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## EVIDENTIAL REASONING

### Chapter for the Handbook of Legal Reasoning

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When a suspect appears in front of a criminal court, there is a very high probability that he will be found guilty. In the Netherlands, for instance, the conviction rate of suspects that appear in criminal courts is reported to be around 95% year after year.<sup>1</sup> In the United States, the conviction rate in federal courts has been roughly 75% and in Japan has reached as high a rate as 99%.<sup>2</sup> This does not mean that the fact-finders deciding about the facts of a case have an easy job. Whether laypeople, such as jury members selected from the general public, or professionals, often experienced judges having completed postgraduate education, all face the difficulties associated with handling the evidence that is presented in court. What to do with conflicting testimonies? Does an established DNA match outweigh the testimony that the suspect was not on the crime scene? How to coherently interpret a large body of evidence? When is there enough evidence to convict ‘beyond a reasonable doubt’?

The primary aim of this chapter is to explain the nature of evidential reasoning, the characteristic difficulties encountered, and the tools to address these difficulties. Our focus is on evidential reasoning in criminal cases. There is an extensive scholarly literature on these topics, and it is a secondary aim of the chapter to provide readers the means to find their way in historical and ongoing debates.

## 1 SETTING THE STAGE

We set the stage by using two important and often encountered kinds of evidence as an illustration: eyewitness testimony and DNA profiling. These two kinds of evidence will be used to establish a list of central questions that structure the exposition that follows.

### 1.1 *Eyewitness testimony*

Eyewitness testimony has always been a central source of information in criminal proceedings. It typically takes the form of oral statements by the witness in court, in response to questions by the prosecution, the defense, the court, and sometimes, albeit rarely, the jury. Eyewitness testimony can also come in the form of reports of oral examinations written in the pre-court stages of the criminal investigation.

Eyewitness testimony can provide information about what has happened on the scene of the crime. Here is an example.

Q: Can you describe what happened that day?

A: I was in the park and suddenly heard a lot of noise, very close by. I saw two men quarreling, shouting. Suddenly one of them pulled a gun, and I heard a

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<sup>1</sup>Source: CBS, the Dutch central bureau of statistics, publishing its data at [www.cbs.nl](http://www.cbs.nl).

<sup>2</sup>SOURCE TO BE ADDED

shot. The other man fell to the ground. The shooter looked around, looked me in the eye, and then started to run.

Q: Can you describe the shooter?

A: He was a young men, in his twenties, I think. Tall, blonde, with a very white skin, and unusually blue eyes. He looked unhealthy, with bad teeth, like a drug addict. He was wearing a perfectly ironed Armani shirt, which surprised me.

The information contained in the testimony can be more or less detailed, and on its basis the fact finders can form a hypothesis about what happened. Still, it remains a hypothesis. There are many reasons why the hypothetical events reconstructed on the basis of the testimony might not be true. Typical reasons against the truth of the events reported by an eyewitness include that a witness has wrongly interpreted what she saw, that time has distorted her memories, or that the witness is intentionally lying.

## 1.2 DNA profiling

DNA profiling has become an important tool in courts. The evidential relevance of a DNA profile stems from the fact that, although most of the structure of DNA is shared among all human beings (more than 99%), the variations that do exist are very specific for each individual.

A *DNA profile* is determined by analyzing a number of specific locations—the so-called *loci*—of a DNA molecule. Each locus is associated with different *alleles* which can be found at that location, where an allele differs from another because of the number of repetitions of a small DNA sequence. For instance, one locus used in the profiles stored in forensic DNA databases in the United States is CSF1PO. This locus has up to 16 allele types, depending on how often the molecular sequence AGAT is repeated at that location.<sup>3</sup> Different countries use different sets of—what are called—*core loci* for their DNA profiles. For instance, the CODIS system in the United States uses 13 core loci, to be expanded to 20 core loci in 2017.<sup>4</sup> A DNA profile, then, consists in a list allele types for a certain number of select core loci.

How is the statistical frequency of a DNA profile estimated? Many countries have created extensive reference databases that contain million of DNA profiles. Each specific DNA profile is rare, and reference databases of profiles are used to estimate how rare a profile is. This is a two step process. First, the number of occurrences of each allele at each core locus in the reference database are counted. This gives an estimate of the proportional frequency of each allele at each core locus in the population. Second, the measured proportional frequencies for the alleles at the core loci are multiplied. This gives an estimate

<sup>3</sup>See [www.cstl.nist.gov/strbase/str\\_CSF1PO.htm](http://www.cstl.nist.gov/strbase/str_CSF1PO.htm).

<sup>4</sup>See [www.fbi.gov/services/laboratory/biometric-analysis/codis](http://www.fbi.gov/services/laboratory/biometric-analysis/codis).

of the frequency of the DNA profile, or to use a more common terminology, the *Random Match Probability* of the DNA profile. These Random Match Probabilities are the numbers reported by forensic experts in courts, and the smaller they are, the higher the evidential value of the profile is taken to be. The sets of core loci have been chosen such that Random Match Probabilities are typically very small, for instance, in the order of 1 in 50 billion, amply exceeding the number of people on our planet.

A key assumption underlying the model—used when multiplying the estimated probabilities of specific alleles—is that there are no dependencies among the alleles at different loci in the population considered. This assumption does not always hold, for instance, in a population with family relations. Scientists have also established certain dependencies among the profiles within ethnic groups. Moreover, testing the independence assumption can be hard, and require the assessment of more profiles than reasonably possible.

With this background in place, suppose now that a trace of blood is found on the crime scene, and that the DNA profile created from the trace matches the DNA profile of the suspect. Using the match, the fact finders can form the hypothesis that the suspect is the source of the blood trace. The Random Match Probability associated with the profile provides a measure of the evidential strength of the match. Now, the hypothesis that can be formed on the basis of a DNA match is rather circumscribed. It is limited to the suspect being the *source* of the trace. It should not be confused without the hypothesis that the suspect is *guilty*, at least absent other information about how the trace got there. Further, the hypothesis itself that the suspect is the source need not be true. The suspect and the perpetrator, though different people, might share the same DNA profile, either because they are identical twins or because, though unrelated, they happen to share the same profile.<sup>5</sup> We should also be wary of laboratory errors which give rise to false positive results.

### 1.3 Central questions

Using the two kinds of evidence as an illustration, we can now provide a list of central questions about evidential reasoning in the law.

*Question 1: How should we handle conflicting evidence?* It often occurs that the evidence provides conflicting perspectives on the crime. For instance, a witness claims that the criminal has blond hair, but the suspect whose DNA matched that of the trace at the crime scene, has dark hair. What to do in case of such conflicts?

*Question 2: How should we handle the strength of the evidence?* Some evidence is stronger than other evidence. This is most obvious in the case of DNA evidence, where DNA profiles come with different Random Match Probabilities. But also some eyewitness testimonies are stronger than others. For instance, the description of a criminal by a witness

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<sup>5</sup>At a rate of a dozen or more twin births per 1000 live births, identical twins are not that rare. Source <https://en.wikipedia.org/wiki/Twin#Statistics>.

who could only view the crime scene in bad lighting conditions, is of lesser value. How to address the strength of evidence?

*Question 3: How should we coherently interpret the available evidence?* A DNA profile match can support that the suspect is the source, and a witness can add information about how the crime was committed. In general, there is a lot of evidence that needs to be coherently combined in order to make sense of what has happened. How do we combine all information in a coherent whole?

*Question 4: How should we decide about the facts given the evidence? When are we done?* After a careful and exhaustive investigation in the pretrial and trial phases of the criminal proceedings, the question arises when a decision can be made and what that decision is. When is the burden of proof met? What is the meaning of “beyond a reasonable doubt”? When have we collected enough evidence to make a decision?

The plan for the paper is as follows. In the next section (Section 2), we discuss three normative frameworks that can help us understand how to correctly handle the evidence. In the remaining sections, the four questions we set out above will be discussed, consecutively, while emphasizing the role of the three normative frameworks (Sections 3, 4, 5 and 6).

## 2 THREE NORMATIVE FRAMEWORKS

In this section, we discuss three normative frameworks for the correct handling of the evidence: arguments; probabilities; and scenarios. We shall only briefly sketch their distinctive theoretical strengths. Arguments can naturally capture the dialogical dimension, by modeling relations of support and attack. Probabilities are better suited to quantify the value of the evidence, and this is useful when it comes to DNA evidence and its statistical underpinnings. Finally, scenarios are best in offering a coherent and holistic interpretation of large bodies of evidence.

### 2.1 Arguments

The first normative framework that we discuss uses arguments as primary tool. Arguments are best analyzed in a dialogical setting, for they contain reasons that *support* or *attack* a certain conclusion of interest. For instance, when a witness reports that she saw the suspect at the crime scene, this evidence constitutes a reason for the conclusion that the suspect was, in fact, at the crime scene. But if the DNA profile found at the crime scene does not match the suspect’s DNA profile, this constitutes a reason attacking the conclusion. A simple argument structure with a supporting and an attacking reason is represented in Figure 1.

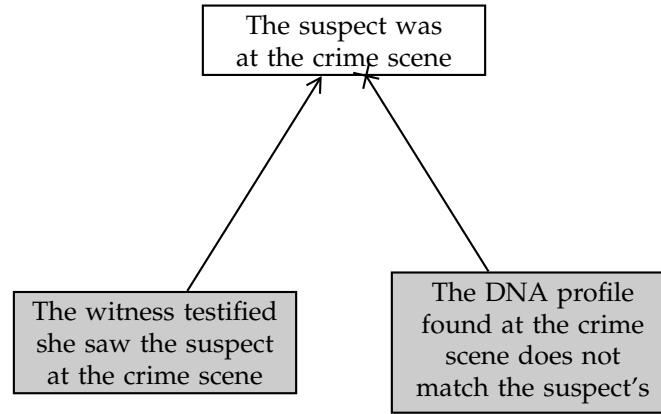


Figure 1: Arguments with supporting and attacking reasons

## 2.2 Probabilities

The second normative framework uses probabilities as the main tool. In handling evidence in court, a crucial question from the probabilistic perspective is, how probable is a certain hypothesis  $H$  given a body of evidence  $E$ ? This is the *conditional probability* of  $H$  given  $E$ , or in symbols,  $P(H|E)$ . Another crucial question is, how does the probability of  $H$  change in light of evidence  $E$ ? This *probability change* is expressed by the difference between the conditional probability  $P(H|E)$  and the so-called *prior probability*  $P(H)$ . Both questions can be addressed with the famous Bayes' theorem:<sup>6</sup>

$$\Pr(H|E) = \frac{\Pr(E|H)}{\Pr(E)} \cdot \Pr(H)$$

One of the lessons of Bayes' theorem is that the more surprising the evidence—that is, the lower  $\Pr(E)$ —the higher the probability of the hypothesis given the evidence (and the more pronounced the probability increase). To illustrate, compare two DNA profiles, one with a Random Match Probability of 1 in 10 and the other with a Random Match Probability of 1 in 1 million. It is more surprising—that is, less probable—to find a match for the latter than the former profile. Suppose now a genetic match is found between the crime traces and a suspect. The hypothesis that the suspect is the source of the traces is more probable (or the probability increase more pronounced) if the matching profile has a lower Random Match Probability.

