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REPLY TO ALLEN

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I am grateful to Ronald Allen, both for his prior work that helped to stimulate my interest in the topic of conditional relevance (as well as a number of other topics in the law of evidence), and for the substantive engagement by so distinguished an evidence scholar with my recent paper on the subject. Allen is surely correct about both the possibilities and the pitfalls of interdisciplinary scholarship, including at the intersection of law and philosophy; such work can be profoundly enlightening, and yet also sometimes leads to frustrating miscommunications.

Allen's principal complaint about my paper appears to be that we agree about so much—or, at least, that we agree about so much in those parts of the paper that are not "beyond the scope of [his] interest." Unfortunately, many of the substantive contributions of my paper appear to fall outside the scope of Allen's interest. I think that it is both interesting and important to consider other conditional notions in the law of evidence besides conditional relevance, such as conditional probative value and conditional prejudice, which have received (in the former case) far less or (in the latter case) no sustained scholarly attention. Relatedly, I think that it is interesting and important to explore how these other conditional notions complicate the balancing test prescribed by Rule 403, particularly in situations where an item of evidence is (merely) conditionally relevant to a fact of consequence. Perhaps my analyses of and proposals about these issues are mistaken; I would be delighted to engage substantively with those who have objections, questions, or suggested modifications. But that is all outside the scope of Allen's interest; instead, he concludes that "the one addition to the literature that [he] can discern in [my] paper's lengthy critique" is the correction of a mistaken claim of his regarding the collapse of conditional relevance into the

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judge's power to direct a verdict. In his commentary, Allen attempts to minimize this mistake by characterizing *any* judicial determination that an item of evidence is inadmissible as the functional equivalent of a partial directed verdict. That characterization seems quite strained to me, but as long as we're agreed that the doctrine of conditional relevance "reduces" to the judge's power to enter a (partial) directed verdict only in the (strained) sense in which *any* determination of inadmissibility of *any* sort of evidence so "reduces," I'm happy to count this as (yet) another point on which Allen and I agree.

One of the main points of *disagreement* between me and Allen—and, in my humble opinion, one significant contribution of my paper—concerns the question of what Vaughn Ball's argument aimed at exposing the "myth of conditional relevancy" actually demonstrates. Ball's argument has been influential, and a number of contemporary legal scholars seem to think that it shows what it set out to show—i.e., that all non-trivial cases of conditional relevance are also cases of unconditional relevance, and hence that there is no need for a separate rule to govern the introduction of conditionally relevant evidence. That is *explicitly* what Ball claims when he writes that "there is nothing for Rule 104(b) to operate on."[1] And that is explicitly what his argument purports to show. Recall that Ball's argument involves the putative demonstration that, in any non-trivial case in which A is conditionally relevant, conditional on B, it is *also* the case that A is unconditionally relevant; hence, there is no need for a separate rule to govern the introduction of conditionally relevant evidence, since all (non-trivial) conditionally relevant evidence can be introduced through the route available for unconditionally relevant evidence. For his part, Allen praises the "inexorable force of [Ball's] logic," claiming that it "so powerful that it overwhelms" ordinary prudential considerations in favor of slow and incremental change in the law.[2] Allen then claims that Ball's argument is "even more powerful than [Ball] explicitly recognized," and endeavors to "extend" the argument from the horizontal case involving separate treatment of elements to the vertical case

[1] Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435, 458 (1980).

[2] Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOY. L. A. L. REV. 871, 871-72 (1992).

involving at least one intermediate premise in support of a single element.[3]

