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### Wild Dreamers: Meditation on the Admissibility of Dream Talk

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## WILD DREAMERS: MEDITATIONS ON THE ADMISSIBILITY OF DREAM TALK

Louise Harmon\*

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## INTRODUCTION

Dream talk. We all dream.<sup>1</sup> We all talk. But we do not all talk about dreams. Every culture has its norms about the narration of dreams—where and when and how they may be talked about, and by whom. In modern western culture, there is no public forum for dream talk. Perhaps because we dream in sleep—alone, horizontal, and in the dark—we deem dreams to be private. Dreams are revealed in hushed tones at breakfast tables, across pillows, in therapists' offices, in cars that drive through rainy nights. Dreams fall into no one's public domain; they are on no one's agenda for discussion.

Dream talk, and talk about dream talk, are rarely heard of in the law.<sup>2</sup> The law belongs to the waking world, not to the world of sleep;<sup>3</sup> it

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1. The word "dream" is difficult to define. The first definition in Webster's New Universal Unabridged Dictionary is "a sequence of sensations, images, thoughts, etc. passing through a sleeping person's mind." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 555 (2d ed. 1986). In pointing out the problems in defining dreaming, one scholar rejects the view that there is one, and only one, kind of dream. He isolates a variety of kinds:

There do seem to be relatively distinct types of dreaming, each with its own line of development and potentially one-sided exaggeration—as permitted or perhaps demanded by the subductive clouding or single-mindedness of dreaming. There are relatively mundane dreams that seem to be based on mnemonic consolidations and reorganizations; Freud-type relatively fantastic, pressure-discharge dreams, often based on complex rebuslike wordplay; dreams based on somatic states and illness; dreams based on aesthetically rich metaphor; dreams based on problem-solving and deep intuition (perhaps extrasensory?); lucid-control dreams; the varieties of nightmare; and a Jung-type archetypal-mythological form of dreaming.

HARRY T. HUNT, *THE MULTIPLICITY OF DREAMS* 76 (1989).

2. For a fascinating discussion of "sleep talk," or "vocalizations uttered during sleep" as opposed to the subject of this article which is "dream talk," or narrations of dream experiences, see generally Deborah Rosenthal, *Voices from Darkness: The Evidentiary Admissibility of Sleep Talk*, 30 U.S.F. L. REV. 509 (1996).

3. Sleep does make a brief appearance in most criminal law texts under the rubric of the defense of somnambulism, a form of "automatism" in which "one who engages in what would otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness or semi-consciousness." 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 4.9, at 541 (1986). The leading case is *Fain v. Commonwealth*, 78 Ky. 183 (1879). In *Fain*, the defendant, while asleep in a hotel lobby, shot and killed a porter who was trying to wake him up. The Kentucky Court of Appeals reversed *Fain's* murder conviction after the trial court refused to receive evidence that the defendant was a sleepwalker or to instruct the jury on an unconsciousness defense. *Id.* at 187 (quoting a nineteenth century treatise, *Brown on the Medical Jurisprudence of Insanity*: "Indeed, there are very many cases in which the confused thoughts of awakening consciousness have led to disastrous consequences. And this is to be accounted for by the fact that

presupposes consciousness, social interaction, verticality. The sentences spoken and written by those who live with and in the law are crafted for the light. Besides, most of the law's business is volitional. Dreams seem to happen to us.<sup>4</sup> Often dreams make no sense; they defy rationality.

The law prides itself on rationality. The law also ascribes to the dominant epistemology of empiricism. As generations of philosophy undergraduate students have learned, empiricism demands that all knowledge derive from sensory perception. We can only claim to "know" that the desk the professor sits upon is "real" because we can see it, hear and feel our hands thumping on it, and, if we were so inclined, we could sniff it, lick it, and taste its woodiness or plasticity.<sup>5</sup> The model is scientific; only after we have methodically gathered our sense data are we prepared to stick out our necks and make the ambitious claim that we "know" the table is really there. Dreams have no place in such an episteme. So-called "knowledge" that comes from dreams, from extrasensory perception, from visions, or from a spiritual experience is not really knowledge. One can make sentences about information received from a dream, a vision, or an intuition, but they constitute a different kind of claim—a claim of faith perhaps.

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there is a state between sleeping and waking when the thoughts of the dreamer have as much reality as the facts he is assured of by his senses.").

4. Our need for sleep has been scientifically verified, although scientists are uncertain about its biochemical purposes. See WILLIAM C. DEMENT, *SOME MUST WATCH WHILE SOME MUST SLEEP* 3 (1976). There are two kinds of sleep: REM (Rapid Eye Movement) sleep and non-REM sleep. BSTAN-'DZIN-RGYA-MTSHO, DALAI LAMA XIV, *SLEEPING, DREAMING, AND DYING* 29 (Francisco J. Varela ed. & narr., B. Alan Wallace & Thupten Jinpa trans., 1997) [hereinafter DALAI LAMA, *SLEEPING, DREAMING, AND DYING*]. Dreaming takes place during REM sleep. *Id.* In non-REM sleep, the brain becomes more silent, according to measurements of the global amount of brain electrical activity. *Id.* at 32. The heartbeat and respiration also slow down. *Id.* at 31. In REM sleep, there is rapid eye movement; muscle tone changes and significant cerebral activity are manifest. *Id.* at 31–32. The brain patterns in REM sleep correspond to the dream state, and when people are awakened from REM sleep, more than eighty percent report they were dreaming. *Id.* at 32. About twenty to twenty-five percent of the complete circadian cycle is spent in REM sleep. *Id.* at 33. REM sleep is universal in mammals. *Id.*

5. William James defines this theory of knowledge and use of logical reasoning as "rationalism." His definition is as good as any:

Rationalism insists that all our beliefs ought ultimately to find for themselves articulate grounds . . . [:] (1) definitely statable abstract principles; (2) definite facts of sensation; (3) definite hypotheses based on such facts; and (4) definite inferences logically drawn. Vague impressions of something indefinable have no place in the rationalistic system, which on its positive side is surely a splendid intellectual tendency, for not only are all our philosophies fruits of it, but physical science (amongst other good things) is its result.

WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 72 (1958). James goes on to point out that rationalism accounts for only a superficial part of man's mental life, albeit the "part that has the prestige." *Id.*

These principles of rational thought and of privileging only claims of knowledge based upon sensory perception are reflected in the rules of evidence.<sup>6</sup> In a trial, the rules of relevance assume that jurors will use tools of logical inference to establish guilt or innocence.<sup>7</sup> Another rule allows lay witnesses to testify only to matters about which they have personal knowledge—things they have perceived for themselves.<sup>8</sup> We will allow percipients to come into court and claim to know such a thing, although the opposing party will have an opportunity on cross-examination to demonstrate that they did a lousy job looking, a lousy job listening. Conversely, we will not generally allow witnesses to testify to out-of-court observations of others—those statements constitute hearsay.<sup>9</sup> The percipients would not be present in court, and not subject to cross-examination. There would be no way to test their credibility as lookers, listeners, competent narrators of all they have perceived.

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6. Peter Murphy summarizes what William Twining has dubbed the “tenets of Optimistic Rationalism” that pervade the law of evidence and how we conduct our trials in the Anglo-American legal system:

The basic tenet of Optimistic Rationalism is that the drawing of rational inferences from relevant evidence is the only, or only known, method of correctly reconstructing past events. Twining analyzes the assumptions underlying this tenet, which include the epistemological assumptions: (1) that events and states of affairs occur independently of human observation; (2) that it is possible in principle to achieve present knowledge of past events; (3) that because evidence is typically incomplete, proof in judicial trials must be based on some degree of probability rather than absolute certainty; and (4) that a chain of inferential reasoning from evidence to hypothesis must depend on intermediate generalized assumptions about the causes and courses of human affairs.

Peter Murphy, *Introduction to EVIDENCE, PROOF, AND FACTS* 1, 19 n.16 (Peter Murphy ed., 2003).

7. The very concept of relevance is based upon a logical form of reasoning. Federal Rule of Evidence 401 defines relevance in this way: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401. One evidence scholar explained some of the reasons we might call evidence relevant:

In some cases evidence seems relevant because we can construct a direct chain of reasoning from the evidence to some major, ultimate, or final hypothesis of concern. In other cases, however, we may have evidence from which we can form no such chains of reasoning, but the evidence seems relevant all the same because it bears upon the strength or weakness of links in the chains of reasoning we have already established from other evidence.

DAVID A. SCHUM, *THE EVIDENTIAL FOUNDATIONS OF PROBABILISTIC REASONING* (1994), reprinted in *EVIDENCE, PROOF, AND FACTS*, *supra* note 6, at 170.

8. Federal Rule of Evidence 602 provides that a “witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” FED. R. EVID. 602.

9. *See id.* 801, 802.

Rational thought and empiricism, with its firm commitment to sense data and rejection of the unseen world, have controlled the law.<sup>10</sup>

Does dream talk have any place in the law? And what about those of us who are wild dreamers, who try to live with and in the law?<sup>11</sup> Where do we fit within the rigid confines of law's rationality, with its insistence on the empirical episteme? How many lawyers would rather sleep than be awake?<sup>12</sup> I would.<sup>13</sup> But I do not sleep to escape what others call the

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10. Historically, evidence law grew out of sixteenth and seventeenth century empirical philosophies. In her chapter on the development of the "beyond a reasonable doubt" standard, Barbara Shapiro writes about the intellectual traditions that the judges drew upon in their formation of the rules of evidence:

Thus the judges confronted twin sources of epistemological guidance. One was the English religious tradition, particularly the casuistical tradition, which sought a rational method of decision making in everyday life. The other was the scientific movement of Bacon, Boyle, and especially Locke and the empirical philosophers, who sought to establish scientific truth from the evidence they gathered.

BARBARA SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE (1991), *reprinted in* EVIDENCE, PROOF, AND FACTS, *supra* note 6, at 327.

11. This article is only going to treat the dreams we have during sleep, although I suspect that many nocturnal wild dreamers are also wild daydreamers. I am confident there are many daydreamers in the legal profession. We daydream all the time, with one eye on our utterances to the outside world—in our law offices, courtrooms, and law classrooms—and the other eye turned inward. We remain quiet about those daydreams, worried that we will be deemed untrustworthy, not in touch with reality—a rudderless, oarless vessel drifting out to sea. Unlike sleep research and dreaming, there has been little research about daydreams, partly because there is no consensus about how to define a daydream. They can range from "fairly structured fantasies to the series of disconnected images that emerge during relaxed free association." JAMES R. LEWIS, THE DREAM ENCYCLOPEDIA 59 (1995). While there seems to be some relationship between daydreams and regular dreams, "investigators in this area have hypothesized that somewhat different and perhaps independent cognitive processes are at work." *Id.*

12. I am not alone in believing that sleep is not only a fundamental need, but a right. In the area of human rights, there has been pressure to expand the list of recognized rights due to every human being. Probably one of the longest lists is that proposed by Galtung and Wirak, of needs "that might be considered as important candidates on the world waiting list for processing into rights." Galtung & Wirak, *On the Relationship Between Human Rights and Human Needs*, UNESCO Doc. SS-78/Conf.630/4, at 48 (1978), *quoted in* Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 610 (1984). At the top of the list: "the right to sleep." *Id.*

For a discussion of sleep as symbolic speech, see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). In *Clark*, demonstrators set up a small tent city in Lafayette Park in Washington D.C. called "Reaganville" to demonstrate the plight of the homeless. *Id.* at 291–92. At issue were National Park Service regulations that forbade camping except in designated areas. *Id.* at 290–91. While the Court upheld the regulations, it also assumed, without deciding, that sleeping in "Reaganville" was symbolic speech. *Id.* at 293. The dissent was critical of what it perceived to be the majority's evasiveness in not deciding that such activity is, or is not, speech. *Id.* at 301–02 (Marshall, J., dissenting). Chief Justice Burger stated in his concurrence that sleep was conduct, not speech. *Id.* at 300 (Burger, C.J., concurring).

real world. I sleep to enter the dream state, to establish contact with an unseen world that often reveals the truth to me. I have come to know many things from the dream state: about illnesses, my own and those of others; about past events; about hidden love.<sup>14</sup> I have untied many knots in my dreams: solved problems,<sup>15</sup> understood hearsay within hearsay, discovered a new direction in my thinking,<sup>16</sup> and even found the words

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13. I am also a Puritan, however, and try to keep my sleep to a medically acceptable minimum. There are norms for different species with respect to how much they sleep, and the bodily positions assumed for sleep. Humans tend to sleep about a quarter to a third of each twenty-four-hour period, and typically sleep lying down. DALAI LAMA, *SLEEPING, DREAMING, AND DYING*, *supra* note 4, at 34. Tigers sleep in trees. *Id.* Elephants sleep standing up, and only sleep on the average 3.2 hours of the day. *Id.* Rats sleep eighteen to twenty hours of the day. *Id.* Dolphins continue to swim since only half of their brain actually sleeps. *Id.* Biologists speculate that birds who migrate for many days sleep while they are flying. *Id.*

14. My dreams were most vivid and frequent during pregnancy. I kept having dreams of giving birth to a litter of kittens. Research has shown that pregnant women's dreams are remarkably different from those of nonpregnant women. Pregnant women not only dream more, but the content of their dreams "is also unusual in that it is frequently vivid and rich in detail, bizarre, and often nightmarish." Patricia Maybruck, *Pregnancy and Dreams*, in *DREAMTIME AND DREAMWORK: DECODING THE LANGUAGE OF THE NIGHT* 143, 143 (Stanley Krippner ed., 1990) [hereinafter *DREAMTIME AND DREAMWORK*]. Many pregnant women dream of giving birth to small mammals, and "small animals in their dreams [are] said to represent the unborn child." *Id.* "Kittens, puppies, bunnies, and other small creatures [are] also typical fetal symbols." *Id.*

There may also be a dream connection between the mother and her newborn. There have been many anecdotes about telepathic bonding between a mammalian mother and her infant. In mammals, when most of the postnatal time is spent in sleep, and a significant portion of the total sleep time in REM sleep, one researcher suggested that dream telepathy served "the important function of bridging the gap between a vulnerable dreaming organism exposed to threats and a protective adult, in most cases the mother, as fathers tend to leave the mothers long before the birth." Jon Tolas & Montague Ullman, *Extrasensory Communication and Dreams*, in *HANDBOOK OF DREAMS* 168, 195 (Benjamin B. Wolman ed., 1979). Tolas and Ullman theorized that the dreaming young would locate the external threat of a predator, incorporate it into dream imagery, and telepathically communicate the danger to the mother who might be away, out of earshot, gathering food. *Id.*

15. Elias Howe was said to have invented the sewing machine in a dream. He was having trouble making a machine that would create a locking stitch. He dreamed that "he had been captured by natives who all carried spears which had holes through the blades." VALERIE FRANCIS, *ILLUSTRATED GUIDE TO DREAMS* 56 (1995). "He realized that the position for the eye of the needle was at the point, and went on to produce the machine needles we know today." *Id.*

16. Vivid dreaming might even make us more productive in our work. The psychologist Ellen Winner writes:

Strands of similarity are thus drawn between art, neurosis, play, daydreaming, nocturnal dreams, and ordinary forms of productive work. All of these forms of behavior are driven by a common ingredient: powerful wishes that cannot be fulfilled. Add to this ingredient a proclivity toward repression, and one becomes neurotic. But add to this same ingredient a proclivity toward sublimation, and one becomes an ambitious worker or, if one also possesses a mysterious ingredient called 'genius,' one becomes a creative artist or scientist.

ELLEN WINNER, *INVENTED WORLDS: THE PSYCHOLOGY OF THE ARTS* 18-19 (1982).

to say what during the day was unsayable.<sup>17</sup> I travel,<sup>18</sup> write poems, paint murals, design clothes. I sing arias, dance over lunar landscapes, fly over tree tops, encounter the dead and other inhabitants of the unseen world. Sometimes these nocturnal journeys sadden me;<sup>19</sup> other times they fill me with joy. I do not know what these dreams do to or for me, but I know I need to have them.<sup>20</sup> So I sleep.

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17. Unfortunately, I always dream in words and not in numbers. In 1997, a former New Hampshire telephone operator and her husband shared a \$66 million lotto prize when she played six numbers that appeared to her in a dream. After she woke up with the six numbers “‘dancing in her head,’ she played the numbers and won the multistate Powerball lottery jackpot.” *Nation in Brief*, THE ATLANTA J. & CONST., Dec. 24, 1997, at A9. “‘They came to me in a dream,’ Mary Sanderson said, ‘and, no, it didn’t have anything to do with the Psychic Network.’” *Id.*

18. I often travel to the house in which I grew up, both in dreams and in daydreams. Gaston Bachelard writes about the dreams and daydreams that we all have of the houses “we were born in.” GASTON BACHELARD, *THE POETICS OF SPACE* 16 (1964). When we visit the home of our past in dreams and daydreams, we reach the

real being of our childhood. . . . It is on the plane of the daydream and not on that of facts that childhood remains alive and poetically useful within us. Through this permanent childhood, we maintain the poetry of the past. To inhabit oneirically the house we were born in means more than to inhabit it in memory; it means living in this house that is gone, the way we used to dream in it . . . [B]eyond all the positive values of protection, the house we were born in becomes imbued with dream values which remain after the house is gone. . . . And we should not forget that these dream values communicate poetically from soul to soul. To read poetry is essentially to daydream.

*Id.* at 16–17.

19. Bad dreams are frequently experienced by victims of crimes, war, or other violence. *See, e.g.*, *Clemens v. Massanari*, No. CV 00-6204-KI, 2001 WL 34043764, at \*3 (D. Or. May 17, 2001) (where applicant who was beaten by a baseball bat reported nightmares and flashbacks as part of the symptoms of his Post Traumatic Stress Disorder (PTSD) claim); *Wright v. Massanari*, No. A-99-CA-808 AA, 2001 WL 694499, at \*2 (W.D. Tex. May 10, 2001) (where applicant who was in a plane crash dreamed he saw blood and people with missing limbs as part of the symptoms of his PTSD claim); *Curry v. West*, No. 98-1980, 2000 WL 792316, at \*2 (Vet. App. June 14, 2000) (where applicant had trouble sleeping due to nightmares and flashbacks as part of the symptoms of his provisional PTSD claim); *State v. Catalano*, No. M200103039CCAR3CD, 2003 WL 21877933, at \*3 (Tenn. Crim. App. Nov. 24, 2003) (where child victims of aggravated sexual battery experienced nightmares); *Fairfax County Fire & Rescue Dep’t v. Mottram*, 559 S.E.2d 698, 700 (Va. 2002) (where worker dreamed recurrent distressing dreams and suffered from sleep disturbance due to repeated exposure to traumatic stressors from his work as a paramedic supervisor as part of his workers’ compensation claim).

20. It is my firm belief that the world would be a better place if we all dreamed—and slept—more. This is true even for people who do not solve problems in their dreams. People now sleep twenty percent less than people who lived a hundred years ago, a decline that began with the widespread use of electric light. Nick Rufford, *Bosses Wake Up to Benefit of Taking a Nap*, TIMES NEWSPAPERS, July 2, 1995, at 2.7. Studies at Cornell University indicate that most business executives, for example, carry a “sleep debt” of between an hour and an hour-and-a-half from insufficient sleep at night that “impairs almost every mental faculty, including decision-making, creative problem-solving, attention span, concentration, memory and vocabulary.” *Id.* James Maas, professor of psychology at Cornell, offers a seminar, *Asleep in the Fast Lane*, to introduce daytime sleep therapy for business people in America and Asian-Pacific countries. *Id.*



Sometimes I enter the dreams of others, becoming an inhabitant in someone else's unseen world.<sup>21</sup> My visitations are occasionally reported. A friend will tell me that I was in her dream last night, and I am not surprised. Almost always the dreamer's story is different from mine. In our sleep, we each craft a unique concatenation of events, our own unsturdy web of unlikely causal relations and bizarre backdrops, but our dreams have something in common: a knot with two connecting threads. I was there; she was there. I do not volunteer that I already know of our encounter.<sup>22</sup> Revelations like that bother most people. They challenge widely held beliefs about what is real and what is not.

How could such a wild dreamer have become a lawyer?<sup>23</sup> Even more confounding: how could such a wild dreamer have become a teacher of

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21. Walt Whitman recorded visitations to the dreams of others in his poem *The Sleepers*. WALT WHITMAN, *The Sleepers*, in LEAVES OF GRASS (1855), reprinted in THE PORTABLE WALT WHITMAN 30, 115 (Mark Van Doren ed., 1945). Whitman claimed more than visitation, however; he also claimed union with all those who sleep and dream:

The earth recedes from me into the night,  
I saw that it was beautiful . . . and I see that what is not  
the earth is beautiful.

I go from bedside to bedside . . . I sleep close with  
the other sleepers, each in turn;  
I dream in my dream all the dreams of the other dreamers,  
And I become the other dreamers.

*Id.* at 116.

22. Someone might label me as mentally ill. Some of my dreams are diagnostic. Sometimes in my dreams, and even when I am awake, I will get images of hot, violet-red pain in other people's joints, particularly those from the hip down. I am also overly sensitive to the clogged kidneys of others that manifest themselves, again in both my waking and dreaming life, as a lime, green phosphorescent light emanating from around the neck and shoulders. Confessing to these kinds of images can be dangerous. In a discussion of healers and shamans, Holger Kalweit writes about how many wild dreamers are institutionalized:

For the most part, Western mediums and healers live in a culture that regards their experiences as unnatural, if not pathological, and mediumistic activities are looked at from the point of view of standard psychological norms and are therefore regarded as hallucinatory. . . . [I]n our culture the symbols of transformation are negative: they include hospitalization, schizophrenia, brain-wave tests, stupefying psychotropic drugs, and ostracism from society. How many unrecognized shamans, mediums, and saints fill the madhouses of rationalism? How many powers have been mangled and cut off during the long history of psychiatry? How many people has psychology reduced to mindless robots through its abasement of the psyche?

HOLGER KALWEIT, SHAMANS, HEALERS, AND MEDICINE MEN 52, 54 (Michael H. Kohn trans., 1992) (1987).

23. It is not so much that lawyers would reject my dream life per se, but they would not accept that anything learned during a dream could qualify as knowledge. William James would probably call dreams "mystical states of consciousness." JAMES, *supra* note 5, at 292. Besides dreams' ineffability, James points out, their other hallmark is their "noetic quality." *Id.* at 293. James writes:

law? Teachers are authority figures; their job is to transmit knowledge, to inculcate the dominant values of the profession. How could a teacher operate out of a different—or at least augmented—epistemology from her students and colleagues? Were those who hired me just ignorant of my heresy? Or did they choose to hire a heretic—perhaps a court jester? Most of them are no longer alive, so perhaps it is not worth asking. Besides, being dead, they might be unable to reconstruct the narrow framework of thought that generated the conclusion, lo, these many years ago, that this wild dreamer should teach the law. Surely that must be one thing dying will do for you—it will broaden your horizons.<sup>24</sup> I am counting on that.

This article presents a mosaic of interrelated meditations on how judges have dealt with the admissibility of dream talk, interspersed with short digressions on the meaning of dreams from a variety of historical and cultural perspectives. In Part I, I begin with theories about dreams from Aristotle, Hobbes, and others. I then tell the story of O.J. Simpson, wild dreamer *extraordinaire*, interrupted by a Freudian interlude and a speculation about the theories that the jurors may have silently applied to Simpson's dreams of killing his wife. In Part II, I present three wild dreamers from family court: a husband who dreams of his wife's car exploding, a father who dreams about the future, and a six-year-old girl

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[M]ystical states seem to those who experience them to be also states of knowledge. They are states of insight into depths of truth unplumbed by the discursive intellect. They are illuminations, revelations, full of significance and importance, all inarticulate though they remain; and as a rule they carry with them a curious sense of authority for after-time.

*Id.* James may have found that sense of authority "curious," *id.*, but "rational" thinkers—and most lawyers wish to be included in that category—find that sense of authority bogus.

24. There have been some fascinating cases about the establishment of testamentary charitable trusts where the dead have tried to ensure that their worldly possessions go to some worthy cause that benefits them. The law of trusts and estates is also firmly grounded in the empiricist episteme. An English case demonstrates the law's hostility to gifts to any organization that ascribes to belief in paranormal phenomena. In *Beatty v. London Spiritualistic Alliance*, 1 Ch. 237 (1923), the decedent left a legacy to set up a trust to establish a college for the training of mediums. *Id.* at 239–40. Under the law, in order to establish such a trust, it had to be "a good charitable gift," namely, one that would benefit the public. *Id.* at 240. Justice Russell held the gift to be invalid:

If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects, of which the training of poodles to dance might be a mild example.

*Id.* at 242. The court expressly reserved the right to determine whether a college for mediums was foolish. I, for one, would love to leave some money to establish a college for dancing poodles. For a less demeaning assessment of spiritualism and the training of mediums, see *In re Lockwood's Estate*, 25 A.2d 168 (Pa. 1942). See also Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341 (1995).

who dreams of her own murder by her father. I explore how this girl would have fared under Carl Jung's theory of dreaming, or in the dreaming culture of the seventeenth century Iroquois. In Part III, I tell the story of the penultimate wild dreamer who dreamed he had killed a young woman (but had not) and ponder his confusion from the point of view of Descartes and the ancient Chinese philosopher Zhuang Zhou, ending with an interlude about what dreams mean in Tibetan Buddhism. In Part IV, I present the tale of the ultimate wild dreamer—a man who dreamed someone else had killed a young woman and ended up convicted of that crime.

Here is my central observation: how a judge will rule on the admissibility of dream talk will depend upon his or her theory about the meaning of dreams. That theory in turn will depend upon his or her metaphysics and episteme. Here is my conclusion: given the dominance of rationalism and the empirical episteme, evidence of dream talk should not be admissible.

