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Built on Lies: Preliminary Reflections on Evidence Law as an Autopoietic System

by
RICHARD O. LEMPERT*

Introduction

This Symposium on Truth and Its Rivals seems most concerned with what one might think of as the “output” side of evidence law—that is, whether the rules of evidence enhance the likelihood that trial verdicts will capture the true state of the matter giving rise to the litigation. From this perspective, the legitimate rivals to truth are values that may justify decisions that eclipse the truth. The most obvious examples are rules of privilege, which allow probative information to remain concealed even where it is essential to accurate fact finding.

My focus is different. I look not at implications of evidentiary rules for outputs, but at the *lies* that are at the very heart of our evidentiary system. My thesis is that our system of evidentiary rules, including the common law, statutes, and constitutional elements, works in part because it often falsely portrays reality. It does so because distorting factual reality allows for reasonableness and consistency at a conceptual level as well as, in many cases, a superior output, in other words, greater verdict accuracy. Although stating that our system of evidence law rests, in part, on lies is not necessarily to condemn it, the situation is not a healthy one. The system’s legitimacy is threatened when the spotlight is cast on the lies at its core. Thus, the attention that social scientists are now giving evidence rules is not entirely a good thing from the system’s point of view, because science can undercut the claimed factual basis of an evidentiary rule without offering a substitute basis that articulates well with other evidentiary rules, is politically feasible, and promotes verdict accuracy.

Evidence Law as an Autopoietic System

Evidence law can rest on unreal assumptions about the world because the set of evidentiary rules and the cases that justify them are an autopoietic system in the sense that the German sociologist Niklas Luhmann uses the term.¹ An autopoietic system, as described by

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1. See generally Niklas Luhmann, *The Unity of the Legal System*, in AUTOPOIETIC

Luhmann, is a system of communication that is recursive, self-referential, self-producing, self-reproducing, self-observing, and self-describing. To put this in more folksy language, it is a system that talks to itself, about itself, and in its own terms. An autopoietic system is also bounded or closed. It can observe the world external to it, but it does not directly respond to it. Rather it responds to a representation of the world modeled in the system's own terms. In an earlier piece I have called this "the *as if* world of evidence law."² Evidence law, in other words, does not respond to the realities of the actual world, rather it responds to the supposed realities of a world it has established and modeled *as if* it were the actual world.

Evidence law's world is in large measure congruent with the actual world, but the model has been built up over time. Parts of it correspond to the way the actual world appeared generations ago, and parts of it correspond to worlds that anyone except a court would always have regarded as fictive. The hearsay rule, for example, in large measure reflects a world in which the threat that hearsay poses to the truth rests to a considerable extent on the fact that hearsay statements are not given under oath.³ This underpinning remains conceptually important even though in today's world the lack of an oath may be the least important reason to suspect the accuracy of most hearsay. Thus the presumed capacity of excitement to still tendencies to lie and thus substitute for an oath continues to justify an exception for excited utterances,⁴ although the consensus of the past half century is that the cost of excitement in terms of less accurate perception exceeds the benefit of presumably increased sincerity.⁵ Similarly, on the one hand, the hearsay rule continues to rest in part on the factfinder's

LAW: A NEW APPROACH TO LAW AND SOCIETY 12 (Gunther Teubner ed., 1988) [hereinafter AUOTOPIETIC LAW]; Niklas Luhmann, *Closure and Openness: On Reality in the World of Law*, in AUOTOPIETIC LAW, *supra*, at 335. For an excellent article about the developments in Luhmann's theory since 1988, see Hugh Baxter, *Autopoiesis and the "Relative Autonomy" of Law*, 19 CARDOZO L. REV. 1987 (1998). For present purposes I mean simply to assert rather than defend the proposition that the set of evidence rules and cases form an autopoietic system, although in what follows I shall show certain respects in which evidence law behaves autopoietically. I hope in a later work to return to this theme and more rigorously demonstrate the autopoiesis of evidence law.

