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Evidence Rules and the Ritual Functions of Trials: Saying Something of Something

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EVIDENCE RULES AND THE RITUAL FUNCTIONS OF TRIALS: "SAYING SOMETHING OF SOMETHING"[1]

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The function of the courts is largely dramatic, and drama, to be effective, must not adopt the technique of science.[2]

I. INTRODUCTION

If Anglo-American evidence law has first principles, one of them is that you cannot assess the means without specifying the end. This tenet is introduced on the first day of the typical law school evidence class as the solution to the King Solomon puzzle: "You can't decide whether an item of evidence is relevant without asking 'relevant to what?'" It resurfaces with character evidence, which is disallowed only when offered to prove "action in conformity therewith."[3] And the same relativity principle is part of the definition of hearsay: an out-of-court statement is only "hearsay" when it is offered for a particular purpose—"to prove the truth of the matter asserted."[4]

This principle, so fundamental to the law of evidence, also applies to evidence scholarship. Before we can make any judgment about whether the rules of evidence matter, we must decide what we wish to accomplish with them. Because evidence law does not embrace its own substantive ends, the purposes of evidence law must be determined by reference to the trial which it is designed to regulate. Thus, before we can decide whether or how the rules of evidence make a difference, we must commit to some understanding of the function and meaning of the trial.

Most evidence scholarship assumes that the trial is primarily a search for truth and analyzes the rules of evidence in terms of how effec-

1. Clifford Geertz, *Deep Play: Notes on the Balinese Cockfight*, *in* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 412, 448 (1973).

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2. Thurman W. Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913, 931 (1934).

3. FED. R. EVID. 404(a).

4. FED. R. EVID. 801(c).

tively they advance that aim. This rationalist tradition[5] constitutes the internal account of the doctrine because it includes the justifications that actors within the legal system use to explain and interpret the law. An examination of the character evidence rule from within this tradition might compare the assumptions about human personality it embodies with the findings of psychology.[6] An analysis of the hearsay principle would ask whether the rule adequately distinguishes those out-of-court statements that are reliable from those that are not.[7]

A lesser competing tradition within the body of evidence scholarship regards the trial as a mechanism for the authoritative resolution of disputes, rather than as a search for truth. Working from this premise, scholars have arrived at a different understanding of the rules. When the purpose of the trial is understood to be dispute resolution, the character evidence rule exists as much to give the parties a sense of "catharsis" as to filter out evidence of dubious reliability.[8] From this perspective, the hearsay rule can be seen as promoting the stability, rather than the accuracy, of verdicts.[9]

This Essay presents a third perspective on the trial in order to suggest an alternative understanding of the law of evidence. Rather than assess the rules of evidence against the background of the trial as a search for truth or as "society's last line of defense in the indispensable effort to secure the peaceful settlement of social conflicts,"[10] this Essay will look at how the rules of evidence appear when the trial is viewed as an attempt to "say something." To that end, this Essay will first briefly describe the technique of symbolic interpretation of collective group behavior. It will illustrate the technique by summarizing one of the best known and most influential examples of this approach—Clifford Geertz'

5. *See* William Twining, *The Rationalist Tradition of Evidence Scholarship*, *in* WELL AND TRULY TRIED 211 (Enid Campbell & Louis Waller eds., 1982).

6. *See, e.g.*, Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 505-06 (1991) (finding that assumption in exceptions to Federal Rules of Evidence that character evidence is probative of conduct disproved by social scientists in 1970s strongly supported in current psychological literature).

7. *See, e.g.*, Roger C. Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783, 829-38 (1990) (assessing whether assertion-centered definition of hearsay in Federal Rules of Evidence reliably captures evidence in which hearsay dangers are present).

8. David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 2-3 (1986-1987).

9. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1373 (1985) (arguing that many evidentiary rules can be explained by need to promote public acceptance of verdicts).

