# OVERCOMING THE OPPOSITION TO A THIRD VERDICT: A Call for Future Research on Alternative Acquittals

Hannah Phalen*

## INTRODUCTION

In 1807, former Vice President Aaron Burr faced charges of treason. After a month-long trial, the jury deliberated for less than an hour. When they returned, however, they were not content with delivering one of the two traditional verdicts. Instead, the jury foreman declared, "[w]e of the jury say that Aaron Burr is not proved to be guilty under the indictment . . . submitted to us."[1] Defense attorneys protested the wording of the verdict but Chief Justice Marshall let it stand, recording the verdict as "not guilty."[2]

Nearly 200 years later, President Bill Clinton faced impeachment in the United States Senate. Rather than voting guilty or not guilty, Republican Senator Arlen Specter announced that the charges against the President were "not proven."[3] Specter was upset that the Senate refused to allow live testimony and explained his vote by stating, "I do not believe the president is 'not guilty'. . . . I believe that there has been . . . a sham trial, and it's a trial on which you can't really come to a verdict."[4]

In the American criminal justice system, juries are typically limited to one of two verdicts: guilty or not guilty.[5] A guilty verdict demonstrates the jury's

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* J.D. Candidate, May 2019, Sandra Day O'Connor College of Law at Arizona State University; M.S. Candidate, May 2019, College of Interdisciplinary Studies at Arizona State University; B.A. Psychology, 2015, University of Colorado Colorado Springs. The Author would like to thank Professor Linda Demaine for her advisory assistance, and extends special gratitude to the student editors who assisted during the writing of this Article.

1. THOMAS FLEMING, DUEL: ALEXANDER HAMILTON, AARON BURR AND THE FUTURE OF AMERICA 392 (1999).

2. *Id.* at 393.

3. Jack Torry, *Specter Says He'll Vote "Not Proven,"* PITT. POST-GAZETTE, Feb. 11, 1999, at A1.

4. *Id.* (second alteration in original).

5. *See, e.g.*, RAJI (CRIMINAL) 16–17 (4th ed. 2016) (The Standard Criminal 5b(1) instructions read, in part, as follows: "If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find [him][her] guilty.

judgment that the defendant committed the crime charged *and* that the prosecution met its burden of proof. A not guilty verdict is much broader; it encompasses both a belief in innocence and a lack of proof. In fact, it has been argued that "[g]iven our deeply rooted preference for acquitting guilty people to convicting the innocent, we strongly suspect that many defendants who are acquitted were in fact guilty but were not convicted."[6]

When delivering a not guilty verdict, juries and judges are not required to announce their reasoning. In fact, jurors, in most cases, are prohibited from testifying about the reasoning that led to their verdict.[7] While these rules are meant to protect the sanctity of the jury and to uphold acquittals against challenge, limiting jurors in such a way produces several negative side effects. By forcing juries to choose between two options, the American legal system effectively limits a jury's ability to express moral condemnation without the legal ramifications that come with a guilty verdict. Particularly in emotionally charged, high profile cases, not guilty verdicts often leave the community with the feeling that justice has been denied because a not guilty verdict can mean innocence as easily as it means a lack of proof.

Other legal systems do not limit the jury to two verdicts. These alternative verdicts have the same legal effect as the American not guilty verdict but serve to expand the fact-finder's voice. Alternative verdicts allow the fact-finder to express the reasoning behind its verdict, be it innocence, disagreement with the law, or simply that the prosecution has failed to meet its burden.

In recent years, scholarly interest in alternative verdicts has grown. Several legal scholars have proposed the adoption of various alternative acquittals. These scholars have examined the positive effects such acquittals might have on defendants, victims, communities, and juries. However, most of the scholarly discussion of these verdicts is theoretical and lacks empirical support.

This Article argues that, given scholarly interest in alternative verdicts and the current research indicating that alternative verdicts have a net positive effect on the justice system, further research is needed to overcome potential structural opposition to the adoption of a third verdict in the United States. Part I of this Article provides an overview of alternative verdicts, including their appearance in the United States and the current proposals for the adoption of alternative verdicts in the United States. Part II analyzes the effect

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If, on the other hand, you think there is a real possibility that [he][she] is not guilty, you must give [him][her] the benefit of the doubt and find [him][her] not guilty." (alterations in original)).

6. Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1299 (2000).

7. *See, e.g.*, FED. R. EVID. 606(b).

that such verdicts have on defendants, victims, members of the community and the jury system in the United States. Part III examines the philosophical and psychological opposition to adopting an alternative verdict. Part IV offers future steps that should be taken to demonstrate the positive effect of an alternative verdict on all members of the criminal justice system and ends with a call for further research into alternative verdicts.

## I. AN OVERVIEW OF ALTERNATIVE VERDICTS

Most criminal justice systems provide the fact-finder with two options: guilty or not guilty. In these systems, a guilty verdict is fairly self-explanatory: the defendant has committed the offense and should be punished. The not guilty verdict, which covers all acquittals, has an ambiguous meaning. In a two-verdict system, the acquittal verdict covers both factually innocent defendants and those defendants in the legal "gray-zone" between believed innocence and proven guilt. Some justice systems divide this gray zone into additional, or alternative, verdicts.

### *A. Alternative Verdicts: The Stories of Scotland and Italy*

The most well-known alternative verdict is Scotland's not proven verdict. This verdict provides a middle ground between guilty and not guilty. The verdict is a jury's way of saying that they are suspicious of the accused but the State has not met its burden.[8] The not proven verdict functions as an acquittal of the charges, and the accused is safe from double jeopardy.[9]

The not proven verdict began as "the result of a historical accident" and has been part of the Scottish legal system for over 250 years.[10] The practice began in the seventeenth century. Between 1600 and 1688, Scottish juries, in a form of rebellion, began to refuse to convict under unpopular statutes.[11] To combat this rebellion, general verdicts of guilty and not guilty were replaced by special verdicts of proven and not proven for each fact.[12] The jury's only job was to determine which facts had been proven. Based upon that

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8. Samuel Bray, Comment, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299, 1301 (2005).

9. *Id.*

10. Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, 62 LAW & CONTEMP. PROBS., 173, 193.

11. Joseph M. Barbato, Note, *Scotland's Bastard Verdict: Intermediacy and the Unique Three-Verdict System*, 15 IND. INT'L & COMP. L. REV. 543, 547 (2005).

12. *Id.*

determination, the judge would determine guilt.[13] This practice continued until the 1728 trial of Carnegie of Finhaven, where the jury's right to deliver a not guilty verdict was reestablished.[14] However, the not proven verdict did not disappear completely. Instead, by the early nineteenth century, the verdict took on a new meaning: that there was insufficient evidence to convict but that the jury was not convinced of the defendant's innocence.[15]

Today, Scottish juries return a not proven verdict in about one-third of all acquittals, and judges return the verdict in about one-fifth.[16] The not proven verdict is somewhat controversial in Scotland because it is considered to favor defendants.[17] The verdict has come under scrutiny several times in recent years, but all attempts to eliminate the verdict have failed.[18]

Italy's use of alternative verdicts is more recent. In 1989, the Republic of Italy adopted a new Code of Criminal Procedure which shifted Italy's criminal justice system from an inquisitorial system to an adversarial system.[19] The shift included the development of five acquittal verdicts.[20] The verdicts are (from strongest to weakest):

> 1) that no crime was committed; 2) that there was a crime, but the defendant did not commit it; 3) that the defendant is innocent of the crime, because evidence was insufficient to convict him; 4) that there was no crime, because the defendant had a justification for his action (such as self-defense or necessity); or 5) that it was not possible to decide the case due to procedural fault.[21]

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13. IAN DOUGLAS WILLOCK, THE ORIGINS AND DEVELOPMENT OF THE JURY IN SCOTLAND 219 (1966).

14. Barbato, *supra* note 11, at 548.

15. *Id.* at 549.

