

A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making

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Published online: 17 August 2007

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Abstract In most adversarial systems, jurors in criminal cases consider the binary verdict alternatives of “Guilty” and “Not guilty.” However, in some circumstances and jurisdictions, a third verdict option is available: Not Proven. The Not Proven verdict essentially reflects the view that the defendant is indeed culpable, but that the prosecution has not proven its case beyond a reasonable doubt. Like a Not Guilty verdict, the Not Proven verdict results in an acquittal. The main aim of the two studies reported here was to determine how, and under what circumstances, jurors opt to use the Not Proven verdict across different case types and when the strength of the evidence varies. In both studies, jurors were more likely to choose a Not Proven verdict over a Not Guilty verdict when the alternative was available. When evidence against the defendant was only moderately strong and a Not Proven verdict option was available (Study 2), there was also a significant reduction in the conviction rate. Results also showed that understanding of the Not Proven verdict was poor, highlighting inadequacies in the nature of judicial instructions relating to this verdict.

Keywords Jury decision making · Not proven verdict · Alternative verdict option

In most adversarial systems, jurors in criminal cases consider the binary verdict alternatives of “Guilty” and “Not guilty.” Typically, the prosecution will attempt to demonstrate that the case against the defendant has been “proven” beyond reasonable doubt (resulting in a Guilty verdict) while the defense will argue that the case is “not proven” (resulting in a Not Guilty verdict). This simple dichotomy has proved frustrating to juries, and jurors in a number of high profile cases have expressed a preference for an alternative verdict which more accurately reflects their view that the defendant is indeed culpable, but that the prosecution has not met the legal standards necessary to convict (Barbato 2005).

There is at least one jurisdiction where an alternative to the standard dichotomy is available to jurors. Under Scottish law, three verdict options are presented to jurors. Like jurors in criminal cases elsewhere, Scottish jurors have the option to convict or to acquit by means of a Guilty or Not Guilty verdict. But unique to the Scottish system is a third option: jurors may also decide that the Prosecution’s case has not been proven. The Not Proven verdict is actually a vote for acquittal and has the same legal effect as a Not Guilty verdict. In both instances, the accused cannot be retried for the same offense. There is a sense, however, that a verdict of Not Guilty should be returned when the jury decides that the defendant definitely did not commit the offense with which he or she is charged whereas a verdict of Not Proven is reserved for situations in which there is doubt about the accused person’s guilt, in essence, because the Prosecution has

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not proven its case beyond a reasonable doubt (Connelly 1999).

This unique verdict option has been part of the Scottish legal system for more than 300 years (Scottish Office 1994) and in recent decades, the Not Proven verdict has typically accounted for between one-fifth (Scottish Office Study 1994) and one-third (Duff 1999) of all acquittals by Scottish juries. Recent Scottish court statistics indicate that of all persons acquitted in 2004–2005, 19% had received a Not Proven verdict (Scottish Executive 2006). However, it should be noted that for acquittals in cases of homicide, the Not Proven verdict rate was 71% whereas for less serious crimes, the rate tended to be lower.

The Not Proven verdict option has also spawned significant controversy in Scotland. Debate was sparked by three separate murder trials in the 1990s in which the jury returned a verdict of Not Proven to the dismay of the victims' relatives, and was fueled by a British Broadcasting Company (BBC) documentary entitled "Not Proven: That bastard verdict" (Duff 1996). These high profile murder cases (and their controversial verdicts) launched a public debate about the merits of the three-verdict system and families of murder victims have campaigned vehemently to have the Not Proven verdict option rescinded (Connelly 1999).

Despite some misgivings in Scotland and the possibility of a review by the European Court of Human Rights for breaches of "natural justice," the Not Proven verdict option has recently been considered by other countries' legal systems (Macaskill 2005). For example, the Home Secretary suggested that a Not Proven verdict may be introduced within English courts (Barrett 2006). It would appear that the suggestion has been made on the grounds that unsafe or wrongful convictions (reached via a Guilty verdict) might be avoided were a Not Proven verdict available to jurors. In other words, the availability of a third verdict option might assist jurors who would otherwise choose an inappropriate Guilty verdict, thereby avoiding expensive compensation claims.

There have also been developments in the use of this particular alternative verdict in the United States. For instance, a "Not Proven" verdict was issued during the impeachment trial of President Clinton in 1999 by a Pennsylvania senator on the grounds that prosecutors could not meet the heavy burden of proof beyond a reasonable doubt. The use of a Not Proven verdict was factored into the decision in *United States v. Merlino* (2002), a case stemming from a murder alleged to have been committed by a Philadelphia Mafia boss when jurors were presented with a Not Proven option on their verdict sheet. Debate over the use of the Not Proven verdict within the U.S. legal system has centered on whether that verdict option might focus the jurors' attention on weaknesses in the evidence (McKenzie 1985). Given this possibility, it is unsurprising that as far back as 1994, the American Bar Association

Journal reported that a number of criminal defense attorneys were keen to have a Not Proven verdict added to the verdict form (Cassens and Curriden 1994). In California, following the acquittal of O. J. Simpson, state senator Quentin Kopp attempted to "revive legislation that would allow juries a third option between 'guilty' and 'not guilty': a middle ground called 'not proven'" (Ainsworth 1995). This proposal was opposed by the American Civil Liberties Union on the grounds that a new verdict option would be confusing for both jurors and judges and that the verdict itself fostered a perception of guilt (Barbato 2005). Ultimately, the bill was defeated. A further bill providing for a verdict of Not Proven was introduced in California in 2003 only to be defeated again. These recurring situations illustrate that this third verdict option has had some exposure and generated debate beyond the borders of its native Scotland and suggest that it may be revived and reconsidered by other entities in the future.

