

# Challenging the forensic interview

By MICHAEL G. BROCK

*"There is one thing a professor can be absolutely certain of: almost every student entering the university believes, or says he believes, that truth is relative. If this belief is put to the test, one can count on the students' reaction: they will be uncomprehending. That anyone should regard the proposition as not self-evident astonishes them, as though he were calling into question 2 + 2=4. These are things you don't think about. The students' backgrounds are as various as America can provide. Some are religious, some atheists; some are to the Left, some to the Right; some intend to be scientists, some humanists or professionals or businessmen; some are poor, some rich. They are unified only in their relativism and in their allegiance to equality. And the two are related in a moral intention. The relativity of truth is not a theoretical insight but a moral postulate, the condition of a free society, or so they see it."*

—Alan Bloom  
Introduction: *The Closing of the American Mind*

*"An ideologue—one who thinks ideologically—can't lose. He can't lose because his answer, his interpretation has been determined in advance of the particular experience or observation. They are derived from the ideology, and are not subject to the facts. There is no possible argument, observation or experiment that could disprove a firm ideological belief for the very simple reason that an ideologue will not accept any argument, observation or experiment as constituting disproof."*

—James Burnham  
*The Suicide of the West: An Essay on the Meaning and Destiny of Liberalism (p. 108)*

*"The courtroom oath—to tell the truth, the whole truth and nothing but the truth—is applicable only to witnesses... because the American justice system is built on a foundation of not telling the whole entire truth."*

—Alan Dershowitz,  
*The Best Defense (New York: Vintage), 1983-5-12, p. xv.*

*"As one civil-liberties lawyer, who is concerned about the sometimes vigilante attitude toward accused rapists, puts it: 'Some people regard rape as so heinous an offense that they would not even regard innocence as a defense.'"*

—Alan Dershowitz  
*New Dangers Are Evident in Rape-Case 'Reforms' published 1985-04-08 Los Angeles Times*

*"The goal of a forensic interview is to obtain a statement from a child, in a developmentally-sensitive, unbiased, and truth-seeking manner, that will support accurate and fair decision-making in the criminal justice and child welfare systems."*

—Introduction  
*Michigan Forensic Interviewing Protocol*

I used to send my Criminal Sexual Conduct Cases to Terry Campbell, who was well qualified, good at it, and liked doing them. When he died I looked around, but wasn't really confident of the people who were taking these cases, or satisfied with the job they were doing. So, recently I began taking CSC cases again, and researching/catching up on the forensic literature. There are some changes in the process, though I don't know that these changes are all improvements. Some of the fine tuning in protocols mentioned by Debra Poole in her recent book<sup>1</sup> indicated advancements that would undoubtedly be helpful for someone who had the basics of interviewing and wanted to refine the process. Dr. Poole also maintains an objective/neutral position with regard to the outcome of the interview, the importance of the child's narrative, exploring alternative hypotheses, and (most importantly) avoiding leading questions.

Some of the newer protocols, apparently in the interest of being more prosecutor friendly (the main consumers of their product), do not hold to these basic scientific principles. Michael Lamb's NICHD Protocol<sup>2</sup>, for example, which is in wide use, offers no techniques for exploring alternative hypotheses, and allows what I consider extremely leading, even coercive questions. Whereas Dr. Poole advises not to lead children

by questioning them about issues they have not yet raised, Lamb's Protocol specifically provides for it:

— Eliciting Information that has not been mentioned by the child. You should ask these focused questions only if you have already tried other approaches and you realize that some forensically important information is still missing. It is very important to pair option-posing questions with open invitations ("Tell me all about that") whenever possible.<sup>3</sup>

Note that Lamb is stating here that it is OK to seek information that has not been mentioned by the child. This is clearly hypothesis confirming rather than hypothesis exploring behavior. When he says that forensically important information is missing, he means information that has been provided to him by other sources that the child has not yet confirmed. If he were exploring alternative hypotheses, he might consider that the information provided to him by other sources was either contrived by that source, or obtained because of hysterical and extremely leading questions, which is frequently the case with parents who are coaching their children in acrimonious custody disputes, or questioning children they suspect of having been abused.

As it is, telling a child that someone else—an authority figure that the child may feel guilty about contradicting—has told the interviewer a different story, is false coercive and apt to support a false allegation. This is particularly true if the child has been coached and/or pressured by a parent or family member to provide a certain response. Keep in mind also that the persons conducting the interview, and those deciding whether the interview is good "science" are members of the prosecution team, who are not looking for exculpatory evidence, but have a confirmation bias. It doesn't help the cause of justice if the interviewing protocol is also biased.

Since I have been doing these cases again, it continues to surprise me that so many defense attorneys know so little about interviewing protocol. I talked with forensic psychologist James Bow about this yesterday on the phone and he agreed that this was shocking to him. Possible explanations he put forward are:

- Everyone drinks the Kool Aid—pro prosecution propaganda is ubiquitous and many defense attorneys may question their client's innocence of even ridiculous charges because they may consciously or unconsciously believe that everyone is guilty.
- They are intimidated by science, have little feel for it, and believe that if they approach it at all, it is better left to the expert.
- They have always believed that forensic science is the domain of the prosecution, and that it is more likely to be useful to their adversary than to themselves.
- They equate challenging the forensic interview with attacking the child, which is rarely if ever beneficial to the defense.
- They believe the less time spent on the prosecution's allegations, the less those allegations are reinforced in the jury's minds. Don't keep reminding them. Above all, don't play the entire forensic interview video (if one exists), or offer the prosecution a chance to do so.

I have heard this concerns expressed by defense attorneys and am reluctant to question them. I'm not a lawyer. Moreover, I don't want the defense attorney to blame me if I say I think he should put me on the stand, play the video, challenge the interview, and he winds up losing the case. On the other hand, I don't know how many of these trials are actually won by the defense. It has also been my experience that when I testify the jury is out longer and produced more favorable verdicts than in cases where I've been retained and not testified, and that the jurors at least have a competing theory to consider. I've read articles by trial attorneys who express this understanding of the jury's mindset:

"All too often, criminal defense attorneys rest their case and await a favorable verdict—confident that they have rendered a critical state witness unbelievable—only to lose. Why? Unfortunately for these defense attorneys, undermining the credibility of a critical witness is not sufficient to prevail. True, the prosecutor has the burden of proof, but both parties have a more important burden: a good

story. Parties must tear down, but they must also create. In the absence of an alternative explanation presented on behalf of the defendant, the jury gravitates toward the only story, the State's. A persuasive counter-narrative has essential elements. It provides a compelling explanation for what happened. It has factual integrity. And it supports cognizable defenses: Someone else did it, the defendant has an alibi or an affirmative defense, the police conducted a flawed investigation, or no crime actually occurred. However innocent or wrongfully charged, a defendant without a counter-narrative will lose."<sup>4</sup>

OK, but how does one challenge the forensic interview? I have read a large enough chunk of the forensic literature to realize that for the most part, everyone is on or near the same page with regard to what constitutes best practices, and even what the forensic interviewer ought not to do. However, there is very little available that specifically tells someone trying to evaluate a forensic interview what constitutes a bad interview. And keep in mind, this is the defense attorney's burden.

Most prosecutors and their teammates—including forensic interviewers—have never heard a false allegation, and have never seen or done a bad interview. If defense counsel does not point it out to the jury, no one will. Nor can you expect to get any help from judges, who may be skeptical of the evidence, but still have to get elected, and many of whom also drink the Kool Aid of 24/7 pro-extreme-Right-and-extreme-Left-wing-law-and-order feminist-propaganda. This is the only respect in which our otherwise hopelessly divided country is united, we all absorb, to a greater or lesser extent the mass hysteria that will likely destroy our nation and Western Civilization sooner rather than later.<sup>5</sup>

For those of you who really don't think our society is that crazy, remember the words of Martin Niemöller, an early supporter of Hitler's:

"First they came for the Socialists, and I did not speak out—  
"Because I was not a Socialist.  
"Then they came for the Trade Unionists, and I did not speak out—  
"Because I was not a Trade Unionist.  
"Then they came for the Jews, and I did not speak out—  
"Because I was not a Jew.  
"Then they came for me—and there was no one left to speak for me.

