Replies to readers of *Justice In-Between*

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During a symposium at the University of Edinburgh and, again, on this issue of the Edinburgh Law Review, Antony Duff, Fiona Leverick, Martin Smith and Gabrielle Watson raised a number of challenges to my book *Justice In-Between. A Study of Intermediate Criminal Verdicts* (OUP 2022). I feel honoured by the opportunity to converse about the book with such distinguished scholars and I am very grateful for the attention they have given to the work. In the space at my disposal, I endeavour to answer the most serious of these challenges. Unless stated otherwise, references to chapters, sections and pages are references to my book.

Replies to Duff

Duff points out that the compatibility between intermediate verdicts and the presumption of innocence straightforwardly follows from an understanding of the presumption as including just a rule on the allocation of the burden of proof. Intermediate verdicts do not alter the allocation of the burden of proof and are, therefore, compatible with whatever rule determines this allocation. I agree that intermediate verdicts do not alter the allocation of the burden of proof and I have stated as much in the book (23, 40, 58 fn5). But the presumption is often understood as *also* including a rule on how the accused should be treated. This is an understanding that I share,[1] and it is the understanding on which the argument for incompatibility is premised. Hence the need to take a longer route to argue for the compatibility between the presumption and intermediate verdicts. To define the rule of treatment included in the presumption, I identified and studied the principle of which the presumption is expression. This – I argue – is the principle of inertia in argumentation.

Regarding the principle of inertia, Duff questions my claim that it is sufficient to justify the rule according to which the prosecution bears the burden of proving guilt at trial. He argues that it would be compatible with the principle of inertia to adopt a system whereby, when the prosecution has adduced sufficient evidence to justify bringing the defendant to trial, it is for the defendant to prove their innocence to the trial fact finder. This is because – according to Duff – the prosecution's reason-giving effort can be seen as ushering in a new status quo (precisely, that in which the defendant is on trial), and this status quo may warrant 'the presumptive loss of those rights that are lost upon conviction for a crime'.

My reply starts by pointing out that being brought to trial may well be considered a 'new' status quo, but surely it isn't the status quo consisting in being subject to punishment, that is, in the loss of those rights to which Duff refers. So, while the

[1] In F. Picinali, *The presumption of innocence: A deflationary account* (2021) 84 MLR 708 I denied that the presumption includes a rule of treatment. As discussed in the book (81-89), I changed my mind on this.

prosecution's reason-giving effort in Duff's hypothetical may well warrant a change in the status quo of innocence – again, if we understand being brought to trial as such a change – it surely does not warrant punishment itself. After all, if giving sufficient reasons for charging were the same as giving sufficient reasons for punishing, the nature of the trial would be considerably altered. As we understand it, the trial is the phase where the decision about punishment-worthiness is made. If this decision preceded the trial, then the trial would either be unnecessary, or it would essentially be an appeal process. In fact, at a closer look Duff's hypothetical does not involve dispensing with, or reconceptualising, the trial. Rather, he suggests that the reason-giving effort that justifies bringing the defendant to trial may warrant only a *presumption* that the defendant is guilty, and therefore punishable; and he argues that the principle of inertia would allow for this presumption to determine a reversal of the burden of proof on the issue of guilt, such that at trial the defendant could be burdened with proving their innocence. This view, however, betrays a misunderstanding of how the principle of inertia operates.

To presume is to take a conclusion as true (perhaps only provisionally) without having sufficient evidence to reach that conclusion (whatever the standard of sufficiency may be). A presumption of guilt, then, cannot warrant the change of the status quo of innocence represented by punishment, because it does not satisfy the requirement – set by the principle of inertia – that sufficient reasons be given for the change to occur. The presumption may be based on some evidence of guilt, of course, such as evidence sufficient to charge the defendant. But if it is a *presumption* of guilt, it is not based on sufficient evidence to find the defendant guilty according to the applicable standard. Hence, according to the principle of inertia, the presumption does not warrant punishment, or a reversal of the burden of proof. The defendant cannot bear a burden to show at trial that sufficient reasons for punishing do not exist, because the reasons that the trial adjudicator recognises, until it reaches a decision to convict, favour the defendant's enjoyment of those rights that would be infringed upon by punishment.[2]

