## Why criminal defense attorneys have to learn the science

#### BY MICHAEL G. BROCK

"If your [defense counsel's] client didn't do it, why is the child saving he did?...There can be no loose ends in your explanation [to the jury] as to why the false allegations arose. Maybe mom's repeated and suggestive questioning of the child about an imagined molest has turned the child into a believer with a story to tell. But make sure you can prove this before it becomes your theory of the case...The physical findings are normally going to be presented to the jury by a child advocate masquerading as a physician. The doctor whose only role in the case is to come before the jury and say 'I didn't find anything, but that's entirely consistent with sexual abuse having occurred' needs to be precluded on relevance grounds. Offer to agree not to argue the absence of physical findings (it will occur to the jury anyway) and thereby remove any possible relevance this doublethink has."

#### —Richard Lougee Defending Allegations of Sexual Abuse (2017)

"In criminal cases, the importance of science (and understanding the limits of science) cannot be gainsaid. The statistics are clear: in a review of homicide cases in Cleveland, Ohio, the clearance rate was higher [63.1%] for cases with probative results — either matches or exclusions — than in cases without such evidence [56.3%], and the average sentence imposed was higher in the former category. Yet there is a confounding problem – the consumers of forensic evidence have little or no scientific training, either at the college level or 'on the job.' Perhaps 5% of lawyers [and judges] studied science, a number presented in research papers and confirmed repeatedly by polling attendees at legal education conferences. And the consequences are severe."<sup>2</sup>

—Jules Epstein The Judicial Edge (2016)

"Unfortunately, the destructive pattern of catering to the forensic confirmation bias persists because of a stark disconnect



Michael G. Brock

during the question and clarification phase. Instead of following this procedure, the FIs begin to seek specific incriminating information early and frequently, bypassing the narrative entirely, or building the narrative themselves with long questions requiring short answers, and containing information the child has not yet mentioned. These questions make it sound like the child is telling the story, but the story is actually being built by the FI. Unfortunately, though research and protocols all emphasize the importance of the amount and quality of the narrative, they do not stress that a poor quality narrative equates to a poor quality of evidence, leaving that decision entirely to the prosecutor, who will then do whatever he or she can to keep the jury from seeing the process by which

b) The child should never be asked leading questions presuming correct answers, or containing information the child has not yet volunteered, but most forensic interviews are replete with such questions. Again, there is no guideline regarding at what point such questions and the disclosures they produce constitute leading and coercive interviewing, which is no longer "child centered<sup>4</sup>," but very much controlled by an interviewer who disregards information that does not fit a preconceived notion of events. Again, the prosecution makes the decision about whether the interview

the evidence was disclosed.

sexual activity.
The child lied about abuse or neglect to attempt to change a living or visitation arrangement.
The child exaggerated about an event to show off to friends.

• The child lied about who the perpetrator was to protect the actual perpetrator.<sup>6</sup>

People I believe to be innocent are serving long sentences on the unsupported word of a child in which these alternative hypotheses should have been, but were not adequately explored. In one of these cases the child had made a previous unfounded allegation of abuse against a teacher, but her lack of credibility did not stop the innocent defendant from being convicted.

However, errors in the forensic interview are not the only concern

about distorted evidence making its way as fact to the jury. The person to whom the initial disclosure is made (sometimes referred to as the outcry witness) is typically not an objective professional who will be trying to follow a proper protocol to assess exactly what has happened to the child. More often, it is a family member who, with or without any motivation to implant ideas of abuse in the mind of the child, has typical-

ly questioned the child in a very leading and aggressive manner. The parent or grandparent who is questioning the child in this situation is concerned/upset, and is asking very specific and even demanding questions, "Did daddy touch your peepee?" "Did he make you touch his peepee?" "Did you feel any wet stuff?" etc. This initial interviewer will also frequently divulge a history of abuse, if they have one, sending a clear message to the child that they expect her to divulge a simi-

lar experience. This is a great deal of pressure for a child, and they are reluctant to let mom or auntie down.

It is also very likely that the child will also be interviewed by a therapist, police officer, school social worker, or child protective services worker, and the records of these interviews are sketchy at best. Each interview provides opportunity for taint. Moreover, after the disclosure, the child is often praised for their courage and honesty in divulging what the

# THE EXPERTISES WITNESS Allegorical economics:

### The storyteller's journey (part one) By JOHN F. SASE, Ph.D.

#### Gerard J. Senick, general editor Julie Gale Sase, copyeditor

"The standard path of the mythological adventure of the hero is the magnification of the formula represented in the rites of passage: separation—initiation—return, which might be named the nuclear unit of the monomyth."

—Joseph Campbell, American mythologist, writer, and lecturer, The Hero with a Thousand Faces (Pantheon Books, 1949)

Last month, we considered some economic principles that all of us can use in our daily businesses. Since the original model of Land-Labor-Capital does not seem to address the needs of the Twenty-First Century for many of us, we explored the Factors of Production in the new light of Behavioral Economics.

This month, we turn to Allegorical Economics by delving into the source of all economic understanding—ourselves as human storytellers as we have developed into productive beings over many millennia. I (Dr. Sase) and my colleagues aim to write a multipart series on this subject that we hope will enrich both the personal and professional lives of our audience.

