

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

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 FRE 104³ and CEC §§ 403 and 405.⁴ I have received the conventional wisdom that the judge decides all questions under the rubric of “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. In contrast, those questions of fact conditioning the admissibility of evidence upon a finding of fact *merely*⁶ necessary to establish the evidence’s relevance⁷ are for the

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*.

² The strangeness of the preliminary fact dichotomy is well stated by the late Professor John Kaplan’s thoughtful article, 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 2007). 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*, 43 HARV. L. REV. 165, 169 (1929). Professor Morgan’s article was a follow-up to the article published two years earlier by Professor John M. Maguire and Charles S.S. Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1927). 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. 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. Morgan’s article has been much relied upon over the decades and was the noted basis for the drafters of both the CEC and the FRE.

⁶ 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, *id.*, at 404; Kaplan, *supra* note 2, at 999; JOHN M. MAGUIRE, EVIDENCE COMMON SENSE AND COMMON LAW 224 (Foundation 1947); CHARLES T. MCCORMICK, ON EVIDENCE § 53, at p. 125 (West 2d Ed. 1972).

⁷ 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*, 70 B.U.L. REV. 447 (1990), Ronald J. Allen, *The Myth of*

jury. This formulation has a ring of utter simplicity, and, over the years, I have developed some finesse in my ability to deliver the message to students—I think.

My message, based on the language immediately above, is that 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. 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. In other words, if the decision as to the fact's existence involves the preservation of an exclusionary rule of law, either the law of evidence or substantive 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 constitutional or substantive law goal. In such a situation, just because the preliminary fact question also determines relevance, the judge must still be the fact-finder. And, the judge must be the fact-finder even if both the preliminary fact is also an ultimate fact on the merits of the case and that fact may thus be the jury ultimately to resolve the case.

I believe that the foregoing formulation works largely to explain the operation of the evidence law and 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 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.⁸ I say this after re-reading much of the literature on the basics of preliminary fact determinations and Professor Mendez'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.⁹

Conditional Relevancy, 25 LOY. L.A.L. REV. 871 (1992), 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 (Foundation 2002) in which he asks "Is there a there there?" in examining this literature on conditional relevancy.

⁸ 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 997-99 & 1000-01; see also Nance, *id.*, at 464-66.

⁹ Professor Mendez's recommendations are included in California Law Revision Commission, STAFF MEMORANDUM 2004-19 (May 28, 2004), attached as Exhibit 3 thereto, is Miguel A. Mendez, *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).

The critical difference between the recommendations to the California Law Revision Commission and the CEC and the position I advocate in this article, 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 that undermines the operation of the exclusionary force of the hearsay rule. The jury should not be allowed to consider the contested hearsay in deciding the existence of these preliminary facts.

In Part 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 test the critics' tests.

I. Preliminary Facts under the FRE

Federal Rule of Evidence 104 sets forth a scheme, or system, for dealing with preliminary facts¹⁰ that determine the admissibility of evidence. 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.¹¹ 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." 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,¹² but only if the proponent of the

¹⁰ 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 . . ." 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 7, at 881-82. See also, Edward J. Imwinkelried, *Preliminary Fact Finding under Rule 104*, CALI Lesson, at question 22 and answer; available on the web at <http://www2.cali.org/index.php?fuseaction=lessons.lessondetail&lid=536>. It is particularly difficult to get this point across to students; Professor Imwinkelried's CALI lesson does a noticeably fine job of doing so.

¹¹ Such preliminary fact questions "shall be determined by the court," albeit "subject to the provisions of subdivision (b)." 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).

¹²The word "jury" does not appear in the Rule. 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

evidence submits or promises to submit evidence sufficient to support a finding of the existence of the fact.

Some preliminary fact questions are clearly determinable under one or the other of the provisions, 104(a) or 104(b), either because of the language of the rules or the comments of the drafters, principally in the advisory committee's notes. Preliminary questions relating to invocation or application of privilege are for the judge.

