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Federico Picinali, **Justice In-Between: A Study of Intermediate Criminal Verdicts**, Oxford, Oxford University Press, 2022, 278 pp.

In *Justice In-Between*, Picinali examines intermediate verdicts (hereafter 'IV') in criminal cases. An IV is a third option that sits between 'guilty' and 'not guilty'. The vast majority of contemporary jurisdictions use the binary verdict system of 'guilty' and 'not guilty' in criminal cases, but Scotland, for example, has two acquittal verdicts, 'not guilty' and 'not proven', the consequences of which are identical. In Israel too there exists an IV known as 'acquittal on the basis of doubt' that differs from 'not proven' as adverse consequences can attach to a doubt-based acquittal that cannot attach to a 'full' acquittal.

Picinali's book does not focus primarily on either the Scottish or Israeli IV system (perhaps wisely as the Scottish Government announced in 2022 it would bring forward legislation to abolish the 'not proven' verdict). Rather he sets out to make the case for a particular type of IV that permits harder treatment of a defendant receiving it than they would have received following a 'not guilty' verdict. He calls this verdict 'conditional acquittal' (hereafter 'CA') and it applies where the strength of the evidence suggests a probability of guilt that lies close to the standard of proof required for conviction. The difference between this and 'full' acquittal is that if new and compelling evidence emerges after the initial trial, re-prosecution is possible following CA in a way that is not open in relation to defendants who received a full acquittal. In other words, the 'hard treatment' is that a defendant receiving a CA has to live with is the possibility that they might subsequently be re-tried, whereas the defendant receiving a full acquittal does not.

How, then, does Picinali argue for CA? He begins by focusing on the presumption of innocence (hereafter 'PoI'). One of the most common arguments against IVs is that they are incompatible with the PoI. The argument is that a defendant should be treated as innocent until they are proven guilty in a court of law. On this argument, an IV – if it casts doubt on the guilt of the defendant who has *not* been found guilty by a court of law – violates the presumption. If this argument cannot be overcome, then any proposals for a CA cannot get off the ground.

Picinali approaches this by setting out what he sees as the fundamental justification of the PoI. Rejecting moral rights-based justifications, he argues that the PoI is justified by "the principle of inertia in adjudication" (69). This is the idea that "in the absence of sufficient reasons to the contrary, the status quo should be preserved" (69). This leads to the proposition that it is the State that bears the burden of proof in a criminal trial, as the party that is seeking a change in position in relation to the defendant (78).

If this is all that the PoI does, then it is not even engaged by the idea of an IV. But while some hold this minimalist understanding of the PoI, others argue for a wider conception, namely that the PoI requires that the treatment of the defendant should - as far as possible - be consistent with innocence (unless guilt has been established according to law). In previous work, Picinali placed himself in the former camp, but *Justice In-Between* reflects a development in his thinking. He now accepts that it was a "mistake" to "deny that the presumption of innocence includes a rule protecting legal innocence" (87) and accepts that "this rule is a normative implication of the institution of a criminal process attaching distinctive significance to proof of guilt" (87).

But this does not necessarily mean that an IV – even one with hard treatment attached – violates the PoI. For Picinali, the principle of inertia is the more fundamental principle, and the PoI is *derived* from the principle of inertia. And the principle of inertia merely holds that those seeking to change the status quo "must give sufficient reasons for it" (89). What this means is that if there are sufficient reasons – and by this Picinali means moral reasons – to justify an IV system, then it cannot possibly violate the PoI. The PoI simply has nothing to say about this, deferring to the more fundamental principle of inertia in adjudication (91).

One might pause to reflect at this point. Picinali makes a credible argument and cuts through much of the loose reasoning that can sometimes be found in relation to the PoI and IVs. However, there is an obstacle to be overcome if the CA is to be utilised in legal systems governed by the European Convention of Human

Rights (ECHR), Article 6(2) of which provides for the PoI in criminal proceedings. The European Court of Human Rights has adopted a broad understanding of the PoI, extending beyond the burden of proof to the manner in which an acquitted person is treated.

But it would be a mistake to be derailed into lengthy consideration of Article 6. ECHR jurisprudence holds that the presumption will be violated where, following an acquittal, suspicions of guilt are voiced by a court. So, for example, violations have been found where acquitted persons have had claims for compensation rejected on the basis that suspicions remained over their guilt. Picinali's proposal may well not fall foul of that jurisprudence, if it is merely a statement about the strength of evidence against the defendant. It will depend on the way in which the CA is formulated. It may well be that a court formally declaring that a CA is appropriate because there is (say) a 90% probability that the defendant is guilty would raise ECHR problems, but it is not obvious that this would be so and, even if it is problematic, it may be possible to avoid the issue through careful wording.

The PoI, then, may well be something of a red herring. But, as Picinali recognises, compatibility with the PoI is not a *positive case* for IVs. That case is made using decision theory. Decision theory operates on a principle of maximising expected value. When deciding how to act (or in this case how to design a criminal justice system), the decision maker should choose the option that maximises value. In the decision problem whether to convict or acquit, value is maximised when a true outcome is produced – that is, the defendant is convicted if guilty, and is acquitted if innocent (103).

How does this relate to IVs? For Picinali, they are justified when the probability of guilt falls within a certain range. Within that probability range, an IV would be justified if it yields higher expected value than acquitting or convicting (139). Picinali does not himself suggest figures – he is merely providing a model to be applied rather than dictating what the appropriate range should be.

