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Commentary on John Woods: “The Incommensurability of Rival Legal Abductions”

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0. Admittedly, it has been many years since I was a prosecutor, or Crown as we say here, and many more since I took Criminal Procedure, but reading John Woods' characteristically erudite and persuasive paper on the logical frailties of legal reasoning in criminal cases what went through my mind was: 'My Lord, things sure are different down South'. For it seemed to me that there are several features of Woods' characterization of the abductive reasoning in criminal proceedings, especially the role of juries, that does not accord with my understanding of Canadian, or English, criminal procedure, especially in light of sections 7 and 11 of the *Charter of Rights and Freedoms*.

[It bears mentioning, before going on, some background facts about Canadian criminal law that are undoubtedly responsible for my concerns about Woods' discussion. First, in Canada jury trials are relatively rare. Secondly, for any serious offence, the trial is merely the first of a series of steps: in Canada every murder trial goes to the Supreme Court of Canada, as of right. Together, these facts make the point that factual disputes, which only arises at trial, invariably fade into insignificance as the case proceeds through appeals (which can only debate issues of law, not fact). Thirdly, a substantial portion of criminal trials involve confessions or other forms of self-incrimination. Lastly, in Canada since 1981, nearly every criminal trial for a serious offence resolves to an application of one or another sections of the Charter of Rights and Freedoms, which takes the issue out of criminal law and into constitutional law, where a wide range of other policy considerations become relevant.]

1. Woods' first example of the criminal law's "epistemic shortfall" he dubs the 'no reason to doubt problem'. Wood suggests that the problem arises most naturally in cases based solely on circumstantial evidence, and to start things going Woods draws our attention to two widely-shared misconceptions:

a) that circumstantial evidence is too weak to meet the criminal standard of proof beyond a reasonable doubt; and that

b) the Crown's theory of the case cannot meet this standard if there exists a rival theory that is reasonable.

Woods is quite correct that the first of these is a misconception. Circumstantial evidence

is standardly distinguished from direct, or more accurately, testimonial evidence. The difference here is not a matter of inference – inference is required for both – but rather that in the case of circumstantial evidence the trier of fact must consider both the credibility of the witness and the soundness of the inference the witness is suggesting, whereas in testimonial evidence the issue is credibility alone. In a word, circumstantial evidence has two sources of error, the assessment of credibility and the drawing of inferences. But it would be wrong to conclude that circumstantial evidence is either weaker or less reliable than testimonial evidence. There are cases in which circumstantial evidence has been held to be more reliable than direct evidence. Hence, Wood's first misconception is probably so described.

As for the second misconception, here's where things become considerably less clear. Woods quotes from a case that, without naming it, cites the so-called Hodge's Rule on circumstantial evidence [*Hodge's Case* (1838), 168 E.R. 1136], namely that in order to convict on circumstantial evidence, the jury must *not only* come to the conclusion that the evidence is consistent with the prosecutor's theory of guilt, *but also* come to the conclusion that the evidence is inconsistent with any rational theory of innocence. In Canada, and elsewhere, Hodge's Rule is no longer the law [*R v. Cooper* (1977) 47 D.L.R. (3d) 731 (S.C.C.)]; there is even some dispute whether it ever was intended to be taken seriously.

Woods', however, says that to reject Hodge's Rule commits one to an 'offence to common sense' that is embodied in two facts:

- I. Criminal conviction requires evidence to show guilt beyond reasonable doubt;
- II. Criminal conviction is possible even when there exists a reasonable case for acquittal.

Woods states: "If there exists a reasonable case for acquittal then, by common sense, that very fact constitutes a reasonable doubt of guilt." On the basis of this, Woods' concludes that the criminal proof standard is incoherent, and massively unjust.

2. Unfortunately, Woods has misinterpreted what a rejection of Hodge's Rule entails. Even if it were the jury's proper role to determine guilt or innocence (which I will deny in a moment), the jury's role is never, ever to decide between the Crown's theory and the defence's theory. To do so would violate the presumption of innocence, which in Canadian terms is embodied in the *Charter* and as such has pre-eminent legal authority over anything in the criminal law.

The presumption of innocence means that the defence is under no obligation whatsoever to produce a theory of innocence; the legal burden falls entirely on the Crown to overthrow the presumption of innocence, which can only occur by producing a theory of guilt beyond a reasonable doubt. The defence's job is to cast doubt on the prosecutor's theory – that it is based on incredible or unreliable evidence, that the evidence is irrelevant to the offence as charged, that the evidence is insufficient to make out a proof beyond reasonable doubt. An alternative theory is one way of doing that, but the defence is under no obligation to do so, and indeed, strategically, it often is a mistake to try.

