Irrelevance, Minimal Relevance, and Meta-Relevance (Response to David Crump)

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COMMENTARY

IRRELEVANCE, MINIMAL RELEVANCE, AND META-RELEVANCE

Richard D. Friedman*

Table of Contents

I. EXPLORING THE MINIMALIST DEFINITION OF RELEVANCE ........................................ 57
II. REVISING THE RULES ON MINIMAL RELEVANCE .................................................. 64
III. META-RELEVANCE ..................................................................................................... 67
IV. CONCLUSION ................................................................................................................. 71

An old Jewish tale I learned from my mother:

A merchant, newly wealthy, decided to educate his children in style. He advertised for a tutor in the classics, Romance languages, the sciences, and literature. The next day, an old man, somewhat seedily dressed, showed up at the merchant's door, saying that he was responding to the advertisement. With some hesitation, the butler showed the visitor in. The merchant, though surprised by the applicant's appearance, began the interview.

"What is your background in the classics?" he asked. "I don't know from the classics."
"And in which Romance languages are you fluent?"
"None of them."
"And what do you know of science and literature?"
"Hardly anything," answered the old man with a shrug. "My good man," said the merchant with patience slightly

* Professor of Law, University of Michigan; B.A., Harvard University, 1973; J.D., Harvard Law School, 1976; D. Phil., Oxford University, 1979. My thanks to my mother.
strained, "you don't seem to have any of the qualifications for the position. Why did you come here today?"

"I came," said the old man with a flourish, "to tell you: On me you shouldn't depend."

That is a story, of course, about the value of information. The old man did have a point: The merchant's quest for the best tutor for his children may have been advanced, however infinitesimally, by knowledge that he need not worry about forsaking the opportunity to hire this one potential tutor. But the information hardly seems valuable enough to warrant the merchant's time. And so, though it rarely generates more than a polite hint of laughter, I often use this old chestnut in Evidence class to illustrate a basic point made by Professor David Crump: Evidence is relevant, under the modern definition exemplified by Federal Rule of Evidence 401, if it has "any tendency" to increase or decrease the probability of a proposition of consequence to the action. That tendency might be very slight; even if there are many alternatives to the proposition at issue (e.g., thousands of potential tutors or murderous Colombian drug lords?), evidence tending to make any one of them less probable also will tend to make the material proposition more probable, and thus will be relevant. Dean McCormick famously pointed out that a piece of evidence could satisfy the test of relevance even if it was, metaphorically, merely a brick rather than an entire wall. Professor Crump aptly extends the metaphor by pointing out that, under the Rule 401 definition, an atom qualifies just as well as the brick does.

Of course, to say that evidence is relevant under this minimalist definition does not mean that it will be offered into evidence, or that it is or should be admissible, or even that it is admissible unless some specific exclusionary rule applies. If the probative value of the evidence is very slight, usually the potential proponent will recognize that and not find the proffer worthwhile: It costs time and money to present evidence, the fact-finder's attention will likely be distracted from more important information, and the fact-finder may well infer that only a party with a very weak case would present such worthless evidence. Moreover, even if the proponent does offer evidence with minuscule probative value, the court is likely to rule it

1. See David Crump, On the Uses of Irrelevant Evidence, 34 Hous. L. Rev. 1, 2 (1997); FED. R. EVID. 401 (defining "relevant evidence").
3. See Crump, supra note 1, at 11.
"irrelevant," without worrying very much whether it actually fails to satisfy the Rule 401 definition of relevance. And even if the court chooses to be punctilious, it can exclude the evidence under Rule 403 or its counterpart, on the ground that whatever probative value the evidence might have is substantially outweighed by the costs of admitting it—including, if nothing else, waste of time. Finally, even if the evidence survives this balancing test, it might indeed run afoul of some specific exclusionary rule. But, as Professor Crump explains vividly, evidence that seemingly has insubstantial probative value often slips through all these filters and is offered and admitted.

Professor Crump's analysis runs the full traverse from academic theorizing to practical observation. I will attempt to follow him over the same course, addressing three questions among the congeries that he raises. First, is it true that all evidence satisfies the minimalist definition of relevance? Second, should evidentiary codes include a tighter definition of relevance? Third, how should we assess lawyers' use of evidence that, loosely speaking, is irrelevant?