Qualification to be a witness, particularly with respect to qualifying as an expert witness,¹³ also present questions of fact for the judge.¹⁴

The fact of a witness's personal knowledge,¹⁵ all manner of facts relating authentication¹⁶ of documents, objects, voices, and handwriting, and the fact of the existence of a writing,¹⁷ or status as an original or correct reflection of the contents of writings, recordings, or photographs,¹⁸ are all for the jury, according to the language of the pertinent rule or the advisory committee's notes to the rules. 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).

Supreme Court precedent provides guidance as to how some other preliminary fact questions should be treated under Rule 104. In *United States v. Bourjaily*,¹⁹ 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."²⁰ In the case, the pressing issues related to whether, and to what extent, the trial judge could engage in bootstrapping to decide those preliminary fact questions. The Court resolved 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.²¹

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 7.

¹³ 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, 145 (1999).

¹⁴ 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, see FED. R. EVID. 603, seems to call for an administrative function, at most, by the court. Contrast CAL. EVID. CODE §§ 700 & 702 (West 2007), 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.

¹⁵ FED. R. EVID. 602, advisory committee's note, ¶ 1: "It will be observed that the rule is in fact a specialized application of the provisions of Rule 104(b) on conditional relevancy."

¹⁶ FED. R. EVID. 901(a), advisory committee's note ¶ 2: "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)."

¹⁷ FED. R. EVID. 901(b).

¹⁸ Fed. R. Evid. 1008(a)-(c).

¹⁹ 483 U.S. 171 (1987).

²⁰ *Id.* at 175.

²¹ The Court attributes the first reference by the Court to the term "bootstrapping" to *Glasser v. United States*, 315 U.S. 60, 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

On the question whether the trial judge could engage in total bootstrapping²²—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”²³ 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 purposes²⁴ dictated by *Ohio v. Roberts*.²⁵

In *Huddelston v. United States*,²⁶ the Court addressed the admissibility of evidence of “similar acts” evidence under FRE 404(b). 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.²⁷ 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.²⁸ 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).²⁹ 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.³⁰

II. The Theory from which FRE 104 Developed

The principles (“merits”) underlying the allocation of the preliminary fact questions between judge and jury were identified authoritatively by Professor Maguire and Mr. Epstein and endorsed by Professor Morgan³¹ as five-fold: 1) simplicity; 2) predictability; 3) protection; 4) precision; and 5) prompt vindication. 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

bootstraps to the level of competent evidence.” The *Glasser* Court cited no source for the bootstraps reference. 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 article, 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 429-30, nn. 104 & 105. “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.”

²² FED. R. EVID. 801(d)(2) was amended, effective 1997, to prohibit total bootstrapping by the trial judge in determining the preliminary questions of authority of agents and the existence of a conspiracy and participation in it by the declarant and opponent of the evidence for the co-conspirators exception.

²³ *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. See *id.* advisory committee’s note to the 1997 amendment ¶ 2.

²⁴ *Bourjaily*, 483 U.S. at 182-3.

²⁵ 448 U.S. 56 (1980).

²⁶ 485 U.S. 681 (1988).

²⁷ *Id.* at 686-87.

²⁸ *Id.* at 687-89.

²⁹ *Id.* at 689.

³⁰ *Id.*

³¹ *Supra*, note 5.

principles. 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.³² When, however, the question of preliminary fact “merged imperceptibly into the weight of the evidence, if admitted”³³ they 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.

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 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 take the issue to the jury. And, 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 article reviewed six alternatives for dealing with such situations, expressing no opinion or choice.³⁴ The most troublesome cases considered by them involved the determination of the application of rules of witness competency or privilege, for example the case of *State v. Lee*,³⁵ a prosecution for murder. The defendant was alleged to be one “‘Mack Lee,’ who was admittedly the murderer. The defendant called Mack Lee’s wife and asked her whether the prisoner was her husband. Obviously counsel expected a negative reply.”³⁶ At that point, the prosecution objected on grounds that spousal incompetence, the prevailing rule in Louisiana at the time, prevented the witness from testifying. The prosecution further demanded that the trial judge make the preliminary finding as to the existence of the marital relationship. The trial judge decided the fact, found the relationship existed, and “‘rejected the witness.” 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.³⁷ 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.”³⁸

A contrasting case analyzed next by Maguire and Epstein is *Hitchens v. Eardley*,³⁹ a “well-known pedigree case” according to Maguire and Epstein. In their view and approval, the trial judge himself resolved the preliminary fact question in this case

³² Maguire & Epstein, *supra* note 5, at 398.

