JOURNAL OF LAW AND SOCIETY
VOLUME 29, NUMBER 4, DECEMBER 2002
ISSN: 0263-323X, pp. 533–59

Questions and Answers: The Logic of Preliminary Fact Investigation

KOLA ABIMBOLA*

My paper considers the role of questions and answers in the inferential tasks of fact investigators (investigators such as police officers and crime scene examiners) prior to trial and indeed prior to arrest. My contention is that the reasoning processes of these investigators obey an internal, simple, successful, but dangerous, logic.

INTRODUCTION

This paper examines the nature and function of questions in pre-trial legal reasoning. My contention is that the presuppositions of questions constrain inferential choices entertained by fact investigators. More specifically, I argue that the availability of fact and evidence, and the sort of inferential connections a legal agent makes when choosing between alternatives, are all dependent upon the presuppositions of the questions posed.

It is important to distinguish the interrogative approach of this paper from two other approaches to the study of questions in the legal process. On the one hand, studies by Michael Zander examine the specific rules and regulations imposed upon the police by the legal system.[1] These studies are interested in what Henry Wigmore called the Trial Rules of Admissibility because their focus is on questions such as: 'Whom can the police question?' 'Is a citizen obliged to answer police questions?' 'What are the formal consequences of refusal to answer police questions within the legal process?' This paper is not about trial rules of admissibility.[2]

** Department of Philosophy, Seattle University, 900 Broadway Avenue, Seattle, WA 98122, United States of America*

I am grateful to William Twining, C.J. Miller, Andrew Simester, and the anonymous referees of the *Journal of Law and Society* for their helpful comments and suggestions.

1 M. Zander, *Cases and Materials on the English Legal System* (1999).

2 J. Wigmore, *The Science of Judicial Proof: As Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials* (1937); J. Wigmore, 'The Problem of Proof' (1913) 8 *Illinois Law Rev.* 77.

Trial rules of admissibility are important to our understanding of the legal process. Nonetheless, they have little or no role to play in my inquiry into the role of questioning in pre-trial legal reasoning. This is because interrogation in this paper is not about statutory or judge-made rules. Nor is it about how fact investigators translate formal procedural rules into the 'working rules' that actually govern their day-to-day practices. This paper is not about legal rules at all. Rather, my subject is the process by which fact investigators (such as police officers, scene-of-crime examiners, and forensic scientists) generate and construct evidential fact during the preliminary stages of the legal process.

In contrast to the Zander-style approach, studies such as that of McConville et al. focus on how the police use questioning and interrogation 'to manipulate the social environment of the suspect to increase their control and influence over the suspect's decision making and to prepare the ground for building the case against the suspect'.[3]

Although this paper has some affinities with the McConville et al. approach to the study of questioning, it is pertinent to make a prima facie distinction between the *art* of questioning and the *logic* of questioning. The art of questioning is about effective interviewing and cross-examining techniques. It is more about style and delivery than about logic. Perfecting one's skills in the art of questioning is about honing persuasive skill. The logic of questioning, however, is about the validity and cogency of legal arguments.[4] It is an analysis of the role and function of the presuppositions of questions in the evaluation of legal evidence.

THE CONSTRUCTION OF FACT AND EVIDENCE

According to one popular image, the law applies only to those facts of the case that have either been determined by the courts, or admitted by the parties to a trial. Hence we can say that although facts are not created by the law (they exist out there in the real world independently of the law), it is the law that determines the rights and duties attached to these facts. But as facts are often disputed, one function of the courts is that of ascertaining and

3 M. McConville et al., *The Case for the Prosecution* (1991) at 56. See, also, J. Baldwin, 'Police Interview Techniques: Establishing Truth or Proof?' (1993) *Brit. J. of Criminology* 325.

4 The distinction between the art and logic of questioning is not so clear-cut. In formal deductive logic for instance, we have the fallacy of complex (or loaded) questions. 'Have you stopped beating your husband?' and, 'Have you given up your evil ways?' are fallacious because (unless it is quite clear from the context of the discussion) we are incapable of establishing cogency on the basis of whatever answer we give to such questions. But avoiding complex questions is also good heuristics and good questioning practice. In short, although the art and the logic of questioning are conceptually distinguishable, they are not distinct.

determining what the facts are, before spelling out their legal consequences. This popular image of the law upholds the viewpoint that factual reasoning is distinct and distinguishable from legal reasoning because facts have an objective existence independent of the legal process.

This popular image also distinguishes constitutive facts from evidential facts. Constitutive facts (ultimate, dispositive, or material facts, as they are also known) are technical and theoretical constructs of the law. They are conditional in the sense that they are legally defined notions to which specified legal consequences attach. Hohfeld, for instance, expresses this view as follows:

> an evidential fact is one, which, on being ascertained, affords some logical basis – not conclusive – for inferring some other facts. The latter may be either constitutive fact or an intermediate evidentiary fact.[5]

For example, 'unlawful intentional killing' is a constitutive fact to which the legal consequence 'guilty of murder' applies. Other examples of constitutive facts include 'offer', 'acceptance', 'trespass', and so on. The implication of these examples should not be lost. For what these examples indicate is that constitutive facts are not just concrete observable objects, they include events, beliefs, actions, state of affairs, and so on.

Evidential facts are more primordial and fundamental in the sense that they are the facts on the basis of which constitutive facts are inferred by the fact finder. For instance, the 'facts' that the accused's fingerprints were found on the bloodstained knife, and that the victim's credit card was found on the accused, form the basis for the inference that the accused robbed and killed his victim. Also, items of evidence such as 'woollen hat', 'fingerprints', and 'footmarks' could be the evidential facts to which 'entry as a trespasser' and 'taking of property belonging to another with intention to permanently deprive the other of it' are attached as constitutive facts. The legal consequences of these constitutive facts are 'burglary' and 'theft'.

The implication of the foregoing for the standard image is crucial. If constitutive facts are 'inferred from other facts' as Hohfeld points out, then

5 W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1923) at 34. Some contemporary scholars also assume this image. See, for example, S. Uglow, *Evidence: Text and Materials* (1997); C. Tapper, *Cross and Tapper on Evidence* (1999). Uglow, for instance claims that:

> In a contested trial, under the common law system of justice, the opposing parties will present differing, sometimes diametrically opposed, views of the same event. Having listened to these accounts, the trier of fact must decide what the facts are. It is this problem as to how 'facts' are established with which the law of evidence is concerned: what information can be presented in court; through what means; how does a court decide whether that information proves whether an event happened in a particular way or not? Such rules, alongside the rules of civil and criminal procedure, can be described, not as substantive, but as adjectival law. This means that these rules attach themselves to and qualify the operation of a substantive rule but never, by themselves, directly decide the rights and wrongs of any issue (id., p. 1).

they cannot simply be descriptions or records of occurrences and events. Constitutive facts are theoretical constructs of the law. But while it accepts that constitutive facts are theoretical constructs, the popular image fails to emphasize the point that even evidential facts are inferred and constructed. For in our descriptions of reality, we take so many things for granted, and whether something we designate as a fact exists out there in the real world (and not merely in our minds or in our theories) is always dependent upon the assumptions we make. In short, the assumptions we rely on in our interpretations of phenomena are themselves relevant to the question of what can count as an evidential fact; and until we spell out what these presuppositions or background assumptions are, we cannot simply conclude that a potential fact is indeed a fact. Moreover, this old image of fact and law gives the erroneous impression that the analysis of fact is secondary to the task of identifying legal rules, legal standards, and the policy considerations that underpin them. This is precisely why the only classification of fact and law to be found in most traditional treatises on the law of evidence is the rather simplistic one that questions of fact are for the jury, while questions of law are for the judge. Thayer succinctly describes this view when he states that:

> In general, issues of fact, and only issues of fact, are to be tried by the jury; when they are so tried, the jury and not the court are to find the facts, and the court and not the jury is to give the rule of law; the jury are not to refer the evidence to the judge and ask his judgement upon that, but are to find the facts which the evidence tends to establish, and may only ask the court for their judgement upon these. That this determination by the jury involves a process of reasoning, of inference and judgement, makes no difference.[6]

