1995

Refining Conditional Probative Value

Richard D. Friedman
University of Michigan Law School, rdfrdman@umich.edu

REPLY

Refining Conditional Probative Value

*Richard D. Friedman**

The subject of conditional relevance, or what I think is better called "conditional probative value," must seem hopelessly arid to many. It continues to engage the attention of evidence scholars, however, because it forms part of the conceptual underpinnings of many parts of evidentiary law. Dale Nance, one of the most astute evidence scholars of our time, has previously written at length on the subject[1] and has done so now more briefly in response to an article of mine. I offer an even briefer continuation of the discussion.

Professor Nance and I have approached the topic in very different ways. My article attempts to show that, as Professor Peter Tillers put it in a very generous response, reports of the death of the concept of conditional relevance have both been exaggerated and misleading.[2] Although the concept as classically expressed in evidentiary rules is subject to some important objections, it "should not be discarded but rather refreshed."[3] I therefore tried to develop and explore these concepts in my article and show the usefulness in several contexts of the notion that an item of evidence, while having relatively low probative value when offered, might have higher probative value under some other sets of evidentiary conditions. Professor Nance's goal in his earlier contribution on the subject was, as I understood it, substantially different. He found the criticisms of the conditional relevance doctrine sufficiently persuasive that the concept "now seems unable to bear the weight as an explanatory device that it had confidently assumed," but he be-

* Professor of Law, University of Michigan. B.A. 1973, J.D. 1976, Harvard; D.Phil. 1979, Oxford. — Ed. Many thanks to Peter Tillers and Dale Nance.

1. *See* Dale A. Nance, *Conditional Relevance Reinterpreted,* 70 B.U. L. REV. 447 (1990) [hereinafter Nance, *Reinterpreted*].

2. *See* Peter Tillers, *Exaggerated and Misleading Reports of the Death of Conditional Relevance,* 93 MICH. L. REV. 478 (1994).

3. Richard D. Friedman, *Conditional Probative Value: Neoclassicism Without Myth,* 93 MICH. L. REV. 439, 441 (1994) [hereinafter Friedman, *CPV*].

lieved it had "residual force" that could best be explained as an "instantiat[ion]" of the "best evidence principle."[4]

This last statement warrants careful examination. Nance has made one of the great contributions to recent evidentiary scholarship by showing the organizing force of the "best evidence" principle. The most interesting aspect of that principle, to my mind, is what Nance calls the "expansionary" aspect. Application of this aspect means that, even if a given item of evidence is more helpful than harmful to the truth-determining process, exclusion may nevertheless be warranted in hopes that it will induce the proponent to produce even better evidence. But in Nance's terms, there is also a "contractionary" aspect of the best evidence principle, which corresponds roughly to Federal Rule of Evidence 403 and provides essentially that evidence should be excluded if, on balance, it is harmful to the truth-determining process because countervailing considerations outweigh any probative value it may have.[5] There is considerable value in putting these two aspects under one head — the latter asking in essence, "Is it more bad than good?" and the former, "Even if it is more good than bad, should it be excluded in hopes of getting better?" — together expressing the search for the optimal package of evidence.

In this light, however, I believe that saying that the justifiable applications of the conditional relevance concept are instantiations of the best evidence principle tells us little that we did not know before. As it has been classically understood, the idea of conditional relevance is that absent predicate evidence, the proffered evidence, is irrelevant or put more loosely and accurately that it has too little probative value to warrant admissibility — which is much the same thing as saying that absent predicate evidence, the contractionary aspect of the best evidence principle demands exclusion of the proffered evidence.

The more intriguing aspect of Nance's approach lies in its application of the expansionary aspect. In this context, that aspect means that although the proffered evidence has sufficient probative value to warrant admissibility, this evidence should nevertheless be excluded absent the offer of predicate evidence, in light of which it

4. Nance, *Reinterpreted, supra* note 1, at 448, 472-73.

5. *See* Dale A. Nance, *The Best Evidence Principle,* 73 IOWA L. REV. 227, 273 (1988) [hereinafter Nance, *Best Evidence Principle*] (quoting Rule 403 to explain the contractionary aspect). Unlike the drafters of Rule 403, however, Nance does not include among these contravening factors the possibilities of prejudice and misleading a less-than-fully rational finder of fact; his attempt is to explain evidentiary rules in terms of the "epistemically best" evidence. *See id.* at 240-41.

