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CORRESPONDENCE

Conditional Probative Value and the Reconstruction of the Federal Rules of Evidence

Dale A. Nance*

In a recent article, Richard Friedman articulates a modified and generalized version of the doctrine of conditional relevance, which he calls "conditional probative value."¹ This version comes in response to a substantial body of academic criticism of the traditional doctrine.² As one of the critics to whom Professor Friedman responds, I offer this reply with two purposes in mind: (1) to clarify the relationship between Friedman's analysis and my earlier reinterpretation of the conditional relevance doctrine; and (2) to address Friedman's specific proposals with regard to the Federal Rules of Evidence. I conclude that Friedman's articulation helps clarify the logic of proof in certain contexts, but I take issue with his suggestions for amending the Federal Rules.

I. THE TRADITIONAL DOCTRINE AND ITS CRITICISM

The doctrine of conditional relevance has become an integral part of evidence law, especially since the passage of the Federal Rules in 1975. The principal codification of the doctrine is the following:

{Federal Rules of Evidence} Rule 104(b). Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

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1. See Richard D. Friedman, *Conditional Probative Value: Neoclassicism Without Myth*, 93 MICH. L. REV. 439 (1994).

2. See 1 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 14.1 (Tillers rev. ed. 1983); Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOY. L.A. L. REV. 871 (1992); Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435 (1980); Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447 (1990).

In addition, the Rules employ the "sufficient to support a finding" standard for preliminary fact determinations with regard to the personal knowledge and authentication requirements.³ The Advisory Committee's notes inform us that these latter requirements are in fact based on the notion of conditional relevance.⁴

The problem that modern critics of this doctrine emphasize is that it reflects a defective conceptualization of probabilistic inference. It would be quite an unusual coincidence if evidence of proposition *X* were relevant only when the probability of some other proposition *Y* is greater than the probability of the proposition *Not-Y*. In most cases, including those by which the doctrine of conditional relevance has been explained, the evidence of proposition *X* is relevant as long as the probability of proposition *Y* is not zero. For example, when it is said that the relevance of Hector's shouting a warning to Penelope is conditional upon her having heard the shout, this statement can only be a very misleading way of saying that the evidence of the shout is relevant as long as we are *not certain* that it was *not* heard. But this is decidedly different from the conventional understanding of Rule 104(b), which requires evidence sufficient to support a "finding" that the shout was heard.⁵

Some of the critics have argued that the only appropriate response to this dilemma is to eliminate the doctrine entirely.⁶ Under this approach, there is no special procedure for determining issues of conditional relevance. When a question of relevance is raised by an objection, the issue for the trial judge to decide is simply whether a reasonable trier of fact could find the offered evidence relevant.⁷ Thus, in response to a relevance objection against evi-

3. See FED. R. EVID. 602 (requiring evidence sufficient to support a finding that a witness has personal knowledge of the matters of her proposed testimony); FED. R. EVID. 901(a) (requiring evidence sufficient to support a finding that the matter in question is what its proponent claims).

4. See FED. R. EVID. 602 advisory committee's note (describing the personal knowledge requirement as a "specialized application of the provisions . . . on conditional relevancy"); FED. R. EVID. 901(a) advisory committee's note (describing the authentication or identification requirement as falling "in the category of relevancy dependent upon fulfillment of a condition of fact").

5. See, e.g., Nance, *supra* note 2, at 450-56 (elaborating on the analysis of cases like that of Penelope and other cases that have been claimed to involve conditional relevance). Professor Friedman agrees, for the most part, with these criticisms. See Friedman, *supra* note 1, at 441-45.

6. This solution is pressed most strongly in Ball, *supra* note 2, and Allen, *supra* note 2.

7. This interpretation is the one usually given for the requirement of relevance, although deference to the potential judgment of the trier of fact cannot be read directly from the Federal Rules. Compare FED. R. EVID. 402 (excluding evidence that is irrelevant, without specifying what is to be done in the event that the trial judge thinks the evidence is irrelevant but also believes that a reasonable juror could think it relevant) with *United States v. Williams*, 545 F.2d 47, 50 (8th Cir. 1976) (endorsing the standard more deferential to the jury).

dence of Hector's shout, the trial judge should simply consider whether, under the state of the admitted evidence, the evidence of the shout could reasonably make the fact of notice to Penelope more likely than it would be without that evidence.

Of course, if, in the end, there is insufficient evidence to support a finding that Penelope had knowledge of the danger described in the shout *and if* that knowledge is itself an ultimate fact to be proved in the case, then the trial judge would be warranted in directing a verdict for Penelope on that issue, be it an issue of contributory negligence, assumption of the risk, or whatever. Still, it is important to keep in mind that such knowledge could come from some source other than Hector's shout. A "sufficient to support a finding" standard, like that prescribed in the current Rule 104(b), is simply misplaced as an admissibility rule.⁸

These arguments are convincing. But do they capture all that there is to say about conditional relevance?

II. NANCE'S REINTERPRETATION OF THE DOCTRINE

In my principal contribution to this subject, I went back to primary sources in order to find out how — and indeed whether — those authorities made the conceptual mistakes the modern critics identify.⁹ I discovered that most of the reported decisions that have been used to explain and justify the doctrine of conditional rele-

Friedman explicitly endorses the deferential standard as correct for ordinary judicial judgments of relevance. See Friedman, *supra* note 1, at 459 (extending the deferential standard to any admissibility decision in which the court must estimate probative value). Professor Allen proposes to formalize this deference to the trier of fact by amending Rule 104(b) to read as follows:

{Allen's proposed} Rule 104(b). *Relevancy.* The court shall admit evidence over a relevancy objection upon, or subject to, a finding that the evidence could rationally influence a reasonable person's assessment of any fact that is of consequence to the determination of the action.

Allen, *supra* note 2, at 883-84. There is, however, another approach, one that is more consistent with the framing of other provisions in the Federal Rules in avoiding the necessity of a special exception to Rule 104(a). See, e.g., FED. R. EVID. 602, 901(a), 1008. One could simply reword Rule 402 on relevance as follows:

{Nance's proposed} Rule 402. *Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.* All evidence that a reasonable person could consider relevant is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence that a reasonable person could not consider relevant is inadmissible.

Later, however, I suggest a very different substitution for Rule 104(b). See *infra* Part IV.

8. The conflation of admissibility and sufficiency issues is a principal theme in the criticism of conditional relevance. See, e.g., Nance, *supra* note 2, at 451, 453-54, 457-62. Here again, Professor Friedman agrees with the critics, arguing that the "sufficient to support a finding" language artificially interferes with the trier of fact's ability to evaluate complex inferences. See Friedman, *supra* note 1, at 447-53.

9. See Nance, *supra* note 2, *passim*.

vance, in fact, illustrate something entirely different. In particular, many reflect the broader policy of assuring an optimal trade-off between the goal of having all relevant and available evidence before the tribunal and that of avoiding a waste of resources — including the parties' resources — in the consideration of the evidence.¹⁰ In the late-eighteenth and early-nineteenth centuries, this trade-off was achieved under the rubric of the "best evidence" principle. This principle, as I have elaborated it in a series of articles, imposes on each litigant a duty to present the most probative evidence reasonably available to the litigant, except to the extent that (a) to do so would be a waste of resources, or (b) an opponent has a reasonable opportunity to present evidence omitted by the litigant.¹¹

Applying this notion to the purported conditional relevance cases, I argued that some of the decisions represent nothing more controversial than the exclusion of undeniably relevant evidence because the consumption of time and energy entailed by its consideration outweighs its weak probative value, at least without further supporting evidence. For example, evidence of Hector's shout, though undeniably and unconditionally relevant, could be excluded nonetheless if the circumstances indicate a very low probability that the shout was heard. This kind of exclusion represents what I have called the *contractionary* dimension of the best evidence principle.¹²

On the other hand, some cases instantiate an *expansionary* dimension of that principle, the idea that exclusion of the proffered evidence is used as an inducement or reminder to present further probative evidence affecting the inferences drawn and probably available to the proponent of the challenged evidence. This kind of application of the principle is more controversial, primarily because of arguments that can be made concerning the adversarial privilege indicated in the qualification (b) to the duty articulated above. Nonetheless, there will be cases in which the cost-benefit analysis suggests that the burden to present the additional evidence should be placed upon the proponent of the challenged evidence rather than left to an adversarial response.¹³ For example, evidence of Hector's shout might be excluded if there is significant doubt both about whether Penelope heard the shout *and* whether the propo-

10. See *id.* at 466-83.

11. The principle is most fully developed in Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988). See also Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831 (1991); Dale A. Nance, *Understanding Responses to Hearsay: An Extension of the Comparative Analysis*, 76 MINN. L. REV. 459 (1992).

12. See Nance, *supra* note 2, at 474-75.

13. See *id.* at 472-74.

ment of the evidence has reasonable and superior access to additional potential evidence that would help resolve that doubt.¹⁴

Finally, and importantly, I argued that some cases used to justify the conditional relevance doctrine cannot be explained by either a contractionary or expansionary application of the best evidence principle or by any other convincing policy or principle. I concluded that these decisions were simply mistaken rulings that the defective logic of conditional relevance cannot vindicate.¹⁵ Thus, I argued that courts should reinterpret the conditional relevance doctrine to eliminate these mistakes without rejecting those decisions that can be justified by appropriate applications of the best evidence principle or by some other policy or principle distinct from the notion of conditional relevance.¹⁶

III. FRIEDMAN'S RECONSTRUCTION OF THE DOCTRINE

Professor Friedman offers to reconstruct the traditional doctrine by shifting the focus from the binary, all-or-nothing concept of relevance to the more variable concept of probative value. The resulting concept of "conditional probative value" is not limited to the relatively small number of situations in which the *relevance* of evidence can truly be said to be conditional upon the introduction of other evidence.¹⁷ Indeed, the probative value of *every* piece of evidence is conditional upon other evidence. But if so, what utility is obtained from this shift of focus? In particular, what pragmatic consequences follow from identifying an issue of conditional probative value?

Note that the traditional doctrine directly implicates an admissibility rule: if evidence of *X* is relevant only upon the introduction of some evidence of *Y* or — as the traditional doctrine lamely put it

14. See *id.* at 466-71 (discussing the similar treatment of this issue in the leading case of *Gila Valley, Globe & N. Ry. v. Hall*, 232 U.S. 94 (1914)).

15. See *id.* at 459-62, 493. Some of these mistakes are probably attributable, at least in part, to the incorporation of the defective conventional logic into authoritative norms like Rule 104(b). See *id.* at 471-72.

16. Consequently, Professor Allen's characterization of my article as an attempt to "defend the status quo" is misleading. See Allen, *supra* note 2, at 871-72. Although I did suggest how courts can interpret the existing Federal Rules to achieve maximal possible coherence with the best evidence principle, I did not argue that those Rules are now optimally worded nor did I argue that courts have consistently interpreted them according to my suggestions. See Nance, *supra* note 2, at 492-505. My article was more the basis of reinterpretation and reform than a defense of the status quo.

