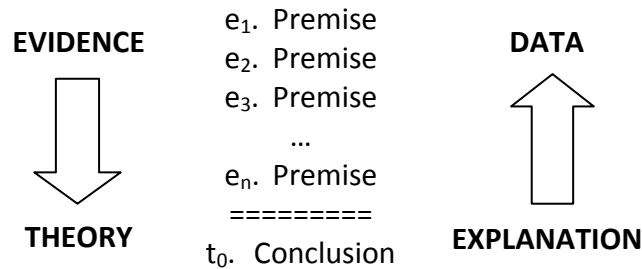


EVIDENCE AND EXPLANATION IN LAW AND LITERATURE

I.

In making this inference one infers, from the fact that a certain hypothesis would explain the evidence, to the truth of that hypothesis. In general, there will be several hypotheses which might explain the evidence, so one must be able to reject all such alternative hypotheses before one is warranted in making the inference. Thus one infers, from the premise that a given hypothesis would provide a "better" explanation for the evidence than would any other hypothesis, to the conclusion that the given hypothesis is true.¹

Evidence and explanation stand in a symmetrical relationship. Facts, observations, data and the like can be marshaled as evidence in defense of a theory or hypothesis. The theory being defended is often, perhaps always, an explanation of, at least part of, the data.



This simple schema gives us both a structural model of how evidence works, and announces an evaluative standard for good evidence. As Harman notes the preferred explanation must not only explain the data, it must explain it *better* than any rival explanations.

In this short paper I want to take the first steps toward defending the view that inference to the best explanation captures the structure of evidence as it is used in literature, at least detective fiction, the criminal law, literary criticism, and constitutional interpretation. I concede at the outset, as Harman did in his canonical work on inference to the best explanation, that much additional work remains to be done.

There is, of course, a problem about how one is to judge that one hypothesis is sufficiently better than another hypothesis. Presumably such a judgment will be based on considerations such as which hypothesis is simpler, which is more plausible, which explains more, which is less ad hoc, and so forth. I do not wish to deny that there is a problem about explaining the exact nature of these considerations; I will not, however, say anything more about this problem.²

Although vague and abstract I believe these criteria for explanatory success work remarkably well in the contexts we will be considering here.

II.

(yeah, yeah, yeah, yeah, yeah, yeah)
(yeah, yeah, yeah, yeah, yeah, yeah)

When you left me all alone at the record hop
Told me you were goin' out for a soda pop
You were gone for quite a while, half an hour or more
You came back and man oh man this is what I saw

Lipstick on your collar told a tale on you
Lipstick on your collar said you were untrue
Bet your bottom dollar you and I are through
Cuz lipstick on your collar told a tale on you, yeah

You said it belonged to me, made me stop and think
Then I noticed yours was red, mine was baby pink
Who walked in but Mary Jane, lipstick all a mess
Were you smoochin' my best friend, guess the answer's yes

Lipstick on you collar told a tale on you
Lipstick on you collar said you were untrue
Bet your bottom dollar you and I are through
Cuz lipstick on you collar told a tale on you, boy

Told a tale on you, man

Told a tale on you, yeah

Connie Francis, *Lipstick On Your Collar*

Connie is confronted with data, mainly her own simple observations, that cry out for explanation. Where did the lipstick stain come from? Why was he gone for so long? Why did he say it belonged to her when the stain was red and her lipstick was baby pink? Why when Mary Jane appeared was her lipstick all a mess? Although neither a trained natural scientist, nor an experienced detective, Connie easily forms an explanatory hypothesis. When she then writes her sad song, she implicitly asks us to account for what happened. Her argument looks like this.

- e₁. He left Connie all alone at the record hop.
 - e₂. He was gone for half an hour or more.
 - e₃. There was a lipstick stain on his collar.
 - e₄. When confronted he claimed that the stain came from Connie's lipstick.
 - e₅. The stain was red.
 - e₆. Connie's lipstick was baby pink.
 - e₇. Mary Jane's lipstick was all a mess.
- =====
- t₀. He had been smooching Mary Jane during the half hour absence.

