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# A Modern History of the Not Proven Verdict

*James Chalmers, \* Fiona Leverick\*\* and Vanessa E Munro\*\*\**

- A. THE ORIGINS OF THE VERDICT
- B. THE USE OF THE VERDICT BY JURIES
- C. THE APPROACH OF THE COURTS TO THE VERDICT
- D. THE MEANING OF THE VERDICT
- E. THE CONTENT OF ARGUMENTS FOR AND AGAINST THE VERDICT
- F. ATTEMPTS TO REFORM THE THREE VERDICT SYSTEM
- G. CONCLUSIONS

While the origins of Scots law's unique "not proven" verdict in criminal cases are well-documented,<sup>1</sup> there has been no systematic examination of its use and interpretation over time. Although the verdict has frequently been the subject of controversy in the courts, legal journals or public debate, analysis of it has tended to be sporadic and focused on specific controversies arising at given points in time. As a result, discussions about the verdict's future are often cyclical, meaning that the debate tends to repeat itself rather than advancing over time.

This paper fills this gap in the literature. Based on a comprehensive review of sources including (but not limited to) judicial statistics, court decisions, periodical literature and Parliamentary debates, it charts the evidence on the use of the not proven verdict by juries, the approach of the courts, and debates both on how the verdict should be interpreted and whether it should be retained. It advances the following propositions:

- (1) Jury preferences between the two verdicts of acquittal, measured by reference to verdicts across all jury trials rather than in relation to trials for specific offences, have shifted very substantially over time, from a strong preference for acquitting by way of not proven in the nineteenth century to a strong preference for acquitting by way of not guilty today. That change has gone unremarked.
- (2) Over time, the High Court has worked to prevent judges from, when charging juries, expressing views either about the appropriateness of the not proven verdict or what it might be taken to mean, and has successfully embedded a consistent practice of simply informing the jury that there are two verdicts of acquittal with identical results open to them, without any further elaboration.
- (3) Debates as to how a verdict of not proven should be understood have largely centred on the proposition that it implies guilt (or the possibility of guilt) but in the absence of sufficient evidence for conviction. Aside from a forgotten attempt from the unlikely pen of A V Dicey, there has been no attempt to set out any kind of framework for the proper interpretation of a not proven verdict in an individual case. Views on how the not proven verdict should be interpreted have remained

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<sup>1</sup> See I D Willock, *The Origins and Development of the Jury in Scotland* (Stair Society vol 23, 1966) 217-225.

remarkably constant even though the use of the verdict by juries has changed significantly over time. The way in which juries use not proven has changed significantly but the way in which legal commentators interpret their choices has not.

- (4) The case against permitting not proven verdicts has consistently been a combination of three arguments: that the verdict is incompatible with the presumption of innocence, encourages jurors to avoid the proper discharge of their functions, and casts an unwarranted stigma on the accused.
- (5) The case for permitting not proven verdicts has taken two forms: either that while Scots law might not design a three verdict system if starting today from a blank slate, that does not justify changing one which already exists; or, more positively, that the verdict works to the benefit of the accused by reducing the risk of wrongful conviction and also by allowing the jury positively to declare innocence in appropriate cases. The second of these arguments is attendant with the risk that it may be used to avoid the Scottish criminal justice system introducing other necessary safeguards against wrongful conviction, as its invocation in the specific context of eyewitness identification demonstrates.
- (6) Debates on the not proven verdict have, however, shifted in two specific ways in recent years. First, an emphasis on the interconnection of the not proven verdict with other distinctive aspects of the Scottish criminal justice system has operated as a brake on reform efforts, highlighting the difficulty and complexity of change.
- (7) Second, sexual offence trials have become particularly prominent in the debate from the 1990s onwards, but with their relevance to the debate radically changing. Initially, sexual offence trials were identified as a strong reason for permitting the not proven verdict, the argument being that it allowed juries to declare a reasonable doubt without implying that they believed the complainer to be dishonest. More recently, sexual offence cases have been argued to be a strong reason against permitting the verdict, with the argument being that not proven is disproportionately used in rape cases and provides juries with an “easy way out”.

The way in which the verdict has been used, interpreted, attacked and defended over time is a separate question from whether the verdict should be retained.<sup>2</sup> This paper does not seek to answer the question of principle, but instead to provide a biography of the verdict which can inform that debate. Recent empirical work by ourselves and others, along with the historical study presented in this paper, now provides a basis on which some of the arguments made for and against the verdict can properly be evaluated, and our views on the question of principle are set out fully in a separate paper, where we argue for the abolition of the verdict.<sup>3</sup>

This paper proceeds in six substantive parts. For context, it begins by briefly summarising the origins of the verdict. It then looks at five separate issues: the use of the verdict over time by juries; the approach of the courts to the verdict and how juries should be directed on it; debates over how verdicts of not proven should be understood; debates over whether

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<sup>2</sup> Or, indeed, introduced into other systems. See e.g. S L Bray, “Not proven: introducing a third verdict” (2005) 72 University of Chicago Law Review 1299.

<sup>3</sup> J Chalmers, F Leverick and V E Munro, “Why it is time to consign the not proven verdict to history”, in preparation.

the option of a not proven verdict should be retained; and attempts to amend the Scottish three verdict system. It concludes by noting the remarkably (although not entirely) static nature of the debate over time, hoping that a repetitive debate will not continue indefinitely.

### **A. THE ORIGINS OF THE VERDICT**

As Willock has explained, the not proven verdict is a “historical accident”.<sup>4</sup> Scottish juries did not originally use set forms of verdict but instead decided on the guilt or innocence of the accused, using forms of language such as “fylet, culpable and convict” or “clene, innocent and acquit”.<sup>5</sup> The terms “guilty” or “not guilty” were found as early as the 16th century in a variety of different forms, such as “giltye”, “gyltie and criminall” and “nocht giltie”, although this precise language did not become established until later.<sup>6</sup>

In the early 17<sup>th</sup> century, a procedural change meant that juries ceased to declare such general verdicts, instead returning “special verdicts” stating whether individual facts were proven or not proven, with conviction or acquittal then being a matter for the judge. In 1728, the landmark case of *Carnegie of Finhaven* re-established the right of the jury to return a verdict of not guilty, rather than leaving that decision to the judge. By the 19<sup>th</sup> century, lawyers came to view “special verdicts” as irrelevant, but juries continued to use the established language of “not proven” as one of two possible verdicts of acquittal, as they continue to do today.<sup>7</sup>

The lack of established forms of verdict prior to the 17th century sometimes leads to the misconception that “proven” and “not proven” were the “original” forms of verdict in Scotland.<sup>8</sup> In fact, it is clear from Willock’s work that Scottish juries couched their verdicts in terms of guilt and innocence prior to the 17<sup>th</sup> century, albeit using varying terminology, and the move to “proven” and “not proven” was a substantive change. Be that as it may, the history of the verdicts, while interesting in its own right, says little about how a verdict system should operate in the modern day.

### **B. THE USE OF THE VERDICT BY JURIES**

In contemporary practice, not proven is seen as the exception rather than the rule. In 2018-19, it accounted for 19% of acquittal verdicts in the Scottish courts,<sup>9</sup> although its use by juries is more frequent, where it accounts for around 30% of acquittals annually.<sup>10</sup> What seems to have gone unnoticed, however, is that this is a significant change from historical practice.<sup>11</sup> The German scholar Carl Mittermaier, analysing the Scottish system of criminal

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<sup>4</sup> Willock, *The Origins and Development of the Jury* (n 1) 217.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* at 217-218.

<sup>7</sup> As, of course, do sheriffs and justices of the peace in solemn procedure, where juries are not used.

