Of Judges and Juries: A Proposed Revision of Federal Rule of Evidence 104

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INTRODUCTION

Trial by jury is the most distinctive feature of Anglo-American justice. Ordinary citizens determine facts necessary to resolve sometimes intricate, often emotionally charged, legal disputes. The jurors resolve these facts based on evidence presented in open court. The jurors then apply the law, as given by the trial judge, to those facts and render their verdict.

Conventional wisdom teaches that untrained jurors should not hear all the evidence that the litigating parties might wish to present.[1] The judge, a trained expert on legal matters, controls the flow of evidence which these lay people hear.[2] Most fundamentally, the judge may keep evidence from the jury because the evidence is not relevant to the mate-

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[1] *See* FED. R. EVID. 104(a) advisory committee's note, *reprinted in* 28 U.S.C. app. at 681 (1982). As the Committee noted, rules of exclusion of evidence on grounds other than relevancy are the "child of the jury system." *Id.* (MCCORMICK ON EVIDENCE § 53, at 136 n.8 (E. Cleary 3d ed. 1984)). The rule that the judge considers all pertinent matters in deciding facts relating to admissibility of evidence underscores the point that the jury should not hear all relevant evidence. FED. R. EVID. 104(a).

[2] *See* FED. R. EVID. 104(a). The judge determines all preliminary questions of fact not falling under FED. R. EVID. 104(b). The judge admits evidence under 104(b) after a sufficient showing of a factual condition's fulfillment.

rial issues at trial.[3] In addition, the judge may refuse to admit relevant evidence because of exclusionary rules. These exclusionary rules, based on extraneous social and legal policies, conflict with the social value given to the just resolution of disputes through the presentation of all relevant evidence.[4]

A. Preliminary Questions of Fact — The Root of the Problem

Admissibility under evidentiary rules always depends upon the existence of one or more factual preconditions. The terms of the evidentiary rule in issue prescribe these factual preconditions.[5] If the litigating parties do not dispute the factual preconditions, the judge decides admissibility without any role for the jury to play. The litigating parties, however, often dispute the factual preconditions. Federal Rule of Evidence 104[6] delineates the respective functions of judge and jury in determining disputed preliminary facts.

Consider these two examples of preliminary factual disputes: (1) Did police officers beat the defendant in a criminal case before the defendant confessed? If so, the judge excludes the confession. If not, the judge admits the confession. (2) In a slip and fall case, did the plaintiff hear the verbal warning by defendant's employee? If so, the defendant warned the plaintiff of the dangerous condition. If not, the warning becomes irrelevant because it proves nothing as to the plaintiff's knowledge of the condition.[7] Who, judge or jury, should decide whether police officers beat the defendant and whether the plaintiff heard the warning?

The judge decides the first question. The objection to admissibility, based on the privilege against self-incrimination, furthers an important

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[3] *See infra* notes 64-66 and accompanying text.

[4] *See infra* notes 67-77 and accompanying text.

[5] For a discussion of the factual preconditions for coconspirator statements, see *infra* notes 138-39 and accompanying text. To qualify for the business records exception to the hearsay rule, the proponent must meet the exception's requirements. For example, the business must make the record in the regular course of business. FED. R. EVID. 803(6).

[6] This article cites all references to the Federal Rules of Evidence in accordance with accepted form. For ease of location, this article cites to the Appendix of the United States Code for some of the notes relating to the Rules.

[7] *See, e.g.*, FED. R. EVID. 104(b) advisory committee's note *reprinted in* 28 U.S.C. app. at 681 (1982). For an example of this situation, see Safeway Stores v. Combs, 273 F.2d 295 (5th Cir. 1960). In *Combs*, however, the court focused on the warning's hearsay aspects.

social and legal policy.[8] This policy conflicts with the jury's primary task in a criminal trial, to determine justly the defendant's guilt or innocence. If the jurors heard that the defendant confessed, the judge could not expect the jurors to ignore the confession if the jurors conclude that police officers beat the defendant.[9]

The jury decides the issue of whether the plaintiff heard the warning because this issue raises merely a question of "conditional" relevancy, not one involving legal policy for the judge.[10] The judge can trust the jurors to disregard the warning if the jurors believe that the plaintiff did not hear the warning. If they believe she did hear it, the warning becomes directly relevant to the material issues of notice and contributory negligence. Questions such as "[t]hese are appropriate questions for juries." [11]

Federal Rule of Evidence 104 addresses the question of who, judge

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[8] For a discussion of this policy, see *infra* notes 74-75 and accompanying text.

[9] Evidence may be admissible for one purpose even though inadmissible for another purpose. *See* FED. R. EVID. 105. The judge may admit the evidence with a limiting instruction when the jury will disregard such evidence for its improper purpose. When the jury cannot be expected to disregard the improper purpose, the judge may exclude the evidence entirely. *Id.*

Justice Cardozo summarized this notion in Shepard v. United States, 290 U.S. 96 (1933), a homicide case in which the defendant's wife accused him of poisoning her before she died. The Supreme Court found that the evidence might be admissible to support the prosecution's claim that the wife had the will to live, thereby negating the defendant's theory that his wife committed suicide. The Court also noted that the jury might consider the wife's accusation as proof that the defendant murdered her. Justice Cardozo stated:

> It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

Id. at 104.

[10] *See* Kaplan, *Of Mabrus and Zorgs — An Essay in Honor of David Louisell*, 66 CALIF. L. REV. 987 (1978). Professor Kaplan used the terminology "merely [questions] of relevance." *Id.* at 999. Kaplan also recognized that the judge must decide preliminary questions implicating rules other than relevancy. *Id.* at 993-94.

[11] FED. R. EVID. 104(b) advisory committee's note, *reprinted in* 28 U.S.C. app. at 681 (1982). The notes clearly assign this issue to the jury. For a discussion of the concept of materiality as defined by the Federal Rules of Evidence, see *infra* note 30.

or jury, should settle these two preliminary factual disputes. Although the resolution of this question appears obvious in the two examples given, this is not the case with all preliminary questions of fact. Just last year, the United States Supreme Court resolved the issue of who should decide whether a criminal defendant committed prior similar acts.[12] This article develops a test which distinguishes the characteristics of different preliminary questions of fact, and thus, guides the allocation of functions under Rule 104.

Rule 104 differs significantly from the original, orthodox rule of law that "it is the province of a judge sitting with a jury 'to decide any preliminary questions of fact, however intricate, the solution of which may be necessary to enable him to determine the . . . admissibility' of evidence."[13] Literally applied, this orthodox rule required a judge to determine *all* preliminary questions of fact, and thus, proved unsatisfactory.[14] Harvard Professor Edmund G. Morgan initially stated the more modern concept of Rule 104:

> On theory, then, where the *relevancy* of *A* [an item of evidence] depends upon the existence of *B* [a disputed preliminary fact], 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.[15]

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[12] Huddleston v. United States, 108 S. Ct. 1496 (1988). The prosecution sought to admit this evidence under FED. R. EVID. 404(b). For a discussion of this rule, see *infra* note 106 and accompanying text.

[13] Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392, 392 (1927) (footnote omitted) (citing Gorton v. Hadsell, 63 Mass. 508, 511 (9 Cush. 1852)).

[14] *See* Maguire & Epstein, *supra* note 13. These authors cited two cases in which the court gave disputed preliminary questions to the jury. *Id.* at 395-96. In Winslow v. Bailey, 16 Me. 319 (1839), the plaintiff sued on a promissory note. The defendant sought to avoid the transaction on grounds that the plaintiff induced him to purchase the land with a fraudulent certificate. The judge gave the preliminary question, whether the defendant saw the falsified certificate and relied upon it, to the jury.

In Patton v. Bank of LaFayette, 124 Ga. 965, 53 S.E. 664 (1906), the defendant alleged that her signature on a promissory note was forged. The judge left the preliminary question of the signature's authenticity to the jury.

Maguire and Epstein opined that, "The cases seem sound." Maguire & Epstein, *supra* note 13, at 399. The authors encourage the reader to verify this conclusion with the test proposed in this article. *See* text accompanying *infra* notes 27-30. The reader should conclude that the judge properly gave the questions to the jury.

[15] Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 169 (1929) (emphasis added). Notice that Morgan states that the jury *normally* decides conditional relevancy questions, and the judge *always* decides competency questions. The authors fail to understand why Morgan felt compelled to use "normally" with reference to conditional relevancy questions.

Federal Rule 104[16] did not adopt Morgan's "competency versus relevancy" distinction for allocating the functions of judge and jury. The rule, however, substantially incorporates the idea.[17] Morgan's principle, though simple in formulation, gives little practical guidance in allocating these functions because Morgan did not define the terms. Unfortunately, Federal Rule 104 did not do much better in giving content to its distinction.

RULE 104. PRELIMINARY QUESTIONS.

> (a) QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
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> (b) RELEVANCY CONDITIONED ON FACT. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.[18]

Rule 104 does not exemplify a drafting masterpiece — some ambiguity is unnecessary, some unavoidable. As an example of the former, 104(b) never mentions the jury even though this subdivision defines the

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[16] The Federal Rules of Evidence for United States Courts and Magistrates represent the predominant version of evidentiary rules in this country. Congress proposed the Federal Rules in March, 1969. *See* 46 F.R.D. 161 (1969). The Rules became effective in July, 1975. *See* 28 U.S.C. app. at 678 (preface to Federal Rules of Evidence). The Rules apply in all federal courts. FED. R. EVID. 1101. The Military Rules of Evidence, prescribed by executive order and based on the Federal Rules, apply in courts-martial. *See* J. WEINSTEIN, J. MANSFIELD, N. ABRAMS & M. BERGER, EVIDENCE at iii (1989).

Additionally, the Federal Rules have greatly influenced the law of evidence in the states. The Uniform Rules of Evidence, first adopted by the National Conference of Commissioners on Uniform State Laws in 1974 and last amended in 1986, "reflect as closely as possible" the Federal Rules. 13A U.L.A. 5 (1986). As of January, 1989, 33 states and Puerto Rico have adopted either the Federal or the Uniform Rules.

The National Conference of Commissioners on Uniform State Laws claims that all states which have adopted rules based on the Federal Rules of Evidence have adopted the Uniform Rules of Evidence. *See id.* at 1 (giving table of jurisdictions). Note that the authors of the EVIDENCE case book claim that all of these jurisdictions have adopted the Federal Rules. J. WEINSTEIN, J. MANSFIELD, N. ABRAMS & M. BERGER, *supra*, at iii.

[17] Federal Rule 104 expresses the distinction as "[q]uestions of admissibility generally" and "[r]elevancy conditioned on fact." FED. R. EVID. 104(a)-(b). The advisory committee's note to Rule 104(b), however, expressly refers to Morgan's works. 28 U.S.C. app. at 681.

