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Response: Exaggerated and Misleading Reports of the Death of Conditional Relevance

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RESPONSE

Exaggerated and Misleading Reports of the Death of Conditional Relevance

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I

In 1980 the late Professor Vaughn C. Ball of the University of Georgia published an article called *The Myth of Conditional Relevancy.*[1] Ball's article is widely admired. One well-known evidence scholar, Ronald J. Allen, liked Ball's article so much that he borrowed its title word for word.[2] Although the extent of Allen's enthusiasm for Ball's analysis may be unmatched, a good number of students of evidence — including this writer — have said that Ball's analysis of conditional relevance is both original and important.[3] Richard Friedman, by contrast, cannot be counted as one of Ball's more ardent admirers. Although Friedman does show due respect for Ball in his article in this issue of the *Michigan Law Review,*[4] he also finds fault with some parts of Ball's argument.

Friedman's article is an important one. It is important in part precisely because Friedman's view of the problem of conditional relevance and conditional probative value is distinctive.[5] In addition, Friedman's article effectively serves as a timely reminder of a fundamental property of inference from evidence in the judicial process, namely, the hierarchical or chain-like character of factual inference in contexts such as adjudication. Friedman's argument about how judges should be directed to handle challenges to the admissibility of conditionally relevant and conditionally probative

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

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

3. *See, e.g.,* 1 JOHN HENRY WIGMORE, EVIDENCE § 14.1, at 724-30 (Tillers rev. ed. 1983) [hereinafter WIGMORE (Tillers ed.)]; Dale A. Nance, *Conditional Relevance Reinterpreted,* 70 B.U. L. REV. 447, 448 (1990).

4. Richard Friedman, *Conditional Probative Value: Neoclassicism Without Myth,* 93 MICH. L. REV. — (1994).

5. Friedman views conditional relevance as a special case of conditional probative value. Friedman, *supra* note 4, at [7-8 & 8 n.20].

evidence is likely to provoke a new round of much-needed scholarly debate about the more general and very important question of how the law should deal with the ineluctable phenomenon of hierarchical inference.

II

Friedman's article needs to be considered in context. The starting point is Ball's truly seminal 1980 article. Professor Ball was apparently a blunt fellow. He argued that the doctrine of conditional relevance is incoherent and unmanageable and that we ought to get rid of it. Friedman's general view of the conditional relevance doctrine is rather different from Ball's. Although Friedman agrees with Ball that the doctrine as it stands has flaws, he also sees a core of good sense in it. Hence, instead of arguing that the doctrine ought to be abolished, as Ball proposed, Friedman favors modifying it.

Friedman is clearly right about one thing: there *is* a core of good sense in the conditional relevance doctrine. It is important to make a distinction between the *phenomenon* of conditional relevance and conditional probative value, on the one hand, and the legal *rules* governing that phenomenon, on the other hand.[6] If we wish, we can abolish the legal doctrines now governing conditional relevance and conditional probative value. Try as we might, however, we cannot get rid of the phenomenon of conditional relevance — or, more broadly speaking, the phenomenon of conditional probative value. Practically every inference from evidence to a fact in issue in litigation — and possibly every such inference — involves a *series* of inferences rather than just a single inference; that is, practically every inference from evidence to a *factum probandum* in a lawsuit involves a *chain,* or network, of inferences.[7] Hence, the force of any single inference is practically always contingent upon, or affected by, at least one other inference.[8]

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6. Some years ago I made this point in a slightly different way. I said then that it is important to draw a distinction between conditional relevance as a legal doctrine and conditional relevance as an analytical concept. *See* WIGMORE (Tillers ed.), *supra* note 3, § 14.1, at 703.

7. The chain-like character of inference has been recognized by many observers. *See, e.g.,* EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 185-86 (1963); DAVID A. SCHUM, THE EVIDENTIAL FOUNDATIONS OF PROBABILISTIC REASONING §§ 2.2.5, 3.1.3-.6 (1994); *cf.* Albert J. Moore, *Inferential Streams: The Articulation and Illustration of the Trial Advocate's Evidentiary Intuitions,* 34 UCLA L. REV. 611 (1987).

8. Ball's view of the existence of the *phenomenon* of conditional relevance is unclear. I would like to think that Ball attacked conditional relevance as a "myth" only because he thought that the existing *doctrine* of conditional relevance rests on the mistaken assumption that the phenomenon of conditional relevance is rare. *See, e.g.,* Ball, *supra* note 1, at 455-56

Ball himself fully understood that the relevance of a great deal of evidence about a fact in issue — and possibly of all such evidence — is in some sense contingent upon inferences about other facts. Ball's own critique of the conditional relevance doctrine rests in part on his thesis that the relevance of practically all evidence is in some sense conditional.[9] Friedman's article, however, exposes a significant weakness in Ball's argument. Even if one believes — as I do — that Ball's exposé of the flaws in the conditional relevance doctrine is generally on target, Friedman's argument shows that it is far from clear that Ball's proposed *remedy* for those flaws is the correct one.

