

# Of Mabrus and Zorgs—An Essay in Honor of David Louisell

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David Louisell was my friend. He was a warm and deeply moral person, as well as a fine scholar. In this essay, I will pay tribute to him in his capacity as teacher, since the area I will discuss is one which, over the years, has bedeviled both his and my students, and one about which we talked many times. The names Mabrus and Zorgs are mine, but he often referred in a light-hearted vein to the problem of teaching students to tell one animal from another. In the hope that this piece can help, let me dedicate it to him.

In law, we are accustomed to the view that general principles govern specific cases. Our paradigm, in other words, is that all Mabrus<sup>1</sup> are decided by Rule A, and all Zorgs<sup>2</sup> by Rule B. All we have to do, then, is determine whether the issue before us is a Mabru or a Zorg and we instantly know whether Rule A or Rule B applies.

Of course, in a very substantial number of cases—indeed, in most of the interesting ones—we have to grapple with something that is both a Mabru and a Zorg, or something which, though not exactly either, lies somewhere between the two. There are, moreover, times when we have to contend with something which, though we would have thought it a Mabru, seems better decided by the Zorg rule. Of such are made some of the most interesting and challenging problems of law.

The law of evidence is replete with Mabrus and Zorgs and their hybrid relatives, but an infrequently thought about—or at least infrequently written about<sup>3</sup>—area is the distribution of functions between

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1. A Mabru—or for that matter any other name you want to give it—is a kind of question.

2. A Zorg is also a question, usually one thought to be different from a Mabru.

3. The existing literature on preliminary fact questions includes: C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 53 (2d ed. E. Cleary 1972); J. MAQUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 211-30 (1947); Laughlin, *Preliminary Questions of Fact: A New Theory*, 31 WASH. & LEE L. REV. 285 (1974); Maquire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1927). Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929). Particularly thoughtful treatments of the subject are: Kaus, *All Power to the Jury—California's Democratic Evidence Code*, 4 LOY. L.A. L. REV. 233 (1971) and Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975).

the judge and the jury in determining what are called preliminary questions of fact. In general, we have two rules to cover two different questions that come up in the trial of cases.<sup>4</sup> The first question, our *Mabru*, occurs when the issue is whether a proffered piece of evidence is admissible. Here the elementary rule is that the judge, not the jury, must decide the issue. The second question, our *Zorg*, occurs when an issue of fact arises and the evidence bearing on it is such that a reasonable person could find either way. There, the equally elementary rule is that the jury, not the judge, is to resolve the question.

In large numbers of cases, we have no trouble telling the *Mabru* from the *Zorg* and the two rules peacefully coexist. Virtually no one would suggest that the jury should determine whether an item of evidence is or is not hearsay, or whether an accountant has or does not have a privilege not to testify against his client. Similarly, most judges would not dream of directing a verdict on the issue of who went through the red light where the usual crowds of drivers, passengers, and bystanders fell to disputing whether the plaintiff or the defendant was the guilty party. It is elementary, however, that we often come across questions that seem to be both *Mabrus* and *Zorgs*—cases in which the admissibility of a piece of evidence turns on the resolution of a question of fact.<sup>5</sup>

Before examining the conventional wisdom about distinguishing *Mabrus* from *Zorgs*, let us examine a hypothetical and ask ourselves how a rational legal system—assuming that any legal system which makes use of a two-headed problem solving institution such as a judge and a jury could properly be called rational—should allocate the preliminary factfinding task. We sometimes call these questions preliminary questions of fact.

1. Prosecution of D for the murder of V. Witness W takes the stand and wishes to testify that D shot V. D objects on the ground that W is his wife and hence is forbidden by the husband-wife privilege<sup>6</sup> from testifying against him. Let us also say that, for reasons of preserving marital harmony, it has been decided that, with exceptions not relevant here, a person should be prohibited from testifying against his or her spouse. In this case, however, there is a dispute whether W is in fact D's wife. It turns out that D had been married before he went through a wedding ceremony with W, but there is evidence both ways

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4. Of course, we are here talking about questions in actions that are clearly at law with a jury present. There are, to be sure, other kinds of questions: the *Kador*, which arises in equity, and the *Gurten*, which arises in non-jury cases at law.

5. Although this issue is unique to the law of evidence, it is roughly analogous to problems in other areas of the law. See, e.g., *Chance v. E.I. Du Pont De Nemours & Co.*, 57 F.R.D. 165 (1972). See also Reese, Smit & Reese, *The Role of the Jury in Choice of Law*, 25 CASE W. RES. L. REV. 82 (1974).

6. Or, one might more accurately say, "spousal incapacity." Moreover, we assume that we are in a jurisdiction in which the party can invoke the privilege.

whether D's former spouse, S, had died before D's purported marriage to W.

Is this question a Mabru, which the judge should decide on the principle that the court must rule on the admissibility of evidence? Or is it a Zorg, which the jury should decide (under proper instructions, of course) on the theory that it is the proper trier of the facts? Of course, the secret in law is that we do not first decide whether we are dealing with a Mabru or a Zorg and then apply the appropriate rule. Rather, we first ask which rule should apply and then, on the basis of our answer, categorize the question before us. Indeed, we are referring to this very method of decision when we say that law is a purposive discipline.

There are several ways of handling the problem of hypothetical 1. In theory, we could interrupt the trial and empanel a separate jury to listen to the evidence about S's death and decide the sole issue of whether W is in fact D's wife. Thus, the question of fact would be decided by a jury, and the judge, bound by this factual finding, could decide the question of admissibility or what was left of it. We would then have two separate questions decided at different times, and our Mabru and Zorg could lie down like the proverbial lion and lamb.<sup>7</sup> If the specially empaneled jury were to decide that W is in fact D's wife, the trial judge would exclude the evidence, and the jury trying the prosecution itself would not hear her testimony. Alternatively, if the specially empaneled jury were to find that W is not D's wife, the judge would allow the evidence in and the trial jury would then listen to what W had to say.

If questions of preliminary fact were relatively rare, we might seriously consider this course. Such questions, however, are very common and a given trial may raise dozens of them. We have enough difficulty disposing of our litigation with one jury per case. Obviously, it would be that much more time-consuming and expensive to empanel in each case additional juries—or even just one additional jury—to decide all the questions of preliminary fact.