17. Friedman amplifies and at times corrects the concessions by earlier critics that there are indeed some cases in which the relevance of evidence is conditional upon the presence of other evidence. Compare Nance, *supra* note 2, at 456 n.30, 474 n.114 and accompanying text with Friedman, *supra* note 1, at 443.

— upon the introduction of evidence “sufficient to support a finding” of *Y*, then a *fortiori* the evidence of *X* should be excluded unless or until the required evidence of *Y* is introduced. This result follows immediately from the rule excluding irrelevant evidence. Indeed, the conditional relevance doctrine has been conceived as simply stating an implication of that rule.¹⁸ By contrast, the fact that evidence of *X* possesses probative value that is conditional on evidence of *Y* does not by itself determine the application of any rule or principle of exclusion; exclusion is warranted only by reference to a rule or principle that cannot be inferred directly from the conditional character of the probative value.¹⁹

Where, then, is the exclusionary bite of Friedman’s reconstruction? Here, unfortunately, there is a considerable ambiguity in his article. The most plausible understanding of the answer he gives to this question is this: sometimes, when the probative value of evidence *A* is conditional on evidence *B*, the presence or absence of evidence *B* will determine whether or not evidence *A* is admissible under rules excluding relevant evidence because its probative value is outweighed by the waste of time and other resources necessary to consider it. In other words, the admission of *B* will put *A* over the threshold between *de minimis* evidence and significant evidence. He even gives this situation a special name, “near-absolute conditional probative value.”²⁰ If this is the tack that Friedman intends to take, then the implicated exclusionary rationale is just the contractionary dimension of the best evidence principle I described earlier. To this extent, Friedman’s reconstruction amounts to an elaboration of the implications of that contractionary principle,

18. It should be added, however, that the goal of the conventional formulation was actually to weaken the exclusionary force of the relevance rule compared to what some earlier courts had done with it. See Nance, *supra* note 2, at 454-55 (discussing Edmund Morgan’s efforts to relax the restrictions on admissibility some courts imposed under the rubric of relevance determinations).

19. In Penelope’s case, for example, the fact that there exists other evidence conditioning the probative value of the evidence of Hector’s shout does not, by itself, warrant exclusion of the latter. Suppose the court has reason to believe that Romulus, not before the court, witnessed the shout. Then the probative value of the proffered evidence of the shout is conditional on the testimony of Romulus. But that, by itself, is not enough to warrant exclusion or else virtually all evidence would be subject to similar exclusion unless and until all other potential evidence, otherwise admissible on the same material issue, is admitted. To warrant exclusion, one must advert to something else, such as (a) the fact, if true, that consideration of the evidence of the shout would waste too much time or (b) the fact, if true, that the testimony of Romulus is reasonably available for presentation by the proponent but not by the opponent.

20. See Friedman, *supra* note 1, at 458. Thus, his principal reconstruction of the doctrine of conditional relevance, as an admissibility rule, is a doctrine of near-absolute conditional probative value.

though he does not describe it as such.²¹ Friedman offers a series of nicely constructed hypotheticals that illustrate the common problem of technically relevant evidence that has *de minimis* probative value until further evidence is received.²²

On the other hand, Friedman's concept of near-absolute conditional probative value is susceptible to a broader interpretation. Friedman could mean this concept to apply in any situation in which some conditioning evidence, *B*, augments the probative value of the initial evidence, *A*, enough to overcome some rule that would otherwise operate to exclude the latter. In this situation, *A* and *B* would have near-absolute conditional probative value *relative to* the rule in question. The implicated admissibility rule would not be limited then to that which excludes evidence as a waste of time or other resources. Moreover, this broader notion could apply even if *A* without *B* has high probative value, as when very probative evidence is inadmissible, without more, because of its extremely prejudicial potential. This interpretation of Friedman's argument is rather difficult to square with his explicit definitions of near-absolute probative value, which refer to *A* as having "very little" or "insignificant" probative value without *B*, and this is especially so in the context of the examples that motivate his definition.²³ Nonetheless, if this broader meaning is the one intended, then the con-

21. Friedman, however, does cite as analogous my discussion of the contractionary dimension. See *id.* at 445 n.22.

22. See *id.* at 444-45, 450-51, 454-55, 461-63.

23. The examples Friedman uses to motivate the concept of near-absolute conditional probative value refer to the initial evidence as having very low probative value without the conditioning evidence, with no countervailing factor in play except the obvious resource conservation factor. See *id.* at 444 (exemplifying evidence with probative value "too minuscule to warrant admissibility"). Friedman's definitional passage then reads as follows:

I will use the term *near-absolute conditional probative value* to describe this special case, because the essence of it is that not only does the proffered evidence have greater probative value given the predicate than absent the predicate, but absent the predicate the proffered evidence has very little probative value at all, too little to warrant admissibility. In other words, evidence of *A* has significant probative value with respect to proposition *X* conditional on *B* in this narrower sense if (i) *A* does *not* have significant probative value with respect to *X* if *B* is not included in the base of information, but (ii) *A* *does* have significant probative value with respect to *X* if *B* is included.

Id. at 458. To read these definitions as describing the broader version of the concept explained in the text entails some counterintuitive understanding of the language used. For example, in the case of the first definition, it would require one to read the words "too little to warrant admissibility" as refining and in fact altering the meaning of the phrase "very little probative value at all" or perhaps providing a disjunctive alternative to that phrase; indeed, the phrase "very little probative value" would then be mere surplusage, having no independent content in a definition that seems to be very carefully worded. A conjunctive reading, to the effect that *A* must have very little probative value *and* indeed too little to warrant admissibility, is the more natural and obvious one. Similarly, in the second definition, it would be odd to say that evidence that is very probative but excluded because also extremely prejudicial is evidence that lacks "significant probative value." Of course, it is true that "significance" is always relative to something, but his discussion up to this point in the paper and in

ceptual connection between Friedman's near-absolute conditional probative value and the best evidence principle is severed. The concept of near-absolute conditional probative value can then be employed in connection with any exclusionary rule, however grounded, wise or unwise, so long as its application depends upon a weighing of the probative value of *A*.²⁴

To be sure, the analysis is very helpful under either interpretation. Most obviously, it helps to clarify the relationship between the conditional quality of probative value assessments and the prevailing exclusionary rules. For example, Friedman applies his analysis in a useful critique of the Supreme Court's employment of conditional relevance in the context of prior offense evidence in the well known *Huddleston* case, the reasoning in which is defective under either reconstruction of that doctrine.²⁵ Peter Tillers, in a comment on Professor Friedman's piece, has articulated well the benefits derived from attention to the logic of proof provided by commentators like Friedman, benefits that in fact go well beyond the subject of admissibility rules.²⁶

Moreover, by recourse to the more general idea of conditional probative value, not limited to cases of near-absolute conditional probative value, Friedman explicitly articulates a connection between the expansionary dimension of the best evidence principle and the issue of inducing parties to present additional valuable evidence by excluding evidence with undeniably significant probative value. To be sure, Professor Friedman devotes relatively little at-

most of what follows does not suggest anything relative to which the probative value of *A* would be insignificant except the obvious factor of the time and expense of its consideration.

24. Based on Professor Friedman's article, the first interpretation is so much better than the second that, in the original draft of my paper, I had largely discounted the latter. The broader interpretation is implicated only later in his article, in connection with two examples that seem directed at other issues. See *id.* at 464-66 (using the hypothetical "Akers" case to show that, by presenting evidence *B*, the *opponent* can "open the door" to the proponent's introduction of evidence *A*, where *A* would otherwise be excluded under rules barring the use of excessively prejudicial evidence); *id.* at 466-70 (using an actual decision involving potentially prejudicial evidence to illustrate the allocation of responsibility for decisionmaking between the judge and jury). These examples employ an idea that could be intended as identical to or as simply analogous to that of near-absolute conditional probative value; Friedman does not clearly indicate which. Based on a personal communication from Professor Friedman in regard to my draft, however, I now believe that indeed he did intend the broader interpretation of near-absolute conditional probative value. Electronic Mail from Richard D. Friedman, Professor of Law, University of Michigan (July 12, 1995) (on file with author). Consequently, I have incorporated discussion of it in the text.

25. See Friedman, *supra* note 1, at 467-70 (discussing *Huddleston v. United States*, 485 U.S. 681 (1988)); cf. Nance, *supra* note 2, at 498-505 (articulating a similar critique of *Huddleston*).

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

tention to this dimension of the best evidence principle. Whereas I had offered it as one unifying theme cutting across many so-called conditional relevance cases, he limits his endorsement of the idea to a special category of problems, those that run under the rubric of "authentication."²⁷ Understandably, this emphasis raises the following difficult question: Why should the endorsement be limited to authentication problems? I return to this issue in Part VII.

In the next four Parts, I raise specific objections to what I generally consider a solid contribution by Professor Friedman to the literature on relevance and probative value. The issues I raise do not concern the analytical phenomenon of conditional probative value, which I think is clearly articulated in his article, despite the ambiguity noted earlier. Rather, they concern the operationalization of these ideas in his proposed amendments to the rules of admissibility. To this subject, Friedman devotes considerably less space. But in the details of specific proposals often lies much that is very important, both practically and theoretically.

IV. CONDITIONAL PROBATIVE VALUE AND CONDITIONAL ADMISSIBILITY

The first specific proposal that Professor Friedman makes is, of course, to reword Rule 104(b). Because he agrees with most of the earlier criticism of the notion of conditional relevance, he proposes to substitute a conditional probative value rule:

{Friedman's proposed} Rule 104(b): Probative value conditional on further evidence. When a proffered item of evidence has insufficient probative value to warrant admissibility on the current state of the evidence but would have sufficient probative value to warrant admissibility on some other evidentiary states, the court may in its discretion admit the evidence subject to the introduction of evidence to achieve such another evidentiary state.²⁸

This proposal is a considerable improvement over the current Rule 104(b). Although judges can make mistakes in the application of any rule, at least Friedman's proposed wording does not invite the kind of mistakes that the current rule does.

The problem with the proposal is simply that it is not as generalized as it should be. In order to see why this is so, consider four hypothetical problems.

27. See Friedman, *supra* note 1, at 451-53, 470-72. To this extent, his treatment of authentication closely parallels that for which I had earlier argued. See Nance, *supra* note 2, at 484-88, 490-97.

28. Friedman, *supra* note 1, at 473.

Example #1: A litigant offers evidence *A*. The trial court rules it inadmissible under that portion of Rule 403 that grants authority to exclude evidence the probative value of which is substantially outweighed by the danger of wasting time. The litigant then offers to introduce evidence *B* if necessary to gain admission of *A*, and the trial court indicates that, when coupled with *B*, *A* would have sufficient probative value as not to be excludable as a waste of time under Rule 403.

This example would constitute the paradigmatic application of Friedman's proposed Rule 104(b).²⁹ But consider the following hypothetical:

Example #2: The litigant offers evidence *A*. Despite the fact, acknowledged by all, that *A* has significant, indeed high probative value, the trial court rules it inadmissible under that portion of Rule 403 that grants authority to exclude evidence the probative value of which is substantially outweighed by the risk of unfair prejudice. The litigant then offers to introduce evidence *B* if necessary to gain admission of *A*, and the trial court indicates that, when coupled with *B*, *A* will have sufficient probative value as not to be substantially outweighed by the danger of unfair prejudice.

