In 1807 at the trial of Aaron Burr for treason, the jury was not content to return one of the usual verdicts, guilty or not guilty. The evidence at trial failed to prove Burr's guilt, but the jury was too suspicious of the scoundrel to declare him not guilty. Instead the jury offered this grudging acquittal: "We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us."

Almost two hundred years later, a United States senator echoed the Burr acquittal in the impeachment trial of President Clinton. Disliking both of the traditional verdicts, Senator Arlen Specter offered a verdict drawn from Scottish law: not proven. His vote was recorded, however, as not guilty.

Verdicts other than guilty and not guilty are exceptional in American criminal law, yet some legal systems routinely use more than two verdicts. In Scotland, judges and juries in criminal trials choose from three verdicts: guilty, not proven, and not guilty. Not proven and not guilty are both acquittals, indistinguishable in legal consequence but different in connotation. Not guilty is for a defendant

2 See Helen Dewar and Peter Baker, 3 GOP Senators Reject Articles; Acquittal May Win Majority; Censure Ails, Wash Post A1 (Feb 11, 1999). See also Neil Kinkopf, The Scope of “High Crimes and Misdemeanors” After the Impeachment of President Clinton, 63 L & Contemp Probs 201, 203 n 8 (2000).
3 He announced his vote as “[n]ot proven, therefore not guilty,” adding the last three words only to avoid being counted as “present.” See Impeachment Vote of Senator Arlen Specter, 106th Cong, 1st Sess, in 145 Cong Rec S 2140 (Mar 2, 1999); Explanation of Vote, 106th Cong, 1st Sess in 145 Cong Rec S 1741 (Feb 22, 1999).
the jury thinks is innocent; not proven, for a case with insufficient evidence of guilt. One verdict announces "legally innocent" and thus exonerates. The other says "inconclusive evidence" and fails to exonerate or even stigmatizes.

The American verdict of not guilty covers both of these grounds for acquittal. The jury that thinks a defendant is truly innocent has no means of conveying that message. For the jury that considers the charge unproved but does not want to assert factual guilt or innocence—as Burr's jury and Senator Specter wished—no verdict speaks only to proof. The two-verdict system, or any other verdict system for that matter, limits the jury's speech. Reasons could be given for obscuring the verdict: one might say a two-verdict system maintains the presumption of innocence and prevents social stigma for unproven charges. As shown below, a two-verdict system secures neither of these advantages. With a high standard of proof, such as beyond a reasonable doubt, the public will know that some defendants are being acquitted because of insufficient evidence, not because of actual innocence. With that knowledge, the public will see the acquittal in a two-verdict system as stigmatizing and tarnishing, and no well-intentioned decree can change that fact. Once this stubborn reality of tarnishing acquittals is recognized, the arguments for a two-verdict system lose their force.

This Comment proposes introducing a verdict patterned after Scotland's not proven. Part I surveys legal systems that have more than one kind of acquittal available to most defendants. Part II proposes a not proven verdict for the United States. Part III analyzes consequences of introducing this verdict, such as more information, more acquittals, and more stigma.

I. THE USE OF DIFFERENTIATED ACQUITTALS

Most criminal justice systems use two verdicts, guilty and not guilty. In a two-verdict system, the acquittal verdict covers "that 'gray zone' of uncertainty somewhere between a belief in innocence and the required proof of guilt." Some legal systems, however, divide that gray zone into multiple acquittals, differentiated by meaning.

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5 Here and throughout this Comment, "innocence" refers to legal innocence, not moral innocence or blamelessness. The word "describes a person who did not commit the act or crime." Vincent T. Bugliosi, Not Guilty and Innocent—The Problem Children of Reasonable Doubt, 4 Crim Just J 349, 353 (1981).

6 The same is true for judges in bench trials. Most points referring to juries in this Comment apply to either legal decisionmaker.

7 Bugliosi, 4 Crim Just J at 355 (cited in note 5).
A. Scotland's Verdict of Not Proven

Scotland's distinction between not guilty and not proven appears to be the longest-standing example of differentiated acquittals. These two verdicts have been employed together since the seventeenth century. With either verdict, the defendant goes unpunished by the state and is safe from double jeopardy, but not proven is the verdict jurors return when "their suspicions have been aroused, although they cannot hold the charge fully proved."  

This unusual verdict took root in Scotland by "pure historical accident." Since the 1720s the acquittal verdicts of not proven and not guilty have existed side by side in Scottish criminal procedure. Scottish juries return a not proven verdict in about a third of all acquittals, judges in about a fifth. But because trials by a judge are far more frequent, "almost nine tenths of not proven verdicts are returned in such cases." Not proven is invaluable for a defendant when the jurors

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8 See Scottish Office, Juries and Verdicts § 7.2 at 26 (1994). This report is a consultation paper published by the Scottish Office (since devolution called the Scottish Executive).
9 See id § 9.2 at 31 (rebuttering the misconception that a defendant who receives a not proven verdict may be retried if new evidence emerges). See also id § 9.5 at 32 (noting that the not proven verdict "is in its effects the same as a not guilty verdict").
11 Ian Douglas Willock, The Origins and Development of the Jury in Scotland 217 (Stair Society 1966). Many Scottish critics of not proven, including Willock, misguidedly consider this pedigree a fault. Id (unfavorably contrasting the not proven verdict—a "pure historical accident"—with manifestations of "the genius of Scottish criminal jurisprudence"). But a change is no worse because it arises when jurors want it rather than when a jurist imposes it. In fact, this bottom-up reform—based on the decisions of many actors in many times and places—is a Hayekian point in its favor. Consider R.H. Helmholz, The Mitior Sensus Doctrine, 7 Green Bag 2d 133, 134 (2004) (favorably contrasting a rule "that had its roots in history" with "an invention of desperate judges").

For the history of not proven and its roots in the royal persecution of the Covenanters, the essential early sources are David Hume, 2 Commentaries on the Law of Scotland: Respecting Crimes 422 (Bell & Bradfute 2d ed 1819); Hugo Arnot, A Collection and Abridgment of Celebrated Criminal Trials in Scotland 174 (Smellie 1785). For a history by an English author, see R.S., The Scotch Verdict of Not Proven, 13 L Mag Q R Juris 182, 183-84 (1850) (calling the verdict of not proven "the combined result of arbitrary government, rude times and manners, contending with a living sense of truth and right"). For revisionist criticism, see Willock, The Origins and Development of the Jury in Scotland at 219-20.

12 Peter Duff, The Not Proven Verdict: Jury Mythology and "Moral Panics," 1996 Jurid Rev 1, 7. For possible explanations of this disparity, see note 82.
13 Duff, 1996 Jurid Rev at 7 (cited in 12). In 2002, in the United States only 22 percent of federal criminal trials not disposed of by a dismissal or guilty plea were bench trials. See Kathleen Maguire and Ann L. Pastore, eds, Sourcebook of Criminal Justice Statistics 445 table 5.43 (DOJ 2002) (comparing the number of defendants receiving verdicts following bench trials to those following a jury trial, without including cases disposed of by guilty pleas or dismissals). For historical trends and a comparison with state numbers, see Danny J. Boggs, The Right to a Fair Trial, 1998 U Chi Legal F 1, 7.
“have some lingering doubts as to the guilt of an accused” but “are certainly on the evidence not prepared to say that he is innocent.”14

The not proven verdict is controversial in Scotland because it is widely considered too friendly to defendants.15 Intermittent efforts to abolish it have failed, and the Scottish Parliament is again considering an abolition proposal.16 The verdict has acquired many epithets over the last several centuries. Not proven is the “convenient,”17 “sophisticated,”18 and “ungracious verdict”;19 “that bastard verdict”;20 the “Caledonian _medium quid_”;21 for the judge or jury, a “comprehensive cop-out”;22 for the defendant, a “second-class acquittal”23 that gives “less than a ringing endorsement of the accused’s position.”24 To some it is “that ambiguous and indefensible verdict,”25 but to others it is “an honest verdict,”26 perhaps even “the most honest verdict a jury can truly give.”27

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14 _McNicol v HM Advocate_, 1964 Scots L Times 151, 152 (High Court of Justiciary). For more on Scottish verdict patterns, see Part III.B.

15 See text accompanying notes 97–99.

16 See _Jury Out on “Not Proven_,” Scotsman (Nov 22, 2004), online at http://news.scotsman.com/print.cfm?id=1341952004 (visited Sept 19, 2005) (reporting that the bill “is unlikely to be given priority by the Executive”). In Scotland the most common arguments against not proven are that it is an illogical compromise, that it stigmatizes acquitted defendants, and that it leads to more acquittals. The most common arguments for not proven are either the mirror image of the criticisms or the trade-offs the criticisms suggest: the verdict is a logical compromise, it allows the exoneration of acquitted defendants, and it reinforces the high standard of proof for conviction. See, for example, Scottish Office Home and Health Department, _Firm and Fair—Improving the Delivery of Justice in Scotland_ 15 (1994) (arguing, in a “command paper,” for the retention of the three-verdict system); Scottish Office, _Report on Improving the Delivery of Justice in Scotland—Juries and Verdicts_ 33–34 (1993) (stating the above arguments and adding that the non proven verdict is frequently used by juries and judges). These arguments reappear throughout this Comment.