My conclusion may seem inconsistent with my avowed experience as a wild dreamer. How could someone who believes that knowledge can be obtained from dreams argue against their admissibility? As a lawyer, I too have been indoctrinated in rationalism and the dominant, empirical episteme. I might be willing to accept a dream as a source of knowledge for myself, in my own private waking world, but I am not willing to send someone to prison, or to decide issues of child custody, on the basis of dream talk. Dream talk is too speculative. Because dreams are privately experienced in our culture, we have developed no criteria by which to judge their credibility. There are no shared assumptions about the meaning of dreams, no accepted principles about how to interpret them, no social norms about whether any given dream reveals the truth or is just foolishness. Under the empirical episteme, there is some agreement about what constitutes a valid claim of knowledge, and what does not. We are equipped to test the reliability of sentences that start out: I saw this, I heard that, I felt this, or I smelled that. We are not equipped to test the reliability of sentences that start out: I dreamed this or I dreamed that. We share no assumptions about the dream world; we have no common language to make sense of each other's dream talk.

Even more worrisome: no one can predict what theories about the meaning of dreams the jurors might follow. They sit silently in judgment. There is no way to detect what their metaphysical and epistemological assumptions might be. Indeed, it is precisely my status as a wild dreamer that compels me to argue against the admissibility of

dream talk. I am all too familiar with how easy it is to mask one's competing world view beneath a veneer of rationality—even from one's self. Too much authority might be granted to dream talk. Someone might think that God was talking, for example,<sup>25</sup> or that the direction of time was temporarily reversed. For all anyone knows, the jurors' assumptions about the source and meaning of dreams may be as wild as mine—or wilder. I know a man, a staunch member of the community, a sweet, bald, middle-management kind of guy, who believes that aliens are not only walking among us, but actively intruding in our dreams. He worries that through his dreams, his waking life is being micro-managed by a busy body from a distant corner of the universe. In my private life, I am willing to concede that any of those things might be happening, but not in the courtroom. Not with someone else's life at stake.

How did I become interested in the admissibility of dream talk into evidence? During the O.J. Simpson trial, Judge Ito admitted a statement by Simpson that he had dreams of killing his wife, and I was bothered by that. I am still bothered by that. A lot. One day, while daydreaming about the Simpson trial, I discovered that on occasion the dream world interjects itself into the rational, empirical, waking world of the law. More often than not, these intrusions occurred in criminal prosecutions for murder. There were other kinds of cases as well, mostly from family court, in which dreams were offered to prove the unfitness of a parent, or to show the dreamer's damaged state of mind. I became intrigued with the clash of epistemes.

As I researched the subject of the admissibility of dreams, I also began to wonder if there was any role for the wild dreamer to play in the legal profession and its academy. A hidden agenda developed, although as I reveal it, I suppose it loses its essence of subterfuge. Does the wild dreamer who lives with and inside the law have anything to contribute? And the wild dreamer law professor? Those questions are close to the surface of this article, still under water, but getting enough sunlight to know that they are there.

Enough introduction. Let me begin with Aristotle and Hobbes, and some premodern theories of dreaming, just to get us started. Then I will tell you the story of O.J. Simpson who was a wild dreamer *extraordinaire*. Freud will erupt in the middle of that story. Do not despair at the article's lack of linearity. Just pretend you are in a dream.

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25. See *infra* Part I.A.

# I. SOME EARLY THEORIES ABOUT DREAMS, O.J. SIMPSON, AND A FREUDIAN INTERLUDE

## A. Aristotle, Hobbes, and Some Premodern Dreamers

I begin with the mundane, a characterization that Aristotle, who always had his feet planted firmly on the ground, would not have quarreled with. Aristotle's theory about dreams and their meaning—or lack thereof—is the least ambitious, and consequently, the easiest one to grasp.<sup>26</sup> I also suspect that for those readers who are not psychologically inclined, Aristotle's theory about dreams will still resonate. It sounds remarkably modern, and for that reason, belongs more to the empirical episteme than to what I shall call the premodern or medieval.<sup>27</sup>

Dreams, Aristotle believed, were the result of impressions that had been experienced in the physical world, and were re-experienced in the

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26. Aristotle departed from the earlier Greek view of dreams in which it was believed that a god would actually make a visit to a sleeping person in some recognizable form. These dreams were often the result of incubation—"the practice of seeking dreams for specific purposes." LEWIS, *supra* note 11, at 4. People went to special temples devoted to the god Aesculapius, the most popular healing divinity in the Hellenistic world. *Id.* There they would fast, engage in rituals, and sleep, with the intention of receiving a healing dream. *Id.* Other gods made visitations in dreams as well. In *The Iliad*, Zeus sent dreams to chosen people (the recipient was always a male). See HOMER, *THE ILIAD* book 2, at 100, lines 33–34 (Robert Fagles trans., 1991). In *The Odyssey*, Athena sent dreams to female recipients (for example, Athena sent a phantom to Penelope's bedroom to tell her at the "gate of dreams" about how Telemachus, her son, was alive and well). See HOMER, *THE ODYSSEY* book 4, at 150–51, lines 910–45 (Robert Fagles trans., 1996). As one scholar put it:

Dreams were considered to be objective facts, things that happened to you. The Greek was 'visited' by a dream (episkopein), at best he 'saw' a dream (enypnion idein). They would never have dreamed of saying as the French do nowadays, 'J'ai fait un rêve,' or the Italians, 'Ho fatto un sogno.'

Carl Alfred Meier, *The Dream in Ancient Greece and Its Use in Temple Cures (Incubation)*, in *THE DREAM AND HUMAN SOCIETIES* 303, 308 (G.E. Von Grunebaum & Roger Caillois eds., 1966). This purely religious attitude towards dreams was replaced by the more rationalistic tradition exemplified by Aristotle.

27. I confess to using the word "modern" very loosely. I do not mean to imply that the medieval period was the only premodern historical age; obviously, for example, Aristotle belonged to classical Greece, having lived sometime in the fourth century B.C.E., although his ideas often seem more "modern." "The word *modern*, first recorded in 1585 in the sense 'of present or recent times,' has traveled through the centuries designating things that inevitably must become old-fashioned as the word itself goes on to the next modern thing." *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* (4th ed. 2000), <http://www.bartleby.com/61/28/M0362800.html>. I am using it more in that broader sense, although historically, the empirical episteme became dominant within the historical period typically dubbed "modern." At any rate, I acknowledge sloppiness of usage here in using the terms "premodern" and "medieval" synonymously. Some of my famous premodern wild dreamers were medieval, but others belonged to much earlier periods, and some of us are still around.

dream in a random fashion.<sup>28</sup> He pointed out that people usually dream at night of the same experiences that occurred earlier in the day; similarly, a dream at night might cause someone to get up in the morning and repeat the same experience.<sup>29</sup> Since the soul is more sensitive at night, Aristotle argued, it is more likely to register sensations from the outside, magnifying their degree and changing their quality:

This is plain in what often happens during sleep; for example, dreamers fancy that they are affected by thunder and lightning, when in fact there are only faint ringings in their ears; or that they are enjoying honey or other sweet savours, when only a tiny drop of phlegm is flowing down [the oesophagus]; or that they are walking through fire, and feeling intense heat, when there is only a slight warmth affecting certain parts of the body. When they are awakened, these things appear to them in this their true character.<sup>30</sup>

For Aristotle, the dream was nothing more than the result of somatic stimuli. There was no divine agent; God had nothing to do with it.<sup>31</sup>

As they ushered in the modern age,<sup>32</sup> the empiricists of the sixteenth and seventeenth centuries expanded upon this Aristotelian belief that dreams were merely a biological response to external stimuli. Hobbes was exemplary, expressing a dogged dualism that was the hallmark of western philosophy.<sup>33</sup> He had no trouble distinguishing the honey of his

28. ARISTOTLE, *De Divinatione per Somnum*, in *THE BASIC WORKS OF ARISTOTLE* 626, 627 (Richard McKeon ed., 1941).

29. *Id.*

30. *Id.*

31. *Id.* Aristotle embraced many of the principles that later belonged to empirical science and rejected Platonic metaphysics. In *De Anima*, for example, he developed a theory of the soul that treated the soul and the body as constituting a single entity, standing to each other in the relation of form to matter. ARISTOTLE, *DE ANIMA* 156–57 (Hugh Lawson-Tancred trans., 1986). Aristotle believed that the waking state was determined by the activation of the common-sense faculty, and the sleeping state by its inactivity. The illusion of “sense-perception” in sleep is due to “the improper functioning of the senses, which frees the way for the forming of dreams, without correction by judgment or evaluation.” LEWIS, *supra* note 11, at 19. Aristotle wrote about dreams in *De Somno et Vigilia*, *De Insomniis*, and *De Divinatione per Somnum*. *Id.* at 18.

32. Most European history texts consider the Early Modern Period to span 1500–1800, with the later Modern Period covering perhaps 1789–1914. See, e.g., *THE ENCYCLOPEDIA OF WORLD HISTORY*, tbl. of contents (Peter N. Stearns ed., 6th ed. 2001), <http://www.bartleby.com/67>. The Protestant Reformation ended the medieval period and heralded the beginning of the modern period.

33. Hobbes went even further than Aristotle, assuming that all dreams were the result of physical factors:

And seeing dreames are caused by the distemper of some of the inward parts of the Body; divers distempers must needs cause different Dreams. And hence it is, that lying cold breedeth

dreams from the phlegm that flowed down his esophagus. When Hobbes was awake, he was not dreaming, and what he experienced was real. When Hobbes was asleep, he was dreaming, and what he experienced was not real. The dreaming state was just the reverse of the waking state. "And that as Anger causeth heat in some parts of the Body, when we are awake," Hobbes argued,

so when we sleep, the over heating of the same parts causeth Anger, and raiseth up in the brain the Imagination of an Enemy . . . . In summe, our Dreams are the reverse of our waking Imaginations; The motion when we are awake, beginning at one end; and when we Dream, at another.<sup>34</sup>

Aristotle and Hobbes both denied that dreams could have a divine origin, or that they could be interpreted through the use of supernatural skills. Their beliefs were in stark contrast to the premodern or medieval tradition with its belief in an ultimate, transcendent reality, the worldly reality being only its sign or symbol.<sup>35</sup> In the premodern era, the universe and the individual life were centered on God; man's purpose was outside of himself. This meant that the source and rationale of all the incidents of man's life, including dreaming, were divine.<sup>36</sup> Thus, under Jewish and Christian belief systems, the dream was often deemed to be a vehicle for divine/human encounters.<sup>37</sup> God appeared to a number of patriarchs, including Abraham, Jacob, and Joseph; the dreams were usually prophetic and often exhorted the dreamer and his people to

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Dreams of Feare, and raiseth the thought and Image of some fearfull object (the motion from the brain to the inner parts, and from the inner parts to the Brain being reciprocall[.])

THOMAS HOBBS, *LEVIATHAN* 91 (C.B. Macpherson ed., 1968) (1651).

34. *Id.*

35. G.E. Von Grunebaum, *Introduction: The Cultural Function of the Dream as Illustrated by Classical Islam*, in *THE DREAM AND HUMAN SOCIETIES*, *supra* note 26, at 3, 5.

36. In premodern belief systems, "the dream is seen as possessed of cognitive force in regard to otherwise inaccessible sectors of objective reality, especially such as the future and the Hereafter, or, more generally, truths bearing on man's relation to the divine." Meier, *supra* note 26, at 6.

37. The Book of Daniel consists largely of a series of dreams and visions; it is the most complete treatment of dreams in the Talmud. Daniel interpreted the dreams of King Nebuchadnezzar who was afflicted by insomnia brought on by his awareness of portentous dreams that he could not remember. After consulting a number of Babylonian soothsayers who were unable to help him (and who paid for their failure by execution), Daniel sought assistance from God who revealed the meaning of the king's dreams. One dream prophesized that his kingdom would one day be divided; another exhorted the king not to assume he was all powerful, a warning Nebuchadnezzar did not heed, paying for his hubris by being afflicted with a strange psychosis that lasted seven years. *See generally Book of Daniel.*

take a particular course of action.<sup>38</sup> The New Testament has a number of dreams that were divinely inspired—for example, the Lord’s visitation to Joseph in a dream, telling him to take Mary for his wife, since “that which is conceived in her is of the Holy Ghost.”<sup>39</sup> Both the Jewish and Christian traditions regarded the dream as highly symbolic, requiring the assistance of a skilled interpreter to decode its meaning; almost always the dream was a revelation from God directing the course of human affairs.<sup>40</sup>

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38. In biblical accounts, the dream has sometimes served as a means of encountering God directly. The most prolific dreamers in the Talmud were the patriarchs, in particular Abraham, Jacob, and his eleventh son, Joseph. All of their dreams were forms of divine communication; most were direct revelations from God about his involvement in human affairs. Abraham, the ancestor of the Jews, was visited by God in a deep sleep. He was told the prophecy of the enslavement of the Jews for four hundred years and made a covenant to eventually save them. *Genesis* 15:12–16. The patriarch Jacob had the famous dream of “Jacob’s ladder,” and his son, Joseph, was not only a famous prophetic dreamer, but a famous dream interpreter. *See id.* 28:11–16. When Joseph interpreted the Pharaoh’s dream to foretell seven years of hunger and famine in Egypt, he recommended a plan to save the nation from the famine, and the Pharaoh was so impressed, he made Joseph prime minister. When Joseph’s family came to Egypt to buy grain, they honored him, according to earlier dreams that he had experienced, in which not only his family, but “the sun and the moon and the eleven stars made obeisance to me.” *Id.* 37:9.

39. *Matthew* 1:20. This dream announced to Joseph the conception of Christ. There were also three dreams connected to the flight into Egypt: the dream of the wise men who were warned not to return to Herod; the dream in which one of God’s agents, an angel, tells Joseph to go into Egypt to escape Herod; and after Herod’s death, the dream in which the agent again tells Joseph to return to the land of Israel. LEWIS, *supra* note 11, at 33.

40. The Islamic tradition also holds that dreams are revelations from God. LEWIS, *supra* note 11, at 131–32. Islam is essentially “a prophetic religion that is based on a series of divine revelations given to the prophet Muhammad through an angel during the latter part of his life,” sometime around 610 to 632 C.E. *Id.* at 131. Some of Muhammad’s spiritual instruction came through the medium of dreams. *Id.* In Islam, the Koran spells out a classification of dreams to Joseph. They are of three kinds: dreams of glad tidings from God; dreams of warning from the devil; and dreams that originate in the self. Von Grunebaum, *supra* note 35, at 7–8 (citing Abdalghanī ad-Nābulusī, *Ta’īr al-anām fī ta’bīr al-manām*, I, at 3–4 (1316)). Dreams could also, among other things, constitute a private prophecy, bear on politics, or be used to elucidate theological doctrine. *See id.* at 11–21.

In the Hindu tradition, the sacred literature is full of references to dreams, and most of them suggest that dreams are somehow connected to the supernatural. In the Rig Veda, for example, there are hymns for avoiding the evil effects of dreams that were said to cause disease and ill fortune. KRISHNA DAS GUPTA, *THE SHADOW WORLD* 52–53 (1971) (citing several Hymns of the Rig Veda). In the Brihad-Aranyaka Upanishad, there were two theories about dreams. *Brihad-Aranyaka, Fourth Adhyaya*, 3.7–.34, in *THE THIRTEEN PRINCIPAL UPANISHADS* 134–39 (Robert Ernest Hume trans., Oxford Univ. Press 2d ed. 1995). One held that the soul took information from the world and constructed objects

according to its own choice and desire. The other, which is very important as being connected with the idea of the immortality of the soul, states that during sleep the soul gets away from the body and experiences things which were distant from the sleeper. This theory implies that the soul roaming at a distance from the body may not find its way back into it and this has been regarded as an evil, very difficult to cure.



During the medieval period, mistranslations by St. Jerome of key biblical passages led to the notion that demons might visit someone during a dream.<sup>41</sup> The central idea was that Satan's minions were sent out to sleeping souls to lure them into temptation. Benedict Peterius, a sixteenth century Jesuit priest, wrote: "The devil is most always implicated in dreams, filling the minds of men with poisonous superstition and not only uselessly deluding but perniciously deceiving them."<sup>42</sup> St. Hildegard of Bingen, a tenth century nun, was a wild dreamer and categorized her dreams as either prophetic or simply mundane, but she too "warned people to beware of demons masquerading as divine beings."<sup>43</sup> Perhaps nowhere was this suspicion of dreams more clearly demonstrated than in the notion of the incubi and succubi, particularly during the Inquisition.<sup>44</sup> These were demons who took the form of handsome men and women who seduced the dreamer in his or her sleep.<sup>45</sup> The incubi and succubi explained how otherwise celibate people—perhaps those who had given themselves up to God—could awaken in a state of sexual arousal with impunity<sup>46</sup>—a medieval version of "the devil made me do it."

Historically, it was too late for anyone in the courtroom in O.J. Simpson's murder trial to seriously argue that his dream of killing his wife was the work of demons. Neither was the biologically based theory of dreaming on anyone's mind. Rather, the *Simpson* case was tried about a hundred years after Sigmund Freud published *The Interpretation of Dreams*.<sup>47</sup> As the prosecutors sought to introduce evidence of Simpson's dream talk, they were counting on the fact that everyone in the

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DAS GUPTA, *supra*, at 53.

41. LEWIS, *supra* note 11, at 158. Apparently St. Jerome was preparing a Latin translation of the Bible during the fifth century, and he consistently mistranslated a Hebrew word, resulting in a prohibition against any kind of dream work in the sacred text. As a result, dreams were "categorized with witchcraft for more than a thousand years." Wilse B. Webb, *Historical Perspectives: From Aristotle to Calvin Hall*, in DREAMTIME AND DREAMWORK, *supra* note 14, at 175, 179.

42. LEWIS, *supra* note 11, at 158.

43. FRANCIS, *supra* note 15, at 15.

44. LEWIS, *supra* note 11, at 123.

45. *Id.* at 158. An incubus was male, a succubus female, and they worked in concert. Incubi were sterile, but could still impregnate women with seed taken by succubi from men—a belief that was sometimes used to explain pregnancies from secret liaisons. *Id.* at 158.

46. *Id.*

47. Freud's *The Interpretation of Dreams* was published in 1900. SIGMUND FREUD, THE INTERPRETATION OF DREAMS 154 (James Strachey ed. & trans., 1965) (1900). The O.J. Simpson case was tried in 1994–1995. Jacquelyn Cenacveira, *The Simpson Verdict; Simpson Case Timeline*, L.A. TIMES, Oct. 3, 1995, at A3.

courtroom knew about Freud's theory and how Simpson's dreams revealed what was on his unconscious mind.

Not only that: the prosecutors may have been counting on the fact that some of the jurors might not be wholly rational in their thought. Their indoctrination in the dominant episteme might not have taken hold. As one scholar put it, certain contemporary attitudes towards dreams are incompatible with our concepts of infinite universe and of causation, in short with the major assumptions of both our cosmology and our epistemology. . . . Like an erratic bloc surviving from a past geological age the popular quest for material guidance from dreams, fed by curiosities and anxieties, continues on the medieval pattern.<sup>48</sup>

As Simpson's dream talk was revealed, most of the jurors were probably steered by the prosecution to give it meaning under Freud's theory of dreaming. But some of the jurors may have continued on the medieval pattern. Either way, how the jurors interpreted Simpson's dreams posed grave danger to his defense.

But let me tell you first about O.J. Simpson, wild dreamer *extraordinaire*.

#### B. *O.J. Simpson: Wild Dreamer Extraordinaire*

O.J. Simpson was a dreaming man. The admissibility of evidence about Simpson's dreams was at issue in his trial for the brutal murders of his wife, Nicole Brown Simpson, and her friend, Ron Goldman, by multiple stabbings, slashings, and cuttings.<sup>49</sup> Ron Shipp, a former Los Angeles police officer and would-be actor, was a friend of O.J. Simpson.<sup>50</sup> On the evening of June 13, 1994, the day after the murders, Simpson asked Shipp to accompany him to his bedroom to ask questions about the police investigation of the crime.<sup>51</sup> According to Shipp's statement to the police, Simpson first inquired about how long it took for DNA evidence to come back:

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48. Von Grunebaum, *supra* note 40, at 3, 6.

49. Record, Motion re Admissibility of Statements of Ronald Shipp, Examination of Ronald Shipp, *People v. Simpson* (L.A. Super. Ct. 1995) (No. BA097211), 1995 WL 37667, at \*1–\*13 [hereinafter Motion re Admissibility]; Record, Motion re Admissibility of Statements of Ronald Shipp (Resumed), Examination of Ronald Shipp, *Simpson* (No. BA097211), 1995 WL 39921, at \*1–\*9 [hereinafter Resumed Motion re Admissibility]. I am grateful to Professor Martin Schwartz for alerting me to the dream talk issue in the *Simpson* case.

50. Motion re Admissibility, *supra* note 49, at \*18.

51. Resumed Motion re Admissibility, *supra* note 49, at \*19–\*20.

[Shipp:] Yeah, It just came out of the blue . . . I mean he was just telling me regular O.J. talk and this just came out of the blue[.] He says, "How long does it take for D.N.A. evidence to come back?" I honestly have no idea, but I told him ["two months." And uhm, then uhm, I don't know [we're] watching T.V. for a while and then he said, oh, uhm, let me back up. Way before he brought up the D.N.A[.], he was telling me about this interview and he did not name the detective[,], he did not name you guys, but he said, "I was interviewed by detectives and they asked me to take a lie detector test." And I replied, "Well, what did you say?" And he kind of chuckled and he says, "Hey, to be truthful Ron, Man, I have had a lot of dreams about killing her." And he says, "I really don't know about taking that thing." He did not say ["I won't take it.["] He said, "I really don't know about taking it."

[Detective Vannatter:] Did he elaborate on these dreams?

[Shipp:] No. And I really did not ask him, because I said, "I am in shock man." I just did not know what to say to this man . . . and at this point in time, it's not personal. I mean from being a police officer, I just knew my personal belief, that he was guilty by asking these questions then.<sup>52</sup>

For a month, Ron Shipp did not reveal this conversation to anyone but his wife.<sup>53</sup> When police detectives interviewed him, he did not tell them about Simpson's statement that he had dreamed of killing his wife; neither did he subsequently tell the prosecutors.<sup>54</sup> In Shipp's later testimony at trial, he explained his failure to reveal it as a mixture of concern for Simpson ("I mean I loved this man for 26 years"),<sup>55</sup> shock, and a desire to distance himself, wanting "nothing to do with any of this

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52. People's Points and Authorities in Support of Admitting Defendant's Statement to Ron Shipp, *Simpson* (No. BA097211), 1995 WL 39922, at \*3-\*4 [hereinafter Points & Authorities].

53. Record, Examination of Ronald Shipp (Resumed), *Simpson* (No. BA097211), 1995 WL 37668, at \*8. Similarly, when he was interviewed a couple of times by the defense team, Shipp was asked to tell them the worst things he knew about O.J. Simpson, and he still did not reveal the conversation. *Id.* at \*12. While Shipp agreed that "this statement about the supposed dream is a pretty bad thing about Mr. Simpson," and that he had lied about the statement about the dream, he felt both guilty towards the victims and loyal to the defendant. *Id.* "I really did not want to be really involved in all of this and I didn't want to be going down as a person to nail O.J." *Id.*

54. *Id.* at \*8.

55. *Id.*

at the time. I just—I was just still thinking it was a dream like most of America.”<sup>56</sup>

A month after the murders, Ron Shipp was interviewed by Sheila Weller for her book *Raging Heart*, and consented to her relaying the conversation, as long as she referred to him by the pseudonym Leo.<sup>57</sup> Shipp revealed the conversation to Weller, and later to the police and the jury: “for my conscience and my peace of mind. I will not have the blood of Nicole on Ron Shipp. I can sleep at night unlike a lot of others.”<sup>58</sup> The conversation with Simpson about his dreams of killing Nicole was “eating” him up, and he initially talked to Weller, on the condition of anonymity, hoping to “exercise [sic] this pain” from his body.<sup>59</sup>

When Ron Shipp was set to testify, Simpson’s defense team hotly contested the admissibility of the entire statement, including both Simpson’s reluctance to take the polygraph test and his dreams of killing Nicole.<sup>60</sup> Also contested was Simpson’s puzzling chuckle sandwiched between Simpson’s answer to Shipp’s question about how Simpson had responded when detectives asked him to take the lie detector test and Simpson’s “to-tell-the-truth” seven-word admission that “I’ve had a lot of dreams about killing Nicole.”<sup>61</sup>

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56. *Id.*

57. *Id.* at \*15–\*16.

58. *Id.* at \*18.

59. *Id.* at \*16. Shipp admitted that once Weller’s book revealed the conversation about the dreams between “Leo” and Simpson, he believed someone from the police or prosecution team would investigate the source of that conversation. *Id.* at \*14. Fearing that he might have to perjure himself (“I did not want to sit up here and lie. Like I said, I’ve never lied on the stand ever in my life and I’m not starting now,” *id.* at \*18.), Shipp contacted law-enforcement authorities himself a day or two before the book came out. *Id.* at \*17.

60. See Motion re Admissibility, *supra* note 49, at \*1–\*13.

61. What was Simpson chuckling about, defense counsel argued? Simpson’s counsel said:

Is he chuckling because the whole idea of a polygraph was funny because he is innocent and of course he passed? Is he chuckling because it is a silly idea because he is innocent and he throws in just by happenstance the sentence, ‘Well, you know, I’ve had dreams about killing her’? Is he chuckling because the whole idea of having dreams is funny to him as well? Who knows.

*Id.* at \*13.

