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# THE MYTH OF CONDITIONAL RELEVANCY

*Ronald J. Allen\**

## I. INTRODUCTION

A little over a decade ago, Professor Vaughn Ball wrote a startlingly brilliant article which demonstrated that the received wisdom about conditional relevancy was false.<sup>1</sup> Like most brilliant legal scholarship, his analysis has had virtually no practical short-term consequences. Judges have not picked up on his powerful dissection of the nonsensical doctrine nor have codifiers been receptive to his message. Part of the reason for this may be that he concluded his article with the true proposition that the doctrine of conditional relevancy "should be dismantled at the earliest opportunity."<sup>2</sup> This sentence dramatically emphasizes the awful cost of brilliant critical legal scholarship: responding to it often requires the dismantling of social practices and institutions.

Professor Ball's emphasis on the consequences of his analysis rendered improbable any result other than short-term oblivion. Social practices and institutions are not, and should not be, at the mercy of whatever brilliant analysts, especially brilliant legal analysts, have to say for otherwise there would be dislocating swings in the law. Rather, the implications of legal thought must unfold over relatively long periods of time, as ideas seep slowly into the unconsciousness of students, emerging later when the former students are in positions of authority, blossoming into a conscious willingness to tolerate reform. Moreover, as time passes, the brilliance of the idea can be polished, its imperfections rubbed out, and its limits plumbed by those in the academy as they disseminate the idea to their students and in their own scholarship.

In this respect, Professor Ball's idea is doing quite well. The commentary on it is uniformly favorable,<sup>3</sup> and at least one major study has been published attempting to defend the status quo against the inexorable

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1. Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435 (1980).

2. *Id.* at 469.

3. See, e.g., RONALD J. ALLEN & RICHARD B. KUHN, AN ANALYTICAL APPROACH TO EVIDENCE 166 (1989) (referring to it as the brilliant article it is). See also the very interesting discussion in 1 JOHN H. WIGMORE, EVIDENCE § 14.1 (Peter Tillers rev. 1983) (concluding doctrine of conditional relevancy, when actually applied, leads to exclusion of relevant evidence).

force of his logic by reconceptualizing its foundation.<sup>4</sup> Attracted as I am to stability in the law, and thus to slow and incremental change, Professor Ball's analysis is so powerful that it overwhelms these inertial prudential considerations. Indeed, as I intend to discuss in this Essay, it is even more powerful than he explicitly recognized. I first review and restate his thesis in a more accessible way. Next, I extend it in one trivial, and in one important respect. Last, I demonstrate its corrosive consequences for the Federal Rules of Evidence and in passing suggest a way out of the thicket.

## II. THE BALL THESIS

The received wisdom on the doctrine of conditional relevancy is contained in the following oft-quoted Advisory Committee note on Rule 104(b) of the Federal Rules of Evidence:

In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus, when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled "conditional relevancy." Problems arising from it are to be distinguished from problems of logical relevancy, e.g., evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401.<sup>5</sup>

As the Advisory Committee note indicates, Professor Morgan was the intellectual source for the conditional relevancy concept, and he, like the Advisory Committee, explicated the concept through examples:

It often happens that upon an issue as to the existence of fact C, a combination of facts A and B will be highly relevant, but that either without the other will have no significance. For example, if M is charged with having caused the death of X, the fact that X carried life insurance in favor of M is entirely irrelevant unless M knew of it. Or if P sues D for breach of contract, and offers evidence of an oral offer made to X and acceptance

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4. Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447 (1990).