<sup>6</sup> Bayes' theorem follows quickly using the definition of conditional probability. We have  $\Pr(E|H) = P(H \wedge E)/P(H)$ . Here we use logical conjunction  $\wedge$  to write the combined event  $H$  and  $E$ . Hence  $P(H \wedge E) = \Pr(E|H) \cdot P(H)$ . It follows that  $\Pr(H|E) = P(H \wedge E)/P(E) = \Pr(E|H) \cdot P(H)/P(E)$ , proving Bayes' theorem.

### 2.3 Scenarios

Finally, the third normative framework centers around scenario analysis. In a scenario, a coherent account of what may have happened in a case is made explicit. Different scenarios are contrasted, and evaluated, by considering their plausibility and by checking to what extent they match and contradict the available evidence. Scenario analysis proves helpful when considering a complex case and its evidence. The coherent explanation of the evidence provided by a scenario can be regarded as a sense-making tool for handling cases with a large dossier.

**Further readings** The three normative frameworks (Anderson et al., 2005; Dawid et al., 2011; Kaptein et al., 2009).

*Arguments:* Wigmore charts (Wigmore, 1913, 1931). The New Evidence Scholarship (Anderson et al., 2005). Formal and computational study of arguments (Pollock, 1987, 1995). Informal and formal argumentation theory (van Eemeren et al., 2014).

*Probabilities:* Evidence and probabilities Mortera and Dawid (2007); Schum (1994) Statistics in the law (Fenton, 2011). Miscarriages of justice involving statistics (Dawid et al., 2011; Schneps and Colmez, 2013). Debates on whether probabilistic calculations have a place in courts Finkelstein and Fairley (1970); Tribe (1971), back in 1970's, and more recently, the 2012 special issue of *Law, Probability and Risk*; Vol. 4, No. 2.

*Scenarios:* Scenarios in evidential reasoning (Bennett and Feldman, 1981; Pennington and Hastie, 1993a,b). Scenarios and miscarriages of justice (Wagenaar et al., 1993). Inference to the best explanation (Pardo and Allen, 2008). Hypothetical explanations of the evidence (Thagard, 1989).

*Combined approaches:* Combining arguments and scenarios (Bex, 2011; Bex et al., 2010). Bayesian networks for evidential reasoning (Fenton et al., 2013; Hepler et al., 2007). Combining arguments, scenarios and probabilities (Timmer et al., 2015; Verheij, 2014; Verheij et al., 2016; Vlek et al., 2014).

## 3 CONFLICTING EVIDENCE

In many situations, it is clear what the facts are. In a simple case of tax evasion, for example, it will be easy to establish whether you filed for taxes on time and whether your employer paid you 100,000 dollars in 2015. Only in special circumstances, such as administrative errors, there will be something to dispute here. But cases that are litigated in court are typically more complicated. Disputes emerge because the two parties—who then become the defense and the prosecution in a criminal trial—introduce evidence that support conflicting reconstructions of the facts. In this section, we illustrate how each of the three frameworks can represent and model conflicts between different pieces of evidence.



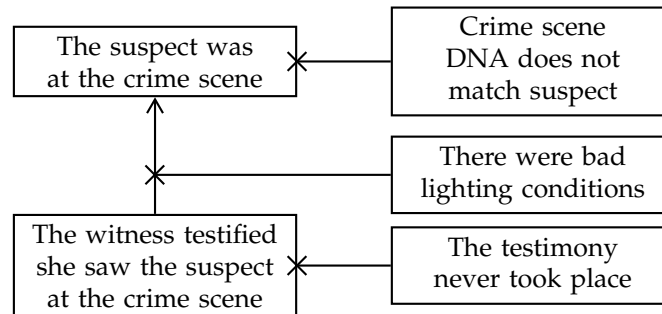


Figure 2: Three kinds of attack

### 3.1 Arguments

In the argument-based framework, the handling of conflicting evidence is analyzed in terms of arguments for and against a certain conclusion.

**Three kinds of attack can be distinguished: rebutting, undercutting and undermining.** Consider a crime case, where a witness testified she saw the suspect at the crime scene. The witness testimony constitutes a reason supporting the conclusion that the suspect indeed was at the crime scene. There are three parts to this argument: the conclusion; the reason (also called the premise); and the connection between the reason and the conclusion. Each of these three parts can be attacked.

First, the conclusion can be attacked. For example, suppose DNA testing shows that the suspect does not genetically match with the traces found at the crime scene. Such an attacking reason is called a *rebutting attack*. It supports the opposite conclusion, namely that the suspect was *not* at the crime scene. Second, the reason itself can be attacked, although this is a bit more difficult to imagine. For instance, if the witness never actually testified that she saw the suspect at the crime scene, this challenges the very existence of the supporting reason itself. Third, the connection between the reason and the conclusion can be attacked. The fact that the lighting conditions were bad when the witness saw the crime, is an example of such an attack, referred to as an *undercutting attack*. In contrast with a rebutting attack, an undercutting attack provides no support for the opposite conclusion. In the example, if the lighting conditions were bad, there is no reason explicitly supporting that the suspect was not at the crime scene. The attacking reason, here the existence of bad lighting conditions, is also referred to as an exclusionary reason. The three examples of the different kinds of attack are shown in Figure 2.

**Three kinds of support can be distinguished: multiple, subordinated and coordinated.** Just as attacking reasons can target the conclusion of an argument, its supporting reason or

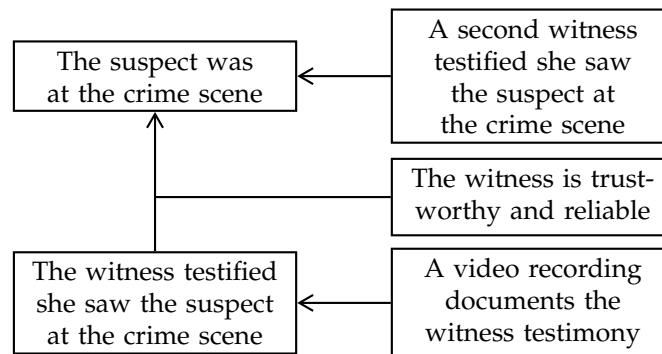


Figure 3: Three kinds of (further) support

the connection between the two, additional reasons can provide further support for each of these parts. Having in mind a dialogical setting for analyzing the structure of arguments, additional reasons can be understood as responses to attacking reasons.

Consider, once again, the argument that the suspect was at the crime scene because the witness reports that she saw the suspect at the crime scene. First, the conclusion can be further supported, for example, by a second witness testimony. If a conclusion is supported by more than one reason, this is referred to as *multiple support*. Second, the reason itself can be further supported, for example, by a video recording of the witness testimony itself. Support of the reason itself is called *subordinating support*. Finally, the connection between the reason and the conclusion can be supported, for example, by another testimony that the witness has always been trustworthy and reliable. Support for the connection between the reason and the conclusion does not have a standard name, but is closely related to a third named kind of support: *coordinated support*. In coordinated support, the support for the conclusion consists of at least two supporting reasons which, in their conjunctive combination, provide support for the conclusion. Coordinated support is distinguished from multiple support because in the latter each supporting reason provides support for the conclusion by itself. Figure 3 shows the three kinds of (further) support. (Multiple and subordinated support are graphically visualized with an arrow, whereas coordinated support is shown with a line. An arrow indicates the unnamed kind of support of the connection between reason and conclusion.)

### **Arguments have structures, involving complexes of supporting and attacking reasons.**

So far we have looked at a simple argument, one consisting of a reason and a conclusion, along with three types of attacking reasons and three types of symmetric supporting reasons. But an argument can also have a more complex structure, for example, it can contain *chains of reasons*, both supporting or attacking reasons.

Consider, once again, the example of a witness who reports that she saw the suspect at

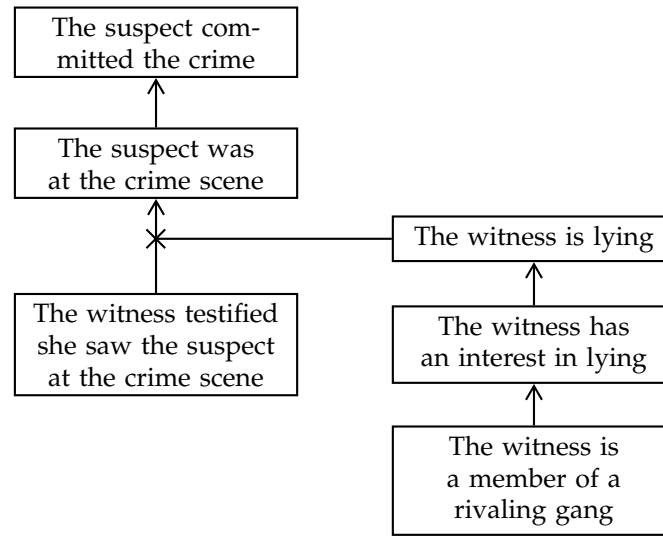


Figure 4: Supporting and attacking reasons can be chained.

the crime scene. The witness testimony constitutes a reason supporting the conclusion that the suspect was at the crime scene, and this conclusion—in turn—functions as a reason that supports the conclusion that the suspect committed the crime. This chain of supporting reasons is graphically depicted in Figure 4, on the left. Attacking reasons can also be chained. For example, when it is discovered that the witness is a member of a rivaling gang, this constitutes a reason for concluding that the witness has an interest in lying, and further, for concluding that the witness is in fact lying (Figure 4, on the right). This conclusion attacks—undercuts, to be precise—the connection between the witness testimony and the conclusion the suspect was at the crime scene.

**Further readings** Argument structure and diagrams (Freeman, 1991; Toulmin, 1958; Wigmore, 1913, 1931). Defeasible reasoning and nonmonotonic logic (Gabbay et al., 1994; Pollock, 1987). Rebutting and undercutting attack (Pollock, 1987, 1995). Undermining attack (Bondarenko et al., 1997). Formal evaluation of defeasible arguments (Dung, 1995; Pollock, 1987, 1995; Prakken, 2010). Argumentative dialogue (Hage, 2000; Prakken, 1997; Toulmin, 1958; Walton and Krabbe, 1995). Accrual of reasons and weighing (Hage, 1997; Pollock, 1995; Prakken, 2005; Verheij, 1996). Argument diagramming and evaluation software (Gordon et al., 2007; Kirschner et al., 2003; Pollock, 1995; Reed and Rowe, 2004; van Gelder, 2003; Verheij, 2005).

