

Blame, Punishment and Intermediate Options

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In this paper I explore some ideas inspired by Federico Picinali's *Justice In-Between: A Study of Intermediate Criminal Verdicts*. Picinali makes a case for the introduction of intermediate options in criminal trials – verdicts with consequences that are harsher than an acquittal, but not so harsh as a conviction. From a certain perspective, the absence of intermediate options in criminal trials is puzzling – out of kilter with much of our everyday decision-making and, perhaps, with the recommendations of expected utility theory. I will argue, however, that the lack of intermediate options is much *less* puzzling when put in the context of our ordinary practices of blame and non-legal punishment.

I Where Are the Intermediate Options?

Federico Picinali opens his excellent *Justice In-Between* with a puzzle about criminal trials and intermediate options. Suppose I'm trying to decide how to get to work. If the weather is fine I like to walk through the park, but if it's raining I prefer to take the subway. Another option is to walk through the city. This is not as scenic as a walk through the park, but it offers some protection from the rain. Walking through the city is an *intermediate* option in the following sense: If it's not raining then walking through the city is better than taking the subway but not as good as walking through the park. And if it is raining then walking through the city is better than walking through the park but not as good as taking the subway. No matter what the weather is like I know that walking through the city won't lead to the best outcome, but I also know that it won't lead to the worst outcome – and, as a result, it could be a sensible choice, particularly if I'm very unsure about whether it's going to rain.

This impression is borne out by *expected utility theory* – the best known formal framework for navigating decisions under uncertainty. The expected utility of an option is equal to the probability weighted average of the utilities that it would yield, given each possible state of the world. Suppose I assign utilities as follows:

	Not raining	Raining
Walking through the park	6	-2
Walking through the city	4	1
Taking the subway	2	2

Given these assignments, if the probability of rain were, say, 60% then the expected utility of walking through the city would be 2.2, which exceeds the expected utility of walking through the park or taking the subway (1.2 and 2 respectively). If that is the probability of rain then expected utility theory would recommend that I walk through the city.

One place where intermediate options are not available, however, is in a criminal trial, in which the fact-finder has to make a binary decision; to acquit or to convict the defendant.¹ If the defendant

¹ Or so it is in almost all contemporary criminal justice systems. Picinali discusses several examples of non-binary verdict systems, including the Scottish system which allows for a verdict of 'not proven' in addition to the verdicts of 'guilty' and 'not guilty'. Contrary to what Picinali claims, though, I think it's unclear whether the not proven verdict counts as an intermediate option in the sense defined here – something I will return to in n6. At the time

is convicted then they will face punishment, which would usually take the form of a fine or a custodial sentence, and will be determined by the severity of the crime along with any aggravating or mitigating factors. Importantly, though, the determination of punishment is treated as a *separate* decision problem, triggered just in case the defendant is convicted (Fisher, 2011). The initial decision has only two options. In some criminal trials the decision over conviction and the decision over punishment would even fall to *different agents*, with the first decision made by a jury and the second by the trial judge.

While we may be very accustomed to this set-up, it's not *inevitable* that criminal trials should work like this. If the separation of these two decisions was less rigid, this could open up a range of intermediate options. Suppose a fact-finder could choose between acquitting, assigning full punishment or assigning *half* punishment. If a defendant is innocent then half-punishment would be worse than acquitting, but not so bad as full punishment. And if a defendant is guilty then half-punishment would be not be as fitting as full punishment, but would be better than acquitting. That is, half-punishment would count as an intermediate option. So why not allow a fact-finder to consider it?² In the commuting example, it would be strange if I first made a binary judgment as to whether it will rain or not and then, on that basis, selected the best way to get to work. This process would only ever lead to walking through the park or taking the subway – and never to walking through the city. When deciding how to get to work, I'd never exclude the intermediate option out of hand – so why exclude all intermediate options when it comes to criminal trials?