10. Henry M. Hart, Jr. & John T. McNaughton, *Evidence and Inference in the Law*, *in* 87 DAEDALUS 40, 44 (Fall 1958).

essay *Deep Play: Notes on the Balinese Cockfight*.[11] This Essay will then examine the rules governing proof at trial as a reflection of our ideas about the nature of law and fact. It will show how enacting those ideas in the context of the trial tends to invest them with concrete reality, thereby validating the very assumptions on which the system operates.

II. SYMBOLIC INTERPRETATION OF COLLECTIVE SOCIAL ACTION

Interest in the expressive aspect of organized group behavior is not new. The name most closely associated with this method is Emile Durkheim, who saw in the rituals of punishment the mechanism by which society creates and regenerates the shared values that make social life possible.[12] Traditionally, the symbolic interpretation of collective social action focused almost exclusively on religious rites.[13] The recent trend toward applying the tools of social anthropology to modern secular societies, together with developments in the sociology of knowledge, have given rise to an interest in a symbolic interpretation of thoroughly secular public ceremony. This engrafting of the ideas and techniques used in the study of religious rites onto nonreligious social and political ceremony spawned the concept of nonreligious or secular ritual.

As applied to nonreligious activity, the term ritual is used to mean any symbolic behavior that is socially standardized and repetitive.[14] Understood in this broad sense, ritual is a universal feature of social life. It includes diverse events, such as high school football games, political conventions and city council meetings. These secular ceremonies promote various ends. On one level they are what they purport to be—amusement, candidate selection and city governance. But on another level they are part of the process by which we make sense of ourselves and our social world. Through them we tell ourselves who we are and what the world is like. It is in part through the symbolic expression of ideas in collective ceremony that the ideas we hold about ourselves come into existence as social realities. For just as religious rites give concrete reality to unseen mystical and religious beliefs, secular rituals "make visible, audible, and tangible beliefs, ideas, values, sentiments, and psychological dispositions that cannot directly be perceived."[15] Furthermore, this rit-

11. Geertz, *supra* note 1, at 448.

12. EMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE (Joseph Ward Swain trans., 1st ed. Free Press 1965) (1915).

13. This emphasis was due in large part to the fact that in the preindustrial societies studied by anthropologists, virtually all collective behavior was religious.

14. DAVID I. KERTZER, RITUAL, POLITICS AND POWER 9 (1988).

15. VICTOR TURNER, THE FOREST AND THE SYMBOLS: ASPECTS OF NDEMBU RITUAL 49-50 (1967).

ual depiction of abstract social, legal and political ideas makes them seem both real and somehow given or inevitable. "Ritual . . . assert[s] that what is culturally created and man-made is as undoubtable as physical reality."[16]

> Through form and formality [ritual] celebrates man-made meaning, the culturally determinate, the regulated, the named and the explained. It banishes from consideration the basic questions raised by the made-upness of culture, its malleability and alterability. Every ceremony is par excellence a dramatic statement against indeterminacy in some field of human affairs. Through order, formality, and repetition it seeks to state that the cosmos and social world, or some particular small part of them are orderly and explicable and for the moment fixed.[17]

A. Geertz' Study of Balinese Cockfights

The preeminent example of the symbolic interpretation of collective group behavior is Clifford Geertz' hermeneutic study of Balinese cockfights. On one level, cockfights are about betting on which of two chickens armed with razor-sharp leg spurs will first succeed in hacking the other to bits. On another level, cockfights are collective efforts to organize and imaginatively actualize Balinese' perceptions about themselves and their social world.

In Balinese cockfights, according to Geertz, "it is only apparently cocks that are fighting. . . . Actually, it is men."[18] This identification of Balinese men with their fighting cocks is complex. On the one hand, cocks represent the ideal male ego, "ambulant penises" as Geertz puts it.[19] On the other hand, cocks are in fact animals. And for the Balinese, animals and their own animal nature produce both feelings of revulsion—witness the practice of filing children's teeth so as not to look like fangs—and supernatural fear, since animals are associated with demons and the powers of darkness. Thus, "[i]n the cockfight, man and beast, good and evil, ego and id, the creative power of aroused masculinity and the destructive power of loosened animality fuse in a bloody drama of hatred, cruelty, violence, and death."[20]

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16. Sally F. Moore & Barbara G. Myerhoff, *Secular Ritual: Forms and Meanings*, *in* SECULAR RITUAL: A WORKING DEFINITION OF RITUAL 3, 24 (Sally F. Moore & Barbara G. Myerhoff eds., 1977).