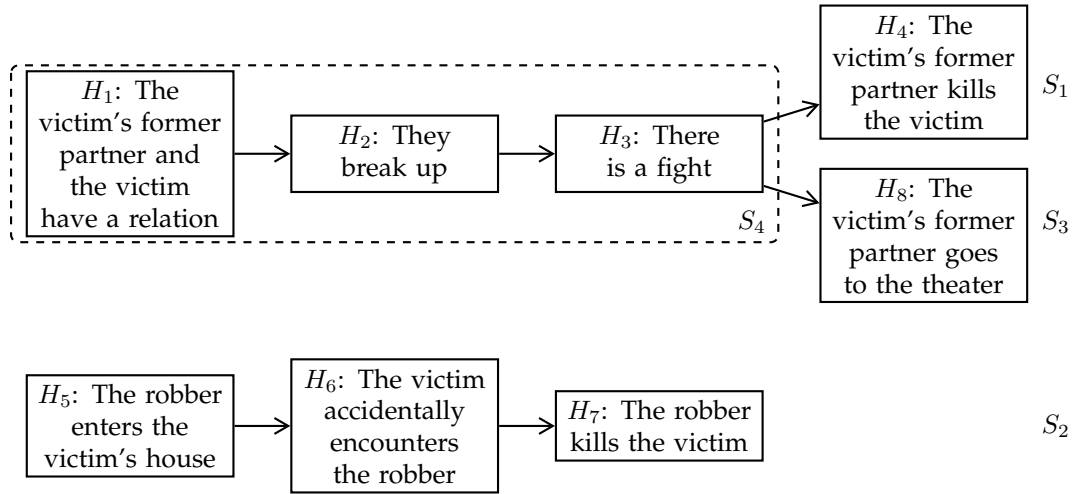


Figure 5: Alternative scenarios and their structure

### 3.2 Scenarios

In the scenarios normative framework, the handling of conflicting evidence is analyzed by considering different scenarios about what may have happened.

**Scenarios are clusters of events, ordered in time and connected by causal relations.**

Consider again the murder example with two suspects: the victim's former partner, who killed the victim after a fight ( $S_1$ ), and a robber who killed the victim when caught during a robbery ( $S_2$ ) (used in Section 2.3). Scenario  $S_1$  can be made explicit as a sequence of four hypothetical consecutive events (Figure 5). First, the victim and his former partner have a relation ( $H_1$ ); then they break up ( $H_2$ ); subsequently, there is a fight ( $H_3$ ); and finally, the victim is killed by his former partner ( $H_4$ ). Scenario  $S_2$  can be analyzed as consisting of three events. First, the robber enters the victim's house ( $H_5$ ); then the victim accidentally encounters the robber ( $H_6$ ); and finally, the robber kills the victim ( $H_7$ ). Some of the events in these chronologically ordered scenarios are causally connected. For instance, in the first scenario, the killing is caused by the break up and the fight; and in the second scenario by the accidental encounter.

**Scenarios can explain a piece of evidence or be contradicted by it.** The starting point of the murder investigation is the victim's body found at the crime scene (evidence  $E_0$ ). There are two alternative scenarios that explain this evidence: Both the former partner murder scenario  $S_1$  and the robbery murder scenario  $S_2$  explain evidence  $E_0$ , in the sense that finding the body is expected assuming the scenario to be true. Assume now that a match is found between the DNA profile of a tissue trace found under the victim's finger nails and

that of his former partner (evidence  $E_1$ ). This evidence is explained by scenario  $S_1$ , but not by  $S_2$ , of which evidence  $E_1$  is independent.

When the former partner is confronted with the DNA evidence, she provides a different scenario that explains evidence  $E_1$ : Indeed there was a fight about the break up, but she did not kill the victim, and instead subsequently went to the theater (scenario  $S_3$ ; Figure 5). So we have two scenarios explaining the DNA profile match  $E_1$ : the former partner murder scenario  $S_1$  and the former partner alibi scenario  $S_3$ . In fact, the two scenarios share a subscenario about the break up fight, that explains the finding of the match (scenario  $S_4$  in Figure 5).

When checking the alibi scenario, it is found that the victim's former partner's bank card was used at the theater that night (evidence  $E_2$ ), contradicting the former partner murder scenario  $S_1$ . Scenario  $S_3$  explains both the DNA evidence  $E_1$  and the use of the bank card  $E_2$ .

**Scenarios considered may or may not solve a case, and show which evidence is legally relevant.** A criminal case is only solved when the legally relevant circumstances can be proven. For instance, in murder cases, it should be proven who killed the victim and why. Of the scenarios considered, the former partner murder scenario  $S_1$  and the robbery murder scenario  $S_2$  explain how and why the murder happened, but the alibi scenario  $S_3$  does not. In a crime investigation, it can be hard to find evidence that proves a sufficiently detailed scenario about what has happened. For instance, in the example, it is initially clear that a murder had happened, but not by who. Because of the break up, a scenario that answers the why-question is considered: the former partner murder scenario  $S_1$ . That scenario is initially corroborated by the DNA match  $E_1$ , but then breaks down by the use of the bank card  $E_2$  that proves the alibi scenario  $S_3$ . Only when the robber is caught and confesses having killed the victim (evidence  $E_3$ )—possibly much later, it becomes clear what has happened. The body found  $E_0$  and the confession  $E_3$  are relevant for answering the legally relevant questions who killed the victim and why. The other evidence considered, the DNA match  $E_1$  and the use of the bank card  $E_2$ , have played a relevant role in the investigation, but do not support or contradict robbery murder scenario  $S_2$ .

**Further readings** Scenarios in evidential reasoning (Bennett and Feldman, 1981; Pennington and Hastie, 1993a,b). Scenarios and miscarriages of justice (Wagenaar et al., 1993). Inference to the best explanation (Pardo and Allen, 2008). Hypothetical explanations of the evidence (Thagard, 1989).

### 3.3 Probabilities

In the probabilistic normative framework, the handling of conflicting evidence is analyzed in terms of the conditional probabilities that connect the evidence and the hypotheses.

**Evidential support and attack can be characterized as “probability change”.** A piece of evidence  $E$  supports an hypothesis  $H$  whenever  $E$  raises the probability of  $H$ , or in symbols,  $P(H|E) > P(H)$ . For example, a witness testifies that she saw the defendant around the crime scene at the time of the crime. The testimony supports the hypothesis that the defendant is guilty. This can be described probabilistically, as follows:

$$P(\text{guilt}|\text{testimony}) > P(\text{guilt}).$$

By contrast, a piece of evidence  $E$  attacks a hypothesis  $H$  whenever  $E$  lowers the probability of  $H$ , or in symbols,  $P(H|E) < P(H)$ . For example, if a DNA test shows no match between the traces found at the crime scene and the defendant, this evidence attacks the hypothesis that the defendant is guilty. Probabilistically,

$$P(\text{guilt}|no\ DNA\ match) < P(\text{guilt}).$$

**Evidential support and attack can be characterized as “likelihood ratio”.** There is another characterization of evidential support and attack. Instead of comparing the initial probability  $P(H)$  and the probability  $P(H|E)$  of the hypothesis given the evidence, a so-called likelihood ratio of the form  $P(E|H)/P(E|\neg H)$  can also be used. On this account,  $E$  supports  $H$  whenever the likelihood ratio  $\frac{P(E|H)}{P(E|\neg H)}$  is greater than one. Intuitively, this means that the presence of the evidence is more probable if the hypothesis is true than if the hypothesis is false. By contrast, a piece of evidence  $E$  attacks a hypothesis  $H$  whenever the likelihood ratio is lower than one. This means that the presence of the evidence is less likely if the hypothesis is true than if the hypothesis is false. For the two examples considered earlier, we have:

$$\frac{P(\text{testimony}|\text{guilt})}{P(\text{testimony}|\neg\text{guilt})} > 1, \text{ and}$$

$$\frac{P(\text{no DNA match}|\text{guilt})}{P(\text{no DNA match}|\neg\text{guilt})} < 1.$$

These two characterizations of evidential support/attack—in terms of probability increase/decrease, and in terms of a likelihood ratio greater/lower than one—are in fact equivalent. For the

following statements hold:

$$P(H|E) > P(H) \text{ iff } \frac{P(E|H)}{P(E|\neg H)} > 1.^7$$

$$P(H|E) < P(H) \text{ iff } \frac{P(E|H)}{P(E|\neg H)} < 1.$$

**The conflict between two pieces of evidence can be described probabilistically.** Two pieces of evidence come into conflict with one another insofar as one supports a hypothesis and the other attacks the same hypothesis. The conflict can be described probabilistically, in that one piece of evidence increases the probability of the hypothesis, while the other decreases it, or equivalently, the likelihood ratio is positive (for one piece of evidence) and negative (for the other). For example, the testimony that the defendant was around the crime scene conflicts with the lack of a DNA match. Probabilistically, the testimony increases the probability of the defendant's guilt (or equivalently, the likelihood ratio is greater than one), while the lack of a DNA match decreases the probability of the same hypothesis (or equivalently, the likelihood ratio is lower than one).

**Further readings** On confirmation theory and accounts of evidential support (Carnap, 1950; Crupi, 2015; Fitelson, 1999).

## 4 EVIDENTIAL VALUE

The evidence found in a criminal investigation has different levels of evidential value: some evidence is very strong, other not so much. How is evidential value handled in each of the three normative frameworks? That is the topic of this section.

<sup>7</sup>To see why, recall that

$$\frac{P(H|E)}{P(\neg H|E)} = \frac{P(E|H)}{P(E|\neg H)} \cdot \frac{P(H)}{P(\neg H)},$$

which implies

$$\frac{P(E|H)}{P(E|\neg H)} > 1 \text{ iff } \frac{P(H|E)}{P(\neg H|E)} > \frac{P(H)}{P(\neg H)}.$$

For one direction, if  $P(H|E) > P(H)$ , then  $1 - P(H|E) < 1 - P(H)$ . This means that  $\frac{P(H|E)}{1 - P(H|E)} > \frac{P(H)}{1 - P(H)}$ , and thus  $\frac{P(H|E)}{P(\neg H|E)} > \frac{P(H)}{P(\neg H)}$ . So, by the equivalence above,  $\frac{P(E|H)}{P(E|\neg H)} > 1$ . For the other direction, if  $\frac{P(E|H)}{P(E|\neg H)} > 1$ , then  $\frac{P(H|E)}{P(\neg H|E)} > \frac{P(H)}{P(\neg H)}$ , again by the equivalence above. The latter is the same as  $\frac{P(H|E)}{1 - P(H|E)} > \frac{P(H)}{1 - P(H)}$ . To establish  $P(H|E) > P(H)$ , suppose for contradiction that  $P(H|E) \leq P(H)$ , which implies  $1 - P(H|E) \geq 1 - P(H)$ . This means that  $\frac{P(H|E)}{1 - P(H|E)} \leq \frac{P(H)}{1 - P(H)}$ . This contradicts  $\frac{P(H|E)}{1 - P(H|E)} > \frac{P(H)}{1 - P(H)}$ , and thus  $P(H|E) > P(H)$ .