Some theorists have sought to apply the machinery of expected utility theory to the criminal trial.³ On this approach we begin by assigning values, in the form of numerical utilities, to the four possible trial outcomes; acquitting the guilty, acquitting the innocent, convicting the guilty and convicting the innocent. If the defendant is guilty then the utility of convicting will be greater than that of acquitting, and if the defendant is innocent then the utility of acquitting will be greater than that of convicting. The higher the probability of guilt, the higher the expected utility of convicting, and the lower the expected utility of acquitting. Based on the utility assignments, we can calculate a probabilistic threshold for conviction – the point at which the expected utility of convicting overtakes the expected utility of acquitting. Suppose we assign utilities to the four trial outcomes as follows:

	Defendant is guilty	Defendant is innocent
Acquit	-5	0
Convict	5	-100

of writing, the Victims, Witnesses and Victim Reform (Scotland) Bill, which proposes, amongst other measures, the abolition of the not-proven verdict, is under consideration by the Scottish parliament.

² As Picinali discusses, *ius commune* trials, common in Europe in the late middle ages, arguably *did* have something like a half punishment option (Picinali, 2022, section 1.2). In particular, *ius commune* judges had the discretion to impose 'extraordinary punishments' – typically less severe than the punishments prescribed by statute – in cases where guilt had not been fully proved. But systems like this are the exception rather than the rule, and it's instructive to look at the broader context in which this particular system emerged – against the backdrop of a widespread dissatisfaction with the requirements of 'full proof', which were seen as overly restrictive (Picinali, 2022, section 1.2.1). I won't discuss this further here.

³ This approach was pioneered by Kaplan (1968) and Cullison (1969). For some applications of the approach see Lillquist (2002), Hamer (2004), Laudan (2011) and Nance (2016, section 2.2).

If we are out to maximise expected utility then we should convict if the probability of guilt is greater than ≈ 0.91 and acquit if the probability of guilt is less than ≈ 0.91 (and if the probability is exactly 0.91 – or, more strictly, exactly $0.9\overline{09}$ – then either option could be permissibly chosen).⁴

This is a familiar line of reasoning – but to leave things at this point seems premature. If we are serious about using expected utility theory to guide decision making in criminal trials, then we should at least *consider* the possibility of intermediate options (though proponents of this approach seldom do).⁵ An intermediate option would be any verdict that yields a utility strictly between the utility of convicting and acquitting in the event that the defendant is guilty and strictly between the utility of acquitting and convicting in the event that the defendant is innocent (Picinali, 2022, p149).⁶ The intermediate option needn't perhaps be conceived of as partial *punishment*, but it will plausibly need to involve formal legal consequences that impose a significant burden on the defendant (Picinali, 2022, p2, section 4.4.1).

Suppose, for instance, that there was a third verdict that yielded a utility of -50 when applied to the innocent and a utility of 1 when applied to the guilty. If the probability of guilt were between ≈ 0.89 and ≈ 0.93 then, as can be easily checked, this verdict would have a higher expected utility than both acquitting and convicting. Maybe there are no partial punishments or formal legal consequences that would have a utility profile like that – but this is presumably not something that can be settled a priori. Put differently, there are going to be *logically possible* intermediate options that are capable of maximising expected utility – like the option described above – and the question of whether there are any *available* options like this would seem to be an empirical one.

Picinali derives a necessary and sufficient condition for an intermediate option to be capable of maximising expected utility.⁷ He then argues that there are genuine, viable intermediate options

⁴ Let U_{ag} be the utility of acquitting the guilty, U_{ai} be the utility of acquitting the innocent, U_{cg} be the utility of convicting the guilty and U_{ci} be the utility of convicting the innocent. The guilt probability at which the expected utility of convicting overtakes that of acquitting is given by $1/(1 + ((U_{cg} - U_{ag})/(U_{ai} - U_{ci})))$ (Picinali, 2022, section 4.2). As the formula makes clear, when it comes to calculating a probability threshold for conviction, what matters is not the utilities themselves, but the *difference* between the utility of convicting and acquitting in the circumstance in which the defendant is guilty and the circumstance in which the defendant is innocent.

⁵ Buchak (2014, p301) notes that an expected utility approach to criminal trials may, in the end, lead to a system in which the severity of a punishment is scaled according to the strength of the incriminating evidence, and Nesson (1985, section IIIA) makes a similar observation with respect to the award of damages in civil trials. Neither Buchak nor Nesson endorse this approach however. Fisher (2011) and Wansley (2013) argue in favour of evidentially scaled punishments – but appeal primarily to considerations of deterrence and crime reduction.