Would Professor Friedman consider this a case for the application of his Rule 104(b)? A "plain meaning" approach to his rule would embrace this situation as well.³⁰ Yet the ambiguity already noted concerning Friedman's concept of near-absolute conditional probative value, upon which his Rule 104(b) is apparently built, casts doubt on whether he should be understood as intending this outcome.³¹ If the rule extends only to cases that the narrower interpretation of that concept covers, it does not apply to Example #2, since a crucial feature of Example #2 is that, by hypothesis, the probative value of *A* is significant even without *B*. On the other hand, Friedman does not explicitly limit his proposed rule to contexts of near-absolute conditional probative value, and there is no reason *not* to extend the kind of treatment specified in his proposal to evidence the admissibility of which is dependent on a weighing of probative

29. At various places, Professor Friedman notes that the principal provision of the Federal Rules that would exclude evidence of near-absolute conditional probative value is Rule 403. See *id.* at 444 n.21, 469.

30. That is probably the approach we could expect the federal courts to take. See Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years — The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857 (1992); Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEXAS L. REV. 745 (1990).

31. The context suggests that Friedman considers his proposed rule to be an operationalization of his notion of near-absolute conditional probative value. See Friedman, *supra* note 1, at 458 (indicating that, for the most part, near-absolute conditional probative value is the pertinent concept in his paper).

value against considerations other than merely wasting resources. Moreover, if the broader interpretation noted in the previous section is given to the meaning of near-absolute conditional probative value, then the applicability of Friedman's proposed rule can be viewed as intended.

In any event, what this point illustrates is the fact that Friedman's proposal for Rule 104(b) is essentially a proposed wording of the traditional procedural doctrine of "linking up," also called "connecting up" or, more formally, "conditional admissibility." Indeed, Friedman notes the relation between his proposal and that doctrine.³² There is no explicit provision for this idea in the Federal Rules, except of course the present Rule 104(b), and it would not be a bad idea to make more explicit the authority to condition admission in this way.³³ But if we are to do so, we should at least make sure that we have stated the authorization correctly. Friedman's proposal does not quite accomplish this purpose.

The problem can be seen by considering the next hypothetical:

Example #3: A plaintiff offers evidence *A* directed at showing the opponent's wealth in a case in which punitive damages are at issue. While the defendant's wealth is material, and evidence *A* is undeniably probative of defendant's wealth, the trial court rules it inadmissible under Rule 403 because such evidence is too prejudicial to be admitted unless a *prima facie* case of malicious conduct is established. The litigant then offers to introduce evidence *B* to show malice in the defendant's conduct, and the trial court indicates that when coupled with *B*, *A* would be admissible because the risk of prejudice is now unavoidable.

This example is another plausible candidate for the "linking up" procedure, but it is not one in which admissibility is achieved by introducing additional evidence that increases the probative value of the conditioned evidence. There are surely many other such examples.³⁴ Friedman's proposed Rule 104(b) does not cover such a case because it provides only for such a procedure when the effect of evidence *B* is to augment the probative value of *A*.³⁵ True, Fried-

32. See *id.* at 467 (stating that his proposed rule "addresses only the situation in which the concept of conditional probative value may be brought into play in an operationally significant way").

33. Despite the narrowness of Rule 104(b), the courts have managed to employ such conditional admission in many contexts not involving only relevance issues. See 1 MCCORMICK ON EVIDENCE § 58, at 233 n.10 (John William Strong ed., 4th ed. 1992) (citing the discretion granted under Rule 611(a) to control "the mode and order of interrogating witnesses and presenting evidence").

34. One is mentioned in Nance, *supra* note 2, at 463-64 (explaining how such conditional admissibility does not involve conditional relevance despite assertions that it does).

35. This is true even if we take the proposed Rule 104(b) as restating the broader interpretation of near-absolute conditional probative value.

man's rule does not *explicitly* require that the connecting evidence *B* increase the probative value of *A* in order to activate his proposed rule. Literally read, the proposal thus could be said to cover a case in which the only effect of *B* is to reduce the unfairness of the prejudice that is weighed against *A*'s unchanged probative value. But that is clearly not the most obvious reading of the proposal, at least not in the context of an article that consistently speaks to the effect of *B* on the probative value of *A*. In any event, if the proposed rule is to cover Example #3, then that rule cannot be based on the phenomenon of conditional probative value as such.

Moreover, the proposed rule would have to be stretched beyond the breaking point in order to cover the conditional admissibility of otherwise privileged or incompetent evidence where neither the probative value of the challenged evidence nor the effect thereon of the conditioning evidence would be at issue. Consider:

Example #4: A plaintiff offers evidence *A*, a statement made by the defendant to Witness. The defendant objects to the testimony on the ground that the marital communication privilege covers the statement to Witness. The plaintiff asserts that the defendant was not in fact married to Witness at the time the statement was made and offers to show this by documentary evidence *B*, indicating the date of the marriage. After considering what the defendant has to say in response to the objection, the trial judge agrees that if the plaintiff can present the indicated documentary evidence, then Witness will be allowed to testify to the statement.

In understanding the application of Friedman's proposed rule to this example, two points are crucial. First, the probative value of the statement is not affected in any way by information about whether or not the two were in fact married when it was uttered or so we may assume hypothetically. In this respect, Example #4 is like Example #3. Second, unlike Example #3, the decision whether to admit the testimony does not even involve weighing the probative value of *A* against some other consideration; the very premise of Friedman's rule thus fails to apply because the reason to exclude *A* without *B* has nothing to do with its lack of probative value. Rather, the admissibility of *A* depends on the introduction of evidence *B* that will yield a finding that the privilege did not attach to the statement, regardless of the statement's probative value. It is perfectly plausible that circumstances could warrant a conditional admission of Witness's testimony, if, for example, the plaintiff gives appropriate assurances that the indicated documentary evidence will be forthcoming, the defendant has nothing to say in reply, and

the inconvenience to Witness precludes recalling her at a later date. If Friedman's proposal is intended to cover a case like this, it should be rewritten. Its references to probative value are entirely misleading.³⁶

So as far as it goes, Friedman's proposal should be expanded to the more general case of conditional admissibility. I propose a somewhat different replacement for the current Rule 104(b):

{Nance's proposed} Rule 104(b). *Conditional admissibility.* When a proffered item of evidence is inadmissible but would be admissible on some other state of the evidence, the court may admit the proffered evidence subject to the subsequent presentation of evidence sufficient to achieve such other evidentiary state. If the court does not conditionally admit the proffered evidence and further evidence is subsequently presented that achieves such other evidentiary state, the court may not exclude such further evidence on the ground that it is inadmissible without other evidence if admission of the original proffer would have rendered the further evidence admissible.

This broader rule covers the cases of concern to Professor Friedman and also all other cases where such a procedure would be appropriate. By referring to the *presentation* of further evidence, as distinct from its *introduction*, this proposal covers situations in which the conditioning evidence is not technically admissible; in most such cases, the judge may nonetheless consider it in determining whether the condition on the admissibility of the original evidence has been satisfied.³⁷

The scope of the authorized discretion is essentially limited to deciding whether satisfactory representations have been made by the proponent in order to warrant conditional admission. In particular, the second sentence helps to give more precise definition to the discretion accorded the trial judge by foreclosing the alternative, formally allowed by Professor Friedman's version, of rejecting evidence *A* because of the absence of *B* and then rejecting *B* be-

36. Although the point is somewhat more subtle, most competency rules will involve a similar problem. Consider a preliminary factual issue determining the applicability of a hearsay exception. Although many, but certainly not all, hearsay exceptions are crafted so that satisfying the conditions of the exception augments the probative value of the hearsay evidence, the preliminary decision itself rarely calls for the trial court to weigh the probative value explicitly. Thus, it is hard to imagine that Friedman's proposed rule would be construed as applicable.

37. See FED. R. EVID. 104(a) (prescribing that, in making determinations of admissibility, the trial judge is not bound by the rules of evidence except those with respect to privileges). In the context of Example #4, suppose the documentary proof of the date of the marriage does not qualify under an exception to the hearsay rule; the judge could still use it in deciding whether the marital privilege applies. Exceptions to the proposition that unprivileged but inadmissible evidence may be considered in deciding admissibility will be noted in the next section. See *infra* notes 50-53 and accompanying text.

cause of the absence of *A*. Theoretically, this result could happen in a case in which *B* suffers from the same problem as *A*. Although such an application of his rule would probably be called an abuse of discretion by a reviewing court, it would not hurt to resolve the issue because the practical necessity of introducing either *A* or *B* first is one of the reasons for allowing the procedure in the first place.³⁸

In a sense, it is inevitable that Friedman's proposal should be generalized to such a conditional admissibility rule. If evidence *A* has near-absolute conditional probative value, under either interpretation of what that means, then it necessarily follows that *A* should be excluded as of too little probative value to warrant consideration, unless of course *B* has already been introduced. This statement is true *whether or not* one can identify potential evidence *B* in conjunction with which *A* would have significant probative value.³⁹ All that identifying some such evidence *B* does, besides advertent to the possibility of introducing *A* after *B* is introduced, is present the proponent with the opportunity to try to invoke the court's discretion to allow the proponent to introduce *A* now and "connect up" with *B* at a later time. The admissibility function is exhausted, so to speak, by a combination of the exclusionary rule for insufficiently probative evidence and a rule of conditional admissibility, neither of which depends necessarily on the concept of conditional probative value.

V. PRELIMINARY DETERMINATIONS

As an adjunct to his proposal for Rule 104(b), Professor Friedman recommends the following changes to Rule 104(a), with *italics* indicating material to be added and [brackets] indicating material to be deleted:

{*Friedman's proposed amendment to*} Rule 104(a). *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court[, subject to the provisions of subdivision (b)]. In making its determination it is

38. See 1 WIGMORE, *supra* note 2, § 14; 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1871 (Chadbourne rev. ed. 1976).

39. Friedman's formal definitions of near-absolute conditional probative value make this clear. In terms broad enough to cover both interpretations given to that concept, the definitions have two requirements: (1) that *A* have insufficient probative value for admission by itself; and (2) that *A* have sufficient probative value for admission when coupled with some *B*. See Friedman, *supra* note 1, at 458. The first requirement, which, by itself, activates an exclusionary rule, is independent of any identification of potential evidence *B* or its characteristics.

not bound by the rules of evidence except those with respect to privilege. *That the probative value of proffered evidence is conditional on the truth of a given proposition is not a ground on which the truth or falsity of that proposition shall be deemed a preliminary question within the meaning of this rule.*⁴⁰

The proposed deletion is correct given either his or my change in Rule 104(b). Friedman's explanation of the proposed additional language is that it is intended to emphasize that his new Rule 104(b) is not a qualification of Rule 104(a), but rather a provision of a substantially different type.⁴¹ I agree with the logical status of the new Rule 104(b), whether his version or mine. Actually, if my version were adopted, the relationship to Rule 104(a) would be so much more obvious that no accentuation in Rule 104(a) would be necessary.