Ball's proposed remedy for the defects in the present conditional relevance doctrine is the *absence* of *any* legal rule about conditional relevance or conditional probative value; Ball wanted to abolish the doctrine without replacing it with a different one.[10] Although Friedman agrees with Ball that the conditional relevance doctrine as it now stands invites inappropriate judicial intervention in the fact-finding activities of juries, Friedman rejects Ball's proposal for the complete abolition of the conditional relevance doctrine. Friedman advocates replacing the existing conditional relevance rule with a rule about conditionally probative evidence. (Friedman views conditional relevance as a special case of the more general phenomenon of conditional probative value. I think Friedman is right about this point.)

Ball saw no need to replace the existing conditional relevance doctrine with an improved or different version of the doctrine. Ball believed that when a challenge is made to the relevance of conditionally relevant evidence, trial judges should do what they already do — or are supposed to do — when the relevance of any kind of evidence is questioned. And what are trial judges ordinarily supposed to do? How are they supposed to determine whether evidence is relevant? According to Ball, trial judges should articulate, or ask a lawyer in the case to articulate, one or more "evidential hypotheses" — which today we tend to call "generalizations" —

(discussing the frequency of conditionally relevant evidence under the existing conditional relevance rule); *see also id.* at 460 ("I believe that all offered evidence is conditionally relevant, but that the conditions for relevancy are far other than those supposed in the received doctrine of conditional relevancy."). Nonetheless, as Friedman points out, *see* Friedman, *supra* note 4, at [6-7] n.17, in one part of his article Ball did go to considerable lengths in an apparent effort to show that conditional relevance problems do not really involve the phenomenon of conditional relevance. *See* Ball, *supra* note 1, at 466-69 n.38.

9. Ball, *supra* note 1, at 460.

10. *Id.* at 466-69.

that appear to have the possibility of establishing a link between the challenged evidence and the fact in issue, the *factum probandum.*[11] The trial judge should then make a judgment about whether any such evidential hypothesis or generalization does in fact offer any (perceptible?) support for the proposed inference, the *factum probandum.*[12]

In one sense, it is difficult to quarrel with Ball's account of the method that the trial judge should use to evaluate the relevance of conditionally relevant evidence. It is difficult to do so because practically all reputable evidence scholars have agreed for quite some time now that rational assessment of the force of a proposed factual inference requires the articulation and evaluation of the generalizations that seem — initially, at least — to offer some support for such an inference. So only a brave soul would venture to say that Ball was *wrong* in believing that generalizations play an important part in judgments about the relevance of conditionally relevant evidence. Nonetheless, there is something unsatisfactory about Ball's proposal that judges deal with problems of conditional relevance by consciously attending to evidential hypotheses. The difficulty is that Ball's proposed analytical technique is in certain respects *uninstructive.* Indeed, if we are prepared to say that we already know about the importance of generalizations in inferential reasoning, we may be entitled to say that Ball's proposed analytical method for dealing with conditional relevance problems is *vacuous.*

The obvious difficulty with Ball's proposal is that it says nothing at all about how trial judges should assess the relevance of evidence when the trier of fact can reach the inference that the proponent of the evidence wants to establish only by drawing at least one other inference. In other words, Ball's proposed method of analysis does not address the question of how the trial judge should deliberate about the relevance of evidence when the proffered evidence leads to a fact in issue only by means of a *chain* of inferences. This is a serious failing because conditional relevance problems belong to a class of problems whose solution requires at least *two* separate inferences. In short, if we know or believe, as I do, that conditional relevance problems — and, more generally, problems of conditional probative value — have distinctive characteristics,[13] Ball's

11. *Id.* at 460.

12. *Id.* at 461-62.

13. When I say that the problem of conditionally relevant and conditionally probative evidence is *distinctive,* I am not asserting or implying that such evidence is *rare.* (It is possible that the relevance and probative value of most evidence — and possibly of all evidence —

proposed analytical method for dealing with conditional relevance problems seems unedifying. Ball's proposed analytical method may speak to the question of how one assesses a single step in an inferential chain, but it seems to have nothing to say about how one should assess the relationships among the links or parts of an inferential chain or network.

Unlike Ball, Friedman does make some claims — quite a few claims, actually — about the structure of hierarchical inferential argument. Moreover, as I have already noted, Friedman advocates the adoption of a conditional probative value rule that in some circumstances effectively *directs* trial judges to think about the hierarchical, or chain-like, nature of a problem of evidence. Hence, whether or not Friedman is correct about the structure of hierarchical inferential problems or about how the law should handle such problems, no one can accuse Friedman of responding to the problem of hierarchical inference by acting like an ostrich; Ball may have dug his head in the sand but Friedman most certainly does not. Whether or not Friedman's theory ultimately withstands scrutiny, Friedman is to be praised simply for *having* a theory of conditional relevance and probative value. The phenomenon of inferential chains and webs is both real and widespread. It is wonderful to see a theorist who, instead of ducking tough inferential problems, tackles them.