[18] FED. R. EVID. 104.

jury's preliminary questions. Rather, the language focuses on the judge's functions concerning such questions.[19]

Subdivision (a) is unavoidably imprecise. The judge decides all preliminary questions not falling under 104(b). The rule allocates to the judge questions broader than questions of fact,[20] resulting in a range of preliminary factual questions which defies precise enumeration. Thus, the Advisory Committee probably did as well as can be expected by making Rule 104(a) "subject to the provisions of subdivision (b)." The drafters, however, complicated subdivision (a) by including the final sentence which states that evidentiary rules do not bind the judge in determining preliminary questions of fact under Rule 104(a).[21]

The title of Rule 104(a), "Questions of admissibility generally," is the most troublesome aspect of Rule 104's language. Any dispute based on evidentiary rules, including the rule of relevancy, is one of admissibility.[22] For example, a judge may exclude evidence on grounds of logical irrelevancy. In addition, if the proponent fails to produce sufficient evidence to support a finding that a requisite preliminary fact exists, a judge may exclude evidence on grounds of factual ("conditional") relevancy.[23]

Because Rule 104 fails to give courts clear guidance, courts inconsistently allocate functions between judge and jury.[24] Commentators have

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[19] The phrase "the court shall admit it upon . . . introduction of evidence sufficient to support a finding" in FED. R. EVID. 104(b) means that the judge must find that the proponent demonstrated a *prima facie* case for admission of the conditionally relevant evidence. Clearly, "finding" under Rule 104(b) refers to a finding by the jury.

[20] Courts commonly refer to these broader questions as mixed questions of law and fact. These mixed questions occur along a continuum which ranges from pure factual evaluations to pure legal evaluations.

The voluntariness of a confession exemplifies a pure factual evaluation. The determination of voluntariness involves the application of a legal standard to facts surrounding the making of a statement. *See* Lego v. Twomey, 404 U.S. 477 (1972). Whether a claimed hearsay declaration is "against interest" so as to come within the hearsay exception under FED. R. EVID. 804(b)(3) exemplifies a pure legal evaluation. The determination of fact intertwines with the legal definition of what constitutes "against interest." FED. R. EVID. 104(a) advisory committee's note, *reprinted in* 28 U.S.C. app. at 681 (1982).

[21] This parallels accepted practice and derives from the principle that rules of exclusion are a "child of the jury system." *See supra* note 1.

[22] Note that the final sentence of FED. R. EVID. 402 states, "Evidence which is not relevant is not admissible."

[23] For a discussion of the logical and factual aspects of relevancy, see *infra* text accompanying notes 55-60.

[24] *See* Gila Valley, Globe & N. Ry. v. Hall, 232 U.S. 94 (1914) for an example of a pre-Rule 104 misallocation. The Court held that the judge decides the factual question

attempted to develop the principle to provide clearer standards.[25] Their diverse views as to the causes of and solutions to the confusion, however, have probably produced "more dust than light."[26] An author of this paper, as an evidence professor, found this rule as difficult to explain clearly as the other author, as a student, found it to grasp.

B. A Proposed Solution

In this article, the authors advance a workable test to determine which preliminary questions of fact the judge decides ("competency" questions) and which preliminary questions of fact the jury decides ("conditional" relevancy questions). Relevancy forms the test's foundation. If a preliminary factual question only involves a determination of the evidence's relevancy, the jury's conduct in resolving that question can be predicted. In contrast, when a preliminary factual question involves some rule of evidence other than relevancy, the jury's conduct cannot be predicted readily. Thus, the predictability of the jury's conduct when faced with a particular question of fact, upon which the admissibility of evidence depends, determines the proposed test's allocation of functions.

This test gives content to what Professor Morgan probably intended when he used the terms "competency" and "relevancy," but rejects these terms because they add no content to the proposed test. This article refers to preliminary questions for the judge simply as "Rule 104(a)" or "judge" questions and those for the jury as "Rule 104(b)" or "jury" questions.

The reality of jury deliberations makes relevancy the only rule of

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of whether the plaintiff heard the warning, thereby putting the plaintiff on notice of the danger in a negligence action. *Id.* at 103. Clearly, the jury should decide this preliminary question of fact. For an example of a post-Rule 104 misallocation, see United States v. Huddleston, 802 F.2d 874 (6th Cir. 1986), *aff'd*, 108 S. Ct. 1496 (1988). The appellate court held that the judge decides whether the defendant committed the similar acts. *Id.* at 877. For a discussion of this case and similar acts evidence, see *infra* notes 110-14 and accompanying text.

[25] *See, e.g.*, Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435 (1980); Kaplan, *supra* note 10; Kaus, *All Power to the Jury — California's Democratic Evidence Code*, 4 LOY. L.A.L. REV. 233 (1971); Laughlin, *Preliminary Questions of Fact: A New Theory*, 31 WASH. & LEE L. REV. 285 (1974). *See also*, Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975). Saltzburg addresses a different issue relating to preliminary questions of fact. Saltzburg analyzes the appropriate standard of proof for judge questions.

[26] Judge Friendly coined this phrase in Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966).

evidence which the jury will apply consistently. Our legal system relies on the jury to make common sense inferences based on the evidence presented. The policy of the rule of relevancy seeks to channel those inferences toward the resolution of material facts, as determined by the substantive law and the parties' pleadings.[27] The judge must decide preliminary questions of fact which pertain to any rule of evidence other than relevancy. The jury will rarely, if ever, understand or apply the policy behind a rule of evidence other than relevancy.[28] Thus, the factors which define a jury question must be found in the peculiar characteristics of relevancy.

A preliminary question of fact raises a relevancy problem for the jury under Rule 104(b) if all three of the following questions are answered in the affirmative:

> 1) Is a reasonable juror certain to consider and to resolve the preliminary question of fact if the juror considers the evidence?
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> 2) Will the resolution of the preliminary question of fact necessarily occur *before* a reasonable juror would make any use of the evidence in resolving material facts?
>
> 3) Will a reasonable juror completely disregard the evidence if the juror finds the preliminary fact not to exist? In other words, the evidence becomes irrelevant. No rational juror would make any logical inference as to the existence or nonexistence of a material fact based on that evidence because the factual predicates for a valid logical syllogism do not exist.

The jury does *not* decide a preliminary question of fact if the answer to *any* of these three questions is "no." These questions need not be answered in any particular order. If one of the answers is clearly "no," the other two factors need not be evaluated. This proposed test departs from the present language of Rule 104. The proposed test, however, achieves the result apparently intended by the framers of Rule 104, which in its present form offers so little guidance as to be nearly useless.

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[27] For example, in a negligence action, the parties may not introduce evidence of either party's wealth. A juror, however, might find the facts that the defendant earns millions and that the plaintiff earns nothing helpful in resolving who should pay for the plaintiff's injuries. Thus, the rule of relevancy channels the jurors' inferences toward the material elements of duty, breach, causation, and damages.

[28] For a discussion of rules which exclude evidence on grounds other than relevancy, see *infra* notes 67-77 and accompanying text. The Federal Rules of Evidence provide specialized applications of the 104(b) principle. *See, e.g.*, FED. R. EVID. 602 (stating jury determines whether witness has personal knowledge); FED. R. EVID. 901 (requiring jury to determine authentication or identification of document as condition precedent to admissibility of evidence); FED. R. EVID. 1008 (distinguishing court and jury functions concerning contents of writings, recordings, or photographs).

The heading of Rule 104(b) is "*Relevancy* conditioned upon fact."[29] Rule 401 defines "relevancy" as having any tendency to prove or to disprove a material fact.[30] Since Rule 401 defines "relevancy," not simply logical relevancy, the definition should not be limited to logic.[31] The Advisory Committee's note to Rule 104(b) refers to "relevancy of an item of evidence, in the large sense."[32] To have any meaning, relevancy must include logic *plus* evaluation because both produce a jury's conclusion.

The proposed test combines these two facets of relevancy. Arguably, Rule 104 implicitly adopts both facets.[33] Revising the rule to reflect the proposed test, however, would provide a clearer basis for allocating preliminary questions. Moreover, specific legislation would serve as a more direct guide than judicial adoption. Therefore, the authors propose that Congress amend Rule 104 of the Federal Rules of Evidence to read:

RULE 104: PRELIMINARY QUESTIONS: FUNCTIONS OF JUDGE AND JURY

(a) The court shall commit a preliminary question upon which the admissibility of an item of evidence depends to the jury for determination if the following conditions are met:

(1) The preliminary question is one of fact; and

(2) The proponent introduces evidence sufficient to support a jury finding that the preliminary fact exists;[34] and

(3) A reasonable juror

(A) would consider and resolve the preliminary factual question if the juror makes any use of the evidence; and

(B) would necessarily resolve the preliminary factual question before making any inference based on the evidence as to

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[29] FED. R. EVID. 104(b) (emphasis added).

[30] FED. R. EVID. 401 uses the phrase "fact that is of consequence to the determination of the action" as the definition of a material fact to avoid using the "ambiguous word 'material.'" FED. R. EVID. 401 advisory committee's note, *reprinted in* 28 U.S.C. app. at 688 (1982). Thus, materiality is incorporated into the concept of relevancy.

Material facts are matters properly provable in the case: "The fact[s] to be proved may be ultimate, intermediate, or evidentiary." *Id.* One must identify the action's material facts before one may determine what evidence is relevant to prove those facts. The authors use the term "material" in the sense defined by the Federal Rules of Evidence.

[31] For a discussion of logical relevancy, see *infra* notes 57-59 and accompanying text.

[32] 28 U.S.C. app. at 681 (1982). For a further discussion of the committee notes on this issue, see *infra* notes 49-51.

[33] *See infra* notes 48-63 and accompanying text.

[34] FED. R. EVID. 104(b) adopts this standard for jury questions. The appropriate standard of proof for judge questions is beyond this article's scope.

> the existence or nonexistence of a fact of consequence to the determination of the action; and
> (C) would completely disregard the evidence if the juror found the preliminary fact not to exist.
> (b) The court shall determine all other preliminary questions, whether of fact or otherwise, which affect the admissibility of evidence. Rules of evidence other than those based on privilege do not bind the court in making its determination.

Note that subsection (a) of this revision, in contrast to Rule 104, deals with jury questions. The authors find it unproductive to define judge questions other than in the negative. The proposed test would not revise the remainder of Rule 104.[35]

The balance of this article clarifies the proposed test by applying the test to specific cases and rules which have dealt with preliminary questions of fact. In contrast to the confusion often reigning in this area, the proposed test consistently allocates preliminary questions of fact between judge and jury.

