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# The Ground-Zero Theory of Evidence

by  
KIM LANE SCHEPPELE\*

When the subject of “truth and its rivals” is raised, I suspect that most of us think about an unattainable but ideal conception of truth and the principles that regularly conflict with the proof of truth in American courts of law, such as fairness, efficiency, and the promotion of worthwhile social relationships. Typically, this inquiry starts with an ideal conception of truth and asks whether the methods of proof in American evidence law have any chance of attaining this idealized truth. I propose, however, to recast the inquiry. I will show that American evidence law already embodies a conception of truth which is strong and coherent, but flawed. Law is, of course, a principled field, but it is also a pragmatic one. Law lives not only in the world of philosophy, but also in the world of practice. In this Article, I will emphasize the practice over the principles to show from the ground up, as it were, just what conception of truth American evidence law acts upon. I will be asking: What *is* truth as seen from the perspective of American evidence law, and what rival conceptions of truth might be used to disrupt our standard view?

What I propose to do here might be called the ethnography of doctrine. Just as anthropologists study foreign (to them) cultures until these cultures gradually become familiar, routine and explainable to others, an ethnographer of legal doctrine examines the rules and structures of legal practice as if they were foreign in order to see what visions of social life and values they contain.<sup>1</sup> The ethnographer of legal discourse first wonders why the things that seem so obvious to native informants (in this case, lawyers and judges) are the way they are. By then working her way into the rules and seeing the world through these local understandings (though always remembering that she could and once did see in other ways), the doctrinal ethnographer comes to understand legal rules as regulating a particular construction of social reality, one that normalizes itself by presenting itself as inevitable. Reasonable alternatives to the rules, within any social practice, are driven out or abnormalized. What the ethnographer can see, however, is the way in which these exclusionary practices have

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1. I first started elaborating this perspective in my book KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* (1988).

constituted the rules that remain as the only sensible rules.

I will argue that American evidence law embodies a “ground-zero” theory of evidence. This theory implicitly adopts a conception of truth that takes for granted a strong relationship between informational accuracy and relevance on the one hand, and the distribution of knowledge over time and space on the other. In other words, the American law of evidence deems a piece of information to be more likely to be true if it was produced close to the events that are in question in the lawsuit, the “ground zero” of the metaphor. For example, if the lawsuit is about a car accident, the facts generated from the time and place where the cars collided (eyewitnesses to the accident, the twisted metal wreckage of the particular cars in question, the weather conditions at that precise moment) are considered to be more accurate and useful (that is, relevant and true) than the facts from any other time and space (friends who heard about the accident later from one of the drivers, other intact cars of the same sort that were not involved in that particular accident, the weather in the week preceding the crash). The point of American evidence law is to enable the reproduction of the ground-zero moment and its aftermath to assess what truly happened.

The ground-zero metaphor is military. Ground zero is the point where the bomb hits, and, in nuclear destruction models, levels of devastation are measured out from this zero point. To understand the bomb and its effects, one first goes to ground zero and then traces the patterns from that ground-zero point to understand “what happened.” American courts of law work similarly. In the evidence law context, the ground-zero metaphor refers to the legally relevant events—the car crash, the breached contract, the failed merger, the insider trade, the bank robbery, the rape—which, like the place where the bomb was dropped, have a central physical and temporal point at which the damage is thought to be greatest. Like the effects of the bomb, the effects of the legally relevant events radiate outward. Thus, ground zero is the moment when “the trouble” occurred, and the law of evidence strives to admit facts that were generated as close in time and space as possible to the moment when this trouble happened.

Looking for facts at ground zero and its immediate surroundings makes sense if you believe that knowledge of the events in question is concentrated at ground zero. Under this belief, by looking at ground zero you are most likely to find the truth of the matter, if such a truth exists. American evidence law embodies just this sort of theory because, as I will show, the rules of evidence privilege the information

that comes from the ground-zero location.<sup>2</sup> This model imagines that ground zero is not just the central location of damage, but also that it is the central point in the distribution of knowledge. The closer a piece of information is to ground zero (for example, if it came from witnesses in the time and place of the event, from statements made at the time by the parties, from the physical objects retrieved from the scene), the more likely an American court of law is to admit it as evidence. The farther away from ground zero the knowledge comes (from hearsay, from reconstructions, from comparison with other similar occurrences, from rethinkings of the events after the fact), the less likely the evidence is to be admitted. The reliability and relevance of knowledge, like the extent and scope of damage, are thought to lessen with distance in time and space from the original event. And reliable and relevant knowledge is the essential ingredient in the determination of truth.