The above statements notwithstanding, there is some literature about challenging the forensic interview, and the testimony of children in general, both from lawyers and mental health professionals, that bears reviewing and that could be helpful in seeking the truth of whether or not a child's evidence can be relied upon. This is not to say that a child has to be lying, although they will lie, and about large things as well as small. Historically, in fact, children's testimony has been considered unreliable in court.<sup>6</sup> What is supposed to make current cases different is the so called science of the way we obtain their information. However, science rarely comes in to play in my experience, whereas a host of other things do: contested custody, a child's embarrassment at being caught in sexual play (which, of course, none of us ever did when we were children), hysterical parents who see a child molester behind every bush and who badger their children with merciless persistence until they reveal what the parents most fear to hear (at which point they are both satisfied and destroyed), and, in one instance that I still recall from my days in family court, the promise of anything the child wanted from McDonald's if she told me that her mother had touched her inappropriately (The PS worker later called me to relay this info). They can be bribed, coerced, brainwashed and threatened, make up stories for attention or to get out of trouble, be subjected to counselors who practice forensic in the name of therapy, and ultimately reach a point where they have no idea what the truth is because they have had memories implanted that have now become "real memories," but these possibilities are never explored by the forensic interviewers.

I had one case recently where the child told the forensic interviewer that her mother had told her what to say. The forensic

interviewer, a police officer, quickly assured her that she wasn't in any trouble, nor was her mother. That the police officer was to keep her safe, and then she quickly steered the child back to the target of the investigation, her father. When she could not get the allegation she wanted from increasingly coercive interviewing, she provided a large toy animal for the child to confide her secret to, and absolute violation of proper forensic interviewing protocol, which warns interviewers to stay away from anything smacking of play or fantasy:

"Improper Interviewing: As we use the term, improper interviewing techniques consist mainly of things that interviewers should not do. Specifically, certain techniques have been widely criticized because they have the potential, either real or perceived, to elicit false allegations from children (Ceci & Bruck, 1998, 1995; Everson, 1997; Myers, 1996; Myers, Saywitz, & Goodman, 1996; Reed, 1996). Garven, Wood, Malpass, and Shaw (1998) have suggested that most of these techniques fall into four broad categories: Suggestiveness, influence, reinforcement, and removal from direct experience (SIRR)

"Suggestiveness: This occurs when the interviewer, rather than the child, introduces new information about the topic of concern into an interview. For example, "Did he touch you on the bottom?" would be a highly suggestive question in a sexual abuse interview if the child had not already mentioned inappropriate touching. Many studies have shown that interviewer suggestiveness can reduce the accuracy of children (Cassel, Roebers, & Bjorklund, 1996; Poole & Lindsay, 1995; see summaries by Ceci & Bruck, 1993, 1995; Poole & Lamb, 1998). One or two mildly suggestive questions may be necessary to get the ball rolling with some children or focus their attention on a particular abuse-related topic (Home Office, 1992; Jones, 1992; Warren, Woodall, Hunt, & Perry, 1996; Wood, McClure, & Birch, 1996). However, suggestiveness can seriously compromise accuracy when the child is 4 years old or younger; or has been interviewed repeatedly (Ceci & Bruck, 1993, 1995; Garven et al., 1998; Myers et al., 1996).

"Influence. This category encompasses various techniques that place undue social pressure on a child during an interview. These problematic techniques involve social influence or persuasion (Brewer & Crano 1994; Cialdini, 1993) and include (a) inducing social conformity by telling the child what other people believe or have said about the topic of concern (Garven et al., 1998; Myers, 1996, p. 218), (b) eliciting obedience to authority by telling the child the interviewer's point of view, and (c) inducing stereotypes by describing an alleged perpetrator in negative terms to the child (Leichtman & Ceci, 1995).

"Reinforcement. As has long been known, reinforcement in the form of tangible, promised, or implied punishment or reward can have a powerful influence on behavior (Ettinger; Crooks, & Stein, 1994). More specifically, recent research has shown that reinforcement can elicit false allegations of wrongdoing from children during interviews (Garven, Wood, & Malpass, in press; Garven et al., 1998). Several improper interviewing techniques constitute forms of reinforcement (see also Lamb, Steinberg, & Esplin, 1995; Myers, 1996, p 218): (a) praising the child for making allegations; (b) implying that the child can demonstrate helpfulness or intelligence by making allegations; (c) criticizing the child's statements or suggesting that they are false, inaccurate, or otherwise inadequate; (d) giving tangible rewards (e.g., stickers or food) to reward disclosure; (e) limiting the child's mobility (e.g., delaying a visit to the bathroom or return to home) until he or she has discussed issues of interest to the interviewer; (subjecting the child to physically or verbally stressful stimuli during the interview (e.g., calling the child a liar); and (g) repeating a question in a way that suggests the child's first answer was incorrect or otherwise unsatisfactory (Cassel et al., 1996; Poole & White, 1991, 1993; Siegal, Waters, & Dinwiddie, 1988).

"Removal from direct experience. In forensic interviews with both adults and children, the witness is usually asked to give a

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# THE EXPERT WITNESS

## Behavioral economics in the factors of production

By JOHN F. SASE,  
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*"In present popular usage, soul, and mind are not clearly differentiated and some people, more or less consciously, still feel that the soul, and perhaps the mind, may enter or leave the body as independent entities."*

—James M.R. Delgado, *Spanish-born Neuroscientist, and Physiologist, Physical Control of the Mind; Towards a Psycho-Civilized Society (Fitzhenry & Whiteside Limited, 1969)*

Last month, we presented our readers with a letter to the members of the U.S. Congress. Due to events of the past year as well as public attitudes that have surfaced during this time, we wanted to remind Congress about the values on which our humanity—as well as Law and Political Economics—are based.

This month, we will return to 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 will explore the Factors of Production in a new light. We hope that our updated model and brief comments on how to use it will benefit smaller businesses as well as larger ones, especially proprietary, partnership, and Limited Liability forms of Law practices.

*The 2017 Nobel Prize in Economics*

On 9 October 2017, American Economist Richard H. Thaler won the Nobel Prize in Economics for upending the longstanding notion that individuals make rational decisions about their futures and finances as well as for his help in developing policies intended to nudge people toward altering their choices. In a takeover from his research, Dr. Thaler has concluded that economic agents are humans and that economic models need to incorporate this fact. We recommend his most accessible book on the subject of Behavioral Economics to our readers, "Misbehavior: The Making of Behavioral Economics" (W.W. Norton, 2015).

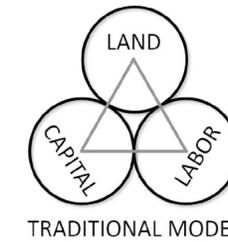
The award to Thaler follows the 2013 Nobel Prize in Economics awarded to Detroit native Robert J. Shiller, an Economist who is well known for his work in Behavioral Economics. Shiller's books on the subject include "Irrational Exuberance," (Princeton University Press, 2000) and "Animal Spirits: How Human Psychology Drives the Economy and Why It Matters for Global Capitalism" with co-author George A. Akerlof (Princeton University Press, 2009). In recent years, Shiller, Thaler, and other Economists have focused on making economic thought more human and, as a result, more understandable to a wider audience.