I. EXPLORING THE MINIMALIST DEFINITION OF RELEVANCE

I will begin by restating in somewhat formal terms the definition of relevance contained in Rule 401. Suppose evidence $E$ is offered with respect to hypothesis $H$. Let $O$ represent all other information that the factfinder may validly consider with respect to $H$; this may include other evidence and also information that the factfinder received outside the courtroom but is permitted to use at trial. Then $E$ is relevant to $H$ if, and only if, $P(H|E,O)$

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

5. See, e.g., FED. R. EVID. 404 (excluding, subject to exceptions, "[e]vidence of a person's character or a trait of character" to prove "action in conformity therewith"); FED. R. EVID. 409 (barring evidence of offers or promises "to pay medical, hospital, or similar expenses occasioned by an injury" in order "to prove liability for the injury"); FED. R. EVID. 802 (excluding hearsay evidence except as provided by the Federal Rules or by other rules established by the Supreme Court or by Congress).

6. See Crump, supra note 1, at 22-46.

7. See id. at 5.

8. See id. at 6.

9. See id.

10. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 2.10, at 102-03 (1995). Mueller and Kirkpatrick discuss two types of "background knowledge" jurors are allowed to possess. One is "communicative facts," which involve knowledge of the basic English language, including knowing "the ordinary meaning of common words ... [and] idioms, common shorthand and slang expres-
differs from \( P(H | O) \)—that is, if the probability of \( H \) given \( E \) and \( O \) is different, either greater or less than, the probability of \( H \) merely given \( O \). And it is easy to show that, if \( P(H | E, O) \) differs from \( P(H | \text{Not-}E, O) \)—the probability of \( H \) given \( O \) and the proposition that \( E \) is not true—then it also differs from \( P(H | O) \), and in the same direction.

Sometimes the relationship of the evidence to the hypothesis is such that \( P(H | E, O) \) and \( P(H | O) \), or \( P(H | E, O) \) and \( P(H | \text{Not-}E, O) \), can be compared directly, without the need for an intermediate step. Suppose, for example, that the hypothesis \( H \) at issue is that Defendant murdered Victim, and the evidence \( E \) is that Defendant had a substantial motive to do so—the desire to prevent Victim from exposing a prior murder committed by Defendant. It is easy enough to see that \( H \) is more likely given \( E \) than it would be given the negation of \( E \), or given the absence of any new information as to whether or not \( E \) is true. The motive would plausibly be a cause of the murder in the sense that it makes the murder more probable. \( E \) therefore is relevant.

Sometimes the evidence is relevant to the hypothesis even

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11. I am putting aside for now the question of whose probability assessments—the judge’s, the jury’s, or those of a hypothetical juror—are being considered. I will address this issue briefly in Part II. I am also putting aside the difficult problem of defining conditional relevance, or what I prefer to call conditional probative value. See Fed. R. Evid. 401(b). For a recent exchange on this issue, see Richard D. Friedman, Conditional Probative Value: Neoclassicism Without Myth, 93 Mich. L. Rev. 439, 439-41 (1994) (disputing the notion that conditional relevance is a "myth," as some commentators have asserted, while concluding that the "expression of the concept in evidentiary rules should not be discarded but rather refreshed"); Dale A. Nance, Conditional Probative Value and the Reconstruction of the Federal Rules of Evidence, 94 Mich. L. Rev. 419 (1995) (comparing my analysis to Nance’s own, emphasizing the best evidence principle, and criticizing some of my proposed amendments to the Federal Rules); Richard D. Friedman, Refining Conditional Probative Value, 94 Mich. L. Rev. 457 (1995) (comparing Nance’s analysis to my own, and discussing his comments on my proposed amendments); Peter Tillers, Exaggerated and Misleading Reports of the Death of Conditional Relevance, 93 Mich. L. Rev. 478 (1994).

12. \[
P(H | O) = P(E | O) \times P(H | E, O) + P(\text{Not-}E | O) \times P(H | \text{Not-}E, O).
\]

\[
P(\text{Not-}E | O) = 1 - P(E | O), \text{ and must be positive. } P(H | O) \text{ therefore may be seen to be equal to } P(H | E, O) + [1 - P(E | O)] \times [P(H | \text{Not-}E, O) - P(H | E, O)]. \text{ Thus, if } P(H | \text{Not-}E, O) \text{ is, respectively, greater than, equal to, or less than } P(H | E, O), \text{ then } P(H | O) \text{ is similarly greater than, equal to, or less than } P(H | E, O).
\]
though their relationship is not quite so immediately apparent. It may be, for example, that if \( E \) is true it makes an intermediate proposition \( I \) more probable, and that, whether or not \( E \) is true, if \( I \) is true it makes \( H \) more probable. In this case, proof of \( E \) makes \( H \) more probable. And the same type of reasoning might be extended indefinitely, involving a series of intermediate propositions \( I_1 \) through \( I_m \). As shown nicely by Professor Crump in his demonstration of how rainfall in Utah might be relevant to theft in Chicago, these chains might be very extended.