But this conception of truth—so commonsensical at first glance—is also deeply problematic in many ways. The ground-zero theory, for instance, has the effect of elevating what is distinctive and particular about the individual event in question over and above what is a larger *social* pattern, which might be a more adequate causal account. If, for example, you see the particular car accident as the result of an individual driver's error or the uniquely bad weather on the day in question, you miss the role of broader forces that provide a context for these local causes. A public policy that encourages cars over mass transportation has a certain causal effect in creating a particular accident rate, and hence might be seen as responsible for the individual accident. But this would require a reconsideration of relevance rules, which would require that the ground-zero theory of evidence be thrown out or substantially modified. The focus on the ground-zero version of events has a tendency to blur or completely eliminate those effects precisely because they operate equally in all cases of a similar sort and therefore there is nothing distinctive in the particular case to link the general cause with the particular effect. For American evidence law, the focus on the particular restricts the use of evidence with such remote causal connection because of problems about relevance, which is a sort of filter through which facts are passed before truth can be determined.<sup>3</sup>

But even if you assume that background causes or whole social practices cannot bear the weight of legal responsibility in individual cases as a matter of policy, the ground-zero theory of evidence is still

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2. See *infra* Part II.

3. For a discussion of the way that tort doctrine emphasizes the particular over the general, see Kim Lane Scheppelle, *Law Without Accidents*, in *SOCIAL THEORY FOR A CHANGING SOCIETY* 267, 271-74 (James S. Coleman and Pierre Bourdieu eds., 1991).

problematic when you want only to figure out what happened at the moment of trouble using completely conventional accounts of legal relevance. People who are seriously injured by the events in question in a lawsuit often respond to these traumatic events by repressing, altering, dissociating or otherwise failing to reproduce in their memories exactly what happened at the time. They cannot help it. Theories of trauma within different schools of psychoanalysis show that the ground-zero moment is exactly when one would expect to *fail* to find adequate knowledge about what occurred at the time.<sup>4</sup> If you ask people “what happened” right at the moment of trouble, those most injured by the events in question will often not be able to say, or to say adequately, what has just occurred. Trauma works by shutting down narrative, or the possibility to adequately explain or describe fully, exactly at the moment when the trauma occurs. Instead, trauma survivors often develop broken accounts or covering rationalizations that enable them to deal with the excess of emotion and the wildly unstable situations in which they find themselves at the ground-zero point. And what they say—even what they believe in that moment—may be anything but accurate. Therefore, if law is interested in truth, it needs to take into account that reliable accounts of the participants in traumatic events may be located at some spatial and temporal remove from the events in question.

All of this is, so far, very abstract. It will take a bit of explaining to make it more concrete and clear. Let us start by looking at the suspicion that attends reflection on facts and then at the way that the ground-zero theory is built into the Federal Rules of Evidence.

### I. Reflection upon Facts; Facts upon Reflection

Consider why reflection seems to improve all of the products of thought, except the statement of facts. If one is making a decision, the usual advice is that one should reflect on it before committing oneself, otherwise one can be accused of making a “snap” (read: bad or at least unstable) decision. If one is trying to arrive at a moral judgment, consider how much better it is to have evaluated one’s position and all of the alternatives for some time before judging. Rushing to judgment is not usually considered a good thing. If one has preferences, better that they should be “considered” preferences, rather than just the first things that come to mind. Considered preferences are deemed more stable, more enduring, and closer to what the preferrer actually thinks than those blurted out on the spur of the moment. Reflection improves decisions, moral judgments and state-

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4. The best review of this literature on the effects of trauma can be found in JUDITH HERMAN, *TRAUMA AND RECOVERY* (1992).

ments about what one wants.