2. See Richard Lempert, *Of Flutes, Oboes and the "as if" World of Evidence Law*, 1 INT'L J. EVIDENCE & PROOF 316 (1997).

3. See SIR GEOFFREY GILBERT, THE LAW OF EVIDENCE 3-4 (1754). For a general discussion of the development of rationales for the hearsay rule and the way they changed over time, see Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149 (1990).

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

5. See, e.g., Edward J. Imwinkelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 46 U. MIAMI L. REV. 1069, 1091 n.213 (1992).

inability to evaluate the demeanor of absent speakers.⁶ On the other hand, little is made of the danger that hearsay will be misreported because witnesses to hearsay may be cross-examined like other witnesses, and cross-examination is presumed to be an effective device for revealing testimonial inaccuracies. But the likely effectiveness of cross-examination in getting at the truth is seldom examined—numerous court opinions and commentaries rely on Wigmore's conclusion that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth"⁷ rather than on empirical evidence. In particular, in the hearsay context, courts ignore ways in which cross-examining witnesses about a few lines of speech they heard differs from cross-examining witnesses about more complex perceptions, like descriptions of accidents, and so makes the discovery of erroneous or dishonest reporting less likely when all a witness has testified to is having heard a particular statement.⁸ Rather, evidence law treats its construction of the world, here a construction which sees cross-examination as an effective means for revealing misreported hearsay, as if it were the reality in which decisions about the creation and meanings of rules have their effects.

This does not mean evidence law is necessarily bound to past views of reality. Evidence law's world model, like the real world, is not stable. Rather it is an ongoing, self-referential, communicative representation of reality which incorporates and builds on past representations and, often self-consciously, provides building blocks for imagined future representations.

The motivation for changing evidence law's self-created world view has historically been the legal case, an extra-systemic influence which, in Luhmann's terms, while being entirely external to the legal system, can nonetheless act as an "irritant" to it. The case is a matter the system must deal with, an itch that must be scratched. Usually the irritation is minor, and the treatment is as routine and automatic as responses to most itches are—the unreflective scratch. Thus for evidence law's normal itches—the routine case—clear rules or precedents allow most issues of procedure and admissibility to be resolved quickly. But in some situations, the "irritation" a case poses is too great or novel, and neither code nor precedent supplies a balm. In these circumstances, evidence law's world model may change so that

6. Professor Wellborn, drawing on modern social science research, has persuasively questioned the value of this cue. See generally Olin Guy Wellborn, III, *Demeanor*, 76 CORNELL L. REV. 1075 (1991).

7. 5 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 1367 (Chadbourn Rev. 1974).

8. See RICHARD O. LEMPert & STEPHEN A. SALTzBURG, A MODERN APPROACH TO EVIDENCE 353 (2d ed. 1982).

existing precedent can put down the itch, or the case may be incorporated into the system as a new event and a new precedent, or, even, a new code provision may arise to meet it. There is, however, a difference in these solutions. Where a new precedent is created, it will build on and perhaps change the suppositions that shape the world as evidence law conceives it. New code provisions may do the same thing, or they may, as with the recent enactment of Federal Rules of Evidence ("FRE") 413 through 415,⁹ reflect the world view of a different system—here the political system—that can impose itself on evidence law by brute force.

Examples of Fictional Worlds

But enough abstraction and metaphor. Let me provide concrete examples of what I mean. Consider the case of *Ohio v. Roberts*,¹⁰ which despite the majority's disclaimer seemed, when it was handed down, to have the potential to reshape a large segment of evidence law.¹¹ *Roberts* applied to Confrontation Clause jurisprudence the same general thinking that gave us the catch-all exception to the hearsay rule,¹² namely the idea that necessity and reliability together justify the admission of hearsay.¹³ For constitutional purposes *Roberts* also accepted the negative pregnant here: without reliability and necessity, the Confrontation Clause prohibits hearsay. Thus, *Roberts* seemed to hold that hearsay could not be admitted against a criminal defendant without violating the defendant's Confrontation Clause rights unless the speaker's unavailability was established and the state could show some special reason to believe the speaker's hearsay was reliable. The burden potentially imposed by this second prong was, however, eased considerably by the Court's pronouncement that reliability could be inferred, without more, if the hearsay met the requirements of a long established exception to the hearsay rule.¹⁴

The first prong of the *Robert's* test was a fair representation of the actual world. Hearsay is only necessary to prove a point when the speaker of the hearsay cannot testify as a witness.¹⁵ Yet it was obvi-

9. FED. R. EVID. 413-15 (relating to evidence admissible in sexual assault and child molestation civil and criminal cases).

