

# Reply to Professor Rothstein

David S. Schwartz\*

## TABLE OF CONTENTS

OVERVIEW.....	16
I. PLAUSIBLE IMPROBABLE MATTER AS “RELEVANT EVIDENCE”?.....	17
II. CONDITIONAL RELEVANCE.....	20
CONCLUSION .....	22

## OVERVIEW

It is an honor and a privilege, both to have garnered Professor Rothstein’s careful and sympathetic reading of my article *A Foundation Theory of Evidence* (hereinafter “*Foundation Theory*”)<sup>1</sup> and to have the opportunity to respond to his thought-provoking comments in these pages. I’m gratified that Professor Rothstein has agreed with some of *Foundation Theory* and, while as yet unconvinced on some key points of my argument, remains open to being convinced.<sup>2</sup> No one has more authority than Professor Rothstein to judge a piece of evidence scholarship and call out the thin patches in its argument, and I welcome his suggestion that I try to elaborate some aspects of my argument further in future articles.

My basic argument in *Foundation Theory* is that relevant evidence must be “well founded,” by which I mean “case-specific, assertive, and probably true.” Proffers to the jury cannot be “relevant evidence” without these qualities. This principle follows logically from the requirement of our legal system that a claimant can only win the imposition of liability (civil or criminal) on a defendant by proving things that *probably did happen* rather than things that *may have happened*. Claimants must present a specific narrative that includes the factual elements required by the substantive law for a particular claim. Some specific thing must have happened to give rise to liability, and the claimant must commit himself to a specific, detailed narrative of what happened. I argue further that all evidentiary facts that are necessary to proving this narrative must be probably true if the overall narrative is to be found probably true.

The question of how much certainty is needed to justify belief is a question that is debated by philosophers and that lends itself to different answers depending on the area of inquiry. Decisions must be made under uncertainty in a variety of settings; where the status quo is unstable—that is, where change will occur no matter what decision is taken—a decision may be justifiably based on a level of probability that would not justify belief in another context. A doctor considering which of several paths of treatment to recommend to a sick patient may be justified in relying on a theory that is only 40% probable if the competing theories are even less probable. The legal system, however, seems committed to the idea that the status quo of liberty, property, and rights will not be shifted by a court in the absence of probabilities greater than

---

\* Professor of Law, University of Wisconsin Law School; Visiting Professor of Law, University of Denver, Sturm College of Law (Spring 2012). © 2012, David S. Schwartz. All rights reserved.

<sup>1</sup> David S. Schwartz, *A Foundation Theory of Evidence*, 100 GEO. L.J. 95 (2011).

<sup>2</sup> See Paul Rothstein, *Response Essay: Some Observations on Professor Schwartz’s “Foundation” Theory of Evidence*, 100 GEO. L.J. ONLINE 9, 14, 16 (2012).

50%. Presumably, the legal status quo is sufficiently stable and livable that we do not feel compelled to change it under conditions of greater uncertainty than that 50% threshold.

It seems intuitive that one cannot prove a fact assertion to be probable by relying on component “facts” that are improbable (albeit plausible). This intuition is supported by formal logic. The doctrine of logical consequence—also known as “entailment”—tells us that a fact consisting of subparts cannot be more probable than the least probable subpart.<sup>3</sup> I assert that any litigated case consists of a single fact (for example, the defendant injured the plaintiff through medical malpractice) consisting of numerous subparts (the detailed narrative comprising the evidence to prove that overall fact).<sup>4</sup> The doctrine of logical consequence tells us that all the evidence necessary to that narrative must be at least probably true if the overall claim is probably true. Facts that don’t fit—even though offered as relevant by a party and admitted as *potentially* relevant by the judge—can be disregarded by the jury as ultimately irrelevant because unnecessary to the narrative.<sup>5</sup> A corollary of this argument is that proffers to the jury that are not probable—that are conceded by the offering party to be merely possible but not probable—are not relevant evidence.