Initially, Section I examines the rules of evidence by focusing on peculiar characteristics which define relevancy and which distinguish relevancy from other rules.[36] The article then translates these characteristics into the proposed test.[37] Section II analyzes *Huddleston v. United States*.[38] In *Huddleston*, the Supreme Court resolved a dispute among the federal circuit courts of appeal concerning the allocation of a preliminary factual question under Rule 104. *Huddleston* is the most recent in a series of major Supreme Court decisions involving the interpretation of Rule 104.[39] *Huddleston* correctly rejected the erroneous

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[35] FED. R. EVID. 104 states in part:

> (c) HEARING OF JURY. — Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.
> (d) TESTIMONY BY ACCUSED. — The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.
> (e) WEIGHT AND CREDIBILITY. — This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

[36] *See infra* notes 43-88 and accompanying text.

[37] *See infra* notes 89-99 and accompanying text.

[38] 108 S. Ct. 1496 (1988). *See infra* notes 100-28 and accompanying text.

[39] *See, e.g.*, Bourjaily v. United States, 483 U.S. 171 (1987) (holding that judge determines preconditions for coconspirator statements); Lego v. Twomey, 404 U.S. 477 (1972) (holding that preponderance of evidence standard applies in determination of confession's voluntariness); Jackson v. Denno, 378 U.S. 368 (1964) (holding that trier

allocation of judge and jury functions made by some lower courts. The proposed test, however, offers a more solid footing for the decision.

Following this analysis, Section III considers two of the most troublesome problems in the allocation of functions between judge and jury. The first occurs when the resolution of a preliminary factual question determines both the evidence's admissibility and a material fact in the case.[40] The proposed test allocates all of these preliminary questions to the judge. To exemplify, this article compares a Supreme Court decision with the California Evidence Code. The second problem arises when the declarant's identity affects both the relevancy and the admissibility of evidence.[41] These troubled areas clearly demonstrate the proposed test's utility.

I. Evidentiary Rules of Inclusion and Exclusion

The Anglo-American system of justice resolves legal disputes by employing structured rules of evidence, rules of inclusion or exclusion of evidence, rather than permitting an evidentiary free-for-all.[42] An objection based on an evidentiary rule of inclusion or exclusion usually raises a Rule 104 issue.

A. Relevancy — The Touchstone of the Law of Evidence

1. In General

The Federal Rules of Evidence adopt two fundamental principles. First, courts admit all relevant evidence, with certain exceptions. Second, courts exclude all irrelevant evidence.[43] These principles "are 'a presupposition involved in the very conception of a rational system of evidence.' "[44] Relevancy, therefore, provides the starting point for determining the admissibility of evidence. If a proponent meets this fundamental requirement, the evidence is at least potentially admissible.

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of fact must make "clear cut" determination of confession's voluntariness prior to confession's introduction into evidence).

[40] For a discussion of this troublesome area, see *infra* notes 129-64 and accompanying text.

[41] For a discussion of this troublesome area, see *infra* notes 165-79 and accompanying text.

[42] *See generally* McCormick, *supra* note 1, § 53, at 135 (discussing general concept of exclusionary rules).

[43] *See* Fed. R. Evid. 402.

[44] Fed. R. Evid. 402 advisory committee's note, *reprinted in* 28 U.S.C. app. at 689 (1982) (quoting J. Thayer, A Preliminary Treatise on Evidence at the Common Law 264 (1898)).

Given these fundamental principles, one must clearly understand relevancy to comprehend the law of evidence. An understanding of the true concept of relevancy requires a precisely defined vocabulary. The concept of relevancy involves four facets. Those four facets are: 1) relevancy "in the large sense;"[45] 2) the logical aspect of relevancy; 3) the factual aspect of relevancy; and 4) the legal aspect of relevancy.[46] This subsection considers only the first three aspects of relevancy.[47]

This article defines relevancy "in the large sense" as incorporating both logical *and* factual aspects of relevancy. Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[48] The drafters of the Federal Rules of Evidence intended Rule 401 to define the concept of relevancy. They apparently believed, however, that relevancy "in the large sense" included only logical relevancy.[49] The drafters' belief was erroneous. Rule 401's standard requires an evaluation of the facts and evidence in the case because logic alone cannot determine if evidence has any tendency to prove or to disprove a material fact.[50]

The conventional interpretation of Rule 401 as involving only the logical aspect of relevancy is too restrictive. This view reads the standard as "any tendency [*in logic*][51] to make more probable or less proba-

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[45] *See* FED. R. EVID. 104(b) advisory committee's note, *reprinted in* 28 U.S.C. app. at 681 (1982). As used herein, relevancy "in the large sense" encompasses both the logical and factual components. *See infra* notes 52-61 and accompanying text.

[46] This aspect concerns policies other than relevancy which require the exclusion of evidence. For example, a court may exclude evidence because of its potential for unfair prejudice. FED. R. EVID. 403.

[47] For a consideration of the fourth aspect, see *supra* note 9 and *infra* notes 67-77 and accompanying text.

[48] FED. R. EVID. 401.

[49] The Advisory Committee intended the definitional content of Rule 401 to encompass the totality of the meaning of relevancy. The Committee thought, "Passing mention should be made of *so-called* 'conditional' relevancy. . . . The problem *is one of fact* and the only rules needed are for the purpose of determining the respective functions of judge and jury." FED. R. EVID. 401 advisory committee's note, *reprinted in* 28 U.S.C. app. at 688 (1982) (emphasis added).

[50] Note that Rule 401's text does not limit the definition of relevancy to logical considerations.

[51] The Advisory Committee intended to expand the definition of "logic." *See* FED. R. EVID. 401 advisory committee's note, *reprinted in* 28 U.S.C. app. at 688 (1982). This note states that, "Whether the relationship [relevancy] exists depends upon principles evolved by experience or science, applied logically to the situation at hand." *Id.* The note continues by stating that previous Uniform Rule 1(2), which stated the rule

ble" a material fact. This interpretation focuses solely on the discernment of rational connections between given facts. The next subsection reveals the error in this limited interpretation by incorporating the concept of "conditional" relevancy into the definition of Rule 401's standard.

2. Questions for the Jury Under Rule 104(b) and the Meaning of "Conditional" Relevancy

Rule 104(b), "Relevancy conditioned on fact," concerns the factual aspect of relevancy. Factual or "conditional" relevancy simply requires the determination of whether factual assumptions in a logical syllogism are valid, and thus, whether the syllogism is validly employed in the case. Conditional relevancy links logical relevancy and relevancy "in the large sense." The evidence's logical tendency to prove or to disprove depends upon a factual determination that the proper premises for a valid logical inference exist.[52] If the evidence has no tendency to prove or to disprove a material fact in the absence of the preliminary fact's existence, the jury decides the preliminary question of fact.[53]

Thus, the determination of an item of evidence's relevancy necessitates a two-step process. Using Rule 401's standard, the judge performs the first step, a logical analysis. The evidence, *assumed* to be true and genuine, must logically tend to establish a material fact. The second step mandates a factual evaluation: *Is* the evidence true and genuine? Relevancy "in the large sense" simply means the combination of logic and factual evaluation, since the validity of a logical syllogism depends upon both.

For example, a prosecutor in a murder case seeks to introduce love letters allegedly written by the defendant to the victim's wife.[54] The

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as a "tendency in reason," was "perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle." *Id.*

[52] In trial language, this step requires the proponent to "lay the foundation" for admission.

[53] Conversely, if the evidence has a tendency to prove or to disprove a material fact in the absence of the preliminary fact's existence, the judge decides the preliminary question of fact. By itself, however, this analysis proves inadequate. If the preliminary and material facts coincide, and the jury finds the preliminary fact not to exist, the evidence becomes irrelevant. The jury, however, does not determine the evidence's irrelevancy until after resolving the material fact. For a discussion of this problem in the context of coconspirator statements, see text accompanying *infra* note 148.

[54] This article borrows this classic example from E. MORGAN, BASIC PROBLEMS OF EVIDENCE 185-88 (1961).

judge initially determines if the letters are logically relevant. If the defendant loved the victim's wife, the defendant more likely had motive and intent to kill the victim. Motive and intent are "facts of consequence to the determination of the action."[55] The judge resolves any dispute as to the validity of this series of inferences. The second, evaluative step means simply that the letters are logically relevant *only if* the defendant did, in fact, write the letters. This is the "condition of fact" which must be fulfilled and which Federal Rule of Evidence 104(b) assigns to the jury for determination. Thus, the love letters are "conditionally" relevant.

Applying the classical syllogism in deductive logic[56] to the above example clarifies the meaning of conditional relevancy. How is the evidence, a love letter to *V*'s wife, relevant to the murder charge? The prosecution's relevancy argument, in syllogistic form, follows:

> *MAJOR PREMISE*: One who writes love letters to a murder victim's wife more likely had a motive to kill *V* than if the letters had not been written.
>
> *MINOR PREMISE*: *D* wrote love letters to *V*'s wife.
>
> *CONCLUSION*: *D* more likely had a motive to kill *V*.

The major premise is a *logical* prediction of human behavior based on a *given set of facts* (the evidence as alleged by the proponent).[57] The judge determines the evidence's *logical* relevancy:[58] whether the evidence is a valid logical indicator of the existence of *D*'s motive to kill. If the judge believes that the evidence satisfies the logical connection,[59] then the judge admits the letters to prove motive to kill.[60] Once admitted, we also trust that the jurors will make the same rational connection between the evidence and the conclusion. The judge does not instruct the jury that the love letters may prove the factual issue of motive. We

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[55] FED. R. EVID. 401.

[56] *See* James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 694-99 (1941) (discussing deductive syllogism's utility in connection with relevancy analysis).

[57] This proposition corresponds with FED. R. EVID. 901(a)'s language: "Evidence sufficient to support a finding that the matter in question is what its proponent claims."

[58] Thus, *logical* relevancy presents an admissibility of evidence problem for the judge under FED. R. EVID. 104(a).

[59] The judge must make this determination based on an assessment that experience or science supports a logical connection between the evidence and the ultimate conclusion. This is not a matter that can be proven; it need not even be true. *See* FED. R. EVID. 401 advisory committee's note, *reprinted in* 28 U.S.C. app. at 688 (1982).

[60] The judge must also find that the proponent introduced sufficient evidence to support a jury finding that *D* wrote the letters. In terms of trial practice, if the proponent has laid a "proper foundation," the judge will admit the evidence. *See supra* note 19.

expect the jurors to make the appropriate logical inferences on their own.[61]

The validity of the whole syllogism stands on the factual minor premise as well as the logical major premise. The minor premise is the "condition of fact." Assuming that the jury finds the minor premise to be true, then the syllogism's conclusion is presumably valid. The syllogism then becomes relevant "in the large sense." The structure of the logical syllogism forms the basis for the proposed test because the minor premise must be resolved before the conclusion can be reached, and the conclusion will not follow if the minor premise does not exist.