Early writers of Economics addressed the humanness to which Behavioral Economists now turn their focus. For example, many students hail "An Inquiry into the Nature and Causes of the Wealth of Nations" (W. Strahan and T. Cadell, 1776) by Scottish Economist Adam Smith as the preeminent title on this subject. However, most of these students have ignored the book that Smith had written earlier, one that he intended as a prerequisite for fully understanding his concepts in "The Wealth of Nations." He wrote "The Theory of Moral Sentiments in 1759" (two volumes, printed for Alexander Kincaid and J. Bell in Edinburgh and Andrew Millar in the Strand, London). In this book, Smith addresses the issues of human nature and morality that we now consider to have provided the ethical, philosophical, psychological, and methodological underpinnings of his later works, including "The Wealth of Nations." Smith states, "[The rich] consume little more than the poor and, in spite of their

natural selfishness and rapacity, ... they divide with the poor the produce of all their improvements. They are led by an invisible hand to make nearly the same distribution of the necessities of life, which would have been made had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society and afford means to the multiplication of the species." A review of work done by members of the current Behavioral Economics Movement as well as earlier works by Adam Smith and others leads us to rethink some of our principles of Economics and to re-conceptualize them.

*The Factors of Production*

The traditional model of the Factors of Production includes three primary categories of inputs: Land, Labor, and Capital. The diagram below shows those categories as well as their interrelationship.



We define the Factors of Production as resources and inputs that we use in the process of producing the output of finished goods and services. The balanced amounts of various inputs utilized determine the quantity of output according to a relationship known as the Production Function. Many of our concepts and models in Economics date back to the time in Europe when agriculture was the fundamental driver in many economies. Therefore, the three primary factors traditionally have included only Land, Labor, and Capital. Students in college classrooms around the world continue to recite the Land-Labor-Capital mantra. However, does this simplified model remain relevant in the Twenty-First Century or has this model become deficient in our post-agrarian economy?

*The Landed Estate*

Early Economic thought as we know it developed in Europe during the centuries when Land was the principal factor. Here is an example of Land. Before Highclere Castle in Hampshire, England, became a tourist attraction due to it serving as the filming location for the BBC television series "Downton Abbey," the property had thrived as an agricultural estate from the Eighth to the Twentieth Centuries. During that period, agriculture considered the simple factor-set of Land, Labor, and Capital. During the Age of Serfdom, Labor had been legally and economically tied to the Land rather than to the owner of the title to the estate. Early Economists considered Capital as a matter of hard currency for trade purposes. Gradually, the introduction of paper currencies added a more portable marker-system for value. As we recognize it today, Capital was slow in materializing due to prohibitions in respect to the ownership of Land titles and to the laws on usury that forbade the lending of money in return for payments of interest. Since the Mid-Nineteenth Century, we crudely have modified our original primary-factor names in order to fit our post-agrarian economies. Now we recognize Land as part of Real Estate, which also includes buildings, fixtures, mineral rights, air rights, and other peculiarities of our Industrial and Post-Industrial Ages.

*Workers*

In the early United States, the spirit of independence gave the message that anyone can own property. This translated to the desire for small family farms and

businesses in the North. However, the large estate-system that mimicked Medieval Europe dominated the antebellum South. Through this division, the concept of Labor has grown more convoluted over time. Originally, Labor represented the work performed under the constraints of slavery and serfdom as well as commodity-money paid to freemen for their work. Fishers, hunters, and others, who traditionally have relied upon the open sea or on untamed wilderness in order to live and to prosper, fell beyond the limits of centrally controlled agricultural realms. In such domains, a ruling body assigned titles for the land to members of a well-defined hierarchy of the subservient Upper-Class. However, the underlying deeds to the land remained in possession of the Crown.

*Capital Against Labor, Labor Against Capital*

As our industrial culture began to dominate agrarian culture, Labor began to migrate from field-work and manor-work to wage labor in factories and shops in cities and towns. As a result, the economic importance of Land diminished as a factor. This paradigm shift left those who relied on their Labor and those who depended on Capital to vie for economic and political control. As large segments of the population took a stand either with Laborism or Capitalism, divisiveness became increasingly obvious. This division in the body politic led to the social polarization that has defined much of our modern society. However, as computerization and the Internet have developed and proliferated while traditional manufacturing industries have matured to the point of economic fossilization, our sense of how to define the Factors of Production has grown murkier. During the past Half-Century, we have struggled to identify and to define additional factors.

*The Human Mind*

If we look to the field of Humanities as well as to the other Social Sciences, which include Psychology, Sociology, and Anthropology, we encounter an important factor that has been ignored greatly in economic thought since the early Nineteenth Century. This factor is the Human Mind. In our revised model of the Factors of Production, let us position this factor at the center. The other six factors surround the Human Mind and are managed by it.

Our human mind serves as a cognitive faculty of consciousness and thoughts. Also, it acts as the base for our perception, judgment, and memory, which holds our powers of imagination, recognition, and appreciation. Our minds are responsible for processing our feelings and emotions that, in turn, result in our attitudes and actions. As addressed by philosophers and scientists throughout the ages, the primary conundrum presented by the concept of the Mind has been the Mind-Body Problem. The relation of the Mind to the physical brain and the nervous system continues to pose questions in many fields of study. Most thinkers agree that our Mind enables us to have consciousness, to practice subjective awareness and intentionality toward all that is beyond ourselves, to perceive stimuli and to respond to it, and, therefore, to have thought and feeling.

Throughout human history, the concept of Mind has been understood in many ways by various religious and cultural traditions. The speculations of earlier humans have treated Mind as identical to Soul or Spirit. However, the myriad views have varied in respect to contrasting theories of cosmology, life after death, and natural order. Furthermore, the debate as to whether Mind is exclusive to humans, to deities, to animals, to non-living entities, or to some combination of the preceding four has continued through the ages.

(See SASE, page 3)



# Supreme Court Notebook

## Justices won't take USS Cole attack case

WASHINGTON (AP) — The Supreme Court is leaving in place a decision that the alleged mastermind of the 2000 attack on the USS Cole that killed 17 U.S. sailors should face a trial by a military commission.

The court on Monday declined to take up the case of Saudi national Abd al-Rahim al-Nashiri. Al-Nashiri had sought to challenge the authority of a military commission in Guantanamo Bay hearing his case. But an appeals court ruled last year that al-Nashiri's challenge would have to wait until after his trial.

Al-Nashiri argued that military commissions only have authority over offenses that take place during an armed conflict. He said the U.S. was not officially at war with al-Qaida at the time of the attack.

Al-Nashiri's trial date is not yet scheduled.

## Court upholds Ten Commandments ruling

WASHINGTON (AP) — The U.S. Supreme Court on Monday sided with a lower court that

ordered a New Mexico city to remove a Ten Commandments monument from the lawn outside City Hall.

Civil liberties advocates behind the case called the decision involving the city of Bloomfield a victory for the separation of church and state.

ACLU of New Mexico Executive Director Peter Simonson said it sends a "strong message that the government should not be in the business of picking and choosing which sets of religious beliefs enjoy special favor in the community."

However, David Cortman, a senior counsel and vice president of U.S. litigation with Alliance Defending Freedom, said the outcome did nothing to resolve confusion in lower courts involving such monuments.

"Americans shouldn't be forced to censor religion's role in history simply to appease someone who is offended by it or who has a political agenda to remove all traces of religion from the public square," said Cortman, whose group represented the city of Bloomfield.

The decision came after attorneys for the city argued that the 10th U.S. Circuit Court of Appeals had ignored previous rulings by the Supreme Court that simply being offended by such a monument did not give someone a legal

basis to challenge the monument.

In other cases, a Ten Commandments poster in a Kentucky courthouse was found constitutional and a monument on the grounds of a public building in Arkansas was determined to be unconstitutional.

In Bloomfield, a concrete block that displays the Ten Commandments sits alongside other monuments related to the Declaration of Independence, Gettysburg Address and Bill of Rights.

The city claims it avoided endorsing a particular religion by placing disclaimers on the lawn stating the area was a public forum for citizens and that the privately funded monuments did not necessarily reflect the opinions of the city.

The Ten Commandments monument was erected in 2011 and challenged a year later by the ACLU. Lower courts concluded it violated the Constitution's ban on the government endorsing a religion.

