Legal Theory (2024), 30: 2, 105–127
doi:10.1017/S1352325224000090

CAMBRIDGE UNIVERSITY PRESS

RESEARCH ARTICLE

The Three-Verdict Problem

Jack H.L. Whiteley*

Minnesota Law, University of Minnesota, United States
Email: whiteley@umn.edu

Abstract

In Scotland, for hundreds of years, juries have chosen between three criminal verdicts: "guilty," "not guilty," and "not proven." The "not proven" verdict's legal meaning remains mysterious. In this article, I aim to describe and solve the problem. Applying modern ideas about standards of proof to the intellectual history of "not proven" yields eight plausible meanings for the verdict. With the extent of the problem in mind, I offer a solution. In the three-verdict system, jurors should deliver a "guilty" verdict when they believe that the accused has committed the crime and a "not guilty" verdict when they believe that the accused has not committed the crime. The "not proven" verdict is for all other states of mind. Clarifying this question matters for determining whether the verdict's existence is just. It also offers some evidence for how the criminal standard of proof works in other legal systems.

I. Introduction

Criminal trials in most jurisdictions end in one of two ways. The accused is pronounced guilty or not guilty. A "guilty" verdict licenses criminal punishment, while a "not guilty" verdict results in acquittal, which protects the accused from being tried again for the same crime.

In Scotland, it is different. Scottish juries may choose a third verdict: "not proven." Like "not guilty," "not proven" is a verdict of acquittal. Scottish juries are given few instructions on how the verdicts differ, often being told simply that there are two verdicts of acquittal, and they may choose either one.[1] By offering these two verdicts, Scotland appears to be unique.[2]

*I am very grateful to Brian Bix, Catherine Siyue Chen, Claire Hill, Jeesoo Nam, and two anonymous reviewers at *Legal Theory* for their comments on previous drafts.

[1]See Judicial Institute for Scotland, Jury Manual 112.1 (2021).

[2]Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, 62 Law & Contemp. Prob. 173, 195 (1999). There are—and have been—differentiated verdicts in other jurisdictions that do not use the Scottish typology. See Federico Picinali, Justice In-Between 17–56 (2022) (describing differentiated verdicts in medieval Europe and in Italy during the nineteenth and twentieth centuries); James Chalmers, Fiona Leverick, and Vanessa E. Munro, *Beyond Doubt: The Case Against "Not Proven"*, 85 Modern L. Rev. 847, 850 (2022); Judith Hahn, *Guilt, Innocence, and Remaining Doubts: Some Considerations on the*

The "not proven" verdict's existence, commentators believe, is "a matter of historical accident rather than conscious design."[3] Originating in seventeenth-century special verdict forms, which asked the jury to decide whether elements of the charged offence were proven or not proven, "not proven" endured as a third verdict after the forms went out of use.[4] In the intervening centuries, the verdict has been criticized as inconsistent with the principle of innocent until proven guilty, and sometimes defended as a protection for the accused from wrongful convictions.[5] Juries' willingness to issue it has also changed over time, once making up more than half of all verdicts of acquittal and now making up substantially less.[6]

Recently, the Scottish Parliament has proposed abolishing the verdict, inviting perspectives from the public.[7] As part of the process, the government has commissioned reports on the "effects of the unique features of the Scottish jury system on jury reasoning and jury decision making," and in particular, "jurors' understandings of the not proven verdict and why might they choose this over another verdict."[8]

The conversation about whether to retain or abolish the verdict is strikingly agnostic about the verdict's legal meaning. Because courts do not explain the verdict's meaning to juries, the question has shifted to trying to determine how members of the public understand it.[9] But public perceptions of the "not proven" verdict are not necessarily good evidence of the verdict's legal meaning. Legal commentators do not take lay perceptions of burglary or manslaughter as determining the legal requirements of those crimes. Legal concepts often have specific meanings, which means if juries take a different view of these meanings, they are applying the concepts incorrectly, rather than revealing those concepts' meaning.[10]

The agnosticism is all the more curious because it was not shared in previous centuries. In the nineteenth century, a comment attributed to Lord Cockburn

---

Congregation for the Doctrine of the Faith's Three-Verdict System of Deciding Cases of Sexual Abuse, 10 Oxford J. L. & Religion 91, 102–4 (2021) (concluding that a guide for investigations within the Catholic church "roughly complies" with Scotland's legal order). Proposals have also been made for other kinds of differentiated criminal culpability thresholds. See, for example, Talia Fisher, *Conviction without Conviction*, 96 Minn. L. Rev. 833, 836 (2012) (developing a probabilistic culpability regime, on which, "[f]or example, for a given offense, conviction on guilt beyond all residual doubt would yield maximal punishment (capital punishment, for instance), whereas conviction on guilt beyond a reasonable doubt would render near-maximal sanctions (allowing for life imprisonment but precluding capital punishment). Conviction by clear and convincing evidence for the same crime would lead to an intermediate level of punishment (less than a life sentence), while conviction on guilt by a preponderance of the evidence would entail only the lowest of the possible sanction alternatives (such as a fine).").

[3]Chalmers et al., *supra* note 2, at 849.

[4]*See infra* Part I.

[5]*See* Chalmers et al., *supra* note 2.

[6]*Id.* at 814.

[7]See Victims, Witnesses, and Justice Reform (Scotland) Bill (introduced on 25 April 2023); Chalmers et al., *supra* note 2.

[8]*See* Scottish Parliament, Policy Memorandum on Victims, Witnesses, and Justice Reform (Scotland) Bill 12 (2023), https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/victims-witnesses-and-justice-reform-scotland-bill/introduced/policy-memorandum-accessible.pdf.

[9]*See infra* Part I.

[10]For similar reasons, I think the question will remain of interest if the Scottish Government removes the verdict. For hundreds of years, criminal litigants have been governed by a proof system that, save for the "not proven" verdict, looked similar to that of England or the United States. The question of the verdict's legal role in this system will still be interesting.

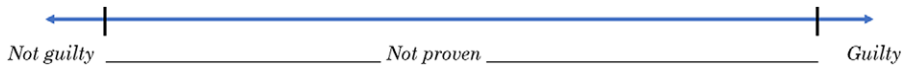

Figure 1. Dicey conception.

concluded that "not proven" means that "while the jury are not satisfied with the evidence of guilt, neither are they satisfied of the prisoner's innocence."[11] Scholars offered two narrower, opposed conceptions of this idea during that century.

First, A. V. Dicey conceived of "guilty" and "not guilty" as two extremes, like a north and south pole, with "not proven" as the globe in between. The "not guilty" verdict must, Dicey concluded, "mean more than in England, and amount to a moral acquittal: it must signify not only that the jury are uncertain whether the prisoner did or did not, e.g., commit murder, but—what is a very different matter—that they are convinced that he did not commit a murder."[12] Because a Scottish jury, unlike an English one, always has the option to return a "not proven" verdict, a Scottish "not guilty" verdict is a statement by the jury that the accused is innocent—just as a "guilty" verdict is a statement that the accused is guilty. And for all cases in which the jury is unconvinced in either direction, "not proven" is appropriate (Figure 1).

An opposing view, linked to Dicey's contemporary William Forsyth, thought of the three verdicts as having a different relationship. For Forsyth, a Scottish "not guilty" verdict does not mean that the jury is convinced that the accused is innocent. Instead, a "not guilty" verdict in Scotland means something more like what it means in England or the United States. It implies only "that the legal evidence is not sufficient to produce that degree of certainty which would justify or render safe a conviction."[13] The jury need not be sure of an accused's innocence to hand down a "not guilty" verdict, says Forsyth:

> [Jurors] do not thereby say that he has not committed the crime, but merely that it has not been legally proved that he has. There is therefore nothing in the verdict which need alarm the most scrupulous conscience, for it may be, and indeed ought to be, given whenever a juror is not fully and beyond all reasonable doubt satisfied of the guilt of the accused.[14]

If this is the meaning of the verdict of "Not Guilty," Forsyth argues, then "there are grave objections against that of Not Proven."[15] "Not guilty" is not an opposite verdict to "guilty," announcing that the jury is convinced of the accused's innocence. "Not guilty" verdicts include such cases, but they also include cases in which the jury is simply unconvinced of the accused's guilt. "Not proven" must then be reserved for cases in which the jury is especially unsure of the accused's innocence, or especially close to thinking the accused committed the crime. "One hardly sees how [the accused] can afterwards hold up his head amongst his fellow-men, when there stands

[11]Lord Cockburn, *Scottish Criminal Jurisprudence and Procedure*, 83 Edinburgh Rev. 196, 206 (1846).