There was some confusion about which of the statements the chuckle related to: Simpson’s reluctance to take the polygraph test, or Simpson’s statement about dreams of killing Nicole. *Id.* at \*10–\*11. The prosecution yielded to the admission of the chuckle, as long as it reflected upon the statement about dreaming of murdering his wife. *Id.* About the defense position that the chuckle related to Simpson’s “flippant attitude about polygraphs,” the prosecutor argued:

What on earth does that begin to say about the context of the statement that we are concerned with, about dreaming about the murder of his wife? That is the statement we are interested in

The prosecution yielded on the statement about the polygraph test<sup>62</sup> but insisted on the admission of the dream talk,<sup>63</sup> arguing that the dream was relevant to Simpson's state of mind.<sup>64</sup> Building upon its contention that Simpson was a wife-batterer who went too far, the prosecution argued that the statement was

circumstantial evidence of a—what you could call a fatal obsession with this woman. And here it is almost as if he is saying I have a fatal obsession with Nicole except people don't talk like that, and the way that he expresses it is he says I have been having a lot of dreams about killing her, and to me that seems like it is so obviously powerful compelling evidence of this fatal obsession with this woman that it is almost difficult for me to—to think of—to articulate, to put it into words. It is one of those things that almost seems to leap out.<sup>65</sup>

The defense obviously quarreled with the prosecution over this claim of relevance. While the Dream Team<sup>66</sup> was not prepared to produce expert testimony at the hearing on the statement's admissibility, it argued that "whenever there are statements of dreams or questions of dreams, it is not necessarily indicative of the state of mind of the speaker."<sup>67</sup> There

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putting into context. . . . [H]e should have argued that somehow the chuckle reflects upon that statement, but to the extent that it does, the chuckle can come in.

*Id.* at \*11.

62. The prosecution yielded because they had to. According to the U.S. Supreme Court, "[T]here is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques." *United States v. Scheffer*, 523 U.S. 303, 309 (1998). One fear is that by "its very nature, polygraph evidence may diminish the jury's role in making credibility determinations." *Id.* at 313. Moreover, such evidence is explicitly excluded under the California Evidence Code. *See* CAL. EVID. CODE § 351.1 (West 1995). In the prosecution's words, "Since references to polygraphs are not admissible in evidence . . . the brief statements of the defendant that the detectives asked him to take a lie detector test and that he 'didn't know about taking one' should be omitted." *Points & Authorities*, *supra* note 52, at \*3.

63. The prosecution got around the hearsay rule by arguing that Simpson's statement was admissible under California Evidence Code Section 1220 as an admission of a party. *Points & Authorities*, *supra* note 52, at \*2. Such statements need not be incriminating. *See id.* (citing *People v. Aho*, 199 Cal. Rptr. 671, 674 (1984); *People v. Perkins*, 180 Cal. Rptr. 763, 768 (1982)).

64. *Id.* at \*3.

65. Motion re Admissibility, *supra* note 49, at \*11.

66. The Dream Team was the name given by the press to Simpson's defense team. It consisted of a cadre of famous lawyers, including Johnnie Cochran, F. Lee Bailey, Robert Shapiro, Alan Dershowitz, Barry Scheck, and Peter Neufeld. For a criticism of the term "Dream Team," and a description of how the team was put together, see VINCENT BUGLIOSI, *OUTRAGE: THE FIVE REASONS WHY O.J. SIMPSON GOT AWAY WITH MURDER* 34–42 (1996).

67. Motion re Admissibility, *supra* note 49, at \*9.

was no “probative nexus between someone saying that I dreamt about something, assuming for the sake of my statement that the statement was made, and that it means something that is relevant to the trier of fact.”<sup>68</sup>

The defense argued that O.J. Simpson was a distraught, weary, and unreliable narrator of the things of which he had dreamed, in the sleep he was not getting. To let the jury hear these seven words was highly prejudicial—too high a price to pay for evidence of negligible probative value.<sup>69</sup> The defense threatened to bring out a cadre of experts:<sup>70</sup>

[These experts will] talk about dreams and particularly in the context when this man is told that very day that a woman with whom he had been involved for seventeen years had just died . . . he is told on the telephone that this happens and he rushes back and he is consumed with all of this grief and all of this uncertainty and all of this emotion and he is tired because he didn’t sleep going to Chicago and didn’t sleep coming back and there are these family members that are also grieving with him. There is an entire context, your honor, that it would be unfair to require that we simply examine under a microscope six or seven different words without appreciating the entire context in which it is offered.<sup>71</sup>

Judge Ito focused on the polygraph references, but expressed some curiosity about what inferences a jury might draw from Simpson’s dream statement that “I have had a lot of dreams about killing her.”<sup>72</sup> He indicated that “it is a little more indirect as a thought process. So the

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68. *Id.*

69. Alan Dershowitz, O.J. Simpson’s “hired constitutional guardian,” stated in a telephone interview that Judge Ito’s ruling admitting Simpson’s statement that he had dreams of killing Nicole constituted “a very significant issue on appeal here.” Brian McGory, *Attorney Sees Grounds To Appeal Simpson Case*, THE BOSTON GLOBE, Feb. 3, 1995, at 3. “We have looked at 10 cases around the country, all of which say dreams are not admissible. They say they’re prejudicial, because dreams do not reflect reality.” *Id.* Obviously, since Simpson was acquitted, there was no need for an appeal.

70. When proposed evidence is of a novel type, subject to a significant debate within the scientific community, most jurisdictions allow a hearing to determine whether to admit this kind of expert testimony. In California, it was called a “Kelly-Frye hearing” at the time of the Simpson trial. *See* CAL. EVID. CODE § 801 (West 1995). Oddly enough, the defense did not request such a hearing regarding the admission of dreams, and Judge Ito did not order one on his own. Although the defense implied that there would be such a hearing, *see* Motion re Admissibility, *supra* note 49, at \*9 (“Therefore, there is going to be a great deal of scientific testimony that I will have to try to obtain to put on people that will be able to talk about dreams.”), it seems from the record that there never was such a hearing on the scientific significance of dreams—an oversight in my mind.

71. Motion re Admissibility, *supra* note 49, at \*9.

72. *Id.* at \*11.

question then becomes what is the probative value of, you know, putting your head on the pillow and having dreams about killing your wife?"<sup>73</sup> Ito asked the parties if either side had "found cases that deal with admissibility of dreams."<sup>74</sup> The prosecution, the proponent of the evidence, confessed "quite frankly we didn't even research that, your honor, because it seemed like our thought process was much the same as the court's and that we were more concerned about the issue of the polygraph and redacting that out."<sup>75</sup> The prosecution argued that the jury should be able to use "their collective life experience and their common sense for the purposes of interpreting evidence . . . . [T]hat is all we are

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73. *Id.*

74. *Id.* at \*12. Despite this request, it became clear from the transcript that Ito planned to admit the statements about Simpson's dreams when he began to inquire into the mechanics of how the prosecution was going to question the witness, redacting out the references to the polygraph test, and including the statement about the defendant's dreams. *Id.* ("All right. Mr. Goldberg, how would you propose to present this, knowing the mine fields that are apparent on either side of this sentence?").

75. *Id.* Judge Ito was the only participant at the hearing who cited to any case law about the admissibility of dream talk. Resumed Motion re Admissibility, *supra* note 49, at \*3. Ito urged both parties to read *State v. White*, 156 S.E.2d 721, 722 (N.C. 1967), a murder case in which the defendant, Bobby Joe White, was prosecuted for the shooting of his good friend, Bud Brown, in a poolroom brawl. Resumed Motion re Admissibility, *supra* note 49, at \*3. In *White*, a witness, Booker T. Brown, testified that he had worked with the defendant the day before Bud Brown had been shot, and when asked about a conversation with the defendant on that day, he said, "'We were riding to work together every day. That Thursday morning we were going to work, he said he dreamed that he had shot Bud.'" *White*, 156 S.E.2d at 723. The defendant denied ever having made such a statement, and argued it was error to admit it since the jurors were not competent to interpret a dream. *Id.* The state argued that Bobby Joe's statement that he had dreamed he had shot Bud was "competent to show ill will and malice against the deceased." *Id.* The Supreme Court of North Carolina agreed with the defendant's brief that stated, "'We submit that even a highly specialized expert would have difficulty explaining the meaning of such a dream.'" *Id.* The court went on to note:

What a dream means, if anything, presents an occurrence filled with mystery. As to the meaning of a dream, we can only conjecture. The evidence as to the statement of the defendant that he dreamed that he shot Bud leaves the meaning of the dream in the realm of mere conjecture, surmise, and speculation, and one surmise may be as good as another. Nobody knows.

*Id.* at 724. The speculative nature of the dream, however, worked against the defendant. *Id.* Even if the evidence were incompetent, the court concluded, "it is, in our opinion, so speculative and uncertain as to have had no probative force on the minds of a jury and would not justify a new trial of this case." *Id.*

Judge Ito's application of the *White* court's rationale—that dream evidence is so speculative it can have no probative force on the minds of the jurors—must have been his reason for admitting the dream talk evidence, although the record does not reflect his rationale. Ito merely stated, "The statement regarding the dreams about killing will be admitted." Motion re Admissibility, *supra* note 49, at \*13.

going to be asking them to do here.”<sup>76</sup> Without explaining why, Judge Ito finally ruled that the references made to the polygraph test would be excluded, and that the “statement regarding the dreams about killing will be admitted.”<sup>77</sup>

To my mind, Judge Ito made a mistake.<sup>78</sup> Simpson’s statement about

76. Motion re Admissibility, *supra* note 49, at \*12.

77. *Id.* at \*13.

78. In the press, there were many commentators who shared this view. The former Los Angeles County District Attorney, Ira Reiner, came right out and called Ito’s ruling “wrong”:

Before you can put on any evidence about the significance of our dreams, you have to deal with the question of do our dreams truly reveal our thoughts and feelings . . . Maybe they do, maybe they don’t. There is nothing approaching general agreement in the scientific community on this.

Jim Newton & Andrea Ford, *Simpson Dreamed of Killing, Witness Says*, L.A. TIMES, Feb. 2, 1995, at 1. A defense attorney, Gerald L. Chaleff, posited that if there is such a thing as reversible error, “it would seem like this is it. . . . Discussions of a defendant’s dreams or nightmares are prejudicial by their very nature because they suggest that merely dreaming about something means you’re going to do it. Common experience tells all of us that isn’t true.” *Id.* Professor Peter Arenella from the University of California at Los Angeles agreed that “Ito faltered badly in allowing the testimony.” McGory, *supra* note 69, at 3. However, Arenella went on to say, “It is clearly an error to admit this dream, for several reasons. This is a great issue for appeal, but in California, almost nothing is a reversible error. A California appellate court might still rule this is harmless.” *Id.* (internal quotations omitted).

Had a California court ruled the admission of dream evidence to be harmless error, it would not find itself alone. For example, in *State v. Tyler*, the Supreme Court of Kansas ruled that admitting a defendant’s dream narration via another witness was improper. 840 P.2d 413, 426 (Kan. 1992). In *Tyler*, the defendant was convicted of second-degree murder, aggravated assault of a law enforcement officer, and various drug-related charges. *Id.* at 419. John Tafoya, a defendant’s friend, had testified at a preliminary hearing that the defendant had “described a dream to him in which a Colorado detective almost captured him.” *Id.* at 425. After that dream narration, the defendant said that if the Colorado detective, Pat Crouch, came to get him, “[t]hey would have to shoot him and he would take someone out with him.” *Id.* The Kansas Supreme Court held that it was an abuse of discretion to admit Tafoya’s testimony to prove the defendant’s state of mind. *Id.* at 426. The court reasoned: “Such evidence is too speculative to be reliable. Although Tyler’s statement to Tafoya was not a part of the actual dream, it was so closely related to the dream that it also lacks probative value.” *Id.* The court concluded, however, that the error was harmless. *Id.*

In a Michigan appellate court case, *People v. Allen*, No. 212699, 2000 WL 33418839 (Mich. Ct. App. June 9, 2000), the defendant was convicted of a first-degree murder for shooting his codefendant’s girlfriend who was preparing to inform the police about her boyfriend’s drug dealing. *Id.* at \*1. After the shooting occurred, the defendant spent the night with friends. *Id.* He awakened his friend Riddle crying, “She was after me, and that she is all bloody.” *Id.* Later Riddle told someone else that she had “heard the dream he had.” *Id.* Citing *Tyler*, the court agreed that

the evidence of defendant’s dream, and his statement following that dream even though he was awake when he made the statement, lacks probative value. The statement was made immediately upon defendant awakening and was clearly induced by the dream. “Such evidence is too speculative to be reliable.”

*Id.* at \*2 (quoting *Tyler*, 840 P.2d at 426). However, also following the rationale in *Tyler*, the court held that the error was harmless. *Id.* It could not “conclude that Riddle’s testimony concerning defendant’s statement about his dream had such an effect as to undermine the reliability of the



having dreamed of killing Nicole should not have been admitted. That statement directly related to Simpson's fear about taking the lie detector test. He was afraid that he might fail the test. He knew that polygraph tests measure changes in the subject's body that are beyond the subject's control: damp palms, beating heart, shallow breaths.<sup>79</sup> When it came time to answer questions about killing Nicole, he might balk because of the dreams he remembered about killing her. Just as a dog might twitch involuntarily in his sleep over chasing a rabbit, its body being fooled into thinking the dream was really happening, Simpson was worried that the opposite would happen. While awake, his body might twitch involuntarily when asked about killing Nicole, being fooled into thinking the dream had really happened. It was not an irrational fear at all. Those involuntary twitches might look a lot like a confession.<sup>80</sup>

Simpson's thought had two parts: (1) I am afraid to take the polygraph test because (2) I have had a lot of dreams about killing Nicole. Ito, and all of the attorneys involved, knew that the first part of the thought was inadmissible because of the reference to the polygraph test. The second part of the thought, however, explained the reason for the first part. Indeed, had the occasion for the first part never arisen, the second part might never have been said. To allow the statement embodying the second part of the thought to reach the jury without admitting the first part is out-of-context, misleading, and highly

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verdict." *Id.* The dream talk was also admitted in the trial of his co-defendant, relying on *Tyler*. See *People v. Shaw*, No. 211825, 2000 WL 33533976, at \*3 (Mich. Ct. App. Feb. 29, 2000).

79. "The polygraph is a device that measures physiological reactions of humans in an attempt to determine the veracity of statements they make." Timothy B. Henseler, Comment, *A Critical Look at the Admissibility of Polygraph Evidence in the Wake of Daubert: The Lie Detector Fails the Test*, 46 CATH. U. L. REV. 1247, 1251 (1997). The polygraph instrument measures blood volume, heart rate, respiratory activity, and galvanic skin resistance (palm sweating). The examiner attaches

the instruments to the subject[;] any changes in the physiological measurements are transmitted to pens which record them on moving chart paper.

The general hypothesis upon which the theory of polygraphy rests is the notion that when a person lies, the human aversion to lying causes a physiological response which in turn causes an involuntary physiological reaction. A lie is believed to precipitate an alteration in the rate and pattern of breathing, blood pressure, rate and volume of blood flow, and the moisture on the skin. Truthful responses do not precipitate these same reactions.

*United States v. Cordoba*, 194 F.3d 1053, 1057 (9th Cir. 1999).

80. It is also possible that embarrassment about having had such a dream might cause Simpson's body to respond involuntarily in response to questions about murdering his wife. However, given the context of the polygraph examination, as an investigatory tool for the murder of his wife, it is more likely that Simpson was fearful that his body's involuntary responses were going to be interpreted as evidence that he had in fact killed her.

prejudicial.<sup>81</sup> Lacking proper context and therefore failing to explain why he was afraid to take the polygraph test, the statement about dreaming of killing Nicole looks like an unprompted party admission. And it does not take much imagination to see how easily a juror might make the mental leap from an out-of-context admission to an out-and-out confession.<sup>82</sup>

To my mind, both parts of Simpson's thought should have been excluded: the first part because evidence about polygraph tests is inherently unreliable and must be excluded, and the second part because the first part had to be excluded. The first part gave meaning and context to the second part. This contextual argument alone should have persuaded Judge Ito to exclude the evidence. But there is another more compelling reason: the jurors might have ascribed alternate meanings to O.J. Simpson's dreams. From those alternate meanings, they may have unfairly drawn an inference of guilt.

### C. *A Freudian Interlude: Simpson's Fatal Obsession*

It is time for a Freudian interlude. The prosecutor's main argument in favor of admitting Simpson's dream talk was that it evidenced a "fatal obsession" for Nicole.<sup>83</sup> This theory of relevance obliquely refers to

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81. A sense of unfairness about introducing bits and pieces of an out-of-context statement is embodied in Federal Rule of Evidence 106: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." FED. R. EVID. 106. Federal Rule of Evidence 106 only applies to writings or recorded statements. *Id.* For oral conversations, the opposing party must develop the remainder on cross-examination, or as part of his own case. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171–72 (1988). The problem in the Simpson trial was that the defense did not, and could not because of the evidence rules, introduce the statement about the polygraph that would have given context and explanatory meaning to the statement about the dream.

82. For a fascinating discussion of the O.J. Simpson case and its parallels to the Salem witchcraft trials, see Peter Charles Hoffer, *Invisible Worlds and Criminal Trials: The Cases of John Proctor and O.J. Simpson*, 41 AM. J. LEGAL HIST. 287 (1997). Hoffer points out that while the rules of evidence and modern trials bow to "the bright light of science and the expert witness," *id.* at 290, there are invisible worlds still influencing jurors. For middle-class whites, that invisible world includes the fear of crime and the identification of criminals as dangerous and black; their invisible world created a conspiracy theory based on "black malevolence." *Id.* at 313–14. For black jurors, however, it was easy to convince them of the conspiracy of the police to nail Simpson, since for them, "South Central is a world in which the police always and routinely bend and break the rules—much like the world where the Devil and his minions do their mischief." *Id.* at 292. Thus, both whites and blacks created their own conspiracy theories that were generated by their respective invisible worlds.

83. Motion re Admissibility, *supra* note 49, at \*3.

Sigmund Freud's theory that a "*dream is the fulfilment of a wish.*"<sup>84</sup> For Freud, dreams had meaning:

[They are] not to be likened to the unregulated sounds that rise from a musical instrument struck by the blow of some external force instead of by a player's hand; they are not meaningless, they are not absurd; they do not imply that one portion of our store of ideas is asleep while another portion is beginning to wake. On the contrary, they are psychical phenomena of complete validity—fulfillments of wishes; they can be inserted into the chain of intelligible waking mental acts; they are constructed by a highly complicated activity of the mind.<sup>85</sup>

According to Freud, the human organism is plagued by a host of primitive needs and desires that are threatening to the personality.<sup>86</sup> Our id is instinctual, biologically driven—we want, we desire, we need, we have to have.<sup>87</sup> Our superego is the internalized parent who commands socially appropriate behavior and seeks to control our hidden impulses.<sup>88</sup> To the ego is left the task of reconciling the two forces of the id and the superego, as well as responding to the demands of outside realities.<sup>89</sup> When one's ego reaches a level of maturity, the demands of the id and the superego are not denied, but are dealt with in a fashion that is no longer destructive.<sup>90</sup> Getting the ego into a position of healthy defense against the tyranny of the id and the superego and against the demands

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84. FREUD, *supra* note 47, at 154.

85. *Id.* at 155.

86. These primitive needs and desires are often distressing to the dreamer, and that attitude of repugnance towards them requires the dreamer to distort them. As Freud wrote,

Everyone has wishes that he would prefer not to disclose to other people, and wishes that he will not admit even to himself. On the other hand, we are justified in linking the unpleasurable character of all these dreams with the fact of dream-distortion. And we are justified in concluding that these dreams are distorted and the wish-fulfillment contained in them disguised to the point of being unrecognizable precisely owing to the repugnance felt for the topic of the dream or for the wish derived from it and to an intention to repress them. The distortion in the dream is thus shown in fact to be an act of the censorship.

*Id.* at 193.

87. SIGMUND FREUD, *The Ego and the Id*, in THE FREUD READER 628, 636 (Peter Gay ed., 1989) (1923).

88. *Id.* at 642–43.

89. *Id.* at 656.

90. Alasdair MacIntyre, *Freud, Sigmund*, in 3 THE ENCYCLOPEDIA OF PHILOSOPHY 249, 250 (Paul Edwards ed., 1967).

of external reality is presumably what we mean by “growing up.”<sup>91</sup> It is also the goal of psychoanalytic therapy.<sup>92</sup>

In 1900, Freud published *The Interpretation of Dreams*,<sup>93</sup> and his treatment of dreams illuminated his theory of the unconscious.<sup>94</sup> Freud believed that the unconscious is hidden from and unobservable by the conscious mind.<sup>95</sup> Much of what exists in the unconscious is there through the process of repression.<sup>96</sup> The mind pushes beneath the surface thoughts that are too painful or dangerous to contemplate, such as incestuous sexual desires or violence to others.<sup>97</sup> Drives that cannot find an outlet are then often rechanneled into socially acceptable behavior through a process known as sublimation.<sup>98</sup> Similarly, thoughts that are

91. *Id.*

92. *Id.* According to Freud, in interpreting the dream, the dreamer reports the manifest content of the dream to the analyst, and then proceeds to associate freely to various parts of the dream. Richard M. Jones, *Freudian and Post-Freudian Theories of Dreams*, in HANDBOOK OF DREAMS, *supra* note 14, at 271, 276–77. The analyst then seeks to draw inferences about how the unconscious wish linked itself up to the residue of images from the previous day in order to discover the latent content of the dream. *Id.* at 277. As one scholar put it, “The sole aim of the interpretive process is to reformulate the manifest content of the dream back into the latent thoughts which, it is assumed, provoked the dream in the first place.” *Id.*

93. FREUD, *supra* note 47. While Freud squarely placed the dream within the scientific domain, his work was part of a trend in the nineteenth century psychological literature to show an interest in dreams. Webb, *supra* note 41, at 180. One scholar, Hendrika Vande Kemp, looked at American and British psychological periodicals, both popular and professional, between 1860 and 1910, and discovered that there was a steady increase in articles about dreams from 1860 to 1870. *Id.* Thereafter, interest in dreams declined in popular periodicals but increased in professional journals. *Id.* By 1910, dream literature was almost exclusively found in professional journals. *Id.*

94. Freud’s *The Interpretation of Dreams* was published in November 1899, although he had been working on the book since about 1892 when he began to record his analyses of dreams. See Peter Gay, *Introduction to SIGMUND FREUD, The Interpretation of Dreams*, in THE FREUD READER, *supra* note 87, at 129, 129. The most celebrated of the dreams was the so-called “Irma dream,” which was dreamed in 1895. *Id.* After his interpretation of this famous dream about the incurable Irma, a personal friend and patient of Freud, Freud wrote:

The dream acquitted me of the responsibility for Irma’s condition by showing that it was due to other factors—it produced a whole series of reasons. The dream represented a particular state of affairs as I should have wished it to be. *Thus its content was the fulfillment of a wish and its motive was a wish.*

FREUD, *supra* note 47, at 151.

95. FREUD, *supra* note 47, at 651 (“The unconscious is the true psychical reality; in its innermost nature it is as much unknown to us as the reality of the external world, and it is as incompletely presented by the data of consciousness as is the external world by the communications of our sense organs.”).

96. See *id.* at 268–70.

97. SIGMUND FREUD, *Repression*, in THE FREUD READER, *supra* note 87, at 568, 569–70.

98. See SIGMUND FREUD, *Leonardo Da Vinci and a Memory of His Childhood*, in THE FREUD READER, *supra* note 87, at 443, 452.

too painful or dangerous to contemplate often show up in our dreams.<sup>99</sup> According to Freud, the human organism is plagued by repressed infantile wishes that create “intolerable states of psychological tension in waking life.”<sup>100</sup> These unconscious wishes or motives, expressed in symbolic form, are hidden in the manifest content of the dream—what the dream was apparently about.<sup>101</sup>

Freud believed that two psychical forces operate to give dreams shape.<sup>102</sup> The first force “constructs the wish which is expressed by the dream.”<sup>103</sup> However, while this unconscious wish is too strong to be denied, it is too threatening to be directly expressed.<sup>104</sup> Thus, the second force “exercises a censorship upon this dream-wish and, by the use of that censorship, forcibly brings about a distortion in the expression of the wish.”<sup>105</sup> The second agency censors out “distressing content,” allowing “nothing to pass without exercising its rights and making such

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99. See FREUD, *supra* note 47, at 269–70, 297–98.

100. Jones, *supra* note 92, at 279–80. Freud also saw a close connection between day-dreams, or “phantasies” as he called them, and nocturnal dreams. A child plays at make-believe in a quite serious fashion. SIGMUND FREUD, *Creative Writers and Day-Dreaming*, in THE FREUD READER, *supra* note 87, at 436, 438. When the child grows up, he no longer plays, but he “*phantasies*. He builds castles in the air and creates what are called *day-dreams*.” *Id.* The adult is “ashamed of his phantasies and hides them from other people. He cherishes his phantasies as his most intimate possessions, and as a rule he would rather confess his misdeeds than tell anyone his phantasies.” *Id.* Just as child’s play is a form of wish-fulfillment, the “motive forces of phantasies are unsatisfied wishes, and every single phantasy is the fulfillment of a wish, a correction of unsatisfying reality.” *Id.* at 439. Thus, a “happy person never phantasies, only an unsatisfied one.” *Id.* Dreams at night are “nothing else than phantasies like these, as we can demonstrate from the interpretation of dreams. Language, in its unrivalled wisdom, long ago decided the question of the essential nature of dreams by giving the name of ‘day-dreams’ to the airy creations of phantasy.” *Id.* at 440.