<sup>8</sup> See e.g. Scottish Parliament, Official Report, Justice Committee, cols 3981 and 3983 (10 Dec 2013).

<sup>9</sup> Scottish Government, *Criminal Proceedings in Scotland, 2018-19* (2020) 54.

<sup>10</sup> See Scottish Parliament Question S5W-18904 (28% in 2015-16, 30% in 2014-15 and 31% in 2016-17).

<sup>11</sup> The analysis presented here focuses on jury verdicts, in part because those reflect the practice in more serious cases, but also because this is simply the category of case for which the necessary historical data is available.

procedure in 1851, observed that the use of the not guilty verdict was rare, accounting for just 16% of acquittals in the years for which he presented figures.<sup>12</sup> Mittermaier does not cite a source for these figures, although it is clear that judicial statistics were compiled to some extent prior to the regularisation of the system by the Judicial Statistics (Scotland) Act 1868, which enabled the publication of some retrospective data in early reports.

Judicial statistics from 1868 until 1978 do provide consistently recorded figures on which of the two verdicts of acquittal were recorded when a person prosecuted on indictment escaped conviction.<sup>13</sup> It is clear that the not proven verdict dominated in this period, albeit not to the extent described by Mittermaier, with the high point being 1874 when 74% of jury acquittals were not proven verdicts. The gap in practice narrowed over time, however, and by 1908 the numbers for each verdict had started to approach parity, with not guilty verdicts exceeding not proven verdicts for the first time in 1913. From that date onwards, the not guilty verdict attained the ascendancy. The use of not proven occasionally outstripped it marginally, including as late as 1948 (with 66 not proven acquittals to 62 not guilty), but the general pattern was of a consistently and sometimes significantly higher number of not guilty verdicts.<sup>14</sup> Over the final five years of statistics being published (1974-1978), jury practice had reached a point very similar to the present day, with only 34% of acquittal verdicts being not proven.

After this date, the published statistics no longer allow for this comparison to be continued,<sup>15</sup> although they do start to provide data on the use of not proven across both summary and solemn prosecutions.<sup>16</sup>

Quite why juries shifted from a preference for not proven to a preference for not guilty is unclear. Although early commentators were conscious of the jury preference for the not proven verdict, with one describing it as “perhaps the favourite verdict of acquittal”,<sup>17</sup> the shift in practice seems to have gone unremarked. There are a number of possible explanations. The change may simply have been the culmination of a gradual shift away from the “not proven” label since the Carnegie of Finhaven case in 1728. Jurors may have become more conscious of the anomalous nature of the not proven verdict as compared to the two-verdict system utilised in England and elsewhere. Counsel may, for a variety of reasons, have changed their approach in addressing juries or judges in charging them: in the

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<sup>12</sup> C J A Mittermaier, *Das englische, schottische und nordamerikanische strafverfahren* (1851) 480-481, giving figures as follows: 1841 25 NG, 191 NP; 1842 69 NG, 319 NP; 1848 55 NG 212 NP; 1849 36 NG 224 NP.

<sup>13</sup> The data presented here is based on a review of the statistical reports from the First Report on Judicial Statistics of Scotland (C 233: 1871) through to Criminal Statistics, Scotland, 1978 (Cmnd 7676: 1979)

<sup>14</sup> The occasionally slightly higher number of not proven verdicts was sometimes accompanied by a radically higher number of not guilty ones. For example, while in 1943 there were 115 not proven verdicts as compared to 112 of not guilty, the figures for the previous year were radically different: 47 not proven and 203 not guilty verdicts.

<sup>15</sup> See Criminal Statistics (Scotland) 1980-1982 (Cmnd 1475: 1991) 5 (“This volume, unlike its predecessors, does not contain a large set of Annual Tables. It was felt that these tables were too detailed for the general reader but not detailed enough for some e.g. research interests.”)

<sup>16</sup> The most recent annual statistics note that in 2018-29 5% of accused persons were acquitted on a not guilty verdict and 1% on a not proven verdict, proportions which were “broadly unchanged over the last five years”, but without breaking those figures down between solemn and summary procedure. See Scottish Government, *Criminal Proceedings, 2018-19* (n 9) 15.

<sup>17</sup> Anon, “The verdict of not proven” (1889) 33 Journal of Jurisprudence 620 at 623.

latter case, the frequency of not proven verdicts might even have been affected simply by the number of trials which different judges presided over in a given year.<sup>18</sup>

It may be that there was a level of scepticism towards the not proven verdict among the judiciary around the time that its use began to be outnumbered by verdicts of not guilty. In 1912 the American law professor Edwin Keedy was commissioned by the American Institute of Criminal Law and Criminology to spend two months in attendance at the Scottish courts to make a study of the administration of Scottish criminal law.<sup>19</sup> He reported that the not proven verdict was “clearly anomalous and illogical”,<sup>20</sup> that one judge (Lord Moncrieff) had recently attacked it in print,<sup>21</sup> and that in a case which he had observed the (unnamed) trial judge had told the jury that they could return a verdict of guilty or not guilty, adding that there remained “that last refuge of perplexed jurors, a verdict of not proven, against which I have a very strong opinion”.<sup>22</sup> Another (again, unnamed) judge had told Keedy that he was strongly opposed to the verdict.<sup>23</sup>

Keedy reported that although the not proven verdict was frequently returned there was “general dissatisfaction” with it.<sup>24</sup> It is notable that when discussing another anomalous feature of the Scottish jury system – the simple majority verdict – he was able to report a sharp defence of that feature from the Lord Justice-Clerk.<sup>25</sup> By contrast, he reported no defence of the not proven verdict from his interlocutors.<sup>26</sup>

### C. THE APPROACH OF THE COURTS TO THE VERDICT

In 1815, a jury returned a majority verdict of not proven against William Paterson on a charge of murdering his wife by poisoning. Lord Justice-Clerk Boyle, after thanking the jury for their efforts, proceeded to address Paterson before dismissing him:<sup>27</sup>

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<sup>18</sup> Viscount Dunedin, who was appointed directly to the post of Lord Justice-General in 1905 and served until appointed a Lord of Appeal in Ordinary in 1913, is, remarkably, reported to have said that he never remembered a verdict of not proven during his eight years as a judge: “Scots law and English law” (1932) 1 South African Law Times 185. Given the prevalence of not proven verdicts over this period, it is difficult to see how this result – assuming the report to be accurate – would have been possible without actively dissuading the jury from considering the verdict.

<sup>19</sup> See E R Keedy, “Criminal procedure in Scotland” [part I] (1913) 3 Journal of the American Institute of Criminal Law and Criminology 728 at 728.

<sup>20</sup> E R Keedy, “Criminal procedure in Scotland” [part II] (1913) 3 Journal of the American Institute of Criminal Law and Criminology 834 at 842.

<sup>21</sup> See Lord Moncrieff, “The verdict ‘not proven’” (1906) 179 Blackwood’s Magazine 763.

<sup>22</sup> Keedy (n 20) at 843. The jury did not avail themselves of this option.

<sup>23</sup> Ibid. Lord Moncrieff, having died in 1909, would not have been one of these two judges.

<sup>24</sup> Ibid.

<sup>25</sup> At 842: “...the writer suggested that the chief argument in this country against less than a unanimous verdict is the requirement whereby the prosecution must prove its case beyond a reasonable doubt, the vote of several jurors against conviction amounting to such doubt. The reply to this was that there is the same element of doubt in a case where it requires many hours for the jury to reach a verdict.”

