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AN ESSAY ON: OF JUDGES AND JURIES¹ REVISITED IN THE CONTEXT OF
CERTAIN PRELIMINARY FACT QUESTIONS DETERMINING THE ADMISSIBILITY
OF EVIDENCE UNDER FEDERAL AND CALIFORNIA RULES OF EVIDENCE

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In the course of teaching evidence for close to forty years, I have struggled with the strange² issues surrounding the function of judge and jury in deciding preliminary facts to determine the admissibility of evidence, the subject of [Federal Rules of Evidence 104](#)³ and [California Evidence Code Sections 403 and 405](#).⁴ I have received the conventional wisdom that the judge decides all questions under the rubric of *854 “competency” and the jury decides all questions under the rubric of “relevance.”⁵ In other words, those questions of fact conditioning the admissibility of evidence upon a finding of fact as a necessary foundation to satisfy a rule of law are for the judge.⁶ In contrast, those questions of fact conditioning the admissibility of evidence upon a finding of fact merely⁷ necessary to establish the evidence's relevance⁸ are for the jury.⁹ This formulation has a ring of utter simplicity, and, over the years, I think I have developed some finesse in my ability to deliver the message to students.

My message, based on the language immediately above, is that if the preliminary fact question is one, the answer to which determines the *855 relevance of the evidence and nothing more, then the jury must have the final word on deciding the existence of the fact. The simplicity of this part of the formulation is complicated by the reality that even when the jury functions as the final arbiter of the existence of facts to determine relevance, the judge also has a role: to make sure that there is adequate evidence presented from which the jury could find such fact to exist.

The questions of fact for the judge ultimately to determine with finality are those that involve more than just determining the relevance of the evidence dependent upon the finding of the fact's existence. If the decision as to the fact's existence involves the preservation of an exclusionary rule of law, either the law of evidence, substantive law, or constitutional law, then the judge must be the one to decide whether the fact exists before the jury gets to hear anything about the proffered evidence. Otherwise, the jury would be tainted by consideration of the evidence governed by the exclusionary rule. In other words, the judge must be the fact-finder in order to ensure that the value promoted by the rule will be achieved, either to serve the gods of evidence, or some substantive or constitutional law goal. In such a situation, just because the preliminary fact question also determines relevance, the judge must still be the fact-finder. Moreover, the judge must be the fact-finder even if the preliminary fact is also an ultimate fact on the merits of the case that the jury must ultimately resolve.

I believe that the foregoing formulation works largely to explain the operation of evidence law and the rules under the FRE completely and would work under the CEC, but for the CEC's deviation from logic in allocating the preliminary questions of the existence of certain facts with respect to the authority of agents and co-conspirators (a sub-species of agents). I will even go so far as to say that the drafters of the CEC got it wrong, at least insofar as the theory is concerned. I believe, as I point out in Part IV, *infra*, that they overlooked some important fundamentals. I side with the ghosts of Professor John Kaplan and Judge

Otto Kaus in concluding that the mavens of the CEC did, in fact, get it wrong.¹⁰ I say this after re-reading much of the literature on the basics of preliminary fact determinations and Professor Méndez's most recent recommendations to the California Law Revision Commission, in which he recommends no change in the area that I think makes the least sense: the determination of the preliminary facts necessary for the admission of agents' and co-conspirators' admissions.¹¹

***856** The critical difference between the recommendations to the California Law Revision Commission and the CEC and the position I advocate in this essay, reflected in the FRE, is that preliminary questions in the areas of authorization for agents and conspiracy for co-conspirators though presenting conditional relevancy questions, also present questions that determine the application, or not, of a rule of evidence necessary for the admission of evidence. The recommendations to the California Law Revision Commission and the CEC allow the jury to hear contested hearsay in deciding the existence of those preliminary facts that determine the application of the hearsay exception, which undermines the operation of the exclusionary force of the hearsay rule. The jury should not be allowed to have the chance to consider the contested hearsay in deciding the existence of these preliminary facts if there is any real danger that the jury would be unable to disregard the contested hearsay.

In Part I, I examine the treatment of preliminary facts under [FRE 104](#) and judicial precedent interpreting the rule. In Part II, I examine the theory from which the federal rule developed. In Part III, I focus on the theory underlying the allocation of functions for agents' and co-conspirators' admissions. In Part IV, I consider the CEC procedure affecting preliminary facts for agents' and co-conspirators' admissions, and the criticisms of the procedure. Finally, in Part V, I evaluate the critics' tests.

I. Preliminary Facts under the Federal Rules of Evidence

[Federal Rule of Evidence 104](#) sets forth a scheme, or system, for dealing with preliminary facts¹² that determine the admissibility of ***857** evidence.¹³ According to the language of [Rule 104\(a\)](#), those preliminary fact questions for the judge are ones determining the admissibility of evidence generally, and those concerning witness qualification and privilege.¹⁴ Other than the specification of witness qualification and privilege, the Rule gives no further clarification about what species of questions might fall within the broader category of “admissibility of evidence.”¹⁵ Subsection (b) says, however, that “[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact,” the question is one for the jury,¹⁶ but only if the proponent of the evidence submits or promises to submit evidence sufficient to support a finding of the existence of the fact.¹⁷

Some preliminary fact questions clearly fall under one or the other of the provisions, [Rule 104\(a\)](#) or [104\(b\)](#), either because of the language of the rules or the comments of the drafters in the advisory committee's notes. Preliminary questions relating to invocation or application of privilege are for the judge.¹⁸ Qualification to be a witness, particularly with respect to qualifying as an expert witness,¹⁹ also present questions of fact for the judge.²⁰

***858** The fact of a witness's personal knowledge,²¹ all manner of facts relating to authentication²² of documents, objects, voices, and handwriting, and the fact of the existence of a writing,²³ or status as an original or correct reflection of the contents of writings, recordings, or photographs,²⁴ are all for the jury under [Rule 104\(b\)](#), according to the language of the pertinent rule or the advisory committee's notes to the rules.²⁵ No other provisions of the rules or comments by the drafters suggest what other preliminary questions might be for the jury under [Rule 104\(b\)](#).

United States Supreme Court precedent provides guidance as to how some other preliminary fact questions should be treated under [Rule 104](#).²⁶ In *United States v. Bourjaily*,²⁷ the Court, without any discussion, observed that both parties agreed “that the existence of a conspiracy and petitioner's involvement in it are preliminary questions of fact that, under [Rule 104](#), must

be resolved by the [trial] court.”²⁸ In the case, the pressing issue related to whether, and to what extent, the trial judge could engage in bootstrapping to decide those preliminary fact questions.²⁹ The Court decided that, indeed, the trial judge could utilize the contested evidence itself in deciding the existence of the facts necessary to admit that contested evidence; that is, engage in the process known as bootstrapping.³⁰ As to the *859 question of whether the trial judge could engage in total bootstrapping--the finding of the preliminary facts with no independent evidence whatsoever, relying solely on the content of the disputed evidence, the Court concluded it “need not decide [that question] in this case”³¹ The Court went on to conclude that hearsay admissible under such bootstrapped preliminary determinations by the trial court was admissible under the prevailing “firmly rooted” analysis for Confrontation Clause purposes³² dictated by *Ohio v. Roberts*.³³

In *Huddelston v. United States*,³⁴ the Court addressed the admissibility of evidence of “similar acts” evidence under [FRE 404\(b\)](#).³⁵ Defendant argued that the question of whether or not the accused had committed the “other act” alleged to be admissible under the Rule had to be decided by the trial judge before the evidence could be admitted and considered by the jury.³⁶ The Court rejected this claim, because of the “structure of the rules,” a reading of the plain language of [Rule 404\(b\)](#) itself, and the legislative history of the rule.³⁷ The Court then concluded that this question of fact was among “[s]uch questions of relevance conditioned on a fact [that] are dealt with under” [FRE 104\(b\)](#).³⁸ Hence, the trial judge “simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact” to exist.³⁹

II. The Theory from which [Federal Rule of Evidence 104](#) Developed

The principles (“merits”) underlying the allocation of the preliminary *860 fact questions between judge and jury were identified authoritatively by Professor Maguire and Mr. Epstein and endorsed by Professor Morgan as five-fold: 1) simplicity; 2) predictability; 3) protection; 4) precision; and 5) prompt vindication.⁴⁰ According to this analysis, preliminary questions determining the admissibility of evidence are to be decided by the judge, rather than the jury, to promote one or more of these five principles.⁴¹ Maguire and Epstein noted that promotion of these goals seemed to work as long as the preliminary fact questions did not bear upon the merits of the ultimate case.⁴² When, however, the question of preliminary fact “merged imperceptibly into the weight of the evidence, if admitted,”⁴³ Maguire and Epstein noted that most of the merits underlying the orthodox rule allocating the function of fact-finding to the judge could be achieved by transferring the function to the jury: only predictability would be lacking.⁴⁴

When the preliminary fact question and the ultimate question for the jury to resolve on the merits are the same, there is a seeming dilemma if the judge were to resolve the question of fact in such a way that the case would come to an end. Hence, to promote the value of trial by jury, many courts, as well as Maguire and Epstein, exhibited strong reluctance to allow the orthodox rule to operate. So, in such cases, there is a substantial inclination to allow such questions to be decided ultimately by the jury, after the judge at least determines that there is sufficient evidence to submit the issue to the jury. Also, in the case of preliminary fact questions overlapped with ultimate questions, that could often be viewed the same as the issue presented on motion for directed verdict.