16. Bray, *supra* note 8, at 1301.

17. *Id.* at 1302.

18. *See, e.g.*, *Bid to Scrap "Not Proven" Verdict from Scots Courts Fails*, BBC (Feb. 25, 2016), http://www.bbc.com/news/uk-scotland-scotland-politics-35659541.

19. William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 5 (1992). Interestingly, unlike in the United States, any party, including the prosecution and injured parties, may appeal the trial court's decision. For a detailed discussion of the Italian Appellate System, see *id.* at 15.

20. *Id.* at 15.

21. *Id.*

All five of Italy's acquittals are covered by the not guilty verdict in the United States. Unlike the United States, however, a defendant in Italy has the right to appeal any verdict, in hopes of receiving a stronger acquittal.[22]

### *B. Alternative Verdicts in the United States*

Despite the United States' historical use of a two-verdict system, alternative verdicts have occasionally made their way into American courts. The two most famous uses of a not proven verdict are the 1807 trial of Aaron Burr for treason and Bill Clinton's impeachment trial nearly 200 years later in 1999. In both cases, the not proven verdict was logged as a not guilty verdict.[23] In 1973, a Washington State judge, when entering a verdict of not guilty, qualified his verdict by saying "My judgment here is not a verdict of innocent. It will be a verdict of, 'not proven.'"[24] In 1994, a handful of defense attorneys in Georgia requested that not proven be added to the verdict form.[25] The California Legislature has twice considered legislation that would add a not proven option.[26] The first time, in 1993, the California Senate Committee on Criminal Procedure rejected the bill.[27] The second time, in 2003, the California Senate Committee on Public Safety rejected the bill.[28] In both cases, the California District Attorneys Association and the American Civil Liberties Union opposed the bills.[29]

While the not proven verdict has not officially taken root in the American criminal justice system, several states have developed other ways for defendants to clarify their not guilty verdicts. For example, California allows for defendants to petition for a finding of factual innocence after they have

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22. *Id.* Receiving a stronger acquittal could be beneficial for defendants due to the potential stigma attached to some of the "weaker" acquittals. For a discussion of the stigma of acquittal, see discussion *infra* Part II.A.

23. FLEMING, *supra* note 1, at 392; Bray, *supra* note 8, at 1299.

24. State v. Bastinelli, 506 P.2d 854, 857 (Wash. 1973) (en banc) (Hale, J., concurring) (quoting the trial judge's oral opinion).

25. Barbato, *supra* note 11, at 573.

26. *Id.* at 574–75; *see also Verdict Upon a Plea of "Not Guilty" Change to "Not Proven": Bill Analysis: Hearing on SB 638 Before S. Comm. On Pub. Safety*, 2003–04 Sess. (Cal. 2003) [hereinafter *Hearings on SB 638*]; *Verdict Upon Plea of "Not Guilty": Bill Analysis Hearing on SB 1413 Before S. Comm. on Crim. Proc.*, 1995–96 Sess. (Cal. 1996) [hereinafter *Hearings on SB 1413*].

27. *Hearings on SB 638*, *supra* note 26.

28. Barbato, *supra* note 11, at 575.

29. *Hearings on SB 638*, *supra* note 26; *Hearings on SB 1413*, *supra* note 26.

been found not guilty.[30] Although few defendants use this system, exoneration is valuable.[31] North Carolina created the North Carolina Innocence Inquiry Commission in 2007.[32] The Commission examines post-conviction innocence claims and provides relief if a three-judge panel finds that the defendant was factually innocent.[33] Relief includes dismissal of all or any charges and eligibility for compensation from the State.[34] In addition to these systems, several legal scholars have proposed additional verdicts at the trial stage to assist defendants.

### *C. Proposals for Adding Alternative Verdicts*

Several legal scholars have proposed adding alternative verdicts to the American criminal justice system. University of Pennsylvania law professor Paul Robinson and Rutger's Law School co-dean Michael Cahill suggest several new acquittal verdicts to clarify why the defendant is found innocent.[35] University of North Carolina law professor Richard Myers proposes a system incorporating a vote of censure into a conviction.[36] Meanwhile, Andrew Leipold, a law professor at the University of Illinois, recommends the addition of an innocence verdict,[37] and Samuel Bray's proposal is modeled after Scotland's not proven verdict.[38]

#### 1. The Robinson-Cahill Proposal

Robinson and Cahill suggest replacing the not guilty verdict with a variety of possible verdicts.[39] The goal of the Robinson-Cahill model would be to "maintain the clarity of the law's conduct prohibitions and to make the scope

30. Bray, *supra* note 8, at 1303. For more on the benefits of a declaration of factual innocence, see generally Leipold, *supra* note 6.

31. Leipold, *supra* note 6, at 1329 n.112. Leipold estimates that in the twenty years only 6,000 defendants were exonerated. Exoneration is valued because it may help alleviate some of the stigma that comes with arrest. The stigma defendants face after arrest is discussed more thoroughly in *infra* Part II.A and in Leipold, *supra* note 6.

32. Richard E. Myers II, *Requiring a Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137, 176 & n.163 (2009).

33. *Id.* at 176.

34. N.C. GEN. STAT. § 15A-1469(h), (i) (2017).

35. PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 210 (2006).

36. Myers II, *supra* note 32, at 138.

37. Leipold, *supra* note 6, at 1300.

38. Bray, *supra* note 8, at 1304.

39. ROBINSON & CAHILL, *supra* note 35, at 210.

of those prohibitions transparent."[40] Specifically, the Robinson-Cahill model includes at least four acquittal verdicts: "no violation," a "justified violation," a "blameless violation," and an "unpunishable violation."[41]

A "no violation" or a "justified violation" verdict would indicate that the defendant's actions were acceptable, with justified violation being the appropriate verdict in cases involving self-defense or other such justification defenses.[42] A "blameless violation" finding would indicate that the defendant's conduct was not acceptable but punishment is inappropriate under the circumstances.[43] Blameless violations include cases involving insanity defenses and other so-called "excuse defenses."[44] Finally, "a 'not-punishable' verdict would at least make clear that the offender's conduct is not necessarily condoned and the offender is not necessarily blameless."[45] Such a verdict would be appropriate in cases involving nonexculpatory defenses, such as diplomatic immunity.[46]

The primary problem with the Robinson-Cahill model is the number of acquittals. The system closely resembles the Italian criminal justice system in that there are several acquittal verdicts from which to choose.[47] However, in Italy, a judge, not a jury is responsible for delivering a verdict.[48] Additionally, the judge is given precise instructions about how to use the different acquittals and required to follow an exact formula when announcing both the verdict and the reasoning used to reach that verdict.[49] Crafting a jury instruction that would accurately explain the different verdicts in a clear and succinct manner would likely be impossible. Further, part of the purpose expressed by Robinson and Cahill was to make the legal system more transparent.[50] The more verdicts a jury has to choose from, the more difficult it will become to differentiate between them.

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40. *Id.*
41. *Id.*
42. *See id.*
43. *Id.*
44. *See id.* at 203, 210. For example, the authors suggest this would have been an appropriate verdict in the famous case *The Queen v. Dudley & Stephens* [1884] 14 QBD 273.
45. ROBINSON & CAHILL, *supra* note 35, at 210.
46. *Id.* Robinson and Cahill suggest that offenders receiving a not-punishable verdict could be subject to nonpunitive consequences of conviction. *Id.* at 211. This suggestion is unique to the Robinson-Cahill proposal and raises constitutional questions that are outside the scope of this Article.
47. Pizzi, *supra* note 19, at 15.
48. For an overview of the Italian Criminal Justice system, see *id.*
49. G.C. Gebbie, S.E. Jebens & A. Mura, *"Not Proven" as a Judicial Fact in Scotland, Norway and Italy*, 7 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 262, 271 (1999).
50. ROBINSON & CAHILL, *supra* note 35, at 210.