Conditional relevancy questions occur repeatedly in every trial. Specific rules may govern a particular conditional relevancy question. For example, Federal Rule of Evidence 602[62] permits a witness to testify only if the witness has personal knowledge of the events to which the witness testifies. The witness' knowledge presents a condition of fact, which the proponent must fulfill before the witness' testimony becomes relevant. Federal Rule of Evidence 104(b) would clearly govern the question of personal knowledge even if Rule 602 did not specifically cover this recurring question.[63]

As a final note, relevancy itself serves as an exclusionary rule of evidence. "Evidence which is not relevant is not admissible."[64] A judge may exclude irrelevant evidence on that ground alone. Thus, as a preliminary matter, the judge may exclude evidence on grounds of logical irrelevancy[65] or based on a determination that the proponent failed to

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[61] The judge may tell the jury to limit its consideration of the evidence. For example, the judge may instruct the jury not to use the evidence for certain issues on which the evidence may be clearly probative, but inadmissible. FED. R. EVID. 105; *see also supra* note 9.

[62] FED. R. EVID. 602 states:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding the he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

[63] *See* FED. R. EVID. 602 advisory committee's note, *reprinted in* 28 U.S.C. app. at 699 (1982). The committee note states that the jury decides this question under Rule 104(b). *Id.*; *see also* FED. R. EVID. 901(a) (governing authentication and identification of evidence prior to its introduction at trial). Rule 901 uses the "sufficient to support a finding" language. The committee note also expressly states that Rule 104(b) governs Rule 901's procedure. *See* FED. R. EVID. 901 advisory committee's note, *reprinted in* 28 U.S.C. app. at 738 (1982). The love letter must meet Rule 901's preconditions before the court will admit the letter.

[64] FED. R. EVID. 402; *see also* CAL. EVID. CODE § 350 (West 1966).

[65] FED. R. EVID. 401.

show sufficient facts to support a jury finding that a preliminary fact exists.[66]

B. Exclusionary Rules Based on Policies Other Than Irrelevancy

1. In General

The judge may also exclude relevant evidence based on other rules of evidence,[67] rules of civil or criminal procedure, other legislative enactments, or state or federal constitutional considerations.[68] These evidentiary rules further policies important to our overall social structure. These policies, however, conflict with the jury's primary purpose of doing substantive justice in the case by depriving the jury of evidence relevant to material issues.[69]

The hearsay rule probably excludes more relevant evidence than any other rule. The hearsay rule furthers a legal policy of excluding evidence of questionable trustworthiness.[70] The shortcomings of these out-of-court statements include: The declarant makes these statements while not under oath; the jury cannot scrutinize these statements when the declarant makes the statements; and the opponent may not have an opportunity to cross-examine the declarant.[71]

Additionally, the Supreme Court has articulated a number of rules which exclude evidence to further constitutional principles. One of the

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[66] FED. R. EVID. 104(b).

[67] *See, e.g.*, FED. R. EVID. 802 (stating that hearsay is admissible in limited circumstances).

[68] Thus, FED. R. EVID. 402 states, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." For a discussion of the various evidentiary restrictions in the stated categories, see FED. R. EVID. 402 advisory committee's note, *reprinted in* 28 U.S.C. app. at 689 (1982).

[69] *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976). *Stone* involved a fourth amendment search and seizure issue. Writing for the majority, Justice Powell stated, "The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment." *Id.* at 482. Justice Powell further explained that, "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *Id.* at 485.

[70] *See* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 179-85 (1948); *see also* Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958-61 (1974) (discussing testimonial infirmities of ambiguity, insincerity, faulty perception, and erroneous memory).

[71] *See generally* MCCORMICK, *supra* note 1, § 245, at 726-28 (discussing problems associated with out-of-court statements).

best known, "the exclusionary rule," prohibits the prosecution from introducing evidence obtained in violation of the fourth amendment.[72] This rule furthers the policy of deterring unlawful police conduct in searches and seizures.[73] Under certain circumstances, the Constitution also requires the exclusion of a criminal suspect's confession when law enforcement officials fail to advise the suspect of her rights to remain silent and to counsel.[74] This rule seeks to prevent police overbearing during questioning of suspects.[75] Privileges, either constitutional[76] or legislative,[77] provide some of the most fundamental policy-based rules excluding relevant evidence.

2. Questions for the Judge Under Rule 104(a) and the Meaning of "Competency"

Morgan's "competency" of evidence means the evidence's admissibility, apart from its basic probative value (relevancy). This is also what the drafters of Rule 104(a) meant by "admissibility." "Competency" thus refers to whether the evidence is admissible under one of the policy-based exclusionary rules discussed in the preceding subsection.

For example, nothing could be more relevant to a prosecution for possessing narcotics than evidence that the defendant had heroin in her coat when police officers arrested her. The judge must exclude that

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[72] Weeks v. United States, 232 U.S. 383, 398 (1914) (establishing exclusionary rule in federal cases); *see also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying exclusionary rule to states).

[73] *Mapp*, 367 U.S. at 656. The Court originally justified the exclusionary rule as protecting the integrity of the judicial system. *See Weeks*, 232 U.S. at 392. The Court probably has narrowed the justification to deterrence. *See* Brewer v. Williams, 430 U.S. 387, 421 (1977) (Burger, C.J., dissenting) (stating that Court has "repeatedly emphasized that deterrence of unconstitutional or otherwise unlawful police conduct is the only valid justification for excluding reliable and probative evidence from the criminal factfinding process").

[74] Miranda v. Arizona, 384 U.S. 436 (1966). Whether the Constitution mandates this exclusionary rule is beyond the scope of this article.

[75] *See id.* at 445-47.

[76] *See, e.g.*, U.S. CONST. amend. V (privilege against self-incrimination); U.S. CONST. amend. VI (rights to confrontation and to counsel).

[77] FED. R. EVID. 501 governs privileges in federal courts. This rule provides that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts." *Id.* In civil cases in which state law provides the rule of decision, applicable state law controls privileges. The Supreme Court has spoken on the subject of privileges on many occasions. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383 (1981) (attorney-client); Trammel v. United States, 445 U.S. 40 (1980) (marital); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination). Statutes prescribe privileges in many states. *See, e.g.*, CAL. EVID. CODE §§ 930-1070 (West 1988).

evidence, even though highly probative, if the police had no probable cause to search the coat.[78] The existence of probable cause to search involves a preliminary question of fact[79] upon which the competency, and thus the admissibility, of the evidence depends.

The relevancy of this evidence does not depend upon the factual existence of probable cause. The evidence remains highly relevant even if police engaged in Gestapo tactics. The question becomes whether, as a matter of social and legal policy, the judge will allow the jury to hear the evidence and to draw the appropriate logical inferences as to the case's material issues.[80] The social values underlying the fourth amendment require the judge to exclude the evidence. The evidence is not competent unless the preliminary fact, probable cause to search, exists. Federal Rule of Evidence 104(a) commits this question to the judge.

The ability to make the decision does not determine who decides. No inherent difficulty resides in these factual determinations which would render the jury incapable of understanding the evidence. Morgan noted that "it is not a whit more difficult for the jury to determine the existence" of a preliminary question of fact which determines the competency of evidence.[81] Leaving the question of probable cause to the jury, however, poses a variety of problems.

For example, the jury usually renders a general verdict, rather than a separate verdict, on all material issues. A general verdict would not indicate the resolution of whether probable cause existed.[82] Therefore, a record for review would require a special set of preliminary jury findings.[83] Additionally, if the evidence is inadmissible, preventing jury contamination may prove impossible.

If the jury decided such preliminary questions of fact, courts would

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[78] "The exclusionary rule" mandates the exclusion of this evidence. For a brief discussion of this rule, see *supra* notes 72-73 and accompanying text.

[79] The preliminary question of probable cause involves a mixed question of law and fact falling on the pure legal end of the continuum. The determination of fact intertwines with the legal definition of what constitutes "probable cause." For a discussion of mixed questions of law and fact, see *supra* note 20.

[80] The judge must determine whether the jury may hear evidence of the defendant's possession of heroin so that the jury may determine the material fact of whether the defendant had knowledge of and possessed the heroin.

[81] Morgan, *supra* note 15, at 167.

[82] The general verdict would simply indicate guilt or innocence.

[83] *See, e.g.*, Jackson v. Denno, 378 U.S. 368 (1964). The Court held that the defendant has a constitutional right to a "clear-cut determination" that his confession was voluntary prior to admission of the confession. *Id.* at 391; *see also* Lego v. Twomey, 404 U.S. 477, 489 (1972) (holding that jury may make determination of voluntariness by preponderance of evidence).

further the social values underlying the fourth amendment incompletely, if at all.[84] The jury may not even consider whether police acted improperly prior to using the fact of defendant's possession of heroin to determine defendant's guilt or innocence. Additionally, a reasonable juror would not completely disregard the evidence if the juror found the search improper. The juror may give the evidence less *weight.* Police lawlessness may even offend the juror. Nevertheless, the juror will not ignore the evidence. More likely, the juror will condemn both the police and the defendant.

Other factual "questions of admissibility" under Rule 104(a) include privileges of parties and witnesses,[85] whether a document satisfies the best evidence rule,[86] and whether a statement qualifies under an exception to the hearsay rule.[87] These represent recurring questions of admissibility which the judge determines under Rule 104(a). In these areas, little dispute exists in the federal courts.[88]

C. *Distinguishing the Functions of Judge and Jury: A Proposed Test*

The traditional concept that the jury determines facts and the judge decides the law necessitates a division of functions between judge and jury.[89] This article proposes a test to determine the proper division. Characteristics of relevancy questions, which make them appropriate for the jury to decide, form the basis of this proposed test.

The previously mentioned example of love letters allegedly written

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[84] If the judge admitted this evidence for the jury to consider, police would not be deterred from acting improperly in the future. *See* Mapp v. Ohio, 367 U.S. 643, 656 (1961).

[85] *See* FED. R. EVID. 501 (discussing privileges of witness, person, government, or political subdivision).

[86] *See, e.g.*, FED. R. EVID. 1001 (addressing question of whether proffered document is the original); FED. R. EVID. 1004 (specifying circumstances for introduction of secondary evidence). Note that FED. R. EVID. 1008 specifically allocates judge and jury functions. The rule allocates the preliminary questions to the judge, except in specified circumstances. *Id.*

[87] *See* FED. R. EVID. 803 & 804 (discussing hearsay exceptions when declarant is either available or unavailable).

[88] Of course, courts do not universally agree that the judge decides preliminary questions concerning the application of a hearsay exception. For a discussion of this division, see *infra* notes 111-12 and accompanying text.

[89] The orthodox rule stated at the beginning of this article derives from the proposition that judges decide the law and juries decide the facts. *See supra* text accompanying note 13.

by the defendant to the victim's wife[90] illustrates the characteristics of relevancy questions. The judge clearly would usurp the jury's function of deciding the material facts if she excluded the letters because *she* did not believe the defendant wrote the letters, if at the same time, she believed a reasonable juror could find otherwise. A determination of the material facts rests with the jury. The preliminary question, whether the defendant wrote the letters, "merge[s] imperceptibly into the weight of the evidence"[91] on the material issues of motive and intent to kill. If the defendant wrote the letters, the jury could find motive and intent to kill from the contents of the letters alone. If the jurors found that the defendant did not author the letters, then the letters provide no evidence of defendant's motive and intent to kill.

