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Commentary on John Woods' "Evidence, Probativity and Knowledge: A Troubled Trio"

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As it is always the case when reading John Woods' elaborate yet poignant prose, I enjoyed myself a lot while going through his contribution to this edition of the OSSA conference. To my mind, Woods' paper articulates two main theses, one negative, the other positive:

- Negative thesis: Jury-based criminal trials repeatedly and consistently violate epistemological and logical standards of correctness. Yet they deliver acceptable results, i.e. jurors are capable of reaching competent verdicts in spite of all those violations. Thus, those standards are, at the very least, not the only game in town when it comes to adjudicate the correctness of reasoning procedures.

- Positive thesis: Jurors achieve their goal by doing something different from both the epistemological and logical mandate, and what judges tell them to do, i.e. establishing proof of guilt beyond reasonable doubt; instead, jurors use common knowledge and common sense to reach a conclusion that satisfies their own intellectual honesty. In Woods' own words: "What counts here is not *proof* of guilt beyond a reasonable doubt but conscientious doubt-free *belief* of guilt". Here Woods' argument is (explicitly) abductive: since jurors' application of common sense and common knowledge lead to epistemically valuable results, it is most likely that common sense and common knowledge possess epistemological and logical virtues far greater than what is usually assumed by the philosophical establishment.

Alas, I am in complete agreement with both claims! This is unfortunate, since agreement between an author and his appointed commentator does not bode well for the audience: in the absence of some point of contention, the poor commentator is often left with no other recourse than summarize and applaud the author's work, which is, to be honest, a rather tedious business. Besides, John Woods would get little out of my approval, since he has often received (deservedly so) more significant praise and acknowledgment from higher sources than my humble self. In fact, on that note, I would like to invite our readers to dwell on the many contributions included in a recent collection on Woods' monumental work on the logic of argument, the volume "Natural arguments", edited by Dov Gabbay, Lorenzo Magnani, Woosuk Park, and Ahti Veikko Pietarinen in 2019: many of the papers collected there are also relevant for the topic of the essay I am commenting upon.

However, to rescue me from the embarrassment of "dumbness by sheer agreement", there is a minor point of clarification I would like to bring up in this commentary: it pertains the assessment of what Woods call "criminal proceedings on the ground", or CPG for short. After detailing "a clear conflict between establishment epistemology and the epistemology and logic implicit in CPG", Woods concludes his indictment of the former by noting that "one of two things would be true. One is that CPG is somehow compatible with establishment thinking. The other is that CPG defeats it. Of the two, the second alternative is easily explained. The first calls for the faith of ages". While this usage of CPG as an instrument to defeat establishment thinking is ingenious and compelling, it ultimately rests on the assumption that CPG outcomes are not only acceptable, but also superior to what could be achieved by giving free rein to establishment thinking in criminal proceedings. I suggest this assumption warrants further inspection.

Firstly, how good are CPG pronouncements? Relatedly, how do we measure their quality? In matters of criminal justice, correctness should be our guiding light, thus there are two parameters we need to consider: the rate of false convictions, and the rate of false acquittals. Woods mentions the matter just passingly (footnote 3) and seems to think that both numbers are small enough not to generate substantial concerns on

the goodness of CPG; in particular, he compares a rough estimates of wrongful convictions (800) to the total number of criminal convictions (172000) per annum in Canada, which would indeed equal to a false conviction rate lower than 0.5%. However, these numbers may be questionable, since confirmed exonerations (i.e., false convictions that we know about) typically pertain only high-profile cases, e.g. murder and rape, whereas in other criminal offenses false convictions are likely to fly under the radar, because "those wrongfully convicted for a minor offense are neither interesting from the point of view of the media nor are they likely to make the effort to have the verdict overturned" (Brants 2012, p. 1071). Thus calculating the rate of false convictions as the ratio between confirmed exonerations and the total of criminal convictions is likely to give us too optimistic an estimate of how well the legal system is working.

Here is the same reasoning applied to the US case: "As recently as 2007, Justice Antonin Scalia wrote in a concurring opinion in the Supreme Court that American criminal convictions have an 'error rate of .027 percent – or, to put it another way, a success rate of 99.973 percent' (*Kansas v. Marsh*, 2006). A highly comforting assessment, if true – but of course, it is absurd. The error was derived by taking the number of exonerations we know about – almost all of which occur in a tiny minority of murders and aggravated rapes – and dividing it by the total of all felony convictions, from drug possession and burglary to car theft and income-tax evasion. To actually estimate the proportion of erroneous convictions, we need a well-defined group of cases within which we can identify all mistaken convictions, or at least a substantial proportion of them. It is hard to imagine how that might be done for criminal conviction generally; however, it may be possible to do so, at least roughly, for the two types of crimes for which exonerations are comparatively common: rape and capital murder" (Gross & Elsworth, 2012, p. 165). And if we look at these categories of crimes, then the numbers appear less rosy: for instance, recent data suggest that more than 2% of death sentences in America are based on false convictions, and this is likely to be just the (most tragic) tip of the iceberg (Gross, 2008), considering that 95% of criminal convictions in the US are decided by guilty pleas based on plea bargains (Gross & Elsworth, 2012). Unfortunately, the adversarial system makes it perfectly reasonable for an innocent defender to falsely plead guilty for cost-benefit considerations, both in less serious crimes and in the most severe ones, e.g. to avoid the risk of the death penalty in a murder trial. Granted, guilty pleas need not undermine Woods' point on the quality of jurors' pronouncement, since those case never go to trial in the first place; yet false guilty pleas are likely to affect (poorly) the rate of false convictions in criminal proceedings, which in turn constitute a key parameter to establish the overall goodness of CPG.