Another potential complication in the relationship between evidence and hypothesis is particularly important: It may be that they are causally related, but that causation runs from hypothesis to evidence. Suppose, for example, \( H \) is the proposition that Defendant handled a gun believed to be the murder weapon, and \( E \) is the proposition that Defendant's fingerprints have been found on the gun. The evidence seems plainly relevant, but why? It seems clear enough that \( P(E \mid H, 0) \) is, or at least might well be considered to be, greater than \( P(E \mid \text{Not-}H, 0) \)—if \( H \) is true, that is likely to make \( E \) more probable than it would be if \( H \) were not true. But \( E \) is what we know and it is the probability of \( H \) that we are trying to assess. That is, the causal relationship between \( H \) and \( E \) may give us some sense of \( P(E \mid H, 0) \) and \( P(E \mid \text{Not-}H, 0) \), but we are trying to assess \( P(H \mid E, 0) \). In other words, we have to transpose the conditional—planning the \( H \) to the left, and the \( E \) to the right, of the vertical line representing conditionality. Bayes's Theorem (or Rule) expresses the relationship. For present purposes, it will be easiest to express Bayes's Theorem in terms of odds, rather than of probabilities:

\[
O(H \mid E, 0) = O(H \mid 0) \times L_{HE}
\]

where \( O(X) \), the odds of \( X \), equals the ratio of \( P(X) \) to \( P(\text{Not-}X) \), or \( P(X) \mid [1-P(X)] \), and \( L_{HE} \), the likelihood ratio of \( E \) with respect to \( H \), is the ratio of \( P(E \mid H, 0) \) to \( P(E \mid \text{Not-}H, 0) \). In other words, the posterior odds of \( H \) (the odds of \( H \) given the evidence) equal

\[
P(H \mid E, 0) = P(I \mid E, 0) \times P(H \mid I, E, 0) + [1-P(I \mid E, 0)] \times P(H \mid \text{Not-}I, E, 0).
\]

Similarly, \( P(H \mid \text{Not-}E, 0) = P(I \mid \text{Not-}E, 0) \times P(H \mid I, \text{Not-}E, 0) + [1-P(I \mid \text{Not-}E, 0)] \times P(H \mid \text{Not-}I, \text{Not-}E, 0) \). Assuming that \( P(H \mid I, E, 0) = P(H \mid I, \text{Not-}E, 0) = P(I \mid 0) = C_1 \), and similarly that \( P(H \mid \text{Not-}I, E, 0) = P(H \mid \text{Not-}I, \text{Not-}E, 0) = P(I \mid \text{Not-}0) = C_2 \), then

\[
P(H \mid E, 0) - P(H \mid \text{Not-}E, 0) = P(I \mid E, 0) - P(I \mid \text{Not-}E, 0) \times [C_1 - C_2].
\]

Thus, if \( P(I \mid E, 0) > P(I \mid \text{Not-}E, 0) \), and \( C_1 > C_2 \)—that is, \( E \) makes \( I \) more probable and \( I \) makes \( H \) more probable—\( P(H \mid E, 0) > P(H \mid \text{Not-}E, 0) \), which means that \( E \) makes \( H \) more probable.

15. For a simple exposition of this form of Bayes's Theorem, see BERNARD ROBERTSON & G.A. VIGNAUX, INTERPRETING EVIDENCE: EVALUATING FORENSIC SCIENCE IN THE COURTROOM 16-18, 221-28 (1995).
the prior odds of \( H \) (the odds as assessed before consideration of the evidence) multiplied by the likelihood ratio.

It is easy to see from this expression that if \( L_{HE} \) equals 1—if \( P(E|H,0) \) equals \( P(E|\text{Not-}H,0) \)—the evidence is irrelevant, because the posterior odds are equal to the prior odds. If \( L_{HE} \) is greater than 1—the evidence is more likely to arise given \( H \) than given \( \text{Not-}H \)—the evidence is relevant, making \( H \) appear more likely than it did before consideration of the evidence. Correspondingly, if \( L_{HE} \) is less than 1, the evidence is relevant in the opposite direction, making \( H \) appear less probable than it did beforehand.

All this may appear painfully familiar to readers that have followed the academic debate over the use of probabilistic analysis in discourse about evidence. ¹⁷ But I have set out some aspects of the Bayesian approach because I think they help illuminate a basic point on which I agree with Professor Crump, and the extremity at which I disagree. I agree with him that most evidence that parties are likely to offer, and much that they are not (such as rainfall in Utah when the issue is theft in Chicago), satisfies the minimalist definition of relevance. ¹⁸ One way of putting this is that the likelihood ratio will not equal exactly 1—there is some basis for assessing \( P(E|H,0) \) as different from \( P(E|\text{Not-}H,0) \), either greater or lesser.