As explained in the book (74-75), the operation of the principle of inertia in the criminal process must be understood in conjunction with the institutional set-up of the process. Under the current set-up in England and Wales, it is the trial adjudicator that, qua institution representing the polity, needs convincing that there are sufficient reasons to change the status quo through punishment. This determination is made only at the end of the trial, such that up to that point the reasons recognised by said institution favour the enjoyment of rights. This set-up is independent of the principle of inertia and, as far as the principle is concerned, may well be changed. We have, however, strong reasons for maintaining it. Insofar as we do so, the principle of inertia demands that the prosecution bears the burden of proving guilt at trial.

[2] As for the issue whether the principle of inertia would allow reverse burdens of proof on individual elements of the crime/defences, I dealt with it in Picinali, n 1 and in the book (72 fn 38).

Duff argues that the presumption of innocence does not merely regulate the conduct of the process, but also 'defines the status quo', determining the rights to which everyone living in a society is prima facie entitled. Elsewhere, I have argued against similar 'substantivist' conceptions of the presumption.[3] In a nutshell my view is that interpreting the presumption so broadly is unnecessary (because there is already an independent jurisprudence of substantive human rights and there are already principles that can be relied upon in court to protect these rights from oppressive criminal laws); but it is also dangerous (because this extension of the meaning of the presumption risks turning it into an empty, toothless, norm).

In chapter 3 of the book I argue that, in the problem of adjudication, a deontologist about punishment can rely on decision theory without relinquishing any tenet of their theory of punishment. Duff doubts 'that deontologists can engage as wholeheartedly as [I claim] in the enterprise of maximising expected value' and he substantiates this doubt by relying on thought experiments that are frequently used to stress the distinction between deontological and consequentialist theories, and to test the respective commitments. It is important for the reader to appreciate that my focus is on adjudication and that, as defined at the start of chapter 3, adjudication is a very different decision problem from that represented by said thought experiments – a point that I make in the chapter (108). To clarify, typically adjudication differs from these experiments in the stakes involved and in its being characterised by uncertainty about which outcome will be produced by which action. Moreover, I do not advance any claim about consequentialist and deontological theories *tout court*: being concerned with adjudication, I focus on theories of punishment only.[4] My claim is that *in adjudication* a deontologist *about punishment* can rely on decision theory without falling foul of any of their deontological commitments regarding the choice whether to punish. I express these commitments about punishment as plausible restrictions to the maximisation of value (e.g., do not punish whom you know to be innocent, even if value is maximised by punishing) or permissions not to maximise value (e.g., you may punish whom you know to be guilty, even if value is maximised by not punishing). I show that decision theory delivers the same adjudicative decision as that delivered by these norms, whenever any of them applies due to the adjudicator having the relevant knowledge.

As pointed out in the book (section 3.5.2, in particular), a deontologist about punishment cannot avoid relying on a value function[5] (and on decision theory) for the purposes of adjudication, because not all cases will be governed by deontological restrictions and permissions. Whatever reasons a deontologist will factor in their value function – and assuming that they endorse a plausible ordering of the values of

[3] See Picinali, n 1, and F. Picinali, *Innocence and burdens of proof in English criminal law* (2014) 13 Law, Probability and Risk 243.

[4] My project, therefore, is much more modest than that of Seth Lazar. See chapter 3 for references to his work.

[5] This is an interval scale arranging the possible outcomes of the trial as a function of their respective value.

trial outcomes – I argue that using decision theory on the basis of said value function will actually deliver the same result as that delivered by following their deontological norms, when these do apply. The deontologist may not see themselves as an expected-value maximiser (perhaps, as suggested in section 3.6.4 they will see themselves only as a maximiser of expected *relevant* value). This does not matter for my argument. What matters is that in the context of adjudication they *will* maximise expected value, given their value function, even when they decide exclusively based on their restrictions and permissions. This result is important because it shows that my decision-theoretic justification of intermediate verdicts is viable also for the deontologist about punishment.