[12]A. V. Dicey, The Verdict: A Tract on the Political Significance of the Report of the Parnell Commission 16 (1890).

[13]William Forsyth, History of Trial by Jury 336 (2d ed. by J.A. Morgan, 1875).

[14]*Id.*

[15]*Id.* at 336–37.

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

Figure 2. Forsyth conception.

recorded against him the opinion of a jury, that the evidence respecting his guilt was so strong that they did not dare to pronounce a verdict of acquittal (Figure 2)."[16]

"Not proven" roused Forsyth's moral concern because he believed it was inconsistent with the principle of innocent until proven guilty. "Not proven" casts an aspersion on the accused if the "not guilty" verdict includes cases in which the jury is not sure of the accused's innocence. If we were to plot Forsyth's verdicts along Dicey's spectrum, "guilty" still sits at the far end; "not guilty" begins at the close end and now travels some significant way down the path; and "not proven" is in the middle distance, between "not guilty" and "guilty."

For the remainder of this article, I will attribute the first idea—that "not guilty" amounts to a moral acquittal—to Dicey, and the second idea—that "not guilty" is intended for a wider range of cases, including all cases in which the jury is not satisfied that the accused committed the crime—to Forsyth.[17] Both Dicey and Forsyth agreed that "guilty" has a fixed meaning. It is the meanings of "not guilty" and "not proven" that are in dispute.

Courts provide little help. As the *Jury Manual of Scotland* describes, trial judges are quite limited in what they may instruct juries on what "not proven" means. The guidance suggests simply that there are two verdicts of acquittal, and that neither permits a retrial.[18] It might be that courts recognize that the meaning of the verdict is not easy to decipher, and they do not wish to risk trial judges giving juries incorrect instructions. And this is where the "not proven" verdict's legal meaning currently stands.

But the problem of the "not proven" verdict's meaning is deeper than previously recognized. It is harder than simply choosing between the Dicey and Forsyth accounts. This is because Dicey and Forsyth agreed on at least the meaning of "guilty." That was the fixed star around which their disagreement about the meanings of "not guilty" and "not proven" revolved. In our time, that star is out of orbit: there is disagreement about the meaning of the "guilty" verdict even in simpler, two-verdict systems. There are, in fact, at least four conflicting theories of what a "guilty" verdict means. These are based in (1) probability assessments, (2) full belief requirements, (3) relative plausibility judgments, and (4) probabilistic knowledge acquisition. Each of the four legal meanings of "guilty" proposed by these accounts will define "not proven" differently, whether on Dicey's conception or Forsyth's. There are thus at least eight possible legal meanings of "not proven."

[16]*Id.* at 337. Forsyth likely meant "a verdict of 'not guilty,'" as both "not proven" and "not guilty" are verdicts of acquittal.

[17]The goal of this article in attributing each view to Forsyth and Dicey is not primarily exegetical. I think each of the concepts described is the best interpretation of each commentator's views, but if that turns out not to be the case, the relevant concepts will remain.

[18]Judicial Institute for Scotland, Jury Manual, *supra* note 1. The primary appellate cases from which this rule derives are *MacDonald v. HMA*, 1989 S.C.C.R. 29 and *Fay v. HMA*, 1989 J.C. 129. 46-47. For a discussion of these cases, see Eamon P.H. Keane, *Scotland's Not Proven Verdict: The Nightmare of History?*, in The Ian Willock Collection on Law and Justice in the Twenty-First Century (Eamon P.H. Keane & Peter Robson, eds.) 37, 46–47 (2023).

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

The legal meaning of "not proven" depends on what the other two verdicts mean. It is a three-verdict problem. In this article, my first goal is to describe the problem, and to show that it extends further than previously recognized. The question matters for Scottish criminal procedure, as well as for the ongoing debate about whether to keep the verdict in Scotland.[19] My other goal is to solve it. I take it that an account should be able to maintain non-arbitrary conceptual distinctions between the three verdicts, and I argue that the clearest way to divide them is through the contemporary notion of full beliefs. In Scotland, the law intends that the jury deliver a "guilty" verdict when it believes that the accused committed the crime and deliver a "not guilty" verdict when it believes that the accused did not commit the crime. For all other cases—for example, where the jury isn't sure, or thinks that there is some chance in either direction—the "not proven" verdict is appropriate. If "P" is the proposition that the accused committed the crime, then the jury should deliver a "guilty" verdict if it thinks P is true, a "not guilty" verdict if it thinks P is false, and a "not proven" verdict if it has neither belief.[20] This is the best construction of the law's intent.

My argument is thus that a combination of Dicey's account of the Scottish "not guilty" verdict and the modern-day full belief account of the "guilty" verdict is the best explanation of the "not proven" verdict's meaning. In two-verdict systems, by contrast—such as England or the United States—the "not guilty" verdict includes any jury belief state other than the belief that the accused committed the crime. In all these jurisdictions, the law gives the same effect—acquittal—to any jury belief state other than the belief that the accused committed the crime, but Scotland allows the jury to be more specific.

Just as theories of the criminal standard of proof are instructive for the legal meaning of "not proven," so observing how the criminal standard of proof works with a "not proven" verdict might reveal something about how it works without one. In two-verdict systems like England and the United States, there is ongoing debate about the meaning of the guilty verdict. If the full belief account accurately describes the Scottish guilty verdict, then this is some evidence that it also accurately describes the guilty verdict in England and the United States. Of course, it is not dispositive evidence—each system could deal with the beyond a reasonable doubt standard differently. But simplicity would indicate that the full belief account correctly describes the beyond a reasonable doubt standard in general.

In their abstraction, contemporary debates over the meaning of criminal guilt have rarely made their way into judges' opinions or instructions. Still, it is hard to avoid the sense that the subject matters outside of the university spires. Judges in different jurisdictions have tinkered over the centuries with how they explain what proof

[19]To be sure, what the verdict means—legally—might have little to do with what juries or the public believe it means, especially given the absence of judicial direction on the point. Even in two-verdict systems, the meaning of the standards of proof remains elusive. For the moral or ethical question of whether to retain the verdict in Scotland, more may turn on the verdict's social meaning: what contemporary jurors, trial participants, and members of the public take it to mean, even if these social understandings end up conflicting with the verdict's real legal meaning.

[20]By this I mean that full belief is a necessary condition for the verdicts of guilty and not guilty. There will be other requirements, too—the jurors must base their belief on the evidence presented at trial, for example, and not on some initial unjustified hunch about the case. *Cf.* Sarah Moss, Probabilistic Knowledge 212 (2018).

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

"beyond a reasonable doubt" means.[21] Sometimes their explanations have tracked prevailing scholarly theories. It is important to the participants in a criminal justice system to know what the courts are trying to do.

If the "not proven" verdict has a specific legal meaning, then members of the public's views on the verdict take on a different normative valence. Rather than revealing the verdict's function, surveys of mock jurors in Scotland—as well as actual patterns of criminal verdicts—might be revealing that juries are misapplying the verdict. This question therefore matters for the ongoing conversation about whether the verdict's existence is just. Courts' unwillingness to describe the verdict to jurors might be allowing for widespread misapplications of a legal standard—and indeed, they might have been doing so for hundreds of years. If that is the case, then those who seek to abolish the verdict have a new theory of history for how it came to be unjustly applied, and those who seek to retain the verdict might have a more specific position to defend.

This article will (1) assess in more detail the prevailing accounts of the "not proven" verdict; (2) analyze how current theories of criminal guilt would classify these accounts; and (3) attempt to solve the problem.

II. Prevailing Understandings of "Not Proven"

The origins of the "not proven" verdict are well traversed. In the seventeenth century, Scottish indictments itemized each fact relevant to the criminal charge, and juries were expected to determine whether the alleged facts were proved.[22] But because new facts could come to light during trials, and because of repeated legal substance disputes over whether the alleged facts constituted a crime, judges began issuing special interlocutors of relevancy—special verdict forms—that asked the jury to determine whether a set of facts was proven or not proven, with the ultimate finding of guilt being left to the judge.[23] After the special interlocutors system came to an end in the eighteenth century, "not proven" survived as a third verdict.