Unfortunately, this debate has occurred in the absence of any real data on use of the three-verdict options and has been based instead on anecdote, speculation, and preconception. One purpose of the present research was to lend an empirical perspective to this topic and to determine how, and under what circumstances, jurors opt to use the Not Proven verdict. In particular, we sought to examine whether offering jurors a third option (of Not Proven) would result in fewer convictions or fewer acquittals than would be found in a two-verdict system. In theory, if the Not Proven verdict really functions as an acquittal, then one would expect that when jurors move from a two-verdict to a three-verdict system (i.e., when they are offered three choices rather than two), the number of guilty verdicts would remain the same but the number of Not Guilty verdicts would be reduced as some of the jurors who opted to acquit the defendant under a two-option plan would now use the third Not Proven verdict option instead. In particular, this would occur for cases in the "gray area," where the evidence is not so overwhelming as to point directly to the accused person's guilt, but neither is it completely lacking (in which case an outright acquittal should obviously result).

However, given that inconsistencies associated with small changes in the decision context have been well-documented in the decision making literature, there is a distinct possibility that the verdict may not function in this manner and that guilty verdicts may also be affected by the addition of a third verdict option. For instance, in the asymmetric dominance effect (otherwise known as the attraction effect) adding an alternative option to an existing choice set increases the proportion of alternative choices from the original set. This phenomenon clearly violates the principle of regularity embedded in many rational choice models which predict that the likelihood of choosing one option from an initial choice set cannot be altered by

adding another alternative (e.g., Huber et al. 1982). This type of decision-making inconsistency has been documented across a wide range of contexts including consumer, employment, political, and partner choices (Doyle et al. 1999; Highhouse 1996; Kim and Hasher 2005; Pan et al. 1995; Sedikides et al. 1999). Adding an additional verdict choice to the standard two-verdict choice may have similar effects and impact on the selection of original verdict such that one particular choice is made more favorable by the addition of a third option.

Alternatively, and possibly more likely, the addition of the Not Proven verdict may elicit a “compromise effect” (Simonson 1989; Simonson and Tversky 1992; see also Dhar et al. 2000; Kivetz et al. 2004). In essence, the compromise effect refers to the phenomenon that an alternative or third option is more likely to be selected “when it becomes a compromise or middle option in the choice set” (Simonson 1989, p. 159). It is quite possible that the Not Proven verdict may be viewed as a “compromise” verdict when the evidence is not sufficiently compelling to warrant a guilty verdict but jurors remain doubtful as to the innocence of the defendant.

There exist a few parallels to the two-verdict vs. three-verdict situation that may be instructive. A fairly common practice in the United States is the inclusion of one or more “lesser” charges in addition to the more serious charge, and the resulting opportunity for jurors to convict on one of those lesser charges (i.e., jurors in these trials are offered more verdict options than a simple conviction or acquittal). The effects of these so-called “lesser included offenses” on jurors’ decisions have been examined in a handful of studies. In the first investigation of this topic, Vidmar (1972) asked mock jurors to read a description of an attempted robbery and consequent murder of a store proprietor under one of seven possible combinations of the following charges: first-degree murder, second-degree murder, and manslaughter (there was also an option to acquit). Vidmar hypothesized that if a defendant would generally be perceived to be guilty of manslaughter or second-degree murder in a situation where verdict choices were unrestricted (i.e., when all verdict options are available), that same defendant would likely be acquitted as the guilt alternatives become more severe (e.g., when first-degree murder is the only option for conviction). Vidmar found that when jurors were offered restricted decision alternatives, the probability of acquittal was positively related to the severity of the least serious charge; the more serious that charge, the higher the acquittal rate (the “severity-leniency” effect).

Although there are other interpretations of Vidmar’s data (e.g., Grofman 1985; Larntz 1975), subsequent studies (e.g., Kaplan and Simon 1972; Kaplan and Krupa 1986)

have supported Vidmar’s general conclusions. In addition, a more recent simulation study (Koch and Devine 1999) showed that more guilty verdicts occurred in situations where jurors had the option to convict on the lesser charge of voluntary manslaughter (in addition to the more serious charge of murder), as opposed to only a murder option. In this instance, adding a particular option increases the likelihood of conviction (or changes the type of conviction most likely to occur). In short, as predicted by the theoretical literature, the number and type of decision alternatives affect the kind of decision that is made.

Studies on the effects of verdict alternatives in insanity trials are also relevant to our concerns. American jurors deciding cases in which the insanity defense has been raised have typically been given three verdict options: Guilty, Not Guilty, and Not Guilty by Reason of Insanity (NGRI). However, during the 1970s, in response to concerns that the number of insanity acquittals was unacceptably high (and in order to provide treatment for some mentally disordered inmates), some state legislatures devised a fourth verdict option—Guilty But Mentally Ill, or GBMI (Robey 1978). Since 1975, approximately 13 states have adopted this provision (Borum and Fulero 1999).

What effect has the GBMI option verdict option had on dispositions in insanity cases? Although proponents of this legislation intended that it would decrease the number of defendants found NGRI, the implementation of the GBMI verdict did not significantly reduce the overall rate of insanity acquittals (Borum and Fulero 1999). Rather, it appears that NGRI verdicts have remained relatively stable and the number of *guilty* verdicts in insanity cases has dropped (Blunt and Stock 1985). In states with the GBMI option, some defendants who previously would have been found guilty are now being adjudicated Guilty But Mentally Ill.

Based on this example, one wonders whether the third verdict option available in Scottish criminal trials (and perhaps in other venues as well) will have the intended effect of serving as an acquittal based on lack of prosecution evidence. In other words, when the Not Proven verdict is presented as a third choice, will the number of Guilty verdicts remain the same as in the two verdict situation but the number of Not Guilty verdicts drop as predicted? If the insanity defense example is illustrative, it may forewarn us that jurors do not necessarily adhere to a rational choice model in their decision-making.