⁶ Is the Scottish not-proven verdict an intermediate option in this sense? Given that the formal legal consequences of a not proven verdict and a not guilty verdict are exactly the same (see for instance, Chalmers, Leverick and Munro, 2021, Picinali, 2022, pp1-2, section 1.4), I think it is at best unclear whether the former should be regarded as yielding greater utility than the latter when applied to a guilty person. It's true that the public perception of these two verdicts may be quite different, and a guilty person who receives a not-proven verdict might be expected to face greater social stigma – but is this really something that we should regard as *valuable*? It's one thing to think that there is value in deserved punishment, but it's quite another thing to think that there is value in a guilty person simply experiencing hardship and suffering, even when it doesn't take the form of any formal punishment for their crime. In any case, there are more plausible historical examples of intermediate verdicts in criminal trials, such as the imposition of extraordinary punishments in *ius commune* trials, as mentioned in n2, and the *per insufficienza di prove* verdict which was an option in Italian criminal trials until 1988, and did trigger burdensome legal consequences for the defendant (Picinali, 2022, sections 1.2 and 1.3).

⁷ Once again, let U_{ag} be the utility of acquitting the guilty, U_{ai} be the utility of acquitting the innocent, U_{cg} be the utility of convicting the guilty and U_{ci} be the utility of convicting the innocent. Let U_{ig} be the utility of applying the

that plausibly meet the condition in question, and advocates for their introduction into criminal trials. One significant contribution of Picinali's book is that he truly follows through on the implications of the expected utility approach to criminal trials. Perhaps he is more thorough in this than any of the other theorists who have endorsed this approach. While Picinali's argument for introducing intermediate verdicts into criminal trials certainly deserves serious consideration, in what follows I will suggest that the argument is significantly weakened when put in the context of our ordinary practices of attributing *blame*.

II Evidence and Blame

Blame is clearly something that comes in degrees; if I catch one person in the act of stealing my pen and another person in the act of stealing my car I might blame them both, but I blame the second person much more strongly than the first. In order to blame someone for an act of wrongdoing we clearly require evidence that they committed the act. And yet the *strength* with which we blame a person is not affected by the *strength* of this evidence.⁸ That is to say, the strength of the evidence might determine whether we blame a person *at all*, but if we do blame them, then the strength of this blame is determined by other factors – how serious we take their wrongdoing to be, whether we think they have a viable excuse etc.

Suppose some school textbooks have been defaced and a reliable witness tells me that Roger is the student responsible. If that's enough evidence for me then I'll blame Roger for ruining the textbooks, and do so with whatever strength of blame I think is proportionate to the act. If another witness comes forward and tells me exactly the same thing, then that might make me more confident about my decision to blame Roger, but it's not going to make me blame him *more*. If I discovered that the textbooks are difficult to replace and the students are going to struggle without them in the lead up to exams etc. then *that* might make me blame Roger more – but getting additional evidence that he damaged the books is not going to have this effect. Similarly, if another witness comes forward and tells a conflicting story – Roger couldn't have done it because he was somewhere else when the incident happened say – then that wouldn't make me blame him *less*. More likely, I'd stop blaming him altogether while I try to get the facts straight. If I discover that Roger was coerced into damaging the books then *that* might make me blame him less – but getting evidence that he might not have damaged the books at all is not going to have this effect.

Once I've settled on a view as to how bad this act is, and what strength of blame it warrants, I treat this, in effect, as an on-off decision – either I blame Roger with full strength or I withhold blame altogether. Another possible option would be to blame Roger with less strength – perhaps the same strength with which I blame the pen-thief. It seems that this would meet the conditions for an intermediate option – if Roger is innocent then it's better to blame him weakly than strongly, and if he's guilty, it's better to blame him weakly than not at all. Furthermore, this is an option that is open to me in some sense – in that I am psychologically capable of blaming with less strength. But it's striking that this is not something I would even consider. Intermediate options like this are effectively excluded from my decision – not by any rules I've been forced to abide by but, seemingly, by my own volition.

intermediate option to the guilty and U_{ii} be the utility of applying the intermediate option to the innocent. As Picinali shows, if $(U_{ii} - U_{ci}) / (U_{ai} - U_{ii}) > (U_{cg} - U_{ig}) / (U_{ig} - U_{ag})$ then there will be a guilt probability range through which the expected utility of the intermediate option will exceed the expected utility of both acquitting and convicting (Picinali, 2022, section 4.3).