101. Freud divided dreams into three categories with respect to the relation between their latent and manifest content. SIGMUND FREUD, *On Dreams*, in THE FREUD READER, *supra* note 87, at 142, 148. The first were those dreams that made sense and were intelligible. The second group of dreams, which were connected and seemed to make sense, still had a “bewildering effect, because we cannot see how to fit that sense into our mental life.” *Id.* (giving the example of a dream that a beloved relative died of the plague). The third group contained those

dreams which are without either sense or intelligibility, which seem disconnected, confused and meaningless. The preponderant majority of the products of our dreaming exhibit these characteristics, which are the basis of the low opinion in which dreams are held and of the medical theory that they are the outcome of a restricted mental activity.

*Id.* at 149. According to Freud, “The contrast between the manifest and latent content of dreams is clearly of significance only for dreams of the second and more particularly of the third category.” *Id.*

102. See FREUD, *supra* note 47, at 177; see also *id.* at 178–79, 210, 269–70.

103. *Id.* at 177.

104. *Id.* at 177–79.

105. *Id.* at 177.

modifications as it thinks fit in the thought which is seeking admission to consciousness.”<sup>106</sup> The function of this second agency is “of a *defensive* and not of a *creative* kind.”<sup>107</sup> The wish emerges in symbolic form, a tangle of internalized prohibitions and repressions.

Furthermore, the sexual nature of our most basic wishes results in dreams full of sexual symbolism that often reflect hidden incestuous desires.<sup>108</sup> While Freud denied that all dreams require a sexual interpretation, he also asserted that a “great many other dreams, however, which show no sign of being erotic in their manifest content are revealed by the work of interpretation in analysis as sexual wish-fulfillments.”<sup>109</sup> Thus, most dreams are about inexpressible and threatening sexual desires.<sup>110</sup> Since these dreams are too awful to face,

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106. *Id.* at 177–79.

107. *Id.* at 179.

108. One of the processes that takes place in dream formation Freud calls “condensation.” FREUD, *supra* note 101, at 151. Various constituents of the dream become compressed, and for any single element in a dream, there are a number of different associative threads that “branch out in two or more directions; every situation in a dream seems to be put together out of two or more impressions or experiences.” *Id.* The material in dream thought is “packed together for the purpose of constructing a dream-situation,” and there is a common element among them. *Id.* at 152. Thus, “in analysing a dream, if an uncertainty can be resolved into an ‘either—or’, we must replace it for purposes of interpretation by an ‘and’, and take each of the apparent alternatives as an independent starting-point for a series of associations.” *Id.*

109. *Id.* at 169–70.

110. Freud believed that the adult retained the infantile forms of sexual life, and that repressed infantile sexual wishes were the most “frequent and strongest motive-forces for the construction of dreams.” *Id.* at 170. The sexual ideas in the dream are not represented as such, “but must be replaced in the content of the dream by hints, allusions and similar forms of indirect representation.” *Id.* There are stock “dream-symbols,” which

serve to represent persons, parts of the body and activities invested with erotic interest; in particular, the genitals are presented by a number of often very surprising symbols, and the greatest variety of objects are employed to denote them symbolically. Sharp weapons, long and stiff objects, such as tree-trunks and sticks, stand for the male genital; while cupboards, boxes, carriages or ovens may represent the uterus.

*Id.* at 171.

We do not know the form of murder that Simpson dreamed about, but perhaps his dreams were of stabbing Nicole with a sharp object—the phallic symbolism of the knife is impossible to miss. Most of Freud’s discussion about murder, however, concerns the son’s murder of his father. Freud even took the position that the commandment “thou shalt not kill” first referred to the most murderous of acts, the killing of the primitive father. See SIGMUND FREUD, *The Future of an Illusion*, in THE FREUD READER, *supra* note 87, at 685, 712 (“Under totemism, this commandment was restricted to the father-substitute, but it was later extended to other people, though even to-day it is not universally obeyed.”).

we instead dream about something else that is symbolically a representation of that unexpressed desire.<sup>111</sup>

Who knows what Freud would have said about Simpson's dreams? From my cursory reading of Freud, it seems that if we could resurrect the gentleman and put him on the stand, his interpretation might have had something to do with Simpson's unresolved and threatening fear of being in love with his mother and his anxiety about being castrated.<sup>112</sup> But Freud is dead and difficult to subpoena. In any case, we are not now concerned with Freud's interpretation—we are concerned with the interpretations of those diverse members of the jury.

The impact of Freud's legacy is undeniable. His insights about the unconscious have by now become mainstays in popular culture. Freudian jargon and concepts have percolated down to almost anyone who reads books or magazines, or who watches film or television, even if just the commercials. We can expect that some members of Simpson's jury knew about and believed in the power of the unconscious to motivate conscious action, and that dreams were a manifestation of that unconscious. Moreover, some jury members likely had misconceptions about Freud's theories. Their inferences about Simpson's "wish-fulfillment" were likely far more simplistic, and far more dangerous to Simpson's defense, than the more convoluted exercises in dream symbolism that Freud himself would employ. Some jurors may well

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111. Freud believed that dreams were derived from the events of the preceding day, or past few days. FREUD, *supra* note 101, at 155 ("[W]e find that every dream without any possible exception goes back to an impression of the past few days, or, it is probably more correct to say, of the day immediately preceding the dream, of the 'dream day.'"). If a connection between the content of the dream and any impression of the previous day is made, "that impression is so trivial, insignificant and unmemorable, that it is only with difficulty that we ourselves can recall it." *Id.* Since the dream seems to be concerned with "the most indifferent trivialities," it therefore appears to be "unworthy of our interest if we were awake. A good deal of the contempt in which dreams are held is due to the preference thus shown in their content for what is indifferent and trivial." *Id.* However, "analysis uncovers the numerous associative paths connecting these trivialities with things that are of the highest psychical importance in the dreamer's estimation." *Id.* at 156. Through the distorting process of displacement, "the psychical intensity passes over from the thoughts and ideas to which it properly belongs on to others which in our judgment have no claim to any such emphasis." *Id.* at 154–55.

112. According to Freud, adolescent boys are anxious about being in love with their mothers, and fearful of being punished by castration. SIGMUND FREUD, *Anxiety and Instinctual Life*, in THE FREUD READER, *supra* note 87, at 773, 777 ("But we have not made any mention at all so far of what the real danger is that the child is afraid of as a result of being in love with his mother. The danger is the punishment of being castrated, of losing his genital organ."). Freud insists this fear of castration cannot be dismissed lightly: "He has some ground for this, for people threaten him often enough with cutting off his penis during the phallic phase, at the time of his early masturbation." *Id.* at 777–78.

have reasoned: Simpson dreamed of killing his wife; therefore, Simpson wanted to kill his wife.<sup>113</sup> In that same line, the prosecutor argued, sometimes wishes become so powerful that they become a “fatal obsession.”<sup>114</sup> Id over superego. Bingo: Nicole is dead. O.J. dreamed of doing it; therefore, he wanted to do it; therefore, he did it.<sup>115</sup>

The Freudian interlude concludes. But there are other, wilder theories about the meaning of O.J. Simpson’s dreams that worry me even more than watered down, ill-formulated Freudian wish-fulfillment.

#### *D. Other Wilder, More Worrisome Theories About the Meaning of O.J. Simpson’s Dreams*

These theories are less likely to be articulated in a court of law where reason and an empirical episteme reign supreme. They are based on the concept of the dream as a form of hearsay and implicate a premodern or medieval mindset.<sup>116</sup> Hearsay is defined as an out-of-court statement

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113. Here is how some jurors might have reasoned: Simpson’s dreams of murdering Nicole were indicative of Simpson’s murdering state of mind. He had such hostility for his wife that he wished her a violent death; furthermore, he wished to be the instrumentality of that violent death. His dreams manifested these latent desires. While they may not have explained the motive for her violent death—why he came to hate her so much—the dreams surely evidenced an inchoate mens rea. And they surely suggest the identity of her murderer: Who in the world could hate Nicole Simpson so much that he wished to destroy her in such a violent way? The dreamer of hateful dreams—the defendant, O.J. Simpson.

114. See *supra* note 65 and accompanying text.

115. O.J. Simpson would not have fared much better had the members of the jury applied an alternative theory about dreams: Alfred Adler’s. Adler’s theory about dreams and their function differed from Freud’s. Adler viewed the dream as integral to the thought process, and reflective of the dreamer’s view of life, combined with his goals. Leo Gold, *Adler’s Theory of Dreams: An Holistic Approach to Interpretation*, in HANDBOOK OF DREAMS, *supra* note 14, at 319, 321. The dream had a “forward aim, that it ‘puts an edge’ on the dreamer for the solution of a problem in his own particular way.” *Id.* (quoting ALFRED ADLER, SOCIAL INTEREST: CHALLENGE TO MANKIND 259 (1938)). The dream represents unfinished business and carries into sleep all the impression and events of the day. *Id.* There is a continuity between our waking and sleeping thoughts, and the individual is always geared towards coming up with possible solutions to the mundane demands of life, as well as the development of long-term goals. *Id.* at 326. The dream, like all thought, is part of the process of achieving the future. Adler stated, “In dreams we reproduce the pictures which will arouse the feelings and emotions which we need for our purposes, that is, for solving the problems confronting us at the time of the dream, in accordance with the particular life style which is ours.” *Id.* at 325–27 (quoting H.L. ANSBACHER & R.R. ANSBACHER, THE INDIVIDUAL PSYCHOLOGY OF ALFRED ADLER 361 (1956)) (internal quotations omitted). Hence, Simpson’s dreams about killing his wife would have been considered part of the process of achieving his future—presumably a future that did not include Nicole.

116. See *supra* notes 35–44 and accompanying text.



offered to prove the truth of the matter asserted.<sup>117</sup> Even though it would never be said out loud in court, I suspect that the truth of the matter sought to be proved by the prosecution in Simpson's narration of the dream was—depending upon how one defines the relevant time frame—Simpson has killed Nicole, or Simpson will kill Nicole.

The analysis gets complicated. It is possible that Shipp's testimony about Simpson's narration of the dream could be considered multiple hearsay. The first level of hearsay, and the only level recognized by the court, is obvious: Simpson's out-of-court narration of the dream to Shipp.<sup>118</sup> But the second level of hearsay is subtler: Simpson's dream itself could be regarded as an out-of-court statement.

Who is the declarant of this second level of hearsay—the dream itself? Under a premodern or medieval mindset, the declarant of the dream itself may be God, or some other invisible, transcendent entity, a demon or an alien perhaps. This unknown entity was the author of the dream, or in evidentiary terms, someone who had made a statement in the form of a dream that Simpson experienced in his sleep. Under this analysis, we have Ron Shipp who would testify that he personally observed O.J. Simpson's narration of the dream. Shipp would say that Simpson told Shipp, "I was an eye-witness to this dream, although I was asleep and my eyes were closed. I personally observed the making of the second declarant's statement, even though I don't know who the second declarant was." Thus, there were two levels of hearsay: the first was the narration by Simpson of the dream, the second was the statement by an unknown, possibly supernatural, declarant that constituted the dream itself.

The danger of this analysis is in the second level of hearsay—the dream authored by an unknown entity. That statement seemed to say: O.J. Simpson has killed or will kill his wife—which is, of course, the very truth that the prosecution is seeking to prove. The law of evidence is settled about how to deal with traditional instances of multiple hearsay.<sup>119</sup> It tackles the issue every time a police officer makes a written

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117. The definition of hearsay is found in Federal Rule of Evidence 801. It first defines the term "statement" as: "(1) an oral or written assertion or 2) non-verbal conduct of a person, if it is intended by the person as an assertion." FED. R. EVID. 801(a). Then "hearsay" is defined as: "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* 801(c).

118. See also *supra* note 63.

119. Federal Rule of Evidence 805 provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." FED. R. EVID. 805.

report of a statement that was made to him at the scene of an incident. Let us imagine a civil lawsuit arising out of a car accident. Person *X* makes Statement #1 to Police Officer *Y* about what he observed at the time of the accident. Then Police Officer *Y* writes down Statement #2 in his incident report that reads: “Person *X* says, ‘Statement #1.’” At trial, neither declarant is present to testify; hence, both statements are hearsay. Each level of hearsay must qualify for an exception to the hearsay rule in order for the document containing Statement #1 to be admissible.<sup>120</sup> We might get Police Officer *Y*’s Statement #2 into evidence under some version of a public records exception,<sup>121</sup> and then we have to deal with Statement #1: was it perhaps some form of spontaneous declaration,<sup>122</sup> a party admission,<sup>123</sup> or some other kind of recognized statement with sufficient reliability to let the jury hear it?

But when the second declarant is an unknown, possibly supernatural entity, as in our premodern scenario, how do the Rules of Evidence govern? We can leave that question unanswered—conceiving of the dream itself as a level of hearsay is never going to happen. Lawyers are running the trial on all fronts, bench and bar. Lawyers are consummate rationalists, thoroughly indoctrinated in the dominant episteme. It will never occur to most of them that the dream could be considered a statement—except on some uncomfortable, unconscious level.

But here is the rub: some members of the jury may not swear fealty to the dominant episteme. They may also not be the mavens of rational thought that the law of evidence assumes them to be. They may know credible wild dreamers, or be wild dreamers themselves. To them, the defendant’s narration of dreams that he killed his wife, over and over again, may be heard as double hearsay—under a premodern theory, with the dream constituting a second declarant’s statement that O.J. Simpson either has or will soon kill his wife. They may believe that God, or some other invisible transcendent being, was trying to transmit information, and such a belief would be incredibly harmful to the defense.

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120. *See id.* This rule about multiple hearsay applies in California as well. *See* CAL. EVID. CODE § 1201 (West 1995).

121. Federal Rule of Evidence 803(8), for example, provides an exception to the hearsay rule for certain records and reports prepared and maintained by public offices and agencies. FED. R. EVID. 803(8). Note that Federal Rule of Evidence 803(8)(B) imposes a restriction in criminal cases upon the use of records of reports from police officers and other law enforcement personnel containing matters observed pursuant to official duty. *Id.*

122. *See id.* 803(2) (providing excited utterance exception to hearsay rule).

123. *See id.* 801(d)(2) (defining party admissions as not hearsay). I am grateful to Professor Gary Shaw for his feedback on this double hearsay analysis.

This harm suggests that even if the court cannot bring itself to consider a dream a statement, the fact that jurors might well do so should preclude its admissibility under Federal Rule of Evidence 403.<sup>124</sup> There are times when an item of evidence may be probative, at least logically, of some material fact, but it should be excluded because it poses a substantial risk of unfair prejudice if heard by the jury.<sup>125</sup> This is a catch-all category in which to dump arguably relevant evidence that might evoke horror or repulsion, or prod the jurors into unduly punishing the defendant because they cannot get some image or damaging idea out of their minds.<sup>126</sup>

Under Rule 403, Judge Ito should have excluded any reference to Simpson's repeated dreams of murdering his wife. All sorts of illogical propositions may have flashed through the minds of the jurors, silently in their inner minds, or publicly within the walls of the deliberation room. But the jurors' inner minds may have been secretly or unconsciously wedded to an alternative episteme, one more medieval than modern, or to something else entirely. By hearing about the defendant's dreams in the courtroom, the seeds of thought were planted. Whether or not the full-grown plants make sense to the rational empiricist does not matter. They may have grown like powerful weeds in the untamed garden of the inner mind—tough, reedy, impossible to extirpate.

O.J. Simpson was a wild dreamer *extraordinaire*, a famous wild dreamer who became entangled with the law, but who was ultimately

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124. *Id.* 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). California has its analog of Federal Rule of Evidence 403, which provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352.

125. The Advisory Committee Notes to the Federal Rules define "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403 advisory committee's note.

126. Some examples of cases involving evidence deemed inadmissible due to prejudice are *Wallace v. Mulholland*, 957 F.2d 333, 336 (7th Cir. 1992) (refusing to admit evidence of a defendant's schizophrenia in a civil rights case involving police injury to a mental patient), *United States v. Masters*, 924 F.2d 1362, 1368 (7th Cir. 1991) (refusing to allow evidence of alleged transvestism of a third party in a murder trial), *United States v. Eason*, 920 F.2d 731, 738 (11th Cir. 1990) (refusing to allow as evidence the fact that the defendant's father was convicted of a similar offense), and *In re Bendectin*, 624 F. Supp. 1212, 1224 (S.D. Ohio 1985) (refusing to allow the presence of a deformed child in the courtroom).

acquitted.<sup>127</sup> But not all wild dreamers are so lucky. I will now tell the stories of three wild dreamers from family court<sup>128</sup> where nightmares abound, lesser mortals who narrated their dreams to others and came to rue the day. One man dreamed of his wife's car exploding; the second merely dreamed of days to come. The third wild dreamer was a six-year-old child who dreamed of her father killing her—and then he did. It is through the prism of her tragic situation that we will look at Carl Jung's attitude towards dreams, and at the dreaming culture of the seventeenth century Iroquois.

## II. THREE WILD DREAMERS FROM FAMILY COURT, A JUNGIAN INTERLUDE, AND THE DREAMING CULTURE OF THE IROQUOIS

### A. *Wild Dreamer #1 in Family Court Who Dreams of His Wife Exploding*

*Susan V.H. v. Robert W.H.*<sup>129</sup> involved a custody dispute before a Delaware family court, a battle over who would raise the shattered child of a shattered marriage.<sup>130</sup> The father, Robert H., appears to have been an abusive alcoholic.<sup>131</sup> In January 1997, the court issued an Order of Protection from Abuse, providing that the father shall not "threaten . . . harass or commit any other act of abuse" against the mother, and shall stay "100 yards away" from her, and shall not attempt to contact her in any way.<sup>132</sup> A second order, issued the following March, provided that the father shall not consume any alcohol during the twenty-four hours preceding any visitation with their son, Austin, who was two years old at the time.<sup>133</sup> Robert H. failed to comply with both

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127. Stephanie Simpson & Jim Newton, *The Simpson Verdict*, L.A. TIMES, Oct. 4, 1995, at A18.

128. That it was family court came as no surprise to me. In my brief foray into practice, I did an internship with the Murder Task Force of the Chicago Public Defender, and then several years of family law. Between the two, I used to say: give me criminal law over matrimonial—any day. Criminal practice was a lot cleaner, and for the most part, my clients, the indigent men and women accused of murder, were a lot saner, and a lot nicer, than my clients in family court.

129. No. CN95-10836, 97-13584, 1997 WL 728366 (Del. Fam. Ct. June 2, 1997).

130. *See generally id.*

131. *Id.* at \*1.

132. *Id.* (alteration in original) (internal quotations omitted).

133. *Id.*

orders.<sup>134</sup> Following one of the hearings, he came up to the mother, Susan H., and told her that if his visitation privileges stopped, he would leave the state and stop paying child support.<sup>135</sup> Susan H. also testified that Robert H. had told her that he “think[s] of the day . . . [that her] car will explode.”<sup>136</sup>

Robert H. testified himself about the conversation.<sup>137</sup> Susan H. had parked her car beside his, and waited for him following their child support hearing.<sup>138</sup> The two talked for “approximately one hour, during which he told [Susan] that he ‘dreams’ of her car exploding with her in it.”<sup>139</sup> Robert H. elaborated that this dream is what “keeps . . . [him] clinging to life.”<sup>140</sup> The court held that the second statement was “abuse” under Delaware law,<sup>141</sup> and ordered Robert H. to submit to a psychological evaluation.<sup>142</sup> In addition, because the judge found the father’s “‘dreams’ so chilling,” the matter was referred to the Office of the Attorney General for “possible criminal prosecution.”<sup>143</sup>

We do not know how Robert H. was using the term “dream.” Were these images of Susan H.’s exploding car just dreams Robert H. had in sleep—plain old, garden variety Freudian death wishes? Or perhaps they were daydreams, fantasies he engaged in while drifting through what William James calls the “dreamy states.”<sup>144</sup> The referral to the Office of the Attorney General suggests that the judge regarded these images, and the narration of them, as potential threats to Susan H.’s life. But does it seem appropriate to refer the matter to the prosecutorial arm of the state for investigation on the basis of Robert H.’s set of purported “chilling dreams”?

There is great danger in taking that step. If we were held criminally liable for our murderous dreams, then many of us would end up in

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134. *Id.* at \*2.

135. *Id.*

136. *Id.* (alteration in original). He admitted that “he told Mother that he dreams of the day when her car will explode with her in it.” *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. In characterizing the statement as “abuse,” the court cited to DEL. CODE ANN. tit. 10, § 1041(1)(iv) (1999). *Susan V.H.*, 1997 WL 728366, at \*2.

142. *Susan V.H.*, 1997 WL 728366, at \*3.

143. *Id.*

144. JAMES, *supra* note 5, at 295.

prison. How many Presidents of the Rotary Club have woken in a nocturnal sweat from dreaming of the violent death of his beloved wife who lies beside him—the same beloved wife who will get up in the morning and make him blueberry pancakes? But clearly Robert H. is not the president of any civic organization, and from reading the bare facts of the case as reported in the appellate decision, I would have no bone to pick with any judge who ordered Robert H. to keep a respectful and safe distance from his wife and child, or who ordered a psychological examination. I could probably never be talked into referring the matter to the prosecutor's office, but someone might give it a try, under a different analysis.

It is not the judicial action with which I quarrel, but its justification. Instead of basing his order on Robert H.'s "chilling dreams," the judge should have based it on Robert H.'s attitude towards those dreams. Even applying Freud's wish theory, Robert H.'s dreams of Susan H.'s car exploding do not necessarily tell us anything about how he feels about his wife. Without the dreamer being an agent in causing her destruction, the dream could represent nothing but fear of loss. But telling us that those dreams are what keep him "clinging to life" is another matter altogether. How he feels about her is revealed. And in the context of a past history of alcoholism, and presumably violent behavior towards his wife, I agree with the judge—his attitude towards the dreams of her destruction is chilling. Maybe I could even issue an order to have Robert H. investigated for that statement as a not-so-thinly-veiled threat.

By fine-tuning the basis for justifying the judge's order, we avoid the muddy waters of conflicting epistemes and murky metaphysics. No one has to question what the dream might mean, only what the dreamer's attitude towards the dream might mean. Not only is this analysis fairer to folks like Robert H., it also keeps the President of the Rotary Club out of prison for dreaming about the violent death of his wife. He can dream without worry or censorship. He might even wish that she *were* dead, even if her blueberry pancakes are the best. But he should beware. Once he starts to make noises about clinging to those dreams for his dear life, some of us may begin to worry about his dear wife's life, and might condone invoking the power of the state.

And what if the wild dreamer's dreams have no violent content, but he is capable of telling the future from his dreams? Let me tell you what happened to Terry G.

*B. Wild Dreamer #2 in Family Court Who Only Dreams of Tomorrow*

It was a custody case, and as is often true in these cases, neither parent in *In re Interest of Amber G. v. Terry G.*<sup>145</sup> had much to offer.<sup>146</sup> Following the Nebraska divorce, Amber, Jessica, Adam, and Brittany went to live with their mother, Dolly G.; their father, Terry G., then went to live in Missouri for awhile.<sup>147</sup> Following reports of sexual abuse and neglect, the children were placed in foster care, under the temporary custody of the Department of Social Services (DSS).<sup>148</sup> For three years, DSS tried to reunite the family.<sup>149</sup> Visitations by both parents occurred on a regular basis, but the DSS reports recommended counseling for both parents, indicating the “[p]ast abuse and chaotic or dysfunctional life styles by both parents,” and noting that “placement [with the father] had been questioned as marginal due to past history,” and that while both parents’ lifestyles “must change to provide safety and stability . . . [t]his is questionable due to the ongoing instability both have or have had.”<sup>150</sup>

There was never much of an issue regarding the mother: the children were not going back with her. Rather, the choice seemed to be whether the children would stay in foster care under a permanent guardianship, or would live with their father.<sup>151</sup> Terry G. was no treat either. He was threatening to the foster parents and the social worker, used foul and abusive language with both,<sup>152</sup> frightened his children, allowed them to hit each other, stated that he hated his son, let them wear feces-stained underpants and other unwashed clothing, never washed their hair, and let them take their own medication without supervision.<sup>153</sup> His philosophy for managing his children was *laissez-faire*—and hostile: “When kids

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145. 554 N.W.2d 142 (Neb. 1996). The father had appealed the order of the county court recommending permanent guardianship of his four minor children. *Id.* at 145.

146. *See generally id.*

147. *Id.* at 145.

148. *Id.* at 145–46.

149. *Id.* at 146.

150. *Id.*

151. *Id.* at 145–46.

152. *Id.* at 146 (“[D]ad said he could knock [the social worker] clear across the street. That he wanted to push his fist down [the foster mother’s] throat. Lot of swearing, such as, and pardon my language[,] asshole, shit used frequently. Threaten to sue the [foster family], accusing them of taping conversations. That he was going to start trouble in Clearwater.”).

153. *Id.*

ain't fightin' or running away, I don't give a shit what they do."<sup>154</sup> Anyone reading the DSS report would have agreed with the social worker: Terry G. was unfit for parenting.

But here is the part of the case that bothered me. Terry G. testified that he had dreams in which he could predict the future:

I go to sleep at night. About five minutes, if I'm asleep I see things. And if—I don't want to see them, so I wake up. But they just keep coming back. Three nights in a row. And when they do, then I know it's going to happen. That's all I can say.<sup>155</sup>

Later in the case, we see that the father's revelations about his prophetic dreams influenced the social worker in his decision not to recommend that Terry G. have custody: "In his meetings with the father, the clinical social worker expressed significant concerns about the father's fitness to have custody due to his claims that he can predict future events through his dreams and his lack of awareness as to the significant needs of his children."<sup>156</sup>

No one would argue with the social worker's considerable concerns about Terry G.'s lack of awareness as to the significant needs of his children. Those dreadful details—abusive language, the threats, the unsupervised medication, the unwashed hair, the dirty underwear—all warrant a finding that these kids would be better off in foster care. But what about those prophetic dreams of Terry G.? What relevance do those dreams have to his fitness as a father? I find myself looking at my children, and shuddering. I make a vow to keep my dreaming life to myself—a vow I promptly break. Dreams of things to come have on occasion happened to me. I know other kind and responsible parents who have experienced dreams that came true, or who have confessed to having a *déjà vu*. We should all vow to keep our dreaming life to ourselves. We are all in jeopardy.

