

# Response Essay: Some Observations on Professor Schwartz’s “Foundation” Theory of Evidence

PAUL ROTHSTEIN\*

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## OVERVIEW

Professor David Schwartz’s *A Foundation Theory of Evidence*<sup>1</sup> posits an intriguing new way to look at Evidence. It asserts that offered evidence must meet a tripartite requirement before it can be relevant. The tripartite requirement is that the evidence must be “case-specific, assertive, and probably true.”<sup>2</sup> His shorthand for the tripartite requirement is that evidence must be “well founded.”<sup>3</sup> Hence, he calls his theory the “foundation theory of evidence” and claims this foundation notion is so central to evidence law that it eclipses in importance even relevance itself.<sup>4</sup> The tripartite requirement inheres in the very concept of evidence and relevancy, he says, and although there are only a few evidentiary areas where the Federal Rules of Evidence and their state progeny specifically require something analogous to this requirement,<sup>5</sup> he finds the requirement almost universally applied in trials across the country by judges’ rulings (going by a variety of other names) and in decisions by parties about what evidence to offer as a practical matter.<sup>6</sup>

Professor Schwartz says that once we understand this, we also understand the concept of “conditional relevancy”<sup>7</sup> that has been controversial among some doubting Evidence scholars,<sup>8</sup> though not among Evidence codifications and judicial rulings. Conditional relevance refers to a situation where one piece of evidence is not relevant unless some other evidence is introduced and found to be probably true. The doubting scholars hold that the original piece of evidence will

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\* Professor of Law, Georgetown University Law Center. © 2012, Paul Rothstein. Professor Rothstein is the author of several books and numerous articles on Evidence and has served as a Congressional Advisor on the Federal Rules of Evidence. He was formerly a trial practitioner in Washington, D.C.

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

<sup>2</sup> *Id.* at 121–24. He is a little ambiguous as to whether he regards this as a relevance requirement, but his discussion to the effect that it explains conditional relevancy suggests he regards it as a relevance requirement.

<sup>3</sup> *Id.* at 121.

<sup>4</sup> *Id.* at 97 (“It is a commonplace among evidence scholars to assert that relevance is the foundational principle of evidence law. They are wrong. The foundational principle of evidence law is foundation.” (footnote omitted)).

<sup>5</sup> *Id.* at 105–10 (discussing FED. R. EVID. 104(b) (conditional relevance), 602 (personal knowledge), 701 (lay opinion testimony), and 901 (authenticating and identifying documents and things)).

<sup>6</sup> *See id.* at 141 (“But no court would admit [unfounded] evidence, and no party would offer it . . .”).

<sup>7</sup> *See id.* at 107–10, 117–21, 140–44.

<sup>8</sup> *See, e.g., id.* at 117–21 (discussing scholarly critiques of conditional relevancy).

virtually always have some relevance regardless of the other piece of evidence, and so is not “conditionally” relevant—and that when courts and rules require the other piece of evidence to make the original piece admissible, it is for reasons other than that the original piece alone is not relevant. The other reasons might include that the original piece of evidence, unaccompanied by the other supporting evidence upon which its “relevance” is conditional, has very low probative value compared with its tendency to mislead the jury, use up time, etc. Hence, there is no such thing as *relevancy* conditioned on another fact, except perhaps in some very rare situations. What is conditional is *admissibility*, on grounds other than relevancy.

For example, a gun found in defendant’s possession introduced in evidence is traditionally deemed only “conditionally relevant”—relevant only if there is other evidence tending to show that it was the gun used in the murder that is on trial. But the doubters argue the gun is relevant as long as it *could* be the murder weapon—as long as it is not impossible that it was the murder weapon—because all that relevance requires is a slight increase in a claim’s probability by the introduction of the evidence. If the court excludes the gun when not accompanied by this other evidence, these doubters contend, it is doing so for some other reason, such as low probative value compared with time consumption, misleadingness, prejudice, etc.

But Schwartz contends otherwise, and that his theory explains why these “conditional relevancy” situations occur so frequently and why they are genuinely a matter of relevance. Often, Professor Schwartz explains, offered evidence does not on its face comply with the tripartite requirement and needs an additional showing by means of other evidence to make it comply: The gun alone without the other evidence (that is, evidence that it was the gun used in the murder) is not *case-specific* enough, and the proposition that it was the gun used in the murder is not *probably true*.<sup>9</sup> Hence, without the other evidence, the gun does not satisfy two branches of the tripartite requirement. Because the tripartite requirement is a precondition for relevance, the gun is indeed conditionally relevant—that is, its relevance is conditional on the other evidence.