The verdict's meaning is not straightforward, in part because Scottish appeals courts do not permit trial judges to tell jurors what the verdict means. Jury directions on this score are described in the Judicial Institute for Scotland's *Jury Manual*.

> Except for exceptional circumstances, the appropriate standard direction is that there are three verdicts open to them: guilty, not guilty and not proven … It is not necessary to inform the jury specifically that "not proven" is a verdict of

[21]In Scotland, unlike the United States, courts often omit the indefinite article: Scottish courts speak of proof "beyond reasonable doubt," rather than beyond *a* reasonable doubt. *See* Judicial Institute for Scotland, Jury Manual, *supra* note 1. That might make a difference, but I will assume in this article that it does not.

[22]J. Ross Harper, *Not Proven—A Unique Verdict*, 13 Int'l L. Practice 49, 49 (1988).

[23]See, for example, Harper, *supra* note 22; Joseph M. Barbato, *Scotland's Bastard Verdict: Intermediacy and the Unique Three-Verdict System*, 15 Ind. Int'l & Comp. L. Rev. 543, 547–48 (2005). Professor Harper has credited the surrounding political context—post-Restoration Scottish jurors' reluctance to convict in Charles II's prosecutions of the Covenanters—with causing these changes: "The particular legal procedure was convenient, not only for a government which sought convictions, but also for juries who did not want the responsibility of finding their peers guilty." *Id.* For a detailed argument about the role of political power in the history of the Scottish verdicts, see Keane, *supra* note 18, at 39–43.

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

> acquittal and that the accused cannot be tried again for the same offence, but it is thought to be good practice to do so.[24]

But it is "dangerous," the *Manual* continues, "to attempt to explain any difference between the not proven and not guilty verdicts."[25] Judges are advised to say just that "[n]ot guilty and not proven are verdicts of acquittal and have the same effect."[26]

In the context of this enforced vagueness, public discussions have focused on the verdict as it radiates outward from the bench: what jurors, trial participants, and the public at large understand it to mean.[27] Advocates for the verdict have argued that it communicates something to trial participants and the public, that it protects against wrongful convictions, and that it satisfies jurors. Others dispute these claims, arguing that the verdict undermines the "innocent until proven guilty" rule[28] or, conversely, that it makes acquittals more likely and so is too friendly to the accused.[29]

What jurors, trial participants, and the public take the verdict to mean is not necessarily the same thing as what the verdict means as a matter of law, however.[30] This is true also for the historical pattern of jury verdicts. Juries used to award "not proven" verdicts more frequently than they do today,[31] and one might take this as evidence that the verdict's legal meaning has changed over time. But in this article I will not do so. Jurors might deliver verdicts that fail to follow the "not proven" verdict's legal meaning, especially given how little they are told about the verdict. I propose to ask what the best construction, conceptually, of the three verdicts is. I will assume that the "not proven" verdict's true legal meaning is to be found in the concepts embodied in the standards themselves and in their mutual relation. I take this to be the same question that interested Dicey and Forsyth.[32]

Contemporary judges' unwillingness to describe the verdict's legal meaning have led some to conclude that the verdict simply has no distinct meaning—there are just two verdicts of acquittal, the jury can choose between them, and that is all that can be said.[33]

---

[24]Judicial Institute for Scotland, Jury Manual, *supra* note 1, at 112.1.

[25]*Id.*

[26]*Id.* at 116.2. Beyond this, the Manual notes that one trial court was permitted to tell the jury that it "might return a not proven verdict where the Crown have not established guilt beyond reasonable doubt but where there are still 'lingering doubts' as to the accused's guilt, or where the words 'not guilty' would 'stick in their throats'." *Id.* at 112.1 (quoting *Larkin v HMA*, 1993 S.C.C.R. 715).

[27]Patterns of the verdict's use have changed significantly over time. In the nineteenth century, juries awarded "not proven" verdicts in up to 75 percent of acquittals, with the remainder taken up by "not guilty" verdicts; today, "not proven" makes up just 30 percent of acquittals, and it is awarded most often in sexual offence cases. Chalmers et al., *supra* note 2 at 849.

[28]Chalmers et al., *supra* note 2. These debates seem to move in circles through the decades. James Chalmers, Fiona Leverick, and Vanessa E. Munro, *A Modern History of the Not Proven Verdict*, 25 Edinburgh L. Rev. 151, 151 (2021).

[29]*See* Samuel Bray, *Not Proven: Introducing a Third Verdict*, 72 U. Chi. L. Rev. 1299, 1319 (2005).

[30]For a recent study of what complainants and mock jurors take the verdict to mean, see Chalmers et al., *supra* note 2.

[31]See *supra* note 27.

[32]For those who find this method of investigation unsatisfactory, I hope this article can still be helpful for future inquiry. Those who think jury verdict patterns are dispositive evidence of the verdict's legal meaning might take the arguments I offer as a hypothesis, seeing whether they fit the pattern.

[33]Chalmers et al., *supra* note 2, at 861: "[T]he verdict has no settled meaning other than it being one of two verdicts of acquittal. In strict legal terms, it does not signify any particular probability that the acquitted person committed the offence charged."

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

Yet the fact that "not proven" and "not guilty" have the same official result is not enough to settle the matter of their legal meaning. Defenses to crimes like self-defense or insanity both have the same result. But self-defense—using justified force to protect oneself from another's violence—means something different from insanity —suffering from a mental illness that makes it impossible to appreciate the wrongfulness of one's actions and conform them to the law. Both negate criminal liability; each has a different meaning.

In the three-verdict system, "not proven" and "not guilty" have the same result. But many people think that "not proven" must lie somewhere in between "not guilty" and "guilty" in denoting the jury's opinion of the facts. That is why, although the court of appeal tells trial judges not to explain the "not proven" verdict to jurors, trial judges have been allowed to tell jurors that "not proven" may be appropriate when there are "lingering doubts" about the accused's guilt.[34]

Dicey says "not guilty" verdicts have a different meaning in Scotland than in England: a moral acquittal, an assertion that the accused is innocent. Forsyth says that "not guilty" verdicts have the same meaning in both countries: the jury finds the evidence insufficient to convict the accused.

The question, I will now argue, is deepened by debates about how "guilty" verdicts work in simple two-verdict systems. For Dicey and Forsyth, "guilty" had a fixed, agreed-upon meaning, and the contested meanings of "not guilty" and "not proven" revolved around it. But for contemporary scholars, there is no consensus about what a "guilty" verdict means. There are, in fact, at least four theories about what the law intends for "guilty" verdicts to mean. Each theory, as we will see below, would categorize a "not proven" verdict in different ways. Applying Dicey's and Forsyth's "not guilty" verdicts to the four modern theories of "guilty" verdicts yields different results in each case.

III. Ways of Thinking About "Not Proven"

Although there have been many ideas of how the burden of proof works to sustain a "guilty" verdict, there are currently four leading theories. Each theory, taken seriously, conflicts with the other three.

The first theory is about probability. It envisions the jury's task as assessing the likelihood that the accused committed the crime. "Beyond a reasonable doubt" means "above some probability threshold," which, though not defined specifically by the law, might be 80 percent, 90 percent, or 99 percent. This we may call the *probability account*.

A second account—the *full belief account*—asserts that jurors may only pronounce the accused "guilty" if, after going through the evidence, they fully believe that the accused committed the crime. This is to say that they assess the probability that the accused committed the crime as a moral certainty, and have no conscious probability estimate in their minds that is less than 100 percent.

A third account—the *relative plausibility account*—sees the jury as comparing two stories to see which best explains the evidence: the story offered by the prosecutor or the one offered by the accused.

[34]Judicial Institute for Scotland, Jury Manual, *supra* note 1 (quoting *Larkin v HMA*, 1993 SCCR 715).

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

A fourth account—the *probabilistic knowledge account*—is in some senses like the probability account because it says the "guilty" verdict requires some probability threshold below 100 percent. But it asks jurors to adopt a particular state of mind with regard to the percentage. They cannot merely think that there is a high chance that the accused committed the crime; they must know that there is a high chance.

While the theories have interested law professors and philosophers, they seem to have influenced judges more rarely. There is an abstruseness to these questions that make them hard to translate into everyday legal doctrine. But I hope the following analysis will suggest that judges ought to cast an eye on these debates; depending on which of the four accounts is right, jury instructions might be describing the law incorrectly.