I am not satisfied, however, that all evidence meets the minimalist definition of relevance. Consider an illustration used by Professor Crump—a brown stone, or other object neither green nor an emerald, offered to help prove the proposition that most emeralds on the crust of the earth are green. ¹⁹ Professor Crump maintains that even this evidence is relevant because “[a]s we exhaust the finite stuff that could disprove the questioned proposition, we increase the probability that the proposition is true.” ²⁰ But one could as easily say that, as we exhaust the finite stuff that could prove the questioned proposition, we decrease the probability that the proposition is true. Before knowing the nature of the object, we do not know whether it is (a) a green emerald, (b) a nongreen emerald, or (c) a nonemerald. If the object turns out to be a green emerald, it will tend (ever so


¹⁸. See Crump, supra note 1, at 9-14.

¹⁹. See id. at 13.

²⁰. Id.
slightly) to prove the proposition, because that result is more likely given the truth of the proposition than given its falsity; by the same token, if the object turns out to be a nongreen emerald, it will tend (perhaps slightly more) to disprove the proposition, because that result is more likely given the falsity of the proposition than given its truth. But I do not see any basis for concluding that a non-emerald (which, we knew before looking, describes most of the earth) is more or less likely to be found given the truth of the proposition than given its falsity. This evidence, I believe, should leave an assessment of the probability of the proposition just where it was before the evidence was found.

Nor am I convinced that cases of absolute irrelevance are limited to fanciful hypotheticals like this. Suppose that a prosecutor introduces evidence of the victim’s blood type. If the prosecutor later offers evidence that blood of that type was found on the clothes the defendant wore that day, and that the defendant has another blood type, the combined evidence might have great probative value. But without that predicate, it does not seem to me that evidence of the victim’s blood type has any probative value; it is akin to the sound of one hand clapping.

Now I must add two complications. First, probability, at least the conception of probability that is ordinarily useful in evidentiary analysis, is a subjective matter, dependent on the individual observer’s own personal assessments. Conventional probability theory puts some constraints on the relationships among these assessments, prescribing in effect that a person cannot rationally hold certain combinations of assessments. The theory does not, however, prescribe generally the probability assessment that an observer should attach to a given proposition. Therefore, when Rule 401 speaks of evidence making a given proposition “more probable or less probable than it would be without the evidence,” it begs a question that is critical when the fact-finder is a jury—more or less probable according to whose assessment? The court’s probability assessments should not control, because the court might deem the evidence to have

21. Hence, if before examining this particular object we think the proposition is probably true, we would regard result (a) as more probable than result (b).

22. Blood type might give some indication of the person’s race. See, e.g., Ian Ayres et al., Unequal Racial Access to Kidney Transplantation, 46 Vand. L. Rev. 805, 862 (1993) (stating that “the blood type A population is disproportionately white and the blood type B population is disproportionately black”). In particular cases, this might have some significance, but this can be set aside by assuming realistically that the race of the victim is already known.


24. See id.

little or no probative value even though a juror might rationally ascribe substantial value to it. But the court cannot know what probability assessments a juror will make.

Does this indicate that all evidence is necessarily relevant because a juror might regard the evidence as tending to alter the probability of the litigated proposition? I do not believe so. I do not think the relevance definition is meant to leave an open gate to evidence on the basis that some juror—no matter how unfounded or foolish her thought on the matter might be—might conceivably find the evidence probative. The relevance inquiry is bounded; roughly speaking, it seems to me, the court should focus on the hypothetical juror who is most persuaded by the evidence but still within the bounds of reasonableness. And the same admittedly difficult framework should apply in deciding the threshold question of relevance. Thus, a judge considering evidence of the nonemerald variety might conclude: “I do not see how this evidence bears on the proposition at issue, nor do I see how any juror acting reasonably could believe that it does. So unless I am persuaded that such a juror could believe that, I am going to hold the evidence irrelevant.”

In some sense, then, the matter may always be open. A conclusion that evidence is irrelevant amounts to a conclusion that no reasonable observer would have any basis for assessing the prior and posterior probabilities as being at all different. That is quite a vulnerable conclusion. We may not know whether there is some reasonable observer who would indeed find some basis for some divergence. But courts have to issue rulings in finite time, and even law review articles must end. So I will leave the matter much the same way as does this hypothetical judge: Unless Professor Crump persuades me otherwise, and he has not done so thus far, I believe the nonemerald evidence is irrelevant.