³³ *Id.*, citing and quoting Judge Learned Hand in *Di Carlo v. United States*, 6 F.2d 364, 367 (2d Cir. 1925).

³⁴ *Id.* at 408-24.

³⁵ 54 So. 356 (La. 1911).

³⁶ Maguire & Epstein, *supra*, note 5, at 408.

³⁷ *Id.* at 409.

³⁸ *Id.* at 409-10.

³⁹ L.R. 2 P. & D 248 (1871), as cited and discussed in Maguire & Epstein, *id.* at pp. 410-13 and characterized as a case in “contrast” to *Lee*. Professor Morgan discusses this case extensively, reaching a different conclusion from Maguire and Epstein. See Morgan, *supra*, note 5, at pp. 183-85, 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.

where the evidence was offered within an exception to the hearsay rule⁴⁰ and disallowed the opposing party's attempt to introduce countervailing evidence on the issue. 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, whereas the hearsay rule invoked in the later case "has for its sole object the protection of jurors from unveracious evidence."⁴¹

Professor Morgan's seminal article approved the work of Maguire and Epstein, but presented some "different interpretation of some decisions" and "a slightly different approach to some of the problems."⁴² 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."⁴³ He then reviewed the authorities finding them to be of "'variegated inconsistency,'"⁴⁴ principally noting 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"⁴⁵ Much of Morgan's article takes apart the analyses of cases dealing with grounds for witnesses' incompetency and privilege and, at the end, he advocates for the repeal of those rules of incompetency though some common law privileges, he thought, might be preserved.⁴⁶ In the analysis leading to this conclusion and in his later writing, however, I think Morgan got the nub of the distinction with clarity. In his BASIC PROBLEMS OF EVIDENCE⁴⁷ he describes conditional relevance giving two examples. 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." 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. The "offer and acceptance are irrelevant unless X's authority to act for D also exists. In each of these situations fact A is irrelevant without fact B."⁴⁸ 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 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

⁴⁰ Maguire & Epstein, at p. 411. 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.

⁴¹ *Id.*

⁴² Morgan, *supra* note 5, at 165 n. *.

⁴³ *Id.* at 169.

⁴⁴ *Id.* at 170, citing JOHN H. WIGMORE, 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1644(2).

⁴⁵ *Id.* at 175.

⁴⁶ *Id.* at 190.

⁴⁷ Morgan, BASIC PROBLEMS OF EVIDENCE (Inst. CLE 1961).

⁴⁸ *Id.* at 46. The examples herein appear in the 1961 edition of BASIC PROBLEMS OF EVIDENCE. The examples appearing in the advisory committee's note accompanying FED. R. EVID. 104(b) appear in the 1962 edition of the same book.

existence and the jury should determine the dispute as to each under proper instruction from the judge.⁴⁹

There is one further, pre-FRE, Supreme Court precedent that merits consideration, and it is discussed by Maguire and Epstein, Morgan, and then Maguire alone: the case of *Gila Valley, Globe & Northern Ry. V. Hall*.⁵⁰ The reference to the case in the Maguire and Epstein piece treats it rather kindly, noting that the decision is at variance with the authors' conclusion about one-sided cases, concluding in a footnote: "The opinion does not make clear who should have decided the question of communication if there had been a real conflict of evidence."⁵¹ The case was this:

[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 (within twenty yards of him according to the description appearing in Maguire and Epstein's article). Evidence of the remark about the wheel was excluded on the ground that plaintiff was not proved to have heard it.⁵²

The Supreme Court approved of the decision, affirming that the preliminary fact question was one for the judge, not the jury. Morgan's description of this decision in his 1929 article asserts only: "The only possible ground for excluding this evidence was its irrelevancy."⁵³ Yet, Morgan's principal example of conditional relevancy cited in the advisory committee's note accompanying FRE 104(b) is a hypothetical suspiciously similar to the *Gila Valley* case.⁵⁴ Maguire, in his *Evidence, Common Sense and Common Law* is far less tactful: "The 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."⁵⁵

Numerous other preliminary fact questions that arise in application of the rules of evidence present the same issue of division of 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, 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.⁵⁶ For example, to borrow a hypothetical from Professor Kaplan:

⁴⁹ *Id.*

⁵⁰ 232 U.S. 94 (1914).