But just the opposite is true when it comes to statements about facts. If someone asks you, "What happened in the faculty meeting today?" and you say, "Well, I would like to think it over before committing myself to a description," you can quickly see that thinking before describing is odd. Reflection is not supposed to improve facts. Instead, reflecting on facts puts the facts that are stated after such reflection under suspicion. If you have to think about what happened at school today before you describe it, others can wonder whether you are fabricating the account, or at least distorting it to serve certain purposes. We all may be criticized for rushing to judgment, but we are all supposed to "rush to description." In fact, failing to rush to description is a sign that something is wrong.

Why is this?

Decisions, evaluations and preferences are created in the mind. In other words, decisions, evaluations and preferences are the results of mental operations that make sense of the raw materials, that is, of facts. Perceptions, whether of the outside world or of one's own inner states, are considered on a certain empirical view to be the raw material processed in these mental operations. They come into the mind but are not created by the mind, or at least so the empiricist story goes.<sup>5</sup> Decisions, evaluations and preferences operate on perceptions that give rise to facts. If perceptions themselves needed to be decided upon before they could be entered into these other operations, the distinctions between mental operations and the raw materials on which they operate would be lost. Time can be taken for mental operations, but not for the raw materials that enter these calculations. The raw materials are supposed to be given, not made.

But psychologists working on the logic of memory have long since known that memory does not work the way a camera does—recording what happened in a way that can be endlessly reproduced without change over time.<sup>6</sup> Memory instead is updated, adjusted to account for information learned since an event took place. Thus, experiments show that subjects "recall" seeing something that they could not possibly have seen on the day in question. Subjects recall such things after they have had intervening information that fills in their previous lack of knowledge. Thus, subjects in experiments often show that their memories can in fact be predictably altered by the introduction of new information, and they unproblematically (even unconsciously) take into account the new information as if it were

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5. This view is most famously attributed to DAVID HUME, *A TREATISE OF HUMAN NATURE* (L.A. Selby-Bigge ed., 1888).

6. The literature on memory and its relationship to eyewitness testimony has been summarized by ELIZABETH LOFTUS, *EYEWITNESS TESTIMONY* (1979).

part of the original memory.<sup>7</sup>

This, of course, is a very good reason to distrust factual accounts given after there has been some time for reflection, for time adds the possibility of distortion even if one assumes that reflection does not itself distort. Memory is alarmingly flexible, while simultaneously hiding from itself the fact that it was ever different. When one realizes also that there may be many reasons to *consciously* distort an account of an event once one either has worked out one's interest in the matter, or has seen the (political or other) importance of certain versions of events, or has just decided not to be truthful, then this further discredits the accounts that are removed in time from the event under description. Memory can be altered unconsciously, or statements of facts can be consciously changed (through shading the truth or just plain lying). Descriptions repeated at some distance from an event, then, come with good reasons to distrust them.

From this viewpoint, it is reasonable to believe that the distribution of accurate knowledge after an event is quite patterned. The most accurate descriptions should be given in the moment when an event is occurring, preferably at the time that the eyewitness is watching the event, preferably with an eyewitness who is as close as possible with the best possible view of the event. This is the ground-

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7. In my evidence class each year, I conduct the following experiment: One class is interrupted by an unfamiliar person who is lost, looking for something or bringing a message. A scripted dialogue takes place between me and the interrupter, and then the interrupter leaves. About 15 minutes after the interruption, I ask the class to write down a description of the person who previously entered the room. As one might expect from the literature on eyewitness testimony, the descriptions are wildly different. In one run of this experiment, estimates of the height of the male stranger ranged from 5' to over 6' and his dress ranged from yellow dress shirt and navy sports coat to red flannel shirt with jeans. The students were all describing the same person that they had equal opportunity to see. But then I have the stranger return the day after the first interruption, wearing something different, changing his hairstyle, looking quite altered in appearance. I then have the stranger introduce himself by name, explain something about his background, give his height and weight. Students often laugh when they see the gap between their descriptions and the person who showed up on the second day. The day after that (by now, the third day), I ask the students to recall their memories of the first day, telling them explicitly that they are not to take into account the information they heard on the second day. In other words, they are to remember only what they saw and heard on the day of the initial interruption without allowing in their new knowledge gained on the intervening day. A great many students—and these are law students with demonstrably good memories—cannot recall the first day's events without letting in information gleaned on the second day, even when they know that this danger exists and they are trying not to do it. And those who do find that they can recall the information from the first day relatively accurately often say that they were able to do so because they recalled what they wrote in their descriptions and not the underlying events. They remember writing down that the interrupter had a mustache and an accent but then cannot recall how they knew that. This experiment should give some pause to those who believe in the power of memory to hold events accurately over time.