A. The Probability Account

On this theory, it is up to the jury to look at the facts of a case and estimate the probability that the accused has done what the prosecutor claims. This is a common way to interpret the burden of proof in two-verdict systems, especially the United States.[35] If the jury thinks that it is at least, say, 95 percent likely that the accused committed the crime, then it delivers a guilty verdict.

"Not proven" may be plotted along this spectrum. On Dicey's view that "not guilty" amounts to a moral acquittal, then "not guilty" should be an opposite likelihood to "guilty." If a "guilty" verdict means a 95 percent chance or greater that the accused committed the crime, a "not guilty" verdict would mean an equivalently small chance that the accused committed the crime. Although there might be mathematical wrinkles in how to calculate "equivalently small" along a percentage line, we might for convenience say 5 percent—the same distance from zero as the "guilty" standard's 95 is from 100. For all cases in which the jury thinks that it is between 6 percent and 94 percent likely that the accused committed the crime, "not proven" is the proper verdict (Figure 3).

Under the Forsyth conception, the analysis is similar. For Forsyth, the "not guilty" verdict includes a much larger number of cases. If "guilty" means a 95 percent chance or greater, "not guilty" might mean any case in which the probability falls between zero and 70 percent that the accused committed the crime, with "not proven" being reserved for cases in which there is a 71–94 percent chance that the accused committed the crime. In either case, the percentages may be ratcheted upward or downward along the scale depending on where one sets the likelihood required by "guilty" (Figure 4).

[35]See, for example, Brown v. Bowen, 847 F.2d 342, 345–46 (7th Cir. 1988), a U.S. federal appeals court stating that, "The preponderance standard is a more-likely-than-not rule, under which the trier of fact rules for the plaintiff if it thinks the chance greater than 0.5 that the plaintiff is in the right. The reasonable doubt standard is much higher, perhaps 0.9 or better"; U.S. Ninth Circuit Jury Instructions Comm., Manual of Model Civil Jury Instructions at 8 (model jury instructions for American federal courts in California and other western states, which state that the burden of proof in civil cases requires that the jury find the plaintiff's claim to be "more probably true than not true."); Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 Yale L.J. 1254, 1256 (2013) (beginning an article criticizing probabilistic theories of evidence by observing that, "[a]s every first-year law student knows, the civil preponderance-of-the-evidence standard requires that a plaintiff establish the probability of her claim to greater than 0.5. By comparison, the criminal beyond-a-reasonable-doubt standard is akin to a probability greater than 0.9 or 0.95.").

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

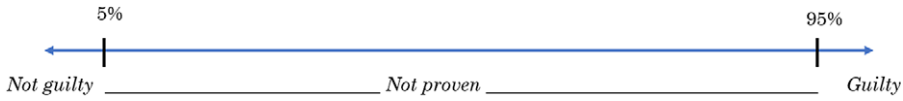

Figure 3. Dicey conception—probability account.

Figure 4. Forsyth conception—probability account.

Some people might find such calculations unsettling in criminal cases. But perhaps others find them inevitable. Percentage estimates, this second group might think, are unavoidable, as life is made up of relative chances—what can we really know with 100 percent certainty?—and the only way to resolve criminal cases is to proceed on that understanding. There might be reasons not to tell jurors, or the public, what the mathematics of criminal guilt are, and to leave it up to the jurors themselves to determine to their satisfaction what probability threshold "beyond a reasonable doubt" requires. But it clearly requires some probability threshold less than 100 percent, and thus the inquiry into the standard of proof can end. That is the thought.

But despite its popularity as a shorthand description of the "guilty" verdict, scholars who write about criminal burdens of proof are unconvinced that the probability model is right. A famous type of thought experiment shows why:

> Imagine that twenty-five visitors are standing in an art gallery. After the gallery guard leaves the room for a break, twenty-four of the visitors work together to steal an Impressionist painting. Some disable the security systems, others watch for the guard's return; some remove the painting from the wall, others push the painting through a window into a waiting getaway car. The twenty-fifth visitor, who just came to see the art, tries to stop the theft but is held back by several of the conspirators. The only witnesses watch from the street through the gallery's frosted glass windows, too far away to distinguish the individual features of the participants. By the time the guard returns, the painting is gone, and all twenty-five visitors say they are innocent.[36]

On these facts, twenty-four of the twenty-five visitors have committed theft. If a prosecutor charged one of them at random, there would be a 96 percent chance that the accused committed the crime.[37] And yet most scholars feel it is impossible to grant a guilty verdict for the randomly selected accused. Something is lacking as a matter of law.[38] The problem, moreover, does not seem to be local. The evidence in the Impressionist painting case seems insufficient whether the theft takes place in

[36]This scenario is derived from Charles Nesson's "prison yard" hypothetical. See Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187, 1192-93 (1979).

[37]1/25 = 0.04, the probability that the defendant is innocent, so 0.96 chance of guilt.

[38]This has become known as one of the proof paradoxes. See Mike Redmayne, *Exploring the Proof Paradoxes*, 14 Legal Theory 281(2008).

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

Edinburgh, Cape Town, or Chicago.[39] In any jurisdiction that uses the "beyond a reasonable doubt" standard, the evidence does not seem to suffice.[40]

As a result, many commentators have concluded that a "guilty" verdict requires something more than juries' belief in a high probability that the accused committed the crime. Each of the three following proposals offers a different idea of what else is required.

B. The Full Belief Account

The full belief account asserts that a "guilty" verdict requires a different belief state from jurors than a probability below 1. In order to convict the accused, jurors must hold a full belief that the accused committed the crime.[41] A full belief is not a probability assessment—or at least, it is not a probability assessment of anything less than 100 percent. Philosophers have developed theories of how full beliefs can be made to work with probability assessments, offering a plausible account of how people go about their lives—and, indeed, how we must go about our lives—sometimes making probability assessments about the world and sometimes simply having beliefs about it.[42] Proponents of the full belief account also say it forbids juries from gambling on the outcomes of criminal trials. A criminal justice system with a 95 percent probability threshold for conviction is in some sense telling juries to *aim* at a 5 percent rate of mistaken convictions, which poses questions as a matter of justice.[43]

While the ways lawyers, scholars, and the public use words and concepts like "belief" and "confidence" change over time, the idea that criminal guilt requires what

[39]There is an interesting question about what Scottish jurists would think of a "not proven" verdict in the Impressionist painting case. If the law does not accept a conviction of the randomly selected defendant, does it permit a jury to make a "not proven" finding for this defendant? As we will see below, the different conceptions of criminal guilt give different answers for whether a "not proven" verdict is permissible in the Impressionist painting case.

[40]Scholars have sought to solve the problem in different ways. One thought is that criminal guilt has an individualised evidence requirement. On this view, a "guilty" verdict still requires a juror to think it is 95 percent likely (or some similar high probability), but also requires something else: individualised evidence that links this specific defendant to the crime committed. For accounts of what an individualised evidence requirement might be, and why the law requires it, see Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329 (1971); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan. L. Rev. 1477 (1999). For a criticism of these two accounts, see Charles R. Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 Harv. L. Rev. 1357, 1380–81, 1381 n. 80 (1985). Such explanations must define individualised evidence, as well as give a reason for why the law requires it. And every fully explored account of what the individualised evidence requirement might mean seems to end up requiring more from the jury than a simple probability assessment.

[41]See Andrea Roth, *Safety in Numbers? Deciding When DNA Alone Is Enough to Convict*, 85 N.Y.U. L. Rev. 1130, 1160 (2010); Lara Buchak, *Belief, Credence, and Norms*, 169 Philos. Stud. 285, 296 (2014); Sarah Moss, *Knowledge and Legal Proof*, in Oxford Studies in Epistemology vol. 7, 176, 199 (2023); Jack H. L. Whiteley, *How Jurors' Beliefs Count*, 90 Miss. L.J. 383 (2021).

[42]See Buchak, *supra* note 41; Daniel Greco, *How I Learned to Stop Worrying and Love Probability 1*, 29 Philosophical Persp. 179 (2015); Jacob Ross & Mark Schroeder, *Belief, Credence, and Pragmatic Encroachment*, 88 Philos & Phenomenological Rsch. 259 (2014).

[43]See Tribe, *supra* note 40, at 1374 ("Tolerating a system in which perhaps one innocent man in a hundred is erroneously convicted despite each jury's attempt to make as few mistakes as possible is in this respect vastly different from instructing a jury to aim at a 1% rate (or even a .1% rate) of mistaken convictions."); Roth, *supra* note 41, at 1165.

