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CONDITIONAL RELEVANCE AND CONDITIONAL ADMISSIBILITY

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ABSTRACT. In this paper, I aim to explicate the distinction between 'unconditional relevance' and'conditional relevance' as those terms and related concepts are applied in the contextof admissibility determinations in modern trials. I take the U.S. Federal Rules ofEvidence to be my model in analyzing these concepts, though on my view anyreasonable approach to legal evidence will have to distinguish between theseconcepts and make appropriate provisions for their separate treatment. I begin byexplaining how the Federal Rules define and apply the concepts of relevance andconditional relevance, and I present an influential argument due to Vaughn Ball thatthreatens to undermine the distinction between the two concepts. I then argue thatBall's argument fails and I diagnose that failure. However, building on some insightsfrom a variety of evidence scholars, I argue that the approach to conditional relevanceadopted by the Federal Rules is crucially flawed for reasons entirely independent of theones raised by Ball's argument. I identify the main constraints that, on my view, anyreasonable approach to conditional admissibility must obey, and I argue for a specificproposal that obeys those constraints. On my positive view, two pieces of evidenceshould be admitted under a Conditional Admissibility Principle only when each pieceof evidence would survive ordinary admissibility scrutiny, conditional on the admissionof the other one. I conclude by considering the question of whether it should also benecessary for the two pieces of evidence to survive admissibility scrutiny together, asan 'evidential package'; I argue that, though the issue may arise infrequently inpractice, there is good reason to impose this additional requirement.

I. INTRODUCTION

In this paper, I aim to explicate the distinction between 'unconditional relevance' and 'conditional relevance' as those terms and related concepts are applied in the context of admissibility determinations in modern trials. I take the U.S. Federal Rules of

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Evidence to be my model in analyzing these concepts, though on my view *any* reasonable approach to legal evidence will have to distinguish between these concepts and make appropriate provisions for their separate treatment. I begin by explaining how the Federal Rules define and apply the concepts of relevance and conditional relevance, and I present an influential argument due to Vaughn Ball that threatens to undermine the distinction between the two concepts. I then argue that Ball's argument fails and I diagnose that failure. However, building on some insights from a variety of evidence scholars, I argue that the approach to conditional relevance adopted by the Federal Rules is crucially flawed for reasons entirely independent of the ones raised by Ball's argument. I identify the main constraints that, on my view, any reasonable approach to conditional admissibility must obey, and I argue for a specific proposal that obeys those constraints. On my positive view, two pieces of evidence should be admitted under a Conditional Admissibility Principle only when *each* piece of evidence would survive ordinary admissibility scrutiny, conditional on the admission of the other one. I conclude by considering the question of whether it should also be necessary for the two pieces of evidence to survive admissibility scrutiny *together*, as an 'evidential package'; I argue that, though the issue may arise infrequently in practice, there is good reason to impose this additional requirement.

II. RELEVANCE AND CONDITIONAL RELEVANCE

Under the Federal Rules, the *relevance* of an item of evidence is a necessary condition for its admissibility.[1] Relevance is *not* a sufficient condition for admissibility; indeed, the majority of the Federal Rules is dedicated to characterizing when relevant evidence is inadmissible.[2] The test for relevance is Rule 401:

[1] *See* Fed. R. Evid. 402 ('Irrelevant evidence is not admissible'.).

[2] *See id.* ('Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court'.)

Evidence is relevant if:[3]

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.[4]

Thus, in order for an item of evidence to be admissible, it must probabilistically either confirm or disconfirm some fact of consequence. However, Rule 401 is explicit that *any* tendency—even a small one—to a make a fact of consequence more or less probable is sufficient for relevance. Thus, relevance is not a graded notion: there is no such thing, under Rule 401, as a piece of evidence being *somewhat* or *moderately* or *highly* relevant. Rather, relevance is a binary notion: a piece of evidence is relevant if and only if it has any tendency at all to make a fact of consequence more or less likely. By contrast, the *probative value* of a piece of evidence—roughly, the *strength* of its tendency to make a fact of consequence more or less probable—is a graded notion; even if *A* and *B* are both relevant, *A* might have more or less probative value than *B*.[5] Since relevance is not sufficient for admissibility, a finding that a piece of evidence is relevant does not settle the question of its admissibility; in particular, Rule 403 gives the court discretion to exclude relevant evidence if its probative value is substantially outweighed by a variety of other factors, including, most significantly, danger of unfair prejudice.[6]

In some cases, the relevance of an item of evidence may be obvious on its own. For example, evidence that the defendant in a murder trial had a heated verbal exchange with the victim hours before the victim's death tends to make it more probable that the defendant had the intention to kill the victim, and hence is relevant to establishing the mens rea of murder, which is undoubtedly a fact

[3] Though Rule 401 purports to give only a sufficient condition for relevance ('Evidence is relevant *if*...') (emphasis added), it is uniformly interpreted to provide a necessary and sufficient condition for relevance; in accordance with that standard approach, I will treat Rule 401 as though the 'if' were an 'if and only if'.

[4] Fed. R. Evid. 401.

[5] One way for this to happen is if *A* has a more or less significant tendency to confirm or disconfirm some particular fact of consequence than *B* does. Another way for this to happen is if *A* has a tendency to confirm or disconfirm a fact that is of more or less significant consequence than *B* does.

[6] Fed. R. Evid. 403 ('The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, wasting time, or needlessly presenting cumulative evidence'.).

of consequence.[7] This sort of relevance has been called 'logical relevancy'.[8] Of course, the sort of relevance involved here cannot truly be *logical* in the philosopher's sense; there is obviously no logical entailment from the heated exchange to the intention to murder (or to any other fact of consequence), and the observation that the former is evidence for the latter presumably depends on antecedent empirical reason to believe the contingent generalization that heated exchanges are positively correlated with subsequent murderous intentions. It arguably also depends on the *absence* of antecedent empirical reason to believe that the heated exchange at issue was an 'exceptional' one—say, one that took place as a scripted component of a play rehearsal.

Some authors have seized on this point in order to argue against the analytical coherence of the Federal Rules' approach to relevance;[9] this is a point to which I shall return in Section 4. For now, it will have to suffice to note that there are some empirical propositions—like the proposition that heated arguments are positively correlated with subsequent murderous intentions—that juries are permitted (via so-called 'jury notice'[10]) to reasonably rely upon in their reasoning, even in the absence of evidence *in the trial record* for the proposition; and that there are other empirical propositions—like the proposition that the defendant performed the actus reus of the crime—that juries are not permitted to reasonably rely upon in their reasoning, in the absence of evidence in the trial record for the proposition. Of course, at least in typical cases, the jurors' commonsense belief that heated arguments are positively correlated with subsequent murderous intentions is a perfectly reasonable one, and one that is supported by their total body of evidence outside of the courtroom. But the crucial point is that not all empirical propositions require—in order to be reasonably depended upon in the factfinder's reasoning—evidence to be adduced in support of them at trial. And so a 'logically relevant' item of evidence is just an item of evidence

[7] *See* Advisory Committee's note on Rule 104(b). Of course, the heated argument might *also* be relevant to establishing other facts of consequence, such as identity, motive, etc.

[8] *See id.*

[9] *See, e.g.,* Ronald J. Allen, 'The Myth of Conditional Relevancy', 25. LOY. L. A. L. REV. 871 (1992).

[10] *See, e.g.,* John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* §2570 (3d ed. 1981): '...so far as the matter in question is one upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all, the analogy of judicial notice obtains to some extent, and the jury are allowed to resort to this information in making up their minds'.

which could support a reasonable juror in becoming more or less confident in a fact of consequence, without the need for any other particular type of evidence to be in the record.

By contrast, in other cases, the relevance of an item of evidence can crucially depend on the existence of evidence in the trial record for some other proposition. One standard example here involves a suit for breach of contract: plaintiff's evidence that their oral offer was made to and accepted by a third party is relevant to the existence of a contract between plaintiff and defendant only if the third party was authorized to act for defendant.[11] Considered in isolation, plaintiff's evidence of offer and acceptance looks to fail the test of relevance in Rule 401; evidence of offer to and acceptance by some particular third party, all by itself, does not appear to have any tendency to change the probability that a valid contract existed between plaintiff and *defendant*.[12] However, *conditional* on the third party's authorization to act for defendant, the evidence of offer to and acceptance by the third party becomes obviously relevant, since it tends to make the existence of a valid contract between plaintiff and defendant—clearly a fact of consequence in a breach of contract claim—more likely than it would be without that evidence.

In order to handle cases like this of so-called 'conditional relevance', Rule 104(b) provides for the admissibility of evidence in cases where the relevance of that evidence 'depends on a fact':

> Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.[13]

Thus, under Rule 104(b), plaintiff's evidence of offer to and acceptance by the third party may be admitted—notwithstanding its current failure to be relevant—as long as evidence sufficient to support a finding that the third party was authorized to act for the defendant is (at some point) introduced.

Some terminological clarifications: We've already said what a *logically relevant* item of evidence is: it is an item of evidence that could support a reasonable juror in becoming more or less confident in a fact of consequence, without the need for any other evidence to be

[11] *See* Edmund Morgan, *Basic Problems of Evidence* 45–46 (1962).

[12] Nor does this evidence, all by itself, appear to have any tendency to change the probability of any *other* fact of consequence to the breach of contract claim.

[13] Fed. R. Evid. 104(b).

introduced into the record. And Rule 401 characterizes *relevance*: relevant evidence tends to make some fact of consequence more or less likely, given what other evidence is already in the record. Thus, all logically relevant evidence is relevant, but not all relevant evidence is logically relevant. Whether an item of evidence is logically relevant does not change as more evidence is introduced into the record, since the relevance of logically relevant evidence does not depend on other evidence in the record.[14] But whether an item of evidence is relevant can change as more evidence is introduced into the record. In particular, an item of evidence might be merely conditionally relevant at time t_1—i.e., conditionally relevant, but not relevant, at t_1—and then become relevant at a later time t_2, once some other evidence has been introduced. This is not a case of an item of evidence becoming logically relevant (since that is impossible), but it is a case of an item of evidence becoming relevant. Since the conditional relevance of an item of evidence is always relative to the particular fact that its relevance is conditional on, I will generally avoid the construction '*E* is conditionally relevant to *F*', and instead use the construction '*E* is conditionally relevant to *F*, conditional on *G*'.[15] When *E* is conditionally relevant to *F*, conditional on *G*, I will refer to *G* as the 'predicate proposition' or simply as the 'predicate'.[16] Finally, though the Federal Rules often refer to the 'existence' of a fact, this language is obviously not intended to express any ontological claim about the existence of fact-tokens, but is rather a legalistic way of referring to the truth of a proposition. Thus, when Rule 104(b) requires that proof be introduced sufficient to support a finding that a predicate 'fact does exist', it is simply imposing the requirement that proof be introduced sufficient to support a finding that the predicate proposition is true.

[14] There is a possible complication here, to which I alluded above, in cases where a logically relevant piece of evidence is completely 'undercut' by subsequent evidence—say, where the evidential impact of the heated exchange between the defendant and the victim is completely neutralized by uncontroverted proof that the exchange took place as a scripted component of a rehearsal for a play. It may be natural to characterize such cases as examples of logically relevant evidence becoming irrelevant; however, this complication will not impact my aims in this paper, in large part because the undercutting evidence at issue would typically be introduced *after* the logically relevant evidence and hence would not interfere with its admissibility. But, regardless of whether it is possible for logically relevant evidence to become irrelevant, it is certainly impossible for irrelevant evidence to become logically relevant.

[15] It is also worth nothing that, for nearly any *E* and *F*, there is *some* proposition relative to which *E* is conditionally relevant to *F*. For example, the fact that Juan's favorite color is orange is conditionally relevant to whether Oswald killed Kennedy, conditional on the truth of the material conditional proposition that if Juan's favorite color is orange then Oswald killed Kennedy.

[16] There is a subtlety here about whether it is the *proposition itself* or the *evidence of the proposition* that should be properly regarded as the predicate. I will return to this issue in Section 7.