Justice Neil Gorsuch did not take part in the court's action because he was on the federal appeals court in Denver when it considered the matter.

*Associated Press writer Russell Contreras contributed to this report from Albuquerque, New Mexico.*

## SASE: Behavioral economics in the factors of production

(Continued from page 2)

Many philosophers and scientists have portrayed the phenomenon of the Mind as a stream of consciousness in which sense-impressions and mental phenomena change constantly. Over the past Half-Millennium, the generalized concept of what constitutes our Mind includes mental faculties, thought, volition, and feeling along with higher intellectual functions of memory and reason.

Current debate continues the focus on the relationship between Mind and Brain. In addition to philosophical questions, this debate involves a number of scientific inquiries, including "What is the relationship between mental activity and brain activity?", "What are the exact mechanisms by which drugs influence cognition?", and "What are the neural correlates of consciousness?"

*The New Model*

Keeping the focal point "in mind," let us assemble our surrounding six Factors of Production. Over the past three-quarters of a century, Economists have put forth some suggestions for additional factors that influence current Economic thought. At present, the purpose of rebuilding this model is to synthesize one that remains relevant into the foreseeable future. Rather than throwing out the old, we concentrate on reshaping and redefining what we have, adding new concepts as needed, and assembling a new paradigm that makes sense for our current era. We have mounted Mind in the center because it serves to orchestrate and to balance the use and behavior of the other inputs. Furthermore, the remaining six Factors will impact and produce effects on one another. This set of actions/reactions is noted through the interconnecting lines in the diagram below.

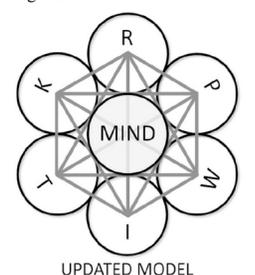


DIAGRAM KEY:  
R – Real Estate  
P – Profit Labor  
W – Wage Labor  
I – Intellectual Property  
T – Technology  
K – Capital

*Real Estate*

To commence, we carry over the primary three factors of Land, Labor, and Capital from the basic model that developed during the Eighteenth and Nineteenth Centuries. Nevertheless, we need to make some modifications. In respect to Land, let us describe it more properly as Real Estate. In the concept of Real Estate, no one truly owns the Land. Rather, a person only enjoys the benefits derived from the bundle of legal rights in the use of the Real Estate. As mentioned above, the concept of Real Estate includes other elements beyond that of the

Land. We represent Real Estate on the updated model as the letter "R."

*Wage and Profit Labor*

Over the past two centuries, the concept of Labor has grown more complex. Labor originally was defined by hours and energy of work exchanged in the market for coin or other payment of like value. However, the defining number of persons for a large business concern has grown from twenty-five in the age of Adam Smith to corporate structures of more than 250 employees. Meanwhile, the entrepreneurial skill-set has risen in expectation to a level that reflects the standard curriculum of an MBA program. The payment to this variation of the Labor factor is Profit, the positive difference between Revenue and Costs. Adding further to the complexity is the fact that many of us work for a combination of Wage and Profit. The latter may take the form of bonuses and stock options within a corporate structure or for independent professionals such as Attorneys and Economists who teach for wages and who practice their professions for profit. For the sake of clarity, we will settle for a duality in the form of Wage Labor and Profit Labor. In our diagram, Wage Labor is represented as "W" and Profit Labor is represented as "P."

*Useful Tools*

The concept of Capital has changed over the centuries from hard currency in the form of gold and silver; to paper money dripping out of the coat pockets of J.P. Morgan in a widely-circulated newspaper cartoon; to the world of today in which mortgage-backed derivatives, electronic transfers, and bitcoins have emerged. If almost anything can serve as Capital, then how might we define it? The definitions among Economists include broad generalities such as "Any useful tool" or "If it's not Labor or Land, then it must be Capital."

Delineation has offered a solution in the assignment of Technology and Intellectual Property to two separate categories. Representing Technology as (T), we can place it next to Capital (as "K" from the German spelling traditionally used by economists). Capital continues to include primary tools used to manufacture modern-production machine instruments (Technology). However, since Intellectual Property includes Copyrights and Patents that hold the legal rights to build and to use Technology or other Intellectual Property, we represent it as "I" in our diagram and place it next to Wage Labor and Profit Labor. Summarily, Technology is the product of the human mind of a Wage-Labor person who may have created it as work-for-hire or a Profit-Labor person who has created it as part of entrepreneurial speculation.

We now have our complete set of the Factors of Production. This set includes the Human Mind as well as the more mundane conceptualizations of the mind—Real Estate, Profit Labor, Wage Labor, Intellectual Property, Technology, and Capital. One hope for this exercise is that it may lead to a diminishment of the economic-political standoff that has grown

since the dawn of the Industrial and Post-Industrial Ages. Rather than working intelligently in balance, Capital and Labor have off-ended one another in the form of opposing teams battling along the fifty-yard line. This ongoing battle muddies the involvement of the four remaining mundane factors that must function as parts of a harmonious unit in order for the whole to prosper.

In the political context, we might use the analogy of an eagle attempting to fly. Labor has moved toward the tip of the ideological left-wing while Capital has done likewise on the right. This growing extremism has weakened the cohesiveness of the central body as opposing wings attempt to fly the bird separately. In such an analogy, we humans appear rather clueless if we do not comprehend that we need to use our collective mind to govern the body as we use both of our wings to fly like one.

*The Mediator*

In this updated model of the Factors of Production, the mind orchestrates six hands that must work together in harmony. A culture succeeds through such means. However, we need to add one more element in order to make the model human. A title card from Metropolis, the classic silent film from Germany, released during the years of the Weimer Republic, states: "Head and hands want to join together, but they don't have the heart to do it.... The mediator between the head and hands must be the heart!" ("Metropolis," novel, and screenplay by Thea von Harbou, film directed by Fritz Lang, Universum Film [UFA], 1927).

*Takeaway*

For our takeaway this month, let us consider the universal application of our updated model, which gives a contemporary spin

through a more holistic approach to the Factors of Production. We have brought the nature and morality of humanity back into the mix through the inclusion of Mind and Heart. Also, we have a model explainable by laying six coins of the same denomination onto a table or desk in a way that any human being in any part of the world can understand.

To bring this model home to the professional lives of Attorneys, Economists, and others, we have created a view that works well for mentally organizing and managing a wide variety of practices. For Attorneys, this approach will serve sole proprietorships, general and limited partnerships, and limited-liability companies as well as "S" and "C" corporations. Use it in good health.

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# Oakland County Legal News

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# Calendar

## October

**19** The Oakland County Bar Association will host the "Taste of Diversity" strolling cocktail reception on Thursday, Oct. 19, from 5:30 to 07:30 p.m. at The Bird & The Bread located at 210 S. Old Woodward in Birmingham. During the event, the Leon Hubbard Award and the Michael K. Lee Award will be presented. Partnering bar associations include the Armenian-American Bar Association, Black Women Lawyer's Association, Detroit Bar Association, Hellenic Bar Association, Hispanic Bar Association of Michigan, Incorporated Society of Irish-American Lawyers, Michigan Muslim Bar Association, South Asian Bar Association, State Bar of Michigan, Women's Bar Association, and Women's Lawyers Association of Michigan. The event sponsor is Ogletree Deakins. Tickets cost \$40 per person and \$30 for new lawyers (P 75866+) and students. To register or for additional information, visit [www.ocba.org](http://www.ocba.org) and click on "events."