<sup>26</sup> When Solicitor-General, the Lord Justice-Clerk had expressed the view that there should be only a single verdict of acquittal, albeit that his preference was for that to be a verdict of not proven rather than not guilty. See Third Report of the Commissioners Appointed to Inquire into the Courts of Law in Scotland (C 36: 1870) 684.

<sup>27</sup> “Trial of William Paterson, for poisoning his wife” (1815) 77 The Scots Magazine and Edinburgh Literary Miscellany 260 at 262.

...a Jury of your country, on their oaths, have, by a *small* majority, returned a verdict of *not proven*. You have not, Sir, to flatter yourself with believing that the jury found you *not guilty*. Such a verdict was not asked, or so much as mentioned by your Counsel; for, unless the mind of man be totally lost to feeling, and to the slightest sense of justice; unless that mind be overset from its very foundation, and absorbed in the deepest depravity, no *fifteen men* in this country could acquit you on the charge... Sir, after what you have already heard from the Judges, who were equally anxious with the Jury to search every thing; to compare circumstances with circumstances; you may easily perceive, that, as in the presence of Almighty God, we all concur with the minority in thinking you *guilty*.

Reported pronouncements from the bench on the not proven verdict in subsequent cases have, sadly, been less evocative. In some cases, judges may not even have advised the jury in any way on the two different verdicts of acquittal. In the 1857 trial of Madeline Smith for the murder of Pierre L'Angelier, the published report of the case suggests that Lord Justice-Clerk Hope said nothing whatever about the different verdicts when charging the jury, who went on to return verdicts of not guilty and not proven on the two charges of administering poison with intent to kill, and one of not proven on the charge of murder.<sup>28</sup> That precedent has proved convenient for the appeal court, allowing it to hold that a failure to remind the jury of the option of a not proven verdict is not a misdirection which necessitates the quashing of a conviction.<sup>29</sup> "I am very unwilling", Lord Justice-General Cooper said, "to believe that any Scottish jury does not know that there are three possible verdicts".<sup>30</sup>

Just as the Scottish jury must be taken to know that there are three possible verdicts, it must also be taken to know what these verdicts mean. There is only limited evidence of judges seeking to explain the verdicts to the jury in any way. This clearly happened on some occasions, such as the 1932 trial of Peter Queen for the murder of his wife, where Lord Justice-Clerk Alness suggested to the jury that if they were unable to decide between the medical theories presented by the prosecution and the defence, they should return a verdict of not proven, but that if they accepted Queen's own evidence, they should declare him not guilty.<sup>31</sup> The evidence for such approaches is scant, but this may simply be a consequence of the limited extent to which jury charges appear in the law reports or other materials. It may alternatively suggest that, like Lord Justice-Clerk Hope in the trial of Madeline Smith, judges rarely felt it necessary to offer specific directions on the available verdicts.<sup>32</sup>

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<sup>28</sup> See J Morison, *A Complete Report of the Trial of Miss Madeleine Smith*, 4th edn (1857) 173-184.

<sup>29</sup> *MacDermid v HM Advocate* 1948 JC 12; *Harkin v HM Advocate* 1992 SLT 785. See also *Bergson v HM Advocate* 1972 SLT 242.

<sup>30</sup> *MacDermid* at 15. See to similar effect *Harkin* per the Lord Justice-Clerk (Ross) at 786.

<sup>31</sup> W Roughead, "Queen's evidence, or suicide v murder" (1932) 44 JR 139 at 172-173. See also *Margaret Wishart* (1827) Syme 1, where the accused's counsel suggested that they should return a verdict of not proven if they thought her guilty but that the proof was insufficient, and not guilty if they thought it more likely that she was innocent. They convicted, and Wishart was hanged.

<sup>32</sup> See e.g. J W More, *Trial of A J Monson* (1908): like Madeline Smith's case, the trial ended with a verdict of not proven despite the absence of any reference to that verdict in the speeches of counsel or Lord Justice-Clerk Macdonald's charge to the jury. See also W Roughead, *Trial of Dr Pritchard* (1906), where Lord Justice-

Until the 1960s, the High Court of Justiciary confined its observations on not proven to relatively technical matters.<sup>33</sup> So, it was said, a not guilty verdict would be the appropriate choice if the accused's acquittal was by virtue of his proving a statutory defence on the balance of probabilities.<sup>34</sup> It was also accepted in one case that a judge could legitimately tell a jury that not proven was not open to them on one specific charge where self-defence was in issue, the implication being that in deciding this question the jury had to determine whether or not the violence used by the accused was "proper retaliation" or not, as opposed to the factual extent of what that violence was.<sup>35</sup>

In addition, if the defence were effectively prevented from leading exculpatory evidence by virtue of an indication from the bench that the prosecution evidence was insufficient for conviction, it was accepted that the appropriate verdict would be one of not guilty rather than not proven.<sup>36</sup> This was later to lead to one exceptional – perhaps unique – case where an accused acquitted on a not proven verdict in similar circumstances successfully appealed his own acquittal and had it substituted with one of not guilty.<sup>37</sup> That point no longer arises, as since 1980 an accused person can make a submission of no case to answer at the end of the prosecution case, and if successful he will simply be acquitted without either verdict being returned.<sup>38</sup>

Matters came to a head in the 1964 case of *McNicol v HM Advocate*, where the trial judge (Lord Cameron) advised the jury that while both not proven and not guilty were open to them, he personally disliked the not proven verdict: "...it seems to me the honest and proper thing to do is either to find a person guilty or, if the Crown has failed, to acquit them with a verdict of not guilty. But that verdict lies open to you, and you can use it if you so wish."<sup>39</sup> While acknowledging that there might be exceptional cases where a judge could direct the jury that the possibility of a particular verdict did not arise,<sup>40</sup> the appeal court held Lord Cameron's observations on his personal views to be a misdirection and quashed

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Clerk Inglis's charge to the jury observes (at 289-290) that the absence of proof of motive cannot be a reason for a verdict of not guilty in the face of satisfactory evidence, but offers no general directions on verdicts and does not mention the not proven verdict.

<sup>33</sup> Including the difficulty of operating a simple majority verdict rule where three options are available. This is not discussed here, but see *Lord Advocate v Nicholson* 1958 SLT (Sh Ct) 17 (where the jury initially attempted to return a "majority" verdict of guilty with only six votes in favour, the remaining jurors being split between the two verdicts of acquittal) and *Kerr v HM Advocate* 1992 SLT 1031.

<sup>34</sup> *Dickie v Corbett* 1953 JC 57. See similarly *Agar v HM Advocate* 2000 GWD 12-421.

<sup>35</sup> *Reid v HM Advocate* 1947 SLT 150. Juries were similarly advised that the not proven verdict was unlikely to be of practical relevance to them in *HM Advocate v Sheppard* 1941 JC 67 (a defence of superior orders) and *HM Advocate v Aitken* 1975 SLT (Notes) 86 (a plea of insanity), although in neither case did the trial judge withdraw it quite so clearly as in *Reid*. See also *Hasson v HM Advocate* (1971) 35 J Crim L 271.

<sup>36</sup> *Thomas and Peter Galloway* (1836) 1 Swin 232 (although the jury returned a verdict of not proven nonetheless); *Archibald Phaup* (1846) Ark 176. See also *John Craig* (1867) 5 Irv 523 and the 1844 trial discussed by R S, "The Scotch verdict of not proven" (1850) 13 Law Magazine 182 at 197-198.

<sup>37</sup> *McArthur v Grosset* 1952 JC 12.

<sup>38</sup> Criminal Justice (Scotland) Act 1980 s 19. See now Criminal Procedure (Scotland) Act 1995 ss 97 and 160.