2. The Myers Proposal

Richard Myers' proposal is slightly more limited than the Robinson-Cahill proposal. Myers suggests that every conviction be accompanied by a vote of censure.[51] A vote of censure is an explicit finding that the crime committed is worthy of moral condemnation.[52] The goal of Myers' proposal is "to improve jury accuracy, better guide jury deliberation, and improve the feedback loop between the populace—in the form of the jury—and all three branches of government."[53] His proposal would result in four possible verdicts: "[1] required facts to prove all elements found, and for censure; [2] required facts to prove all elements found, and against censure; [3] required facts to prove all elements not found, but sufficient for censure; and [4] required facts to prove all elements not found, and against censure."[54] All but the first verdict would result in an acquittal.[55] This proposal incorporates both jury nullification[56] (in the elements proven and against censure option) and the Scottish not proven verdict (in the elements not proven but sufficient for censure option).[57]

Myers' proposal also suggests two potential versions. In one, the jury only votes for censure if the prosecution meets its burden of proof on the elements.[58] This version would result in three potential verdicts: elements proven and for censure; elements proven and against censure; and elements not proven.[59] Adopting this proposal eliminates the condition that closely resembles the Scottish not proven verdict.

The largest criticism of the Myers' proposal is the implicit adoption of jury nullification.[60] Myers argues that this limited adoption of nullification would be beneficial because "[t]he forced feedback mechanism would encourage legislators and prosecutors to reevaluate the law regularly."[61] However, nullification is a controversial subject in American criminal law, with many

51. Myers II, *supra* note 32, at 138.
52. *Id.*
53. *Id.* at 142.
54. *Id.*
55. *See id.*
56. Jury nullification allows juries to acquit criminal defendants who are technically guilty but do not deserve punishment. For more on nullification, see generally CLAY CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE (2013) (discussing the evolution of the jury system and the development of jury nullification).
57. Myers II, *supra* note 32, at 142
58. *Id.*
59. *Id.*
60. *Id.* at 146
61. *Id.* at 143.

people concerned that it allows jurors to subvert laws with which they do not agree.[62]

### 3. The Leipold Proposal

Leipold's proposal differs from the proposals discussed above in that it focuses primarily on curing the problems of the innocent, acquitted defendant.[63] To draw the distinction between defendants who are acquitted due to innocence and those acquitted for other reasons, Leipold proposes the adoption of an innocence verdict.[64]

Unlike the other proposals, Leipold advocates for retaining the current system and creating a secondary, voluntary process that could result in an innocence verdict.[65] Under the Leipold system, the defendant would have the option of choosing between the current process and the process that might result in a finding of innocence.[66] If the defendant selects the second process, a finding of innocence could come about in one of two ways.[67]

First, if the charges were dismissed or the defendant was acquitted in a bench trial, the defendant would file a motion asking for a finding of innocence.[68] The defendant would be required to make a prima facie case for innocence and then the burden would shift to the prosecutor to explain why an innocence finding is inappropriate.[69] The defendant could make his case by presenting witnesses, introducing physical evidence, or otherwise demonstrating that the allegations in the indictment are false.[70] The defendant would be required to prove his innocence by a preponderance of the evidence.[71]

Second, if the case went to a jury, deliberations would proceed in a stepwise fashion.[72] First, the jury would be asked to unanimously decide

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62. *Compare* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (proposing that nullification can be used to correct racial inequities in the criminal justice system), *with* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996) (arguing that nullification is rife with consequences and without many benefits).

63. Leipold, *supra* note 6, at 1300.

64. *Id.*

65. *Id.* at 1314.

66. *Id.*

67. *Id.* at 1315.

68. *Id.*

69. *Id.* at 1319.

70. *Id.*

71. *Id.* at 1319–20.

72. *Id.* at 1322.

whether the defendant was guilty or not guilty.[73] If the jury determined that the defendant was not guilty, the jury would be asked to consider whether it is more likely than not[74] that the defendant did not commit the crime.[75] The Leipold proposal would require unanimity in an innocence verdict.[76] However, to avoid a mistrial when a jury has decided that a defendant is not guilty but is unable to determine whether the defendant is innocent, Leipold also proposed that not guilty should be the default verdict in those cases.[77] If a defendant is found innocent, either by judge or jury, the defendant's record related to that charge would be expunged and inadmissible in any future proceedings.[78]

The clearest problem of the Leipold proposal is the requirement that an innocence verdict be unanimous, which imposes a burden of proof on the defendant. First, by requiring that an innocence verdict is unanimous, Leipold severely limits the number of innocent verdicts that will be returned. This means that many of the defendants whom Leipold's system is trying to protect will still be subject to the stigma attached to acquittal.[79] Additionally, the concept of unanimity with a potential default verdict is very confusing. Leipold does not explain the way in which the default option would become accessible to juries. Second, by imposing a burden of proof on the defendant, Leipold's proposal runs the risk of harming defendants. Leipold's proposal might confuse jurors about the standard of proof. This could lead jurors to either decrease the prosecutor's burden of proof or increase the defendant's burden of proof.[80]

#### 4. The Bray (or Scottish) Proposal

The Bray proposal follows the Scottish model.[81] First, the decision-maker (whether judge or jury) decides between conviction and acquittal.[82] Second, when the vote is for acquittal, the decision-maker is required to explain its

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73. *Id.*
74. This imposes a preponderance of the evidence burden of proof on the defendant.
75. Leipold, *supra* note 6, at 1322.
76. *Id.* at 1323–24.
77. *Id.* at 1324.
78. *Id.* at 1300.
79. The stigma faced by acquitted defendants is discussed *infra* Part II.A.
80. For more on the problems with requiring a burden of proof for innocence, see Bray, *supra* note 8, at 1306.
81. *Id.* at 1304.
82. *Id.* at 1305.

acquittal by choosing between not proven and not guilty.[83] When the decision-maker is a judge, the first and second steps happen simultaneously.[84] When the decision-maker is a jury, the second step would be decided by majority vote.[85] Bray argues that a unanimity requirement would only obscure the point of differentiated acquittals—explaining why a jury chose to acquit.[86]

Bray rejects the idea of a burden of proof for innocence, out of concern that a high burden would rarely be met but a lower burden might confuse jurors, leading them to soften the "beyond a reasonable doubt" requirement.[87] Both acquittal verdicts would invoke double jeopardy—preventing the prosecution from retrying the defendant.[88] Additionally, defendants would not be permitted to appeal a not proven verdict because the verdict is simply an explanation of the jury's reasoning.[89]

Bray's proposal is incomplete. While Bray details the stepwise fashion which the decision-maker is to use to decide a case, he never suggests jury instructions or legal definitions that would help explain the meaning of not proven as opposed to not guilty. This might be due in part to the fact that Scotland does not explain the difference between the two verdicts to jurors.[90] Regardless of Bray's reasoning for not including suggested jury instructions, such instructions are instrumental to the adoption of his proposal.

## II. CONSEQUENCES OF ALTERNATIVE VERDICTS

The most obvious concern with adopting an alternative verdict is the effect such a verdict might have on the people involved in the legal system. Before adopting one of the discussed proposals and overhauling the justice system, it is important to consider the effects of doing so on defendants, prosecutors, victims, the community, and the jury.

### *A. For the Defendant*

Three categories of defendants are affected by adopting a not proven verdict: (1) those who would have been found guilty under the two-verdict system but are acquitted under the three-verdict system; (2) those who would

83. *Id.*
84. *Id.* at 1306.
85. *Id.* at 1305.
86. *Id.* at 1306.
87. *Id.*
88. *Id.*
89. *Id.* at 1307.
90. *Id.* at 1305 n.42.

have been acquitted under the two-verdict system and are now found not guilty; (3) and those who would have been acquitted under the two-verdict system and now receive a not proven verdict.