A somewhat less taxing proposal would be to use the trial jury itself to decide each preliminary fact question, but require it to do so before the judge could decide the admissibility of the questioned evidence. Thus, in hypothetical 1, the jurors would first hear all the evidence bearing on W's and D's marriage and then, under proper instructions from the judge, retire for their deliberations on this issue. If the jurors were to decide that W and D are in fact husband and wife, they would so inform the judge who would excuse W from the witness stand. If the jurors were to decide that W and D are not married, then,

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7. *Isaiah* 11:6. It has been pointed out, by the way, that in such a situation, the lamb—at best—gets very little sleep.

on their return, the judge would permit them to hear W's testimony as to the shooting.

Although it is not quite so impractical as the first possibility, this proposal also poses overwhelming problems. First, it would be enormously expensive in terms of time and effort to require many interruptions of the trial while the jury deliberated the numerous preliminary fact questions that arise in the trial of any lawsuit. And this waste of lawyers' and witnesses' time would not be the only problem. We would also have to determine what to do when the jury could not reach unanimous agreement on the preliminary fact issue. Most important, however, we would be unable to cope with the natural inclination of jurors routinely to find the existence of the preliminary facts necessary to the admissibility of evidence so that they could better perform their factfinding duties and satisfy their own curiosities as well.

The next possibility is considerably more administrable than either of the aforementioned, but is itself fatally defective. Why not, one might suggest, simply let the jurors hear both the evidence bearing on the preliminary facts concerning the validity of the marriage and W's testimony as to the shooting, but instruct them to consider W's testimony as evidence only if they first find that W and D are not husband and wife.

The problem with this course stems from the jury's role being basically quite different from the judge's. A judge's duty is to apply the rules of a legal system which is, one would hope, designed to reach the appropriate factual resolution in the largest possible number of cases, giving appropriate weight as well to other societal values. These other values which shape many of our rules of evidence but which are often unrelated to the fact determining role, include privacy, encouragement of certain confidential relations, convenience in administering a complex body of evidence law, and notions of fairness. A jury, on the other hand, focuses on the determination of the facts of one particular case and in doing so frequently is far less interested than a judge in the societal values underlying our rules of evidence or anything else which might get in the way of their determining the facts of the case at hand.

As a consequence of its role, a sensible jury in hypothetical 1 would simply disregard any instructions the judge might give to apply the rule of spousal incapacity, and instead, would consider W's testimony about the shooting regardless of whether or not W and D are validly married. The jurors will, of course, consider factors bearing on W's credibility such as whether she is, in general, a truthful person or whether she had a motive to falsify. But if the judge does not decide the factual issues antecedent to the validity of an alleged marriage between the witness and the defendant and implement the values underlying the marital privilege, clearly nobody will. Note that this is not to

say that the marital privilege is a foolish evidentiary rule. It may or may not be. It is, however, to say that because of the role the jury sees for itself—finding the appropriate resolution of a particular case on the merits—that body cannot be trusted to implement the rule, be it wise or foolish. As a result, the judge must decide the facts determining the validity of the marriage. If he finds the marriage valid, he must keep W's testimony from the jury, while if he finds the marriage invalid he should allow the jury to hear the evidence. We have here, in short, a Mabru.

Just to make sure we understand this fully, let us examine another hypothetical:

2. Prosecution of D for the murder of A. W testifies that while A lay in the hospital, two days after suffering a gunshot wound in the stomach, A said, "I saw D shoot me," and, without commenting further on the subject, died shortly thereafter.

Clearly, A's out-of-court declaration is hearsay. Arguably, however, it is within the dying declaration exception to the hearsay rule which provides that in a homicide prosecution a statement of the deceased as to the cause of his death, made on personal knowledge and under a sense of impending death, is admissible to show the truth of the facts asserted.

Let us assume that there is no dispute about A's personal knowledge and that the only real issue as to admissibility is whether the statement was made under a sense of impending death—an issue as to which there is conflicting evidence. One witness testifies that he, a physician, told A, just before A made the statement at issue, that his condition was hopeless and that he would die very shortly. Another witness, a nurse of somewhat dubious credibility because she turns out to have been a girlfriend of D, testifies that, a moment after the statement, the deceased whispered to her that doctors are often wrong and that he felt much better than he had the day before.

Obviously, as in hypothetical 1, the jury will not be prepared to enforce the policy of the law to exclude such statements that were not made under a sense of impending death. The jury will be much more interested in whether A had a grudge against D, whether A wished to shield someone else, and whether his memory and perception of the shooting were good. Unlike the case in hypothetical 1, the jurors might be somewhat interested in the preliminary fact at issue because if A had spoken under a sense of impending death and had been a religious man, that might be an extra guarantee of his sincerity. In most cases, however, they would be much more interested in other facts about the statement. As a result, if anyone is going to enforce the policy of the hearsay exception, it will have to be the judge.

Can we then conclude that in all cases the judge should decide the

factual questions which determine the admissibility of evidence and let the jury hear the evidence only if he finds those facts in favor of admissibility? In other words, are all such questions *Mabrus*? The conventional wisdom is to the contrary, and for good reason. Let us consider another hypothetical:

3. Plaintiff, P, injured in an automobile accident, alleges that the defendant, D, was driving at an excessive speed. To help show this, he produces a witness, W, to testify that about a minute before the accident and one mile from the scene he (W) saw D's car travelling at an excessive speed on the road toward the place of impact. D, however, produces evidence that indicates it was another car that W saw, not D's.

Presumably no one would argue that W's testimony is sufficiently relevant to show D's speed if the car W saw was D's car. Assuming, then, that one mile is close enough to the accident, the relevance of this evidence depends on a question of fact: whether the car observed by W was the defendant's. Is there any reason why this question must be treated like a *Mabru* and be decided by the judge as was the case in hypotheticals 1 and 2? Obviously not. The judge can let the jury hear all the evidence on the issue of which car W saw, confident that if the jurors decide that W saw another car and not the defendant's, they will ignore W's testimony as to its speed and decide the case on other evidence. In other words, here we have a *Zorg*.

Similarly, let us examine another hypothetical, illustrating the same point:

4. A sues B on a note that purportedly carries B's signature. B's defense is that the note is a forgery, and there is evidence both ways on the question of genuineness. Under the facts of the case, a forged note would bear no relation to the rights and liabilities of the parties.<sup>8</sup> For this reason, when A attempts to introduce the purported note into evidence, B objects on the ground of relevance.