would have significantly greater probative value.[6] I have used the term *relative conditional probative value* to express the idea that though the proffered evidence has significant probative value under one set of evidentiary conditions, it potentially — given the satisfaction of another set of evidentiary conditions — would have substantially more value.[7] I believe exclusion on this basis is clearly warranted in some circumstances — but in my own article, I have suggested that these circumstances are rather narrowly limited.[8] For the most part, if the proffered evidence is more probative than prejudicial, the court should not exclude it in hopes of inducing the production of predicate evidence, given that neither the proponent nor the opponent has decided to produce the predicate evidence. It seems to me, and this may be wishful thinking, that Nance's response to my article suggests some shift of emphasis in this direction.[9]

In my own article, I certainly gave more emphasis to the traditional realm of the doctrine, to applications of what I called *near-absolute conditional probative value.*[10] Professor Nance, with his usual perception, has spotted an unfortunate lack of precision in my statement of this concept. What I had in mind was the situation in which the court might conclude, in effect, "On the current state of the evidence, the proffered evidence does not have enough value to warrant admissibility, but, under another state of the evidence, it would." In other words, exclusion is warranted on the present state of the evidence, without need to rely on the possibility that exclusion will induce the presentation of better evidence, simply because as matters now stand, admissibility would be more harmful than helpful: The probative value of the proffered evidence is outweighed by the consumption of time in presenting the evidence, the dangers of confusion and prejudice, and any other detrimental effects that the proffer might entail. The "near-absolute" terminol-

6. Thus, Nance criticizes the Supreme Court's decision in Huddleston v. United States, 485 U.S. 681 (1988), as badly decided, though he regards the result as possibly justifiable as an application of the expansionary aspect of the best evidence principle. *See* Nance, *Reinterpreted, supra* note 1, at 498-505. In my article, I suggested that the *Huddleston* Court moved in the right direction but not far enough. *See* Friedman, *CPV, supra* note 3, at 467-70. No part of my analysis is based on the best evidence principle. Nance says that we have made "similar critique[s]" of *Huddleston*, Dale A. Nance, *Conditional Probative Value and the Reconstruction of the Federal Rules of Evidence,* 94 MICH. L. REV. 419, 426 n.25 [hereinafter Nance, *Reconstruction*], but, to me, the dissimilarities are far more striking.

7. *See* Friedman, *CPV, supra* note 3, at 457.

8. *See id.* at 471-72.

9. *Compare* Nance, *Reconstruction, supra* note 6, at 422, 424 n.19 *with* Nance, *Reinterpreted, supra* note 1, at 506 *and* Nance, *Best Evidence Principle, supra* note 5, at 263-70.

10. *See* Friedman, *CPV, supra* note 3, at 458.

ogy was meant to convey the idea that under the first set of evidentiary conditions, "the proffered evidence has very little probative value at all, too little to warrant admissibility."[11]

As Nance points out, "very little probative value" is not synonymous with "too little to warrant admissibility."[12] I treated them as synonymous because I believe that in *most* cases, if the proffered evidence is inadmissible under current conditions, but admissibility *would* be warranted if it had more probative value, that means that under current conditions, the evidence has very little probative value. Often, for example, evidence has too little probative value to be worth the time to present it unless predicate evidence is presented, thereby tying the evidence closer to the case. But this is not inevitably so. It may be that there is an objection to admissibility — perhaps a significant danger of prejudice — that is not insuperable but could be overcome if predicate evidence gave the proffered evidence probative value above a certain level that, on the current state of the evidence, it does not have.

My concern, then, is with the situation in which, however much probative value the proffered evidence may have on the current state of the evidence, it is not enough to overcome objections to admissibility, but, on another evidentiary state, the evidence may have sufficient value.[13] I believe that in most cases, but not in all, this will mean that under current evidentiary conditions, the evidence has very little probative value. But even if I am wrong about that, I do not believe that any significant part of the analysis of my article is undercut.

In any event, Nance's principal focus in his latest contribution is not on theory but on the last section of my article, in which I tried to crystallize my approach by proposing several reformulations of evidentiary rules. Here Nance makes some very useful comments.