Despite the intuitive and formal appeal of this idea, evidence scholars maintain the idea that “what may have happened” is relevant to prove “what probably did happen.” Professor Rothstein’s response essay devotes each of its two main subsections to a critique that revolves around a tacit adherence to this idea, that a “maybe” can make a “probably” more probable. Professor Rothstein finds that both the “single fact theory” and the doctrine of logical consequence fall short of making a case for the argument that a maybe does not tend to prove a probably. He asks whether “an evidentiary assertion of, say, only 40% or even less probability, may play a legitimate role in advancing a claim.”<sup>6</sup>

I have tried to deal with this counter to my argument at some length in *Foundation Theory*, and it may be that the theoretical checkmate has eluded me.<sup>7</sup> This response paper is not the right venue for me to go back to the drawing board to try a different and, perhaps more convincing, theoretical approach and restating my argument at length would be a bore. Instead, I’ll focus on the illustrations highlighted by Professor Rothstein. Evidence scholars invariably test theoretical arguments with illustrative fact patterns, real or hypothetical, and indeed sometimes a well-chosen vignette makes the point far better than pages of abstractions.

#### I. PLAUSIBLE IMPROBABLE MATTER AS “RELEVANT EVIDENCE”?

Professor Rothstein offers the following hypothetical as a counterexample to my argument: in a civil wrongful death case, a juror is hung up on the question of how the victim’s body was disposed of.<sup>8</sup> Evidence that there was a meat-grinding plant might tip this juror’s decision in favor of the plaintiff by supplying a plausible hypothesis that the body was disposed of in the meat grinder, even though the probability that that is what happened doesn’t exceed 40%. Why can’t a plausible possibility such as this constitute relevant evidence?

---

<sup>3</sup> Schwartz, *supra* note 1, at 132–33.

<sup>4</sup> *Id.* at 129–32.

<sup>5</sup> *Id.* at 133.

<sup>6</sup> Rothstein, *supra* note 2, at 12.

<sup>7</sup> See Schwartz, *supra* note 1, at 144–55.

<sup>8</sup> Although this hypothetical essentially posits a murder scenario, Professor Rothstein makes it a civil wrongful death case to make his illustration more clear and helpful by allowing us to set aside complications arising from the criminal “beyond a reasonable doubt” standard.

Before answering that question, I have to observe that Professor Rothstein subtly, and probably unintentionally, shifts the argument—and I need to shift it back. Professor Rothstein does not in fact pose the question, “Why can’t a plausible possibility such as this constitute *relevant evidence*?” Instead he asks:

Mightn’t [the juror] now, after introduction of the meat-grinder evidence, *be correctly influenced by* just the possibility (not the probability) of defendant’s use of the meat grinder to dispose of the body? Mightn’t this *properly slightly tip him over into accepting* the murder scenario?<sup>9</sup>

The differences in language are not merely semantic. My foundation theory, as Professor Rothstein correctly and carefully observes, sets out a “tripartite requirement” for *relevant evidence*. It is not my contention that well-founded, relevant evidence is the only matter that may permissibly influence a juror’s decision making.

“Relevant evidence” must be both “relevant” and “evidence.” But relevant evidence is not synonymous with “matter that influences the jury’s decision.” Jurors can be influenced by matter that is evidence but not relevant. As Rule 403 acknowledges, faulty conclusions may be drawn from irrelevant aspects of otherwise relevant evidence; these conclusions could tip a juror’s decision. For instance, a juror presented with prior-bad-acts evidence may be “tipped” to find a defendant guilty of the current crime, not because he believes the prior acts have any bearing on the probabilities of the current crime, but because he believes the defendant was insufficiently punished for them. Jury decisions might also be influenced by matter that is neither relevant nor evidence: the clothing choices or personalities of trial counsel or the personalities of the expert witnesses. In other words, jurors can be influenced by various irrelevant matter presented to their senses in court, some of which is not even evidence.

I believe Professor Rothstein agrees with this analysis and intended to eliminate that category of juror persuasion when he says “*correctly influence*” and “*properly tip*.” But even matter that “correctly,” “properly,” or “rationally” influences the jury is not necessarily relevant evidence. Closing arguments of counsel are supposed to be rationally and properly influential on juror decision making. Good arguments may tip jurors on the cusp of decision. They are, therefore, relevant in any meaningful sense of that term, but of course they are not *evidence*.