5. FED. R. EVID. 104(b) advisory committee's note (citing EDMUND MORGAN, BASIC PROBLEMS OF EVIDENCE 45-46 (1962)) (citation omitted).

thereof by X in behalf of D, the offer and acceptance are irrelevant unless X's authority to act for D also exists.<sup>6</sup>

Ball demonstrated that both of these comments are logically false save, in his view, only one uninteresting case. The proof is breathtaking in its simplicity: in any case comprising more than a single element, evidence of one element is relevant so long as the probability of no other element is 0.0.<sup>7</sup> Consider the contract hypothetical, and assume that there are two "facts." The first is offer and acceptance, and the second is authority. The received wisdom says evidence of offer and acceptance is conditionally relevant upon proof of authority, but of course the reverse is also true. Evidence of authority is conditionally relevant upon proof of offer and acceptance. In fact, neither is conditionally relevant upon the other, unless the probability of one of them is 0.0.<sup>8</sup> Assume that the probability of authority is not 0.0. In that case, any evidence that affects the probability of offer and acceptance obviously may affect the outcome of the case. By making the probability of offer and acceptance higher or lower, the probability of which one of the parties will ultimately prevail is changed, which obviously means the evidence is relevant. Holding the probability of authority constant, if the probability of offer and acceptance increases, then the probability of finding a valid contract increases, and the reverse is true as well. Consequently, evidence of offer and acceptance is in no fashion dependent upon evidence of authority,<sup>9</sup> and thus the received wisdom on conditional relevancy is wrong.

The only qualification that Professor Ball felt it necessary to express to his thesis occurs if the probability of any element is 0.0. In that case, evidence on other elements is conditionally relevant on proof of the element whose probability is 0.0. Why? Because proof of offer and acceptance is of no consequence whatsoever if the probability of authority is 0.0. If the probability of authority is 0.0, a directed verdict of no contract must be entered, no matter what the evidence of offer and acceptance is. This is, to be sure, a case of conditional relevancy, but it is also a case in which the concept is insignificant because the judge will always direct a verdict for insufficiency of evidence. Thus, the only case in which the doctrine of conditional relevancy can operate is, ironically, a case in which it is of no consequence.<sup>10</sup>

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6. EDMUND MORGAN, BASIC PROBLEMS OF EVIDENCE 45-46 (1962).

7. Ball, *supra* note 1, at 450.

8. *Id.* at 450-53.

9. *Id.*

10. *Id.*

## III. ADDITIONS TO THE BALL THESIS

I have two additions to make to Professor Ball's thesis. The first addition is merely a generalization of his thesis that he failed to note. The second demonstrates that Professor Ball overgeneralized in one respect by extending his argument to a second, and different, analytical problem. Straightening out this matter does not cast his proof into doubt. Rather, it results in further proof of the emptiness of conditional relevancy.

First, the generalization of the thesis. As Professor Ball stated the implications of his analysis:

If we were to reword the received doctrine to take account of this analysis, we would say "evidence that P made the offer and that X accepted on behalf of D is relevant to a contract between P and D unless it is certain beforehand that X had no authority from D—that is, unless it is certain beforehand that no contract was made."<sup>11</sup>

This statement is true, but it is not complete. It is not knowledge that the probability of some element is 0.0 that matters; rather, it is knowledge that proof of some element does not satisfy a party's burden of persuasion that matters. Assume that the plaintiff has the burden of persuasion to show authority by a preponderance of the evidence. Assume further that the trial judge determines that no reasonable person could conclude by a preponderance of the evidence that there was authority. Proof of offer and acceptance is then of no consequence, and in that sense is conditionally dependent upon proof of authority.<sup>12</sup> But of course the trial judge will not know this until all the evidence is in. Thus, the generalized implication of conditional relevancy merely demonstrates further that there is no independent concept operating here. Instead, the trial judge must merely make the conventional decision at the end of the evidence whether to send a case to the jury. If reasonable people could disagree whether burdens of persuasion have been satisfied, the case goes to the jury; if they could not, the judge decides the case. Ball's analysis merely picked one dramatic example of an insufficient case—a case in which the probability of an element is 0.0—but that example generalizes in the manner I have described with the result that the received learning on conditional relevancy collapses into the judge's power to send the case to the jury.<sup>13</sup>

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11. *Id.* at 451.

