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THE CREATED, THE FALLEN, AND THE REDEEMED—
THE SYMBOLISM OF THE FEDERAL RULES OF EVIDENCE

By Nelson P. Miller, Curt A. Benson, and Christopher G. Hastings

The Federal Rules of Evidence, taken as a whole, represent an ethical system—not just norms, values, or cultural constructs but, moreover, a genuine way of comprehending the world consistent with our best understanding of how it would, if not constrained, truly operate. Underlying each rule are assumptions about the nature and dispositions of lawyers, clients, witnesses, jurors, and judges, as well as the nature of evidence itself. Those assumptions symbolize what the rules’ promulgators understand to be the imperatives of justice in a system peopled by the created, the fallen, and the redeemed. Citing each of the 67 Federal Rules of Evidence, this article explores the rules’ symbolism as a way of synthesizing them while revealing and evaluating our foundational common understandings about those whom they govern.

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I. Examining the Federal Rules of Evidence—A Framework

A. Using Semiotics to Explore Tacit Assumptions in the Law

Lawyers and the general public readily recognize certain legal and political objects (such as the American flag) and events (such as Watergate), and even people (such as Joseph McCarthy or perhaps Ralph Nader) as iconographic or symbolic of broader political and legal constructs and meanings.\(^1\) In the very broadest sense, the law itself, as well as the legislatures, administrations, and courts that implement it, could be said to symbolize or embody not just the American understanding of justice but also the reality of human social needs in an ordered, teleological dynamic. The law and justice systems solidify what we know about our human condition. One can reverse the flow through a symbolic or semiotic study, and study not so much the law and justice system but the assumptions about the players in that system that the laws embody.\(^2\) Put simply, individual laws and legal rules as well as law codes and rule collections can be understood through their semiotics and symbolism.

Before proceeding further, some definition might help. In this article, the word “symbolism” is used to mean a signifying system—a collection of human signs and symbols intended to represent perceived truths relevant to human existence. Semiotics is generally known as the more specific study of the ways in which signifying systems are communicated.\(^3\) A semiotic study of film, for instance, might examine how a movie’s images convey meaning in a less than direct manner. When applied to law, semiotics enables one to more readily explore assumptions underlying the various expressions and constructs of the law and perhaps also to more readily examine its philosophies and ideologies—indeed those places where it departs from truth and enters the realm of distortion.\(^4\) A symbolic approach enables one to examine underlying

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\(^2\) See Robin Paul Malloy, A Sign of the Times—Law and Semiotics, 65 TUL. L.REV. 211, 213 (1990) (“the entire notion of a legal system, consisting of interrelating communicative processes between legal discourse and legal practice, functions almost universally as a model of dialogic thought development”).


\(^4\) See J.M. Balkin, The Hohfeldian Approach to Law and Semiotics, 44 U. MIAMI L.REV. 1119, 1120 (1990) (legal semiotics as a way “to understanding politics and ideology as they are expressed in and disguised in legal thought”).
assumptions and in some cases resolve underlying paradoxes.\(^5\) It might be said more poetically that reading a law code symbolically is to press it to give up its secrets or to bare its soul,\(^6\) if law has a soul and secrets. We know at least that language is necessarily symbolic. A semiotic study may also include consideration of the legal provision’s conceptual framework within a philosophy or ideology of law as well as its implied references to other laws, truths, and social understandings.\(^7\) Laws, after all, often take their meaning by relationship to other laws and understandings.\(^8\)

Symbolic or semiotic approaches have been used to examine specific legal issues such as the definition of terrorism\(^9\) or the admission into evidence of the clothing of a rape victim.\(^10\) It can be revealing to examine a specific legal code’s symbolism. When the language is a set of rules, it can show the assumptions about those whom the rules govern, those who employ the rules, and those who provide relief under them. It is not just that knowing the assumptions can help us understand and test the rules. Rules are understood and appreciated not only instrumentally for how they work in practice but also symbolically for what they say about who we are as well as who we want to be.

The Federal Rules of Evidence make a perfect study, because they stand at the justice system’s crossroads. Evidence is the judicial proof of events not perceived directly by persons who are called upon to make a judgment upon those events. More importantly, evidence is the basis on which the justice system translates the proof of those events into their acceptable substitute—the means by which we determine whether to punish, assuage, compensate for, or otherwise address our most profound interactions and events. Looked at in the cold light of semiotics, the Federal Rules of Evidence can tell us about our shared understanding of the nature of human interaction through a justice system. The rules stand as symbols of what the profession generally and (more specifically) the bodies drafting and adopting the rules assume to be the real and substantial natures and motivations of the lawyers, clients, witnesses, jurors, and judges who participate in the justice system. We can, in essence, study the building blocks\(^11\)

\(^{5}\) See Tiefenbrun, *supra* note 3, at 360.
\(^{6}\) See Balkin, *supra* note 4.
\(^{7}\) Paul, *supra* note 5, at 1787 (semiotic conceptual/referential study of various legal provisions including trespass, helmet laws, and curfews).
\(^{8}\) Id. at 1787-1788.
\(^{11}\) See Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L.REV. 1147 (2001) (“the moves or tropes or building blocks out of which … [we] have composed our various and conflicting theories of lawdom”).
of the Federal Rules of Evidence—good exercise for the law professor and student, to be sure, but also a useful one for the judge and law practitioner, because it is those building blocks that support the structure of the justice system. The advocate justifies assertions and the judge justifies opinions as to the application of any one rule in any particular instance by reference (explicit or implied) to the fundamental understandings on which the rules are based. A better judge or advocate knows those assumptions and necessarily employs them, wittingly or unwittingly. To that extent, this article explores truths of which we are already aware, albeit perhaps only tacitly.

A bit more background on symbolic and semiotic interpretation: There is a legal semiotics school (using “school” in the loose sense), though its shape, political constituency, and future promise are all in question. This article does not purport to represent the views of that or any other particular school. Indeed to some degree this article eschews what seems like an increasingly tiresome “schools of thought” debate. Some critics see semiotics as tied to an academically-dominant Darwinian-progressive worldview with a relentlessly relativistic and subjective outlook. Semiotics is probably more often thought of and employed in connection with critical legal studies. Hence we see its application (mentioned above) to the evidentiary issue of the admission into evidence of the dress of a rape victim. Others perceive semiotics as neither necessarily progressive nor conservative—that it can be employed within the constructs of a diversity of worldviews. And so the litany goes. This article aspires to take a fresh “ethical” approach based on the following brief summary and hopes to avoid hasty consignment to one or another school, philosophy, or ideology.