Professor Rothstein’s example seems to me to be a variant of an issue I dealt with in *Foundation Theory*:<sup>10</sup> the admission of technically irrelevant matter to fill narrative gaps. The problem arises because there is not a perfect overlap between the rules of storytelling outside the legal system—in Hollywood, for example—and the rules for narratives within the legal system. The latter need only contain all the “essential elements” of a claim. These can be satisfied while leaving gaps in the non-legal narrative. For example, motive is never an essential element of homicide, but it is very important (if not essential) to non-legal storytelling. Jurors bring their non-legal expectations of storytelling into the courtroom with them and may be dissatisfied with narrative gaps—absences of evidence to supply elements they have come to expect in stories, such as motive—even though those gaps are not required to be filled by the substantive law. Where this occurs, many courts apparently allow the “evidence” to be admitted or allow speculation. A prosecutor might be allowed to argue in closing, “we may never know exactly why [defendant] killed the victim. Maybe it was jealousy; maybe it was revenge; maybe it was

---

<sup>9</sup> Rothstein, *supra* note 2, at 13 (emphases added).

<sup>10</sup> Schwartz, *supra* note 1, at 154–55.

no reason at all . . . .” Perhaps some “evidence” of these motives may be admitted. Professor Rothstein’s hypothetical posits a similar kind of factual issue; a homicide can be proven without proving how the body was disposed of, but a juror may be bothered by that narrative gap.

Whether such “complete-the-narrative” material should be admissible in evidence (note that I don’t say “*as* evidence”) is an interesting question beyond the scope of *Foundation Theory* and this reply. I don’t take a position in *Foundation Theory* about the *admissibility* of such material. Because jurors will always speculate in order to fill narrative gaps, I’m inclined to believe that the parties should be allowed to offer background facts to guide jury speculation and to offset jurors’ tendency to give too much weight to irrelevant missing facts. The key point is that Professor Rothstein’s illustration does not rebut my theory.

Relevant evidence must elevate the prior probability (the probability without the evidence) of a material fact. I argue that the prior probability of a material fact must be deemed to be 50%, based on a systemic premise of litigation expressed in the jury instruction that jurors are not supposed to favor either party with prejudgment of the facts. To argue otherwise, one has to pick some arbitrary number, presumably based on jurors’ subjective preconceptions about the world. Such “subjective probabilities” are, to be sure, recognized in probability theory,<sup>11</sup> but they are highly problematic as baselines for fact finders in litigation. Litigated events are by their nature unusual; the probability of their occurrence, in the general pool of occurrences of daily life, is low. If there were a 50% chance that I would have an accident every time I drove, I would never get into my car. But in a car-accident litigation, my preconceived ideas about the probability of a car accident have to go out the window. When we instruct jurors to approach a case with an open mind, what we are really asking is for them to dispose of at least some of their unduly low subjective prior probabilities.

Professor Rothstein’s hypothetical fudges this issue by asking us to assume a juror with an arbitrarily low subjective probability—one who can’t imagine how a body could be disposed of without being informed of a meat-grinding plant—and to assume further that this is an “objectively reasonable juror,” notwithstanding his excessive skepticism or lack of imagination. I have no doubt that real jurors get hung up on all manner of tangents or stubbornly refuse to make inferences that most jurors would readily make. For a juror who arbitrarily assumes that there is only a 10% possibility that a murderer could dispose of a body, evidence of a 40% probability of disposal should raise the probability. But the idea that relevance theory is based on a “jury from Missouri”<sup>12</sup>—one that believes nothing unless shown in court—contradicts the principle that relevance determinations assume jurors with common sense and common knowledge. If material that elevates the imaginative capacities of jurors is relevant evidence, then the wood-chipper scene from the movie *Fargo* would be relevant evidence in Professor Rothstein’s hypothetical too.

*Fargo* is fiction, but it is plausible fiction, and I see no analytical distinction between such fiction and the 40% probability of the body-in-the-meat-grinder. When lawyers and judges talk about speculation, they essentially mean something akin, if not identical, to plausible fictionalizing. Speculation, like plausible fiction, is the creation of narratives from background knowledge about the world. Background knowledge is, in essence, generalization. Professor Rothstein’s evidence is fundamentally a generalization—“bodies can be disposed of in meat-grinding plants.” (I explain this further in the next section.) It is widely, and correctly, assumed that jurors’ generalizations and common background knowledge are not in themselves evidence.