In the book I state clearly that my argument does not show – and is not meant to show – that there is no difference between deontological and consequentialist theories of punishment (108, 126-128). This difference can be articulated through thought experiments like the ones mentioned by Duff. More importantly, I stress that different theories of punishment will have different value functions and that, therefore, they are also likely to endorse different standards of proof and, thus, to lead to different adjudicative decisions.

Duff questions my *prima facie* case for conditional acquittal, arguing that an innocent defendant is likely to be worse off in a system adopting such intermediate verdict, compared to the current English and Welsh system; and that the use of conditional acquittal is likely to erode 'mutual social trust'. I take these points in turn. My defence of conditional acquittal is based on the principle of expected-value maximisation: from the perspective of the decision maker – and given that their value function meets certain minimal plausibility conditions – conditional acquittal maximises expected value if issued when the probability of guilt falls within a particular probability range. Notice that this approach is very different from an attempt to justify conditional acquittal by reasoning about the overall value of the likely distribution of outcomes produced by a system that were to adopt such a verdict. As pointed out in the book (54-56, 213-215) the latter justificatory strategy is not viable. We cannot calculate reliably the (value of the) distribution of outcomes in our current system; how can we hope to calculate reliably the (value of the) distribution of outcomes of a hypothetical system? So, it is probably true that, as Duff says, some innocent defendants would be worse off with conditional acquittal in place (because they would receive this verdict instead of the acquittal they would have received in the current system); but it also probably true that some innocent defendants would be better off (because they would be fully acquitted and, therefore, they could not be retried). Without a reliable calculation of the outcomes' distributions, we cannot say which of the two effects is stronger and, hence, whether innocent defendants would on the whole benefit from a reform of the verdict system. Notice that this uncertainty is avoided by justifying the verdict system from the *ex-ante* perspective of the decision maker in a token case, having the maximisation of expected value as the guiding principle. With this justificatory strategy there is no need to calculate distributions of outcomes, and their overall value.

Be that as it may, my objection to the current system is that it allows for a retrial in cases where the probability of guilt, even after discovering new incriminating evidence, is too low to overcome arguments from finality, distress and public confidence (176-183). While I do not offer a conclusive case, I show how a decision-theoretic defence of conditional acquittal could overcome these arguments (184-189).

The point about conditional acquittal eroding social trust is an important one and I do not take it lightly. But here I need to remind the reader that my case for conditional acquittal is a *prima facie* justification only (4.4.2 and Conclusion). Conditional acquittal is the best verdict I could think of that has potential to satisfy the 'superiority condition' identified in chapter 4. Whether it does indeed satisfy such a condition will depend on the value function of the decision maker – in particular, on how they value inflicting this verdict on the innocent and on the guilty, respectively. In the book I do not defend a particular value function, but I invite theorists of punishment to consider whether conditional acquittal could be justified, given their value function (that is, the value function of the theory of punishment that they endorse). Duff is precisely taking up this invitation – or so it seems – and he is pointing out that conditional acquittal may not be justified based on the value function that he would endorse.

Replies to Leverick

Fiona Leverick raises the question whether conditional acquittal would be compatible with the European Court of Human Right's (ECtHR) understanding of the presumption of innocence. In chapter 2 of the book, I have defended an alternative understanding of the presumption and I have argued that there is no incompatibility between an intermediate verdict (be it conditional acquittal or some other verdict) and my preferred understanding. But the question about the compatibility with the ECtHR's understanding is undoubtedly interesting. According to Leverick, the issue boils down to whether the expression of doubt that one may reasonably see as an intrinsic feature of conditional acquittal would undermine the presumption of innocence.[6] I cannot engage with ECtHR case law here. However, I agree with Leverick's remark that acquittals in jurisdictions that adopt reasoned verdicts often express doubt but are not for this reason considered incompatible with Art. 6(2) ECHR. Perhaps a similar approach would be adopted by the Court towards an intermediate verdict such as conditional acquittal.