zero point I mentioned earlier—the witness who is present at the moment when an event takes place simultaneously, or very nearly simultaneously, narrating the event to those who must determine what happened in that moment. As knowledge moves out from this ideal point—out in time to days or weeks or months or years afterwards, or out in space, from feet to yards to blocks away from the event—knowledge declines in accuracy. This is exactly the ground-zero theory—that the best knowledge exists at the time of the event itself in the immediate recollection of the people closest to the event. Knowledge then becomes less accurate and more unreliable as one gains distance from the moment in question. As with the effects of a bomb, knowledge is more intense and accurate at the ground-zero point, and becomes less concentrated and reliable as one moves away.

Reflection on descriptions is, then, considered to be a marker of unreliability while reflection on decisions, judgments and preferences is considered to be a necessary condition of their reliability. This leads us to the conclusion that descriptions of events, on this view, should be most reliable when produced at ground zero itself.

## II. The Ground-Zero Theory and the Rules of Evidence

This ground-zero theory is reflected in the Federal Rules of Evidence. While, of course, other ideas are present in the rules as well, a great many of the core provisions about relevance and reliability can be understood by showing that they ensure the enforcement of the ground-zero theory.

Take, for example, the personal knowledge requirement of Rule 602, probably the most important criterion for determining who may be a witness in a proceeding under the jurisdiction of the Federal Rules. It is phrased as an absolute ban: “a witness *may not testify* to a matter” unless it can be demonstrated that s/he has “personal knowledge of the matter.”<sup>8</sup> What is personal knowledge? Generally, it is interpreted as requiring that the witness have sensory perception of the facts about which she is testifying, sensory perception which could only be acquired in the moment that the fact at issue is directly apparent in the world.<sup>9</sup> In other words, the witness has to be present at the ground zero of the fact to which she testifies—that the green car ran the red light or the suspect was observed running from the scene of the crime. Second-hand or after-the-fact knowledge is not al-

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8. FED. R. EVID. 602 (emphasis added).

9. See FED. R. EVID. 602 advisory committee's note (“[A] witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact” in question.).

lowed.<sup>10</sup>

While Rule 602 leads us to the idea that witnesses must have some relationship to ground zero (that they were within direct sensory perception of it), it does not necessarily say anything about privileging statements made at ground zero relative to statements made at other times, as our ground-zero theory would require. What we should be looking for is the privileging of statements made as close in time as possible to the time of the event in question to allow for “description without reflection.” Getting close in time like this is accomplished through a series of broadly interpreted exceptions to the hearsay framework of Rules 801-804. While the general prohibition against hearsay is of course shot full of holes, some of the major openings come around the area of statements made contemporaneously with the events.

The rules exempting present-sense impressions,<sup>11</sup> excited utterances<sup>12</sup> and statements about then-existing mental, emotional, or physical conditions<sup>13</sup> can be justified in light of the fact that they protect ground-zero statements—statements made at the time of the underlying event being described. In fact, the bar on the use of Rule 803(3) to include current memories that reach back to previous events confirms that the purpose of the exception is to encourage description without reflection.<sup>14</sup> Such hearsay exceptions have the effect of saying that the hearsay framework should not be interpreted as excluding from introduction at trial utterances made at the same

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10. How can we reconcile this insistence on personal knowledge with expert testimony? Such testimony can be admitted, even though experts are almost by definition witnesses who are not present at the time of the events in direct question in the lawsuit. What, then, are they witnesses to? They have their “personal knowledge” of other bodies of knowledge to shed light on the matter at hand. They are witnesses to the processes of knowledge production, but not necessarily witnesses to any matter in factual dispute in the concrete case. Of course, some experts are experts precisely by observing through their senses countless events of a similar sort (e.g. dislocated shoulders, sharp axle breaks, forged signatures). But others are experts by virtue of book-learning or through other distancing tools of science. The admission of this kind of expert testimony shows a kind of stress fracture in the law of evidence. Rule 602 requires personal knowledge that authoritative commentators want to equate with sensory perception while Rule 702 and 703 allow experts who have special knowledge which may or may not have come through direct sensory perception of the world, unless you count sensory perception of words on pages in books or of computer printouts or other tools of science in the production of knowledge. See FED. R. EVID. 602, 702-703. Expert testimony is one place to imagine that the ground-zero theory is already not an adequate description of the testimony that is actually allowed. But much of the admissibility of expert testimony can be recast by saying that experts have personal (i.e. sensory) knowledge of *something*.

