THE BORED MURDERER AND THE EXCITED EYEWITNESS

It was dim but the lights and fanfare of the amusement park turned the darkness of a summer night into a lively dusk. I was 11 years old. I was standing at the edge of a safety fence looking up and watching carefully as train after train of screeching roller-coaster riders looped through the spirals of the aptly named "Corkscrew." My sister was on one of these strands of looping cars and I was hoping to catch a glimpse of her streaking by. Me? I was tall enough to ride, but too chicken to do it. Train after train looped through. I didn't see her. It was 8:45 at night. Another train of the coaster zipped down the main hill, shot up into the first big loop, and on its ascent the cars broke apart from the strand like the pearls of a snatched necklace. The sound of the train of cars coming apart was a loud and low roar, terrifyingly out of place in an amusement park. The first cars in the train made it through and passed normally through the corkscrew portion of the coaster. The trailing and detached cars, however, were stuck on the tracks. I could see the silhouettes of waving arms. I could hear the shrieks of the people stuck on the coaster.

Your turn. First, tell me about the moment you found out you had passed the bar.

Have you thought about it? Now, tell me where you were on the night of Tuesday, April 4th, 2023 at 8:34 p.m. What's that you say? You were probably at home? You can't be sure though. You don't know if you were alone or not? I'm sorry, you say you ***might*** have been at a mock trial practice? But you're not sure of that either, eh?

I recently read a research review on alibi generation that explored the idea that perhaps the often-maligned inconsistent alibi isn't such a bad alibi after all.[1] Perhaps the bored murderer isn't a murderer at all and the thing that's truly boring about him was what he was doing on the night of the murder. Let's flesh this out a bit more. At some point immediately after the awful sound I heard on the night of the roller-coaster accident, I realized I was witnessing something exciting, terrible, and terribly memorable. My brain was searching for details, for truths, and, principally, for the face of my sister amid the madness. At some point during the commission of a crime or while witnessing a car accident, the eyewitness is similarly excited, realizing that they're seeing a truly unique event in their workaday life.[2] Now contrast that with April 4th, 2023 at 8:34 p.m. That's not an event. It's a moment. And for the vast majority of us, there's nothing unique about that date and time. The moment itself is workaday.

In memory-making and memory-telling, there are two principal phases: encoding and retrieval.[3] The authors of the research review note a truth which is intuitively obvious to us, but one which we probably don't think much about: Why would our brains bother to stash away the boring stuff for later use?[4] And if it's true that they don't, we shouldn't be surprised that an accused person offering a completely valid alibi is mistaken about the details of their alibi. Nor should we be surprised that after further reflection and investigation the accused offers a later (but now inconsistent) alibi that actually represents the truth. If I'm grilling you at police headquarters about April 4th and you're digging through your memory, you're not digging through your daily planner or the collective memories of friends and family. Indeed, if you could use all those people, they might remind you that you weren't actually home alone, but you were doing something *truly* awful—like attending a kindergarten graduation ceremony for your neighbor's kid. Now, as a result of remembering that you're a really nice neighbor, your alibi changes, and you have a few new alibi witnesses to boot! In fact, the authors produce a number of Innocence Project stories of exonerations where defendants were later proven to be innocent even though they had originally offered inconsistent

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[1] William E. Crozier et al., Memory Errors in Alibi Generation: How an Alibi Can Turn Against Us, 35 BEHAVIORAL SCIENCE AND THE LAW, February, 2017, at 6-17, https://doi.org/10.1002/bsl.2273

[2] *Id.* at 8.

[3] *Id.* at 7.

[4] *See id.* at 7-8.

alibis.[5] The authors also mention a host of studies to show how judges and juries find inconsistent alibi stories to be inherently suspect and indicative of guilt.[6] This problem then produces a real conundrum for an accused: Stick with a bad alibi that is at least consistent or offer up a revised but inconsistent alibi that risks the guilty votes of a judge or jury?[7]

That night standing at the safety fence, I'm staring at the roller coaster run amok. I'll never forget that night. The yellow glow of the park lights silhouetting the metal skeleton of the coaster and the darkened cars clinging awkwardly to the curve of its ribs. Someone even shouted that a person had died. Thankfully, that was merely hysteria and not the truth. I also won't forget the relief I felt seeing my sister's face emerge from the dusky gloom and the throng of panicking people. Her car had passed safely down the hills and loops before the accident occurred. Now, as for where I was on the night of April 4th, 2023 at 8:34? That memory has faded into the dusky gloom of a thousand evenings and I'm guilty only of having a relatively boring life. I suspect your alibi for that night is as bad as mine.

[5] *See id.* generally.
[6] *Id.* at 8.
[7] *Id.* at 13.