A reasonable juror would not overlook the question of authorship when considering the letters as evidence of defendant's motive. This establishes the first characteristic of preliminary questions of fact for the jury because a question for the jury should be one they are likely to consider. For example, a reasonable juror would probably not consider the factual predicates to many of the hearsay rule exceptions. Many factual predicates required by the hearsay rule exceptions do not invoke analogous logical and factual considerations as required by the rule of relevancy.[92]

The word "preliminary" signals the second characteristic of preliminary questions of fact for the jury. A reasonable juror must resolve the preliminary question before considering the evidence to determine material facts. A reasonable juror would not conclude that the defendant had a motive to kill the victim based on the love letters before the juror found that the defendant wrote the letters. In contrast, if a preliminary fact coincides with a material fact, no reasonable juror could resolve the preliminary fact prior to and independently from the resolution of the fact as an ultimate matter. The two requisite determinations collapse

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[90] *See supra* text accompanying note 54.

[91] DiCarlo v. United States, 6 F.2d 364, 367 (2d Cir. 1925).

[92] For example, assume that the defendant shot the declarant in a face-to-face encounter. If the declarant later accused the defendant of shooting her, the accusation would not be admissible under the hearsay exception for dying declarations unless the declarant believed that her "death was imminent." *See* FED. R. EVID. 804(b)(2). A juror would undoubtedly find the fact that the declarant had a good look at her assailant much more important than whether the declarant thought her death was imminent. The law imposes this requirement of belief in imminent death on the theory that a dying person, for psychological or religious reasons, will more likely speak the truth. FED. R. EVID. 804(b)(2) advisory committee's note, *reprinted in* 28 U.S.C. app. at 732 (1982).

into one conclusion.[93] The reason is simple. The same factual conclusion cannot serve as the minor premise of the syllogism as well as the conclusion.

The following provides the most basic reason that the judge may entrust the question of authorship to the jury: The jury will disregard the evidence if they do not find that the defendant wrote the letters. In this situation, the jury may actually draw an inference favorable to the defendant. If another suitor wrote love letters to *V*'s wife, perhaps that suitor murdered *V*. The jury, however, can draw no prejudicial inference against the defendant. Thus, the determination of this preliminary question implicates no social or legal policy which requires judicial intervention to prevent unfair prejudice.

Conversely, the jury may not decide preliminary questions of fact unrelated to the relevancy of evidence.[94] The jury would not disregard the evidence even if the jury does not find the preliminary fact to exist. In this situation, the evidence may remain relevant and may tend to prove a material fact even though the preliminary fact does not exist. The jury would consider the evidence because the jury must determine the material facts. We should not expect ordinary citizens to ignore facts and to overlook wrongdoing because of intricate, often arcane, legal policies.[95]

Thus, the ability of a reasonable juror to disregard the evidence if

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[93] *See infra* notes 148-49 and accompanying text (discussing impossibility of separating preliminary and material facts in setting of coconspirator exception). Morgan also cited coconspirator statements as an example of this problem and argued that the judge must decide these preliminary questions. Morgan, *supra* note 15, at 182-83.

Maguire and Epstein cited the case of State v. Lee, 127 La. 1077, 54 So. 356 (1911), to illustrate the problem of overlapping questions of material and preliminary facts. Maguire & Epstein, *supra* note 13, at 408-14. In *Lee*, the sole issue was whether the defendant was Mack Lee, since Mack Lee was unquestionably the murderer. *Lee*, 127 La. at 1078, 54 So. at 357. The defendant claimed he was not Mack Lee. *Id.* at 1077, 54 So. at 356. The defendant called Mack Lee's wife to the stand to testify that the defendant was not her husband. *Id.* at 1078, 54 So. at 357. The prosecution successfully prevented her from testifying on the theory that she was Mack Lee's wife, and so could not testify because of the marital incompetence rationale. *Id.* At that time, Louisiana followed rules of witness incompetency, including the rule prohibiting one spouse from testifying in a case involving the other spouse. *See id.*

Maguire and Epstein questioned whether the judge should have decided the wife's competency to testify. Maguire & Epstein, *supra* note 13, at 409-10. This article's proposed test corresponds with the judge's decision. The concern remains, however, that the court deprived the defendant of his best witness.

[94] These unrelated rules involve legal and social policy. *See supra* notes 67-77 and accompanying text.

[95] For an example of such a rule, see *supra* note 92.

the juror does not find the preliminary fact to exist constitutes the third characteristic of a relevancy question for the jury. The above probable cause to search example[96] clearly raises a Rule 104(a) question for the judge for this reason. The heroin in the coat remains relevant to the crime of possession, notwithstanding the nonexistence of the preliminary fact, the existence of probable cause. Because the legal policy of admitting all relevant evidence to resolve disputes conflicts with the social policy of deterring unlawful police conduct,[97] the judge must determine this preliminary question. The jurors would not ignore the evidence if they found that probable cause to search did not exist.

Thus, these three characteristics form the test for allocating preliminary questions of fact and define a question of "relevancy conditioned on fact" under Rule 104(b). The proposed test allocates the preliminary question of fact to the jury if: 1) a reasonable juror would not overlook the preliminary question of fact if the juror considers the evidence; 2) a reasonable juror would decide the preliminary question of fact before considering the evidence to determine a material fact; and 3) a reasonable juror would completely disregard the evidence if the juror does not find the preliminary fact to exist.

Preliminary questions of fact range from pure Rule 104(b) jury questions to pure Rule 104(a) judge questions. Under the proposed test, pure 104(b) "conditional" relevancy questions meet all three requirements; pure 104(a) "competency" questions meet none. The most serious difficulties arise in cases in which a material fact is identical to a preliminary fact. Such questions usually satisfy one or two of the test's requirements, but not all three.[98]

The proposed test demonstrates that the judge should decide all of these troublesome questions to ensure consistent applications of the evidentiary rules of inclusion and exclusion. Professor Morgan noted that giving the jury preliminary questions, upon which the application of a nonrelevancy rule depends, negates that evidentiary rule.[99]

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[96] *See supra* note 78 and accompanying text.

[97] Morgan implicitly stated the notion that competency questions involve competing policy considerations. Morgan, *supra* note 15, at 178. Kaplan explicitly stated this idea. Kaplan, *supra* note 10, at 990. The policy of deterring improper police conduct outweighs the admission of all relevant evidence, resulting in an exclusion of the evidence if probable cause to search did not exist.

[98] For an example of this problem, see *infra* notes 130-64 and accompanying text.

[99] Morgan, *supra* note 15, at 189-91.

II. Applications of the Proposed Test

The proposed test offers a principled basis for uniform allocations of preliminary factual questions between judge and jury. The allocation resulting from the test may cause dissatisfaction. Nonetheless, the present version of the Federal Rules of Evidence mandates the allocation. Rather than shifting the allocation of functions between judge and jury, changing the particular rule of exclusion or inclusion better addresses dissatisfaction.

A. *An Analysis of the Supreme Court's Decision in* Huddleston v. United States

The following analysis of the most recent Supreme Court ruling in this area clarifies the proposed test's application. Furthermore, this analysis demonstrates that although the Supreme Court properly allocated the Rule 104 functions, the proposed test offers a more satisfactory basis for the Court's decision. The case, *Huddleston v. United States*,[100] involved the introduction of evidence of uncharged, "similar acts" of a defendant.[101] The prosecution sought to admit this evidence to prove knowledge in a case involving knowing possession and sale of stolen videotapes.

The jury convicted the defendant of possessing recently stolen property in interstate commerce, a federal offense.[102] The trial focused on the defendant's claim that he lacked knowledge that the videotapes had been stolen. The defendant contended that a man named Wesby gave him the videotapes to sell on a commission basis.[103]

To refute this claim and to support the essential element of knowledge, the prosecution introduced the testimony of Paul Toney, a record store owner. Toney testified that about two months prior to the videotape transaction, defendant offered to sell him several thousand new black and white televisions for $28 a set.[104] Toney further testified that he eventually purchased thirty-eight of these televisions through defendant.[105] Huddleston admitted his involvement in these transactions

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[100] 108 S. Ct. 1496 (1988).

[101] For the text of the rule governing similar acts evidence, see *infra* note 106.

[102] *Huddleston*, 108 S. Ct. at 1498. The prosecution also charged the defendant with selling the stolen videotapes. The jury convicted him only on the possession count. *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* The low price and the defendant's inability to produce a bill of sale provided the only proof that the televisions were stolen. *Id.* at n.1. An FBI agent, Robert Nelson,

and stated that Wesby had provided the televisions.

The prosecution sought to introduce this evidence at trial pursuant to Federal Rule of Evidence 404(b). This rule prohibits the use of similar acts evidence to prove a defendant's propensity to commit crimes, but allows the use of similar acts evidence for other purposes.[106] The admissibility of this similar acts evidence depended upon the determination of the following preliminary questions:

1. Is the evidence relevant for a purpose other than propensity. Specifically, is the evidence relevant to prove defendant's knowledge; and
2. Had the defendant previously sold stolen goods that he had obtained from the same suspicious source, Wesby.

Question one is not a question of fact. The question presents the task of determining logical relevancy, which the judge must decide.[107] The Court stated, "The Government's theory of relevance was that the televisions were stolen, and proof that [defendant] had engaged in a series of sales of stolen merchandise from the same suspicious source would be strong evidence that he was aware that each of these items, including the [video]tapes, was stolen."[108] The lower courts had uniformly, and correctly, allocated the first preliminary question to the judge.[109]

Question two presents a preliminary question of fact. The issue in *Huddleston* centered on who, judge or jury, should decide this question. A division existed among lower federal courts.[110] Some circuit courts required the judge to decide the second question before submitting the evidence to the jury.[111] Other circuit courts required the judge

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testified for the prosecution. As part of an undercover operation, Nelson purchased stolen appliances from Huddleston and Wesby shortly after Huddleston's sale of televisions to Toney. *Id.* From this evidence, the Court stated, "It was determined that the appliances . . . were . . . stolen." *Id.*

[106] FED. R. EVID. 404(b) states:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[107] For a discussion of logical relevancy, see *supra* note 57 and accompanying text.

[108] Huddleston v. United States, 108 S. Ct. 1496, 1499 (1988) (footnote omitted).

[109] *Id.* The judge must decide this question because the evidence remains logically probative even if offered to prove propensity. Although relevant, FED. R. EVID. 404(b) prohibits the use of similar acts evidence to prove propensity. Thus, the judge, to admit the evidence, must find that the evidence is relevant for another, proper purpose.

[110] *Huddleson*, 108 S. Ct. at 1499.