The same problem can also arise in cases involving the application of technical evidence rules. Maguire and Epstein, in their seminal essay, reviewed six alternatives for dealing with such situations and expressed no opinion or choice.⁴⁵ The most troublesome cases considered by them involved the determination of the application of rules of witness competency or privilege.⁴⁶ For example, in the case of *State v. Lee*,⁴⁷ a murder case, the defendant was alleged to be one “‘Mack Lee[,]’ who was *861 admittedly the murderer.”⁴⁸ The defendant called Mack Lee's wife and “asked her whether the prisoner was

her husband.”⁴⁹ “Obviously counsel expected a negative reply.”⁵⁰ At that point, the prosecution objected on grounds that spousal incompetence, the prevailing rule in Louisiana at the time, prevented the witness from testifying.⁵¹ The prosecution further demanded that the trial judge make the preliminary finding as to the existence of the marital relationship.⁵² The trial judge decided the fact, found that the relationship existed, and “rejected the witness.”⁵³ The defendant's argument that he was entitled to a jury decision on the “identification of the accused as the person who committed the crime . . .” was rejected by the courts.⁵⁴ Maguire and Epstein are critical of this result, noting that a finding of other “error necessitating a new trial scarcely softens the result. The evidential ruling was likely to deprive the defense of its very best witness on retrial.”⁵⁵

A contrasting case analyzed next by Maguire and Epstein is *Hitchins v. Eardley*,⁵⁶ a “well-known pedigree case” according to Maguire and Epstein.⁵⁷ In their view and approval, the trial judge himself resolved the preliminary fact question in this case where the evidence was offered within an exception to the hearsay rule, and disallowed the opposing party's attempt to introduce countervailing evidence on the issue.⁵⁸ Maguire and Epstein distinguish the two cases on the basis that when the rule of “disability or incompetency of a witness” is imposed, the issue does not just address witness credibility, but also, as in the case at hand, the rule seeks to preserve the marital relationship. In contrast the hearsay rule invoked in *Hitchens* “has for its sole object the protection of jurors from unveracious *862 evidence.”⁵⁹

Professor Morgan's seminal essay approved Maguire and Epstein's work, but presented some “different interpretation[s] of some of the decisions, and a slightly different approach to some of the problems.”⁶⁰ He stated the rule to be: “On theory, then, where the relevancy of A depends upon the existence of B, the existence of B should normally be for the jury; where the competency of A depends upon the existence of B, the existence of B should always be for the judge.”⁶¹ He then reviewed the authorities, finding them to be of “variegated inconsistency”⁶² and noted that within the judge's realm of competency determinations, “where it [the evidence] is such that a trier of fact might reasonably find either way, the cases show the orthodox rule in the process of dissolution”⁶³ Much of Morgan's essay takes apart the analyses of cases dealing with the grounds for witnesses' incompetency and privilege and, although, he advocates for the repeal of those rules of incompetency, he ultimately thought that some common law privileges might be preserved.⁶⁴ However, in the analysis leading to this conclusion and in his later writing I think Morgan got the nub of the distinction with clarity. In Morgan's *Basic Problems of Evidence*, he describes conditional relevance by giving two examples.⁶⁵ First, M is charged with killing X and the fact that X carried life insurance naming M beneficiary is “entirely irrelevant unless M knew of it.”⁶⁶ Second, P sues D for breach of contract and tenders evidence of an oral offer made to X and accepted by X on behalf of D.⁶⁷ The “offer and acceptance are irrelevant unless X's authority to act for D also exists.”⁶⁸ Moreover, “[i]n each of these situations fact A is irrelevant without [the existence of] fact B.”⁶⁹ Morgan points out that the preliminary facts in both of these hypotheticals present a question:

. . . of the kind customarily answered by a jury; no rule of policy *863 applicable to evidence requires the exclusion of this sort of evidence or forbids its consideration by the jury. . . . Consequently where the only objection to the admissibility is lack of relevance, it seems clear that the function of the judge should be to see to it only that sufficient evidence of each is introduced to justify a finding of its existence and the jury should determine the dispute as to each under proper instruction from the judge.⁷⁰

There is one further, pre-FRE, Supreme Court precedent that merits consideration, and it is discussed by Maguire and Epstein,⁷¹ Morgan,⁷² and then Maguire⁷³ alone: the case of *Gila Valley, Globe & Northern Ry. v. Hall*.⁷⁴ The reference to the case in the Maguire and Epstein essay treats it rather kindly, noting that the decision is at variance with the authors' conclusion about

one-sided cases, concluding in a footnote that “[t]he opinion does not make clear who should have decided the question of communication if there had been a real conflict of evidence.”⁷⁵ In this case:

[P]laintiff sued for damages on account of personal injuries sustained when a railroad velocipede ran off the track. Defendant claimed contributory negligence, and offered evidence that the day before the accident a conversation occurred during which a cracked wheel-flange on the velocipede was mentioned within possible range of plaintiff's hearing.⁷⁶ According to Maguire and Epstein's essay, the conversation occurred within twenty yards of the defendant.⁷⁷ “Evidence of the remark about the wheel was excluded on the ground that plaintiff was not proved to have heard it.”⁷⁸

The Supreme Court approved of the decision, affirming that the preliminary fact question was one for the judge, not the jury.⁷⁹ Morgan's description of this decision in his 1929 essay asserts that “[t]he only possible ground for excluding this evidence was its irrelevancy.”⁸⁰ Yet, Morgan's principal example of conditional relevancy cited in the advisory committee's note accompanying FRE 104(b) is a hypothetical suspiciously *864 similar to the Gila Valley case.⁸¹ Maguire, in his *Evidence, Common Sense and Common Law*, is far less tactful stating that “[t]he Supreme Court of the United States approved this ruling, saying that the finding of fact was to be made by the trial judge, and manifesting complete ignorance of the difference between problems of relevance and of technical incompetency with respect to such findings.”⁸²

Numerous other preliminary fact questions that arise in application of the rules of evidence present the same issue of division of the function of judge and jury. Closely aligned with the questions presented in the arena of co-conspirators' statements, are those preliminary to the admissibility of adoptive admissions. The hearsay exception at common law, and exemption (as non-hearsay) under the Federal Rules of Evidence requires that a person's manifestation of intent to “adopt, agree with[,] or approve of the contents of the statement of another, [as] a precondition to the admissibility of evidence offered under” that exception or exemption.⁸³ For example, to borrow a hypothetical from Professor Kaplan:
Prosecution of D for rape. Witness, W, wishes to testify that while he sat in a bar with D, the prosecutrix's father, F, entered, pointed at D and said: “You are the man who attacked my daughter,” but that D made no reply.⁸⁴