B. Ethics beyond Normative Judgments and Values

If rules are usefully interpreted as symbols of shared understandings concerning those whom they regulate, it is also true that rules in such cases are usefully understood as ethical systems. The Federal Rules of Evidence are plainly

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13 Malloy, *supra* note 2, at 211 (“the universe becomes and not that it is, that something really new may be created, and that this real novelty is not manifest in the actual order of things but is present in the evolving concepts of signs which stand for a reinterpretation of values and meanings of relationships between things”).
14 *Id.* at 213 (“we cannot refer to an individual fact, but only to perceived relations between what we say we have observed as factual”).
what some would call normative or moral. They reflect commonly held, egalitarian and democratic aspirations. But these high-flown descriptors alone are not quite what this article seeks to address as an ethical system. If it were, the article would be properly and quickly consigned to one of those schools reflecting one or another ideology or –ism (one not usually associated with progressive semiotics). The progressive disputes the moralist; and the moralist the progressive. Neither is persuaded, and the divide grows wider.\footnote{See J.L.A. Garcia, The Aims of the University and the Challenge of Diversity: Bridging the Traditionalist/Multiculturalist Divide in M.N.S. Sellers, An Ethical Education: Community and Morality in the Multicultural University 21 (Berg Publishers 1994) (recent philosophical trends reducing ethics to politics retards clarity about ethics).} This article is on neither side of that debate.

Instead, this article examines how the symbolism of the Federal Rules of Evidence reflects a perception of the condition of those involved in the justice system as well as the common good the rules promote. That broader, apolitical study is what is defined as “ethics” for the purposes of this article. This article avoids the fact/value distinction that occupies much of post-modern ethics discourse and seeks to focus upon premises so fundamental that even a thoroughgoing skeptic such as David Hume would have to recognize. At the risk of oversimplifying, the large questions of “right and wrong” do not lurk at the heart of the word “ethics” as used in this article, rather, the questions of who we are and what we do. As contemporary philosopher J.L.A. Garcia puts it:

Recent academic philosophy has acknowledged that ethics concerns much more than Kant’s famous question, “What ought I to do?” Indeed, it is doubtful that one could even begin to answer Kant’s question without first having a good idea of how in general one ought to feel about things, what one ought to like about the world and thus strive to realize or preserve, and what one ought to abhor and thus strive to eradicate or prevent.\footnote{Garcia, supra note 17, at 22.}

Like Garcia in his work, this article seeks not to plumb the Kantian’s “ought,” but rather to glean experienced truths\footnote{Id.} from the facts on the ground—not a narrow, technical approach to the Federal Rules of Evidence, nor a critical or ideological one, but the broadest possible approach exploring the vision of humanity and rationality the Rules embody.

The Federal Rules of Evidence are to some degree captive to their vocation, and a goal of this article is to liberate them, slightly, from this captivity, so that they may be seen through a different lens. It might be what some would
call Common Sense realism approach—that which has no substantial present currency but was instead the dominant American philosophy of the nineteenth century\(^\text{20}\)—married to a post-modern semiotic or symbolic deconstruction of the rules. And wouldn’t that be nice for a change (in this philosophically, politically, and ideologically-divided academic environment) to combine the traditional, the modern, and the real in a practical study of an important legal topic.

All voluntary purposive action is inescapably moral. As a matter of fact and not theory, we each constantly encounter our own rationality and personality in every act and omission. There is no point in engaging in any discourse that presumes any contrary condition as fact, because dialogue itself (even dialogue with oneself (recognizing its inherent contradiction)) depends on both rationality and personality. Given that fact, any system that purports to account for our observation and experience is in its essence a moral system. We choose all of the time over and over, constantly shaping ourselves by what we have chosen. Those choices are shaped by our words formed into attitudes and ideas. The choice to act in a manner inconsistent with rationality and personality is an irrational, amoral, or immoral choice. It goes against what we know to be true and genuine about our condition—not solely metaphysical but in addition observed and experienced. We live in a mysteriously constructed world in which we are individually conscious—try denying that—an inescapable aspect of which is the constant confrontation with objective experience. We are not imagined. We are genuinely experiencing our own identity and consciousness. And we are rational, genuinely experiencing the universe’s ordered cause and effect. The Federal Rules of Evidence, like any rules of law, are imposed to alter the order of cause and effect that would otherwise exist. This semiotic exposition of the Rules seeks to expose the nature of the universe the Rules posit and seek to alter.

II. The Symbolic Constituents of the Federal Rules of Evidence

A. Lawyers as the Fallen Redeemed

The Federal Rules of Evidence,\(^\text{21}\) adopted and amended by the Supreme Court\(^\text{22}\) and applicable to and governing all proceedings in the courts of the


\(^{21}\) Fed. R. Evid. 1103 (“These rules may be known and cited as the Federal Rules of Evidence.”).

\(^{22}\) Fed. R. Evid. 1102 (“Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.”), citing 28 U.S.C. § 2072 (1990) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.”).
United States, naturally treat lawyers as proponents of the admissibility of evidence—but as a certain kind of proponent that may be labeled the “fallen” and “redeemed.” It is typically understood that evidence rules operate with a regulatory function determining what is and is not admissible. But in fact, it is not the evidence the rules regulate as much as it is the proponents of the evidence. In our usual studies of the rules, we look intently at the proffered evidence. But why not look at the proponent who offers it? It is the attorney who develops the theory of the case and determines which evidence to offer. Evidence does not stand up, announce its intention to be admitted, and walk across the well of the courtroom. What do the Federal Rules of Evidence assume about the intentions and, for that matter, the character of those lawyers?

The drafters of the Federal Rules of Evidence seem to have assumed three things about lawyers: (1) they will do or attempt what they can to win; (2) in those efforts they lack a certain judgment and discipline; and (3) in light of assumptions (1) and (2), they need opposing counsel to alert judges to their indiscretions in the expectation that judges will exercise the power and possess the inclination to control the legal proceedings. The rules assume in other words that lawyers are corrupted to some extent (we hope not to too great an extent) in their intentions and judgment but yet capable (with the help of opposing counsel and judge) of redemption.