Here again we have a *Zorg*. If the jurors are at all rational in attempting to perform their job, we would certainly expect them to ignore a forged note in determining the rights and liabilities of A and B.

It is, of course, conceivable that a jury might decide that the note is a forgery but, nonetheless, for entirely extrinsic reasons—such as the plaintiff's great need or the defendant's intrinsic recklessness—decide to consider it and to give judgment on it to the plaintiff. This type of violation of the rules of the game is very different, however, from the violation of the instructions we worried about in hypotheticals 1 and 2. In those cases, the jurors could be expected to violate the judge's instructions in order better to perform their role of discovering the facts

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8. This is not to say that the note would be inadmissible for all purposes. For example, the very fact that A was desperate enough to forge a note might show that he was liable, let us say, on a counterclaim.

and deciding the merits of the case according to the substantive law. Here, should they give judgment on a note that they believed to be forged, they would be violating their duty completely. Certainly, as a matter of probability, it would be quite unlikely in both hypotheticals 3 and 4 that the jury would decide that the factual predicate for the admissibility of the evidence did not exist and nonetheless consider the evidence to be probative. Our treatment of both these questions as Zorgs, then, is based on our confidence that no conflict exists between the judge's duty to make sure only admissible evidence is considered and the jury's right to determine questions of fact.

Note that one could still take the position that the preliminary fact questions in hypotheticals 3 and 4 should nonetheless both be Mabrus for the judge to decide. In hypothetical 3, the judge could probably do a perfectly adequate job if he, alone, decided whether the car W saw was the defendant's and let the jury hear the evidence about its speed only if he first found that it was. Similarly, in hypothetical 4, the judge could decide the genuineness of the note without anyone arguing that our legal system was thereby uncivilized, brutal, or grossly irrational. If the judge found the note to be a forgery, he would simply keep it from the jury; if he found it to be genuine, he would allow it into evidence. In other words, the argument is not that there would be something terrible about regarding the preliminary questions of fact in hypotheticals 3 and 4—and, indeed, in all other cases—as Mabrus to be decided by the judge. Rather, it is that in these cases such a step is not necessary and, hence, the jury's role as primary factfinder should prevail.

Even where a preliminary fact question is a Zorg to be decided by the jury, the judge still retains his function of making sure there is sufficient evidence from which a rational jury could find the preliminary fact. If not, the evidence must be kept from the jury—but not because the judge had decided the preliminary fact question. Rather, the judge would simply be holding that there was, in contemplation of the law, no question to be decided. In our legal system, all jury questions presuppose a situation in which the evidence is sufficient to support a jury finding.

I hope that the first four hypotheticals and the accompanying discussion illuminate the appropriate distinction between Mabrus and Zorgs. A preliminary fact question that determines the admissibility of evidence is a Mabru if and only if the judge must decide that question to uphold the policy of the rule that makes the admissibility of the evidence turn on the preliminary question of fact to begin with. In other words, a preliminary fact question is a Mabru, and the judge must determine it, whenever we cannot trust the jury to apply the rule governing admissibility. All other such questions, where we can trust the jury, are Zorgs.

There are, to be sure, certain problems in phrasing the test in terms of whether we can or cannot trust the jury. It is impolitic as well as impolite to speak of cases in which we do not trust the jury, despite the fact that a goodly portion of our law of evidence is founded on this reality. More important, our formulation forces us to admit what is undeniably true, but perhaps unpalatable—that a sensible jury might well ignore the many distinctions over which we have so carefully labored in ramifying our law of evidence.

In any event, our modern evidence codes do not use such blunt language to divide the *Mabrus* from the *Zorgs*.<sup>9</sup> The California Evidence Code provides for the division of factfinding functions as to preliminary facts between judge and jury in its sections 403 and 405.<sup>10</sup> Section 403 sets out the *Zorgs* and provides:

(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

- (1) The relevance of the proffered evidence depends on the existence of the preliminary fact;
- (2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;
- (3) The preliminary fact is the authenticity of a writing; or
- (4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.

The California Evidence Code makes all preliminary fact determinations not governed by section 403 *Mabrus*. These are covered by section 405 which provides:

- (a) When the existence of a preliminary fact is disputed, the court [in cases not covered by sections 403 or 404] shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall

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9. There are, to be sure, other cases in which, in addition to showing certain preliminary facts, the proponent of a piece of evidence must meet a more indefinite standard. Thus, a number of statutes give the judge a supervening discretion with respect to certain exceptions in the hearsay rule to exclude evidence that he does not feel is trustworthy. *See, e.g.*, FED. R. EVID. 804(b)(3) ("A statement [against interest] tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."); CAL. EVID. CODE § 1252 (West 1966) ("Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."). Here it can be argued that it is the opponent of the evidence rather than the proponent who has the burden of persuasion, though the issue is far from clear.

10. CAL. EVID. CODE §§ 403, 405 (West 1966).



admit or exclude the proffered evidence as required by the rule of law under which the question arises.

The Federal Rules of Evidence handle the problem somewhat differently. The basic rule is rule 104:

(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) . . . .

(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.

In other words, rule 104(b) restricts the Zorgs to cases of what we call conditional relevancy, as in hypotheticals 3 and 4.

A little thought, however, reveals that rule 104(b) does not provide a complete enumeration of the Zorgs. Examine the following hypothetical:

5. P v. D, a street corner collision case. Witness, W, testifies that she saw the accident and that the defendant went through the stop light. Defendant objects and offers evidence to show that, at the time referred to, W was in another state, many miles from the accident.

It is standard, black letter law that personal knowledge is required of all but expert witnesses; hence, if W does not have personal knowledge of the accident, her testimony is inadmissible. Of course, this question should be a Zorg since the jury would be expected to ignore W's testimony if it finds that she did not actually see the accident. The California Evidence Code covers this question in section 403(a)(2) which provides that the personal knowledge of a witness is to be determined by the jury. Presumably, here W's testimony itself makes the issue a jury question<sup>11</sup> and provides enough evidence to support the finding necessary for admissibility.

The Federal Rules of Evidence reach the same result, but not in rule 104, the main section on the distribution of functions between judge and jury, where one would expect to find it. Rather, the personal knowledge requirement is contained in rule 602 which provides:

A [nonexpert] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.