There is a more subtle problem, however, one that lies in the nature of the directive that Friedman has added. That directive is not an exclusionary rule nor an exception to such a rule, and it is not an otherwise unstated rule about how to apply other exclusionary rules. Rather, it is an analytically correct directive warning practitioners not to make a particular conceptual error in applying the exclusionary rules. It is, moreover, a directive that is already implied by the other rules because no other rule makes the admissibility of evidence turn on the mere fact that the probative value of the evidence is conditional. The proposed admonition is thus virtually tautological. While tautologies cannot be "wrong," they are rarely useful in a codification. A couple of examples will illustrate the problems.

Returning to my example of Hector's warning shout to Penelope, the upshot of the criticism of conditional relevance is that the court should not consider it appropriate, in ruling on admissibility, to make a determination about the truth or falsity of the following proposition:

P: Penelope heard Hector's shout.

Friedman apparently intends to emphasize this point by the added language. If, however, the lawyer or judge applying the rule does not understand the modern conceptual criticism of the conditional relevance doctrine, Friedman's proposal will not prevent the error because the practitioner will likely reason as follows:

The relevance of the evidence of Hector's shout is conditional on a finding that the shout was heard, in other words, a finding that *P* is

40. *Id.* at 474.

41. *Id.*

true because the shout means nothing unless it was heard. Therefore, there is a preliminary issue that determines the applicability of Rule 402, the rule excluding irrelevant evidence. True, Friedman's revision of Rule 104(a) says that proposition *P* should not be deemed a preliminary issue *simply because* the probative value of the shout is conditional on the truth of *P* but *that* is not the reason I must or can invoke Rule 104(a); rather, I must or can invoke it because the *relevance* of the shout is conditional.

For those stuck in the traditional conceptual error, Friedman's proposal is unlikely to be effectual.⁴²

On the other hand, even for those who accept the modern criticism, his proposal is potentially confusing. This is so because, on those occasions when the relevance of evidence is truly conditional, it is also necessarily true that the probative value is conditional. The added language might, therefore, be construed as implying that no preliminary finding would be appropriate on the question of whether the predicate evidence has in fact been presented. Similarly, for evidence of near-absolute conditional probative value, the language might be construed as implying that no preliminary finding would be appropriate as to the question of the presentation of the conditioning evidence.⁴³

For example, assuming that the proffered evidence of Hector's shout, considered alone, has near-absolute conditional probative value, consider the following proposition:

*P**: Other evidence has been introduced in the case showing that there is more than a de minimis probability that Penelope heard or otherwise became aware of Hector's shout.⁴⁴

42. In this regard, it is interesting to note that if practitioners understand the modern criticism of conditional relevance, they can virtually eliminate the possibility of perverse exclusions of relevant evidence, even under the *existing* Rule 104(b), by recognizing that the only "condition of fact" upon which "the relevancy of evidence depends" is the existence of a nonzero probability for each conditioning proposition, that is each proposition knowledge of which affects the probative value of the proffered evidence in such a way that the evidence is logically relevant only if the probability of that fact being true is nonzero. See Nance, *supra* note 2, at 455-56.

43. This, of course, is not logically precise in either case. The proposed language precludes a preliminary finding when the premise of such is the conditional character of the probative value of the proffered evidence, not when the premise is the conditional character of the relevance nor when the premise is the near-absolute conditional character of the probative value. Relevance and probative value are not identical concepts even though relevance entails the existence of probative value, and near-absolute conditional probative value, is not identical to conditional probative value even though the former entails the latter. But it is fair to question whether these subtleties will be appreciated in applying Friedman's proposed language.

44. For simplicity I have stated *P** as a compound proposition, part of which is almost purely factual, that such other evidence has been introduced and, part of which is heavily judgmental, that the effect of the other evidence is to render the evidence of the shout significantly probative. I am concerned here only with the factual part of the proposition. Note the

The probative value of the proffered evidence of Hector's shout is conditional on the truth of proposition P^* , so the proposed language might be understood as precluding the court from making a finding on the truth of P^* . Yet this is exactly the kind of proposition the truth or falsity of which the trial court should determine under Rule 104(a).⁴⁵ Indeed, much of the thrust of Friedman's comparatively subtle criticism of conditional relevance is that the courts should not confuse propositions like P with propositions like P^* .

Of course, one could try to reword Friedman's additional sentence to obviate this difficulty. I suspect what Friedman had in mind by the word "proposition" was a proposition of adjudicative fact, a fact about the parties and their conduct, like P , not a proposition about the state of the evidence, like P^* .⁴⁶ But he does not attempt to limit the term in this way and, in fact, makes a point of describing the latter as "evidentiary propositions."⁴⁷ The confusion is unnecessary. The point is simply that courts must be careful about which kinds of propositions they decide under Rule 104(a). That point can and should be made by way of explaining the elimination of Rule 104(b) in its current form. If this is done as part of the legislative history, there is no need to formulate language of accentuation to add to Rule 104(a).

This is not to say that Rule 104(a) is otherwise a good provision. Actually, it is one of the worst in the Federal Rules.⁴⁸ This is primarily because it takes the very interesting and difficult set of issues associated with preliminary determinations and addresses only two. It tells us (1) that the trial judge makes the preliminary determination, and (2) that in doing so the judge may consider unprivileged evidence, even if it would be technically inadmissible. The first of

parallel to my earlier Example #1. Similar propositions, the truth of which condition the probative value of proffered evidence, can be generated by using Example #2.

45. In terms of a theory of inference, the beauty of these propositions about the presentation of evidence is that they will be known by the court as true or as false to a practical certainty. Thus, while the standard formally may be "preponderance of the evidence," the truth values of these propositions will be known more certainly than that suggests.

46. This is evident from Friedman's discussion of the example following the suggested language. See Friedman, *supra* note 1, at 474 (discussing an application of that language to the *Huddleston* case).

47. See *id.* at 456 (defining an "evidentiary" proposition as a proposition that evidence of a certain description has been introduced). To be precise, it is the purely factual part of P^* that appears to be what Friedman means by an evidentiary proposition, see *supra* note 44, but the point remains the same.

48. A preliminary critique is Ronald J. Allen, *The Explanatory Value of Analyzing Codifications by Reference to Organizing Principles Other Than Those Employed in the Codification*, 79 Nw. U. L. REV. 1080, 1084-89 (1985).

these prescriptions is apparently intended to preclude any role for the jury in administering the application of the exclusionary rules.⁴⁹ Most of the other interesting questions, like who bears the burden of persuasion and what standard of proof the judge should employ, were left to be resolved by the courts.

Rule 104(a), however, does specify the evidence that the trial court may consider in ruling on preliminary issues. Unfortunately, this second prescription is not accurate, either as a description of what is done under the Rules or as a guide to what ought to be done. In any situation in which admissibility depends on weighing the probative value of the challenged evidence,⁵⁰ probative value should be assessed by the trial judge in light of what the trier of fact may legitimately consider, which means in light of admissible evidence.⁵¹ At least when the issue has been posed as one of conditional relevance, the existing qualification of Rule 104(a), cross-referencing Rule 104(b), in effect negated the second sentence of Rule 104(a). If Rule 104(b) is replaced with some form of conditional admissibility rule, then Rule 104(a) should be modified to reflect more accurately the limitation on the prescription of the second sentence. Rule 104(a) would then read:

{Nance's proposed amendment to} Rule 104(a). Questions of admissibility generally. Preliminary questions concerning the qualifications of a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court[, subject to the provisions of subdivision (b)]. In making its determination, it is not bound by the rules of evidence except those with respect to privilege, provided however 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.

Like Friedman's proposed addition, the goal of this amendment is to prevent lawyers and judges from doing something that they should be smart enough to avoid anyway.⁵² But unlike Friedman's proposal, this language is aimed at precluding an analysis that

49. See generally MCCORMICK, *supra* note 33, § 53.

50. See, e.g., FED. R. EVID. 403, 609(a), 609(b), 803(24), 804(b)(5).

51. Professor Friedman would surely agree with this point. See Friedman, *supra* note 1, at 459 (emphasizing that a judge should evaluate probative value from the jury's point of view).

52. For example, considering the effect of evidence that will not be before the jury in balancing probative value against potential prejudice or the risk of misleading the jury, as under Rule 403, would have to be recognized as unsound evidentiary policy though it is not logically inconsistent with other extant rules. The matter is somewhat less clear in the context of balancing probative value against waste of time and resources because, in very unusual contexts, this analysis might not advert only to wasting resources of the trier of fact. Rather than complicate matters by reference to this latter possibility, I have suggested a simpler rule.

otherwise could quite plausibly be viewed as *mandated* by the language that it qualifies. Thus, in Example #3 of the previous Part, the trial judge might be called upon to rule on the admissibility of evidence of the defendant's wealth based, in part, on reliable but inadmissible hearsay evidence of the defendant's malicious conduct. Without the proposed qualification to Rule 104(a), the trial judge might be inclined — or induced — to reason as follows:

A crucial part of the evidence of defendant's malice is inadmissible hearsay, yet, were it admissible, I think a *prima facie* case of malice would be established. Further, the second sentence of Rule 104(a) says that in making the determination of admissibility of the evidence of defendant's wealth, I am not bound by exclusionary rules other than those related to privileges. Thus, I must consider the hearsay evidence of malice and hold, for present purposes only, that a *prima facie* case of malice is established. Therefore, although I doubt the sense of it, I must hold the evidence of defendant's wealth admissible.

The proposed qualification would preclude this reasoning, which otherwise arguably follows from the plain language of the existing rule.⁵³ In my view, this danger, however serious, is one more amenable to a codified solution.

VI. THE PERSONAL KNOWLEDGE REQUIREMENT

Turning from the rules focused on preliminary issues to the "substantive" exclusionary rules, consider first the "personal knowledge" requirement. As indicated above, the rule that a witness must testify to personal knowledge has been said to be based on the idea of conditional relevance. That explanation fails, once again, and we must seek a different understanding of the rule. The preference for information that is within the personal knowledge of the witness serves several functions: (1) expanding the information available to the trier of fact beyond a conclusory statement of knowledge by the witness; (2) revealing the possible applicability of other exclusionary rules, especially the hearsay and original document rules; and (3) affirming the empiricist rejection of knowledge based on intuition or mystical insight.⁵⁴

53. Of course, there is a way around this conclusion even under the existing rule. One could draw a distinction between the admissibility of the evidence before the judge in the preliminary issue hearing and the use that the judge makes of the evidence that is admitted for this purpose. The liberal admissibility rule stated in the current Rule 104(a) could then be said to apply only to the former issue. Unprivileged evidence that would not be admissible on the merits would then be admissible for the preliminary issue hearing, but it would not be considered in weighing the probative value of the evidence at issue against competing concerns. The language I propose directs courts to draw just this distinction.