III. BALL'S CRITIQUE OF CONDITIONAL RELEVANCE

In 'The Myth of Conditional Relevancy', Vaughn Ball argues that the doctrine of conditional relevance should be abandoned.[17] His argument is that, except in certain trivial cases, *all* evidence that is conditionally relevant under Rule 104(b) is also relevant under Rule 401. Thus, in all but the trivial cases, Rule 104(b) is redundant because any evidence that could be admitted through the 104(b) procedure could also be admitted without Rule 104(b), through Rules 401 and 402. The trivial cases are trivial because, even though they are technical cases of conditional relevance without relevance, they are also cases in which no evidence could be admitted through Rule 104(b) anyway, since the evidence is conditionally relevant only relative to propositions certain to be false. So, in the trivial cases, Rule 104(b) cannot be properly invoked, since it requires that evidence be introduced sufficient to support a finding 'that the [predicate] fact does exist', which could never be satisfied, since the predicate proposition is certain to be false. Thus, there is 'no need' for Rule 104(b) or, indeed, for *any* rule providing for the admissibility of conditionally relevant evidence; any such rule is redundant most of the time and useless the rest of the time.[18]

Ball's argument for this conclusion, as applied to the contract example, proceeds as follows.[19] With respect to the issues of (i) offer to and acceptance by the third party, and (ii) the third party's authorization to act for the defendant, there are four possibilities:

1. There was offer and acceptance, as well as authorization. Prior probability: *a*.
2. There was offer and acceptance, but there was no authorization. Prior probability: *b*.
3. There was no offer and acceptance, but there was authorization. Prior probability: *c*.
4. There was no offer and acceptance, and there was also no authorization. Prior probability: *d*.

Let us suppose that a valid contract existed here if and only if Possibility 1 is actual—i.e., that there is no other possible source of a valid contract between plaintiff and defendant, and that there is no

[17] Vaughn C. Ball, 'The Myth of Conditional Relevancy', 14 GA. L. REV. 435 (1980).

[18] *Id.* at 454.

[19] *See id.* at 447–451.

other doctrine of contract law in play that might invalidate a putative contract between plaintiff and defendant in Possibility 1. Ball further supposes that the prior probability of Possibility 1 (i.e., the value of a) is not 0—in other words, that a reasonable factfinder would not entirely rule out the possibility that there was a valid contract between plaintiff and defendant. Then, Ball argues that, *even in the absence of evidence in the record for authorization*, evidence of offer and acceptance necessarily increases the probability of Possibility 1, and hence of a valid contract between plaintiff and defendant; hence, it is *logically* relevant to the existence of a contract:

> The prior probability that offer and acceptance occurred is $a + b$. When proponent offers his witnesses ...to testify that the offer and acceptance took place, a reasonable juror could decide from their testimony that it increases the probability of offer and acceptance by a factor of x, let us say, where x is greater that 1 (but not of course so large that the result $x(a + b)$ is greater than one). But $x(a + b) = xa + xb$. With the evidence, the probability of the contract ([Possibility 1]) is xa, which is larger than a, and the evidence is relevant. It is obvious that this result follows no matter how small a is, so long as it is not zero....The increase in a may be large or small, and the posterior probability may be small, but so long as there is an increase, the evidence is relevant to contract; and in particular its relevance does not depend on the 'existence' of authority..., nor on the probability of that authority having any particular magnitude so long as it is not zero....[20]

Thus, though the contract hypothetical was supposed to be a case where evidence of offer and acceptance was only *conditionally* relevant (conditional, that is, on sufficient evidence of authorization), Ball takes himself to have shown that the evidence of offer and acceptance is in fact (except in the trivial case) *logically* relevant to the existence of a contract. Moreover, Ball observes, the trivial case where the prior probability of Possibility 1 is 0 can be safely ignored in the analysis of conditional relevance, since if the prior probability that a contract exists is 0, then 'we would already know the answer to the contract question and need no evidence'.[21] Suppose, for example, that the prior probability of Possibility 1 was 0 because the prior probability of authorization was 0—i.e., that no reasonable jury could find it even minimally credible that the third party was authorized to act for defendant. Then, it is still true that the relevance of evidence of offer and acceptance depends on whether there was authorization; *if* there were authorization, then evidence of offer and acceptance *would* tend to increase the probability of a contract, so the evidence of offer and acceptance is conditionally relevant, conditional on authorization. But, in this trivial case, evidence of offer and acceptance is not relevant;

[20] *Id.* at 450–451.

[21] *Id.* at 451.

since the prior probability of authorization is 0, evidence of offer and acceptance does not tend to increase the probability (from 0) of a contract. Thus, conditional relevance does not entail logical relevance in the trivial case. But, in the trivial case, the conditionally relevant evidence is of no use, since it is relevant only conditional on a fact that is known to be false. As a result, the clause in Rule 104(b) requiring that proof be introduced to support a finding that the relevance-making fact exists cannot be satisfied; the relevance-making fact is known with certainty to be false, and thus no subsequent evidence could support a finding that it is true. Thus, though conditional relevance does not entail logical relevance, this conceptual distance is of no consequence because it could not underwrite a legitimate introduction of the conditionally relevant evidence.

Since Ball thinks that 'almost all [putative cases of conditional relevance] fall into the same pattern and fall also into the same error',[22] he draws the general lesson that the concept of conditional relevance effectively collapses into the concept of logical relevance, and thus that there is no need to have a special rule like 104(b) governing conditional relevance; all non-trivial putative cases of conditional relevance under Rule 104(b) are also cases of ordinary relevance under Rule 401. He concludes that 'there is nothing for Rule 104(b) to operate on'[23] and thus that the *doctrine* of conditional relevance—not just Rule 104(b)'s particular *implementation* of that doctrine—'should be dismantled at the earliest opportunity'.[24]

IV. ALLEN'S DEVELOPMENT OF THE BALL ARGUMENT

Ball's critique of the doctrine of conditional relevance was well-received.[25] Perhaps the chief exemplar of the positive reception of

[22] *Id.* at 453.

[23] *Id.* at 458.

[24] *Id.* at 469.

[25] *See, e.g.,* Wigmore, *Evidence* §14.1 (Peter Tillers rev. 1983); 21A Fed. Prac. & Proc. Evid. §5052.4 (2d ed.) ('Readers who have understood Professor Ball's argument will understand that dilemma supposed to arise in this case—both facts are relevant but neither can be proved unless the other is proved first—does not arise under the Evidence Rules'.); Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* §1.13, at 48 & n.7 (citing Ball and concluding that 'the concept of conditional relevancy seems...intuitively true but logically false'); Craig R. Callen, 'Rationality and Relevancy: Conditional Relevancy and Constrained Resources', 2003 MICH. ST. L. REV. 1243, 1247–1249 (2003); Douglas Walton, 'Argumentation Schemes: The Basis of Conditional Relevance', 2003 MICH. ST. L. REV. 1205, 1232 (2003) ('Another problem shown by Ball is that conditional relevance is hard to define, in precise operational terms, as an exact logical concept'.)

Ball's critique is Allen's 'The Myth of Conditional Relevancy',[26] which repeatedly characterizes Ball's argument as 'powerful' and his article as 'brilliant'.[27] Allen endeavors to 'extend'[28] Ball's argument, but Allen fully concurs with Ball's demonstration of the 'emptiness'[29] of the received doctrine on conditional relevancy, and concludes that '[a]ll cases of conditional relevancy are cases of relevancy, and all cases of relevancy are cases of conditional relevancy. The concepts are identical'.[30]

Allen's central extension of Ball's argument takes the form of an argument that, while Ball's own examples were all 'horizontal' cases involving multiple elements of a single cause of action, his conclusion that conditional relevance collapses into relevance (in nontrivial cases) applies as well to 'vertical' examples where an item of evidence is alleged to be conditionally relevant to a single element. Allen's argument for this claim is that

> [n]o 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. But if determining the relevance of evidence always requires relying on some intermediate premise, no distinction can be drawn between relevancy and conditional relevancy.[31]

In short, Allen's point here is that *every* judgment of relevance—whether 'conditional' or 'unconditional'—actually involves the determination that the factfinder possesses enough information to forge an epistemic link between the evidence and a fact of consequence in the proceeding; the only difference is whether the factfinder *already* possesses that information, or whether the factfinder will need to acquire that information *in the future*. Either way, the two situations seem to be on an epistemic par, and thus call for analogous treatment.[32]

Allen concludes that the doctrine of conditional relevance in actuality simply reduces to the judge's power to enter a directed verdict in cases where the evidence presented by one party is legally

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[26] Allen, *supra* note 9.

[27] *See id.* at 871–872, 884. *See also* R. Allen & R. Kuhns, *An Analytical Approach to Evidence* 165–168 (1989) (endorsing Ball's 'brilliant' article).

[28] *Id.* at 872.

[29] *Id.*

[30] *Id.* at 879.

[31] Allen, *supra* note 9, at 877.

[32] 'The determinations [of relevance and conditional relevance] are analytically identical, and thus the standard applicable to them should be the same'. *Id.* at 883.

insufficient to get to the jury. The idea here is that a case where the evidence in support of an element or defense is 'conditionally relevant' is simply a case where further evidence needs to be introduced in order to avoid a directed verdict for the opposing party, whereas a case of 'logical relevance' is simply a case where no such further evidence is needed in order to avoid a directed verdict. But since the judge (with certain exceptions in the criminal context) has the power to enter a directed verdict for a party *whenever* the opposing party's evidence is legally insufficient, there is no need for the *separate* doctrine of conditional relevance to deal with one particular way in which a party's evidence can be legally insufficient—namely, the situation in which that party's evidence is conditionally relevant without being relevant.[33]

V. THE BALL/ALLEN ARGUMENT FAILS

Let's return to Ball's argument. Ball assumes that, when evidence is presented that there was offer and acceptance, the probabilities of each of Possibility 1 and Possibility 2 go up. Indeed, Ball assumes that they go up by the same factor, represented by the variable x in his formalism (with the stipulation that $x1$). Thus, for Ball, after the evidence of offer and acceptance is presented, the probability of Possibility 1 goes up from a to xa, and the probability of Possibility 2 goes up from b to xb, and thus the total probability of offer and acceptance (i.e., the disjunction of Possibility 1 and Possibility 2) goes up from $a + b$ to $x(a + b) = xa + xb$.

As a preliminary point, it is worth noting that these assumptions require that the evidence of offer and acceptance that is presented does not probabilistically distinguish between Possibility 1 and Possibility 2; in Bayesian terms, this requires that the evidence is just as likely if Possibility 1 is true as if Possibility 2 is true. But not *all* evidence of offer and acceptance has this feature. For example, some evidence of offer and acceptance might weigh in favor of each of Possibility 1 and Possibility 2, but might more strongly favor (say) Possibility 2, in which case Possibility 1 and Possibility 2 would go up by different factors. More importantly, not all evidence of offer and

[33] "[C]onditional 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'. *Id.* at 880.

acceptance leads to an increase in the probabilities of both Possibility 1 and Possibility 2. For example, evidence in favor of offer and acceptance might actually *lower* the probability of Possibility 1; as long as it increases the probability of Possibility 2 by more than it lowers the probability of Possibility 1, it will still have a net positive probabilistic effect on the hypothesis of offer and acceptance. Indeed, any evidence that counts both in favor of offer and acceptance and also against authorization will count in favor of Possibility 2, but that evidence will necessarily have either a less positive impact or a negative impact on Possibility 1. For example, evidence that the third party in question fraudulently represented himself as an agent of the defendant will clearly have a more positive impact on Possibility 2 than it has on Possibility 1, since it counts both in favor of offer and acceptance and also against authorization. And, depending on the background details, this evidence could very well count in favor of Possibility 2 but against Possibility 1—for example, if the evidence counts more strongly against authorization than it counts in favor of offer and acceptance.