17. *Id.* at 16-17.

18. Geertz, *supra* note 1, at 417.

19. *Id.* at 432.

20. *Id.* at 420-21.

As social phenomena, cockfights are highly structured events.[21] Just as the cocks are a metaphor for their owners, the structure of the human performance in these events is a metaphor for Balinese society. The owners of the opposing cocks and the coalition of supporters betting on those cocks always coincide with opposing factions in the social structure. Likewise, the betting by nonowners that accompanies every cockfight is done strictly according to factional affiliation. The groups represented and the category of allies and opponents changes from match to match. In a fight between representatives of two kin groups, the opposition follows kin group lines, whereas in a fight between owners who come from different villages, one's allegiance depends on one's village. In all cases, the pattern of betting reflects larger societal divisions. How one bets, therefore, is determined by who you are, rather than by your estimation of the likelihood that one or another of the two birds will come out alive.[22]

Given the metaphorical significance of the cocks as the alter egos of their owners, and the metaphorical character of the betting as a microcosm of society, it is readily apparent that the cockfight is not about either cocks or money. Rather, it "is fundamentally a dramatization of status concerns."[23] And in Bali, "[s]tatus is all,"[24] or nearly all.[25]

Although an obsession with status permeates all aspects of Balinese social life, overt expression of interpersonal and intergroup conflicts is suppressed by an equally obsessive concern with maintaining the appearance of social harmony.[26] In the guise of a fight between chickens, important aspects of everyday experience, such as masculinity, animal aggression, personal prestige and intergroup rivalry, are given open

21. *Id.* at 421-23. The cockfight, which takes place in a 50-foot square arena, is regulated by well-defined rules administered by an umpire. These rules specify virtually everything: the placement of the leg spurs the cocks use to dispatch their adversaries; the duration of the round and intermission (measured by the time it takes for a coconut pierced with a small hole to sink in a pail of water); and the matching and engagement of cocks (based on a complex variety of factors including color and physical characteristics of the bird, the date of the fight within the Balinese calendar, and the direction—North, South, East, West—from which the cocks are engaged). *Id.*

22. *Id.* at 437-38.

23. *Id.* at 437.

24. CLIFFORD GEERTZ, NEGARA: THE THEATRE STATE IN NINETEENTH-CENTURY BALI 102 (1980).

25. Geertz, *supra* note 1, at 447. This obsession with status has its source in Balinese cosmology, which sees the cosmos as a grand hierarchy, wherein animals and demons are at the bottom, gods and god-kings are at the top, and ordinary mortals are distributed throughout an elaborate assortment of fixed status ranks in between. This "hierarchy of pride," derived from Polynesian title ranks and Hindu caste, "is the moral backbone of society." *Id.*

26. *Id.* at 446-47.

expression.[27]

> [T]he cockfight renders ordinary, everyday experience comprehensible by presenting it in terms of acts and objects which have had their practical consequences removed and been reduced . . . to the level of sheer appearances, where their meaning can be more powerfully articulated and more exactly perceived. . . . An image, fiction, a model, a metaphor, the cockfight is a means of expression; its function is neither to assuage social passions nor to heighten them . . . but, in a medium of feathers, blood, crowds, and money, to display them.[28]

But cockfights are more than simply an acting out of Balinese ideas about status. In part through their symbolic expression in cockfights those ideas come into being, not as ideas, but as descriptions of reality. Like other symbolic action, "cockfights are not merely reflections of a preexisting sensibility analogically represented; they are positive agents in the creation and maintenance of such a sensibility."[29] Through them the Balinese simultaneously form their own temperaments and the temper of society, or at least a facet of each. In this way "the inner becomes outer, and the subjective world picture becomes a social reality."[30]