10. 448 U.S. 56 (1980).

11. *See id.* at 64-65.

12. Originally these were exceptions FRE 803(24) and FRE 804(b)(5). *See* FED. R. EVID. 803(24), 804(b)(5). Today there is a single catch-all exception. *See* FED. R. EVID. 807.

13. *See Roberts*, 448 U.S. at 65-66.

14. *See id.* at 66.

15. With the conspicuous exception of hearsay enshrined in business and official records. *See* FED. R. EVID. 803(6)-(8).

ous when *Roberts* came down that the necessity prong could not stand because it potentially excluded too much hearsay (excited utterances, states of mind, statements for medical treatment, etc.) that had long been admitted regardless of the speaker's availability.¹⁶ In purporting to exclude such hearsay, *Roberts* ignored one of the "facts" of evidence law's world view, namely, that some hearsay is likely to convey *more* accurate information than the speaker's testimony could provide. This is because a speaker's trial testimony has a higher risk of suffering from memory and sincerity problems than an earlier out-of-court statement on the same topic.

Is this "fact," which rests on a reasonable premise, correct? Not necessarily, for this argument that hearsay is more credible than testimony ignores possible memory and sincerity problems by the person reporting the hearsay as well as the reporter's possible mishearing of what was said. More importantly, in comparing the likely reliability of the speaker's earlier out-of-court statement with the same statement uttered as testimony, the analysis ignores the value of information about context or other matters that cross-examining the speaker might reveal. Thus, it may only be the unusual case in which information conveyed by admissible hearsay, such as present sense impressions, excited utterances, then existing states of mind, or statements for medical diagnosis,¹⁷ is likely to conduce to more accurate fact-finding than the information gained by calling the speaker to the stand. No matter, as far as evidence law is concerned, the likely value of substituting a person's testimony for a witness's report of his excited utterance or statement to a physician is low because numerous cases have, as a matter of fact, proclaimed it to be. *Roberts* was intolerably inconsistent with this long established view of the world, and this prong of *Roberts* was laid to rest by a simple refusal to take seriously what it said. Despite a seemingly clear text, the Court, with the concurrence of those who profess to believe that the plain meaning of texts controls, limited the availability prong of *Roberts* so as to reconfirm its irrelevance to the FRE 803 exceptions and perhaps apply it only to former testimony among the FRE exceptions that require unavailability.¹⁸

If the first prong of *Roberts* was based on a plausible model of the real world, and what it means for hearsay to be necessary, the second prong, by which I mean the requirement that hearsay be reliable coupled with the proposition that without more reliability can be assumed if the out-of-court statement fits a long established hearsay

16. See FED. R. EVID. 803(2)-(4).

17. See FED. R. EVID. 803(1)-(4).

18. See *White v. Illinois*, 502 U.S. 346, 353-54 (1992); *United States v. Inadi*, 475 U.S. 387, 394 (1986).

exception, was not. Evidence law's world is the only place where all hearsay fitting long-established exceptions is especially likely to be true. In the case of some exceptions, most notably the excited utterance exception,¹⁹ the consensus seems to be that the conditions that qualify statements for the exception conduce, on balance, to unreliability. The same may be said of the "tender years" exceptions that some states have created in an effort to make it easier to prove child abuse.²⁰ Moreover, even if most admissible hearsay has a special likelihood of being reliable, most exceptions will nevertheless admit some hearsay which, if it were examined for reliability, would not pass the *Roberts* test. But the counter-factual proposition that any hearsay which meets the conditions of a long-established hearsay exception is reliable is the prong of *Roberts* that has been staunchly reaffirmed.²¹ Whatever the world may look like to non-judicial observers, the proposition that hearsay which meets the conditions of a long-established exception is reliable is not counter-factual in the *as if* world that evidence law constructs.