In order for this evidence to be relevant, D must have heard the accusation, and it must be the case that the circumstances were such that if the accusation were untrue, D would have denied it.⁸⁵ These facts, upon which relevance depends, can no doubt be decided by the jury, and Professor Kaplan concludes that these are questions for the jury.⁸⁶ So, the pre-FRE law similarly treated such questions as ones for the jury.⁸⁷ *865 Professor Kaplan also notes, however, “that the problem is somewhat more complex than this . . .” and proceeds to argue that allowing the jury to hear the father's accusation while deciding whether he admitted it, would be unrealistic.⁸⁸ He asserts that the jury “would, of course, ignore the judge's instructions that F's statement should not be considered for the truth of the fact it asserts, but only to show that he did or did not admit.”⁸⁹ The point is that the problem inherent in such preliminary fact question scenarios involves conditional relevancy plus, the plus being the necessary determination of whether the policy of an exclusionary rule of law or evidence can be furthered. The policy of the hearsay rule prohibits statements from being considered for their truth unless certain requirements are met: here, the foundation for an adoptive admission. To allow the jury to hear the statement in order to find the basis for whether the evidence is relevant defeats the operation of the exclusionary rule and the purpose behind it.⁹⁰

***866 III. Admissions by Agents and Co-conspirators under the Federal Rules of Evidence⁹¹**

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A subject most pertinent to this essay is the treatment of the preliminary questions presented by admissions: admissions by agents and co-conspirators. Maguire and Epstein allude to such questions as drawing the hearsay rule into issue and hence “the evidence [is] challenged on grounds of competency rather than, or at least, as well as, relevancy.”⁹² This statement is followed by a reference to a later point in the essay where the authors, while examining the permutations of deviations from the orthodox rule, reference cases dealing with the “admissibility of declarations by one or some of a group of alleged conspirators against the whole group . . . [and] hearsay assertions of an alleged agent” to prove agency.⁹³

Morgan, in his 1929 essay, picks up the thread of the reference to agent and conspirator statements as the starting point for a blistering criticism of the departure from the orthodox rule.⁹⁴ It is this criticism that I think forms the most viable argument for the allocation to the judge of preliminary questions related to the admissibility of agent and conspirator statements. The result of Morgan's criticism is his conclusion, thereafter expressed by him⁹⁵ and others,⁹⁶ that to preserve the exclusionary rule (the hearsay rule), the preliminary facts that must be found to exist for a statement by an alleged agent or conspirator to be admissible against an alleged principal or co-conspirator are for the judge not the jury to find.⁹⁷

Remember, the orthodox rule is that “where the competency of A depends upon the existence of B, the judge alone shall determine the *867 existence or non-existence of B.”⁹⁸ So, for our discussion, where the admissibility of a claimed agent's or co-conspirator's statement depends upon the existence of the agency relationship or conspiracy, the judge, as arbiter of rules of competency of which hearsay is surely one, is the sole determiner of those preliminary facts according to the orthodox rule. Morgan points out that “if the evidence as to B is such as to require a particular finding, no difficulty arises.”⁹⁹ However, “where it is such that a trier of fact might reasonably find either way,” the state of the law, particularly as explored by Maguire and Epstein, shows the orthodox rule to be “in [a] process of dissolution[] in at least four stages.”¹⁰⁰

Morgan then notes that the fourth stage of dissolution, the worst stage, is where “the trial judge is required to admit A unconditionally.”¹⁰¹ His condemnation of this result is most direct:

Such a rule means total abandonment of exclusionary rules wherever their applicability depends upon the decision of a preliminary question of fact. It means in cases in which the exclusion is based on dangers of false valuation that while a jury cannot be trusted to evaluate A where B does not exist, it can be trusted to do so where the existence of B is in dispute.¹⁰² According to Morgan, the sole application of this worst stage principle is “where the preliminary fact B, upon which the competency of A depends, coincides with an ultimate fact for the jury.”¹⁰³ He further asserts that within the class of such cases, the phenomenon “is exhibited chiefly in situations where A is the declaration of an alleged conspirator or agent offered against his alleged fellow conspirator or principal.”¹⁰⁴ He supposes *868 that such “serious departures from the orthodox rule” resulted from the desire to promote trial by jury and to avoid “judge-made” decisions.¹⁰⁵ However, Professor Morgan elegantly rejects such grounds for reaching a conclusion that denudes exclusionary rules of their force.¹⁰⁶

First, he points out that a litigant often only has access to incompetent evidence to support his case, incompetent under either a statute or the common law rule;¹⁰⁷ and, we may add today, incompetent under constitutional principle.¹⁰⁸ In the situation that a litigant's case cannot be made based on incompetent evidence that does not depend upon a preliminary fact determination, “no court allows itself to be influenced by this consideration.”¹⁰⁹ Motions to dismiss for failure to state a claim, on summary judgment, for directed verdict, or the criminal equivalent of judgment of acquittal, are regularly granted because of a failure of the proponent to promise or tender competent evidence. If then, the basis for finding evidence incompetent is the existence of an exclusionary rule of evidence, such as the hearsay rule, and that rule is valid, “there is no plausible or substantial reason for

discriminating between such cases [e.g., directed verdict] and those where a preliminary [fact] investigation is necessary.”¹¹⁰ To the argument that decision by the judge on preliminary questions for admissibility of evidence purposes usurps the function of the jury, Morgan concludes:

There never was a time when every question of fact arising in a lawsuit was to be decided by the jury; nor has there been a time since the jury has been required to base its findings upon evidence submitted in open court, *869 when it has been privileged to hear and consider all relevant evidence. There is nothing inherently objectionable in a judge-made decision.¹¹¹

There is an argument that when the preliminary and ultimate facts overlap, since the jury must ultimately find the ultimate fact, it does not matter that the jury gets to decide preliminarily. Morgan's response is that “[t]his overlooks the very gist of the question.”¹¹² He points out that “[t]o decide B [the preliminary fact] on evidence exclusive of A [the disputed evidence] is quite a different thing from deciding B with the helpful or harmful influence of A[] [and] [i]f A without B is improper provender for the jury, its prejudicial effect is not at all reduced by the circumstances that B is one of the issues on the merits.”¹¹³ Morgan's ultimate conclusion with respect to this subject is that “there is no argument for departure from the orthodox practice which does not strike at the validity of the exclusionary rules themselves.”¹¹⁴

Professor Kaplan addresses the preliminary questions for conspirators' admissions in his essay, but he does so by contrasting the treatment under the FRE with the treatment under the CEC.¹¹⁵ So, let us turn to the CEC treatment of preliminary facts in those instances.

IV. Admissions of Agents and Co-Conspirators under the California Evidence Code

Professor Méndez, in his essay relied upon by the California Law Revision Commission,¹¹⁶ characterizes the difference between California's treatment of the division of functions on preliminary questions as a use of a “sufficiency standard” in CEC section 403, versus a “higher standard” under CEC section 405.¹¹⁷ He asserts that “[s]cholars disagree” on when that difference in “standard” should be used and then asserts that the CEC “avoids the controversy by describing with particularity the kinds of preliminary fact issues governed” by the respective sections.¹¹⁸ In addition, *870 specific sections of the Code and the comments accompanying sections 403 and 405 specify and list the particular kinds of preliminary questions governed by each section respectively.¹¹⁹ Remember, CEC section 403 is the counterpart to FRE 104(b) and CEC section 405 is the counterpart to FRE 104(a). So, the result of the commitment of CEC section 403 preliminary fact questions to the sufficiency standard is to delegate the function of ultimate fact-finding on such questions to the jury and not the judge.¹²⁰

Whether a party has authorized or adopted an admission and whether a conspiracy exists for the admissibility of a co-conspirator's admission, are preliminary fact questions governed by CEC section 403.¹²¹ Moreover, CEC section 1222, stating the hearsay exception for authorized admissions, and CEC section 1223, stating the hearsay exception for co-conspirators' statements, both specify that such evidence is admissible upon or subject to “admission of evidence sufficient to sustain a finding” of the preliminary facts.¹²² Professor Méndez concludes that “[r]easonable people might differ on whether the foundational facts for this hearsay exception should be proved by a sufficiency or higher standard,”¹²³ citing Professor Kaplan's essay as “arguing that the foundational facts of the hearsay exception for co-conspirators' statements should be governed by section 405 since jurors are unlikely to engage in the required fact finding before considering the statement.”¹²⁴

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Professor Kaplan explored these issues in connection with a series of hypotheticals, one of which presented the basic co-conspirator's statement problem:

Prosecution of D for aiding and abetting a bank robbery. W testifies that he (W) was in on the plan and that, to bolster his (W's) courage, A, his coconspirator told him, "You know D is an excellent driver. Well, D told me he'll be waiting outside the bank with the motor going."¹²⁵ After citing CEC section 1223, and "temporarily put[ting] aside the problem of what to do when the crime charged is conspiracy so that the preliminary question and ultimate question are the same," Kaplan concludes, "[s]urely, in principle, section 1223(c), which makes these *871 preliminary fact questions . . . [jury questions], is in error."¹²⁶ He reasons that the "jury will likely give short shrift to" the preliminary fact questions; the jury is likely to "ignore our hearsay rule and decide whether to give the statement weight depending on whether they think A was knowledgeable and truthful, regardless of whether he was a coconspirator."¹²⁷ This was the very point made by Professor Morgan in condemning this procedure for placing upon the jury "impossible burdens of deciding issues of fact upon which admissibility of evidence depends" and leading ultimately to abandonment of the exclusionary rules.¹²⁸

At the very least, the California procedure, applied to this hypothetical, even in the most common type of case--where A is clearly a conspirator but defendant's status as a conspirator is disputed--opens the door for the jury to bootstrap,¹²⁹ a result that is denied even to the judge under current California law.¹³⁰ Noteworthy is the fact that the Commission concluded that the bootstrapping problem is not an issue under California law with respect to "the admissibility of co-conspirator hearsay [,] . . . because California law generally provides that the preliminary fact necessary for admission of admissions . . . are subject to sufficiency review under Section 403."¹³¹ Surely, the Commission should see that the result of allowing the conditional relevancy determination by the jury on the "sufficiency of evidence" standard results in virtual jury bootstrapping! Nonetheless, the Commission apparently does not. How can this be? And, what of the more problematical scenario where the defendant is charged with conspiracy as well as the substantive crime, in which case the jury will necessarily, under California procedure, hear the disputed evidence in deciding the preliminary *872 questions necessary for them to consider that very evidence. In other words, the issue presented in *Bourjaily* that led the United States Supreme Court to reaffirm the functions of judge and jury in this arena under FRE 104.¹³² Criticism of the Federal Rule's permitting of judicial bootstrapping under FRE 104(a) pales in comparison with this allowance of the jury to hear the disputed evidence while deciding whether it, the jury, can consider the evidence. It would be the rare reasonable juror who could be counted upon to disregard the disputed hearsay once having heard it. Even the most dedicated juror would have a hard time following such a limiting instruction, in my opinion.

Before answering the question about bootstrapping, let us turn back to Professor Kaplan and his further consideration of the California procedure in a slightly different context. He points out that in connection with the hearsay exception for authorized admissions, closely related to the co-conspirator's exception, the CEC "reaches the indefensible result of allowing the preliminary fact to be ignored completely."¹³³ CEC section 1222(b) makes the question of authorization one for the jury.¹³⁴ Kaplan notes that a rational jury will pay no attention to the "artificial preliminary fact requirement of authorization [in] . . . the usual case [where] the truck driver's statement as to his own negligence probably should be admissible against his employer even if he was not authorized."¹³⁵ Interestingly, the CEC allows the jury to hear such statements in a larger number of cases than the common-law and California authority rule would otherwise require, but that result is not because of the law's definition of the hearsay exception, and "the proper remedy is to change the exception."¹³⁶ Moreover, when the proponent of the agent (the truck driver in our example) has no evidence of authority to speak, "even the treatment of the question as . . . [one for the jury] will not help produce the 'correct' result of admitting the statement."¹³⁷ Professor Kaplan points out that the result of *873 the California procedure "allows the jury to hear what may be unauthorized statements, even" where most persons

willing to enforce the hearsay rule would deny those statements admissibility.¹³⁸ He proclaims that “[i]n this case, at least, two wrongs do not make a right.”¹³⁹

Let us turn back to the question of why the California Law Revision Commission does not see that the CEC procedure leads to jury bootstrapping when the Code does not permit judge bootstrapping. In its latest staff memorandum,¹⁴⁰ the Commission gives the reasons why it poses no recommendation to bring the CEC in line with the FRE on the preliminary questions in the areas of authorization for agents and conspiracy for co-conspirators.¹⁴¹ The memorandum first quotes Professor Méndez's assertion that “reasonable people might differ on whether the foundational facts for this hearsay exception should be proved by a sufficiency or higher standard.”¹⁴² As previously noted, this overlooks the fact that the effect of the shift of the preliminary facts to the jury is not merely a matter of choice of standards of proof; rather, it is a shift of fact-finding function.¹⁴³

Second, the Commission cites and relies upon a 1976 “study” by Professor Jack Friedenthal.¹⁴⁴ The body of the Commission's memorandum cites this study and says that Professor Friedenthal “describes the admissibility of an authorized admission as turning on a question of conditional relevance, i.e., if a statement is not authorized by a party or is not made in furtherance of a conspiracy of which the defendant is part, then it is inadmissible because irrelevant. [Additionally,] [q]uestions of conditional relevance are for the jury to determine under Section 403.”¹⁴⁵ The critical point of departure between the Commission's observations here and the analysis of Professors Maguire and Epstein, Morgan, and Kaplan,¹⁴⁶ *874 and Judge Kaus, as well as this author, is that the preliminary questions in such cases, though presenting conditional relevancy questions, also present questions that determine the application, or not, of a rule of evidence. These questions are not relevancy¹⁴⁷ questions only. Therefore, allowing the jury to hear the contested hearsay in deciding the existence of those preliminary facts that determine the application of the hearsay exception abrogates the operation of the exclusionary force of the hearsay rule if the jury considers the contested hearsay in deciding the existence of the preliminary facts. Furthermore, there is nothing to ensure that the jury will not do so, nor is it reasonable to think that the sufficiency test for the judge and a limiting instruction to the jury will resolve the problem. Even though I believe in the jury system and trust jurors to “do the right thing,” in many settings it is unrealistic to expect the jury to do the impossible: to disregard very potent evidence that also may violate an exclusionary rule. After all, exclusionary rules of evidence are in place to keep relevant evidence from the jury because of some policy of the law, substantive or constitutional.

The Commission concludes that the procedure “has been the law in California for over 37 years. Neither Professor Méndez nor Professor Friedenthal are recommending substantive change to that approach.”¹⁴⁸ Moreover, “[w]hile the staff sees merit in the criticism offered by Professor Kaplan, it isn't clear that the problem he describes is actually creating practical difficulties significant enough to warrant reversal of long-standing law.”¹⁴⁹ I suppose that continuing rules and procedures that are inconsistent with history, doctrine, and theory on the ground that no significant practical difficulties have arisen is a practical resolution for the Commission.

V. Conclusion: AN EVALUATION of the Critics' Tests--Preliminary Fact of Identity of the Declarant

Who, judge or jury, decides the identity of the declarant to determine whether a proffered statement is admissible as an admission by a party opponent, poses one of the most challenging issues under the principles discussed in this essay. The answer to this question is not so clear under the FRE and, under the CEC it is treated too simply. Let us consider a fairly *875 recent case and two hypotheticals posed by Professor Kaplan¹⁵⁰ in addressing this problem.

The case is *United States v. Vigneau*,¹⁵¹ involving the conviction of the defendant of various charges stemming from his participation in a drug distribution scheme.¹⁵² He allegedly engaged in money laundering as part of the charged drug transactions and scheme.¹⁵³ The government introduced, against the defendant, twenty one Western Union “To Send Money” forms, filled out with defendant's name, address, and telephone number, each form supporting a money order which the sender sent, according to the government, to launder money derived from the drug scheme.¹⁵⁴ The Court of Appeals reversed the conviction, finding that the admission into evidence of the Western Union “To Send Money” forms was error.¹⁵⁵ The government argued that the forms were admissible within the business records exception,¹⁵⁶ but the Court of Appeals rejected this argument because there was no foundational evidence that the source of the critical information contained in the business form was a person with a business duty to report.¹⁵⁷ The forms were filled out by the Western Union employees, from information transmitted orally by the customer.¹⁵⁸ Under the familiar doctrine of *Johnson v. Lutz*,¹⁵⁹ the forms thus failed as business records.¹⁶⁰ In order for the evidence to be admissible, the declarant, here the customer securing the money order, would have to be shown to be the defendant.¹⁶¹ Hence, the critical preliminary fact question upon which admissibility depended was the identity of the declarant.¹⁶² The only evidence of the identity of the declarant was the content of the forms *876 themselves: the government presented no independent evidence that the twenty one forms were obtained by Vigneau.¹⁶³

The Vigneau court noted that if there were independent evidence that the defendant wrote the forms (or supplied the information inserted by the Western Union agent), the statements would be admissible as party-opponent admissions.¹⁶⁴ The court also noted that whether the defendant “signed the form may be governed by Fed.R.Evid. [sic] 104(b) as a matter of conditional relevance.”¹⁶⁵ Also, if the issue was whether the information was supplied by Vigneau, had the government presented circumstantial evidence to that effect, sufficient for a jury to so find, that too might have been admissible under FRE 104(b).¹⁶⁶

Though it is debatable, I think the Vigneau court was wrong that the preliminary fact question of the identity of the declarant in the case before it was one that would have been for the jury, if there had been any evidence sufficient to support a jury finding as to defendant being the supplier of the information. If the jury were permitted to hear the independent evidence and the contested evidence relating to the forms, the jury could not be trusted to consider the independent evidence without being affected by the contents of the forms as well. Thus, under the rationale posited in this essay, the preliminary fact question of the identity of the declarant, not being one of relevance alone, would be for the judge and not the jury.