B. The Trial as Ritual

The significance of Geertz' article is not in what it says about the substance of Balinese views about status, but as an illustration of the way formal, symbolic expression of abstract ideas formulates those ideas as social reality. Just as cockfights are not merely amusement, trials cannot be completely understood from the perspective of their practical significance alone. Our law courts simply have not become the passionless, routinized, matter-of-fact institutions that a bureaucratic instrumental justification suggests. Just as cockfights adhere to formal rules that seem superfluous to their patent function as entertainment and spectacle, our judicial procedures are "elaborated with what seem to be digressions, formulae and formalisms,"[31] that are difficult to explain by reference to their explicit practical purposes alone. And in the same way that cockfights display and give reality to Balinese views about themselves and

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27. *Id.* at 443.

28. *Id.* at 443-44.

29. *Id.* at 451.

30. KERTZER, *supra* note 14, at 9 (quoting H.L. NIEBURG, CULTURE STORM: POLITICS AND THE RITUAL ORDER 30 (1973)).

31. Sally F. Moore, *Political Meetings and the Simulation of Unanimity: Kilimanjaro 1973*, *in* SECULAR RITUAL: A WORKING DEFINITION OF RITUAL, *supra* note 16, at 151, 152.

their social world, trials depict and thereby validate assumptions about the nature of fact and the authority of law on which the legitimacy of the practice depends. The process, in effect, proves its own premises.

1. Formal features of the trial

The process by which ceremonial expression gives concrete content and form to abstract ideas is not easily discerned. One attempt to articulate the process identifies formality as both the dominant means of ritual expression and the mechanism by which the message embodied in the ritual behavior is invested with the quality of unquestionable truth.[32] Formality, according to this view, is "the magical aspect of a rational activity."[33] It is communication by assertion and display rather than by demonstration. Because the ideas are asserted as postulated truth, they cannot be subjected to rational reflection or criticism. They are simply declared to be so and, by virtue of that declaration, accepted as true.

The efficacy of formalistic ritual expression derives in part from the extraordinary character of ritual experience. The regularity and repetition that characterizes ritual "sets [it] apart from the ordinary course of life, lifts it from the realm of everyday practical affairs, and surrounds it with an aura of enlarged importance."[34] It creates a time and space which is, if not quite sacred,[35] at the very least emotionally charged. And formalistic expression lends to the ideas embodied in the ritual the quality of, if not sanctity, at least "unquestionable truthfulness."[36] Thus, the sense of heightened reality that trials and other public rituals produce has the effect of "bring[ing] the ethical and jural norms of society into close contact with strong emotional stimuli."[37] In this way, ritual "converts the obligatory into the desirable."[38]

If formality and repetition is the hallmark of ritual, the judicial trial must be counted as among the most decidedly ritualistic institutions of our society. Few if any features of modern life are as imbued with formality as jury trials. To begin with, the occasion and content of the trial is determined by formal criteria. To bring a trial into existence one must recite certain things in certain ways within precisely specified time periods. Failure to conform to these formalities may result in invalidation of

32. Moore & Myerhoff, *supra* note 16, at 24.
33. Moore, *supra* note 31, at 153.
34. Geertz, *supra* note 1, at 448.
35. *See* MIRCEA ELIADE, THE SACRED AND THE PROFANE 20-22 (1959).
36. Roy A. Rappaport, *Ritual, Sanctity and Cybernetics*, 73 AM. ANTHROPOLOGIST 59, 69 (1971).
37. TURNER, *supra* note 15, at 30.
38. *Id.*

the process. Likewise, what the trial is about is formally determined by the pleadings.

Trials, like other rituals, are distinct from ordinary life both as to time and place.[39] The duration of the trial is precisely defined according to formal criteria. Its beginning is marked by the ceremonial swearing of the jury, and its termination by the ritual recitation of the verdict. While the trial is in progress, the ordinary rules of conduct are temporarily suspended in favor of special rules of speech, behavior and demeanor which have the effect of differentiating the trial from everyday experience. Most important among these rules are the rules of evidence, which specify the permissible form and content of much of what is said at trial. Other rules specify when one may stand or sit, where to stand and sit, when it is permissible to speak, acceptable forms of address, appropriate display of emotion, status distinctions, and many other less easily defined aspects of demeanor.