Consider also *White v. Illinois*, not for its affirmation of the reading I have just given *Roberts*, but for what Chief Justice Rhenquist, apparently speaking for a unanimous Court, says with respect to the case he is deciding. The Chief Justice writes, "a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony."²² This is true in the Court's world of evidence law. The problem is that in the world where the case arose the declarant was a four-year-old girl who, after telling her story to her babysitter, her mother and a police officer, four hours later told it to a nurse and, even later, to a doctor.²³ The alleged sexual assault apparently left no physical injury, and the girl's hearsay statement simply identified the assailant and purported to describe what he had done.²⁴ It would be surprising, indeed I would be astonished, if the four year old thought as she repeated her story for the fourth and fifth times that on these occasions she had better be accurate because her medical treatment depended on it.

Although I have relied primarily on Supreme Court decisions to

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

20. For a list of states having such statutes and a discussion of some of the issues they raise, see generally Robert G. Marks, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207 (1995).

21. See *White*, 502 U.S. at 354; *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987).

22. *White*, 502 U.S. at 356.

23. See *id.* at 349-50.

24. See *id.*

illustrate my points, one does not have to go to the nation's highest court to view judges creating fictional worlds to justify evidence rulings. Consider impeachment by prior inconsistent statements and the many courts that have found an inconsistency between a witness's earlier statement implicating a defendant and her later testimony, "I don't remember." Only in evidence law's *as if* world do people not only not forget anything they ever said, but also mean to deny a defendant's guilt when they say they don't remember what they once said about him.²⁵

The decision of a D.C. Circuit Court panel in *Winfield v. United States*²⁶ provides another example of how fictional worlds are invoked to support evidentiary decisions. In *Winfield*, a man

was identified by government witnesses as the man who had chased down and shot the victim to death while saying "do you like snitching?" The defense offered to prove that on the day of the murder the victim had informed against a man named Huff, and that Huff had previously threatened, shot, and stabbed the victim after a prior instance of informing.²⁷

The *Winfield* court upheld the trial court's ruling:

Although evidence of a third person's motives, actions, opportunity and statements are of the type which may be used to establish the requisite link to the crime charged in the case, to be admissible, the proffered evidence in the aggregate must establish "the necessary link, connection or nexus between the proffered evidence and the crime at issue." Thus, we have held that a defendant's proffer of evidence that other individuals had even stronger motives to murder the victim than the accused was insufficient, without more, to establish the necessary link to the offense charged to render the evidence admissible at trial

. . . .

Even threats against the crime victim are not relevant, "unless the third person is an accomplice or accessory of the accused" or unless the third person is implicated by other evidence in some way to the crime charged.²⁸

Doesn't FRE 401 define as relevant, evidence having *any* tendency to make a consequential fact more or less probable than it

25. See generally David Greenwald, *The Forgetful Witness*, 60 U. CHI. L. REV. 167 (1993).

26. 652 A.2d 608 (D.C. 1994) vacated, reh'g en banc granted, 661 A.2d 1094 (D.C. 1995), rev'd 676 A.2d 1 (D.C. 1996).

27. Donald A. Dripps, *Relevant But Prejudicial Exculpatory Evidence: Rationality Versus Jury Trial and the Right to Put on a Defense*, 69 S. CAL. L. REV. 1389, 1409 (1996).