Here was an empiricist social worker so hostile to an alternative episteme that he deemed dream talk of this sort as evidence of parental unfitness. This social worker ranked his concern about Terry G.'s prophetic dreaming not only in the same sentence as his concern over Terry G.'s lack of awareness of his children's needs, but in the breath before it. Then, to make matters worse, the appellate court chose to include those words of concern over the prophetic dreams in its decision

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154. *Id.* at 147.

155. *Id.*

156. *Id.* at 149–50.



affirming the denial of custody.<sup>157</sup> To include the empiricist social worker's assessment of unfitness due to wild dreaming is to ratify it, and to set precedent for other prophetic dreamers—who may be perfectly good parents—that they had better keep their mouths shut if they want to keep their children.

Don't get me wrong: those children do not belong with Terry G. He was an unfit parent. There were plenty of facts about his conduct in the waking world to establish that. Where he travels in his sleep, however, and what information he garners in his dreaming state, from whatever source, extrasensory or divine, I am not willing to allow a court to consider. I fear he will be punished for having an alternative episteme, for being a wild dreamer. I fear they will take his children away. I fear they will take my children away.

But now let us turn to our third wild dreamer from family court. Her story is the saddest of all.

C. *Wild Dreamer #3 in Family Court Who Dreams of Her Own Murder (and Then Is Killed)*

This wild dreamer started out in family court, and then became the victim in her father's murder trial.<sup>158</sup> Only six years old, Ayla was a dreaming girl.<sup>159</sup> She lived with her mother, Joann Daigle-Moylan.<sup>160</sup> Her father, Diego Vas, who was not married to her mother, had supervised parenting time with Ayla at the Child Protection Council (CPC) in Danielson, Connecticut.<sup>161</sup> In November 1992, Joann brought Ayla to the CPC office for parenting time, to be supervised by a CPC social worker, Joyce Lannan.<sup>162</sup> During the session, Vas became visibly

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157. *Id.* Some scholars would quarrel with my use of the word "prophetic" here. Lewis distinguishes among prophetic dreams, precognitive dreams, and traditional divinatory dreams. LEWIS, *supra* note 11, at 192. Precognitive dreams usually involve some trivial future event over which the dreamer has no control. *Id.* In contrast, a prophetic dream also tells the future, but the events "relate to important areas of life. As with the Hebrew prophets, there is also some sense that a prophetic dream gives one a chance to actually change the future, as if the dreamed events do not have to happen or can be modified in some way." *Id.* Divinatory dreams are more symbolic in content. *Id.* For example, if one dreams of falling off an office building, and the next week loses his job, the dream might be said to have predicted the firing. *Id.* Divinatory dreams require symbolic interpretation, and thus are distinguished from most other precognitive dreams. *Id.*

158. *See State v. Vas*, 687 A.2d 1295 (Conn. 1997).

159. *Id.* at 1297, 1300.

160. *Id.* at 1297.

161. *Id.*

162. *Id.*

upset and accused his six-year-old daughter of not informing him of the mother's impending marriage.<sup>163</sup> When Joann Daigle-Moylan came to pick up Ayla, she argued with Vas, and he ended up pointing a gun at all three of them—the mother Joann, Ayla, and Lannan.<sup>164</sup> Then, according to the appellate court's recitation of the facts in *State v. Vas*,<sup>165</sup> Joann

barricaded herself in an office. Lannan initially approached [Diego Vas] to take the gun away, but then changed her mind and turned away from him. As she turned, [Vas] fired several shots and ran from the building . . . . Daigle-Moylan came out of the office to find that Lannan and Ayla had been shot. Lannan was severely wounded but eventually recovered from her wounds. Ayla died as a result of wounds to the head. [Diego Vas] was arrested in New York City the next day.<sup>166</sup>

He was charged with one count of murder and two counts of attempted murder, and was ultimately convicted.

At trial, the defense put on a witness, Thomas Joko, who testified of the defendant's loving relationship with Ayla, describing how he had regularly observed the defendant and Ayla interacting at an eating establishment that he frequented. The state's attorney then asked Joko, "[W]ere you aware that the child—near the time of her death—was dreaming that her father was killing her?"<sup>167</sup>

Defense counsel for Diego Vas objected, and the judge instructed the jury to disregard the question.<sup>168</sup> Defense counsel then moved for a mistrial; the motion was denied, and again in its charge to the jury, the judge told the jurors to disregard the prosecutor's question about the victim's dream that her father was killing her—just in case they had forgotten about it altogether.<sup>169</sup> On appeal, most of the opinion in *State v. Vas* was about the trial court's instruction to the jury about the defense of mental disease or defect;<sup>170</sup> regarding the jury's hearing about Ayla's dreams of murder, the appellate court concluded that the defendant had

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163. *Id.*

164. *Id.*

165. 687 A.2d 1295 (Conn. 1997).

166. *Id.* at 1297.

167. *Id.* at 1300.

168. *Id.*

169. *Id.*

170. *Id.* at 1297–1300.

“failed to show that the state’s question to Juko was so prejudicial that it deprived him of a fair trial.”<sup>171</sup>

Unlike O.J. Simpson, who was a famous dreaming man, this wild dreamer was just a little girl who lived for a short time somewhere in central Connecticut—unknown to the world except for her brief posthumous appearance in the *Atlantic Reporter*. Having no more information about her, the storyteller in me feels driven to invent some context for her murder. Over and over on my mind’s movie screen, I direct various scenes of this sad tale, not always with satisfaction—the only script I have are the few sentences written in a lower court’s opinion.

Here is the first take. *Scene One*: Ayla and her father, kidding around in a diner, Diego making funny faces at his little girl behind a plastic menu. Ayla, shy, but smiling, pleased at the attention. Thomas, sitting in the booth next to the window, drinking his coffee, black, two sugars, watching the two make fun, envious of the love and affection that flowed between father and daughter. *Scene Two*: Diego sitting on a gray naugahyde couch in the waiting room of the Child Protection Council offices in Danielson, leafing nervously through a *Parents Magazine* as he waits for Joyce to call him into the Visiting Room. (I am plagued by weaknesses in the plot. Why is the father in the diner with Ayla if he only has supervised parenting privileges? Did the scenes described by Thomas predate some shameful conduct that forced the supervised parenting on Diego? And who is this guy, Thomas? Is this the best witness the defense could muster, a guy who has watched Diego interact with his daughter at some undisclosed time in “an eating establishment that he frequented”?) *Scene Three*: Joyce—I see her as an efficient woman of about thirty, slightly overweight, sincere, concerned. She is pouring over Ayla’s file and frowns when she encounters an entry from a caseworker: “Ayla reports dreaming often that her father was killing her.”

Maybe I have the script all wrong. Did Ayla tell her dreams to her caseworker, or to her mother? Or was there a grandmother somewhere in the background, the kind of grandmother a six-year-old could confide in—who might listen to a little girl’s nightmares? Perhaps her mother, Joann, was too busy with the new love of her life to listen. One thing is for sure: Ayla did not tell Thomas Juko her dreams. Why would he have had any reason to know what Ayla was dreaming? Dream-telling in our

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171. *Id.* at 1300–01.

culture is an intimate exchange, not one to take place over the top of a booth in a diner, between strangers. No one would believe my first scene, if I had directed Ayla to lean over suddenly and remark from the side of the menu to Thomas Joko, “Hey, mister, you might think this looks like a lot of laughs, this warm exchange between me and my father, but you ought to know that at night, when I am alone and asleep, I dream another truth: that the man across this formica table top is killing me.”

How did those lawyers in the courtroom feel about Ayla’s dream? We know the trial judge ruled that Ayla’s dream of being murdered by her father was inadmissible. We also know the trial judge told the jury to disregard the question, both when it was introduced, and in the charge to the jury at the end of the trial. But even for an off-hand statement in a cross-examination, struck from the record, the mention of Ayla’s dream must have raised some eyebrows in the courtroom. Why else would the defense argue on appeal that the reference to her dream warranted a mistrial? Defense counsel must have believed that something very harmful had happened to Diego in that one slip of the prosecutor’s tongue.

And how slipful was that question? Surely the prosecutor must have made a tactical decision to inflict that harm. He intentionally asked Thomas Joko whether he knew that Ayla had dreamed of her father killing her. No doubt his rationale for asking the question was to undermine Joko’s credibility, to show that Joko lacked knowledge of the defendant and his relationship with his daughter, to show that he only knew the partial truth—the superficial image of the playful father and laughing daughter in the diner. He meant to say to Joko and to the jurors: *that same child—laughing and loving, so you say—that same child cried out at night, convinced in her dreams that her father was going to kill her.* But there are rules about such cross-examination, and the prosecutor must have known that he had broken them—that he had asked a question that went far beyond testing Joko’s knowledge of the defendant and his situation.<sup>172</sup>

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172. I can only assume Joko was a character witness for the defendant. For example, with “specific act” cross-examination of a reputation witness, it is permissible to ask the reputation witness whether he knew that the defendant had committed prior bad acts, not to show that he had generally a bad character, but to test the knowledge and credibility of the witness. See GLEN WEISSENBERGER & JAMES J. DUAHE, *FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY* § 405.4, at 129 (2001). The government has to show that there was a good-faith factual basis for the incidents raised on cross-examination, and that they are relevant to the character traits at issue. *Id.* Plus, the prior bad acts must have been likely to have

And where would a six-year-old girl come up with a dream that her father was killing her? And when she cried out at night, was there someone who came into her room to lead her back to a safer reality? Did she have a safer reality? It seems not. Who heard about those dreams? Why was there no state of alarm declared when a six-year-old child tells someone that she dreams of her father killing her? Why was Diego Vas allowed to enter the child protection office with a gun? Why did her mother barricade only herself in an office when Vas pulled out his gun, and not her daughter as well? Who was protecting that child? How could they not have suspected she was in danger? To my mind, a six-year-old child who dreams that her father is murdering her might well be in danger.<sup>173</sup> It does not strike me as a universal dream that a healthy, secure six-year-old might have. At a very minimum, the dream reveals that Ayla felt she might be in danger, and that ought to have been enough to put them on alert.

I wish someone in her family or the social work system had listened to Ayla's dreams. She needed and deserved better protection. But I would not have wanted the jury trying Ayla's father for her murder to have heard about her dreams. As dreams of a living six-year-old girl narrated to her family or social worker, they are indications of her state of mind and cries for help. But as dreams of a dead six-year-old girl mentioned in a prosecution for her murder, we are again plagued by problems of hearsay—forgetting for a moment the issue of relevance. Just as with O.J. Simpson's dreams of killing his wife, there is the concern about a hidden layer of hearsay in this case: that Ayla's dream was a prophecy, and originated from another declarant, one unseen, possibly one divine. No one is going to argue that point, but I assure you, some members of the jury might be thinking about it.

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been known in the relevant community. *See, e.g.,* United States v. Monteleone, 77 F.3d 1086, 1089–91 (8th Cir. 1996) (seeking to impeach the defense character witness in the same fashion—not to show that the defendant had committed prior bad acts, but to show that the character witness was not knowledgeable about the defendant and his prior history).

173. Unfortunately, Ayla is not alone in dreaming of her victimization. In a study of 300 dreams of children ages two through twelve years, there was a high level of physical aggression, and usually the dreamer was the victim. PATRICIA GARFIELD, *YOUR CHILD'S DREAMS* 46–47 (1984). The younger the child, the more frequently they reported becoming the victim of someone's aggression in a dream, indicating that children are "more anxious about victimization than adults are." *Id.* "As adults, females are more often victims of violence in their dreams than men are, and it is most often the dream men who commit these crimes; it is a male-dominated dream world." *Id.* at 47.

Every time I tell Ayla's sad story to someone, when I get to the part about the prosecutor's cross-examination, where he asked Juko, "Were you aware that the child—near the time of her death—was dreaming that her father was killing her?"—the listener makes a low moan. The same low moan that I made on the first reading of *State v. Vas*. My guess is that some members of that jury also let out a low moan when they heard the question—and that the prosecutor was counting on that. A moan is defined as an "audible expression of sorrow or suffering."<sup>174</sup> Moans do not emanate from rational thought, from inferences of knowledge carefully drawn from sense data. Moans emanate from the primitive self, perhaps from the medieval self, from the self that recognizes knowledge of a different sort—knowledge that comes from the bones, from the heart, from the premonitions of a dead child who cried out to no one in the night.

And I am confident of this: the prosecutor knew that he had no theory of admissibility for Ayla's dreams. Again, I can hear him thinking, even if I could get the statement in as an exception to the hearsay rule, there is the more foundational issue of relevance. Ayla's dream is even more problematic than O.J.'s because at least his dreams could be deemed relevant on a rough and ready version of a Freudian wish-fulfillment theory. The state of mind of the defendant relates to the issue of *mens rea*. Here, when the dreamer was the victim and not the perpetrator, there is no "state of mind" theory to justify the dream's introduction into evidence. Ayla is not on trial for the murder of her father. Hence, there is no theory of self-defense making the victim's state of mind relevant—no argument before the jury that Ayla was afraid of her father, hence justifying an act of violence against him. All the prosecutor had in his arsenal was a lame effort to impeach the witness, Thomas Juko, on how well he knew the defendant, on how competent he was to state an opinion about the defendant's warm relationship with his daughter.

Under a rationalist scheme, there is simply no theory to make Ayla's dreams relevant. If the prosecutor wanted to stay faithful to the empirical episteme, how could he argue that Ayla's dreams make it more likely than not that the defendant killed the victim? But while not legally relevant, her story is compelling—and the prosecutor knew that too: Ayla dreamed of being killed by the defendant; Ayla was killed by the defendant. Her murder gave the dream context and meaning; it suddenly became prophetic, the first chapter of a story. The structure of the

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174. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1153 (2d ed. 1986).

narrative began to hold sway in the mind of the listener. The dream foreshadowed the last chapter of Ayla's story; it set into stone the chain of causal relations that must inexorably lead to Ayla's tragic end. Hearing about that dream would be highly prejudicial to the defendant in his trial for Ayla's murder. For many dream interpreters, he would not stand a chance.

It is time for a Jungian interlude.

*D. A Jungian Interlude—Ayla's Dream and the Archetype of the Murdering Father*

Here is an understatement: Carl Jung was not an empiricist.<sup>175</sup> He might have embraced the epistemological stance for the conscious mind—that we may only claim to “know” things experienced with one's sensory apparatus. But for Jung, to focus solely on the functioning of the conscious mind reflects too narrow a view of the human psyche.<sup>176</sup> He believed that the unconscious was capable of attaining a more profound awareness of matters beyond our perception, and that at least part of the psyche is “not subject to the laws of space and time.”<sup>177</sup> “True,” he

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175. Freud was Jung's elder by nineteen years, and at one time early in their relationship, he confided to Jung that he was adopting him “as an eldest son, anointing him as successor and crown prince.” Joseph Campbell, *Introduction to THE PORTABLE JUNG*, at vii, xvii (Joseph Campbell ed., 1976) (internal quotations omitted). Freud and Jung eventually had a professional and personal falling out that centered around Jung's rejection of some of Freud's ideas, as well as Jung's openness to alternative epistemes, manifested in his interest in precognition and parapsychology, which Freud dubbed: “Sheer nonsense!” Jung characterized Freud's response to his views in terms “of so shallow a positivism that I had difficulty in checking the sharp retort on the tip of my tongue.” *Id.*

176. According to Jung, psychic life does not consist “only of self-evident matters”; if it did, then “we could content ourselves with a sturdy empiricism.” CARL JUNG, *The Stages of Life*, in *THE PORTABLE JUNG*, *supra* note 175, at 3, 4. Rather, our psychic processes are “made up to a large extent of reflections, doubts, experiments, all of which are almost completely foreign to the unconscious, instinctive mind of primitive man.” *Id.* As we move out of childhood, we abandon nature “and are driven to consciousness. There is no other way open to us; we are forced to resort to conscious decisions and solutions where formerly we trusted ourselves to natural happenings.” *Id.* But our conscious thought is only the tip of the iceberg. We also unconsciously think “in primordial images, in symbols which are older than historical man, which are inborn in him from the earliest times, and, eternally living, outlasting all generations.” *Id.* at 21. These images

still make up the groundwork of the human psyche. It is only possible to live the fullest life when we are in harmony with these symbols; wisdom is a return to them. It is a question neither of belief nor of knowledge, but of the agreement of our thinking with the primordial images of the unconscious.

*Id.*

177. CARL JUNG, *MEMORIES, DREAMS, REFLECTIONS* 304 (Richard & Clara Winstons trans., 1963) [hereinafter *MEMORIES*].

argued, “the unconscious knows more than the consciousness does; but it is knowledge of a special sort, knowledge in eternity, usually without reference to the here and now, not couched in language of the intellect.”<sup>178</sup> Jung believed that we get a glimmer of these “irrepresentable realities” when we make mathematical statements about infinity, or when we engage in dream analysis, or when we have experiences that evidence proof of life after death.<sup>179</sup>

Jung’s autobiography is full of stories with premonitions, precognitive dreams, intuitions, and visions.<sup>180</sup> In the *Prologue*, Jung warns the reader that his memoirs are shy on external events and outward circumstances.<sup>181</sup> Rather, he could only understand himself “in the light of inner happenings.”<sup>182</sup> Recollection of the outward events in his life had “largely faded or disappeared. But my encounters with the ‘other’ reality, my bouts with the unconscious, are indelibly engraved upon my memory. In that realm there has always been wealth in abundance, and everything else lost importance by comparison.”<sup>183</sup>

Jung believed that the unconscious had two discernible layers.<sup>184</sup> The first layer he dubbed the personal unconscious; it was specific to the individual, consisting of forgotten bits of the past, or repressed thought from which the consciousness had withdrawn, or of sense impressions that “never had sufficient intensity to reach consciousness but have

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178. *Id.* at 311.

179. *Id.* at 304–11.

180. In his autobiography, Jung described numerous paranormal experiences. Here is an example: Several nights after the sudden death of a friend, Jung awoke from sleep, and felt that the friend was in his room. *Id.* at 312. The friend was standing at the foot of Jung’s bed, and beckoned him to go with him. *Id.* Jung asked himself: could this be a fantasy or is my friend really there? *Id.* Then, in a cool, rational way, Jung reasoned: “Proof is neither here nor there! Instead of explaining him away as a fantasy, I might just as well give him the benefit of the doubt and for experiment’s sake credit him with reality.” *Id.* (internal quotations omitted). After that thought, his friend “went to the door and beckoned me to follow him. So I was going to have to play along with him! That was something I hadn’t bargained for. I had to repeat my argument to myself once more. Only then did I follow him in my imagination.” *Id.* Jung followed the dead friend who led him to his former library, climbed a stool, and pulled down the second of five books with red bindings that stood on the second shelf from the top. *Id.* Then the vision was over. *Id.* When Jung went to visit his friend’s widow the next day, he asked if he could look something up in the dead man’s library, and there was the stool, and on the second shelf, there were the five books with red bindings. *Id.* at 312–13. The books turned out to be the novels of Emile Zola. *Id.* at 313. Jung climbed onto the stool, and read the title of the second volume: *The Legacy of the Dead*. *Id.*

181. *Id.* at 5.

182. *Id.*

183. *Id.*

184. CARL JUNG, *The Structure of the Psyche*, in THE PORTABLE JUNG, *supra* note 175, at 23, 38.



somehow entered the psyche.”<sup>185</sup> The second layer, called the collective unconscious, is not individual but common to all men; it is the “ancestral heritage of possibilities of representation.”<sup>186</sup> The collective unconscious “so far as we can say anything about it at all—appears to consist of mythological motifs or primordial images, for which reason the myths of all nations are its real exponents.”<sup>187</sup>

There are myth motifs in all cultures that Jung calls “archetypes.”<sup>188</sup> For example, many myths and fables portray rivers as containing spirits, and thunder as the voice of an angry god, with lightning as “his avenging missile.”<sup>189</sup> There is a “universal hero myth” that depicts a “powerful man or god-man who vanquishes evil in the form of dragons, serpents, monsters, demons, and so on, and who liberates his people from destruction and death.”<sup>190</sup> Even human families consist of archetypes: the father, the earth mother, the innocent child—all these myth-motifs are eternally and universally repeated in all cultures.<sup>191</sup> In Jung’s words:

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185. *Id.*

186. *Id.* Mythology and primordial images are the exponents of the collective unconscious. The collective unconscious is

the totality of all archetypes, is the deposit of all human experience right back to its remotest beginnings. Not, indeed, a dead deposit, a sort of abandoned rubbish-heap, but a living system of reactions and aptitudes that determine the individual’s life in invisible ways—all the more effective because invisible.

*Id.* at 44.

187. *Id.* at 39. Under Jung’s theory, there are three psychic levels: (1) the consciousness; (2) the personal unconscious (which belongs individually to the person and consists of contents that were forgotten because they had lost their intensity, or were repressed, or were never sufficiently intense to have reached consciousness); and (3) the collective unconscious. *Id.* at 38. The collective unconscious does not just belong to the individual, but is “common to all men, and perhaps even to all animals, and is the true basis of the individual psyche.” *Id.*

188. CARL G. JUNG ET AL., *MAN AND HIS SYMBOLS* 68 (1964) [hereinafter *MAN AND HIS SYMBOLS*].

189. *Id.* at 85.

190. *Id.* at 68.

191. According to Jung, the archetypes that have the “most frequent and the most disturbing influence on the ego” are the shadow, the anima, and the animus. CARL JUNG, *Phenomenology of the Self*, in *THE PORTABLE JUNG*, *supra* note 175, at 139, 145. The anima refers to personality traits regarded as feminine; they are often repressed into the unconscious in a male psyche. *Id.* at 151. The parallel structure in the female psyche is the animus. *Id.* The ego represents the individual’s sense of personal self; the shadow is a kind of unconscious “counterego.” *Id.* at 145. It is the negative, socially undesirable part of the self, and becoming conscious of one’s shadow cannot be achieved “without considerable moral effort.” *Id.* It involves “recognizing the dark aspects of the personality as present and real. This act is the essential condition for any kind of self-knowledge, and it therefore, as a rule, meets with considerable resistance.” *Id.*

The deposit of mankind's whole ancestral experience—so rich in emotional imagery—of father, mother, child, husband and wife, of the magic personality, of dangers to body and soul, has exalted this group of archetypes into the supreme regulating principles of religious and even of political life, in unconscious recognition of their tremendous psychic power.<sup>192</sup>

These archetypes, together with instincts, form the collective unconsciousness.<sup>193</sup> Instincts are unconscious processes that are inherited, and occur uniformly and regularly among all people.<sup>194</sup> For example, the reproduction process is instinctual.<sup>195</sup> It is not learned behavior, but automatic.<sup>196</sup> Intuition is sometimes referred to as an “instinctive” act of comprehension, but Jung points out that intuition is a process analogous to instinct, with the difference being that “instinct is a purposive impulse to carry out some highly complicated action, intuition is the unconscious, purposive apprehension of a highly complicated situation.”<sup>197</sup> Intuition is one of the basic functions of the psyche, and Jung calls it “perception of the possibilities inherent in a situation.”<sup>198</sup>

Jung agreed with Freud that dreaming was a direct expression of the unconscious, but he rejected Freud's insistence that the content of the repression was invariably a sexual trauma.<sup>199</sup> Indeed, Jung's entire

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192. JUNG, *supra* note 184, at 43.

193. *Id.* at 44.

194. CARL JUNG, *Instinct and the Unconscious*, in THE PORTABLE JUNG, *supra* note 175, at 47, 50.

195. *Id.* at 50–51.

196. *Id.* at 50.

197. *Id.* at 51.

198. JUNG, *supra* note 184, at 26 (original emphasis omitted). Jung did ascribe to an empirical epistemology for conscious knowledge. “Consciousness seems to stream into us from outside in the form of sense-perceptions. We see, hear, taste, and smell the world, and so are conscious of the world.” *Id.* at 25 (original emphasis omitted). From sensations, we think about what things might be, and we have feelings towards those things. *Id.* at 25–26. But apart from sense-perception, thinking, and feeling, there is intuition. *Id.* at 25. About intuition, “language shows a regrettable lack of discrimination.” *Id.* at 26.