Trials are also separated from common experience by location. They are conducted in courtrooms specially designed and set aside exclusively for that purpose. These courtrooms, moreover, are often constructed and adorned so as to incite feelings of awe and reverence in those who enter. Even when the physical appearance of the courtroom does not itself convey a sense of solemnity, the fact that the space is committed exclusively to the performance of judgment creates a sense that what goes on there is both especially serious and somehow connected with fundamental reality.

Trials are characterized by an inner structure and an "absolute and peculiar order."[40] The sequence of events during the trial is invariant. In addition, the participants in trials act within well-defined roles as judge, juror, attorney, party, witness and spectator. Behavior in these roles is closely specified and is frequently exaggerated and stylized.[41]

Like other rituals,[42] trials are suffused with secrecy and mystery. Much of what happens during trial is incomprehensible to lay participants and observers. Though not told why some questions may not be asked or answered, they are constantly assured that the judge's rulings are not his or her own, but conform to the irresistible demands of "the

39. JOHAN HUIZINGA, HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE 28 (1970) (explaining limitations of time and place fixed on ritual and play).

40. *Id.* at 29.

41. *See* THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 65 (2d ed. 1988). For example, the classic first line in both opening statement and closing argument is "May it please the Court, counsel and members of the jury." *Id.*

42. HUIZINGA, *supra* note 39, at 31.

Law." The oracular character of the jury ensures that the basis of its decision remains largely unknown.

In addition, trials display an obsession with exactness that is foreign to strictly rational types of behavior. Though there is widespread suspicion that lay jurors are incapable of comprehending the lengthy, prolix charges read to them by the judge, the statement of the law must be perfect nonetheless. Not only the judge's instructions, but frequently the questions posed by attorneys and the answers of witnesses must be phrased in ritually correct language.

The uncertainty of outcome in jury trials, the high stakes involved and the all-or-nothing nature of most solutions to judicial disputes generate feelings of emotional tension and release. Indeed, as Professor Moore observed, "[n]o time in a criminal trial, and few in life, are as charged with tense expectation as the period after the jurors have retired to deliberate upon [the] defendant's fate."[43] Civil trials involving large sums of money or significant issues of principle produce comparable levels of tension.

2. The construction of independent realms of law and fact

In its most general sense, law is a technique for assigning normative significance to historical occurrence. It is a way of "describing the world and what goes on in it in explicitly judgmatical terms."[44]

Different cultures and different legal systems construct the relation between law and fact, between the realm of judgment and the realm of proof, in different ways. The distinctive feature of our system is the representation of law and fact as completely separate. It is assumed that a world of fact exists out there as part of reality, and that through the use of perception, memory and rational inference from observed phenomena, we can arrive at a more or less accurate picture of what it is.

Alongside or above the world of fact is a separate realm of valuation or law. Because the domain of "is" and "ought" are completely separate, neither influences the other. On the one hand, the process of determining what is so must be wholly value free. The facts themselves have no inherent meaning. Thus, the only valuative judgment that can be made about any statement of fact is that it is either true or false. Indeed, to say that description is not evaluation is tautologous, since it is precisely the quality of being *only* true or false that makes a statement factual. Be-

43. 8A JEREMY C. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 31.04, at 31-32 (2d ed. 1985).

44. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 174 (1983).

cause we posit an independently existing reality, any statement of fact is necessarily either true or false. To the extent our factfinding procedures can produce only approximations of reality, it is because the procedures are imperfect, not because the world of phenomena is indistinct.

Just as questions of meaning do not influence questions of truth, the question of "what is so" does not affect the content of the law. Legal decision-making consists of bringing the two worlds together through a process of matching a found fact with an appropriate legal rule. The normative judgment that results is legitimate or correct to the extent that it is based on the true facts and results from the correct application of the correct legal rule.