The main aim of the two studies reported here was to determine how jurors use the Not Proven verdict across different case types and when strength of evidence is manipulated. We also sought to ascertain juror understanding of the Not Proven verdict option. The verdicts of Not Guilty and Not Proven are appropriate in different circumstances yet judges give scant instruction about how jurors should differentiate between these two verdicts and

when they should use each. Instead, judges tend to describe the consequences of the verdict (i.e., both result in an acquittal without further prosecution). Furthermore, jurors tend not to ask what the Not Proven verdict means or under what circumstances they can use it.¹ Where judges have tried to provide more detail about the significance of the two acquittal verdicts, an appeal based on judicial misdirection has sometimes resulted (Duff 1996). The High Court of Justiciary in Scotland has indicated that it is dangerous to go beyond instructing jurors that there are two alternative verdicts that result in acquittal (Macdonald v. HM Advocate 1989). In the current studies, we used instructions modeled on those supplied to actual jurors regarding use of the Not Proven verdict. Thus, a secondary goal of this study was to examine whether the judicial instructions imparted the required knowledge to assist jurors in understanding the implications of the verdict.

This paper presents two juror simulation studies that manipulated the number of verdict options such that either two (Guilty, Not Guilty) or three (Guilty, Not Guilty, Not Proven) verdict options were available to mock jurors. In both studies, participants read a summary of a criminal case and received instructions on reasonable doubt and elements of the crime (and, for jurors in the three verdict condition, an additional judicial instruction on the effect of a Not Proven verdict). Participants delivered an individual verdict and answered a number of questions about the likelihood that the defendant committed the crime, their confidence in the verdict, the extent to which the evidence was sufficient to support their verdict, and implications of the Not Proven verdict. Study 1 examined the use of a third verdict option in a sexual assault case. In Study 2, we used different trial materials (a physical assault case) for purposes of generalization and also manipulated the strength of evidence to examine whether the Not Proven verdict had a differential effect depending of the probative value of the evidence.

Study 1

Governmental statistics suggest that use of the Not Proven verdict varies by crime type (Scottish Executive 2006). Whereas across all crime types, 18% of acquittals took the form of a Not Proven verdict, use of the Not Proven verdict reflected 25–35% of all acquittals in sexual assault cases. Desirous of understanding the ways that jurors use the third verdict option, we simulated a sexual assault case in Study 1. One explanation for increased reliance on the Not Proven verdict in cases of sexual assault is that the defense of consent is often raised, making sexual assault difficult to prove.

¹ Personal communication, Sheriff Nigel Morrison, 17 July 2003.

Method

Design and Participants

One hundred and four jury-eligible Scottish college students (37 male, 67 female), aged 17–62 years ($M = 19.48$ years, $SD = 5.19$) were tested individually in non-interacting groups of 12–15 and were awarded course credit for participation.² Participants were randomly assigned to one of two conditions: the three-verdict (3V) condition allowed participants to reach one of three verdicts (Guilty, Not Guilty or Not Proven) while in the two-verdict (2V) condition only the two standard verdict options (Guilty, Not Guilty) were available. Each session lasted approximately 60 min.

Materials

Trial

The summarized trial was adapted from a trial transcript concerning a charge of sexual assault (see Myers et al. 2003 for previous research using these materials). The prosecution argued that subsequent to meeting in a bar, the defendant followed the victim to her home, accessed her home on false pretences, and then sexually assaulted her. The defense suggested that the defendant and victim were previously acquainted and engaged in consensual sexual activity on the evening in question. Pursuing that version of events, the defense contended that the victim was keen to engage in a serious relationship with the defendant but the defendant rejected her advances and, as a result, the victim fabricated the allegation of sexual assault as a form of revenge. Testimony for the prosecution was presented by the victim, a witness who had been with the victim and defendant in the bar, and a physician from the local hospital who attended to the victim. The defendant testified and was cross-examined.³ Pilot work indicated that mock jurors reading the trial understood the facts at issue in the case and that roughly equivalent rates of Guilty and Not Guilty verdicts were returned. Comprehensive judge's instructions modeled on actual instructions in such cases were also presented. Within these instructions jurors were

² Although participants were required to indicate previous experience as a juror, jury experience was not screened for in advance as it was considered highly unlikely that any significant number had acted as jurors in actual trials given the age profile of the sample and the limited use of jury trial (less than 1% of all criminal trials) within the local jurisdiction (Duff 1999).

³ This trial was chosen because it has not, to our knowledge, been published in its entirety in a source likely to be accessed by the current participant sample nor would details of a trial such as this have been reported in the British media.

informed that “an individual is guilty of sexual assault if he or she engages in sexual conduct with another adult without the consent of the other party and uses any degree of physical force to engage in the victim’s compliance.” Jurors were also reminded of the presumption of innocence and of the reasonable doubt standard to be considered before reaching a verdict. In keeping with the local standards of proof requirements, jurors were also reminded that corroborative evidence was a requirement for conviction.

Additional instructions were provided to participants in the 3V conditions concerning the use of the Not Proven verdict. These instructions, which replicated those provided to actual jurors, were as follows: “There are three verdicts open to you here in Scotland: Not Guilty, Not Proven and Guilty. The practical effect of verdicts of Not Guilty and Not Proven is the same. Both result in an acquittal, and a defendant (also known as the accused) acquitted of a charge cannot be prosecuted again on it.” In keeping with the experience of actual jurors in the local jurisdiction, mock jurors were only required to decide whether the defendant was guilty as charged (i.e., no sentencing decisions were imposed). Mock jurors in the 2V condition were also informed that a Not Guilty verdict would result in an acquittal and, in line with instructions provided to participants in the 3V condition, were also informed that a defendant acquitted of a charge cannot be re-prosecuted on the same charge. Mock jurors were not informed of the available verdict options prior to reading these instructions.