<sup>39</sup> 1964 JC 25 at 25.

<sup>40</sup> One of the members of the appeal court in *McNicol*, Lord Carmont, was the judge who had given such a direction in *Reid v HM Advocate* 1947 SLT 150.



McNicol's conviction for culpable homicide, with Lord Justice-General Clyde mounting a strong defence of the utility of the not proven verdict.<sup>41</sup>

Aside from cases such as *McNicol* where the judge's directions on verdicts have been a ground of appeal, an examination of the occasional reported case from the 1950s onwards where the judge's directions on verdicts are incidentally recorded suggests a developing practice of simply advising the jury that there are two acquittal verdicts available to them without any attempt to distinguish between them.<sup>42</sup>

Such cases are a small and potentially unrepresentative sample, and practice was doubtless not uniform. In 1987, Lord Wheatley noted Hume's observation that the verdict of not proven was "[n]ot uncommonly... employed to mark a deficiency only of lawful evidence to convict the accused; and that of *not guilty*, to convey the jury's opinion of his innocence of the charge"<sup>43</sup> and observed that "[t]here was a time when this formula was adopted by judges and given to the jury in presenting them with the different forms of verdict open to them, but that practice has shaded off considerably in recent times".<sup>44</sup> Two years later, the appeal court moved towards formalising a practice of non-explanation, advising that it was "highly dangerous" to try and explain the difference between the two verdicts of acquittal.<sup>45</sup>

Individual sheriffs were to find themselves castigated for persisting in offering the jury explanations of the not proven verdict in a number of cases thereafter.<sup>46</sup> The last such reported case was in 2002,<sup>47</sup> suggesting that the standard charge of description without explanation has become firmly established in practice.

This process of standardisation has doubtless been assisted by the *Jury Manual*,<sup>48</sup> which now recommends a direction in the following terms:<sup>49</sup>

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<sup>41</sup> At 26-28. Lord Clyde's arguments are discussed in section D below.

<sup>42</sup> *HM Advocate v Mitchell* 1951 JC 53; *HM Advocate v Kidd* 1960 JC 61 at 62; *HM Advocate v Hayes* 1973 SLT 202 (the trial judge here being Lord Cameron, presumably suitably chastised by the appeal court's decision in *McNicol*); *Crowe v HM Advocate* 1990 JC 112 at 115; *Erskine v HM Advocate* 1994 SCCR 345; *Robertson v HM Advocate* 1996 SCCR 243. The exception to the pattern is *McCann v HM Advocate* 1960 JC 36, where the trial judge suggested that a not proven verdict might be appropriate if the jury were "somewhat uncertain".

<sup>43</sup> D Hume, *Commentaries on the Law of Scotland, Respecting Crimes*, 4th edn (1844) vol ii, 440.

<sup>44</sup> Lord Wheatley, *One Man's Judgment: An Autobiography* (1987) 204.

<sup>45</sup> *McDonald v HM Advocate* 1989 SLT 298. The court was later to say that it was not even necessary for the trial judge to tell the jury that not proven and not guilty both lead to acquittal: *McRae v HM Advocate* 1990 JC 28; *Martin v HM Advocate* 1993 SLT 197.

<sup>46</sup> *Fay v HM Advocate* 1989 JC 129 (although, as the court acknowledged, *McDonald* had not been reported at the time of the trial in that case); *MacDonald v HM Advocate* 1996 SLT 723; *Cussick v HM Advocate* 2001 SLT 1316. Cf *Larkin v HM Advocate* 1993 SCCR 715 where the court declined to take issue with the sheriff's direction that not proven would be appropriate if "the words 'not guilty' might just stick in your throats".

<sup>47</sup> *Sweeney v HM Advocate* 2002 SCCR 131. Cf *Morrison v HM Advocate* 2014 JC 74 where the court faced the rather different problem of a diatribe by the prosecutor on the appropriateness of the not proven verdict which the sheriff had failed to address in his charge.

<sup>48</sup> In practice, it appears the appeal court will be slow to criticise judges who follow the Manual's suggestions, while recognising that responsibility for the content of a charge lies with the trial judge and the suggestions in the Manual may be inadequate for a particular case or overtaken by new case law. See *WM v HM Advocate* 2011 JC 49 at [11]; *Deeney v HM Advocate* 2014 SCCR 672 at [19].

<sup>49</sup> Judicial Institute for Scotland, *Jury Manual* (2020) 111.2.

Not guilty and not proven are verdicts of acquittal and have the same effect. An accused acquitted of a charge cannot be prosecuted again on that charge, save in exceptional circumstances, and it makes no difference whether the acquittal verdict is not guilty or not proven.

#### D. THE MEANING OF THE VERDICT

If a jury is not to be told anything about how to differentiate between the verdicts of not guilty and not proven, then what should be made of the jury's choice in this regard?<sup>50</sup>

In the history of the verdict, explanations of how to interpret a verdict of not proven have remained largely unchanged from the account offered by Lord Cockburn in his 1846 attack on the verdict: not proven "means, that while the jury are not satisfied with the evidence of guilt, neither are they satisfied of the prisoner's innocence".<sup>51</sup>

Commentators following Cockburn tended to tilt the balance of this formulation slightly towards incrimination: not proven means that the jury believe that the accused is guilty but that the evidence is insufficient for conviction<sup>52</sup> or (perhaps subtly different) they do not wish to be responsible for his punishment.<sup>53</sup> Sometimes, this interpretation has been specifically linked to the corroboration requirement, the suggestion being that a not proven verdict may indicate that the jury in fact believes the prosecution case but does not believe that the necessary supporting evidence exists.<sup>54</sup> On either account, there is a danger that the approach of linking the verdict with a tentative belief in guilt tends towards the glib possibility once noted by William Roughead: that not proven means "not guilty, but don't do it again".<sup>55</sup>

The better answer may simply be to deny that there is any consistent meaning to be attributed to a verdict of not proven, and that if there is a proper reading of the jury's decision to return it then that will vary from case to case.<sup>56</sup> While it might be that a not proven verdict should generally be interpreted in the fashion suggested by Lord Cockburn, it

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<sup>50</sup> Moncreiff (n 21) notes (at 767) the 1854 acquittal of William Smith on a charge of murder where Lord Justice-Clerk Boyle sought to shed light on this question by asking the jury whether their doubts had been between not proven and guilty, or between not proven and not guilty. The jury advised that it had been the former; Moncreiff notes that Smith later abandoned his attempts to claim on policies of insurance in respect of the deceased's life.

<sup>51</sup> Lord Cockburn, "Scottish criminal jurisprudence and procedure" (1846) 83 *Edinburgh Review* 196 at 206; the article was published anonymously but has consistently been attributed to Cockburn from shortly after its publication. See e.g. F H, "English and Scotch criminal jurisprudence and procedure III", *The Daily Scotsman* 18 Feb 1859 p 2.

<sup>52</sup> W Forsyth, *History of Trial by Jury*, 2nd edn by J A Morgan (1875) at 182-184; J L, "The jury question in criminal cases" (1887) 31 *Journal of Jurisprudence* 21 at 24; A S Pringle, "The verdict of 'not proven' in Scotland" (1904) 16 *JR* 432 at 432-433.

<sup>53</sup> Lord Thankerton, "Administration of the criminal law in Scotland" (1937) 49 *JR* 35 at 40-41.

<sup>54</sup> See e.g. Hume, *Commentaries* (n 43) vol ii, 440; HC Deb 13 Feb 1838, col 1765-1766 (Lord Advocate (John Murray)); *Criminal Procedure in Scotland (Second Report)* (Cmnd 6218: 1975) para 51.04.

