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Need verdicts come in pairs?

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Abstract Given the high standard of proof that operates in criminal cases, the meaning of an acquittal is highly ambiguous. This disadvantages the genuinely innocent defendant and also citizens who are unsure of the significance of any given 'Not Guilty' verdict. The finders of fact may have taken any one of a wide range of views in relation to the defendant's guilt, and it is argued that the two extremes of acquittal and conviction take insufficient account of this.

Keywords Conviction; Acquittal; Standard of proof; Beyond reasonable doubt; Verdict of not proven

When it comes to acquittals, it would be hard to devise a verdict that is less informative than the one currently in use.

Andrew D. Leipold¹

I intend to explore a plethora of issues surrounding the question whether a trial system that utilises only two verdicts (guilty or not guilty) serves the interests of criminal justice and of the larger society. The aim is not to recommend any particular reform to the verdict system, but to try to render explicit the kinds of factors that might play a role in addressing and settling such large-scale questions. This exploration will be highly tentative and provisional, not least because—apart from the odd and sometimes bemused discussion of the Scottish system of three verdicts (below)—there is precious little serious discussion

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1 A. Leipold, 'The Problem of the Innocent, Acquitted Defendant' 94 Nw U L Rev 1297 at 1302 (2000).

of these issues to build upon.² But the intellectual motive should be clear: to provoke a conversation about a matter that is almost universally taken as an unexplored given, with a view to figuring out whether the current verdict system is optimal or, failing that, if it is even satisfactory.

The status quo

In the vast majority of legal systems, whether of common or Roman law origin, there are two permissible verdicts open to the trier of fact: guilty and not guilty (or, more accurately, guilt not proven). The standard of proof in virtually all these systems is deliberately very demanding, whether it is proof beyond a reasonable doubt or an ‘intimate conviction’ about the guilt of the defendant (and the multiple variants of the latter such as Mexico’s ‘full proof’, Argentina’s ‘healthy criticism’, etc.).

In *every* legal system with only two outcomes and a demanding standard of proof for the inculpatory one, the exculpatory verdict will be neither very informative nor very exculpatory. Accordingly, acquittal in such systems will be stigmatising, in the specific sense that it does little to remove the stigma already arising from being arrested, charged with, and tried for, a crime; this result is incontrovertible, even if the courts try to minimise the ambiguous message sent by an acquittal that means nothing more than guilt not proven.³ The more demanding the standard of proof is, the weaker will an acquittal be at counteracting the stigma. If we gloss the typical criminal standard of proof as meaning something like 95 per cent confidence of guilt, then an acquittal signifies nothing more than that the trier of

- 2 One noteworthy exception to this generalisation is Leipold, above n. 1, which is a very thoughtful treatment of many of the pertinent issues. Here is his own summary of his key proposal: ‘A defendant who has been acquitted of criminal charges, or who has had the charges against him dismissed, should have the statutory right to ask for a determination that he is factually innocent. If a defendant is acquitted in a bench trial, or if the charges are dismissed prior to trial, the defendant should be permitted to ask the judge for a finding that, not only has the government failed to prove guilt, but also that the evidence shows his innocence. If the case is tried to a jury, the defendant should be allowed to request that the jurors be given three verdict options: guilty, not guilty, and innocent. If either the court or jury makes a determination of innocence, the defendant’s record related to that charge should be expunged, and should be inadmissible in any future proceeding’ (at 1297). In due course, I will suggest alternatives to some of Leipold’s specific proposals, since his proposed standard for acquittal is, in my view, too weak to be seriously exonerative (see below), but I here acknowledge the utility and suggestiveness of his discussion.
- 3 ‘With a high standard of proof, such as beyond a reasonable doubt, the public will know that some defendants are being acquitted because of insufficient evidence, not because of actual innocence. With that knowledge, the public will see the acquittal in a two-verdict system as stigmatizing and tarnishing, and no well-intentioned decree can change that fact’: Samuel Bray, ‘Not Proven: Introducing a Third Verdict’ 72 U Chi L Rev 1299 (2005).

fact believes that the $p(\text{apparent guilt}) < 0.95$, a finding fully compatible with everything from ‘innocence proven’ to ‘guilt highly likely’.⁴

It follows that the criminal defendant leaving a courtroom with an acquittal in hand—however genuinely innocent he may be—cannot expect to be welcomed back into civil society with open arms. However much his counsel may pretend otherwise, and however much news headlines may insinuate otherwise, an acquitted defendant is not ‘exonerated’ by a trial using a demanding standard of proof. True, he will not go to jail but the trial and verdict can do little to restore his reputation since, as much as courts may preach the presumption of innocence, few in the larger society who understand what a guilt not proven verdict means will (or should) interpret an acquittal as a strong warrant for the hypothesis that the defendant did not commit the crime of which he was just acquitted. (As we will see below, in many jurisdictions not even the courts will accept that interpretation of an acquittal.)

This is all rather curious. We have adopted a high standard of proof specifically out of a concern to protect and shield the innocent defendant from undeserved harm. That notwithstanding, we have embedded this demanding standard in a two-tier verdict system, thereby guaranteeing that a cloud of doubt will remain over his head, even if he wins an acquittal. While taking pains to protect the innocent from being falsely convicted and thus falsely imprisoned, the legal system—if limited to only a pair of verdicts—cannot fully remove the taint of arrest, trial and a profoundly ambiguous acquittal.

4 For some time, California has had on its books a procedure permitting a defendant who receives an acquittal to subsequently petition the court for a finding of innocence. The standard used there is significantly higher than the standard proposed here: specifically, it demands that ‘the arrestee thus must establish that facts exist which would lead no person of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that the person arrested is guilty of the crimes charged’ (*People v Matthews*, 9 Cal Rptr 2d 348 at 350 (Cal Ct App 1992)). Legal folk wisdom has it that few acquitted defendants have availed themselves of this option. Leipold suggests that, because this standard is so demanding, ‘relatively few acquitted defendants even attempt to take advantage of the procedure’ (above n. 1 at n. 97). His implicit suggestion is that we should make it much easier to get an ‘innocent’ (and thus truly exonerating) verdict so that relatively many defendants will use the procedure. This seems dubious to me. The proportion of cases in which a judge can find in the evidence a *prima facie* proof of guilt beyond a reasonable doubt and in which the defendant can find sufficient evidence to secure a genuine exoneration should be small or else the system is failing even more often than we suspect. That this set of genuinely innocent defendants, who can be robustly exonerated by the evidence, is small is no argument whatever that this option should not be in place. The risk with Leipold’s suggestion is that genuine exoneration cannot legitimately flow from a proof of innocence as weak as the preponderance.