19 Note, _Libel by Effigy_, 8 Harv L Rev 495, 495 (1895).

20 William Roughhead, _Twelve Scots Trials_ 189 (William Green 1913) (quoting from the journal of Sir Walter Scott).

21 Id.

22 261 Parl Deb, HC at 219 (cited in note 18).


24 John P. Grant, ed, _Lockerbie Trial Briefing Handbook_ 13 (Glasgow 1999).

25 Roughhead, _Twelve Scots Trials_ at 221 (cited in note 20).

26 Ian Bell, _ Tried but Not Proven: The Verdict that Last Week Cleared a Man of Murdering a Prostitute Continues to Divide Public Opinion_, Sunday Herald (June 13, 2004), online at http://www.sundayherald.com/print42634 (visited Sept 19, 2005).

B. Other Differentiated Acquittals

Other legal systems have differentiated acquittals of more recent vintage. As part of a wholesale change of its criminal procedures in 1989, Italy adopted a new verdict scheme with five acquittals.\(^\text{28}\) California has only two verdicts, guilty and not guilty, but allows defendants to petition for a finding of factual innocence.\(^\text{29}\) Although few acquitted defendants avail themselves of the procedure,\(^\text{30}\) the exoneration is valuable and some defendants even pursue it after all charges have been dismissed.\(^\text{31}\)

Two scholars propose more verdicts for criminal trials in the United States.\(^\text{32}\) Paul Robinson suggests that not guilty be replaced with two acquittals: no violation and blameless violation.\(^\text{33}\) In Robinson’s verdict scheme, the acquittal given “would clearly indicate whether this actor’s conduct is approved or disapproved, so that the public could...
properly guide its future conduct." Andrew Leipold proposes the addition of an innocence verdict, with different procedures for bench and jury trials. In either kind of trial, the standard of proof for innocence would be more likely than not. Whether by jury or judge, a conclusion of innocence would require the state to expunge the defendant’s arrest and trial records.

II. A PROPOSAL FOR A DIFFERENTIATED ACQUITAL

This Comment proposes the adoption of a third verdict in the United States—a variation on the Scottish not proven. Although this is the first academic proposal of not proven, there is an obscure and colorful history of efforts to slip it into American law. Lawyers have occasionally requested a jury instruction on not proven. Three decades ago a Washington state judge returned the Scottish verdict in a criminal trial, unilaterally announcing: “My judgment here is not a verdict of innocent. It will be a verdict of, ‘not proven.’” In 1996 and

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34 Robinson, 57 U Chi L Rev at 766 (cited in note 33). Robinson notes that “the objections to the two-verdict system proposed here apply equally to the ‘not guilty by reason of insanity’ verdict; yet that verdict seems workable in practice.” Id at 767 n 88. He does not spell out those objections.

These acquittals would bring some of what is now jury nullification into the open by allowing a jury to say the defendant violated the law but should nevertheless be acquitted. Unlike the Scottish verdicts, Robinson’s verdicts would fail to distinguish between the defendants the jury considered legally innocent and the defendants the jury acquitted because of insufficient proof.

35 Leipold, 94 Nw U L Rev at 1314–26 (cited in note 29) (outlining the structure of the proposal). Once charged with a crime, the defendant could elect to have the normal criminal procedure or an alternative that could result in a finding of factual innocence. Id at 1316–17. In bench trials, or when charges are dismissed before trial, the defendant could ask the judge for a finding of innocence. Id at 1315. In jury trials, if the defendant had elected the innocence option, the potential verdicts would be guilty, not guilty, and innocent. Id.

36 Id (noting that the standard is constant but places the burden on the prosecution before a judge to show the defendant is more likely than not factually guilty and on the defense before a jury to show the defendant is more likely than not factually innocent).

37 Id. Leipold’s proposal and the proposal of this Comment share little except the number of verdicts. The differences include whether a defendant must opt into the three-verdict system, whether different procedures govern the admission of evidence in bench and jury trials, whether a defendant seeking the favorable acquittal must meet a burden of proof, as well as the naming and symbolism of the verdicts and the mechanics by which they are selected. This Comment’s focus on the value to third parties of verdict information is also absent in Leipold’s proposal.

38 A former colleague of mine has witnessed defense attorneys in two Georgia counties unsuccessfully request that the jury charge and the verdict form include three verdicts—guilty, not proven, and not guilty. For a court rejecting such a proposed instruction, see Williams v State, 589 S2d 1278, 1278–79 (Miss 1991) (holding that instructions on the burden of proof and the presumption of innocence adequately address the concerns to which a not proven verdict is directed). For an attorney discussing a verdict of not proven during voir dire, see State v White, 850 S2d 751, 765 (La App 2003).

39 State v Bastinelli, 81 Wash 2d 947, 506 P2d 854, 857 (1973) (Hale concurring) (quoting the trial judge’s oral opinion and agreeing with the court’s holding that the judge’s verdict was an
2003, bills were introduced in the California Senate that would have changed the name of the not guilty verdict to “not proven.”

This Comment proposes that each jurisdiction in the United States require the legal decisionmaker in every criminal trial, whether judge or jury, to reach and explain the verdict in two steps. (Although these steps are procedurally distinct in order to allow different voting rules for each step, in practice the first deliberations often will be decisive—the jury, to take it as the paradigm, likely will use the first deliberations to bargain between all possible verdicts, making the second step merely formal but still necessary for the voting rules.)

The first step is the decision between conviction and acquittal. The jury receives an explanation of both steps and an instruction about convicting only on proof of guilt beyond a reasonable doubt. The jury’s decision between conviction and acquittal must be unanimous.

The second step requires the jury to explain its acquittal. If a jury acquits in the first step, it must choose between two acquittal verdicts—not proven and not guilty.

The jury selects its explanation by majority vote. Two other corporate voting rules are possible, each inferior to determining the ex-

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40 Verdict upon a Plea of “Not Guilty”—Change to “Not Proven,” Bill Analysis Hearings on SB 638 Before the California Senate Committee on Public Safety (2003), online at http://info.sen.ca.gov/pub/03-04/bill/sen/sb_0601-0650/sb_638_cfa_20030506_152920_sen_comm.html (visited Sept 19, 2005). The bill was opposed by the California District Attorneys Association and the American Civil Liberties Union. Id at Pages H–J.

41 In some cases, however, where the not proven verdict reflects juror disagreement and subsequent compromise, the second step will not be explaining the choice of acquittal. See text accompanying note 81.

42 Compare Scottish Court Service, Information for Potential Jurors in Criminal Trials 4, online at http://www.scotcourts.gov.uk/courtusers/jurors/docs/info_jurors crim.pdf (visited Sept 19, 2005) (“Although there are three verdicts open to the jury—guilty, not guilty or not proven—their fundamental choice is to decide whether or not the Crown has established, beyond reasonable doubt, that the charge before them was committed by the accused.”).

The jury could receive a rudimentary instruction about the two verdicts. In Scotland, however, juries receive no instruction about not proven, an omission defended in two notable cases. In McDonald v HM Advocate, 1989 Scots L Times 298 (High Court of Justiciary), the court said it was “highly dangerous” for a trial judge to “endeavor to explain what the not proven verdict is in relation to the not guilty verdict.” Id at 299. In Kerr v HM Advocate, 1992 Scots L Times 1031, 1035 (High Court of Justiciary), the court said:

It is not our practice to give directions to the jury as to the difference between a verdict of not guilty and one of not proven. Nor is it our practice to give directions as to what a jury should do if those for acquittal are equally divided between these verdicts. The matter is left to the good sense of the jury to resolve, and in practice it very rarely gives rise to difficulty.

43 The legislature would adopt one acquittal or the other as a default in case of a tie vote. Which one is chosen will matter only slightly—a few more defendants will receive the default choice, and its expressive force will be slightly diluted.
planation by a simple majority. First, the jury could be required to vote unanimously for one explanation or the other. (A variation on this would require only a supermajority.) But it would be absurd to have a hung jury that agrees to acquit but hopelessly divides over why the defendant should go free. This absurdity would be avoided by the second possibility: a jury could have a default acquittal (not guilty, for example) that is set aside only if the jurors unanimously choose the alternative explanation. (Again, a supermajority is the variation.) This second approach suffers from a fault just as serious: whichever form of acquittal is the default would lose its force, for the verdict might explain the votes of only some holdout jurors. A unanimity requirement would only obscure the point of the differentiated acquittals, which is explaining why the jury chose to acquit. It is true that allowing a majority explanation limits the expressive force of both acquittals, for the verdict chosen might reflect only the preferences of a bare majority of jurors, but it does explain what most jurors thought and keeps either acquittal verdict from becoming an almost wholly diluted default.

The first step determines the legal punishment, and the second announces the jury's reasoning. Either choice in the second step is an acquittal, without threat of punishment or risk of retrial. The two-step process serves no purpose other than making possible the use of a majority voting rule. For a judge the two steps are obviously indistinguishable, and as suggested above, even for a jury a decision on step two would often be made before the jury announced its decision for step one. Thus, in effect, the judge or jury would have three choices—guilty, not proven, and not guilty.