199. MEMORIES, *supra* note 177, at 147. Jung could not accept Freud's identification of the content of repression as invariably sexual trauma. In 1910, Freud and Jung had a famous encounter at the Second Congress of the Association of Psycho-Analysis where Freud insisted, even against organized opposition, that Jung should be appointed the permanent president. He urged Jung to “promise me never to abandon the sexual theory. That is the most essential thing of all. You see, we must make a dogma of it, an unshakable bulwark.” Campbell, *supra* note 175, at xviii. When Jung asked him, a bulwark against what, Freud replied, “‘Against the black tide of mud’—and here he hesitated for a moment, then added, ‘of occultism.’” *Id.* at xix. Jung was alarmed at the use of the

approach to dreams was pragmatic and open-minded;<sup>200</sup> he aggressively sought to ensure that no preconceived theory about the meaning of dreams intruded upon their interpretation.<sup>201</sup> He would protest: "I have no theory about dreams. I do not know how dreams arise. And I am not at all sure that my way of handling dreams even deserves the name of a 'method.'"<sup>202</sup> Dreams were just one of many psychic phenomena, and Jung exhorted others to "bear in mind that there is no simple and generally known theory of psychic phenomena, neither with regard to their nature, nor to their cause, nor to their purpose."<sup>203</sup> Theories like Freud's wish-fulfillment and sexual repression were valuable points of view, but they did not do "anything like justice to the profundity and richness of the human psyche."<sup>204</sup>

Consistent with Jung's rejection of dogmatism, he took the position that "it should be an absolute rule that every dream, and every part of a dream, is unknown at the outset, and to attempt an interpretation only after carefully taking up the context."<sup>205</sup> Each dream is embedded in a web of associations that belong and are known to only the individual dreamer, yet the dreamer might also include images from our shared collective experience in the form of archetype.<sup>206</sup> Jung found that sometimes the dreams of his patients contained images with which they

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word dogma, an "undisputable confession of faith" contrary to scientific judgment. *Id.* But he was also upset by Freud's fear of "occultism." *Id.* Jung wrote:

"I knew that I would never be able to accept such an attitude. What Freud seemed to mean by 'occultism' was virtually everything that philosophy and religion, including the rising contemporary science of parapsychology, had learned about the psyche. To me the sexual theory was just as occult . . . a hypothesis that might be adequate for the moment but was not to be preserved as an article of faith for all time."

*Id.* at xix (quoting Jung).

200. Jung disagreed with Freud that the dream is a "'facade' behind which its meaning lies hidden—a meaning already known but maliciously, so to speak, withheld from consciousness." MEMORIES, *supra* note 177, at 161. To Jung, dreams

are a part of nature, which harbors no intention to deceive, but expresses something as best it can, just as a plant grows or an animal seeks its food as best it can. . . . Long before I met Freud I regarded the unconscious, and dreams, which are its direct exponents, as natural processes to which no arbitrariness can be attributed.

*Id.* at 161–62.

201. Thayer A. Greene, C.G. Jung's *Theory of Dreams*, in HANDBOOK OF DREAMS, *supra* note 14, at 298, 298.

202. *Id.*

203. *Id.* at 299.

204. *Id.*

205. *Id.* at 310.

206. *Id.* at 315.

were unfamiliar, but which reflected symbols that could be found in the world's mythological systems.<sup>207</sup> The analyst's job was to take these two layers of meaning—the personal and the collective or universal—and relate them to the dream's situation.<sup>208</sup>

For Jung, the dream served two functions. First, it compensated for internal imbalances in the psyche,<sup>209</sup> and second, it assisted in what Jung called the “individuation process,” which Jung translated as “coming to selfhood” or “self-realization.”<sup>210</sup> The dream's purpose was to communicate something to the conscious mind.<sup>211</sup> Thus, the dream had a pragmatic function and was future-oriented.<sup>212</sup> The unconscious had its own intelligence, and the dream was a tool of revelation—something for the conscious mind to learn from and use in its ongoing quest for self-realization and individuation.<sup>213</sup>

How would Carl Jung interpret Ayla's dream of her father murdering her?<sup>214</sup> At one time in his life, Jung would not have deemed her precognitive dream a prophecy. In his earlier writings, he had this to say about dreams that “tell the future”:

The occurrence of prospective dreams cannot be denied. It would be wrong to call them prophetic, because at bottom they are no more prophetic than a medical diagnosis or a weather

207. See, e.g., *id.* (relating account of a young man's dream of performing fellatio on himself and noting that it was an exact parallel to an ancient Hindu myth of creation).

208. *Id.* at 306–07 (“The task of the analyst is to differentiate these two layers and to relate them relevantly to the conscious life situation of the dreamer. Such a skill requires of the analyst that he or she be well read and deeply familiar with the images and motifs of religion, mythology, folklore, fairy tale, drama, and the arts. When such images and motifs appear in dreams, the archetypal layer is impinging upon the personal ‘story’ of the dreamer.”).

209. *Id.* at 302. Jung also theorized that the dream could be regarded as compensation or correction for unbalanced conscious thoughts. The nature of psychic process is a “dialectical interplay between pairs of opposites, most especially that between ego consciousness and the unconscious. Consequently, the dream is understood as the primary mode by which the unconscious expresses in symbolic form a balancing or homeostatic reaction to the one-sided position of the conscious attitude.” *Id.* Jung interpreted a dream that he had that presaged his forthcoming break with Freud. He had dreamed that Freud was a “peevish official of the Imperial Austrian monarchy, as a defunct and still walking ghost of a customs inspector.” *MEMORIES*, *supra* note 177, at 164. He postulated, “But it was possible that the dream could be regarded as a corrective, as a compensation or antidote for my conscious high opinion and admiration. Therefore the dream recommended a rather more critical attitude toward Freud.” *Id.*

210. *MEMORIES*, *supra* note 177, at 383.

211. Greene, *supra* note 201, at 304.

212. *Id.* at 304–05.

213. *Id.* at 305.

214. See *supra* Part II.C.

forecast. They are merely an anticipatory combination of probabilities which may coincide with the actual behavior of things but need not necessarily agree in every detail.<sup>215</sup>

He might have said: Ayla's dream was like a bit of dreaming intuition. She was looking at the possibilities in the situation—and had concluded her father just might murder her.

But later in his life, Jung seemed more open to the idea of a dream as prophecy. He admitted there were documented cases of what he referred to as “spontaneous foreknowledge,” sometimes occurring in precognitive dreams.<sup>216</sup> Because a rationalist only believes in the reality of the phenomenal world, Jung explained, he must reject the existence of such para-psychological experiences.<sup>217</sup> But if those phenomena occur, and Jung later believed they did, then the “rationalistic picture of the universe is invalid, because incomplete.”<sup>218</sup> A complete picture of the world would require the addition of still another dimension; only then could the totality of phenomena be given a unified explanation.<sup>219</sup> So maybe if we asked Jung later in his life, he might be willing to say that Ayla had been prophetic—and that time might go in both directions.<sup>220</sup>

Either way, Jung would surely be willing to say that Ayla's dream was informed by the collective unconscious, the ancient, primitive store of symbolic imagery and mythology that transcends particularity. Myths contain several parental archetypes. The earth mother, for example, is one, and her devotion to her child is laudable and comforting.<sup>221</sup> But the

215. Greene, *supra* note 201, at 305 (quoting Jung).

216. MEMORIES, *supra* note 177, at 304; see also *supra* note 157.

217. MEMORIES, *supra* note 177, at 305.

218. *Id.*

219. *Id.*

220. This is a subject that has generated a great deal of scientific literature. See, e.g., P.C.W. DAVIES, THE PHYSICS OF TIME ASYMMETRY (1977); PHYSICAL ORIGINS OF TIME ASYMMETRY (J.J. Halliwell et al. eds., 1994); H. PRICE, TIME'S ARROW AND ARCHIMEDES' POINT (1996).

221. Demeter's story is told in the earliest of the Homeric poems. Demeter, the goddess of the corn, the harvest, the summer time, only had one daughter, Persephone, who was the maiden of spring. EDITH HAMILTON, MYTHOLOGY 49 (1940). Lured by the bloom of the narcissus, Persephone strayed too far and was taken by the lord of the dark underworld where she dwelled among the shadowy dead. *Id.* at 50. Demeter grieved her loss so much that nothing would grow on earth, and there was famine in the land. *Id.* at 52. Zeus intervened, and sent Hermes to the underworld to fetch Persephone. *Id.* The lord of the underworld made Persephone swallow a pomegranate seed, “knowing in his heart that if she did she must return to him.” *Id.* Persephone returned to her mother, and the fields were once more abundant with fruit and greenery, but every year, for four months, Persephone had to return to the underworld. *Id.* at 53–54.

After the lord of the dark world below carried her away she was never again the gay young creature who had played in the flowery meadow without a thought of care or trouble. She did

myths manifesting the collective unconscious sometimes reveal the shadow, the darker side of the human psyche—including the parent’s potential for selfishness and jealousy. Perhaps it was the archetype of Cronos that Ayla’s unconscious was drawing upon—the Titan father who destroyed his young by swallowing them whole when he learned that one of them would someday steal his throne.<sup>222</sup> Sometimes the parent is willing to sacrifice his child if it benefits him in some way, or if he feels threatened, or if someone else wants to take the child from him. Anyone who has ever spent any time in family court knows this to be true—that children are often used as pawns by their parents in bitter battles between husband and wife.<sup>223</sup> Entitlement to the child trumps concern for the child.<sup>224</sup> Children can even get murdered that way—if I cannot have her, then neither can you. Ayla sensed that the father who gave her life believed that he had the power to destroy her if things did not go his way. It is an old story, Jung would say, and no quirk of fate that Ayla would have access to it in her sleep—even before it happened. About this I am certain: Jung would have exhorted Ayla’s protectors to be attentive to her dreams.

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indeed rise from the dead every spring, but she brought with her the memory of where she had come from; with all her bright beauty there was something strange and awesome about her. She was often said to be, “the maiden whose name may not be spoken.”

*Id.* at 54.

222. Cronos, or Saturn in Latin, was one of the Titans, often called the Elder Gods. *Id.* at 65. The Titans were for many ages supreme in the universe, and of enormous size and strength. *Id.* The most important Titan was Cronos who ruled over the other Titans until his son, Zeus, vanquished him and seized the throne for himself. *Id.* at 66–67. Cronos had himself wounded his own father, and he was more than a little sensitive about being dethroned by his own son. *Id.* at 65. Cronos had learned that one of his children would one day dethrone him, so “he thought to go against fate by swallowing them as soon as they were born.” *Id.* After his sister-queen, Rhea, gave birth to Zeus, she had him secretly removed to Crete, and gave her husband a stone wrapped in swaddling clothes that he promptly swallowed. *Id.* at 65–66. When Zeus grew up, he forced Cronos to disgorge the stone, along with his five siblings. *Id.* at 66. Eventually, after a terrible war, Zeus and his siblings vanquished Cronos and his brother Titans. *Id.* at 66.

223. These stories show up in the newspaper from time to time. Here is an example: *Woman in Custody Case Kills Herself and Her Child, Police Say* was the caption for a brief story in the Metro Section of the *New York Times*. See Bruce Lambert, *Woman in Custody Case Kills Herself and Her Child, Police Say*, N.Y. TIMES, July 25, 2003, at B5. The bodies of a thirty-four-year-old woman and her two-year-old daughter were found in a Long Island home the day before the woman was due to appear in Nassau County Family Court in a child custody suit; the deaths appeared to be a murder-suicide, based on the note left behind. *Id.* The girl was found face down in the bathtub, underwater. *Id.* The last sentence of the newspaper article read, “A complaint about the family’s situation was reported to the county’s child protection agency earlier this year, but an investigation determined that the report was unfounded, the county social services commissioner, Bob Sherman, said last night.” *Id.*

224. See *id.*

But ours is not a culture where dreams matter much. It is time to end Ayla's story with a discussion of the Iroquois—a people who had a dreaming culture. Sad but true, we have to move back in time, before the Europeans set foot on North America, when the belief system of the Iroquois was still intact.<sup>225</sup> Ayla might still be alive today if she had belonged to a dreaming culture like that of the Iroquois.

*E. Concluding Ayla's Story—The Dreaming Culture of the Iroquois*

Much of what we know about the Iroquois comes from first-hand accounts of Europeans, many of them Jesuit priests who settled in the northeast during the seventeenth century.<sup>226</sup> From their letters and diaries, we have learned that the Iroquois took dreaming very seriously.<sup>227</sup> Dream-sharing was a common practice among the Iroquois.<sup>228</sup> Sometimes if the dreamer could not remember or fully understand a dream, a shaman possessing visionary powers would be

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225. Even in the late twentieth century, the dreaming cultures of North American native people were much stronger than non-native populations:

Not only did a group of Cree Indians from Alberta recall significantly more dreams and feel more alert on awakening than did non-Indian control subjects, but they made more attempts to understand and analyze their dreams. They were also significantly more likely to contact the people who appeared in their dreams—thus maintaining the traditional performative utilization of dreams.

HUNT, *supra* note 1, at 85.

Lydia Degarrod provides a fascinating account of how the Mapuche in southern Chile use dream narratives to aid in the formation of a distinct ethnic identity, and to help establish a cultural resistance to oppression and domination. See generally Lydia Nakashima Degarrod, *Mapuche: Dream Interpretation and Ethnic Consciousness*, in NEW DIRECTIONS IN ANTHROPOLOGY (Prentice Hall CD-ROM, Apr. 14, 2003).

226. "Iroquois" is a term used to include the Five Nations of the Iroquois and the Huron. Donald Patrick St. John, *The Dream-Vision Experience of the Iroquois: Its Religious Meaning* 6 (1981) (unpublished Ph.D. dissertation, Fordham University) (on file with author). The Iroquois lived in the northeast prior to the beginning of the Christian era, probably initially in small, mobile bands, subsisting on hunting, fishing, and gathering. *Id.* at 6–7. They became settled by 500 C.E., and after 1000 C.E., the Iroquois moved from villages along rivers and banks to more permanent settlements on hill tops, consolidating in larger tribal units. *Id.* at 7–8. The League of the Iroquois was formed in the middle of the fifteenth century. *Id.* at 8.

227. *Id.* at 24. Most of the diaries and letters were written by French Jesuit missionaries who lived among the native people of the Northeast in the seventeenth and early eighteenth centuries. *Id.* Considered the "single largest source of data on seventeenth century Iroquoian life," the "Jesuit Relations," consisting of the written reports, journals, and correspondence left by the missionaries, resulted in "an admirable account of Indian life and customs, even considering the conditions of the time and the fundamental differences between the Indians and the Europeans. It is mainly to the Relations that we owe our knowledge of the role of the dream-vision experience in Iroquoian society." *Id.*

228. *Id.* at 62.

called in to divine its meaning.<sup>229</sup> During the great annual Midwinter Festival, and at other times of the year if a healing ceremony was called for, the Iroquois engaged in the *onoharoia*, or the dream-guessing ceremony.<sup>230</sup> At this ceremony, old and new dreams would be told, and the community would respond by performing various rituals designed to “disarm the spirits who might bring disease to the people across the ice-bridge from the old year.”<sup>231</sup> There were expert “interpreters,” or *artemidores*, who “tried to make sense out of the confused images in order to create a coherent dream sequence.”<sup>232</sup> At times, “communal dramatization of the dream might be demanded” by the dreamer.<sup>233</sup> The fear was that “great peril would come to the nation” if the dream was not acted out.<sup>234</sup>

The Iroquois believed that “sympathetic communication can exist between two psychophysical beings in the sacred cosmos”; sometimes that communication took place in dreams.<sup>235</sup> One of the closest relationships in this sacred cosmos was between a human being and his guardian spirit, often an animal spirit guide.<sup>236</sup> With respect to animal spirit guides, it was crucial for the Iroquois, and in particular the Huron who depended less on agriculture, to be successful in their winter hunts.<sup>237</sup> Success depended on “the maintenance of a proper relationship with those sacred beings who watched over the animals.”<sup>238</sup> Animals were created by the Master of Life, who instructed them that they must give themselves over to humans so that the latter might live; animals therefore needed to be “related to both their spiritual and material dimensions.”<sup>239</sup> Through the dream, humans encountered either the “tutelary spirit of an animal species or the spirit (‘soul’) of a particular animal.”<sup>240</sup> Such an encounter was seen as a fortuitous sign, and usually

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229. *Id.*

230. *Id.* at 64–65.

231. *Id.* at 66.

232. *Id.* at 68.

233. *Id.*

234. *Id.*

235. *Id.* at 51.

236. *Id.* at 54–55.

237. *Id.* at 49.

238. *Id.*

239. *Id.*

240. *Id.*



guaranteed success in hunting.<sup>241</sup> Dream visitors, such as the animal spirit guides, came from a dimension beyond the physical plane.<sup>242</sup>

For the Iroquois, dreams sometimes foretold the future.<sup>243</sup> At other times, the dream relayed vital information to the dreamer—often about his health or survival.<sup>244</sup> Dreams were essential to healing.<sup>245</sup> The Iroquois understood the intimate relationship between the spirit and the body—how the former, if not protected, could poison the latter. As one Jesuit priest reported, the soul makes its wishes

“known by means of dreams, which are its language. Accordingly, when these desires are accomplished, it is satisfied; but, on the contrary, if it be not granted what it desires, it becomes angry, and not only does not give its body the good and happiness that it wished to procure for it, but often it also revolts against the body, causing various diseases, even death.”<sup>246</sup>

Another seventeenth century Jesuit observer wrote that for the Iroquois, disease comes from the “mind of the patient himself, which desires something, and will vex the body of the sick man until it possesses the thing required.”<sup>247</sup> He added:

“[T]hey think that there are in every man certain inborn desires, often unknown to themselves, upon which the happiness of individuals depends. For the purpose of ascertaining desires and innate appetites of this character, they summon soothsayers, who

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241. *Id.*

242. *Id.* at 49–50. The Iroquois assumed a network of rights and duties among all beings:

Whether one speaks of the great cosmic forces or the soul of a fish, nothing is autonomous and independent but has a place and duties “assigned” to it by the Master of Life. There is also the assumption that sympathetic communication can exist between two psychophysical beings in the sacred cosmos. In times of disharmony within the cosmic order, such communication is absolutely necessary for the restoration of balance. Sometimes a non-human person may take the initiative by appearing in a dream. Sometimes a human being through ritual will try to communicate with or influence one of the other beings in the cosmos.

*Id.* at 50–51.

243. *Id.* at 69.

244. *Id.* at 61.

245. *Id.* at 58.

246. *Id.* at 57–58 (quoting Relation of Father Ragueneau).

247. Anthony F.C. Wallace, *Dreams and the Wishes of the Soul: A Type of Psychoanalytic Theory Among the Seventeenth Century Iroquois*, 60 AM. ANTHROPOLOGIST 234, 237 (1958) (quoting Relation of Father Jouveney, 1610–1613).

as they think, have a divinely-imparted power to look into the inmost recesses of the mind.”<sup>248</sup>

Moreover, the Iroquois believed that fulfillment of the frustrated desire, either directly or symbolically, would provide relief of the dreamer’s distress.<sup>249</sup> This meant that for the Iroquois, dreams, and their fulfillment, were a matter of public discussion and concern. About the Seneca, one Jesuit priest wrote that these “people think only of [dreams], they talk about nothing else, and all their cabins are filled with their dreams.”<sup>250</sup> Needless to say, the black-robed Jesuit priests were worried that some Seneca might have dreams of killing them.<sup>251</sup> Father Fremin wrote:

“What peril we are in every day . . . among people who will murder us in cold blood if they have dreamed of doing so; and how slight needs to be an offense that a Barbarian has received from someone, to enable his heated imagination to represent to him in a dream that he takes revenge on the offender.”<sup>252</sup>

At times, the members of this dreaming culture would get involved in the interpretation of certain dreams—those that were thought to contain a warning of some kind: impending death, disease, or other threats to the people or to the peace of the community.<sup>253</sup> A prophecy in a dream might require certain rituals to ensure that the future event would not take place.<sup>254</sup> Sometimes if the dream foretold personal disaster for the dreamer, the community could prevent the event by symbolically acting

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248. *Id.* (quoting Relation of Father Jouvency, 1610–1613). According to Iroquois theory, there were actually three sources of disease or bodily infirmity: from the mind of the patient himself; from natural injuries, “such as wounds of war or physical accident; from witchcraft, by which certain foreign articles such as balls of hair, splinters of bone, clots of blood, or bear’s teeth were projected magically into a victim’s body.” *Id.*

249. There are many accounts from Jesuit priests of these public dream fulfillments:

He who has dreamed during the night that he was bathing, runs immediately, as soon as he rises, all naked, to several cabins, in each of which he has a kettleful of water thrown over his body, however cold the weather may be. Another who has dreamed that he was taken prisoner and burned alive, has found himself bound and burned like a captive on the next day, being persuaded that by thus satisfying his dream, this fidelity will avert from him the pain and infamy of captivity and death.

*Id.* at 235 (quoting Relation of Father Fremin).

250. *Id.* (quoting Relation of Father Fremin).

251. *Id.*

252. *Id.* (quoting Relation of Father Fremin).

253. See generally St. John, *supra* note 226, at 54–70.

254. See *id.* at 69–70.

out the dream.<sup>255</sup> For example, one Iroquois man dreamed that he was going to be captured and tortured by the enemy.<sup>256</sup>

To prevent this, his friends bound him and dragged him through the streets to a scaffold. Here they lit a fire in anticipation of the torturing. After he has sung his death song he was satisfied that enough of the dream has been fulfilled to prevent the actual event from occurring.<sup>257</sup>

One early Jesuit missionary concluded that the Iroquois

“speak of their dreams as of a God, they mean nothing else than it is by this means that they gain knowledge of the will of God . . . and that the doing of what they have seen in dreams is a means which contributes to the establishment of their health and of their good fortune.”<sup>258</sup>

In many ways, the Iroquois were centuries ahead of Freud. While they had no theory of the unconscious, they recognized that dreams had a symbolic importance. There was also a public forum for the interpretation of important dreams, and a process by which to interpret them, including the assistance of a trained, expert interpreter to discover the dream’s latent meaning.<sup>259</sup> For the Iroquois, dreams were privileged and regarded as a source of sacred knowledge.

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255. *Id.* at 68–69.

256. *Id.* at 69.

257. *Id.* Sometimes the dream premonitions had to be fully acted out:

One man had a dream that his house burned down. He kept insisting, to a reluctant group of elders or chiefs, that he must carry out that dream (possibly because he was afraid that he might be asleep when it actually occurred). After weighing the matter, the chiefs with great ceremony carried out the act for him.

*Id.* at 69–70.

258. *Id.* at 71 (quoting Relation of Father Milet).

259. *Id.* at 68. In our culture, the only trained, expert interpreters of dreams are therapists. If the dream is interpreted as a threat of violence to another person, under the rationale in *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), the therapist may have a duty to warn the intended victim if he determines that the patient “presents a serious danger of violence to another.” *Id.* at 340; *see, e.g.*, *Brown v. Smith*, No. X03CV000053181S, 2001 WL 1004162, at \*2 (Conn. Super. Ct. Aug. 7, 2001) (imposing duty to warn on the therapist when the patient revealed, among other things, that “he had dreams of violent outbursts, mostly directed against himself but also directed to others, especially when he returns to work”). Apparently the assailant in *Brown* killed four co-workers at the Connecticut Lottery and then killed himself. *Id.* at \*1; *see also* *Logan v. Smith*, No. X03CV000503179S, 2001 WL 1004188 (Conn. Super. Ct. Aug. 7, 2001); *Mlynarczyk v. Smith*, No. X03CV000503096S, 2001 WL 1004183 (Conn. Super. Ct. Aug. 7, 2001); *Rubelmann v. Smith*, No. X03CV000503180S, 2001 WL 1004237 (Conn. Super. Ct. Aug. 3, 2001).

Ayla would have fared better with the Iroquois, in a culture where all their cabins were filled with their dreams. Perhaps the Iroquois would have interpreted her dream as a warning of impending violence, threatening not only to the dreamer's life, but to the peace of the community. Perhaps a trained interpreter would hear her dream and conclude that Ayla suffered from soul sickness, brought on by living in a damaged, fractured home where parents were at war and a child was at risk. Perhaps someone would have recognized that a six-year-old girl who dreams of her father killing her—particularly a father with a history of violence—might have something of importance to say. At the very least, there would have been a public arena in a dreaming culture like the Iroquois for her to narrate her dream and subject it to expert interpretation—and perhaps to alert the authorities to provide her with some protection.

Ayla was just born among the wrong people, at the wrong time, and in the wrong place, where dreams are not regarded as a legitimate basis for knowledge.<sup>260</sup> No one was responsible for listening to a child's dream talk. Her dreams were private matters; they did not matter. Ultimately, neither did she.

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260. In one case, at least the police took a dream interpretation seriously, although this seems to be the exception to the rule. *State v. McCrady*, No. 97CA33, 1999 WL 4859 (Ohio Ct. App. Dec. 18, 1998). A psychic directed Mary Dye, the dreamer, to the grave site of a murder victim, where she also witnessed the defendant driving his car away from the site. *Id.* at \*3. Mary Dye directed police to the area of the victim's grave. *Id.* On appeal, the defendant argued that the trial court should have suppressed evidence gathered in the course of executing search warrants because the detective had made material omissions in the affidavits submitted to obtain those warrants, including the fact that Mary Dye had been led to the grave site on the basis of the psychic's dream interpretation. *Id.* at \*6. The detective found that Dye's story was "incredible, and . . . he did not include the dream and psychic portions of her story in his affidavit in order to bolster Dye's credibility." *Id.* Moreover, Dye had been a witness to the defendant at the site, and her story was the strongest lead the detective had. *Id.* The court held that even if the defendant had proven the detective had been intentional or reckless in omitting allegations about the dream or the psychic, the other facts were sufficient to find the requisite probable cause for the search warrant. *Id.* at \*7. Obviously, the psychic's interpretation of the dream as a basis of the dreamer's knowledge was regarded as damaging to the dreamer's credibility.

### III. THE PENULTIMATE WILD DREAMER, CARTESIAN CONFUSION, ZHUANG ZHOU'S BUTTERFLY, AND A TIBETAN BUDDHIST INTERLUDE

#### A. *Wild Dreamer Dreams He Has Murdered a Young Woman (and He Had Not)*

Glenville Smith is the penultimate wild dreamer of these meditations—the ultimate wild dreamer is another young man, Steven Linscott, who also dreamed he had murdered a young woman, and he had not.<sup>261</sup> But before we turn to Smith and Linscott's stories, let me tell you first about Descartes, a seventeenth century French philosopher, and Zhuang Zhou, a Chinese scholar and philosopher from the fourth century B.C.E.