54. See Friedman, *supra* note 1, at 474-75; Nance, *supra* note 2, at 488-90 & n.189.

Friedman, although recognizing the complexity of these issues, proposes only a "modest-seeming" revision of the applicable federal rule:

*{Friedman's proposed amendment to} Rule 602. Lack of personal knowledge. A [witness may not testify to a matter unless evidence is introduced sufficient to support a finding] witness' testimony concerning a matter shall be deemed to have probative value only to the extent that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.*⁵⁵

The goal of this revision is two-fold. First, it eliminates the "sufficient to support a finding" language that erroneously prescribes an intermediate finding of personal knowledge; any significant degree of probability of personal knowledge should be sufficient to allow admission of the testimony as far as this rule is concerned. Second, the revision removes from the trier of fact's consideration any information that is not derived from personal observation or perception, even if relevant.⁵⁶

The "to the extent" language Friedman offers does not necessarily accomplish the first purpose because a court might well consider it necessary to make a preliminary determination that the witness is testifying from personal knowledge. Indeed, the elimination of the "sufficient to support a finding" language might be construed as meaning that the court's determination of personal knowledge is to be made under the usual preponderance of the evidence standard, just the opposite of the intended effect. Friedman's retention of the language in the existing rule that authorizes the use of the witness's own testimony "to prove personal knowledge," as if personal knowledge is a fact that must be proved as a condition of admitting the testimony, encourages such a construction. This problem could be avoided by appropriate recourse to legislative history but perhaps a different formulation of the rule would be better.

Moreover, Friedman's goal of admitting testimony if there is any significant probability that it is based on personal knowledge arguably does not give enough weight to the other purposes of that requirement. His proposal is certainly consistent with the rejection of conditional relevance as an explanation of the personal knowledge requirement as well as its substitution with near-absolute conditional probative value. But the avoidance of nonempirical

55. Friedman, *supra* note 1, at 475-76.

56. See *id.* at 476.

sources of testimony and the appropriate regulation of hearsay evidence call for a somewhat more demanding standard than Friedman prescribes, especially in regard to hearsay declarants' sources of information.

It is also discomfoting to have a rule that uses the phrase "deemed to have probative value." Like its use in Friedman's proposed Rule 104(a), this language employs a fiction because testimony not reporting matters from personal knowledge may well have significant probative value, as Friedman acknowledges.⁵⁷ Thus, a witness's testimony that the defendant killed the deceased, although based entirely on the victim's dying declaration to that effect, has significant probative value. But it should be excluded in preference for the witness's report of the dying declaration, which itself may or may not be admissible under the hearsay rule. It is better to have a rule that directly forces the report in the proper form, if that is possible, than a rule that indirectly forces this report by treating the witness's testimony as without probative value if the testimony is based on communication from others, especially when it is the jury that is being asked to apply such a fiction.⁵⁸

It should also be noted that the personal knowledge requirement proceeds from the premise that the preferred testimony is a witness reporting what she has directly observed with her own senses. In converting this preference into a personal knowledge rule, there are two distinguishable but analytically related problems to keep in mind. First, there is the problem of uncertainty about which of several distinct possible sources is the source of the witness's claimed knowledge, assuming there is only one such source. The witness may claim to have observed the events when in reality she only knows what she was told about what happened. On the other hand, there is the problem of knowledge derived from multiple sources and the attending uncertainty in attributing the knowledge to the various sources. Suppose, for example, that an eyewitness to a shooting thinks he recognizes the shooter and suppose that, after the shooter has fled the scene, the witness hears the declaration of the victim that confirms the witness's tentative conclusion that the shooter was the person who later is accused. The witness proposes to testify that he witnessed the shooting and that the accused committed the murder. Should this testimony be ad-

57. See *id.* at 474-75 n.69.

58. When the issue arises, Professor Friedman clearly contemplates an instruction to the jury to treat as without probative value information that the witness provides from a source other than direct observation. See *id.* at 476.

missible? What if it is true that the dying declaration substantially affected his confidence in his perception of the shooter as the accused?

In handling these problems, I suggest a different path to a somewhat more restrictive result:

{Nance's proposed} Rule 602. *Testimonial sources; personal knowledge.* Subject to the provisions of Article 7, concerning opinion evidence,

(a) *Witnesses.* (1) Testimony is inadmissible unless the witness discloses the source or sources of the witness's knowledge of the information to be provided, except with regard to testimony about preliminary matters and other matters that are not reasonably disputable. (2) Testimony must be limited in form to reports of the witness's sensory observations.

(b) *Hearsay declarants.* (1) Hearsay evidence, as defined in Rule 801(c), is inadmissible if the declarant's putative knowledge of the declared information is primarily attributable to sources other than personal sensory observation or communication from others. (2) If a hearsay declarant's putative knowledge of the declared information is more attributable to communication from others than to the declarant's personal sensory observations, the hearsay declaration containing that information shall be treated as a report of such communication for purposes of applying the hearsay rule and section (b)(1) of this rule, even if it is not, in form, a report thereof.

Like Friedman's proposal, my proposal calls for some explanation. Live testimony and hearsay declarations are treated differently because witnesses can be required to limit their testimony to direct observations, whereas hearsay declarations must be accepted or not in the manner that they were uttered.⁵⁹

As to witnesses, the principal function of the personal knowledge requirement, viewed from the vantage of the best evidence principle, is to expand the information the witness provides. This expansionary best evidence rule induces the proponent of the testimony to elicit, up front, information that is peculiarly available to the witness and especially helpful to the tribunal if contemporaneously presented, namely, the source or sources of the witness's asserted knowledge. The disclosure that section (a)(1) thus mandates will reveal information about one or more of several possible sources: personal observation of the events declared, including statements made by others; communication from others not identi-

59. Professor Friedman does not address the problem of hearsay declarants in his proposed rule, though he does mention in a footnote a difference in how they should be treated. See *id.* at 475 n.71.

fied as such; clairvoyance or mystical inspiration; and so forth.⁶⁰ Such revelation in turn serves to facilitate the application of other exclusionary rules, in particular, the exclusionary rule contained in section (a)(2). This section obviously serves as the prohibition to which Rules 701 and 702, concerning permissible opinion testimony, are exceptional.⁶¹ The words "in form" in section (a)(2) are intended to dispel any remaining inference that the trial court must make a finding under this rule about whether the witness in fact observed the events reported.⁶²

For example, if the revealed source is mystical intuition or an asserted personal observation under undeniably impossible conditions, the testimony should be excluded as irrelevant under Rule 402 or a waste of time under Rule 403. If the source is claimed to be personal observation, but the evidence indicates this to be improbable, though not impossible, the court will have to determine whether the probative value of the testimony is great enough not to be a waste of time under Rule 403. But ordinarily, if the witness plausibly reveals a direct observation of events and reports the events assertedly observed, the testimony should be admitted, as generally happens under current practice.⁶³ Finally, if the testimony reports a communication from others, the court will need to determine whether the hearsay rule applies and, in appropriate cases, whether the expert witness provisions are satisfied.

Similarly, if the witness acknowledges or if the trial court believes based on other evidence that the witness's knowledge derives from multiple sources, the court should use Rule 403 in deciding whether to go forward with the testimony. Ordinarily, any substantial claim of a mystical or clairvoyant source is so self-impeaching as

60. Cf. DAVID A. SCHUM, *THE EVIDENTIAL FOUNDATIONS OF PROBABILISTIC REASONING* 94-95 (1994) (articulating the three rational sources of testimony as (1) direct observation, (2) hearsay, and (3) inferences from the first two).

61. See FED. R. EVID. 701 (authorizing the admission of certain lay opinions); FED. R. EVID. 702 (authorizing the admission of certain expert opinions). That, however, does not make Rule 602(a)(2) merely redundant with those sections. For example, Rule 701 does not prohibit testimony of a lay witness that, "while I was meditating on my mantra, it came to me in a flash that X committed the murder." This testimony is no more in the form of an opinion or inference than that of the usual eyewitness, so presumably it does not bring into operation the strictures of Rule 701. But as a report of extrasensory perception, it would violate section (a)(2) of the version of Rule 602 proposed here.

62. Because the application of section (a)(2) will ordinarily presuppose the disclosure of testimonial sources, it is arguably redundant to make the disclosure a distinct requirement. Since the disclosure could indicate situations of multiple sources, however, it may aid both the court and the trier of fact in handling testimony that complies with this section.

63. This reason is the principal one for the sentence in the current rule, as well as Friedman's proposal, that allows the court to use the witness's own testimony in making judgments about personal knowledge. This clarification is unnecessary under my proposal.

to render the testimony a waste of time. If, however, the revealed multiple sources are a mixture of substantial components of direct observation and communication from others, as in our example of the eyewitness to the shooting and subsequent declaration, then the court should simply instruct the witness to testify as best as possible solely about the direct observation and admit the testimony, leaving out reference to the communication unless it complies with the hearsay and other applicable rules. Unlike Friedman's proposal, as I understand it, the jury would not be instructed to discount the testimony to reflect the degree to which or probability that the witness's knowledge is based on inadmissible hearsay. Of course, the jury would be free to discount the weight of the testimony if the opponent chooses to explore the issue by way of impeachment.

With regard to hearsay declarants, addressed in section (b) of the proposal, we are of course assuming that the hearsay falls within some exception or exclusion to the hearsay rule. In this context, one cannot employ the same strategy used for witnesses, namely, requiring the declarant's statement to be in the form of a report of direct observations. If not already in that form, the declarant has no opportunity to rephrase the declaration.⁶⁴ Even with the assistance of testimony from the declarant, it may not be possible to segregate the parts or aspects of the declaration that are based on direct observation from those based on other sources. Some practical compromise is inevitable.⁶⁵ One must rely upon regrettably gross probabilistic judgments as to the source or sources of the knowledge contained in the declaration. Although one can quibble over the precise formula for this purpose, no other approach is coherent with both the strong preference for limiting evidence to matters of personal knowledge and the prevailing practice in ruling on the admissibility of evidence claimed to be hearsay not within an exception.⁶⁶

64. For the same reason, the lay opinion rule should not be applied to a hearsay declaration. See McCORMICK, *supra* note 33, § 18. Note that the proposed rule does not exclude hearsay that states an inference from the permissible sources of direct observation or communication from others. Such inferences may or may not be allowed under the rules in Article 7 (on opinion evidence) or Article 8 (on hearsay evidence). Irrational inferences can also be excluded under Rule 402 or 403.

65. Cf. *id.* § 10, at 17 (noting the necessity of practical compromise in contexts of multiple sources for the live testimony of a witness).

66. We do not, for example, admit a hearsay statement when there is a small probability that it comes within a hearsay exception; we do not simply leave it to the trier of fact to discount the hearsay to the extent of the probability that it does not come within an exception. See generally GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 10.4 (2d ed. 1987).