28. 65 A.2d at 612-13 (citations omitted). For a thoughtful commentary on this case and an analysis of what is problematic about this and similar cases, see Dripps, *supra* note 27.

would be without the evidence?²⁹ In no world I know is evidence of the sort offered in *Winfield* irrelevant. Yet not only was it irrelevant in the trial judge's and the panel's world, but they could find precedent for their decision, as other judges had constructed similar worlds to justify similar rulings.³⁰

Finally, consider the artificial worlds that have been created by courts and legislators to allow the hearsay of children alleged to have been victimized sexually into evidence.³¹ Excitement in some such children can endure for hours or even days without being noticeable until the incriminatory words are spoken; statements in response to probing or even leading questions can be spontaneous, and as we saw in *White*, anything said to a doctor will be true because no matter how young the child or doubtful a physical injury, the child will know medical treatment depends on his veracity.

Reasons for Fictional Worlds

The reader may think that I have laid bare these judicial lies to deplore them. Not at all. The situation is more complex, for courts can get in trouble when they see the world as it is. Consider *Bruton v. United States*.³² Here the Court rejected one of the fictions that evidence law had not only long lived with, but actually thrived upon: namely, the fiction that juries will follow instructions and consider evidence only for certain purposes or against particular persons. The Supreme Court recognized in *Bruton* that when a defendant's confession implicated himself and a codefendant, a jury would find it difficult if not impossible to follow a judge's instructions to consider the confession only against its maker.³³ In so holding the Court recognized that most people are unable to rigidly segregate, by issue, information provided them or to control completely its influence on them. Thus the Court found that *Bruton's* Confrontation Clause rights had been violated by the admission of his codefendant's confession at their joint trial.³⁴ *Bruton* should have been tried separately from the confessing defendant.

Perhaps because so many crimes are committed with company,³⁵ *Bruton* proved impossible to live with, and the Court soon fell back into its usual ways of finding comfort in worlds it constructed. First,

29. See FED. R. EVID. 401.

30. See e.g., *Johnson v. United States*, 552 A.2d 513, 516-18 (D.C. 1989).

31. See generally Marks, *supra* note 20.

32. 391 U.S. 123 (1968).

33. See *id.* at 135-36.

34. See *id.* at 137.

35. In *Richardson v. Marsh*, 481 U.S. 200, 209 (1987), Justice Scalia indicates that one-third of all federal criminal trials involve joint defendants.

the Court held in *Nelson v. O'Neil*³⁶ that there was no *Bruton* violation when the defendant whose confession was introduced testified in his own defense because the codefendant could cross-examine the confessing defendant when he took the stand.³⁷ The Court ignored the fact that when codefendants are mounting a joint defense, their cooperative effort will be destroyed if one casts doubt on the other's credibility, and they ignored the fact that in the very case they were deciding there was nothing to cross-examine the testifying defendant on because he denied making the confession that implicated his codefendant. Nineteen years after *Bruton*, the Court retreated still further, holding in *Richardson v. Marsh* that separate trials were not the only means of preventing a *Bruton* violation.³⁸ Redacting one defendant's confession to remove references to another defendant is sufficient.³⁹ But when *Richardson* is applied in the real world of criminal trials, it is unlikely to offer the protection *Bruton* promised. Although *Richardson* itself may have been an exception, anything less than a redaction which destroys the story of a joint enterprise is likely to leave jurors suspecting that the accomplice referenced in a defendant's confession, however vague and shadowy the reference, is the person on trial with him.⁴⁰

The fate of *Roberts* provides another example of why courts do not always want to write opinions that reflect the fair implications of accepted legal values for evidence rulings in the world we live in. The first prong of *Roberts*, that the Confrontation Clause requires a showing of actual unavailability before hearsay is admitted, seems necessary to implement the full value of the Confrontation Clause rights in all situations where jurors would be better informed by a hearsay declarant's examination and cross-examination than they are by a listener's report of the hearsay statement. Yet we have long lived with a system which admits considerable hearsay from available witnesses and, without more, admits hearsay that falls under traditional exceptions. There is no particular reason to think that, over the years, this traditional system has been responsible for considerable injustice. I applaud the values of *Roberts* and the world of proof it aspired to. But as a practical matter, *Roberts* was an irresponsible decision, changing as it did, in one quick and unthinking stroke, so much

36. 402 U.S. 622 (1971).