Procedure

Few details of the study were provided to mock jurors prior to attendance. Participants were informed that the research concerned “individual differences in decision-making” and were instructed to work through the test materials without conferring. Participants in both conditions read the same trial summary. All participants were asked to imagine they were sitting in court hearing the evidence presented to them and were instructed to base their verdict only on the evidence presented in the trial summary. They were instructed to read the trial materials carefully in the order presented. On completion of the trial booklet, mock jurors were required to indicate their verdict and degree of confidence that they had reached the correct verdict (1 = Not at all certain, 7 = Absolutely certain), estimate the percentage likelihood that the defendant had committed the crime with which he had been charged and supply a rationale for reaching the verdict they did.

In the second part of the booklet, participants’ understanding of the Not Proven verdict was examined in all conditions. Participants were required to rate their understanding of the verdict (1 = Do not understand; 7 = Fully

understand) and indicate what they believed the implications of a Not Proven verdict would be for the defendant (prison sentence, re-trial, acquittal, monetary fine). A “Don’t Know” option was also included. Participants were then specifically asked whether the defendant could be re-tried if new evidence came to light.

No time limits were imposed on the completion of these tasks. On completion of the response booklet, all participants were fully debriefed.

Results and Discussion

The main aim of this study was to compare verdicts reached by jurors who were allowed to choose a Not Proven verdict with those reached by jurors in the standard two-verdict condition. All statistical tests were performed with a preset $\alpha = .05$. Where homoscedasticity was an assumption of a statistical test, Levene’s test for equality of variance was assessed, and the assumption supported unless otherwise noted. Effect sizes are reported as Cohen’s d and Cramer’s ϕ where appropriate.⁴ Analyses of verdict choice suggested that the availability of a third verdict option had a significant effect on the decisions reached by jurors (see Table 1). Specifically, jurors in the 3V condition were less likely to reach a Not Guilty verdict than were jurors in the 2V condition (7% vs. 39%), $\chi^2(1, N = 104) = 16.10, p < .01, \phi = .39$.

As a Not Proven verdict has the same practical outcome as a Not Guilty verdict, verdicts were recoded to reflect a conviction or acquittal. The acquittal rate was 39% in the 2V condition and 49% in the 3V condition (including Not Guilty and Not Proven responses), with a corresponding conviction rate of 61 and 51%, respectively. This association was not significant, $\chi^2(1, N = 104) = .97, \phi = .10, ns$. Overall confidence in verdict did not differ between experimental conditions, $t(102) = -1.59, d = -.32, ns$.

In terms of estimates that the defendant actually committed the crime, participants who reached a Not Guilty verdict in the 3V condition returned estimates that were roughly equivalent to those from jurors who reached a Not Guilty verdict in the 2V condition (3V $M = 42.50\%$; 2V $M = 42.35\%$). Mock jurors who opted for a Not Proven verdict did not give significantly higher estimates of guilt likelihood ($M = 52.40\%$) than participants reaching a Not Guilty verdict in either 3V or 2V condition. These data are shown in Fig. 1.

⁴ Cohen (1988, 1992) prescribed the values for small, medium, and large effect sizes for different significance tests. For independent t tests, the values for small, medium, and large d are .20, .50, and .80 respectively. Cohen’s conventions for Cramer’s ϕ ($df = 1$) are .10 (small), .30 (medium), and .50 (large).

Table 1 Proportion of verdicts (guilty, not guilty and not proven) by experimental conditions, Study 1

	Guilty		Not guilty		Not proven	
	Prop.	<i>N</i>	Prop.	<i>N</i>	Prop.	<i>N</i>
Two Verdict (2V)	.61	27	.39	17	–	–
Three Verdict (3V)	.51	31	.07	4	.42	25

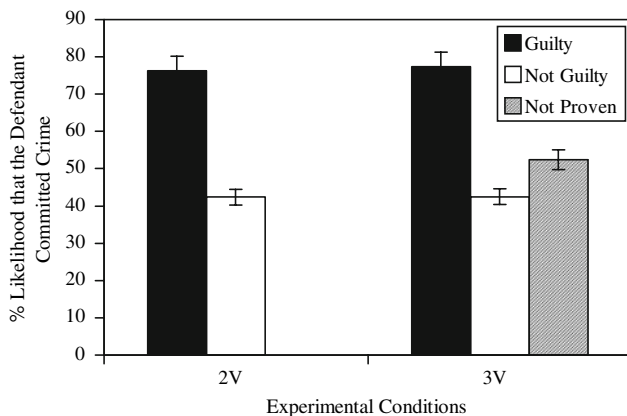


Fig. 1 Percentage likelihood that the defendant committed the crime by verdict condition, Study 1

Verdict Understanding

We asked jurors to reflect on their understanding of the Not Proven verdict option. Results suggested that general awareness of the Not Proven verdict in this sample was somewhat limited; 55% of participants in the 2V condition indicated that they had not previously heard of the verdict. Despite the brevity of the judge's instructions regarding the verdict, participants in the 3V condition rated their understanding of the verdict significantly higher than those in the 2V condition who received no information about the Not Proven verdict, $t(102) = -2.07$, $p < .05$, $d = -.41$. Seventy-seven percent of participants in the 3V condition correctly understood that reaching a Not Proven verdict would result in the acquittal of the defendant (whereas only 57% of 2V participants responded correctly). However, over one-third (35%) of 3V participants mistakenly believed that the accused could be retried for the same offence at a later date. Thus, the judicial instructions proved reasonably effective in representing the third verdict as a functional acquittal, but our results also mirror the findings of public surveys identifying misconceptions about the implications of the verdict.