[111] The Court noted that the Second and Sixth Circuits "prohibit[] the introduction of similar act evidence unless the trial court finds by a preponderance of the evidence that the defendant committed the act." *Id.* at n.2.

to determine that the evidence established the existence of the similar act by a standard greater than a preponderance of the evidence.[112]

In a unanimous opinion, the Supreme Court held that the preliminary question of fact was a Rule 104(b) question for the jury.[113] Therefore, the judge must first decide that the evidence proves something other than propensity (preliminary question one). The jury must then decide whether Huddleston had sold stolen goods before under suspicious circumstances (preliminary question two).[114]

The Court correctly decided the case. The Court, however, failed to provide any clear explanation as to how the Court reached its decision. Justice Rehnquist simply stated: "In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. . . . Such questions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b)."[115] The critical question remains unanswered. Why is it a relevancy question under Rule 104(b) and not a Rule 104(a) question?

The proposed analysis reveals why the jury decides this preliminary question. The analysis also exposes the real source of dissatisfaction with the use of similar acts evidence, which changing the allocation of functions will not relieve.

Federal Rule of Evidence 404(b)[116] prohibits the use of similar acts evidence to prove propensity. A party, however, may introduce similar acts evidence if the similar acts are relevant for a proper purpose, such as knowledge, intent, or motive.[117] In determining the evidence's logical relevancy, the judge must find that the similar acts have a tendency to prove a proper issue and that the proponent does not seek to use the similar acts to prove propensity. The prosecutor in *Huddleston* persuaded the judge that the prior sales of stolen televisions had a logical tendency to prove that the defendant knew the videotapes were stolen.

The only remaining question of fact then became whether Huddleston had engaged in the prior sales of stolen televisions. If so, this finding would support the prosecution's theory that the defendant knew or should have known that the videotapes were stolen. This pre-

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[112] The Court further explained that, "The Seventh, Eighth, Ninth, and District of Columbia Circuits require the Government to prove to the court by clear and convincing evidence that the defendant committed the similar act." *Id.*

[113] *Id.* at 1501.

[114] *Id.* at 1500-01.

[115] *Id.* at 1501.

[116] For the text of this rule, see *supra* note 106.

[117] FED. R. EVID. 404(b).

liminary question of fact raises the issue of who should decide that question. Let us first break the prosecution's argument on relevancy into a syllogism:

> MAJOR PREMISE: One who has previously sold stolen goods obtained from a suspicious source more likely has knowledge that goods obtained from the same source on this occasion were stolen.
>
> MINOR PREMISE: Defendant has previously sold stolen goods obtained from a suspicious source.
>
> CONCLUSION: Defendant more likely had knowledge that the goods he sold on this occasion were stolen.

The minor premise poses the preliminary factual question of whether the defendant made the prior sales of stolen televisions under suspicious circumstances. The proposed test reveals that the judge can safely entrust this question to the jury.

1. Would a Reasonable Juror Necessarily Consider and Resolve the Preliminary Question When Considering the Similar Acts Evidence?

A rational juror would not make any, not even an improper, use of the similar acts evidence if the juror did not believe that the defendant sold stolen televisions under suspicious circumstances. Thus, when considering the similar acts evidence, the juror must necessarily resolve the preliminary question of whether the defendant did in fact commit those acts.[118] The juror could not easily overlook this preliminary question of fact.

2. Would a Reasonable Juror Resolve the Preliminary Question of Fact Prior to Making Any Use of the Similar Acts Evidence in Resolving the Material Issues?

Notice that this second question focuses on the order of resolution of preliminary and material fact issues and not on consideration of those issues. The jury's often free-wheeling consideration of issues may occur in any order. The logical syllogism's structure, however, dictates that a jury could not use the similar acts evidence to *resolve* the material issue, whether the defendant knew the videotapes were stolen, before the jury determined whether the defendant committed the similar past acts.

An example will illustrate this distinction between resolution and

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[118] The jurors did not need to take an actual vote on the preliminary question. In this case, Huddleston admitted to the prior transactions. *Huddleston*, 108 S. Ct. at 1498. Whether the televisions were stolen posed the only question.

consideration of issues. A juror may conclude that the similar acts would tend to prove that the defendant knew the videotapes were stolen. Then the juror's attention may turn to whether the defendant engaged in the prior sale of stolen televisions. The juror, however, would not conclude that the defendant had knowledge based on the similar acts evidence until the juror decided that the defendant previously sold stolen televisions and was more than an innocent participant. These factual conclusions must occur prior to the juror's resolution of the material fact because the preliminary factual question forms the syllogism's minor premise. The minor premise establishes the evidence's relevancy to the material fact.

3. Would a Reasonable Juror Completely Disregard the Similar Acts Evidence if the Juror Did Not Believe that the Defendant had Committed the Similar Acts?

Common sense dictates that a reasonable juror would not consider evidence of events that the juror did not think occurred. Specifically, a juror would not find any probative value in legitimate television sales. The defendant might even gain sympathy if the jury believes that the prosecution attempted to convict the defendant based on a litany of fabricated events. In any event, no reasonable juror would find any probative value in the false evidence because this false evidence renders the syllogism factually invalid.[119] Thus, the juror would completely disregard the evidence because the evidence of similar acts becomes irrelevant.

Since the evidence fulfills all three prongs of the test, the trial judge in *Huddleston* could have trusted the jury to determine the preliminary fact. If, however, similar acts evidence presents no risk of prejudicing the jury if the jury finds that the defendant did not commit the similar acts, why have so many judges removed this preliminary question of fact from the jury?[120]

Courts fear that the jury will consider the similar acts evidence for its improper purpose, *after* the jury finds that the defendant committed those acts. This fear motivated some circuit courts to take the preliminary question away from the jury. These judges sought to alleviate the prejudice by first satisfying themselves that the defendant committed the similar acts.

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[119] The absence of the minor premise renders the syllogism invalid.

[120] For a discussion of circuits which removed this issue from the jury, see *supra* notes 111-12.

This approach fails to provide a solution. The jury may still make improper use of the evidence even if the *judge* determines that the defendant committed the similar acts. The real problem, which the reallocation of fact-finding responsibility cannot address, lies with the jury's use of similar acts evidence to convict the defendant on a "bad person" theory. In the proper syllogism, a juror would infer the defendant's *knowledge* that the videotapes were stolen. In the improper syllogism, a juror would infer that the defendant had *acted* in conformity with his previous behavior. In other words, because Huddleston previously possessed and sold stolen property, Huddleston probably possessed and sold stolen property on this occasion.

The proposed analysis focuses the concern. The jury may use the improper major premise because each syllogism includes the same minor premise. The prosecution's proper theory of relevancy contained the following major premise: One who knows he has sold stolen goods before more likely has *knowledge* that he is now selling stolen goods. The improper major premise is: One who has sold stolen goods before more likely is *selling* stolen goods again. In either syllogism, the minor premise is: The defendant has previously sold stolen goods.

Federal Rule of Evidence 403[121] properly addresses concern over improper use of similar acts evidence by the jury. The question becomes whether the likelihood of the jury using the improper major premise (propensity) substantially outweighs the likelihood that the jury will use the proper major premise (knowledge). In *Huddleston*, the defendant admitted to possession and sale of the stolen videotapes.[122] The jury only needed to determine the defendant's knowledge.[123] Thus, the jury would probably not use the evidence for its improper purpose because the jury did not need to decide whether the defendant had *acted* in a particular manner. The inherent risk in allowing evidence of two similar acts to go to the same jury presented the only risk of prejudice. Rule 404(b) allows the jury to hear this evidence notwithstanding the potential risk.

The defendant would have created a more difficult Rule 403 question if he had not admitted to possession and sale of the videotapes. In this situation, the jury may consider the similar acts while resolving the

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[121] FED. R. EVID. 403 provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[122] 108 S. Ct. at 1498.

[123] *Id.*

question of whether the defendant possessed and sold stolen goods on this occasion. Nonetheless, Congress apparently intended to make such evidence readily admissible.[124] Thus, the possibility of excluding similar acts evidence properly offered under Rule 404(b) becomes negligible. A judge may still exclude similar acts evidence under Rule 403 if additional factors further increase the risk that the jury will use the improper major premise. Such additional factors include the heinousness of the similar acts, the complexity of transactions involving the similar acts, or the sheer number of similar acts makes it unlikely that the jury could disregard the improper premise.[125]

Because Rule 404 requires courts readily to admit similar acts evidence, Rule 403 serves as an inadequate safeguard against potential jury misuse. As already discussed,[126] Rule 104 offers no solution. Despite the Court's assurances,[127] courts may have no means to alleviate the risk of jury misuse. In the absence of constitutional objections to *Huddleston*'s result, Congress must provide a solution for potential jury misuse of similar acts evidence.[128]

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[124] Justice Rehnquist concluded that, "Congress was not nearly so concerned with the potential prejudicial effect of rule 404(b) as it was with ensuring that restrictions would not be placed on the admission of such evidence." *Id.* at 1501.

[125] *See generally* MCCORMICK, *supra* note 1, § 190, at 565 (noting factors that may justify discretionary exclusion).

[126] *See supra* notes 120-21 and accompanying text.

[127] Justice Rehnquist concluded that four safeguards exist to prevent misuse of similar acts evidence. These include the proper purpose requirement of Rule 404(b); the trial court's determination of relevance for a proper purpose pursuant to Rule 402, virtually indistinguishable from the first safeguard; Rule 403's balancing test; and the limiting instruction available under Rule 105. Huddleston v. United States, 108 S. Ct. 1496, 1502 (1988).

As demonstrated, Rule 403's balancing offers little protection in knowledge and intent cases, except for heinous, complex, or numerous similar acts cases. Furthermore, the limiting instruction cannot prevent the jury from making improper use of the evidence and finding the defendant guilty because of a belief in his propensity. The judge can only *ask* the jurors not to use the evidence for its improper purpose. Thus, the only solution to this feared result requires a change to Rule 404(b).

[128] *See, e.g.*, FED. R. EVID. 412(c)(2). This rule gives the judge the preliminary questions concerning a rape victim's past sexual behavior, which otherwise the jury would decide. Moreover, the rule limits the purposes for which a proponent may introduce such evidence.

III. Problem Areas in the Allocation of Functions Between Judge and Jury

A. Coincidence of Preliminary and Material Fact: Bourjaily v. United States, *the California Evidence Code, and the Coconspirator Exception to the Hearsay Rule*

The most troublesome problem in the allocation of functions occurs when a preliminary factual question coincides with a material fact. In this situation, the preliminary question has some characteristics of a relevancy question. The preliminary question, however, fails the proposed test's second prong.[129] In *Bourjaily v. United States*,[130] the Supreme Court correctly allocated the question to the judge under Rule 104(a).[131] A comparison of that decision with the solution offered in California Evidence Code Section 1223[132] will exemplify the utility of the proposed test.