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But surely, Woods' says, common sense dictates that a reasonable theory of innocence is inconsistent with a proof beyond reasonable doubt. Of course it would. More to the point, if the best the jury could come up with was that the accused was probably guilty, or even more likely than not guilty, they would be legally obliged to vote for acquittal. But all of this is a red herring and does not show that the criminal standard is incoherent, far from it.

The criminal standard does not require 'proof beyond the possibility of reasonable doubt', which is as close to logical certainty as doesn't matter. Given that we are operating in the realm of reality rather than mathematics, a reasonable theory of innocence consistent with the evidence is always possible. It is not very likely that our accused had an evil twin, but if we suggest he did then the alternative theory constructed on this basis (and consistent with all the evidence we have) would count as reasonable. Reasonable, but highly unlikely. Indeed, with enough imagination and time we could come up with as many reasonable but highly unlikely theories as we had patience for.

What the rejection of Hodge's Rule means, in light of the fact that there is no intrinsic probative difference between circumstantial and testimonial evidence, is that it would be a hopelessly impossible burden to require the prosecutor, not only to construct a theory of guilt, but to make the case that there is no logically possible reasonable theory of innocence. Such a burden is impossible to satisfy, that is why Hodge's Rule is not law.

What is the criminal standard, then? It is a level of proof sufficient to dislodge the presumption of innocence; it is a level of proof that applies to the entire corpus of admissible evidence taken together, not bit by bit; it is proof that reaches 'moral certainty', but not logical certainty. Hence, a reasonable doubt is not a frivolous or imaginary doubt, however reasonable it may be.

Perhaps Woods is assuming one or the other of the following principles:

- a) If *X is a reasonable doubt that P*, then *X* entails not-*P*.
- b) If *X is a reasonable doubt that P*, then no adequate or persuasive abductive argument would show that *P* is true.

Principle a) requires an interpretation of '*is a reasonable doubt*' that turns it into a truth-functional operator, which it manifestly is not in legal discourse. Principle b) miss the boats since conditions of rational adequacy or persuasiveness are wholly intrinsic to the legal discourse and governed by principles of procedural justice (and since 1981, constitutional law). As my criminal prof used to say, "Legal logic is not common sense, thank god."

3. Woods' second problematic for criminal law reasoning – the 'no rival' problem – is far more difficult to respond to in a short space. What I want to do quickly, though, is point out some important misconceptions about the role of juries that are buried within the manner in which Woods sets out his problem and his solution involving individual juror's 'filtration' of the evidence.

First of all, a caveat. Obviously what I am about to say involves the legal role and requirements of juries and judges, not a sociological description of what jurors actually do behind closed doors, nor a psychological description of how jurors' minds work.

Suffice to say that neither valid nor reliable sociological or psychological descriptions are available since the factual features of jury deliberations are not accessible for easy study. Obviously, Woods is offering a reconstruction not an empirical accounting, and I appreciate that. My point is essentially that Woods' reconstruction does violence to the legal role and obligations of juries. Putting it operationally, if anyone found out that juries were actually doing what Woods suggests that are, then the case would be successfully appealed and a new trial would be ordered.

I say this because of the following, legally trite propositions about juries:

- A. Juries are triers of fact, not law. Guilt or innocence are legal judgments (supervenient on facts), not facts themselves. Juries do not make judgements about guilt or innocence, they are directed by judges to come to one conclusion or another should they be in agreement on certain specified factual issues such as credibility.
- B. Juries discuss and debate only those issues that are explicitly put before them by judges; if their judgment relies on issues or facts not put before them, the chances are very high indeed that their decision will be successfully appealed.
- C. Typically, juries are not in the courtroom when questions of admissibility of evidence and any other evidentiary or procedural issues are debate by counsel (these 'trials within trials' are called *voir dire*s).
- D. The judge is obliged to give detailed directions to the jury before their deliberations. Besides providing instructions as to the burden of proof, the presumption of innocence, the respective roles of the judge and the jury, the judge will review the evidence the jury may consider. Finally, the judge will outline the respective theories of the case as presented by the prosecutor and the defence.
- E. The judge will regularly instruct the jury to take certain facts or inferences from facts as indisputable and not open for further deliberation.
- F. The judge – on pain of having an appeal court overturn the trial decision – will instruct the jury that their only task is to determine whether the Crown has made out a case for guilt, beyond a reasonable doubt, and that the jury is not to proceed as if it's task was to determine which of the two theories – the Crown's and the defence's – are more likely.

Now all of this makes it sound as if juries are under extraordinary constraints that limit their ability to discuss and deliberate, or as we would say, try out abductive arguments and select the best of them. Legally speaking, this is true. This is a fundamental pillar of our conception of procedural justice. What actually happens, is anybody's guess.

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