Picinali also makes it clear at this stage that his IV will involve harder treatment for those issued with it than those issued with a 'not guilty' verdict. But – crucially – it must be hard treatment that is harder for those *who actually are guilty* than those who are innocent (161). It is this that leads him to the idea of CA: "an acquittal with a condition attached to it: precisely, that the defendant can be retried if new incriminating evidence is discovered" (165).

This takes Picinali into the territory of double jeopardy law. As he rightly points out, in England and Wales (and indeed in all of the UK jurisdictions), it is already possible to retry an acquitted defendant if fresh evidence emerges. Under Part 10 of the Criminal Justice Act 2003, a fresh prosecution can be brought where "new and compelling evidence" emerges that "appears highly probative against the acquitted person". Picinali's proposal would, therefore, narrow the law as it currently stands, allowing re-prosecution only following a CA, and not after a 'not guilty' verdict.

There are compelling arguments for a strict double jeopardy rule. In particular, a second trial may cause distress and anxiety for defendants and witnesses (179), it might undermine public confidence if the reliability of the procedures the State uses to determine guilt are questioned (180) and defendants are entitled under the principle of finality to move on and not live under the constant threat of re-prosecution (181).

These arguments are not decisive objections against allowing re-prosecution where compelling fresh evidence of guilt emerges (182). But, for Picinali, "[t]here is a point where the evidence adduced in the first trial is so weak—thus, the prior probability of guilt is so low—that, even accounting for the substantial probative value of the new incriminating evidence, the posterior probability of guilt is insufficient to overcome these arguments" (183). It is for this reason that re-prosecution should only be possible following a CA: "conditional acquittal would only be issued in cases in which the probability of guilt is sufficiently high that, with the discovery of incriminating evidence with substantial probative value, the posterior probability of guilt would be such as to outweigh arguments from distress, finality, and public confidence" (184).

Finally, Picinali defends his proposal against potential criticisms that might be made of it. To a lawyer such as myself, the most interesting of these relate to whether the CA could be implemented in practice. One objection, which Picinali discusses in section 5.4, is how the guilt probability thresholds that need to be applied (to determine which verdict is the appropriate one) might be sufficiently well defined. Picinali recognises the difficulty of representing these in percentages (224). He suggests that the relevant standard of proof for each of his three verdicts could be translated "into a corresponding verbal formula" and that "[w]hile this may not be easy, it is not an unprecedented task" (224).

At the outset, I was sceptical about whether it would be possible to design an IV that did not violate the PoI. Having read the book, I am far less so. The proposal is, as Picinali states, "more modest than the reader might at first have feared: as far as the English and Welsh system is concerned, the verdict I defend simply reallocates to a different range of the probability of guilt a form of hard treatment that the law already provides" (191).

The book does raise interesting questions for future debate. One relates to the practicalities of definition, especially as CA encroaches on some of the territory previously occupied by the 'guilty' verdict. Under the CA system, "the most severe measures that the criminal justice system employs, i.e. those involved in conviction, would be justified only when guilt is proven to a higher standard than that of the binary system" (242). Given that the binary system currently requires proof of guilt "beyond reasonable doubt" (often expressed in England and Wales as requiring that the trier of fact be "sure" of guilt), it is difficult to see what space is left for a 'guilty' verdict if the CA encroaches into some of that territory, other than conviction requiring 100% certainty of guilt. This would seem to present an almost insurmountable barrier, especially in cases such as sexual offence prosecutions, where conviction rates are already worryingly low.

A second issue is whether the CA might be utilised by decision makers as a "cop-out". The danger is that instead of applying the appropriate legal test (whether expressed in terms of probability of guilt or in a verbal formulation), the CA is used by the trier of fact as a compromise to avoid making a more difficult decision. Picinali does not avoid this issue – in fact he discusses it at some length. His response is to suggest that if this was to occur under the CA system, this would be "perfectly rational" (235), as CA changes the conditions under which conviction and full acquittal are justified. But this does seem to place a lot of faith in jurors to act under conditions of economic rationality. It may be that the CA works best in a system that utilises professional judges and it would certainly be interesting to hear Picinali's views on whether the CA system holds too many dangers for lay jurors.

Then, finally, it is worth thinking about implications of CA for double jeopardy law. Picinali's proposal would narrow the law as it stands, only allowing re-prosecution in the event of compelling fresh evidence following a CA, and not a full acquittal. Picinali justifies this on the basis that where there has been a full acquittal the probability of guilt is too low to be outweighed by the compelling arguments against re-prosecution (180). But probability of guilt is not a static concept. It can change after the discovery of evidence that was not available at the original trial. One need only think of the case against those who murdered Stephen Lawrence, who were (rightly) acquitted on the basis of the (weak) evidence that initially existed, but were convicted in a fresh prosecution when a re-examination of the forensic evidence, using techniques not available at the time of the trial, discovered compelling new evidence of guilt. Under Picinali's proposal, a re-trial would not have been possible in this case, but it seems to be precisely the sort of case where public confidence might have been lost if there had *not* been a re-prosecution.

All of that said, I raise these as points as conversation starters, rather than as criticisms of the work. Picinali concludes by stating that his goal was "to raise a question and bring it to the attention of those working in such jurisdictions who may never have considered it: can intermediate criminal verdicts be justified?" He acknowledges that his answer may not convince everyone but hopes that he "has succeeded in showing that there is something valuable to be gained from addressing the question" (243).

In this, the book is a resounding success. It puts IVs on the table and gives them the attention they deserve. The account is rigorously argued, rooted in an understanding of criminal procedure and, without doubt, provides food for thought to those who have never questioned the binary verdict system.

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