<sup>55</sup> W Roughead, "The luck of Adelaide Bartlett: a fireside tale" (1924) 36 *JR* 218 at 220.

<sup>56</sup> W Scott Moncreiff, *The Records of the Proceedings of the Justiciary Court, Edinburgh, 1661-1678* (1905) i, xv.

could therefore follow that a different approach would be merited in the circumstances of an individual case.<sup>57</sup>

Somewhat surprisingly, the only attempt to explore the question of how a not proven verdict should be interpreted appears to be that of A V Dicey, in a pamphlet discussing the report of the Parnell Commission.<sup>58</sup> Dicey argues that “[t]he moral effect of a verdict of ‘not proven’ must depend in each instance upon the circumstances of the particular case. It may come near to a moral acquittal, it may amount to something like a scarcely qualified condemnation.” What, therefore, are the circumstances which allow a view to be taken on that moral effect? For Dicey, there were two main considerations: first “the character of the accused, combined with the nature of the act to which the verdict applies” – meaning that a verdict of not proven might be “very near” to one of guilty where the accused had previous convictions – and second, “the readiness or the refusal of the accused to produce all the evidence which may test his guilt or innocence”.<sup>59</sup>

Dicey’s pamphlet was a partisan attempt to make the case that the Parnell Commission’s report had not, in fact, exonerated Parnell,<sup>60</sup> and his choice of considerations reflects the argument which he wished to make rather than an impartial consideration of the matter. Nonetheless, it is notable for being the only serious attempt in the history of the not proven verdict to go beyond simple assertion and instead develop a framework for how the verdict should be interpreted in an individual case. It seems to have gone entirely unnoticed in debates on the verdict since.

The most striking thing about discussions on how the not proven verdict is to be interpreted is that they have remained remarkably static over time (although, as will be discussed in the next section, the proper interpretation of the verdict in trials for sexual offences specifically has become a significant feature of the debate in the last quarter-century). The suggestion that not proven indicates the jury’s belief in guilt alongside a concern that it has not been proven to the requisite standard has consistently been the prevailing viewpoint in the debate from a period where not proven acquittals dominated to the present day when they are significantly outweighed by not guilty acquittals. The way in which juries use not proven has changed significantly but the reading of their choices has not.

## E. THE CONTENT OF ARGUMENTS FOR AND AGAINST THE VERDICT

The starting point for criticism of the not proven verdict is a celebrated 1846 article by Lord Cockburn in the *Edinburgh Review*.<sup>61</sup> In a wide-ranging essay on Scottish criminal

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<sup>57</sup> See e.g. HC Deb 10 Feb 1818, cols 284-285, where the Lord Advocate suggested that not proven meant that the crime had been proved but that the accused was not implicated in it (thereby, he claimed, substantiating a statement he had made to the Commons the previous year). This might be a fair reading of the verdict in some individual cases but it is difficult to see how it could be universally so.

<sup>58</sup> A V Dicey, *The Verdict: A Tract on the Political Significance of the Report of the Parnell Commission* (1890). As we note in section F below, there is now experimental evidence which sheds some light on how jurors might choose to use the verdict.

<sup>59</sup> At 18-19.

<sup>60</sup> See R A Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (1980) 149 (“a political judgment so partisan that the book deserved little attention and received less”).

<sup>61</sup> Cockburn (n 51).

jurisprudence and procedure, framed as a review of Hume's *Commentaries*, he fired a broadside at the verdict, which he termed a "confusion of legal duty with private suspicion".<sup>62</sup> For Cockburn, the verdict was incompatible with the presumption of innocence and cast an objectionable stigma on an accused against whom guilt had not been proven. It impeded the work of the jury, tempting jurors "not to look steadily at the evidence, and to give it its correct result; but to speculate about the possibility of soothing their consciences, or their feelings, by neither convicting nor acquitting, but steering between the two".<sup>63</sup>

Cockburn does not make the complaint that the not proven verdict is illogical. That argument has been a tiresome feature of much of the debate since: the verdict's proponents assert its logic<sup>64</sup> and its opponents its illogicality,<sup>65</sup> in both cases to no end as the logic or illogicality of the verdict is entirely dependent on a range of premises explicitly or implicitly adopted by the writer rather than being any sort of free-standing argument.<sup>66</sup>

Subsequent criticism of the verdict has tended largely to replicate parts or all of Cockburn's argument, holding the verdict to be one which is incompatible with the presumption of innocence,<sup>67</sup> encourages jurors to avoid the proper discharge of their functions,<sup>68</sup> casts an unwarranted stigma on the accused,<sup>69</sup> or all three of these points.<sup>70</sup>

Those responding to these arguments have tended to focus on the first and third points, for perhaps obvious reasons. Responding to the second is difficult without empirical evidence of how juries approach their task in practice. Perhaps more importantly, if the first and third points are rebutted so that the verdict no longer seems intrinsically problematic, the case for arguing that not proven encourages jurors to avoid discharging their functions properly, becomes intuitively weaker. Lord McCluskey in particular responded to the point about the

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<sup>62</sup> At 206.

<sup>63</sup> Ibid.

<sup>64</sup> See e.g. Anon, "A French criminal trial" (1857) 11 *Journal of Jurisprudence* 509 at 512; J W Brodie-Innes, *Comparative Principles of the Laws of England and Scotland* (1903) 29; *McNicol v HM Advocate* 1964 JC 25 at 27 per Lord Justice-General Clyde. Or, alternatively, arguing that it is "not guilty" which is illogical: Lord McCluskey, "Not proven: a reply" 2002 SLT (News) 148 at 149.

<sup>65</sup> W C S, "Some notes on Scottish criminal procedure" (1891) 35 *Journal of Jurisprudence* 399 at 399; Pringle (n 52) at 434 and 438; A H Charteris, "An outline of Scots as compared with English and French criminal procedure on indictment" (1910) 26 *International Law Association Reports of Conferences* 465 at 485; L Murray, *The Pleader: An Autobiography* (2012) 141.

<sup>66</sup> The writer of "Lord Cooper on Scots law: a heritage that must be preserved", *The Scotsman* 6 Jul 1949 p 6 manages the deft trick of arguing that three verdicts are superior to the English two because it is unsafe to design the system by "sheer logic" while being unable to resist the claim that Scots law is "in general more logical" than the English.

<sup>67</sup> See e.g. Lord Kilbrandon, *Other People's Law* (1966) 62 n 4; Wheatley, *One Man's Judgment* (n 44) 203-204; Murray, *The Pleader* (n 65) 141; G Maher, "Jury verdicts and the presumption of innocence" (1982) 3 *Legal Studies* 146 at 153.

<sup>68</sup> See e.g. Anon, "The late trial for poisoning" (1857) 1 *Journal of Jurisprudence* 393 at 396; Moncrieff (n 21) 777.

<sup>69</sup> See e.g. Moncrieff (n 21) 777; HC Deb 17 Jul 1963, col 399 (Mr Dempsey); HC Deb 5 Feb 1969, cols 405-406 (Mr Dewar); P Hardin III, "Other answers: search and seizure, coerced confession and criminal trial in Scotland" (1964) 113 *University of Pennsylvania Law Review* 165 at 186; J M Barbato, "Scotland's bastard verdict: intermediacy and the unique three-verdict system" (2005) 15 *Indiana International and Comparative Law Review* 543 at 580.