In a single source case in which there is doubt about the identity of the source, the terms "primarily attributable" in section (b)(1) and "more attributable" in section (b)(2) refer simply to a comparison of source probabilities. For example, if the court finds it more likely than not that the source is the declarant's personal observation of the events declared, then the rule poses no barrier to admission.⁶⁷ If, however, the court finds that the declarant probably had no meaningful opportunity to observe either the events or at least a communication from another about the events, then the declaration should be excluded as concocted or imagined, as specified in section (b)(1) of the rule. If the court finds it more likely than not that the single source is communication from another, section (b)(1) is satisfied as to this declarant, but it must be separately applied to the other person or persons from whom the communication came. Section (b)(2) assures this result; thus, it covers the situation in which, for example, the hearsay declaration is, "John killed her," but the evidence indicates that the declaration was based solely on the statement of yet another person. Functionally, the declaration is itself hearsay; that is, the *testimony* is "double hearsay," and it should be excluded unless the personal knowledge rule is satisfied as to the second-order declarant, and a second-level hearsay exception applies.⁶⁸ Summarized succinctly, section (b)(1) calls for a probabilistic comparison of the two types of permissible sources with all other impermissible sources; section (b)(2) calls for a probabilistic comparison between the two types of permissible sources for hearsay declarations.⁶⁹

67. This includes a situation in which the declaration is that someone else told the declarant something. Again, the references in the rule to the source being "a communication from others" is only activated if the declarant reports the content of that communication without identifying it as communicated information.

68. Cf. MCCORMICK, *supra* note 33, § 10, at 16 (explaining that in the context of a witness testifying to events rather than the communication that is the source of the witness's knowledge, the testimony should be excluded under the personal knowledge rule rather than the hearsay rule); § 247, at 429 (elaborating on the point and noting that "when it appears, either from the phrasing of his testimony or from other sources, that the witness is testifying on the basis of reports from others, though he does not in terms testify to their statements, the distinction loses much of its significance, and courts may simply apply the label 'hearsay'"). In the context of a hearsay declarant, however, one must look to the substance rather than the form because the declarant cannot correct the form.

69. For a more complex example than those provided in the text, imagine a single-source case in which the trial court assigns probabilities as follows:

Probability (declarant reporting direct observation)=.3

Probability (declarant reporting an unstated communication)=.4

Probability (declarant imagining or fabricating the information)=.3

In such a situation section (b)(1) does not exclude the testimony because the last probability is less than the sum of the first two; however, because the second probability is greater than the first, section (b)(2) prescribes that the testimony be handled as double hearsay, assuming, of course, that it would be double hearsay if the declarant had stated it as a communication

In the relatively unusual case in which there are serious possibilities of multiple sources, the terms "primarily attributable" and "more attributable" indicate a more complex weighing of the importance of the various sources in applying the two rules of section (b). Note that if it is more likely than not that the source is some combination of personal observation of the events declared and unstated communication from another about such events, then section (b)(1) of the rule is satisfied as to the first-order hearsay declarant; this amounts to a finding that the declarant's statement was probably not concocted or imagined. A similar finding under this section, however, must be made as to the second-order hearsay declarant if a finding is made under section (b)(2) that the primary permissible source of the first-order hearsay declarant's knowledge was the communication from the second-order declarant. On the other hand, even if the more likely explanation of the first-order declaration is that it is more a fabrication than a report of direct or indirect observations or inferences therefrom, the declaration may still qualify for admission under this rule because the *more likely* explanation could be a scenario partly based on direct or indirect observation.⁷⁰

Together, these applications of Rules 402, 403, and 602, as proposed, accomplish everything that it is important to achieve through a personal knowledge requirement. One final point should be noted, however. While I have not included it in the foregoing language, one might want to exempt admissions of a party opponent from the demands of the personal knowledge rule.⁷¹ Although there is much authority to the effect that personal knowledge is not

from another. In addition to demanding a second-order hearsay exception, this means that section (b)(1) must be applied to the communication of the second-order declarant.

70. Imagine, for example, that the trial court determines that there are only two significant possibilities: either (A) the declarant directly observed the declared events, or (B) the declarant derived 45% of his confidence in the declaration from direct observation and 55% of his confidence from a vision that came during hypnosis. To be more concrete, suppose that another witness testifies that the declarant reported the hypnotic experience to her, but the declarant denies it in court. Then suppose the court assigns the probabilities of these two explanations as follows:

Probability (A)=.4

Probability (B)=.6

In such a case, the testimony is not excluded under proposed section (b)(1) even though it is more likely than not that the declaration was based primarily on the hypnotic vision because it is also true that $.4 + (.6)(.45) = 67\%$ of the declaration's significance is attributable to the declarant's direct observations. To anticipate the howls of protest, I do not mean to suggest that such a precise calculation will ever actually be made by the court; the numerical example is intended only heuristically, and the practical judgment will undoubtedly be made in a more impressionistic manner.

71. To accomplish such an exclusion, for example, one could simply substitute "Rules 801(c) and 801(d)(2)" for "Rule 801(c)" in section (b) of the proposed rule.

required for admissions, I doubt the wisdom of such a rule, especially in the context of vicarious admissions.⁷² Even as to personal admissions, the proposal would exclude only those the court considers probably not based primarily on either direct observation or communications from others, which hardly seems too restrictive. The inclination to dispense with the personal knowledge requirement in these contexts is grounded in the assumption that the party-declarant or the party's agent-declarant will have exercised caution in ascertaining the accuracy of important and usually damaging information. The mere making of such a statement should generally be enough to warrant the conclusion that the declarant's knowledge was *probably* not concocted out of thin air, and that is all section (b)(1) requires. The adversely affected party remains free, of course, to challenge the source of the declarant's knowledge, both in the judge's determination of admissibility and in the trier of fact's ultimate determinations.

VII. THE AUTHENTICATION REQUIREMENT

It is in the context of the authentication requirement that Professor Friedman has taken the boldest step in terms of restructuring the Federal Rules. Here he explicitly endorses and formalizes the expansionary dimension of the best evidence principle, although he prefers to call it the "better" evidence principle.⁷³ He suggests the following:

{Friedman's proposed amendment to} Rule 901(a). General provision.
[The] *There shall be no separate* requirement of authentication or identification as a condition precedent to admissibility [is satisfied by evidence sufficient to support a finding that the matter in question] *unless there is substantial doubt that the proffered evidence is what its proponent claims and the proponent of the evidence is substantially*

72. See McCORMICK, *supra* note 33, § 255.

73. See Friedman, *supra* note 1, at 471 & n.66 (noting a suggestion by Peter Tillers). I had considered using the "better evidence" terminology in drafting my first article on the subject. Philosopher Jim Nickel also preferred that terminology when he read my article some years ago. It is more accurate in the sense that a preference for evidence E_2 over offered evidence E_1 can rightly be enforceable even though E_2 is not the *best* evidence. If we know it is not, however, then that supposes there exists some evidence E_3 that is preferred to E_2 , and, if that is so, we could also enforce a preference for E_3 . Moreover, the fact that piecemeal relative improvements in the evidence may be enforced should not obscure the fact that the point of doing so is, ultimately, to have the best evidence practicable under the circumstances. Of course, in the end, the nomenclature matters only to the extent that it avoids confusion about the ideas being expressed, and I think either terminology is acceptable. I chose the "best evidence" locution partly out of deference to early evidence thinkers who expressed it that way. See Nance, *The Best Evidence Principle*, *supra* note 11, at 244 n.83.

*better able than the opponent to produce evidence bearing on that question.*⁷⁴

Once again, Professor Friedman has made a decisive step forward by eliminating the "sufficient to support a finding" language that produces such theoretical and occasionally practical mischief. There are, however, three problems that must be addressed. The first two are modest and technical; the third is more fundamental. Once we correct for the first two, we will be in a better position to address the third.

To dispose of one technical problem, an important cost-containment feature does not appear in the proposal. Suppose the amount in controversy is \$5,000; the authenticity of the proponent's proffer is seriously disputed; the proponent can obtain further evidence of authenticity at a cost of \$100,000; and the opponent can obtain further evidence only at a cost of \$500,000. Given the last two figures, the proponent is "substantially better able than the opponent to produce evidence bearing on" the question.⁷⁵ Yet, it seems wrongheaded as a policy to require the proponent to obtain and present the additional evidence at such an extravagant cost or else forego the proffer in question, unless of course the proponent set up the situation, for example, by destroying other evidence that might have helped resolve the issue of authenticity at a much lower cost. Perhaps Professor Friedman's thinking is that such cases are unlikely to arise because the costs of obtaining additional evidence of authenticity will never be so out of line with the amount in controversy, but I see no reason to assume that to be so. A correction of this sort would seem to be entirely consistent with the spirit of his proposal.⁷⁶

The other technical problem has to do with the structure of the rules as a whole. Because the starting point in the analytical structure of the rules is that all relevant evidence is admissible, all other admissibility rules should be articulated as exclusionary rules or as qualifications of otherwise specified exclusionary rules.⁷⁷ As the

74. See Friedman, *supra* note 1, at 477.

75. One could try to stretch the meaning of "substantially" in Friedman's proposal by saying that a degree of difference, no matter how large, is insubstantial unless it is enough to make the presentation by the proponent practical. But it would be better to make the point explicit.

76. Indeed, inclusion of a cost-containment limitation renders the "substantial doubt" language in Friedman's proposal superfluous because the cost of extrinsic evidence of authenticity cannot be worth incurring if there is no substantial doubt about authenticity. Thus, the cost-containment limitation can be seen as a generalization of the "no substantial doubt" exception.

77. To be sure, some extant rules fail this standard, and they present serious interpretational problems. See, e.g., FED. R. EVID. 406 (prescribing that evidence of habit "is rele-

law now stands, Rule 901(a) does not state an exclusionary rule; it refers to, without defining, a "requirement of authentication or identification" and then states how the exclusionary consequence of such a requirement is to be avoided by the proponent. Given the drafters' belief that these requirements simply apply the notion of conditional relevance, Rule 402 must be the exclusionary rule underlying Rule 901; Rule 104(b) must be the method for handling the associated preliminary questions; and Rule 901(a) merely restates these points. But once this explanation of the rule is undermined, and one must look for a different theory of authentication and identification, one cannot rely on the implicit cross-reference to Rule 402.⁷⁸ Either the cross-reference should be changed to Rule 403, the more likely conceptual cousin, or the requirement must be stated as a distinct exclusionary rule specifying the circumstances in which it applies.⁷⁹

Friedman's proposal addresses this problem. He tells us that no such requirement is to be imposed unless certain conditions are present. His proposal attempts to make the rule more self-sufficient. Unfortunately, as a matter of logic, it does not tell us whether such a requirement *is* to be imposed if those conditions *are* present.⁸⁰ More importantly, it does not tell us what the content of the requirement is if the conditions that invoke it are satisfied. Both difficulties seem to be unintended, so I will now restate Friedman's proposal so as to correct these points as well as the cost-containment feature mentioned above:

{Modified version of Friedman's proposal for} Rule 901(a). General provision. Except as otherwise specifically provided, in order to in-

vant"); FED. R. EVID. 609(a) (prescribing that certain evidence of the commission of a crime "shall be admitted" for impeachment purposes).

78. See Nance, *supra* note 2, at 484-85.

79. If Rule 403 is the exclusionary authority upon which the authentication requirement depends, then the imposition of such a requirement presupposes a determination that the probative value of the unauthenticated thing 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." FED. R. EVID. 403. Only upon such a finding by the trial court would the authentication requirement be imposed, a requirement that could then be satisfied by evidence satisfying the standards specified in Article 9. The problems with such an analytical structure are, I take it, obvious. If the proffer is conditionally excluded for failure to meet the standard of Rule 403, why should it then be admitted upon introduction of evidence satisfying Rule 901? Why not gauge the effect of the additional foundation evidence directly in terms of the standard of Rule 403?