37. *See id.* at 629.

38. *See* 481 U.S. at 208-09.

39. *See id.*

40. Since this was written, the Supreme Court seems to have taken the point of view of the text and mandated the elimination of references that directly but anonymously point to the defendant. *See Gray v. Maryland*, 118 S.Ct. 1151 (1998). The case does not go so far, however, as to destroy the story of the joint enterprise. *See id.*

of our received culture of hearsay law. Thus, the Court was right to retreat into its *as if* world to contain the damage to long received tradition that *Roberts* might have wrought, as well as, in the real world, to avoid the extra expenses *Roberts* would have imposed and the disputes that would have arisen over issues of availability.

It is no accident that courts have created a system of evidence rules that seem ill-suited to the world in which they operate, or that courts create fictional worlds to justify evidentiary decisions. Retreating to fictional worlds helps stabilize the integrity of the system of evidence rules over time and helps resolve the tension between deeply held, but in practice often conflicting, values at the heart of our system of evidence law.

The assumption in *Roberts* that hearsay meets constitutional standards of reliability whenever it meets the requisites of a traditional exception is a good example of the stabilization function of pretend realities. Without this unreal assumption, the system of hearsay exceptions that has been applied in criminal cases for generations would come undone, and a predictable, low application cost system of categorical exceptions would be replaced by a system in which the admissibility of all hearsay offered by the state would be, in theory, open to dispute before the judge. The received system in which the reliability of hearsay that fits a categorized exception is disputable only in front of the jury (or the judge as trier of fact in bench trials) is part of American trial culture and appears to have worked no great or systematic injustices. The Court in *Roberts*, although it may appear blind to reality, was thus wise not to overturn the understandings of generations. At the same time, the Court in *Roberts* wanted to ensure that the Confrontation Clause barrier to hearsay evidence did not become a nullity, as it might have with the proliferation of new exceptions designed to make it easier to secure convictions in certain kinds of cases, and with the availability of catch-all exceptions which, practically speaking, make all hearsay potentially admissible. Thus, the Court in *Roberts* sought to ensure that the status quo would not change with respect to accused criminals except where the change was likely to enhance justice by yielding more true convictions—an outcome which appears likely to be fostered by the admission of reliable hearsay. Yet, the Court could hardly write an opinion which held that only in the case of novel hearsay exceptions did the Constitution demand some reason to believe that the hearsay offered against an accused criminal was reliable. Instead, and quite naturally, the Court in *Roberts* presented the Confrontation Clause as a constitutional gatekeeper that let pass only hearsay that was likely to be reliable. But the Court saw to it that this gatekeeper posed no barrier to the admission of hearsay under traditional exceptions by constructing a world in which such hearsay was, without more, reliable.

There are two kinds of inconsistencies a court can fall into. One involves a conflict of doctrine or concepts that is internal to the legal system. The other is an empirical inconsistency between what the law asserts as fact and what actually is a fact in the external world. When it is difficult to write an opinion without falling into one kind of inconsistency or the other, courts almost always opt for empirical rather than conceptual inconsistencies. This is to be expected if evidence law constitutes an autopoietic system, for autopoietic systems model external systems in ways that allow for coherent system action. But it is also explainable without regard to the theory of autopoiesis. Internal inconsistency may be demonstrated on the face of an opinion or by contrasting one opinion or body of doctrine with another. While assertions of inconsistency may be contestable, the contest can be judged within the law-versed community. Moreover, the closest observers of courts, lawyers and law professors, are well schooled in making conceptual and doctrinal critiques but rarely are experts in making empirical ones, even when they possess on-point and convincing information. It is not surprising that courts try to avoid the kind of inconsistencies their usual critics are best equipped to pounce on.