This simplistic classification does not give us a good account of the function of fact in inferential tasks throughout the legal process. That judges deal with questions of law, while juries deal with questions of fact, is an artificial device we adopt in order to allocate roles. For, in reality, all agents throughout the legal process have to engage in the interpretation, construction, and evaluation of fact in decision-making. Judges, police officers, crime scene examiners, lawyers, and others involved with the legal process, all 'find facts' in one form or the other. McConville et al. illustrate this same point succinctly when they claim that:

6 J. Thayer, ' ''Law and Fact'' in Jury Trials' (1890) 4 *Harvard Law Rev*. 147, at 150. I hasten to add that Thayer did not quite adopt this version of the jury/judge functions. Indeed, Thayer maintained that the version of the separation of functions stated above is a fable. This is why he identified different types of facts: facts as acts; facts as completed operative transactions (for example, a deed); facts as matter of fact; evidentiary fact; and ultimate fact. In Thayer's view, only ultimate or material facts which are contested in issue by the parties are of concern to the jury: 'When it is said that fact is for the jury, the fact intended . . . is that which is at issue, the ultimate fact' (id., p. 156). For a more robust account of facts, see W. Twining, 'Taking Facts Seriously' (1984) 34 *J. of Legal Education* 22.

> . . . in a very real sense, the police construct evidence (and sometimes more than evidence). The police have, at a fundamental level, the ability to select facts, to reject facts, to not seek facts, to evaluate facts and to generate facts. Facts, in this sense, are not objective entities which exist independently of the social actors but are created by them.[7]

In their discussion, McConville et al. examine how police officers manipulate various socio-legal factors in their construction of fact and evidence. For instance, because the police have the power and ability to control the environment when they are questioning suspects in police stations, the integrity of the police's record of events is often compromised. The police can also manipulate discussions with suspects so as to create facts when they are questioning suspects:

> 'Facts' are not elicited, they are created. The 'facts' generated during interrogation are the product of a complex process of interaction between suspect and officer, much of which is directly traceable to the style and manner of police questions. The creation of such 'facts' is not an unusual or aberrant feature but absolutely endemic to police interrogation. Nor are such 'facts' accidentally created: they are precisely what the process sets out to achieve.'[8]

Whilst I do not controvert McConville's socio-legal analysis of questioning, I nonetheless maintain that the strategic use of questions within the legal process is not just about the social environment of police questioning; it is also very much a question of logic.

Differently put, the contrast I want to draw between this project and that of McConville et al. (or that of Baldwin) is between sociology and nomology.[9] McConville's approach is socio-legal while this one is

7 McConville, op. cit., n. 3, at p. 56.

8 id., at p. 67. For a discussion of the role of forensic science in the construction of evidence, see P. Roberts, 'Science in the Criminal Process' (1994) 14 *Ox. J. of Legal Studies* 467.

9 McConville, id.; Baldwin, op. cit., n. 3. It is also important to distance my views from the most popular version of nomologicalism – the deductive nomological (DN) model of explanation. According to one version of nomologicalism, to explain a phenomenon is to subsume it under a general law. An 'explanation' is an argument whose premises contain a general law and whose conclusion describes the phenomenon being explained. In the DN model, a good explanation must be a valid deductive argument. For example, to explain why *M* (a particular metal) expanded, we require an argument of the sort: all metals expand when heated; *M* is a metal; *M* was heated; therefore, *M* expanded. I do not accept the DN model for various reasons. These reasons (which I do not discuss here) have to do with the nature and role of causation in explanation. The important point for now is that nomology, the way I use it, is not based on any 'covering law' account of explanation. The word nomology itself comes from the Greek words *nomos* (denoting law *or* custom) and *logos* (denoting discourse). The DN model of explanation concentrates on the 'law' in *logos*; it seeks covering laws under which to subsume the phenomenon to be explained. I concentrate on the 'custom' in *logos*. So while the Chambers Dictionary (1994) defines nomology as 'the science of the *laws* of the mind', I would define it as

(nomo)logical. Questions, I will argue, are cognitive devices that enable fact investigators to link various items of factual information in complex arguments. As we shall see, questions, and the various elements of questions, are indispensable attributes of the human thinking processes.

Before we proceed, it is important to understand the functions of what Anderson and Twining call standpoints in the analysis of evidence.[10] To understand how a person constructed facts or evidence, and to understand why that person drew a particular conclusion from the evidence, we need to understand the perspectives or frames of reference (that is, standpoints) from which that person approached his or her inferential task(s).[11] For it is only after we have clarified the standpoint of the fact investigator that we can fully assess the adequacy of the conclusions drawn from the evidence by the fact investigator. Unfortunately, people do not always make their standpoint clear. This makes it important for us to identify the inferential tasks implicit within the legal process, and the standpoints of fact investigators when they perform these tasks.

the science of the customs of the mind. But custom is here understood in the generic manner that David Hume and Immanuel Kant used it. It has to do with cognitive structural attributes of the human mind. It is not about the socially variable habits (or ways of life) of particular communities. Rather it is about those thinking patterns which prevail in all human minds. For further discussion, see K. Abimbola, 'Preliminary Fact Investigation: A Theoretical Model for the Analysis and Configuration of Pre-Trial Criminal Evidence' (PhD Thesis, University of Birmingham, 2000).

10 T. Anderson and W. Twining, *Analysis of Evidence: How to Do Things With Facts* (1991). See, also, K. Abimbola, 'Abductive Reasoning in Law: Taxonomy and Inference to the Best Explanation' (2001) 22 *Cardozo Law Rev.* 1683.

11 Anderson and Twining (id.) maintain that there are three important questions we need to address in the identification of standpoints. These are: (i) Who am I? (ii) At what stage in what process am I? and (iii) What am I trying to do? The question, 'Who am I?' stresses the point that different individuals (or the same individual at different points in time) could perform different functions in a task at hand. Thus, the role of the solicitor is different from that of the barrister. The function of the judge is different from that of the jury. And the role of the expert witness is different from that of the normal witness. Asking the question 'Who am I?' is significant in identifying the role of an individual in a particular research. The second question, 'At what stage in what process am I?' alludes to the point that tasks, perceptions, and functions are both time and context dependent. At the earlier stages of the criminal process, the police, for instance, function as investigators trying to ascertain who committed an offence. At this stage, they also function as the trier of fact and law that is, literally, as the jury and judge rolled into one). For at this stage, they have to decide whether a suspect is suspicious enough to be charged with a specific offence. But during the trial itself, the police merely function as witnesses. The role, function and tasks of the police therefore change over time in accordance with changes from one stage of the legal process to another. The final standpoint question, 'What am I trying to do?' asks a question about one's objectives and purposes. Individuals having different objectives about an inquiry at hand will often entertain different issues and arrive at different conclusions.

The figure below depicts all the stages at which inferential problems can occur in the legal process:

Figure 1[12]

This figure depicts the legal process as a set of events occurring in time.[13] The first main event is described as 'investigative discovery'. The machinery of the legal process is set in motion with investigative discovery. Binder and Bergman describe the particular point when the legal process is set in motion as the 'moment of substantial importance' (MSI).[14] At MSI, events that may

12 This figure is adapted from P. Tillers and D. Schum, 'A Theory of Preliminary Fact Investigation' (1991) 24 *U.C. Davis Law Rev.* 931, at 940.

13 This is not quite accurate. As the figure illustrates, the legal process is made up of four main events (investigative discovery, legal discovery, trial, and post-trial activities). But each of these events involves numerous activities. Take trial for instance, we have activities which range from story telling by lawyers, through expert testimony by forensic scientists, to decision making by judges and jurors. So, trial (just like all the other main events) involves a series of activities, and is therefore a set in its own right. So to be very precise, the legal process ought to be described as a class or collection of sets; it is a set of sets.