The defendant has no burden of proof for not guilty: the verdict is pure explanation, a peek inside the black box. Consider it a narrow, official post-verdict interview. Any burden of proof for innocence would inevitably harm the defendant, because a high burden of proof (such as beyond a reasonable doubt) would be rarely met, and a lower standard would inevitably confuse jurors, tempting them to soften the requirement of proving guilt beyond a reasonable doubt.

44 On another possible voting rule, that each juror announces an individual verdict, see Part III.C.
45 This is now the case in capital sentencing, where a less than unanimous verdict means life. But where the choice is between the expressive force of two acquittal verdicts, such caution is self-defeating. See the analysis of stigma, verdicts, and standards of proof in Part III.B.2.
46 In any interval between the two steps, neither the prosecution nor the defense may present evidence or make arguments about innocence; the second step is an explanation based on the trial evidence.
Pleas of not proven should probably not be allowed. Such a plea would always mean what a plea of not guilty often means now: "I did it and you didn't catch me." But even if defendants could plead "not proven," few would want to do so.

Nor may a defendant appeal a not proven verdict. Because not proven would be the jury's explanation for acquitting, it would be inconceivable for an appellate court to reverse. Who could know better than the jurors themselves why they acquitted? And allowing appeals from not proven would drastically increase the administrative costs of adopting it.

Because a three-verdict system allows a distinction between acquittals, we could use the additional verdicts to calibrate other areas of law. Not guilty could establish innocence for a 42 USC § 1983 claim; it could be excluded from subsequent parole decisions; it could be the basis for expunging all arrest and trial records and reimbursing the exonerated defendant for attorney's fees and incarceration. Even with these reforms, the most dramatic consequence of introducing not proven might have less to do with legal rules than with public perception.

III. THE CONSEQUENCES OF DIFFERENTIATED ACQUITTINGS

Introducing not proven would work both dramatic and subtle changes. The crucial change is that three verdicts offer more information than two. This information would benefit the public, but for defendants the consequences are mixed, stigmatizing some and exonerating others.

A. The Public: The Market in Information About Acquitted Defendants

A not proven verdict would transform how juries and the public react when guilt and innocence are uncertain. The evidence at trial lies somewhere along a continuum between absolute proof of guilt and absolute proof of innocence, while the output demanded of the jury is binary—guilty or not guilty. Some means of determining legal guilt, such as trial by ordeal or a coin toss, can claim to provide the finality that comes from never having indeterminate evidence. The accused

47 But the greater the difference in legal consequences between the two acquittal verdicts, the more desirable it becomes to have an appeal from a not proven verdict. If the stakes were high enough, the choice between acquittals might even justify procedures I have not called for, such as separate evidentiary hearings and standards of proof.

48 For more analysis of how acquitted defendants are legally disadvantaged, see Leipold, 94 Nw U L Rev at 1329–36 (cited in note 29) (noting the effects of a prior acquittal on indictment decisions, sentencing, aggravation in capital cases, and parole and probation).
sank or floated, the coin was heads or tails. But any system of criminal
law that relies on human judgment and imperfect evidence will inevi-
tably face the problem of partial proof.

This problem raises two questions. The first is whether the defen-
dant whose guilt has been only partially proved should be punished.
Such punishment was effectively allowed by the European law of
proof that developed in the thirteenth century. For serious crimes, a
defendant could not be convicted except on the testimony of two
eyewitnesses or on the defendant's own confession—but if the evi-
dence was strong enough (if it amounted to "half-proof"), a confession
could be wrung from the defendant through torture.9 The United
States professes the opposite rule—no punishment on semi-proof—but
the rule is gutted by the exception of plea-bargaining, which "ef-
fectively substitutes a concept of partial guilt for the requirement of
proof of guilt beyond a reasonable doubt."50

The second question raised by the problem of partial proof is
whether we should admit that the evidentiary continuum exists. State
and federal courts often ignore it, describing trials as events that de-
termine "guilt or innocence."51 Newspapers and news anchors rou-
tinely say acquitted defendants were found "innocent." But acquittal
covers some who are guilty and some who are innocent, and informa-
tion that helps distinguish them is a valuable commodity.

This commodity is part of a broader market for information
about defendants.54 In this market, those seeking information may be

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9 See John H. Langbein, The Legal History of Torture, in Sanford Levinson, ed, Torture: A
Collection 93, 95 (Oxford 2004); John H. Langbein, Torture and the Law of Proof: Europe and
England in the Ancien Régime 47 (Chicago 1976) (describing the conditions for full punishment
and half-punishment). For an exaggeration of this point, see Foucault's statement that medieval
punishment acted on "a principle of continuous gradation." Michel Foucault, Discipline and

50 Albert W. Alschuler, Straining at Gnats and Swallowing Camels: The Selective Morality of

51 See, for example, Elizabeth E. Joh, Comment, "If It Suffices to Accuse": United States v.
Watts and the Reassessment of Acquittals, 74 NYU L Rev 887, 907 n 106 (1999); Bugliosi, 4 Crim
Just J at 357 (cited in note 5). But see, for example, United States v One Assortment of 89 Fire-
arms, 465 US 354, 361 (1984) ("[A]n acquittal on criminal charges does not prove that the defen-
dant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.").

52 See Bugliosi, 4 Crim Just J at 360 (cited in note 5). The use of "innocent" in newspaper
headlines may be merely precautionary, however, because the inevitable accident of dropping
the first word from "not guilty" would invite a libel suit.

53 "Innocent" means legally innocent. See note 5. This broad category of innocence will
thus include the person who did not commit the act in question and the person who did but with
a justification or excuse.

54 See note 65. The term market is used in this Comment for something broader than ex-
changes for money: there is a demand, and it may be met commercially, noncommercially, or not
al, eds, The Sexual Organization of the City 3 (Chicago 2004) (finding a transactional market for
employers, parole board members (making decisions about parole after a subsequent conviction), neighbors, relatives, and friends—all of whom may interact with the defendant. Each information-seeker assesses risk and wants to know whether the defendant is the "good type" or the "bad type." The good types are innocent and pose no risk. The bad types are guilty and do pose risks. All defendants are under a cloud of suspicion, having been prosecuted, and the good types want to differentiate themselves. The information-seekers want them to be able to.

A guilty verdict indicates "bad type." Employers, for example, have a strong interest in knowing whether a prospective employee has been convicted. One study of federal fraud and larceny offenders found that conviction had significant effects on employment and income and that these effects appeared "to be based on stigma rather than, say, stalled experience growth or job displacement." In effect,
"conviction may publicize workers' dishonesty," much like "the private information about worker productivity conveyed about workers by individual-specific (as opposed to plant-closing) layoffs." Conviction also matters to nonemployers, and the public interest in open trials is protected by the First Amendment. Indeed, the public interest is great enough that trial courts may even have a constitutional duty to publicly announce guilty verdicts.

Less obviously, a not guilty verdict also indicates "bad type." The verdict obscures an evidentiary continuum from absolute proof of innocence to a point just shy of proof that establishes guilt beyond a reasonable doubt. The information-seeker knows that some acquitted defendants are factually guilty (bad types) and some are factually innocent (good types). Unable to distinguish the "good" and "bad" acquitted defendants, the information-seeker cannot allocate risk efficiently. The "probably guilty" are free riders on the risk profiles of those the jury considered innocent, as both are tarnished by an ambiguous acquittal.

More verdicts would offer valuable information to those who seek it. Already, in a two-verdict system, some information-seekers...
want to know about less-than-certain guilt. With two acquittals, in-
formation-seekers would see one verdict as signaling "good type." But
where an information-seeker thinks the verdict reflects something
other than innocence, the consequences may be severe. Allowing the
jury to differentiate acquitted defendants would reduce the cost to the
public of acquiring and verifying the information needed to assess
risk. Although even now this information is sometimes disseminated,

65 Companies hired to investigate potential employees, such as Background Information
Services, Inc (BIS), of Boulder, Colorado, will report charges that were dismissed when a de-
defendant was convicted on or pleaded guilty to other charges. Dawn Standerwick, Vice President for
Operations, personal communication with author, May 13, 2004. This often happens when a de-
defendant pleads guilty to some charges in exchange for having others dropped. Id. BIS under-
stands the law to require it not to report cases in which all charges were dropped, but for hospi-
titals or nursing homes, the company will nevertheless refer the employer to the source of the
with "thorough information pertaining to criminal histories, including arrest and conviction
records," for all persons seeking employment in a "nursing care facility"). A variety of state and
federal laws, including the Fair Credit Reporting Act, 15 USC § 1681 et seq (2000 & Supp 2004),
limit the information that can be revealed.

Consider Perry v Blair, 407 NYS2d 371, 64 AD2d 870, 871 (1978) (upholding a police com-
mmissioner's dismissal of a probation officer charged with raping a babysitter, even though the
probation officer was acquitted of criminal charges by a jury); Rasmusen, 39 J L & Econ at 539
(cited in note 58) (asking whether you would "really be indifferent about whether your ware-
houseman had a background as a burglar"); Richard D. Schwartz and Jerome H. Skolnick, Two
Studies of Legal Stigma, 10.2 Social Problems 133, 136 (1962) (finding that "the individual ac-
cused but acquitted of assault has almost as much trouble finding even an unskilled job as the
one who was not only accused of the same offense but also convicted").