Attorneys and Economists must be storytellers in both the classroom and the courtroom. Attorneys need to condense the story of their clients to evoke understanding and empathy from jurors in order to achieve justice. This burden comes



John F. Sase

include "The Power of Myth" (Doubleday, 1988). This book is based on Joseph Campbell and the Power of Myth, the television documentary series originally broadcast by PBS in 1988 as six onehour conversations between Campbell and journalist Bill Moyers. In these interviews, Campbell outlines the inner journey of the archetypal hero(ine) who has appeared in stories ranging from Gilgamesh to Star Wars and beyond. In this storytelling archetype, the hero(ine) becomes aware of a problem, overcomes a fear of it, takes a journey in which s/he encounters challenges, and finally accepts the consequences of his/her new life. Through experiences that lead to inner growth, the hero(ine) as a storyteller can help

others. Our Raison d'Etre "We must be willing to let go of the life we planned so as to have the life that is waiting for us."

place. As a result of this finiteness, we learn to allocate them for competing uses.

Factors of Production Consider this second Economic Principle: The objective of the proper allocation of resources is to produce goods and services that serve to satisfy our needs and wants. However, in order to allocate our scarce resources well, we separate them into various categories in our minds. First, we divide these resources into human and nonhuman and then separate each division into subcategories that we call Factors of Production. In last month's column, we suggested an arrangement for modern purposes: Real Estate, Wage Labor, Profit Labor, Technology, Intellectual Property, and Capital. Our laws protect the ownership rights of these resources. **Production Possibilities** 

Here is our third Economic Principle: Depending on the total amounts and relative balance of our Factors of Production, we eventually will reach an upper limit in the creation of desired goods and services. This limit of attainable production suggests optimal utilization of available resources. This limited availability marks the maximum production that we can achieve under present conditions.

There are two ways to achieve a bundle of products beyond our initial limits. First, we can equitably increase our Factors of Production in order to attain an increase in our total output. Second, we can specialize in the production of those

Would such cross-operational development encourage my professional growth?

6. Do I entrench myself in the known and predictable aspects of my professional life? If so, why? Am I willing to respond to innovative practices or do I resist or deny any process of change within my professional field?

Self-reflection turns our attention to the function of Mentoring. The archetype of the Mentor functions to impart wisdom, instruction, and guidance. As with Hermes and Athena, who equipped the Greek hero Perseus; the fairy godmother, who bestowed gifts and guidance upon Cinderella; and Obi-Wan Kenobi, who gave a lightsaber and learned wisdom to Luke Skywalker, we also want to have a Mentor to guide us along our respective journeys.

As with the heroes and heroines above, the Mentor can serve similar functions for Attorneys and Economists. However, one needs to know something about the characteristics of the Mentor Archetype in order to find a real-life Mentor. We need to recognize that such a mentor represents the Self (especially our higher Self) through acting as a conscience, a teacher, a motivator, and the provider of some special help or gift. Furthermore, the person who receives the help or gift from the Mentor needs to earn it. This action requires learning, sacrifice, or commitment to a cause, to one's philosophy, or to an organization. Through Mentorship, we hope to gain the enlightenment that s/he can bring

between the scientific and legal communities...neither field is likely to address the forensic confirmation bias without substantial incentives for structural change. First, lawyers and forensic analysts have inherently conflicting goals. While analysts seek to describe their results objectively, lawyers have an obligation to zealously advocate for their clients. As such, it is unlikely that *lawyers will take steps to mitigate* the very bias that bolsters their chances at obtaining evidence that will support their case. Furthermore, in the criminal justice system, the interests of prosecutors tend to prevail because law enforcement officials, who subscribe to similar prosecutorial goals, tend to have significant control over affiliated crime laboratories...lawyers lack fundamental knowledge of the operations and intrinsic limitations of forensic testing... As such, they are often unable, without the proper education, to appreciate the effects of the forensic confirmation bias on the interpretation of data and test results."

> —John Perez Yale Law Review (2014)

Forensic Science is performed by and favors the prosecution. The forensic interviewers (FI) in a child sex abuse investigation are supposed to be impartial scientists who are using a scientific method to arrive at truth. However, the FI is part of the prosecution team, and their work shows their bias, conscious or unconscious, toward the guilt of the accused. This is evident in a number of ways, but can be seen most readily in the violation of the three most important aspects of a forensic interview:

a) The most important evidence in a sex abuse case is contained in a narrative account of the allegations, and all forensic protocols emphasize obtaining narrative accounts of any and all allegations made throughout the interview. The most important changes in recent years to a process that has stayed fairly consistent for some time, is emphasis on obtaining more information through asking for narrative at every phase of the interview, even

was conducted properly, and will try to prevent the jury from seeing and being informed about the interviewing process, and therefore being allowed the opportunity to decide whether they believe the evidence presented at trial is the tainted fruit of a poison tree.

c) The interview, in order to be truly scientific, must consider alternative hypotheses<sup>5</sup>. If only one hypothesis is considered, it will inevitably be confirmed. Often, alternative hypotheses are suggested by the child's response to questions asked by the FI, but they are rarely followed up on. Answers that demonstrate the child was told what to say by parent or presenting relative, statements that the non-custodial parent treats the other parent badly, demonization of the accused parent by reports of bad acts that unproven or demonstrably not true, repeated accusatory phrases with no connective tissue, reference to the accused parent by first name, or tales that mix fantasy with improbable allegations, all are suspect and should be followed up with open ended questions to investigate other possible explanations for the allegations, but rarely are.