The upshot is that not *all* evidence of offer and acceptance is also evidence in favor of the existence of a contract (i.e., Possibility 1). And this is so despite the fact that all evidence of offer and acceptance is conditionally (positively) relevant to the contract; *assuming* authorization, any evidence in favor of offer and acceptance—even evidence that also counts against authorization—is also evidence in favor of a contract. Moreover, there is no reason at all to think that the sort of evidence described above—evidence that counts against Possibility 1 but counts more strongly in favor of Possibility 2—would be available only in 'trivial' cases where conditional relevance is 'of no consequence'. For example, focusing on Ball's account of triviality, nothing in the above argument presupposes that the prior probability of authorization was 0; indeed, the existence of new evidence that counts *against* authorization presupposes exactly the opposite. Thus, the concept of conditional relevance cannot really 'collapse' into the concept of relevance in all cases; *pace* Allen, the concepts are not identical.

Admittedly, the evidence countenanced above—evidence that counts in favor of offer and acceptance but simultaneously counts against authorization—is somewhat unusual, and judgments may

vary about whether we should categorize evidence as conditionally relevant when it counts against the very proposition that its conditional relevance is conditional upon. But the example is useful for two reasons: first, it reveals a central hidden assumption being relied upon in Ball's argument; and second, it shows that *something* was amiss in Ball's argument for the collapse of conditional relevance into relevance.

But even bracketing this preliminary concern about evidence that counts against the very proposition that its conditional relevance is conditional upon, there is a much more intuitive class of cases where evidence is conditionally relevant without being unconditionally relevant: cases where the conditional relevance derives from a 'match' between two facts, neither of which is relevant on its own. Consider, for example, the following hypothetical in a criminal trial: Suppose, for simplicity, that handedness partitions the population of humans—in other words, that everyone is either left-handed or right-handed, and that nobody is both. Now, consider evidence that the killer is right-handed—say, testimony from a forensic expert that the fatal stab wounds were inflicted by a knife held in the killer's right hand. This evidence is not, alone, relevant to whether the defendant is guilty of murder; with no information about the defendant's handedness, evidence that the killer is right-handed does not have any tendency to make it more or less probable that the defendant committed the murder. But the evidence that the killer is right-handed clearly is conditionally relevant—e.g., it is relevant conditional on the defendant being right-handed.[34] Thus, assuming that sufficient proof is introduced to support a finding that the defendant is right-handed, the evidence that the killer is right-handed can be admitted under Rule 104(b). And, clearly, there is no reason that the situation described above would need to be a 'trivial' case such as one where the prior probability of the defendant's being right-handed is 0; absent any evidence specifically about the defendant's handedness, the prior probability that the defendant is right-handed is presumably quite high due to the high prevalence of right-handedness among humans,[35] and specific evidence could be introduced that makes it even more likely that the defendant is right-

[34] Of course, it is *also* (negatively) relevant conditional on the defendant being left-handed.

[35] *See* Sara M. Scharoun & Pamela J. Bryden, 'Hand preference, performance abilities, and hand selection in children', 5 *Frontiers in Psychology* 82 (2014).

handed. This example suffices to show, in a second way, that there are non-trivial cases in which evidence is conditionally relevant and yet not relevant. And again, the general lesson is conditional relevance does not collapse into relevance; they are most emphatically not the same concept.[36]

Objection: Since the prior probability that the defendant is right-handed is high (due to the high prevalence of right-handedness in the population), evidence that the killer is right-handed does provide *some* reason to think that the defendant is the killer. If we genuinely had *no idea* whether the defendant was right-handed, then evidence that the killer is right-handed would not tend to make it more probable that the defendant is the killer. But, since it is likelier than not that the defendant is right-handed, evidence that the killer is right-handed does have *some* tendency to make it more probable that the defendant is the killer. And since *some* such tendency is all that is required in order to make the evidence of the killer's right-handedness relevant under Rule 401, the handedness example above is a case where that evidence—in addition to being conditionally relevant—is relevant as well. And hence it is not a counterexample to Ball's and Allen's claim that all nontrivial cases of conditional relevance are cases of relevance as well.

Response: Absent some reason to believe that the defendant is likelier (or less likely) to be right-handed than a randomly-selected member of the population, the information that the killer is right-handed is *absolutely no* evidence that the defendant is the killer. It is true that the forensic evidence increases the probability that the killer is right-handed; suppose, for simplicity, that the forensic evidence conclusively demonstrates that the killer is right-handed. And it is true that, based solely on the population-level data about handedness, the defendant is likely to right-handed. But just because we have learned that the killer is right-handed, and we think it is likely that the defendant is right-handed, it does not follow that we have gotten any new reason to believe that the defendant is the killer. The reason is that, if the defendant is indeed right-handed, then the

[36] Friedman considers a case that is like my handedness example, though he largely dismisses its significance because of his emphasis on conditional *probative value* over conditional *relevance*. *See* Richard D. Friedman, 'Conditional Probative Value: Neoclassicism without Myth', 93 MICH. L. REV. 439, 443–444 (1994). Ball also considers a case with a similar structure, but he too dismisses it on the grounds that the example involves two offsetting evidential effects, one confirmatory and one disconfirmatory. *See* Ball, *supra* note 17, n. 38 at 466–469.

information that the killer is right-handed is *some weak* evidence for the defendant's guilt; but if the defendant is left-handed, then the information that the killer is right-handed is *conclusive evidence against* the defendant's guilt; and these two effects precisely balance each other out.

Compare: the 100-ticket raffle winner has just been selected, and it is announced only that the winning ticket number is higher than 10. I purchased a ticket, but the ticket is in my wallet, and I have no recollection of my ticket's number; my confidence is .01 that my ticket number is n, for each $1 \leq n \leq 100$. I reason: the winning ticket number is higher than 10, and I'm 90% sure that my ticket number is higher than 10, so this is some evidence that I've won! My mistake is that, if my ticket number is indeed higher than 10, then the fact that the winning ticket is higher than 10 is *some* evidence that my ticket has won: it increases the probability of my winning from 1100 to 190. But, if my ticket number is 10 or lower, then then the fact that the winning ticket is higher than 10 is the *strongest possible* evidence *against* my winning: it lowers the probability of my winning from 1100 to 0. So, after looking in my wallet and determining whether my ticket number is greater than 10, there is a 90% chance that my confidence that I've won will be 190, and there is a 10% chance that my confidence that I've won will be 0. Thus, my expected confidence, after looking in my wallet, that I've won is $.9 \times 190 + .1 \times 0 = 1100$, the same value as my confidence that I've won *before* looking in my wallet. Thus, before I've looked in my wallet, the information that the winning ticket number is higher than 10 is *absolutely no* evidence that I've won, despite the fact that my ticket is very likely to be numbered higher than 10.[37]

Similarly, suppose that 90% of the population is right-handed, and that no evidence about the defendant's handedness has yet been

[37] These examples are closely related to violations of Hempel's 'Special Consequence Condition'—i.e., the thesis that if E confirms $H1$, and $H1$ entails $H2$, then E confirms $H2$ as well. *See* Carl Hempel, *Aspects of Scientific Explanation* (1965). In the lottery case, the information that the winning ticket is higher than 10 (somewhat) confirms the hypothesis that my ticket and the winning ticket are both (say) #82, which entails that I've won, but the information that the winning ticket is higher than 10 fails to confirm the hypothesis that I've won. Similarly, in the handedness case, the information that the killer is right-handed confirms the hypothesis that the killer and the defendant are both right-handed, which entails that the handedness of the killer and the defendant match, but the information that the killer is right-handed fails to confirm that the hypothesis that the handedness of the killer and the defendant match. For a detailed discussion of Hempel's Special Consequence Condition, *see* Matthew Kotzen, 'Dragging and Confirming', 121 *The Philosophical Review*, 55 (2012).

introduced. Let the prior probability that the defendant is the killer be g. Let Δ stand for the defendant and let K stand for the killer; $\Delta = K$ is the hypothesis that the defendant is the killer and $\Delta \neq K$ is the hypothesis that he is not. Then, by Bayes' Theorem,

$$p(\Delta = K|\ K \text{ Is Right-handed}) =$$
$$\frac{p(\Delta = K) \times p(Kisright - handed|\Delta = K)}{p(\Delta = K) \times p(Kisright - handed|\Delta = K) + p(\Delta \neq K) \times p(Kisright - handed|\Delta \neq K)} =$$
$$\frac{g \times .9}{g \times .9 + (1 - g) \times .9} = g \times .91 \times .9 = g.$$

Thus, as expected, the probability that the defendant is the killer after learning that the killer is right-handed is g, the same value that it had before learning that the killer is right-handed.

Of course, the handedness example works just as well if we instead consider forensic evidence that the killer is left-handed; such evidence is conditionally positively relevant to the defendant's guilt, conditional on the defendant's being left-handed (and also conditionally negatively relevant to the defendant's guilt, conditional on the defendant's being right-handed), but it is not alone relevant to the defendant's guilt. Or we could construct a case where the relevant property is (approximately) evenly distributed in the relevant population—say, having type-O blood; absolutely nothing important changes. Moreover, there is nothing exotic or even unusual about this sort of example of conditional relevance without unconditional relevance. On the contrary: it is a fairly mundane case of acquiring reason to believe that a person (here, the defendant) answers to a definite description (here, 'the murderer') only when we learn that the person and the referent of the definite description share a property (here, being right-handed). We could just as easily construct a case where (say) we acquire a reason to believe that a particular document answers to the indefinite description 'a document written by X' only when we learn that the writing on the document matches X's handwriting; the fact that the document contains the particular ink marks it contains is unconditionally irrelevant to its authorship by X, and yet highly conditionally relevant to its authorship by X, conditional on those marks matching a sample of X's handwriting. Or we could construct a case involving a tort claim for conversion of the plaintiff's vehicle, where evidence that the defendant was driving a red sedan is conditionally relevant only conditional on the assumption that the plaintiff's converted vehicle was a red sedan. Further mundane cases fitting this general pattern abound.

The handedness example and its ilk demonstrate that *something* has gone wrong with Ball's argument. To diagnose the problem, it will be useful to consider the form of argument that Ball gave in the contract case, applied to the handedness case. Begin by considering the four Possibilities that are analogous to the ones that Ball considered in the contract case:

1. The killer is right-handed, and the defendant is right-handed too. Prior probability: a.
2. The killer is right-handed, but the defendant is left-handed. Prior probability: b.
3. The killer is left-handed, but the defendant is right-handed. Prior probability: c.
4. The killer is left-handed, and the defendant is left-handed too. Prior probability: d.

The analog of Ball's argument in the contract case would run as follows:

> The prior probability that the killer is right-handed is $a + b$. When the forensic expert testifies that the fatal wounds were likely inflicted by a knife held in the assailant's right hand, a reasonable juror could decide from this evidence that it increases the probability that the killer is right-handed by a factor of x, where x is greater than 1 (but not of course so large that the result $x(a + b)$ is greater than one). But $x(a + b) = xa + xb$. With the forensic evidence, the probability that the killer and defendant are both right-handed is xa, which is larger than a, and the forensic evidence is relevant. It is obvious that this result follows no matter how small a is, so long as it is not zero. ...The increase in a may be large or small, and the posterior probability may be small, but so long as there is an increase, the forensic evidence is relevant to whether the killer and defendant are both right-handed; and in particular its relevance does not depend on whether the defendant is right-handed, nor on the probability that the defendant is right-handed having any particular magnitude so long as it is not zero....

First, let's again bracket the concern raised above that not all possible evidence that the killer is right-handed is also evidence for Possibility 1, since it is possible for some item of evidence to decrease the probability of Possibility 1 and yet to increase the probability of Possibility 2 by more than it decreases the probability of Possibility 1. Presumably, this concern would not apply to typical forensic evidence that the knife was held in the assailant's right hand; such evidence seems to clearly count in favor of both Possibility 1 and Possibility 2, since it does not have any probative value with respect to the defendant's handedness.