<sup>70</sup> See e.g. W C S (n 65) at 400-401; Thankerton (n 53) at 40-41.

presumption of innocence by arguing that the presumption is merely a statement about the burden of proof in the context of the trial. It has no meaning outside of it and does not entitle the accused to a declaration of innocence on acquittal.<sup>71</sup>

It is the stigma argument which has occupied most space in the debate. Defenders of not proven rebut the charge in various ways, arguing that the accused acquitted on a not proven verdict should consider himself lucky rather than complaining,<sup>72</sup> and observing that such stigma may be perfectly valid.<sup>73</sup> Dicey puts the point most vividly, referring to the acquittal of Madeline Smith:<sup>74</sup>

A lady was some years ago put on trial for the murder of her lover. She escaped the gallows under the benefit of a verdict of 'not proven.' That she should escape punishment was right. But if an enthusiast had consulted a friend on the expediency of marrying the heroine of such a *cause célèbre*, the adviser who had replied, 'The lady's guilt is not proved, she must therefore be presumed innocent – you would, then, act foolishly and wrongly in allowing weight to the suspicion that your intended bride is a murderess,' would have proved himself a knave or an idiot.

Alternatively, defenders have suggested that allegations of stigma are purely hypothetical and not borne out by their professional experience.<sup>75</sup> Such anecdotal evidence is not conclusive – not least because the accused's reaction at the time of acquittal says nothing about his experience of living with the verdict in years to come. Indeed, anecdotal evidence might be identified in the opposite direction, such as the accused acquitted on a not proven verdict who was moved to (successfully) appeal the terms of that acquittal,<sup>76</sup> or the 1961 murder trial of Christina Flanders where her counsel implored the jury to avoid the verdict of not proven, which would give her liberty but not restore her good name, and (successfully) asked them "to find her not guilty so that she can return home and live with her family".<sup>77</sup> The reality is that this remains a point on which empirical evidence is absent.

Rebutting Cockburn's arguments is not, of course, a positive case for the verdict. One approach is simply to say, as Lord Rodger of Earlsferry did when Lord Advocate, that it is unlikely a system would now be designed with three verdicts but that the question is not one of whether such a system should be created, but whether that which exists should be reformed.<sup>78</sup>

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<sup>71</sup> McCluskey (n 64) at 149, a position consistent with his more general views about the factual validity of a verdict outside of the trial itself (*Howitt v HM Advocate* 2000 JC 284 at 289). Other defenders have tended not to confront this point directly, although a very similar argument to McCluskey's is made by an anonymous law student in "'Not proven' verdict", *The Scotsman* 5 Mar 1949 p 4.

<sup>72</sup> See e.g. *First Report of the Commissioners appointed to Enquire into the Courts of Law in Scotland* (1869) 222 (evidence of Horace Skeete).

<sup>73</sup> J Allan, "A democratic legal positivist's defence of Scotland's bastard verdict" (2017) 42 *Australian Journal of Legal Philosophy* 214 at 226; C Sherrin, "Declarations of innocence" (2010) 35 *Queen's Law Journal* 437 at 460.

<sup>74</sup> Dicey, *The Verdict* (n 58) 19-20.

<sup>75</sup> See e.g. HC Deb 21 Feb 1995 col 741 (Mr Campbell): "I have represented a number of accused people who—because of or despite the defence that I have mounted on their behalf—have had their cases found not proven. Not one of them has ever complained to me about the nature of the verdict."

<sup>76</sup> *McArthur v Grosset* 1952 JC 12.

<sup>77</sup> I Smith, *Law, Life and Laughter: A Personal Verdict* (2011) 146.

<sup>78</sup> HL Deb 19 Jan 1995, cols 428-429.

Others have, however, made a more positive case for the verdict,<sup>79</sup> although that positive case has been less prominent in the debate than the abolitionist one. The paradigm example of the former is the case made by Lord Justice-General Clyde in *McNicol v HM Advocate*, offering two reasons in its favour.<sup>80</sup> First, it is “much more humane and much more advantageous to an accused” than a two-verdict system, because it allows a jury to avoid conviction in cases of “lingering doubt” where they are not prepared to say that the accused is innocent and where it is “almost inevitable” that they would convict in the absence of the option of not proven.<sup>81</sup> Secondly, he argued, juries are “not all-seeing and all-knowing”.<sup>82</sup> A verdict of not proven, rather than not guilty, reflects that reality, while allowing the jury to “go further in the accused’s favour” in appropriate cases where the evidence positively establishes innocence and a not guilty verdict is appropriate.

Just as abolitionist arguments have tended to mirror Lord Cockburn’s 1846 case, so have positive arguments in favour of retaining the not proven verdict mirrored Lord Clyde’s propositions,<sup>83</sup> sometimes with the gloss on the second point that if the two verdicts of acquittal were to be amalgamated then the not guilty verdict might acquire a stigma it does not currently possess.<sup>84</sup>

The argument that not proven is favourable to the accused has subsequently tended to be expressed more formally as an argument that it is a safeguard against wrongful conviction.<sup>85</sup> Here, however, attention must be paid to the context in which the argument is made. Lord Clyde’s concern in *McNicol* was that trial judges should not be permitted to dissuade juries from considering the option of not proven. This may be genuinely favourable to the accused. Where, in contrast, the availability of not proven as a safeguard against wrongful conviction is cited in order to argue that Scots law need not introduce alternative safeguards found in other jurisdictions, as the Bryden Committee did in its report on eyewitness identification evidence, it is less clear that the Scottish accused is receiving any genuine benefit.<sup>86</sup>

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<sup>79</sup> See e.g. J R Harper, “Not proven – a unique verdict” (1988) 13 *International Legal Practice* 49 at 51; H Phalen, “Overcoming the opposition to a third verdict: a call for future research on alternative acquittals” (2018) 50 *Arizona State Law Journal* 401; Allan (n 73).

<sup>80</sup> 1964 JC 25 at 27.

<sup>81</sup> This is vulnerable to the objection that it assumes juries are not in fact following the judicial instruction to acquit in cases of reasonable doubt: S A Bennett, “Not proven: the verdict” 2002 SLT (News) 97 at 97. The practical reality, however, is that experimental evidence indicates that the not proven verdict does make a difference to jurors’ verdict preferences even if the logic of the instruction on proof beyond reasonable doubt implies that it should not. See R Ormston and others, *Scottish Jury Research: Findings from a Large-Scale Mock Jury Study* (2019) ch 3.

<sup>82</sup> 1964 JC 25 at 27.

<sup>83</sup> See, mirroring the first, e.g. C A Malcolm, “Notes from recent periodical literature” (1922) 34 JR 95 at 96; T B Smith, *British Justice: The Scottish Contribution* (1961) 126; HC Deb 14 Mar 1991 col 1116 (Mr Stewart, arguing that the Royal Commission on Criminal Justice should consider introducing a not proven verdict into English law for this purpose). See, mirroring the second, e.g. T B Smith, “Public interest and safeguards for the suspect” (1965) 11 McGill LJ 43 at 52.

<sup>84</sup> Criminal Procedure in Scotland (Second Report) (n 54) para 51.04.

<sup>85</sup> See e.g. P Duff, “The Scottish criminal jury: a very peculiar institution” (1999) 62 *Law and Contemporary Problems* 173 at 194; Allan (n 73) at 224; Phalen (n 79) at 415.

<sup>86</sup> Identification Procedure under Scottish Criminal Law (Cmnd 7096: 1978) para 2.08. See also HC Deb 19 Jul 1978, col 531 (Lord Advocate (Ronald King Murray)).