11. See FED. R. EVID. 803(1).

12. See FED. R. EVID. 803(2).

13. See FED. R. EVID. 803(3)

14. See FED. R. EVID. 803(3) advisory committee's note.

time that the observation or sensation is being perceived. These statements are descriptions constructed at the time of the sensory perception—"description without reflection" par excellence. As hearsay exceptions, such statements can be introduced to prove the truth of the matter asserted, and as such are privileged in a way for the exact reasons that hearsay is normally excluded. These statements cannot be cross-examined in the moment of their utterance, nor can the demeanor of the speaker be observed at the same time as the statements are originally made. Contemporaneous statements sit beyond the reach of the ordinary trial tactics that undermine statements made in court. While, of course, these out-of-court contemporaneous statements still can be attacked, these utterances have a certain *facticity* about them, a certain weight because they are factual descriptions made when there has been no time for the tricks of memory or the insertion of revisions based on self-interest. They are the best possible sort of statement, if you believe in the ground-zero theory.

Recorded recollections, as contemplated by Rule 803(5), admit out-of-court statements made closer in time to when the underlying events happened than a description produced in court at the time of the trial. And the rule admits such recorded recollections as tending to show the truth of what they state, if the witness cannot remember the events in the description. Here again, these prior statements have added credibility because they are made closer in time and space to the ground-zero moment. Of course, to invoke the recorded recollections exception, a witness has to fail to have a present recollection of the underlying events, so one might reasonably say that this rule imagines that recorded recollections are second-best evidence. It would be better if the witness testifying in court had a clear recollection. But given that notes may be used to "refresh" the memory of a witness at trial at any point in testimony and the witness can testify thus refreshed without hearsay problems, it is clear that such previously recorded descriptions are thought more likely to be accurate than a later recollection. Witnesses may be encouraged to use such notes as long as they actually "refresh" and are not relied upon entirely to provide the basis of a new memory.

In general, prior inconsistent statements of witnesses may be brought in to the trial, either under the strict restrictions of Rule 801(d)(1)(A) for their hearsay uses or more generally under an analysis of the prior statement as a non-hearsay impeachment use. The latter guarantees that virtually all stories of witnesses that change over time will be called to the attention of fact-finders at trial. Generally, the assumption is that such changing stories should be discounted or even dismissed as fabrications. A witness who changes

her story over time appears unbelievable.

This discussion of the Federal Rules of Evidence as supporting a ground-zero theory might be dismissed by arguing that all I have really said here is that evidence must be relevant, not that the ground-zero theory of evidence in particular must be true. Why should statements made at or near the time of the trouble be excluded when they are our best evidence of what the participants in the event were thinking? Fair enough, but one needs to probe behind the idea of relevance to see the importance of its use in this way.

Relevant evidence is defined as any evidence that tends to make the existence of *a particular fact at issue* more or less likely.<sup>15</sup> Evidence will be deemed relevant if it appears to change the probability that some alleged fact is more or less true. What affects these probabilities depends not only on scientific judgments about probabilities, but also on common sense about what things go together in the world. Relevance does not require a scientific test, but rather, can rest on obvious or commonsense principles. If people believe that the presence of smoke indicates that there is a fire, then smoke will be relevant on the question of whether a fire was burning. But if people do not believe that music soothes the savage beast, then evidence of the sound of music will be irrelevant to determining whether the owner of a lion was taking due care when the lion mauled the neighbor's child. Relevance is meant to be a low standard—if any change in probability can be shown, then the proffered evidence meets the relevance test. Nonetheless, if widespread social prejudices against the influence of x on y exist, then x will be inadmissible for proving y. Relevance, in other words, is itself a socially embedded and practiced standard.

What I have argued so far is that the Federal Rules of Evidence show a strong preference for acquiring information as close in time and space to the events in issue as possible. This does not mean that all other information is excluded. Certainly not. It means, however, that whatever is said and done at the time of the trouble will always have a place in the evidence that must be considered.