His tripartite requirement and how he derives it are likely to be controversial. He derives it in major part from his assertion that claims for relief in lawsuits must be case-specific<sup>10</sup> and probably true (>50% likely),<sup>11</sup> and that a claim for relief cannot be more probable than the least probable evidentiary fact needed to help prove the claim.<sup>12</sup> Also likely to be controversial is where he places the tripartite requirement in the analysis—at the pre-relevance level, according to one portion of his narrative, as a prerequisite for something to be called “evidence” in the first place.<sup>13</sup> These matters are likely to be controversial because they are very different from conventional wisdom on the subject, which holds that generally a party may offer any evidence that affects probability in any degree, no matter how low, and regardless of its specificity, unless

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<sup>9</sup> See *id.* at 141–42.

<sup>10</sup> *Id.* at 123. But what about cases invoking the doctrine of *res ipsa loquitur*, which allows tort plaintiffs to not specify a particular act of negligence, but to suppose that any of an array of negligent acts produced the result? Professor Schwartz sees this as an exception. See *id.* at 152–53. I am not so sure that situations where claims need not be specific are as rare as he believes, and that his exception does not eat up the rule. I would like to see some more explanation, perhaps in a future article. I certainly am open to persuasion on this point.

<sup>11</sup> *Id.* at 124.

<sup>12</sup> *Id.* at 133.

<sup>13</sup> See *id.* at 98 (“The concept of relevance assumes the existence of evidence and is thus radically incomplete as a definition of evidence. Foundation, on the other hand, tells us what evidence is: a case-specific assertion of fact that must be probably true in order to lend support to a legal claim.”); *id.* at 134–44 (arguing that foundation is “a precondition of relevance”).

it is excluded by other particular rules, few of which have anything like the tripartite requirement.

There will be those, steeped in the traditions of Evidence, who will feel he has not made the case that most evidence must be case-specific, assertive, and probably true. Nor will they be convinced that this is why supporting evidence in the “conditional relevancy” situation is required. I think a follow-up article will be required to beef up his argument for the traditionalists, and even for fence-sitters like myself. But I trust that even his detractors will agree that he has revealed a widespread phenomenon that has gone under the radar: that evidence which could not be found to be probably true by a jury is usually excluded, or not offered, though the rationale may be fuzzy or varied. This is enormously useful for litigators to know. Further, even the skeptics will find his analysis along the way to be intriguing and full of other valuable insights.

“Foundation” is perhaps an unfortunate choice of words for his theory, because “foundation” normally means, in Evidence law, *anything* that *any* rule of evidence makes a precondition for admissibility. But as the article moves forward, he begins instead to use the phrase that “evidence must be well-founded,”<sup>14</sup> which I think more clearly connotes what he is getting at: that evidence must be shown to be case-specific, assertive, and probably true, and if these conditions are not complied with on the face of the evidence, there must be other evidence offered to make it so.

The opening quarter of Professor Schwartz’s article probably should have come at the end. In that opening quarter, before we know what he means by “foundation,” he touts his “foundation” theory as such a fundamental concept that it eclipses even “relevance” in importance.<sup>15</sup> To the reader, comparing “foundation” to “relevance” initially sounds like comparing apples to oranges, until he clarifies the point later on. The first quarter of the article spends much time asserting that “foundation,” rather than “relevance,” is *the* fundamental theory of Evidence. I personally find that debate to be unproductive. Everyone knows that there are other concepts than relevance in Evidence, and an abstract debate about which ones are more basic than others is not helpful for most purposes. However, I do understand that he wants to impress the reader with the pervasiveness of the phenomenon with which he is dealing, and that is an important and useful part of his message.

I would like to address further, here in the limited space I have, two of his most intriguing and central contentions: (1) that almost all evidence must be “case-specific,” “assertive,” and “probably true”; and (2) that scholars who say there is no such thing as conditional relevance—that it is an incoherent concept—are wrong: conditional relevance exists and is widespread. The two are linked in Professor Schwartz’s view because it is the tripartite requirement in (1) that often make evidence “conditionally relevant” as asserted in (2)—that is, irrelevant unless something is shown to establish that it complies with the elements of the tripartite requirement.

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<sup>14</sup> *E.g., id.* at 121–22, 144.

<sup>15</sup> *See id.* at 97–99. He seems a little contradictory here because he ultimately argues that foundation is a necessary part of relevancy. *See id.* at 134–44. But even there, it is not clear whether he regards foundation as something separate from relevancy, or as something inherent in the concept of what is “evidence,” or as a kind of precondition or support on which relevancy is then computed. This is probably merely a semantic problem, but it fosters a little confusion.