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

we would currently conceive of as a full belief is an old one.[44] Consider this instruction in a late nineteenth-century Louisiana manslaughter case:[45]

> It is not sufficient you should believe his guilt only probable. In fact, no degree of probability merely will authorize a conviction; but the evidence must be of such a character and tendency as to produce a moral certainty of the prisoner's guilt to the exclusion of reasonable doubt.[46]

Here the idea of moral certainty is a separate state of mind from a belief that an accused's guilt is merely probable.[47] And this solves the Impressionist painting case. On the full belief account, the problem with convicting a randomly selected visitor from the art gallery is that no rational juror can come to a full belief that the defendant is one of the conspirators. At best, the evidence supports a probability assessment of 96 percent, and not a full belief, that the defendant committed the crime.[48]

At this point, some readers might think the full belief account imposes unrealistic requirements. One might observe that we often cannot know even the most ordinary-seeming facts about the world to a certainty of 100 percent. If I look out of the window and see that it is raining, the fact that it is raining seems quite obvious. Yet am I 100 percent sure that it is true? There is probably some chance, even if very small, that the apparent rainstorm is an elaborate hoax. Using special technology, someone could have caused it to appear to be raining when in fact it is not. Moreover, even when it is very strong, the evidence in criminal cases is rarely more convincing than the evidence of one's own eyes. So if a guilty verdict in a criminal case requires 100 percent certainty, then few guilty verdicts could ever be awarded, just as few full beliefs could ever exist, even about things as simple as whether it is currently raining. From this line of thought, one might conclude either that the full belief account is incorrect, or maybe that it is possible to fully believe something—that it is raining, that the accused committed the crime—while assessing the chance of it as less than 1. This thought provides an opportunity to clarify the argument from full belief.

[44]Barbara J. Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 Hastings L.J. 153, 168 (1986) ("The most common directives [in English cases from 1700-1750] employed 'belief' based on evidence … In several cases the terms 'belief' and 'satisfaction' were used synonymously.").

[45]Unlike other U.S. states, Louisiana is not a common law jurisdiction. But its standard of proof seems to be the same in each respect relevant to this article.

[46]State v. Jefferson, 10 So 199, 200 (1891). See also Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 Notre Dame L. Rev. 1165, 1210-11 (2003). Probabilistic accounts also had early proponents, including in a treatise by Sir Geoffrey Gilbert in the eighteenth century. See Shapiro, *supra* note 44, at 176–77 ("The law did not have access to certain knowledge because litigation depended on transient events 'retrieved by Memory and Recollection.' The 'Rights of Men' were therefore 'determined by Probability, not demonstration.'", quoting G. Gilbert, The Law of Evidence 3 (1754)).

[47]Whether this is a pure match for the concept of full belief, of course, may require a deeper historical inquiry, but the idea of a full belief requirement is a plausible interpretation of the passage.

[48]Buchak, *supra* note 41, at 295 ("What these cases bring out is that rational credence and rational belief are sensitive to different features of evidence. So while a given body of evidence will usually support a belief just in case it supports a high credence, there is no necessary connection between the two. The statistical evidence cases show that credence doesn't distinguish between certain facts about our evidence in the way that belief does."). "Credence" is the word used by philosophers to mean a probability assessment.

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

To fully believe something, people need not tell themselves that they think it is 100 percent likely. If they assign no conscious likelihood to the proposition, but simply believe that it is true, that could count as a full belief. But full belief—as I see it—really does rule out conscious probability estimates of less than 100 percent. If it does not, then the Impressionist painting case is no longer solved.[49] So how can such a requirement be realistic?

The full belief account is realistic if we take a certain, not implausible view of how people go about their lives. On this view, it is because the world is vast and uncertain that people must form full beliefs about it. One way to see this is to think about what the probability judgments we make in everyday life seem to rest upon.

To return to the rainstorm example, suppose I were to calculate the chance that the rain was really an illusion. After thinking carefully, I conclude that the possibility that a stranger is using special technology to fake the rainstorm is 0.01 percent. Thus, it is 99.99 percent likely that it is really raining. Consider all of the other things whose likelihood I would need to have calculated to come to that conclusion. There would be the question about how likely I thought it was that such technology could exist. That question would rest upon my experiences—my past. But to rest on my experiences, I would need to assess the probabilities of more basic questions: how good is my memory, to what extent is the present likely to resemble the past, what is the chance that I am undergoing a temporary madness that inhibits my judgment about the current state of rain illusion technologies, and so on? To assess the probability that it is really raining seems to require taking certain things as true, or else my calculations would take too long. Because our capacities are limited, we take things as true in order to function.[50] Our willingness to form full beliefs depends in part on the evidence available, and also on the stakes to holding such beliefs.[51]

If the full belief account is right, the distinction between the Dicey and Forsyth views of "not guilty" is a matter of whether the verdict requires a full belief that the accused is innocent. That is, Dicey says that "not guilty" is intended as a "guilty" verdict's opposite. If "guilty" requires a full belief that the accused committed the crime, then "not guilty" requires a full belief that the accused did not commit the

[49]One might try to solve it in the following way. Imagine we begin to raise the number of visitors to the art gallery. The hope is that there comes a time—a number—when it becomes acceptable to convict the randomly selected visitor. Suppose there were 100 visitors to the gallery, 99 of whom participated in the art heist. Or imagine there were 1,000 visitors, 999 of whom participated. Does the problem vanish? My own intuitions do not give me any precise number of conspirators after which point the evidence becomes sufficient for a criminal conviction. Others might take a different view. If so, then it is possible to take the Full Belief Account as a solution to the Impressionist painting case while also thinking that full beliefs permit probability assessments below 1. Full beliefs would permit probability assessments that match the ratio of the innocent to the culpable at which one's reservations about the Impressionist painting case disappear.

[50]*See* Jacob Ross & Mark Schroeder, *Belief, Credence, and Pragmatic Encroachment*, 88 Phil. & Phenomenological Research 259, 286 (2014); Richard Holton, *Intention as a Model for Belief*, in Rational and Social Agency: The Philosophy of Michael Bratman 12, 14 (Manuel Vargas & Gideon Yaffe eds., 2014); Greco, *supra* note 42, at 186.

[51]As other scholars have observed, in everyday life blaming someone for transgressing seems to require fully believing that they transgressed, not merely thinking there is a high chance that they did so. Buchak, *supra* note 41; Martin Smith, *Blame, Punishment and Intermediate Options*, forthcoming Edinburgh L. Rev. 4–5. So criminal guilt asks for a full belief. For similar reasons, there is also an argument that the full belief account explains civil cases governed by less stringent standards than "beyond a reasonable doubt." *See* Buchak, *supra* note 41; Whiteley, *supra* note 41.

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

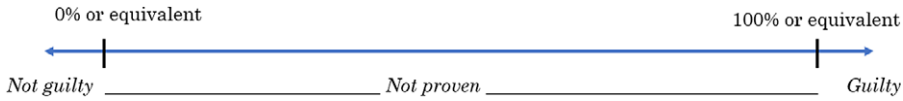

Figure 5. Dicey conception—full belief account.

crime. "Guilty" is reserved for cases in which the jury believes with no conscious estimate less than 100 percent that the accused committed the crime, "not guilty" is for cases in which the jury believes with no conscious estimate less than 100 percent that the accused did not commit the crime, and "not proven" is for cases in which the jury has no full belief in either direction (Figure 5).

An interesting implication of Dicey's "not guilty" verdict, on the full belief account, is that purely statistical evidence, even if it shows that there is an extremely low probability that the accused committed the crime, is not enough to permit a "not guilty" verdict. We can see this if we imagine that the roles of the gallery visitors in the Impressionist painting case were reversed. Now suppose that just one of the visitors, on their own, took the painting, and the other 24 were innocent bystanders. If a prosecutor chose one of the visitors at random to be charged in this context, the odds would be quite low—4 percent—that the visitor was guilty. Nonetheless, 4 percent is above zero, so a rational juror could not form a full belief that the accused was innocent based on this evidence alone.[52]

For Forsyth, no full belief in the accused's innocence is needed for "not guilty." A 100 percent chance that the accused committed the crime is necessary for a "guilty" verdict, which leaves 0–99 percent to be divided between "not guilty" and "not proven." "Not proven" is reserved for a persistent thought in a juror's mind of a high risk—but one that is not enough to give rise to a full belief—that the accused committed the crime. "Not guilty" will take up most potential probabilities, from 0 to some percentage, and "not proven" will take up the difference between that percentage and 100 (Figure 6).