Linking Up — I proposed revising Federal Rule of Evidence 104(b) to make it a straightforward statement of the court's discretion to admit proffered evidence conditionally, subject to being "linked up" by the presentation of predicate evidence in light of which the proffered evidence would have enough probative value to warrant admissibility.[14] Nance proposes a broader formulation, authorizing the court to admit the evidence conditionally, subject to

11. *Id.* at 458.

12. Nance, *Reconstruction, supra* note 6, at 425 & n.23.

13. Nance's Example #2, *id.* at 431, is, as I understand it, meant to suggest this situation, and I intended my proposed reformulation to apply in such a case.

14. *See* Friedman, *CPV, supra* note 3, at 473, 477.

the satisfaction of *whatever* condition might be necessary to make the evidence admissible.[15] His formulation makes excellent sense, though it might be made broader yet.[16]

Preliminary Determinations — I proposed a deletion to Federal Rule of Evidence 104(a) that was meant to reflect that Rule 104(b), which deals with conditional probative value, "is not a qualification of Rule 104(a) but a provision of a substantially different type."[17] Nance endorses the deletion. I also proposed an addition to Rule 104(a) that Nance agrees is substantively correct but that he believes would be better reserved for commentary.[18] In return, he proposes his own addition to the Rule — one that I regard as substantively correct but better reserved for commentary.[19] I would be

15. Nance's Example #3, Nance, *Reconstruction, supra* note 6, at 429, seems to me to be covered by my formulation. His Example #4, *id.* at 431, in which the predicate evidence is significant primarily not because it augments the probative value or diminishes the prejudicial impact of the proffered evidence but because it removes another objection to admissibility, is not.

16. Nance's proposal, like mine, refers to the achievement of evidentiary states in which the proffered evidence would be admissible. But in a case like Nance's Example #4, *id.*, in which the condition is satisfying an objection to admissibility *other than* the insufficiency of probative value — that is, in a case in which Nance's broadening would come into play — the predicate evidence need not be presented to the jury because it is the judge's responsibility to determine whether the facts underlying the objection have been overcome. Indeed, it may be that in some cases the changed condition that would make the proffered evidence admissible could be considered a change in evidentiary state only if that term were construed rather broadly. Nance's formulation might therefore be improved by referring simply to conditions rather than to evidentiary states.

The second sentence of Nance's proposed Rule 104(b) prevents the court from excluding *A* because of the absence of *B* and then excluding *B* because of the absence of *A*. *Id.* at 431. The idea strikes me as so obviously correct that I suspect a formal statement of it in terms such as those proposed by Nance would create more confusion that it solved.

17. Friedman, *CPV, supra* note 3, at 474.

18. *See* Nance, *Reconstruction, supra* note 6, at 434-35. The additional language was meant to accentuate the same point suggested by the deletion, by making clear that a court should not reason as follows: "The proffered evidence *A* has sufficient probative value to warrant admission if proposition *B* is true; therefore, the question whether proposition *B* is true is a preliminary question that I must determine under Rule 104(a)." Nance shows ably how, through rather clumsy interpretation, the language might not achieve its purpose, and how, through very ingenious interpretation, it might achieve more than its purpose. *Id.* (Even the latter interpretation is incorrect, in part, for reasons recognized by Nance and, in part, because I do not even believe his proposition P*, *id.* at 434 & n.44, is one the truth of which the court need determine.) It seems to me that the problem my proposed language addresses is far more significant than any new problems it creates. But that, I suppose, is not for me to say.

19. Nance would provide explicitly that "the court may consider only admissible evidence in assessing the probative value of challenged evidence for the purpose of applying any rule that depends upon such an assessment." *Id.* at 436. He acknowledges that this language is meant "to prevent lawyers and judges from doing something that they should be smart enough to avoid anyway." *Id.* I think we can go further — they *have* been smart enough to avoid the error, and it does not seem to me that the changes that either he or I propose would make the error more likely. The reason is not that the court considers itself "bound" by the rules concerning probative value but that it makes sense, in determining the probative value that proffered evidence will have before the jury, to consider the context in which the

delighted if rulemakers took our substantive exchange with sufficient seriousness that our differences in taste had any significance.