Nor is it obvious that the legal system should go to great efforts in an attempt to disabuse the public of its supposition that an acquitted defendant may well be guilty; that, after all, is a perfectly reasonable inference to make, given the logic of the situation. Indeed, anyone who infers that an acquitted defendant was shown to be innocent of the crime with which he was charged fails to understand the limited exculpatory powers of an acquittal that says nothing more than ‘guilt not proven’. The root of the problem is that an acquittal represents a grave failure on the part of the state to convey pertinent information to its citizens.

Current policy might make sense if the only conclusion a trier of fact were capable of reaching was whether the evidence of guilt reached the bar of proof beyond a reasonable doubt. If jurors were a kind of machine—programmed to light up when proof reached the threshold of beyond a reasonable doubt (hereafter BARD) and to remain dark so long as it had not—the current system of verdicts might be defensible. Clearly, however, triers of fact are not so robotic. As jurors hear and digest evidence, they are fully capable of reaching additional conclusions, above and beyond whether BARD has been satisfied. They could also decide (and many probably already do in their own minds) whether they think the defendant actually committed the crime, whether his innocence is highly likely, and so on.

By having an all-purpose not guilty verdict, which includes every possibility in the range $0 < p(\text{apparent guilt}) < 0.95$, we fail to avail ourselves of juror inferences that would be highly pertinent to a host of decisions that society will have to take about a defendant, subsequent to his acquittal. What can be the possible profit in discharging a jury, which has presumably thought long and hard about the matter, without asking them for a more fine-grained report of the conclusions they have come to about whether the defendant actually committed the crime?⁵

Such information, were it solicited, would not only allow for a genuine exoneration for those factually innocent defendants who were able to undermine the prosecution’s case against them. At the same time, that information would serve

5 ‘This commodity [information about likelihood of guilt] is part of a broader market for information about defendants. In this market, those seeking information may be employers, parole board members (making decisions about parole after a subsequent conviction), neighbors, relatives, and friends—all of whom may interact with the defendant. Each information-seeker assesses risk and wants to know whether the defendant is the “good type” or the “bad type.” The good types are innocent and pose no risk. The bad types are guilty and do pose risks. All defendants are under a cloud of suspicion, having been prosecuted, and the good types want to differentiate themselves. The information-seekers want them to be able to.’ (Samuel Bray, above n. 3 at 1309.)

as a benchmark for the larger society by fingering those persons who, though winning an acquittal, are thought by the jurors to have committed the crime with which they were charged. Consider briefly the O.J. Simpson murder trial. Many of us watched enough of that trial on television to reach our own conclusions about Simpson's guilt and so needed no direction from the jury about how to treat the miscreant subsequent to his acquittal. But in the vast majority of cases, citizens must depend on jury verdicts as their principal, and usually the only, cue in deciding how to treat an acquitted defendant. The not guilty verdict is a dismal failure at conveying information relevant to that decision.

A homely analogy may make the point vividly. Suppose John decides to buy a lounge for his newly remodelled study. Having seen an ad for one that looks suitable, he goes to a nearby furniture store and asks what its dimensions are. The clerk asks him how large the study door is and John, who has an architect's drawing of his study with him, replies, 'thirty-two inches'. The clerk goes into a back room, measures the chair and returns. 'It'll fit through the door', says the clerk. Slightly dismayed, John points out that, while it *is* essential that the chair can be moved into his study, that is not the only pertinent consideration. Is it the right size for his body? Will it cramp the movement of his desk chair? To all such questions, the clerk responds with an indifferent shrug. Exasperated, John makes one last effort: 'Look, you have a tape measure. Can't you simply give me the dimensions of the chair?' 'No', replies the clerk, 'we don't give out such information. We've told you what you need to know to get the chair into your room.'

The Anglo-Saxon verdict system is very like that jerk of a clerk. Jurors (or judges in bench trials) are clearly equipped, by the evidence they have heard and the private inferences they have drawn, to tell us vastly more than a 'guilt not proven' verdict conveys. Neither the interests of society, which will have to deal with the acquitted defendant in its midst, nor those of the genuinely innocent defendant are served by such a minimally informative verdict. An acquittal is, at the same time, unfairly stigmatising for the genuinely innocent defendant and insufficiently tainting for the defendant whose apparent guilt fell just shy of the standard of proof.

Different legal systems have attempted to deal with this problem in different ways. While there is a continuum of responses to it, it will be instructive to highlight the two extremes:

(1) One of those extremes is represented by practices in the USA. There, courts have generally adopted a narrow construal of the scope of the presumption of

innocence.⁶ Following the lead provided by the Supreme Court, most states hold that the presumption is operative only within the trial itself and, even there, principally only as an instruction to jurors to assume, at the outset, that the defendant must be acquitted unless the prosecutor satisfies his demanding burden of proof. The Supreme Court has made clear that, in its view, the presumption of innocence does not govern most events either pre- or post-trial. That reading by the court explains why, for instance, US courts see no conflict between denying bail to defendants whose guilt has not yet been proven and the presumption of innocence.

The Supreme Court has also asserted repeatedly that an acquittal does not imply factual innocence of the charges. As the court unambiguously put the point in 1984: ‘an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt’.⁷ Accordingly, many US jurisdictions do not accept that an acquittal should necessarily expunge the arrest and trial from the defendant’s criminal record and many US courts are generally willing to take into account, when making sentencing decisions, prior arrests (even in cases leading to acquittal or dismissal of charges). In short, the policy of US courts is generally to minimise the exonerative effects of an acquittal, both within the legal system and beyond it. Accordingly, acquitted defendants can in most jurisdictions be legally denied credit by credit agencies, can be disqualified from adopting children, can discover that their prior trial, even if an acquittal, counts against them in child custody hearings, and can be obliged to report their prior arrest(s) to prospective employers, if asked. These are not unreasonable policies, given that a not guilty verdict is so ambiguous; still, they greatly exacerbate the situation of a truly innocent, acquitted defendant, who must carry the unearned stigma of an acquittal around his neck for a long time.

(2) In other jurisdictions (especially in many European legal systems), the treatment of an acquittal is quite different, principally because the scope of the presumption of innocence is construed more broadly than in the USA, especially in the wake of the International Covenant on Civil and Political Rights and the European Convention on Human Rights, both of which highlight the role of the presumption of innocence in criminal justice. Accordingly, in many European jurisdictions, an acquittal usually expunges the arrest and trial from the defendant’s record, and society is urged to treat the acquitted defendant in almost every

6 A detailed account of the US Supreme Court’s interpretation of the presumption of innocence can be found in Larry Laudan, ‘The Presumption of Innocence: Material or Probatory?’ *Legal Theory* 11 (2005) 1–30.