Page 25 of the Michigan Forensic Interviewing Protocol offers the following possible alternative hypotheses to the possibility that the child has been abused

by the person on trial: • Someone misunderstood the child's statement.

The child was abused but misidentified the perpetrator.
An injury was accidental.

• A rash was caused by a medical condition.

• An injury resulted from a medical condition (e.g., falling down from a seizure).

• Touching occurred during routine caregiving.

The child witnessed, but did not experience, the alleged abuse.
Repeated questioning made

the child believe abuse occurred.
Someone coached the child to report abuse.

• The child wanted to retaliate against the accused.

• The child made up a story to get out of trouble.

• The child reported sexual abuse to cover for evidence of

interviewer has already decided is a factual account of abuse. To take back the allegation at any point after that would be to let down a trusted loved one, to disappoint mom or grandma, or another approving authority figure. Moreover, even if the disclosure is not true, they may quickly come to view it as such. By the time this child gets to the FI with their confirmatory bias, they will already have a great deal of moti-

vation to stick with the story, regardless of veracity. Prosecutors, like defense attor-

neys, typically don't know much about the science behind forensic interviewing, but they will present the forensic results as facts and juries will not question them. If defense counsel knows what the science actually says, he can effectively contest the jury's predisposition to accept the prosecutor's word as gospel. Remember that the forensic interview in these cases is effectively the grand jury. The decision to prosecute a criminal sexual conduct (CSC) case without physical evidence is based on the forensic interview. These interviews are rarely conducted according to the science, and the child's testimony in a false allegations case will morph over time and retelling.

Defense counsel does not have to attack the child to win acquittal, but he will have to attack the child's story and show the obvious inconsistencies. Sometimes this can be done by conducting a "virtual" forensic interview on the stand, showing that the child can repeat key phrases, but cannot relate a narrative of event(s) conpacted with the allogations or

nected with the allegations, or getting the child to relate a narrative which is full of contradictions and obvious fabrications and makes no sense, and sometimes revealing the real motive for the allegations. But to do this, defense counsel has to know the science—what a proper forensic interview should be.

Doctor's will testify that "There is no physical evidence of abuse, but that doesn't mean there hasn't been any abuse." It also doesn't mean the child has not been molested by the judge, the (See BROCK, Back Page)

with the territory. Through our sources and approaches, we seek to unravel the mysteries of Law and Economics in universal ways that are understandable to all human beings. By unraveling this mystery that surrounds the Concept of Story, we hope that every reader will reach illumination of the role that each of us plays in the continued growth and development of stories.

Economic Allegory

Economics as Allegory is nothing new. Discussion of it in academic journals goes back more than sixty years. In her research article "Economics as Allegory" (Journal of Interdisciplinary Economics, Vol 4, Issue 2, 1992, pp. 131 – 136), Jannett K. Highfill investigates the proposition by American Economist Donald N. McCloskey that economic journals contain both metaphors and allegory. We can read the defining trait of allegory for economic purposes on two levels, the literal and the figurative—or allegory. The McCloskey proposition points out that, while we write narrative-Economic allegories (stories that use simple numbers, structure, and language to explain economic concepts), not all narratives in Economics are allegories. However, all mathematical-economic models are allegories. Both the literal and figurative levels of these models are abstract, and this fact provides important implications in using empirical data in Economic inquiry. For more information, see McCloskey's book "The Rhetoric of Economics" (University of Wisconsin Press, 1985).

The Storyteller's Journey

Let us begin by looking at the storyteller as hero(ine). By using the model introduced by American author and lecturer Joseph Campbell, the hero(ine) embarks on a journey of self-discovery. In respect to Law and Economics, the hero(ine) storyteller must have a strong knowledge of Law or Economics in its purest and most basic form in order to communicate with a wide audience.

Campbell explored the art of storytelling in depth through his specialty fields of Comparative Mythology and Comparative Religion. He discussed story form in his many publications, which –Joseph Campbell, The Power of Myth (Doubleday, 1988)



In order to illustrate a hypothesis and observations that we put forth in our professional storytelling, we may develop our allegories as explained by Campbell. In our tales, we may ask how our societal, political-economical, and legal institutions have evolved.

As storytellers, why do we need to understand the human basics of Law and Economics? How will this knowledge benefit us? When communicating with students in a classroom or with jurors in a courtroom, we face the challenge of how to explain important fundamental concepts effectively. For example, if an attorney can prepare the judge and jury through clear and intelligible storytelling of the pertinent facts and principles of the case, then that attorney can use his/her experts to a greater advantage when they present their parts of the larger story.

Speaking Economics

More often than not, our audiences have had little to no exposure to the technical aspects of our academic disciplines. Nevertheless, they are capable of following common-sense explanations that relate to their fundamental humanness.