The real problem with the analogous argument is that it ignores the fact that the forensic evidence—in addition to being evidence for Possibility 1—is evidence *against* Possibility 4. After all, Possibility 4

is also, just like Possibility 1, a scenario in which the handedness of the killer and the handedness of the defendant *match*. And while evidence for Possibility 1 tends, *all else equal*, to make it more probable that the defendant is the killer, it is equally true that evidence against Possibility 4 tends, *all else equal*, to make it *less* probable that the defendant is the killer. Thus, while the forensic evidence that the killer is right-handed does indeed increase the probability of Possibility 1, that does not entail that the forensic evidence is relevant to whether the defendant is the killer. Indeed, as I argued above, the forensic evidence is, alone, irrelevant to whether the defendant is the killer, notwithstanding the fact that it is clearly conditionally (positively) relevant, conditional on the defendant being right-handed.[38]

The reason that this issue did not arise in Ball's presentation of his argument in the contract example is that we were there considering *elements* of the kind of contract claim at issue. Elements of a claim (or, indeed, any other necessary conditions for the establishment of a claim) have a special feature: bracketing concerns about evidence counting in favor of one element and against another, and assuming that the probability of no element is 0, evidence for an *element* of a claim is always evidence in favor of the claim, since it leaves less that remains to be proven. In the contract example, Possibility 4 was a scenario in which *both* elements of the contract claim were missing. But since a failure of two elements of a contract claim is (doubly) a case of a non-contract, evidence against Possibility 4 is (subject to the stipulations above) evidence *in favor of* a contract. By contrast, in the handedness example, Possibility 4 is a scenario that tends to *implicate* the defendant; it is decidedly *not* a case of the defendant being doubly exculpated. Thus, evidence against Possibility 4 in the handedness case is (subject to the stipulations above) evidence *against* the defendant's guilt. So, even though the conditionally relevant evidence—evidence of offer and acceptance, or evidence that the killer is right-handed—is evidence against Possibility 4 in both the contract case and the handedness case, it is only in the contract case that the reduction in the probability of Possibility 4 tends to make the fact of

[38] The forensic evidence is also conditionally (negatively) relevant, conditional on the introduction of evidence sufficient to support a finding that the defendant is *left*-handed. But these two facts do not entail that the forensic evidence is unconditionally relevant to the question of whether the defendant is the killer.

consequence—the contract's validity or the defendant's guilt—more probable. Thus, it is only in the contract case that Ball's argument goes through. In the contract case, evidence of offer and acceptance increases the probability of Possibility 1, and since Possibility 4 is a case of a non-contract, the fact that the evidence counts against Possibility 4 poses no danger to the net positive impact of the evidence on the existence of a contract. By contrast, in the handedness case, evidence of the defendant's right-handedness still increases the probability of Possibility 1 and decreases the probability of Possibility 4, but since Possibility 4 tends to implicate the defendant, the fact that the evidence counts against Possibility 4 *can* interfere with the net positive impact of the evidence on the defendant's guilt. And so, in the handedness case, there is no guarantee that the conditionally relevant evidence (i.e., the forensic evidence that the killer is right-handed) will also be relevant all by itself.

Accordingly, the handedness case demonstrates that Allen was deeply (but instructively) mistaken in his conclusion that there is no important difference between the 'horizontal' case involving multiple elements and the 'vertical' case involving an inference in support of a single element. As I have just argued, at least under certain plausible assumptions, the Ball/Allen argument does go through when we are considering the horizontal case, but it fails when applied to the vertical case.

Moreover, regardless of whether Allen is correct that 'determining the relevance of evidence always requires relying on some intermediate premise', it simply does not follow that 'no distinction can be drawn between relevancy and conditional relevancy'. As explained above, even if the relevance of 'logically relevant' evidence like the heated verbal exchange in a murder trial does depend on the 'intermediate premise' that heated exchanges are positively correlated with subsequent murderous intentions, it makes an enormous difference from the standpoint of the trial that this particular intermediate premise is common knowledge that can be reasonably relied upon by jurors via jury notice, without the need for the prosecution to adduce evidence in its support. And in contrast to the intermediate premise about a correlation between heated exchanges and murderous intentions, the intermediate premise that the defendant is right-handed is certainly *not* an item of common knowledge that can

be reasonably relied upon by jurors; reasonable jurors require evidence to be adduced at trial that the defendant is right-handed before they will take evidence that the killer is right-handed to inculpate the defendant. Thus, it would have no probative value and would constitute—at the very least—a waste of the court's time for the prosecutor to introduce evidence that the killer is right-handed if they are not able also to introduce evidence that the defendant is right-handed; thus, such evidence should be disallowed under Rule 403.

Allen may be right that this does not underwrite any deep epistemological disanalogy with a piece of logically relevant evidence that depends on an intermediate premise that is common knowledge, but the issue here is admissibility, not epistemology. The crucial point is that, in some situations, a piece of evidence can induce a reasonable factfinder to change her confidence in a fact of consequence only if some *other* evidence is also in the record; in other situations, a piece of evidence can induce a reasonable factfinder to change her confidence in a fact of consequence even without the need for any other evidence to be in the record. *That* is the core of the distinction between conditionally relevant evidence and logically relevant evidence, and neither Ball's nor Allen's arguments undermine either the coherence of that distinction or the need for separate procedural treatment of the two situations.

In short, on my view, Allen conflates two claims: 1) Relevance and conditional relevance are literally the *same concept*—i.e., there is no conceptual distinction to be drawn between them; and 2) Relevance and conditional relevance are sufficiently similar epistemic concepts that they deserve analogous treatment subject to (essentially) the same legal standard. Claim 2 certainly follows from Claim 1, but Claim 1 does not follow from Claim 2; very often, there are strong reasons to treat non-identical situations analogously. As will be made clear in Section 6, I entirely *agree* with Allen about Claim 2, and thus join him in objecting to the Federal Rules's imposition of different legal standards for questions of relevance and conditional relevance. But Allen's insistence on the truth of Claim 1 is an overreaction that obscures the key issues here; in particular, it obscures the fact that Ball's argument simply does not establish what both Ball and Allen claim that it establishes. Once we clear up this

confusion, we are in a much better position to justify and defend a positive proposal for amending the Federal Rules to treat conditionally relevant evidence more reasonably.

Finally, Allen's claim is mistaken that the analytical difference between unconditionally relevant evidence and conditionally relevant evidence reduces to the judge's power to find that the total evidence in the record is insufficient to warrant sending the case to the jury.

First, the argument proves too much: the same claim could be made about the distinction between relevant and *irrelevant* evidence that Allen makes about the distinction between logically relevant and conditionally relevant evidence. Allen thinks 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 the jury'.[39] But it could with equal force be argued that the requirement of *relevance* under Rules 401 and 402 similarly reduces to the judge's power to decide whether cases should go to the jury—i.e., that 'irrelevance' is simply the label applied to a case that the trial judge finds insufficient to go to the jury and 'relevance' is the label applied to a case that the judge finds sufficient to go the jury. But, presumably, Allen does not want to claim there is no analytical difference between relevance and irrelevance; nothing in Ball's or Allen's articles casts any doubt on the coherence of the distinction between relevance and irrelevance, or does anything to undermine the motivation for a relevance-based approach to evidence such as the one embraced by the Federal Rules. Of course, the distinction between relevant and irrelevant evidence is *related* to the judge's power to direct a verdict for the defendant; if there is no relevant evidence in the record, then the judge must direct a verdict against the party who bears the burden of production. Similarly, if the evidence in the record is 'merely' conditionally relevant—i.e., conditionally relevant but not relevant—then the judge must similarly direct a verdict against the party who bears the burden of production. But this observation does nothing to undermine the analytic coherence of the distinction between relevance and conditional relevance, any more than it undermines the distinction between relevance and irrelevance.

[39] Allen, *supra* note 9, at 880.

Second, the judge's power to find that particular items of evidence are merely conditionally relevant is in fact a far more expansive power than the power to direct a verdict. One obvious reason for this is that there may be lots of *other* evidence for the element or defense in question; the mere fact that some particular piece of (merely conditionally relevant) evidence is legally insufficient to support a jury finding for a party does not entail that the *total* evidence in the record is similarly insufficient to support that jury finding. Thus, the distinction between relevant and merely conditionally relevant evidence cannot, as Allen argues, reduce to the judge's power to direct a verdict. Merely conditionally relevant evidence should be excluded for all of the same reasons that irrelevant evidence should be excluded generally: admitting it would be a waste of the court's time, risk confusing the issues, etc. And merely conditionally relevant evidence—just like irrelevant evidence generally—should be excluded *regardless* of whether *independent* evidence for the same fact of consequence is in (or will be introduced into) the record, or of how strong that other evidence is. This point gets obscured by the focus on the horizontal case where proof of an element is taken to be conditionally relevant, conditional on proof of another element. In cases with that horizontal structure, it is true that a verdict should be directed for the defendant if insufficient evidence of the predicate fact has been introduced, since *the predicate fact is itself an essential element of the case or controversy*. But in 'vertical' cases like the handedness case, even if no evidence whatsoever has been introduced that the defendant is right-handed, it clearly does not follow that the judge should direct a verdict for the defendant. After all, the match in handedness between the defendant and the killer might just be one small component of the prosecution's case against the defendant, and it is entirely possible that the prosecution has introduced other evidence that is sufficient to avoid a directed verdict. Of course, none of this impacts the propriety of excluding evidence of the killer's handedness in a case where no evidence has been (or will be) introduced of the defendant's handedness. Thus, the judge's power to exclude this evidence is neither identical with nor reducible to the judge's power to direct a verdict for the defendant.

VI. BUILDING ON PREVIOUS INSIGHTS

The main upshot of the discussion so far is that conditional relevance is a perfectly coherent notion that is not undermined by the Ball/Allen 'collapse' argument. However, it obviously does not follow from this that previous critiques of Rule 104(b)—including several important points made by Ball and Allen themselves—are misguided; it is crucial to distinguish between the (perfectly coherent) general *doctrine* that some evidence is merely conditionally relevant and various specific (and potentially flawed) *implementations* of that doctrine.

In particular, there is a compelling criticism of Rule 104(b) that has been offered in different forms by several evidence scholars (including Allen[40]), and with which I am entirely in agreement—namely, that the Federal Rules go seriously wrong in imposing a higher, 'sufficient to support a finding', standard to questions of conditional relevance, while at the same time imposing a lower, 'any tendency', standard to questions of ordinary relevance.[41] The crux of the problem is that a conditionally relevant piece of evidence can have *some* tendency to make a fact of consequence more or less likely, even if the evidence in favor of the predicate proposition does not rise to the level of the 'sufficient to support a finding' standard. Under *Huddleston v. United States*, the 'sufficient to support a finding' standard here is to be understood relative to the preponderance standard; in order for conditionally relevant evidence to be admitted under Rule 104(b), the proponent must introduce evidence sufficient to support a finding *by a preponderance of the evidence* that the predicate proposition is true.[42] But, returning to (a variant of) the handedness example, suppose that the conditionally relevant evidence is evidence that the killer is left-handed, and that while the prosecutor is able to introduce *some*

[40] Allen, *supra* note 9, at 881–883.

[41] See, e.g., Friedman, *supra* note 36, at 448–451; Dale A. Nance, 'Conditional Relevance Reinterpreted', 70 B.U.L. Rev. 447, 451 (1990) ('...the trier [of fact] must make a *finding*, by the appropriate standard of proof, only as to the ultimate propositions in the case, not as to intermediate evidentiary propositions contained within inferential chains'.) (emphasis in original); David S. Schwartz, 'A Foundation Theory of Evidence', 100 Geo. L. J. 95, 118 (2011).

[42] *Huddleston v. United States*, 485 U.S. 681, 690 (1988) ('In determining whether [the proponent] has introduced sufficient evidence to meet Rule 104(b), the trial court ...simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact ...by a preponderance of the evidence'.).

evidence that the defendant is left-handed, that evidence is insufficient to support a *finding*, by a preponderance, that the defendant is indeed left-handed. Under the rationale of Rule 401, these two pieces of evidence are jointly relevant in that, taken together, they have *some* tendency to increase the probability that the defendant is the killer. But, under Rule 104(b), evidence of the killer's left-handedness cannot be introduced unless evidence *sufficient to support a finding* that the defendant is left-handed can be introduced, which (by hypothesis) it cannot be in this case. And so Rule 104(b) looks to impose an unmotivated distinction between how ordinary relevant evidence is treated and how conditionally relevant evidence is treated under the Federal Rules.