Verdict Rationale

When asked to indicate the main reason for selecting the verdict they did, participants provided a number of responses. Responses were categorized by two coders

($r = .84$) and reflected a number of categories including references to specific witnesses (e.g., doctor's testimony) or behavior of the victim (e.g., she let him walk her home). For participants who reached a Guilty verdict, the evidence provided by the doctor who examined the victim proved most compelling (in the 2V condition, 59% gave this response and in the 3V condition, 77% mentioned this testimony). A key comparison was between participants who reached a Not Guilty verdict in the 2V condition and participants who reached a Not Proven verdict in the 3V condition. Although both are essentially acquittal verdicts, the current results suggest that when the Not Proven verdict is available, mock jurors are more likely to opt for this verdict. The most frequent response from participants who opted for a Not Guilty verdict in the 2V condition was "Insufficient evidence" (18%). However, in the 3V condition, 80% of participants who reached a Not Proven verdict identified "Insufficient evidence" as the main reason for choosing that particular verdict. There was a significant association between verdict condition and frequency of the "insufficient evidence" verdict rationale, $\chi^2(1, N = 104) = 11.36$, $p < .01$, $\phi = .33$.

Results of the current study clearly indicate a large shift from use of the Not Guilty verdict to the functionally equivalent Not Proven verdict when the latter is made available. This pattern suggests that jurors who acquit using the Not Guilty verdict when three verdict options are available may be more convinced of the defendant's innocence than are jurors who opt for a Not Guilty verdict when only two verdict options are available. Apparently, some jurors in the latter group may suspect, but are not convinced, that the defendant is guilty. This is just the situation in which a Not Proven verdict would be appropriate.

Study 2 was conducted to further examine the circumstances in which jurors opt for the Not Proven verdict when it is presented as an option. Theoretically, the addition of a third verdict option should have the most effect in cases where the strength of the evidence against the defendant is only moderately strong and where jurors might otherwise opt to acquit because the prosecutor failed to convince them beyond a reasonable doubt of the defendant's guilt. A Not Proven alternative may seem attractive to these jurors. On the other hand, when the evidence is weak and acquittal is likely and when the evidence is strong and conviction is likely, the Not Proven alternative may be less useful.

Study 2 also differed from the previous study in its case facts. Whereas we began our efforts with a sexual assault case to maximize the opportunity to observe jurors relying on the Not Proven option, we used the facts of a physical assault case in Study 2 for purposes of generalizability.

Study 2

Method

Design and Participants

One hundred and forty-two jury-eligible community⁵ participants (42 male, 100 female), aged 18–64 years ($M = 25.0$ years, $SD = 11.49$) were tested individually in groups of 4–8 members and were paid a cash honorarium for their participation. A 3 (Strength of Evidence: Weak, Moderate, Strong) \times 2 (Verdict options: 3 verdicts, 2 verdicts) between-subjects design was employed and participants were randomly assigned to one of six conditions. As before, in the three-verdict (3V) conditions, participants were allowed to reach one of three verdicts (Guilty, Not Guilty or Not Proven) while in the two-verdict (2V) condition only the two standard verdict options (Guilty, Not Guilty) were available. Strength of evidence was manipulated so that the evidence presented against the defendant within the trial was strong, moderate, or weak. Each experimental session lasted approximately 80 min.

Materials

Trial

The trial summaries were developed from a trial transcript concerning a physical assault (see Wilson et al. 1986 for previous research using these materials). The trial concerned an aggravated assault in which the prosecution attempted to demonstrate that the defendant committed assault when he threw a bottle in a crowded pub. The bottle broke, striking the victim in the eye with flying glass. The defense contended that the defendant did not assault the alleged victim, that someone else threw the bottle and that the case is one of mistaken identity. Direct testimonies were presented as detailed summarized statements. A summary of the cross-examination questions followed each direct testimony. The prosecution presented testimony from the victim, a witness to the incident, and a police

officer attending the scene. The defendant testified and was cross-examined. Testimony is also presented by the defendant's girlfriend who was with him in the pub.⁶ Extensive pilot testing ($N = 75$) was conducted to produce three versions of the original trial that varied in the strength of evidence against the defendant. Using a between-subjects design, pilot participants read the weak, moderate or strong version of the trial summary and then rated the strength of evidence against the defendant using a 7-point scale (1 = Weak; 7 = Strong). Ratings were significantly different between conditions ($F(2, 70) = 13.40$, $p < .001$) and post-hoc testing indicated a significant difference between each group (Weak $M = 2.92$; Moderate $M = 3.96$, Strong $M = 4.87$). As before, a summary of the cross-examination questions followed each direct testimony and comprehensive judge's instructions were provided.

Procedure

Participants were recruited in small groups and randomly assigned to one of the six experimental conditions such that all group members were in the same experimental condition (i.e., same evidence strength and verdict options). In the first part of the study, the initial instructions, procedure and response booklets were largely the same as in Study 1. An additional question was included following the verdict and confidence in verdict items to further evaluate verdict rationales. As in Study 1, participants' understanding of the Not Proven verdict was also assessed. The Not Proven questionnaire was extended to include participant ratings of the extent to which a Not Proven verdict might be perceived as a satisfactory outcome for various participants in the legal process (i.e., victims of crime, innocent defendants, guilty defendants, general public). Participants were also asked whether they believed a defendant receiving a Not Proven verdict would be disadvantaged in anyway after the trial.

In the second part of the study, after the preliminary response booklets had been completed by all group members, the group was instructed to engage in deliberations for at least 20 min and was given the following instructions:

“You must now discuss the case as a group and, like a real jury, reach a final group verdict. In the first instance, you should aim to reach a unanimous verdict (i.e., a verdict you all agree with). If this is not possible, please record the verdict of the majority of group members.”

⁵ The majority of the community based jury-eligible sample was drawn from a database of local community volunteers held at the University of Aberdeen. Additional participants were recruited by contacting local groups and societies to request volunteers.

⁶ Again, this trial was chosen because it has not been published in its entirety in a source likely to be accessed by the current participant sample nor would details of a trial such as this have been reported in the British media.