The second complication is that juridical evidence is not ordinarily simply “found” by the fact-finder, like the rock that is not an emerald. Rather, it must ordinarily be found, or created, and presented by a party to the litigation, and the process by which the evidence comes to be presented in court might have

26. Professor Crump accurately points out that the drafters of the Federal Rules avoided the formulation of the old Uniform Rule of Evidence 1(2), which spoke of “a tendency in reason” to prove the matter at issue. See Crump, supra note 1, at 7. And he properly states: “The Federal Rules thus avoid undue emphasis on the logical process at the expense of experience, and they support the use of general principles from jurors’ past perceptions.” Id. In suggesting that the relevance inquiry is bounded by a reasonableness inquiry, I do not mean to suggest otherwise. One might say that a juror is acting reasonably even if her conclusions are based on experience and past perceptions rather than on any apparent exercise of reason.
considerable significance.^{27} Consider another illustration used by Professor Crump: In an assault case, the defense offers, along with some other evidence of dubious probative value, an apple.^{28} Professor Crump regards the evidence as relevant on grounds analogous to those bearing on the brown stone—it shows "that a tiny piece of the accessible universe does not furnish physical evidence of guilt."^{29} I regard it as presumptively irrelevant for reasons similar to those I suggested in connection with the brown stone: I cannot find any basis for concluding that the apple is more likely to appear in its present condition given the innocence of the defendant than given his guilt. But this raises a question that a reasonable juror might certainly ask: Given this lack of probative value, does the fact that defense counsel bothered to present the evidence suggest that she was trying to clutter up the case to obscure the weakness of the defense? If so, the evidence might weigh against the defense. To give a different meaning to a nice phrase used by Professor Crump, the evidence might paradoxically be "relevant precisely because it is irrelevant."^{30}

This line of argument would be available whenever a proponent offers evidence of no apparent probative value for no apparent reason other than to shroud weakness. Nevertheless, I do not believe that it need deflect us from the conclusion that evidence might fail to satisfy the minimalist definition of Rule 401. It seems doubtful at best that evidence should be admitted when the only possible legitimate basis on which it may be used is to the detriment of the proponent. Further, it seems that our understanding of the definition of relevance should follow in the same direction: Where Rule 401 says "more probable or less probable,"^{31} we might interpolate "whichever is to the advantage of the proponent."

^{27} I have discussed this approach at some length. See Richard D. Friedman, Still Photographs in the Flow of Time, 7 YALE J.L. & HUMAN. 243 (1995) (Review Essay).

^{28} See Crump, supra note 1, at 13-14.

^{29} See id. at 14. Professor Crump goes on to state that "if we were to provide the defense attorney with infinite time, he could offer every available physical object that does not show guilt, thus enhancing more substantially the probability of innocence." Id. But, of course, if the defendant is guilty and there are objects that would show this, then the defense attorney would have to avoid those; it seems to me, therefore, that until the defense attorney begins presenting objects that might be expected to reveal guilt if the defendant is in fact guilty, this massive world-dump does not accomplish anything.

^{30} See id. at 13 (emphasis omitted). Professor Crump uses the phrase to summarize an argument I do not find persuasive concerning the nonemerald evidence. See id. Refer to note 21 supra and accompanying text (discussing the nonemerald example).

^{31} FED. R. EVID. 401.
II. REVISING THE RULES ON MINIMAL RELEVANCE

Up to now, my discussion has been not only theoretical but entirely academic, in the sense that the difference between Professor Crump and myself does not affect the actual decision of cases. That is, whether a given piece of evidence has only infinitesimal probative value, the irreducible minimum according to Professor Crump, or no probative value at all, which I contend is possible, the evidence should not be admitted. The court should exclude it under Rule 403 or the governing local counterpart, if for no other reason than that the insubstantial probative value that is the most the evidence can claim does not warrant the time the evidence would require to present.

I believe, as does Professor Crump, that in the hands of a pragmatic, confident, and decisive judge, Rule 403 is a sufficient tool to weed out evidence of insubstantial probative value. I also agree with him that not all judges meet this description, and for this reason trials can spin out of control. I probably am less concerned than he is by the O.J. Simpson criminal trial, because I think it is important not to fall into the Simpson Elephantiasis Fallacy—the tendency to draw any broad lesson about ordinary American evidence or criminal procedure from a trial that was a caricature of the norm. And I probably am less sanguine than he that, if a given judge does not use Rule 403 to maintain proper control over the trial, any rules amendment—at least any amendment that would not intolerably limit the judge’s discretion—would relieve the problem substantially.