Relatedly, Schwartz worries that there are situations where the *very same evidential proffer* might be treated by a judge either as a proffer of ordinary relevant evidence under Rule 401 or as a proffer of conditionally relevant evidence under Rule 104(b), leading to arbitrariness (or worse) in the judge's selection of the governing standard.[43] The conclusion that I draw from these points is that, when making a procedural distinction between the treatment of ordinary relevant evidence and conditionally relevant evidence, it is important to apply the **Same Standard** to both types of evidence.

Another important concern that has been raised about Rule 104(b) is that the 'sufficient to support a finding' standard threatens to artificially restrict the jury's role in factfinding, since the conditionally relevant evidence might still be useful—and even dispositive—to the jury, even though the jury has not been presented with evidence sufficient to support a finding that the predicate proposition is true; as long as the jury has seen *some* predicate evidence, there are situations in which it might reasonably accord the conditionally

[43] Schwartz, *supra* note 41, at 118 ('To impose the FRE 104(b) requirement of the higher, 'evidence to support a finding' standard could theoretically be done as to any offer of evidence, making its application a random and arbitrary choice by the judge; and a consistent application of FRE 104(b) would swallow FRE 401 whole'.).

relevant evidence significant (and even dispositive) weight.[44] In some such situations, for a judge to exclude the conditionally relevant evidence would be for the judge to intrude on the jury's proper factfinding role. The lesson here is that there are good reasons to impose a **Permissive Standard** like Rule 401's 'some tendency' standard, as opposed to Rule 104(b)'s more restrictive 'sufficient to support a finding' standard, to questions of relevance.[45]

Moreover, Friedman compellingly argues that analyzing the conditional admissibility of evidence relative to a predicate *factual proposition* is misguided.[46] Instead, Friedman suggests that the conditional admissibility of a piece of evidence be analyzed relative to a predicate *body of evidence*. This strategy sidesteps both the difficulty of choosing how narrowly or broadly to define the predicate proposition, as well as the intrusion into the factfinding process addressed above; when the focus is on predicate *evidence* rather than on a predicate *proposition*, there is no need for the court either to settle on an appropriate predicate proposition or to determine whether there is sufficient evidence for that proposition. The effect of Friedman's focus on the relationship between the conditionally admissible evi-

[44] *See, e.g.,* Friedman, *supra* note 36, at 448–451. Friedman gives two examples where this might arise: 1) A situation where the proffered evidence is relevant conditional on two (or more) different predicates, and where there is evidence sufficient to support a finding that at least one of the predicates is true, but where there is not evidence sufficient to support a finding that any particular predicate is true. 2) A situation where a proponent without the burden of persuasion endeavors to introduce conditionally relevant evidence, conditional on a predicate for which there is some evidence but not evidence sufficient to support a finding by a preponderance. I will add a third: A situation in which the conditionally relevant evidence and the evidence for the predicate are not the only evidence in favor of the fact of consequence (regardless of whether the proponent has the burden of persuasion or not). In such a situation, the conditionally relevant evidence might be significantly probative as long as there is some evidence for the predicate, even if the evidence for the predicate is not sufficient to support a finding of its existence by a preponderance. And since (we are supposing) there is *other* evidence in favor of the same fact of consequence, there is no reason that a verdict must be directed against the proponent, even if he has the burden of persuasion. Indeed, to exclude conditionally relevant evidence when there is some evidence in favor of the predicate, on the grounds that the evidence for the predicate is not sufficient to support a finding of its existence by a preponderance, is to introduce an unmotivated asymmetry between conditionally relevant evidence and unconditionally relevant evidence. Even only mildly probative unconditionally relevant evidence can be admitted under Rule 403 as long as its probative value is not substantially outweighed by a danger of unfair prejudice, etc., without the need for the court to reach a threshold finding that there is evidence sufficient to support *any* particular factual proposition. To categorically exclude conditionally relevant evidence in a situation where the evidence in favor of the predicate renders the conditionally relevant evidence relevant, simply because the evidence in favor of the predicate is not sufficient to support a finding of its existence, is to introduce a completely unmotivated asymmetry between the treatment of unconditionally relevant evidence and conditionally relevant evidence.

[45] Note too that there are other provisions of the Federal Rules that similarly adopt a permissive standard for admissibility, in the interest of preserving the jury's factfinding role. *See, e.g.,* Fed. R. Evid. 403. *But see* Fed. R. Evid. 412(b)(2).

[46] Friedman, *supra* note 36, at 454–455.

dence and an evidential (rather than propositional) predicate is to reduce by one the number of 'preliminary questions' that the court must make in a determination of conditional admissibility.[47] Call this the **Predicates Are Not Propositions** constraint.

Another important insight, developed by both Friedman and Nance, is the usefulness of a notion of *conditional probative value*, as distinct from the notion of conditional relevance.[48] Conditional on background information *B* (which includes both the other evidence introduced in the case and the other 'outside' knowledge that the jury may appropriately notice), Friedman defines the probative value of *A* with respect to fact *F* by comparing $p(F|B)$ and $p(F|AB)$—i.e., the probability of the fact on the assumption of the background alone, and the probability of the fact on the assumption of the background augmented by *A*.[49] Friedman holds that '[t]o the extent that these two probabilities are different, *A* has probative value [conditional on B] with respect to [*F*]'.[50] Though Friedman is not completely explicit about this, the idea is presumably that the amount of probative value that *A* has with respect to fact *F*, conditional on background *B*, is a monotonically increasing function of the difference between $p(F|AB)$ and $p(F|B)$ (at least where one of these values is fixed).[51]

[47] On the standard approach to conditional admissibility under the FRE, the court must first make the preliminary determination that a particular piece of evidence is conditionally relevant, conditional on the truth of the predicate proposition, and then must make the separate determination that sufficient proof has been introduced to support the finding that the predicate proposition is true. By focusing instead on the relationship between the conditionally probative evidence and the predicate evidence, the issue of whether sufficient proof has been introduced to support the finding that the predicate proposition is true is removed from the analysis. Of course, the issue of whether the conditionally probative evidence has sufficient conditional probative value to be admitted is still a preliminary question to be determined by the court. But the reason that the jury's factfinding role is less restricted under Friedman's approach is that the conditionally probative evidence is admitted subject only to the introduction of the predicate evidence; no preliminary determination by the court is required is order to settle whether that predicate evidence is sufficient to support any particular finding by the jury.

[48] Friedman, *supra* note 36; Nance, *supra* note 41, at 473.

[49] I have simplified and modified the notation here to be more consistent with the rest of this paper.

[50] *Id.* at 456–457.

[51] It is controversial how to measure 'amount' of confirmation, which is closely related to degree of probative value. *See, e.g.,* Branden Fitelson, 'The Plurality of Bayesian Measures of Confirmation and the Problem of Measure Sensitivity', 66 *Philosophy of Science* Supplement S362 (1999).

Friedman variously describes the concept of conditional probative value as 'more precise',[52] 'more inclusive',[53] 'more fluid'[54], 'more flexible',[55] and (at least 'ordinarily') more 'technically correct'[56] than the concept of conditional relevance, and he claims that 'the classical concept of conditional relevance is overstated and overly rigid'.[57] But Friedman seems really to mean only that the concept of conditional probative value is more *general* and more *useful* than the concept of conditional relevance—i.e., that conditional relevance is just the limiting case of the more general concept of conditional probative value.[58]

One of the primary reasons that conditional probative value is a such a useful concept is that it is extremely helpful in thinking about how questions of conditional admissibility interact with Rule 403's balancing test, which allows the court to exclude evidence 'if its probative value is substantially outweighed by' various dangers.[59] If this balancing test is to be conducted in the context of a question of conditional admissibility, then we clearly need a notion of *conditional* probative value that can be balanced against the dangers that admitting the evidence would pose. For example, consider a situation where an item of evidence is unconditionally relevant, but where its probative value would be substantially increased, conditional on some other evidentiary background. Here, it is not that the evidence would go from having *zero* to having *some* probative value once the evidentiary background is introduced (as happens in a case of merely conditional relevance), but rather that it would go from having *some* to having *more* probative value once the evidentiary background is introduced. Though this is not a case of (mere) conditional relevance, it is still a case in which the probative value of one piece of evidence crucially depends on another, and this conditional

[52] Friedman, *supra* note 36, at 445.

[53] *Id.* at 445 n. 23.

[54] *Id.* at 455.

[55] *Id.* at 477.

[56] *Id.* at 445.

[57] *Id.* at 477.

[58] *See id.* at 445 n. 23: 'Those cases to which the conditional relevance label would apply—because the proffered evidence would be irrelevant without proof of the predicate proposition...—would also be cases of conditional probative value....'

[59] Fed. R. Evid. 403 ('The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence'.)

probative value should surely play a role in the balancing analysis under Rule 403. This gives rise to the lesson that **Conditional Probative Value Matters**.

I will return to each of these constraints in Section 8.

VII. SOME FURTHER CONSTRAINTS ON A CONDITIONAL ADMISSIBILITY PRINCIPLE

In order to think carefully about how to formulate a substitute Conditional Admissibility Principle, it will be helpful to back up and consider what else we want and need, in general, from a Conditional Admissibility Principle. Obviously, the constraints discussed in the previous section—**Same Standard**, **Permissive Standard**, **Predicates Are Not Propositions**, and **Conditional Probative Value Matters**—are to varying degrees violated by Federal Rules. But in many cases we will find that the Federal Rules do give us some or all of what we need from a Conditional Admissibility Principle; despite its flaws, Rule 104(b) surely has *some* desirable features that we would want to replicate in a substitute principle, and it is important not to throw out the baby with the bathwater.

To begin with, it is useful to distinguish two different Situations in which there is an item of conditionally relevant evidence:

1. *A* is relevant to a fact of consequence. *B* is not relevant to a fact of consequence, but *B* is conditionally relevant to a fact of consequence, conditional on *A*.
2. Neither *A* nor *B* is relevant to any fact of consequence. But, each is conditionally relevant, conditional on the other—i.e., *A* is conditionally relevant to a fact of consequence, conditional on *B*, and moreover *B* is conditionally relevant to a fact of consequence, conditional on *A*.

Notice that there is no third situation is which neither *A* nor *B* is relevant, and yet in which conditional relevance 'goes only in one direction'—say, where *A* is conditionally relevant, conditional on *B*, and yet *B* is not conditionally relevant, conditional on *A*. For suppose that neither *A* nor *B* is relevant; by definition, neither *A* nor *B* alone does anything to make any fact of consequence more (or less) probable. But suppose (without loss of generality) that *A* is conditionally relevant, conditional on *B*; then, *A* and *B* *together* are relevant to some fact of consequence. But, since *A* and *B* together are rele-

vant, and yet neither *A* nor *B* alone is relevant, it follows that *B* is conditionally relevant, conditional on *A*. For example, the handedness case turned on the observation that while evidence of the killer's right-handedness is not alone relevant, it is conditionally relevant, conditional on the defendant being right-handed. There, it is also the case that evidence of the defendant's right-handedness is not alone relevant; absent any reason to think that the killer is right-handed, evidence that the defendant is right-handed is not relevant to any fact of consequence. But, for exactly the same reason that evidence of the killer's right-handedness is conditionally relevant, conditional on the defendant being right-handed, it is also the case that evidence of the defendant's right-handedness is conditionally relevant, conditional on the killer being right-handed.

Now imagine, for a moment, the Federal Rules without Rule 104(b) or any other Conditional Admissibility Principle.[60] And suppose that a proponent wants to admit both *A* and *B* into evidence on the grounds that the two pieces of evidence, together, are relevant to a fact of consequence.[61]

In Situation 1, since *B* is not relevant to any fact of consequence, Rules 401 and 402 prevent *B* from being introduced first; and since we are imagining there is no Rule 104(b) that would allow *B* to be introduced on the grounds that it is *conditionally* relevant, there is no way within the rules for the proponent to introduce *B* first. One solution here would be for the proponent to simply introduce *A* first; since *A* is relevant to a fact of consequence, Rules 401 and 402 would present no bar to the introduction of *A*. Then, once *A* is in evidence, *B* becomes relevant, and so *B* can then be introduced into evidence after *A*. Thus, there is a way for both *A* and *B* to be admitted into evidence in Situation 1, even without Rule 104(b).