⁸ Adler (2002), chap. 8, section 3, Buchak (2014), section 4, Littlejohn (2020), section 8, Ross (2022), section 5.1.

Our non-legal practices of punishment seem to follow the same pattern as blame. Suppose the school principal, after hearing from the witness, gives Roger a week of after-school detention. If another witness then comes forward to corroborate the story, that wouldn't prompt the principal to *increase* Roger's detention. And if a possible alibi emerges, that wouldn't prompt the principal to *decrease* the detention. If she buys the alibi, she'll scrap the detention altogether, otherwise she'll stick with the plan. Once the principal has decided what punishment is fitting for defacing the textbooks, she treats this as a binary decision – either impose that punishment on Roger or don't. Even though lesser punishments – like shorter periods of detention – would clearly count as intermediate options, these are not options that she would consider. And if she did go for an intermediate option we'd clearly regard that as inappropriate. Suppose that, when she hears about the alibi, the principal's reaction is to reduce the detention down to two days. Consider the following exchange:

Me: Only two days detention for defacing all those textbooks? That seems pretty lenient.

Principal: Yes – but I'm not too sure whether he did it at all. You see he might have an alibi.

Me: Well then he shouldn't be getting *any* detention!

Returning to criminal trials, one might think that the way trials are structured – separating the decision of whether a defendant should be acquitted or convicted from the decision of what punishment a convicted defendant should receive – represents an artificial distortion of our ordinary decision making. The comparison with something like deciding how to get to work might encourage that impression. In light of the foregoing considerations, though, I think the truth is just the opposite – the bifurcated set-up of a criminal trial mirrors the way that we *already* make decisions about blame and non-legal punishment.

What does this mean for Picinali's proposal? At the very least, it shows that introducing intermediate options into criminal trials would disconnect them, in one significant respect, from our ordinary practices of blaming and punishing. Perhaps this would be no bad thing – some have explicitly argued that we would do well to expunge the notion of blame from the criminal justice system.⁹ For better or worse, though, I am inclined to think that most people *do* see criminal trials as continuous with our ordinary practices of attributing blame, and that this plays an important role in their perceived legitimacy.¹⁰ Picinali does consider the objection that introducing intermediate options into criminal trials could threaten their legitimacy in the eyes of the public – but he doesn't specifically consider the relation with blame or non-legal punishment (Picinali, 2022, section 5.3.3).

Another way in which the foregoing considerations might affect Picinali's project is by casting doubt on his argument for introducing intermediate options into criminal trials in the first place. Given the parallels between criminal trials and ordinary blaming decisions, Picinali's reasons for adding intermediate options to the former will carry over, with minimal adjustment, to the latter. Much like a criminal trial, a decision over whether to blame a person can result in four outcomes; withholding blame from someone who is guilty, withholding blame from someone who is innocent, blaming someone who is guilty and blaming someone who is innocent. This decision can be shoehorned into the same kind of decision table that is standardly used in the case of a criminal trial. The particular

⁹ Papineau (2019), sections 6-11 and Hedden and Colyvan (2019) p464 express some sympathy for this idea, albeit in the context of a different discussion – concerning the use of bare statistical evidence as a way of proving guilt.

¹⁰ For some relevant discussion see Ross (2022), section 5.

numbers might be different of course – but as long as the outcomes are ranked in the same way, there will still be logically possible intermediate options that are capable of maximising expected utility.

If expected utility theory shows us that we should be considering intermediate options in criminal trials then it also shows us that we should be considering intermediate options in the way we lay blame for acts of wrongdoing. If, like me, you find that conclusion very difficult to accept then that suggests that there is indeed something wrong with this style of argument – though it may be hard to say exactly what it is. Perhaps, in certain domains, there are side constraints that restrict the scope of permissible action, and take precedence over the requirement to maximise expected utility. Or perhaps the fault lies in our assumptions about *value* – in particular, the assumption that the value of correct blame/conviction and the disvalue of incorrect blame/conviction can be measured on the same numerical scale. These questions will have to be postponed for another occasion.

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