**19** John Raudabaugh, Reed Larson Professor of Labor Law at Ave Maria School of Law, will deliver the keynote address during the **Bernard Gottfried Memorial Labor Law Symposium** on Thursday, Oct. 19, at Wayne State University Law School. Alumni, students and anyone interested in furthering their insight into labor law are invited to attend the symposium from 8 a.m. to 3:30 p.m. in the Spencer M. Partrich Auditorium at the law school, 471 W. Palmer St. in Detroit. The registration fee for the symposium is \$100, which includes all sessions, presentation materials, breakfast, and lunch. Students, NLRB staff, and government employees can register for a reduced cost of \$35. The deadline for registration is Thursday, Oct. 12. Register online at [www.eply.com/gottfried25](http://www.eply.com/gottfried25). Parking is available for \$7.75 (credit and debit cards only) in Structure No. 1 across West Palmer Street from the law school.

**21** The Salvation Army William Booth Legal Aid Clinic, in a coordinated effort with Wayne County Friend of the Court, is conducting a **Free Child Support Help Program** on Saturday, Oct. 21, at the Detroit Public Library, 5201 Woodward Ave., in the

"Friends Auditorium" from 1 to 4 p.m. The workshop will feature a joint Wayne County/Macomb County "Bench Warrant Amnesty Program." This will be an arrest free zone. For any questions regarding this program, contact the Wayne County Friend of the Court at 1-877-543-2660.

**24** The Oakland County Bar Association continued its new Law and Practice Management Series with "Marketing Your Practice" on Tuesday, Oct. 24, 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](http://www.ocba.org).

**28** Rev. Jesse Jackson will keynote the "Equal Justice Under Law: Celebrating Judge Damon J. Keith's 50-year Fight for Justice" gala on Saturday, Oct. 28. The celebration will take place at the Charles H. Wright Museum of African American History in Detroit, and will be co-chaired by Edsel B. Ford II and Mitch Albom. Proceeds from the event will benefit the Damon J. Keith Center for Civil Rights at Wayne State University Law School and the Charles H. Wright Museum. Tickets and sponsorships are still available. Visit [eply.com/DJK50th](http://eply.com/DJK50th) for more information.

## November

**4** This year's A (Habeas) Chorus Line public show, "This is the Best We Can Do?" will take place on Saturday, Nov. 4, at 7:30 p.m. in the Berkley High Auditorium, 2325 Catalpa (1 1/2 Mile) between Woodward and Coolidge. The show will include the group's customary satirical and humorous look at current events, human foibles and personalities. Tickets are \$16 plus a service fee of \$1.55 and are available online through Brown Paper Tickets at <http://habeaschorus.brownpapertickets.com>. For additional information, visit [www.habeaschorus.com](http://www.habeaschorus.com).

## BENSON: Former law dean announces candidacy

(Continued from page 1)

counted. Benson, who has developed and supervised three election protection efforts in Michigan, will toughen penalties for those who commit voter fraud and voter intimidation, and she will lead an effort to protect our elections from the threat of computer hacking, tampering and manipulation.

• Protecting Voting Rights and Voter Access: Benson will work to modernize our elections, improve poll worker training, and ensure the voting rights of every citizen are protected. Voters should be able to vote early or by absentee ballot without having to give a reason, just as they do in dozens of other states.

• Ethics and Transparency: Among the 50 states, Michigan is dead last in government transparency and accountability. Benson will champion reforms that will make Michigan one of the best states in the nation by shining a light on the secret money flowing into our election process and requiring instant disclosure of all political and lobbying money.

"For too long, our voices have

been overshadowed by special interests," Benson said. "Our citizens deserve a state government that listens to them. We must be transparent and accountable, promise a secure democracy that is based upon fair and honest elections, and deliver efficient customer service throughout the state. As Michigan's next Secretary of State, I will work on behalf of all our citizens every day to ensure they come first."

Benson has more than a decade of experience as a national leader in election law and administration. She is the author of "Secretaries of State: Guardians of the Democratic Process," the first major book on the role of the secretary of state in enforcing election and campaign finance laws, and promoting fair, accessible and secure elections.

As the former dean of Wayne State University Law School, Benson froze tuition, expanded access to scholarship funds for all students, and bolstered the school's reputation and bar passage rates. She also established programs to promote government oversight, provide free legal services for vet-

erans, and help aspiring entrepreneurs participate in the economic revival of Detroit.

Benson recognizes the challenges facing veterans and military families. In 2012, while her husband Ryan Friedrichs served in Afghanistan with the 173rd Airborne Brigade, she joined with four other military spouses to establish the Military Spouses of Michigan, a network dedicated to providing support and services to military spouses and their children.

Benson is currently CEO and executive director of the Ross Initiative in Sports for Equality (RISE), a national nonprofit. She serves on several national boards including the advisory board of iCivics, a non-profit founded by retired U.S. Supreme Court Justice Sandra Day O'Connor and dedicated to engaging students in meaningful civic learning.

A long-distance runner, Benson has completed 22 marathons. She and Friedrichs reside in Detroit with their 16-month old son.

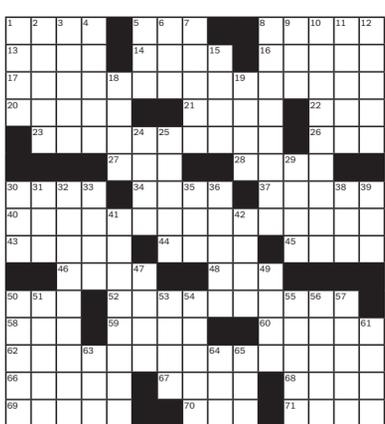
Learn more about Benson and her plan for secretary of state at [www.votebenson.com](http://www.votebenson.com).

## The New York Times Crossword

Edited by Will Shortz No. 0913

- ACROSS**
- 1 Hairdressers' challenges
  - 5 On-screen word in a "Batman" episode
  - 8 Brilliance
  - 13 Cynical rejoinder
  - 14 Shades
  - 16 Figurine on many a wedding cake
  - 17 \*Breakfast, in Burgundy
  - 20 Davis of "Jungle Fever"
  - 21 Fed
  - 22 One throwing shade?
  - 23 \*With 52-Across, 1787 Mozart composition
  - 26 \_\_\_ Plains, Ill.
  - 27 Title for Gandhi
  - 28 Book after II Chronicles
  - 30 Vivacity
  - 34 Corrida cheers
  - 37 Start of a selecting rhyme
  - 40 \*Repeated lyric in "La Bamba"
  - 43 Less feral
  - 44 Like cat videos, typically
  - 45 Goida of Israel
  - 46 Side dish at a barbecue
  - 48 Dada pioneer
  - 50 Affordable Care Act option, briefly
  - 52 See 23-Across
  - 58 21,728-pg. work that is constantly updated
  - 59 Sticker component
  - 60 Boating hazard
  - 62 They're what really count, so it's said ... or a hint to the multilingual answers to the starred clues
  - 63 One may leave wine
  - 67 Blackthorn fruit
  - 68 Org. certifying albums as gold or platinum
  - 69 When said three times, blah blah blah
  - 70 Massachusetts' Cape \_\_\_
  - 71 Philosopher Immanuel

- DOWN**
- 1 Otis's feline pal
  - 2 Portly plus
  - 3 Drink with a Wild Cherry variety
  - 4 "The Autobiography of Alice B. Toklas" author
  - 5 Golden ratio symbol
  - 6 Unconscious
  - 7 It provides more loft than a 9-iron
  - 8 Name in "A Christmas Carol"
  - 9 French vineyard
  - 10 The Cha Cha Slide, for one
  - 11 "Skyfall" singer, 2012
  - 12 Robert Byrd served nearly nine of these in the Senate
  - 15 Prefix with final or formal
  - 18 Pro shop purchases
  - 19 TVs' \_\_\_ the Virgin?
  - 24 McDonald's founder Ray
  - 25 State flower of New Hampshire



- PUZZLE BY DANIEL MAUER**
- 29 Paper purchase
  - 30 Good-news-to-bad-news transition
  - 31 Genetic stuff
  - 32 "OMG, my parents are gonna ground me forever!"
  - 33 Volkswagen competitor
  - 35 End of a freshman's new email address
  - 36 Assault
  - 38 XXX divided by X
  - 39 Listen here!
  - 41 Fizzy citrus beverage
  - 42 \_\_\_ warfare
  - 47 Poet Whitman
  - 49 Encourage
  - 50 \_\_\_-totsy
  - 51 Zubin formerly of the New York Philharmonic
  - 53 Shares of profits for paint to dry, seemingly
  - 54 Very, in slang
  - 55 Avoid, as work
  - 56 Ancient region where the style of an architectural column originated
  - 57 Justice who joined the bench in 2010
  - 61 Aspiring D.A.'s exam
  - 63 Hat, informally
  - 64 Time it takes for paint to dry, seemingly
  - 65 X
- Online subscriptions: Today's puzzle and more than 7,000 past puzzles, [nytimes.com/crosswords](http://nytimes.com/crosswords) (\$39.95 a year).  
Read about and comment on each puzzle: [nytimes.com/wordplay](http://nytimes.com/wordplay).