Leverick correctly points out that implementing the decision-theoretic model requires adopting standards of proof consisting in probability thresholds; and that, whether these thresholds are expressed numerically or verbally, there will inevitably be disagreement amongst adjudicators (both professional and lay) as to what these

[6] A separate issue is whether there is uptake of this expression by the polity; in other words, whether the expression has a stigmatising effect (62-65). This issue would have to be studied empirically and, in my view, it would be relevant to the compatibility between the intermediate verdict and the ECtHR's understanding of the presumption.

thresholds mean and/or how they should be applied. I acknowledge this issue in the book (225 fn 64). But, as Leverick recognises, disagreement already exists with reference to the standards currently adopted (whether the standard is reasonable doubt or being sure of guilt) and their application (*ibid*). Indeed, a quantum of disagreement in the understanding and in the application of standards of proof is inevitable. The challenge is to find ways of limiting it. So, I don't think the decision-theoretic approach introduces a new problem in this respect; nor do I think that it necessarily exacerbates the problem. Indeed, reworking our standards of proof may well be an opportunity to identify formulations that are less likely to foster disagreement.

Leverick claims that my discussion of the worry that an intermediate verdict may be used as a 'cop out' (section 5.6) 'slightly misses the point'. According to her, I have not considered the possibility that in a case where there is a conflict of views within the jury, instead of attempting to solve this conflict through deliberation, jurors seize the intermediate verdict as a solution of compromise that spares them further burdensome discussion. I beg to disagree: I do address this issue in the book (235-237). There I say that this way of employing the intermediate verdict is an instance of non-virtuous decision-making. The jurors who agree to use the verdict as a way of avoiding their responsibility to deliberate on the case are not deploying epistemic virtues such as thoroughness, caution, patience, and judiciousness (236 fn 93). But I also point out the obvious fact that non-virtuous decision-making can occur even in a binary system.[7] This is because 'the ultimate driver of virtuous adjudication is the virtuousness of the adjudicator, not the verdict system' (236). Now, I am not oblivious to the fact that a non-binary system may encourage non-virtuous behaviour –[8] in fact, in the book I engage with relevant findings of the excellent Scottish Jury Research (52-53, 236). However, I argue that if we put sufficient effort into nurturing virtuous behaviour on the part of the adjudicator (whether lay or professional), and if we have reasons to adopt a non-binary system, then the risk that the non-binary system encourages non-virtuous behaviour should be sufficiently small that it should not detract from such reasons.

Leverick appears to mischaracterise my argument against allowing retrials in case of full acquittal. My focus is not on the probability of guilt resulting from the consideration of the evidence adduced in the first trial (or the prior probability of guilt); rather, it is on the probability of guilt resulting from conditioning the prior probability on the new incriminating evidence (or the posterior probability of guilt). My point is that the prior probability may be so low that, notwithstanding the new incriminating evidence, the posterior probability is not sufficient to outweigh arguments against retrial. To clarify, I am not arguing that this will happen in all cases

[7] Perhaps, as juror seven in Sydney Lumet's *12 Angry Men*, jurors operating in a binary system may want deliberation to end quickly so that they can attend a baseball match.

[8] To be sure, whether a non-binary system does so may depend on the particular features of the system and should be empirically tested.

of full acquittal. Rather, I argue that it may happen; and that, therefore, the current English and Welsh law in principle allows for a retrial in cases in which it should not. Limiting the possibility to retry a defendant to cases in which the trial resulted in an intermediate verdict creates a cost. There will be cases of full acquittal where the new incriminating evidence is strong enough to push the posterior probability of guilt beyond the critical threshold that would warrant a retrial. In these cases, though, a retrial will not be allowed. However, in my view this cost is outweighed by the consideration that, as said earlier, a regime allowing for a retrial in all cases of full acquittal (assuming that new evidence with the required features emerges) falls foul of the double jeopardy rule.[9] As for the specific cases mentioned by Leverick (that for the murder of Stephen Lawrence and that for the 'World's End murders'), it is possible that if an intermediate verdict like conditional acquittal had been available at the time, the trials would have resulted in such a verdict, and that the defendants could have been retried on this ground. But this thought is speculative indeed.