Here is our first Economic Principle: The term "Economics" is derived from the Ancient Greek words oikos, meaning "house," and nomos, meaning "custom" or "law." In short, it has come to mean "rules of the household for good management." In modern thought, Economics implies the management of resources. As we consider that all resources are limited in their availability, they are naturally scarce regarding time and

products for which we have an advantage. This is in respect to potential partners with whom we may trade our surpluses in exchange for other products that we need.

Specialization and Division of Labor Finally, here is our fourth Economic Principle: A basic way to increase productivity is to the assemble the workforce and then to divide it into groups based upon the varying talents, skills, and knowledge of the individuals in our force. This approach allows each group to focus on a more specialized process or activity. Such division of labor serves to increase both individual productivity and, as a result, the total quantities produced.

Applying the Campbell Model to Storytelling

The progression of the hero(ine)'s journey has been applied to numerous fields. For example, educators, consultants, and others have incorporated the teachings of Campbell to their respective fields. In order to achieve our goals in Law and Economics, we can adapt some checkpoints for reflection from his works by asking ourselves the following compound questions (Attorneys may find it beneficial to engage in this six-point exercise):

1. Do I feel inauthentic in any way within my professional life? If so, to what degree do I lack connection with the shared vision, purpose, and mission of my firm or group?

2. Do I experience professional isolation within my area of expertise? If yes, would I be willing to change? If so, how might I accomplish this change? If no, what is the source of my resistance?

3. Do I lack any necessary technical skills and knowledge for my further professional development? If so, how might I resolve these issues?

4. Do I operate at cross-purposes with my colleagues? Do we differ in our interpretations of key work initiatives in a way that leads us to act at odds?

5. Do situations exist within my
 specialty that would benefit from
 cross-operational language and
 procedures with other specialties?

to us. The Wrap

Next month, we will continue our exploration of Allegorical Economics as we focus on the challenges found in storytelling with numbers. We will examine the ancient history and methods for communicating the substance of complex mathematical models to those among us who relate better to visual, verbal, and behavioral stories. As we venture forth into the past, we will consider the substance of the mathematical allegories of Atlantis, Athens, and Magnesia created by Plato and follow this approach to storytelling back to Pythagoras and earlier thinkers. Numbers need not be complicated in order to tell a story. They only need to fit together in a meaningful way that can be understood widely.

We hope that our first installment of this series provides our readers with a basic understanding of both Campellesque storytelling and the fundamentals of Economics. We wish our readers a Happy Thanksgiving and are grateful for the opportunity to have written this column in the Legal News for almost twenty years.

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#### WEDNESDAY, NOVEMBER 15, 2017

## **BROCK:** Why criminal defense attorneys have to learn the science

(Continued from page 3) prosecutor, and all the members

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of the jury, but they will still offer an opinion—based on nothing scientific—that the abuse happened. Their opinion regarding whether abuse occurred is irrelevant, but given the doctors' status, will still have an impact on the jury. Attorney Lougee's opinion (stated above) is that such testimony should be precluded on the basis of relevance. A basic principle of law is that it is impossible to prove the negative, and the doctor is not telling anyone anything they don't already know.

That said, there is dispute among medical researchers whether or not penetration of a child will leave any physical signs of abuse. Pediatrician Steven Guertin compiled and provided to me an unpublished paper citing several studies that support the intuitive sense that a child's hymen would show signs of trauma long after the fact, and citing sources. Whether or not it is wise to bring a medical expert to the case is the attorney's call, but if they have one on the stand, you might want to be prepared with a rebuttal witness.

Dr. Guertin's paper states in part: "...However, the issue is: since a transection is what almost certainly would have occurred after penile vaginal intercourse (which is the degree of "penetration" you have asked me about) in a prepubertal child, would you expect to see evidence of that injury within days (or even years) later? Absolutely.

"1) Finkel in 1989 followed a prepubertal girl with transection. It was persistent.

"2) McCann and Voris (1992) followed three prepubertal girls with transections. They persisted even into adolescence.

"3) Pokorny (1992) followed 6 transections. All persisted.

"4) Hostetler and Muram (1994) followed four prepubertal girls with traumatic fenestrations of their hymens. Unless surgically repaired, the injuries persisted.

(5) Slaughter in 1997 followed 18 adolescents and 4 adults with transections; none had reunited at follow-up

"6) Boos followed one case (1999). The transection persisted.

"7) Heger (2003) followed 17 transections. In 6 they tried surgitransections persisted. In every

able, contrary to some popularly held beliefs. Most importantly, the studies that Dr. Guertin cites in his paper making the claim that such healing is possible, and even frequent, are bases primarily on children's claims of abuse rather than children who have been followed by someone who has observed the trauma and subsequently healing process. The fact that we have reached a point where the unlikely is believable if it supports a preconception of abuse, is a testimony to the political climate, not the science.

Likewise, forensic interviewers are products of the political climate. The fact that the underlying presumption of this climate is that men are inherently predators and not to be trusted, is something about which there is apparently no longer serious debate. But thorough examination of the forensic interview will often reveal this bias and defense attorneys have to know what they are looking for. If you can show that the interview was flawed, you can undermine the prosecution's case. However, you should not rely solely on your expert to do this for several reasons:

• The judge may not let your expert testify.