[60] Similar remarks will apply to any code of evidence which takes relevance to be a necessary condition for admissibility.

[61] A preliminary issue that would arise without Rule 104(b) is whether the definition of 'relevance' in Rule 401 takes the evidence already in the record into consideration. In other words, supposing that *A* has already been admitted into evidence, the question would arise as to whether *B*'s 'tendency to make a fact [of consequence] more or less probable than it would be without' *B* is evaluated 'logically' or relative to the total body of admitted evidence, including *A*. As I indicated in Section 1, I have been using the term 'relevance' in the latter sense; on my usage, *B* counts as 'relevant' evidence if it tends to make a fact of consequence more or less probable, on the assumption of all of the other evidence that is already in the record. Thus, on my usage, Rule 104(b) is not required in Situation 1 in order to permit the introduction of *B* once *A* has already been introduced, since *A*'s introduction renders *B* relevant under Rule 401 and hence potentially admissible. Still, Rule 104(b) resolves any potential ambiguity here; with Rule 104(b), it is obvious that *logical* relevance is not required in order to satisfy Rule 401's definition of 'relevance'.

However, there are two problems with this solution. First, the procedure outlined above forces *A* to be introduced into evidence before *B*, since *B* is relevant only once *A* has already been introduced. But forcing this order of presentation of evidence conflicts with the Court's broad discretion under Rule 611 to 'exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment'.[62][63] This discretion is important for a variety of reasons, including the need to allow for parties to develop a 'narrative' that helps the jurors to understand the party's theory of the case and total body of support for that theory, thereby implicating objectives (1) and (2) of Rule 611(a). Developing such a narrative often requires presenting evidence in an order that corresponds to the order of the narrative, and which may not correspond to the order imposed by the solution under consideration. Call this the **Narrative Problem**. Second, even though we are assuming that *A* is relevant, that does not settle whether *A*'s balance of probative value and prejudicialness is sufficient to allow it to be admitted under Rule 403. *A* might have low probative value by itself, but would also contribute very highly to *B*'s probative value, were *B* to be later introduced. In such a case, a moderate degree of prejudicialness might interfere with *A*'s introduction under Rule 403, in which case *A* cannot be introduced. And since *B* is only conditionally relevant, conditional on *A*, *B* cannot be introduced either. Call this the **Prejudicial Predicate Problem**.

Now consider Situation 2. Here, there is no way to introduce either *A* or *B* into evidence, since neither is alone relevant and hence neither can satisfy the requirement of Rule 402. In Situation 2, without Rule 104(b), it is not merely that the *order* of presentation must be one way rather than the other; the problem is that it is *impossible* to introduce *either* piece of evidence, in *either* order. The problem here also does not depend on whether and to what extent either *A* or *B* is prejudicial; even if neither *A* nor *B* is in the slightest bit prejudicial, there is *still* no way for either *A* or *B* to be introduced,

[62] Fed. R. Evid. 611(a). *See also Huddleston v. United States*, 485 U.S. 681, 690 (1988) ('The trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial, and we see nothing in the Rules of Evidence that would change this practice'.).

[63] Thanks to Andy Hessick for helpful discussion here.

since neither *A* nor *B* is, by itself, relevant. Since Rule 402 prevents the court from admitting either *A* or *B* as an absolute matter, the Court never proceeds to do the balancing analysis prescribed by Rule 403. Call this the **Chicken-and-Egg Problem**.

Rule 104(b) solves the Chicken-and-Egg Problem in Situation 2 by allowing one of the conditionally relevant pieces of evidence to be introduced, on the condition that the other is also introduced; thus, even though neither piece of evidence is relevant, Rule 401 does not make it impossible for the two pieces of evidence to be introduced, though it does impose the additional requirement that the predicate evidence is sufficient to support a finding that a predicate proposition is true. And, of course, once the Chicken-and-Egg problem is solved, Situation 2 also (just like Situation 1) confronts the Narrative Problem, since the question then arises of the order in which the two conditionally relevant pieces of evidence can be introduced. Rule 104(b) solves the Narrative Problem—both in Situation 1 and in Situation 2—by allowing either *A* or *B* to be introduced in either order, conditional on the other one also being introduced and being sufficient to support a finding that a predicate proposition is true.

Rule 104(b) does not squarely address the Prejudicial Predicate Problem, since it contemplates only conditional *relevance*, and not either probative value or prejudice, which is left to the balancing procedure of Rule 403. Under Rule 104(b), the fact that *B* is merely conditionally relevant, conditional on *A*, presents no barrier to *B*'s introduction *that arises from the relevance requirement in Rule 402*. But, since Rule 403 presumably still applies to conditionally relevant evidence and to predicate evidence, the question then arises of how—once it is settled that *B* is conditionally relevant, conditional on *A*—the court is to apply Rule 403's balancing procedure. Rule 104(b) does not provide any guidance here, since it addresses only conditional *relevance*. And Rule 403's provision that that the 'court may exclude relevant evidence if its probative value is substantially outweighed by a danger of' unfair prejudice, wasting time, etc., does not specifically address how the balancing procedure should be applied when the 'relevant evidence' under consideration is conditionally relevant rather than unconditionally relevant.

What we need, then, is a Conditional Admissibility Principle that: (a) obeys **Same Standard**, **Permissive Standard**, **Predicates Are Not**

Propositions, and **Conditional Probative Value Matters**; and (b) solves the **Chicken and Egg Problem**, the **Narrative Problem**, and the **Prejudicial Predicate Problem**, in both Situation 1 and Situation 2. I shall turn now to the task of formulating such a principle.

VIII. A TWO-PART TEST FOR CONDITIONAL ADMISSIBILITY

In formulating a Conditional Admissibility Principle that satisfies the constraints laid out in Sections 6 and 7, let us begin by thinking about how the Rule 403 balancing procedure should be conducted in the conditional context.

Suppose that a proponent wants to admit *A*, but that *A*'s probative value is to some extent conditional on *B*. Should each of *A* and *B* have to survive Rule 403's balancing procedure independently? This would not make any sense, in either Situation 1 or Situation 2. In Situation 2, neither *A* nor *B* has *any* probative value considered independently of the other, so it is hard to see how either one could survive independent Rule 403 analysis, regardless of its impact on the probative value of the other. Moreover, the Prejudicial Predicate Problem would still arise in Situation 1, since *A* might have low probative value by itself, but would also contribute very highly to *B*'s probative value, were *B* to be later introduced; in such a situation, a moderate danger of prejudicialness (or time-wasting, etc.) associated with *A* might prevent *A* from surviving independent 403 analysis. Thus, if the Rule 403 determination is made on the basis of each item of evidence separately, then *A* might be excluded under Rule 403, *regardless* of *A*'s impact on the relevance or probative value of *B*. This would be a perverse result, since *the whole point* of a Conditional Admissibility Principle is to allow (at least in some cases) an item of evidence to be admitted precisely because of its impact on the probative value of another piece of evidence.

Should the 403 analysis instead be performed only on *B*—i.e., only on the conditionally relevant evidence? This would also be perverse, as it would effectively exempt the predicate evidence, *A*, from any analysis under 403 for its prejudicial effect (or tendency to waste time, etc.). *A* might render *B* both relevant and substantially probative, but if *A* is also extremely prejudicial, then it is obvious that the rationale of Rule 403 requires an analysis of whether *A*'s pro-

bative contributions are substantially outweighed by the danger of unfair prejudice that the admission of *A* introduces.

Moreover, just as the *probative value* of *A* and of *B* cannot always be analyzed in isolation from each other, for similar reasons the *danger of unfair prejudice* resulting from *A* and from *B* cannot be analyzed in isolation. Just as *A* and *B* might be relevant when considered together but irrelevant (or insufficiently probative to warrant admission) when considered separately, so too can *A* and *B* be non-prejudicial when considered separately but prejudicial when considered together. For example, evidence that the defendant has ties to a particular organization, all by itself, might not be prejudicial. Similarly, evidence that that organization has a racist ideology, all by itself, might not be prejudicial. But the two pieces of evidence together, suggesting that the defendant has ties to an organization with a racist ideology, might present a significant danger of unfair prejudice that should obviously be weighed against the probative value of these pieces of evidence in a proper 403 analysis.

In addition, in the conditional context, other dangers on the negative side of the 403 balancing test—confusing the issues, misleading the jury, undue delay, and needlessly presenting cumulative evidence—may also require conditional analysis. For example, whether a particular piece of evidence is cumulative or not can depend on what other evidence has been presented; it is possible that neither *A* nor *B* is needlessly cumulative when analyzed in isolation, and yet that it would be needlessly cumulative to present both *A* and *B*. Similarly, it is possible that neither *A* nor *B* would present a significant danger of confusing the issues or of misleading the jury by itself, and yet that the two of them together would present such a danger. In such cases, the enumerated dangers presented by the introduction of these two pieces of evidence should be considered in the 403 analysis, just as the impact that they have on each other's probative value should be considered.

These considerations suggest that the only reasonable way for the court to perform the 403 analysis is to somehow take account of both the *individual* probative and prejudicial impacts of *A* and *B*, as well as the *joint* probative and prejudicial impact of *A* and *B* when considered together. One straightforward way of doing this would be to consider both *A* and *B* *together*, as an evidential 'package', and

to determine whether *A* and *B* survive the 403 analysis *as a single evidential unit*. On this approach, the court would consider the admission of *A* and *B* together, and determine whether the net probative value of *A* and *B* together—taking into account both *A*'s individual probative value (which it has in Situation 1 but not in Situation 2) and the probative value that *B* has on the assumption that *A* is already in evidence—is substantially outweighed by the net danger of unfair prejudice, etc., arising from *A* and *B* taken together. In the situation considered above, where *A* has low probative value by itself but would also contribute very highly to *B*'s probative value, the package of *A* and *B* would be admitted as long as the net probative value of *A* and *B* considered together was not substantially outweighed by the net danger of unfair prejudice, etc., arising from *A* and *B*. In such a situation, if *A* carries only a moderate danger of unfair prejudice, and there is no other danger of unfair prejudice that arises from *A* and *B*, then the package of *A* and *B* could be admitted, notwithstanding the fact that *A* would not have survived 403 analysis by itself.

However, it would clearly be dangerous to apply such a 'Package Principle' to 403 analysis in situations where two pieces of evidence are unrelated to each other. For example, consider a situation in which *A* and *B* are each unconditionally relevant and are totally unrelated to each other, and further suppose that while *A* easily satisfies 403 analysis by itself, *B* just barely fails 403 analysis by itself. In this situation, it would be clearly appropriate for the court to admit *A* and to refuse to admit *B*. However, if our Conditional Admissibility Principle were to treat *A* and *B* as a single evidential package, that package would pass a 403 analysis; *A*'s easy passage would more than make up for *B*'s narrow failure, leading to a package in which net probative value is not substantially outweighed by net danger of unfair prejudice. Thus, if the court were to treat *A* and *B* as a single package, the result would be for *B* to be effectively 'smuggled' into evidence on *A*'s evidentiary coattails.

A version of this same problem applies even in situations where *B* is merely conditionally relevant, conditional on *A*. Suppose that *A* has high probative value when considered alone, and produces no danger of unfair prejudice. *B* is irrelevant by itself but is conditionally relevant, conditional on *A*; however, assuming *A*, *B* contributes only

a minuscule amount of probative value and creates a significant danger of unfair prejudice. If *A* and *B* were to be considered as a package, they would again pass 403 analysis together; *A*'s individual high probative value (even ignoring *B*'s minuscule conditional contribution) is alone sufficient to overcome the significant danger of unfair prejudice arising from *B*. However, it is clear that *B* should not be admitted into evidence here; it contributes only a very small amount of probative value, and creates a significant danger of unfair prejudice. Again, the correct result, contrary to the one that the Package Principle yields, is for the court to admit *A* and to refuse to admit *B*.