14 D. Binder and P. Bergman, *Fact Investigation: From Hypothesis to Proof* (1984).

provide the basis for an investigation (and possibly trial) occur. For example: a supermarket is robbed at gunpoint; a car hits a pedestrian on the Zebra crossing, and so on. Investigators may of course be interested in events leading up to the MSI itself. For instance, they may be interested in where the armed robber purchased her gun. MSI simply refers to the point at which an event (or events) that sets the legal process into action occurred.

The event of 'legal discovery' sometimes follows that of investigative discovery. At legal discovery, lawyers, solicitors, barristers, and judges play prominent roles. The work of these actors in the legal process sometimes (but not always) results in trial. But note that the actors involved in legal discovery often become involved at the earlier stage of investigative discovery. For instance, judges and magistrates may have been contacted earlier for search warrants, and so on.

This figure also shows that investigators are usually the first to perform inferential tasks during the pre-trial stages of the legal process. Usually this would be when a crime is reported to the police or when a forensic pathologist is called upon to examine a body at a crime scene. During the trial process, police investigators take up the new role of court witnesses. After trial, their tasks take on new dimensions because they also perform numerous post-trial functions – such as when they investigate claims that a convict is not doing his community service as ordered by the judge.

Judges (and magistrates) often come into play at an earlier stage than lawyers do. This is because they may be asked to issue search warrants, arrest warrants, or asked to authorize intrusive surveillance, and so on, prior to arrest.

However, the tasks of the lawyer often extend beyond those of investigators and judges. For instance, after trial and sentencing, the criminal may continue to receive counsel from his lawyers about appeals, or the possibility of bringing a civil action against other parties (such as doctors and hospitals) to his trial. The function of the jury is however usually limited to the trial process itself.

I hasten to add that this is just a depiction of what happens in most criminal cases. Lawyers may come into play earlier than investigators if the trial is based on a private prosecution. And, of course, in civil trials, the lawyer would usually come into play before judges. Moreover, the criminal process often terminates before trial if the process of investigative discovery does not yield useful information for trial purposes. For instance, the police may not succeed in 'solving' the crime, or the victim may refuse to proceed with prosecution.

My subject in this paper is the construction of evidence and fact by police investigators during preliminary fact investigation (PFI).

Contemporary logicians such as Belnap and Steel distinguish between two types of questions, namely, statement questions and 'wh-' questions. As they put it: 'Questions can be classified into two sorts with respect to how many alternatives they present: a few, or at any rate a finite number of alternatives, on the one hand, and an infinite, or at least a large number of alternatives, on the other.'[15]

Statement questions are those that the fixed set of alternatives 'yes' or 'no' can adequately answer. For example, the following are all statement questions:

- Did Elliot burgle the house?
- Has John finished his homework?
- Is Lagos the capital of England?

In statement questions, the inquirer is interested in eliciting information that will enable her to establish the truth or falsehood of propositions contained within the questions.

'Wh-' questions are requests for information on the basis of words like who, what, where, when, why, and how. Answers to 'wh-' questions require existential commitments in the sense that they require us to designate individuals, names, objects, or things, before they can be adequately answered. Examples of 'wh-' questions would include:

- Who burgled the house?
- Who stole the jewellery?
- What crime did Elliot commit?

The fact that a question begins with a 'wh' word does not mean the question is a 'wh-' question. For example, although the word 'whether' begins with 'wh', it poses a statement question. If I ask you whether you scored an A or a B in your essay, I am actually asking a loaded statement question which requires you to answer 'yes' or 'no' to one of two separate alternative questions. Also, 'how', which is not a 'wh' word, usually poses a 'wh-' question. The point is that the context of the question is important to determining the type of question at hand. The main difference between statement and 'wh' questions therefore lies in the fact that all the alternative answers to statement questions are exhausted by the words 'yes' or 'no' (or some equivalent of these two words). But 'yes' or 'no' answers do not suffice for 'wh-' questions. An adequate answer to 'wh-' questions requires specific information about an individual, an object, a process, or a thing.[16]

15 N. Belnap and T. Steel, *The Logic of Questions and Answers* (1979) at 19. See, also, J. Hintikka and J. Bachman, *What if . . .? Toward Excellence in Reasoning* (1991).

16 One central point to note is that the division of questions into statement and wh-questions is only one way of classifying questions. Other classifications may be

Usually, questions are posed on the basis of a set of background assumptions, presumptions or presuppositions. These presuppositions provide important 'reasoning-connections' between questions and their answers because they supply the basis for determining the adequacy of answers. For example, the question 'why did Elliot burgle the house?' contains the following presuppositions:

- Elliot has some reason for burgling the house;
- Elliot in fact burgled the house;
- Someone did something;
- There is someone who bears the name Elliot.

With statement questions, the presuppositions are easily identified because in answering a yes or no question, all we need is information about the truth or falsehood of a statement or proposition.[17] All the options we have are exhausted by the options:

- A or not-A.

So with statement questions, presuppositions can be identified by spelling out claims implicit in the question, about which A or not-A could possibly be true (or false).

With 'wh-' questions, we need to understand more about the nature and context of the request. We need to identify the sort of existential assumptions that make the 'wh-' question meaningful. 'Wh-' questions of the 'who' type

adequate for other purposes. A. Goldman, 'Epistemology and the Theory of Problem Solving' (1983) 55 *Synthese* 21, for instance, claims that:

> One might, for example, categorize questions as (A) theoretical, (B) practical, and (C) productive. Theoretical questions would include *whether-questions*, such as 'Is there a proof of such-and-such a formula?' and *what-questions*, such as 'What is the proof of this formula?' Under practical questions we might include not only how-to questions, such as 'How can I fix this faucet?' but other questions immediately linked to practical needs or desires, for example, 'Where in this town can I find a good restaurant?' . . . Productive questions might be viewed as a species of practical questions, but they are worth special mention to indicate that creative, artistic, and technical activities generate problems and solution-seeking activities. An artist in the process of painting might ask himself 'What color or pattern in this part of the canvas will achieve such-and-such an aesthetic effect?' (id., p. 26, italics added).

17 Deductive logicians would usually distinguish between presuppositions on the one hand, and background assumptions or presumptions on the other hand. Deductive logicians like to use 'presupposition' only in relation to those presuppositions that are deductively entailed by a question. All other non-deductive implications of questions are referred to as background assumptions or presumptions. Belnap and Steel, op. cit., n. 15, for instance, suggest that Q (a question) presupposes P (a proposition) only if the truth of P is logically necessary for a correct answer to Q. So in the question: 'why did Elliot burgle the house?', only the proposition: 'Elliot had some reason for burgling the house' is logically entailed. All the other propositions would be regarded as background assumptions or presumptions. In this paper I am using the word 'presupposition' loosely to include non-deductive implications.

(for example, who stole Mrs. Jones' jewellery?) assume the existence of a human being. 'Wh-' questions of the 'how' type (for example, how did the burglar gain access into the house?) make existential assumptions about the process or method of doing something.

PRESUPPOSITIONS AT WORK: THE CASE OF STEPHEN LAWRENCE

In this section, I will illustrate the role of presuppositions in the construction of fact and evidence with the case of Stephen Lawrence. But before I proceed, it is important to clarify my standpoint.

The standpoint I adopt is that of a logical analyst looking at a case in order to assess the cogency of presuppositions in evidential reasoning. I am not necessarily a campaigner for the Lawrence family. I am simply doing an analysis of the case in order to understand the influence of presuppositions on the construction of legal arguments. This implies that I am neither playing the role of the prosecutor nor that of the defence. I am simply looking at all the information now available in order to illustrate the point that the cogency of arguments from fact is affected by the construction of these same facts.