• The jury may find the prosecution witness more credible.

• The jury has watched Law and Order SVU and consumed the frequent media stories about horrific cases of multiple victim abuse, and will in all likelihood be biased in favor of the prosecution. • The jury will probably hear

more people say it happened than that it didn't happen.

• The jury needs to hear it from defense counsel to know that you believe your expert, and, more importantly, believe in your client.

• The forensic interview is the basis for the case being before the jury; you need to be sure the jury understands this—if the interview is poorly done, the entire case is built on sand.

• In a false allegation case, what the child says at the forensic interview and the preliminary hearing will differ substantially from what the adult who initially questioned the child has said; you need to point out the clear contradictions.

• In a false allegation case, what the child says at the trial will cal repair and even then, 4 of the be different from what she says at Radical politics has taken over the the preliminary hearing and in the iustice system, just as most other areas of American life. Don't forensic interview. You need to point out the inconsistencies. expect fairness, rule of law, or any False allegers are either quiet and say only what they are led to say, or are loquacious and will spin long and improbable tales of fantastical abuse and other improbabilities. You need to know which kind of child you're dealing with to be effective on cross examination without alienating the jury. Like defendants who babble at trial and wind up putting their foot in their mouth, a child telling a tall tale is likely to do the same. The more the child's story veers from reality and approaches fantasy, the less probable the story becomes. It may be helpful to provide accounts to the jury from the McMartin<sup>8</sup> case, the Kelly Michaels9 case, or the Little Rascals<sup>10</sup> day care case, all of which involved convictions overturned on appeal and including fantastical and extremely improbable stories of abuse which were the result of suggestive interviewing. These cases have been widely studied and well documented in "Jeopardy in the Courtroom" (cited above) and "Investigative Interviews of Children<sup>11</sup>," as well as in the press. The fact that we have to keep reinventing the wheel is a testament to the power of mass hysteria. Juries need to be made aware of this phenomena and the similarities between those cases and that of the innocent defendant you represent. After having spent a lifetime in mental health, and most of that time serving as an independent evaluator and expert witness in the courts, I have become somewhat disenchanted with the law as a means of seeking the truth. I don't see that truth seeking is always the goal of legal proceedings. Indeed, it has been said by someone who should know that "The first casualty of a criminal proceeding is the truth."<sup>12</sup> Many lawyers and judges see the legal process as a sport in which the truth can and should be obfuscated by clever argument in an effort to win at all costs. Though current propaganda suggests that it is defense attorneys who think this way, and that prosecutors-as rep-

resentatives of the government-

do not share this view. Increasingly, prejudicial techniques are employed by prosecutors in pursuit of obtaining convictions, the most blatant of which I've seen are strategies to prevent the accused from mounting a defense, preventing the jury from seeing all the evidence, or examining the evidence in detail from the defense perspective. The adoption of these attitudes

by the ruling elite in the closely aligned fields of politics and the media means that there is virtually no area of American life where truth carries a great deal of weight. No wonder knowledgeable and sober people are predicting the imminent demise of our society<sup>14</sup>, and evidence of social insanity is everywhere evident. That said, the duty of the three hundred at Thermopylae<sup>15</sup> was to hold the line as long as possible, and so we must. But regardless of which side you blame, the unraveling of American democracy is proceeding at a breathtaking pace. Part of me wishes that I had no offspring to witness what will come.

Given the new American reality that truth is given short shrift in the courts, and that "might ultimately makes right," prosecutors know that there are frequently holes in the forensic interview, which is why they will try to keep the specifics of the interview out of evidence and do everything they can to keep your witness off the stand. If your witness cannot testify, or is not allowed to testify to what you need him to say, you must be willing and able to present the truth to the jury. That means you have to understand the scientific truth well enough to explain it.

defense attorneys who have not read the Michigan (or their own state's) Forensic Interviewing Protocol. It is not enough to know the law. You are in a field where it does not take any evidence to send your client to prison for life. Those are the rules and that is the reality. Don't pretend you live in a world where "truth will out.16" This is not a Shakespeare play. The burden of proof is on the defendant; the standard of proof is beyond all doubt, and everyone starts with a presumption of guilt.

I am baffled that there are

seek only justice and fairness, I are accused of committing. I hate 1987, and the trial ran from 1987 working for lazy or cynical lawyers who let themselves off the hook by telling themselves, "Well, he probably did it anyway." I've heard it. Your clients deserve better, at least a thorough investigation of the evidence, which means knowing the forensic protocol. And if you know the science, you will have a better handle on whether he is innocent. Everyone else drinks the Kool Aid—ingests the propaganda that says sex crimes are rampant, presumes guilt, and favors the prosecution. If you agree with a guilty verdict prior to investigation, you are in the wrong business; you're part of the problem, not part of the solution. The more you know about the science, the more control you have over the case. You know whether to plead your case or go to trial, and if you go to trial, you know what the evidence is against your client, so you know how to argue the case. You know how to cross examine witnesses, and what witnesses to put on the stand. It should help you sleep at night, and it should make you a better lawyer. Mark Twain said that a jury is

made of 12 people whose job it is to decide which side has the best lawyer. This is not very fair, but it is true. In the final analysis law may not be the best way to arrive at truth, but it's what we have. It seems more driven by politics, prejudice, personal ambition, and the press than by a search for truth. One might think a civilization that could put a man on the moon could devise something more accurate, but we haven't. But then again, any form of truth seeking, scientific, religious, artistic or legal, is only as good as the integrity of people who are doing the seeking, and that varies wildly, and is a product of the times