# BROCK: Challenging the forensic interview in child sexual assault cases

(Continued from page 2)  
direct description of what he or she has observed and experienced. However, some child interviews deviate from this direct format and instead take an oblique or indirect approach to information gathering. Problematic indirect interviewing techniques include (a) inviting the child to speculate about what might have happened, rather than to describe what the child actually observed; (b) encouraging the child to pretend or engage in imaginative play as part of the investigative interview; and (c) interviewing the child using puppets (but see Jones, 1992, P. 40)."

Note that the interviewer violated Michigan Protocol by failing to even consider the possibility that the child had been coached, even after the child's statements to that effect, and by steering the interview in the direction she wanted it to go; that is, toward confirming the only hypothesis she was willing to consider, that her father had molested her. She also violated best practices by blotting out the child's visibility and audibility with the oversized toy, also bribing the child to provide information she had not been willing to provide, and then encouraging the child to engage in fantasy instead of the dead serious reality that should have been the focus of this interview.

Michigan Protocol author Debra Poole has never forgotten the lessons of her past research, nor ignored the fact that she is a scientist and not a member of prosecution team. She has long recognized that children provide misinformation for a variety of reasons:

"Ceci and Bruck (1995), for example, compared descriptions of coding categories in studies of false allegation rates with the studies' final conclusions. In some cases, conclusions about false allegations reflected only cases in which there was intentional lying, with authors dismissing cases in which false allegations were made for other reasons. When these other mechanisms were included (e.g., honest misunderstandings of children's statements or problems caused by reliance on presumed indicators of abuse followed by suggestive interviewing), rates of false allegations rose considerably (e.g., from 6% to 23% in Jones & McGraw, 1987; from 8.8% to 35% in Faller, 1991)." (P. 2, 3)

"In recent years, however, there have been a number of compelling demonstrations that children do sometimes falsely report events that involve bodily touch or harm, that such reports are alarmingly easy to produce—at least at young ages—and that these reports often contain many of the characteristics considered to be 'diagnostic' of true reports." (P. 3)

"Unhappily, many experts who testify about the characteristics of abused children claim to do so on the basis of their 'experience,' but claim to have little or no experience with children who weren't abused but who at one point claimed to have been. Hence, such experience is—not just 'strictly speaking' but profoundly—irrelevant to 'the determination of an action.' Ironically, such pseudo-experts often try to support their alleged expertise by claiming that almost all the children they see claiming abuse have in fact been abused. If taken seriously, such a claim should automatically disqualify them as having any experience-based expertise in the matter of most urgent interest to the court, which is the rational determination whether or not the child has been abused as claimed. (pp. 6-7)" (P. 21)

"[This research has demonstrated how the accuracy of children's reports can be dramatically shifted by adult influences. Adults alter the a priori probability of abuse in investigated cases by their referral strategies, the content and characteristics of children's reports by their interviewing strategies, and the outcome of individual lives by their tolerance for false-positive versus false-negative errors. It is important to note that there is no reason to assume that efforts to reduce the probability of false positives will necessarily increase the probability of false negatives. What is required is that assessors do not merely alter the stringency of their response criterion, but rather that they qualitatively change and improve the procedures by which assessments are made. Pursuit of this goal is clearly in the best interest of both abused and non-abused children and of society at large." (P. 22)"

It might be expected that there would be a great deal of interview-

er bias, given that the determination of what constitutes good science is the domain of the prosecutor's office. Prosecutors are neither scientists, nor impartial. Yet the same well educated attorneys who would be outraged by Tom Brady deciding how much air should be in a football in a championship game, are willing to quietly and complacently acquiesce to the prosecutor's office about a matter of far more importance: the fairness of the judicial system. Research shows that defense lawyers rarely delve into the process by which forensic evidence is obtained from a child, nor do they employ the techniques that would give them access to reliable evidence from child witnesses in court. This is especially surprising given that there are so many interviewing errors, and that evidence of conscious or unconscious bias is so apparent in the majority of forensic interviews I have observed. Note the following study of attorney cross examination practices:

"What was striking was that both attorneys [prosecution and defense] predominantly asked questions that simply asked for a "yes" or a "no" (two thirds of prosecution questions and over 80% of defense questions), and children typically provided unelaborated answers. The attorneys' emphasis on yes-no questions meant that they [the attorney] were responsible for generating details of the interactions. Furthermore, children virtually never spontaneously referred to conversations (less than 1% of the time), and thus were dependent upon the attorneys' questions to do so. The emphasis on yes-no questions probably decreased both the productivity and accuracy of responses, because recognition questions produce fewer details and less accurate details than recall questions (Lamb, Hershkowitz, Orbach, & Esplin, 2008). Although attorneys were less likely to ask older children yes-no questions, they nevertheless did so 41% of the time, and there were no age differences in the proportion of other questions asked, including wh- questions [who, what, where, how, when, etc.] tapping recall memory."

All forensic research emphasizes how much more information—and more accurate information—can be obtained from open-ended questions than from short-answer, one word, or yes or no questions. If an attorney is looking for a way to get at the truth of a child's report without appearing to be beating up on the child, this is a very good way to do it, but attorneys appear to have very little faith in science, even though answers from scientific questioning are the most reliable evidence a child can produce.

In my experience, a child who is telling the truth of their own experience can provide a reasonably coherent narrative with some detail unique to their case. One way of observing this is to compare the child's practice narrative (if one is elicited, as all protocols recommend) with the narrative of the alleged abuse. In cases where the allegations are questionable, children cannot provide a credible narrative, they either repeat key phrases that they have been fed by someone (daddy touched my pee-pee, white stuff came out, he put his thing in my thing, etc.) without any context, or they provided a rambling narrative of possible truths mixed with obvious fantasy, but lacking any real linear progression. The research tends to show that what makes an adult's report believably and probable, is the same thing that makes a child's report credible.

In two credible stories of abuse that were told to me, a younger child said an older boy came into his room at night, shined a flashlight on his face, and rubbed his penis on his face. He also remembered that the older child had a pattern of little animals on his underwear. Such realistic detail is seldom found in false reports of young children, and even older children's fabrications are generally full of holes. In another story told to me by a 12 year old girl, an older babysitter had told her to go upstairs and take her pants off. Then he told her to hold onto the bed board, get behind her and rubbed his penis on her anus. Again, there is linear progression, and credible detail.