7 *US v One Assortment of 89 Firearms*, 465 US 354 at 361 (US 1984).

pertinent respect as if he were innocent. The Canadian Supreme Court has formulated the rationale for such a policy quite explicitly in terms of protecting the innocent (and, although the court does not say as much, many of the guilty) from taint:

An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that, until [and unless] the state proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice.⁸

Such a policy clearly serves the interests of the truly innocent, acquitted defendant. The price it exacts is that those acquitted defendants who are truly guilty get a free ride at the expense of the rest of society, which must absorb the risks of living and working (often unknowingly) with a felon who, thanks to a demanding standard of proof, managed to avoid receiving his just deserts. In effect, this policy attempts to generalise the presumption of innocence from the courtroom setting to society at large.⁹ It does so by conveniently ignoring the fact that the proposition that the 'defendant did not commit the crime' does not follow from, and is not even rendered probable by, an acquittal.

For reasons already indicated, neither of these strategies is very attractive. Each tries to make the best of a bad situation, either by reducing the exonerative effects of an acquittal (so as to protect society from falsely acquitted felons) or by reducing its stigmatising effects (so as to protect innocent, acquitted defendants from a society that would otherwise judge them probably guilty). Legal systems

8 *R v Pearson* [1992] 3 SCR 665 (Can) (citing *R v Oakes* [1986] 1 SCR 103, 119 (Can)). It is worth remarking on the purely procedural character of innocence as understood by the justices in this passage. The bald claim that someone is 'innocent' until proven guilty presupposes that there is no independent fact of the matter about whether someone committed the crime and that one's guilt consists entirely in having been adjudged guilty. Surely, if the accused actually committed the crime then he is guilty of it, regardless of what a judge or a group of 12 fellow citizens may conclude.

9 The French Civil Code was recently modified so that a French citizen now enjoys a right not to be publicly described as 'guilty' (or 'probably guilty') before conviction or after acquittal. The media can say nothing that implies that the suspect or acquitted defendant committed a felony. (See Francois Quintard-Morenas, 'The Presumption of Innocence in the French and Anglo-American Legal Traditions', *American Journal of Comparative Law*, forthcoming January 2010, available at <http://works.bepress.com/francois_quintard_morenas/1>, accessed 23 October 2009.)

are led into such unseemly contortions by the very structure of a bipolar verdict system. As we will see below, it is possible to conceive of a scheme of verdicts that would simultaneously exonerate the defendant who is likely to be innocent and stigmatise the defendant who, while not convicted, appears to the trier of fact likely to have committed the crime. The Hobson's choice generated by the current system is not intrinsic to determinations of guilt and innocence, even if it is unavoidable in a system with only two verdicts.

At the risk of sounding like Google's founders, I think it is imperative that, if there is important knowledge out there, especially knowledge acquired by a state-funded process of investigation, then it should be shared with the rest of society. Whose interests are served by a system that gags triers of fact from officially reporting what they have learned? Whose interests are served by preventing jurors from declaring someone innocent (as opposed to guilt not proved) if they have reasonably reached the conclusion that it is very unlikely that the defendant committed the crime? Whose interests (apart from those of the guilty defendant) are served by foreclosing the option of declaring someone probably guilty if that is what the evidence clearly indicates?

The legal system acts as if the only pertinent question is whether the defendant will be convicted, and thereby foregoes the opportunity to share with the general public such conclusions as the jurors reached (or at least could have reached) about whether the defendant committed the crime or not. Because the *informative* content of a bare acquittal is so minimal, both its exonerative and its stigmatising dimensions are far less than they could, and arguably should, be.

One remedy for that situation, without going to multiple verdicts, would be to lower significantly the standard of proof. If that standard were (say) the preponderance of the evidence, then an acquittal would at least convey that the defendant is more likely not to have committed the crime than to have committed it. While far from fully exonerative, such an acquittal would carry vastly less stigma than the current acquittal does. The trouble is that there are independent reasons not to lower the criminal standard of proof so drastically. If that option is (at least for purposes of this discussion) foreclosed, the only plausible alternative is to introduce more than two verdicts. It is that possibility I now turn to pursue.

I have already noted that friends, prospective neighbours and employers of an acquitted defendant could profit enormously from having more information and that, without such information, there is a heavy taint that accompanies every acquittal. That taint is officially recognised by some criminal justice systems as

well. We have seen that, in the USA, when a defendant receives an acquittal for crime X, that does nothing to block the justice system from later using his arrest for X as a basis for giving him a harsher sentence, should he be convicted of a subsequent crime Y. When a justice system itself regards arrest followed by acquittal as a reasonable basis for supposing that the defendant was probably guilty of X (despite his acquittal), what possible reason could the rest of the citizenry have for not similarly regarding an acquittal as *prima facie* evidence of probable guilt?

It is also worthy of note that not all acquittals under the current system should carry the same degree of ambiguity and thus of taint as others do. Consider the case of excuses and affirmative defences, again in the US context. In many jurisdictions, one can be acquitted in such cases only by proving to a preponderance of the evidence that (say) one acted in self-defence or under orders or while involuntarily intoxicated.¹⁰ In England and Wales, a variety of defences have to be proved by the defences to the civil standard.¹¹

An acquittal, in such cases, implies that the jurors concluded that it is more likely than not that the defendant is innocent. That should be a far more exculpatory and less stigmatising verdict than the usual common law acquittal. Still, the legal system does nothing to mark it out as such. Nor, it should be added, does the legal system recognise that this verdict arguably should wipe clean the defendant's slate for arrest and trial for the offence in question. If we are inclined to believe that the preponderance of the evidence should govern decisions about the production of evidence at sentencing hearings, it follows that a person acquitted by the preponderance of the evidence should not be subject to having his prior arrest used against him, if he was able at trial to show by a preponderance that he was innocent.

Putting together some of the observations reached earlier, we are now in a position to suggest some tentative conclusions about what a better set of verdicts would look like. Specifically:

10 In federal trials, by contrast, the prosecutor must prove BARD that a defendant's excuse is false. Acquittals won in such cases should not be considered particularly exculpatory. For a lengthy discussion of US practices pertaining to the burden of proof in cases involving affirmative defences, see Larry Laudan, 'Error and Legal Epistemology: Affirmative Defenses' in D. Mayo and S. Lapsis (eds), *Error and Inference* (Cambridge University Press: 2009).

11 For example, insanity, diminished responsibility and various express and implied statutory exceptions: *Attorney-General's Reference (No. 4 of 2002)*; *R v Sheldrake* [2004] UKHL 43, [2005] 1 All ER 237.

1. There should be a strongly exculpatory verdict available. Truly innocent defendants deserve the chance to seek such exoneration if they wish.
2. There should also be a verdict that enables the jury to say clearly (if this is the conclusion they have reached) that, whilst the defendant was not proved guilty BARD, there were good reasons to believe he committed the crime as charged.
3. If the jury emerges from trial believing that the defendant did not commit the crime (which is not the same as believing that his guilt was not proved BARD), then the state should not be allowed to make subsequent use of his instant arrest as a basis for giving him a more severe sentence, should he later be convicted of a subsequent crime.
4. If the charges against someone arrested and charged with a crime are dropped or dismissed, it should be possible to infer from that dismissal whether those charges were dropped because the relevant officer of the court concluded that the defendant was probably innocent of the crime. Otherwise, a dismissal is almost as stigmatising as a not guilty verdict. This can occur only if every pre-trial dismissal were accompanied with a brief statement from the judge or prosecutor specifying in general terms the reason for the dismissal.
5. Because verdicts should serve judicial as well as informational ends, every available verdict should have a different set of legal consequences associated with it.