---

<sup>11</sup> IAN HACKING, AN INTRODUCTION TO PROBABILITY AND INDUCTIVE LOGIC 131–32 (2001).

<sup>12</sup> From the “show me” state; that is, unusually skeptical.

## II. CONDITIONAL RELEVANCE

A key part of my argument is a refutation of the line of scholarship attacking the concept of conditional relevance. Conditional relevance is largely congruent with my “foundation theory” and, indeed, can be understood as an under-articulated, under-theorized version of it. As conventionally stated, conditional relevance is an occasional requirement in which relevance sometimes depends on proof of the probable truth of another closely related fact.<sup>13</sup> I argue that conditional relevance is always required of every item of evidence. Conditional relevance, I try to show, is a coherent concept, whereas it is the underlying premise of the conditional relevance critics—that plausible maybes can constitute relevant evidence—that is incoherent.

Professor Rothstein argues that I have correctly identified a flaw in the conditional relevance critique but expresses doubt that my foundation theory is the correct explanation.<sup>14</sup> He agrees with my analysis of the life insurance hypothetical: the existence of life insurance policies does not make the defendant’s homicide motive more likely, and is therefore irrelevant, because that fact does not exceed what the jury already knows—that life insurance policies exist.<sup>15</sup> But he disagrees with my “notice” example—the mechanic who warns the driver that her brakes are bad—arguing, as the conditional relevance critics do, that the mere utterance of the statement is relevant even without proof that the defendant heard the notice-giving statement. He seems to share Professor Friedman’s view that the latter is a case of “conditional probative value.”<sup>16</sup> What’s more, Professor Rothstein is unconvinced that either example has anything to do with the “case-specific, assertive, and probably true” qualities of the evidence.<sup>17</sup>

Professor Rothstein distinguishes the insurance policy case from the mechanic notice case on the ground that, in the latter case, “the jury does not already have knowledge that such words were uttered.”<sup>18</sup> In other words, the blank insurance policy is generic and simply restates the jury’s background knowledge, whereas the utterance by the mechanic is something that actually happened in the specific, litigated case, which the jury would have had no way of knowing. Interestingly, then, Professor Rothstein agrees with more of my foundation theory than he lets on: the case-specificity of the evidence in the mechanic notice case makes a difference—the difference—in his distinction between relevant and irrelevant matter. Score one for *Foundation Theory*.

But I disagree with Professor Rothstein about the relevance of the mechanic’s utterance; for while seemingly case-specific, it is nevertheless irrelevant because it is not assertive and probably true. Indeed, I would go further and argue that it is not even case-specific. “Case-specific” is not equivalent to “concrete” or “existing in the real world.” A witness can testify to

---

<sup>13</sup> Confusion sometimes arises because a single, unified factual proffer must be fragmented into pieces or items of evidence. The factual proffer—“defendant was motivated to kill the victim because he was the beneficiary of the victim’s life insurance policy”—may require several witnesses and documents, each presenting a piece of that single factual assertion. Many of those pieces may be irrelevant without the whole—that is, one may be conditionally relevant on another. But rather than looking at the pieces as separate items of evidence, it makes more sense to view the whole as a single fact assertion offered by the proponent as probably true.

<sup>14</sup> Rothstein, *supra* note 2, at 14.

<sup>15</sup> *Id.*

<sup>16</sup> See Richard D. Friedman, *Conditional Probative Value: Neoclassicism Without Myth*, 93 MICH. L. REV. 439 (1994); Schwartz, *supra* note 1, at 117, 120 (discussing Friedman’s article).

<sup>17</sup> Rothstein, *supra* note 2, at 14–15

<sup>18</sup> *Id.* at 15.

any “thing” that exists in the real world and thus that can be perceived by the senses, which makes it concrete. That concrete thing might even have some proximity to a party or event in the case—and it would still not be case-specific. There is very little difference between the generalization “most people have cars” (a background generalization based on the jury’s common knowledge and experience, which might inform the jury’s reasoning) and the testimony of a witness, “I saw a car in the defendant’s driveway which I think belongs to him,” unless the car is part of the claimant’s story of liability—for example, that the defendant drove *that* car into the plaintiff, who was walking in the crosswalk. Case-specific means that the fact is part of the offering party’s specific story of guilt or liability.