## I. “EVIDENCE MUST BE CASE-SPECIFIC, ASSERTIVE, AND PROBABLY TRUE”

Professor Schwartz has something really valuable here, but it could use further explication. I recognize that the purpose of his article was to set forth his theory as a whole and not to focus unduly on any one part. I look forward, however, to some further explanation of the concepts of “*case-specific*,” “*assertive*,” and “*probably true*,” perhaps in a future article. On the face of it, it seems that the relevant “*assertion*” that a piece of evidence makes could be phrased in a number of different ways; that a question could be raised as to *how* “*case-specific*” evidence must be, on a continuous scale from complete generality to total specificity; and that there is some flexibility as to what relevant assertion must be “*probably true*” about the evidence. I think the criteria of “*case-specific*,” “*assertive*,” and “*probably true*” will be very important in future Evidence discussions; but to be of maximum usefulness as guides, particularly to litigators, they could use some more specification.

One of Professor Schwartz’s main tenets is that a claimant must prove his case by a preponderance (that is, that the probability of its truth be >50%, which is to say that it must be “*probable*,” which is to say that it must be “*probably true*”), and that *therefore* every piece of evidence (or assertion made by that piece of evidence) used to prove that case must also be probably true.<sup>16</sup> I would like to see some more elaboration of why this follows. He advances in support the logical/philosophical concept of “*entailment*,”<sup>17</sup> but I think a skeptical legal audience needs something more.<sup>18</sup>

Further, I would like to hear more about how this “*probably true*” notion applies to the current “*narrative*” or “*story telling*” theory of trials expounded by some Evidence scholars,<sup>19</sup> which I personally find rather convincing. This theory posits that juries early on construct for themselves alternative possible scenarios of what happened (for example, murder or self defense) and then see what pieces of evidence fit the one or the other. Under such a theory, it may be quite possible that an evidentiary assertion of, say, only 40% or even less probability, may play a legitimate role in advancing a claim.

For example, let us say, in a civil wrongful death case, no dead body is ever found, but the victim, the wife of defendant, has been missing for a long time and has not returned. A witness testifies that there was a factory that manufactures and sells to farmers large meat grinders, suitable for grinding entire bodies of cattle, in defendant’s neighborhood (case-specific enough?). Professor Schwartz, I think, may believe this would not be admissible because the evidentiary proposition behind it is that the defendant used a meat grinder to dispose of the body in an easily concealable way, and this has not been shown to be probably true.

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<sup>16</sup> *Id.* at 99, 132–34.

<sup>17</sup> *Id.* at 132–34.

<sup>18</sup> Some of his support here also involves what I regard as an unconvincing discussion about how there are not separate pieces of evidence, but rather that a claim for relief and its supporting evidence are unitary. *See id.* at 130–34; *see also id.* at 121 (“A party’s claim must be based on a single, probably true narrative which is properly understood to comprise a single fact that is not analytically distinct from the more detailed narrative evidence used to prove it.”). Although this may be true, some more demonstration of it and how it applies here is needed.

<sup>19</sup> *See, e.g.,* Ronald J. Allen & Sarah A. Jehl, *Burdens of Persuasion in Civil Cases: Algorithms v. Explanations*, 2003 MICH. ST. L. REV. 893; Ronald J. Allen & Brian Leiter, Comment, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491 (2001); Eleanor Swift, *Aspirational Optimism About Evidence Law: An Implicit Theme of the Visions of Rationality Symposium*, 2003 MICH. ST. L. REV. 1337, 1359–64. For a briefer presentation, *see* PAUL F. ROTHSTEIN, MYRNA S. RAEDER & DAVID CRUMP, *EVIDENCE IN A NUTSHELL* 4 (6th ed. 2012).

But couldn't it be argued that even a possibility that he did so plays a legitimate role in the jury's deliberations about this case? Suppose a juror, having heard evidence of motive and animosity, is on the cusp between feeling defendant killed the wife and disposed of the body, versus feeling that she just voluntarily left and purposely disappeared. Suppose further that, before the evidence of the availability of a meat grinder in the neighborhood, this juror may have been feeling that if defendant did kill her, it would be hard to get rid of the body, and this may have kept him from tipping over into adopting the murder scenario.

Mightn't he 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?

This is not a case where subsequent evidence or the totality of the evidence convinces the juror that the doubtful proposition (that a meat grinder was used) is now probably true, as required by Professor Schwartz. The juror may well be tipped over into finding murder by the *possibility* a meat grinder *may* have been used, even though the juror adheres steadfastly, up to the very end, to the notion there is less than a probability the meat grinder was *in fact* used. The mere possibility assuages his doubt that there could be any way to dispose of the body without a trace.