My general sense, both from personal correspondence with Allen and from his commentary, is that Allen is no longer interested in what Ball's argument does or doesn't show. To each their own. By contrast, I think that analytical clarity in this area *does* require getting straight on which arguments validly establish which conclusions, and accordingly I *am* quite interested in what Ball's influential argument actually establishes, particularly because I do not think that the scholarly literature in either philosophy or law has yet gotten this right. As I argue in the paper, Ball's argument does *not* establish its conclusion, in either the horizontal case or the vertical case. However, it does come *closer* to doing so in the horizontal case, which teaches us an important lesson about the epistemological difference between elements and intermediate premises; this point is in sharp contrast to Allen's argument that the horizontal and vertical cases should be analyzed identically. Moreover, apart from Ball's *argument* being invalid, his *conclusion*—i.e., that, except in trivial cases, conditional relevance "collapses into" unconditional relevance and hence that there is nothing for a rule of conditional relevance to operate on—is simply false; as I argue in the paper, there are clear cases (such as the "handedness" case) of conditionally relevant evidence that is not also unconditionally relevant.

Similarly, Allen's conclusion that "there is no difference between the two concepts [of relevance and conditional relevance]"[4] seems to be flatly inconsistent with cases like those I discuss in the paper; if there is no difference between the two concepts, then there could not—even in principle—be an instance of one that is not also an instance of the other. Allen's argument for this identity between the two concepts—which, as far as I can tell, is *completely* independent of Ball's—is that conditionally relevant evidence and unconditionally relevant evidence are similar in an important way: epistemologically speaking, the relevance of each depends on antecedent support for at least one intermediate premise.

But first, pace Allen, it is not at all obvious that it is impossible for any piece of evidence to ever be "relevant in its own right" to some

[3] *Id.* at 872.

[4] *Id.* at 879.

fact of consequence. For example, on the Bayesian approach to inference, if a hypothesis makes some evidence more likely than the negation of that hypothesis makes it, then that evidence is positively relevant to the hypothesis, regardless of whether there is any independent support for any intermediate premises. By contrast, ''holists'' like Quine hold that ''our statements about the external world face the tribunal of sense experience not individually but only as a corporate body.''[5] These are certainly not the only two possibilities, and there isn't adequate space here to explore which approach to inference (either in general, or in the law in particular) is best, or how applicable this Bayesian point is to real trials. But Allen's starting point is certainly not an obvious one, and he provides no real support for it, either in his prior work or in his commentary.

And second, even if it's true that the relevance of any evidence to any proposition always depends on independent support for at least one intermediate proposition, that still doesn't establish the conclusion that the concepts are identical; it merely establishes that there is an epistemologically relevant similarity between them. And while there may be various similarities between them, there are also differences. For example, in the unconditional case, the intermediate conclusion is sufficiently supported by the juror's ''common knowledge and experience,'' whereas in the conditional case, it is not, and hence evidence needs somehow to be introduced for the intermediate conclusion into the trial record. That difference alone conclusively demonstrates that the two concepts are not identical.

It seems to me that, notwithstanding his rhetoric about ''identical'' concepts, the most charitable way to read Allen is as arguing that there is not *enough of an epistemic difference* between unconditionally relevant evidence and conditionally relevant evidence to underwrite the different standards to which these types of evidence are subject under the Federal Rules. Note that that is *very* different from saying that there is no coherent distinction between them, which (except in trivial cases) is precisely what Ball's argument purports to demonstrate. Compare: there is no interesting or deep epistemological difference between evidence about automobiles and evidence about bicycles, and it would be both bizarre and epistemologically unmotivated for the Federal Rules to subject these two

[5] W.V.O. Quine, ''Two Dogmas of Empiricism,'' in *From a Logical Point of View*, 2nd edition (Cambridge, MA: Harvard University Press): 41.

kinds of evidence to differing standards that made it easier for a proponent to admit one kind of evidence than the other. But, even if that's so, that doesn't do *anything at all* to undermine the coherence of the distinction between evidence about automobiles and evidence about bicycles. Evidence about automobiles does not "collapse into" evidence about bicycles, the concept of evidence about automobiles is not identical to the concept of evidence about bicycles, there is no reason to doubt the coherence of the distinction between evidence about automobiles and evidence about bicycles, and any argument purporting to establish any of those conclusions is fallacious.