Stephen Lawrence and his friend Duwayne Brooks were on their way home about 10.30pm on 22 April 1993. As they approached the bus stop in Well Hall Road, Stephen went ahead of his friend to see whether a bus was approaching. As Duwayne Brooks called out to his friend to ask him whether he saw the bus coming, someone from a group of five or six white youths on the other side of the road (who must have heard Duwayne) called out: 'what, what nigger?' The whole group then crossed the road, engulfing Stephen. Duwayne turned and ran, and he also called out to Stephen to run. But Stephen was stabbed twice – once in the chest and once in the arm – as he was in the process of flight. Duwayne Brooks ran across the road and away from the scene. There were three eyewitnesses at the bus stop. Stephen died a few minutes after he fell (and before the arrival of the ambulance).

Although we have no official statement of the police's initial assumptions about the case, the Macpherson inquiry into this affair gives us some insight into the police's investigation.[18] In their investigation, the police assumed that the death was the result of a failed drug deal. The police's prime suspect was in fact Duwayne Brooks and it was not until a month after the incident that the police decided that Brooks was not a conspirator in the killing of Stephen Lawrence.

The police's initial assumptions about the series of events leading to the death of Lawrence can be regarded as a product of their presuppositions and their understanding of the problems on the basis of these presuppositions. For in their initial response to the crime, the police did not define the crime as a racial incident.

18 W. Macpherson, *The Stephen Lawrence Inquiry: Report of an inquiry by Sir William Macpherson of Cluny* (1999).

Part of the problem has to do with the identification of a 'racist incident'. The Macpherson report claims that 'a racist incident is any incident which is perceived to be racist by the victim or any other person.'[19] This definition itself is based upon a definition proposed by the Association of Chief Police Officers:

> A racist incident is any incident in which it appears to the reporting or investigating officer that the complaint involves an element of racial motivation, or any incident which includes an allegation of racial motivation made by any person.[20]

Suppose we set aside the numerous problems with the subjective nature of these definitions of 'racist incident', a more important problem is the gap that exists between formal definitions and police practice.[21] For despite the testimony of Brooks, the police's initial investigation was carried out on the assumption that the death was the result of a failed drug deal.

Indeed, despite the fact that various persons from the general public volunteered information to the effect that five individuals were responsible for the crime, the police did not take this information seriously. Stephen Lawrence was killed on 22 April. On 23 April, a letter giving the names and addresses of these suspects was left at a phone box for the police. On that same day, various persons made statements to the police about the attacks. The names of these five suspects were prominent, but most of these informants wished to remain anonymous because the whole neighbourhood was terrified of the gang. The information given to the police also indicated that stabbing an innocent individual was part of the gang's initiation ceremony.

Someone referred to as 'James Grant' supplied very important information to the police. (The informant was given this pseudonym to protect his identity.) James Grant went to the police station on two occasions – on 23 and 24 April. As stated in the Macpherson Report:

> The most important information of all to reach the team during the first weekend came from a man whose identity was in fact established from the start, but who was for obvious reasons given a pseudonym, namely 'James Grant'. At 19:45 on Friday 23 April this young man, later described by DS Davidson as 'a skinhead', walked into Plumstead Police Station. Detective Constable Christopher Budgen had been recruited on that day as a member of the AMIP team. He was sent to see the young man, and the information received was vital and illuminating. The information . . . is known as Message 40: 'A male attended RM [Plumstead] and stated that the persons responsible for the murder on the black youth, are Jamie and Neil Acourt of 102 Bournbrook Road SE3 together with David Norris and 2 other males identity unknown. That the Acourt Brothers call themselves ''The Krays''. In fact you

19 id., p. 328.
20 id., p. 313.
21 If *all* that is required for an incident to be racist were the perception of the victim (or any other person), then the ambit of such incidents would be too wide. At the very least, some corroboration (either by words or deeds) ought to be required as well.

> can only join their gang if you stab someone. They carry knives and weapons most days. Also, David Norris stabbed a Stacey Benefield a month ago in order to prove himself. . . . He then went on to say that a young Pakistani boy was murdered last year in Well Hall, that Peter Thompson who is serving life was part of the Acourts gang. That in fact one of the Acourts killed this lad. They also stabbed a young lad at Woolwich town centre called ''Lee''. He had a bag placed over his head and was stabbed in his legs and arms in order to torture him.'[22]

Despite the fact that the police were able to corroborate some of Grant's claims,[23] the police did not take any action on this information until 26 April – three days later. The police did not arrest any of the suspects, nor did they request a search warrant. Rather, Detective Superintendent Crampton (who was in charge of the case) arranged for surveillance of the suspects – even though he knew that surveillance evidence of this sort was inadmissible in English courts. But in fact, the surveillance was bungled. The full surveillance team did not arrive on time, and the team's researcher and photographer were simply watching when (alleged) vital evidence (the clothes worn by the leaders of the gang – the Acourt brothers – on the night of the murder) was taken out of the house and away in a car to be destroyed.

One could conjecture that the information about the gang was not initially regarded as crucial by the investigating team because they were pursuing the theory that the killing was a failed drug deal in which Brooks was also involved. This conjecture gains some support from the fact that while all this information about the gang was coming into the police station, the police were in fact busy investigating the background of Stephen Lawrence and Duwayne Brooks.

To understand why the initial investigation pursued this line of inquiry, we need to place the investigation in the wider context of police culture. Various studies have shown that the police routinely rely on general assumptions about black youths as criminals. Reiner, for instance, claims that:

> Cain's and Lambert's studies of city forces in the early and late 1960s show a clear pattern of rank-and-file police prejudice, perceiving blacks as especially prone to violence or crime, and generally incomprehensible, suspicious and hard to handle. . . . My own interviews in Bristol in 1973–4 found that hostile and suspicious views of blacks were frequently offered quite spontaneously in the context of interviews concerning police work in general. . . . One uniform constable summed up the pattern: 'the police are trying to appear unbiased in regard to race relations. But if you asked them you'd find 90 per cent of the force are against coloured immigrants.'[24]

22 Macpherson, op. cit., n. 18, at p. 92.

23 For instance, they spoke with Stacey Benefield, who confirmed the story (id., pp. 46–9). Other information such as the two letters written to the police, and statements from anonymous persons, named the Acourt's gang (id., pp. 336–9).

24 R. Reiner, *The Politics of the Police* (1992) at 125. See, also, S. Holdaway, 'Discovering Structure: Studies of the British Police Occupational Culture' in *Police Research: Some Future Prospects*, ed. M. Weatheritt (1989).

Stereotypical assumptions which seemed to have informed the police investigation of the murder would include:

- All/most/many black male youths are involved in criminal activities.
- All/most/many black male youths are unreliable witnesses.
- All/most/many black male youths are involved in drug-related crimes.

These three assumptions played a dangerous and pervasive role in investigation into the murder of Stephen Lawrence. For despite the facts that neither Lawrence nor Brooks had a criminal record, neither was known to the police as a criminal, and there was no evidence to doubt Brooks' version of events, the police nonetheless conducted their initial main investigation along the lines of a failed drug deal.

The response of the black community to the police investigation also highlights the importance of presuppositions. Within the first few days of the police inquiry, individuals from the black community had begun alleging racism on the part of the police.[25] Most of these initial criticisms of the police inquiry were not founded upon fact; they were based upon beliefs about how police forces in Britain usually operate. For having taken it for granted that the police held stereotypical images of black youths, some early criticisms of the investigation were also based on presuppositions about the usual operation of police investigations. Even though there was initially no concrete evidence to sustain the belief that the officers who were investigating the homicide were being racist in this particular investigation, assumptions about police culture led many individuals to make guesses about how the police were likely to conduct the investigation.[26]

25 Most of these allegations failed to distinguish between institutional racism and individual racism, and (as suggested in the text) most of them were not founded on evidence.