12. This is an example of what is typically called conditional irrelevance.

13. See Ball, *supra* note 1, at 458.

The second emendation to Professor Ball's thesis requires somewhat more extended treatment. Professor Ball mixed two distinct categories of cases. Separating them further demonstrates the power of Professor Ball's original analysis. The separation can be done most felicitously by distinguishing between what I term the horizontal analysis of Professor Ball that concentrates on formal elements, and the vertical analysis that concentrates on the reasoning that underlies any particular formal element.

Professor Ball's analysis is horizontal in the sense that it applies to the formal elements arrayed on the horizon, as it were. Moreover, he emphasized that, in cases such as the contract hypothetical, there is no separate inference of a contract to draw once offer and acceptance and authority are found because offer and acceptance and authority formally determine a contract. He presents his analysis as though it depended upon the truism that the negation of a necessary element mandates a peremptory conclusion to the case. This may have led him to fail to separate categories involving, on the one hand, formal elements, and on the other the underlying reasoning informing an inference about an element. For example, he says of the case involving notice: "In the notice by speaking and hearing example, there is no third fact—the speaking of the right words, and hearing by X, constitutes actual notice by legal definition. . . ."<sup>14</sup>

But this is almost surely wrong in virtually every case of notice. Consider a negligence case in which a car owner drove away from a repair shop after a mechanic says to the driver "Be careful. Your brakes are bad." Even if the driver heard the statement, this would not be notice as a matter of law in the same way that offer and acceptance and authority make a contract. Rather, from concluding a factual condition, that the warning was heard, a fact finder would be likely to infer notice, but the inference is defeasible. If the driver convincingly testified that he or she believed the reference was to some other car, or to something other than the brakes of the car, the statement would not establish notice. The evidence of notice, in other words, establishes notice only when analyzed in the same way any evidence of any fact must be analyzed; it does not just establish it in its own right as a consequence of legal definitions. This differs from the contract hypothetical because offer and acceptance and authority comprise the definition of a contract; no further analysis is required. This difference requires, I think, some further explanation.

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14. *Id.* at 441.

In the contract hypothetical, the crucial determination is the definition of a contract, a question we uncontroversially allocate to the trial judge by calling it a question of law. In the notice hypothetical, the crucial determination is whether the evidence permits an inference of notice, a question normally allocated to the fact finder by calling it a question of fact. The two processes are in one sense similar, which is, I suspect, why Professor Ball failed to articulate their difference. They are similar in that each is informed by some external proposition, but the source of that external proposition differs in the two cases. In the contract hypothetical, the proposition is a legal one concerning the nature of contract law. In the notice hypothetical, the proposition is a factual one that connects the evidence to a proposition such as notice or its absence. It is typically in the form of something like: "Generally speaking, a person who is told that his or her brakes are bad should check the matter out, and the failure to do so is culpable." The evidence of the mechanic's statement and that it was heard then forms the minor premise of a syllogism leading to an inference of culpability.

The difference between the two cases is now obvious. The contract case is purely a question of law, after the finding of offer and acceptance and authority, and the notice case remains a question of fact, even after the finding that the mechanic made the statement and that it was heard. Professor Ball's original analysis elided this difference, and thus perhaps there is some scope after all for a conditional relevancy concept. Even though there is nothing else for the trial judge to do in a case like the contract case other than make a determination to send the case to the jury, in the notice case the judge can determine whether the intermediate premise is an acceptable one. Interestingly, all the examples given by the Advisory Committee's note involve questions of fact rather than questions of law. I have already discussed the notice hypothetical; the authentication example is perfectly analogous. "A letter purporting to be from Y . . . relied upon to establish an admission by him . . . has no probative value unless Y wrote or authorized it"<sup>15</sup> because otherwise there is no intermediate premise that connects the evidence to the proposition to be established. The fact that a forged letter contains a statement that would have been an admission had *Y* made it has little probative force in establishing an admission by *Y*.