⁵¹ Maguire & Epstein, *supra*, note 5 at 402, n.34.

⁵² Maguire, *supra* note 6, at 223.

⁵³ Morgan, *supra* note 5, at 173.

⁵⁴ FED. R. EVID. 104(a) advisory committee's note.

⁵⁵ Maguire, *supra* note 6, at p. 223. For more recent analysis of the *Gila Valley* case, see Nance, *supra* note 7, at pp. 466-72. Professor Nance takes an extensive look at the *Gila Valley* case and proposes a different view than that expressed by others quoted herein. See also, Callen, *supra* note 7, at pp. 1249-50.

⁵⁶ *State v. Carlson*, 808 P.2d 1002, 1008 (Or. 1991).

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.⁵⁷

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.⁵⁸ These facts, upon which relevance depends, can be decided by the jury, no doubt—and Professor Kaplan concludes that these are questions for the jury. So, the pre-FRE law similarly treated such questions as ones for the jury.⁵⁹ He 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 the whether he admitted it, would be unrealistic.⁶⁰ Surely, he asserts, "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."⁶¹ The point is that the problem inherent in such preliminary fact question scenarios is one that involves conditional relevancy plus, the plus being the necessary determination 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.⁶²

⁵⁷ Kaplan, *supra* note 2, at 1002.

⁵⁸ *Id.* As Professor Kaplan points out: "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."

⁵⁹ See, e.g., Committee on Model Jury Instructions Within the Eighth Circuit, *MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT* § 4.14 "Silence in Face of Accusation (2000 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). 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." That the law seems murky on this point is not surprising. The Oregon Supreme Court, in *State v. Carlson*, *supra*, note 54, 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). The *Carlson* view was followed by the Supreme Court of Hawaii in *State v. Gano*, 988 P.2d 1153, 1164 (Haw. 1999), and is cited in some secondary sources, but there is no plethora of decisions, state or federal endorsing the proposition.

⁶⁰ Kaplan, note 2, at 1002.

⁶¹ *Id.* at 1002-03.

⁶² See text accompanying footnote 30, *supra*. 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?'" 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." But, there is an implied assertion of the guilt of F, he points out. [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.]

III. Admissions by Agents and Co-conspirators⁶³

A subject most pertinent to this essay is 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.”⁶⁴ This statement is followed by a reference to a later point in the article 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.⁶⁵

Morgan, in his 1929 article picks up the thread of the reference to agent and conspirator statements as the starting point for a blistering criticism of departure from the orthodox rule.⁶⁶ 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 him⁶⁷ and others⁶⁸ 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.

Remember, the orthodox rule is that “where the competency of A depends upon the existence of B, the judge alone shall determine the existence of B.”⁶⁹ 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. But where it is

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.” 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.

⁶³ 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.

⁶⁴ Maguire & Epstein, *supra* note 5, at 407 (emphasis added).

⁶⁵ *Id.* at 418, n.78.

⁶⁶ Morgan, *supra* note 5, at 183-89.

⁶⁷ Morgan, BASIC PROBLEMS, *supra* note 47, 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.

These observations are supported by a footnote reference to the 1927 Maguire and Epstein and 1929 Morgan articles, *supra* note 5.

⁶⁸ See Kaus, *supra* note 8 and Kaplan, *supra* note 2.

⁶⁹ Morgan, *supra*, note 5 at 175.