Nevertheless, I do believe that it might be useful to retool Rule 401, to make it better express the way we hope judges will address questions of relevance and probative value. Rule 402 prescribes that all relevant evidence is admissible unless excluded by other Rules or other governing authority. But this rule of presumptive admissibility does not accurately reflect the decision-making process. Even though I do not agree with Professor Crump that all evidence is relevant under the minimalist definition of Rule 401, I agree that the evidence that might actually be admissible in a given case represents only a small portion of the great mass of evidence that satisfies that definition. If

32. See Crump, supra note 1, at 12-14.
33. See id. at 17.
34. See id. at 17-18; see also Victor J. Gold, Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence, 58 WASH. L. REV. 497, 500-10 (1993) (discussing problems in the application of Rule 403 resulting from a failure to define “unfairly prejudicial”).
35. See FED. R. EVID. 402.
36. See Crump, supra note 1, at 3.
Rule 402 is genuinely to state a presumptive rule of admissibility for a mass of evidence defined by Rule 401, then Rule 401 ought first to do most of the job of whittling the mass down; the heavy cutting should not be left to the general discretion provided by Rule 403.37

The simplest fix would be to insert the word "substantial" into Rule 401:

"Relevant evidence" means evidence having any substantial tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Better yet, Rule 401 could be revised slightly to clarify that probative value, a term used by Rule 403, and relevance are measures of the same concept, relevance being binary (yes or no) and probative value being a matter of degree:

"Probative value" of evidence means the extent to which the evidence tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. "Relevant evidence" means evidence having substantial probative value.38

Professor Crump counsels against amendment of Rule 401.39 But it seems to me that his concerns do not apply to the type of amendment I propose here. He rightly expresses the view that requiring "a tendency in reason" or "logical" support of the matter to be proved—an approach rejected by the Advisory Committee in drafting the Rule40—"might obscure the propriety of using inferences from common experience to supply the evidential hypothesis."41 But the amendment I am proposing does not raise this danger; it allows the same type of inference that the current Rule does, but only insists that the evidence satisfy some threshold

37. For the text of Rule 403, refer to note 4 supra.
38. A third alternative would be to delete "substantial" from this draft, so that the definition of relevant evidence remains as it is under the present Rule 401. Under this alternative, Rule 402 should be revised, so that it provides a presumptive rule of admissibility for evidence having substantial probative value, and a rule of exclusion for evidence without substantial probative value. See FED. R. EVID. 402 (stating that all relevant is admissible unless otherwise proscribed and that all irrelevant evidence is inadmissible). But this approach preserves a distinction of little worth, between evidence of no probative value and evidence of insubstantial probative value.
39. See Crump, supra note 1, at 47.
40. See FED. R. EVID. 401 advisory committee's note (contrasting Rule 401 with Uniform Rule 1(2)). Refer to note 26 supra and accompanying text.
41. See Crump, supra note 1, at 47-48.
of strength before it may be characterized as relevant. Professor Crump also seems to express some doubt as to whether "a meaningful threshold of probative value" can be developed adequately. True, my proposed revisions rely on the term "substantial," a word that is determinedly vague, but no more vague than "substantially" in Rule 403. The revised Rule, in either of the forms I have suggested, would not prescribe results any more than the current Rules do, but it would provide the proper framework for a court's decision. Furthermore, it would conform the formal meaning of the term "irrelevant" to the meaning that it ordinarily has in workaday practice and, indeed, to the meaning that it has in much of Professor Crump's article.

Professor Crump suggests amending Rule 403 rather than Rule 401. This strikes me as a less than optimal approach. For one thing, it does nothing to address a problem that Professor Crump himself highlights: The definition of relevant evidence in Rule 401 has little value because so much evidence—indeed, in Professor Crump's view, all evidence—satisfies it. Much of Professor Crump's argument is aimed at showing that evidence that we are used to regarding as irrelevant in fact has infinitesimal probative value of no probative significance; it seems practical, therefore, to change the definition of relevance to conform to both the common usage and the practical import of the term. Nor does an amendment to Rule 403 satisfy the related problem with Rule 402 that I have suggested above, that the Rule purports to make relevant evidence presumptively admissible even though most evidence satisfying the minimalist definition of relevance should be excluded.

I also have some doubts about the particulars of Professor Crump's proposed revision of Rule 403. It purports to add a second layer to the test of that Rule. Professor Crump's revision provides that evidence of insubstantial probative value should be excluded if that probative value is "counter-balanced by" the negative considerations enumerated in the Rule; for evidence of greater probative value, the proposed revision retains the "substantially outweighed" of the current Rule. Obviously, less of a down side is necessary to warrant exclusion when the probative value of the evidence is minimal than when it is significant. But it is not obvious to me that a different ratio of negative to
positive considerations is appropriate for the two different cases. I am not even quite sure, given that the balancing test of Rule 403 weighs apples against oranges, what the difference in ratio means. Moreover, whatever the theoretical validity of this two-ratio approach, I suspect that trial judges would find it confusing and unduly complicated. Will we see litigation over which ratio applies? Will courts, which until now have gotten to the results they found sensible by using one ratio, find uncomfortable the choice between two ratios, and so develop a sliding scale, so that the greater the probative value of the evidence the greater must be the ratio of negative to positive considerations for exclusion to be warranted? We run a real danger, I think, of overintellectualizing decisions that depend greatly on intuition.