I referred to the analysis of the appropriateness of the intermediate premises as the vertical problem. It is vertical in the sense that underlying any inference of a formal element is an inferential process that will

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15. FED. R. EVID. 104(b) advisory committee's note.

rely on a number of intermediate premises that connect evidence to material propositions. The question to be answered is whether an independent concept of conditional relevancy is to be located here. Professor Ball's analysis did not answer this question precisely because he conflated it with the horizontal analysis of formal elements. The answer to the vertical question is the same as that given by Professor Ball to the horizontal question. Once again there is no room for an independent concept of conditional relevancy. And once again the proof is breathtakingly simple.

No evidence is simply relevant in its own right. Evidence is relevant only because there is an intermediate premise or set of premises that connects the evidence to some proposition involved in the litigation.<sup>16</sup> But if determining the relevance of evidence always requires relying on some intermediate premise, no distinction can be drawn between relevancy and conditional relevancy. The truth of this proof is confirmed by demonstrating that the Advisory Committee's example of a relevancy problem cannot be distinguished from its examples of conditional relevancy.

According to the Advisory Committee, "[p]roblems arising from [conditional relevancy] are to be distinguished from problems of logical relevancy, e.g., evidence in a murder case that the accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401."<sup>17</sup> The Advisory Committee does not tell us its view of how relevancy under Federal Rule of Evidence 401 is to be determined, but there is only one possibility, although it can be expressed in various ways. One is to hypothesize two virtually identical cases of murder, their only difference being that in one case evidence is offered "that accused on the day before purchased a weapon of the kind used in the killing," and then to ask whether rational observers might conclude that the probability of murder is different in the two cases because of that evidence. If so, the evidence is relevant. An alternative way to express the same point is to ask if the probability of murder held by a reasonable fact finder in the case might change in light of the evidence of the purchase. Again, if so, the evidence is relevant.

Consider now how the determination is made by the fact finder whether to adjust prior beliefs, given the new evidence. That decision will be informed by some proposition external to the evidence at trial that connects the evidence to the elements of the case. For example, one fact

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16. Ronald J. Allen, *On the Significance of Batting Averages and Strikeout Totals: A Clarification of the "Naked Statistical Evidence" Debate, the Meaning of "Evidence," and the Requirement of Proof Beyond a Reasonable Doubt*, 65 TUL. L. REV. 1093, 1093-1103 (1991).

17. FED. R. EVID. 104(b) advisory committee's note.

finder might believe the generalization to be true that individuals who buy guns are more likely to be murderers than those who do not. Alternatively, another fact finder might believe that individuals with grudges against others who buy guns are more likely to be murderers than those who do not. Of course, there are competing generalizations that might be held. For example, yet another fact finder might believe the generalization to be true that gun ownership is so ubiquitous that gun purchases do not distinguish murderers from nonmurderers. Indeed, a fourth fact finder might conclude that legitimate gun buyers are less likely than nonbuyers to be murderers.<sup>18</sup> A judge determines "relevancy" by determining whether a rational fact finder could employ three out of these four possibilities. If the judge thinks that a reasonable person could rely on any of these propositions except that of ubiquity of gun purchases, then the evidence is relevant. If the judge believes that the only reasonable external proposition is the ubiquitous one, then the judge would exclude the evidence as irrelevant because no reasoned revisions of belief would result from the evidence.<sup>19</sup>

But, now reconsider the examples given of conditional relevancy by the Advisory Committee:

Thus, when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it.<sup>20</sup>

These cases are ones of "conditional relevancy" only because there is no external proposition that fact finders may rationally rely on to connect the evidence to a material proposition in the absence of a reason to believe that X heard the statement or that Y wrote or authorized the letter. Whether there is such a proposition is, of course, also the problem posed by the murder hypothetical. In all three cases, admissibility will be determined by whether or not the fact finder, as part of common knowledge and experience, might possess a generalization of human behavior that connects the evidentiary proffer to a material proposition. The three examples given by the Advisory Committee are analytically identical. They may be functionally different in that without more evidence the first two are cases in which generally shared beliefs do not connect the evi-

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18. Here the evidence would remain relevant, but for the opposite point pressed by the prosecution.

19. This can be put into Bayesian terms if one prefers. See, e.g., Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1022-23 (1977).