26 In fact, the only viable candidate for individual racism was the action of Police Constable (PC) Linda Jane Bethel's at the crime scene. PCs Bethel and Gleason were the first officers to attend the scene. Although PC Bethel had full training in first aid, and although there was a first-aid kit in their police car, no first aid was administered to Lawrence. At the Macpherson inquiry, the lawyers for the Lawrence family suggested that she did not administer first aid because she did not want to dirty her hands with a black man's blood. This was because all she did was to check for a pulse. But even this was disputed. The lawyers produced an eyewitness, Helen Elizabeth Avery, who also had full first aid training. Avery was a member of the St. John's Ambulance service. The incident occurred right in front of Helen Avery's house as she was returning home with her mother and stepfather. Avery claimed that PC Bethel did not check for pulse. Helen Avery also offered to administer first aid – she was going to try to stop the bleeding by 'stemming the flow of blood' from the victim – but the police did not accept her offer to help. Despite the fact that she realized the importance of 'stemming the flow of blood', PC Bethel herself did not attempt to stop the flow of blood. Moreover, during questioning by the Lawrence family lawyers, PC Bethel admitted that she did not examine the victim to ascertain where the blood was coming from.

The role of presuppositions in the case also illustrates the point that assumptions are necessary, but dangerous. They are necessary because all arguments from fact to conclusion rely upon numerous assumptions. In fact, no investigation can be conducted without assumptions. The process of criminal investigation begins by thinking through the criminal's likely actions. The investigator must ask himself questions such as 'What did he do?', 'What evidence might he have left behind?', and 'Where might he be now?' Questions of these sorts are necessary for fact investigation. But they are also dangerous because they are often value-laden. In the case of Stephen Lawrence, the role of stereotypical assumptions in the police inquiry hampered the investigation of a serious crime.

THE VALUE OF PRESUPPOSITIONS IN LEGAL ARGUMENTS

Henry Wigmore developed a chart method for representing the inferential connections in legal arguments.[27] This method can be used to exhibit how different items of evidence relate to each other and their conclusion. In this section, I will use Wigmore's chart method to illustrate how presuppositions can affect the construction and inferential force of arguments.[28]

Wigmorean charts have analytic and synthetic elements. The analysis part of Wigmore's chart method is the reduction of the arguments into individuated statements (propositions). Some of these statements would be probanda or matters to be proved (one statement would however be the ultimate probandum), while all other probanda would be intermediate or interim claims used to justify the ultimate probandum. Each proposition is given an identifying number, and together, they are called the key list of propositions. It is this key list which will be used in constructing a chart to

27 Wigmore, op. cit., n. 2.

28 The number of symbols I will be using in my chart of the Lawrence evidence is significantly less than those used by Wigmore, id. Indeed only two symbols will be used here. I will use the node symbol 'O' to represent propositions from my key list of propositions. The number of the proposition being charted will be inserted into these node symbols. I will also use the vertical upward point arc symbol 'r' to indicate that the premise below makes the one above more likely or more probable. Generally, the evidence we admit will be more certain than the conclusion we aim to infer from it. We make observations, accept testimony, and examine tangible evidence, and so on, in an effort to establish or ascertain a conclusion. So, in most cases, the premises do not give us conclusive evidence of the truth of the conclusion; they only make the conclusion more or less probable. Another way of putting the same point is that the direction of inference is bottom-up in my chart of the Lawrence evidence. It is bottom-up in the sense that the process of reasoning we engage in requires us to first admit evidence and then to evaluate how the evidence adds up to making the conclusion more or less probable. Bottom-up reasoning is inductive reasoning. It is in the same fashion that tribunals of fact reason from the bottom-up when they evaluate evidence. For, usually, tribunals are urged to project or work up to a hypothesis, theory or conjecture (is D guilty as charged?) on the basis of the evidence proffered.

depict how all these statements fit together in support of the grand conclusion (hypothesis). Drawing this 'big picture' is the synthetic part of the method.

As noted above, because the police assumed that the death of Stephen Lawrence was 'a drug related killing', their initial inquiry was conducted in such a way that only evidence that fitted this definition of the problem was examined. In fact, although Duwayne Brooks (Lawrence's friend) witnessed the incident at close range:

> . . . the officers failed to concentrate upon Mr Brooks [account] and to follow up energetically the information that he gave them. Nobody suggested that he should be used in searches of the area, although he knew where the assailants had last been seen. Nobody appears properly to have tried to calm him, or to accept that what he said was true. To that must be added the failure of Inspector Steven Groves, the only senior officer present before the ambulance came, to try to find out from Mr Brooks what had happened. He, and others, appear to have assumed that there had been a fight. Only later did they take some steps to follow up the sparse information that they had gleaned. Who can tell whether proper concern and respect for Mr. Brooks' condition and status as a victim might not have helped to lead to evidence should he have been used in a properly co-ordinated search of the estate?[29]

But what if the investigation had been carried out on the basis of presuppositions that were consistent with the testimony of Duwayne Brooks? What sort of legal argument might be constructed? One possibility is that of liability against the gang members under the laws of complicity. The law of complicity arises when more than one individual is involved in the commission of an offence. The law recognizes that there may be different levels of involvement in a crime, so it distinguishes between principals and accessories. But this distinction has no practical effect on criminal liability because of the Accessories and Abettors Act 1861 which stipulates that anyone who 'shall aid, abet, counsel or procure the commission of any indictable offence . . . shall be liable to be tried, indicted and punished as a principal offender'.

J.C. Smith explains the law on the liability of accomplices as follows:

> The basic rule . . . is that D is liable for the commission by P of that crime (crime X) which D intentionally assisted or encouraged P to commit. There is no accepted name for that basic rule . . . but [it can be called] 'basic accessory liability'.[30]

This basic accessory liability rule is quite strong because it requires establishing that the accessory actually intended to assist or encourage the principal in the commission of the particular crime s/he is charged with. This basic accessory liability rule is too strong for my purposes. But as Smith also points out:

29 Macpherson, op. cit., n. 18, at p. 15.

30 J. Smith, 'Criminal Liability of Accessories: L Law and Reform' (1997) 113 *Law Q. Rev.* 453, at 454.

> D is also liable for a crime which has been committed by P (crime Y) which D did not intend to assist or encourage P to commit, provided only that he knew that P might do an act of the kind which resulted in crime (Y) while committing the crime (X) which D did intend to assist or encourage him to commit. D intentionally assists or encourages P to commit burglary or robbery, knowing that, in the course of committing the burglary or robbery, P might do an act with intent to cause grievous bodily harm. P does act with that intent in the course of committing the burglary or robbery and causes V grievous bodily harm. D, as well as P, is now guilty of the offence (crime Y) of causing grievous bodily harm with intent, contrary to section 18 of the Offences against the Person 1861. If V dies as a result of the injury, P is guilty of murder and so is D. If D assists or encourages P to commit burglary, knowing that, in the course of committing the burglary, P may act with intent to kill and P does an act which he intends to kill, P is guilty of attempted murder, and so is D. If D knows from his experience with P that, if P comes across a defenceless woman in the course of burglary, as likely as not he will rape her; and he does, D, as well as P is, it seems, guilty of rape.[31]

This is quite significant for my analysis of the Lawrence evidence. In my chart, I will illustrate how Jamie Acourt (one of the gang members) could have been held liable for the crime. I do not need to show that it was Jamie Acourt who actually caused the death of Stephen Lawrence (that is, I need not show that he was the principal). Nor do I need to show that he intended to assist in the killing of Stephen Lawrence. Instead, all I need is to construct a line of argument that shows that Jamie Acourt is one of the gang members involved in the racist attack on Lawrence, and that he encouraged or assisted the racist attack.

I can therefore paraphrase J.C. Smith's analysis of parasitic accessory liability as follows:

> P (the principal) has performed an act (in this case a stabbing) with that intent in the course of committing a racist crime against Stephen Lawrence (SL) and caused SL grievous bodily harm. D (in this case Jamie Acourt), as well as P (which could be Jamie Acourt or any other gang member), are both guilty of the offence (crime Y) of causing grievous bodily harm with intent, contrary to section 18 of the Offences against the Person 1861. But as SL died as a result of the injury, P is guilty of murder, and so is D.