People who are drawn to law and politics seek power. Truth seekers may be drawn to science or the arts, though I would argue that political correctness has done as much damage to art and literature (and possibly science) as it has to justice. But juries do care about the truth, and if you can convince them that you have the best handle on it, you can win despite whatever preconceived notions they have about whether your client is a criminal because he happens to be male. You have to know the science to convince the jury you are the best lawyer. Maybe you have to know the science to be the best lawyer.

to 1990. After six years of criminal trials, no convictions were obtained, and all charges were dropped in 1990. When the trial ended in 1990, it had been the longest and most expensive criminal trial in American history." <sup>9</sup> In Retrying Abuse Case, A

New Issue, Sullivan, J. (February 4, 1994), New York Times, Retrieved 2007-01-21. "Just how to prevent fantasy from being presented as fact in sex-abuse cases is facing the New Jersey Supreme Court in the wake of one of the most sensational of the spate of cases involving day-care workers during the 1980s. The court heard arguments today about the admissibility of evidence in the case of Margaret Kelly Michaels, who was convicted of sexually molesting 19 children, many of them 3- and 4year-olds, during her sevenmonth employment at Wee Care Nursery in Maplewood. She served 5 years of a 47-year sentence before her conviction was overturned early last year."

<sup>10</sup> Jeopardy in the courtroom, American Psychological Association, pp. 9–11. Ceci, S. J.; Bruck, M. (1996). ISBN 1-55798-282-1. Day-Care Owner Is Convicted of Child Molesting. The New York Times. 1992-04-23. Retrieved 2007-10-24. "The Little Rascals Day Care Center was a day care in Edenton, in the U.S. state of North Carolina where, from 1989 to 1995, there were arrests, charges and trials of seven people associated with the day care center, including the owner-operators, Betsy and Bob Kelly. In retrospect, the case appeared to reflect day care sex abuse hysteria, including allegations of satanic ritual abuse, and possible conditioned testimony of children. In January 1989, allegations were made that Bob Kelly had sexually abused a child. After investigation by a police officer and social worker, the conclusion was the allegations were valid and parents were urged to have their children evaluated for abuse. A total of 90 children, after many therapy sessions (in some cases up to ten months' worth), also made allegations leading to accusations against dozens besides Kelly and charges against seven adults (Bob and Betsy Kelly, three workers at the day care, a worker at a local

that a small path led behind the Greek lines. Leonidas, aware that his force was being outflanked, dismissed the bulk of the Greek army and remained to guard their retreat with 300 Spartans, 700 Thespians, and 400 Thebans, fightthe death. to ing https://en.wikipedia.org/wiki/Bat*tle\_of\_Thermopylae* 

<sup>6</sup> The Merchant of Venice (2:2): "But in the end truth will out."

<sup>17</sup> Tao Te Ching 69, Lao Tsu "... There is no greater catastrophe than to underestimate the enemv.'

<sup>18</sup> 10 Tips (Maybe Eleven) for Defending Against False Child Sex Abuse Allegations, (Child Sexual Abuse Crimes: Easiest to Accuse – Hardest to Defend) by Criminal Defense Lawyer Brent Horst "I fully believe that a defense attorney, in defending against the child sex crime allegation, can do everything technically correct by presenting all the right evidence, making all the right arguments, conducting a great cross examination, and making all the right objections, but nevertheless lose the case because he did not display true passion in the belief of his client...I believe true passion is often the difference between a guilty verdict and a not guilty verdict. These cases are very emotional from the state's side and the defense better be able to respond with its own emotion.

Michael G. Brock, MA, LMSW, is a forensic mental health professional in private practice at Counseling and Evaluation Services in Wyandotte, Michigan. He has worked in the mental health field since 1974, and has been in full-time private practice since 1985. Much of his practice in recent years relates to driver license restoration and substance abuse evaluation, but he also consults and serves as an expert witness regarding forensic interviewing and the use of forensic interviewing protocols in cases of child sexual abuse allegations. He may be contacted at Michael G. Brock, Counseling and Evaluation Services, 2514 Biddle, Wyandotte, 48192; 313-802-0863, fax/phone 734-692-1082; e-mail: michaelgbrock@comcast.net, website, michaelgbrock.com.



#### November

**15** The Levin Center at Wayne State University Law School will host a bipartisan panel of experts to analyze the pending GOP tax plans from 12:15 to 1:15 p.m., Wednesday, Nov. 15, at Wayne Law. The event, "The GOP's Tax Reform: A View from all Sides," which is free and open to the public, will be in Wayne Law's Spencer M. Partrich Auditorium, 471 W. Palmer St., Detroit. Registration is required by emailing levincenter@wayne.edu.