In either case—Forsyth's or Dicey's—the full belief account provides a clean distinction between the "guilty" verdict and the other verdicts. Rather than percentage thresholds plotted along a scale, the "guilty" verdict is different in kind from the other two verdicts. A full belief is its own state of mind. And because the results of "guilty" and "not proven" are so dramatically different—one leads to criminal punishment, the other leads to acquittal—there are reasons to find a conceptually clean distinction between the verdicts compelling.

Figure 6. Forsyth conception—full belief account.

[52]If the 24 innocent visitors saw the one visitor take the painting, then they could all testify to that effect, bringing non-statistical evidence into the case. But if this testimony was unavailable, such as if the thief was able to take the painting without the others seeing, then it seems that no rational juror could award a "not guilty" verdict—if Dicey is right about the legal meaning of "not guilty" and the Full Belief Account is right about the meaning of "guilty."

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

C. The Relative Plausibility Account

A third account of the "guilty" verdict instructs juries to reason in a comparative sense, rather than a probabilistic or belief-based one.[53] Juries must assess the plausibility of the prosecutor's claim only in comparison with the account of the facts that the accused offers.

The idea is most easily applicable in the context of civil trials, in which the standard of proof is more equal between plaintiff and defendant than "beyond a reasonable doubt." If a plaintiff is suing a defendant for breach of contract, both sides will offer an account of what happened and the jury will compare each account. But some proponents of relative plausibility also think it explains the criminal standard of proof.[54]

In criminal trials, the prosecutor will offer an account of what happened: the accused stole a painting from the art museum. The accused will offer a different story: perhaps it was someone else who stole the painting, or maybe no painting was stolen at all. Both sides will have a story to tell. The two stories will limit the possible worlds for the jurors to consider to two. The jury must consider the facts as they are presented at trial, using inference-to-the-best-explanation to see which of the two stories best explains the fact presented. After having heard and viewed all the evidence, each juror will have an idea in their mind of which story is more plausible, and that will decide the case.[55]

Because the "beyond a reasonable doubt" standard places a heavier burden on the prosecutor than the accused, the relative plausibility account must somehow allocate that weight, and there are two ways of doing so. On one view, the prosecutor must offer to the jury a plausible account that the accused committed the crime, and also show that no plausible account of the accused's innocence exists.[56] To show that there is no plausible account of the accused's innocence is not to convince the jury that there is nothing less than a 100 percent likelihood that the accused committed the crime. It is to eschew numbers altogether.

On the second view, relative plausibility theorists need not give up on numbers. Because the prosecutor's story needs to be much more plausible than the accused's to secure a conviction, the criminal burden of proof can be described as hypothesis testing. A "null hypothesis"—that the accused did not commit the crime—is favored unless there is significant evidence otherwise. The beyond-a-reasonable-doubt standard sets a false positive rate like 0.05—in other words, 5 percent—which accepts one wrongful conviction for every twenty innocent people who are charged, then the jury determines the likelihood ratio between the two narratives.[57]

Let us consider how "not proven" might apply to each argument.

[53]See, for example, Ronald J. Allen & Michael S. Pardo, *The Problematic Value of Mathematical Models of Evidence*, 36 J. Legal Stud. 107 (2007).

[54]See, for example, Ronald J. Allen & Michael S. Pardo, *Relative Plausibility and Its Critics*, 23 Int'l J. Evidence & Proof 5, 5–6 (2019) (arguing that theories of trial proof, including in criminal cases, are undergoing a "paradigm shift" toward the relative plausibility account); Cheng, *supra* note 35, at 1278 ("In the criminal context, the beyond-a-reasonable-doubt standard is … a likelihood ratio test where the threshold is set through (contestable) notions of the acceptable false positive rate.").

[55]The relative plausibility account also offers several different ways of solving the Impressionist painting category of problems. Cheng, *supra* note 35, at 1277–78.

[56]Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 Virginia L. Rev. 1491, 1528 (2001).

[57]Cheng, *supra* note 35 at 1277–78.

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

1. The Quantitative View of Relative Plausibility

The Dicey and Forsyth views of "not proven" can work with the quantitative relative plausibility account. Dicey would say that "guilty" and "not guilty" should be understood as symmetrical judgments. If "guilty" is set to accept a false positive rate of 0.05, accepting one wrongful conviction for every twenty innocent people who are charged, then "not guilty" would set the false negative rate at 0.05, accepting one wrongful acquittal for every twenty guilty people charged. This is a skewed metric, and thus "not guilty" verdicts would be presumed rare in a functioning, noncorrupt justice system. Even though "not guilty" would be symmetrical with "guilty" as a matter of theory, in a functioning justice system, prosecutors' discernment should be such as to bring criminal charges more frequently against those who are highly likely to be guilty than those who are highly likely to be innocent, and so "not guilty" verdicts might be expected to be rarer than "guilty" ones. "Not proven" verdicts would, in any event, be the more common of the two verdicts of acquittal (Figure 7).

For Forsyth, "not guilty" is not a symmetrical judgment to "guilty," so "not guilty" would be the default verdict for most judgments of acquittal. But there would be two false positive rates for the jurors to have in their mind. The first—the "guilty" false positive rate—would be 0.05, accepting one wrongful conviction for every twenty innocent people charged. The second—the "not proven" false positive rate—would be some value above 0.05, perhaps 0.1. A 0.1 false positive rate would accept one "not proven" verdict for every ten innocent people charged. "Not proven" is considered by Forsyth to be a grey area category in between "guilty" and "not guilty." It will include some people who committed the crime charged and others who did not (Figure 8).

On the quantitative view of relative plausibility, the Forsyth view of "not proven" may seem relatively less troubling to the presumption of innocence than it does on other accounts of the burden of proof. The more pressing moral concern—if the quantitative relative plausibility theory is correct—is that the law is comfortable with convicting innocent people, and specifically convicting one innocent person out of every twenty. It brings up the difference observed by Laurence Tribe between a system in which every jury does their best but at times makes mistakes and a system that aims at some low rate of false convictions.[58] So long as no more than one out of every twenty innocent accuseds is convicted, the second system is, by its own lights, not making mistakes. To maintain the idea that all mistaken convictions are indeed mistakes, which any justice system should try to remedy, it is hard to accept a target false positive rate above zero.

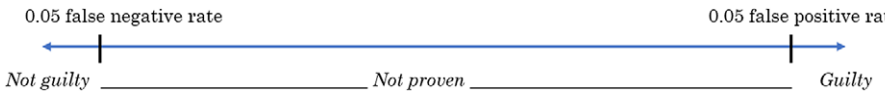

Figure 7. Dicey conception—relative plausibility account (quantitative).

[58]Tribe, *supra* note 40, at 1374.

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

Figure 8. Forsyth conception—relative plausibility account (quantitative).

2. The Non-Quantitative View of Relative Plausibility

The relative plausibility theorists who eschew numbers can also make room for a "not proven" verdict. For these theorists, a "guilty" verdict requires the jury to conclude both that the prosecutor's story that the accused committed the crime is plausible and that the evidence offers no plausible story that the accused did not commit the crime.[59] Thus, for Dicey, "not guilty" would require the reverse. "Not guilty" verdicts are only permissible in those cases in which the jury finds two things: (1) that the accused's story that she did not commit the crime is plausible; and (2) that the evidence offers no plausible account that she did commit the crime (Figure 9).

As with the null-hypothesis-plus-false-positive-rate account of relative plausibility, "not guilty" verdicts would be intended by the law to be extraordinarily rare. A competent prosecutor would be unlikely to bring many criminal cases in which the available evidence offers no plausible account that the accused committed the crime. Even though there is a theoretical symmetry between the two verdicts, there is a striking way in which the relative plausibility account suggests "not guilty" verdicts should be very rare in a Diceyan world.

Forsyth's relative plausibility account is harder to describe. For Forsyth, "not guilty" is expected to take up the bulk of the verdicts of acquittal, leaving a smaller category for those cases in which the jury is unwilling to find the accused guilty, but also is unwilling to categorize the case in the larger subset of "not guilty" cases. If the non-quantifiable relative plausibility account reserves the "guilty" verdict for cases in which jurors conclude (1) that the prosecutor's story is plausible and (2) that there is no plausible account of the evidence consistent with the accused's innocence, then "not proven" verdicts are intended for those cases in which at least one of these factors is not satisfied. Perhaps "not proven" is for cases in which the prosecutor's story is plausible but there is also a plausible-but-unlikely interpretation of the evidence consistent with the accused's innocence (Figure 10).