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.⁷⁰

Morgan then notes that the fourth stage of dissolution, the worst stage, is where “the trial judge is required to admit A unconditionally.”⁷¹ 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.⁷²

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.”⁷³ Further, he asserts, 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.”⁷⁴ He supposed that such “serious departures from the orthodox rule” resulted from the desire to promote trial by jury and to avoid “judge-made” decisions.⁷⁵ But, Professor Morgan elegantly rejects such grounds for reaching a conclusion that denudes exclusionary rules of their force.

First, he points out that frequently a litigant only has access to incompetent evidence to support his case, incompetent under either statute or common law rule;⁷⁶ and, we may add today, incompetent under constitutional principle.⁷⁷ In the situation that a

⁷⁰ *Id.*

⁷¹ *Id.* at p. 176.

⁷² *Id.* at p. 177.

⁷³ *Id.* at p. 183

⁷⁴ *Id.* Professor Morgan again references the Maguire and Epstein article and cases collected therein as the basis for his observations. *Id.* at n.34. Following the footnote reference to those cases Morgan offers a curious possible explanation for courts’ admitting the evidence (A) “unconditionally.” He says:

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. The quote is supported by an extensive footnote that mainly discusses the *Hitchens* decision, but does not further reference Greenleaf. 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.

⁷⁵ *Id.*, at 184-85. I grossly simplify Morgan’s rationalization but the point is essentially as stated.

⁷⁶ *Id.*, at 186.

⁷⁷ Morgan’s examination of the first stage of dissolution from the orthodox rule in Part III of his 1929 article, *id.*, at 176, is the Massachusetts procedure for dealing with confessions in criminal cases approved by the Supreme Court in *Jackson v. Denno*, 378 U.S. 368, 380 n.8 (1964), which 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. The difference in the Massachusetts procedure is

litigant's case cannot be made because based on incompetent evidence that does not depend upon a preliminary fact determination, "no court allows itself to be influenced by this consideration."⁷⁸ Motions to dismiss for failure to state a claim, on summary judgment, for directed verdict, or the criminal equivalent of judgment of acquittal, are granted all the time 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."⁷⁹ 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, when it has been privileged to hear and consider all relevant evidence. There is nothing inherently objectionable in a judge-made decision.⁸⁰

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 responds to this: "This overlooks the very gist of the question."⁸¹ He points out that: "To 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. If 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."⁸² Morgan's ultimate conclusion with respect to this subject is: "In short, there is no argument for departure from the orthodox practice which does not strike at the validity of the exclusionary rules themselves."⁸³

Professor Kaplan addresses the preliminary questions for conspirators' admissions' in his article,⁸⁴ but he does so by contrasting the treatment under the FRE with the treatment under the CEC. So, let us turn to the CEC treatment of preliminary facts in those instances.

IV. Admissions of Agents and Co-Conspirators under the CEC

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. *Jackson v. Denno* raised the issue of voluntariness of a confession to constitutional dimension.

⁷⁸ *Id.* at p. 186.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at pp. 186-87. 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 p. 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 187-88.

⁸³ *Id.* at 189 (footnote omitted).

⁸⁴ Kaplan, note 2, at pp. 997-99 & 1007.

Professor Mendez, in his article relied upon by the California Law Revision Commission,⁸⁵ characterizes the difference between California’s treatment of the division of functions on preliminary questions as a use of a “sufficiency standard” in CEC § 403, versus a “higher standard” under CEC § 405.⁸⁶ 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 the particular kinds of preliminary fact issues governed” by the respective sections.⁸⁷ In addition, 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. Remember, CEC § 403 is the counterpart to FRE 104(b) and CEC § 405 is the counterpart to FRE 104(a). So, the result of the commitment of CEC § 403 preliminary fact questions to the sufficiency standard is to delegate the function of ultimate fact-finding on such questions to the jury, not the judge.⁸⁸

Whether a party has authorized or adopted an admission and whether a conspiracy exists for admissibility of a co-conspirator’s admission, are preliminary fact questions governed by CEC § 403.⁸⁹ Moreover, CEC § 1222, stating the hearsay exception for authorized admissions, and CEC § 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.⁹⁰ Professor Mendez concludes: “Reasonable people might differ on whether the foundational facts for this hearsay exception should be provided by a sufficiency or higher standard,”⁹¹ citing Professor Kaplan’s article 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.”⁹²

Professor Kaplan explored the issues in connection with a series of hypotheticals, with one that 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.”⁹³

After citing CEC § 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 [the] section, which makes the preliminary fact questions . . . [jury questions], is in error.”⁹⁴ He bases this

⁸⁵ Mendez, *supra*, note 9; California Law Revision Commission, *supra*, note 10.