Even when system stability is not a concern, courts locate evidentiary rules and rulings in fictional worlds because this allows them to escape a value conflict that lies at the heart of the evidence system. On the one hand, we want to resolve cases so as to get at the truth. The creation and application of rules of evidence should, as a normative matter, facilitate this process. On the other hand, process matters. We will not allow torture no matter how effective it might be in uncovering truth. More to the point, truth is supposed to be a product of *fair* process. Rules should be fairly read and applied neutrally. Language should not change in meaning, depending on which side is helped and whether that side's case is more likely to be true. Yet the temptation to take outcome into account when interpreting what process requires can be overwhelming.

If an outcome orientation yields better decisions by the talisman of truth, it should not necessarily be deplored. Some vague rules, like the hearsay catch-all exceptions FRE 807, and its predecessors FRE 803(24) and FRE 804(b)(5), invite ends-oriented application. Thus circumstances a court sees as sufficient, as a matter of fact, to guarantee reliability when a court believes hearsay will help a jury find the truth may seem, again as a matter of fact, to be insufficient to guarantee reliability when a court believes the hearsay helps the party that should lose. The situation is similar with respect to other facts that condition the applicability of hearsay exceptions and other evidence rules.

Consider, for example, the case which reached the Supreme

Court as *United States v. Salerno*.⁴¹ In that case the trial judge held that the defendant could not introduce transcripts of the testimony of witnesses who testified before a grand jury under FRE 804(b)(1), the exception for former testimony, because the government's motive in cross-examining grand jury witnesses was not similar to the motive it would have had in cross-examining the same witness at the defendant's trial.⁴² By itself, it is not clear whether the trial court created a fictional world, for the court's analysis is not obviously wrong as a matter of empirical fact.

We should not, however, consider *Salerno* by itself. Instead, we should contrast it with the many decisions of courts at all levels holding that a defendant's motive to cross-examine government witnesses at a preliminary hearing is similar to the motive the defendant has at trial.⁴³ In the fictional world on which this proposition is based, all defendants want to thoroughly discredit government witnesses so that they will not be bound over for trial, and a failure to cross-examine a witness is an indication that the defendant regards the witness's story as sound. But in the real world defendants and their attorneys know that even an effective cross-examination at a preliminary hearing is unlikely to lead to an immediate dismissal of the case. So the defendant's motive in deciding whether to examine a preliminary hearing witness and in actually questioning that witness at a preliminary hearing is often to secure discovery of the government's case or to lock the witness into a story without revealing his own hand. Before a grand jury, on the other hand, the government's goal is to secure an indictment. It would seem that when a witness expected to give incriminatory testimony gives exonerative testimony instead, the government has an incentive to show the grand jury that the witness cannot be believed. Yet this is not what motivates government attorneys before federal grand juries in the world the district court constructs so as to deny the former testimony exception to *Salerno*. Indeed, the government attorneys in *Salerno* saw cross-examination, that "greatest legal engine" for discovery of truth, as having little or no place in the development of a witness' grand jury testimony when a witness' truthfulness is doubted. And the trial court agreed.⁴⁴

By resting decisions in preliminary hearing and grand jury cases

41. 505 U.S. 317 (1992).

42. *See id.* at 320.

43. *See, e.g.,* California v. Green, 399 U.S. 149, 165 (1970).

44. In an affidavit, the government argued that it had "little or no incentive to conduct a thorough cross-examination of Grand Jury witnesses who appear who to be falsifying their testimony to assist Grand Jury targets or other witnesses." *United States v. Salerno*, 937 F.2d 797, 806 (2d Cir. 1991), *rev'd*, 505 U.S. 317 (1992). The trial judge agreed that the government's motive to examine a grand jury witness is "far different from the motive of a prosecutor in conducting the trial." *Id.* at 804.

on fictive views of the motivations of prosecutors and defendants, courts can apply the similar motive requirement of FRE 804(b)(1) in ways that are conceptually faithful to the rule's language while admitting against defendants what the court believes is credible preliminary hearing testimony likely to lead to justified convictions and denying defendants the use of what the court believes is perjured grand jury testimony, likely to lead to unjustified acquittals. Creating fictional worlds thus allows courts to conform conceptually to the requisites of FRE 804(b)(1) while also promoting the evidence law's overall aim of getting at the truth. Other ways of biasing rulings in favor of the truth are less attractive. A court could not, for example, hold that the similar motive requirement of FRE 804(b)(1) is unimportant when prior testimony is offered against an apparently guilty criminal defendant but matters greatly when an apparently guilty defendant offers former testimony against the state. Such an open declaration of what is going on is too obviously inconsistent with fundamental tenets of fair procedure and formal adversarial equality to be a viable way of tilting the balance at trial toward the party who the judge thinks has truth on his side.