66 The best parallel in a two-verdict system is exoneration through DNA evidence. See, for
example, Leonora LaPeter, 21 Years, 10 Months, 23 Days; For a Crime He Did Not Commit;
Guilty Until Proven Innocent, St. Petersburg Times 1A (Nov 14, 2004). Stigma is realized as an
information-seeker's reluctance to interact with those who cannot indicate they are "good types.
Compare Rasmusen, 39 J L & Econ at 520 (cited in note 58) (defining stigma as "someone's
reluctance to interact with someone else who has a criminal record"). See Part III.B.2.

67 A high-profile case is that of O.J. Simpson, who felt immense stigma from information-
seekers associated with him socially and professionally. On the social stigma, see, for example,
("His neighbors in tony Brentwood and Manhattan wanted nothing to do with him. Some mem-
bers of his Riviera Country Club made it known he's not welcome to golf there."). Compare
Kahan and Posner, 42 J L & Econ at 372 (cited in note 56) ("If an individual wants others in his
country club to believe that he is a good type, he might try to signal that he is a good type by
opposing the admission of someone who has been shamed."). On the professional stigma, see, for
example, Reibstein, "Not Guilty" Does Not Mean "Welcome Back," Newsweek at 34 ("His for-
mer high-powered agents, International Creative Management, dropped him. Pay-per-view compa-
nies backed away. Former sponsor Hertz rushed to correct rumors that it would hire him back.").

In Mr. Simpson's case a differentiated acquittal would have made little difference, given the
publicity of the trial and the entrenchment of public views. In less prominent cases, because the
public sees less of the evidence, a differentiated acquittal verdict would be more useful.

68 See, for example, Ronald J. Gilson and Reinier H. Kraakman, The Mechanisms of Mar-
ket Efficiency, 70 Va L Rev 549, 594-95 (1984) (noting that there are three categories of informa-
tion costs: those associated with acquisition, processing, and verification). Under this Comment's
proposal, information-seekers will learn of the additional information as they have always
learned of the verdict: from public records and individuals' own admissions.
as in high-profile cases or when jurors comment on a trial, having different verdicts would convey the information more efficiently and consistently.

At least three objections could be made to such a market in information about acquitted defendants. One could think that juries are so inept at predicting guilt that they have nothing to say to information-seekers. But juries, for all of their cognitive biases and inconsistencies, do see evidence and hear arguments—which is more than can be said for perceptions of guilt filtered through television news and second-hand conversations. And they are unavoidably in the business of assessing probabilities of guilt—if we trust the jury about probabilities when punishment is at stake, we should trust the jury with a choice of acquittals. 69

A similar argument would fault not the ineptitude of the jury but the imperfection of the inputs. Not proven might accurately describe only the jurors' mental states, not objective reality, for only the prosecution bears a burden of proof and even innocent defendants may have tactical reasons for not seeking exoneration. This objection is strong. The information given by a not proven verdict will often be imperfect and sometimes false. Yet errors also plague the current system, both juror errors in sorting defendants and public errors in interpreting the categories. By dividing the acquittal category, not proven would certainly reduce one kind of error, the errors of interpretation. Whether it would reduce sorting errors is a closer question. How effectively jurors could distinguish the probably guilty from the innocent, given the evidence at trial, is an empirical question still unanswered.

A final objection is that information-seekers have no right to distinguish between acquitted defendants. One making this objection might think stigma is inhumane or might prize the presumption of innocence. 70 Appealing as these sentiments are, they are irrelevant to the existence of a market. If the public uses information about acquit-

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69 According to the previously cited executive at BIS, employers would undoubtedly pay for information about not proven verdicts. And companies such as BIS would provide it. Conversation with Dawn Standerwick, Vice President for Operations, May 13, 2004 (cited in note 65). Ironically, the background checks performed by the Scottish government do not disclose verdicts of not proven. See Disclosure Scotland, Frequently Asked Questions, online at http://www.disclosurescotland.co.uk/faq.htm (visited Sept 19, 2005) (providing potential employers with criminal history information on individuals applying for jobs).

70 See, for example, Lord Wheatley, One Man's Judgment: An Autobiography 204-05 (Butterworths 1987) (advocating the abandonment of the "not proven" verdict because it conflicts with the presumption of innocence).
ted defendants, then the market exists. Nor should the public be blamed when it takes acquittal to mean “likely guilty” or “possibly guilty.” Discounting acquittal is the rational response to the state of affairs that law has constructed; it is law that makes the not guilty verdict cover so much ground. The law could reduce the value of this information, for example, by ending the legal penalties for information-seekers who fail to screen high-risk persons. But here law can only do so much: as long as information-seekers calculate risk, they will want to know why defendants were acquitted. Two-verdict systems keep information-seekers from finding out.

The costs of denying this information are high. The most obvious cost is to the defendants the jury would like to exonerate. Refusing to validate their claim to innocence inflicts needless pain. In a two-verdict system, what is lost by those who could be vindicated at trial is gained by those the jury considers probably guilty. Another less obvious cost afflicts all defendants. The chance of any one individual’s being harmed by a recidivist criminal is low; the risk is a low-probability loss. When faced by low-probability losses, “people tend to make risk-averse choices.” If people are risk-averse about the danger from an acquitted defendant, they will be “unwilling to take a bet which is actuarially fair.” Here the bet is the interaction with an acquitted defendant. Although this interaction is only a low-probability risk, when the probability of guilt is obscured by a single acquittal verdict, people will irrationally avoid the interaction because they are risk-averse.

Without not proven, the market for information about acquitted defendants could be seen as a black market. One could object that if employers want to know more, they should pay someone to sit in court and assess the evidence—why should the government subsidize the information? The answer is the jurors’ natural monopoly over hearing the evidence and arguments. In other cases, too, as with the Securities Acts of 1933 and 1934, the government provides for centralized disclosure when the alternative is costly information-gathering by individuals.


See Chris Guthrie, Prospect Theory, Risk Preference, and the Law, 97 Nw U L Rev 1115, 1118 (2003) (“When choosing between paying a definite $50 fine and facing a 5% chance at having to pay a $1,000 fine, individuals tend to make the risk-averse choice and opt to make the sure payment.”).

Kenneth J. Arrow, Aspects of the Theory of Risk-Bearing 28 (Yrjö Hahnsson Foundation 1965) (defining a “risk averter” as a person “who, starting from a position of uncertainty, is unwilling to take” such a bet).

Compare Rasmusen, 39 J L & Econ at 540 n 42 (cited in note 58) (“Allowing people to avoid the hazards of employing or living near offenders is, of course, precisely the point. Wages and housing values fall for some people but rise for others, and rise more, since better information increases efficiency.”). For another example of stigma caused by insufficient information and public risk aversion, see Eric S. Schlichter, Comment, Stigma Damages in Environmental Contamination Cases: A Possible Windfall for Plaintiffs?, 34 Houston L Rev 1125, 1127, 1129–30 (1997) (examining stigma attached to environmentally contaminated property and concluding...
ing only one acquittal verdict raises the total reputational costs for acquitted defendants and redistributes them in a way that is extremely hard to justify—the "probably guilty" gain and the "probably innocent" lose. The costs to information-seekers are obvious: less information means less efficient risk calculation and its consequences.

B. The Defendants: The Winners and Losers from a Third Verdict

Criminal defendants have the most to gain and to lose from a not proven verdict. Specifically, the winners include those who would have been convicted but escape with a not proven acquittal. Other winners, obviously, are those who receive the verdict of not guilty—it exonerates to a degree impossible with only two verdicts. The losers are those who would have been acquitted under two verdicts but now receive not proven.

1. Acquittal: the effect of having a compromise verdict.

The introduction of a third verdict would increase acquittals because people like to compromise. When given three choices, people will choose the middle one more often than they would if it were paired with one of the other choices. This pattern holds true for jurors. In experiments on compromise effects, an "option does better by being intermediate in the choice set presented." For example, mock jurors choose guilty or not guilty by reason of insanity less often when they have an intermediate verdict, such as diminished responsibility or guilty but mentally ill. These studies of mock jurors support the intui-

that property can be "stigmatized by its proximity to property actually contaminated" due to the "public's perception of uncertainty and risk").

76 This Comment predicts that having one acquittal raises the total reputational cost to acquitted defendants (because of greater risk aversion when assessing one large pool rather than two smaller ones). This prediction would be wrong, however, if the public is inclined to think that fair play requires treating acquitted defendants as innocent (in all but a once-a-century case). If the public does have this inclination, it would be undermined by introducing not proven.

77 See Cass R. Sunstein, Behavioral Analysis of Law, 64 U Chi L Rev 1175, 1181–82 (1997) (concluding that people's "[e]xtremeness aversion gives rise to compromise effects"). Compromise effects are often illustrated by showing the effect of introducing a third choice that does not lie between the other two (along a continuum of price, for example). The difference with adding the third verdict is obvious: the not proven verdict is an intermediate choice. But the "extremeness aversion" still exists.