In *Bourjaily*,[133] the prosecution charged defendant with conspiracy to distribute cocaine.[134] The evidence against him included a statement implicating the defendant. An alleged coconspirator made this statement to a government informant.[135] Defendant challenged the trial court's decision to admit this statement under the coconspirator exception[136] to the hearsay rule.[137]

Federal Rule of Evidence 801(d)(2)(E) governs the admissibility of a coconspirator statement. This rule provides that a statement is not hearsay if offered against a party and is "a statement by a cocon-

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[129] The second prong requires the jury to resolve the preliminary question prior to using the disputed evidence to determine a material fact.

[130] 483 U.S. 171 (1987).

[131] *Id.* at 175. In *Bourjaily*, the prosecution charged the defendant with conspiracy. Even in the absence of this charge, however, the proposed test requires the judge to determine the preliminary questions.

[132] For the text of this section, see *infra* text accompanying note 147.

[133] *Bourjaily*, 483 U.S. 171.

[134] *Id.* at 174.

[135] *Id.*

[136] The Federal Rules of Evidence classify coconspirator statements as "non-hearsay." Fed. R. Evid. 801(d)(2)(E). Analytically, such statements are hearsay because offered to prove the truth of what the statement asserts. The common law treated coconspirator statements as hearsay, but admissible under an exception. *See generally* McCormick, *supra* note 1, § 267, at 792. The Supreme Court refers to coconspirator statements as being admissible as an "exemption" to the hearsay rule. United States v. Inadi, 475 U.S. 387, 399 n.12 (1986). The Court also states that such statements are admissible under a firmly rooted exception to the hearsay rule. *Bourjaily*, 483 U.S. at 183.

[137] 483 U.S. at 176.

spirator of a party during the course and in furtherance of the conspiracy."[138] Thus, the proponent must show that the following preliminary facts exist before a court will admit a coconspirator statement into evidence: 1) a conspiracy existed; 2) the defendant and the coconspirator participated in the conspiracy; 3) the coconspirator made the statement in furtherance of the conspiracy; and 4) the coconspirator made the statement during the course of the conspiracy.

Most parties and courts agree that the judge decides the preliminary questions of fact determining admissibility of a coconspirator statement.[139] Defendant objected to the method by which the trial court decided these preliminary questions of fact[140] and to the standard of proof applied in making the decision.[141]

While addressing the defendant's objection to the standard of proof, the Court made the following observations concerning the distinction between judge and jury functions:

> Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary Rules, which embody certain legal and policy determinations. The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied.[142]

Obviously, the Court knew that the preliminary facts for the judge to decide overlapped a material fact[143] for the jury to decide. The Court, however, did not suggest that the jury should play a role in deciding the preliminary factual questions because these involve "legal and policy determinations."

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[138] FED. R. EVID. 801(d)(2)(E). Of course, a statement made by a party declarant, who is also an alleged conspirator, will be admissible against this party as a simple admission of a party opponent. FED. R. EVID. 801(d)(2)(A). The coconspirator exception allows a statement made by an alleged coconspirator to be used against the defendant. FED. R. EVID. 801(d)(2)(E).

[139] *See generally* MCCORMICK, *supra* note 1, § 53, at 139 n.21 (citing cases holding that judge decides preliminary questions).

[140] The defendant challenged the trial court's use of the disputed statement to resolve the preliminary question of the conspiracy's existence. The Supreme Court held that FED. R. EVID. 104(a) permits this "bootstrapping." *Bourjaily*, 483 U.S. at 181. Rules of evidence, other than those concerning privileges, do not bind the judge in deciding preliminary questions of fact. FED. R. EVID. 104(a).

[141] The Supreme Court held that the judge must find the preliminary fact to exist by a preponderance of the evidence, rather than by a higher standard. *Bourjaily*, 483 U.S. at 176.

[142] *Id.* at 175.

[143] One of the preliminary questions was whether a conspiracy existed. *See supra* text accompanying note 138.

In contrast, the California Evidence Code tends to allow juries to hear evidence on preliminary questions which judges alone should decide.[144] This tendency exemplifies Morgan's observation that committing preliminary questions which the judge should decide to the jury expresses an increasing dissatisfaction with exclusionary rules of evidence.[145] By committing the preliminary question to the jury, the judge allows the jury to hear the ultimate evidentiary offer which depends upon the preliminary fact. The jury will then ignore the preliminary factual question and simply consider the weight of the evidence.

The California Evidence Code's treatment of coconspirator statements conflicts with the Supreme Court's implicit understanding in *Bourjaily*.[146] Section 1223 governs coconspirator statements. This section states:

> Evidence of a statement offered against a party is not . . . inadmissible [under] the hearsay rule if:
>
> (a) The statement was made by the declarant while participating in . . . and in furtherance of . . . [a] conspiracy;
>
> (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and
>
> (c) The evidence is offered after [or subject to] admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b).[147]

Thus, subdivision (c) gives the jury the preliminary questions upon which the admissibility of a coconspirator statement depends.

The result reached under the proposed test conforms with the Supreme Court's ruling in *Bourjaily*. The test reveals the unspoken assumptions behind that decision and the Code's erroneous allocation of preliminary questions to the jury. Concededly, the jury will not overlook the issue of whether the conspiracy exists (step one), and the jury

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[144] The California Evidence Code incorrectly allocates several preliminary questions of fact. *See infra* text accompanying notes 147 & 156-61. These allocations arguably present constitutional questions in criminal cases. In Ohio v. Roberts, 448 U.S. 56 (1980), the Court held that no confrontation clause problems arise if "the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* at 66. The California allocation, viewed as a *de facto* abrogation of the common law coconspirator exception to the hearsay rule, may violate the *Roberts* rule.

[145] *See* Morgan, *supra* note 15, at 191.

[146] Other commentators have observed that the California Evidence Code deviates from the orthodox principle of allocating functions between judge and jury. *See* Kaplan, *supra* note 10, at 997-99; Kaus, *supra* note 25, at 234-35; *see also* text accompanying *supra* note 13.

[147] CAL. EVID. CODE § 1223 (West 1966).

will disregard the statements if the jury finds the conspiracy not to exist (step three). Under California's approach, however, the jury will not decide the preliminary questions of fact as a preliminary matter (step two).

Recall that the proposed test's second step requires the jury to resolve the preliminary question of fact before the jury uses the evidence to resolve material issues. The admissibility of coconspirator statements depends upon the fact that the coconspirator made the statement during the course of a conspiracy.[148] *A fortiori* a conspiracy must first be found to exist, which is, of course, the material issue for the jury to resolve. Thus, whether a conspiracy existed cannot serve as a *preliminary* question of fact for the jury. Obviously, the jury cannot resolve the preliminary question independently of and prior to its ultimate determination of whether a conspiracy existed.

More likely, the jury will simply consider the weight of the alleged coconspirator statement as the jury proceeds to its ultimate determination. Only after rendering its ultimate judgment of conviction or acquittal will we know whether the jury determined that the coconspirator made the statement during the course of a conspiracy. The California Evidence Code requires a juror to perform the following mental gymnastic: "I must decide that this statement was made in the course of a conspiracy before I can use the statement to determine whether a conspiracy exists." As Judge Cardozo said, "It is for ordinary minds, and not psychoanalysts, that our rules of evidence are framed."[149]

The Law Revision Commission's comment to section 403,[150] as adopted by the Assembly Committee on Judiciary,[151] sets forth the rationale for this deviation.[152] The comment contends that coconspirator statements are simply another form of authorized admissions.[153] Au-

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[148] *See supra* note 138 and accompanying text.

[149] Shepard v. United States, 290 U.S. 96, 104 (1933).

[150] CAL. EVID. CODE. § 403 (West 1966) assembly committee on judiciary comment at 269.

[151] The Law Revision Commission's comments became those of the California Legislative Committee whenever the legislative comments made the slightest alteration. *See generally* Recommendations at xxviii-xxxiv preceding CAL. EVID. CODE § 1 (West 1966). With respect to § 403, these changes were imperceptible. *See* Kaus, *supra* note 25, at 237 n.13.

[152] The Law Revision Commission comments pertaining to coconspirator statements follow § 403 because this section allocates the jury's function on preliminary questions of fact. Section 403 provides the counterpart to FED. R. EVID. 104(b). Section 1223 specifically governs coconspirator statements. CAL. EVID. CODE § 1223 (West 1966). *See supra* note 147 and accompanying text.

[153] CAL. EVID. CODE § 403 (West 1966) assembly committee on judiciary comment

thorized admissions, as an exception to the hearsay rule, pertain to the admissibility of an agent's statement against a principal. Under section 1222(a),[154] the agent's statement qualifies as an admission against the principal if 1) the principal authorized the agent to make statements for the principal, and 2) the authorization concerns the specific matter which the statement addresses.[155] Under section 1222(b), the jury determines the existence of these preliminary facts on the rationale that this allocation merely codified existing law.[156]

As Justice Kaus points out, the Law Revision Commission misread existing law.[157] Equally probable, the Commission may have failed to distinguish between statements offered for their assertive value and statements that are verbal acts.[158] Exemplifying the latter, the words uttered, an offer of a bribe, may constitute one of the acts charged as part of the conspiracy. Such verbal acts do not necessitate a hearsay analysis.[159] The only preliminary question, whether the declarant made the statement, presents a relevancy question for the jury.

Finally, the Commission may have considered coconspirator statements as merely other instances of determining the declarant's identity for purposes of applying the exception for admissions of a party opponent.[160] If so, the rationale fails on its initial premise. Identity does not

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at 269.

[154] CAL. EVID. CODE § 1222(a) (West 1966).

[155] California's version of the hearsay exception for admissions by an agent conforms to the common law exception. This version is considerably more restrictive than the federal rule. The federal rule extends admissions by agents beyond the authority to speak by including statements made by agents within their authority to *act*. *See* FED. R. EVID. 801(d)(2)(D) advisory committee's note, *reprinted in* 28 U.S.C. app. at 718 (1982) (explaining that trend favors broader interpretation). Under California law, only agents expressly or impliedly authorized to speak on behalf of the principal may bind the principal. *See* Markley v. Beagle, 66 Cal.2d 951, 960, 429 P.2d 129, 137, 59 Cal. Rptr. 809, 817 (1967).

[156] *See* CAL. EVID. CODE. § 403 (West 1966) assembly committee on judiciary comment at 269.

[157] Kaus, *supra* note 25, at 241-45.

[158] Morgan noted that the Commission's treatment of authorized admissions and coconspirator statements "may be explained by the [Commission's] 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." Morgan, *supra* note 15, at 183.

[159] *See* FED. R. EVID. 801(a); CAL. EVID. CODE § 1200 (West 1966).