Why, then, does Allen think that there is not enough of an epistemic difference between unconditionally relevant evidence and conditionally relevant evidence for them to be appropriately subject to different standards? I'm honestly not sure. As noted above, whatever similarities they may have, unconditionally relevant evidence and conditionally relevant evidence are also different in significant ways. In the case of conditionally relevant evidence, the judge actually sees the evidence for the intermediate proposition, and thus is in a position to determine whether a jury could reasonably rely on *that evidence in particular*; by contrast, in the case of unconditionally relevant evidence, the judge has to determine whether "common knowledge and experience"—which may vary from individual to individual, place to place, and time to time—is sufficient *in principle* to support the intermediate proposition. Perhaps, for all that Allen has said, this difference matters, and could reasonably support a different standard for admissibility in the conditional case than in the unconditional case. Again, in the end, I *agree* with Allen here that the same standard should be applied to both unconditionally relevant and conditionally relevant evidence. I just don't think that either Ball's or Allen's argument does anything to establish that conclusion. Accordingly, my argument for this conclusion in my paper relies on very different considerations from the ones that move Ball and Allen.

So: as I said explicitly in the paper, Allen and I are in complete agreement that the Federal Rules go badly wrong in subjecting unconditionally relevant evidence to Rule 401's permissive "any tendency" standard, while subjecting conditionally relevant evidence to Rule 104(b)'s stricter "sufficient to support a finding" standard. I

think that Allen and I are also agreed that the distinction between unconditionally relevant evidence and conditionally relevant evidence is the distinction between, on the one hand, situations where the judge determines that the proponent can establish the relevance of one piece of evidence without needing to introduce any *other* evidence into the trial record, and, on the other, situations where the judge determines that the proponent cannot so establish. And I *think* that Allen and I agree that it is entirely appropriate—rationally required, even—that judges make this distinction, and hence that the Federal Rules contain both an ''unconditional route'' and a ''conditional route'' for the introduction of relevant evidence.

However, though Allen and I indeed agree on a lot, we also disagree on certain key issues, even leaving aside the details of those sections of my paper with which Allen doesn't engage. Our principal disagreements seem to involve (i) the force of Ball's argument; (ii) the force of Allen's ''no evidence is simply relevant in its own right'' argument; (iii) the best way for the Federal Rules to *implement* our shared view that unconditionally relevant evidence and conditionally relevant evidence should be subject to the same epistemic standard; and (iv) whether it is interesting and/or important to think carefully about how issues of conditional relevance interact with issues of conditional prejudice (and other related conditional notions) under Rule 403's balancing test. I've said all I have to say about (i) and (ii), I am hopeful that the future literature will take up a substantive discussion of (iii), and if Allen's interest in (iv) isn't piqued by Sections VI-VIII of my paper, so be it.

Perhaps one final remaining disagreement between me and Allen is about the value of ''intense analytical scrutiny'' in cases where two scholars ''arrive[] at identical destinations.'' Even ignoring various substantive differences in our respective destinations, professional philosophers like myself invariably find it valuable to sort out precisely which *arguments* establish particular conclusions, and it is not uncommon to see intense disagreements among philosophers regarding which arguments successfully establish particular conclusions, even in cases where they all accept the conclusions at issue. The nearly universal view among philosophers here is that the ''destination'' is not the only thing that matters; a bad argument for a true conclusion is still a bad argument, and there can be immense

intellectual value in coming to a rigorous understanding of which arguments establish (or fail to establish) which conclusions. Among other things, this intellectual value can consist in a sharpened sense of *why* some conclusion is true, which can be of enormous practical value when it comes to making use of that conclusion, especially in the context of law and public policy. Though I do hold a Ph.D. in philosophy and a J.D., Allen is correct that I am not a trial attorney, and perhaps differing perspectives on paths and destinations here are at least partially attributable to disciplinary differences in focus, experience, and intellectual temperament. So it often goes with interdisciplinary work, which can be a source of both its value and its limitations. Regardless, I remain grateful to Allen for playing the role of ''sand'' to my ''pearl,'' and I hope that I have done something to return the favor.

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