Replies to Smith

Smith acknowledges that everyday decision-making is often non-binary and that this can be justified on decision-theoretic grounds. However, he argues that there is at least one important domain of our social lives in which decision-making is, and should be, binary. This is the domain represented by non-legal practices of blaming and punishing. Consider, for example, the deployment of blame and punishment in an educational setting, such as the family or school. In our everyday life the extent of our blame and punishment may depend on the seriousness of the behaviour for which we blame and punish, but it does not depend on the strength of the evidence of that behaviour. Blame and punishment seem to presuppose an evidential threshold, such that they are permissible when the evidence of the relevant behaviour meets the threshold and impermissible when the evidence does not. According to a version of this view, blame requires belief, and a cognitive attitude short of belief does not warrant a portion of the blame that would be warranted by believing.[10] Smith suggests that in some instances of everyday decision-making we do not separate the questions 'what is the world like?' and 'how should I act?' and that this allows us to adjust our action to the probability that the world is one way or another. In the case of blame and punishment, instead, we keep the factual and the practical questions separate. First, we decide whether the relevant behaviour did or did not occur, based on an evidential

[9] An alternative that I briefly discuss in the book (182 fn88 and accompanying text) is to allow for a retrial in case of full acquittal, but to alter the current evidential test for a retrial. Aside from requiring new incriminating evidence, the test should also require that the posterior probability passes a critical threshold. This regime would be immune from my objections.

[10] See L. Buchak, *Belief, Credence, and Norms* (2014) 169 Philosophical Studies 285, at 299, claiming that a credence, even if high, is not sufficient for blame. Blame requires belief, and 'the degree of blame I assign to a particular agent is based on the severity of the act, not on my credence that she in fact did it'.

threshold of sorts. We then choose our action accordingly, such that either we act as if the behaviour occurred (we blame and punish) or we act as if it did not occur (we do not blame or punish).

Smith draws a parallel between non-legal blaming and punishing practices, on the one hand, and criminal justice, on the other. In common law systems, the criminal process presents a separation between trial fact finding and sentencing, which parallels the separation, discussed earlier, between factual and practical questions. In other words, while the separation characterising the criminal process may be due to historical contingencies that are unrelated to our non-legal blaming and punishing practices (after all, we do not find this separation in civil law systems, notwithstanding that such practices are arguably similar in these jurisdictions), the process appears to mirror these practices. Indeed, legal punishment is often understood as, and valued for, being about the attribution of blame. Smith's main worry, then, is that 'introducing intermediate options into criminal trials would disconnect [trials] from our ordinary practices of blaming and punishing' and that this may threaten the 'perceived legitimacy' of the criminal justice system.

There are two points that I wish to raise in reply to this challenge. To begin with, one may question whether legal punishment is, and especially whether it should be, about blame. Following Hart's influential definition, one may characterise legal punishment as the intentional imposition, by the legal system, of hard treatment on an individual for their offence.[11] Blame is not an element of this definition and, indeed, not all normative theories of punishment see blame as one of punishment's essential or desired features. In the book I take no position on the issue whether punishment should be about the attribution of blame. Taking a position would have meant committing to (at least some traits of) a theory of punishment, and this is something that I have intentionally avoided. If legal punishment should not be about the attribution of blame, though, there may be little reason to worry about discrepancies between it and our everyday blaming practices.

This reply may seem too fast to the reader, to be sure. Whether or not the best normative theory of legal punishment conceives of it as a blaming practice, if legal punishment is indeed currently understood and valued by the polity as a blaming practice, one may argue that discrepancies between it and other blaming practices should be avoided, since they may threaten the perceived legitimacy of legal punishment. This worry, while non-trivial, involves empirical unknowns (e.g., how is punishment understood by the polity in a given system?) that prevent me from dealing with it appropriately in this venue.[12]

Even if legal punishment is, and should be, about blame, this need not mean that all forms of hard treatment that the criminal justice system imposes as a conclusion of the process must also be forms of punishment and involve blame. Arguably the

[11] H. L. A. Hart, *Punishment and Responsibility. Essays in the Philosophy of Law* (OUP 2008), at 4-5.