### III. Trauma and Narrative

My work on trauma and narrative goes back 20 years to the time when, as a graduate student, I worked on a study of rape victims and rape avoiders.<sup>16</sup> In this study, with interviews conducted in the mid-

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15. See FED. R. EVID. 401.

16. The principal investigator on the study was Pauline Bart. Some work that grew out of this study was published in Kim Lane Scheppele and Pauline Bart, *Through Women's Eyes: Defining Danger in the Wake of Sexual Assault*, 39 J. SOC. ISSUES 63

1970s, women were asked during a life-history interview to tell the story of the sexually violent event(s) that had happened to them. The differences in the women's stories were striking. The physical events that happened were not different (these, in fact, were depressingly similar), but the methods of narration used to describe what had happened varied quite widely. Some rape victims had terribly disorganized stories, while others had perfectly ordered narratives. Some stories had clear plots, described appropriate reactions, and presented what would have been orderly evidence, while other stories stopped and started, associated apparently unrelated events and fears with the attack(s) the women had experienced, and generally showed little narrative coherence.<sup>17</sup> Some of the stories themselves, in other words, seemed to have been the victims of events.

What we found in our study has been found among other survivors of particularly traumatic events.<sup>18</sup> In fact, a symptom of trauma is that "[t]he survivor's initial account of the event may be repetitious, stereotyped, and emotionless . . . It does not develop or progress in time, and it does not reveal the storyteller's feelings or interpretations of events."<sup>19</sup> Survivors of traumatic events—and this includes Holocaust survivors, political prisoners, disaster victims, crime victims and women who have been held through violence in a sort of "domestic captivity"<sup>20</sup>—have trouble narrating what has happened to them, especially at first. They engage in self-blame,<sup>21</sup> minimize what has happened, or simply fail to remember<sup>22</sup> or say<sup>23</sup> what has happened.

Psychoanalytic theorists have long associated narrative disorganization, minimization and omission with trauma. Freud believed, for example, that traumatic events were repressed, that is, pushed down into the level of the unconscious where the subject who experienced the trauma could not consciously remember what actually had

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(1983) and in Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095 (1987) (reviewing SUSAN ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* (1987)).

17. For various examples, see generally Scheppele and Bart, *supra* note 16.

18. See generally HERMAN, *supra* note 4 (reviewing the evidence of survivors of traumatic events).

19. *Id.* at 175.

20. See *id.* at 74.

21. See Scheppele and Bart, *supra* note 16, at 79.

22. Many rape victims suffer from short-term memory loss. See generally Lois G. Veronen et al., *Treating Fear and Anxiety in Rape Victims: Implications for the Criminal Justice System*, in PERSPECTIVES ON VICTIMOLOGY 148 (William H. Parsonage ed., 1979).

23. For evidence that shows that rape in particular is a very underreported crime, see Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 126 n.13 (1992).

occurred.<sup>24</sup> The Freudian and then Lacanian idea of repression or foreclosure was defined primarily as a disorder in the symbolic realm, with either the forgetting of an event or disassociation of a symbol with the thing that it was supposed to represent as one of the primary symptoms of trauma.<sup>25</sup> In other words, the inability to come up with a description or account of some event was a sign that a traumatic event had occurred. Julia Kristeva observed, following Freud, that sometimes the memory of a traumatic event is not repressed or forgotten, but instead it is recalled and deprived of any emotional power—it seems completely unimportant.<sup>26</sup> The most shocking events, then, would be described as if they were the most normal in the world, which would then make it appear as though “nothing happened.”

Either way, whether the underlying trauma is forgotten or downplayed by being immediately normalized, the narratives of people who have been traumatized will be exactly the opposite of what the law requires: these will not be orderly narratives stating “just the facts” of a traumatic event as if recorded by a videocamera. Instead, it will be a sign of the trauma itself that such narratives will be inadequate and even inaccurate. Theories of trauma tell us that the worst time to get information about “what happened” at the moment of trouble is exactly at the moment of trouble itself from those to whom the trouble has happened. And yet, the ground-zero theory of evidence tends to push evidence-seekers to look exactly there for answers.