⁸⁶ Mendez, *supra* note 9 at 1010.

⁸⁷ *Id.*

⁸⁸ Of course, the judge still must determine that there is presented evidence sufficient to support a finding of the preliminary facts by the jury.

⁸⁹ Mendez, *supra* note 9 at 1013. See also, CAL. EVID. CODE § 403, assembly committee on judiciary comment.

⁹⁰ CAL. EVID. CODE §§ 1222(b) & 1223(c).

⁹¹ Mendez, *supra* note 9, at p. 1019.

⁹² *Id.*, n. 89.

⁹³ Kaplan, *supra* note 2, at p. 997.

⁹⁴ *Id.*

conclusion on the reasoning 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.”⁹⁵ 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 depends” and leading ultimately to abandonment of the exclusionary rules.⁹⁶

At the very least, the California procedure, applied to this hypothetical, even in the most common type of case—where A was clearly a conspirator but defendant’s status as a conspirator is disputed—permits the jury to bootstrap,⁹⁷ a result that is denied even to the judge under current California law.⁹⁸ 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.”⁹⁹ 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 bootstrapping! But, apparently it does not. Why is this so? 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 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 104.¹⁰⁰

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.” CEC § 1222(b) makes the question of authorization one for the jury.¹⁰¹ 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

⁹⁵ *Id.* Professor Kaplan points out that “where the declarant, A, was clearly a conspirator and the disputed preliminary fact question is whether the defendant, D, was also a member of the conspiracy,” the California error is not so serious because 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.

⁹⁶ Morgan, *supra* note 5, at 175-76.

⁹⁷ Professor Kaplan points out, following the quoted observation in note 95, *supra*, that “the other possibility that many find upsetting . . . 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.

⁹⁸ Mendez, note 9, at p. 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 issue. California Law Revision, *supra* note 10, at 8.

⁹⁹ California Law Revision Commission, *supra* note 10 at p. 7.

¹⁰⁰ See discussion accompanying notes 19-24, *supra*.

¹⁰¹ CAL. EVID. CODE § 1222(b) and CAL. EVID. CODE § 403, assembly committee on judiciary comment.

negligence probably should be admissible against his employer even if he was not authorized.”¹⁰² 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.”¹⁰³ 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.”¹⁰⁴ Professor Kaplan points out the result of 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.¹⁰⁵ He proclaims: “In this case, at least, two wrongs do not make a right.”¹⁰⁶

Let us turn back to the question why the 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,¹⁰⁷ 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. The memorandum first quotes Professor Mendez’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.”¹⁰⁸ 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.

Second, the Commission cites and relies upon a 1976 “study” by Professor Jack Friedenthal.¹⁰⁹ 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 it is not made in furtherance of a conspiracy of which the defendant is a part, then it is inadmissible *because irrelevant*. Questions of conditional relevance are for the jury to determine under Section 403.”¹¹⁰ The critical point of departure between the Commission’s observations here and the analysis of Professors Maguire and Epstein,

¹⁰² Kaplan, *supra* note 2, at 999 (footnote omitted).

¹⁰³ *Id.* The FRE counterpart to CEC § 1222 is FED. R. EVID. 801(d)(2)(C) & (D). Under FRE 801(d)(2)(D), the authority need be only to act, not speak. 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 a puzzlement why the CEC reaches this result in such a roundabout way.

¹⁰⁴ Kaplan, *supra* note 2, at 999.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ California Law Revision Commission, STAFF MEMORANDUM 2004-55 (November 8, 2004).

¹⁰⁸ *Id.* at p. 10, citing Mendez, *supra*, note 9.