[12] But see section 5.3.3 of the book for a discussion on whether adopting intermediate verdicts would undermine the legitimacy of the system.

current English and Welsh system already imposes 'concluding' forms of hard treatment that are not forms of punishment and do not involve blame. Think about cautions, or the reparative measures agreed upon in the context of a restorative justice procedure. An intermediate verdict need not involve punishment and blame either, even if it does involve hard treatment. In fact, the intermediate verdict that I have defended in the book – conditional acquittal – could hardly be seen as involving either. It is no accident that in the book I avoided referring to intermediate verdicts as involving punishment,[13] notwithstanding that I have stressed the possibility that they involve hard treatment.[14] What is more, I believe that also in our everyday blaming and punishing practices (practices involving the ascription of responsibility for immoral acts) we do sometimes make use of intermediate options that do not involve punishment or blame. I have given an example of this phenomenon in the Introduction to the book (5), but another example may be useful. Think of a party that you have organised with great effort in the house in which you have just moved. You invited a group of friends, as well as your new neighbour. After the party, you become aware that an unfair rumour has spread in the neighbourhood according to which you are a terrible cook and a poor host. All your friends live in a different part of town, such that it is unlikely that they are responsible for spreading the rumour. You don't have sufficient evidence to believe that your neighbour is responsible, but you suspect that they are. Therefore, you may not blame your neighbour, but the suspicion may well be sufficient for you to decide not to invite them to the next party you organise. If you had no suspicion on them at all, instead, you would happily invite them again.

The bottom line is that even if it is true that legal punishment is about blame and that the extent of our blaming response (whether in a legal or in a non-legal setting) does not depend on the strength of the evidence, it does not follow that, in the absence of sufficient evidence to blame, we may not justifiably adopt an option that is more burdensome for our interlocutor than acting as if they had done nothing wrong. If intermediate options can be non-blaming options, perhaps Smith's worry about using them in legal and non-legal blaming and punishing practices is unfounded.

Replies to Watson

Addressing Gabrielle Watson's stimulating objections last, and given the partial overlap between these objections and those advanced by other discussants, I will draw on some of the above replies.

Conditional acquittal involves hard treatment, consisting in the expected cost of a new trial. Watson argues that this hard treatment – in fact, the hard treatment involved

[13] Of course, an exception to this is the *ius commune* 'extraordinary punishment', which I discussed in chapter I.

[14] My reason for not referring to intermediate verdicts as involving punishment was not that punishment should be about blame, whereas intermediate verdicts may not be. As said already, I have taken no position on whether punishment should be about blame. Rather, the reason has to do with the assertive component of verdicts, as discussed at p. 160, fn 39.

in any intermediate verdict – may not be a form of punishment, since it is not directed at the 'legally guilty'. In my replies to Smith, I pointed out that this claim may, indeed, be correct and that in the book I have not suggested otherwise. Watson argues, though, that irrespective of the definitional issue, conditional acquittal 'generates serious ethical challenges': if not a punitive measure, it is, at least, a 'quasi-punitive' measure on a par with other such measures (e.g., police custody and pre-trial detention)[15] that 'all impose hard treatment in the absence of a guilty verdict'. Adopting conditional acquittal, therefore, requires justification. This is a statement I plainly agree with: in fact, much of the book is devoted to the task of justifying intermediate verdicts, conditional acquittal in particular.

But what are, according to Watson, the main challenges for a justification of conditional acquittal? As I understand her paper, Watson makes three interrelated considerations. First, she points out that conditional acquittal 'fails to adhere to the presumption of innocence', a norm that she construes as including both a rule allocating the burden of proof and a rule setting the reasonable doubt standard. I won't dwell on the presumption of innocence here. In my replies to Duff and in chapter 2 of the book I have discussed at length why the presumption of innocence is compatible with intermediate verdicts – even if it is construed as encompassing also the reasonable doubt standard.[16] Second, Watson argues that conditional acquittal is in tension with the system's obligation to treat defendants respectfully, since the doubt that is expressed by the verdict 'would risk imposing severe dignitary harms on legally innocent individuals'. Watson's discussion implies that this obligation flows from the presumption of innocence itself, this being a claim that I deny for reasons expressed in the book: the presumption of innocence implements requirements of rationality only.[17] Whichever reading of the presumption one favours, though, the obligation, and hence the argument from disrespect, apparently hold. Watson's third consideration effectively fleshes out her point on respect: conditional acquittal is disrespectful because it risks stigmatising the innocent defendant, leading to social phenomena such as labelling, stereotyping, status loss and discrimination.[18]