#### 4.1 Probability

In the probabilistic framework, evidential value is measured using the numeric calculus of probability theory.

**The evidential value of a piece of evidence is measured by probabilistic difference or likelihood ratio ('incremental evidential value').** The incremental value of evidence for, or against, a hypothesis can be quantified probabilistically in various ways. One approach considers the difference between the probability of the hypothesis with and without the evidence, that is,  $P(H|E) - P(H)$ . The larger the positive difference, the higher the value of the evidence for the hypothesis. An alternative approach is given by the likelihood ratio  $P(E|H)/P(E|\neg H)$ . For any value greater than one, the higher the likelihood ratio, the higher the value of the evidence for the hypothesis. By contrast, a negative difference  $P(H|E) - P(H)$  and a likelihood ratio lower than one quantify the value of the evidence *against* a hypothesis. The larger the negative difference and the lower the likelihood ratio (for any value below one), the higher the value of the evidence against the hypothesis.

**The evidential value of all the evidence, in its totality, is measured by the overall conditional probability ('overall evidential value').** In contrast with the incremental evidential value of evidence that is measured by a probabilistic difference or likelihood ratio, the overall evidential value of the full body of evidence is measured by the conditional probability of the hypothesis given the evidence. The higher, or lower, the probability  $P(H|E)$ , the higher the overall value of the evidence for, or against, the hypothesis. If there is a series of pieces of evidence  $E_1, \dots, E_n$ , the overall evidential value of the evidence is measured as  $P(H|E_1, \dots, E_n)$ .

Overall and incremental evidential value should not be confused. To illustrate, suppose we have strong evidence  $E_1$  for the hypothesis  $H$  that a suspect was at the crime scene, for instance security camera footage in which the suspect is easily recognizable. In this case, the overall evidential value  $P(H|E_1)$  of the evidence is high. If this is the only evidence, then also the incremental evidential value is high: before the evidence the hypothesis is not strongly supported, i.e.,  $P(H)$  is low, whereas after the evidence, the hypothesis is strongly supported, i.e.,  $P(H|E_1)$  is high. In this case, the overall and incremental evidential value of  $E_1$  align. Now suppose that a witness testifies that the defendant was not at the crime scene (evidence  $E_2$ ), but as it turns out, the witness is unreliable as a known accomplice of the suspect. Consider now the overall evidential value  $P(H|E_1, E_2)$  of the two pieces of evidence together. This will not have changed much when compared to  $P(H|E_1)$ . As a result, the incremental evidential value of  $E_2$  is low, while still the overall evidential value  $P(H|E_1, E_2)$  is high, even though  $E_2$  did not contribute much.

The difference between overall and incremental evidential value can be especially con-



fusing when there is a single piece of evidence and there is a misalignment between the two values. Consider the hypothesis  $\neg H$  that the suspect was not at the crime scene and the evidence  $E_2$ , the testimony of the unreliable witness. Then  $P(\neg H)$  is high and also  $P(\neg H|E_2)$  is high. Uncritically interpreted, the high value of  $P(\neg H|E_2)$  suggests that the testimony of the unreliable witness has a high evidential value. But incrementally  $E_2$  did not change much. The hypothesis  $\neg H$  is in totality still strongly supported after the incrementally weak evidence  $E_2$ , since the hypothesis was already strongly supported before that evidence.

**DNA evidence can have a high incremental evidential value, but one should beware of complications.** As an illustration, we discuss the likelihood ratio of a DNA match. When introduced in court, a DNA match comes with an estimated Random Match Probability (RMP). As explained earlier, this is the probability that a random person, who had nothing to do with the crime, would match. An RMP is derived from the estimated frequency of the DNA profile across a sample population. Now, with some simplifications (on these later), the evidential value of the DNA match  $M$  in favor of the suspect being the source of the sample  $S$ , in terms of a likelihood ratio, is as follows

$$\frac{P(M|S)}{P(M|\neg S)} = \frac{1}{RMP}.$$

The numerator  $P(M|S)$  equals 1 because we assume that if the defendant is the source of the sample, the lab test will report a match. As for the denominator, putting  $P(M|\neg S) = RMP$  is plausible because the probability that a match would be reported assuming that the defendant was *not* the source is roughly the same as the chance that a random person—someone who had no contact with the victim—would match anyway. For example, if the RMP is 1 in 200 million, the likelihood ratio would be

$$\frac{P(M|G)}{P(M|\neg G)} = \frac{1}{\frac{1}{200 \text{ million}}} = 200 \text{ million}.$$

Since the likelihood ratio in question is a high number, the DNA match in favor of the suspect being the source has a high evidential value. More generally, a low RMP corresponds to a match with a rare profile, hence has a high evidential value.

Still, even with a low RMP one should beware of the complications when using a DNA match to establish the guilt of a suspect. Consider the following, non-equivalent hypotheses:

1. The *lab reports* that the defendant's genetic profile matches with the crime traces;
2. The defendant's genetic profile *truly matches* with the crime traces;

3. The defendant is the *source* of the traces; and
4. The defendant *visited* the crime scene;
5. The defendant is *guilty*.

The inferential path from ‘reported match’ to ‘guilt’, passing through the intermediate steps ‘true match’, ‘source’ and ‘visit’, is a long one, and each step comes with sources of error that undermine the inference along the way.

First, the inference from ‘reported match’ to ‘true match’ depends on the question whether the laboratory has made a mistake. A key source of lab mistakes originates in human error, much less rare than a good DNA profile. Second, the inference from ‘true match’ to ‘source’ can go wrong in several ways. Of course, even a rare match can be accidental, as measured by the RMP. But another cause of a match without the suspect being the source occurs in cases of close family relations. For instance, a suspect’s genetically identical twin has identical DNA, and twins are much less rare than good DNA profiles. Third, the inference from ‘source’ to ‘visiting the crime scene’ is not infallible. In particular, the traces can have been accidentally transferred to the crime scene or have been planted there. Fourth, the inference from ‘visiting the crime scene’ to ‘guilt’ can go wrong in many ways, because having visited a crime scene is not nearly the same as having committed the crime investigated.

**Further readings** Introductions to using probability for weighing evidence (Dawid, 2002; Finkelstein and Fairley, 1970; Mortera and Dawid, 2007). Critique of the probabilistic approach (Allen and Pardo, 2007; Cohen, 1977; Tribe, 1971). Prosecutor’s fallacy (Thompson and Shumann, 1987). Introduction to DNA evidence (Kaye and Sensabaugh, 2000; Wasserman, 2008). Different hypotheses for evaluating DNA evidence (Cook et al., 1998; Evett et al., 2000; Koehler, 1993). Probabilistic analyses of DNA evidence (Balding, 2005; Buckleton, 2005; Robertson and Vignaux, 1995). Lab errors for DNA evidence (Thompson et al., 2003). Match is not all-or-nothing judgment (Kaye, 1993). Uniqueness of DNA profiles (Kaye, 2013; Weir, 2007). How DNA evidence can be synthesized and implanted (Frumkin et al., 2009). Cold hit controversy in DNA evidence cases (Balding and Donnelly, 1996; NRC, 1996). Comparison between DNA evidence and fingerprints (Zabell, 2005). Probabilistic analyses of eyewitness testimony (Friedman, 1987; Schum, 1994; Schum and Starace, 2001).

## 4.2 Arguments

The evidential value of arguments can be analyzed in terms of the reasons they are built from.

**The reasons used in arguments have different evidential value. Some are conclusive, others defeasible.** A reason is conclusive when, given the reason, its conclusion is guaranteed. The main type of conclusive reasons correspond to deductive, logically valid reasoning. An example of a conclusive reason occurs in the logically valid argument from the reason ‘The witness saw the suspect commit the crime and the suspect denies having been at the crime scene’ to the conclusion ‘The suspect denies having been at the crime scene’. Its logical validity is connected to the underlying logical structure of the argument: From A AND B, conclude B.

Many reasons are not conclusive, but defeasible: There are circumstances in which the conclusion does not follow, although the reason obtains. The reason ‘The witness reports to have seen the suspect at the crime scene’ supports the conclusion ‘The suspect was at the crime scene’, but does not guarantee that conclusion, as—for instance—the witness can have been lying or have made a mistake. A defeasible reason can provide *prima facie* justification for a conclusion, that is withdrawn in light of further information.

Some other terms are used in connection with the difference between conclusive and defeasible arguments. For instance, there is the triplet of deductive, abductive, and inductive arguments. Consider the rule ‘If someone is shot, he dies’. A deductive argument involving this rule applies the rule to an instance of its antecedent: From ‘John is shot’ and ‘If someone is shot, he dies’, conclude ‘John dies’. An abductive argument using this rule uses an instance of the rule’s consequent as a starting point, to infer the antecedent: From ‘John dies’ and ‘If someone is shot, he dies’, conclude ‘John is shot’. Abductive arguments can be thought of as providing an explanation. Abductive arguments are typically defeasible, since there often are alternative explanations. Inductive arguments generalize from an instance of the rule’s antecedent and consequent (or several such instances) to the rule: From ‘John is shot’ and ‘John dies’, conclude: ‘If someone is shot, he dies’. Inductive arguments are also typically defeasible, as the inferred rule often does not hold, at least not in full generality. Deductive arguments are also contrasted with ampliative arguments. In that distinction, deductive arguments only lead to conclusions that were already implicit in their premises, whereas ampliative arguments go beyond their premises. Arguing from A AND B to B is deductive in this sense, and from A to B ampliative.