False convictions are worrying not only for their immediate consequences (i.e., wrongfully apportioning guilt), but also for their indirect effects: a recent study by Norris and colleagues (2019) suggests that false convictions also correlate positively with an increase in criminal behaviour, since they provide evidence of impunity to the actual offenders. Moreover, the problem of false convictions is thought by many to plague mostly the kind of criminal justice systems that Woods is interested to discuss, i.e. jury-based systems. Indeed, false convictions rates are often reported as being higher under an adversarial system, which typically (but not necessarily) is used in common law countries and relies on a jury, rather than under the inquisitorial model, more characteristic of civil law systems and reliant solely on the work of trained professionals (prosecutor, defender, judge, court-appointed experts, etc.; for discussion, see Roach, 2009). Incidentally, this opens up an interesting direction for future work in this line of inquiry: to what extent the inquisitorial model of criminal law comply with traditional epistemological and logical standards of conduct, and what is the role of such compliance in determining its outcomes? Here Woods may find further ammunitions for his main claim, since some scholars consider the adversarial model epistemologically superior to the inquisitorial one: "certainly, from a scientific point of view, the presentation of and attempt to falsify two versions of events is surely a better way of arriving at the "truth" than verification of the prosecutor's version by the judge—however many limited opportunities the defense may have had to influence that version in the dossier pre-trial" (Brants 2012, p. 1079). But this is mostly a digression, only intended to suggest further opportunities for intellectual exploration of these phenomena.

Now back to the main worry: all considered, it seems to me there is room for debate on whether and to what extent CPG is capable of ensuring good results in criminal justice, especially in adversarial systems based on

jury proceedings. The point, of course, is not whether the system is good or bad in absolute terms, but whether it is superior to the establishment thinking Woods is contrasting it with. Here a staunch defender of the establishment (not me, since I am on Woods' side in this battle) may see an opportunity for counter-argument: "Look, your CPG is not that good, since it gets things wrong in a non-trivial percentage of instances. In fact, I dare you to prove that, should trials be conducted following the letter of establishment thinking, things would not be significantly improved!".

Of course, the reply to that is simple enough, and it goes like this: "It cannot be done!" – that is, conforming criminal trials (in fact, any trial, or any other everyday decision-making activity, for that matter) to the mandates of establishment thinking is impossible, because the assumptions made by that approach are never met in reality. The facts of the case are never going to be clear and complete enough to allow establishment thinking to apply, and if they were, there would be no need for trial in the first place, since the conclusion would be patently obvious to all involved. In a sense, this nostalgic longing for ruling human matters by logic is truly vacuous: it fails to understand that the adoption of alternative ways of thinking, such as CPG, is not the recalcitrant quirk of some obdurate logic-denialist, but rather a matter of necessity. We would all love to conduct our affairs by the pure and clear light of logical thinking, but most of the time (possibly, all the time, with tiny exceptions) reality is not kind enough to allow us such luxury. Hence, we look elsewhere for guidance, and rightly so.

However, if that is the ultimate bedrock of Woods' rejection of establishment thinking in matters of criminal justice, then it seems to me that the whole paper is meant to provide an exemplification of a much broader theme, to wit, the inadequacy of establishment thinking for dealing with human reasoning in general, not just when it comes to criminal justice. To be sure, I have nothing to object to this broader theme: in fact, I have gone on record many times to register similar worries, either on my own or in partnership with several others, including Woods himself (e.g., Paglieri & Woods, 2011). So my only concern here is a nagging suspicion of having missed something: is there something special in the case against establishment thinking that can be mounted using criminal justice trials as a benchmark, in comparison with the general worries that have been levelled at establishment thinking before? If there is, I failed to appreciate it – surely through no fault of Woods.

On the other hand, even as an example of a broader concern, this is still a case worth making, and I greatly enjoyed reading Woods' well-argued paper. In particular, I agree with him that, having established the worthiness of CPG, it is crucial "to sketch an epistemology and logic of inference in which CPG could freely breathe". This is the purpose of the version of Woods' paper destined to the proceedings, which is not the one I had the pleasure of commenting upon: thus I can only command it to the attention of every reader interested to explore new ways of understanding the epistemology and logic of everyday reasoning, as opposed to the offerings of establishment thinking, which are, in that regard, exceptionally meager.

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