Personal Knowledge — I suggested in my article that the "personal knowledge" requirement is a very complex one, and I proposed only a relatively narrow amendment of Rule 602, one that kept the structure and most of the language of the current rule.[20] The current rule requires the admission of evidence sufficient to support a finding of the witness's personal knowledge. The essence of my proposal is to provide instead that the witness's testimony concerning a matter should be "deemed" to have probative value only to the extent that the witness has personal knowledge concerning the matter. In a given case, the proposition that the witness has the requisite personal knowledge might appear so implausible that the court, applying this rule, should decide that the testimony has insufficient probative value to warrant admissibility. Often, however, personal knowledge will appear sufficiently plausible that the testimony must be admitted. In such cases, my proposal would effectively ask the jurors to police the personal knowledge requirement and instruct them to *treat* the testimony as lacking probative value to the extent that the witness lacks personal knowledge.

This last aspect of my proposal, as Nance points out, is rather discomforting.[21] If a better solution is available, I believe it would require a far more drastic revision of Rule 602 than I have attempted. I suspect such a revision might eliminate a general personal knowledge requirement but incorporate the following principles: (1) the lack of personal knowledge is a factor to be taken into account by the court in assessing whether the testimony has enough probative value to warrant admission; (2) the personal observations made by a lay witness are more useful evidence, to the extent they may be communicated to the fact finder, than the inferences drawn by the witness from those observations; and (3) it is generally more efficient and less troublesome — at least if the witness is friendly to the proponent — to press the proponent to secure the witness's testimony of those observations than to allow the proponent to secure it as to the inferences and then allow the opponent to explore the extent to which the inferences are not based on the witness's personal knowledge.[22]

---

jury will actually consider the proffered evidence, and that context does not include inadmissible evidence.

20. *See* Friedman, *CPV, supra* note 3, at 475-76.

21. Nance, *Reconstruction, supra* note 6, at 439.

22. Another principle is tempting, but I, tentatively, would reject it:

Commendably, Nance has been bold enough to propose a full rewrite of Rule 602. As one would expect, his proposal reflects remarkable perspicacity, but I believe it also raises some significant problems,[23] some of which could probably be addressed by drafting changes. In the end, it takes two separate tacks, neither entirely comforting, to avoid the "deeming" difficulty of my proposal. With respect to live witnesses, Nance disclaims any intention to require the trial court to make a finding as to whether the witness in fact observed the events reported.[24] But suppose that the witness satisfies Nance's rule by testifying "in form to reports of [her] sensory observations," so that the testimony is admitted, and yet there is substantial doubt as to whether in fact the witness made those observations; the witness might have drawn an inference from other

(4) If it appears to the court that the witness, or the declarant of an otherwise admissible hearsay statement, has based her testimony or statement on information communicated by another person, then the testimony or statement should be treated, for purposes of applying hearsay law, as a report of that communication.

The problem is that it should be for the jury to assess a witness's or declarant's contention that she is speaking from personal observation. Leaving the matter to the jury means that a witness who would be barred by the rule against hearsay from testifying truthfully, "Observer told me *A*" would be allowed to testify falsely, "I personally observed *A*." I do not regard such a rule as self-contradictory. The first form of testimony but not the second invokes the credibility of Observer; the second relies on the credibility of the witness and exposes it to impeachment, far more than the first. Of course, to the extent it appears probable to the jurors that the witness was lying in claiming personal observation, the probative value that they accord the testimony would presumably be diminished substantially. Also, if the witness *admits* that her testimony of *A* is actually based on a communication from Observer, then the court should treat the testimony as a report of hearsay.

23. Nance's proposal is made "[s]ubject to the provisions of Article 7." Nance, *Reconstruction, supra* note 6, at 440. Rule 701 provides, in part, that a lay witness may testify in the form of an opinion or inference, if the opinion or inference is "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." FED. R. EVID. 701. This standard, it seems to me, is generally more lenient than and would usually displace Nance's proposed requirement that "[t]estimony must be limited in form to reports of the witness's sensory observations." Nance, *Reconstruction, supra* note 6, at 440.

Nance would require the witness herself to "disclose[ ] the source or sources of [her] knowledge of the information to be provided." *Id.* This is more restrictive than current law, which allows personal knowledge to be established by any admissible evidence, not limited to the witness's own testimony. I am not sure there is any need for the restriction.

In another restriction on traditional law, Nance would apparently make party admissions subject to the personal knowledge requirement. The logic of the exemption may be troublesome, at least as applied to vicarious admissions, but, on the whole, I think it makes good sense: An admission usually has substantial probative value even if made without personal knowledge, and the opponent is usually in at least as good a position as the proponent to show that the lack of personal knowledge undercuts the probative value.