#### IV. What Is To Be Done?

While it is commonsensical in many ways and even adequate for dealing with nontraumatic events, the ground-zero theory of evidence does not take into account a body of scientific research on the effects

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24. How had it come about that the patients had forgotten so many of the facts of their external and internal lives, but could nevertheless recollect them if a particular technique was applied? Observation supplied an exhaustive answer to these questions. Everything that had been forgotten had in some way or other been distressing; it had been either alarming or painful or shameful by the standards of the subject's personality. It was impossible not to conclude that that was precisely why it had been forgotten—that is, why it had not remained conscious. . . . It was only necessary to translate into words what I myself had observed, and I was in possession of a theory of *repression*.

Sigmund Freud, *An Autobiographical Study*, in THE FREUD READER 3, 17-18 (Peter Gay ed., 1995).

25. For a very compact history of the psychoanalytic idea of repression, see ELISABETH ROUDINESCO, JACQUES LACAN 281-283 (Barbara Bray trans., 1997).

26. See JULIA KRISTEVA, NEW MALADIES OF THE SOUL 47 (Ross Guberman trans., 1995).

of trauma on the organization of descriptions. Insofar as the law attributes causation and blame to traumatic events, those who are traumatized will not make the best witnesses right after they have been traumatized. Instead, they will be exactly the witnesses whose statements at the scene of the event—at the ground-zero point—will be least helpful and least revelatory of “what happened.”

The inadequacy of such witnesses surfaces most often in American evidence law when the earlier statements are contradicted or modified through later statements made at trial. Statements made close in time to the events are either introduced as contemporaneous statements tending to show the truth of what they state precisely *because* they are contemporaneous (casting doubt on later accounts) or they are introduced to impeach the statements that a witness makes later, when her mind is clearer, when the trauma has started to heal, or when the context has been reestablished against which to judge the events that occurred and when elements or emotions around the story change.<sup>27</sup> Either way, the inference a fact-finder is encouraged to draw is that the witness whose account changes is unstable, which means that the witness should now be distrusted, in part or in full. But as we have seen, a witness who has started to recover from trauma can be expected to have a somewhat different account of events than she did when suffering from the effects of trauma. Instead of being used as a sign of new possibilities of truthfulness, any change in stories can be used to show that nothing the witness says should be believed.

The ground-zero theory rests on a conception about truth that requires modification. The idea about truth embedded in the theory is precisely that description without reflection is possible, and that one can find a somehow untainted or “raw” description that then gets tainted or “cooked” in subsequent retellings. The theory holds out the possibility that there is a version of events that has no “spin”—an account of “what happened” that is the simple and unvarnished truth. Distortions sneak in later when the witness figures out what is in her interest to say.

The ground-zero theory assumes that while later events have a “spin” attached to them, the first version does not. But as Ludwig Wittgenstein reiterated perhaps most powerfully, seeing is never pure in the first place, but is always “seeing as.”<sup>28</sup> In other words, the *first* version of events *also* has a perspective embedded in it, like with any

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27. See generally Scheppele, *supra* note 23.

28. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 194-195 (G.E.M. Anscombe trans., 3d ed. 1984), in which Wittgenstein provides the famous account of the duck-rabbit in which the image portrayed in the picture shifts depending on one's perspective.

other version of events. The perspective embedded in the first things people say when traumatized are those produced either by the trauma itself (downplaying or forgetting the most traumatic details) or by the most unthinking frameworks people have for interpreting the world (stereotyped, repetitive, undeveloped accounts). For example, if a trauma victim has come to see the horrible events that have occurred to her or him as natural, then she might tell listeners stories that put herself rightly in the role of the victim. This is why it is not surprising to find stories of self-hating Jewish victims of the Holocaust or self-blaming victims of domestic violence.<sup>29</sup> The trauma presents itself as naturalized or minimized. And the story repeats the trauma in this inverted way.

Why should the law privilege the most stereotyped or colonized framework that a trauma victim presents—which is what the first story tends to be? Why should the accounts given in the moment when the trouble occurred have such special power and force? If the studies about the effects of trauma are correct, then the law of evidence has it exactly backwards. Much more sympathy and belief should be placed in the later stories, even when they contradict what the victims said at ground-zero.

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29. See generally HERMAN, *supra* note 4.