These assumptions are most clearly seen in Rule 403 prohibiting unduly prejudicial evidence as well as Rule 611 providing for judicial control of the mode and order of witness interrogation and presenting evidence. Rule 403 assumes that lawyers will offer unfairly prejudicial, confusing and misleading, unduly delaying, wasteful, and cumulative evidence. Indeed the entire concept

23 FED. R. EVID. 101 (“These rules govern proceedings in the courts of the United States....”); FED. R. EVID. 1101(a) (“These rules apply to the United States district courts....”).
24 See United States v. Reaves, 636 F. Supp. 1575, 1578 (E.D. Ky. 1986) (“An attorney's primary concern is to WIN the case.”).
25 Id. (“If he believes he can win that case by” “camouflage” of weaknesses “it is asking too much of our fallen nature to expect him voluntarily to do otherwise.”).
26 See FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by” various dangers).
27 See FED. R. EVID. 611(a) (“The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence....”).
28 FED. R. EVID. 403 (“unfair prejudice”).
29 Id. (“confusion of the issues, or misleading the jury”).
30 Id. (“considerations of undue delay, waste of time, or needless presentation of cumulative evidence’’); see also United States v. Reaves, 636 F. Supp. at 1579 (imposing time limits to discourage overlong trials, because “Nothing lulls an attorney to the passage of time like the sound of his or her own voice.”).
of relevancy defined by Rule 401\textsuperscript{31} and applied by Rule 402\textsuperscript{32} assumes a failing on the part of counsel either to be able to determine on their own what matters from a legal standpoint and what does not, or worse, a willingness to disregard it for the sake of prevailing. Similarly, Rule 611 protects against lawyers who will offer needlessly cumulative,\textsuperscript{33} unduly harassing and embarrassing\textsuperscript{34} evidence. To the uninitiated, the list might appear to validate the assumptions underpinning all of the worst “lawyer jokes.” Rules 403 and 611 assume that lawyers will try to overcome weak cases by resorting to evidence that is of little relevance but tends to excite the passions of the jury—that lawyers would allow (if permitted) jurors to decide cases on improper (most often emotional) bases.\textsuperscript{35} Indeed Rule 103(c) assumes that lawyers will resort to suggesting prohibited evidence to the jury where it is otherwise barred.\textsuperscript{36} Rule 611 further assumes that, if permitted, a lawyer will “lead” his own witness in an effort to gain an unfair advantage.\textsuperscript{37}

It is not merely that lawyers are assumed to be overzealous. The rules rather obviously guard against a certain degree of nefariousness. Rule 106 is an example, assuming as it does that a lawyer will unfairly offer only one portion of a writing or statement when other portions should be read or heard with it in order to mislead the factfinder as to the thrust of the entire document.\textsuperscript{38} Rules 407, prohibiting the misuse of evidence of subsequent remedial measures,\textsuperscript{39} Rule 408, prohibiting the misuse of evidence of offers of settlement,\textsuperscript{40} and Rule 409,
prohibiting the misuse of evidence of offers of medical payments, each assume lawyers’ willingness to use parties’ good acts and intentions against them. Rule 410, prohibiting misuse of plea discussions, similarly assumes that lawyers have the same (shall we say “unfortunate”) intention to take advantage of discussions in which parties would not have engaged had they known of the intention. One can say the same and more about Rule 411’s limitation on the use of evidence of liability insurance. At very least, Rule 411 assumes parties will not bother to attempt to settle cases if the efforts may leak out. To some of us (and one of the authors of this article), it may additionally assume that lawyers will take undue advantage of a party’s largesse in maintaining insurance; and what’s more, assume that lawyers are more interested in deep pockets than in balanced justice.

But the rules’ assumption of depravity goes well beyond a surfeit of zeal and a willingness to abuse the graces of another in pursuit of their riches. Rule 613(b) appears to assume that attorneys will twist witnesses’ prior statements (not such a surprising assumption, probably). Rule 404 restricting the use of character evidence and in particular of other crimes, wrongs, and acts, and Rule 412 restricting use of other sexual behavior or predisposition, assume that lawyers will resort to varying forms of character assassination. Justice Cardozo described (in typically stylish manner) this propensity in a 1930 case in which the defendant, an optician “heated with liquor,” shot and killed a young man who had insulted his wife. The defendant admitted the killing and the lack of justification or excuse, leaving the degree of murder as the question. The district attorney had gained the admission of evidence showing that the police had found three other pistols and a tear gas gun in the defendant’s apartment when they arrested him two months later. In reversing the conviction, Justice Cardozo described the district attorney’s strategy:

41 Fed. R. Evid. 409 (“Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.”).
42 Fed. R. Evid. 410 (“evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions”).
43 Fed. R. Evid. 411 (“Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.”).
44 Fed. R. Evid. 613(b) (“Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same….”).
45 Fed. R. Evid. 404(a) (“Evidence of a person’s character or a trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion, except….’’); cf. Fed. R. Evid. 405 (permitting character evidence where character is an element).
46 Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”).
47 Fed. R. Evid. 412(a) (“The following evidence is not admissible … (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) Evidence offered to prove any alleged victim’s sexual predisposition.”).
Almost at the opening of the trial the People began the endeavor to load
the defendant down with the burden of an evil character. He was to be put
before the jury as a man of murderous disposition…. The end was to
bring persuasion that here was a man of vicious and dangerous
propensities, who because of those propensities was more likely to kill
with deliberate and premeditated design than a man of irreproachable life
and amiable manners. Indeed, this is the very ground on which the
introduction of the evidence is now explained and defended. The District
Attorney tells us in his brief that the possession of the weapons
characterized the defendant as ‘a desperate type of criminal,’ a ‘person
criminally inclined.’