I will shortly try to conjure up a system of outcomes that satisfies these demands.

Instances of more nuanced verdicts

The Scottish verdict trio

The Scottish outcome matrix is widely known in the world of Anglo-Saxon law.¹² There, the trier of fact must choose between a guilty verdict, a guilt not proven verdict and a not guilty verdict. BARD is the standard for a conviction but beyond that point the probative issues are very murky. To the best of my knowledge, neither the Scottish Parliament nor Scottish jurisprudence has issued a definitive reading on what separates a finding of 'not guilty' from a finding of 'guilt not

12 Three useful recent accounts of the Scottish verdict matrix are Samuel Bray, above n. 3 at n. 5; Joseph M. Barbato, 'Scotland's Bastard Verdict: Intermediacy and the Unique Three-Verdict System' (2005) 15 *Ind Int'l & Comp L Rev* 543; and Peter Duff, 'The Scottish Criminal Jury: A Very Peculiar Institution' (1999) 62 *Law & Contemporary Problems* 173.

proved'.¹³ And the highest Scottish court has even suggested (in *Macdonald v HM Advocate*) that 'it [would be] *highly dangerous* for a judge or sheriff to endeavour to explain what the not proven verdict was in relation to the not guilty verdict'.¹⁴

Since the courts—ever alert to feigned dangers—evidently will not do it for us, we need to draw our own conclusions about where the standard for the guilt not proven verdict might fall. We can reasonably infer that its upper bound is occasioned by a single reasonable doubt, for such a doubt precludes a guilty verdict. But its lower bound, which would distinguish it from a finding of not guilty, is wholly unclear. One natural conjecture, but it is no more than that, would be that a not guilty innocent verdict is triggered when the defendant's innocence appears more likely than his guilt.¹⁵ So construed, the confidence range for a guilt not proven verdict occupies the epistemic gap between proof beyond a reasonable doubt and the preponderance of the evidence. Putting it in probabilistic terms (which the Scottish courts would doubtless repudiate in principle), a finding of guilt not proven should occur when

$$0.5 < p(\text{apparent guilt}) < \sim 0.95.$$

The fact that the borderline between a not guilty verdict and a guilt not proven finding remains profoundly fuzzy (despite more than two centuries of the frequent use of this verdict) suggests that the Scottish judicial system is less than fully serious about this intermediary verdict. That does not gainsay that it is widely used both by Scottish juries and judges.¹⁶

13 Peter Duff and Mark Findlay insist that: 'Despite the fact that it has been part of the Scottish criminal justice system for around 300 years, there is no common law or statutory definition of the [guilt not proven] verdict nor of the difference between it and the not-guilty verdict' ('Jury Reform: Of Myths and Moral Panics' (1997) 25 *International Journal of the Sociology of Law* 368). The nearest thing I have found to an official definition—if we can call it that—of the difference between the two verdicts comes from *Larkin v HM Advocate* 1993 SCCR 715 in which the Lord Justice-Clerk and Lord Morison approved a direction that 'if the jury felt the charges had not been fully proved but "not guilty" might just stick in their throat, they should return a not proven verdict'.

14 *Macdonald v HM Advocate* 1996 SLT 723, 1995 SCCR 663. My italics.

15 Schauer and Zeckhauser, among others, have read the standard this way: 'Similarly, the Scottish verdict of "not proven" in criminal cases does not appear to be a distinct standard of proof; rather, it is a vehicle by which a jury that has determined that the prosecution has not proved its case beyond a reasonable doubt can express its view that the defendant more likely than not (a preponderance of the evidence) committed the acts charged' (Frederick Schauer and Richard Zeckhauser, 'On the Degree of Confidence for Adverse Decisions' 25 *Journal of Legal Studies* 27, 52 (1996)).

16 Duff and Findlay claim that one-third of all jury acquittals and one-fifth of all bench acquittals are of the form 'guilt not proven' (above n. 13 at 370).

The fact that a finding of not guilty and a finding of guilt not proven have precisely the same legal consequences partially mitigates the failure to clarify the difference.¹⁷ Still, given that trial verdicts have important informational functions (even when they have no purely legal ones), it is anomalous that the verdict remains wholly undefined; it appears to be another case (of which there are many) of judicial authorities invoking the cop-out that ‘what is already clear needs no definition’.¹⁸

By cutting up the traditional ‘not guilty’ verdict into two distinct parts, the Scottish system produces a pair of verdicts, each of which is significantly more informative than a simple common law acquittal. It could represent a significant advance over the rest of the common law world with respect to information communicated to the general public, particularly if the Scots would define their standard. It is notably less innovative in terms of utilising its trio of verdicts within the judicial system itself. This is because, in virtually every respect, an outcome of guilt not proved and an outcome of not guilty carry precisely the same *legal* consequences in Scottish courts.

There is nothing in theory that requires the intermediary verdict to be so inert legally. If, as conjectured, the guilt not proven verdict in the Scottish system is tantamount to a ‘probably guilty’ verdict, it would be natural and appropriate to attach some legal form of stigma—short of imprisonment—to it. One could imagine, for instance, allowing the guilt not proven verdict to allow for easier retrial, if significant new inculpatory evidence emerges. The law could likewise insist that this weak form of acquittal fails to expunge the defendant’s arrest and trial from his criminal record. For reasons doubtless lurking in the historical record, the Scots decided that the advantages of their trio of verdicts would be purely informational rather than judicial.¹⁹

17 Neither admits of appeal by the prosecution nor of retrial of the accused. Neither carries any form of legally sanctioned punishment. As conventional wisdom has it, the intermediary Scottish verdict amounts to saying to the defendant: ‘You’re acquitted of the crime: now, don’t do it again.’

18 See Larry Laudan, *Truth, Error and Criminal Law* (Cambridge University Press: 2006) ch. 2, for a detailed examination of efforts by the US Supreme Court in the 20th century to avoid having to define a ‘reasonable doubt’.

19 More than once, Scottish politicians have sought to get rid of the guilt not proven verdict, arguing specifically for its informative failures. For instance, in 2004, Michael McMahon, a Labour Member of the Scottish Parliament, proposed a Bill eliminating the guilt not proven verdict. He argued that this intermediary verdict fails to exonerate the (acquitted) defendant while leaving the victim of the crime feeling cheated: ‘[The] present system leaves the person who was charged of the crime without exoneration, and it leaves the victim or their family feeling that no justice has been done’ (‘Findlay Set to Pen Defence of Not Proven Verdict; Victims’ Families Angered over Book on “Third Verdict”’, *Sunday Herald*, 16 January 2005). McMahon is surely right that the intermediary verdict neither exonerates the accused nor brings closure to the victim. But can he possibly imagine that his own proposal (returning to the traditional two Anglo-Saxon verdicts) would produce less pain for the parties?