Two shifts in the debate on whether to retain the not proven verdict can be identified in recent times. The first is to emphasise the inter-connectedness of the not proven verdict with other aspects of the Scottish criminal justice system, in particular the simple majority verdict.<sup>87</sup> While this is not in itself an argument for the retention of the not proven verdict, it can in practice operate as a brake on discussion by implying that the point is more complex and difficult to resolve, perhaps to the point that it is not worth the effort.<sup>88</sup>

The second, more significant, shift in the debate has been its effect in cases of rape in particular. In 1995, an MP (John Home Robertson) unsuccessfully moved a clause which would have abolished the not proven verdict.<sup>89</sup> In response to the proposal, Malcolm Chisholm MP said:<sup>90</sup>

I have been lobbied by the rape crisis centre in Edinburgh, which is supported by other rape crisis centres in Scotland... The rape crisis centre in Edinburgh and the people it represents feel passionately about this issue. Other women's organisations in Edinburgh have also raised the issue with me... If the not proven verdict is taken away and such verdicts in the High Court become not-guilty verdicts, the credibility, honesty and reliability of women will be further called into question. If women know that that verdict is not available, it will not only be a serious problem for victims of rape but women will be discouraged from coming forward with complaints of rape. I therefore cannot express too strongly the fact that rape crisis organisations feel that this is a major issue for them and those they represent.

Variations of this argument – that the not proven message sends a message to a complainer that she was not disbelieved – have been made on a number of occasions,<sup>91</sup> with a 2007 commentator describing it as “the real argument” for the use of the not proven verdict.<sup>92</sup>

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<sup>87</sup> See e.g. HC Deb 19 Jul 1978, cols 531-532 (Mr Rifkind and the Lord Advocate (Ronald King Murray)); Criminal Procedure in Scotland (Second Report) (n 54) para 51.05; *Post-Corroboration Safeguards Review: Final Report* (2015) para 12.1; Barbato (n 69) at 580.

<sup>88</sup> See e.g. Scottish Parliament Official Report (Justice Committee) 29 Nov 2011 col 544, where Lord Carloway responds to an observation that his report on Scottish criminal procedure (*The Carloway Review: Report and Recommendations* (2011)) does not mention the not proven verdict: “I think that I said that if we go down the route of examining majority verdicts, we must examine the not proven verdict. If I had gone down that road, there would have been another 150 pages in the report”.

<sup>89</sup> HC Deb 7 Jun 1995, col 219.

<sup>90</sup> HC Deb 7 Jun 1995, cols 225-226. George Robertson MP, one of the leading campaigners for the abolition of not proven, replied bluntly (at col 233): “I have responded in writing to the rape crisis centres that have written to me. I have told them that, if they are satisfied with juries going for the not proven cop-out, they are doing a disservice to those who find themselves in court.”

<sup>91</sup> Including shortly before this debate. See e.g. Scottish Office, *Juries and Verdicts* (1994) 33-34; HL Deb 19 Jan 1995, col 427 (Lord McCluskey); HC Deb 21 Feb 1995, col 740 (Mr Campbell, reporting the views of a constituent who as a complainer in a rape trial had “told me that that verdict had allowed her to leave the court with a certain sense of dignity”); McCluskey (n 64) at 149; Duff (n 173) at 194; Phalen (n 79) at 416.

<sup>92</sup> M Linklater, “Make that ‘bastard verdict’ legitimate”, *The Times* 28 Nov 2007 p 17.

Despite the views expressed in 1995, however, concern about the use of the not proven verdict amongst survivor organisations has developed over a long period of time since.<sup>93</sup> In 2018, Rape Crisis Scotland launched an “End Not Proven” campaign,<sup>94</sup> drawing in particular on the experience of a woman known as Miss M who had been the complainer in a rape trial resulting in a not proven verdict but who had successfully sued for damages for rape in the Sheriff Court thereafter.<sup>95</sup> The campaign summarises its argument for abolishing the verdict in the following terms:<sup>96</sup>

The not proven verdict is used disproportionately in rape cases. In 2016/17, only 39% of rape and attempted rape cases resulted in convictions, the lowest rate for any type of crime. Nearly 30% of acquittals were not proven, compared with 17% for all crimes and offences.

The not proven verdict has the exact same impact as a not guilty verdict, and can be just as distressing for the complainer as a not guilty verdict.

There is some evidence that juries can be reluctant to convict in rape cases, and that preconceived notions of how someone should react to rape may impact on their decision making. There are real worries that the existence of the not proven verdict gives juries in rape trials an easy out and contributes to guilty people walking free.

The concerns of survivor organisations have been prominent in recent debates (including before the formal launch of the End Not Proven campaign) and it is significant that when, following the 2019 publication of jury research, the Cabinet Secretary for Justice announced that the government would give further consideration to amending the Scottish verdict system, he did so while making specific reference to parallel work then being carried out on the management of sexual offence cases.<sup>97</sup>

## F. ATTEMPTS TO REFORM THE THREE VERDICT SYSTEM

When the Royal Commission on the Courts of Law in Scotland carried out an extensive review of the Scottish court system (resulting in five reports being published between 1869 and 1871) it put the question of verdicts to six of its witnesses, with results which were mixed but clearly in favour of retaining the not proven verdict overall. Four witnesses

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<sup>93</sup> See e.g. Scottish Parliament Justice and Home Affairs Committee Official Report, 13 Jun 2000 col 1411 where Sandy Brindley (then legal affairs spokesperson for the Scottish Rape Crisis Network) referred to concerns about sexual history and sexual character evidence contributing to verdicts of not proven.

<sup>94</sup> H Duncanson, “Fight to scrap not proven verdict after civil rape case”, *The Herald* 14 Nov 2018 p 2. See also HL Deb 23 Jul 2019, col 715 (Baroness Bryan of Partick).

<sup>95</sup> *AR v Coxen* 2018 SLT (Sh Ct) 335.

<sup>96</sup> Rape Crisis Scotland, “End not proven”, <https://www.rapecrisisscotland.org.uk/not-proven/> [accessed 9 June 2020]. The experiences of complainers whose cases have ended in a not proven verdict are discussed in V E Munro, *Piecing Together Puzzles: Complainers’ Experiences of a Not Proven Verdict* (2020).

<sup>97</sup> Scottish Government, “Jury research launch event”, 9 Oct 2019, <https://news.gov.scot/speeches-and-briefings/jury-research-launch-event> [accessed 9 June 2020]



(including the judge Lord Ardmillan) endorsed the verdict,<sup>98</sup> while a procurator fiscal remarked that there was “little benefit from it... The only good that a verdict of not proven does, is that it relieves the mind of a jury”.<sup>99</sup> JHA Macdonald, then Solicitor-General, took a stronger line against the three verdict system, arguing that it was wrong for the jury to be able to signal that they were uncertain of the accused’s innocence. “The question whether the man is to be shunned in society is not the question which the jury are dealing with, and whatever verdict they may return cannot in the least affect the public mind legitimately upon that matter”.<sup>100</sup>

In its conclusion on the Court of Justiciary, the Commission did not mention the issue at all, commenting that while there had been many suggestions for amending criminal procedure, for the most part “the defects alleged are rather theoretical than practical, and the system in force is generally admitted to be effective for the detection of crime, and for securing the punishment of the guilty”.<sup>101</sup>

It seems that the issue was not raised in Parliament until 1938, when a Scottish MP (Sir Douglas Thomson) intervened in a debate on proposed English legislation on criminal verdicts to argue that not proven “has always appeared to me to be the most ridiculous verdict that could be given” and to ask whether the Bill before the House might be amended to bring the Scots law in line with the English.<sup>102</sup> It is not clear what prompted Thomson’s intervention, while no MP appeared to have any interest in engaging with the question which he raised, and the Bill was in any event suspended because of the Second World War.<sup>103</sup>

While Parliamentary questions were intermittently asked suggesting that the three-verdict system should be reformed,<sup>104</sup> or suggesting that English law should adopt it,<sup>105</sup> it was some time before the matter led to any debate. In 1969, Donald Dewar introduced a ten-minute rule Bill which would have abolished the verdict, arguing that not proven was unsatisfactory and incompatible with the presumption of innocence, but the nature of the ten-minute rule procedure being what it is, the Bill went no further than a brief speech by Dewar setting out that case.<sup>106</sup> The issue was finally directly addressed by the Thomson Committee in its

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<sup>98</sup> See *First Report of the Commissioners appointed to Enquire into the Courts of Law in Scotland* (1869) 111 (Robert Sconce, sheriff-substitute, Stirlingshire), 114 (J Guthrie Smith, advocate and sheriff-substitute, Dundee), 222 (Horace Skeete, practitioner in Perth and Forfarshire) and 375 (Lord Ardmillan). Witnesses were given little opportunity to develop their views on the point; Lord Ardmillan in particular is recorded as saying no more than “Yes, I think that right” to a question on whether he approved of the verdict system.