The first group affected by the adoption of a third verdict is that which includes defendants who would have been found guilty under a two-verdict system but are acquitted under the three-verdict system. When researching the not proven verdict, psychologist Lorraine Hope and colleagues found that the evidence against these defendants would be moderately strong but might not rise to the level of proof beyond a reasonable doubt.[91] Further, a third verdict would give the jury an opportunity to send a message that the defendant probably did something wrong. Therefore, alternative verdicts "limit[] the risk that jurors convict because they feel the defendant is a bad person."[92] In other words, the not proven verdict gives jurors a way to express their opinion, in cases where the government has not met its burden of proof, that the defendant probably did something wrong without having to convict. This category of defendants would benefit from a third verdict because they will be acquitted rather than convicted.

The second type of defendants affected by the addition of a not proven verdict are those who would continue to receive a not guilty verdict under a three-verdict system. These defendants would benefit from the addition of a third verdict because of the new meaning that would be assigned to a not guilty verdict. In a way, the addition of a not proven verdict would strengthen these defendants' argument that they were wrongfully charged and that they are in fact innocent of the crime for which they were accused. As Robinson and Cahill point out, "[t]he current general verdict of 'not guilty' obscures distinctions between bases for acquittal and thereby makes the meaning of every acquittal dangerously ambiguous."[93] In contrast, adding a third verdict will allow these defendants to more successfully argue that they have been "found innocent."

The third group affected is that which includes the defendants who would have been found not guilty but are now acquitted by a not proven verdict. These defendants would not benefit from the not proven verdict. They may face increased stigma because they will no longer be able to argue that they

91. Lorraine Hope et al., *A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making*, 32 LAW & HUM. BEHAV. 241, 246 (2008).

92. Myers II, *supra* note 32, at 148.

93. ROBINSON & CAHILL, *supra* note 35, at 330–31.

were "found innocent."[94] In fact, the second study by Hope and colleagues found that ninety-two percent of participants believed that defendants may be treated differently after receiving a not proven verdict rather than a not guilty verdict.[95] Due to the fact that alternative verdicts decrease the ambiguity of a not guilty verdict, some defendants who would have been completely acquitted are deprived of the opportunity to argue that they were found innocent.[96] This might result in social shaming or other social stigma.

Robertson argued that this risk of stigma destroys the presumption of innocence.[97] He claimed that the Scottish public was only satisfied with the not proven verdict because "the community at large in Scotland then assumes that the individual was guilty, but there was not enough evidence."[98] Further, John MacKenzie argued that the not proven verdict, in practice, "leaves the accused slightly blemished."[99]

However, this argument relies on the assumption that there is not currently social stigma attached to acquittal. Leipold argues that the social stigma of an indictment may, in and of itself, damage the reputation of a defendant to such an extent that the defendant "may never be able to return to the life he knew before being accused."[100] Courts have occasionally acknowledged the harm that simply being indicted can cause. For example, in the case *In re Fried*, the prosecution argued that an indictment based on improper evidence would do no harm to the defendant.[101] In response, the Second Circuit held, "[A] wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased."[102] Leipold further argues that such stigma can complicate custody disputes and adoption matters as well as efforts to find employment.[103]

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94. *See* SCOTTISH OFFICE, JURIES AND VERDICTS: IMPROVING THE DELIVERY OF JUSTICE IN SCOTLAND 36 (1994) [hereinafter JURIES AND VERDICTS] (discussing the stigma faced by Scottish defendants who are found not proven).

95. Hope et al., *supra* note 91, at 249.

96. JURIES AND VERDICTS, *supra* note 94, at 36.

97. 261 Parl Deb HC (6th ser.) (1995) col. 230 (UK).

98. *Id.* at col. 230–31.

99. John P. MacKenzie, Editorial, *Between Guilt and Innocence: Scotland Created a Middle Verdict for Nervous Jurors*, N.Y. TIMES, Aug. 16, 1985, at A28.

100. Leipold, *supra* note 6, at 1299.

101. *In re* Fried, 161 F.2d 453, 458 (2d Cir. 1947).

102. *Id.*; *see also* United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979) ("[T]he handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo."); Chase v. King, 406 A.2d 1388, 1391 (Pa. Super. Ct. 1979) (Hoffman, J., concurring in part and dissenting in part) ("The mistakenly arrested person never knows when it will cause a denial of credit, loss of a new job, or simply the loss of esteem, trust, and respect from other members of the community.").

103. Leipold, *supra* note 6, at 1308.

Leipold's argument is further supported by a study conducted by Schwartz and Skolnick.[104] Schwartz and Skolnick prepared four employment folders, varying criminal court record for the applicant.[105] The first folder indicated that the applicant was convicted for assault, the second indicated that the applicant was tried and acquitted for assault, the third was identical to the second but contained a letter from the judge reaffirming the presumption of innocence, and the fourth contained no mention of a criminal record.[106] Schwartz and Skolnick showed employers one of the applicant files and asked the employer if they would hire the applicant.[107] The results indicated that "the individual accused but acquitted of assault [had] almost as much trouble finding even an unskilled job as the one who was not only accused of the same offense, but also convicted."[108] This indicates that Leipold is correct: stigma attaches not only to conviction, but also to acquittal.

If stigma attaches to an acquittal in today's system, there is no logical reason to avoid clarifying verdicts. Arguably, the system would provide benefits to some with no greater harm to others. Those who would have been found guilty but have now been acquitted due to an alternative verdict would benefit because they are not imprisoned. Those who would have been acquitted but are now given a verdict that demonstrates factual innocence are better able to argue that they were wrongfully accused and avoid the stigma to which they might otherwise have been subjected. Those who would have been acquitted under either system but are not considered factually innocent would simply experience the stigma they already would have received.

### *B. For Prosecutors*

Prosecuting attorneys would likely be affected by the addition of a third verdict. Myers argues that current prosecutors rely on overcharging defendants and hoping that juries convict on a lesser-included charge.[109] Myers argues that alternative acquittals will force prosecutors to be selective about the charges they choose to bring.[110]

A not proven verdict would also provide detailed feedback for prosecutors. When a jury returns a not guilty verdict in a system that allows for a not

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104. *See* Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133, 136 (1962).
105. *Id.* at 134.
106. *Id.*
107. *Id.* at 135.
108. *Id.* at 136.
109. Myers II, *supra* note 32, at 148–49.
110. *Id.* at 149.

proven verdict, it indicates that the jury believed the defendant was innocent. By paying attention to what types of cases result in not proven verdicts and what types of cases result in not guilty verdicts, prosecutors could learn more about what types of cases are worth pursuing. This feedback will allow prosecutors to make better informed decisions about what charges to bring based on the evidence.

Prosecutors might oppose this change out of concern that the not proven verdict would reduce their conviction rates. Reduced conviction rates, in turn, may reduce public confidence in that prosecutor and hurt the prosecutor's reelection chances. However, reduced conviction rates are not necessarily problematic. If juries are opting for not proven where they would have chosen a guilty verdict, this demonstrates that the verdict is working because the burden of proof has not been met.

The not proven verdict will also influence use of plea bargaining. Currently, plea deals resolve between ninety and ninety-five percent of criminal cases.[111] Prosecutors might push for plea deals more aggressively, fearing a not proven verdict. However, the not proven verdict gives defense attorneys a better negotiating position in plea negotiations. In the same way that a prosecutor might fear a not proven verdict, the defense benefits from existence of the not proven verdict. This change in the bargaining positions of the two sides could result in better, fairer plea deals.[112]

### *C. For Victims*

Those arguing against the not proven verdict argue that victims are left unsatisfied by the verdict. George Robertson, a former member of the Scottish Parliament once argued that the victims "are left hanging in the air of frustration and mystery that comes at the end of a trial when a not proven verdict is handed down."[113] However, Robertson's argument fails to consider that the logical alternative to a not proven verdict would not necessarily be a

111. LINDSEY DEVERS, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 3 (2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

112. Although a discussion on prosecutorial discretion and plea bargaining is outside the scope of this Article, the current plea bargaining system is weighted in favor of the prosecutors and against defendants. *See* Michael Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3601–02 (2013); Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea-Bargaining*, 2 TEX. A&M L. REV. 385, 388–90 (2015); Steven Wall, *Waving Goodbye: In Memory of the Reasonable-Doubt Standard*, 44 HASTINGS CONST. L.Q. 61, 62, 64–65 (2016).