¹⁰⁹ JACK FRIEDENTHAL, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code* (Jan. 1976) (on file with the Commission).

¹¹⁰ California Law Revision Commission, *supra* note 107, at 10 (emphasis in the original), citing Friedenthal, *supra* note 109, at 46-47, 50. 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.

Morgan, and Kaplan,¹¹¹ 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 relevancy¹¹² 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. And, 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.

The Commission concludes that the procedure “has been the law in California for over 37 years Neither Professor Mendez nor Professor Friedenthal are recommending substantive change to that approach.” And, finally: “While 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.”¹¹³ 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.

V. Conclusion: A Test 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 that question is not so clear under the FRE and, under the CEC is treated too simply. Let us consider a fairly recent case and two hypotheticals posed by Professor Kaplan¹¹⁴ in addressing this problem.

The case is *United States v. Vigneau*,¹¹⁵ involving conviction of the defendant of various charges stemming from his participation in a drug distribution scheme. He allegedly engaged in money laundering as part of the charged drug transactions and scheme. The government introduced against the defendant 21 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

¹¹¹ 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.” California Law Revision Commission, *supra* note 107 at 11.

¹¹² I have refrained from calling the relevance questions “conditional” relevance questions, in order to avoid the dispute over the existence of conditional relevance. See discussion in note 7, *supra*.

¹¹³ *Id.*

¹¹⁴ I have previously addressed these hypotheticals in my earlier article in support of a proposed revision of FRE 104, see Garland & Schmitz, *supra* note 1. This essay, I think, demonstrates that the thinking reflected in that article 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.

¹¹⁵ 187 F.3d 70 (1st Cir. 1999).

launder money derived from the drug scheme. The Court of Appeals reversed the conviction, finding that the admission into evidence of the “To Send Money” forms was error. The government argued that the forms were admissible within the business records exception,¹¹⁶ 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. The forms were filled out by the Western Union employees, from information transmitted orally by the customer. Under the familiar doctrine of *Johnson v. Lutz*,¹¹⁷ the forms thus failed as business records.¹¹⁸ 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. Hence, the critical preliminary fact question upon which admissibility depended was the identity of the declarant. The only evidence of that was the content of the forms themselves: the government presented no independent evidence that the 21 forms were obtained by Vigneau.

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. The court also noted that whether the defendant “signed the form may be governed by Fed. R. Evid. 104(b) as a matter of conditional relevance.”¹¹⁹ And, if the issue were whether the information was supplied by Vigneau, if the government had presented circumstantial evidence to that effect, sufficient for a jury to so find, that too might have been admissible under FRE 104(b).¹²⁰

The *Vigneau* court was surely 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, not the jury.

Consider the two hypotheticals on this subject from Professor John Kaplan’s article. 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.¹²¹

¹¹⁶ FED. R. EVID. 803(6).

¹¹⁷ 170 N.E. 517 (N.Y. 1930).

¹¹⁸ *Vigneau*, supra, note 114, at pp. 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 p. 77 (footnote omitted).

¹¹⁹ *Id.* at p. 75, n.2.

¹²⁰ *Id.* at p. 76.

¹²¹ Kaplan, supra, note 2, at p. 1000.

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. And if 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 CEC § 403(a)(4) specifically covers the case.¹²² But he asserts that only a little thought “reveals that the preliminary question . . . should be [one for the judge.]”¹²³ 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.”¹²⁴ Similarly, in *Vigneau*, once the jury got to see the content 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. 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 how could the CEC call this a jury question, Professor Kaplan asserts that the “drafters simply were thinking of another question”,¹²⁵ 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.¹²⁶

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.”¹²⁷ 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.”

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.¹²⁸

¹²² *Id.*, quoting CAL. EVID. CODE § 403(a)(4) provides that the question of fact is for the jury, when: “The 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.”

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ I think this formulation is much simpler than that presented the earlier *Of Judges and Juries*, *supra*, note 1, though as analysis of the *Vigneau* case demonstrates, in some situations, taking into account whether the

Preliminary questions presented by admissions by agents and co-conspirators, 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. This would greatly ease the teaching of this thorny area of the law.

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.