**An argument can be tested by asking critical questions and the evaluation of the argument depends on the answers given.** Consider again the one-step argument from the reason ‘The witness reports that she saw the suspect at the crime’ to the conclusion ‘The suspect was at the crime scene’. Critical questions that can be asked about the argument include ‘Are there reasons to doubt the suspect was not at the crime scene, such as an alibi?’, ‘Are there reasons to doubt that the witness testimony supports the conclusion that the suspect was at the crime scene, for instance is the witness lying?’ and ‘Are there reasons

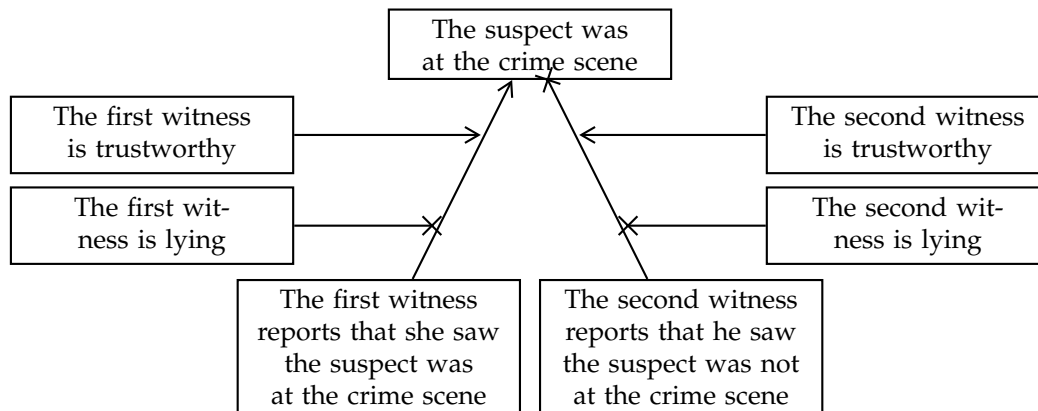


Figure 6: Arguments about whether a reason is supporting or attacking

to doubt the witness testimony, such as a fraudulent report?'. The first of these questions is directed at the argument's conclusion, the second at the argument step from reason to conclusion, and the third at the argument's reason. These different kinds of critical questions are connected to the three kinds of argument attack discussed in Section 3.1 (see in particular Figure 2, page 9). Suppose that initially it is believed that the suspect was at the crime scene because of the witness testimony. A positive answer to any of the questions will weaken the support for the conclusion that the suspect was at the crime scene, perhaps up to the point of it no being believable.

**It can be subject to debate whether a reason supports or attacks a conclusion.** The supporting or attacking relation between a reason and its conclusion can be supported or attacked. This gives rise to four different combinations: support of a supporting relation, support of an attacking relation, attack of a supporting relation, and attack of an attacking relation. In Figure 6, these situations are illustrated by two opposite witness testimonies.

Whether a reason supports a conclusion is associated with an underlying general rule. For instance, the argument from a witness testimony (the reason) to the suspect's being at the crime scene (the conclusion) is connected to the general rule that what witnesses say can generally be believed. Following Toulmin (1958)'s terminology, such general rules making explicit how to get from the reason to the conclusion are referred to as warrants. Support for a warrant is called the backing of the warrant.

**Further readings** Nonmonotonic reasoning (Gabbay et al., 1994). Prima facie reasons, undercutting and rebutting defeaters (Pollock, 1987, 1995). Warrants and backings (Toulmin, 1958). Argument schemes and critical questions (Walton et al., 2008).

### 4.3 Scenarios

The evidential value of a scenario depends on how well it matches up with the evidence. This matching up can be understood in three ways: a scenario's consistency with the evidence; its power to explain the evidence; and its evidential support. Let us consider each in turn.

**Scenarios must be consistent with the evidence, taken at face value.** We can evaluate a scenario by checking whether it is consistent with the evidence presented in a case. If a witness testifies that the defendant was at home with his girlfriend at 6 PM, while according to the scenario proposed by the prosecutor, the defendant was at the crime scene at 6 PM, the two are inconsistent. More precisely, insofar as the evidence is taken at face value—that is, the witness is taken to be truthful—the scenario is inconsistent with the evidence. A *prima facie* inconsistency between the evidence and a proposed scenario need not be damning for the scenario's credibility, but at least, it calls for further investigating. It might, of course, turn out that the witness was untruthful or simply confused about the timing. If so, the evidence will be discarded, not the scenario. But, there are cases in which the evidence cannot be easily discarded. Suppose a video recording shows the defendant went into a bank and committed a robbery, and instead, the scenario proposed by the defense denies precisely that. The defense will be hard pressed to justify the proposed scenario given the inconsistency with the evidence.

**Scenarios must explain the evidence.** The fact that a scenario is consistent with the evidence, is not by itself a good enough reason to believe the scenario. Scenarios should also *explain* the evidence. Two senses of 'explanation' are relevant here. First, a scenario explains the evidence in the sense that it *predicts* the evidence. This can be expressed by the statement *if S, then e*, where *S* is a scenario and *e* the evidence, in the sense that *e* follows deductively from *S*. The relation of prediction can also be probabilistic, in the sense that given the truth of the scenario, the truth of the evidence is highly probable. For example, let *V* be a scenario that comprises the event that the defendant visited the crime scene, and let *M* be evidence that certain genetic material matching the defendant was found at the crime scene. Clearly *V* predicts *M*, in the sense that from the truth of *V* the match *M* follows almost deductively or at least with a high probability.

There is another sense of explanation that deserves mentioning here. A scenario explains the evidence in the sense it exhibits the *causal process* by which the evidence was brought about. This applies most naturally to physical and testimonial evidence. In a case in which traces were found at the crime scene, it is more plausible that an individual visited the crime scene and left the traces by physical contact. Here the scenario exhibits the causal process (physical contact) by which the existence of the evidence (traces) was

brought about.

**Scenarios can be evaluated against two directions of fit.** Scenarios can be evaluated according to two directions of fit: whether they adequately explain the evidence, so that the fit is from the scenario to the evidence; and whether the evidence supports the scenario, so that the fit is from the evidence to the scenario. We have already discussed the first direction of fit. The other direction—from the evidence to the scenario—is equally important in evaluating the credibility of a scenario. In the language of probability, besides the conditional probability  $P(e|S)$  of the evidence given the scenario (which is closer to explanatory power), we should also consider the conditional probability of the scenario given the evidence,  $P(S|e)$  (which is closer to evidential support).

The two directions of fit are not unrelated. Setting aside wildly implausible scenarios such as ‘God did it’, if a scenario explains or predicts the evidence, it will also be well supported by the evidence. Conversely, if a scenario is supported by the evidence, it will also explain it. This is not always true but often so. Suppose a witness asserts that she saw the defendant around the crime scene during the time of the crime. This evidence supports a scenario that contains the event ‘the defendant was around the crime scene at the time of the crime’. Conversely, this scenario would also explain why the witness testified the way she did, that is, it was because the witness saw what the defendant was doing. However, suppose that the defendant was alone with the victim on an island during a time when it was impossible for anyone else to reach the island. During this time the victim dies of causes that cannot be natural. The fact that the defendant was alone on the island with the victim is evidence that the defendant killed the victim, but this scenario does not explain the evidence. It does not explain, in terms of prediction or causality, why or how the defendant found himself alone with the victim on the island.

**Further readings** Explanation in the deductive nomological model (Hempel and Oppenheim, 1948). Explanation and causality (Salmon, 1984). Abduction and inference to the best explanation (Lipton, 1991). More the philosophical literature on scientific explanation (Woodward, 2014). Two directions of fit (Wells, 1992).

## 5 COHERENTLY INTERPRETING THE EVIDENCE

The dossiers of criminal cases can be large, and the coherent interpretation of the evidence in such a dossier can be daunting, whichever normative framework is used. For each framework, we discuss how the coherent interpretation of the evidence can be addressed.

### 5.1 Scenarios

**The more evidence a scenario can explain, the better.** When a case comprises several items of evidence, a scenario's credibility depends on how it can account for the whole mass of evidence. The more items of evidence a scenario can account for, preferably from both the prosecutor and the defense, the better the scenario. This depends on the scenario's consistency with the evidence, explanatory power and evidential support. These criteria were already discussed earlier. The difference now is that consistency, explanatory power and evidential support should be measured relative to the totality of the evidence.

Suppose two items of evidence must be explained: first, the presence of fingerprints at the crime scene; and second the fact that those fingerprints match with the defendant. Suppose scenario  $S_1$  comprises the event that the defendant visited the crime scene, while  $S_2$  comprises the event that some other individual visited the crime scene. Both scenarios explain the presence of fingerprint traces, but only  $S_1$  can explain the fact that the traces match with the defendant. Now, a third scenario  $S_3$  in which another individual visited the crime and implanted fingerprints that match the defendant can explain both items of evidence. As far as explanatory power goes, scenarios  $S_1$  and  $S_3$  are equal, although further evidence may distinguish them. For example, if a witness testified that she saw the defendant walk towards the location of the crime when the crime was committed, scenario  $S_3$  could not easily explain the testimony, while  $S_1$  could. So, absent other evidence, scenario  $S_1$  explains more evidence than the other competing scenarios.

Other more openly holistic criteria such as a scenario's plausibility and completeness are also important. We discuss them now.

**Scenarios can be more or less plausible, logically consistent, cohesive, normal** While consistency with the evidence, explanatory power and evidential support measure how well a scenario matches up with the evidence, *plausibility* measures how well a scenario matches up with our background assumptions and knowledge of the world. The events that constitute a scenario must be linked by relations of temporal order and causality. These relations, at the very least, should not violate the laws of nature or common sense. If a scenario asserts that the same individual was in two different locations at the same time, or moved from one location to another in too short amount of time, the scenario would lack plausibility. Lack of plausibility can become so pronounced that it amounts to a lack of *logical consistency*, for example, claiming that the defendant had and did *not* have a motive for killing the victim

The plausibility of a scenario is weakened when the components of the scenario, its sub-scenarios, cannot be easily combined together. This could also be understood as a lack of *cohesiveness* among the components of a scenario. Suppose the defendant is said to have a lovely relation with the victim the day before, while the next day the defendant is depicted

as killing the victim out of anger. The scenario lacks cohesiveness because it cannot explain why anger followed a peaceful interaction the day before. So, not only the scenario should explain the evidence, but certain components of a scenario should explain others. Typically we expect that events prior in time explain events later in time.

Plausibility should not be reduced to *normality*. Plausibility has certainly something to do with what happens most of the time, but criminal cases are often about odd coincidences, unexpected and improbable occurrences. Indeed, a scenario according to which the defendant covered 500 mile of distance by car is more normal than a scenario in which the defendant covered the same distance by foot. But the former need not be more plausible than the latter. Consistency with the laws of nature and common sense, whether the parts of the scenario “hang together” nicely (cohesiveness and internal consistency) are also indicators of plausibility.

**Scenarios can be more or less complete.** Another criterion to evaluate scenarios is their *completeness*. Since scenarios are discursive arrangement of events, ordered according to temporal and causal relations, they may contain gaps in time, space and causality. A scenario may not describe the defendant’s whereabouts between 4 and 6 PM, while it describes, rather precisely, what the defendant did at 7 PM, immediately before the killing took place. The temporal gap between 4 and 6 PM makes it less complete than a scenario which describes the defendant’s whereabouts between 4 and 7 PM without gaps. Yet, this might not be the notion of completeness that is important here.