There were 14 juries in the 2V conditions and 14 juries in the 3V conditions. Jury groups were provided with a verdict sheet on which they could record their verdict (2V vs. 3V in accordance with the relevant condition) and whether or not the verdict had been reached unanimously. All discussions were audio recorded. On completion of the study, all participants were fully debriefed.

Results and Discussion

As in Study 1, the main aim of this study was to compare verdicts from jurors given an alternative verdict option (Not Proven) with verdicts reached in the standard two-verdict condition when the strength of evidence against the defendant was weak, moderate or strong.

Again, the availability a third verdict option had an impact on the decisions reached by jurors (see Table 2). In the 3V condition there was a significant association between verdict options and likelihood of reaching a Not Guilty verdict; jurors in the 3V condition were less likely to reach a Not Guilty verdict than were jurors in the 2V condition ($\chi^2(1, N = 142) = 59.19, p < .001, \phi = .65$). Only 5% of participants in the 3V condition reached a Not Guilty verdict (compared to 65% in the 2V condition) and 76% opted for Not Proven verdicts.

All Not Proven and Not Guilty verdicts were recoded as acquittals (and Guilty verdicts were recorded as convictions). The conviction rate for mock jurors (irrespective of evidence strength) was 35% in the 2V condition and, 22% in the 3V condition. This association was marginally significant, $\chi^2(1, 142) = 2.9, p = .06, \phi = .10$. We conducted a hierarchical loglinear (HILOG) analysis to examine the effects of verdict options (2V or 3V) and evidence strength (weak, moderate, strong) on verdict outcome (conviction or acquittal). The variables contributing to the final model were evidence strength and verdict outcome, $\chi^2(6) = 9.52, p = .15$. Follow-up χ^2 tests were conducted to examine the interaction nested under these variables. For the weak evidence condition, there was no association between

verdict options and verdict outcome, $\chi^2(1, 49) = 2.17, p = .24, \phi = .21$). Similarly, in the strong evidence condition, there was no association between verdict options and verdict outcome, $\chi^2(1, 52) = 0.41, p = .36, \phi = .09$). However, for the moderate evidence condition, the conviction rate in the 2V condition was 33% whereas in the 3V condition, the conviction rate was only 5% resulting in a significant association between verdict option and verdict outcome, $\chi^2(1, 41) = 5.24, p = .03, \phi = .36$.

Irrespective of choice of verdict, there was a main effect of verdict option (but not evidence strength) on overall confidence in verdict between experimental conditions such that participants in the 3V condition indicated higher confidence in their verdict choice (3V $M = 5.33$; 2V $M = 4.62, F(1,142) = 16.04, p < .001, \eta_p^2 = .11$).

For estimates of percentage likelihood that the defendant committed the crime, there was a main effect of evidence strength in the predicted direction with the strong evidence condition rated highest ($F(2,142) = 24.56, p < .001, \eta_p^2 = .27$). There was no effect of verdict condition or any interaction effect on rated likelihood that the defendant committed the crime. In the 3V condition, 100% of participants who reached a Not Proven verdict stated that they had chosen this verdict due to insufficient evidence to reach either of the other verdict alternatives.

In order to examine the nature of the verdict reached, statements reflecting verdict certainty were examined. Across all verdicts in all conditions, a majority of participants (61%) thought it likely that the defendant *had* committed the crime but they could not be certain whereas 28% thought it likely the defendant *had not* committed the crime but could not be certain. Ten percent of participants were certain the defendant was guilty while only 1% of participants were certain of his innocence. For participants reaching a Not Proven verdict, 64% thought it likely the defendant had committed the crime but could not be certain although this decision rationale varied by evidence strength (Weak: 55%; Moderate: 61%; Strong: 83%). By comparison, 58% of participants reaching a Not Guilty verdict in

Table 2 Proportion of individual juror verdicts (guilty, not guilty and not proven) by experimental conditions, Study 2

Evidence strength	Guilty		Not guilty		Not proven	
	Prop.	N	Prop.	N	Prop.	N
Two Verdict (2V)						
Weak	.08	2	.92	22	–	–
Moderate	.33	7	.67	14	–	–
Strong	.63	15	.37	9	–	–
Three Verdict (3V)						
Weak	.00	0	.08	2	.92	23
Moderate	.05	1	.05	1	.90	18
Strong	.54	15	.00	0	.46	13

the 2V condition believed it likely that the defendant had committed the crime and this certainty also varied by condition, (Weak: 46%; Moderate: 64%; Strong: 78%). There was no overall association between verdict options, evidence strength, and choice of certainty statement.

Verdict Understanding

As in Study 1, general understanding of the Not Proven verdict was somewhat lacking with only 50% of participants in the 2V condition reporting previous knowledge of the verdict. Again, participants in the 3V condition understood the Not Proven verdict better than participants in the 2V condition, $t(139) = -4.68$, $p < .001$, $d = -.79$). Seventy-eight percent of participants in the 3V condition correctly understood that reaching a Not Proven verdict would result in the acquittal of the defendant (whereas only 52% of 2V participants responded correctly). Similarly, only 37% of 3V participants mistakenly believed that the accused could be retried for the same offence at a later date (compared to 87% of 2V participants).

For questions concerning perceptions of the Not Proven verdict by various stakeholders in the legal system, ratings of the extent to which the verdict would constitute a satisfactory outcome for different parties were on a 7-point scale (1 = Not at all satisfactory; 7 = Very satisfactory). The mean perceived satisfaction ratings were 1.84 ($SD = 1.21$) for victims of crime, 2.92 ($SD = 1.15$) for the general public, 3.71 ($SD = 1.93$) for innocent defendants and, unsurprisingly, 6.44 ($SD = .90$) for guilty defendants. There was no difference in responses between experimental conditions.