78 See Mark Kelman, Yuval Rottenstreich, and Amos Tversky, Context-Dependence in Legal Decision Making, 25 J Legal Stud 287, 295 (1996). From their two experiments on compromise effects and law, the authors concluded that there was "at least prima facie evidence that context effects are likely to influence jurors and judges." Id at 303.

79 See Norman J. Finkel, The Insanity Defense: A Comparison of Verdict Schemas, 15 L & Human Beh 533, 544–45, 551 (1991) (concluding that "the third option verdict (i.e., the DR or GBMI) judgments are significantly different from NGRI and guilty verdict judgments"). See also Robert J. MacCoun, Experimental Research on Jury Decision-Making, 30 Jurimetrics J 223,
tion that a jury will acquit less often if it can convict on lesser-included offenses: "[A] compromise verdict diminishes the probability of acquittal." With a not proven verdict, the reverse is true. Because the compromise verdict is an acquittal, it diminishes the probability of conviction.

The phrase "compromise verdict" covers (and thus obscures the difference between) two kinds of jury decisions. Jurors could use the compromise verdict because they think it best fits the evidence, or they could pick the compromise verdict in order to avoid deliberating and choosing a proper verdict. Scotland's experience suggests that not proven is the first, more faithful, kind of compromise, because judges employ the not proven verdict. (The conclusion that these are accurate compromises, rather than shirking ones, depends on judges' being less likely to retreat from hard cases and close calls.) A Scottish commentator makes the same deduction: "[T]hose who opposed the verdict on the ground that it was used by juries which were confused or which were reluctant to make difficult decisions failed to explain why it was also used relatively frequently by judges sitting alone."

Because not proven functions as a compromise verdict, its introduction will increase the number of acquittals. I argue below that this compromise is desirable. Regardless of whether one accepts this nor-

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230 (1990) (describing how, in insanity defense cases and homicide cases, studies "suggest that the availability of multiple response options can fundamentally alter the jury's decision").
80 Kelman, Rottenstreich, and Tversky, 25 J Legal Stud at 306 (cited in note 78). See also Dennis J. Devine, et al, Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups, 7 Psych Pub Pol & L 622, 670-71 (2001) (summarizing empirical work in the area and concluding that "[j]uries thus appear fairly responsive to verdict options, but the impact of verdict options is likely to interact with the strength of evidence against the defendant," although, "there is not enough research on the impact of sentencing to draw any conclusion with reasonable confidence").
81 See Michael Abramowicz, A Compromise Approach to Compromise Verdicts, 89 Cal L Rev 231, 236 & n 24 (2001) (distinguishing, in a civil context, compromise verdicts that reflect "basic uncertainty about what [the] defendants did" from compromise verdicts that "are a means of avoiding deliberation").
82 Scottish juries return not proven verdicts in about a third of all acquittals, judges in about a fifth. Duff, 1996 Jurid Rev at 7 (cited in note 12). The second kind of compromise verdict (decision-shirking) need not explain the difference between the not proven rates in jury and bench trials. Other explanations include: (1) judicial expertise, because nonrepeat players such as jurors may be less certain about the evidence and thus compromising more often would be rational, and (2) the number of decisionmakers, because conflict among decisionmakers may pull them toward the middle, a phenomenon absent for the solitary judge. Compare Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation, 90 Va L Rev 301, 337-46 (2004) (describing how three-judge panels are polarized according to party ideology when the judges are either all Republican appointees or all Democratic appointees but reach more compromises when the panels are mixed).
mative claim, the descriptive claim is undeniable. Some juries will choose not proven instead of guilty.\textsuperscript{84}

The empirical evidence from Scotland suggests the types of cases in which jurors compromise. One can never know when the presence of an intermediate verdict led to acquittal in any particular Scottish case. But in Scotland some charges are more likely to end in not proven. The data comes from \textit{Criminal Proceedings in Scottish Courts}, an annual report published by the Scottish Executive. From 1996 to 2001, the latest year available, there were 841,188 verdicts in criminal trials.\textsuperscript{85} The vast majority were guilty verdicts.\textsuperscript{86} Of the acquittals, 25,036 (2.98 percent of total verdicts) were not guilty; 7,269 (0.86 percent) were not proven. In other words, more than three-quarters of acquittals were not guilty; 22.50 percent were not proven.

Not proven was more common for serious charges, but so were all acquittals. Scottish defendants were twice as likely to receive not proven if tried for a "crime" rather than an "offence," which is less serious, and this disparity was remarkably persistent over time.\textsuperscript{87} But for both crimes and offences the percentage of acquittals that were not proven verdicts was almost identical.\textsuperscript{88}

For specific crimes, however, the not proven rates vary sharply, and this is true of not proven rates as a percentage of all verdicts and as a percentage of acquittals. Defendants charged with a crime in one

\begin{footnotes}
\item[	extsuperscript{84}] This conclusion is avoided only by pretending that jury decisions are context-independent. For a source doing exactly that, see Scottish Office, \textit{Juries and Verdicts} \textsuperscript{12.3} at 38 (cited in note 8).
\item[	extsuperscript{86}] There were 808,883 guilty verdicts (96.16 percent). This number includes guilty pleas; the number of acquittals does not include dropped charges. E-mail from David Young, Scottish Court Service (Dec 13, 2004) (on file with author).
\item[	extsuperscript{87}] For crimes, the rates of not proven verdicts as a percentage of all verdicts at trial were the following: 1.35 percent in 1996, 1.45 percent in 1997, 1.17 percent in 1998, 1.14 percent in 1999, 1.16 percent in 2000, 0.94 percent in 2001. For offences, the not proven rates were consistently lower: 0.74 percent in 1996, 0.76 percent in 1997, 0.66 percent in 1998, 0.63 percent in 1999, 0.64 percent in 2000, and 0.62 percent in 2001.
\item[	extsuperscript{88}] For defendants charged with crimes, 23.04 percent of acquittals were not proven; for defendants charged with offences, 22.02 percent were not proven.
\end{footnotes}
of the two most serious categories were far more likely to receive a not proven verdict. For all crimes, the not proven rate (as a percentage of total verdicts) was 1.22 percent. But defendants were four times more likely (4.91 percent) to receive a not proven verdict when charged with a nonsexual crime of violence, a category that includes homicide, serious assault, and robbery. And defendants were three times more likely to receive not proven when charged with what the Scottish criminal law calls a "crime of indecency"—sexual assault, lewd and indecent behavior, and "offences connected to prostitution." If charged with a crime of violence or indecency, defendants receive not proven verdicts at a far higher rate than defendants charged with other crimes or with offences.

The disparity in not proven rates—much higher for the most serious crimes than for the least serious crimes—is remarkably stable throughout the six-year period (1996–2001). And this greater rate of not proven verdicts for the most serious crimes also holds true for not proven verdicts as a percentage of total acquittals. In other words, for these serious-crime categories, not proven is more likely and takes a larger share of acquittals. Why is not proven more likely?

On serious charges Scottish judges and juries show more reluctance to convict. The not proven rate for sexual assault was 9.78 percent; for serious assault, 6.48 percent; and for homicide, 4.09 percent. The average for all crimes and offences was much lower—only 0.86 percent—and the rates for some offences were much lower. (The not proven rate for shoplifting, for example, was 0.19 percent.) Where the stakes are high, doubtful cases get not proven verdicts. One obvious aberration is the higher rate of not proven for serious assault than for homicide. The aberration, however, matches the two crimes' acquittal rates. For a defendant charged with serious assault the acquittal rate is 22.50 percent, and of these acquittals 28.80 percent are not proven. For a defendant charged with murder the acquittal rate is only 14.18 percent, but an almost identical 28.87 percent of the verdicts are not proven. It is not clear why conviction on murder charges is more likely than conviction on serious assault, but both are serious crimes—much

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90 More cynical explanations are possible. For example, prosecutors may feel more pressure to solve heinous crimes and thus choose to prosecute weaker cases. These weaker cases could result in fewer convictions and more not proven verdicts. Such an explanation does better at explaining the rate of total acquittals, however, than the proportion of not proven to not guilty verdicts.
Sexual assault is the crime with the highest incidence of not proven verdicts. Given the previous explanations, this fact is unsurprising—the crime is heinous and the stakes enormous. But another dynamic may explain the extraordinary rate of not proven verdicts—nearly 10 percent of all verdicts for sexual assault charges (9.78 percent) and a third of all acquittals (33.44 percent). It may be that a defendant is more likely to be acquitted in a three-verdict system when charged with a crime that turns on the credibility of the accuser—paradigmatically, rape. In such cases, a judge or jury may turn to not proven “because it can reflect the absence of the necessary proof without casting doubt on the honesty or reliability of the victim.”