The methods we use for determining facts and assigning normative meanings to particular instances of conduct both rely on and help construct this view of the relationship between fact and value. Our rules of evidence and procedure depict the world of fact as an objective reality that exists independently of the process by which it is known. Through the dramatization of our beliefs about the nature of reality in ritual or ceremonial fashion, those beliefs take on the quality of postulated truths. Thus, the very process that certifies the unquestionable truthfulness of those beliefs then uses the same certified truths as the premises on which it operates.

The structure of the trial constitutes the most obvious expression of the views that perception is independent of interpretation and that the process of ascertaining what is can proceed without regard for what it means. At trial, proof and judgment are kept completely separate. The presentation of the evidence from which the jury is to find the facts occurs first. In a distinct phase of the trial, the judge instructs jurors on the legal categories that they must use to determine the significance of those facts.

This separation of proof and judgment is emphasized by the judge's constant admonitions to the jury not to discuss the case or to arrive at any conclusions before they are instructed on the law. It is also manifest in the enforced passivity of the jury. Allowing jurors to ask questions would constitute a tacit admission that they have some idea of what it is they want to know. The prohibition against juror participation rests on the assumption that it is possible—indeed, desirable—to determine the truth about events without any idea about the purpose of the inquiry. Jurors are supposed to take in data and postpone all interpretation until the judge presents the criteria for judgment through instructions on the law.

The use of uninformed jurors as decision makers further reinforces

the conception of a value-free world of objectively discoverable fact. Insisting that jurors approach the case as a clean slate implies that jurors could have a point-of-viewless point-of-view. It suggests that it is possible to approach an event entirely without preconceptions and formulate a picture of reality based entirely on neutral facts.

This belief in the radical dissociation of law and fact is also expressed in the division of functions between the judge and the jury: proof is the province of the jury, while the judge is the exclusive guardian of law. The different qualifications of judge and jury correspond with qualitative differences between law and fact. The judge, whose domain is right and wrong, is a Brahmin, both in social status and as the repository of moral esoterica accessible only to a scholastic elite. The mysterious and sacred character of law is reinforced by the ritualistic way it enters the trial through judicially intoned formulas that are worded in abstruse language and must be read to the jury with the precision of magic incantations.

In contrast, the vulgar world of fact is committed to "a fair cross-section of the community"[45] represented by the jury and enters the trial through the common language of ordinary witnesses. The bringing together of law and fact is obscured from view by the secrecy that surrounds jury decision-making and the inscrutable general verdict. This allows us to continue to believe that law and fact remain apart until forcibly conjoined in a verdict.

The view of factfinding as a value-free process of disinterested evaluation of evidence is also expressed in the rules regarding burden of proof. These rules structure judicial factfinding as a series of decisions about the truth or falsity of discrete propositions of fact. The definition of what propositions or elements must be tested is determined by the substantive law. Because the fundamental units of decision-making are regarded as questions of fact, the only judgment that can be imposed is the binary judgment of true or false. Accordingly, the jury is asked to determine the truth of these factual propositions by some standard of probability, and it is only after all the elements are assembled that an evaluative statement of the meaning of the litigated event emerges.[46]

The evidentiary rules of admissibility, rationalized in terms of how

45. Taylor v. Louisiana, 419 U.S. 522, 527 (1975).

46. This "bottom up" approach conforms to the model of classical, pre-Kuhnian scientific investigation that conceives knowledge as a product of induction from discrete facts, in contrast to a method based on the assumption that knowledge derives from the dialectical interaction of fact and theory. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

effectively certain evidence advances the search for truth, obviously imply a belief in an ascertainable objective truth to be found. Moreover, the form of these rules, which seek to filter out evaluation and present the fact finder with concrete, irreducible sense perception, reflects the view that phenomena present themselves to the senses directly, unmediated by our experience or interpretive classificatory scheme. This is shown most clearly in the rule prohibiting lay witnesses from giving testimony in the form of opinion.[47] Unless the witness is qualified as an expert, the witness must confine him- or herself to presenting concrete facts devoid of evaluation. The assumption underlying this rule is that perception, if stripped of distorting influences, is entirely passive. It is possible to simply take in or imprint images of reality uninfluenced by any effort to make sense of it.