Consider the two hypotheticals on this subject from Professor John Kaplan's essay.¹⁶⁷ Here is the first:
P v. D, an auto accident case. W, a police officer, testifies for the plaintiff that after an intersection collision, he approached the defendant's car and asked, “What happened?” A voice answered, “I couldn't see because the windshield was all fogged up.” It is disputed, however, whether this statement was made by the defendant driver, D, or by D's passenger, F.¹⁶⁸

If the statement was made by D, it would be admissible as an admission, just as the “To Send Money” forms in the Vigneau case. On the other hand, if the statement was made by the passenger, it would be a hearsay statement by the passenger, inadmissible on its face, in the absence of any applicable exception to the hearsay rule, just as would be the forms in Vigneau if submitted by someone other than the defendant. As Kaplan points out, the CEC treats the preliminary question as one for the jury, since *877 CEC section 403(a)(4) specifically covers the case.¹⁶⁹ However, he asserts that only “[a] little thought reveals . . . that the preliminary question . . . should be [one for the judge.]”¹⁷⁰ This is because the jury might find the statement critical to the case, whoever said it and “would not have much interest in what, for our evidence law, is the crucial question: whether the statement was made by the driver or by the passenger.”¹⁷¹ Similarly, in Vigneau, once the jury got to the see the content

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of the “To Send Money Forms,” containing as they did, the defendant’s name, address, and telephone number, the jury would “not have much interest in what, for our . . . [purposes], is the crucial question: whether the” person supplying the information to the Western Union agent was the defendant or someone else.¹⁷² There being no independent evidence of Vigneau being the person before the agent, it would not be likely that the jury would overlook the circumstantial effect of the contents of the forms pointing to him as the culprit.

In answer to the question of how the CEC could call this a jury question, Professor Kaplan asserts that the “drafters simply were thinking of another question,”¹⁷³ namely one presented in a slightly different hypothetical: Same as [the last] hypothetical . . . except that, in answer to the policeman’s question, the voice from the car said, “I don’t know, I fell asleep just before the accident.” Again, it is disputed whether D or F said this.¹⁷⁴

In this case, the evidence is relevant to D’s negligence only if D made the statement, and not if his passenger did. In this scenario, the statement, if made by F, would not only be hearsay, but would be irrelevant as well, since “there is nothing wrong with driving accompanied by a dozing passenger.”¹⁷⁵ Hence, a jury should decide whether the statement was made by D or F, but a court applying the CEC to the first of these two hypotheticals “could reach the correct allocation of the preliminary fact question only by placing the purpose of the rule above its literal wording.”¹⁷⁶

***878** So, I end where I began. My simple proposition, which I think has rung true to the end of this journey, is:

If the preliminary fact question is one, the answer to which determines the relevance of the evidence and nothing more, then the jury must have the final word on deciding the existence of the fact.¹⁷⁷

Preliminary questions presented by agents and co-conspirator admissions, though presenting conditional relevancy questions, also present questions that determine the application of a rule of evidence necessary for the admission of evidence. As discussed in this essay, in my view the recommendations to the California Law Revision Commission and the CEC improperly allow the jury to hear contested hearsay in deciding the existence of those preliminary facts that determine the application of the hearsay exception. California should adopt the position of the FRE that is consistent with history, doctrine, and theory.

Footnotes

¹ Norman M. Garland & Jay A. Schmitz, Of [Judges and Juries: A Proposed Revision of Federal Rule of Evidence 104](#), 23 U.C. Davis L. Rev. 77 (1989). I have not wavered much from the views expressed in that article, as will be apparent to the reader of this essay. Here, though, I have refocused on the earlier works relating to the subject, see references cited in notes 2 & 5, *infra*, and sought to explore the recent reconsideration of the issues by the California Law Revision Commission, see the discussion in Part IV, *infra*.

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² The strangeness of the preliminary fact dichotomy is well stated by the late Professor John Kaplan’s thoughtful essay, in which he utilizes the nonsense terms, *mabru* and *zorg* to distinguish between those questions of fact for the judge, *Mabrus*, and those questions of fact for the jury, *Zorgs*. John Kaplan, Of *Mabrus* and *Zorgs*--An Essay in Honor of David Louisell, 66 Cal. L. Rev. 987 & nn.1-2 (1978).

- 3 [Fed. R. Evid. 104](#). Many references in the text to the Federal Rules of Evidence appear as FRE followed by the rule number.
- 4 [Cal. Evid. Code §§ 403, 405 \(West 1995\)](#). Many references in the text to the California Evidence Code appear as CEC followed by the section number.
- 5 Edmund M. Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, *Harv. L. Rev.*, Dec. 1929, at 165, 169 (1929). Professor Morgan's essay was a follow-up to the essay published two years earlier by Professor John M. Maguire and Charles S.S. Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, *Harv. L. Rev.*, Jan. 1927, at 392 (1927). *Id.* at 165. Maguire and Epstein had focused on what they called the “orthodox rule” that required the trial judge to decide every question of fact necessary to determine the admissibility of evidence. John M. Maguire & Charles S.S. Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, *Harv. L. Rev.*, Jan. 1927, at 392, 392. Their seminal work noted the inconsistency of the cases in following the orthodoxy and presented an analytical framework for understanding the rule and its deviations. *Id.* Morgan's essay has been much relied upon over the decades and was the noted basis for the drafters of both the CEC and the FRE.
- 6 Morgan, *supra* note 5.
- 7 It is the use of the term “merely” that is the key to the simple distinction I am drawing between judge and jury questions. “Merely” in this context means that relevance and relevance alone is the basis for the need to decide the question of fact. See Maguire & Epstein, *supra* note 5, at 404; Kaplan, *supra* note 2, at 999; John M. Maguire, *Evidence Common Sense and Common Law* 224 (1947); [McCormick's Handbook of the Law of Evidence § 53, at 125 \(Edward W. Cleary ed., 2d ed. 1972\)](#) (1954).
- 8 Morgan approached the dichotomy by the analysis of the relevance question as one of “conditional” relevancy and much has been written (and debated) about whether the relevance issue is truly one of conditional relevancy or mere relevancy. The FRE, in the language of [Rule 104](#) itself deals with the notion of conditional relevancy. The full force of that debate is beyond the scope of this essay, but let it be said that I do not care if one considers the relevance question one of conditional relevancy or relevancy generally. My point is that the questions of fact that are for the jury under 104(b), and that should be for the jury under [CEC § 403](#), arise in situations where the issue presented is one upon which relevance depends and nothing more. The debate about conditional relevancy, should the reader be interested, should be traced through Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 *Ga. L. Rev.* 435 (1980), Dale A. Nance, *Conditional Relevance Reinterpreted*, *B.U. L. Rev.*, May 1990, at 447, Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 *Loy. L.A. L. Rev.* 871 (1992), Richard D. Friedman, *Conditional Probative Value: Neoclassicism Without Myth*, 93 *Mich. L. Rev.* 439 (1994); Peter Tillers, *Exaggerated and Misleading Reports of the Death of Conditional Relevance*, 93 *Mich. L. Rev.* 478 (1994); and Craig R. Callen, *Rationality and Relevancy: Conditional Relevancy and Constrained Resources*, 2003 *Mich. St. L. Rev.* 1243 (2003). And, one of my favorites appears in Professor George Fisher's Evidence casebook, George Fisher, *Evidence* 32-38 (2002) in which he asks “Is there a there there?” in examining this literature on conditional relevancy. George Fisher, *Evidence* 32-38 (2002).
- 9 Morgan, *supra* note 5.
- 10 Otto M. Kaus, *All Power to the Jury--California's Democratic Evidence Code*, 4 *Loy. L.A. L. Rev.* 233, 235 (1971); Kaplan, *supra* note 2, at 997-1001. See also Nance, *supra* note 8, at 464-66.
- 11 Professor Méndez's recommendations are included in Miguel A. Méndez, *California Evidence Code--Federal Rules of Evidence III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 *U.S.F. L. Rev.* 1003 (2003), attached to California Law Revision Commission, Staff Memorandum 2004-19: *Conforming Evidence Code to Federal Rules: Role of Judge and Jury* (May 28, 2004).
- 12 [FRE 104](#) is headed “Preliminary Questions” and subdivision (a) is headed “Questions of admissibility generally.” [Fed. R. Evid. 104](#). The first clause of [Rule 104\(a\)](#) says, as does the title of the Rule, “preliminary questions concerning...” *Id.* From this, it might appear that all preliminary issues arising concerning the admissibility of evidence are governed by [Rule 104](#). A closer examination, however, suggests that [Rule 104](#) addresses consideration only of determination of facts preliminary to the admission of evidence. Hence, for example, the question of the relevance of evidence presented by the standards of rules 401, 402, and 403, are to be decided by the judge consistent with those rules, and having no reference to the provisions of [Rule 104](#). See Allen, *supra* note 8, at 881-82. See