Suppose in a murder case that the prosecution’s theory of the case includes the assertion that the defendant shot the victim with a .45 caliber pistol. The evidence shows that the victim’s cause of death was a gunshot wound. However, there are no 100% certainties in litigated events, and it is therefore *possible* that the victim was killed—by the defendant—in some other way. The prosecution offers in evidence a lengthy inventory of additional possible murder weapons found in the defendant’s home: 12 kitchen knives (stabbing), 25 heavy blunt objects (bludgeoning), 8 kinds of lethal household chemicals (poisoning), 19 chords (strangling), 5 pillows (suffocating), and 10 electrical appliances (tossing into the bathtub, causing electrocution). Don’t these all make it (slightly) more likely that the defendant killed the victim because he had access to murder weapons? Isn’t this entire inventory therefore relevant evidence?

I say no, for two reasons. First, the jury already knows that the average household is filled with ordinary objects that could be used as murder weapons. Second, these are irrelevant to the prosecution’s specific narrative of guilt. Readers skeptical of my theory could say that these are all relevant and are simply excluded by an application of FRE 403, but that argument, it seems to me, trivializes the concept of relevance to the point of meaninglessness.

In my insurance policy case, Professor Rothstein agrees with me that testimony about a blank insurance policy would be irrelevant because it doesn’t inform the jury about anything case-specific beyond its common knowledge. My guess is he would agree that the same point applies to my murder weapon example. Yet, he balks at the notice example. I fail to see any analytical distinction. The mechanic’s probably unheard utterance is no more case-specific than the probably unused murder weapons. The same is true for the insurance policy. Suppose the blank life insurance policy provisions were found in the victim’s home but still without the declarations page identifying the insured and the beneficiary. The difference between the utterance and the blank insurance policy, which Professor Rothstein agrees is irrelevant, is one of degree and not of kind.

To analyze the relevance of the mechanic’s utterance, we must not disregard the offering party’s theory of the case.<sup>19</sup> If the plaintiff’s narrative to the jury is that the defendant knew her brakes were bad because she ran into a tree the day before when her brakes failed, then the mechanic’s unheard utterance would be every bit as irrelevant as the inventory of unused murder weapons. Notice-giving utterances are a generic category that are not case-specific unless the offering party posits that this was (probably) an utterance that gave notice in this case—that is, that the defendant heard it. As I argue, the complete foundation for any item of evidence contains all facts necessary to make the evidentiary assertion fit into the offering party’s narrative of liability—its theory of the case.<sup>20</sup> Because there is a pre-existing possibility, before

---

<sup>19</sup> Schwartz, *supra* note 1, at 157–59.

<sup>20</sup> *Id.* at 103.

any evidence has been presented, that the defendant received notice somehow (indeed, a 50% chance, as suggested above), the mere possibility that notice was given by an utterance from the mechanic does not affect that pre-existing possibility. The utterance becomes relevant to the issue of notice when the plaintiff asserts that the defendant probably heard that utterance.

Without adverting to the possibility that the defendant heard it, the mechanic's utterance is generic and not case-specific. By reframing the evidence as case-specific, but without evidence that the defendant heard it—in other words, relying on the utterance alone to give rise to an inference that the defendant heard it—the evidence is not probably true but is a mere possibility. “Maybe (it is true that) the defendant heard the utterance.” If one wants to say that that the statement of possibility is a true statement, that is, “it is true that there is a 40% possibility that the defendant heard the statement,” then the statement is nonassertive. Note that any maybe statement can be broken down into components containing at least some assertive probability statements. “Maybe defendant heard the mechanic's utterance” breaks down into “the mechanic made the utterance” (assertive) and “maybe defendant heard it” (nonassertive). Or “there is a meat-grinding plant in town” and “maybe the body was disposed of there.” But as I've tried to argue above, the assertive component of these statements is not case-specific. In this way, the foundation requirement isn't exactly “tripartite,” in the sense of three distinct parts, but is better thought of as a single idea with three facets.

#### CONCLUSION

Although I disagree that Professor Rothstein's examples illustrate holes in my foundation theory, I can't argue with his suggestions about specific points that would benefit from further elaboration. His critique has already helped refine my thinking on these questions. I hope to continue this dialogue with him and other evidence scholars in the near future.