Finally, 92% of participants believed that defendants may be treated differently after receiving a Not Proven verdict as opposed to a Not Guilty verdict despite the fact that both verdicts result in an acquittal. All rationales provided in support of this belief implicated a perceived stigma associated with the Not Proven verdict e.g., “*Not proven implies that the crime could have been committed by the accused but insufficient evidence means it cannot be proven so the accused could be getting away with it;*” “*A not proven verdict indicates that they are thought guilty but there is just not enough evidence to convict them—they would therefore be treated differently to someone thought to be completely innocent and exonerated;*” “*The public will still view the defendant with suspicion and an element of guilt.*”

Jury Group Verdicts

Given the relatively small number of jury groups ($N = 28$), the main purpose of examining group data is to identify the frequency of the Not Proven verdicts at the jury group

level, rather than to conduct statistical analyses. The jury verdicts mirror individual level decisions in that when a Not Proven verdict was available it was preferred to a Not Guilty verdict. Whereas the Not Guilty verdict represented 79% of jury group verdicts in the 2V condition only 7% of juries selected a Not Guilty verdict in the 3V condition and the remainder (64% of 3V juries) selected a Not Proven verdict. “Lack of evidence” was cited by all juries as the rationale underpinning the final choice of Not Proven verdict.

Not surprisingly, the likelihood of a hung jury was reduced when a third verdict option was presented. Unanimous verdicts were reached by only 50% of juries in the 2V condition but by 71% of juries in the 3V condition. The content of deliberations for both 2V jury groups reaching a Not Guilty verdict and 3V jury groups reaching a Not Proven verdict was thematically similar and tended to focus on lack of evidence as a precursor to either verdict.

General Discussion

The aim of the current research was to examine empirically the use of the Not Proven verdict option and determine how jurors use this third verdict alternative. To our knowledge, no previous experimental examination of this verdict has been conducted despite the fact that approximately 7,500 individuals processed through the criminal justice system in Scotland in the past 5 years have received such a verdict and the Not Proven option is being considered by other jurisdictions. Although the verdict functions as an acquittal and has no formal sanctions associated with it, one might argue that for a truly innocent defendant, a Not Proven verdict may appear to imply guilt in the absence of compelling evidence or corroboration or, at the very least, be considered a “second class” acquittal (Duff 1996).

In both studies we observed a large shift from use of the Not Guilty verdict (in the two-verdict condition) to the Not Proven verdict when the latter was an available option (in the three-verdict condition). Furthermore, in Study 2, we observed a significant drop in the conviction rate in the moderate evidence condition when the Not Proven verdict alternative was available. In other words, when the case against the defendant was only moderately strong (as opposed to weak or very strong), participants were more inclined to opt for a Not Proven verdict as opposed to Guilty verdict. However, in the weak and strong evidence conditions, the availability of the Not Proven verdict had no effect on the conviction rate and, as in Study 1, simply reduced the selection of Not Guilty verdicts.

This finding demonstrates interesting decision-making inconsistency: Jurors are not adhering to a rational choice model that would predict that if defendants could be

considered guilty when one set of verdict choices is available they should also be considered guilty when an expanded set of verdict choices is available (i.e., no further information has been made available to render the defendant “less guilty”). As predicted, the availability of the Not Proven verdict results in the type of decision making inconsistency documented in a wide range of other applied contexts (e.g., Doyle et al. 1999; Highhouse 1996; Kim and Hasher 2005; Sedikides et al. 1999). These data are also consistent with the use of the NGRI verdict alternative in the United States (recall the drop in *convictions*, rather than acquittals, when an “intermediate” verdict option was provided).

On the other hand, as a drop in conviction rates was observed in only one condition (i.e., moderate evidence condition of Study 2), it could be argued that a Not Proven verdict actually promotes more accurate juror decisions. Instead of being frustrated by the standard binary dichotomy, jurors with only moderately strong evidence against the defendant were able to reach a verdict that reflected their view that the defendant may have been guilty but that there was insufficient evidence to convict. An examination of the rationales for choice of verdict indicated that the majority of participants who chose both a Not Guilty verdict and a Not Proven verdict did so because they believed there was insufficient evidence to convict. These data raise the possibility that jurors may not be particularly discriminating in their use of the Not Proven verdict in situations where a Not Guilty verdict might be a better alternative. In other words, the Not Proven verdict may become the default verdict; it may simply be easier and more expeditious for jurors to reason that the prosecution’s case was not proven than to assess whether they had a reasonable doubt about the defendant’s guilt, in which case they should acquit outright.

In this way, our results fit well with results from research on the “compromise effect” in decision making whereby a compromise alternative is more likely to be selected from a three-option set (e.g., Simonson 1989). This effect has been explained as a type of “extremeness aversion” whereby decision makers view extreme values or options as less attractive (Chernev 2004; Simonson and Tversky 1992). In the current studies, the availability of “Not Proven” verdict certainly reduced selection of the relatively unambiguous Not Guilty verdict and, in particular circumstances, the similarly unequivocal (or “extreme”) Guilty verdict.

The availability of a Not Proven verdict could also have implications for jury group decisions in that it may function as a compromise or middle course between juror group members. Study 2 presents some preliminary findings on this issue. As we had a relatively small jury group sample, we are cautious in reaching firm conclusions but it would appear that a typical leniency effect promoting a Not

Guilty bias (cf. MacCoun and Kerr 1988) was present in the 2V condition, but not in the 3V condition. There was, instead, a high rate of Not Proven verdicts (64%) in the 3V condition. These results suggest that the Not Proven verdict may be used as a “compromise.” Clearly, further research is needed to clarify the precise nature of that compromise and any associated social decision schemes.