<sup>99</sup> *Ibid* at 171 (John Gair, procurator fiscal at Falkirk).

<sup>100</sup> Third Report of the Commissioners Appointed to Inquire into the Courts of Law in Scotland (C 36: 1870) 130. Macdonald indicated that he would prefer to abolish not guilty and retain not proven.

<sup>101</sup> Fifth Report of the Commissioners Appointed to Inquire into the Courts of Law in Scotland (C 260: 1871) 6.

<sup>102</sup> HC Deb 1 Dec 1938, col 690.

<sup>103</sup> P Rock, *The Official History of Criminal Justice in England and Wales: Volume 1* (2019) 109.

<sup>104</sup> HC Deb 5 Feb 1962 col 18 (Mr Rankin, appearing to conflate a proposal to abolish “guilty” in favour of “proven” with a proposal to abolish the not proven verdict); HC Deb 17 Jul 1963, col 499 (Mr Dempsey); HC Deb 19 Jul 1978, col 531 (Mr Dempsey).

<sup>105</sup> HC Deb 10 Jun 1936, col 1942 (Mr Day); HC Deb 3 Mar 1955, cols 2221-2222 (Mr Gower).

<sup>106</sup> HC Deb 5 Feb 1969, cols 404-406.

review of Scottish criminal procedure in the 1970s, which (after considering established arguments for and against the verdict), recommended that it be retained.<sup>107</sup>

The verdict has since been the subject of substantive Parliamentary consideration on two occasions, the first in a debate on an amendment in 1995 which followed public controversy after the acquittal of a man accused of murder on a not proven verdict.<sup>108</sup> That case was a significant causal factor in the issue coming to prominence, but the case for and against the verdict was made in much more general terms. Protagonists in the debate deployed well-established arguments for and against the verdict, with the important addition of a case based on the use of the verdict in sexual offence trials, as discussed earlier.<sup>109</sup>

The second occasion was a member's Bill – the Criminal Verdicts (Scotland) Bill – introduced into the Scottish Parliament by Michael McMahon MSP in 2013, which fell in 2016.<sup>110</sup> Mr McMahon's case for abolition rested in particular on the argument that a not proven verdict resulted in the acquitted accused being unfairly stigmatised.<sup>111</sup> The Bill would also have required that a verdict of guilty could only be returned with at least ten of the fifteen jurors voting in favour, with the jury being required to return a verdict of not guilty in all other cases.<sup>112</sup> In its report on the Bill, the Justice Committee noted that a clear majority of its membership supported the abolition of the not proven verdict but not the changes to the majority requirement. Noting that the Scottish Government intended to carry out research on jury decision-making, it concluded that there would be benefit to such research concluding before proceeding with the reforms set out in the Bill. The general principles of the Bill therefore did not receive the support of a majority of the Committee.<sup>113</sup>

The research referred to above – the Scottish Jury Research – began in 2017 and reported in 2019.<sup>114</sup> It was a large-scale programme of mock jury research where jurors watched a realistic trial simulation, before deliberating in groups of 12 or 15 and reaching a verdict. Because half of the jurors had the not proven verdict available, whereas half did not, this has provided data on the difference that the availability of the not proven verdict makes to juror verdict preferences. The deliberations were recorded and thus information is now also available about the ways in which (mock) jurors understand the verdict.<sup>115</sup>

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<sup>107</sup> Criminal Procedure in Scotland (Second Report) (n 54) para 51.05. Three members of the committee (Mrs Barclay, Professor Gordon and Sheriff Middleton) dissented.

<sup>108</sup> This specific debate is well-documented: see P Duff and M Findlay, "Jury reform: of myths and moral panics" (1997) 25 *International Journal of the Sociology of Law* 363 at 367-370; P Duff, "The not proven verdict: jury mythology and 'moral panics'" 1996 *JR* 1. For a later unsuccessful attempt to mount a fresh prosecution under the terms of the Double Jeopardy (Scotland) Act 2016, see *HM Advocate v Auld* 2016 SLT 636.

<sup>109</sup> See HC Deb 7 Jun 1995, cols 219-238 and section E above.

<sup>110</sup> Consideration of the Member's Bill was postponed while the Scottish Government's Criminal Justice (Scotland) Bill proceeded through Parliament: see Justice Committee, *Stage 1 Report on the Criminal Verdicts (Scotland) Bill* (2016) para 15.

<sup>111</sup> Criminal Verdicts (Scotland) Bill Policy Memorandum (2013) paras 4-5.

<sup>112</sup> Criminal Verdicts (Scotland) Bill s 2, which also made provision for a reduced majority where the size of the jury was itself reduced.

<sup>113</sup> Justice Committee, *Stage 1 Report on the Criminal Verdicts (Scotland) Bill* (n 110) 15.

<sup>114</sup> Ormston and others, *Scottish Jury Research* (n 81).

<sup>115</sup> As well as *ibid*, see also the summary of the research findings in J Chalmers et al, "Three distinctive features, but what is the difference? Key findings from the Scottish jury project" [2020] *Crim LR* 1012.

At the launch of the report, the Cabinet Secretary for Justice announced that the research had provided a “vital evidence base” and that the government would “engage in serious discussions around its implications and whether we should move from a three verdict system to a two verdict system”.<sup>116</sup> This work is ongoing at the time of writing but has been paused due to the coronavirus pandemic, which itself has created significant practical difficulties for the operation of trial by jury.

## G. CONCLUSION

The propositions which this paper advances are set out at the outset and are not unnecessarily repeated here. It is worth observing, however, that the trend in recent years to stress the complexity of the not proven question, by pointing to its interrelationship with other aspects of the Scottish criminal justice system (or asking whether a single verdict of acquittal should be named “not guilty” or “not proven”), runs the risk of being an impediment to the proper consideration of the question. Such issues should, as Lord Wheatley argued in 1987, be considered as ancillary ones.<sup>117</sup> It should be possible, over a century and a half since Lord Cockburn fired the starting gun on this debate, for the Scottish legal system to take a clear decision about whether or not it wishes to retain the not proven verdict, particularly now that robust experimental evidence on the use of the verdict by juries is available as a result of the Scottish Jury Research. Once that decision is taken, its consequences can be addressed and a decision taken on what further changes, if any, should accompany it. As the discussion above shows, the debate on the verdict has for the most part been remarkably static over time even as the practical use of the verdict has changed dramatically, and another 150 years of repeating these arguments would be in no-one’s interests.

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<sup>116</sup> Scottish Government, “Jury research launch event” (n 97).

<sup>117</sup> Wheatley, *One Man’s Judgment* (n 44) 203.