20. FED. R. EVID. 104(b) advisory committee's note.

dence to a material proposition, but that is simply a pragmatic difference. No analytical distinction exists.

To emphasize that no analytical distinction exists, I will reconfigure each hypothetical factually to show that any apparent discrepancies are only apparent and not real. Suppose in the murder hypothetical that the cause of death was by bombing, and the evidence offered was that the defendant purchased chemical X, whatever that might be. Standing alone, this evidence would not be admissible, precisely because common knowledge does not extend to the chemical composition of bombs. Evidence that chemical X is a necessary or typical ingredient in bombs would "condition" the admissibility of this evidence, but the conditioning would be a consequence purely of the judge's assessment of the contents of the fact finders' minds. Suppose in the notice hypothetical that the driver wished to testify that he believed the mechanic was joking. His evidence would be "conditionally relevant" upon the reason why he believed the message was a joke, but I suggest that all judges would admit the testimony whether he was questioned about his reasons or not. The trial judge would reason that the generalizations about human affairs necessary to appraise this testimony are commonly held ones, and thus there is no need for further evidence about the justification for the belief, even though justificatory evidence would clearly be permissible. In the letter hypothetical, assume that Y's secretary wished to testify that Y had authorized the letter. That evidence would be "conditionally relevant" on the reason why the secretary so believed, but the judge would admit the evidence without requiring any further testimony even though testimony about the reasons would also be permissible. Again, the trial judge would reason that the fact finders possess sufficient information as part of their common knowledge to reason about and decide this conflict in testimony, even though further information might be helpful.

We thus see that the two examples of "conditional" relevancy given by the Advisory Committee can easily be transmuted into cases of "pure" relevancy, and the case of "pure" relevancy can easily be transmuted into a case of "conditional" relevancy. This is not surprising, because there is no difference between the two concepts. All cases of conditional relevancy are cases of relevancy, and all cases of relevancy are cases of conditional relevancy. The concepts are identical. The distinguishing feature of the examples given by the Advisory Committee of conditional relevancy is simply that the evidence proffered does not yet satisfactorily connect with the fact finders' experience to justify letting deliberation occur. By comparison, the case of pure relevancy is one in which the evidence does satisfactorily connect with the fact finders' expe-

rience. But this means that "conditional relevancy" is simply the label applied to a case that the trial judge finds insufficient to go to the jury and "relevancy" is the label applied to a case that the judge finds sufficient to go to the jury. We need no further proof of their identical nature. Professor Ball's original thesis has been confirmed when applied to the vertical problem of the inferential structure underlying any particular formal element: there is no independent scope for the concept of conditional relevancy.

Unfortunately, the consequences of the analytical error underlying the idea of conditional relevancy have not been simply benignly academic. The drafters of the Federal Rules of Evidence were apparently badly misled by the concept, so badly in fact that the result was perhaps the most misshapen rule in the Federal Rules, Rule 104.<sup>21</sup> The relevant portions of Rule 104, in all their misshapen glory, are:

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.<sup>22</sup>

These tight provisions are just chock full of bizarre implications; indeed, it is remarkable that so much confusion could be located in so few lines. I will concentrate only on that aspect of the mass of confusion relevant to the false dichotomy between relevancy and conditional relevancy.<sup>23</sup>

Note first that these provisions buy into the conventional, false concept of conditional relevancy. Rule 104(b) is explicitly limited to relevancy "conditioned on fact."<sup>24</sup> The obvious implication is that the drafters believed that there was some other kind of relevancy *not* "conditioned on fact."<sup>25</sup> The only other kind of relevancy is that defined in

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21. The only challenger to Rule 104 is Rule 609 prior to its amendment. See *Green v. Bock Laundry*, 490 U.S. 504, 509 (1989).

22. FED. R. EVID. 104.

23. For a thorough discussion of the rest of the confusion generated by the rule, see Ronald J. Allen, *The Explanatory Value of Analyzing Codifications by Reference to Organizing Principles Other Than Those Employed in the Codification*, 79 NW. U. L. REV. 1080 (1984).