…. [T]he tendency of the whole performance was to characterize the
defendant as a man murderously inclined. The purpose was not disguised.
From the opening to the verdict, it was flaunted and avowed.49

Case law abounds with examples of overreaching attorneys doing
“whatever it takes to win.” Prosecutors, for instance, may ask questions implying
a factual predicate they know they cannot support with evidence.50 People v.
Malkin51 is one of the earliest cases describing this type of prosecutorial
misconduct. The case is noteworthy as one of the principal authorities cited by
Justice Sutherland in his classic exposition of prosecutorial misconduct in Berger
v. United States.52 The defendants in Malkin were tried for an assault arising out
of a labor dispute.53 The trial judge allowed the prosecutor to cross-examine the
defendant to suggest that in spite of his denial, he was guilty of habitual acts of
violence.54 The prosecutor, in clear violation of rules of evidence, confronted the
defendant during his interrogation with a succession of seven individuals who
stood mute in the courtroom while the prosecutor elicited denials that the
defendant had assaulted them.55 The appellate court concluded that the
prosecutor's questions “must have been intended to bring home to the jury the impression that the persons confronting the defendant on the stand were silently accusing him and that his denials were false and perjured.”\textsuperscript{56} Of course, the defendant was charged with assaulting none of these individuals.\textsuperscript{57}

The Supreme Court in \textit{Michelson v United States}\textsuperscript{58} also worried about lawyers’ willingness to go beyond the rules in order to attack a witness’s character. In the following quote the Court quoted Professor Wigmore on the potential for abuse while reminding the bench of the importance of strict judicial control over the admission of character evidence and the methods of cross-examining character witnesses. Note the assumptions the passage makes about a lawyer’s willingness to make forbidden attacks and engage in subterfuge:

“This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation. The value of the inquiry for testing purposes is often so small and the opportunities of its abuse by underhand ways are so great that the practice may amount to little more than a mere subterfuge, and should be strictly supervised by forbidding it to counsel who do not use it in good faith.”\textsuperscript{59}

The Court offered lawyers the following advice against their own natural but corrupt tendencies:

It must not be overlooked that abuse of cross-examination to test credibility carries its own corrective. Authorities on practice caution the bar of the imprudence as well as the unprofessional nature of attacks on witnesses or defendants which are likely to be resented by the jury.\textsuperscript{60}

At the same time the Court cautioned that the wide discretion for a searching cross-examination that the evidence rules allow carries with it a heavy judicial responsibility to prevent misuse.\textsuperscript{61} The solution in other words is that lawyers need judges with the power and inclination to stop abuse in ways more forceful than the Court’s warning. There is thus in the final analysis an

\begin{footnotes}
\item[56] Id.
\item[57] Id.
\item[58] 335 U.S. 469, 475-476 (1948)
\item[59] Id. at 475.
\item[60] Id., citing \textit{Wellman, Art of Cross Examination} 167 et seq. (1927).
\item[61] 335 U.S. at 480.
\end{footnotes}
assumption that lawyers may yet be redeemed—that with the right authority in place lawyers will be adequately guided so that their conduct will produce justice and truth. Given the multifarious nature of their assumed inclinations and capable wrongs, the drafters’ contrary assumption of the possibility of lawyers’ redemption is perhaps extraordinary. But there it remains: with the right Rules of Evidence in place, and the right authority to enforce them, the drafters very clearly assume a central role for lawyers in the pursuit of truth and justice in an adversary system.

B. Parties as the Great Unwashed

The Federal Rules of Evidence similarly assume both the best and the worst about parties—and more of the worst. Rule 407 on subsequent remedial measures\textsuperscript{62} assumes for instance that parties will fix matters gone wrong that have injured or harmed someone—surely an admirable trait. But the same Rule 407 assumes that the same parties will \textit{not} fix those same matters if doing so might affect their likelihood of success in a lawsuit\textsuperscript{63}—surely not an admirable trait. A decent person might just as well fix the wrong and confess the harm if fixing the wrong is the equivalent of confession. Surely, unreasonable risks should be eliminated and responsible wrongs paid when someone has been harmed. Rule 407 assumes instead that parties would prefer to risk injuring again than to pay for the first wrong. In short, Rule 407 assumes that parties are deceptively self-interested. Indeed Rule 408 on offers of compromise\textsuperscript{64} makes the assumption that parties are, to be sure, willing to compromise but not if their willingness will be used against them to prove what they may self-interestedly prefer to deny. The same can be said about Rule 409 prohibiting evidence of offers to pay for medical expenses,\textsuperscript{65} Rule 410 limiting admissibility of plea discussions,\textsuperscript{66} and Rule 411 limiting use of evidence of liability insurance.\textsuperscript{67} Each of these rules assume that the party would not engage in these generally laudatory and useful actions if doing so might lead to genuine responsibility—not a particularly gracious assumption.

Other rules make more explicit assumptions regarding the unappealing traits of parties. Rule 413 contemplates that certain defendants accused of sexual

\textsuperscript{62} FED. R. EVID. 407, \textit{supra} note 37 (“When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur”).

\textsuperscript{63} \textit{Id.} (“evidence of subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction”).

\textsuperscript{64} FED. R. EVID. 408, \textit{supra} note 38.

\textsuperscript{65} FED. R. EVID. 409, \textit{supra} note 39.

\textsuperscript{66} FED. R. EVID. 410, \textit{supra} note 40.

\textsuperscript{67} FED. R. EVID. 411, \textit{supra} note 41.
assault will have committed other similar offenses. Indeed Rule 413 is fairly explicit in describing the sexual crimes parties are assumed in some cases to have committed including “deriving sexual pleasure or gratification from the infliction of death….”—not a pretty picture. Rule 414 similarly assumes that certain parties accused of child molestation will have molested other children. And again, Rule 414 is explicit that some such defendants will have been “deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child….” Rule 415 makes both Rule 413 as to the sexual assaulter and Rule 414 as to the child molester applicable in civil cases. Had enough yet? Not quite. Both Rule 413 and Rule 414 assume that in certain cases the sexual assaulter or child molester will have engaged in conspiracies to commit that conduct.

Whatever other specific traits the Rules of Evidence assume about parties, they clearly assume that those traits are habitual. Rule 406 expressly authorizes the use of evidence of habit or routine. Perhaps we are habitual, or perhaps not. Rule 406 assumes the former. Rule 301, imposing through presumptions a duty upon a party to go forward with evidence in civil actions, suggests an equally curious assumption about parties that in some cases they would prefer to rest upon their laurels than to engage in civil battle.