III

Despite my admiration for Friedman's article, I am not yet prepared to endorse every part of Friedman's argument. In particular, I do not yet have a firm opinion about whether the kinds of legal rules Friedman recommends for dealing with problems of conditional relevance and conditional probative value are a good idea.

I see three or four general options for legal responses to the problem of the admissibility of evidence whose relevance or probative value is conditional. One possible legal response — a response favored by Ball — is to have no specific legal rule to address the phenomenon of evidence whose relevance or probative value is conditional.[14] A second possible legal response is to have special,

are conditional.) I am only proposing that hierarchical inference has properties that are not found in single-stage inference.

14. This option is not necessarily limited to scholars who share Ball's view that conditional relevance problems are not sui generis. It is entirely conceivable that scholars who believe in the distinctiveness of inferential problems with multiple steps also believe that it is better not to have a legal rule that speaks directly about problems involving chains of inferences. One might take this view, for example, if one believes that we do not understand

fixed ways of handling special categories of problems of conditional relevance and conditional probative value; Professor Dale Nance seems to lean in this direction.[15] A third possible response is to call for judges to make individualized, case-by-case determinations of the relevance and probative value of conditionally relevant evidence and conditionally probative evidence, respectively. Finally, there is a fourth possible legal response, at least theoretically speaking. The fourth option is to have a legal rule that directs trial judges to use a particular analytical procedure in cases in which the relevance or probative value of conditionally probative evidence is challenged.[16]

Friedman seems to prefer a species of the third type of legal response described above; he seems to anticipate that under his proposed rule about conditional probative value, trial judges would make individualized, case-by-case determinations of the probative value of conditionally probative evidence. However, I do not think the case has yet been made that the third type of response is best. More generally, it is not yet clear to me which of the three or four legal options I have listed is best; I see possible problems with each of them. For example, I worry that the conditional probative value rule that Friedman favors will lead to wildly inconsistent rulings on the admissibility of conditionally relevant and conditionally probative evidence. I also wonder whether trial judges who are enmeshed in real-world, fast-paced, resource-straitened trials would have sufficient time to analyze problems of conditional probative value with the degree of finesse and subtlety that Friedman's theory seems to require. (If it can ever be said that the devil is in the details, this can be said about details in inferential reasoning.) By

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hierarchical inference well enough to prescribe by rule how judges should deal with complex inferential problems.

15. *See* Nance, *supra* note 3, at 447-48, 472-75, 505-07. Nance has a unique perspective on the conditional relevance doctrine. *See generally id.* Nance's perspective on conditional relevance grows out of his more general theory concerning the "best evidence principle." *See* Dale A. Nance, *The Best Evidence Principle,* 73 IOWA L. REV. 227 (1988). Nance argues that it is important to consider how rules of evidence, including the conditional relevance doctrine, work over time; he maintains that if we wish to explain a rule of evidence such as the conditional relevance rule, it is necessary — if not sufficient — to view such a rule as a component, or ingredient, of a dynamic process. Nance further argues that when we look at the conditional relevance rule from this point of view, we find, as a general matter, that the best explanation or justification for the conditional relevance doctrine is the best evidence principle. Nance, *supra* note 3, at 472-83. This thesis is provocative and profound; no one who wishes to say anything important about conditional relevance can afford to ignore or slight it.

16. I know of no one — including Friedman — who favors this fourth option; that is, thus far no evidence scholar has had the hubris to advocate the express and complete codification of the analytical technique that he or she happens to favor.

the same token, I worry (for example) that the first option — the option of having no rule at all concerning conditional relevance or conditional probative value — will invite or permit judges to ignore subtleties in problems of evidence that really are there.[17]

I have yet other worries, doubts, and concerns, both about Friedman's proposed replacement for the conditional relevance rule and about the two or three other types of possible legal responses to the phenomenon of conditionally relevant and conditionally probative evidence. So I am not yet sure that it would be a good idea to abolish the existing conditional relevance doctrine and to replace it with the conditional probative value rule that Friedman proposes in his article. But even if Friedman has not come up with a convincing solution to the riddle of conditional relevance, he has made a sophisticated and subtle argument for his proposed conditional probative value rule, and he deserves our praise for initiating a scholarly and professional conversation that eventually may lead to a consensus.

17. Perhaps it is better to direct judges to think about such problems as best as they can — while recognizing that they will sometimes err and not do their job as they might in more ideal circumstances. If one takes this view, one might then favor the type of conditional probative value rule that Friedman proposes.