Part (b) of Nance's proposed rule — which I believe would implement in part the fourth principle that I discuss but tentatively disapprove in note 22 *supra* — refers to "[h]earsay evidence, as defined in Rule 801(c)." Nance, *Reconstruction, supra* note 6, at 440. But Rule 801(d) excludes certain categories of evidence from the definition of hearsay, and it appears that Nance's rule would apply to statements that fall within the latter rule. This part also makes exclusion dependent on what source the declarant's knowledge is "more attributable." I suspect that inquiry would be a very difficult one; perhaps it is indeterminate.

24. *See id.* at 441.

information that she received, perhaps including reports by other persons. In such a case, perhaps justifiably, Nance's version of the personal knowledge requirement would be toothless, for the jurors would be free to afford the evidence whatever weight it deemed appropriate. By contrast, with respect to declarants of otherwise admissible hearsay, Nance's rule would establish a far stronger—and in my view, stronger than ideal—requirement, under which the jury would not receive the evidence if the court were persuaded that the declarant was more likely than not speaking without personal knowledge.[25]

The problem of the personal knowledge requirement is an intractable one. Nance has made great strides toward understanding and resolving it, but I do not believe he has yet achieved a solution.

Authentication — As in the case of the personal knowledge requirement, I proposed a change to Rule 901(a), on authentication, that preserved much of the language of the current rule.[26] This proposal, though, would work a substantial change, providing that there is no requirement for separate evidence authenticating proffered evidence unless (1) "there is substantial doubt that the proffered evidence is what its proponent claims," and (2) "the proponent of the evidence is substantially better able than the opponent to produce evidence bearing on that question."[27] Nance criticizes this proposal on several grounds. First, he points out that it lacks "an important cost-containment feature."[28] I suppose my draft could be read to include that feature, but the feature might as well be supplied explicitly — which can be done easily, by inserting the words "reasonably able and" before the words "substantially better able than the opponent."

Second, Nance points out that my proposal does not alter an odd feature of the current rule: Though the rule refers to and describes an authentication requirement, it does not affirmatively impose one and leaves matters in an uncomfortable limbo, given the provision of Rule 402 that all relevant evidence is admissible unless otherwise provided. True, but this aspect of Rule 901 seemingly has not created any significant problem, and, again, I have taken a minimalist approach to amendment; moreover, I have a glimmer of doubt as to whether it is wise to prescribe an affirmative require-

25. *Id.* at 443.

26. *See* Friedman, *CPV, supra* note 3, at 476-77.

27. *Id.*

28. Nance, *Reconstruction, supra* note 6, at 446.

ment in this area.[29] But, of course, such a requirement could be stated simply: "Authentication or identification shall be required as a condition precedent to admissibility if and only if . . . ."

Third, Nance believes that the authentication requirement should be explicitly limited to tangible evidence — which, again, could be simply accomplished. For now, he has rendered me an agnostic on this point.

Fourth, Nance criticizes the dependence of both my proposal and the current rule on the question of whether the proffered evidence is "what its proponent claims."[30] He contends that this concept is manipulable by the proponent, who can contend, for example, "I'm not claiming that this document is a contract signed by the defendant; I'm only claiming what is clearly true, that it purports to be a contract signed by someone with the same name as the defendant." I do not regard this as a significant problem. In such a case, the court could ask: "Are you serious? Are you willing to stipulate that it is *not* a contract signed by the defendant?" If the proponent answered in the negative, his bluff would be called; if he answered in the affirmative, the judge would presumably hold that the document lacks sufficient probative value to warrant admissibility — unless the document, in fact, has significant probative value even on the assumption that it is not a contract signed by the defendant.

* * *

Plainly, the last word has not yet been said on conditional probative value or on the various other evidentiary doctrines that it informs. Professor Tillers worried that my approach would require a high degree of "finesse and subtlety."[31] My hope, though, is that no matter how abstruse the underlying theoretical discussion may be, it will eventually lead to rules that are rather simple and straightforward, contain a minimum of artificial structure, and clearly express what we expect courts to do. I hope this latest exchange helps advance that process.

29. My proposal was, after all, meant to relax, not to strengthen, the authentication requirement.

30. Nance, *Reconstruction, supra* note 6, at 448.

31. Tillers, *supra* note 2, at 483.