80. Although one could quibble over the meaning of the word "unless," its most likely and ordinary meaning is "if not." Thus, the apparent form of his proposal is, "Not-Requirement, if Not-Conditions." The contrapositive of this inference, which is its logical equivalent, is "If Requirement, then Conditions." But this rule is not the kind we need nor is it probably the kind Friedman intended. We need a rule in the converse form, "If Conditions, then Requirement."

roduce an item of evidence, its proponent must introduce any admissible extrinsic evidence, on the question of whether the proffered evidence is what the proponent claims, that the proponent is substantially better able to produce than each opponent, unless without fault of the proponent the costs of providing and considering such evidence are unwarranted by the nature of the controversy and what such evidence might contribute to its resolution.

As restated, the third, more fundamental problem comes into clearer view. It will be observed that this provision is extremely wide ranging. It is not limited to any particular kind of evidence, tangible or testimonial, direct or circumstantial. In other words, it is a general better-evidence provision applicable in any situation in which there is substantial doubt that the proffered evidence "is what its proponent claims." The common law rule and the federal rule are not applied so broadly; they are largely limited to tangible, in other words nontestimonial evidence.⁸¹ This raises a very difficult question. On the one hand, Friedman eschews a universally applicable expansionary best evidence rule, limiting his endorsement of that idea to the authentication requirement. Yet his formulation of that requirement does nothing to limit its applicability. How then are we to reconcile this apparent conflict?

It is important to recognize that the "what the proponent claims" language appearing in both the current Rule 901(a) and Friedman's proposal does not serve effectively to limit the scope of the rule. To see why, consider the following:

Example #5: Plaintiff offers a document that appears on its face to evidence a contract between plaintiff and defendant; it is signed in the name of the defendant. An objection is made that the document must be authenticated by a showing that it is in fact signed by the defendant. Plaintiff responds that what she "claims this evidence to be" is a document *purporting* to be signed by someone with the same name as defendant. She asserts that if this claim is satisfactorily established, then the authentication requirement is satisfied, and the only remaining issues would simply be the document's relevance and near-absolute conditional probative value.

Plaintiff's argument seems correct; yet if we accept it, it ends the authentication requirement as such. Under the present regime, this is of no great consequence because the plaintiff will only have substituted a conditional relevance problem for an authentication problem. The defendant can renew his objection by saying that the

81. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 9.1 (1995). At least one exception appears to be recognized by FED. R. EVID. 901(b)(5) which implicitly asserts the applicability of the identification requirement to testimonial identifications of persons by voice recognition. See also FED. R. EVID. 901(b)(6) (concerning telephonic conversations). I will indicate below why I think this exception is a mistake.

evidence is relevant only on a showing "sufficient to support a finding" that defendant did in fact sign that document. Because the standard under the authentication rule is the same as that under conditional relevance, this ultimately leaves the plaintiff in the same position, at least if the defendant recognizes the fallback objection.

But, once again, the conventional reasoning is defective,⁸² and, without the conditional relevance fallback, the malleability of the "what the proponent claims it to be" language poses serious difficulty. For example, if one applies Friedman's proposed rule to Example #5, there will be no substantial doubt that the document is what plaintiff claims it to be, and the "better evidence" function will be thwarted even if the plaintiff has superior access to inexpensive evidence that will better show whether the defendant signed the document. This problem can be solved only by being less willing to allow the proponent to define what she "claims the evidence to be." Thus, one would have to say to the plaintiff in Example #5 that what she *really* claims the document to be is a contract signed by the defendant, not a contract purporting to be signed by someone with the defendant's name. Of course, one can imagine a state of the evidence in which that is *not* what she ultimately would claim the document to be, and such a demand on the plaintiff would force her to make at least a tentative commitment about the probative significance of the document.

If we are to make this insistence on a specific probative connection with the ultimate material facts, however, then there will be difficulty precluding a more-than-trivial application of the authentication requirement to testimonial evidence. Consider:

Example #6: Plaintiff offers the testimony of Wally that he was present when defendant signed a writing evidencing a contract with plaintiff. Defendant objects that the testimony must be authenticated by evidence showing that Wally really was in the company of the defendant, that it really was the defendant that Wally observed signing a contract, that what he really did was sign something as opposed to scratching himself with his pen, and so forth. Plaintiff replies that all she claims this evidence to be is the account of an eyewitness who asserts that these things are true, the rest of the issues simply going to the relevance or near-absolute conditional probative value of the testimony.

The structure of the argument is the same as in Example #5, and there is no basis in the "what the proponent claims it to be" lan-

82. The document is certainly relevant to the formation of the alleged contract even without any further evidence that the defendant signed it, even though it may not be sufficient, without more, to satisfy the burden of proof. See Nance, *supra* note 2, at 457-59 (discussing a similar promissory note case).

guage for limiting the range of application of the authentication-identification requirement to nontestimonial evidence, as has conventionally been the practice. Moreover, if we prevent the proponent from narrowing "what she claims the evidence to be" in respect to tangible items, as in Example #5, we must also do so in applying the authentication rule to testimonial evidence, as in Example #6. Thus, its application to the latter example cannot be confined to the trivial form argued by plaintiff.

If conventional practice is right, both the current Rule 901(a) and Friedman's proposed version are, as stated, overinclusive by a wide margin. Friedman's proposal amounts to a universally applicable better evidence rule, notwithstanding his stated desire to limit this rule to a special category of problems. It is not clear that he intends this breadth, but, if he does, an argument should be made either that conventional practice already contains such a rule, appearances notwithstanding, or that altering conventional practice in this regard would be beneficial. Perhaps such a case can be made. Although the matter is certainly debatable, there is at least good reason to follow the common law in imposing a *special* requirement applicable only to nontestimonial evidence.

That reason arises from the obvious fact that nontestimonial evidence, by definition, does not itself present a knowledgeable person that can be examined and cross-examined with regard to the connection between the thing and the events that are the subject of the litigation. Authentication requires extrinsic evidence concerning the thing, extrinsic evidence that is either testimonial or nontestimonial, and, if it is the latter, then that nontestimonial thing will itself require authentication. In other words, at some point a sponsoring witness must be provided as a source of information concerning the nontestimonial things offered into evidence.⁸³ While a nontestimonial thing cannot be said to be *irrelevant* for want of such sponsorship, it will generally be the case that the proponent will have access to a person who can provide important information by way of sponsorship and often the case that the presentation of the sponsoring witness by the proponent will be both more efficient and easier for the trier of fact to evaluate than a subsequent presentation of such a witness by the opponent.⁸⁴

83. Of course, as under current practice, there should be exceptions for situations of self-authenticating things. See FED. R. EVID. 902 (specifying circumstances in which "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required").

84. See Nance, *supra* note 2, at 485-86.

While a special authentication requirement is desirable, there has been much confusion in the common law and codifications about exactly how that requirement should be articulated, the most recent confusion arising from the Federal Rules' asserted dependence on the concept of conditional relevance. I propose to retain the requirement in terms that will confine its application to nontestimonial evidence and free it from that dependence:

{Nance's proposed} Rule 901(a). *Requirement of Authentication or Identification.* Except as otherwise specifically provided in these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress, in order to introduce nontestimonial evidence, the proponent must present any admissible extrinsic evidence on the question of the thing's connection to the subject matter of the dispute that the proponent is substantially better able to produce than each opponent, unless without fault of the proponent the costs of producing and considering such extrinsic evidence are unwarranted by the nature of the controversy and what such evidence might contribute to its resolution.⁸⁵

Like Friedman's proposal, this rule would prescribe a "better evidence" authentication of nontestimonial things, insisting on extrinsic evidence that can be used to evaluate the significance of the proffer. Like Friedman's proposal, this rule expresses an *excusable* better evidence preference: when the proponent has provided all that reasonably can be expected, the requirement is satisfied so that relevant tangible evidence is not lost simply because the proponent cannot prove it to be genuine by some inferentially arbitrary standard, like "a preponderance of the evidence" or "evidence suffi-

85. Under both Friedman's proposal and mine, Rule 901(b), which in the current rule provides a list of "illustrations" of how one can satisfy the requirement of Rule 901(a), would have to be substantially reworded or dropped entirely. In order to help resolve two points of inevitable contention, I further propose the following replacement for Rule 901(b):

{Nance's proposed} Rule 901 (b). *Witnesses identified with the proponent.* In applying part (a) of this rule, the potential testimony of the proponent or of a witness who is closely identified with the proponent by virtue of current employment, family relationship, or otherwise shall be considered evidence that the proponent is substantially better able to produce than an opponent. However, Rule 901(a) shall not be used to require the testimony of the accused in a criminal case.

The effect of this additional component of proposed Rule 901 would be to prevent the proponent from offering no sponsoring witness by arguing that the agents or relatives of the proponent with authenticating information are equally available to the opponent. In almost no context, other than those involving self-authenticating documents and those in which the accused is the only potential witness, will the proponent be able to escape the responsibility of producing a sponsoring witness. On the other hand, even those persons closely identified with the proponent need not be produced if to do so would run afoul of the cost-containment limitation at the end of proposed Rule 901(a). The exclusion of the accused from the operation of Rule 901(a) is intended to avoid a conflict with the constitutional privilege against compelled testimony. See Nance, *supra* note 2, at 482-83.

cient to support a finding by a preponderance of the evidence."⁸⁶ But unlike Friedman's proposal, it would use the language "to show the thing's connection to the subject matter of the dispute" in order to avoid the proponent's ability to control the requirement by altering her "claim" about the thing.⁸⁷ It does not employ language that is readily extended to cover testimonial evidence.⁸⁸

This is not to say that there should be no "better evidence" rules applicable to testimonial evidence. In Part VI, for example, I discussed the personal knowledge requirement for witnesses, which, under my theory, is closely analogous to the authentication requirement for tangible things. Moreover, there are best evidence rules, such as the hearsay and original document rules, that apply to both testimony and documents. Finally, there is the possibility of applying the best evidence principle under the residual exclusionary discretion of the trial court.⁸⁹

As an example, it will be noted that my proposal eliminates the authentication or identification requirement, insofar as prescribed

86. See Nance, *supra* note 2, at 492-97 (discussing the need for an excusable preference and the possibility, not always realized, of interpreting the existing federal rules so as to achieve such flexibility). Of course, the existence of exceptions for self-authenticating things, see *supra* note 83, will occasionally necessitate preliminary fact determinations under the preponderance standard, as with exceptions to other exclusionary rules.

87. The "connection" language comes from Wigmore. See 7 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2129, at 704 (Chadbourn rev. ed. 1978). While it is also subject to some degree of malleability, at least it is not articulated in such a way as to allow the proponent to control its meaning.