Similarly, the federal rule governing the distribution of functions between judge and jury on the issue of authentication is found some

11. Actually, this may not be precisely the case. If W insists she saw the accident, but also asserts she was 500 miles away at the time, her clairvoyance notwithstanding, the judge should hold her testimony inadmissible.

distance from the main section on authentication. Rule 901(a) provides:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

This misplacement is probably not even troublesome, because rule 901(a) is most likely redundant. After all, our rules of authentication, as illustrated in hypothetical 4, simply require that the proponent show the relevance of its evidence. Hence, the matters covered in rule 901(a) are also covered by rule 104(b).<sup>12</sup>

Finally, in yet another section, rule 1008, the federal rules address the distribution of functions under the best evidence rule. Here, the same rule creates both *Mabrus* and *Zorgs* depending on the precise issue. Some preliminary fact questions—such as whether the original writing was lost or destroyed and under what conditions it is obtainable—should be *Mabrus* because the jury would probably ignore them or at least not give them determinative weight as the best evidence rule does. Other questions—such as whether secondary evidence is a correct copy or whether the alleged original document ever existed—should be *Zorgs* simply because we safely can leave them to the jury. Federal rule 1008 provides precisely this solution:

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

The California Evidence Code does not explicitly provide for the distinction drawn in rule 1008, but this is not too serious because the proper answer is reasonably clear. More serious, on grounds of both convenience and substance, is the California code's treatment of the preliminary fact questions arising under the hearsay exception for authorized admissions and their near relatives, coconspirator statements. Although almost all of the rules on preliminary questions are centralized in sections 403 and 405, these conspicuous deviations from orthodoxy are found elsewhere, in the sections creating certain hearsay exceptions.<sup>13</sup> Far more important than that these formulations are

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12. FED. R. EVID. 104(b) provides: "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."

13. CAL. EVID. CODE §§ 1220-1341 (West 1966 & Supp. 1978).

found in an unexpected place, however, is that the California Evidence Code has taken what, on principle, are clearly Mabrus and turned them into Zorgs. Let us examine the following hypothetical:

6. Prosecution of D for aiding and abetting a bank robbery. W testifies that he (W) was in on the plan and that, to bolster his (W's) courage, A, his coconspirator, told him, "You know D is an excellent driver. Well, D told me he'll be waiting outside the bank with the motor going."

Section 1223 of the California Evidence Code provides:<sup>14</sup>

Evidence of a statement offered against a party is not inadmissible by the hearsay rule if:

(a) The statement was made by the declarant while participating in a conspiracy . . . and in furtherance of . . . that conspiracy;

(b) The statement was made prior to or during the time that the party was participating . . . ; and

(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or . . . subject to the admission of such evidence.

Let us temporarily put aside the problem of what to do when the crime charged is conspiracy so that the preliminary question and ultimate issue are the same. (Actually, that is not too serious a problem, and we cover it in hypothetical 13.) Here the crime charged is not conspiracy but bank robbery, and under the California code, as under the common law, the admissibility of W's testimony for the most part turns on whether A, the declarant, and D, the defendant, were members of the conspiracy and whether A's statement was made "in furtherance" of that conspiracy. (Note that W, himself, need not be a member of the conspiracy: the same rule of admissibility would apply if he merely had overheard A's statement to someone else—provided that A's statement was, in fact, in furtherance of the conspiracy and was not simply bragging. W's participation, however, makes it more likely that A's statement was in furtherance of the plan.)

Surely, in principle, section 1223(c), which makes these preliminary fact questions Zorgs, is in error. The jury will likely give short shrift to questions such as whether the declarant, A, was himself a member of the conspiracy or whether the statement was made in furtherance of the conspiracy. Rather, as in hypothetical 2, the dying declaration example, the jurors probably will ignore our hearsay rule and decide whether to give the statement weight depending on whether they think A was knowledgeable and truthful, regardless of whether he was a coconspirator.

Interestingly, in the most common type of case, where the declarant, A, was clearly a conspirator, but the disputed preliminary question

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14. CAL. EVID. CODE § 1223 (West 1966).

is whether the defendant, D, was also a member of the bank robbing conspiracy, the error in the California statute is not so serious. If D's guilt of bank robbery were based on his membership in the conspiracy, and the jury did not believe him to have been a conspirator, it would acquit him. In this case, it would be hard to get upset about whether or not the jury improperly considered A's hearsay statement as to D's guilt.

Of course, it is the other possibility that many find upsetting: that the jurors would believe D to be guilty in part because they considered A's hearsay statement on this issue. This does not mean, however, that the jury would have ignored the policy of the law requiring D's status as a coconspirator as a condition of using A's statement against D. After all, the jury has found that D was a conspirator. The only issue is whether the jury must decide the question as a preliminary fact question—before it decides the same question on the merits of the case. Looked at another way, the issue is whether the jury may consider the hearsay evidence—or more precisely, A's hearsay statement—on the issue of the preliminary fact of D's conspiratorial status. Certainly it is a departure from orthodoxy to do so, but to allow a jury to consider hearsay evidence in making its preliminary fact determination is very different from misallocating our Mabrus and Zorgs so that the jury will consider inadmissible evidence on the merits of the case. Interestingly, in deciding the same preliminary question under the federal rules, the judge, is, at least in one circuit,<sup>15</sup> permitted to consider A's hearsay statement that D is a conspirator as evidence of the preliminary fact which, in turn, determines the statement's admissibility.

It is in the related exception to the hearsay rule—for authorized admissions—that the California Evidence Code reaches the indefensible result of allowing the preliminary fact to be ignored completely. Section 1222<sup>16</sup> makes the question of authorization a Zorg, providing:

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and

(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

Here, even more clearly than in the case of the coconspirator exception,

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15. See *U.S. v. Petrozziello*, 548 F.2d 20 (1st Cir. 1977). This is a consequence of the provision in federal rule 104(b) which provides that the judge, in deciding a Mabru, can rely on hearsay evidence. See note 31 *infra*. The Fifth Circuit, however, has been unable to accept this result. See, e.g., *United States v. Ochoa*, 564 F.2d 1155 (5th Cir. 1977).