**10** Human resources professionals, general counsel, business owners and all who deal with employees need a playbook to keep up with changing laws, regulations and other issues impacting today's workplace. Butzel Long's 30th Annual Labor, Employment, Benefits and Immigration Law Forum will focus on a variety of these legal matters on Thursday, Nov. 16, at the MotorCity Casino Hotel located at 2901 Grand River Avenue in Detroit. The seminar begins with registration at 7:15 a.m. The conference takes place from 8 a.m. to 2 p.m. The \$190 registration fee includes a continental breakfast, lunch and seminar materials. For additional information or to register online, visit www.butzel.com/event. For inquiries, contact Jonathan Spencer at 313-983-6995 or email at spencer@butzel.com.

I / The Journal of Law in Society at Wayne State University Law School will present its 2017 symposium "Why Detroit Rebelled: The Intersection of Racism and Social Control in the City," on Friday, Nov. 17. The event will be from 8:30 a.m. to 4:30 p.m. in the Spencer M. Partrich Auditorium at the law school, 471 W. Palmer St. The symposium is free, but registration is required by Friday. Nov. 10. Additional details and registration can be found at rsvp.wayne.edu/journal2017. Parking will be available for \$7.75 (credit or debit card only) in Parking Structure No. 1 across West Palmer Street from the law school.

non-surgical case the transection persisted.

"8) These studies led Pillai in 2008 to conclude, "A full thickness transection through the posterior hymen is reliable evidence of trauma and does not heal without surgical repair."

"9) Pillai likely was not aware of the study by McCann published in 2007 which showed that there is the possibility of healing to the point of appearing normal. In this study 4-8% of the follow-up examinations done of transections which occurred during the prepubertal period could subsequently have been interpreted as normal or possibly normal. On the other hand, more than 90% of the follow-up exams did show residual abnormality. Again, although < 10% of the total, some of the follow-up exams after prepubertal transections would have, or possibly could have, been interpreted as being normal. As the transections healed only 25-30% remained as complete transections. However, only 3 (1 normal and 2 "unable to be determined") of the 38 follow-up exams (8%) could have been interpreted as being normal. If those 3 exams were all final exams, then 3 of 21 patients (14.3%) could have been interpreted to have had normal exams when seen beyond one month of injury. However >85%of them would have continued to be abnormal. Even if healing to this degree was to occur, it would not do so in 1-5 days. There were no changes after one month (no further healing).

"In other words, in the only study (McCann, 2007) that has ever shown that prepubertal transections can heal to the point where the exam, done later, could be interpreted as normal, >85% of the exams (at least) remained ABNORMAL. Certainly within a few days such an injury would still be raw and obvious."

So much for medical evidence. This is not my area of expertise and I am including Dr. Guertin's research here simply to show that there is no hard and fast evidence to support the idea that extensive trauma with no physical evidence is unlikely, and that there is medical research that shows it is probother fiction you may have been taught to believe it. The people I've seen who are most realistic about the legal realities are women lawyers who understand how much radical feminists hate men just for having a penis. Learn from them. It is what it is; if you understand that you can win, but not if you underestimate your enemy or your task.<sup>1</sup> If defense counsel is unable to

> impeach an abuse allegation by showing that the child is not credible, the versions of the story have morphed considerably over time, or allegers have a clear motive to fabricate, conviction is a slam dunk. If you know the science you are better prepared to impeach the child witness and the FI. If you can get the FI to admit she made major mistakes in the forensic interview, or if she is

unable to tell you why there is no alternative hypothesis, why she asked leading questions, or why there is no narrative, you may thereby convince the jury she was biased, and how that bias led the child to make an allegation she otherwise would not have made.

I know that defense lawyers have to defend the guilty. I don't envy them that task, but I understand that it needs to be done. If the guilty are convicted with bad evidence, the innocent will be too, so holding to evidentiary standards keeps everyone honest. But I don't have to defend guilty people and I will not testify for someone I believe to be guilty. More importantly, I believe, and have read<sup>18</sup> and heard lawyers say that defense counsel has to believe in their client's innocence to be effective at trial. If you know the science, you can make a more impassioned plea for someone you believe to be innocent. I sometimes question whether defense attorneys believe that any of their clients are innocent, or whether they too, accept the propaganda that says everyone accused is guilty—especially

when it comes to sex crimes. I believe that many people accused of CSC, where there is no physical evidence, are actually innocent of the acts which they

<sup>1</sup>Defending Against Allegations Of Child Sexual Abuse, Atty Richard L. Lougee, March 3. 2017, https://www.lougeelawoffice.com/blog/defending-againstallegations-child-sexual-abuse/

<sup>2</sup> When Must Lawyers Learn Science? Jules Epstein, The Judicial Edge, January 21st, 2016

<sup>3</sup> Confronting the Forensic Confirmation Bias, John Rafael Pena Perez, 2014 Volume 33 Issue 2 Yale Law & Policy Review, Yale Law School, P. 462

<sup>4</sup> Michigan Forensic Interviewing Protocol, P. 1, P. 24

<sup>5</sup> Michigan Forensic Interviewing Protocol, P. 1: "There are two overriding features of a forensic interview: • Hypothesis testing. • A child-centered approach. First, forensic interviews are hypothesis-testing rather than hypothesisconfirming (Ceci & Bruck, 1995). Interviewers prepare by generating a set of alternative hypotheses about the source and meaning of the allegations. During an interview, interviewers attempt to rule out alternative explanations for the allegations."