These considerations motivate a Conditional Admissibility Principle that requires each piece of admitted evidence to 'earn its keep' separately, while also allowing the impact of each piece of evidence on the other (with regard to both probative value as well as prejudice and the other 403 dangers) to factor into the analysis. To that end, I propose that the court should apply a **Two-Part Test** in analyzing evidence proposed under the Conditional Admissibility Principle; in order for evidence to be so admitted, *both* parts of the test need to be satisfied. The two parts of the Two-Part Test are constituted by symmetrical determinations of whether each piece of proposed evidence would survive ordinary (i.e., non-conditional) admissibility analysis, *on the assumption that the other item of evidence has already been admitted*. Thus, when *A* and *B* are being proposed for admission under the Conditional Admissibility Principle, the court should first consider whether, on the assumption that *B* has already been admitted, *A* is relevant and passes 403 analysis; and should next consider whether, on the assumption that *A* has already been admitted, *B* is relevant and passes 403 analysis. If *A* and *B* pass *both* of these prongs of the Two-Part Test, the court should admit both *A* and *B* (in either order). However, if *either* prong of the test fails—i.e., if *A* fails to be relevant or to survive 403 analysis on the assumption that *B* has been admitted, *or* if *B* fails to be relevant or survive 403 analysis on the assumption that *A* has been admitted—then the court should refuse to admit *A* and *B* under the Conditional Admissibility Principle.

Note that the Two-Part Test does *not* say that, if *A* is relevant and survives 403 analysis on the assumption that *B* has already been

admitted, then *A* should be admitted. Nor does it say that, if *B* is relevant and survives 403 analysis on the assumption that *A* has already been admitted, then *B* should be admitted. Rather, the Two-Part Test is a test that *A* and *B* either pass or fail *together*; they pass exactly when each piece of evidence is both relevant and survives 403 analysis, conditional on the other.

Of course, the standard route to admissibility—through an unconditional application of Rules 402 and 403 that doesn't take conditional relevance or conditional probative value into account—is still available, and should be seen as entirely independent of the Two-Part Test. Thus, on the model I am suggesting (as on the model adopted in Federal Rules), there are two distinct routes through which a proponent may introduce evidence. First, evidence that is unconditionally relevant and passes the 403 balancing test can be introduced alone, as usual, through Unconditional Route. Second, if a proponent opts to proffer two pieces of evidence for joint admission through the Conditional Route, the proponent must show that the two pieces of evidence can together pass the Two-Part Test. If (either part of) the Two-Part test fails, the proponent may try again under the Two-Part Test with a different pair, including a pair that shares an element with the first pair. Or, the proponent may instead proffer one of the pieces of evidence for admission through the Unconditional Route, under an unconditional application of Rules 402 and 403.

In the situation considered above, where *A* has low probative value and moderate prejudice by itself, but where *A* would also contribute very highly to *B*'s probative value (and no other prejudice would result from the introduction of *A* and *B*), the Two-Part Test delivers the correct result that *A* and *B* can be admitted together. Since *B* is highly probative on the assumption of *A*, and since *B* creates no danger of unfair prejudice either alone or in concert with *A*, it follows that *B* passes its prong of the Two-Part Test. Similarly, on the assumption of *B*, *A* passes its prong of the Two-Part Test. *B* is irrelevant by itself but highly probative once *A* is also admitted into evidence; thus, once *B* has been introduced, the introduction of *A* adds a high degree of probative value. And since *A* is only moderately prejudicial, *A* passes the 403 analysis too, conditional on B; its

high probative contribution is not substantially outweighed by its moderate danger of unfair prejudice.

Similarly, the Two-Part Test delivers the correct result in the situation where *A* has high probative value and no prejudicial danger alone, and where *B* adds only a minuscule amount of probative value and a significant danger of unfair prejudice on the assumption of *A*. Recall that the Package Principle wrongly held in this case that *A* and *B* should both be admitted, since the package of *A* and *B* together—high probative value and moderate danger of prejudice—survive a 403 analysis. By contrast, the Two-Part Test does not allow *A* and *B* to be introduced together. *A* passes its prong of the test since, on the assumption of *B*, *A* contributes a lot of probative value and no prejudice. But *B* fails its prong of the test, since on the assumption of *A*, *B* contributes only a tiny amount of probative value and a significant danger of unfair prejudice.

Again, the fact that *A* and *B* fail the Two-Part Test means only that *A* and *B* cannot be admitted together though the specialized Conditional Admissibility Principle, not that each is categorically inadmissible; if either piece of evidence is unconditionally relevant and can survive 403 analysis, then it can be admitted through the standard unconditional route. In the example just considered, *A* could be admitted alone in this manner; even without assuming *B*, *A* has high probative value and no prejudicial danger, so *A* can be admitted through the standard 402/403 route, without reference to any conditional notions. What the Two-Part Test properly prevents, and the Package Principle improperly allows, is for *B* to be admitted into evidence by riding on *A*'s evidential coattails, without making an evidential contribution that is (in comparison with its prejudicial danger) sufficient for admission under the rationale for Rule 403.

When *A* and *B* are totally unrelated to each other, the Two-Part Test effectively reduces to the standard unconditional 402/403 analysis. When *A* and *B* are totally unrelated, *A* will pass the first prong of the test precisely when *A* would have been admitted individually under a 402/403 analysis; similarly, *B* will pass the second prong precisely when *B* would have been admitted separately. So, while it is technically possible for two unrelated pieces of evidence to pass the Two-Part Test together, they will do so in exactly those cases where *A* and *B* are separately admissible through a

standard 402/403 analysis. Thus, when *A* and *B* are totally unrelated, the Two-Part Test is satisfiable but completely redundant; it does no harm, and allows only those pieces of evidence to be admitted that would have been admitted anyway under Rules 402 and 403.

In addition, the Two-Part Test respects all of the constraints identified in Section 6, and solves all of the problems identified in Section 7.

The Two-Part Test applies the **Same Standard** to questions of conditional relevance as Rules 401-403 apply to questions of unconditional relevance, which straightforwardly follows from the Two-Part Test's structure of analyzing whether each piece of proposed evidence would survive ordinary (i.e., non-conditional) admissibility analysis, on the assumption that the other item of evidence has already been admitted. Relatedly, the Two-Part Test applies the same **Permissive Standard** in the conditional context as Rules 401–403 apply in the unconditional context. Just as Rule 401 says that evidence is relevant if it has *any tendency* to make a fact of consequence more or less probable, so too does the Two-Part Test entail that evidence is conditionally relevant (i.e., has some positive conditional probative value) if it has *any tendency* to make a fact of consequence more or less likely, conditional on the admission of the predicate evidence. Thus, unlike Rule 104(b), the Two-Part Test makes no appeal to a stricter standard like the 'sufficient to support a finding' standard, and thus raises none of the problems (including concerns about the jury's proper factfinding role) associated with that stricter standard.

Moreover, the Two-Part Test clearly respects **Conditional Probative Value Matters**, since it explicitly weighs *conditional* probative value against the standard dangers under Rule 403; for the same reason, the Two-Part Test respects the observation these standard dangers have conditional aspects as well. In addition, the Two-Part Test respects the constraint that **Predicates Are Not Propositions**, since it analyzes two pieces of *evidence* for joint admissibility; as a result, there is no need for the proponent or the court to identify any particular predicate *proposition* or to evaluate the strength of the evidence for that proposition. Indeed, on the Two-Part Test, there is not even a meaningful distinction between the evidence with conditional probative value and the predicate evidence; instead of arti-

ficially dividing evidence into 'conferring' and 'receiving' roles with respect to conditional probative value, it instead analyzes conditional probative value with a symmetric procedure that draws no categorical distinction between the evidence which 'confers' probative value and the evidence which 'receives' it. The handedness example from Section 5 is an illustrative example here; just as the evidence that the killer is right-handed has conditional probative value, conditional on evidence that the defendant is right-handed, so too does the evidence that the defendant is right-handed have conditional probative value, conditional on evidence that the killer is right-handed. This 'symmetric' approach to conditional admissibility is impossible if we conceive of the predicate as a proposition, as Rule 104(b) does, since it forces a categorical distinction between the *evidence* that has conditional probative value and the *proposition* relative to which it has that conditional probative value.

The **Chicken-and-Egg Problem** is addressed because the Two-Part Test provides a mechanism for both pieces of evidence to be introduced, notwithstanding the fact that neither evidence could survive a 403 analysis all by itself; under the Two-Part Test, *A* and *B* can both be admitted if each survives a 403 analysis on the assumption of the other. The Two-Part Test also solves the **Narrative Problem**. Indeed, a solution to the Narrative Problem straightforwardly falls out of the Two-Part Test; since the Test treats the two pieces of evidence perfectly symmetrically, it would be manifestly arbitrary for the court to insist that one member of the evidential pair be introduced before the other. And the Two-Part Test solves the **Prejudicial Predicate Problem** by allowing the danger of unfair prejudice associated with a piece of evidence to be balanced against its probative value *conditional on the other member of the evidential pair*; thus, when one member of the pair contributes sufficient probative value to the other, that impact is taken into appropriate consideration in the twin 403 analyses. Moreover, the Two-Part Test is not artificially restricted in its scope or application to cases of mere conditional relevance; instead, it provides a far more *general* mechanism for evidential pairs to be admitted into evidence when they each make an appropriate conditional contribution to the body of admitted evidence. And yet, it is still perfectly applicable, without modification, to cases of mere conditional relevance.

In addition, though I have been focusing on the case of conditionally admissible *pairs*, the Two-Part Test can easily be generalized to a situation in which there are more than two members of a set. Suppose, for example, that a proponent wants to admit three pieces of evidence, and that the relevance and/or probative value of each depends on the other two. Of course, the proponent could try to admit each through the standard unconditional 402/403 procedure, but examples can be constructed where this is impossible, despite the fact that the package of the three pieces of evidence clearly has probative value that is not substantially outweighed by danger of unfair prejudice, and where each of the three pieces of evidence makes an essential conditional contribution to the probative value to the package. In such cases, the Two-Part Test can be generalized to an *n*-Part Test, for sets of *n* pieces of evidence. The strategy (and motivation) for this generalization would be precisely the same as it is for the Two-Part Test: perform *n* separate tests to make sure that each piece of evidence passes a 403 analysis, conditional on the rest of the evidence being admitted. Thus, for an evidential triple consisting of *A*, *B*, and *C*, the court would perform a Three-Part Test to verify: that *A* passes a 403 analysis on the assumption of *B* and *C*; that *B* passes a 403 analysis on the assumption of *A* and *C*; and that *C* passes a 403 analysis on the assumption of *A* and *B*. If necessary, generalization to larger sets is straightforward.

Finally, though my focus here has been on conditional proffers that fall under Rule 104(b), it has been often noted that many of the same issues of conditional relevance (in addition to the 'sufficient to support a finding' standard) also arise in the context of a lay witness's personal knowledge of the subject of their testimony under Rule 602, as well as in the context of authentication of exhibits under Rule 901. Indeed, it is generally accepted that Rule 901 is a 'special case' of the concept of conditional relevance appealed to in Rule 104(b).[64] Though a full treatment of Rules 602 and 901 is outside the scope of

[64] *See, e.g.,* Schwartz, *supra* note 41, at 108; David A. Sklansky, *Evidence: Cases, Commentary, and Problems,* 620 (2003) ('[A]uthentication is best understood as a specific application of a more [general] principle of evidence law: conditional relevance'.); 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* §104.30[3] (2021) ('[Rule 901(a)'s] requirement of authentication or identification is the paradigm of a preliminary question under Rule 104(b)'.).

his paper, I am optimistic that the core of the Two-Part Test can be usefully applied in these contexts as well.[65]

IX. A THIRD PRONG?

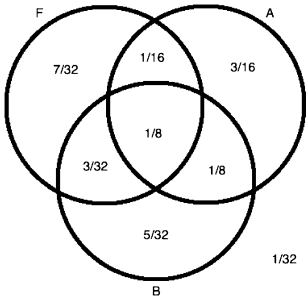
In evaluating evidential pairs for admission via our Conditional Admissibility Principle, should we also analyze the *pair itself* under Rule 403? I argued above that the pair's passing a 403 analysis as a single evidential unit should not be *sufficient* for the admissibility of the pair (since one or the other member of the pair might not 'earn its keep' individually), but that does not settle the question of whether the pair's passing 403 as a single unit should be *necessary* for the admissibility of the pair.