16. CAL. EVID. CODE § 1222 (West 1966).

a rational jury will pay no attention to the artificial preliminary fact requirement of authorization. Consequently, the question should, of course, be a Mabru to be decided by the judge. Nor can one defend the California code's transformation of this Mabru into a Zorg on the ground that the hearsay exception itself is much too narrow. It is true that in the usual case the truck driver's statement as to his own negligence probably should be admissible against his employer<sup>17</sup> even if it is not authorized. By treating the question of authorization as a Zorg, the California code partially rectifies this arguable error by allowing the jury to hear such statements in a much larger number of cases. On the other hand, if indeed it is the scope of the hearsay exception that is at fault, the proper remedy is to change the exception. When the proponent of the truck driver's statement lacks any evidence of authorization, even the treatment of the question as a Zorg will not help produce the "correct" result of admitting the statement. In this case at least, two wrongs do not make a right. Moreover, the California Evidence Code allows the jury to hear what may be unauthorized statements, even in cases in which most of us would regard the lack of authorization as important enough to deny them admissibility, at least so long as we are willing to enforce the hearsay rule.

The federal rules reach a better result in handling both coconspirator statements and authorized admissions, although the matter is somewhat complicated by the peculiar definition of hearsay in the federal rules which allows both kinds of out-of-court statements into evidence, not as hearsay exceptions, but rather as nonhearsay.<sup>18</sup> In both cases the preliminary issues are not ones merely of relevance, and hence the judge must decide the preliminary fact questions rather than leaving them to the jury.

It is not enough simply to go through our evidence codes, look at the preliminary facts required by each rule, and decide which is a Mabru and which a Zorg.<sup>19</sup> The matter, regrettably, is more complex than this.

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17. This is the case under the federal rules—at least where the statement is made during the employment relationship and concerns a matter within the scope of the employment. See FED. R. EVID. 801(d)(2)(D).

18. FED. R. EVID. 801(d)(2)(E). The rule provides in part:

A statement is not hearsay if—

(2) Admission by party-opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

19. There are a few cases where we choose to treat questions as Mabrus rather than as Zorgs, not because we are worried about our laws of evidence being flouted, but merely because we do not wish to waste time. Determination of the qualifications of our expert witness probably falls into this category. I am grateful to Professor Norinan Abrams for this point.

Examine this hypothetical:

7. P v. D, an auto accident case. W, a police officer, testifies for the plaintiff that after an intersection collision, he approached the defendant's car and asked, "What happened?" A voice answered, "I couldn't see because the windshield was all fogged up." It is disputed, however, whether this statement was made by the defendant driver, D, or by D's passenger, F.

In the former case, of course, the statement clearly would be admissible as an admission. In the latter case, however, the evidence would simply be a hearsay statement by the passenger. (Let us assume that we do not have a contemporaneous statement exception and that the utterance is not an excited one.) The federal rules do not provide any guidance on the problem, while the California Evidence Code seems to cover it specifically, treating the question as a *Zorg*. Section 403(a)(4)<sup>20</sup> states that the jury determines the issue 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."

A little thought reveals, however, that the preliminary question in hypothetical 7 should be a *Mabru*. Although the statement if made by F is hearsay and inadmissible (at least in the great majority of jurisdictions), the jury might still find it quite probative. Indeed, it is likely that the jury would not have much interest in what, for our evidence law, is the crucial question: whether the statement was made by the driver or by the passenger. Rather, it would focus on whether whoever said that the windshield was fogged up was correct—no matter who said so. If we want someone to apply the evidence rule, it will have to be the judge.

How, then, could the California Evidence Code possibly call this *Mabru* a *Zorg* and entrust the fact determination to the jury? The answer is that the California Evidence Code's drafters simply were thinking of another question.

Let us focus on a slightly different hypothetical:

8. Same as hypothetical 7 except that, in answer to the policeman's question, the voice from the car said, "I don't know, I fell asleep just before the accident." Again, it is disputed whether D or F said this.

This is the situation contemplated by the California Evidence Code in making a *Zorg* of, ". . . whether that person made the statement. . . ." Here the evidence is relevant to D's negligence only if D made the statement, and not if his passenger did. After all, there is nothing wrong with driving accompanied by a dozing passenger. As a result, the statement would not only be hearsay if made by F, it would be irrelevant as well. Thus, there is no reason why the jury should not decide who said the words in hypothetical 8, and the California Evi-

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20. CAL. EVID. CODE § 403(a)(4) (West 1966).

dence Code would reach the correct result in this situation. In hypothetical 7, however, a court applying the California Evidence Code could reach the correct allocation of the preliminary fact question only by placing the purpose of the rule above its literal wording.

The issue raised by hypothetical 7, by the way, is not a far-fetched possibility. Although it is noticed rarely, we often encounter the problem of who should determine the preliminary fact when under one possible resolution of the facts the preliminary question should be for the judge and under the other resolution the question should be for the jury to determine.

A case illustrating this very issue is *United States v. De Marco*,<sup>21</sup> one of the cases arising out of the tangled tax affairs of former President Richard Nixon. De Marco, accused of filing false tax information with the government, defended on the ground that he lacked the criminal intent necessary for guilt. The crucial evidence arose out of a conference with several government officials that De Marco and his attorney attended. During this conference, a statement was made which was extremely damaging to De Marco's version of the facts, but there was evidence both ways as to whether it had been made by De Marco or by his attorney. The district judge decided that if the statement had been made by the attorney, it would be inadmissible as hearsay—and, for our purposes, the case is interesting only on this probably contrafactual<sup>22</sup> assumption. The posture of the case, then, was that if the statement had been made by De Marco, it would be admissible as an admission, and the question of whether he said it would ordinarily be a Zorg to be decided by the jury. On the other hand, if the statement had been made by De Marco's attorney, it would (under our hypothesis) be inadmissible hearsay, and questions as to its admissibility would be Mabrus, to be decided by the judge. In *De Marco*, as the judge saw it, the jury could not be trusted to apply the appropriate rules of evidence. After all, the jurors might very well decide that De Marco's attorney knew as much about the case as De Marco himself and, hence, consider the statement as probative regardless of who said it or of its technical admissibility. The defense attorney saw the precise conundrum and argued:

[W]e would have just been . . . damning ourselves if we had attempted to have [the witness to the damaging statement] admit that the admissions, or confessions of De Marco were not made by the defendant De Marco, but by his lawyer . . . .

I mean, we just couldn't go that way. If the jury believed that [the lawyer] believed his client was guilty, it would take them about two

21. 407 F. Supp. 187 (C.D. Cal. 1975).