113. 261 Parl Deb HC (6th ser.) (1995) col. 234 (UK).

guilty verdict, which would result in closure for the family, but rather a not guilty verdict. There is no reason to believe that a not guilty verdict is more satisfying for victims than a not proven verdict.

Many victim advocacy centers actually support the existence of a third verdict.[114] Although the not proven verdict may sometimes be unsatisfying for victims, these centers argue that the not proven verdict can simply reflect "the absence of the necessary proof without casting doubt on the honesty or reliability of the victim."[115] This is especially true in cases of rape. Often, rape cases rely so heavily on credibility that either verdict in a dichotomous system implies something about the believability of the parties.[116]

Further, Barbato argues that the not proven verdict saves the victim from having to see the defendant receive "the unqualified certificate of good character to which a not guilty verdict would have entitled him."[117]

When a Scottish jury returns a not proven verdict, the implication is the prosecution failed to prove their case, not that the defendant is innocent. In contrast, when an American jury returns a not guilty verdict, its reasons for doing so are not always clear. With a not proven verdict, the victim can feel at least partially satisfied that the defendant will not be able to argue that a jury believed him to be innocent.

### *D. For the Community*

A not proven verdict provides feedback to the community. For example, the not proven verdict expresses that the prosecutor did not prove its case. This information is valuable for prosecutorial elections. If a prosecutor tries many cases that result in not guilty verdicts under a three-verdict system, this would likely indicate that the prosecutor is overzealous.

The not proven verdict also gives community members more information about verdicts. This would allow employers to differentiate between the wrongfully accused (those found not guilty) and those who simply were not caught (people receiving a not proven verdict), which would result in better informed hiring decisions. This would ease the stigmatism that acquitted defendants experience. It would also allow for employers to feel more comfortable hiring an acquitted defendant.

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114. *See* SCOTTISH OFFICE, FIRM AND FAIR: IMPROVING THE DELIVERY OF JUSTICE IN SCOTLAND 19 (1994), https://perma.cc/MXH5-EKG3 (noting that consultees, including victim advocacy groups, supported the retention of the three-verdict system).

115. JURIES AND VERDICTS, *supra* note 94, at 33–34.

116. Bray, *supra* note 8, at 1318.

117. Barbato, *supra* note 11, at 569.

The not proven option would also reduce the cost of the justice system. In a deliberation study, Hope and colleagues found that there are fewer hung juries when there is a not proven option.[118] Mistrials due to a hung jury create a large burden on the system because they require a retrial for a conviction. This means that prosecutors seeking to retry a defendant after a mistrial must use all of its resources twice: once during the first trial and again during the second trial. Mistrials also affect the defendant. There is often a long time between arrest and trial, typically anywhere between six months and two years.[119] A retrial extends this time. This problem is particularly pressing for defendants who are detained pending trial.

Finally, the not proven verdict will be particularly helpful in cases with emotional verdicts. Barbato speculates that returning a verdict in a high-profile case might alleviate some of the public outrage that attends a not guilty verdict in such a case.[120] The verdict makes a useful statement when there is a general belief that the defendant did something wrong.

The not proven verdict provides clarity for the community. When a defendant is acquitted under the current system, the community does not know the reasoning behind the acquittal. With a not proven verdict, the community would have greater clarity about why a specific verdict was returned.

### *E. For the Jury*

The adoption of an alternative acquittal, such as Scotland's not proven verdict, would have a net positive effect on the jury for two reasons. First, the addition of an alternative verdict would increase juror satisfaction because jurors would be able to clearly express their feelings about the defendant. Second, the addition of a third verdict would increase juror preciseness.

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118. Hope et al., *supra* note 91, at 251. One potential explanation for the finding that there are fewer hung juries when there is a not proven option is that the not proven option is being used as a compromise verdict. For discussion of this possibility, see *infra* notes 154–57 and accompanying text.

119. *See* THOMAS H. COHEN & BRIAN A REAVES, U.S. DEP'T JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS: STATE COURT PROCESSING STATISTICS, 1990–2004, at 1, 7 (2007), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf; Alice Brennan, *How Long Does it Take for a Criminal Case to Go to Trial?*, N.Y. WORLD (Feb. 27, 2012), http://www.thenewyorkworld.com/2012/02/27/the-daily-q-how-long-criminal-cas/ (stating that the average time between trial and arrest in New York City is 783 days); Kevin Deutsch, *Huge Backlog in 'Bronx Gulag' Means Years in Jail*, N.Y. DAILY NEWS (Feb. 27, 2012), http://www.nydailynews.com/news/huge-backlog-bronx-gulag-means-years-jail-day-court-article-1.1028966.

120. Barbato, *supra* note 11, at 574.

Although opponents fear increased juror confusion, current research indicates that this fear is likely unfounded and does not outweigh the potential benefits of a third verdict.

### 1. Increasing Juror Expression and Preciseness

In a dichotomous verdict system, the jury's voice is limited. An alternative acquittal gives the jury a venue to clarify an acquittal. This is particularly important in cases where the jury believes the defendant is culpable but that the prosecution has not met its burden of proof.

This might be particularly true in high profile cases. Many psycho-legal studies on the effects of pretrial publicity have found that negative pretrial publicity significantly increases guilty verdicts.[121] One possible explanation for the increase in guilty verdicts is that pretrial publicity increases punitiveness. The not proven verdict allows jurors to express their punitive feelings because it expresses that the defendant has done something wrong.

Giving jurors an avenue to express their belief that the defendant is culpable will also increase juror satisfaction. For example, after the O.J. Simpson trial, the common belief was that the jury freed a man they believed to be guilty due to lack of proof.[122] Mark Pinsky speculated that results like the one in the Simpson trial lead to "a feeling of a job half-done by jurors who know that while technically 'not guilty,' the defendant was surely not 'innocent.'"[123] A not proven verdict would reduce this feeling of a job half-done because not proven truly reflects the idea that the defendant cannot be convicted but is not necessarily innocent.

A not proven verdict is particularly important in emotionally charged cases. When jurors feel a combination of anger and disgust, they experience increased moral outrage, which in turn creates a need to punish.[124] This combination of anger and disgust commonly occurs in criminal cases, particularly those involving gruesome photographs.[125] The not proven option

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121. For a meta-analysis on the effect of pretrial publicity, see Nancy M. Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 LAW & HUM. BEHAV. 219, 219 (1999).

122. Barbato, *supra* note 11, at 574.

123. Mark I. Pinsky, *When Juries Need a 3rd Choice: Not Proven*, ORLANDO SENTINEL, Aug. 20, 1995, at G1.

124. Jessica Salerno & Linda Peter-Hagene, *The Interactive Effect of Anger and Disgust on Moral Outrage and Judgments*, 24 PSYCHOL. SCI. 2069, 2074 (2013).

125. Kevin S. Douglas, David R. Lyon, & James R. P. Ogloff, *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?*, 21 LAW & HUM. BEHAV. 485, 497 (1997). Preliminary research is being done on the impact of

gives jurors an outlet to direct their anger and moral outrage. Allowing jurors to express their voice should leave jurors feeling that they have completed their job and reduce unjustified guilty verdicts in emotionally charged cases.

