**Philosophy 338**
**Philosophy of Law**
**2017**
**Note Seventeen**

RECONSIDERING THE ROLE OF ABDUCTION IN CLOSING ARGUMENTS

1. Towards the end of chapter 17 (from the last paragraph of p. 213 to the end of p. 215) and in many places throughout chapter 18, we took a favourable view of the idea that

- counsels' closing arguments are abductively structured.

- they have the structure of *Peircean* abductions and therefore are *ignorance-preserving* and, to that extent, do nothing to add to the strength of counsels' respective positions.

- and, that being so, a closing argument make no contribution to the Crown's effort to meet the proof standard, and weakens the defence's effort to show a reasonable doubt.

AN ASIDE It would be lovely to see what a jury would make of a defence argument whose premisses were the first two of these bulleted propositions and whose conclusion were the third one. Would the judge allow it, fearing a reversal on appeal for providing an inadequate defence? Would a crown prosecutor object to it, on grounds that it assumes facts not in evidence?

On page 223 of chapter 18, we briefly considered the idea that the structure of closing arguments (and theories of the evidence more generally) is not abductive after all or, even if it were, it is not abductive in Peirce's sense. We also remarked in a footnote on p. 213 that it seems rather odd to take a trial's only two possible *conclusions* as *hypotheses.* I want now to spend a bit more time with these suggestions.

2. For a theory of the evidence to have the logical structure of a Peircean abduction, the following things would have to be true.

- there would have to be something surprising or untypical about the evidence heard and seen at trial or anyhow about the evidence addressed in the closing argument.

- the only hypotheses available for consideration as candidates for eliminating this surprise or the impression of untypicality are the only two conclusions open to a jury to reach, G or not-G.

- both of counsels'closing arguments would have to embed at least implicitly and tacitly as a premiss: a true subjunctive conditional proposition in the following (rough) form "If G (not-G) were true, then my evidence E would be matter of course."

On thinking it over, none of these assumptions adequately fit the facts of how closing arguments actually work. Taking these three assumptions in order,

(1) In the actual circumstances of a real-life criminal trial, it is not at all surprising that evidence is called and subject to cross, and there is nothing intrinsically surprising about what it says.

It is true that it is not typical for a person at large to be on trial in the first place. The number of accused in relation to the total population is vanishingly small. Equally, and correspondingly, in relation to everything that happens on a daily basis, the number of criminal happenings is (while in no way unimportant) *statistically* trivial. All the same, when crimes occur they are investigated by the police, and sometimes result in charges. Once an accused is brought to trial, there is nothing intrinsically surprising or atypical about the processes that now unfold. We have already noticed that the evidence at criminal trials is invariably inconsistent. Yet this appears to be no serious impediment to a jury's arriving at a unanimous conclusion. Now this, we might think, *is* surprising, and *it* might be something which calls for abductive resolution. We'll come back to this later on. But the point that matters here is that there is nothing about trial evidence as such that meets the Peircean element of surprise required for abductive consideration. That is good reason to deny the assumption here.

(2) Closing arguments have the following (simplified) overall structure.
   a. If my evidence were true that would be reason enough to prove G (or raise a reasonable doubt about whether the other guy's evidence is reason enough to convict).
   b. My evidence is true.
   c. Therefore, it proves G (shows that the other guy's evidence doesn't; hence not-G).

There is nothing in this simplified schematization which is recognizably abductive in Peirce's sense. There is nothing recognizable as "inference to the best explanation." The best explanation of the evidence cited by counselis that it has been testified to under oath by people in a position to know what they say is truthful. So this is another blow to the so-called criminal proof dilemma of chapter 18.

(3) Since the "hypothesis space" for theories of the evidence in criminal proceedings is *pre-set* as G or not-G, there is no occasion even to consider the material on the *Peircean* selection of hypotheses.

(4) Peircean abduction aside, good reasons remain for questioning the contribution of theories of the evidence to fulfill the criminal proof standard, or even to raise contrary reasonable doubt.

We have seen ample reason to see why this could be so. Witness evidence is artificially tariffed and entirely subject to the regulatory control of opposing counsel and the rules of evidence, including those that shape the nature of questions put to witnesses and the scope of their answers, and also to the screening role of judges concerning their admissibility. And on and on.

Even so, this is a victory for the philosophical defence of the proposition that within an acceptably narrow margin of error common law criminal juries reach just verdicts and, in case

of conviction, true ones. All the same, it continues to look rather badly for the philosophical defence, never mind that it needn't worry about the turbulence purported by the doctrine that theories of the evidence are Peirceanly shaped in ignorance-proving ways.

3. What to do now? I have in this note rebutted, successfully I think, a major chunk of chapter 18. Therefore, in preparing for the final exam, there is no need to bother with the logical structure of Peircean abduction. For example, the final four lines of p. 209 go, as does the footnote just below them. The section running from p. 212 to p. 215 also goes. Also ignore pp. 216 to 224, *except for* the material in the final paragraph of page 224 running on to the end of p. 226. It is also essential that you read pp. 202 to 209. Please mark your texts accordingly.

   There is no harm at all in reading these excised pages. But if you do, please keep it firmly in mind that they don't really bear on the matters that concern us in this course. In this respect, I now think that our book has missed the mark. Clearly it requires a second and revised edition. The mistake is one of putting a very successful theory to work in a context in which it simply doesn't pan out. Mistakes of like character are no strangers to intellectual enquiry. Part of my plea here is that the tools of EE, which may work splendidly in certain contexts, often don't work well or at all in others. Well, blow me down, I've gone and made the same kind of mistake.

   The logic of abduction on offer here is known in the literature as the Gabbay-Woods model. The originating insight was Peirce's, but all the details are worked out in the G-W model. It is one of the dominant theories in the abductive logic research community, not needless to say without its doubters. I admit to taking considerable satisfaction from the G-W initiative, which appears to work well in contexts of scientific inference and to extend very encouragingly to contexts of everyday human reasoning, especially under the assumptions of a causal response epistemology.

   Even so, it goes wrong here, given the striking peculiarities imposed on legal proceedings. It is not an uncommon error. People who invent productive investigatory methods tend to love them as their children, much in the way that founders of great companies do when they pass them on to their beloved children. Think here of the collapse of the once-great T. E. Eaton Co. In such cases, that love of children – retail or theoretical – is love of self, hence is the ancient sin of *hubris.* I don't know about the departed Eatons, but on my own account I am deservedly contrite. There are two hot papers in the current literature promoting the criminal dilemma heresy, both by me. My penance will be to expose their folly forthwith.