C. Judges as Constituted Authority

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68 Fed. R. Evid. 413(a) (“In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible….”).
69 Fed. R. Evid. 413(d)(4).
70 Fed. R. Evid. 414 (a) (“In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible….”).
71 Fed. R. Evid. 414(d)(5).
72 Fed. R. Evid. 415(a) (“In a civil case … predicated on a party’s alleged commission of … sexual assault or child molestation … evidence of that party’s commission of another offense or offenses is admissible….”).
73 Fed. R. Evid. 413(d)(5); Fed. R. Evid. 414(d)(6).
74 Fed. R. Evid. 406 (“Evidence of the habit of a person or of the routine practice of an organization … is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.”).
75 Fed. R. Evid. 301 (“a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption”); see also Fed. R. Evid. 302 (state law determines procedural effect of presumptions on substantive elements established by state law).
The Rules of Evidence assume that judges are meaningfully capable of exercising extraordinary discretion. Rule 102 broadly implores judges to construe the rules fairly to eliminate unjustified expense and delay and to promote the law that truth may be ascertained and justice done. Rule 102 assumes, together with several other rules like Rule 403, that judicial expertise is the property of the public and that it is the judge’s job to scrupulously protect this public property from undisciplined and in some cases unscrupulous lawyers. More specifically, Rule 104(a) firmly establishes judges as gatekeepers against (to extend the analogy) the wolves that lawyers would otherwise admit into the sheep pen. The judge’s discretion granted to exercise these powers is extraordinary. The same Rule 104(a) states patently that in exercising the gate-keeping function, the judge “is not bound by the rules of evidence except those with respect to privilege.” Rule 614(b) permits the trial judge to call and interrogate witnesses. Rule 201 even permits the judge to take judicial notice of facts on the judge’s own initiative at least when the facts are not reasonably disputed.

Yet the Rules of Evidence do not assume an infallible judge. Rather, Rule 103 assumes that judges will make errors hoping only that the errors will not affect substantial rights, or perhaps that if they do, the judicial error will not result in a reversal but will instead be laid at the feet of the sleeping attorney—sleeping apparently being another assumed trait of attorneys. Why else have a rule stating what to do when the attorney fails to object, if the failure is not assumed or anticipated? Rule 605 does, however, excuse lawyers who sleep while an errant judge assumes the conflicted roles of presiding and testifying. In other words, the Rules assume that trial judges will occasionally go so far astray as not to even an attorney’s own lack of diligence and regard for the rights of the client will not supersede the judicial error.

76 Fed. R. Evid. 102 (“secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined”).
77 Fed. R. Evid. 104(a) (“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….”).
78 Fed. R. Evid. 614(b) (“The court may interrogate witnesses, whether called by itself or by a party.”).
79 Fed. R. Evid. 201(c) (“A court may take judicial notice, whether requested or not.”).
80 Fed. R. Evid. 201(b) (“A judicially noticed fact must be one not subject to reasonable dispute….”).
81 Fed. R. Evid. 103(a) (“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected….”).
82 Id. (requiring objection or offer of proof to establish error).
83 Fed. R. Evid. 605 (“The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.”).
D. Jurors as Silent Novitiates

The Rules of Evidence to some extent patronize jurors. Rule 606 prohibiting jurors from acting as witnesses or testifying to their deliberations, for starters, treats them as silent novitiates. Rule 606 permits juror testimony only to prove that the juror considered extraneous information or was improperly influenced—two not-particularly-endorsing assumptions implying instead jurors senseless or corrupt enough to be so influenced. Today we trust jurors more than we did historically. Yet there is no question that the rules assume that the judge, counsel, and parties are able to make and follow distinctions that the jurors cannot. Consider Rule 103(c), admonishing judges “to the extent practicable” to conduct trials so as to prevent the jury from hearing even the suggestion of inadmissible evidence. Rule 104(c) similarly admonishes judges to conduct all confession admissibility hearings out of the jury’s presence and to conduct such other admissibility hearings out of the jury’s presence “when the interests of justice require….”. Rule 105 extends these protections even to admitted evidence as to which the rule authorizes the judge to instruct the jury as to the evidence’s properly limited scope. We do not, in other words, even trust juries to properly use admitted evidence when there are prohibited grounds for which the evidence might be misused. In civil actions, Rule 201(g) even permits the judge to tell the jury what it must accept as true even, presumably, when it

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84 Fed. R. Evid. 606(a) (“A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting.”).
85 Fed. R. Evid. 606(b) (“a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations”).
86 Id. (“a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror”).
88 Fed. R. Evid. 103(c) (“In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means….”).
89 Fed. R. Evid. 104(c) (“Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury.”).
90 Id.
91 Fed. R. Evid. 105 (“When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”).
92 Fed. R. Evid. 202(g) (“In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.”).
might not otherwise do so (as the criminal action portion of the same rule contrarily provides\textsuperscript{93}).

No other rule shoulders our collective assumptions as obviously as Rule 404(a) generally excluding character evidence.\textsuperscript{94} The rule powerfully reinforces the assumption that jurors are easily confused by distinctions the parties and their counsel must make in the use of character evidence. The Supreme Court once described the jury’s limitation as follows:

The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.\textsuperscript{95}

In so stating, the Supreme Court had noted the Court of Appeals’ concern that “the jury almost surely cannot comprehend the Judge’s limiting instructions,” and its plea that the Supreme Court clarify the rule.\textsuperscript{96} The Supreme Court clearly agreed, stating,

The refinements of the evidentiary rules on this subject are such that even lawyers and judges, after study and reflection, often are confused, and surely jurors in the hurried and unfamiliar movement of a trial must find them almost unintelligible.\textsuperscript{97}

And yet for all of that, the Rules of Evidence equally assume a critical role and place for juries. There is no getting around it: the Rules of Evidence accept what the Rules of Procedure impose, that juries decide fact questions. Juries are the determiners of what is and is not consistent with what actually is or has taken place. Jurors may be silent novitiates, but in our civil justice system under the

\textsuperscript{93} Id. (“In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.”).
\textsuperscript{94} FED. R. EVID. 404(a) (“Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion…”).
\textsuperscript{95} Michelson v. United States, 335 U.S. 469, 475-476 (1948) (citations omitted).
\textsuperscript{96} Id. at 475n.4.
\textsuperscript{97} Id. at 484-485.
Rules, they are also unquestionably the novitiate determiners of what is and is not real. Our tremendous suspicion of their ability to distinguish significant from insignificant evidence is, paradoxically, counterbalanced with our overarching confidence that they will decide rightly if the evidence they hear is properly trammeled.