Even on that front, however, the information is less specific and less exculpatory than one might wish. The ‘guilt not proven’ verdict could be quite specific in what it communicates, namely, that (on the interpretation I have proffered) the defendant probably committed the crime but some, perhaps significant, uncertainty remains. Even if the intermediary verdict, once clarified, could be highly informative, the Scottish ‘not guilty’ verdict, by contrast, suffers from a deficit of truth in advertising because, while it proclaims the defendant not guilty, all it apparently asserts is that the defendant’s innocence is more likely than his guilt. While a guilty verdict conveys that guilt has been proved to a high standard, the Scottish not guilty verdict seemingly rests satisfied with proclaiming someone innocent on the strength of a relatively weak standard for such vindication. Because the ‘not guilty’ verdict covers such a broad range of possibilities from $p(\text{guilt})=0$ to $p(\text{guilt})=0.5$, it is not an especially exculpatory verdict. There is still significant taint if a finding of ‘not guilty’ can emerge when it is almost as likely that the defendant is guilty as that he is innocent. It thus fails to be the ringing exculpatory counterpart to a highly inculpatory finding of guilty. That would not be objectionable if this verdict advertised itself as something like ‘innocence plausible’ or ‘probably innocent’. But, presenting itself as an unqualified verdict of ‘not guilty’ is stretching things to the point of obfuscation. Worse, it sails dangerously close to being a case of mutton dressed up as lamb.

If we combine this informational deficit with the fact, already noted, that not guilty and guilt not proven are *legally* indistinguishable in Scottish law, we have to conclude that this particular experiment with multiple verdicts leaves much to be desired. That said, the not guilty verdict is doubtless more informative and more exculpatory than the usual Anglo-Saxon acquittal (or at least it would be if the Scottish courts were willing to define it). Still, as the epigraph reminds us, that is a dismally low standard against which to judge anything. One possibility would be to define the standard of proof for the not guilty verdict as requiring clear and convincing evidence of innocence. This would be far more clearly exonerative, but would still leave the Scots with a conundrum about what to do if apparent guilt fell in the range defined by $0.25 < p(\text{guilt}) < 0.5$, supposing that clear and convincing evidence cashes out at about 75 per cent confidence. In principle, guilt not proven could be extended downwards so as to pick up the slack, but that would have the unacceptable consequence of making the probably innocent appear to be probably guilty. As we will see below, this problem could be fixed by adopting a fourth verdict—probably innocent—that would cover this remaining epistemic space.

Early modern verdicts and the Beccaria proposal

As we have seen, the Scottish and most other proposed three-element matrices begin with the current dual-outcome system and proceed to generate the third by dividing up the not guilty spectrum. The aim is to limit punishments to the class of proven guilty defendants and to send an informational message about those who, while acquitted, look guilty. I turn now to discuss briefly a different set of three-outcome matrices. Like the Scots, they use a very high standard for a full conviction but, departing sharply from that model, they define a class of persons who will be punished, albeit less harshly than if they were fully convicted.

Through the early modern era, in most civil law jurisdictions, there was a verdict of ‘semi-proof’ of guilt. This would arise when, for instance, the two reliable witnesses normally specified as the requisite proof of full guilt (absent a confession) were unavailable, but when (a) one reliable witness incriminated the defendant and (b) physical evidence corroborated that witness’s testimony. In such circumstances, the defendant could be convicted, but would receive a less harsh sentence than would have been applied had guilt been fully proved. The influential Italian penologist and political theorist, Cesare Beccaria, argued for just such a strategy in his *Of Crimes and Punishments* (1764). If the judge in a criminal trial was persuaded that the defendant was probably guilty (but not so strongly persuaded as to be able to affirm that the prevailing standard of proof—which for Beccaria was moral certainty—had been satisfied), and if the defendant’s record indicated that he was probably a risk to the community, Beccaria recommended a weaker punishment than the usual one (his own preference was for banishment in such circumstances) for a finding of semi-proof.

Both the civil practice of semi-proofs and Beccaria’s proposals about what to do absent moral certainty address an issue wholly ignored alike by the Scottish trio of verdicts and the dual verdicts of the modern system; to wit, what should be done when it appears very likely that the defendant is guilty, but his apparent guilt nonetheless fails to reach the BARD standard? The Scots, like the rest of the common law world, simply acquit in those circumstances, with the Scots possibly adding the warning—but nothing more than that—that the defendant is probably guilty. The Roman–Beccaria approach punished both the proven guilty and the presumptively guilty, leaving an acquittal for those who are neither guilty by moral certainty nor even highly likely to be guilty. (So far as I am aware, Beccaria never specified a standard of proof for his milder form of conviction.)

A thought experiment with one plausible alternative to the present system

More for the sake of argument than as a matter of advocacy, I will explore a proposal that appears to be a decided improvement on both the usual

dual-outcome matrix and also on the triple-outcome system of Scotland. It offers a verdict that is more exonerative than either a Scottish ‘not guilty’ (or the Anglo-Saxon ‘not guilty’) and a verdict that is more inculpatory than the Scots’ ‘guilt not proven’. In brief, it would consist of four outcomes: guilty, probably (or plausibly) guilty, probably (or plausibly) innocent, and innocent. The pertinent standards would be BARD for ‘guilty’, and the preponderance of the evidence (PoE) for ‘probably guilty’. The state would carry the burden of proof for both.²⁰ To activate the ‘innocent’ outcome, the defendant would have to prove by clear and convincing evidence (C&CE) that he did not commit the crime. The final outcome, ‘probably innocent’, would be the default verdict: if both parties failed to realise their respective burdens of proof, the defendant would be found probably innocent.

Lest shock and dismay descend on readers, I hasten to address some familiar obstacles to this way of thinking. Note first that *no* defendant would be obliged to seek a verdict of innocent. That would be his election. In that sense, a trial would impose no burden of proof whatever on the defendant unless he sought exoneration more powerful than a ‘probably innocent’ finding. Similarly, the fabled presumption of innocence would remain intact. Jurors would be instructed that they should assume, going into a trial, that in order to arrive at either inculpatory verdict, the prosecutor would have to satisfy one or the other of the burdens of proof indicated. Failing that, the defendant would automatically be found probably innocent, unless he requested that the jury also consider an innocent verdict, in which case the burden would fall on him.