Here the option of not proven may be most dangerous yet most needed. It is most dangerous because the stigmatizing acquittal is being used for the most stigmatizing of crimes—a devilish combination for an acquitted person who is factually innocent, or for a victim whose rapist escapes punishment because of an intermediate verdict. But it may be needed because proving a sexual assault often turns on credibility to such a degree that in the public perception there are two trials, one for the accuser and one for the accused. Either verdict, guilty or not guilty, appears to exonerate one and to impugn the other. In such a case, especially when jurors think guilt is more likely than not, having a not proven verdict frees the jury to acquit without repudiating the accuser. When the jury convicts, it should do so because

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91 Possible explanations for the higher murder conviction rate include the following: public scrutiny means more prosecutorial resources go to prosecuting murder cases; prosecutors are more likely to bring serious assault charges, because they can better maximize sentencing years for defendants as a whole with serious assault prosecutions than with murder prosecutions (again, because of resources that must be expended); and dead victims are harder to blame.

92 This is true as a proportion of total verdicts and as a proportion of acquittals. The following percentages are not proven verdicts as a share of acquittals: sexual assault, 33.44 percent; serious assault, 28.80 percent; homicide, 28.87 percent; robbery, 25.66 percent; theft of a motor vehicle, 25.07 percent; drugs, 21.06 percent; shoplifting, 14.02 percent.

93 Compare Scottish Office, *Juries and Verdicts* ¶ 10.4 at 34 (cited in note 8) (noting that “a slightly higher proportion of acquittals are in the form of not proven verdicts in [rape and sexual assault cases] than for other serious offenses,” but warning that “too much should not be read into it”).

94 Id ¶ 10.4 at 33–34. The need for such a verdict is perhaps higher in Scotland than in the United States, for in Scotland all testimony must be corroborated by other testimony or evidence. For the tenuous connection between the corroboration requirement and the not proven verdict, see id ¶ 10.5 at 34.

95 See 261 Parliamentary Debates at 222 (remarks of Menzies Campbell) (cited in note 18) (noting that for one of his constituents, the not proven verdict “continued to provide a justification for her courage in exposing herself to cross-examination in open court”). Another Member of Parliament noted that he had been strongly lobbied by Scottish rape crisis centers to retain
the case was proved beyond a reasonable doubt, not because of a desire to avoid rejecting the claim.

This "sympathy" use of not proven underscores the verdict's attraction and danger. The chance of a not proven instead of total repudiation for the rape victim is so valued by Scottish rape crisis centers, as an encouragement to reporting rape, that the benefit outweighs any acquittals of rapists because of the intermediate verdict. But dangers abound. A sympathy verdict dilutes the informational force of the two acquittals; the possibility of a sympathy verdict could sway the jury from evaluating evidence to considering the respective appeal of the accuser and the accused. The trade-off is vicious; both two- and three-verdict systems are fraught with problems.

In Scotland, the belief that not proven increases acquittals inspires opposition to the verdict. Nearly a century ago, the Scottish jurist Lord Moncrieff criticized it as "favourable to a criminal," and the same concern animates more recent criticism. After not proven verdicts in three murder trials in the early 1990s, victims' families campaigned to abolish the verdict.

The increase in acquittals from adopting not proven is not inherently desirable. Many who escape conviction would be guilty in fact. But letting guilty persons go free is the trade-off inherent in the be-
yond a reasonable doubt standard. The requirement of beyond a reasonable doubt can be silently subverted by a two-verdict system: in a close case, where the jury has strong suspicions and reasonable doubts, the beyond a reasonable doubt standard requires that the jury acquit. A not proven verdict strengthens wavering jurors to make that decision. This strengthening is all the more needed when a jury faces public pressure to convict an unpopular defendant. When the jury most dislikes a defendant, the defendant most needs the option described this way by a Scottish judge: "[I]t may be that the words 'not guilty' might just stick in your throats and you could not bring yourselves to utter them but nevertheless felt that the charges have not been proved fully to your satisfaction, . . . if that was so, a verdict of not proven would be appropriate." In such cases jurors have a difficult duty to acquit. Not proven braces them to do just that.


The defining characteristic of the not proven verdict is not that it reduces convictions but that it creates stigma. The expressive function of punishment has long been noted and debated. Less attention

100 See In re Winship, 397 US 358, 372 (1970) (Harlan concurring) (concluding that it is a "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free"). See also generally Alexander Volokh, Guilty Men, 146 U Pa L Rev 173 (1997) (considering justifications for this trade-off based on calculations of how many guilty persons are going free for every innocent person saved from unjust incarceration). For a skeptical assessment of why we prefer acquitting the guilty, see Richard A. Posner, The Problems of Jurisprudence 217 (Harvard 1990) (calling this preference "a confession of systemic ineptitude in deciding questions of guilt and innocence").

101 Consider Campbell Deane, Not Proven Verdict Stands Accused of Sending a Mixed Message, Scotsman (June 15, 2004), online at http://thescotsman.scotsman.com/scotland.cfm?id=676002004 (visited Sept 19, 2005). Deane describes the case of a man charged with murdering a prostitute. DNA evidence showed the man had been with her a short time before her death, but there was "little beyond circumstantial evidence" to suggest he murdered her. Although the not proven verdict was met with public outrage, the case is "a classic illustration of precisely what the verdict is for." Id.

102 Scottish Office, Juries and Verdicts ¶ 8.3 at 30 (cited in note 8).

103 Yet not proven can also be a convenient verdict for nullification. Not proven makes following the law and evading it both a bit easier. On nullification, see Peter Duff, The Scottish Criminal Jury: A Very Peculiar Institution, 62 L & Contemp Prob 173, 195 (1999) (citing "[a]ncedotal evidence" that sometimes not proven is used when "the jury knows perfectly well that the accused is guilty but thinks that the law needs to be tempered with mercy," and offering as the "classic example" a battered wife's nonconfrontational killing of an abusive husband).


has been given to the expressive function of the verdict itself.\textsuperscript{106} This neglect is a natural consequence of having only two verdicts, for the absence or presence of punishment dwarfs the meaning of the verdict—guilty is the verdict that precedes punishment; not guilty, the verdict that precedes no-punishment.

The expressive significance of the current not guilty verdict is something short of exoneration. In Leipold's words,

[W]e strongly suspect that many defendants who are acquitted were in fact guilty but were not convicted because of the prosecutor's high burden of proof, because of guileless jurors, or because of some other social values that conflict with the truth-seeking function (the need to exclude illegally-seized evidence, for example).\textsuperscript{107}

That the public doubts the innocence of the acquitted is disputed, however,\textsuperscript{108} and empirical work is sorely lacking.\textsuperscript{109} But we should expect not guilty to fall short of exoneration, for it comes on the heels of an intensely stigmatizing process. The defendant is arrested, jailed, indicted, and forced to appear in a public place where respected persons paid by the government denounce the defendant and propose that a group of citizens choose to strip the defendant of life, of further liberty, or of property. Joel Feinberg said, "[W]e can conceive of ritual-

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\item[106] For a rare discussion of the topic, see Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum L Rev 199, 246 (1982) (complaining that the "limited value of a simple 'not guilty' verdict to convey the proper message accounts for some of the difficulties" in excuse cases).
\item[107] Leipold, 94 Nw U L Rev at 1299–1300 (cited in note 29).
\item[108] For an opposite interpretation of the popular understanding, see Joh, Comment, 74 NYU L Rev at 903–05 (cited in note 51) (concluding that "not all defendants who are acquitted of criminal charges are factually innocent, but the popular understanding of acquittal tends to treat them as if they are"). Joh appears to confuse the admittedly widespread use of expressions like "judged innocent" with widespread belief that the person acquitted is innocent.
\item[109] Several bits of data suggest public doubt that acquittal indicates innocence, but none of the data is conclusive. See, for example, Simha F. Landau, Leslie Sebba, and David L. Weisburd, *Senior Public Figure Offenders and the Criminal Justice System: The Public's Perception*, 35 Israel L Rev 354, 370–71 (2001) (finding that 54 percent of Israelis surveyed thought that public figures were more likely to be acquitted than ordinary citizens were); USA TODAY *1991 Smith Trial*, Study no. 3257, retrievable by study number online at http://www.irss.unc.edu/dataarchive/catsearch.html (visited Sept 19, 2005) (conducting a national poll after the rape trial of William Kennedy Smith and finding that more respondents approved of the verdict than thought he was innocent—60.4 percent thought Smith was innocent but 82 percent thought that not guilty was the right verdict "[b]ased on the evidence [the jury] saw and heard in this case"); Leipold, 94 Nw U L Rev at 1304 n 22 (cited in note 29) (citing a study in 1984 suggesting a public perception that persons guilty in fact of driving under the influence are often acquitted); Stephen D. Easton, *Lessons Learned the Hard Way From O.J. and the "Dream Team,"* 32 Tulsa L. J 707, 739–40 (1997) (describing the effects of O.J. Simpson's "banishment" and noting the value to some defendants of having a not proven verdict). None of these studies, polls, or observations is conclusive, yet each suggests that acquittal might not always be taken to mean innocent.
\end{footnotes}
istic condemnation unaccompanied by any further hard treatment.\textsuperscript{110}

Of course we can: acquittal in America.