E. Witnesses as Self-Interested Turncoats

The Rules of Evidence quite plainly provide in Rule 601 a general presumption that witnesses are competent. On its face, Rule 601 would seem to suggest the assumption that all witnesses are competent. That is after all what Rule 601 says. But why did the drafters believe such a presumption necessary? A fair inference is that the drafters actually assumed several probable incompetencies in certain cases—those which are, in fact, set forth in the rules immediately following Rule 601’s presumption. The drafters assumed in other words that many witnesses who would be called would presume themselves competent when in fact they would not be. The judge and litigator know this assumption to be largely true, that many people who deem themselves valuable witnesses to the truth in fact are not so. Thus Rule 612, permitting opposing parties to examine writings a witness uses to refresh the witness’s recollection and to cross-examine the witness on those writings, assumes that some witnesses will simply recite what they just read ostensibly to refresh a nonexistent recollection. Rule 613, permitting cross-examination on prior inconsistent statements, assumes that witnesses will give one account one time and a different account the next. Rule 701, prohibiting lay witness testimony unless rationally based on the witness’s own perception, assumes in effect that lay witnesses will attempt to testify irrationally from their own or rationally from someone else’s perception—neither a reliable practice. Witnesses, the drafters clearly assume, have the very human capability for self-deception—for believing themselves to be arbiters of truth when they have an inadequate basis for so thinking.

In the same vein, Rule 602 renders incompetent to testify witnesses who lack personal knowledge. Witnesses (the drafters assume) will attempt to testify even when they have no personal knowledge on which to do so—to speak

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98 Fed. R. Evid. 601 (“Every person is competent to be a witness except as otherwise provided in these rules.”).
100 Fed. R. Evid. 613 (prior inconsistent statements).
101 Fed. R. Evid. 701.
102 Fed. R. Evid. 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”).
out of their hat (to employ a favorite colloquialism) perhaps like charmers or snake-oil salesmen. The concern that witnesses would regularly testify about that which they do not know is at the root of the hearsay rules. Rule 801 defines hearsay (in essence) as testimony about what someone other than the witness knows.103 The drafters assume that witnesses are so ready to speak of that which not they but someone else knows that Rule 802 prohibiting hearsay was necessary.104 Rule 805, on hearsay within hearsay,105 assumes that witnesses will even speak not of what they know or of what someone who told them something knows but of what someone who told them what someone who knew something knows. Rule 806, permitting the parties offended by the admitted hearsay to attack the declarant’s credibility,106 adds to that the probability that the third person who began the string of statements was already lying.

Hearsay exceptions such as Rule 803(2)’s for excited utterances,107 Rule 803(4)’s for statements made for medical treatment,108 and Rule 804(b)(2)’s statements upon impending death,109 prove the contours of the drafters’ assumption that witnesses are commonly ready to speak of truths they do not know in order to shape reality to suit their interests, and only uncommonly ready to turn to sound truth-telling.110 To the drafters, witnesses must be excited, sick or injured, or about to die, in order for their out-of-court statements to be reliable. Rule 603 requiring witnesses to give an oath111 adds the assumption that witnesses must have their consciences’ awakened—that their willingness to speak the truth

103 Fed. R. Evid. 801(c) (““Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”).
104 Fed. R. Evid. 802 (“Hearsay is not admissible except as provided by these rules or by other rules....”).
105 Fed. R. Evid. 805 (“Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.”).
106 Fed. R. Evid. 806 (“When a hearsay statement .... has been admitted in evidence, the credibility of the declarant may be attacked....”).
107 Fed. R. Evid. 803(2) (excluding from the hearsay bar “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition”).
108 Fed. R. Evid. 803(4) (excluding from the hearsay bar “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history”).
109 Fed. R. Evid. 804 (b)(2) (excluding from the hearsay bar “a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death”).
110 See also Fed. R. Evid. 807 (“A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule....”).
111 Fed. R. Evid. 603 (“every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.”).
is a trait that lies latent, leaving at the fore (one supposes) their willingness to fabricate and lie. Rule 604, requiring that interpreters give an oath, assumes in a similar fashion that interpreters will make untrue translations unless their own latent conscience is tweaked to arise.

Beyond these preliminary observations, it is readily apparent that the Rules assume witnesses lacking in credibility. Rule 607 permits their impeachment, and why have an impeachment rule if witnesses could be trusted? Rule 608(a) permitting impeachment by the witness’s reputation assumes that certain witnesses will be widely known to be untrustworthy. Rule 608(b) permitting cross-examination on specific instances of witness misconduct assumes that certain witnesses will have character flaws favoring falsehoods. The (in some way) amusing aspect of Rule 607, though, is that it permits impeachment by the party calling the witness. Evidently, certain witnesses can be relied upon only to be mistrusted—to be, in essence, turncoats. The litigator knows best that the characterization of witnesses as untrustworthy turncoats is often not far off the mark. Try as you might to discover witnesses’ anticipated testimony in a reliable format (depositions, written statements, recorded statements, interviews, and the like), yet it so often seems that the courtroom has an entrancing effect on their recollections. For that matter, Rule 615 authorizing the sequestration of witnesses (that which Wigmore called the greatest of truth’s engines) assumes that witnesses will be copycat liars. And the scurrilous quality of witnesses is not merely in their character and propensity for falsehood. Rule 609 assumes that certain witnesses will have committed not merely crimes involving falsehood but also crimes punishable by death [the commission of which the drafters were willing to connect with their propensity for falsehoods—perhaps murderers as well as liars]. Rule 412 assumes witnesses in sexual misconduct cases will have engaged in unfavorable sexual behavior and possess unfavorable sexual predisposition. The drafters seem to hold little faith

112 Fed. R. Evid. 607 (“The credibility of a witness may be attacked by any party, including the party calling the witness.”).
113 Fed. R. Evid. 608(a) (“The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation…..”).
114 Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking … the witness’ character for truthfulness, … may … be inquired into on cross-examination of the witness….”).
115 Id.
116 Fed. R. Evid. 615 (“At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses….”).
117 Fed. R. Evid. 609(a)(2) (“evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement”).
118 Fed. R. Evid. 609(a)(1) (“evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death”).
119 Fed. R. Evid. 412, supra note 42.
in finding good character in the witness box. That is not to say that the drafters expected to find no redeeming witnesses. After all, Rule 610 assumes that some witnesses hold religious views that could enhance their reliability, although on the other hand the same Rule 610 assumes that other witnesses hold religious views impairing their credibility. In either event, the evidence of religious beliefs is excluded.