### 2. The Potential for Juror Confusion

One of the greatest concerns about the adoption of new verdicts is that doing so may create jury confusion.[126] George Robertson, a former Member of the Scottish Parliament, used the confusion caused by the not proven verdict to bolster his argument for its abolition.[127] Robertson claimed that the risk of such confusion led to "an undermining of faith in the Scottish criminal justice system.[128]

This concern is likely unfounded. As Leipold argues, "[t]he current system already assumes that juries understand the distinction between innocent and not guilty, and that they appreciate the role of the reasonable doubt rule, acquitting even when they believe a defendant is factually guilty."[129] If this assumption is true, then juries should be able to easily incorporate a new verdict. Confusion would only be due to novelty and would likely dissipate over time.[130]

Of course, if this assumption is false, there might be increased juror confusion. However, even if jurors are confused, having alternative verdicts might force them to attempt to comprehend the burden of proof. For example, if a jury has two verdict options: guilty or not guilty, it may convict a defendant when the jury thinks the defendant committed the crime, regardless of whether or not the State has met its burden. On the other hand, if a jury has multiple acquittal options, the jury might opt for a not proven verdict (in Bray's proposal), a not guilty verdict (from Leipold's proposal), or a "facts not proven but sufficient for censure" verdict (from Myers' proposal) rather than a guilty verdict in cases where the State has failed to meet its burden but the jury is nevertheless convinced of the defendant's guilt.

Additionally, empirical research has found that, following instruction, jurors understand the Scottish not proven verdict. Hope and colleagues

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gruesome photographs and a third verdict on jury decision-making, see, for example, HANNAH PHALEN ET AL., AM. SOC'Y TRIAL CONSULTANTS, GUILTY, NOT GUILTY, OR SOMETHING IN BETWEEN: AN ANALYSIS OF THE IMPACT OF A THIRD VERDICT OPTION AND GRUESOME PHOTOGRAPHS ON JURY DECISION-MAKING (2017), https://perma.cc/XK59-G32G.

126. 261 Parl Deb HC (6th ser.) (1995) col. 230 (UK).

127. *Id.*

128. *Id.* at col. 229.

129. Leipold, *supra* note 6, at 1353.

130. *Id.* Juror understanding is discussed further *infra* Part IV.

assessed Scottish mock juror understanding in two studies.[131] Participants in the first study were placed in either a two-verdict condition or a three-verdict condition.[132] All jurors read a trial summary, and jurors in the three-verdict condition were given jury instructions that were modeled after instructions given to real Scottish jurors.[133] All participants were asked to answer questions about their verdict and about their understanding of the not proven verdict.[134] Participants who were given instructions on the not proven verdict demonstrated significantly better understanding of the not proven verdict, with seventy-seven percent of participants understanding that the verdict led to an acquittal.[135] Additionally, eighty-eight percent of participants in the three-verdict condition cited "insufficient evidence" as their primary reason for giving the not proven verdict.[136] The second study closely followed the first study and found similar trends in participant understanding (with seventy-eight percent of three-verdict participants understanding that the verdict led to an acquittal).[137] The studies conducted by Hope and colleagues indicate that minimal instruction can increase juror understanding of a third verdict option. Therefore, concerns about juror confusion are likely cured by jury instructions.

Accordingly, any confusion jurors may experience with the addition of a not proven verdict can be mitigated by jury instructions. Further, the addition of a not proven verdict will increase juror expression and satisfaction. Therefore, the benefits of the not proven verdict for the jury outweigh the concerns.

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131. Hope et al., *supra* note 91, at 244, 247.
132. *Id.* at 245.
133. *Id.* Jurors were instructed:

> There are three verdicts open to you here in Scotland: Not Guilty, Not Proven and Guilty. The practical effect of verdicts of Not Guilty and Not Proven is the same. Both result in an acquittal, and a defendant (also known as the accused) acquitted of a charge cannot be prosecuted again on it.

*Id.*
134. *Id.*
135. *Id.* at 246.
136. *Id.*
137. *Id.* at 249.

## III. PHILOSOPHICAL AND PSYCHOLOGICAL OPPOSITION TO VERDICT REFORM

The adoption of an alternative acquittal will have a net positive effect on the criminal justice system. However, all attempts to adopt a third verdict have been unsuccessful.[138] This is likely due to the philosophical and psychological opposition to verdict reform. The three clearest arguments against the adoption of alternative verdicts are that: (1) alternative verdicts may lead to more acquittals, (2) the American people desire a harsh criminal justice system, and (3) the adoption of a third verdict alters the justice system by destroying the veil of secrecy and allowing for compromise verdicts.

### *A. More Acquittals*

Another argument against alternative verdicts is that they would result in more acquittals by causing jurors to focus on the weaknesses of the evidence.[139] However, empirical research demonstrates that this fear is unfounded. The first study conducted by Hope and colleagues did not find a significant difference between conviction rates in the two-verdict condition (guilty v. not guilty) and in the three-verdict condition (guilty v. not guilty v. not proven).[140] Additionally, an empirical study by Smithson and colleagues found that the not proven option resulted in fewer full acquittals rather than fewer guilty verdicts.[141]

The second study conducted by Hope and colleagues comes to a slightly different result. In this study, Hope and colleagues compared verdicts from participants given two verdict options (guilty and not guilty) with verdicts from participants given three verdict options (guilty, not guilty, and not proven) when the strength of evidence against the defendant was strong, moderate, or weak. [142]

This study did find a significant difference between conviction rates in the two-verdict condition and the three-verdict condition.[143] However, in the strong and weak evidence conditions, there was no difference between the conviction rates in the two-verdict and three-verdict conditions.[144] It was only

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138. *See* discussion *supra* Part I.B.

139. MacKenzie, *supra* note 99.

140. Hope et al., *supra* note 91, at 245.

141. Michael Smithson, Sara Deady & Lavinia Gracik, *Guilty, Not Guilty, or . . . ? Multiple Options in Jury Verdict Choices*, 20 J. BEHAV. DECISION MAKING 481, 486 (2007).

142. Hope et al., *supra* note 91, at 247–48.

143. *Id.* at 248.

144. *Id.*

in the moderate evidence condition that there was a significant difference between conviction rates in the two verdict conditions.[145] This signals that the not proven verdict only reduces convictions in cases where there is moderate evidence against the defendant. Therefore, the not proven verdict might actually be protecting the defendant's constitutional rights, by reducing guilty verdicts when jurors believe the defendant is not innocent (and therefore are willing to vote guilty in a two-verdict condition) but are not necessarily convinced beyond a reasonable doubt of the defendant's guilt.

### *B. An American Desire for a Harsh Criminal Justice System*

It is possible that the not proven verdict might be perceived as too lenient. Since the not proven verdict functions as an acquittal and might result in fewer guilty verdicts, the verdict might be perceived as "soft on crime." Therefore, American legislatures may be reluctant to adopt the verdict. The "tough on crime" movement began in the 1970s.[146] By the 1980s, national political discourse focused more and more on a need to "get tough" on crime.[147] It became widely believed that being the law-and-order candidate was the best way to win elections.[148] The political fear of being "soft on crime" prevents many criminal justice reforms from being adopted because they might be perceived as lenient.

However, conventional wisdom that the American people want a harsh criminal justice system is likely incorrect. A 2012 Pew Research survey of likely voters found that only twenty-eight percent of people surveyed believe that the number of people in the prison in the United States is "about right."[149] In addition, sixty-nine percent of people surveyed believe that prison was not always the best response for non-violent crime.[150] Further, an empirical analysis of California state elections demonstrated that there was no

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145. *Id.*

146. Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act*, *in* SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES 43, 45–46 (Cyrus Tata & Neil Hutton eds., 2002).

147. *Id.* at 50–51.

148. Steven A. Krieger, *Do "Tough on Crime" Politicians Win More Elections? An Empirical Analysis of California State Legislators from 1992 to 2000*, 45 CREIGHTON L. REV. 131, 138 (2011). This widespread belief is supported today by the results of the 2016 Presidential Election, where winner Donald Trump was widely considered the "law-and-order" candidate. Dan Roberts & Ben Jacobs, *Donald Trump Proclaims Himself 'Law and Order' Candidate At Republican Convention*, GUARDIAN (July 22, 2016, 4:40 AM).