This apparent “default” use of the Not Proven verdict may reflect the inadequacy of the judge’s instructions concerning use and implications of the Not Proven verdict. In the current studies, we provided jurors with the verbatim instructions likely to be used in court, yet their understanding of the Not Proven verdict was relatively poor. The most serious conceptual error was the assumption that the defendant may be retried should more evidence come to light. This result mirrors results of the BBC public opinion poll (1993) which also reported that a sizeable portion (59%) of the Scottish public was misinformed about how the Not Proven verdict works. The finding, more than 20 years later, that potential jurors are displaying similar misconceptions represents a clear challenge for the Courts and legislators to correct.

Our data also suggest that “default” use of the Not Proven verdict is problematic at a societal level. Although the nature of an acquittal (Not Guilty or Not Proven) may not be legally important, our results suggest that a Not Proven verdict is viewed as a “second-class” acquittal and a large majority of participants indicated that they believed a defendant in receipt of a Not Proven verdict would encounter stigma (in the form of continued suspicion) as a consequence of the verdict. This perception is unsurprising given the controversial nature of the verdict. On one hand, Article 6 of the European Convention on Human Rights (ECHR) and the Sixth Amendment to the United States Constitution guarantee the right of citizens to a fair trial but it could be argued that the “presumption of innocence” is removed when a Not Proven verdict is delivered. On the other hand, the Not Proven verdict may put the government at a disadvantage because it gives the accused two chances of being acquitted but only one of being convicted. To this end, a review of the Not Proven verdict by the European Court of Human Rights is underway to assess the extent to which the verdict breaches rules of “natural justice” and is fair to both the government and defendants.

There are a number of limitations associated with the current studies; one concerns disparity between the frequent use of the Not Proven verdict in our studies and its less frequent use among actual jurors in Scotland. There are a number of possible explanations for this disparity. First, as discussed earlier, statistics that describe the average use of the verdict mask its use across a broad range of case types. The second explanation concerns the strength of the evidence against the accused in the cases we used,

particularly in Study 1. Whereas the average conviction rate for charges brought before Scottish criminal courts is 89%, only approximately one half of jurors in the sexual assault case opted to convict. In our first study, we purposefully structured our materials so that there was ambiguity about the defendant's actions, reasoning that the Not Proven verdict would be chosen more often in cases in the "gray area" when the evidence did not overwhelmingly support either side. In doing so, we may have presented cases that were more ambiguous than those typically offered to juries and, as a result, increased the likelihood of a Not Proven verdict. However, in Study 2, where strength of evidence was manipulated, we obtained clearer insight into the use of the Not Proven verdict under conditions of varying evidence strength.

In terms of methodology, as with all laboratory-based juror decision-making studies, our studies lack the external validity associated with the actual experience of being a juror (for a full discussion of this and associated limitations, see Bornstein 1999; Studebaker et al. 2002). The methodology, specifically the use of trial summaries, may also account to some degree for the disparity in use of the Not Proven verdict between our sample and the average use of the verdict by actual jurors. However, unlike many studies, we did include the opportunity to deliberate (Study 2) and we also used actual Not Proven verdict instructions in keeping with the local custom. Future research on this issue might consider the use more ecologically valid trial simulations.

Although jurors in many cases have multiple options for convicting defendants (e.g., first degree assault, second degree assault), it is rare that they have multiple options for acquitting. Acknowledging limitations in the current studies, these data provide the first empirical insights into juror decision-making in situations where a Not Proven verdict option is provided. The availability of this alternative verdict option clearly impacts the decision-making processes of jurors. Our final study also goes some distance in identifying particular circumstances in which a Not Proven verdict might be used at the expense of a Guilty verdict, which has important implications for the legal system.

Several ideas for future research are apparent. One might examine the extent to which the Not Proven verdict option is used as a tool of compromise between Guilty and Not Guilty factions within a jury. In particular, it would be beneficial to examine decision schemes for use of the verdict under different evidentiary conditions. If jurors opt for this choice as a compromise position, the incidence of hung juries may be reduced.⁷ It would also be useful to determine

how the Not Proven verdict option influences the nature of the deliberation. In our second study, deliberations appeared to "dry-up" and discussions focused on lack of evidence once the possibility of a Not Proven verdict was raised by a jury member. It may be that the availability of a Not Proven verdict promotes a verdict-driven deliberation style whereby individual jurors take a position in relation to their verdict preference and cite evidence in support of that preference (in contrast to "evidence-driven" deliberations where jurors work from the evidence to a verdict (Hastie et al. 1983)). Thus, on one hand, the availability of the Not Proven verdict option may serve to limit the number of hung juries; on the other hand, it may also promote a less thorough, and therefore less desirable, form of deliberation. Perhaps the most obvious need for future research is related to the apparent inadequacy of judicial instructions. There is a clear need for revision of the way jurors are educated about the use and implications of the Not Proven verdict and about the conditions in which it is appropriate.

In conclusion, this first systematic examination of the Not Proven verdict demonstrates some important features of the verdict and conditions of its use. Drawing on the decision making literature, we have been able to suggest the likely phenomena underpinning its use. Our results also suggest that, for an innocent defendant, a Not Proven verdict is at best morally unsatisfactory and, at worst, may incur social sanctions by virtue the of associated stigma. Future research should focus on the experience of actual defendants in receipt of the Not Proven verdict. Finally, a lower conviction rate is unlikely to capture public support in favor of amending the binary option favored in most adversarial systems—although, of course, the third verdict may be the most accurate verdict when the case against the defendant is "not proven" either way.

Acknowledgments We wish to thank Jane Anderson and Yvonne Adams for their assistance in collecting, collating and coding the data for Study 1. We also wish to thank the Editor and a number of anonymous reviewers for their constructive, comprehensive and thoughtful comments, which contributed significantly to the completion of our manuscript.

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⁷ As a simple majority jury decision is adequate under Scottish law, the latter outcome is not a particularly pressing concern. However, the possible degradation of the deliberative process certainly should be.

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