In a murder case, the identity of the perpetrator, the motive, the *modus operandi* of the crime and the weapon are relevant items which a scenario should specify. The lack of any of these from a proposed scenario would make it incomplete. The law itself sometimes requires that specific items be proven, for example, in criminal cases both the *mens rea* and *actus reus* must be proven. Still, the law does not say whether the defendant’s whereabouts the day before or a month before the murder are relevant. They could be relevant to establish motive or they might not. This depends on the circumstances of the case. So, how is completeness a criterion to evaluate a scenario? Some suggest that scenarios must follow certain patterns, schematic structure or scripts. For example, in most violent crimes, we can identify an initial moment of conflict, which triggers a specific psychological reaction that gives rise to the formation of an intention, which, in turn, later results in the violent act. On this account, a scenario is complete whenever it has all of its parts, at least given an appropriate scenario script. The notion of completeness, then, overlaps with that of plausibility and cohesiveness of a scenario.

All in all, evaluating a scenario required different levels of analysis: consistency with the evidence; explanatory power (predictive power and causal fit); evidential support; plausibility (and also, cohesiveness, internal consistency and normality); completeness.



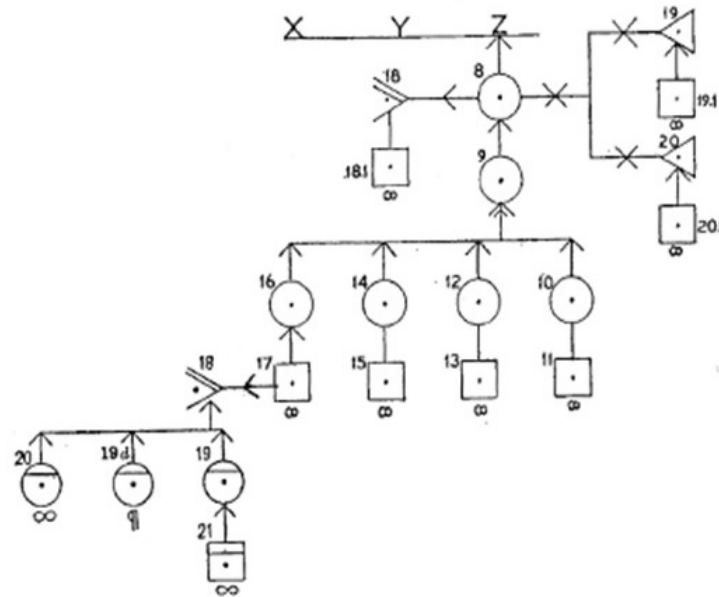


Figure 7: A Wigmore chart

**Further readings** Explanation and unification in philosophy of science (Friedman, 1974). Coherence in epistemology (BonJour, 1985). The crossword puzzle analogy for coherently evaluating a mass of evidence (Haack, 2008). Explanatory coherence (Thagard, 2001). The story model (Pennington and Hastie, 1993b). Scenarios as scripts (Wagenaar et al., 1993). Scenarios in legal cases (Griffin, 2013). Worries about scenarios in law (Velleman, 2003).

## 5.2 Arguments

An analysis of a case in terms of arguments can become very complex. This was already noted by Wigmore, when he developed his charting method for analyzing the evidence in a criminal case (Wigmore, 1913, 1931). Figure 7 provides an example of a Wigmore diagram (1931). Here Wigmore has analyzed a murder case (*Commonwealth v. Umilian*, 1901). Jedrusik, the victim, was the author of a letter in which he falsely advised a priest that Umilian had a wife and children (back in the country from which they emigrated), conflicting with Umilians intention to marry. In the chart, Z stands for the charge that Umilian killed Jedrusik. The node at 8 represents a revengeful murderous emotion toward Jedrusik. At 18, it is represented that the marriage is in the end performed, reducing his feelings of revenge. This claim is supported by the (unspecified) evidence at 18.1. The diagram contains some two dozen nodes. Diagrams for more complex cases can contain many more nodes.

**The evaluation of an argument can depend on its subarguments.** Given an argumentative analysis of the case, one would like to know which conclusions follow, and which don't. We already discussed how arguments consisting of conflicts of reasons can be evaluated in this sense, when we discussed the role of exceptions, preferences and weighing (Section 4.2). More generally, the structure of a complex of arguments influences the evaluation of the arguments. In particular, the subarguments of a larger argument determine the evaluation of the whole. For an example, we go back to the argument in Figure 4 (page 11). There the witness report supported the intermediate conclusion that the suspect was at the crime scene, which in turn supported the conclusion that the suspect committed the crime. So there is an argument consisting of two steps. In the example, the first of these steps is attacked by a counterargument involving the lying of the witness. As a result of this attack, the argument to the intermediate conclusion that the suspect was at the crime scene breaks down and its conclusion does not follow. As a result, also the larger two-step argument no longer supports its conclusion, which hence does not follow. Since the one-step subargument does not successfully support the intermediate conclusion, also the whole two-step argument for the final conclusion does not successfully support its conclusion.

**The evaluation of an argument can depend on chains of attacks.** When an argument is successfully attacked, it no longer successfully supports its conclusion. But attack can be chained, since the attack itself can be countered by a further attack. When an attack is successfully attacked, the original argument can become reinstated, in the sense that it again successfully supports its conclusion. Figure 9 shows an example. A first witness, Witness *A*, reports that the suspect was at the crime scene. Given only this information, there is good reason to assume that the suspect was at the crime scene. However, there is a second witness, Witness *B*, who reports that Witness *A* is lying. Given these two reasons, based on the witness reports by *A* and *B*, it is no longer successfully supported that the suspect was at the crime scene. If now there is a third witness, Witness *C*, who reports that Witness *B* is lying, the attack is countered. Witness *B* is no longer believed, so there is no reason to conclude that Witness *A* is lying. As a result, *A*'s report can again support its conclusion that the suspect was at the crime scene. The original argument based on *A*'s report is reinstated.

**Conflicts between reasons can be addressed by exceptions, preferences and weighing.** The counterarguments to a reason that result from asking critical questions give rise to conflicts between reasons. Sometimes conflicts of reasons can be resolved in the sense that it can be determined which conclusions follow from the conflicting reasons. We distinguish three kinds of conflicts.

In the first kind of conflicts between reasons, there is a reason attacked by an exclusion-

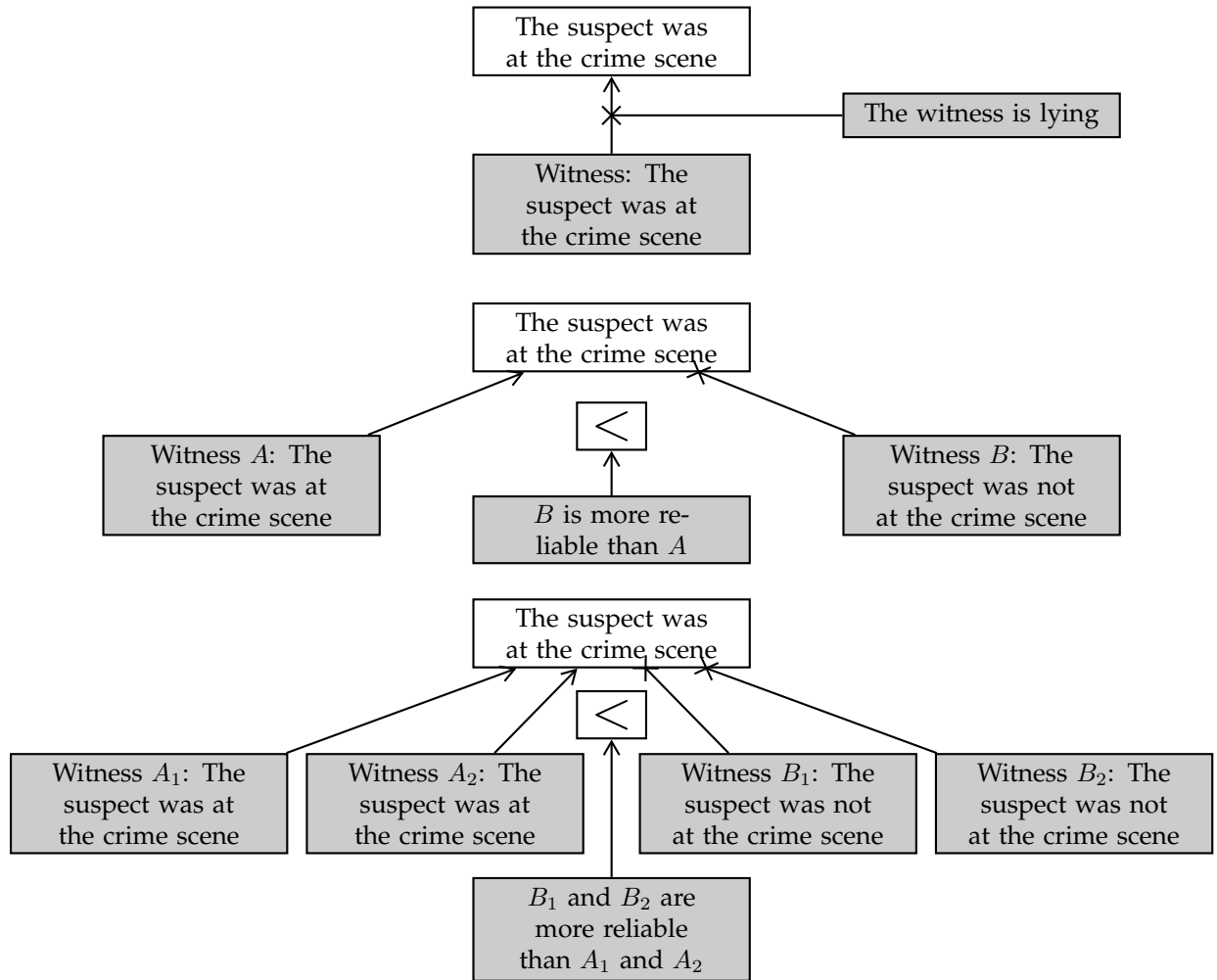


Figure 8: Three kinds of conflicts and their resolution

ary reason, i.e., an attack of the undercutting kind that goes against the connection between the reason and its conclusion (cf. Section 3.1). This situation is shown at the top of Figure 8: There is a witness reporting that the suspect was at the crime scene, but there is evidence that the witness is lying. In that case, the conclusion that the suspect was at the crime scene does not follow, since there is no supporting reason for it. The reason (the witness report itself) and the exception (the lying of the witness) both hold as they are assumptions. In this situation of a reason with an undercutting attack by an exclusionary reason, the conflict of reasons is resolved by the exception expressed in the exclusionary reason.