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also Edward Imwinkelried, Preliminary Factfinding Under [Rule 104](#), CALI Lesson, at question 22 and answer; <http://www2.cali.org/index.php?fuseaction=lessons.lessondetail&lid=536> (last visited Mar. 14, 2007). It is particularly difficult to get this point across to students; Professor Imwinkelried's CALI lesson does a noticeably fine job of doing so.

13 [Fed. R. Evid. 104](#).

14 Such preliminary fact questions “shall be determined by the court,” albeit “subject to the provisions of subdivision (b).” *Id.* This “subject to” language, I have come to believe, modifies the reference to “the court,” thereby making clear that the judge continues to function even with respect to preliminary fact questions committed to the jury under subsection (b).

15 *Id.*

16 The word “jury” does not appear in the Rule. *Id.* Students have sometimes had trouble understanding the division of functions of judge and jury contemplated by [Rule 104](#) because of this. Even a quick reading of the advisory committee's notes accompanying the Rule, especially the note to 104(b) should alleviate this confusion. The note is clear, except for a seeming error when the committee note concludes: “If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them.” [Fed. R. Evid. 104\(b\)](#) advisory committee's note (emphasis added). The word “not” should not be there. See Fisher, *supra* note 8.

17 [Fed. R. Evid. 104\(b\)](#).

18 [Fed. R. Evid. 104\(a\)](#).

19 The Supreme Court's decisions in this area, in fact, refer to the trial judge as the gatekeeper in determining admissibility of evidence of expert opinion. See, e.g., [Kumho Tire Co., Ltd. v. Carmichael](#), 526 U.S. 137, 137 (1999).

20 [Fed. R. Evid. 104\(a\)](#). But what else might come within the “qualification” to be a witness language of [Rule 104\(a\)](#)? Competency of witnesses under the FRE is no longer an issue for the most part, except for judges, per Rule 605, and jurors, per Rule 606. Personal knowledge is not a qualification question for the judge. See [Fed. R. Evid. 602](#) advisory committee's note. All other matters relating to witness capacity are not, under the FRE, matters of competency for the judge. The requirement of oath or affirmation by a witness seems to call for an administrative function, at most, by the court. See [Fed. R. Evid. 603](#). Compare [Cal. Evid. Code §§ 700, 702 \(West 1995\)](#) (defining competency as encompassing the ability to be understood and understanding the obligation to tell the truth, both matters of capacity, not competency under the FRE).

21 [Fed. R. Evid. 602](#) advisory committee's note (“It will be observed that the rule is in fact a specialized application of the provisions of [Rule 104\(b\)](#) on conditional relevancy.”).

22 [Fed. R. Evid. 901\(a\)](#) advisory committee's note (“The 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\(b\)](#).”).

23 [Fed. R. Evid. 901\(b\)](#).

24 *Id.* 1008(a)-(c).

25 [Fed. R. Evid. 602](#) advisory committee's note; [Fed. R. Evid. 901\(a\)](#) advisory committee's note; [Fed. R. Evid. 901\(b\)](#); [Fed. R. Evid. 1008](#).

26 [Bourjaily v. United States](#), 483 U.S. 171, 175 (1987); [Huddleston v. United States](#), 485 U.S. 681, 682 (1988).

27 [Bourjaily](#), 483 U.S. at 171.

28 *Id.* at 175.

29 *Id.* at 173, 177.

30 *Id.* at 181. The Court attributes the first reference by the Court to the term “bootstrapping” to [Glasser v. United States](#), 315 U.S. 60, 74-75 (1942): if a co-conspirator's statements could be admissible against an accused without “proof aliunde” that he is connected

with the conspiracy, “hearsay would lift itself by its own bootstraps to the level of competent evidence.” *Id.* at 176-77 (quoting *Glasser v. United States*, 315 U.S. 60, 74-75 superseded by statute, *Fed. R. Evid.* 104(a) as recognized in *Bourjaily*, 483 U.S. at 181). The *Glasser* Court cited no source for the bootstraps reference. *Glasser*, 315 U.S. at 60-93. There is some reference in earlier cases to the term in connection with cases involving failed credit. See, e.g., *Townsend v. United States*, 106 F.2d 273, 275 (3d Cir. 1939). In fact, however, there is a “boot straps” reference in Maguire and Epstein’s essay, at the very end, in the last footnote referring to Wigmore’s advocacy of the principle that in making a factual determination upon which admissibility of evidence depends, the trial judge the “ordinary rules of evidence do not apply.” Maguire & Epstein, *supra* note 5, at 429 & n.104. “If the rule quoted from Wigmore is correct, it goes a long way toward explaining many cases in which evidence seems to lift itself by its own boot straps.” *Id.* at 430 n.105.

31 *Bourjaily*, 483 U.S. at 181. *Fed. R. Evid.* 801(d)(2) was amended in 1997 to prevent total bootstrapping on the preliminary questions of the authority for agents’ statements and conspiracy for co-conspirators’ statements, the amendment having been designed in specific response to the Court’s reservation of decision on the issue. *Fed. R. Evid.* 801(d)(2) advisory committee’s note.

32 *Bourjaily*, 483 U.S. at 182-83.

33 *Ohio v. Roberts* 448 U.S. 56 (1980) abrogated by *Crawford v. Washington*, 541 U.S. 36 (2004).

34 *Huddleston v. United States*, 485 U.S. 681(1988).

35 *Id.* at 682.

36 *Id.* at 686-87.

37 *Id.* at 687-89.

38 *Id.* at 689.

39 *Id.* at 690.

40 Maguire & Epstein, *supra* note 5, at 393-95, 412; Morgan, *supra* note 5, at 168-69 nn.7-9.

41 Maguire & Epstein, *supra* note 5, at 392-95, 412.

42 *Id.* at 398.

43 *Id.* at 398 & n.21 (quoting *Di Carlo v. United States*, 6 F.2d 364, 367 (2d Cir. 1925) (Hand, J.)).

44 *Id.* at 398 & n.22.

45 *Id.* at 408, 413-15, 420, 422-23.

46 Maguire & Epstein, *supra* note 5, at 408-13.

47 *State v. Lee*, 54 So. 356 (La. 1911).

48 Maguire & Epstein, *supra* note 5, at 408.

49 Maguire & Epstein, *supra* note 5.

50 *Id.*

51 *Id.*

52 *Id.* at 408-09.

53 *Id.* at 409.