[160] The Assembly Committee on the Judiciary comment to § 403 incorporates all of the admission exceptions, including authorized and coconspirator statements. CAL. EVID. CODE § 403 (West 1966) assembly committee on judiciary comment at 269. Section 403 addresses conditional relevancy problems. CAL. EVID. CODE § 403 (West

entail a conditional relevancy question for the jury when identity raises the issue of *applicability* of a hearsay rule exception.[161] Juries rarely decide preliminary questions concerning the admissibility of an agent's hearsay statements. An example from a workbook on trial advocacy[162] illustrates this point. In this example, the plaintiff-buyer claims that in a telephone conversation an agent of the defendant orally modified a contract for the sale of a new car.

Whether the plaintiff spoke with one of the defendant's employees presents the initial issue. The jury determines the identity of the person to whom the plaintiff spoke.[163] A reasonable juror would certainly consider and resolve the question of who the plaintiff spoke to before giving weight to the alleged conversation. Additionally, the juror would surely disregard the entire conversation if the juror thought that the plaintiff did not speak with an agent of the defendant.

The situation differs as to the oral modification issue. The plaintiff claims that upon calling the defendant's business number a woman answered. The plaintiff informed the woman that he wished to change the model of car that he had ordered. The plaintiff claims that the woman put him on hold and came back in a few minutes. The woman then stated that "everything was taken care of." Defendant claims that none of his female employees have the authority to modify contracts, which renders the statement inadmissible hearsay.

Under California Evidence Code Section 1222(a), the statement "everything was taken care of" is admissible only if the defendant authorized the declarant to make statements concerning modification of contracts. Under subsection (b), the jury decides the preliminary questions of authorization and extent of authorization. Of course, the jury must decide the material question of whether the defendant agreed to the modification of the sales contract. This material question, in turn,

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1966). The Committee's only explanation for treating authorized admissions as conditional relevancy issues is that existing law treats these admissions as conditional relevancy problems. CAL. EVID. CODE § 403 (West 1966) assembly committee on judiciary comment at 269. Kaus, however, notes that existing law treated authorized admissions, including coconspirator statements, as admissibility or judge questions. Kaus, *supra* note 25, at 241-44. The Committee states that under § 403, the declarant's identity presents a conditional relevancy issue. CAL. EVID. CODE § 403 (West 1966) assembly committee on judiciary comment at 268. Treating authorized admissions as a conditional relevancy issue follows from this statement.

[161] For a discussion of this issue, see *infra* text accompanying notes 165-79.

[162] MAUET & WOLFSON, MATERIALS IN TRIAL ADVOCACY, PROBLEMS AND CASES 29 (2d ed. 1987).

[163] *See, e.g.*, FED. R. EVID. 901(b)(6)(B).

depends upon whether an authorized agent of the defendant approved the modification.

Under this article's proposed test, the judge decides the preliminary question of whether the defendant authorized the declarant to modify the contract for the same reason that the judge decides the admissibility of coconspirator statements. The jury will not resolve the preliminary question prior to and independently of the resolution of the material issue—whether defendant modified the contract. In this hypothetical, the jury will not consider as a preliminary matter whether the declarant actually had authority to modify the contract. More likely, the jury will simply decide whether *someone* in defendant's office modified the contract. A statement by a secretary in defendant's office would be probative even if the secretary had no authority to speak on that matter. Thus, giving the preliminary question to the jury rather than to the judge circumvents the policy of the authorized admission exception. When preliminary and material questions of fact overlap, the judge must decide the preliminary question of fact, and the jury must decide the material fact. A lack of symmetry may result from judge and jury determining the same fact. When judge and jury both decide the same fact, the judge simply decides the preliminary factual question to determine the *admissibility* of the evidence. The jury may then decide the case, without any further reference to the judge's preliminary determination.[164]

B. The Declarant's Identity Affects a Statement's Admissibility

Finally, this subdivision examines cases involving the identity of an out-of-court speaker. Frequently, both the statement's relevancy and its admissibility under a hearsay rule exception depend upon the declarant's identity as a party to the action. For example, "I did it" becomes relevant[165] and becomes an admission only if uttered by the defendant. In other cases, the declarant's identity does not affect the statement's relevancy, leaving only the issue of admissibility under the hearsay

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[164] Morgan addressed this problem of overlap. *See* Morgan, *supra* note 15, at 182-83. Some years later, courts adopted Morgan's solution. *See, e.g.*, Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963).

[165] This exemplifies another situation in which the jury may draw a negative inference if the jury finds the preliminary fact not to exist. If someone else said "I did it" that would tend to disprove the defendant's guilt, and thus, would be relevant under the standard of FED. R. EVID. 401. The statement would also be admissible under FED. R. EVID. 804(b)(3) as a declaration against penal interest.

rule. For example, an excited utterance[166] describing an accident is relevant regardless of the declarant's identity. A court, however, will admit the statement only if the proponent satisfies the hearsay exception requirements. The proposed test provides a principled basis for determining when the judge may trust the jury to determine these preliminary questions of fact.

Recall the earlier example of the love letter written by *D* to *V*'s wife.[167] The proponent offers the letter for the truth of its contents, that *D* loved *V*'s wife. Assume that *D* objects to the letter. *D* claims that since he did not write the letter, the letter does not qualify as an admission of a party opponent.[168] Seemingly, what this article previously analyzed as a preliminary question of relevancy for the jury now becomes an admissibility question for the judge.

The defendant's objection does not affect the proposed test. The preliminary question remains a jury question. A reasonable juror will consider and resolve the preliminary question prior to any resolution of the material issue of motive. Additionally, the juror will disregard the evidence if the juror finds that *D* did not write the letter. Thus, under the proposed test, the question remains one for the jury.

Cases in which parties dispute the declarant's identity demonstrate the proposed test's utility. In some cases, the test allocates the preliminary question of fact to the jury, and in others, to the judge.[169] This subdivision also explains why the proposed test necessitates this allocation.

In contrast, California Evidence Code Section 403 allocates to the jury all questions where "[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."[170] The California Law Revision Commission theorized that all issues of the declarant's identity simply involve conditional relevancy issues for the jury.[171] "The admissibility of some hearsay declarations is dependent solely upon the determination that a particular declarant made the statement. . . . [T]he only preliminary fact to be determined in regard to these declarations involves the relevancy of the evidence."[172] Thus,

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[166] FED. R. EVID. 803(2).

[167] *See supra* note 54 and accompanying text.

[168] *See, e.g.*, FED. R. EVID. 801(d)(2)(A).

[169] *See infra* text accompanying notes 173-77.

[170] CAL. EVID. CODE § 403(a)(4)(West 1966).

[171] CAL. EVID. CODE § 403 (West 1966) assembly committee on judiciary comment at 268-69.

[172] *Id.*

the jury decides this preliminary question of fact in every instance.

The content of the declarant's statement determines the statement's relevancy, rendering this rationale erroneous. Not all statements become irrelevant when not made by a party opponent. Thus, the jury will not completely disregard the statement if the jury finds that the declarant did not make the statement.

Two hypotheticals expose the California Evidence Code's error.[173] The first involves an auto collision between *P* and *D*. A police officer testifies that she approached *D*'s car and asked what happened. A voice answered: "I couldn't see because the windshield was all fogged up." The officer does not know whether *D* or the passenger in *D*'s car made the statement.[174] California Evidence Code Section 403 gives the issue of declarant's identity to the jury. The preliminary question of fact is whether *D* made the statement. If *D* did not make the statement, then the statement becomes inadmissible hearsay under California law.[175]

The second hypothetical includes the same facts as the first hypothetical, except the voice answers: "I don't know [what happened], I fell asleep just before the accident."[176] Again, under section 403, the jury decides whether defendant made the statement.

Under the proposed test, the judge decides the preliminary question in the first hypothetical. In the second hypothetical, the jury decides the preliminary question. In the first hypothetical, the question satisfies the first two prongs of the proposed test. A reasonable juror would probably consider and resolve the preliminary question before addressing material issues, such as negligence. The fact that *D* said the windshield was foggy, rather than the passenger, would add weight to the evidence. Secondly, a reasonable juror would determine whether *D* said that the windshield was foggy prior to using the statement to determine if *D* drove negligently.

This statement, however, fails step three of the proposed test. A reasonable juror might still consider the evidence even if the juror did not believe that the defendant made the statement. The statement about the foggy windshield has some tendency to prove defendant's negligence

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[173] Kaplan poses these two wonderful hypotheticals. *See* Kaplan, *supra* note 10, at 1000. He built on the insightful criticisms of Justice Kaus. *See supra* note 157 and accompanying text.

[174] Kaplan, *supra* note 10, at 1000.

[175] *See* CAL. EVID. CODE § 1241 (West 1966). This section limits admissible present sense impression statements to those relating to *declarant*'s conduct. Under FED. R. EVID. 803(1), however, the statement could be admitted as a present sense impression even if the passenger made the statement.

[176] Kaplan, *supra* note 10, at 1000.

even if the defendant did not make the statement. A reasonable juror could believe that no one could have seen out of a foggy windshield. Therefore, this question does not pose a relevancy issue, and the judge should decide this preliminary question.

In the second hypothetical, the question also satisfies the first two prongs. Additionally, a reasonable juror who did not believe that the defendant made the statement about falling asleep would disregard the statement. The fact that a passenger in defendant's car fell asleep has absolutely no tendency to prove that defendant acted negligently. This question meets all three prongs of the proposed test. Therefore, the jury should decide the preliminary question of the declarant's identity.[177]

The Federal Rules of Evidence, in contrast to the California Evidence Code, do not specifically govern the foregoing situations. The above problems require an interpretation of Rules 901[178] and 801.[179] The interpretation of these rules should correspond with the proposed test's allocation. The authors believe that the proposed test offers a clear and acceptable method of analysis.

CONCLUSION

The admissibility of evidence depends upon the satisfaction of factual preconditions. This article's proposed test clearly allocates the determination of preliminary questions of fact between judge and jury. Because the jury should decide questions that only involve the evidence's relevancy, this test defines and incorporates the characteristics of relevancy.

The jury decides a preliminary question of fact if the question satisfies three requisites. First, the jury must resolve the preliminary factual question when considering the disputed evidence. Second, the jury must necessarily resolve the preliminary question prior to determining a material fact based on that evidence. Third, the jury will disregard the evidence if the jury finds the preliminary fact not to exist.

Troublesome areas demonstrate the proposed test's utility. The test provides a clear solution when a preliminary question of fact coincides with a material fact and when the declarant's identity affects both the evidence's admissibility and relevancy. The authors encourage teachers, lawyers, commentators, and judges to utilize this test and to form their own opinion as to its value. Most importantly, the authors hope that

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[177] Professor Kaplan reached the same conclusions. Kaplan, *supra* note 10, at 1000.

[178] FED. R. EVID. 901. For a discussion of Rule 901, see *supra* note 28.

[179] FED. R. EVID. 801. For a discussion of Rule 801, see *supra* note 138 and accompanying text.

the test will advance the law's development and will serve as a useful guide to future judicial and legislative action on problems explored in this article.