88. Even as limited to nontestimonial evidence, one could argue that the proposed rule demands too much from the proponent in those cases in which, arguably, the proponent has access to more information than he provided. The standard of the proposed rule requires at least some potentially difficult judgments about the comparative access of the parties to the extrinsic evidence at issue. If it is viewed as simply too inconvenient for the trial courts to get into such issues as regularly as the proposed rule might require, then one could add a provision, possibly along the lines of the language of the current rule, that would place an *upper limit* on how much can be demanded of the proponent under this rule.

89. In construing the discretion accorded trial judges under Rule 403 to exclude unduly prejudicial evidence, the drafters advised that "[t]he availability of other means of proof may . . . be an appropriate factor" to consider. FED. R. EVID. 403 advisory committee's note. Even if one takes a narrow construction of what the drafters meant by prejudice here, it is very likely that they intended for the same factor to be relevant in deciding whether to exclude evidence because of its potential to mislead the trier of fact. Moreover, the notion of "other means of proof" does not necessarily refer to evidence that is wholly distinct from that which the proponent has offered; it can also mean evidence that is more inclusive, in other words, further evidence that conditions the probative value of the proffered evidence. See, e.g., *United States v. Crosby*, 713 F.2d 1066, 1071-72 (5th Cir.), *cert. denied*, 464 U.S. 1001 (1983) (affirming the exclusion of tangible evidence of allegedly prior consistent statements of a testifying defendant partly on grounds of their incompleteness). Consequently, it should also be legitimate in some cases to exclude testimonial evidence in order to induce its proponent to present other evidence that conditions the probative value of the proffered testimony. See, e.g., *United States v. Williams*, 561 F.2d 859 (D.C. Cir. 1977) (finding error in the admission of testimony when additional information conditioning the probative value of the admitted testimony was not also presented by the prosecution).

by Rule 901, that has been applied to testimony identifying a person with whom the witness has had a telephone conversation.⁹⁰ Testimony of the person who made or received the communication, who can be cross-examined as to its nature and content, should ordinarily be an adequate compliance with the best evidence principle even if the witness is unable to identify the speaker on the basis of familiarity with his voice. Of course, in such a case the witness will be required to phrase the testimony in terms of a communication "with a speaker who identified himself as Smith," rather than a communication "with Smith"; that follows from the personal knowledge and opinion rules. Given testimony in such form, the dangers of false self-identification by the speaker are ordinarily no worse than many other *unavoidable* probative dangers, especially because the trier of fact is alerted to the danger by the very form of the testimony. Rarely in such cases does the proponent have superior access to additional evidence on the issue of the speaker's identity.⁹¹ On the other hand, an occasional case could arise where, for example, the proponent has access to a comparison specimen of the alleged speaker's voice that can readily be used to assist the witness in forming a helpful opinion about identity. In such a case, an application of discretionary authority to exclude the testimony as misleading for want of use of the specimen may be in order under Rule 403. Moreover, in the absence of any such basis for comparison, the circumstances may show the testimony to be of too little probative value to warrant admission, and again, it may be excluded under Rule 403.⁹²

90. See FED. R. EVID. 901(b)(5), (6). See generally MUELLER & KIRKPATRICK, *supra* note 81, §§ 9.12-13.

91. The use of admissibility language where sufficiency rulings are more appropriate is common in the cited cases. See, e.g., *United States v. Pool*, 660 F.2d 547, 560 (5th Cir. 1981) (reversing a conviction because DEA agent testified to receiving call from someone using same nickname as defendant; no other evidence confirmed that defendant in fact made the call, and the identification was essential to the conviction). More perversely, the authentication-identification requirement is sometimes applied in this context in order to facilitate the reversal of lower court factual findings "as a matter of law" by eliminating testimonial evidence the presence of which would militate for deference to the trier of fact because of the importance of credibility. See, e.g., *In re Dodd*, 82 B.R. 924, 929 (N.D. Ill. 1987) (ignoring testimonial evidence of a phone call from a creditor's employee in order to facilitate reversing bankruptcy court's finding that creditor had notice of subject matter of phone call).

92. One might suspect a strategic ploy in response to the proposed rule. A proponent considering the introduction of a tangible thing into evidence, who does not want to provide the information the authentication rule demands, might offer instead a witness with limited or no knowledge about the connection of the thing to the dispute, for the sole purpose of describing the thing. This testimony would not invoke an authentication requirement that is limited to nontestimonial evidence. It would, however, raise the applicability of the original document rule, if the thing in question is a document or other recording. See FED. R. EVID. 1001, 1002. As for unscripted tangible things, the original document rule does not apply, but

CONCLUSION

When I wrote on conditional relevance in 1990, I was concerned with an exploration of the conceptual and policy underpinnings of the doctrine. I left for another day the question of how to draft provisions of an evidence code in order to reflect best the legitimate structure of thought found in the classic cases. Although it was not his primary purpose, Professor Friedman has done a great service by raising and addressing the codification issue, specifically in the context of the Federal Rules of Evidence. It is high time to take account of the criticism of the conditional relevance doctrine and the rules that are said to be based on it. There can be little doubt that the rules must be amended or else a very different explanation will have to be offered for them. This is true even if the present rules are considered relatively uncontroversial. Either mistakes are being made by following the existing rules, or lawyers and judges are — perhaps unknowingly — ignoring them in order to reach a better result than they prescribe. I suspect both things are happening. The new Advisory Committee on the Federal Rules, established within the U.S. Judicial Conference, should at some point address these issues. I hope that what I have added here will help move that process yet further along.

I also hope to have set to rest one misconception about the role of the best evidence principle in the analysis of these problems. As Professor Peter Tillers points out in his comment on Friedman's article, one dimension on which responses to the problems generated by situations of conditional probative value can be differentiated is the inclination to use relatively fixed rules to capture the balance of competing considerations versus the inclination to commit the balancing to the judgment of the trial court, usually pursuant to some sort of grant of discretionary authority.⁹³ Obviously, the existing

it remains within the court's discretion to exclude the secondary evidence under Rule 403 when the thing is available for presentation. See generally Nance, *The Best Evidence Principle*, *supra* note 11, at 256-63.

93. This idea seems to be one expressed in the following passage:

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. A second possible legal response is to have special, fixed ways of handling special categories of problems of conditional relevance and conditional probative value; Professor Dale Nance seems to lean in this direction. 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.

Tillers, *supra* note 26, at 482-83 (footnotes omitted).

rules use both strategies in dealing with admissibility issues in general.⁹⁴ The question is how to deal with conditional probative value problems in particular. In terms of this criterion, both Professor Friedman and I, for the most part, favor the exercise of discretion. Ordinarily, in the Federal Rules scheme, this would mean discretion pursuant to Rule 403. Obvious exceptions for both of us are the requirements of personal knowledge and authentication, where we favor specific rules that directly or indirectly employ the expansionary dimension of the best evidence principle.

What this illustrates is that the employment of the best evidence principle and the breaking down of its use into contractionary and expansionary components do not presuppose any particular answer to the issue of rules versus discretion. Each component can be effectuated by either type of response.⁹⁵ The judgment about whether to employ relatively fixed rules or looser grants of discretion is a judgment shaped by considerations of the context in which the trial courts make admissibility rulings, the frequency with which the particular issue recurs, the need of advocates for a degree of certainty in the planning of their cases, and the ability to capture the right balance in an appropriately worded rule. These considerations, although practically very important, are largely extraneous to the theory of the best evidence principle that I have worked to elaborate. One can, for example, imagine an evidence code that consists solely of Rules 401 through 403, where discretionary exclusion under Rule 403 would be largely informed by the best evidence principle. Thus, it is wrong to suppose, as some apparently have, that the emphasis on that principle calls for categorical rules.⁹⁶

94. Compare the discretion conferred by FED. R. EVID. 403 with the relatively fixed rules concerning hearsay, in Article 8; authentication, in Article 9; and documentary originals, in Article 10.

95. The possibility of discretionary invocation of the best evidence principle is clearly articulated in my first article on that subject. See Nance, *The Best Evidence Principle*, *supra* note 11, at 256-63 (discussing rule-based and discretion-based applications). Indeed, it is a major part of the introductory discussion. *Id.* at 227-30 (criticizing the tendency to see the best evidence principle as underlying only the original document rule and arguing for the discretionary employment of that principle in situations that fall outside that or other rules). It recurs in the analysis of various doctrinal pockets illustrating the pressure toward discretionary exclusion on best evidence grounds. See, e.g., *id.* at 256-63 (discussing cases that fall outside the scope of the original documents rule).

96. For example, consider the following passage from a popular textbook addressing admissibility problems generally:

One of the larger questions raised by the Anglo-American system of evidence is who should be responsible for selecting the evidence to be presented to the trier of fact. The range of possible answers to this question is very broad. At one end of the spectrum, the rules could dictate very rigidly that certain types of evidence will not be accepted in lieu of other types of available "superior" evidence. . . . One could justify such a system with the argument that (1) reliability is the primary concern of the fact-finding process, (2)

Evidence law's movement over the past 100 years away from fixed rules or at least the appearance of fixed rules and toward more explicitly discretionary judgment is, I suspect, as unmistakable as it is generally desirable, but that by itself does not necessitate any change in the underlying principles by which the admission and evaluation of evidence are regulated. Indeed, if anything, understanding the traditional rules in terms of the best evidence principle allows one to see more clearly that the historical expansion of discovery rights reduces the need for enforcement of evidentiary preferences, whether by rules or by more discretionary judgments. In historical context, the best evidence approach has a generally corrosive effect on exclusionary practices.

certain kinds of evidence (e.g., "real" evidence) are inherently more reliable than other kinds (e.g., testimonial evidence), and (3) the rules of evidence should specify evidentiary choices so as to promote reliability. If one accepted all three parts of this argument, it might be possible to construct a detailed typology of kinds of evidence, from the most to the least favored variety, to apply to all situations. If nothing else, such a catalogue would provide an easily accessible guide to the advocate planning a litigation strategy and to judges ruling on objections at trial. Indeed, Professor Dale Nance believes that the "best evidence principle" was the crucial organizing concept motivating the rationalistic common law judges during the formative era of Anglo-American jurisprudence.

ERIC D. GREEN & CHARLES R. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 978-79 (2d ed. 1994). Although the last sentence in this passage is essentially correct, its relationship to the preceding sentences is somewhat obscure. The passage mixes the issue of whether the inducement of parties to present superior evidence can and should be undertaken with the issue of whether it should be undertaken by means of fixed rules applicable to specified categories of evidence. From the paragraph that follows in their text, one can infer that Professors Green and Nesson might say that a regime that enforced evidential preferences by ad hoc discretionary judgments would fall somewhere between the fixed-rules-of-evidence hierarchy extreme and a completely laissez-faire approach in which preferences were entirely unenforced. *See id.* at 979-80. But associating the historical component of my work with the fixed-rules end of the spectrum, which itself is debatable, might erroneously suggest that, as a prescriptive matter, I generally or even consistently favor the use of rule-based enforcement over the discretionary enforcement of preferences that these authors acknowledge would be necessary within an otherwise largely unregulated evidence presentation process. Compare Professor Tillers's characterization of my views, *supra* note 93.