In the second kind of conflicts between reasons, there is one reason for a conclusion and another against the conclusion. For instance, there are two witnesses with opposite reports about whether the suspect was at the crime scene or not (see the middle of Figure 8). This

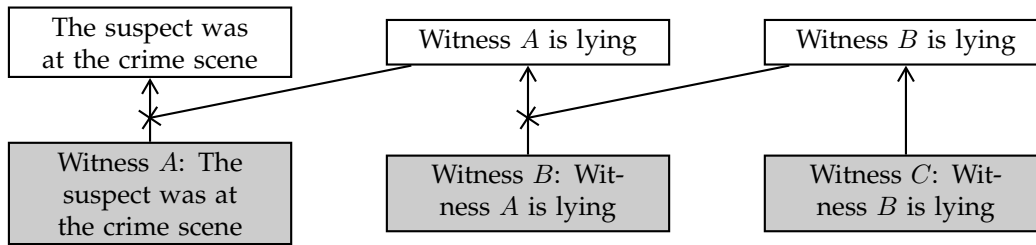


Figure 9: Reinstatement

is an example of a rebutting attack (Section 3.1). The conflict of reasons is unresolved given only the reasons. Further information about the reasons is required to resolve the conflict. The resolution of such a conflict of reasons can be thought of as the preference of one over the other. A reason can be preferred over another, for instance when it is stronger. In the example, the preference (in the figure indicated by the  $<$ -sign) is argued for by the claim that one of the witnesses is more reliable than the other. In this case, the conclusion follows that the suspect was not at the crime scene, given this conflict of reasons and its resolution.

The third kind of conflicts between reasons discussed here involves more than two reasons. For instance, there are more than two witnesses, with conflicting reports (Figure 8, bottom). In the figure, both sides are supported by two witness reports. Resolving such a conflict can be thought of as a weighing of the reasons, generalizing the preference between two conflicting reasons. Again, it is concluded that the suspect was not at the crime scene, given this resolution of this conflict of reasons.

**Further readings** Argument structure and their evaluation (Pollock, 1995). Formalizing argumentation (Prakken and Vreeswijk, 2002). Evaluating argument attack (Dung, 1995). Formal argumentation models (Gordon et al., 2007; Prakken, 2010; Simari and Loui, 1992; Verheij, 2003; Vreeswijk, 1997).

### 5.3 Probability

The probability calculus provides formal rules for the coherent interpretation of the evidence.

**The likelihood ratio formula shows how new evidence changes the odds of a hypothesis.** The odds of a hypothesis  $H$  are defined as the ratio  $P(H)/P(\neg H)$  of the probability of the hypothesis and the probability of its negation. Given new evidence  $E$ , the odds  $P(H)/P(\neg H)$  of the hypothesis unconditioned on the evidence are called the *prior odds* of the hypothesis, and the odds  $P(H|E)/P(\neg H|E)$  of the hypothesis conditioned on the evidence the *posterior odds*. It follows from Bayes' theorem (Section 2.2) that the posterior odds

can be found by multiplying the prior odds with the likelihood ratio:

$$\frac{P(H|E)}{P(\neg H|E)} = \frac{P(E|H)}{P(E|\neg H)} \cdot \frac{P(H)}{P(\neg H)},$$

To derive the likelihood ratio, one first applies Bayes' theorem to both  $H$  and  $\neg H$ . We get  $\Pr(H|E) = \Pr(E|H) \cdot \Pr(H) / \Pr(E)$  and  $\Pr(\neg H|E) = \Pr(E|\neg H) \cdot \Pr(\neg H) / \Pr(E)$ . Using these, we find:

$$\frac{\Pr(H|E)}{\Pr(\neg H|E)} = \frac{\Pr(E|H) \cdot \Pr(H) / \Pr(E)}{\Pr(E|\neg H) \cdot \Pr(\neg H) / \Pr(E)} = \frac{\Pr(E|H) \cdot \Pr(H)}{\Pr(E|\neg H) \cdot \Pr(\neg H)},$$

proving the likelihood ratio formula.

The likelihood ratio formula shows that an estimate of the (incremental) evidential value of evidence for a hypothesis does not by itself give rise to an estimate of the posterior odds of a hypothesis. One needs an estimate of the prior odds too. As such, the likelihood ratio is a constraint that must be obeyed in a coherent interpretation of the evidence concerning a hypothesis.

#### EXAMPLE

**A generalization of the likelihood ratio formula shows how to handle multiple pieces of evidence, but naively generalizing is not correct.** In a naive generalization of the likelihood ratio formula to more than one piece of evidence, the posterior odds are found by the repeated multiplication of the likelihood ratios of the individual pieces of evidence. For two pieces of evidence we get the following naive generalization:

$$\frac{P(H|E_1 \wedge E_2)}{P(\neg H|E_1 \wedge E_2)} = \frac{P(E_2|H)}{P(E_2|\neg H)} \cdot \frac{P(E_1|H)}{P(E_1|\neg H)} \cdot \frac{P(H)}{P(\neg H)},$$

Appealing as it is, this naive generalization is false in general and does not hold in the probability calculus.

The correct generalization of the likelihood ratio formula for two pieces of evidence is as follows:

$$\frac{P(H|E_1 \wedge E_2)}{P(\neg H|E_1 \wedge E_2)} = \frac{P(E_2|H \wedge E_1)}{P(E_2|\neg H \wedge E_1)} \cdot \frac{P(E_1|H)}{P(E_1|\neg H)} \cdot \frac{P(H)}{P(\neg H)}$$

Note how the factor  $P(E_2|H)/P(E_2|\neg H)$  in the naive, incorrect generalization has been replaced by the factor  $P(E_2|H \wedge E_1)/P(E_2|\neg H \wedge E_1)$  in the correct generalization.

An informal explanation why the naive generalization of the likelihood ratio is false is that the evidential value of a piece of evidence (as measured by the likelihood ratio) can change in the face of other evidence. Formally,  $P(E_2|H)/P(E_2|\neg H)$  is in general different from  $P(E_2|H \wedge E_1)/P(E_2|\neg H \wedge E_1)$ . Evidence can for instance be mutually strengthening.

#### EXAMPLE

**The probability of a composite hypothesis cannot in general be calculated from the probability of its components.** Consider a scenario that consists of several elements, for instance an accidental encounter with a robber ( $H_1$ ) followed by the robber killing the victim ( $H_2$ ). When the two events are independent, the probability of the composite hypothesis  $H_1 \wedge H_2$  is (by definition of probabilistic independence) the product of the probabilities of the individual elements. But in general the elements of a scenario are not independent. In the example, it seems reasonable to assume that an accidental encounter with a robber increases the probability of being killed, albeit slightly. Using formal notation,  $P(H_2) < P(H_2|H_1)$ . Hence also  $P(H_1) \cdot P(H_2) < P(H_1 \wedge H_2)$  and  $H_1$  and  $H_2$  are not independent. This point also holds when considering the probability of a composite hypothesis conditioned on evidence  $E$ . It does not in general hold that  $P(H_1|E) \cdot P(H_2|E) = P(H_1 \wedge H_2|E)$ , only when the elements of the composite hypothesis are independent given the evidence.

**Further readings** The conjunction paradox (Cohen, 1977) and a response (Dawid, 1987). Coherence and probability (Bovens and Hartmann, 2003). Bayesian networks (Taroni et al., 2006). Probabilistic analysis of an entire legal case (Kadane and Schum, 1996). On the use of probability in law (Fenton, 2011).

## 6 REASONING AND DECISION MAKING

So far we have focused on how the evidence can be evaluated and combined, and how inferences can be drawn. But once the evidence has been introduced at trial, examined and cross examined, it comes a time when the fact finders, either a trained judge or a group of lay jurors, must reason from the evidence, reach a conclusion and decide whether to convict or acquit the defendant. The decision criterion is defined by law and consists of a standard of proof, sometimes also called burden of persuasion. This is not to be confused with the burden of proof, which includes the burden of persuasion as well as the burden of production. The criterion for criminal cases in common law countries is *proof beyond a reasonable doubt*, and a similar criterion exists outside the common law. If the decision makers are persuaded of the defendant's guilt beyond a reasonable doubt, they should convict, or else they should acquit.

In *Commonwealth v. Massachusetts Webster* (1850), proof beyond a reasonable doubt is equated to 'reasonable and moral certainty'. In *R. v. Lifchus* (1997), the Supreme Court of Canada writes that the 'the standard of proof beyond a reasonable doubt is inextricably intertwined with ... the presumption of innocence', that it is connected with 'the evidence or absence of evidence', and also that 'it does not involve proof to an absolute certainty' and so 'it is not proof beyond any doubt' (335). Explanations abound in the case law. And

yet, it is unclear whether they improve our understanding. The US Supreme Court might have been right when, in *Holland v. United States* (1954), 348 U.S. 121, it wrote that that ‘attempts to explain the term “reasonable doubt” do not result in making it any clearer’ (140).

The three frameworks we considered—probability, arguments and narratives—can be used to characterize more precisely the standard of proof, although they are not immune from shortcomings either, as we shall soon see.

**Further readings** Evidence law manuals (Fisher, 2008; Méndez, 2008). Criminal Procedure manuals (Allen et al., 2005). Character evidence and its exclusion (Redmayne, 2015).

### 6.1 Probability

**The guilt probability is estimated by weighing the evidence within the probability calculus.** On the probabilistic framework, the goal is to estimate the probability of the defendant’s guilt based on all the available evidence. The estimation begins with the lowest possible value for the guilt probability, prior to considering any evidence. As more evidence is presented, the guilt probability moves upwards or downward depending on whether the evidence is incriminating or exculpatory. When all the evidence is considered, a final guilt probability value is reached, all things considered. This forms the basis for the decision to convict or acquit.

The value of the guilt probability is arrived at by applying Bayes’ theorem a repeated number of times and by plugging the values of the probabilities that are needed. Sometimes these probabilities are known because they are based on estimated frequencies, but sometimes they are not. For example,  $P(G)$  is required to calculate  $P(G|E)$ . This is the probability of the defendant’s guilt regardless of the evidence presented at trial. What should  $P(G)$  be? For technical reasons, it cannot be zero, but it also cannot be 50% because of the presumption of innocent. Arguably,  $P(G)$  should be relatively low, but how low? This remains hotly debated.

**The decision criterion is a guilt probability threshold.** In probabilistic terms, proof of guilt beyond a reasonable doubt means that the defendant’s *probability of guilt*, given the evidence presented at trial, meets a threshold, say, >99% or >99.9%. A numerical value for the threshold can be identified using expected utility theory. Let  $c(CI)$  be the cost of convicting an innocent and  $c(AG)$  the cost of acquitting a guilty defendant. For a conviction to be justified, the expected cost of convicting an innocent must be lower than the expected cost of acquitting an innocent, that is,

$$P(G|E) \cdot c(AG) > [1 - P(G|E)] \cdot c(CI).$$

The inequality holds just in case

$$\frac{P(G|E)}{1 - P(G|E)} > \frac{c(CI)}{c(AG)}.$$

Suppose  $\frac{c(CI)}{c(AG)} = \frac{99}{1}$ , as might be more appropriate in a criminal case in which the conviction of an innocent defendant is regarded as far worse than the acquittal of a guilty defendant. Then, the inequality holds only if  $P(G)$  meets the threshold 99%. More complicated models are also possible, but the basic idea is that the probability required for a conviction is a function of weighing the costs that would result from an erroneous decision.