22. See C. McCORMICK, *supra* note 3, § 267 (2d ed. E. Cleary 1972 & Supp. 1978); 4 J. WIGMORE, EVIDENCE §§ 1063, 1078 (rev. ed. J. Chadbourn 1974).

minutes, probably, to vote for a decision of conviction in this case.<sup>23</sup>

The trial judge did not consider the question of who made the statement to be a preliminary fact question. Rather, he looked at it as a matter of discretionary balancing of the probative against the prejudicial effect of a piece of evidence. The judge reasoned that since he found that the attorney, not De Marco, had made the statement, it had no admissible probative effect but a very great prejudicial one. Of course, there are problems with this analysis. Every Zorg, one would suppose, would have no admissible probative effect if the judge decided the preliminary fact against admissibility. The whole point of the Zorg is that the jury should make that determination. The judge should decide the preliminary fact question only when we have decided that the question is not a Zorg but a Mabru, since in this kind of resolution there is no balancing of prejudicial against probative effect.

A variant of the problem in hypothetical 7 and the *De Marco* case is what is called the admission by silence, and here again our analysis results in a somewhat unusual division between Mabrus and Zorgs. Examine the following hypothetical:

9. Prosecution of D for rape. Witness, W, wishes to testify that while he sat in a bar with D, the prosecutrix's father, F, entered, pointed at D and said: "You are the man who attacked my daughter," but that D made no reply.

Our black letter law is that when a party is accused of something in circumstances where, had he been innocent of the accusation, he would have denied it, his failure to make any denial is admissible as an admission. This is a Zorg, and the jury must decide the preliminary fact questions so long, of course, as reasonable jurors could differ about them. Thus, whether the party heard the accusation, whether the circumstances were such that if it were untrue he would have been likely to deny it, and whether he did, in fact, deny it, are all issues for the jury.

It would seem, however, that the problem is somewhat more complex than this. Remember that in hypothetical 9, the jury passing on the admission by silence will have to hear not only evidence about the fact of silence and the surrounding circumstances, but it also must hear F's accusation as the necessary predicate for understanding what it is that D allegedly has admitted. Certainly, one can imagine situations where the jurors might decide that D had not heard the accusation or that he had denied it, but that the accusation itself, because of F's reliability, was nonetheless highly probative. In such a situation, they would, of course, ignore the judge's instructions that F's statement should not be considered for the truth of the fact it asserts, but only to

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23. 407 F. Supp. at 114.



show what D did or did not admit.<sup>24</sup>

Are we to conclude that our standard rules as to admission by silence are wrong and that the preliminary questions are Mabrus rather than Zorgs? Not quite. There are indeed some admissions by silence which are—or at least should be—Zorgs. Take the case where F's accusation is independently admissible as an exception to the hearsay rule. Let us say it is a spontaneous declaration or, should the jurisdiction's evidence rules permit, a prior identification made by a witness or a contemporaneous statement. In these cases, the jury would be permitted to consider the hearsay accusation anyway, and hence, the admission by silence would carry no freight of inadmissible hearsay. In such a case, the jury could be trusted to apply the judge's instructions in its consideration of the significance of D's silence. So too, perhaps, where F has already testified about the facts giving rise to the accusation. Here, though the accusation itself is still hearsay, it is likely in most cases that the jury would not give it any independent weight, over and above F's testimony.

A somewhat more difficult question is presented by the cases where the admission by silence involves a failure to reply, not to an accusation, but to a question. Examine the next hypothetical:

10. Same as hypothetical 9 except that F asks: "Are you the man who attacked my daughter?"

Although D's failure to reply certainly might be an admission by silence, it is a close case whether the preliminary facts should be Mabrus or Zorgs. One might argue that since the question is not itself a statement, the jury would not be tempted to rely on the credibility of the questioner. On the other hand, by singling out D to ask, F makes an implied assertion about the existence of some basis for the question. In any event, the question is a difficult one and I am prepared to overlook it here if the reader is as well.

Let us now move on to a somewhat more complex set of hypotheticals involving our Mabrus and Zorgs.

11. Witness, W, testifies that he is unable to recall a certain incident sufficiently well to testify about it from memory. He says it might help if he could attempt to refresh his recollection from a list he had made earlier. The examiner wishes to have him try and if, indeed, the list does refresh his memory, to have him testify from his revived memory.

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24. It can be argued that if the jurors had nothing further to go on than the mere fact of accusation, it would be extremely unlikely that they would rely on its credibility and, hence, the jurors might, in such cases, be permitted to decide the preliminary fact question. This would be quite difficult to determine in many cases, however, since the jury might make many inferences about the credibility of the accuser which were not strictly rational. As a result, the better rule in all such cases where the accusation would be inadmissible would be to have the judge determine the preliminary facts before the jury could hear the evidence.

In general, the witness may be shown almost anything to refresh his memory, and if he does remember, he may then testify from what is called "present recollection revived." The provisions in both the California Evidence Code<sup>25</sup> and the Federal Rules of Evidence<sup>26</sup> seem to deal primarily with the rights of the adverse party to discovery, rather than who should decide the preliminary fact questions. According to *Weinstein's Evidence*,<sup>27</sup> the most modern of the evidence treatises, however, the trial judge may thwart counsel's efforts to present this sort of testimony in three different ways. First, the judge may find that the witness' memory, despite his testimony, is not lacking and, hence, may not allow him to look at the list to begin with. Second, the trial judge may permit the witness to look at the list, but may then find that his memory was not in fact refreshed and, hence, refuse to allow him to testify. Finally, the trial judge, in his discretion, may find that the possibility of undue suggestion outweighs the probative value of the testimony and decline to permit the witness to testify on this ground.

A closer look at this analysis, however, raises substantial questions. If we wish to confine our examination to Mabrus and Zorgs, only one of the preceding three possibilities genuinely involves a preliminary fact question determining the admissibility of evidence. The first possibility, involving whether the attorney can show a document to the witness on the stand, simply concerns a trial technique which, like many others, should be within the trial judge's discretion. The second, involving the admissibility of the allegedly refreshed recollection, raises a genuine preliminary fact question, but it would seem incorrect to regard the question of whether the witness truly remembers as a Mabru to be decided by the judge. Generally, the question of whether, in fact, a witness remembers what he purports to remember is a Zorg. After all, memory is just another aspect of personal knowledge and, as discussed in hypothetical 5, the question should be for the jury. It is true that the dangers of suggestion are high in this area, and certainly the witness, at the very least, might in the judge's discretion be required to wait several minutes after viewing the writing before testifying. In that way, we could at least be sure that he remembered something, whether the writing or the event itself. If the witness could not do this, the judge could decide that no reasonable person could believe he actually remembered the event, and, hence, take that issue from the jury.