There is nothing in this way of structuring a trial that undermines the spirit or the letter of the presumption of innocence, properly parsed. On the contrary, it is much more compatible with that principle than existing matrices of outcomes are because it makes available a genuinely exculpatory verdict. As we have seen, the most a defendant in a trial can now expect is a lukewarm verdict of ‘not guilty’, even should he present powerful evidence of his innocence (say an ironclad alibi). Under the proposal on offer here, the defendant who chose to present no evidence

20 It is commonly feared that the availability of a third (let alone a fourth) verdict would give jurors an excuse to opt for the intermediary verdict, thereby avoiding a conviction under circumstances where they would convict if obliged to choose between only two verdicts. This possibility has been empirically explored in detail with mock juries (especially by Smithman, Deady and Gracik). Their conclusion is that ‘[the verdict] Not Proven is not being used as a decision-avoidant option, but is associated with middle-range culpability ratings and higher levels of decisional difficulty’ (Michael Smithson, Sara Deady and Lavinia Gracik, ‘Guilty, Not Guilty, or ...? Multiple Options in Jury Verdict Choices’ 20 *Journal of Behavioral Decision Making* 481 at 493 (2007)). They add: ‘the hypothesis that the Not Proven option attracts jurors away from returning a conviction has been flatly contradicted ...’ (ibid. at 492).

whatever (as is his right) could expect to receive a verdict of probably innocent if the prosecutor failed to discharge his burdens of proof. That verdict would already be more exculpatory than the present 'not guilty'. If he chose to seek something stronger than that, it would be his choice. The only controversial outcome here is that the defendant could be found 'probably guilty' by a weaker standard than BARD. That is no violation of the presumption of innocence either, since that presumption of innocence is neutral with respect to the *height* of the standard of proof, provided that the latter is higher than $p(\text{apparent guilt}) > 0.5$, which the preponderance of the evidence (just) is.

Professor Leipold, who has explored the possibility of a verdict of 'innocent', has argued that the standard of proof for an innocent verdict should be no higher than the standard for an arrest.²¹ He holds that such a verdict would both exonerate the defendant and justify the elimination of his arrest and trial from the defendant's record.²² For reasons already indicated, I believe that the preponderance of evidence offers, at most, a relatively weak form of exoneration, corresponding to what I have been proposing as a 'probably not guilty' verdict. What sense does it make to have a tough standard for guilt and a very weak standard for innocence, given that an outcome of 'innocent' is not required for an acquittal? Even if we believe that false acquittals are less egregious than false convictions, and for that reason we make it much harder to convict someone than to acquit them, it does not follow that the demandingness of the standard for a finding of 'innocent' must differ markedly from that of a finding of 'guilty'.

There are huge informational gains to be expected from such a matrix of outcomes. By permitting an unqualified finding of 'innocent', that is nothing like so lukewarm as the Scottish 'not guilty' verdict, a defendant can come out of a trial with a verdict that plausibly and strongly affirms his innocence. Equally, the 'probably guilty' verdict seems (by comparison with the present 'not guilty' outcome) a highly informative message to society that the defendant is someone who probably committed a crime and that the public should react to that additional information as they will.

21 Leipold: 'For the government to insist on a very high level of proof before relieving the suspect of these same burdens would be at least odd and at most cruel. The need to vigorously prosecute crimes is sufficient justification for charges based only on probable cause, but once the defendant has shown that those charges are legally improper, it would be highly inequitable to withhold the benefits of vindication by then insisting on a far more exacting burden of proof' (above n. 1 at 1321). It is unclear whether, in a system with a 'probably innocent' verdict, Leipold's equity argument would be pertinent to a verdict of innocent.

22 'Ultimately, if a preponderance of the evidence showed that the defendant did not commit the crime, the court would enter an order that would vindicate and expunge' (Leipold, above n. 1 at 1320).

I have claimed that it would be desirable to see different legal consequences associated with each of the possible outcomes at trial. In the case of a conviction, I suppose that a defendant would, as now, be subject to imprisonment for a fixed period of time, if the crime is deemed sufficiently serious. For a finding of 'probably guilty', imprisonment would not be an option but a milder form of punishment might well be. For instance, it could be specified that a defendant receiving a 'probably guilty' verdict would, if subsequently convicted of a serious crime within n years, be given a harsher sentence than that crime would ordinarily warrant. Such a policy would presumably have at least a mild deterrent effect on those defendants found probably guilty. It would also be conceivable that double jeopardy protection (in those jurisdictions that still offer protection against double jeopardy) should be waived for defendants receiving this verdict. If new, exculpatory evidence emerges within a specified time frame, the prosecutor could, if he so elected, retry them.

If the defendant receives a 'probably innocent' verdict, the case would be closed. More than that, this verdict would foreclose the use of his arrest and trial in a subsequent judicial proceeding. Unlike many current systems of justice (and notably the USA), where a defendant can win an acquittal and yet still receive a harsher sentence or be denied bail for a subsequent conviction because of his arrest for this one, no records of that arrest and trial would appear on his rap sheet. The same policy would apply, of course, to a defendant winning a verdict of innocent, with the added feature that the state would reimburse him the costs of his defence. Arguably, if a defendant can prove his innocence by clear and convincing evidence, then the prosecutor had no business bringing him to trial in the first place and the trial judge probably had no proper justification for letting the case go to the jury.

Given the ubiquity of plea bargaining, I would be remiss if I did not explore how that might cash out under such a matrix. For defendants who appear clearly guilty beyond a reasonable doubt, the plea system would presumably function largely as it now does. In return for a plea of guilty, the prosecutor could offer a reduced sentence or a reduced charge. One important new element is that prosecutors would be able to bring to trial, and thus to enter into plea negotiations with, defendants against whom charges are now routinely dropped: specifically, those whose apparent guilt falls in the region $0.95 > p(\text{apparent guilt}) > 0.50$. What would the plea in such cases be? I take it that it would seem more than a little anomalous if a defendant pleaded 'probably guilty'. Perhaps the plea here should be something like *nolo contendere*. But what does the prosecutor have to offer that would persuade a defendant to choose this option rather than going to trial? Unless he feared a full-blown conviction at trial, it would seem he has little to lose

by electing trial. This problem could be eased by giving the prosecutor discretion to negotiate the exemption from double jeopardy associated with an outcome of ‘probably guilty’. See Table 1 below for a summary of four-outcome trials.