**It is not clear how to estimate all the required probabilities.** The characterization is simple, crisp and elegant, but a too literal interpretation of it is problematic. If a probabilistic threshold is understood as a criterion which the decision makers should mechanically apply whenever they confront the decision to convict or acquit, two difficulties arise. The first difficulty is that assigning a probability value to guilt itself might not be feasible. As seen earlier, the starting probability  $P(G)$  cannot be easily determined, and even if this value could be known, other probability values might remain unknown. One solution here is that instead of aiming for a unique guilt probability, we can simply aim for an interval of admissible probabilities given the evidence. More generally, the estimation of the probability of guilt can be viewed as an idealized process, a regulative ideal which can improve the precision of legal reasoning. In this spirit, setting a probabilistic criterion for criminal convictions would only be a way to theorize about the meaning and ideal of the criminal standard of proof.

Another problem with the probabilistic characterization is that it does not take into account the so-called weight of the evidence, that is, whether the evidential basis contains all the evidence in the case or just a partial subset of the evidence. The guilt probability will vary dramatically depending on the evidence that is used to estimate it. It is tempting to suggest that the guilt probability must be based on a body of evidence that is complete, or at least as complete as reasonably possible. And yet, it is unclear how to characterize this notion.

**Further readings** Probabilistic accounts of the burden of proof (Cheng, 2013; Hamer, 2004; Kaplan, 1968; Kaye, 1986, 1999). Critique of probabilistic accounts (Cohen, 1977; Haack, 2011; Ho, 2008; Nesson, 1979; Pardo and Allen, 2008; Stein, 2005; Thomson, 1986). On the question whether the threshold should be variable (Kaplow, 2012; Picinali, 2013). The problem of priors (Finkelstein and Fairley, 1970; Friedman, 2000). A critique of the proof beyond a reasonable doubt as understood in the law (Larry Laudan, 2006). History of beyond a reasonable doubt standard (Shapiro, 1991; Whitman, 2008). Other measures,



weight, resiliency and completeness of the evidence (Kaye, 1999; Stein, 2005).

## 6.2 Arguments

**Arguments and counterarguments are collected and weighed.** In a court of law, the prosecutor or plaintiff puts forward a claim and offers supporting arguments. The opposing party responds by offering counterarguments. The dialectical process can be complex. There are different counterarguments: undermining, undercutting and rebutting. The process is complex also because it can be iterated. An argument can be attacked by a counterargument, and the latter in turn can be attacked by a further counterargument. And so on. When the dialectical process reaches an equilibrium point and the opposing parties have nothing more to contribute, the status of a claim and its supporting argument can be assessed.

On the argument based framework, the goal is to consider all the available arguments, by representing them in a comprehensive argumentation graph that keeps track of the relations of support and attack between arguments. The two competing theories of the cases, the prosecutor's and the defense's theory, will each be supported by a set of arguments. The argument framework, through the aid of argument graphs, allows us to compare the relative strength of the arguments in favor of one side of the case or the other. This comparison of the argumentative strength of the two sides forms the basis for the trial decision.

**Defeating all counterarguments is the criterion for meeting the standard of proof.** In order to establish the defendant's guilt beyond a reasonable doubt, all counterarguments to the contrary must be responded to, or in other words, all the attacks against the argument for guilt must be defeated. Now, whether a counterargument or an attack is defeated is not always an all or nothing affair. It is often a matter of degrees. If the argument for guilt is slightly stronger than all its counterarguments, this would not be enough yet. To meet the demands of the standard of proof beyond a reasonable doubt, an argument must be significantly stronger than all its counterarguments. On the other hand, defeating all its counterarguments with absolute certainty would be too much to expect. So, more realistically, all counterattacks must be defeated in an almost definitive way. Here, it seems, we need to reintroduce some threshold, even though not in an explicitly probabilistic or numerical way.

**It is not clear when to stop collecting arguments and counterarguments.** The argumentation framework is rather realistic. The dialectic between arguments and counterarguments effectively takes place in court, and the idea that meeting the standard of proof requires to answer all counterargument against guilt is natural enough. A problem is that if the opposing party puts forward no counterarguments, meeting the standard of proof

would be effortless. A possible response here is that the counterarguments must be all the counterarguments which a reasonable objector could in principle put forward, not just the counterarguments that in fact are put forward.

Another problem consists in identifying the threshold. While the probability based account can identify a specific probability threshold, at least in theory, by applying the principle of expected utility theory, the argumentation based framework cannot. How could the principle of expected utility theory be applied to the argument framework as well?

**Further readings** Carneades model (Gordon and Walton, 2009; Gordon et al., 2007). Justified argument model (Prakken and Sartor, 2007, 2009).

### 6.3 Scenarios

**Competing scenarios are collected and compared.** On the narrative framework, the two parties will put forward competing scenarios, at least two or possibly more than two. This is partly problematic because in a criminal case, the defense does not have the burden of proof. So it might well be that the defense puts forward a scenario that weakens the prosecutor's scenario, but that is not a scenario that proves innocence. Be that as it may, the various competing scenarios will be evaluated along the different criteria we identified, such as, consistency with the evidence, explanatory power, plausibility, cohesiveness, etc. The question arises, which scenario should be selected among the competitors?

**The best explanatory scenario is the rule of decision.** We can picture the process of evaluation of the competing scenario as a process of elimination. At the beginning, several scenarios are viable, but as more evidence is considered and the scrutiny of each scenario continues, fewer scenarios will survive. The goal would be to select one scenario, or at least a limited set of scenarios, so that the answer to the question 'guilty or not?' would be univocal. On this picture, a scenario meets the demands of the standard of proof whenever it is the *only* scenario left.

But, once again, we confront a recurrent problem. The selection of one scenario is not always an all or nothing affair. The term 'abduction' or the expression 'inference to the best explanation' is sometimes used in this context. The basic idea is that, when confronted with two or more competing scenarios, the best explanation must be chosen. The notion of 'best explanation' here is wide ranging. It includes criteria such as consistency with the evidence, explanatory power (predictive power and causal fit), evidential support, plausibility, completeness, etc. Other criteria might also play a role, such the simplicity of the scenario. So, the best explanation is the scenario that fares better on some combination of these criteria. This is a matter of degrees. The scenarios get higher or lower scores relative

to the applicable evaluation criteria. The scenario that gets the best score, and that meets a suitable threshold level, should be selected.

**It is not clear how to find the scenarios.** The process of scenario selection resembles how jurors reason in trial proceedings, whereas despite its clear mathematical underpinnings, it is hard to relate probability to judicial proceedings: jurors do not naturally quantify guilt, and it is difficult to quantify it even if we wanted to. Still, a problem with the scenario approach is that the method by which a scenario is selected is not entirely transparent. The different criteria, such as consistency, explanatory power, coherence etc. can pull the decision makers in opposite directions. For example, a scenario might be better in terms of explanatory power, while another might be more plausible. What to do, then? One might wonder whether the criterion for the best scenario should simply be this: the most probable scenario which meets a sufficiently high probability threshold. If so, this would not be very different from the probability based account of the standard of proof.

**Further readings** Inference to the best explanation (Lipton, 1991). Application of inference to the best explanation to legal reasoning (Pardo and Allen, 2008). Narrative based account of proof beyond a reasonable doubt (Allen, 2010; Allen and Stein, 2013).

## 7 SUMMARY AND CONCLUSION

We have discussed evidential reasoning in the law. For this, we have distinguished three normative frameworks: one focusing on the arguments for and against the positions taken, the second using probabilities to assess the evidential value of the evidence, and the third considering the scenarios that best explain the evidence.

We discussed four main themes: conflicting evidence, evidential value, the coherent interpretation of the evidence, and reasoning and decision making. For each theme, we discussed how they can be addressed in each of the three frameworks. We summarize our discussions for each theme, using the highlighted phrases in the preceding sections.

### *Conflicting evidence*

**Arguments** The arguments for and against different positions have structure, involving complexes of reasons supporting and attacking positions. Three kinds of support can be distinguished: multiple, subordinated and coordinated support. Three kinds of attack can be distinguished: rebutting, undercutting, and undermining attack.

**Scenarios** Scenarios are clusters of events, ordered in time and connected by causal relations. Scenarios can explain a piece of evidence or be contradicted by it. Scenarios consid-

ered may or may not solve a case, and show which evidence is legally relevant.

**Probabilities** Evidential support and attack can be characterized as “probability changes”. Evidential support and attack can be characterized as “likelihood ratio”. The conflict between two pieces of evidence can be described probabilistically.

### *Evidential value*

**Probabilities** The evidential value of a piece of evidence is measured by probabilistic difference or likelihood ratio (‘incremental evidential value’). The evidential value of all the evidence, in its totality, is measured by the overall conditional probability (‘overall evidential value’). DNA evidence can have a high incremental evidential value, but one should beware of complications.

**Arguments** The reasons used in arguments have different evidential value. Some are conclusive, others defeasible. An argument can be tested by asking critical questions and the evaluation of the argument depends on the answers given. It can be subject to debate whether a reason supports or attacks a conclusion.

**Scenarios** Scenarios must be consistent with the evidence, taken at face value. Scenarios must explain the evidence. Scenarios can be evaluated against two directions of fit.

### *Coherently interpreting the evidence*

**Scenarios** The more evidence a scenario can explain, the better. Scenarios can be more or less plausible, logically consistent, cohesive, normal. Scenarios can be more or less complete.

**Arguments** The evaluation of an argument can depend on its subarguments. The evaluation of an argument can depend on chains of attacks. Conflicts between reasons can be addressed by exceptions, preferences and weighing.

**Probabilities** Independent items of evidence can be combined by multiplying the likelihood ratios. Items of evidence can be combined even if they are not independent. Different items of evidence for different hypotheses can also be combined.

### *Reasoning and decision making*

**Probabilities** The guilt probability is estimated by weighing the evidence within the probability calculus. The decision criterion is a guilt probability threshold. It is not clear

how to estimate all the required probabilities.

**Arguments** Arguments and counterarguments are collected and weighed. Defeating all counterarguments is the criterion for meeting the standard of proof. It is not clear when to stop collecting arguments and counterarguments.

**Scenarios** Competing scenarios are collected and compared. The best explanatory scenario is the rule of decision. It is not clear how to find the scenarios.

With the thematic discussion of the three normative frameworks, we have aimed to show how each framework contributes to the understanding of conflicting evidence, evidential value, the coherent interpretation of the evidence, and reasoning and decision making. In this way, we hope to contribute to the further development of the three frameworks. In our perspective, there is no need to choose between the frameworks, since each adds to the normative analysis of evidential reasoning. At the same time, there is room for further studies of how the three normative frameworks relate to each other, and how they can be integrated into an overall normative perspective on evidential reasoning.

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