In his *First Meditation*, Rene Descartes found himself sitting by the fire, staring at his hands and wondering how he could be certain of the reality of his ordinary sense perceptions when his dreams seemed to be so real.<sup>262</sup> He examined his hands, and extended them, noting that he did so “deliberately and of set purpose.”<sup>263</sup> His perceived reality seemed so real—he had to be awake.<sup>264</sup> Then he pondered how real similar perceptions of familiar things had seemed in his dreams.<sup>265</sup> Could he trust his senses? How could he know whether he was awake or in a dream? He remarked:

[I]n thinking over this I remind myself that on many occasions I have in sleep been deceived by similar illusions, and in dwelling carefully on this reflection I see so manifestly that there are no certain indications by which we may clearly distinguish wakefulness from sleep that I am lost in astonishment. And my astonishment is such that it is almost capable of persuading me that I now dream.<sup>266</sup>

Descartes was one of the few philosophers in the West to consider the phenomenon of dreaming, but aside from the questions that dreams pose

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261. See *infra* Part IV.

262. RENE DESCARTES, *Meditation I*, in THE PHILOSOPHICAL WORLD OF DESCARTES 144, 145–46 (Elizabeth Haldane & G.R.T. Ross trans., 1973) (1911).

263. *Id.* at 146.

264. *Id.*

265. *Id.*

266. *Id.*

about the reliability of our waking senses, he had little to say about the dreams themselves. It is from Descartes' skepticism, however, that we have the legacy of the scientific method. We replicate experiments over and over again, under exactly the same conditions, and with the same results, continually striving to reduce the unreliability of our fallible senses.<sup>267</sup> "All that up to the present time I have accepted as most true and certain," Descartes wrote, "I have learned either from the senses or through the senses; but it is sometimes proved to me that these senses are deceptive, and it is wiser not to trust entirely to any thing by which we have once been deceived."<sup>268</sup> Descartes provided the basis for scientific objectivity, for drawing the line between what can be claimed as real, and what cannot.

Sometime in the fourth century before the Common Era, there was a Chinese scholar and official named Zhuang Zhou, who meditated on the same duality of the dreaming and waking reality as Descartes.<sup>269</sup> In a famous passage, Zhuang Zhou relates his dream of being a butterfly, and of the puzzlement he felt when he awoke:

A butterfly fluttering happily around—was he revealing what he himself meant to be? He knew nothing of Zhou. All at once awakening, there suddenly he was—Zhou. But he didn't know if he was Zhou having dreamed he was a butterfly or a butterfly dreaming he was Zhou. Between Zhou and the butterfly there must surely be some distinction. This is known as the transformation of things.<sup>270</sup>

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267. WALTER TRUETT ANDERSON, *OPEN SECRETS: A GUIDE TO TIBETAN BUDDHISM FOR WESTERN SPIRITUAL SEEKERS* 130–31 (1979). Anderson writes of Descartes' contribution to modern science:

Descartes, in his *Discourse on Method* and in *Principles*, worked out a set of basic concepts for understanding the physical universe, with a radical separation of the "I," the knower of phenomena, from the world of observed phenomena. . . . Descartes provided the intellectual basis for modern science: a universe of bodies moving through space according to mechanistic laws, and a separate human intelligence capable of observing their behavior and discovering the laws.

*Id.* at 110–11.

268. DESCARTES, *supra* note 262, at 145.

269. 1 *SOURCES OF CHINESE TRADITION* 103 (William Theodore de Bary & Irene Bloom eds., 1999). Zhuang Zhou, or Zhaungzi as he is often referred to, probably lived during the late Warring States period. *Id.* at 95. His work often takes the form of a conversation between real or imaginary entities (e.g., a fictional Confucius, or a talking tree) or of parables. *Id.* The issues he tackles are all highly philosophical: the nature of knowledge, the limitations of language, the relationship between the universal and the particular. *Id.* at 96.

270. *Id.* at 103.

A man named Glenville Smith found himself caught in Zhuang Zhou's butterfly quandary—or if you prefer to stay in the west and stare at your hands, in Descartes' *First Meditation*. He had difficulties distinguishing between the real and the dreamed.<sup>271</sup> These difficulties almost subjected Glenville Smith to the death penalty—he could have lost his life for being a wild dreamer.<sup>272</sup> Glenville Smith had a dream about a heinous crime, and understood the dream to mean that he was the perpetrator.<sup>273</sup> Smith, age twenty-eight, claimed to have psychic powers.<sup>274</sup> He lived in a separate room in his girlfriend's house in Queens; her thirteen-year-old daughter lived with them.<sup>275</sup> The daughter ran away from home and was picked up by a young man from Brooklyn who suggested that they have sex.<sup>276</sup> She agreed and drove back to his house where she hid out for six days.<sup>277</sup> Her mother reported her missing, and the police were alerted.<sup>278</sup>

A few days after the teenager was missing, Glenville Smith had a vivid and violent dream in which the girl was raped, murdered, and buried under the water in nearby Nassau County.<sup>279</sup> He contacted the police, and they went out searching for her body the next day; they found nothing.<sup>280</sup> Smith later took the police to six locations, and then the next day to seven other locations, but no body was ever found.<sup>281</sup> He

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271. A professor from the American University in Beirut, the plaintiff-abductee who was kidnapped and held for sixty-five days by members of an Iranian-sponsored terrorist organization, Hezbollah, suffered the same difficulties in distinguishing dream from reality. *Regier v. Islamic Republic of Iran*, 281 F. Supp. 2d 87, 91–92 (D.C. Cir. 2003). Unfortunately, when he was in the midst of a happy dream, he would wake up to a living nightmare. During the period of torture and imprisonment, Professor Regier testified to a “complete reversal from normal experience” with regard to the sleeping and the waking state. *Id.* at 92 (internal quotations omitted). “I would sometimes have a happy dream, and then I would wake up to the nightmare rather than the other way around. The nightmare was waking up, not going to sleep.” *Id.* (internal quotations omitted).

272. Mike McAlary, *Confessed Murderer Spared by His Victim*, DAILY NEWS (N.Y.), Jan. 23, 1998, at 16.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. One wonders why the police allowed the investigation to go on for so long. As Gregory L. Lasak, the executive assistant to the Queens District Attorney said, “The detectives were very anxious to find the body. . . . They had questions about his credibility, but he also had the opportunity and he was confessing, and it would have been foolhardy to let him go.” Jan Hoffman,

also signed a written confession, and then later made a grisly video-taped confession in which he admitted to raping the girl on the couch, sodomizing her and smothering her with one hand, and then snapping her neck.<sup>282</sup> From his dream, “I realized I killed her,” Smith wrote, “I feel sorry for what I did.”<sup>283</sup>

The missing teenage girl happened to be watching television in her hide-out in Brooklyn and saw a video clip of Glenville Smith, her confessed killer, being escorted out of the precinct in handcuffs.<sup>284</sup> “But I ain’t even dead,” she protested.<sup>285</sup> Once she learned that she was presumed dead, she decided to go home, called her mother, and took the J train back to Queens.<sup>286</sup> Despite his dream, apparently Smith had never touched the girl, and was eventually charged with obstructing justice, a felony, and filing a false police report, a misdemeanor.<sup>287</sup> He was also examined by psychiatrists at Queens Hospital Center and Kings County Hospital.<sup>288</sup>

Who knows what motivated Glenville Smith to confess to a crime that he did not commit?<sup>289</sup> Perhaps he just wanted to be in the limelight; perhaps he was just crazy; perhaps Glenville Smith’s dreamed-of-deeds were merely repressed desires, so vividly reenacted in sleep, that he was genuinely unable to distinguish them from reality. Smith’s confusion, if confined to meditating about whether his hands were being held out before his real face or his dreaming face, presents an interesting philosophic quandary. But when the confusion is about whether he raped and killed his girlfriend’s daughter who had run away from home, and now he has gone to the police and signed a statement to that effect,

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*Questioning Miranda: Police Refine Methods So Potent, Even the Innocent Have Confessed*, N.Y. TIMES, Mar. 30, 1998, at A1, B4 (internal quotations omitted).

282. McAlary, *supra* note 273, at 16.

283. *Id.* Smith was having a tough time. When he returned home from looking for the girl’s body the first time, he was beaten up by the girl’s mother, his girlfriend. *Id.* His girlfriend later made a tape admitting that it was she, and not the police, who had beaten up Smith. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. The *New York Times* suggested that Smith “was fascinated by law enforcement. He claimed he was a security guard, and led Queens officers to 13 locations where the body might be buried. Then the teen-ager showed up, very much alive.” Hoffman, *supra* note 281, at B4.



confessing the dream of his crime—that kind of confusion could get a man executed in New York state.<sup>290</sup>

Had the girlfriend's daughter decided to stay away forever, Glenville Smith's horrible dream talk about her fate might have been adopted as the truth. An ambitious, zealous prosecutor might have decided to introduce his wild dream of raping and killing her—a wild dream made suddenly real by his waking confession—into evidence at his murder trial.<sup>291</sup> Maybe Glenville Smith, given his predilection for taking responsibility, might have pled guilty. For a crime arguably punishable by the death penalty, the state might have insisted on going to trial. Either way—imprisoned for many years, or executed—it would have been a harsh punishment for an innocent man who could not distinguish dream from reality.

Perhaps he was caught in Zhuang Zhou's dilemma and found himself wondering: am I Glenville Smith, just a guy hanging out at his girlfriend's house in Queens, dreaming that I am a vicious killer? Or am I a vicious killer, dreaming that I am Glenville Smith, just a guy hanging out at his girlfriend's house in Queens? There is an inherent duality in those questions—between what we call the real and the unreal, the

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290. In 1995, Governor George E. Pataki approved the long-inactive New York death penalty legislation. James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 7, 1995, at A1. New York limits the imposition of the death sentence to only those defendants convicted of first-degree murder. N.Y. PENAL LAW § 60.06 (McKinney 1998). To be convicted of first-degree murder in New York, the murder must have been committed under one of twelve enumerated aggravating factors, including that the killing was done in “an especially cruel or wanton manner pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim's death.” *Id.* § 125.27(1)(a). One journalist wrote about the problem of executing innocent defendants:

It almost happened in Queens, where prosecutors suddenly realized they had an innocent man on the track to the death house. The suspect must have been guilty, he admitted the crime. Only the rape and murder was a complete fabrication. He was saved by a girl who turned on the television during the middle of a thoroughly reckless teenage week and took the subway home.

The next time you hear politicians talking about the social curing power of lethal injection, remind them of Glenville Smith, an admitted killer who might even be lucky enough to outlive his murder victim.

McAlary, *supra* note 273, at 16.

291. In *State v. Mitchell*, 577 N.W.2d 481 (Minn. 1998), for example, a fifteen-year-old defendant in a murder trial stated that he did not remember the night of the murder, but

continue[d] to have nightmares about what happened. The psychologist stated that Mitchell “feels haunted by the victim, [and is] terrified to go to sleep for fear of having more nightmares and [demonstrates] frequent vigilance in that he hears the victim's voice whispering to him. There should be no mistaking that Mr. Mitchell experiences guilt.”

*Id.* at 487. While there was other evidence that clearly inculpated Mitchell, the psychologist was allowed to testify that despite Mitchell's lack of memory about the murder, the dreams evidenced his experience of guilt. *Id.*

waking and the dreaming state, with their respective spheres of operation.

Zhuang Zhou characterized the duality differently from Descartes. For Descartes, there was a clear distinction between the dream and the waking life; the latter was “real,” and the former an illusion, and the difficulty was in distinguishing one from the other.<sup>292</sup> Zhuang Zhou accepted the duality of the waking and the sleeping state, but he was much less certain about which state of consciousness staked a claim to “reality.”<sup>293</sup> In another passage, Zhuang Zhou wrote:

While we dream we do not know that we are dreaming, and in the middle of a dream interpret a dream within it; not until we wake do we know that we were dreaming. Only at the ultimate awakening shall we know that this is the ultimate dream. Yet fools think they are awake, so confident that they know what they are, princes, herdsmen, incorrigible! You and Confucius are both dreams, and I who call you a dream am also a dream.<sup>294</sup>

Zhuang Zhou’s suggestion that the waking state may be as illusory as the dreaming state is one that we see echoed in Tibetan Buddhism. Before I relate my one last story about dreams and the law—about Steven Linscott’s wild dreams and the terrible price he paid for sharing them—I offer one more interlude about how Tibetan Buddhists regard reality and the world of dreams. This system of thought shatters our western assumptions about the dualities of the real and the unreal, the waking and the dreaming state. The meaning of the dream is entirely different without these dualities. There is no longer any need to account for the relationship between the reality of the waking, conscious world and the sleeping, unconscious world. Both are equally unreal.

### *B. Interlude: Tibetan Buddhism*

Tibetan Buddhism is a belief system that takes dreaming very seriously.<sup>295</sup> Tibetan Buddhism is a part of the Mahayana tradition,<sup>296</sup>

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292. DESCARTES, *supra* note 262, at 145.

293. 1 SOURCES OF CHINESE TRADITION, *supra* note 269, at 102–03.

294. *Id.*

295. The Shakyamuni Buddha himself was conceived in a dream. *The Legend of the Buddha Shakyamuni*, in BUDDHIST SCRIPTURES 34, 35 (Edward Conze ed. & trans., 1959). His mother, Queen Maya, was married to Shiddhodana, the king of the Shakhas.

These two tasted of love’s delights, and one day she conceived the fruit of her womb, but without any defilement, in the same way in which knowledge joined to trance bears fruit. Just

having absorbed most of its ideas and traditions from Indian Buddhism during the seventh through the thirteenth centuries.<sup>297</sup> One reason for the unique quality of Tibetan Buddhism is due to its interaction with the indigenous shamanistic religion of Tibet known as Bön.<sup>298</sup> The shamans of the Bön religion sought to placate and manipulate the capricious spirits of nature. Magic, divination, and shamanistic possession are attributes of the Bön religion that permeate Tibetan Buddhism, creating a unique form of Mahayana Buddhism.<sup>299</sup>

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before her conception she had a dream. A white king elephant seemed to enter her body, but without causing her any pain.

*Id.*

296. Buddhism is generally divided into two traditions. First, Theravada Buddhism believes that the Buddha was a purified being, a saint or arhat, who finally escaped this corporeal life and endless cycle of life and death upon reaching nirvana. *See* ROBERT A.F. THURMAN, *ESSENTIAL TIBETAN BUDDHISM* 2 (1995). Under Theravada Buddhism, there were only a few other prior Buddhas prior to the Shakyamuni, but there are no living Buddhas today, and will be none until the future Buddha, Maitrya, arrives many thousands of years from now. *Id.* The second tradition is known as Mahayana, sometimes translated as “greater vehicle,” and it teaches that there are an infinite number of Buddhas. *Id.*; JOHN POWERS, *INTRODUCTION TO TIBETAN BUDDHISM* 313 (1995). Tibetan Buddhists believe that Buddhas could possibly show up here and now. THURMAN, *supra*, at 2. Many of their great religious figures became perfect Buddhas during their lifetimes, such as Padma Sambhava and Atisha. *Id.* at 3–4. Tibetan Buddhism also emphasizes another characteristic of Mahayana Buddhism, belief in what Thurman calls “Enlightenment Heroes,” the Bodhisattvas, disciples who mediate between Buddhas and the human population. *Id.* at 2–3.

297. ROBERT E. FISHER, *ART OF TIBET* 17–18 (1997).

298. Bön was considered a system of animistic and shamanistic practices, although even early on, Bön had assimilated a lot of Buddhist elements. POWERS, *supra* note 296, at 432. There are a lot of historical connections between shamanism and Hindu-Buddhist yoga practices. In North Asian shamanism, many concepts of Hindu and Buddhist Tantra were assimilated. Larry G. Peters, *The Tamang Shamanism of Nepal*, in *SHAMANISM: AN EXPANDED VIEW OF REALITY* 161, 172 (Shirley Nicholson ed., 1987). Both Tantric yoga and shamanism involve the embodiment of gods. *Id.* at 173. The shaman becomes possessed by the spirits he masters, while the yogi identifies “with gods representative of universal forces.” The altered state of consciousness that accompanies shamanistic possession in North Asian traditions usually occurs to a young person for the first time spontaneously and involuntarily, unlike the North American shamanistic traditions in which the young person takes off on a deliberate “vision quest.” *Id.* at 163. After shamanic training, the initiate can control his trance states, producing them deliberately in order to engage in healing rituals or produce visionary states. *Id.* at 168. The goals of the shaman are different from that of the yogi’s state of samadhi in which the yogi seeks enlightenment and detachment from the sensory world. *Id.* at 174. The shaman’s trance is “outwardly oriented. It is not autonomous, but is directed toward the community and therefore serves as a medium of communication between the supernatural or nonordinary reality and the community of men.” *Id.*

299. The first successful transmission of Buddhism into Tibet came during the reign of Songtsen Gampo who lived circa 618–650 C.E. POWERS, *supra* note 296, at 126. Both of his wives were Buddhists, one from Nepal and one from China, and they are considered by Tibetan tradition to be incarnations of the Buddha Tara. (One is called the Green Tara; the other the White Tara.) *See Tara*, at [http://www.khandro.net/deities\\_Tara1.htm](http://www.khandro.net/deities_Tara1.htm) (last visited Apr. 7, 2004). Besides the more formal Bön religion, there were many animistic Tibetan folk religions, primarily concerned with the

The dualities that we assume in the West, between the real and the unreal, and between their respective spheres of operation, the waking and the dreaming states, are rejected by Tibetan Buddhism. Under the Doctrine of the Dream-State from medieval Kagyudpa texts,<sup>300</sup> the sensuous experiences of the waking state and the dreaming state are equally illusory.<sup>301</sup> The Doctrine of Dreams follows from the Doctrine of Maya.<sup>302</sup> Maya is explained in this way: “Worlds and universes are mind-made; they are of the stuff of which dreams are shaped. It is their illusiveness which is *māyā*. Things, appearances, are what mind makes them to be. Apart from mind they have no existence.”<sup>303</sup> In the West, we

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propitiation of spirits and demons. POWERS, *supra* note 296, at 432–33. When Buddhism entered Tibet, there was no effort to suppress belief in these indigenous forces. *Id.* Rather, it incorporated them, making many of the spirits protectors of the dharma. *Id.* See generally Philip & Marcia R. Lieberman, Brief Introduction to Basic Concepts of Tibetan Buddhism (1999), at <http://www.brown.edu/Research/BuddhistTempleArt/txtfiles/Buddhism.txt> (providing an introduction to Mahayana Buddhism).

300. There are four main schools of Tibetan Buddhism: Nyingma, Kagyu, Sakya, and Geluk. POWERS, *supra* note 296, at 313. The Dalai Lama is the leader of the Gelukpa sect, and is regarded by most Tibetans as “the greatest symbol of all that is best and most worth preserving in their culture.” *Id.* at 412. While the four schools differ, they also share much in common, such as “the importance of overcoming attachment to the phenomena of cyclic existence and the idea that it is necessary for trainees to develop an attitude of sincere renunciation.” *Id.* at 313. All four sects also adhere to monastic discipline, and share the same corpus of religious texts. *Id.*

The Kagyudpa sect is characterized by its lineage of great teachers, beginning with Tilopa (988–1069 C.E.), and continuing with a long line of renowned students and teachers, including Naropa, Marpa, and Milarepa. *Id.* at 346–49. The founder of the Kagyudpa sect was Gampopa (1079–1153), who founded the Kagyudpa monasteries and imposed monastic discipline and a strict educational curriculum. THURMAN, *supra* note 296, at 30. The Kagyudpa were also responsible for the development of the institution of official reincarnations that would have a “profound effect on Tibetan civilization.” *Id.* at 31.

301. *Book III—The Path of Knowledge: The Yoga of the Six Doctrines*, in TIBETAN YOGA AND SECRET DOCTRINES 155, 164 (W.Y. Evans-Wentz ed., 2d ed. 1958) (1935) [hereinafter *The Path of Knowledge*].

302. *Id.*

303. *Id.* at 163. Maya is a central concept in Hindu philosophy. It represents the tendency of our egocentric, false concepts to keep us from perceiving the underlying unity of existence and the ultimate reality of Brahman. DAVID R. KINSLEY, HINDUISM: A CULTURAL PERSPECTIVE 92 (2d ed. 1993).

Maya . . . prevents us from being able to perceive ourselves from the perspective of eternity and enables us to remain content with the limitations of finite existence. In this sense, maya is a kind of drug that prevents us from becoming sick or dizzy in our endless rounds of birth and rebirth and keeps us firmly bound to the world of appearance and desire-motivated actions.

*Id.* at 93.

The function of yoga is to help its practitioner see through this illusory world: “When, by means of *yoga*, the microcosmic aspect of mind is swept clear of the mists and the mirages of conditioned being, it sees itself as the One, emancipated from all *māyāvic* delusions, from all concepts of

assume that the dreaming state is unreal and the waking state is real. Tibetan Buddhism regards both as unreal, since both depend on the “same order of objective and sensuous perceptions, those of the dream-world merely being internal and those of the waking-world external.”<sup>304</sup> Both are merely appearances; the content of the waking state, as well as the dreaming state, is illusory.

The tradition of dream yoga originated with the eleventh century Indian yogi, Naropa;<sup>305</sup> his teachings were later transmitted to Tibetan Buddhism under the name of the Six Principles of Naropa.<sup>306</sup> Dream yoga is a technique that dreamers use to exercise their will on the content of the dream:<sup>307</sup>

At the outset, in the process of realizing it to be *māyā*,  
 abandon all feeling of fear [or dread];  
 And if the dream be of fire, transform the fire into water,  
 the antidote of fire.  
 And if the dream be of minute objects, transform them into  
 large objects;  
 Or if the dream be of large objects, transform them into  
 small objects:  
 Thereby one comprehendeth the nature of dimensions.  
 And if the dream be of a single thing, transform it into  
 many things;  
 Or if the dream be of many things, transform them into

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multiplicity and of dualism, from all the magical deceptions of Nature.” *The Path of Knowledge*, *supra* note 301, at 163.

304. *The Path of Knowledge*, *supra* note 301, at 165.

305. GIUSEPPE TUCCI, *THE RELIGIONS OF TIBET* 26 (Geoffrey Samuel trans., 1980) (1970). Naropa is associated with the Kagyud school of Tibetan Buddhism, which gives particular emphasis to Tantric exercises and to the practices of yoga. *Id.* at 35. Naropa was an Indian Siddha, and his teachings are best known through the writings of his most famous student, Marpa (1012–1096). *Id.* at 36. On the various schools, see *supra* note 300.

306. TUCCI, *supra* note 305, at 98.

307. This form of dream yoga is similar to what some have called “lucid dreaming.” For a general introduction to lucid dreaming, see STEPHEN LABERGE, *LUCID DREAMING* (Jeremy P. Tarcher, Inc. 1985). Generally a lucid dream is a dream in which the dreamer is actively aware that he or she is in fact dreaming. This awareness is separate from the dream, and the dreamer can manipulate the story and characters to create a desired situation. Only about fifty-eight percent of all people have had a lucid dream once in their lifetime, and twenty-one percent have a lucid dream once or more in a month. If the dreamer has done either Buddhist or transcendental meditation, the average goes up to once or more a week. See DALAI LAMA, *SLEEPING, DREAMING, AND DYING*, *supra* note 4, at 103–04. The Dalai Lama postulated that, “[m]aybe this can be seen as an indication that these people have a higher degree of mindfulness. During the dream state there clearly is a form of consciousness in which one may engage in certain types of spiritual practice.” *Id.* at 104.

a single thing:  
 [Thereby one comprehendeth the nature of plurality and  
 of unity.]<sup>308</sup>

The dreamer thus learns through this psychic experimentation that the content of dreams is a mirage.<sup>309</sup> Naropa describes various practices in dream yoga, including special breathing, sleeping in a certain prescribed fashion, praying to one's guru "that thou mayest be enabled to comprehend the dream-state," and performing various visualizations during both waking and dreaming states.<sup>310</sup> Another practice of dream yoga is to "wake up" in the middle of the dream state and to recognize that you are dreaming, and then begin to rewrite the script.<sup>311</sup> Another mode of dream yoga is to convince yourself while you are awake that you are really dreaming.<sup>312</sup>

The ultimate goal of dream yoga is to achieve a Dreamless State, one that is free from the illusoriness of both the waking and sleeping conditions, the Desireless State that goes "beyond both Form and Non-Form."<sup>313</sup> Or in other words:

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308. *The Path of Knowledge*, *supra* note 301, at 221.

309. The relationship between the dream state and maya can be summarized as follows:

The Doctrine of Dreams . . . further illustrates the Doctrine of *Māyā*. It shows that even as all sensuous experiences of the waking-state are illusory, equally illusory are all sensuous experiences of the dream-state; these two states forming the two poles of human consciousness. In other words, Nature as a whole is the Dream of the One Mind; and until man conquers Nature, and thereby transcends *māyā*, he will remain asleep, dreaming the Dream of Ignorance. Whether in this world, or in any after-death state, all *sangsaric*, or *karmically*, conditioned experiences, are but dreams.

*Id.* at 164.

310. *Id.* at 216. The breathing is described as "pot-shaped" breathing. *Id.* at 217. The yogin should sleep "on the right side, as a lion doth," and press the thumb and ring-finger of the right hand against the throat arteries, stopping the nostrils with the left hand, and letting the saliva collect in the throat. *Id.* at 218.

311. Naropa describes in great detail a visualization that must be performed within the dream itself, concentrating the mind on a dot of various colors located in certain places on the body. *Id.* During the day, the practitioner of dream yoga must "hold to the concept that all things are of the substance of dreams." *Id.* at 216.