Connie never suggests any rival explanations, but they are easy enough to formulate. He went out for a soda pop, just as he said. When asked about the lipstick stain he responded that it came from Connie, since she was the only one he had been smooching. The laundry detergent his mother uses left a residue on his collar that chemically changed the baby pink lipstick to a bright red color. Mary Jane had been smooching a new guy she met at the record hop, and this messed up her lipstick. We can label this rival explanation t₁. Or the circumstances might be more sinister. He left Connie all alone because he was feeling ill, but thought it more decorous to say he wanted a soda pop. Mary Jane has been harboring a grudge against Connie since the last student council meeting. She found him in the lobby,

distracted him, and wiped lipstick on his collar. After he left to return to Connie, Mary Jane smudged her lipstick with the back of her hand. When he returned and was asked about the stain, he told Connie it was hers because she was the only one he had been smooching. Let's label this one t_2 . When I evaluate these alternative accounts I am quite confident in judging Connie's explanation as far more plausible than t_1 or t_2 – i.e., she has pretty strong evidence.

III.

Here are the missing links of the very simple chain: 1. You had chalk between your left finger and thumb when you returned from the club last night. 2. You put chalk there when you play billiards, to steady the cue. 3. You never play billiards except with Thurston. 4. You told me, four weeks ago, that Thurston had an option on some South African property which would expire in a month, and which he desired you to share with him. 5. Your check book is locked in my drawer, and you have not asked for the key. 6. You do not propose to invest your money in this manner.³

The beginning of "The Adventure of the Dancing Men" begins with a little case study in Sherlock Holmes' "deductive" method. Holmes' method, of course, is not deductive in the formal logician's sense, but inductive, or better, abductive. It is inference to the best explanation. Holmes possesses a fair amount of data. His reasoning proceeds in two linked explanatory steps.

- e₁. Watson had chalk between his left finger and thumb.
- e₂. He uses the chalk when he plays billiards.
- e₃. He only plays billiards with Thurston
- =====
- t'₀. Watson played billiards with Thurston last night.
- e₄. He told Holmes four weeks ago that Thurston had an option on some South African property which would expire in a month.
- e₅. Watson's check book is locked in Holmes' drawer.
- e₆. Watson has not asked for the key.
- =====
- t''₀. Watson has decided against the investment.

Each of these inferences are to (alleged) best explanations. t'_0 explains the chalk on his hand and is consistent with Holmes' background knowledge of Watson's preferences in playing partners. t''_0 explains the lack of a request for the key, and is consistent with Holmes' knowledge of what Watson told him four weeks ago, and the location of the check book. As always in an explanatory inference, rival explanations are always possible. Other things might explain the chalk.

- t'_1 . Watson played billiards with someone else last night.
- t'_2 . Watson was purchasing a new cue, and applied the chalk to test its feel.
- t'_3 . Something else entirely was responsible for the chalk on Watson's hand.

Although it is unlikely to be taken seriously by juries and the like, including a generic rival like t'_3 is often a good idea. Similarly many other things could explain the absence of a request for the key.

- t''_1 . Watson keeps a secret stash of money, and made the investment with Thurston from this source of cash.
- t''_2 . Thurston's option has been extended an additional two months, and Watson is still considering the investment.
- t''_3 . Something else entirely is the reason Watson did not ask for the key.

We know from Watson's narrative that Holmes was indeed correct in his diagnosis. But even without this additional bit of data, inference to the best explanation allows us to see why Holmes had pretty good evidence for each of his hypotheses, since both t'_0 and t''_0 better explain what we know than any of the rivals we have reflected on. It is, of course, true, that oversight or lack of imagination have precluded consideration of better rivals. And it is also true that even if Holmes' evidence is very strong, one of the rival explanations nevertheless

captures what was actually going on. Such is the nature of evidence – it indicates truth, but does not guarantee it.

IV.

**I pass over the section on the evidence
in the O. J. Simpson murder trial**

V.