It is worth mentioning that in English Law, a charge under the law of complicity will succeed even if the prosecution cannot specify which of the parties to the crime is the principal, and which is the accomplice. All the prosecution need establish is that the individuals were all actively involved in the crime as principal or accomplice. For instance, in *Russell and Russell*, a small child died of methadone overdose.[32] Although the prosecution could show that one of the parents must have administered the drug, they could not show which parent was the principal and which the accomplice (nor could they establish whether they were co-principals). The conviction of both

31 id., pp. 454–5.

32 *Russell and Russell* [1987] 85 Cr App R 388.

parents was upheld. The underlying reason for this verdict goes back to the Accessories and Abettors Act 1861 which stipulates that the aide or abettor is 'liable to be tried, indicted and punished as a principal offender'. Moreover, we do not need to show that the accomplice's conduct caused the principal to commit the offence in question. All we need establish is that Jamie Acourt intentionally assisted or encouraged the crime in some way.

It should also be noted that the law is quite clear on the point that aiding and abetting does not require consensus. In fact an aide could be found guilty even though the principal is unaware of the help rendered by the accomplice.[33]

Although I have chosen to concentrate on Jamie Acourt, any one of the gang members could have been found legally responsible for the death of Stephen Lawrence because they are all assumed (by the Macpherson inquiry) to have been involved in an unlawful criminal activity.[34]

KEY LIST OF PROPOSITIONS

1. Stephen Lawrence (SL) was unlawfully killed.
2. Duwayne Brooks (DB) is legally responsible for SL's death.
3. Jamie Acourt is legally responsible for SL's death.
4. DB and SL were engaged in a narcotic-related dispute.
5. DB is responsible for stabbing SL.
6. Jamie Acourt (JA) is an accomplice (or the principal) in the stabbing of SL.
7. JA is a member of the racist gang.
8. All members of the gang participated in the attack on SL.
9. JA assisted or encouraged the gang attack on SL.
10. The gang was involved in the crime.

33 The American case of *State* v. *Tally* [1894] 15 SO 722 is perhaps the most cited example of this point. In this case Judge Tally prevented the sending of a telegram to a victim because he knew of his brothers-in-law's plans to kill the victim. Someone else, who had learnt of the plan to kill the victim, had sent out a telegram to the victim in an effort to warn him that his life was in danger. Judge Tally however sent a telegram to the telegraph operator instructing him not to deliver the warning telegram. The operator did as the Judge instructed him, and the brothers succeeded in their plan to kill the victim. Although the brothers were not aware of Tally's help until after the crime, the Judge was found guilty of aiding and abetting murder.

34 It should be noted that the law of complicity is quite complex and confused. Some cases seem to support the view that there is a requirement of common design or common purpose (also known as joint enterprise) before liability under complicity can accrue. I do not claim that my treatment of complicity is definitive of the law – the law is simply unclear. As I am primarily interested in illustrating the role of presuppositions in legal reasoning, this is not a major shortcoming.

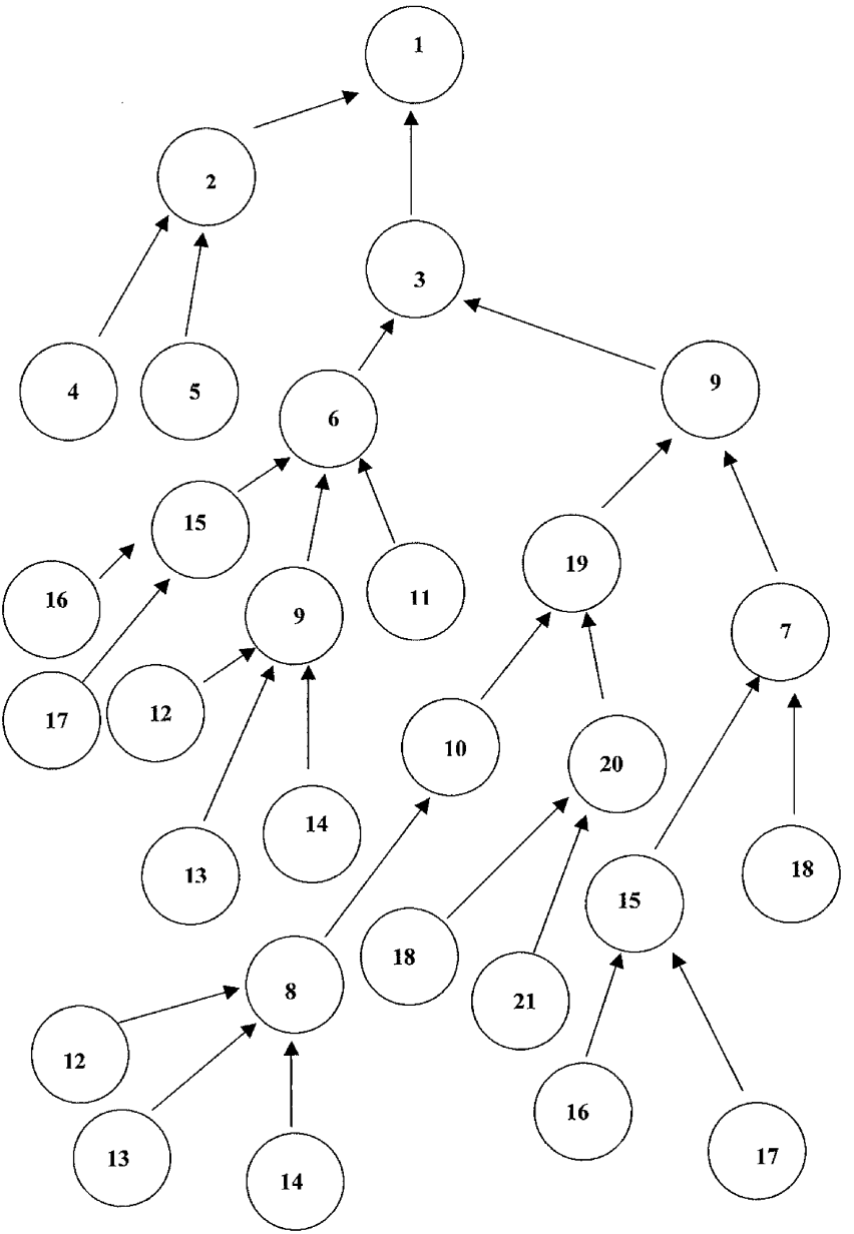
11. Letter sent to the police alleging that JA was involved in the gang attack on SL.
12. Testimony of James Grant that JA was a gang member involved in the attack on SL.
13. Testimony of DB that: (i) the gang did in fact carry out the attack; and (ii) the gang shouted '. . . nigger' before the attack.
14. Testimony of witness X at the bus stop.
15. Police surveillance evidence. (This should be read as a shorthand for the following: (i) secret recordings in which the gang expressed murderous racist intentions against blacks; (ii) secret recordings in which the gang was observed practicing the precision stabbing technique similar to the one used on SL; and (iii) observation of the gang disposing items of clothing alleged to be those worn by the Acourt brothers on the night of SL's death.)
16. Testimony of police photographer involved in the surveillance on the Acourt's residence about events he saw.
17. Testimony of police researcher involved in the surveillance on the Acourt's residence about events he saw.
18. Testimony of Stacey Benefield.
19. JA had a racist murderous emotion towards SL.
20. JA had uttered racist threats and had also participated in racist attacks in the past.
21. Testimony of anonymous witness J about previous racist attacks on others by the gang.

Figure 2 overleaf is a chart of this key list of propositions.

Figure 2 can be sub-divided into four segments:

- Segment I (Figure 3) is a chart of the ultimate and penultimate probanda. The ultimate probanda is the proposition that 'Stephen Lawrence was unlawfully killed', and the penultimate probanda (propositions 2 and 3) are two alternative arguments that can be constructed from the same incident. As we shall see, various assumptions are needed in order to generate facts and evidence in support of these rival arguments.
- Segment II (Figure 4) charts the argument in support of proposition 2. This segment is based on the police's initial presuppositions.
- Segments III and IV (Figures 5 and 6) are the arguments in support of proposition 3.