If the judge tries to do better than this and untangle whether the witness really remembers the event rather than the hearsay list, he will run into serious difficulties. After all, the basic problem is not confined to the case in which the witness has purportedly refreshed his memory

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25. CAL. EVID. CODE § 771 (West 1966).

26. FED. R. EVID. 612.

27. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 612-9 to 612-17 (1977).

on the stand. In every case, it is nearly impossible to know whether the witness is really testifying from his memory of an event or from his preparation by the attorney or someone else. In a sense, on the issue of admissibility, we have to take the witness' word for it just as we have to take his word that he saw or heard the events he testifies about. Of course, the jury, which is entitled to believe him, is entitled to disbelieve him as well and to ignore every word he says. But this would seem to be the province of the jury, not of the judge.

The problem of present recollection revived does, however, involve one complexity not present in the testimony of witnesses. The jury may believe that the witness, despite his assertions, does not remember the event and is merely repeating what the list contains; but it also may believe that the list itself is accurate. If so, the jurors may accept the inadmissible list, which they have not even seen, as a kind of reliable hearsay. Though superficially similar, this case does not need to be treated like hypothetical 7, the *De Marco* case, or the failure to reply to an inadmissible accusation. In those cases, the judge had to decide a preliminary fact question which ordinarily would be a jury question because in those situations the jury reasonably could find the testimony probative even though it was inadmissible under our evidence rules. Here, if no details concerning the making of the list come out in court, it is unlikely that the jury would find the list to be probative. Moreover, if the judge properly anticipates the problem, he may require the witness to attempt to refresh his recollection outside the jury's presence. Then the jurors can decide the question of the witness' memory without being tempted to rely on the probative value of the hearsay list.

Finally, the last of Judge Weinstein's suggestions, that the judge should balance the possibility of undue prejudice against the probative value of the witness's testimony also raises problems—though not of the Mabru-Zorg variety. As in the *De Marco* case, Judge Weinstein's suggestion would be a most unusual use of the trial judge's balancing discretion.<sup>28</sup> Usually such questions come up in the case of gory photographs or of prior crimes where the prejudicial effects are clear.<sup>29</sup> Here,

28. The distinction is stated in FED. R. EVID. 403 as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." The relevant portion of CAL. EVID. CODE § 352 (West 1966) states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice . . . ."

29. See, e.g., *Durns v. United States*, 562 F.2d 542 (8th Cir.), cert. denied, 434 U.S. 959 (1977) (evidence in kidnapping prosecution of previous kidnap attempt admissible under FED. R. EVID. 403 because the danger of unfair prejudice did not outweigh its probative worth); *People v. Gibson*, 56 Cal. App. 3d 119, 128 Cal. Rptr. 302 (2d Dist. 1976) (CAL. EVID. CODE § 352 requires exclusion of evidence of prior criminal acts where required showing of substantial probative value not made, and of gruesome, revolting, and shocking photographs where probative value is outweighed by danger of undue prejudice).

as in the *De Marco* case, discretion is merely being used to prevent the jury from believing a witness who says that he remembers something which the judge thinks he does not remember. Except for the problem we have already mentioned—that the jury may believe the hearsay list—there is no reason to give the judge discretion to spare the jury from listening to untruthful witnesses; indeed, that very reason is why we recognize the existence of *Zorgs* to begin with.

Let us develop further the situation which we examined in hypothetical 11:

12. After seeing the list, W says he cannot recall the events described, but he does remember that he wrote down the list at a time when the events were fresh in his memory and that he knew the list to have been correct at that time.

Now the examiner seeks to introduce into evidence the list itself under the past recollection recorded exception to the hearsay rule.<sup>30</sup> This exemption requires, among other preliminary facts, that the witness lack sufficient memory to testify about the events recorded. Since a jury might well ignore this requirement and still find the list to be probative, the question as to the witness' memory must be a *Mabru* for the judge to decide. It may bemuse us, but it should not upset us that the very same question would have been a *Zorg* had the issue come up in the context of whether the witness could testify as to present recollection refreshed. After all, in many types of cases the judge and the jury may have to decide the same issue for different purposes.

Now, let us move on to another area in which the same prelimi-

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30. FED. R. EVID. 803 provides in pertinent part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

CAL. EVID. CODE § 1237 (West 1966) provides:

(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:

(1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

(2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;

(3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(4) Is offered after the writing is authenticated as an accurate record of the statement.

(b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

nary fact question may have to be decided for two very different purposes. Examine this hypothetical:

13. Prosecution for incest. P, the prosecutrix, wishes to testify that she is the daughter of defendant, D, but that they nonetheless went through a marriage ceremony and thereafter had intercourse. D claims that P cannot testify against him because she is his wife and the marital privilege applies (we will assume here that a defendant may avail himself of this privilege). The prosecution argues that a purported marriage to one's own daughter is invalid so that P and D are not married. D agrees with this statement of the rule, but denies that P is his daughter.

On the issue of admissibility, we have a Mabru, as we noted in hypothetical 1. In deciding whether to admit P's testimony, the judge must decide whether P is D's daughter. If he decides that P is not D's daughter, then P is D's wife and, hence, the judge must exclude her testimony. Of course, in so doing, he is also deciding that, in his opinion, D is not guilty. Should he then direct a verdict of acquittal? The answer is no. True, if there is not enough evidence to convict without the excluded testimony, he must do so. If, however, on the basis of the remaining evidence reasonable jurors could still find D guilty, the judge should leave that question to the jury. That he himself did not believe D guilty may be a reason for him to exercise his very different power to grant a new trial after a guilty verdict, but it is not, we are told, sufficient reason to take the case from the jury initially.

Of course, even if the judge decided that P was D's daughter and, hence, that her testimony was admissible, the jury might nonetheless acquit D. This is the jury's prerogative and such a decision would not necessarily be inconsistent with that of the judge, since the judge would probably use a preponderance of the evidence standard while the jury should apply that of reasonable doubt.

As we noted earlier, the problem presented when a preliminary fact question requires a factual determination identical to one of the ultimate issues of the case also arises with respect to statements of co-conspirators. Again, the questions should be decided both by the judge and by the jury on different standards of proof and for different purposes. This paradox should cause us no particular concern.

The last of our Mabru-Zorg problems in this short discussion involves the admissibility of a defendant's confession. Examine hypothetical 14.