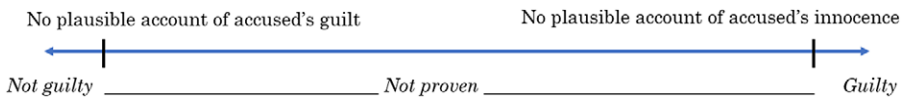

Figure 9. Dicey conception—relative plausibility account (quantitative).

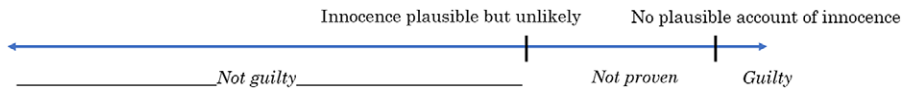

Figure 10. Forsyth conception—relative plausibility account (quantitative).

[59] Allen & Leiter, *supra* note 56.

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

Or perhaps "not proven" is for cases in which the prosecutor's account is implausible, but there is also no plausible interpretation of the evidence consistent with the accused's innocence. Maybe the jury believes that the accused committed the crime but isn't sure how. There is more than one way to plot Forsyth's idea of "not proven" onto the non-quantitative relative plausibility theorist's map of guilt.

D. The Probabilistic Knowledge Account

The probabilistic knowledge account arises out of the philosophy of knowledge. This idea posits that it is possible to know probabilistic content. There is a distinction between knowing that there is a high chance of something and merely believing there to be a high chance. To attain probabilistic knowledge about some event—to know that there is a 70 percent chance that the event happened rather than to merely believe there is a 70 percent chance that it happened—requires a certain set of things to be true. Knowledge is contingent on the ability to rule out alternatives, and mere statistical evidence is not enough to produce knowledge, because it leaves open alternatives that cannot be ruled out.[60]

On the probabilistic knowledge account, a guilty verdict "requires the factfinder to know some probabilistic content, namely that the likelihood that the defendant is guilty exceeds a certain threshold. This threshold is greater than .5 and in some sense less than 1."[61] If the probability threshold is below 1, then the probabilistic knowledge account is distinct from the full belief account. In this sense it is like the probability account. But in another sense, it is different. The probabilistic knowledge account maintains that there is a difference between knowing that there is a high probability that the accused committed the crime, and only believing that there is a high probability that the accused committed the crime. On the probabilistic knowledge account, a guilty verdict requires jurors to know, and not only believe, that there is a high chance that the accused committed the crime.[62]

[60]This solves the Impressionist painting case. If a prosecutor charges at random one of the visitors, jurors can rationally *believe* that there is a 96 percent chance that the defendant is one of the conspirators, but they cannot *know* there is a 96 percent chance. There is a relevant alternative possibility for this defendant. If the defendant argues that something about them, such as their good character, makes them far less likely to have committed such a crime than other visitors to the art gallery who might have been chosen, the jurors have no way of ruling this out. *Id.* There is no evidence in the case other than the bare fact that the defendant was pulled from a room of twenty-five people, twenty-four of whom committed the crime. Thus, the alternative possibility that the defendant raises remains a live one. By contrast, non-statistical evidence like eyewitness testimony does not, according to the probabilistic knowledge account, have this problem. If an eyewitness whom the jury knows is probably telling the truth testifies that they saw this defendant take part in the theft, then the jury "can thereby come to know the probabilistic content" that the defendant was one of the conspirators. Moss, *supra* note 20, at 213.

[61]Moss, *supra* note 20, at 212.

[62]Moss, *supra* note 20, at 212. Because, as described, the probabilistic knowledge account permits jurors to know of a likelihood that, while high, is less than 1, it conflicts with the full belief account, as described. Professor Moss also offers arguments that support the full belief account. Chapter 10 of *Probabilistic Knowledge* observes that, "The attitude that is required by the standard of proof beyond a reasonable doubt seems just like the attitude of full belief," although the book defines full belief to include probability assessments of less than 1. Moss, *supra* note 20, at 206 ("According to my theory, full belief strictly requires certainty, but loosely requires merely having a credence that is close enough to certainty for practical purposes."). In a subsequent article, Professor Moss argues that a guilty verdict in criminal cases requires

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

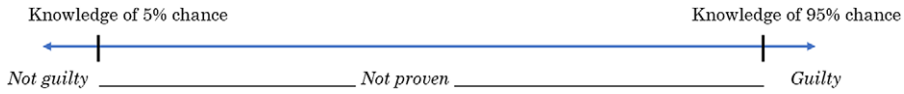

Figure 11. Dicey conception—probabilistic knowledge account.

If the probabilistic knowledge theory of criminal guilt is correct, the Dicey and Forsyth views of the "not proven" and "not guilty" verdicts would work in the following ways. For Dicey, if criminal guilt requires that the jury know that the probability that the accused committed the crime crosses a certain threshold—for example, 95 percent—then "not guilty" would require the juror to know, and not merely believe, that the likelihood that the accused committed the crime is below a comparatively low threshold. Thus, if 95 percent or above is required for guilt, then 5 percent or below might be required for "not guilty" (Figure 11).

Here there is an interesting symmetry with the full belief account. If Dicey has described the "not guilty" verdict correctly, and if the probabilistic knowledge theory has described the "guilty" verdict correctly, then even very low statistical probabilities would not be legally sufficient for a "not guilty" verdict. If the numbers in the Impressionist painting case were reversed, and there were 24 innocents and one guilty party, the randomly selected visitor would have just a 4 percent chance of being the person who committed the crime—a small chance, but not small enough for a "not guilty" verdict. For there is now, it seems, an alternative possibility that the jury cannot rule out: there is something about this randomly selected accused, such as their bad character, that makes them more likely to have committed the crime than an average randomly selected visitor from the gallery would be.

Forsyth's version of "not guilty" requires no theoretical symmetry with "guilty," so probabilistic knowledge of a very low chance that the accused committed the crime is not required. Instead, "not guilty" verdicts could be delivered in cases in which the jurors held a variety of different belief states with regard to the likelihood that the accused committed the crime. Only knowledge that there is at least a 95 percent chance that the accused committed the crime is enough for a "guilty" verdict, and anywhere from knowledge that there is a zero percent chance that the accused committed the crime to a mere belief that there is a high chance that the accused committed the crime could be categorized as "not guilty."

For Forsyth, there must again be some category of cases that are close to but do not reach "guilty." Maybe the law lets the jurors deliver a "not proven" verdict if they come to know that the chances are between 70 and 95 percent that the accused committed the crime (Figure 12).[63]

knowledge. Sarah Moss, *Knowledge and Legal Proof*, in Oxford Studies in Epistemology vol. 7, 176 199 (2023) ("A knowledge account of the criminal standard is plausible, since outright belief in guilt is a viable constraint on conviction."). Since knowledge seems to entail full belief, this argument supports the full belief account.

[63]If so, then mere statistical evidence of the kind available in the Impressionist painting case cannot as a matter of law license a "not proven" verdict, just as it cannot license a "not guilty" one. Statistical evidence is not enough, on its own, to allow jurors to rule out alternative possibilities, so it is insufficient to generate probabilistic knowledge. Moss, *supra* note 41 at 23. It is not, at least, enough to generate probabilistic knowledge that the odds are the percentage specified by the statistical evidence (e.g., 96 percent in the Impressionist painting case). There is a question about whether high percentage chances are ever enough to

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

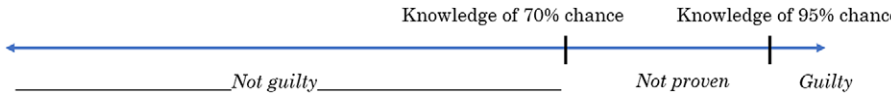

Figure 12. Forsyth conception—probabilistic knowledge account.

Or maybe Forsyth would say that "not proven" is reserved for cases in which the jury does not know, but only believes, that there is some high chance that the accused committed the crime. For example, this probability could cleanly match the probabilistic knowledge requirement. If a "guilty" verdict requires the jurors to know that there is at least a 95 percent chance that the accused committed the crime, then "not proven" could require that they believe, but not know, that there is at least a 95 percent chance that the accused committed the crime. This, like the Full Belief Account, is an interesting and clean distinction between criminal guilt and receipt of a "not proven" verdict. The distinction is knowledge. But there is still an arbitrary feature to this: knowledge of a 94 percent chance generates an acquittal, while knowledge of a 95 percent chance generates a "guilty" verdict and criminal punishment.