Watson's worry about the detrimental social effects of conditional acquittal is akin to Duff's objection that this intermediate verdict would erode social trust. Let me restate here something I said in addressing that objection. In the book I offer only a *prima facie* justification of conditional acquittal and I invite the reader to consider

[15] I won't comment on the analogies drawn by Watson here.

[16] On the compatibility between the presumption, so construed, and intermediate verdicts see p. 58 fn 5.

[17] The rule of treatment embedded in the presumption is such a requirement and need not have any specific moral content. For details see chapter 2.

[18] Watson mistakenly reports that in the book I deny that the social stigma that may be associated with conditional acquittal would be a product of the verdict. Here she confuses my discussion of stigma with reference to full acquittal (61-65) and that with reference to conditional acquittal (section 4.5.2): I argue that stigma is not a product of the former verdict (although it may be correlated with it), while it is a likely product of the doubt expressed by the latter.

whether this verdict may be justified based on their own value function concerning trial outcomes (i.e., whether, given such value function, conditional acquittal would satisfy the superiority condition). Watson's analysis can be interpreted as an attempt to figure out whether this is the case. The fact that it is not, does not contradict the approach of the book. Having said this, I do have some doubts about Watson's arguments.

Watson stresses the obligation to respect the legally innocent (that is, defendants who have not been convicted). According to any sensible construal of the concept of 'respect', though, the polity owes respect also to the legally guilty. Indeed, in previous work[19] Watson has persuasively argued that the value of respect should be taken more seriously in the prison setting. But also consider manifestations of stigma discussed by Watson in her response paper, such as stereotyping and discrimination. Irrespective of whether some forms of stigma suffered by the legally guilty are justified, there undoubtedly are forms of stereotyping and discrimination that we should not accept even if directed at the legally guilty. For example, both as individuals and as a community, we should not endorse a universalising heuristic, according to which 'once a criminal, always a criminal', to ascribe to someone with a previous conviction responsibility for a distinct crime. To do so would be disrespectful, to say the least.

So, what exactly does a duty of respect require in case of a legally innocent person that it does not require in case of a legally guilty person? Here Watson can be taken to claim that in the case of the legally guilty we are justified in changing, within limits, our behaviour and attitudes towards them (indeed, we are justified in punishing them); not so in case of the legally innocent. In my view, this is too stringent an understanding of what respecting the legally innocent requires. It seems perfectly rational, and morally acceptable, that in our everyday life we adjust our behaviour towards others as a function of how confident we are that they are responsible for a given action. Consider the example of the neighbour offered earlier, in replying to Smith: the evidence of their responsibility has more than just two shades, and so does our behaviour towards them. Why would it be a problem if the design of the verdict system were such that individuals would be enabled to make these non-binary adjustments also towards defendants?

Perhaps the system should discourage individuals from adopting any change in attitude and in behaviour towards any defendant (perhaps it should be the exclusive province of state institutions to change attitude and behaviour towards defendants; perhaps this is because we cannot be trusted to appropriately adjust our behaviour and attitude to the evidence and the nature of the crime charged). If attitudinal and behavioural changes by individuals are inimical to criminal justice, though, the problem concerns the guilty verdict – hence, the binary system – too: there is, indeed, strong evidence that this verdict produces social stigma (193 fn105). If, however, someone were to argue that (at least, some) such changes are justified when there is

[19] See G. Watson, *Respect and Criminal Justice* (OUP 2020).

sufficient evidence for conviction, then I would be suspicious of an additional argument to the effect that weaker evidence could not justify milder changes. In any case, in Watson's discussion I cannot find an adequate argument for this conclusion.