I have in mind a sign that is affixed in this unpunctuated form to the door of the Johns Hopkins University Club:

PRIVATE MEMBERS ONLY

I have had occasion to ask several classes what that sign means, and I have received a variety of answers, the least interesting of which is, "Only those who are secretly and not publicly members of this club may enter it." Other answers fall within a predictable narrow range: "Only the genitalia of members may enter" (this seems redundant), or "You may bring in your own genitalia," or (and this is the most popular reading perhaps because of its Disney-like anthropomorphism) "Only genitalia may enter." In every class, however, some Dr. Johnson-like positivist rises to say, "But you're just playing games; everybody knows that the sign really means, 'Only those persons who belong to this club may enter it.'" He is of course right.⁴

You're driving on the Interstate, come up quickly on a car ahead, change lanes and pass. As you pass, the driver's left hand comes up along the side of his head. Did he just give you an obscene hand gesture? Or was he simply scratching his ear? Just as though we must explain the lipstick on his collar and the evidence at O. J.'s trial, we often find ourselves in communicative contexts where we must explain potential hand gestures, mysterious signs on faculty club doors, to say nothing of literary and legal texts. I, of course, believe that inference to the best explanation will be helpful in these latter situations.

Interpreting the sign involves making an inference about what it means. We have a collection of data that is in need of explanation.

- e₁. The "text" is on a sign.
- e₂. The sign is on a door.
- e₃. The door is to the Johns Hopkins University Club.
- e₄. The "text" reads, "PRIVATE MEMBERS ONLY".

Such a characterization of the data implies that we have already done a certain amount of interpretation. We have explained the shapes "PRIVATE MEMBERS ONLY" as an attempt at linguistic communication; they did not accidentally appear when the building was being painted, nor are they modern art. Our explanatory question focuses on what these words are intended to communicate. We have a number of explanatory hypotheses:

- t₀. Only those persons who belong to this club may enter it.
- t₁. Only those who are secretly and not publicly members of this club may enter it.
- t₂. Only the genitalia of members may enter.
- t₃. You may bring in your own genitalia.
- t₄. Only genitalia may enter.
- t₅. The sign was intentionally designed with the double meaning by witty intellectuals.

As Fish's no-nonsense student insists, it is perfectly obvious what the best explanation of the words on the door is. Clearly t₀ is the simplest, most complete, least ad hoc, and most plausible account. Linguistic communication and interpretation is an inherently explanatory process. From casual conversations and fun signs on doors, to the interpretation of literary, constitutional and biblical texts, the role of the reader (or listener) is always the same. There are printed shapes and noises that need to be explained. Given the first order explanation that they are attempts at linguistic communication, the question now becomes what hypothesis best accounts for the meaning in the present context?

VI.

Hamlet is a creature of Shakespeare's imagination ... He is not an actual patient. Therefore clinical diagnosis must be tentative, but there is good evidence in the play for depressive illness. Depressive illness is characterized by low mood, anhedonia, negative beliefs, and reduced energy. Hamlet actually calls himself melancholic and the very first speech he makes in the play is devoted to a public statement of his melancholy.⁵

Not many critics are inclined to take Ernest Jones' hypothesis that Hamlet was suffering from an Oedipus-complex seriously. The problem is not so much the quality of Jones's reasoning, but the Freudian paradigm that he so candidly and enthusiastically buys into. If one is skeptical that such a thing as an Oedipus-complex exists, one is going to find it very difficult to explain the actions and creations of literary characters and authors in terms of it. It is interesting in this connection to consider a more contemporary psychological account of *Hamlet*. A. B. Shaw argues that the text clearly shows Hamlet manifesting the clinical indicators of depressive illness.