Likewise of interest would be the question of a prosecutor dropping or a judge dismissing charges against a defendant under such a scheme. In the current US context, the prosecutor is obliged to drop charges and a judge is obliged to dismiss

Table 1. Summary of four-outcome trials

	Guilty	Probably guilty	Probably innocent	Innocent
Standard of proof	BARD	PoE	Default	C&CE
Burden of proof	State	State		Defendant
Legal consequences	Possible incarceration	Unsupervised probation	No record of arrest/trial	No record of arrest/trial
	Appealable	Appealable	No appeal	No appeal
		Retrial on new evidence		State covers defendant’s costs
		Uncompleted probation time added to sentence limits for subsequent conviction		
Jury deliberation plurality	Majority (if unanimous for probable guilt)	Majority (if unanimous for probable guilt)	Majority (if unanimous for probable innocence)	Majority (if unanimous for probable innocence)
Available pleas	Guilty, <i>nolo contendere</i> , not guilty, innocent			
Criterion for dismissal	Failure to show <i>prima facie</i> probable guilt			

charges when the *prima facie* pre-trial case against the defendant is weaker than BARD. Under the matrix just described, charges would not necessarily be dropped in such circumstances. Instead, both prosecutor and judge would be obliged to drop or dismiss charges only if the apparent guilt in light of the prosecutor's evidence were less than what the preponderance of evidence would require.

Accordingly, more defendants than now would be retained for judicial processing rather than being set free. As with trial outcomes, the greater specificity of dismissals in a four-outcome matrix has numerous advantages for the innocent defendant. Anyone arrested, charged with a crime and subsequently released before trial could legitimately be presumed to be probably innocent, unlike dismissed defendants under the current regime, where dismissal is wholly compatible with probably being guilty. Of those defendants who were released, it would be understood that they were all probably innocent, a judgment which certainly cannot be made of currently dismissed defendants. Again, a dismissal would preclude use of the defendant's arrest for purposes of sentencing if he is subsequently convicted of a different offence.

The analysis of errors in a system of multiple verdicts

There is another point of difference between this matrix and the prevailing one: a foreseeable sharp shift in the distribution of errors. Since the standard for a conviction will remain BARD, one would expect that this proposed system would commit errors of false conviction with about the same frequency as we now see them. What should change drastically is the frequency of false acquittals. We have ample reason to expect that the current acquittal verdict (guilt not proved), teamed with BARD as the standard for conviction, produces prodigious quantities of false acquittals (counting every erroneous 'guilt not proved' verdict, every false dismissal, and every false dropping of charges as a form of false acquittal). If, as proposed here, the only false acquittals are those findings of 'innocent' or 'probably innocent' when someone is factually guilty, then we would expect far fewer of them than now occur, since none of those whose apparent guilt lies in the range $0.5 < p(\text{guilt}) < 0.95$ —persons who are presently found not guilty—would be acquitted but, instead, be found probably guilty. Because most of the members of that class are, we have to presume, probably guilty, most of the false acquittals deriving from this range would no longer be false acquittals. However, neither would they be true convictions, for a finding of 'probably guilty', which is the verdict that should result in these cases, is neither an acquittal nor a conviction.

Indeed, as this example already illustrates, a system of multiple verdicts would have us rethink what we mean by errors in the first place. Clearly, a finding of guilty for someone who was actually innocent would continue to be an error just

as a finding of innocent for a truly guilty defendant would be an error. But would a finding of ‘probably guilty’ be an error if the defendant was actually guilty? Would a finding of ‘probably innocent’ be erroneous if the defendant were genuinely innocent? And what about an outcome of ‘probably innocent’ for someone truly guilty or a verdict of ‘probably guilty’ for an innocent defendant?

To begin to make sense of this congeries of unfamiliar questions, it will be helpful to distinguish the six possible errors in this scheme into two sets. First, there is what I will call the *first-magnitude errors of initial sorting*. These occur when the outcome is at odds with the underlying referent. They include:

- a) finding innocent someone who is materially guilty;
- b) finding probably innocent someone who is materially guilty;
- c) finding guilty someone who is materially innocent;
- d) finding probably guilty someone who is materially innocent.

The *second-magnitude errors* get the predicate right, but fail to be either as exculpatory or as inculpatory as the verdict would have been had all the pertinent facts been known and properly appraised:

- e) finding probably innocent someone who is materially innocent;
- f) finding probably guilty someone who is guilty.

Errors a) and b) are roughly of the same magnitude and count as egregious in terms of their costs. The costs of error c) are the highest in the set and much more serious than d). In turn, d) is less costly than either a) or b). Our other two errors are quite different in terms of their magnitude. The error, e), of finding probably innocent someone who is, in fact, innocent appears the least costly on the list. By contrast, f) carries the serious consequence of failing to incarcerate someone who is genuinely guilty. While there is plenty of room for a detailed debate about the precise costs to be assigned to these six errors, I think there would be little disagreement that we could rank order them in terms of their egregiousness as follows:

$$c > (a \text{ or } b) > f > d > e.$$

It is the conventional, but nonetheless sound, wisdom that the demandingness of a standard of proof used in a decision should depend, in part, upon the costliness of the errors associated with that decision. If that is so, we should expect the most demanding standards to be associated with decisions that can lead to c) and a), while the standards associated with decisions that can lead to less egregious errors

can be less exacting. On the whole, that is captured by our earlier proposals. Before we can find someone unqualifiedly guilty or innocent, a strong probatory hurdle must be leaped. By contrast, where the costs of error are quite low (f, d, and e), the standard can and should be less demanding.

It would be interesting to see whether we can construct a consistent and plausible assignment of utilities to the various outcomes that would square with the three standards of proof that I have proposed here. Fortunately, Harry Saunders has developed a very useful software application that enables precisely such calculations. In Table 2 below, I have indicated assignments of utilities consonant with the rank ordering specified of the costliness of errors spelled out above. Purely for the sake of illustration, I have adopted the conventional (but I believe deeply mistaken) Blackstonian view that false convictions are 10 times worse than false acquittals.²³ Using these utilities, and Saunders' algorithm, the appropriate probabilistic standards of proof would be as follows:

Table 2. *Hypothetical utility assignments in a four-verdict system*

Verdict	State of nature	Rank order (by increasing severity)	Conjectured utility
Guilty	Guilty		1
	Innocent	6	-100
Probably guilty	Guilty	2	-3
	Innocent	3	-6
Probably innocent	Guilty	4	-8
	Innocent	1	-1
Innocent	Guilty	5	-10
	Innocent		0

²³ For some of the more serious problems confronting the Blackstone ratio, see my 'The Elementary Epistemic Arithmetic of Criminal Justice', 5 *Episteme* 282-94 (2008).

Threshold for Guilt: 96 per cent

Threshold for Probable Guilt: 50 per cent

Threshold for Innocent: 33 per cent (that is, a standard of 67 per cent for the defendant).

All three values come very close to what we understand respectively by BARD, the preponderance of the evidence and clear and convincing evidence. That does not prove that these are the right standards in any disembodied sense. Rather, it shows that there is a consistent assignment of utilities to the various outcomes at trial that respects our informal intuitions about the relative severity of these errors and that produces a series of decision standards that are in line with what I have previously proposed.