Introducing not proven would redistribute this stigma among acquitted defendants, and one might think this redistribution violates the Due Process Clause—that for some defendants the state is authorizing an ersatz punishment, a mild shaming penalty, without proof of guilt beyond a reasonable doubt.\textsuperscript{111} But the criminal justice system often disadvantages, and even shames, in ways that are not considered punishment.\textsuperscript{112} Throughout its criminal processes, the state makes stigmatizing assertions—by prosecuting, by declaring someone not guilty by reason of insanity, and by naming someone an unindicted co-conspirator. Not proven differs from each of these cases of stigma without conviction, yet it is more modest than each. Unlike a verdict of not proven, the prosecutor’s charges allow the defendant a subsequent opportunity for rebuttal. But while the prosecutor maligns and accuses,\textsuperscript{113} not proven states only a negative fact, that the case was not proved, and does so only after a full trial. (The significance of this is that a case will never end in not proven when the charges are dismissed at trial, yet the prosecutor has already made the accusations.) A defendant is declared not guilty by reason of insanity only after the state proves the defendant committed the criminal offence, but the stigma from such a verdict is probably much greater than the stigma

\textsuperscript{110} Feinberg, \textit{Doing \& Deserving} at 98 (cited in note 105).

\textsuperscript{111} \textit{In re Winship} held explicitly “that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” 397 US at 364. And the Court has suggested that “punishment before trial” violates the Due Process Clause. \textit{United States v Salerno}, 481 US 739, 748 (1987). In \textit{Giaccio v Pennsylvania}, 382 US 399 (1966), the Court struck down as void for vagueness a state statute that allowed juries in nonfelony trials to require acquitted defendants to pay court costs. Justices Stewart and Fortas would have held that the impositions of costs was unconstitutional punishment of acquitted persons. Id at 405 (Stewart concurring); id at 405 (Fortas concurring). The one-sentence concurrence of Justice Fortas—no state may “impose a penalty or costs upon a defendant whom the jury has found not guilty”—is perhaps the closest the Court has come to undermining the constitutionality of not proven. Though stigmatizing, the bare statement of the not proven verdict is not punishment, for the reasons given below.

\textsuperscript{112} \textit{Smith v Doe}, 538 US 84, 98 (2003) (“Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.”). Pretrial detention is among these disadvantages not considered punishment. See \textit{Salerno}, 481 US at 751–52 (1987) (upholding the constitutionality of pretrial detention because of the government’s interest in detaining potentially dangerous individuals).

\textsuperscript{113} The indictment alone constitutes a shaming punishment. See Kahan and Posner, 42 J L \& Econ at 368 (cited in note 56) (defining shaming as “the process by which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those actions”).
from not proven. In some jurisdictions unindicted coconspirators have had grand jury reports expunged, a privilege unavailable to defendants who receive a not proven verdict. But again, the stigmatizing claim of a not proven verdict is more modest: not that the person is guilty though untried, but that the person was tried and not proved guilty. In legal consequence and public stigma, the closest analogy to not proven might be the current verdict of not guilty. Not proven would certainly be more stigmatizing, as a matter of degree, but it makes an identical claim about absence of proof: the defendant was tried but not convicted.

The difficult question, then, is not whether redistributing stigma with not proven is constitutional but whether it is desirable. This redistribution would do little to advance one of the traditional functions of criminal law, deterrence. The stigma of not proven might increase deterrence for those most concerned about reputation, but the slightly lower chance of conviction might decrease deterrence for those concerned only about incarceration. The effect of not proven on public safety would depend very much on second-order questions: for exam-

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114 For a series of essays discussing, among other issues, stigma attached to the verdict of not guilty by reason of insanity and its effects on the criminal process, see generally Lawrence Z. Friedman, ed, By Reason of Insanity: Essays on Psychiatry and the Law 217 (Scholarly Resources 1983).

115 See, for example, United States v Briggs, 514 F2d 794 (5th Cir 1975). But see United States v Nixon, 418 US 683 (1974), which

suggest[s] that Richard Nixon's probable criminality was relevant to the way [the Court] viewed and resolved the legal issues before it. There is the fact that Nixon had been named an "unindicted co-conspirator," a characterization that Nixon's lawyers argued vigorously was beyond the province of the grand jury and should be ignored by the Court, but which the Court not only left undisturbed, but then seemed to rely on in the course of determining that the evidence sought was relevant and presumptively admissible—thus satisfying the Rule 17(c) standard necessary to justify issuance of a subpoena in the first place.

Michael Stokes Paulsen, Nixon Now: The Courts and the Presidency After Twenty-Five Years, 83 Minn L Rev 1337, 1360–61 (1999). The constitutionality of naming unindicted co-conspirators has been disputed, though it was more controversial in the 1970s than today. For a summary of cases on both sides, see Phillip E. Hassman, Authority of Federal Grand Jury to Issue Indictment or Report Charging Unindicted Person with Crime or Misconduct, 28 ALR Federal 851 (1976). For recent criticism of the practice, see Ira P. Robbins, Guilty Without Charge: Assessing the Due Process Rights of Unindicted Co-Conspirators, 2004 Fed Cts L Rev 1 (arguing that naming someone as an unindicted coconspirator violates the Fifth Amendment because it often causes those named to lose their jobs, suffer injury to their reputation, and become unable to run for public office).

116 The arrest records of defendants receiving a verdict of not guilty by reason of insanity may also be expunged. See People v Wells, 294 Ill App 3d 405, 690 NE2d 645, 647 (1998) (holding that "individuals found NGRI fall within the scope of the [Illinois] statute on expungement"). But see Commonwealth of Pennsylvania v WP, 417 Pa Super 192, 612 A2d 438, 443 (1992) (refusing to expunge an arrest record because the "[a]ppellant is not a petitioner who comes before us cloaked in the mantel of innocence seeking to eradicate a blemish on his good name and character," but rather one who "but for the defense of insanity, . . . might have received a term of imprisonment for his obstreperous behavior").
ple, on whether the possibility of a nonrepudiating acquittal would lead to an increase in the reporting of sexual assaults, an increase that might in turn raise the ex ante costs to an offender, thus raising deter-
rence. Such deterrence benefits from not proven would at least partly be offset by the increase in acquittals—an increase that could slightly reduce deterrence and, more importantly, that could allow some de-
defendants to go free who are quite likely to have committed the crimes they were charged with. Their recidivism is a cost of not proven. If there are deterrence gains, they would likely outweigh the minimal administrative costs of not proven, provided there were no appeals and only three verdicts.117 But any gains or losses from deterrence seem slight and speculative.

The broader costs and benefits of not proven come from its ex-
pressive function.118 The public gains information; some victims gain a sense of second-best vindication (or at least nonrepudiation); some defendants achieve an exoneration not possible with only two verdicts. But for other defendants, not proven brings only more stigma. For the stigmatized defendants, this trade-off is not a mere shuffling of utils but is rather the bitter edge of economic hardship and social isola-
tion.119 Many of the defendants who bear these costs will be guilty in fact, yet some will not be.

But keeping the status quo does not escape the trade-off. Two verdicts are no more natural, no more a prepolitical baseline, than three verdicts. Consider the trade-offs in a move from three verdicts to two. The public would be less efficient in calculating risk, and, un-
able to distinguish between high-risk and low-risk acquitted defen-
dants, employers may shun them all. Some defendants would be con-
victed because their juries caved under the pressure of a two-verdict choice. Other defendants would suffer because juries believe their innocence and yet are powerless to exonerate. All of these costs would have to be justified by lessening the stigma of acquittals when there is significant evidence of guilt. The choice is not between stigmatizing or

117 For analysis of more than three verdicts, see Part III.C.
118 The distinctions here are helpful but not absolute: any deterrence gains from not proven come from its expressive effect, and separating the expressive effect of acquittal for the innocent and the probably-guilty is bound up in questions of desert. It is a decision about the retributive function of shaming nonpunishments.
119 This is especially true for a defendant charged with sexual assault. A not proven verdict may also be disproportionately harmful for a white-collar defendant, because a suspicion of crimi-
nality may be more damaging. See Stanton Wheeler, Kenneth Mann, and Austin Sarat, Sitting in Judgment: The Sentencing of White-Collar Criminals 144–63 (Yale 1988) (discussing how, in de-
termining the appropriate sentence, judges take into account a defendant’s white-collar status). Compare Waldfogel, 29 J Hum Resources at 63 (cited in note 58) (finding that “conviction has significant depressing effects on offenders’ employment probabilities and income”).
not stigmatizing acquitted defendants; it is between doing so more crudely or more accurately.

3. Exoneration: the effect of an innocence verdict.

The defendants who gain most from a not proven verdict do not receive it. Instead they receive an acquittal that exonerates publicly and unstintingly. With two verdicts, if a society prefers acquitting ten guilty persons to convicting one innocent, this exoneration is impossible. As has been noted, the category “acquittal” covers too much ground.

In a two-verdict system, the standard of proof for conviction determines how stigmatizing acquittal is. To replace the beyond a reasonable doubt standard with the preponderance of the evidence standard would clearly be undesirable for criminal trials—the number of innocent persons convicted would increase greatly, as would the prosecutor’s power to accuse—but such a system would reduce the stigma from both verdicts. The likely-guilty cases would shift from acquittal to conviction, diluting the probability that a convicted person was in fact guilty and making it more likely that an acquitted person was actually innocent.