149. PEW RESEARCH CTR., PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA 2 (2012).

150. *Id.*

correlation between criminal justice positions and electability.[151] Finally, a study by Loretta Stalans and Shari Diamond indicates that, while participants believed judges were too lenient in their sentencing, their own sentencing preferences were more lenient than the minimum sentence required.[152] The above empirical evidence indicates that the American people are not as "tough on crime" as politicians believe.

The empirical evidence suggests that the American people would not be opposed to the not proven verdict purely because it might be perceived as "soft on crime." Although further research is necessary to determine what effect the addition of a not proven verdict would have on the community, the not proven verdict certainly provides many benefits to the community.[153]

### *C. Changes to the Justice System*

Adopting a third verdict would dramatically alter the American criminal justice system. Opponents to this change are concerned that adopting a third verdict will have two major effects. First, the American jury is currently behind a veil of secrecy and clarifying verdicts might destroy this secrecy. Second, opponents argue that the not proven verdict is improperly used as a compromise verdict.

First, opponents argue that the not proven verdict will reveal too much about the jury's decision. The American jury is currently behind a veil of secrecy. Jurors cannot testify about discussions in the jury room except in limited circumstances.[154] Jurors are not required to discuss their deliberations with anybody. Opponents of the not proven verdict fear that the not proven verdict might open a Pandora's box by forcing jurors to disclose their reasoning because a not proven verdict will show that the reason the jury acquitted was because the government did not meet its burden of proof. However, the not proven verdict does not remove the veil of secrecy. A not proven verdict is simply another type of acquittal. The jury would not be required to explain its reasoning in coming to the not proven verdict just as the jury is not currently required to explain its reasoning in the dichotomous verdict system.

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151. Krieger, *supra* note 148, at 170–71.

152. Loretta J. Stalans & Shari S. Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing: Misperception and Discontent*, 14 LAW & HUM. BEHAV. 199, 206 (1990). This study sample included community members, jurors, and undergraduates.

153. These benefits are discussed more thoroughly *infra* Part III.

154. *See, e.g.*, FED. R. EVID. 606(b).

Second, it may be argued that the not proven verdict is a compromise verdict. That is, the not proven verdict might result when half the jury is convinced of guilt and the other half is not. Hope and colleagues speculate this might be the case, given the reduced number of hung juries in the not proven condition.[155] However, this argument assumes that compromise verdicts are problematic. Often times, a compromise might occur when jurors are not convinced of the defendant's guilt but are still doubtful of his innocence. In those cases, the proper verdict is an acquittal, as the defendant's guilt has not been proven. In addition, Smithson and colleagues examined whether participants were using the not proven verdict as a decision-avoidant.[156] Smithson and colleagues' study showed no evidence of a group using not proven as a decision-avoidant.[157] Although more research should be done specifically examining the use of the not proven verdict as a compromise verdict, a tentative initial conclusion can be made from Smithson and colleagues' findings that the verdict is not being used in such a way. Smithson's conclusion is further supported by the fact that Scottish judges use the not proven verdict in one-fifth of all cases.[158]

## IV. A NEED FOR FURTHER RESEARCH ON ALTERNATIVE ACQUITTALS

Before the American criminal justice system is reformed to include the not proven verdict, more empirical research on the effects of these verdicts is necessary. Given that current research demonstrates a generally positive effect of a third verdict, continuing this research would give legislators important and necessary arguments to overcome the philosophical and psychological opposition discussed above. Further research should be conducted on four different groups: (1) the effect on defendants; (2) the effect on victims; (3) the effect on the community at large; and (4) the effect on juries.

### *A. Defendants*

As discussed above, there are three distinct categories of defendants who are affected by the addition of an alternative acquittal. The first category need not be researched further as any acquittal is both theoretically and practically

155. Hope et al., *supra* note 91, at 243.

156. Smithson et al., *supra* note 141, at 486.

157. *Id.*

158. Peter Duff, *The Not Proven Verdict: Jury Mythology and "Moral Panics*,*"* 41 JURID. REV. 1, 7 (1996).

preferable to conviction. The effects on the two other categories of defendants should be further explored.

Further studies on the effect of alternative acquittals on defendants should focus primarily on the problem of stigma and whether the addition of a third verdict reduces stigma for defendants found not guilty. Schwartz and Skolnick began to lay the groundwork for this research by examining the effect of a criminal record on employer decisions.[159] Their research indicates that reminding the employer about the presumption of innocence "created a significantly greater number of job offers than those elicited by the convicted record."[160] Hope and colleagues further developed this research by asking participants if they felt the not proven verdict would increase stigma for acquitted defendants.[161] While these two studies begin addressing the problem of additional stigma on defendants, the research should be expanded upon in the specific area of the third verdict.

For example, the findings by Schwartz and Skolnick are limited to the employment arena. However, stigma may exist and may differ in other areas.[162] Future research should investigate the stigma faced by acquitted defendants in areas such as housing, custody disputes, and within the community. This research should closely examine the difference between stigma faced by defendants who have been found not proven as opposed to those who have been found not guilty. While this research would be difficult to conduct in the United States because the not proven verdict is not a part of the current justice system, this research could easily be conducted in Scotland. Alternatively, research could be done in the United States using a hypothetical question. The research could follow the method used by Schwartz and Skolnick and give participants a file emphasizing the presumption of innocence.[163]

The findings of Hope and colleagues can further be expanded. Hope and colleagues only asked participants if the not proven verdict would increase stigma for acquitted defendants.[164] Further studies should examine the actions of participants. For example, further research could ask participants if they personally would treat someone differently if the person was acquitted with a not proven verdict rather than a not guilty verdict. However, a potential limitation of this example is that participants may attempt to respond in a way

159. Schwartz & Skolnick, *supra* note 104, at 134–38.

160. *Id.* at 137.

161. Hope et al., *supra* note 91, at 249.

162. See *supra* note 102 for cases that discuss the stigma faced by defendants; *see also* Leipold, *supra* note 6, at 1305–11.

163. *See* Schwartz & Skolnick, *supra* note 104, at 134–35.

164. Hope et al., *supra* note 91, at 249.

that is socially desirable. In the alternative, a study could employ the method of Schwartz and Skolnick, supplying participants with information on a person, varying whether that person received a not proven verdict or a not guilty verdict, then asking the participant about the way they would treat the person. If participants were not informed ahead of time that the researcher was examining the impact of the not proven verdict, participants would be unlikely to vary their responses to appear socially desirable.

The current research indicates that under the current American system, acquitted defendants face stigma because of their involvement in the criminal justice system. Therefore, the concern that defendants acquitted under a not proven verdict would face more stigma is likely unfounded. Further, current research demonstrates that a reminder about the presumption of innocence reduces this stigma. Future research will likely confirm these results and demonstrate that a third verdict will result in a net benefit to defendants.

### *B. Victims*

There is a large amount of speculation about the impact of the not proven verdict on victims. Both opponents and advocates have opinions about the impact of such a verdict on victims.[165] However, neither side supports their theory with empirical evidence. To determine the true impact of alternative acquittals on victims, real, empirical evidence is necessary.

This evidence cannot be gathered in the United States because alternative acquittals do not currently exist in the United States. However, this research could be conducted in Scotland.[166] Studies of victim satisfaction are not unusual.[167] There are guides that specifically outline the procedures for

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165. See *supra* Part II.C for a discussion of the theorized consequences of alternative verdicts on victims.

166. It should be noted that there may be some resistance to adopting a new verdict simply because of positive results in Scotland. Research done on Scottish victims and Scottish community members should be used in conjunction with research done in the United States. Some research on the not proven verdict can only be done in a place where the verdict already exists; that the research is done outside of the United States does not necessarily limit its applicability within the United States, should the verdict be adopted.

