

## 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 saying 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."

—Jules Epstein  
*The Judicial Edge (2016)*

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



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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 the evidence was disclosed.

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," 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 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

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 typically 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 similar 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 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 motivation to stick with the story, regardless of veracity.

Prosecutors, like defense attorneys, typically don't know much about the science behind forensic interviewing, but they will present the forensic results as facts and jurors 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) connected 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—that 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

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## THE EXPERT WITNESS

### Allegorical economics: The storyteller's journey (part one)

BY JOHN F. SASE, PH.D.  
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"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 multi-part 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 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



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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 one-hour 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."  
—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-economic, 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 humaness.

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

place. As a result of this finiteness, we learn to allocate them for commercial 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 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 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?

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 life?

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 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 Campbell's 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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