- 54 Id. at 409.
- 55 Id. at 409-10.
- 56 *Hitchins v. Eardley*, [1869-72] 2 L.R.P. & D 248 (P. 1871). Maguire & Epstein discussed *Hitchins* and characterized it in “contrast” to *Lee*. Maguire & Epstein, *supra* note 5, at 410-13. Professor Morgan discusses this case extensively, reaching a different conclusion from Maguire and Epstein. Morgan, *supra* note 5, at 183 n.35. Though it is difficult to describe his conclusion with precision, he apparently thought, contrary to Maguire and Epstein, that the trial court in *Hitchens* made only a provisional decision, leaving it to the jury to disregard the evidence if it did not find the fact to exist. Morgan, *supra* note 5, at 184 n.35.
- 57 Maguire & Epstein, *supra* note 5, at 410.
- 58 Id. at 410-11 & n.65 (noting that the preliminary question was whether the declarant of a contested statement was a member of the family of the testatrix, and the statements of the declarant apparently asserted he was a member of the family).
- 59 Id. at 411.
- 60 Morgan, *supra* note 5, at 165 n.*.
- 61 Id. at 169.
- 62 Id. at 170 (quoting John H. Wigmore, 3 *Wigmore, Evidence* (2d ed. 1923) § 1644(2)).
- 63 Id. at 175.
- 64 Id. at 190-91.
- 65 Edmund M. Morgan, *Basic Problems of Evidence* 45-46 (Inst. CLE 1961).
- 66 Id. at 46.
- 67 Id.
- 68 Id.
- 69 Id. The examples appearing in the advisory committee's note accompanying [Fed. R. Evid. 104\(b\)](#) are essentially the same to those appearing in the 1962 edition of Morgan's *Basic Problems of Evidence*. Compare [Fed. R. Evid. 104\(b\)](#) advisory committee's note, with Morgan, *supra* note 65.
- 70 Morgan, *supra* note 65, at 46.
- 71 Maguire & Epstein, *supra* note 5, at 402 n.34.
- 72 Morgan, *supra* note 5, at 172-75.
- 73 Maguire, *supra* note 7, at 223-24.
- 74 [Gila Valley v. Hall](#), 232 U.S. 94 (1914).
- 75 Maguire & Epstein, *supra* note 5, at 402 n.34.
- 76 Maguire, *supra* note 7, at 223.
- 77 Id.
- 78 Id.

- 79 Id.
- 80 Morgan, *supra* note 5, at 173.
- 81 [Fed. R. Evid. 104\(b\)](#) advisory committee's note.
- 82 Maguire, *supra* note 7, at 223. See Nance, *supra* note 8, at 466-72 (giving a more recent analysis of the Gila Valley case). Professor Nance takes an extensive look at the Gila Valley case and proposes a different view than that expressed by others quoted herein. Nance, *supra* note 8, at 467-69, 471. See also Callen, *supra* note 8, at 1249-50.
- 83 [State v. Carlson](#), 808 P.2d 1002, 1008 (Or. 1991).
- 84 Kaplan, *supra* note 2, at 1002.
- 85 Id. (“Our black letter law is that when a party is accused of something in circumstances where, had he been innocent of the accusation, he would have denied it, his failure to make any denial is admissible as an admission.”).
- 86 Id.
- 87 See, e.g., Manual of Model Criminal Jury instructions for the District Courts of the Eighth Circuit § 4.14 (2006 ed.). This manual cites a number of other jury instruction manuals and cases noting, “Whether all the elements necessary to give such silence capacity to be admitted as an implied or adoptive statement are preliminary questions for the court,” citing among other sources, [United States v. Carter](#), 760 F.2d 1568, 1580 n.5 (11th Cir. 1985). Id. (emphasis added). The manual contains the following statement in note 1: “In the previous edition, this Committee joined in the comments to Ninth Cir. Crim. Jury Instr. 4.2 (1997) and Federal Judicial Center, Pattern [Criminal Jury Instructions § 45](#) (1988) recommending that no instruction on this topic be given. However, without such an instruction, the jury is given no guidance on the important findings it must make before it can consider silence to be an admission. Accordingly, if requested by defendant, the jury may be instructed on the elements it must find before it can find evidence of the defendant's silence to be an admission.” Id. at n.1. That the law seems murky on this point is not surprising. The Oregon Supreme Court, in [State v. Carlson](#), adopted the views advocated by this author in [Garland & Schmitz](#), *supra* note 1 in concluding that the judge determine the preliminary facts in deciding admissibility of an alleged adoptive admission under the state version of [Fed. R. Evid. 801\(d\)\(2\)\(B\)](#). [Carlson](#), 808 P.2d at 1008. The Carlson view was followed by the Supreme Court of Hawaii in [State v. Gano](#), 988 P.2d 1153, 1165 (Haw. 1999), and is cited in some secondary sources, but there is no plethora of decisions, state or federal endorsing the proposition.
- 88 Kaplan, *supra* note 2, at 1002-03.
- 89 Id.
- 90 See *supra* text accompanying note 36. Professor Kaplan presents a follow-up hypothetical, the same as the last in the text, “except F asks: ‘Are you the man who attacked my daughter?’” See Kaplan, *supra* note 2, at 1003. Kaplan says that whether the preliminary facts in this scenario are for the judge or jury “is a close case” because the question is not itself a statement, and hence “the jury might not be tempted to rely on the credibility of the questioner.” Id. But, there is an implied assertion of the guilt of F, he points out. Id. [Under the assertion based definition of hearsay, one might readily conclude that questions are not hearsay, so Professor Kaplan's point is a good one; but so is his point that the implication is still troublesome under the hearsay rule.] With obvious tongue-in-check, Kaplan concludes: “In any event, the question is a difficult one and I am prepared to overlook it here if the reader is as well.” Id. In this writer's view, the answer to this hypothetical is the same as the previous: the preliminary fact questions should be resolved by the court, not the jury.
- 91 One might also include here the identity of the declarant, but I think that presents a separate issue and I treat it, *infra*, in Part V.
- 92 Maguire & Epstein, *supra* note 5, at 407 (emphasis added).
- 93 Id. at 418 n.78.

- 94 Morgan, *supra* note 5, at 183-89.
- 95 Morgan, *supra* note 65, at 282.
The admissibility of a vicarious admission depends upon the relationship of the declarant to the party against whom the declaration is offered in evidence. Speaking generally where the relationship is one of agency, the courts usually hold that the question of the declarant's authority to speak for the party is a preliminary question for the judge. In the case of alleged co-conspirators, if the declaration of one is offered against the others, its admissibility depends upon a preliminary finding of conspiracy by the trial judge. But since in most instances this preliminary question coincides with an ultimate question for the jury, the decisions frequently admit the declarations after a showing which would justify the jury in finding a conspiracy.
Id. These observations are supported by a footnote referencing Maguire and Epstein's 1927 essay mentioned *supra* at note 5. Id. at 282 n.91.
- 96 See Kaus, *supra* note 10; Kaplan, *supra* note 2.
- 97 Morgan, *supra* note 65, at 282.
- 98 Morgan, *supra* note 5, at 175.
- 99 Id.
- 100 Morgan, *supra* note 5, at 175; see also Maguire & Epstein, *supra* note 5.
- 101 Morgan, *supra* note 5, at 177.
- 102 Id.
- 103 Morgan, *supra* note 5, at 182.
- 104 Id. at 183. Professor Morgan again references the Maguire and Epstein essay and cases collected therein as the basis for his observations. Id. at 183 n.34. Following the footnote reference to those cases, Morgan offering a curious possible explanation for courts' admitting evidence (A) "unconditionally," states:
These decisions may be explained by the court's [sic] failure to distinguish between the declarations offered for their assertive value and the non-verbal acts and declarations offered as constitutive conduct for which the conspirator or principal is alleged to be responsible. In the latter situations, the question is one of relevancy only, and both A and B properly go to the jury where there is a dispute in the testimony. The opinions frequently intermingle "acts and declarations" and rely upon Greenleaf's confused and confusing characterization of the alleged representative's conduct as "original evidence."
Id. at 183. The quote is supported by an extensive footnote that mainly discusses the Hitchens decision, but does not further reference Greenleaf. Id. at 183 n.35. The gist of the quote makes sense in the context of agents' and conspirators' statements. If such statements are offered to prove the very act in question, e.g., the offer of contract or the robber's threat, then the statements are verbal "acts," are not hearsay, and the only preliminary fact question is whether they were uttered by the person claimed to be the agent or co-conspirator. This also assumes the existence of other evidence of the other preliminary facts relating to the agency or conspiracy.
- 105 Id. at 184-85. I grossly simplify Morgan's rationalization but the point is essentially as stated.
- 106 Id. at 185-86.
- 107 Morgan, *supra* note 5, at 186.
- 108 In Part III of Morgan's 1929 essay, he discusses the first stage of dissolution from the orthodox rule by examining the Massachusetts procedure for dealing with criminal case confessions, which the Supreme Court approved in *Jackson v. Denno*. Morgan, *supra* note 5, at 177; *Jackson v. Denno*, 378 U.S. 368, 380 n.8 (1964). Jackson, also condemned the New York procedure allowing the judge to pass the voluntariness question to the jury without first deciding the question himself, where reasonable minds might differ. 378 U.S. at 377. The difference in the Massachusetts procedure is that the trial judge must first make his own determination that the confession

is voluntary before passing the same question to the jury for reconsideration. *Id.* at 380 n.8. *Jackson v. Denno* raised the issue of voluntariness of a confession to constitutional dimension. *Id.* at 369-70.