I do not suggest for a moment that this four-fold system is the best possible way of orchestrating the results that emerge from a criminal trial. What I do maintain is that it would represent a decided improvement over the status quo (whether in Scotland or the rest of the common law world). It gives the public much more pertinent information about whether the acquitted defendant probably committed the crime or not, and it gives the legal system a leverage over probably guilty defendants that it now lacks. It also makes a much more sensible use of the defendant's criminal record, insisting that prior arrests and prior convictions can be utilised for sentencing purposes only when they emerged from judicial proceedings that produced inculpatory outcomes. Finally, it allows a dismissal of charges to be genuinely exculpatory. I have claimed that the current two-verdict system serves neither the interests of the genuinely innocent defendant nor society's interests in being advised about the probable guilt or innocence of an acquitted defendant. This proposed arrangement would achieve both ends, without requiring jurors to master unfamiliar standards or to arrive at conclusions publicly that they probably are not already reaching privately.

Possible mechanics of deliberation in a system of four outcomes

Basically, there are two choices to be made under a system of four verdicts. The first is whether it is more plausible to believe that the defendant committed the crime or that he did not. It would seem natural to require this decision to be unanimous. If the jurors all agree that the defendant is more likely to have committed the crime than not, the second and last decision is whether his guilt has been proven beyond a reasonable doubt. If so, he is convicted; if not, he is found probably guilty. A simple (or super) majority should be adequate for this decision.

Similarly, if all jurors agree that it is implausible that the defendant committed the crime, the default outcome is 'probably innocent'. If the defendant has

actually pled innocent as opposed to not guilty, then a second question arises, requiring the jury to decide whether there is clear and convincing evidence that he is innocent. If a majority of jurors think so, he is exonerated with a verdict of innocent. Failing that majority, he is found probably innocent.

It is worthy of note, as one can see from Figure 1 below, that mistrial via hung jury is not a possibility in this system. Since roughly 5 per cent of current trials result in mistrials (and the enormous expense that retrial can entail), the disappearance of hung juries, along with more rapid delivery of justice, would be welcome side-benefits of this arrangement.²⁴

It might be objected that the system proposed here is vastly more complex than current decision-making processes and that its intricacies might confuse jurors needlessly. Such a judgment both over-simplifies current practices and treats the current proposal as more complex than I believe it to be. As for the former, consider what happens in those cases where the defendant has the burden of proof on a specific issue, as with self-defence in some US courts.

Jurors are first instructed that the prosecutor must prove BARD both that there was a crime and that the defendant committed it. They are then instructed that the defendant is alleging self-defence and that they must judge whether the defendant has proven, to a preponderance of the evidence, that he so acted. In short, jurors must work with two standards in one and the same case. As the decision-tree in Figure 1 shows, no jury under the proposal offered here would ever have to consider more than two standards and often it would work with only one. In every instance, they would have to decide whether they believe the defendant committed the crime, but that decision requires no state-imposed standard; it is simply a matter of what they believe about the case.²⁵ Depending on their answer to that first question, they might then have to decide whether his guilt has been proved BARD or, if he pleads innocent, whether he has proven innocence to the standard of clear and convincing evidence.

Conclusion

It would obviously be premature to infer that the four-outcome scheme explored here would prove as problem-free in practice as I have described it. Every signif-

²⁴ Kenneth S. Klein and Theodore D. Klastorin report that: 'The hung jury rate nationally in federal criminal cases is approximately 2.5%, and is approximately 5% in state criminal cases nationwide ... In California the hung jury rate in criminal trials is closer to 15%': 'Do Diverse Juries Aid or Impede Justice?' *Wisc L Rev* 553 at 562, n. 53 (1999).

²⁵ In the unlikely event that some juror claimed to be agnostic about whether a defendant committed the crime, his vote would be considered a vote against guilt.

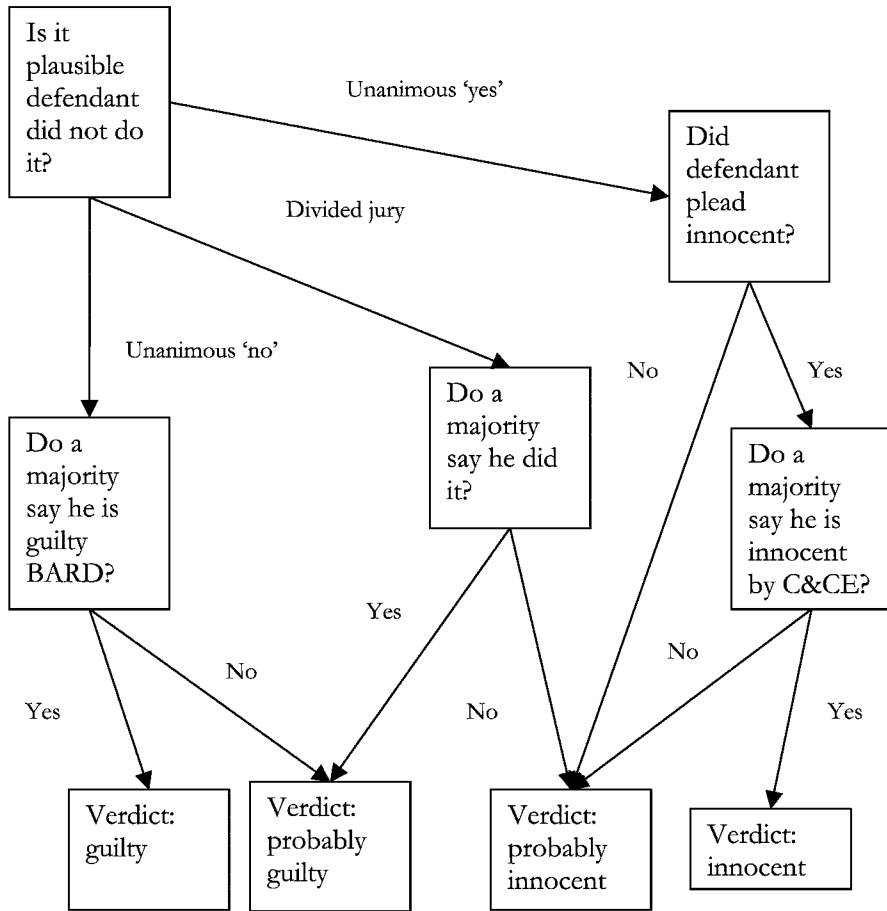


Figure 1. Jury decision-tree

icant change in a legal system brings multiple unintended consequences and unforeseen glitches in its wake. Moreover, what has been constructed here is but one of a large family of potential *n*-verdict systems. Further, readers would naturally want to jigger with different ways of parsing the legal consequences associated with each outcome or alter the utilities associated with various outcomes. The scheme described above is emphatically a shot in the dark, designed to provoke theoretical discussion of an intriguing complex of issues. The core challenge it poses is whether we can rectify the fault in all current outcome-systems that they neither offer genuine exculpation to innocent defendants nor are they sufficiently stigmatising to identify defendants who are very likely to have committed crimes.