To help Professor Schwartz, we could say here that there *is* in this evidence a proposition that *is* probably true (such as “he had potential access to a meat grinder,” or some other proposition<sup>20</sup>). But then couldn't this kind of rephrasing *always* be done? What then keeps this concept of “probably true” useful? Isn't it then too malleable to be useful? Does this qualify for the exception Professor Schwartz recognizes as background facts?<sup>21</sup> If so, does that exception devour the rule?

## II. “CONDITIONAL-RELEVANCE SKEPTICS ARE WRONG”

### A. Insurance Case

Scholars have argued that conditional relevance is intellectually incoherent. To use an example that Professor Schwartz treats,<sup>22</sup> suppose that in a civil wrongful death case, a life insurance policy is offered into evidence by the plaintiff, with unfilled-in blanks for the insured and the beneficiary. The theory is that there may have been a motive for defendant to kill the victim—that defendant may have been the beneficiary of an insurance policy on the victim's life.

The standard theory of conditional relevance holds that the existence of such a policy is not relevant unless there is sufficient evidence upon which a jury could find it probable that there *was* such a policy in this case, and that the insured was the victim and the beneficiary indeed the defendant.<sup>23</sup> Only then would the inference be permissible that this policy was relevant to defendant's motive and his liability for the death.

The anti-conditional-relevance scholars, however, argue that this evidence of the existence of such insurance policies (that is, the blank policy) makes it rationally a tiny bit more

<sup>20</sup> Such as, for further examples, “There are ways in this case the body could have been disposed of in a way difficult to discover,” or “There are meat grinders in this town capable of grinding a body so it would be hard to discover.”

<sup>21</sup> Schwartz, *supra* note 1, at 154–55 (discussing *res gestae* “evidence”).

<sup>22</sup> *Id.* at 140–44.

<sup>23</sup> And perhaps proof that defendant knew about the policy, although this may be a permissible inference if there was such a policy in the case. We will assume it is a permissible inference without proof.

likely to the jury that there was in this case such a policy in which the victim was the insured and the defendant the beneficiary than if the blank insurance policy had not been introduced. (The assumption seems to be that the jury in the latter instance would assume there were no such policies in the world.) Hence, under the definition of relevance, which countenances the slightest increase in probability, the blank insurance policy is relevant and there is no need for the other proof (that there was such a policy in this case and that the insured was the victim and the beneficiary was the defendant) to make the evidence *relevant* (although there might be such a need in order to make the evidence not misleading, or not unduly time consuming, or not prejudicial). These scholars say this will virtually always be the case with evidence which is alleged to be conditionally relevant. Thus, the concept of conditional *relevance* (as opposed to conditional admissibility) is incoherent.

Here, Professor Schwartz correctly points out that these scholars are wrong: Without the additional evidence of an actual policy in this case naming the victim and defendant, evidence showing the existence of such insurance policies in the abstract adds nothing to what the jury already knows—that such policies exist and it is possible there was a pertinent one here.<sup>24</sup> Rule 401 (the definition of relevant evidence) requires, for evidence to be relevant, that there must be an *increment* in the apparent probability to a jury of a fact being true, beyond what probability was already there in their minds. So here the evidence of the existence of such policies (that is, the blank policy) without the other evidence (as to a policy being written in this case with the pertinent insured and beneficiary) adds no such increment, and is irrelevant. It is truly a case of conditional relevance, and the concept of conditional relevance is coherent. *Professor Schwartz is absolutely correct on this, and has put his finger on a serious flaw in the arguments against the existence of and intellectual coherence of conditional relevancy in certain cases like this one.*

But what about Professor Schwartz's *other* reason why we need the evidence that there really is a policy in this case that covers the pertinent insured and beneficiary? His other reason is that without such support, the evidence fails the "case-specific, assertive, and probably true" test he is advancing in this article.<sup>25</sup> In this particular case, the two reasons may come to the same thing, but I still need convincing that this reason amounts to a general theory.

## B. Notice Case

Again using an example from Professor Schwartz's article,<sup>26</sup> suppose a witness heard a garage mechanic say in reference to defendant's car: "These brakes are bad." No other evidence is offered bearing on whether defendant heard this statement of the mechanic. A negligence action is brought against defendant for not fixing the brakes when he knew they were bad. The

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<sup>24</sup> *Id.* at 112–16 (addressing "the problem of *de minimis* probative value"); *see also id.* at 115 ("What do jurors know? They know that life insurance policies exist. . . . Thus, relevance is not the quality of evidence in informing a fact-finder above absolute zero knowledge, but rather of informing jurors above and beyond their state of general knowledge.").