The Rules also assume that witnesses want to keep secrets. Rule 501 incorporates the common law of privilege permitting them to do so. We need not document here the various forms of privilege—most, by the way, within the authority of the witness to waive. Nor is it our purpose to explore in any respect why witnesses wish to keep secrets or why the Rules should allow them to do so. The point we wish to draw is simply that the Rules’ drafters accept that many witnesses would, if they could, keep secrets.

The Rules of Evidence give us their explanation for just why witnesses might be so frequently contumacious. The Rules assume a witness is governed largely if not wholly by self-interest. For instance, what underlies our rules against the admission of hearsay evidence is the belief that such evidence is inherently unreliable and therefore unfair to the party against whom it is offered. The assumption justifying the exceptions is that experience has taught us that hearsay statements made under the circumstances described in the various exceptions are, in fact, reliable and therefore fair. By way of example, Fed R. Ev 804(b)(3) provides in part that statements that would tend to subject the declarant to criminal liability are based on the assumption that “a person is unlikely to fabricate a statement against his own interest at the time it is made.” Similarly, statements made to medical personnel are admissible if they are “made for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source therefore insofar as reasonably pertinent to diagnosis and treatment.” The theoretical basis for this exception to the

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120 Fed. R. Evid. 610 (“Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.”).
121 Id.
122 Fed. R. Evid. 501 (“the privilege of a witness … shall be governed by the principles of the common law”).
123 No less a luminary than Professor James Bradley Thayer offers that “[T]he law of evidence is the creature of experience, rather than of logic, and we cannot escape the necessity of tracing that experience.” Thayer, Select Cases on the Common Law Rules of Evidence, 2nd Ed. (Charles W Sever & Co., 1900).
125 Fed. R. Ev. 803(4).
hearsay rule is the assumption that a person has a strong self-interest in accurately reporting information to a doctor for diagnosis and treatment.\textsuperscript{126}

Indeed the Rules seem to recognize that witnesses are most commonly testifying out of little other than self-interest. At least, there are so many exceptions to the hearsay rule as to question whether the usefulness of the entire construction. For example, in June of 1997, the Law Commission for England and Wales ("the Commission") reported possible reforms to the hearsay rule in criminal trials.\textsuperscript{127} The report proposed sweeping changes to the laws governing hearsay in criminal cases. The Commission concluded that the many exceptions to the hearsay rule show that hearsay is quite often the best available evidence. Judges and legislatures never would have created the exceptions unless such hearsay evidence was the best available evidence. At the end of its report, the Commission recommended a model statute to the Parliament of the United Kingdom. Parliament adopted the Commission’s recommendations in the Criminal Justice Act 2003 (CJA) which received Royal Assent and became law on November 20, 2003.

F. Experts as Useful Purveyors of Charms

The Rules of Evidence assume that parties, through their attorneys, will at least occasionally offer testimony from experts whose credibility is more like that of a purveyor of charms and potions than the scholar or scientist we suppose them to be. It is not that the drafters presume that the hired expert would lack knowledge, skill, experience, training, or education. Rule 702 in essence defines as an expert one who is so qualified by one or more of those characteristics.\textsuperscript{128} Among today’s educated population in an economy based on information technology, there are plenty of knowledgeable, skilled, experienced, trained, and educated individuals willing to act as experts. It is instead that Rule 702, by requiring that expert testimony be based upon fact and drawn from reliable principles and methods,\textsuperscript{129} the drafters assumed that qualified experts would at least on occasion testify unreliably without principle or method not from facts but

\textsuperscript{128} FED. R. EVID. 702 ("a witness qualified as an expert by knowledge, skill, experience, training, or education").
\textsuperscript{129} Id. ("if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably").
from speculation. And indeed, such is the skill of a charms purveyor that they are in fact quite smart and experienced but misapplying their skills in order to speak of whimsy and rubbish.

But on the other hand, the Rules of Evidence recognize or assume that the qualifications of an expert—the skill of the purveyor—grant the expert a special license not permitted the lay witness. Rule 703 permits an expert to rely upon evidence unfiltered by the Rules themselves, in effect to make their own rules as to what is and is not admissible evidence.\footnote{\textsc{Fed. R. Evid.} 703 (“the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted”).} That concession seems astonishing unless one accepts that the drafters assume a certain value in expert testimony even if it has a strong hint or whiff of charms and potions. Perhaps we should call it the placebo effect. Although it could be any one of a number of different defects, one way or another, inadmissible evidence has something wrong with it. The drafters permit experts to testify from inadmissible evidence (indeed even to testify as to ultimate issues\footnote{\textsc{Fed. R. Evid.} 704 (“testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue”).}, without disclosing the factual basis,\footnote{\textsc{Fed. R. Evid.} 705 (“The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise.”); \textit{but cf. id.} (“The expert may in any event be required to disclose the underlying facts or data on cross-examination.”).} and on the trial court’s own initiative\footnote{\textsc{Fed. R. Evid.} 706 (“The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed….“).}) presumably because the expert’s translation of the defect carries with it some positive healing effect. It is as if the drafters were saying, we know that experts can be rascals when it comes to having a solid basis for what they say, but they are still qualified as experts, and their expertise in itself can overcome other defects and facilitate a certain kind of justice. Experts, whether acting on admissible evidence or not, can place events and circumstances in context working a certain kind of understanding—perhaps like the wizard in the \textit{Wizard of Oz}, who in Kansas sold snake oil and in Oz dealt in smoke, mirrors, and hot air, but still made you feel better through the value of his counsel. It is hard to explain Rule 703 any other way, or perhaps we should say, it is easy to understand Rule 703 by such an analogy. The drafters are clearly assuming some value to expert testimony even when on suspect bases.

III. The Immanence and Authenticity of Evidence

The Rules of Evidence make other assumptions that do not implicate the conduct of participants in the justice system but focus instead on the nature of the
evidence itself. The principal such assumption, reflected by Rule 901 requiring authentication of evidence,\textsuperscript{134} is that evidence has a yes/no, is/is not quality determined by whether the evidence is what its proponent claims it to be. Rule 901 requiring authentication declares, in effect, that evidence has a reality apart from the subjective description or interpretation given it by a party or attorney. Evidence either “is” or “is not” what its proponents claim it to be—there is no letting the jury decide. Rule 901’s illustrations of authentication, such as first-hand knowledge,\textsuperscript{135} familiarity,\textsuperscript{136} comparison,\textsuperscript{137} distinctive characteristics in circumstance,\textsuperscript{138} and antiquity,\textsuperscript{139} accept as an imperative growing out of our subjectively experienced personality, intelligence, and rationality, that the matter we encounter giving credence to our experience is present independent of ourselves and in an inherent or immanent form. Rule 903 explicitly states, for instance, that the signer of a document (its maker or creator) need not authenticate it,\textsuperscript{140} implying that once it is made it has an existence and significance all its own. Indeed in Rule 902’s self-authentication provisions,\textsuperscript{141} the drafters rather explicitly assume that certain things (principally documents of certain types) ought to be accepted as reliable without any proponent’s authentication or description.