24. FED. R. EVID. 104(b).

25. One wonders what they thought it was conditioned on.

Rule 401: “ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>26</sup> Even if the Federal Rules were not premised upon a grievous analytical error, this structure leads to bizarre results.

Consider first whether relevancy as defined in Rule 401 is a Rule 104(a) or a Rule 104(b) question, or neither. Rule 104(a) explicitly provides a general rule for determining the “admissibility of evidence,” subject only to the Rule 104(b) exception. If Rule 401 relevancy differs from “relevancy conditioned on fact,” then it apparently is controlled by Rule 104(a). That is quite odd, however, for it means that the higher standard of a preponderance of the evidence implicit in Rule 104(a)<sup>27</sup> is applicable to the general question of relevancy, but the lower standard of Rule 104(b) is applicable to offers of evidence having all the normal general problems of relevancy compounded by whatever “conditioned on fact” might mean. We would thus have to interpret the drafters as providing for a lower standard to be applied to more problematic evidence, which is not a happy conclusion.

Perhaps to avoid the unhappy conclusion just articulated, we should ignore the explicit language of the Rule and interpret it so that Rule 401 relevancy is a Rule 104(b) question. This would at least have the advantage of relevancy being treated as relevancy, but that would be its only comforting consequence. Discomfiting would be the oddness of this interpretation that would seem to call for evidence on all other offers of evidence, thus leading to an infinite regress. Under this interpretation, in other words, the evidentiary process could never cease. Whatever evidence was introduced to make a sufficient showing of the relevancy of some other evidence would itself require evidence in order to be admitted, and so on for infinity.

The only other possible interpretation of the Federal Rules is that relevancy is neither a Rule 104(a) nor a Rule 104(b) question. This is surely what the drafters believed, but note how this conclusion cannot be reached without straining the language of Rule 104. Whether evidence is relevant obviously determines its admissibility, as called for in Rule 104(a), and the only exception to Rule 104(a) is Rule 104(b). Put aside this linguistic difficulty, for a more substantial difficulty looms. If Rule 401 relevancy is not controlled by Rule 104, what is the standard for determining relevancy? Whatever it is, it is nowhere stated in the rules,

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26. FED. R. EVID. 401.

27. *Bourjaily v. United States*, 483 U.S. 171, 176 (1987).

which is another very odd matter, all the stranger because relevancy determinations must be made of virtually every evidentiary proffer.<sup>28</sup> We would accordingly have to read the Federal Rules of Evidence as failing to provide a standard for the most ubiquitous preliminary determination of all. Very odd, indeed.

Suppose, then, we interpret the Rules to provide some other, unspecified standard for determining Rule 401. Now we get to the heart of the matter through the application of Ball's thesis. If we make sense of the structure of the Federal Rules by interpreting them to create three different standards, one for Rule 104(a), a different one for Rule 104(b), and a third one for Rule 401, how do we tell what is a Rule 104(b) issue and what is a Rule 401 issue? The answer is obvious. We cannot tell which is which, because both are both. Every question of relevancy is determined by some other fact, as our previous analysis has demonstrated. Consequently, the only sensible interpretation of the Federal Rules' treatment of questions of admissibility of evidence is nonsensical.

#### IV. RECOMMENDATION

Enough of these contradictions. How do we get out of the mess we are in? The first step is to recognize clearly the problem. The problem is that we want decision-makers to decide rationally and not by whim. That, in turn, means that the trial evidence must sufficiently connect with the common knowledge of the fact finder so that deliberation on the trial evidence may occur. The trial judge's role is merely to see to it that the intermediate premises needed for deliberation and decision are within the common knowledge of the fact finders, and if they are not, to see to it that evidence on those necessary intermediate propositions is forthcoming in order to put the fact finder in a position to deliberate rationally. Otherwise, the decision is likely to be arbitrary. To determine relevancy, then, is to make a sufficiency finding analogous to, but slightly different from, the sufficiency finding that sends the case to the jury. The relevancy determination is that the trial evidence sufficiently connects with the common knowledge and experience of the fact finder to permit rational deliberation and decision. The sufficiency finding that sends a case to the jury is that reasonable people could disagree, given the applicable burden of persuasion.