What juries find credible from child witnesses was the subject of another study of child abuse cases in Scotland:

"In a study by Cashmore and Trimboli (2006), jurors frequently

justified their judgments regarding the truthfulness of children's testimony on the basis of the consistency of details about dates, places, or clothing, and these judgements in turn predicted their verdicts. Another study by Connolly, Price, and Gordon (2009) found that, although inconsistencies were mentioned in 75% of the judicial comments regarding verdicts in historical child sexual abuse cases, and were twice as common when there were acquittals rather than convictions, complainants' emotional behavior during the events and at the trial were more strongly associated with verdicts than the frequency of inconsistencies in witnesses' statements. However, the mean age of witnesses at the time of the trial in Connolly et al.'s study was 25.93 years, which could indicate that adults were more consistent witnesses than children, or that juries place a higher emphasis on consistency when assessing the testimony of a child witness. Therefore, the disproportionate number of self-contradictions defense lawyers refer to using credibility-challenging questions focused on peripheral details or repeated conversations could have strong negative effects on fact-finders' perceptions of the truthfulness of children's testimony and on trial outcomes." (P. 21)

Besides the fact that jurors do care about consistency in children's testimony, note two important factors addressed by the authors. First, the child's emotional state has a profound impact on the jury. One lawyer said in an article I read in preparation for writing this paper that a crying child is "bullet proof." Indeed, who could not be moved by the specter of a child crying on the stand? No one is that hard hearted and rational. But some children are criers and lawyers have to find a way to deal with it. One thing the defense lawyer has to keep in mind is that he is not attacking the child; she is a victim of someone. But is she the victim of your client, or of malicious, or even well intentioned programing?

I gave testimony recently in a case with this type of child witness. In the forensic interview, the child's story was embellished beyond all reason by the interviewer; the story was literally constructed by the interviewer. I was able to explore this with the jury, but there were equally important pieces of information that I was not allowed to go into. The child said in the forensic interview she was raped daily, then twice in one day in the preliminary hearing, and only once when she got to the stand. I wasn't there for the child's testimony, but the morphing of the child's story over time is a sign that the child's testimony lacked credibility. Moreover, she had been questioned by an anxious relative, to whom she told another story. How a lawyer deals with these inconsistencies delicately is certainly something he has to consider before trial. It can't be avoided. Below are some suggestions from a law school professor that might be applicable:

"Child abusers are not the only adults who pressure child witnesses to provide false testimony. It is unfortunately true that some parents embroiled in child custody litigation fabricate allegations of abuse and persuade children to accuse an innocent parent. The target of such an accusation has a right to uncover the truth by impeaching the child's testimony with proof of the coercion which produced the inaccurate testimony. Coercion may be established through examination of the child. Alternatively, counsel may admit extrinsic evidence to establish coercion. Since this form of impeachment relates directly to the credibility of the witness, the collateral fact rule does not apply, and extrinsic evidence may be admitted. A majority of courts require counsel to lay a foundation before offering extrinsic evidence. The trial judge has discretion to limit extrinsic evidence used to impeach. In the case of coercion, however, rather broad latitude should be accorded the impeacher.

"Coached Testimony: A child whose testimony is the product of improper coaching is a biased witness in that her or his testimony reflects an advocate's position rather than an objective statement of the facts. A party against whom coached testimony is offered has a right to examine the witness in an effort to disclose coaching. Furthermore, counsel may offer extrinsic evidence to establish coaching. The collateral fact rule should not apply to impeachment

for coaching because coaching relates directly to the credibility of the witness. As is true with impeachment for bias, interest, and coercion, the court may require a foundation before counsel resorts to extrinsic evidence to establish coaching." (P. 924-926)

"Rule 806 provides that when a hearsay statement is admitted in evidence, 'the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.' The impeaching attorney may employ any of the five modes of impeachment: Inconsistent statements, character, bias, defects in capacity, and contradiction. Rule 806 eliminates the foundation requirements which are often required for impeachment." (P. 941)

"The suggestibility of children is important for three reasons. First, the cross-examiner can occasionally undermine the credibility of a child's testimony by demonstrating that the child is highly suggestible. Second, some suggestible children can be led to alter their direct testimony through skillful use of suggestive questions during cross. Third, in some cases the cross-examiner's pretrial investigation reveals that adults such as parents, investigators, or mental health professionals conducted highly suggestive interviews of a child; interviews which may have distorted or even obliterated the truth. In these cases the cross-examiner elicits information from the child about the number of interviews and what occurred each time. This testimony may be followed by cross-examination of the individuals who interviewed the child. Cross-examination of the adults is designed to elicit evidence of improperly suggestive interview techniques. (emphasis mine)

"As stated above, the cross-examiner can capitalize on the suggestibility of some children. Consider the following excerpt from the cross-examination by defense counsel of a young child at a preliminary hearing:

"Q: Do you remember the last time that we talked?

"A: Yes, I do.

"Q: And when I had that different colored suit on, do you remember that?

"A: Yes, I do. I really do.

"Q: The one that was red?

"A: Yes, I remember it.

"Q: You remember it?

"A: Yeah.

"Q: Do you remember the stripes I had on the other suit were red and they went around my legs that way? Do you remember that?

"A: Uh-huh (affirmative).

"Q: And do you remember we talked about going and getting ice cream?

"A: Yes, I remember that.

"Q: And that me and you were going to get an ice cream, and do you remember my friend that was with me? The other guy that had a beard like I do? Do you remember that man?

"A: Yes, I do remember that man, but I don't remember his name.

"Q: And the three of us were going to go get an ice cream. Do you remember that?

"A: Yes, I remember that.

"Q: How come we didn't go get the ice cream?

"A: I can't remember.

"Q: Why didn't we get the ice cream? What happened?

"A: I don't know.

"Q: We just didn't go, did we?

"A: No, we didn't."

"In fact, the attorney had never met the child. There was no red suit with horizontal stripes, no aborted trip to the ice cream store, and no bearded friend. Yet, under the hand of a skilled cross-examiner, the child accepted as true a set of imagined events. When the attorney was finished, the child's credibility was seriously undermined." (P. 886-887)

"The third important aspect of suggestibility concerns the possibility that a child witness was subjected to improper suggestion prior to trial. When counsel learns that improper suggestion has occurred, it becomes possible to attack the opposition without attacking the child. After all, it is not the child's fault that adults misused their authority to alter the child's recollection of events. Cross-examination of a child always carries the risk of alienating the jury. When counsel can establish that an adult has improperly implanted ideas in a child's mind, however, the jury is unlikely to be sympathetic with the adult, and counsel has more freedom for vigorous cross-examination. By

attacking the interviewer, the cross-examiner convinces the jury that the child and the examiner's client have been treated unfairly." (P. 888) (emphasis mine)

Another take on forensic interviewing from a legal perspective is provided by Atty Kresta Daly, who assumes that all in the legal system are well intentioned, but not necessarily well informed. She provides the following insights specifically about the forensic interview:

"Both prosecutors and defense lawyers want to hear a child describe the conduct in detail in part as a test of whether or not they believe the child is telling the truth or has been coached about their testimony." (P. 22) (emphasis mine)

"If, during the course of a forensic interview, a child starts giving nonsensical, fantastic or nonresponsive answers it's important to delve into these areas. Sometimes nonresponsive answers are nothing more than evidence that a child is bored with an interview or doesn't want to talk about what happened to them. In other instances fantastic details can be indicative of children not telling the truth. The classic example of this is the McMartin Preschool abuse case. In the McMartin case children claimed that in addition to having been sexually abused they saw witches fly, traveled in hot air balloons and were taken through underground tunnels. There were also claims that orgies occurred at car washes and airports and children were flushed down toilets to secret rooms. Ideally the forensic interview is the only time a child has to recount the entire story of their abuse prior to trial. In many ways the forensic examiner serves a sort of gate keeper function—just as it is important to establish what happened it's equally as important to establish if something didn't happen. It's the role of the forensic examiner to question things that don't make sense. Fortunately with the modernization of competency standards, forensic examiners can ask these questions without fearing it may lead to the child ultimately being barred from the witness stand." (P. 25)

"Mental health professionals have always been allowed to testify about a forensic interview but now they can also testify about a much wider array of topics. It is unlikely a mental health professional would be called to testify about a forensic interview and render an expert opinion in the same case. A more likely scenario is that a forensic interview is conducted. A different forensic mental health professional is retained by the lawyers for the defense to review the video of the forensic interview. This mental health professional is asked to consider the factors that have been identified in empirical research related to potential bias in forensic interviews of children. (Fanetti, M. & Boles, R. (2004). Forensic interviewing and assessment issues with children.) In W. O'Donohue and E. Levensky "Handbook of Forensic Psychology: Resource for Mental Health and Legal Professionals." Elsevier Academic Press: New York, those factors are:

"1. The child, due to rapport problems, may not have been comfortable and therefore may not have answered in a complete and accurate manner.