Both verdicts would be even less stigmatizing with an inversion of beyond a reasonable doubt: if defendants were acquitted only when the evidence for innocence was beyond a reasonable doubt, then acquittals would exonerate almost absolutely. Conviction, too, would be less stigmatizing, because the public would know that multitudes of innocent people were being convicted.

In a two-verdict system, then, the higher the standard of proof, the greater the stigma for all defendants. Thus social stigma is inversely correlated to the probability of conviction and punishment. In a two-verdict system, the only way to escape both conviction and stigmatizing acquittal is to avoid trial altogether.\textsuperscript{120} At trial, the defendant will suffer from the very requirement that is meant to protect

\textsuperscript{120} Consequently, where two-verdict systems persist, the best way to preserve the reputation of the truly innocent is to require more evidence before a case goes to trial—for example, by raising the probable cause standard, pushing grand juries to be more exacting, or encouraging dismissal of the weakest cases. Ironically, these changes would limit the number of innocent persons who are tried, thus raising the probability that any given defendant is factually guilty—and that means more stigma for an innocent person who is tried and then acquitted.

The same ironic result (more protections bring more stigma) would come from failing to say how many jurors voted for acquittal. In English law, a jury returning a guilty verdict must state how many jurors agreed with the verdict and how many disagreed with it, but there is no similar requirement when the verdict is for not guilty. See Terence Ingman, \textit{The English Legal Process} 214–16 (Blackstone 8th ed 2000). Much like having one acquittal verdict, the difference in requirements obscures the strength of the jury’s support for acquittal—no one can tell which were the defendants that half the jury wanted to convict and which were acquitted unanimously.
him—a high burden of proof. The same effect comes from protections like the exclusionary rule, where the stricter the protection is perceived as being, the greater the chance that the public will think acquittals are due to “technicalities.”

Introducing a not proven verdict changes the dynamic. It allows exoneration at one pole without any reduction in the proof required for conviction and punishment at the other. It does so, of course, at the cost of a more stigmatizing intermediate acquittal.

No legal system can simultaneously have a high standard of proof, exoneration for the innocent, and no stigma for those acquitted because of insufficient evidence. One aim must be sacrificed. Not proven is a choice to accept greater stigma in the middle category as the cost of exoneration for others. Not proven is the better path because the innocent deserve exoneration more than the likely-guilty deserve lessened stigma.

C. Why Only Three Verdicts?

The arguments for three verdicts might also support five verdicts or twenty-five. If the public benefits from some information, and if some defendants benefit from calibrating the probability of guilt, then why not more information and more precise calibration? Three is not a magic number, but each new verdict would bring diminishing marginal returns.

The fundamental divide among acquittals is between believing the defendant and merely being dissatisfied with the evidence of guilt.

121 For a similar argument in the context of civil juries, see Abramowicz, 89 Cal L Rev at 280 (cited in note 81). Abramowicz proposes a system of mixed verdicts (rather than all-or-nothing). Such a system, he says, “would impose no stigma at all on those who almost certainly should be found not liable, some stigma on those about whom there is a great deal of uncertainty, and the greatest stigma on those who almost certainly deserve punishment.” Id. According to Abramowicz:

By reserving the harshest stigma for those who almost certainly deserve it, a system of mixed verdicts avoids both the danger of diluting stigma by punishing too many individuals in the same way and the danger of subjecting some who may well not deserve punishment to the same level of stigma as everyone else.

Id.

122 The same argument could be made for having only three verdicts but changing the announcement of the verdict: for example, the court could announce that the defendant received a not proven verdict by a jury vote of 8-4. A transparent not proven would escape the problems of proliferating verdicts described below, and it would further reduce free riding (the person receiving a not proven by a vote of 12-0 could not free ride on the reputation of the 8-4 not proven). But the benefit is not great, because the biggest informational step is in having any form of not proven, and the problem with a transparent not proven is the risk of the eccentric juror. Even if almost all the jurors supported exoneration, and did so rationally and vigorously, the eccentric juror or two could tarnish the exoneration.
Not proven captures this difference; each further differentiation of acquittals adds less information.

Further, in any system the public should have access to and comprehend the verdict. As verdicts proliferate, the public will have more trouble distinguishing them—besides the colors, what is the difference between “high” and “elevated” risk of terror attack? Those trained in law may understand the five acquittals of the Italian system, but the public might not easily distinguish them and remember which acquittal a defendant received.

Jurors would also struggle with a broad array of verdicts. Small probabilities bedevil human beings, and few jurors could distinguish 3 percent and 5 percent chances of guilt. Perhaps, though, juries could handle a smaller number of verdicts, a number less than a hundred but more than three.

Yet any choice between more than two verdicts at a time complicates the mechanics of selection, for a simple majority rule no longer suffices. The greater the number of verdicts becomes, the greater the chance that no acquittal verdict is a Condorcet winner, a situation that would force the legal system to accept plurality verdicts or face the risk of deadlocked juries.

Other acquittals are possible, perhaps even sensible. But each new verdict brings diminishing marginal returns, as precision is offset by confusion. The administrative costs rise—both for jurors making decisions and for the public that must comprehend them—and humans’ inability to distinguish small probabilities makes even the additional precision seem spurious. By contrast, adding not proven will secure the largest informational gain and is a practicable and modest step.

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[123] Abramowicz, 89 Cal L Rev at 251 (cited in note 81) (“One need look no further than the state lottery.”).
[124] For a defense of juror competence in rendering compromise verdicts in civil trials, see id at 250–55.
[125] This Comment’s proposal evades this difficulty by having the jury choose, first between conviction and acquittal, then between not guilty and not proven. Even the introduction of not proven could result in cases where no verdict is a Condorcet winner—the jurors could be evenly divided between guilty, not proven, and not guilty—but with each new verdict, the risk increases.
[126] For arguments against having a default choice, see text accompanying notes 43–45.
[127] Committee on Risk Perception and Communication, Improving Risk Communication 131, 167 (National Academy of Sciences 1989) (noting that “[f]ew people can meaningfully distinguish among small probabilities” and suggesting that humans “may have no way of determining if such an assessment as ‘1-in-10,000 lifetime risk’ is worth worrying about”).
CONCLUSION

Juries in the United States are constrained by the two-verdict system. They cannot exonerate without a hint of stigma; they cannot acquit without a hint of exoneration. To evade these constraints, one jury held an extraordinary press conference. In 1980, four Los Angeles police officers were acquitted on charges of shooting a gasoline attendant. The jury "acquitted the officers because it felt the prosecution had not proven its case, [but] it nevertheless wanted to register its condemnation of their conduct." The jury released the following statement at the press conference:

We do not believe that, in the actions related to the shooting of Mr. Tatum, the police conducted themselves with due concern for the lives and welfare of the persons who could have been seriously injured . . . . Two women in a vehicle, almost in the line of fire, were disregarded by the officers.

We believe the Los Angeles Police Department should view with grave concern the actions of these officers. If the actions of these experienced officers are examples of the training they receive, then all citizens should be concerned.

Such a press conference is rare. In a two-verdict system, only deviant juries avow or disavow exoneration. Efforts to choose another verdict, as in Burr's trial for treason and Clinton's impeachment trial, are blocked. This is not to say that American criminal law never allows a middle ground, only that it does so haphazardly and often informally. Civil suits are sometimes available, but they are only practical against wealthy defendants. Sometimes preponderance of the evidence is enough to prove guilt, as in determining homicide for purposes of intestate succession. Censure short of conviction is avail-

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129 Id.
130 Id. A more recent example is the latest Michael Jackson trial, after which one juror said he thought that someone molested the accuser but the prosecution failed to prove its case. See, for example, Nick Madigan and Rick Lyman, Jackson to Change Behavior, Lawyer Says, NY Times A14 (June 15, 2005).
131 On punitive civil sanctions as a middleground, see Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 Yale J 1795, 1799 (1992).
132 For examples of cases in which preponderance of the evidence is sufficient for imputing a crime, see Leigh Ann MacKenzie, Note, Civil RICO: Prior Criminal Conviction and Burden of Proof, 60 Notre Dame L. Rev 566, 584-85 (1985) (demonstrating how broadly courts assess guilt with a preponderance of the evidence standard, from the defense of truth in libel cases to determining the effect of homicide on intestate succession).
able, if the jury happens to be the United States Senate. Most juries have no such option.

The desirability of the not proven option turns on empirical and theoretical questions. The empirical ones include the ability of juries to distinguish accurately between the probably guilty and the innocent, and how much stigma is experienced in a three-verdict system. I have suggested only possibilities, but the questions lack conclusive empirical answers. The theoretical ones include the familiar terrain of the functions that punishment serves. The expressive function explored here is of course not the only one. As noted briefly above, not proven might increase deterrence for some, those most concerned about reputation, but decrease it for others, who care only about incarceration. Ultimately, whether one is inclined to support the introduction of not proven depends on what one thinks a trial is. If it is an exercise in proof, not a morality play, then introducing not proven would focus the factfinder on that exercise. Not proven is made for frail, imperfect factfinders. In a criminal trial in the United States, it would be right at home.