There are in fact situations in which *A* is (positively) conditionally relevant to *F*, conditional on *B*; and in which *B* is (positively) conditionally relevant to *F*, conditional on *A*; and yet where the package of *A* and *B* together is irrelevant to *F*. Assuming that neither *A* nor *B* presents any danger of unfair prejudice, etc., either individually or conditional on the other, the evidential pair would pass the Two-Part test; since each has positive conditional probative value, conditional on the other, and there is no danger of unfair prejudice to worry about, each piece of evidence would pass a 403 analysis conditional on the other. However, since the package of *A* and *B* is jointly irrelevant to *F*, there is a strong argument that the package of *A* and *B* should not admitted into evidence through our Conditional Admissibility Principle; just as Rule 402 prevents unconditionally irrelevant evidence from being admitted, it would be natural for our Conditional Admissibility Principle to prevent jointly irrelevant packages of evidence from being admitted too. For an example of such a situation, consider the following case:[66]

[65] For example, many of the same issues as addressed above involving imposition on the jury's factfinding role arise for Rule 901 as for Rule 104(b). In particular, even if evidence *sufficient to support a finding* that an exhibit is genuine has not been introduced, a reasonable jury still may accord the exhibit nontrivial weight, as long as *some* evidence of its genuineness has been introduced. If the Two-Part Test were generalized to the context of authentication, the question of admissibility would come to the questions (a) whether the exhibit is relevant and survives 403 analysis, on the assumption of the authentication evidence; and (b) whether the authentication evidence is relevant and survives 403 analysis, on the assumption of the exhibit. This approach would enjoy many of the advantages of the Two-Part Test in the context of conditional proffers; for example, it would help to address a version of the Prejudicial Predicate Problem that arises when the authentication evidence itself presents a danger of unfair prejudice.

[66] Thanks to Branden Fitelson for assistance in using the Mathematica PrSAT package to formulate this case precisely.

Figure 1:



$$p(ABF) = 1/8$$
$$p(AB\overline{F}) = 1/8$$
$$p(A\overline{B}F) = 1/16$$
$$p(A\overline{B}\overline{F}) = 3/16$$
$$p(\overline{A}BF) = 3/32$$
$$p(\overline{A}B\overline{F}) = 5/32$$
$$p(\overline{A}\overline{B}F) = 7/32$$
$$p(\overline{A}\overline{B}\overline{F}) = 1/32$$
$$p(F) = 1/2$$
$$p(F|A) = 3/8$$
$$p(F|B) = 7/16$$
$$p(F|AB) = 1/2$$

Here, again assuming that neither A nor B presents any danger of unfair prejudice, A passes the the first prong of the Two-Part Test with respect to fact of consequence F: $p(F|B) = 7/16$ and $p(F|AB) = 1/2$, so A has positive conditional probative value, conditional on B. Similarly, B passes the second prong: $p(F|A) = 3/8$ and $p(F|AB) = 1/2$, so B has positive conditional probative value, conditional on A. And yet the pair $\{A,B\}$ does *not* have any probative value: $p(F) = p(F|AB) = 1/2$. And so it is not at all clear that the pair $\{A,B\}$ should be admitted by our Conditional Admissibility Principle, notwithstanding the fact that both prongs of the Two-Part Test are satisfied.

As a somewhat more concrete example, consider a county which has a proportion of registered vehicles that are red which is lower than the state average, and has a proportion of registered vehicles that are two-door which is lower than the state average, and yet has a state-average proportion of registered vehicles that are both red and two-door. Supposing that whether a particular car was registered in that county (*F*) is a fact of consequence in a proceeding, we have a situation where *A* (the car's being red) is evidence in favor of *F*, conditional on *B* (the car's being two-door); and also where *B* is evidence in favor of *F*, conditional on *A*; and yet where *A* and *B* together (the car's being both red and two-door) are irrelevant to *F*.

There are two reasons why examples like this might be thought to be of limited analytic importance.

First, the situation is fairly unusual: each of *A* and *B* is separately evidence against *F*, but together *A* and *B* are irrelevant to *F*. Thus, this situation is not very likely to arise in any particular case, and our intuitive judgments about the appropriate resolution in atypical situations where it does arise are not always clear or reliable. If such a situation were to arise, it would be natural to defer quite substantially to the trial court's discretion on the admissibility of *A* and *B*, with limited and deferential appellate review for abuse of discretion. Adding a third prong to our Conditional Admissibility Principle requiring that *A* and *B* be jointly relevant thus may threaten to intrude on the trial court's appropriate role under Rule 611 to 'exercise reasonable control over ...[the presentation of] evidence....'

A natural response here is that, just as the requirement in the unconditional context that evidence be relevant to a fact of consequence is a general and well-motivated canon of evidence law that is not typically thought to intrude on the trial court's role in controlling the presentation of evidence, it is similarly well-motivated and appropriate to impose the analogous requirement in the conditional context that evidential *pairs* be jointly relevant. After all, if the net evidential effect of admitting *A* and *B* into evidence would be that no fact of consequence is thereby made more or less probable, then it can seem mysterious why *A* and *B* would be useful for the jury to consider together, notwithstanding the fact that each *would have been* useful for the jury to consider, had it *already* considered the other.

Moreover, it is important to understand that the question for the court raised by the third prong is simply whether, in its judgment, a reasonable jury could find that *A* and *B* are jointly relevant to a fact of consequence.[67] If the court determines that a reasonable jury could so find, then the third prong is satisfied and so poses no impediment to the court's admission of *A* and *B* through the Conditional Admissibility Principle. And if the court determines that *no* reasonable jury could so find, then it is hard to see how the court's role is controlling the presentation of evidence is any meaningful way diminished by the third prong; the result in this situation is simply that an evidential pair *that the court has determined no reasonable jury could find to be relevant to a fact of consequence* is not admitted via the Conditional Admissibility Principle. Given the court's broad discretion to rule on matters of relevance and admissibility, the real concern in this context is not imposition by the Conditional Admissibility Principle into the court's discretion under Rule 611, but rather *the court's* potential imposition into the jury's factfinding role; indeed, concern about the latter is central to one of the concerns raised above about Rule 104(b).[68] But, unlike Rule 104(b), the prong under consideration here (and, indeed, the entire Conditional Admissibility Principle that I am defending) does not inappropriately impose into the jury's factfinding role by requiring 'evidence sufficient to support a finding' of a predicate proposition before conditionally relevant evidence is admitted. Indeed, the issues raised here are no different from the analogous issues in the unconditional context; there are strong reasons in the unconditional context to bar the admission of evidence when the court determines that no reasonable jury could find that evidence to be relevant to any fact of consequence, and there are similarly strong reasons in the conditional context to bar the admission of an evidential pair when

[67] *See, e.g., Ballou v. Henri Studios, Inc.*, 656 F.2d 1147 (5th Cir. 1981).

[68] This concern was also a central focus of the 1973 Advisory Commitee, in its Note to 104(b): 'If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration'.

the court determines that no reasonable jury could find that pair to be jointly relevant to any fact of consequence.

To be sure, the relevance analysis can be more *complicated* in the conditional context than it is in the unconditional context. In the automobile example considered above, the question for the court under the third prong is whether any reasonable jury could find the evidence that the vehicle in question was both red and two-door to be relevant to the issue of whether the vehicle was registered in the county. And it may be that there are more ways for reasonable juries to disagree about that issue than there are in a typical unconditional case—say, if the court determines that a reasonable jury might credit an eyewitness's color vision more or less highly than it credits their ability to discern numbers of doors. But again, there is nothing fundamentally different at stake in the conditional case than there is in the unconditional case; in both cases, admissibility of evidence requires a threshold determination by the court that a reasonable jury could find that evidence to be relevant to a fact of consequence.

Second, it might be thought that the third prong is unlikely to matter, even in situations where the unusual evidential situation exemplified by the vehicle case does arise. In the situation under consideration, *A* and *B* are, separately, evidence against *F*. Since we are supposing that there is no danger of prejudice here, the proponent of *A* and *B* could simply introduce *A* and *B* separately—without any need to invoke the Conditional Admissibility Principle—if its goal were to persuade the factfinder that *F* is false. So we only really need to be concerned about the situation where the proponent's goal is to persuade the factfinder that *F* is true. In such a case, the thought goes, the party is unlikely to propose two pieces of evidence that are, separately, evidence *against F*, all in order to put an evidential package before the factfinder that is actually irrelevant.

However, again, it is not clear why this worry is any more forceful here than it is in the unconditional context. In the unconditional context, the requirement of relevance under Rule 402 might be thought to be unlikely to matter: after all, why would a party whose goal is to demonstrate either the truth or falsity of *F* propose irrelevant evidence which, by definition, has no tendency to make a fact of consequence any more or less likely than it would be without the evidence? The answer, of course, is that parties might try to

introduce evidence that the factfinder might use *unreasonably*, and we impose the requirement of relevance in the unconditional context so that the court can serve as an evidentiary gatekeeper by screening out irrelevant evidence. And there is no clear reason why there is any less danger of the factfinder making unreasonable use of the proffered evidence in the conditional context than there is in the unconditional context. Indeed, there is arguably *more* danger of unreasonable use of *A* and *B* in the conditional situation under consideration, due simply to the evidential complexity of the situation; *A really is* evidence for *F* on the supposition of *B*, and vice versa, and it is very easy to imagine a factfinder confusing those correct observations with the incorrect thought that *A* and *B* are, jointly, evidence for *F*.

Of course, situations implicating this third prong are indeed rare, and so it will only rarely matter whether we incorporate the third prong into our Conditional Admissibility Principle. In particular, if either *A* or *B* is unconditionally irrelevant to *F*, then it follows from *A*'s positive conditional relevance to *F*, conditional on *B*, and from *B*'s positive conditional relevance to *F*, conditional on *A*, that the package of *A* and *B* is jointly positively relevant to *F*.[69] But, notwithstanding the infrequency with which it may be actually invoked, I conclude that there is adequate reason to include the third prong in our Conditional Admissibility Principle. In order for *A* and *B* to be admitted via the Conditional Admissibility Principle, *A* and *B* should be required to be jointly relevant to a fact of consequence, and to survive analysis under Rule 403 as a single evidential package. Importantly, the addition of this third prong does nothing to undermine the advantages of the Two-Part Test that I identified in Section 8. The test still reduces to 'standard' 403 analysis in situations where *A* and *B* are unrelated to each other; its solution to the Chicken-and-Egg Problem, the Narrative Problem, and the Prejudicial Predicate Problem are identical; the third prong does not interfere with the test's symmetric treatment of *A* and *B*, since the

[69] Proof: Suppose without loss of generality that *A* is unconditionally irrelevant to *F*. Since *B* is positively conditionally relevant to *F*, conditional on *A*, we know that, in the presence of *A*, *B* is positively relevant to *F*. So, once the unconditionally irrelevant *A* has been introduced, introducing *B* as well will increase the probability of *F*. Thus, *A* and *B* are positively relevant as a package, Q.E.D. This result limits the application of the third prong, since the the pair of *A* and *B* will be jointly relevant whenever the first two prongs are satisfied and at least one of *A* or *B* is unconditionally irrelevant to *F*. That said, the relevance of the package of *A* and *B* does not settle the question of whether *A* and *B* pass a 403 analysis as a single unit, since *A* and *B* might be jointly prejudicial.

third prong requires only that *A* and *B* be *jointly* relevant and survive a 403 analysis *together*; and the generalization to more than two items of evidence is unaffected by the requirement that the entire set of proffered evidence be jointly relevant and survive 403 analysis.

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