"2. The child did not know that she could say, "I don't know" when she did not know the truth.

"3. The child did not understand what it means to tell the truth.

"4. The child did not know the importance of telling the truth.

"5. The child did not understand her role in the interview or the purpose of the interview and therefore her answers may have been distorted.

"6. The child might have felt uncomfortable discussing certain topics with the interviewer, therefore may not have answered in a complete and accurate manner.

"7. The child had experienced some sort of externally derived threatening experience, which may have served to distort answers (e.g., fear of threats to self, loved ones, or property).

"8. The child did not feel as though she had a choice in the type of responses she provided.

"9. The child answered in a certain way in an attempt to please an authority figure.

"10. There were leading questions.

"11. The child's verbalizations at times were disconfirmed.

"12. The interviewer inappropriately reinforced certain types of answers.

"13. There were repetitive and perhaps coercive questions.

"14. There were aspects of the child's total response (e.g., body posture, facial expressions, etc.) that gave a different interpretation to the child's answer.

"15. The interviewer encouraged the child to speculate about important details, after the child had indicated that she was not sure about an answer or did not have the information.

"16. The interviewer referenced the fact that other individuals (e.g., peers) had been interviewed regarding the interview topic and/or indicated what the other individuals' responses were.

"17. The interviewer focused or redirected the child toward information about a specific detail or individual.

"18. The child's report has been contaminated by some outside source, such as experience with another professional (e.g., retroactive interference from some other interviews)." (P. 29-30) (emphasis mine, indicating mistakes I have frequently encountered)

To refocus on what constitutes best practices in forensic interviewing, I return to Dr. Poole's latest book. Everyone involved in the process of prosecution of crimes against children should know as much about the research as possible. Experience teaches that few attorneys do. Therefore, the ones who do hold a decided advantage over those who do not. It is essential to know both what should be done and what should not be done. Dr. Poole is a strict adherent to forensic literature and her insights are always illuminating. Below she warns about the dangers of obtaining inaccurate information when Protocol is not followed:

"It is easier to keep children on task when interviewers remove unnecessary distractions, use children's names and frequent topic markers to reorient them, and avoid yes/no and forced-choice questions (which permit impulsive responses)." (Kindle Locations 3107-3108)

"Jean Piaget (1928), a famous developmental psychologist, once said that a striking characteristic of young children is their "extreme assurance on all subjects" (p. 202). This tendency to answer focused questions in the absence of knowledge diminishes as children mature, but it never entirely disappears (Pratt, 1990). For instance, one research team embedded an unanswerable question in an interview about a scuffle that had occurred between a man and a woman (Poole & White, 1991). When interviewers asked, "What does the man do for a living?—what is his job?" over a quarter of the 4- and 6-year-olds offered speculations during their first interview, such as "He works with my father" and "He works at the lumber yard." Fewer 8-year-olds guessed, but remarkably, over half the adults did. Thus even older witnesses, when they believe they might know the answer, sometimes just guess." (Kindle Locations 212-219)

"...Interviewers avoid language that asks children to speculate or imagine what might have happened." (Kindle Locations 2207-2208)

"Developmental psychologists...have expressed concern that play activities are distracting and could encourage speculation and silly remarks." (Kindle Locations 2844-2845) (emphasis mine)

"...Children who freely drew reported more than twice as much erroneous information as the non-drawing group, and errors comprised a disturbing 17% of the information reported by children who drew whatever they chose. Many of these errors were plausible but untrue confabulations (which interviewers would not spot as wrong) and fantastical information (strange reports that could discredit the child, such as 'We saw a mermaid')...the research team concluded that a 'playful approach to drawing appears incompatible with the task of talking about a real event'" (MacLeod et al., 2014, p. 9). (Kindle Locations 2858-2863) (emphasis mine)

"Physical objects can cue memory and provide a nonverbal way to communicate, thereby increasing the amount of information obtained, but they can also be distractors and play objects that increase inaccuracies. As the following review explains, the likelihood that a technique will benefit or harm testimony depends on many factors, including the match between a child's cognitive abilities and the skills needed to use

the prop, the child's exposure to false information outside the interview setting, the questioning techniques an interviewer pairs with props..."(Kindle Locations 2837-2841) (emphasis mine)

"Two general principles direct how interviewers design prompts for individual cases. First, they avoid mentioning details of the allegation (e.g., the suspicion that a father's behavior precipitated sexual play) to protect children's credibility, but also because hearing children's words helps interviewers detect any earlier misunderstandings on the part of adults who reported concerns. Second, interviewers avoid language that asks children to speculate or imagine what might have happened." (Kindle Location 2205-2208)

<sup>1</sup> Poole, Debra A., *Interviewing Children, the Science of Conversation in Forensic Contexts* (2016) American Psychological Association, Washington D.C., Electronic edition published 2016. ISBN: 978-1-4338-2216-2 (electronic edition).

<sup>2</sup> NICHD Revised Investigative Interview Protocol, Version 2014 <http://nichdprotocol.com/wp-content/uploads/2013/03/RevisedProtocolTMWH2final-1.pdf>

<sup>3</sup> NICHD Protocol, P. 12

<sup>4</sup> The Criminal Defense Attorney's Burden, ABA, Sept/Oct 2017, Vol. 31 No. 5, By Ion Meyn, Visiting Assistant Professor at the University of Wisconsin Law School, Madison.

<sup>5</sup> The Suicide of the West, James Burnham, 1964

<sup>6</sup> "According to a recent study of children and the law in Connecticut from the colonial period to the Civil War, judges, juries, and lawmakers in the antebellum period were skeptical enough of child witnesses that they reduced the maximum sentence for adults convicted of sexually assaulting a child" Toward a History of Children as Witnesses, David S. Tanenhaus University of Nevada, Las Vegas, William S. Boyd School of Law, William Bush

<sup>7</sup> How Sexual Abuse Interviews Go Astray: Implications for Prosecutors, Police, and Child Protection Services, James M. Wood, Sena Garven, University of Texas at El Paso, Child Maltreatment 2000; 5(2): 109-18

<sup>8</sup> Assessing The Lessons from Accuracy of Young Children's Reports: The Investigation of Child Sexual Abuse, Debra A. Poole Central Michigan University D. Stephen Lindsay University of Wales—Bangor, Bangor, United Kingdom, Applied & Preventive Psychology (1998). Cambridge University Press

<sup>9</sup> How Attorneys Question Children About The Dynamics Of Sexual Abuse And Disclosure In Criminal Trials, Stacia N. Stolzenberg and Thomas D. Lyon, Psychology Public Policy Law. 2014 Jan 1; 20(1): 19-30

<sup>10</sup> Challenging The Credibility Of Alleged Victims Of Child Sexual Abuse In Scottish Courts, Zsófia Szojka, Samantha J. Andrews, Michael E. Lamb, Stacia N. Stolzenberg, and Thomas D. Lyon, Psychology, Public Policy & Law 200-210 (2017)

<sup>11</sup> The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment, John E.B. Myers, Pacific McGeorge School of Law, 1987 McGeorge School of Law Scholarly Articles

<sup>12</sup> Forensic Interviews Regarding Child Sexual Abuse (2016), A Guide to Evidence-Based Practice, Editors: O'Donohue, William T., Fanetti, Matthew (Eds.), Chapter 2: The Purpose of The Forensic Interview: A Lawyer's Perspective, Kresta Daly

<sup>13</sup> Interviewing Children: The Science of Conservation in Forensic Contexts (2016) (Kindle Edition)—Debra Ann Poole

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