109 *Morgan*, *supra* note 5, at 186.

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.* at 187. To a further argument, that the jury might disagree with the judge on the preliminary fact (overlapping with the ultimate fact), if they were able to decide it, *Morgan* responds: “Well, what of it?” *Id.* at 187. “There is... no requirement at all that judge and jury shall agree on ultimate facts” as long as both adhere to their jobs in accordance with the proper allocation of functions. *Id.* at 188.

114 *Id.* at 189.

115 *Kaplan*, *supra* note 2, at 997-99, 1007.

116 *Méndez*, *supra* note 11.

117 *Id.* at 1010.

118 *Méndez*, *supra* note 11.

119 *Id.*; [Cal. Evid. Code §§ 403](#) cmt. a, 405 cmt. (West 1995).

120 See [Cal. Evid. Code § 403](#) cmt. a (West 1995). Of course, the judge still must determine that there is presented evidence sufficient to support a finding of the preliminary facts by the jury. *Id.*

121 *Méndez*, *supra* note 11, at 1013. See also, [Cal. Evid. Code § 403](#) cmt. a (West 1995).

122 [Cal. Evid. Code §§ 1222\(b\)](#), [1223\(c\)](#) (West 1995).

123 *Méndez*, *supra* note 11, at 1019.

124 *Id.* at n.89.

125 *Kaplan*, *supra* note 2, at 997.

126 *Id.* at 997.

127 *Id.* Professor *Kaplan* points out that “where the declarant, A, was clearly a conspirator, but the disputed preliminary fact question is whether the defendant, D, was also a member of the... conspiracy, the error in the California statute is not so serious. If D’s guilt of bank robbery were based on his membership in the conspiracy, and the jury did not believe him to have been a conspirator, it would acquit him.... [Then], it would be hard to get upset about whether or not the jury improperly considered A’s hearsay statement as to D’s guilt.” *Id.* at 997-98.

128 *Morgan*, *supra* note 5, at 175, 177.

129 Professor *Kaplan* points out, following the quoted observation in note 127, *supra*, that “the other possibility that many find upsetting... [is that] the jurors would believe D to be guilty in part because they considered A’s hearsay statement on this [D’s membership in the conspiracy] issue.” *Kaplan*, *supra* note 2, at 998. If this is not actual bootstrapping, it is, nonetheless, virtual bootstrapping.

130 *Méndez*, *supra* note 11, 1021 (“The rules of evidence apply to hearings on the admissibility of evidence under [sections 403](#) and [405](#).”). The California Law Revision Commission staff has tentatively recommended the Code be revised to conform to federal law on this

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issue. California Law Revision Commission, Staff Memorandum 2004-19: Conforming Evidence Code to Federal Rules: Role of Judge and Jury 8 (May 28, 2004).

- 131 California Law Revision Commission, *supra* note 130 at 7.
- 132 See *supra* notes 27-32 and accompanying text.
- 133 Kaplan, *supra* note 2, at 998.
- 134 Cal. Evid. Code § 1222(b) (West 1995); see also Cal. Evid. Code § 403 cmt. a (West 1995).
- 135 Kaplan, *supra* note 2, at 999 (footnote omitted).
- 136 *Id.* (footnote omitted). The FRE counterpart to CEC § 1222 is Fed. R. Evid. 801(d)(2)(C) & (D). See Cal. Evid. Code. § 1222 (West 1995); Fed. R. Evid. 801(d)(2)(C)-(D). Under FRE 801(d)(2)(D), the authority need be only to act, not speak. Fed. R. Evid. 801(d)(2)(D). Hence, though the preliminary fact question regarding the authority still is for the judge under FRE 104(a), the narrower common-law and CEC restriction on agents' admissions being admissible on specific authority to speak will not likely keep the evidence from the jury under the CEC procedure, as pointed out in the text, above. Nonetheless, it is puzzling why the CEC reaches this result in such a roundabout way.
- 137 Kaplan, *supra* note 2, at 999.
- 138 *Id.*
- 139 *Id.*
- 140 California Law Revision Commission, Staff Memorandum 2004-55: Conforming Evidence Code to Federal Rules: Role of Judge and Jury (November 8, 2004).
- 141 *Id.* at 11.
- 142 *Id.* at 10.
- 143 See *supra* text accompanying notes 116-124.
- 144 California Law Revision Commission, *supra* note 140, at 10.
- 145 California Law Revision Commission, *supra* note 140, at 10 (quoting Jack Friedenthal, Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code (Jan. 1976) (unpublished study, on file with the California Law Revision Commission))(emphasis in the original). Of some interest is that Professor Friedenthal also stated, in the same section of his study that Fed. R. Evid. 104(b) "is generally identical with § 403(1)." *Id.* at 46.
- 146 The Commission, in the memorandum, pays lip service to Professor Kaplan's criticism, observing that he "makes a good point," but asserts that the judge's screening for sufficiency and the availability of an instruction to disregard the contested hearsay if the jury fails to find the preliminary facts "help to ameliorate the problem [Professor Kaplan] described." *Id.* at 11.
- 147 I have refrained from calling the relevance questions "conditional" relevance questions, in order to avoid the dispute over the existence of conditional relevance. See *supra* text accompanying note 8.
- 148 California Law Revision Commission, *supra* note 140, at 11.
- 149 *Id.*
- 150 See Kaplan, *supra* note 2, at 1000. I have previously addressed these hypotheticals in my earlier essay in support of a proposed revision of FRE 104. See Garland & Schmitz, *supra* note 1, at 112-15. This essay, I think, demonstrates that this thinking is still

viable. The ambiguity of resolution of the problems discussed in this final section of this essay suggests that some revision of the Rule might still be appropriate. But, that is beyond the scope of the subject of this essay.

151 [United States v. Vigneau, 187 F.3d 70 \(1st Cir. 1999\).](#)

152 [Id. at 72.](#)

153 [Id. at 73.](#)

154 [Id. at 74.](#)

155 [Id. at 78, 82.](#)

156 [Fed. R. Evid. 803\(6\).](#)

157 [Vigneau, 187 F.3d at 75.](#)

158 [Id. at 74.](#)

159 [Johnson v. Lutz, 170 N.E. 517 \(N.Y. 1930\).](#)

160 [Vigneau, 187 F.3d at 75-76.](#) As an interesting aside, the court noted that some “outsider” statements can be admitted within the business records exception upon a showing that the “business itself used a procedure for verifying identity (e.g., by requiring a credit card or driver's license).” [Id. at 77](#) (footnote omitted).

161 [Id. at 74-75.](#)

162 [Id.](#)

163 [Id.](#)

164 [Id.](#)

165 [Id. at 75 & n.2.](#)

166 [Vigneau, 187 F.3d at 76.](#)

167 [See Kaplan, supra note 2, at 1000.](#)

168 [Id.](#)

169 [Id.](#) (“[A question of fact is for the jury when] [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.”) (quoting [Cal. Evid. Code § 403\(a\)\(4\)](#) (West 1966)).

170 [Id.](#)

171 [Id.](#)

172 [Id.](#)

173 [Kaplan, supra note 2, at 1000.](#)

174 [Id.](#)

175 [Id.](#)

176 [Id. at 1001.](#)

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177 I think this formulation is much simpler than the one presented in the earlier *Of Judges and Juries*, supra note 1. Although, as analysis of the *Vigneau* case demonstrates, in some situations, taking into account whether the jury can be expected to disregard the contents of the disputed evidence may be the final step in the required analysis on delegation of function.

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