- e₁. Hamlet exhibits anhedonia – e.g., “He speaks at length to Rosencrantz and Guildenstern, saying he has lost all mirth and that man does not delight him.”⁶
 - e₂. Hamlet expresses negative beliefs – e.g., “He calls Denmark a prison. His comments to Ophelia on women are bitter.”⁷
 - e₃. Hamlet “alludes to sleep disturbance ‘were it not that I had bad dreams’.”⁸
 - e₄. Hamlet “has experienced events likely to precipitate depression: his father's sudden death, his mother's hasty marriage, and his disappointment in the succession.”⁹
- =====
- t₀. Hamlet suffered from depressive illness.

Shaw argues further that it is no embarrassment whatsoever that depressive illness only entered the clinical paradigm centuries after the play was written. We certainly grant that

people suffered from this devastating condition long before psychology and medicine catalogued, and began to treat, it. Shakespeare was an excellent student of the human condition. Just as a perceptive author can recognize overly ambitious characters, jealous lovers, and power mad leaders, Shakespeare can recognize the person exhibiting the clinical behavior brought on by depressive illness – what his contemporaries would have called melancholy. Further, he can locate his depressive lead character in a play with perhaps larger and different artistic motives. Whether or not Shaw’s interpretation is the *best*, of course, can only be determined by comparing it to rival interpretations, of which the critical literature is replete.

VII.

I pass over the section on Justice Blackmun’s evidence for the unconstitutionality of the death penalty in *Callins v. Collins*

VIII.

Though truth *is* correspondence with the facts it cannot be *recognized* by its correspondence. We cannot rely on the facts to guide proofs of scientific theories since the facts are irretrievably at the outer end of the correspondence relation. ... So any indicators of truth must be internal. ... The process of justifying, then, is a process of comparing aspects of the system, and the accomplishment of justification is the demonstration of coherence among the aspects.¹⁰

Peter Kosso’s blending of the correspondence and coherence theories of truth nicely captures much of our thinking about evidence and truth. Connie wants to know how that lipstick stain got there. Jurors want to know who killed Ron and Nicole. We believe that there’s something “out there,” the world, that makes our theories true or false. Sadly, we have no

direct access to that world, so we must rely on evidence to make inferences about it. Our standards for the best explanation are clearly coherence based standards. But, as Kosso wisely reminds us, our inferential goal is “correspondence with the facts.”

But it’s only by analogy and metaphor that we believe that there’s a world where Watson did or did not choose to invest, or one where Hamlet failed to act. We believe there’s a constitutional text, and an historical record of previous Supreme Court rulings. We also believe there’s a world (described, of course, in our conceptual scheme) where race, class, and human error influence who lives and dies. But is it this world that determines the truth or falsity of Justice Blackmun’s claim? Literary and constitutional truths appear to rely more on the coherence theory of truth.

Perhaps it’s not so surprising that we see two very different sorts of truth at work in different compartments of our intellectual lives. The basic explanatory skill that underlies naïve metaphysical realism and the correspondence theory of truth must have developed much earlier in evolutionary history. Our human and pre-human ancestors merely needed to explain the world as it “really” was well enough to survive and reproduce. As we progressed as a species and began to produce complicated texts, and indeed whole cultural practices within which these texts were embedded, these closely related explanatory skills had much more abstract and intellectual applications to these very texts and cultural practices. In these latter contexts, inference to the best explanation does not discover truth as much as it creates truth.

ENDNOTES

¹ Gilbert Harman, "The Inference to the Best Explanation," *The Philosophical Review* 74:1 (1965), p. 89.

² *Ibid.*

³ Sir Arthur Conan Doyle, "The Adventure of the Dancing Men." Reprinted in John A. Hodgson (editor), *Sherlock Holmes: The Major Stories with Contemporary Critical Essays* (Boston: Bedford/St. Martin's, 1994) p. 250 .

⁴ Fish, *Is There a Text in this Class?* (Cambridge MA: Harvard University Press, 1980), pp. 274-5.

⁵ A. B. Shaw, "Depressive Illness Delayed Hamlet's Revenge," *28 Medical Humanities*, 2002, pp. 92-6.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Peter Kosso, *Reading the Book of Nature* (Cambridge: Cambridge University Press, 1992), p. 136.