Figure 2. A Chart of the Lawrence Evidence Showing Two Types of Argument Constructions

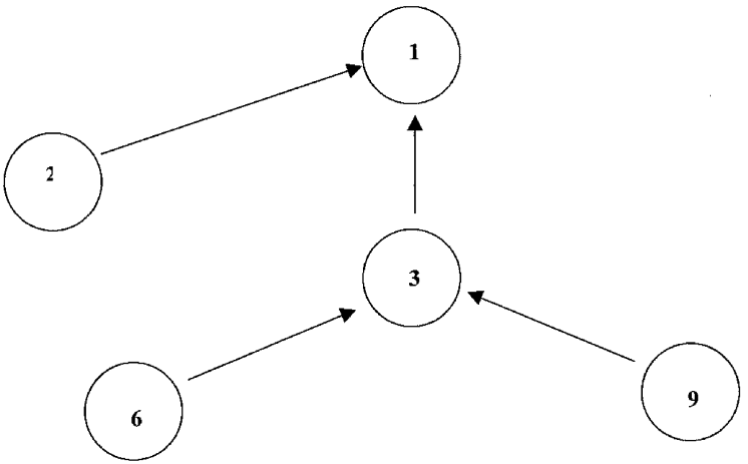


SEGMENT I – ULTIMATE AND PENULTIMATE PROBANDA
(FIGURE 3)

Key List of Propositions

1. Stephen Lawrence (SL) was unlawfully killed.
2. Duwayne Brooks (DB) is legally responsible for Stephen Lawrence's (SL) death.
3. Jamie Acourt is legally responsible for SL's death.
6. Jamie Acourt (JA) is an acomplice (or the principle) in the stabbing of SL.
9. JA assisted or encouraged the gang attack on SL.

Figure 3. Chart of Segment I

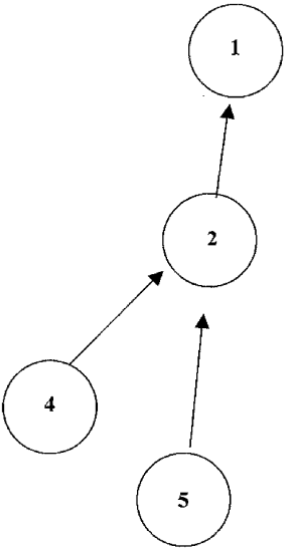


SEGMENT II – KEY LIST OF PROPOSITIONS AND CHART
(FIGURE 4)

1. Stephen Lawrence (SL) was unlawfully killed.
2. Duwayne Brooks (DB) is legally responsible for Stephen Lawrence's (SL) death.
4. DB and SL were engaged in a narcotic-related dispute.
5. DB stabbed SL.

This segment of the chart is a representation of the Metropolitan Police's initial investigation. As explained above (pp. 543–5) there is no real evidence in support of this argument. The police simply constructed their arguments from stereotypical assumptions. The main presuppositions in

Figure 4. Chart of Segment II



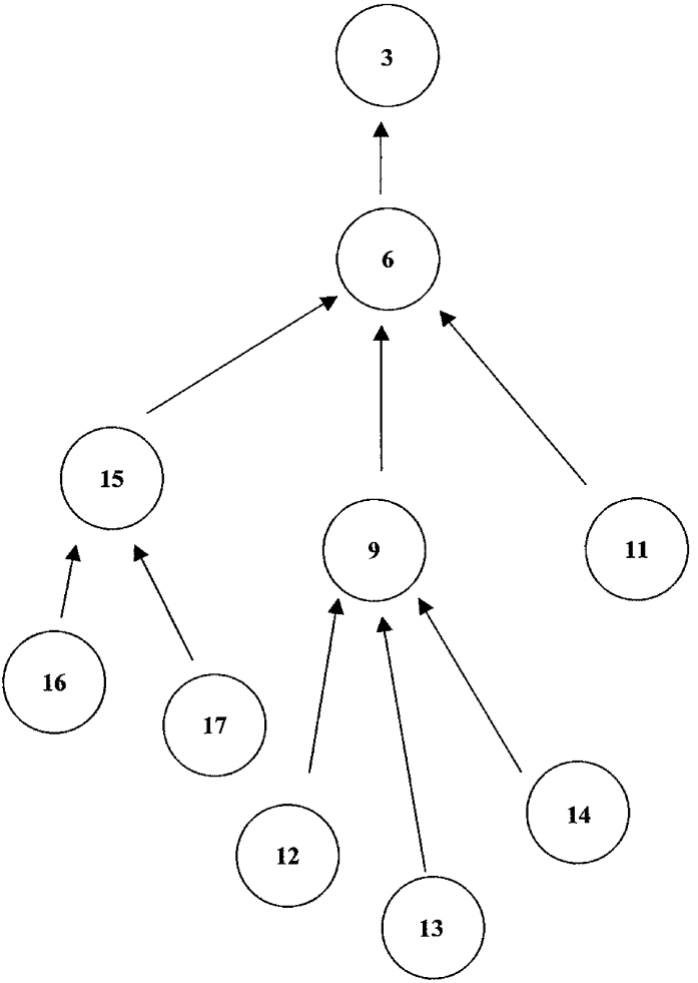
operation here are unstated generalizations about black male youths. Specifically, it is on the basis of presuppositions about young black males and crime that propositions 4 and 5 were generated.

The inferential move from 4 into 2 requires the backing of descriptive presuppositions about drug dealers and violence. These descriptive presumptions might include: 'all/most drug-related disputes involve violence'; 'drug dealers often stab each other'. These presuppositions are descriptive in the sense that they express beliefs about the way the world is. Of course, I do not wish to suggest that a presupposition such as 'most/some drug-related disputes result in violence' is unjustified. Rather, my claim is that in this particular case, the move from 4 to 2 is unwarranted because this line of reasoning is founded upon presupposition alone.

SEGMENT III: KEY LIST OF PROPOSITIONS (FIGURE 5)

3. Jamie Acourt is legally responsible for SL's death.
6. Jamie Acourt (JA) is an accomplice (or the principal) in the stabbing of SL.
9. JA assisted or encouraged the gang attack on SL.
10. The gang was involved in the crime.
11. Letter sent to the police alleging that JA was involved in the gang attack on SL.
12. Testimony of James Grant that JA was a gang member involved in the attack on SL.

Figure 5. Chart of Segment III



13. Testimony of DB about gang at the crime scene.
14. Testimony of witness X at the bus stop.
15. Police surveillance evidence. (This should be read as a shorthand for the following: (i) secret recordings in which the gang expressed murderous racist intentions against blacks; (ii) secret recordings in which the gang was observed practicing the precision stabbing technique similar to the one used on SL; (iii) observation of the gang disposing items of clothing alleged to be those worn by the Acourt brothers on the night of SL's death.)
16. Testimony of police photographer involved in the surveillance on the Acourt's residence about events he saw.

17. Testimony of police researcher involved in the surveillance on the Acourt's residence about events he saw.

Figure 5 above represents one arm of the argument in support of the penultimate probandum that 'Jamie Acourt (JA) is legally responsible for the death of SL' (that is, proposition 3). This segment provides support for the claim that JA is an accomplice to the killing. It should be noted that the argument from proposition 6 into 3 alone does not establish 3. The second arm of the argument (which is supplied in Figure 6 below) is also crucial.

Propositions 16 and 17 into 15, and propositions 12, 13, and 14 into 9, rely upon general knowledge presuppositions about the cogency, adequacy, and acceptance of testimonial evidence. These presuppositions are admixtures of descriptive and value assumptions. While descriptive assumptions express beliefs about the way the world is, value assumptions are preferences for unstated ideas and principles.[35]

On the one hand, the assumption that the law relies on testimonial evidence (that is, assertions by someone that an event occurred or is true) is descriptive because it is based on the way the world is. In Figure 5 above, propositions 16 and 17 into 15, and 12, 13, and 14 rely on the descriptive assumption that testimonial evidence is acceptable in legal evidence.