With the extent of the problem in mind, I will now offer a solution.

IV. What "Not Proven" Means

I take it that a solution to the three-verdict problem should provide comprehensible and non-arbitrary distinctions between the verdicts. Clarity in distinguishing among concepts is its own virtue, and this virtue is perhaps especially implicated by legal concepts, given the power that such concepts can have over people's lives. Each of the accounts that we have been considering has given a different description of the kinds of attitudes that a juror might take during a criminal trial. One account seems to give the clearest distinctions.

Imagine that there are three kinds of views a juror might take about whether the accused committed the crime.[64] First, the juror might believe that the accused committed the crime. Second, the juror might believe that the accused did not commit the crime. And third, the juror might have neither belief. The juror might, for example, feel unsure. If the first state of mind corresponds to "guilty," the second to "not guilty," and the third to "not proven," then the law has a way to distinguish between the three verdicts in a conceptually non-arbitrary fashion. This explanation corresponds most clearly with Dicey's account of "not guilty" and the modern full belief account of "guilty."

generate probabilistic knowledge of some lower percentage chance than the odds specified by the statistical evidence. For example, if the statistical evidence in the Impressionist painting case suggests that there is a 96 percent chance that the random visitor committed the crime, can a juror know that there is at least a 30 percent chance that the visitor did so? At least a 20 percent chance? As a first thought, it seems that the answer is no. The statistical evidence cannot license probabilistic knowledge that the defendant committed the crime, because the problem with statistical evidence, on the probabilistic knowledge account's formulation, is a problem of kind rather than degree. So long as there are possibilities that cannot be ruled out, no knowledge is possible. But maybe this logic grows more difficult at the margins.

[64]See *supra* notes 49–51 and accompanying text.

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

To put it in a more familiar way to contemporary philosophers, if the proposition "P" is that the accused committed the crime, then there are three doxastic states a juror might take toward P.[65]

The juror thinks P is true. A "guilty" verdict.
The juror thinks P is false. A "not guilty" verdict.
The juror thinks neither of these things. A "not proven" verdict.

The first two states are full beliefs, which means they are not categorizable as a probability assessment below 1. In both Scotland and two-verdict systems like England, the law gives the same effect to the jury belief state "P is false" and "neither." England gives the jury just two options, whereas Scotland divides the two categories into two verdicts, each with the same legal result.

Other solutions to the problem rely on distinctions that seem either less comprehensible or more arbitrary. For example, both the probability and probabilistic knowledge accounts of criminal guilt would draw arbitrary lines between percentage thresholds: if the jury thinks (or knows) there is a 95 percent chance that the accused committed the crime,[66] then the accused is guilty and faces a full criminal punishment, whereas if the jury merely thinks (or knows) that there is a 94 percentage chance that the accused committed the crime, then the verdict is "not proven" and an acquittal. This distinction seems arbitrary. The relative plausibility account faces the same arbitrariness problem: depending on where it sets the false positive rates, the same all-or-nothing results come from very similar belief states. And Forsyth's account of the "not guilty" verdict faces, as he points out, another arbitrariness problem: if "not guilty" already includes cases in which the jury simply thinks that it has not been legally proved that the accused has committed the crime, there are questions about what role the "not proven" verdict has to play, other than perhaps to cast a pall over the accused.

This account of the verdict's legal meaning might not correspond with the ways juries tend to use the verdict. The verdict's changing use patterns over time raise compelling questions.[67] If juries do not use the verdict in the way the law intends, then the legal meaning of the verdict might be a dead letter. This would be a reason for courts to change their practices of explaining little about the verdict's legal meaning to juries.

We might briefly consider how the legal meaning that is proposed came to be. Scholars agree that the "not proven" verdict's existence is an accident of history—a melding of two different jury systems during contingent political circumstances.[68] But the legal meaning of a standard of proof can develop over time, through use, analysis, and conversation. The background thought behind my account is that there are basic kinds of belief states that govern how people think about the world, even if they are hard to name and describe. In working through how jurists have written about the standards of proof over time, we can find evidence of which belief states are relevant to criminal verdicts. Dicey and Forsyth provide examples of this working-

[65]I am grateful to Jeesoo Nam for suggesting this formulation.
[66]Or a 90 or 99 percent chance or whatever the specified threshold.
[67]*See supra* notes 6 & 27 and accompanying text.
[68]*See supra* notes 3 & 23 and accompanying text.

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

through of legal concepts. Modern debates about the standards of proof in two-verdict systems are another. Such concepts need not have been consciously articulated by legal decision-makers to aptly describe the law.

Finally, if criminal guilt in Scotland requires jurors to fully believe that the accused committed the crime, then this provides some evidence of how criminal guilt works in other jurisdictions. It establishes, one might say, a prima facie case for the meaning of criminal guilt in a jurisdiction such as England. This is because the jurisdictions speak with the same words—of establishing guilt beyond a reasonable doubt—and have an entangled history. They have shared a parliament for as long as the three-verdict system has existed, and a monarch for longer than that.[69] England's history is likewise influential on the jurisdictions that inherited its common law, such as the United States.

A more serious historical investigation could certainly cast doubt on the idea that each jurisdiction's requirements for criminal guilt are the same. But, in the absence of such contrary evidence, inquiries into the Scottish system can be treated as useful for accounts of trial proof in other systems.[70]

V. Conclusion

The "not proven" verdict's legal meaning is interesting in its own right, and it seems relevant to the conversation about whether to retain the verdict in Scotland. Does the verdict have a legal meaning, or is it up for any given jury to determine what it means? Ought courts to have explained the verdict's meaning in more detail? Each of these questions is implicated by the idea of the verdict's legal meaning. In the absence of court explanations, commentators must fall back on conceptual analysis.

When we shine the light of contemporary debates about the meaning of criminal guilt on the Dicey and Forsyth accounts of "not proven," we find that there are at least eight meanings that "not proven" could have—and probably more, depending on how many shades into which these accounts can be subdivided. But, of the four theories of "guilty," the full belief account most cleanly distinguishes between guilty and not proven, and of the two theories of "not guilty," Dicey's account most cleanly distinguishes between not proven and not guilty. There are three types of belief states that matter: a belief that the accused committed the crime; a belief that the accused did not commit the crime; and all other views about the question. "Guilty" applies to

[69]See generally T. B. Smith, *English Influences on the Law of Scotland*, 3 Am. J. Comp. L. 522, 525–35 (1954) (describing mid-century English influences on Scots law, including statutes passed by the UK Parliament, the appellate jurisdiction of the House of Lords, the citation of English treatises in Scottish courts, and the English educations of some Scottish lawyers); A. D. Gibb, *The Inter-Relation of the Legal Systems of Scotland and England*, 53 L. Q. Rev. 61, 79 (1937) (concluding that "despite the affinity of Scots law in many ways to the continental systems, in the prestige and traditions of the bench and in the animating spirit of her criminal justice Scotland is more closely akin to England than to the continent.")

[70]This, too, might lead to a final conjecture. I have put to one side historical patterns of jury verdicts in this article. See *supra* notes 31–32 and accompanying text. But the fact that "not proven" verdicts used to be awarded more frequently than they are today might be evidence of the influence of England on Scottish procedure. Perhaps juries once thought of the "not guilty" verdict more like Dicey did—something that meant more than it did in England, an assertion that the accused did not commit the crime. But over time, England's influence shifted juries' views, bringing them more into line with Forsyth's account and diminishing the prevalence of "not proven" verdicts. This is one explanation of the pattern.

https://doi.org/10.1017/S1352325224000090 Published online by Cambridge University Press

the first belief state, "not guilty" applies to the second, and "not proven" applies to the third.

The Scottish system also provides some evidence for the meaning of guilty verdicts in two-verdict systems like England and the United States. If the full belief account is the best way to make sense of what Scottish jurors are being asked to do in criminal trials, then—all else equal—that suggests the same might be true for its neighbor, England, and England's common law descendant, the United States. All three jurisdictions use the same words: reasonable doubt. The simplest explanation is that all three use them in the same way.

Cite this article: Whiteley JHL (2024). The Three-Verdict Problem. *Legal Theory* **30**, 105–127. https://doi.org/10.1017/S1352325224000090