<sup>25</sup> As I previously noted, these three required features under Professor Schwartz's theory need more delineating, perhaps in a future article. Different relevant "assertions" made by a piece of evidence can be found, depending upon how you look at the particular piece of evidence. On "case-specific," would it make our blank insurance evidence more case-specific if it was found in the building where defendant works? If it was found in a friend's house? In a different apartment in the defendant's apartment building? In the defendant's own house? If it was a policy especially tailored to professional women and the victim was a professional woman? On "probably true," there are different propositions arising out of evidence, some that may be probably true, some not, all in the chain of relevance/inference.

<sup>26</sup> *Id.* at 139, 144–46, 157–58.

mechanic’s statement as reported by the witness is offered on the issue of notice—that is, whether defendant knew the brakes were bad. The efficacy of this evidence depends on whether the defendant was present and heard the mechanic’s statement. Our conditional-relevance-doubting scholars would say—contrary to conventional conditional relevance analysis—that its *relevance* doesn’t so depend.<sup>27</sup> They would say that it is more likely defendant heard the mechanic’s statement if it was uttered than if it was not uttered. So the evidence of the mechanic’s statement is relevant whether or not other evidence concerning defendant’s hearing of it is offered. Thus, they would say, standard conditional relevance analysis doesn’t make sense.

Professor Schwartz would say, however, that it *does* make sense because without the other evidence, a link in the chain of relevant inferences is not *probably* true (that defendant heard the utterance and was thereby put on notice). That is, it is not >50% likely that defendant heard the mechanic. And probability of truth is, in his foundation theory, a requirement that inheres in the very concept of evidence and relevancy. Furthermore, he would say, another requirement of his foundation theory is violated—the force of the mechanic’s statement, offered without evidence of defendant’s having heard it, depends on a *not-case-specific* generalization (no matter how much a truism): that people are more likely to have heard an uttered statement than one which was not uttered. Thus, since the evidence of the mechanic’s statement is not relevant (as Schwartz defines relevance, which requires well-foundedness) unless there is the additional evidence, the evidence of the mechanic’s statement is indeed *conditionally relevant*.

In my view, the evidence of the mechanic’s statement is *admissible* contingent on the other evidence (of hearing) being offered, but is *relevant* regardless of that additional evidence. Without the other evidence, the statement still heightens the likelihood it was heard by defendant by a tiny amount, so the anti-conditional-relevance scholars are right here; but the likelihood is still so low that Rule 403 (probative value balanced against time consumption, the danger of misleadingness, prejudice, etc.) would be implicated. In other words, in many instances where “foundation” is required, it is not because it is needed to make the evidence *relevant*, but rather because otherwise the evidence is a waste of time, unduly misleading, unduly prejudicial, etc. Thus, in many cases commonly called conditional relevancy, the concept is more properly called conditional *admissibility*. There is a kind of de facto codification of the Rule 403 standards in cases like this and others.<sup>28</sup>

This case involving the mechanic’s utterance is different from the last case above (about the insurance policy) because here the jury does not already have knowledge that such words were uttered. What we learn from contrasting these two cases is that sometimes the conditionality of the admissibility of evidence (that is, its being conditional on other evidence being offered) is because the evidence is irrelevant without the additional evidence, and sometimes it is because the evidence is too misleading and time consuming for its worth without the other evidence.

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<sup>27</sup> I believe the scholarly debate about conditional relevance often gets mixed up between what is required for relevance and what is required for proper jury cerebration. But this is a matter for another time.

<sup>28</sup> Rule 901 (authentication and identification), in my view, is a de jure codification of what the Rule 403 factors demand in the case of documents and things. In other words, it is not, as customarily believed, a codification of what relevance demands. It is not based on conditional relevance, regardless of what the Advisory Committee’s Note to Rule 901 may state. See FED. R. EVID. 901 advisory committee’s note (“This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).”). The foundation requirements in Rule 901 were not invented by the Advisory Committee, but taken over by them from the common law.

The “foundation” Professor Schwartz correctly observes is needed in many cases is, in my view, needed *not* because of some overarching theory that evidence must be case-specific, assertive, and probably true, but rather is needed for a variety of *other* reasons: in the insurance case, because without the foundation, the evidence adds nothing to what the jury already knows and therefore is truly irrelevant; and in the brakes case, because the evidence, though relevant, is unduly time consuming, misleading, and prejudicial unless accompanied by the foundation. But I am open to persuasion.