Much simpler, it seems to me, is the sequential process suggested by my proposed revision. First, the judge asks whether the evidence has significant probative value. If the answer is negative, the evidence is excluded without further ado. If the answer is positive, the judge considers whether the negative consequences of admission, as enumerated in Rule 403, are sufficiently great to warrant exclusion notwithstanding the probative value of the evidence. If the answer is positive, the evidence is excluded. If the answer is negative, the evidence is admitted unless any specific exclusionary rules apply.

III. META-RELEVANCE

Professor Crump offers a fascinating analysis of evidence that has insignificant probative value but is nevertheless offered and often admitted. Interestingly, he defines as outside the scope of his inquiry what I believe is a particularly common situation: The evidence has insubstantial probative value with respect to the material proposition as to which it is supposedly offered, but it bears closely on another proposition that is not a proper subject of proof and that raises a significant danger of prejudice. For example, suppose the defendant is charged with having committed theft by cutting a chain-link fence with a pair of shears, and the prosecution, supposedly to prove the defendant's ability to cut the fence, offers proof that on a prior occasion the defendant committed theft by similar means. The evidence appears to suggest quite strongly a point that the jury is not supposed to use it to consider, the defendant's propensity to commit crimes of the nature of the one charged. On the ground for which it is offered, however, the evidence presumably has

46. See Crump, supra note 1, at 20-46.
47. See id. at 4-5, 20-21.
rather slight probative value, because there was probably not much doubt about the defendant's ability to cut the fence. Nevertheless, courts often allow admission of such evidence.

Putting aside this type of case, Professor Crump offers several examples of what might be called "meta-relevance." That is, even though the information provided by the witness's testimony has only slight probative value, the event of the lawyer's question and the witness's answer has substantial value to the proponent. The topic is important, because I suspect Professor Crump is right that a great deal of time actually spent at trial is taken up by evidence that the proponent offers only because of its meta-relevance. Ordinarily, we tend to think that lawyers will not waste too much time offering evidence that has little probative value, because it does their case too little good. Professor Crump's analysis provides a useful corrective to this view: The meta-relevance might provide an incentive to present the evidence even though the evidence itself conveys little information.

The extent to which this is a good or bad thing largely depends, of course, on whether the meta-relevance is in itself information that is net beneficial to the truth-determining process and worth the time that it takes to present. Professor Crump recognizes this and acknowledges that some evidence of minimal probative value may on balance be worthy of admission. His emphasis, though, is on the damage that evidence of this sort can do.

I agree that courts probably would do better by more aggressively limiting such evidence, though as already suggested I doubt that changes of rules would be necessary to achieve this result or effective in doing so. I also am probably readier than Professor Crump is to find benefit in evidence that has minimal probative value but that serves the functions he identifies. And I believe he overemphasizes at least one danger.

Consider first what Professor Crump calls the entertainment or ingratiation function and the editorial or rhetorical

48. Christopher Mueller and I both have spoken about meta-evidence, giving that term somewhat different meanings. He used it to describe evidence that casts light on the probative value of a recurrent type of evidence, and I more broadly used it to describe evidence about evidence. See Christopher B. Mueller, Meta-Evidence: Do We Need It?, 25 LOY. L.A. L. REV. 819 (1992); Friedman, supra note 27, at 256. In speaking about meta-relevance, I mean to suggest that sometimes evidence has probative value not simply because of the information it expresses but also because of the manner in which it is secured.

49. See, e.g., Crump, supra note 1, at 21.

50. See id. at 46-47.

51. See id.
function. I believe most people that care about the persuasiveness of their communication, especially with relative strangers, find a need to ingratiate themselves with their audiences. Certainly teachers do that, and so do after-dinner speakers that begin with a joke or pleasantry. To a large extent, ingratiation may be considered a lubricant of the channels of communication, and that seems to me to be a good thing. And, as Professor Crump acknowledges, "[p]acing and drama are important to every story... In fact, a certain amount of orientation helps the jury understand the evidence."53

Moreover, a litigating lawyer may need to establish rapport not only with the court and the jury but also with the witness. If a cross-examiner decides to take the amiable approach, as in Professor Crump's example of Adrian Burk examining Joe Bill Walker,54 that ultimately might be helpful to make the witness relax, cooperate with the cross-examiner, and speak more freely. This may well yield benefits for the truth-determining process that are worth some trial time.