<sup>6</sup> Michigan Forensic Interviewing Protocol, P. 25

This paper was prepared by Dr. Guertin for Atty Salle Erwin for the defense in the case of "People v. Carlos Thompson, 2017, and was sent to me by the author. It is not under copyright and will be shared with anyone who wishes a copy.

<sup>8</sup> The Longest Trial – A Post-Mortem. Collapse of Child-Abuse Case: So Much Agony for So Little. Robert Reinhold (January 24, 1990). The New York Times. Retrieved October 24, 2008. "The McMartin preschool trial was a day care sexual abuse case in the 1980s, prosecuted by the Los Angeles District Attorney Ira Reiner. Members of the McMartin family, who operated a preschool in Manhattan Beach, California, were charged with numerous acts of sexual abuse of children in their care. Accusations were made in 1983. Arrests and the pretrial investigation ran from 1984 to

judge). The charges ultimately included rape, sodomy and fellatio, and publicized allegations included the murder of babies, torture and being thrown into a school of sharks. During the trial, children were asked to testify about events that had occurred three years previously, with memories "refreshed" in therapy sessions, meetings with the prosecution and repeated discussions with their parents. While the alleged abuse was occurring, no parents noticed anything unusual about their children's behavior to indicate abuse or torture. The eightmonth trial against Bob Kelly was the most expensive in North Carolina history, ending in conviction on 99 of 100 charges and twelve consecutive life sentences. On May 2, 1995 all convictions were reversed in the Court of Appeals. The remaining six defendants faced a mixture of charges ending in a variety of sentences from life imprisonment to seven years."

Head Start center and the son of a

<sup>11</sup> 1998, Michael Lamb and Debra Poole

<sup>12</sup> In the Criminal Courts, Charges Law Prof Alan Dershowitz, Truth Is the First Casualty, By Gail Jennes

Posted On July 19. 1982 At 12:00 pm EDT

<sup>13</sup> When the Smoke Clears: Cross-Examining the Defense Expert's Attack on a Forensic Interview, Victor I. Vieth Director, NAPSAC's National Child Protection Training Center Winona State University "Consider the filing of a pre-trial motion to limit or exclude the defense attorney's expert."

<sup>14</sup> Is America Headed for a New Kind of Civil War? By Robin Wright, The New Yorker, August 14, 2017

of

<sup>15</sup> The Battle *Thermopylae…was fought between* an alliance of Greek city-states, led by King Leonidas of Sparta, and the Persian Empire of Xerxes I

over the course of three days...The vastly outnumbered Greeks held off the Persians for seven days *(including three of battle) before* the rear-guard was annihilated in one of history's most famous last stands...After the second day, a local resident named Ephialtes betrayed the Greeks by revealing

**21** The Family Division of the Oakland County Circuit Court will celebrate the 15th Annual Celebration of Michigan Adoption Day on Tuesday, Nov. 21, at 9 a.m., in the Board of Commissioners Auditorium at the Oakland County Courthouse. This event is being held in conjunction with over 30 other courts throughout the State of Michigan highlighting the importance of adoption and the needs of children in foster care. Michigan Court of Appeals Judge Amy Ronayne Krause will be on hand to present a proclamation and celebrate the finalizations along with the Oakland County Family Division judges and Circuit Court Chief Judge Nanci Grant. In conjunction with Adoption Day, the Family Division judges will present two special awards recognizing individuals whose contributions have significantly and positively influenced the lives of children in Oakland County.

28 The Oakland County Bar Association continues its new Law and Practice Management Series with "Money Matters" on Tuesday, Nov. 28, from 6 to 8 p.m. at the OCBA offices, 1760 S. Telegraph Rd., Suite 100, in Bloomfield Hills. Pre-registration is \$30 for OCBA members; \$25 for OCBA new lawyers (P75866), paralegals, and students; and \$40 for non-members. Cost at the door is \$40 for OCBA members; \$30 for OCBA new lawyers (P75866), paralegals, and students; and \$50 for non-members. Register online at www.ocba.org.

#### December

5 United States District Court Chief Judge Denise Page Hood, Eastern District of Michigan, has announced the annual New Lawyers' Seminar which will be held in Room 115 of the Theodore Levin United States Courthouse, 231 W. Lafayette in Detroit, on Tuesday and Wednesday, Dec 5-6. This program is designed to assist recent law graduates in understanding the fundamental procedures followed in both federal and state courts and to provide practical teaching in a variety of subject matter areas. It is co-sponsored by the United States District Court for the Eastern District of Michigan, Federal Bar Association, and the State Bar of Michigan's Young Lawyers' Section. On-line registration is available at www.fbamich.org, under "Events and Activities." There will also be a ceremony admitting attorneys to practice in federal court coordinated with this program on Tuesday, Dec. 5, at 4 p.m. in the U.S. Courthouse for all those who have been admitted to the state bar and meet requirements for admission to the bar of the U.S. District Court for the Eastern District of Michigan. This is a separate ceremony with a separate admission fee of payable to the clerk, U.S. District Court. Additional information is available at www.mied.uscourts.gov.