To be sure, often at trial particular bits of proffered evidence will not immediately be analyzable by those possessing the common knowledge of

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28. Perhaps every proffer requires a relevancy determination now that Rule 609 has been revised. *But see* FED. R. EVID. 609(a)(2).

the typical juror, or judge, in the community. It is this fact that gave rise to the myth of conditional relevancy. In such a case, further evidence on the necessary intermediate propositions must be forthcoming, or a directed verdict would be in order. The myth-makers overlooked, however, that no analytical distinction exists between those cases where knowledge of the necessary intermediate premises already exists and those cases where it does not. A finding of relevancy is just a finding that those intermediate premises preexist the offer of evidence, and a finding of conditional relevancy is just that further evidence of those premises is required. The determinations are analytically identical, and thus the standard applicable to them should be the same.

But what should the standard be? Again, the answer to this question comes easily once the two different types of sufficiency determinations specified above are distinguished. In order to protect the fact finder's role, which is to apply common knowledge and experience to the litigated case,<sup>29</sup> the admissibility question should be whether a reasonable person's assessment of the case could rationally (or reasonably) be influenced by the offered evidence. If the answer is yes, the evidence is admissible. If the answer is no, a further question must be asked: are there intermediate premises beyond common knowledge and experience that, if known by the fact finder, would permit this evidence to exert a rational influence on the decision? If the answer to this question is no, the evidence is irrelevant and excluded. If the answer is yes, the evidence may be admitted on the condition that further evidence on the necessary intermediate premises is forthcoming. When that evidence is produced, the same set of questions is asked until the trial judge is satisfied that the evidence of the case has been connected to, or in my way of thinking about the matter, backed up into, the fact finder's common knowledge.<sup>30</sup> The sufficiency question then remaining is merely whether reasonable individuals could disagree about who should win, given the applicable burden of persuasion.

How should this be accomplished through the Federal Rules? By this very simple amendment to Rule 104(b):

(b) Relevancy. ~~conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, t~~ The court shall admit ~~it~~ evidence over a relevancy objection upon, or subject to, a finding that the evidence could rationally influence a reasonable person's assessment of any fact that is of conse-

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29. Putting aside values for now.

30. See Ball, *supra* note 1, at 461 (reaching analogous conclusion).

~~quence to the determination of the action, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.~~

The brilliant simplicity of Professor Ball's original analysis is matched by the simplicity, if not the brilliance, of the needed corrective. The corrective is merely language that implements Rule 401's definition of relevancy. If there is any probability that a reasonable person could be rationally influenced by evidence, the evidence is relevant and should be admitted, subject only to Rule 403<sup>31</sup> and any particularized exclusionary rule. If relevancy cannot be determined without evidence of intermediate propositions, the evidence can be admitted immediately subject to evidence offered on those propositions judged by the same standards as any other relevancy issue, or the judge can require evidence on those propositions immediately. This, of course, is precisely the present practice. Thus, another attractive feature of my proposed modification in addition to its straightening out of the conceptual muddle is that it perpetuates present practice.<sup>32</sup>

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31. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

32. This is not to say that no changes would occur as a result of adopting my suggestion. For example, the case of *Huddleston v. United States*, 485 U.S. 681 (1988), would come out differently, unless it were motivated by best evidence concerns, as Nance argues. See Nance, *supra* note 4, at 498-505 (discussing *Huddleston*). *Huddleston* would come out differently because it employs a second order burden of persuasion of more than .5, whereas under my proposal the appropriate second order burden of persuasion would be any probability greater than 0.0. Rather than requiring the trial judge to be convinced by a preponderance that a rational juror could be influenced by the evidence, I would merely require the trial judge to possess a positive probability greater than 0.0 that a rational juror could be influenced by the evidence.