The recognition of an exception to the rule against opinion evidence for experts[48] only reinforces the message that the process of discovering "what is so" can be neatly separated from the process of determining "what it means." The requirement that the expert be qualified as such connotes that evaluation and interpretation are specialized skills. The requirement that the theoretical foundations for the expert's testimony meet some standard of acceptance or reliability implies that interpretive processes can be isolated from the objective process of bare description.

The hearsay rule and the rule requiring that witnesses testify based on personal knowledge can be seen as emanating from the same desire to present the jury with unadorned description. Unless the witness is present in court so that any processing of direct sense experience can be identified, the evidence is excluded.[49]

Finally, the rule of universal witness competence[50] implies a belief that there is one reality that presents itself to everyone equally. Because perception is a passive process of receiving sense impressions, the nature of the external reality is not dependent on or influenced by the status, moral qualities or even the experience of the witness. Everyone experiences the same thing. Difference in view results from either conscious distortion or misperception. Moreover, the value of the testimony depends entirely on its conformity with reality and not at all on the authority of the source.[51]

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47. FED. R. EVID. 701.

48. FED. R. EVID. 702.

49. FED. R. EVID. 802 (hearsay rule); FED R. EVID. 602 (personal knowledge requirement).

50. *See* FED. R. EVID. 601.

51. There are surely doubts about the absolute character of law and fact. It was observed more than 50 years ago that "[t]he time-honored distinction between 'statement of fact' and

III. CONCLUSION

It is not, of course, surprising that our rules of evidence and procedure reflect the assumption that law and fact are discrete phenomena. That distinction is after all the premise for rational legal decision-making. This Essay claims that the rules of evidence and procedure do more than simply give effect to our assumptions about law and fact; they also help formulate that distinction as descriptive of reality. Just as the ritual enactment of the Balinese man's conception of himself in the form of a cockfight organizes and generates that very conception, the acting out of our assumptions about the nature of law and fact in the conduct of the trial constitutes those assumptions as both tangibly real and indisputably true.

While the ritual character of trials can be overstated, the modern tendency to require rational justifications for our legal and political institutions more often results in discounting their nonrational aspects than in exaggerating them. Thurman Arnold, whose insights into the symbolic functions of law and legal institutions are still recognized fifty years later as important contributions to the symbolic uses of social life generally, said:

> The abstract ideals of the law require for their public acceptance symbolic conduct of a very definite pattern by a definite institution which can be heard and seen. In this way only can they achieve the dramatic presentation necessary to make them moving forces in society. Any abstract ideal which is not tied up with a definite institution or memorialized by particular ceremonies, becomes relegated to the limbo of metaphysics and has little social consequence. The institutions which throw about the law that atmosphere of reality and concreteness so necessary for its acceptance are the court and the law school. The one produces the ceremonial ritualistic trial; the other produces the theoretical literature which defends the ideal from attack by absorbing and weaving into its mystical pattern all the ideas of the critics.[52]

'conclusions of law' is merely one of degree, comparable to the difference between saying: 'I see an object' and 'I see a sedan.' " Adrian A.S. Zuckerman, *Law, Fact or Justice?*, 66 B.U. L. REV. 487, 492 (1986) (quoting Walter Wheeler Cook, *"Facts" and "Statements of Facts,"* 4 U. CHI. L. REV. 233, 244 (1936)). Nonetheless the distinction between law and fact—however suspect—and the belief that an accurate account of reality can be achieved through the rational evaluation of evidence remain integral parts of our jurisprudence.

52. THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 44-45 (1935).

It would be a mistake to suggest that the rules of evidence are symbols and nothing else. But an account of whether and how the rules of evidence matter would not be complete without consideration of the way they operate to support the legitimacy of the practice they also regulate.