Conclusion

This piece is a preliminary inquiry into difficult issues, and my conclusion is accordingly tentative. It is that evidence law responds not to the real world but, as autopoietic theory postulates, to models of the real world that the law constructs. These constructions, which prop up both the system of evidence law and the way the rules of this system are applied, are, to a not inconsiderable extent, fictionalized portraits of the real world and the way people behave. Judges, whom I have focused on, as well as lawyers and legislators who also contribute to evidentiary rule systems, are often informed observers of the actual world and human behavior. In resting evidence law and its application on fictional worlds, they know what they are doing. Hence it is not unfair to say that evidence law, both as doctrine and as applied, rests to a considerable extent on *lies*. It is hard to say whether this is bad. We must consider the possibility that this reliance on fiction is not only understandable but perhaps, on balance, also an eminently serviceable response to dilemmas evidence law cannot avoid. This paper does not, however, prove this proposition. Perhaps the most obvious objection to this kind of perspective on judicial falsehoods is that judges do not necessarily know where the truth lies. The fictive worlds they create to justify rulings that would be untenable in the real world may reflect not an allegiance to the truth but systematic biases in favor of one party (in criminal cases, usually the state). A second objection is that the costs that distorting reality creates for

system legitimacy and predictability outweigh the virtues of skewing discretionary decisions with an eye to the truth or of not abruptly changing long-enduring aspects of evidence law. I shall not pursue these issues here, but leave them to future work by me or by those whom I hope find these preliminary thoughts intriguing.

Instead let me conclude by noting that if this analysis and the conception of evidence law as an autopoietic system is in some measure correct, two recent developments may be contributing to what some perceive as a coming crisis in the legitimacy and viability of our current system of evidentiary procedure.⁴⁵ The first development is the increased empirical attention that is being devoted to evidentiary rules, trials and the settings in which legal cases arise. It is relatively easy for a court to create a fictional world to resolve tensions between doctrine and justice when no one has the data to prove a court's world is fiction. As scholars and lawyers armed with empirical data take a more prominent place among court critics, however, courts may find that lies about how the world works are a less viable way of maintaining conceptual and doctrinal consistency while still skewing decisions toward the truth.

The second development is the creation of the Evidence Rules Advisory Committee, a body that not only is interested in rationalizing the rules of evidence and creating rules that better conform to the conditions of the real world but also has a stake in change since a posited need for change is its *raison d'être*. Moreover, the Advisory Committee is well-situated to integrate the findings of empirical research into rules of evidentiary procedure. The progressive rationalization of evidence rules based on better empirical knowledge may seem like a good thing, but given the dilemmas that are arguably inherent in systems of evidentiary procedure, successive efforts to improve the system may succeed only in making it more complex and may destroy some of the practical compromises by which evidence rules mediate between the requisites of substantive and formal justice. Moreover, too frequent rule changes disrupt system stability. Perhaps I am unduly pessimistic, but when I contemplate the Evidence Advisory Committee's efforts to whip the rules of evidence into a more rational shape that better fits the world we live in, the image of Brer Rabbit trying to punch manners into the tar baby comes to mind. So do Justice Jackson's cautionary words in *Michelson v. United States*⁴⁶:

We concur in the general opinion of courts, text writers and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage

45. See, e.g., MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT (1997).

46. 335 U.S. 469 (1948).

to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.⁴⁷

At the least, evidence scholars today are living in interesting times. This is the bright side. But then again, "May you live in interesting times" is a classic Chinese curse.

47. *Id.* at 486.