Rule 1002 requiring the original of a document\textsuperscript{142} to prove its content reinforces the drafters’ assumption that there is a reality or immanence in created things more so than in their interpretation or description. Only the original will do, because (the implication is) only the original can be what it really is. Rule 1003, admitting duplicates where there is no question as to the original’s

\textsuperscript{134} FED. R. EVID. 901(a) (“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 it to be.”).
\textsuperscript{135} FED. R. EVID. 901(b)(1) (“Testimony that a matter is what it is claimed to be.”).
\textsuperscript{136} FED. R. EVID. 901(b)(2) (“familiarity not acquired for purposes of the litigation”).
\textsuperscript{137} FED. R. EVID. 901(b)(3) (“Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.”).
\textsuperscript{138} FED. R. EVID. 901(b)(4) (“Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.”).
\textsuperscript{139} FED. R. EVID. 901(b)(8) (ancient documents).
\textsuperscript{140} FED. R. EVID. 903 (“The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.”).
\textsuperscript{141} FED. R. EVID. 902 (“Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to” public documents, certified copies of public records, official publications, newspapers, and the like.).
\textsuperscript{142} FED. R. EVID. 1002 (“To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.”); see FED. R. EVID. 1001 (“An ‘original’ of a writing or recording is the writing or recording itself....”).
authenticity, as well as Rule 1004, admitting descriptions of the original where the original has been destroyed, only confirm what the drafters clearly assumed: that created writings and other such evidence is either genuine in its character or corrupt—something real and true, or something awry.

The drafters’ corollary assumption, reflected most expressly by Rule 1006 requiring that original documents be available for examination when summaries are presented, is that we benefit by examining authentic rather than corrupt materials. The Rules also assume that evidence has a hierarchical quality from the most to the least reliable. For example, the most reliable evidence would be evidence that would justify judicial notice: that evidence so beyond reasonable dispute that the court declares it true as a matter of law. At the other end of the spectrum is evidence such as opinions of lay witnesses upon which the law places little value. In fact, though, the assumption goes a little deeper than just that there is a general benefit to observing things real. Where Rule 1007 permits contents of writings offered against a party to be proven by that party’s testimony, the drafters clearly assume that parties are judged against what is authentic and real. If, as the drafters provide in Rule 1007, authentic evidence is offered against parties, then the drafters have assumed that such real and authentic material in some sense judges parties—that the charges, claims, and defenses of parties must account to that which is created and real. Trials are not in other words contests of political power or social preferences or policies. They are determinants of what is consistent with a created order. Rule 1008 carefully divides the determination of what evidence is genuine between the judge and jury, ensuring as much as is possible that the determination is itself true.

143 Fed. R. Evid. 1003 (“A duplicate is admissible … unless (1) a genuine question is raised as to the authenticity of the original….”); see also Fed. R. Evid. 1005 (certified or attested duplicates of public records admissible).
144 Fed. R. Evid. 1004(1).
145 Fed. R. Evid. 1006 (“The contents of voluminous writings … which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation” but “[t]he originals, or duplicates, shall be made available for examination…”).
146 See Fed. R. Evid. 201(b) (“A judicially noticed fact must be one not subject to reasonable dispute….”).
147 See Fed. R. Evid. 701 (“If the witness is not testifying as an expert, the witness’ testimony in the forms of opinions or inferences is limited….”).
148 Fed. R. Evid. 1007 (“Contents of writings … may be proved by the testimony or deposition of the party against whom offered or by that party’s written admission, without accounting for the nonproduction of the original.”).
149 Fed. R. Evid. 1008 (judge decides fulfillment of conditions, whereas jury decides questions of fact, having to do with authentication).
IV. A Synthesis of the Federal Rules of Evidence

From the above examination of the assumptions underlying each of the Rules of Evidence, on the whole one can readily see the necessarily moral nature of the Rules. The drafters seek to thwart a corrupted community of lawyer-advocates who, despite their corruption, are yet capable of incorruption by a proper application of suitably crafted evidence rules. Lawyers are the fallen-redeemed in that the Rules expect of them a continuous transformation toward a self-created future self within the principles represented by the Rules. The Rules hold parties alike to lawyers in their corruption but unalike in their role, thus leaving them within the moral code of the Rules in some sense as the great unwashed. The Rules grant great confidence in judges as authority constituted to guide lawyer-advocates toward their redemption but yet admits that in doing so judges will also have certain failings. The Rules treat jurors as silent novitiates—as the necessary determinants of what is true to the experienced reality or not but as unfamiliar and perhaps even untrustworthy in the role. The Rules treat the witnesses who would provide the information on which the jury would act as unreliable, self-interested, but necessary turncoats, and their expert cousins as equally necessary but untrustworthy purveyors of charms. It is a curious (in one sense) but familiar (in another sense) world—one that is natural enough to each of us who are so familiar with human corruption and incorruption but yet that is strangely revealed and governed toward a universal end neither the drafters nor the rest of us can quite see coming.

Necessarily, the rules embed in these assumptions the message that the intentions and resultant conduct of those involved in the justice system (whether they are the attorneys, parties, judges, jurors, or witnesses) ought rationally to be something other than they are often are. The rules are in that sense, too, a moral imperative. They accept the objective reality of the rational, cause and effect, highly-ordered universe in which we live. The rules recognize that out of our equally objective personality, intelligence, rationality, and volition, certain imperatives flow—that conduct, though free, is by dint of that freedom absolutely (not merely normatively, traditionally, or culturally) committed to being shaped toward universals growing out of those recognitions. The universals are all at once simple, like truth, honesty, and just deserts, but also complex, exhibited by the subtlety of the multiplying Rules of Evidence. To put it most succinctly, the Rules do their best to marry the universal imperative to the subjects of our discontent. They are a remarkable achievement describing an equally remarkable, clearly teleological and even eschatological universe in which we all live.