Of course, these matters might be taken too far, and the court must be prepared to constrain the lawyer. But I think most lawyers know that if they appear to be playing too much for laughs their conduct is likely to be counterproductive; the jurors will likely take the high ratio of style to substance as an indication that substance is absent from her case, and they may even resent her for not treating them seriously.55

Now consider what Professor Crump calls the witness control or debilitation function.56 Debilitation sounds bad, and so I am against it. But I am all for confrontation. That, in fact, is what cross-examination is all about. Testifying is not meant to be a fun experience, and I think it probably is often helpful to the truth-determining process to see how a witness's testimony stands up under a moderate level of stress. (In some contexts, as with child witnesses and witnesses giving accusatory testimony about sexual violence, it may be that the stress inherent in the situation is so great, and so much more than optimal from the point of view of truth determination as well as of the witness's own welfare, that the court ought to attempt to relieve the stress to the extent reasonably possible.)

52. See id. at 26, 30.
53. Id. at 30-31.
54. See id. at 22-25.
55. I remember vividly my senior on one case, a very witty lawyer, affirmatively restraining himself (not an easy thing for him) from being more than occasionally amusing in front of the jury; he expressed the fear that the jurors would go against "the laughing Jew from New York."
56. See Crump, supra note 1, at 32.
Sometimes, of course, the details of cross-examination give it value, and those details may take time to develop. Professor Crump finds the “bit-by-bit” procedure offensive, and no doubt lawyers sometimes do extend it too far. But we should also acknowledge that a lawyer dealing with a hostile witness must advance very slowly, like a soldier advancing in a mine field. If we prevent lawyers from taking cross in small steps, we may not only deprive them of substantial drama but may inhibit the examination and hurt the search for truth.

Beyond that, on occasion it is the very protraction of the examination that makes it useful. Max Steuer’s cross-examination of a witness in the criminal trial arising from the devastating Triangle Waist Company fire of 1911 is a celebrated example: Only on several repetitions of her story, each given with strikingly similar wording and imagery, did it become apparent that her testimony was not, or at least was not merely, an account from her memory.

Finally, I will address the jury debilitation function. Professor Crump argues that evidence of minimal relevance unnecessarily extends trials and that this extension skews the selection of jurors for major trials. He may be right to some extent. I suspect, though, that even if Professor Crump were able to shave from a long trial all the evidence that had too little value to warrant admissibility, he would still be left with a long trial, long enough to discourage jurors eager to avoid major disruptions in their lives. Thus, consider—just one more time, because it does illustrate extended litigation—the Simpson case. Professor Crump uses the criminal trial as an illustration of a trial that was extended far too long by evidence of insubstantial probative value. But notice that the civil trial also took months of evidence, even though, given that the same issues had already been tried once, there were opportunities for shortening it, and even though the presiding judge was aggressive and determined not to repeat

57. See id. at 35-37 & n.174.


59. For a full and vivid account of this incident, see ARON STEUER, MAX D. STEUER: TRIAL LAWYER 83-110 (1950).

60. See Crump, supra note 1, at 39-41.

61. See id. at 19-20, 40.

the experience of the criminal trial.

Let us assume, though, that at the margin some potential jurors do not serve because trials are extended by evidence of little value. Professor Crump carries the point further, stating that “[t]he strategic use of irrelevant evidence to exacerbate these effects and skew the jury venire is a serious threat to our system of justice by jury trials.”63 I will not lose much sleep on account of this threat, because the strategy does not generally seem plausible to me. It seems unlikely to me that, say, the plaintiffs' lawyers in the Texaco-Pennzoil trial seeded the trial with nearly worthless evidence so that potential jurors of a pro-defense inclination would be discouraged from serving in future cases. And I suspect that, at least in some extended cases, the defense lawyers, who are presumably paid by the hour, introduce at least as much evidence of this sort as do the plaintiff's lawyers, who may well be working on a contingency.

IV. CONCLUSION

I have stated some quibbles with Professor Crump's analysis. But I think his article is very valuable. It forces us to attempt to shed light on a shadowy area of the law of evidence. This is an area of theoretical importance, because it has to do with how one of the bedrock principles of evidence, relevance, is understood. And it is an area of practical importance as well, because it has to do with much of the time that is actually consumed in court. I have proposed a modest change in the Rules, but one that I think is more aimed at theoretical neatness than practical improvement. In my view, no change in the Rules is necessary to achieve such improvement, nor would it likely be effectual. To the extent that improvement means more extensive exclusion of evidence of insubstantial probative value, it will only come if judges use more aggressively the tools they already have. The proponent's self-restraint is not always a sufficient check on such evidence because, as Professor Crump demonstrates, the evidence may have consequences that are beneficial to the proponent but harmful to the search for truth and the efficiency of the judicial system.

63. Crump, supra note 1, at 42.