14. Prosecution of D for murder. The state wishes to admit D's confession, allegedly made after his arrest. D, admitting that he did in fact confess to the crime, objects, alleging that no *Miranda* warnings were given him prior to his confession. The prosecution disputes this, offering evidence that the warnings were given.

This is an easy case; the question of whether the warnings were

given is a *Mabru* to be decided by the judge. It is, one would hope, no slight on the *Miranda* rule to observe that no one solely interested in determining D's guilt would pay much attention to it. Although the reliability of confessions may have some positive correlation with the receipt of *Miranda* warnings, compliance with the rule is, by any standard, an irrational way to divide probative from nonprobative confessions. Rational jurors will most likely assume that absent coercion the defendant probably would not confess unless he were guilty and, though this conclusion might be wrong in particular cases, the presence or absence of *Miranda* warnings will not bear much relation to the accuracy of the confession. If anyone, therefore, is to enforce the *Miranda* requirements, it will have to be the judge.

Nor should this result be restricted to cases in which the *Miranda* warnings are an issue. Examine the next hypothetical:

15. In the prosecution of D for murder, the state wishes to admit D's confession made to a police officer. D, admitting that he did confess, objects to admission of the confession, alleging that he was slapped by the officer first. The prosecution disputes this and says that the police behavior was impeccable.

Here we have another *Mabru*. Although if the defendant is telling the truth, the confession would be inadmissible, a rational jury still might believe that the confession is probative even though the defendant was slapped. The jury might find the defendant to be a man of considerable physical courage who realized that the crime with which he was charged was a very serious one. The jury could well conclude that he confessed, not because of the slap, but because he had received information that convinced him the police had him dead-to-rights anyway. The point is that our rules against admitting confessions produced by even moderate physical force against suspects are, like the *Miranda* rule, based on values that go beyond merely helping to ensure the reliability of confessions. Again, as in hypothetical 14, since the jury quite rationally might ignore or, more precisely, discount the fact which makes the confession inadmissible, the issue must be a *Mabru* to be decided by the judge.

Now, examine the hardest confession hypothetical:

16. Same as 15, except that D alleges he was "tortured unmercifully" before he confessed.

Here, finally, it looks like we have a *Zorg*. If the jury finds D's allegations to be true, it rationally should, and probably would, disregard his confession and refuse to give it any weight at all. Certainly the jurors would have to be unusually obtuse not to know that a confession may be wrung from almost anyone if he is tortured enough. Do we then have a true *Zorg*? The answer, it would seem, is no.

Treating this question as a Zorg involves us in two problems—one of which we can solve and the other of which we cannot. First, the jury might find extreme torture but nonetheless regard the confession as reliable because it was well corroborated, perhaps by the subsequent discovery of the murder weapon precisely where the defendant's confession said it would be. We could take care of this case with relative ease, however, by changing our Zorg into a Mabru whenever the surrounding circumstances make the confession probative. Thus, the jury would be permitted to decide the preliminary fact question as to voluntariness in all cases in which the reliability of the confession was not corroborated.

We could not, however, administer a rule dealing with the second problem. What happens when the defendant's allegations of torture are, as usual, directly contradicted by the police, who claim that the defendant was never touched? If the jury could be restricted to believing one set of witnesses or the other, no problem would arise. But what if the jury decided that the truth lay somewhere in between? Then the jury rationally could decide that, although the defendant was illegally abused, the abuse, as in hypothetical 15, was not such as to produce an unreliable confession. There seems to be no way to protect against this possibility, and hence, what looked like a Zorg must be a Mabru, and the preliminary facts as to voluntariness of a confession properly are left to the judge.

#### CONCLUSION

The issues raised by the necessity of determining preliminary fact questions are by no means confined to telling the Mabrus from the Zorgs. Several other problems also require extended discussion that they cannot receive here. One is the "second bite" problem: should the jury be instructed to redetermine a preliminary fact found by the judge? When the preliminary question is a Mabru and the judge has decided it so as to admit the evidence, one can argue that the jury should nonetheless be required to redetermine that fact. If the only reason why we required the judge to decide the preliminary fact question was because we feared that the jury would ignore the entire issue, there is no reason why, once the evidence is in, we then should not allow the primary factfinder to decide the question. If the jury wishes to follow the technical rule of evidence, it should have that opportunity—encouraged, of course, by the judge's instruction to do so. The countervailing arguments, of course, are that the likelihood that the jury will follow such an instruction is small, that it will have enough trouble deciding the case itself, and that instructions to use artificial rules in deciding whether to consider particular pieces of evidence will only confuse the jury.

The second of the questions which deserves, but will not receive, extended discussion here involves the kinds of evidence that the judge may use to decide a preliminary fact question once we have determined it to be a *Mabru*. The California Evidence Code<sup>31</sup> restricts the judge to considering only admissible evidence, while the federal rules<sup>32</sup> make it clear that only the rules as to privilege are binding in deciding questions of preliminary fact. The matter is extremely important under some rules of evidence, such as coconspirator exceptions, where the hearsay statement may prove its own preliminary fact. The issue of when and to what extent a judge in determining preliminary facts should be able to raise himself by his own bootstraps is one which deserves considerable discussion.<sup>33</sup>

Finally, there is the question of the appropriate burden of proof to be applied by the judge in deciding a preliminary fact question committed to him for decision. The Supreme Court has held that the preponderance of the evidence test is enough in the most sensitive of these cases—the voluntariness of a confession.<sup>34</sup> It has been forcefully argued,<sup>35</sup> however, that we can better implement our societal values and improve our factfinding process by applying higher standards of proof in such cases. One might question whether manipulation of the burden of proof on the preliminary findings of fact is an appropriate way to advance these laudable objectives, but in any event, the matter requires a great deal more discussion.

Here, I have attempted only to lay out the issues involved in the distribution of functions between the judge and the jury as to preliminary questions of fact. The problem of *Mabrus* and *Zorgs* is enough to keep us busy at this time. When, as I trust, some later symposium is published honoring further the memory of David Louisell, I will, I hope, be around to dedicate consideration of those further questions to him as well.

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31. CAL. EVID. CODE § 300 (West 1966).

32. FED. R. EVID. 104(a) states in part:

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 . . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges. See note 15 *supra*.

33. Unfortunately, it has been virtually ignored by the courts and commentators.

34. *Lego v. Twomey*, 404 U.S. 477 (1972). But see *People v. Jiminez*, 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978).

35. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975).