On the other hand, reliance on testimonial evidence is also about values because when we accept (or reject) testimonial evidence, we are at the same time evaluating someone's credibility; we are accepting or rejecting the worthiness of a witness's claims about the occurrence (or truth) of an event.

David Schum has identified three 'relatively uncontroversial' generalizations that inform our evaluations of testimonial evidence:

1. People do not always report the events they believe to have occurred. We might restate this generalization to read: When a person reports having observed the occurrence of an event, this person (usually, often, frequently, etc) believes this event to have happened. Some hedge is required, since we do not suppose that people always testify in accordance with their beliefs.
2. The beliefs people have as a result of an observation do not always correspond to the sensory evidence they received during this observation. We might assert: If, on observation, a person believes that an event has occurred, then this person (usually, often, frequently, etc.) has received sensory evidence of this event. This generalization allows for the possibility that a person's beliefs are not consistent with the sensory evidence this person obtained.
3. The evidence of our senses is not infallible. We might assert: If a person's senses provide evidence of an event, then this event (usually, often, frequently, etc.) has occurred. This allows for the possibility that a

35 For further discussion of descriptive and value assumptions, see M. Browne and S. Keeley, *Asking the Right Questions: A Guide to Critical Thinking* (2001).

person's senses might have been inaccurate or were misled in some way.[36]

When value conflicts arise in relation to testimonial evidence, it is often because people are assessing the credibility of a person differently. This is clearly illustrated by the collapse of the private prosecution that was brought against Jamie Acourt's gang by the family of Stephen Lawrence. The private prosecution collapsed because the judge did not accept the presupposition that Duwyane Brooks was a credible witness. Hence in the judge's argument, Brooks' testimony does not warrant the inference from 13 into 9.

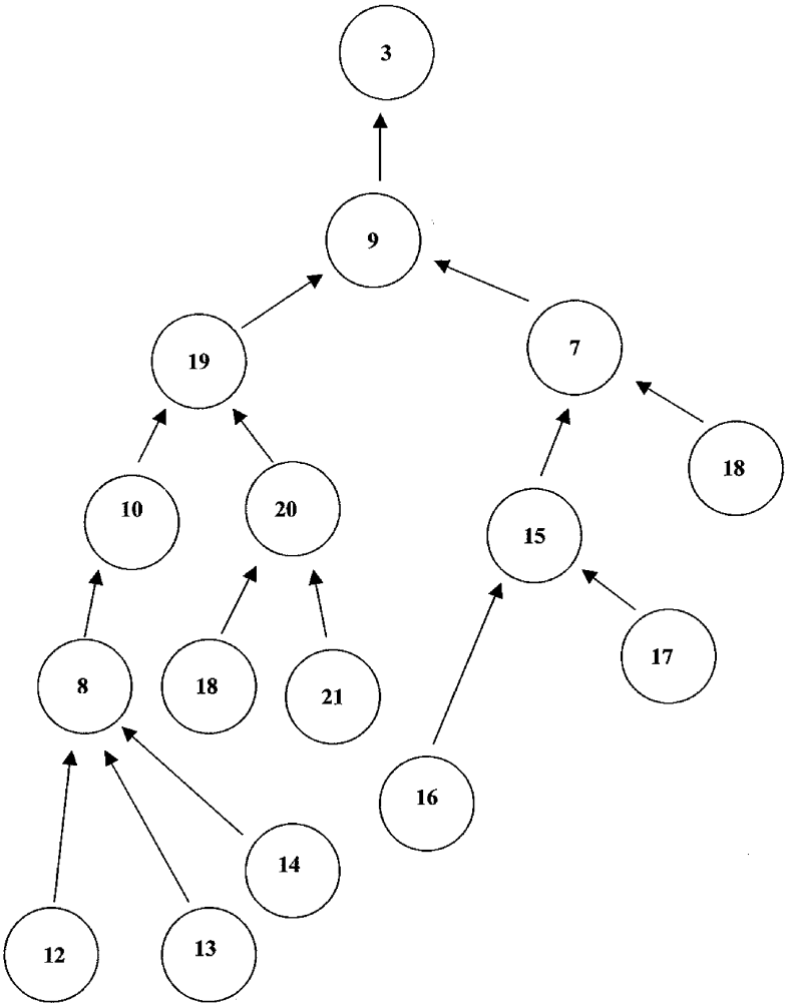
The inferential moves from propositions 16 and 17 into 15; 12, 13, and 14 into 9; and 11 into 6 are all based upon the belief and/or principle that, in this particular case, these witnesses genuinely wanted the criminals brought to justice, and as such they have not fabricated false testimonies.

SEGMENT IV: KEY LIST OF PROPOSITIONS (FIGURE 6)

3. Jamie Acourt is legally responsible for SL's death.
7. JA is a member of the racist gang.
8. All members of the racist gang participated in the attack on SL.
9. JA assisted or encouraged the gang attack on SL.
10. The gang was involved in the crime.
12. Testimony of James Grant that JA was a gang member involved in the attack on SL.
13. Testimony of DB that: (i) the gang did in fact carry out the attack; and (ii) the gang shouted '. . . nigger' before the attack.
14. Testimony of witness X at the bus stop.
15. Police surveillance evidence. (This should be read as a shorthand for the following: (i) secret recordings in which the gang expressed murderous racist intentions against blacks; (ii) secret recordings in which the gang was observed practicing the precision stabbing technique similar to the one used on SL; (iii) observation of the gang disposing of items of clothing alleged to be those worn by the Acourt brothers on the night of SL's death.)
16. Testimony of police photographer involved in the surveillance on the Acourt's residence about events he saw.
17. Testimony of police researcher involved in the surveillance on the Acourt's residence about events he saw.
18. Testimony of Stacey Benefield.
19. JA had a racist murderous emotion towards SL.
20. JA had uttered racist threats and had also participated in racist attacks in the past.

36 D. Schum, *Evidential Foundations of Probabilistic Reasoning* (1994) at 101.

Figure 6. Chart of Segment IV



21. Testimony of witness J about previous racist attacks on others by the gang.

Inference 19 into 9 (in Figure 6 above) relies upon the presupposition that people who hold strong racist murderous emotions against others sometimes carry out racist attacks. This presupposition expresses a descriptive assumption about the way the world is. (This presupposition could of course turn out to be false if it is subjected to scientific testing.) The inferential move from 7 into 9 is also based on the same type of presupposition.

The chart of the Lawrence evidence illustrates the point that in preliminary fact investigation, investigators have to rely on presuppositions

(which are often tacit). In asking questions such as: 'has a crime been committed?'; 'is the death suicide?'; 'is this homicide the result of an unlawful killing?'; 'should I caution or arrest this suspect for possession of cannabis?', investigators assume various presuppositions. These presuppositions supply the link between the fact investigator's questions and the acceptability or relevance of evidence and fact. Values may not be well-founded, in which case identifying an inquirer's value assumptions will facilitate the evaluation of her arguments. Values often conflict, in which case identifying them will ensure that we assess the real argument.[37] Knowing the descriptive assumptions of the inquirer might also save our arguments from egregious mistakes.

CONCLUDING REMARKS

The presuppositions of questions influence inquirers' choice of fact and information in the construction of arguments. Presuppositions also function as the benchmark against which inquirers can measure the adequacy of answers to their questions. Consequently, whether an inquiry is successful (whether a fact investigator has succeeded in tackling the problem at hand) is partly a product of the assumptions the investigator upholds when she or he asks questions. For in understanding the problem at hand and in building their case, investigators, solicitors, and advocates will all ask questions of the evidence and questions about the evidence in an effort to support their conclusions and decisions. They will have items of evidence in search of explanations, and their claims in search of evidence. They will ask questions of witnesses, and questions of arguments. Answers to these questions form the basis for the effective performance of inferential tasks in the Anglo-American judicial system. But the logic of questions and answers comes with a clear warning: presuppositions are as dangerous as they are useful.

37 Value conflicts would include those between: individual autonomy and public safety; equality and order; freedom of speech and national security, and so on.