167. *See, e.g.*, Robert C. Davis & Barbara E. Smith, *Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?*, 22 J. CRIM. JUST. 1, 1 (1994) (examining the effect of victim impact statements on victim satisfaction); Edna Erez & Pamela Tontodonato, *Victim Participation in Sentencing and Satisfaction with Justice*, 9 JUST. Q. 393, 393 (1992) (discussing the impact of participation in sentencing on victim satisfaction); Tinneke Van Camp & Jo-Anne Wemmers, *Victim Satisfaction with Restorative Justice: More than Simply Procedural Justice*, 19 INT'L REV. VICTIMOLOGY 117, 117 (2013) (examining victim satisfaction within a restorative justice model).

interviewing victims.[168] Using these guides and methods used by other victim impact surveys, information can be obtained about the impact of a third verdict on victims.

This research should primarily focus on victim satisfaction. This can be measured in a number of ways. The most obvious measure would ask victims for their level of satisfaction with the case. However, when a defendant is acquitted, victims are unlikely to be satisfied, regardless of the type of acquittal received. Therefore, researchers must look deeper. For example, victims' advocacy centers argue that victims are protected by the not proven verdict because it functions as a comment on the burden of proof, rather than the believability of the witness.[169] Future studies should examine this claim by asking victims if they felt the jury believed them.

Both the advocates and the opponents of an alternative acquittal speculate about the impact of such an acquittal on victims. However, very little empirical research has been discussed by either side. Future research must be conducted to determine who, the advocates or opponents of alternative acquittals, is correct in their speculation about the impact of these types of acquittals on victims.

### *C. The Community*

Future research about the impact of an alternative acquittal on the community should take two forms. First, research should be used to determine if the community supports the adoption of an alternative acquittal. Second, research should examine how the community would use the additional information supplied by an alternative acquittal.

Before adopting a new verdict, it is important to assess the community's desire for that new verdict.[170] Research should be conducted to determine if there is community opposition to the adoption of a new verdict. This research can take two forms. First, in the United States, this research might ask community members about their thoughts on the proposed verdict. If community members are willing to adopt the verdict, a survey should reflect that willingness. Second, research in Scotland could examine current community opinions on the third verdict.

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168. *See, e.g.*, SURVEY TECH. ADVISORY GRP., VICTIM SATISFACTION SURVEYS: SURVEY GUIDANCE (2016), http://doc.ukdataservice.ac.uk/doc/7084/mrdoc/pdf/7084_user_satisfaction_guidance_2016-2017_v1.pdf.

169. 261 Parl Deb HC (6th ser.) (1995) col. 232–33 (UK).

170. See *supra* Part II for a discussion of potential opposition to the adoption of a new verdict system.

The second avenue of research should examine how the community would use the information supplied by an alternative acquittal. This research would closely resemble the research on stigma discussed above: community members could be presented with two defendants, one who received a not proven verdict and one who received a not guilty verdict, and the community members could answer various questions about their opinions of each defendant. These results would demonstrate how the community understands and uses the not proven verdict. Studies should also compare community satisfaction in cases where the defendant receives a not proven verdict as opposed to a not guilty verdict. For example, Barbato speculates that community satisfaction with high profile cases would be higher if the defendant received a not proven verdict as opposed to a not guilty verdict.[171] Empirical research should investigate Barbato's theory.

Community opinion is an important factor in legislative decisions. Therefore, research on the community opinion of the not proven verdict is necessary to determine if society can overcome the psychological and philosophical opposition to the adoption of a not proven verdict. Further, research is necessary to confirm that a not proven verdict would have a positive effect on the community.

### *D. Juries*

Hope and colleagues and Smithson and colleagues lay important groundwork for research into the impact of a third verdict on juries. However, this research is limited. Further research should expand the types of cases studied, attempt to alleviate any remaining jury confusion, and examine juror satisfaction.

The studies conducted by Hope and colleagues and Smithson and colleagues are limited because they do not explore a wide variety of cases and scenarios. Although these studies begin to hypothesize about the effects of the not proven verdict, further research should focus on the generalizability of those effects to a multitude of scenarios. For example, future research might examine how the not proven verdict is used in a widely publicized case or in a highly emotional case.[172] Studies could also examine the impact of introducing a third verdict on the influence of certain types of evidence. For instance, research demonstrates that juries are likely to believe eyewitnesses regardless of the reliability of the witness.[173] Giving jurors the option of

171. Barbato, *supra* note 11, at 574.

172. *See supra* notes 119–23 accompanying text.

173. *See, e.g.*, Brian Cutler, Steven Penrod & Thomas Stuve, *Juror Decision Making in Eyewitness Identification Cases*, 12 LAW & HUM. BEHAV. 41, 54 (1988).

finding the facts not proven may cause them to be more critical of eyewitness testimony, as the not proven verdict allows the jury to implicitly say that something wrong happened, despite a lack of proof. Finally, future research should examine the impact of a third verdict on inadmissible evidence. Research has demonstrated that juries are unable to ignore inadmissible evidence that is mistakenly introduced.[174] However, other research has indicated that inadmissible evidence has the highest impact in weak-evidence cases.[175] This is likely because the jurors are reluctant to find the defendant not guilty when they are aware of the additional evidence. A not proven verdict may give the jury an acceptable alternative.

Hope and colleagues addressed the problem of juror confusion in their study. Future research should include questions about juror comprehension to ensure juror understanding. In addition, future research might focus on writing jury instructions to properly explain and define the not proven verdict. The Scottish system currently lacks a proper definition of the not proven verdict.[176] Research should attempt to build an acceptable and understandable definition.

Finally, future jury research should examine juror satisfaction with the not proven verdict. One argument for the adoption of such a verdict is that juror satisfaction would be increased by giving jurors an avenue for clarifying their verdict. This theory should be tested. Juror satisfaction can be tested in two ways. First, mock jurors can be surveyed about their satisfaction in any study examining the not proven verdict. Second, Scottish jurors can be asked about their satisfaction to see if having the third option increases satisfaction.

Current research tentatively indicates a positive impact of the not proven verdict. However, given the potential for steep philosophical and psychological opposition to the adoption of a not proven verdict and the lack of success in adopting such a verdict, more research is necessary to bolster and support the arguments for adoption.

## V. CONCLUSION

Before the American criminal justice system is reformed to include the not proven verdict, more empirical research on the effects of the third verdict is

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174. *See, e.g.*, Steven Fein, Allison McCloskey & Thomas Tomlinson, *Can the Jury Disregard that Information? The Use of Suspicion to Reduce the Prejudicial Effects of Pretrial Publicity and Inadmissible Testimony*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1215, 1215 (1997) (finding that evidence that is ruled inadmissible significantly affected juror verdicts).

175. Stanley Sue, Ronald Smith & Cathy Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOL. 345, 345 (1973).

176. Barbato, *supra* note 11, at 553.

needed. Studies by Hope and colleagues and Smithson and colleagues laid the groundwork for future empirical research into this verdict. However, the research by Hope and colleagues and Smithson and colleagues is limited as these studies did not widely vary the scenarios in which a not proven verdict was presented. Research needs to be done on a not proven verdict's effect across a wide variety of charges and evidentiary scenarios. For example, the not proven verdict might have a different effect based on the type of evidence presented or based on the gravity of the crime charged. More research into the verdict is ultimately necessary. Further, research is needed into the impact of the not proven verdict on a variety of people impacted by the criminal justice system.

This research should be conducted because of the potential benefits of a not proven verdict. The not proven verdict has the potential to provide a vast amount of positive effects for victims, defendants, community members, and jurors. This verdict has the potential to give jurors an avenue for expressing their moral outrage and general belief that the defendant committed the crime despite the prosecution's failure to meet its burden. However, despite these potential benefits, there is the potential for psychological and philosophical opposition to the adoption of these verdicts. Empirical evidence demonstrating the positive impact of these verdicts is necessary to overcome this opposition. The potential benefits of a not proven verdict are too important to ignore for the sake of tradition.