312. A fourteenth century Tibetan monk described the effects of such a practice:

"With unwavering attention hold to (the idea) that (everything is) like a dream  
 Regardless of whether you are walking, sitting, eating, moving about or conversing.  
 When you are not separate from the idea that  
 Whatever is present, whatever is being done, and whatever is thought about is all a dream,  
 Then you train yourself in absolute non-subjectivity (by realizing that your dream)  
 Has no truth-value, is but something flimsy, something ethereal, something evanescent,  
 Something fleeting, something faint."

ANDERSON, *supra* note 267, at 137 (quoting Longchenpa, a fourteenth century sage).

313. *The Path of Knowledge*, *supra* note 301, at 220–21 n.4.

The whole purpose of the Doctrine of Dreams is to stimulate the *yogin* to arise from the Sleep of Delusion, from the Nightmare of Existence, to break the shackles in which *māyā* thus has held him prisoner throughout the aeons, and so attain spiritual peace and joy of Freedom, even as did the Fully Awakened One, Gautama the Buddha.<sup>314</sup>

The *yogin* comes to realize that all things perceived by the senses in the waking state are also a mirage because both the waking and the dreaming state are *samsaric*.<sup>315</sup> The *yogin* will eventually enjoy

as vivid consciousness in the dream-state as in the waking-state; and in passing from one state to another experiences no break in the continuity of memory. Thereby the content of the dream-state is found to be quite the same as that of the waking-state, in that it is wholly phenomenal and, therefore, illusory.<sup>316</sup>

Tibetan Buddhists believe that sleep, and dream yoga, are essentially a “rehearsal” for the process of dying.<sup>317</sup> In certain kinds of special dreams, the subtle self actually departs from the gross body,<sup>318</sup> a similar process happens upon death when the dead person enters the bardo.<sup>319</sup> The bardo means “going between two” and generally refers to the mental voyage that an individual’s consciousness takes between death and the successive rebirth into another bodily form.<sup>320</sup> The journey through the bardo is similar to the dreaming process in that it is entirely the production of the mind.<sup>321</sup> The visions that one sees in the bardo—

314. *Id.* at 166.

315. In Hindu and Buddhist thought, samsara is usually defined as the endless cycle of birth and death. Ashok Gandadean, *Comparative Ontology and the Interpretation of 'Karma,'* 6 INDIAN PHIL. Q. 203, 211 (1979).

316. *The Path of Knowledge*, *supra* note 301, at 216 n.1.

317. DALAI LAMA, SLEEPING, DREAMING, AND DYING, *supra* note 4, at 43.

318. The subtle body is distinguished from the gross, or purely physical body. It exists “[w]edged between our familiar material universe and the ultimate Reality.” GEORG FEUERSTEIN, TANTRA: THE PATH OF ECSTASY 139 (1998). The subtle body is created by our own energy field and exists simultaneously with the physical body; it is “the energetic mold of the physical body.” *Id.* at 144. Tantric medical practitioners can prevent physical disease and mental imbalance by removing “energetic blockages and correcting damage on the level of the subtle body.” *Id.* at 145.

319. POWERS, *supra* note 296, at 286.

320. ALEXANDRA DAVID-NEEL, IMMORTALITY & REINCARNATION 41 n.1 (Jon Graham trans., 1997) (1978).

321. There are actually six bardo states: the bardo of birth, the bardo of dreams, the bardo of samadhi-meditation, the bardo of the moment before death, the bardo of dharmata, and the bardo of becoming. GURU RINPOCHE, THE TIBETAN BOOK OF THE DEAD: THE GREAT LIBERATION THROUGH

the smells and flavors, the fantastic sights of peaceful and wrathful deities—are all created in the same way our minds create dreams; they are merely the projections of the percipient.<sup>322</sup> After death, as the consciousness seeks another incarnation, the bardo of dharmata, loosely translated as the “essence of reality,”<sup>323</sup> is experienced. The reader of *The Tibetan Book of the Dead* calms the dead person by reminding him that the bardo is self-created:

*Now when the bardo of dharmatā dawns upon me,  
I will abandon all thoughts of fear and terror,  
I will recognise whatever appears as my projection  
and know it to be a vision of the bardo;  
now that I have reached this crucial point  
I will not fear the peaceful and wrathful ones, my own  
projections.*<sup>324</sup>

Thus, for the Tibetan Buddhists, the practitioner of dream yoga is preparing himself for the passage from one lifetime to another. In the bardo, as in his dream practice, the body and mind separate and the true essence of reality “will appear, pure and clear yet hard to discern, luminous and brilliant, with terrifying brightness, shimmering like a mirage on a plain in spring.”<sup>325</sup> Again, the reader of *The Tibetan Book of the Dead* seeks to reassure the dead person: “Do not be afraid of it, do not be bewildered. This is the natural radiance of your own dharmatā, therefore recognise it.”<sup>326</sup>

From the mundane to the sublime. But now, on to our ultimate wild dreamer.

#### IV. THE ULTIMATE WILD DREAMER WHO LEARNS TO KEEP HIS MOUTH SHUT THE HARD WAY

The story of my last dreamer, Steven Linscott, is Kafkaesque. Here was a young man who spent over three years in prison because of his wild dreams. He could have spent more.

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HEARING IN THE BARDO 98–99 (Francesca Fremantle & Chögyam Trungpa trans., Shambhala Publ'ns 1987) (1975).

322. POWERS, *supra* note 296, at 289.

323. RINPOCHE, *supra* note 321, at 107.

324. *Id.* at 40.

325. *Id.* at 41.

326. *Id.*



On the morning of October 4, 1980, Karen Anne Phillips, a twenty-four-year-old nursing student and practitioner of Kriya yoga, was found dead in her studio apartment in Oak Park on Chicago's west side.<sup>327</sup> Her body was lying flat, face down, and naked, except for a nightgown pulled tightly around her neck.<sup>328</sup> There were numerous wounds and abrasions around her face, head, and back.<sup>329</sup> Vaginal smears indicated that she had some kind of intercourse within the preceding twenty-four-hour period, although there was no evidence that she had been raped or sexually abused.<sup>330</sup> Her assailant seems to have been someone known to the victim; there was no evidence of forcible entry into the apartment.<sup>331</sup> A tire iron, encrusted with blood and hair, was found outside.<sup>332</sup>

An autopsy revealed that Karen Anne Phillips had been killed by a combination of beating and strangulation.<sup>333</sup> No one saw the assailant enter, but the next-door neighbor heard pounding about 1:00 a.m. on Saturday morning.<sup>334</sup> He went and knocked on her door; the noise had ceased, but no one came to the door.<sup>335</sup> Then when he returned to his apartment, the pounding noise started up again, and then it stopped.<sup>336</sup> Karen Anne Phillips must have come to the end of her ordeal. When they found the body, the "decedent's fingers were pressed together to form a hand signal, which in the Kriya Yoga religion signifies that the person was accepting death and seeking peace."<sup>337</sup>

The day after the murder, the police canvassed the area residents to see whether anyone had any information about what happened.<sup>338</sup> They stopped at the Linscotts' home, a few houses away from Phillips' apartment.<sup>339</sup> Steven Linscott and his wife, Lois, had just begun working as house parents in a Christian halfway house in the high-crime area of

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327. *People v. Linscott*, 511 N.E.2d 1303, 1312-13 (Ill. App. Ct. 1987).

328. *Id.* at 1313.

329. *Id.*

330. *Id.* at 1306, 1313.

331. *Id.* at 1315.

332. *Id.* at 1313.

333. *Id.*

334. *Id.* at 1312.

335. *Id.*

336. *Id.*

337. *Id.* at 1313.

338. *Id.*

339. *Id.*

Oak Park.<sup>340</sup> The police asked whether either of the Linscotts had seen anything unusual, “no matter how silly it might seem.”<sup>341</sup> At that point, Steven Linscott suddenly remembered a vivid dream that he had experienced around 1:00 a.m. the night before, just when Phillips was murdered.<sup>342</sup> He did not tell the police about his dream at that time.<sup>343</sup> Later, he told someone who worked in the building about the dream, and then his wife.<sup>344</sup> Both of them thought that Steven Linscott should go to the police. His wife, Lois, “thought that he should tell the police about his dream if he thought it might be helpful to the police.”<sup>345</sup> Big mistake.<sup>346</sup>

Who was Steven Linscott? Here is how he was described by the court:

Defendant, Steven Paul Linscott, 26 years old at the time of the occurrence, was a Bible student at Emmaus Bible College in Oak Park. He lived with his wife and two children a few houses from the decedent’s apartment. Previously, defendant attended the University of Maine for two years and then joined the United States Navy. There, he became a radioman, and after background investigations, he was granted a top secret clearance. After an honorable discharge in March 1979, the

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340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 1314.

345. *Id.*

346. The overeagerness of wild dreamers to share their dreams with police seems to be a recurring theme in the reported cases. One case that is frequently cited for the admission of dream narration testimony is *Drake v. State*, 476 So. 2d 210 (Fla. Dist. Ct. App. 1985). *Drake* is a perfect example of how an accused ought to learn to keep his mouth shut. The defendant was prosecuted for the attempted second-degree murder of his wife, Nancy, aggravated battery (a hammer to her head), and armed robbery with a deadly weapon of the ticket sales from a church concert that she had collected as church secretary of the First Nazarene Church of Winter Haven. *Id.* at 210. The defendant was having an affair with another woman, presumably the motive for his crimes. *Id.* at 212–13. The defendant gave a voluntary statement to the police, and the investigator testified that the defendant said, “I wake up at the nighttime, I wake up in the morning, I hear Nancy’s voice, she’s hollering for me to, ‘Stop, stop Tom, no Tom, no Tom, please Tom.’” *Id.* at 212. The defendant later denied making the statements; he also had no memory of the alleged incident. *Id.* at 214. In the interview, it was not clear whether Nancy’s voice haunted him after the crime, although it was implied. The statements were admitted as relevant to the defendant’s consciousness of guilt. *Id.* at 215. Although they were characterized as dream evidence, it is not so clear to me that they qualified. It sounded more like an auditory hallucination, or perhaps an auditory memory of the encounter in which he hammered his wife’s head. There is no evidence that the words were part of any nocturnal dream. Either way, he would have served himself better not to mention the dream/hallucination.

Linscotts lived in Maine. That fall, they moved to Chicago . . . . There is no criminality in defendant's history, and he had never been arrested before this occurrence.<sup>347</sup>

By all accounts, Steven Linscott was squeaky clean.

Here is how Steven Linscott first described his dream to the police: A short blonde man, about 5'5" to 5'7" tall, was talking to a second person.<sup>348</sup> The short blonde man was wearing brown trousers, and a terry-cloth shirt with two or three stripes across his chest. In the beginning, he was calm, but then his demeanor changed. Linscott woke up and tried to shake his dream, then fell asleep again, and the dream resumed. The short blonde man took out an object, and began to strike the victim until blood was "flying everywhere."<sup>349</sup> There were similarities between the dream and the crime, but there were discrepancies as well, the most notable being that Linscott thought the victim was black, when in fact she was white.<sup>350</sup>

Steven Linscott was not surprised by his violent dream. In his words, "It wasn't an unusual dream under the circumstances," noting that he was nervous about having his family live with former prison inmates in a halfway house, in a neighborhood plagued by drugs and prostitution.<sup>351</sup> "I believed that God maybe would use [the dream] in some way," Linscott said, "I did not ever suspect that it would be used by the cops against me . . . If I have a sin, it was being naïve."<sup>352</sup>

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347. *Linscott*, 511 N.E.2d at 1313.

348. Sharon Cohen, *Dream Leads to a Prison Term Until DNA Evidence Frees Him*, L.A. TIMES, Sept. 18, 1994, at A1. At first, Linscott could not determine whether the second person was a man or a woman, although in his written account taken at the request of the police, he identified the victim as female. *Id.*

349. *Id.*

350. *People v. Linscott*, 500 N.E.2d 420, 423 (Ill. 1986). Linscott had several occasions to relate the dream to the police, and each time he did so, there were slight changes in the narrative. For example, the assailant's shirt became a white terry-cloth shirt with two red and purple stripes on the chest, and one on the sleeve. *Linscott*, 511 N.E.2d at 1314. Some things were added in a later narrative as well. For example, Linscott told the police two days later that the victim was somewhat intelligent and seemed to be a religious person; he also described the living room in some detail. *Id.*

351. Barbara Sullivan, *End of a Bad Dream*, CHI. TRIB., June 24, 1994, § 5, at 1, 1-2. Lois Linscott was nervous about the neighborhood as well:

It was a high-crime area; we could hear people arguing at night. Across the street was a prostitution area where pimps would come by and drop their women off and then pick them up later at night. Here we were, in this house with ex-convicts, suspicious of everyone around us, with two little kids. There was a lot of anxiety. It sets you up for nightmarish dreams.

*Id.* at 2 (internal quotations omitted).

352. Cohen, *supra* note 348, at A1.

Linscott revealed his naïveté by showing up at the police station two days later.<sup>353</sup> After hearing Linscott's initial narration of his dream, one of the police officers noticed "similarities between defendant's [Linscott's] physical appearance and the physical characteristics of the attacker who appeared in defendant's dream. Defendant has straight blond hair, a light complexion, and a somewhat husky physique. He is just a bit under 6 feet tall."<sup>354</sup> After concluding their interview, the police asked Linscott to cooperate with their investigation, and he agreed to do so.<sup>355</sup> Two days later, the police telephoned him and asked him to go down to the police station to tell them his dream a second time.<sup>356</sup> The court noted, "When defendant arrived at the police station, he was wearing a light, colored terry-cloth shirt with a light colored stripe on a dark colored sleeve."<sup>357</sup> Why would Linscott have taken the risk of dressing like the assailant in his dream? How could he have been so clueless about the police officers' suspicion that he was the man who killed Karen Anne Phillips? I am not sure "naïve" quite captures the nature of his folly.

Over a period of several days, Steven Linscott met with a detective and police officers, voluntarily giving them more than six hours of tape-recorded statements about the dream.<sup>358</sup> According to Linscott, the police repeatedly told him he was not a suspect,<sup>359</sup> and he voluntarily gave the police samples from his blood, saliva, and hair.<sup>360</sup> At the police station, the officers accused Steven Linscott of having committed the murder, but he was not arrested until November 25, almost two months later.<sup>361</sup> He rejected an offer to plea bargain, insisting on his innocence,

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353. *Linscott*, 511 N.E.2d at 1314.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. Linscott's attorney who handled his appeal, Thomas D. Decker, thought that in requesting him to talk, the police catered to his pride in rendering a civic service. They lied to him about his value to the investigation and preyed cynically on his human instinct that justice be done. They posed endless questions that called for guesswork from a person they assured was possessed of psychic powers.

Joseph R. Tybor, *Court Orders New Trial in 'Dream' Killing Case*, CHI. TRIB., July 30, 1987, § 1, at 1, 20.

359. Cohen, *supra* note 348, at A1.

360. *Linscott*, 511 N.E.2d at 1315.

361. *People v. Linscott*, 566 N.E.2d 1355, 1357 (Ill. 1991).

and voluntarily underwent and passed a lie detector test,<sup>362</sup> which was not admissible at trial.<sup>363</sup> From time to time, Steven Linscott may have equivocated on some of the details of the dream narration, but about one thing he was consistently and vocally adamant: he had not murdered Karen Anne Phillips.

At trial, the prosecution in the *Linscott* case relied on three pieces of evidence: first, the defendant's account of his dream recorded by the police, which so closely paralleled the crime that "it was proof defendant committed the murder";<sup>364</sup> second, the head and pubic hairs that were found in the victim's apartment;<sup>365</sup> and third, the results of blood-typing tests from the seminal material taken from the victim.<sup>366</sup> At trial, the prosecutor made certain erroneous statements about the blood and hair comparisons that eventually were deemed by the Supreme Court of Illinois to be improper and the basis for the remand in 1991 for a new trial.<sup>367</sup> With respect to the hair comparison evidence, the prosecutor claimed in his closing argument that hairs "matching" the defendant's had been found at the crime scene.<sup>368</sup> However, there was no testimony at trial to support that statement, and in fact, there was evidence from several experts that no such identification was possible.<sup>369</sup> Similarly, the prosecutor distorted the connection between the defendant's blood and semen that was found around and inside the victim's body, arguing again that there was something akin to a match<sup>370</sup>—when in fact there was not. All that the evidence had shown was that Linscott could not be eliminated as a suspect—not that he could be identified as the perpetrator of this heinous crime.<sup>371</sup>

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362. Tybor, *supra* note 358, at 20.

363. *See supra* note 62.

364. *Linscott*, 566 N.E.2d at 1357.

365. *Id.*

366. *Id.*

367. *Id.* at 1358–64.

368. *Id.* at 1358.

369. For a full discussion of the subtleties of the hair comparison analysis, see *id.* at 1358–60.

370. *Id.* at 1362.

371. No objections were made to the prosecutor's comments at trial, so the appellate court, and later the Supreme Court of Illinois, invoked the plain error doctrine since the error was egregious enough and "so substantial as to deprive defendant of a fair trial." *Id.* at 1357 (citing *People v. Sanders*, 457 N.E.2d 1241 (Ill. 1983)).

The jury was swayed by this misleading and highly prejudicial physical evidence, and by Steven Linscott's wild dream.<sup>372</sup> He was convicted of the murder of Karen Anne Phillips and sentenced to prison for forty years.<sup>373</sup> Linscott was transferred to the Centralia Correctional Center in southern Illinois, and his family moved down state, his wife Lois taking a job as a nurse.<sup>374</sup> She found it difficult to suddenly be a single mother of three small children, and to have to explain what had happened to their father.<sup>375</sup> In her words, "For the longest time when the kids were little, I would tell them the police made a big mistake . . . and they thought Daddy did something to hurt someone . . . I tried not to

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372. *Id.* at 1356. Using dream evidence to bolster otherwise scant empirical evidence has been the prosecutors' strategy in other cases. In a case similar to Linscott's, another defendant got into trouble for telling his dreams that related to a crime. In an appeal of a district court's denial of Ralph S. Hockett III's pro se petition for a writ of habeas corpus, the defendant challenged his plea of guilty of a murder in an Indiana state court because he was inaccurately advised that the state had in its possession a pair of tennis shoes stained with the blood of the victim. *Hockett v. Duckworth*, 999 F.2d 1160, 1161–62 (7th Cir. 1993). Hockett's attorneys testified that even if the shoes were not stained with the same blood type as the victim's, the nature and amount of evidence against the petitioner was such that they recommended he plead guilty in order to escape the death penalty. *Id.* at 1170. Besides his presence at the victim's home and the fact that items of the victim's property were found in his home, other factors that constituted the "totality of the evidence" included statements by the defendant, in one of which he "admit[ted] to having some dream about being there at the time [of the murders]." *Id.* at 1169.

In *People v. Johnson*, No. G030689, 2003 WL 21499895 (Cal. Ct. App. June 30, 2003), the trial court denied a motion in limine seeking to exclude statements by the defendant's sister about a conversation they had several weeks after the brutal murder of their parents in which the defendant talked about his dreams of killing them. *Id.* at \*4. At trial, Stacey, the sister, testified that the defendant told her, "I think I killed them." *Id.* On cross-examination, Stacey testified: "I think he remembered maybe being in their house, but from the dream, in the dream . . . he thought it was a dream." *Id.* at \*5. Defendant also offered testimony from his psychiatrist that he was taking Prozac to control his depression, and that Prozac would cause "disturbing, vivid dreams of events that are not real." *Id.* The court distinguished the case from one in which a defendant had taken sodium amytal, *id.* at \*5–\*6 (citing *People v. Johnson*, 109 Cal. Rptr. 118, 199–20 (Cal. Ct. App. 1973)), and from one in which the defendant was under hypnosis, *id.* at \*6 (citing *People v. Blair*, 602 P.2d 738, 753–54 (Cal. 1979)). The court also distinguished the case from *State v. Tyler*, 840 P.2d 413 (Kan. 1992), *see supra* note 78, in that *Tyler* was about the admissibility of a statement to prove the defendant's state of mind before the murders, and here the defendant's statement was offered as an "admission of his involvement in the murders after the fact." *Johnson*, 2003 WL 21499895, at \*6. The reliability and credibility of the defendant's dream talk "affected the weight, rather than the admissibility, of the evidence. The court properly permitted the jury to determine whether defendant's statements described a dream or a real event." *Id.* at \*6–\*7. Unlike the *Linscott* case, however, there was substantial circumstantial evidence to prove that the dreaming defendant had indeed killed his parents. *See generally id.*

373. *See People v. Linscott*, 482 N.E.2d 403, 404 (Ill. App. Ct. 1985).

374. Sullivan, *supra* note 351, at 2.

375. *Id.*

ever make it sound like the police were bad people.”<sup>376</sup> At first, Linscott was angry: “The bitterness was tearing me apart . . . I realized I can’t keep going on like this or I’m going to go in a black fugue.”<sup>377</sup> “I’m not going to be able to handle life at all. I decided that as much as I hate it, I’m going to have to forgive these people (the authorities) . . . Once I did, life got much better.”<sup>378</sup>

After three and a half years in prison, the Illinois appellate court ordered a new trial, and Linscott was released on bond.<sup>379</sup> In a series of appeals, the prosecutors were sharply criticized for misrepresenting the physical evidence against Linscott, but during the next seven years, Linscott and his family lived in limbo, waiting for the new trial, wondering whether he would have to return to prison.<sup>380</sup> Finally, after more sophisticated DNA testing of the evidence, the state dropped the charges against him in 1992.<sup>381</sup> Almost thirteen years after Linscott’s arrest, the prosecutor explained, “The scientific evidence does not completely exonerate the man, but it raises sufficient doubts.”<sup>382</sup> It was

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376. See Cohen, *supra* note 348, at A1 (internal quotations omitted).

377. See *id.* It is interesting that Linscott used the expression “black fugue.” A “fugue” is defined as “a state of psychological amnesia during which a patient seems to behave in a conscious and rational way, although upon return to normal consciousness he cannot remember the period of time nor what he did during it; temporary flight from reality.” WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 739 (2d ed. 1986). A “dissociative fugue” is one of the five types of dissociative disorders (defined as a “break in the connection between memories or personality”). See Mary Eileen Crego, *One Crime, Many Convicted: Dissociative Identity Disorder and the Exclusion of Expert Testimony in State v. Greene*, 75 WASH. L. REV. 911, 913 n.16 (2000). The other four dissociative disorders are dissociative amnesia, dissociative identity disorder, depersonalization disorder, and dissociative disorder not otherwise specified. *Id.*

378. See Cohen, *supra* note 348, at A1 (internal quotations omitted).

379. There are a number of Illinois appellate decisions regarding the Linscott prosecution. In 1985, Linscott appealed his conviction by the Circuit Court of Cook County to the Appellate Court of Illinois, First District, Third Division, on the ground that the state had not proven him guilty beyond a reasonable doubt. *People v. Linscott*, 482 N.E.2d 403, 404 (Ill. App. Ct. 1985). His conviction was reversed, with one judge dissenting. *Id.* The Illinois Supreme Court granted the state’s petition for leave to appeal and reversed the appellate court’s decision. *People v. Linscott*, 500 N.E.2d 420, 421, 424 (Ill. 1986). The Illinois Supreme Court remanded the case to the appellate court, asking it to consider issues raised by the defendant that had not been previously addressed. *Id.* In the second round, the appellate court reversed and remanded for a new trial with directions. *People v. Linscott*, 511 N.E.2d 1303, 1304 (Ill. App. Ct. 1987). The Illinois Supreme Court granted leave to appeal, vacated the appellate court judgment, reversed the circuit court judgment, and remanded the case. *People v. Linscott*, 566 N.E.2d 1355, 1356, 1364 (Ill. 1991). In all, it took twelve years from the 1980 arrest for Linscott to be exonerated when the state finally abandoned the prosecution in 1992. Sullivan, *supra* note 351, at 2.

380. Cohen, *supra* note 348, at A1; Sullivan, *supra* note 351, at 2.

381. See Cohen, *supra* note 348, at A1.

382. Randall Sanborn, ‘Dream Murder’ Nightmare Ends, THE NAT’L L.J., July 27, 1992, at 6.

twelve years of hell to pay for having told the wrong people his wild dream.

How could this have happened? Because all of the attorneys involved in the *Linscott* case were rational empiricists. Justice McNamara's dissent in the first appellate decision sheds some light: he unabashedly agreed with the state that Linscott's dream narration constituted a confession, clearly rejecting the notion that Linscott could have obtained "knowledge" of the crime in any other fashion but through direct, sensory experience.<sup>383</sup> Justice McNamara wrote:

I agree with the State that the defendant's statements to the police were a confession. His statements, containing specific details of the crime, a psychological profile of the killer and an expression of concern about his hairs being found in the apartment, were not a recitation of a dream. The jury had the opportunity to observe the defendant, to hear his testimony, and to evaluate his testimony in light of all the other evidence. Their determination that the defendant acquired information about the murder, not through a dream, but because he was present, is very reasonable and understandable.<sup>384</sup>

Neither could Justice Rizzi, the author of the majority opinion in both appellate decisions, bring himself to believe that Linscott could actually have dreamed about the details of a crime he did not commit.<sup>385</sup> He suggested another way that Linscott might have gleaned the information: by reading about the crime in the newspaper.<sup>386</sup> Justice Rizzi compared the language and details from various newspaper articles that had been published before Linscott went to the police with Linscott's dream narration to demonstrate that Linscott was just reciting facts that were already publicly known.<sup>387</sup> While Justices McNamara and Rizzi agreed that Linscott could only claim knowledge of the details of the crime on the basis of sense data, the nature of the sense data differed for each. For the dissent, the data was gathered from the scene of the crime itself—

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383. *Linscott*, 482 N.E.2d at 408 (McNamara, J., dissenting).

384. *Id.* (McNamara, J., dissenting).

385. *Id.* at 406–07.

386. *Id.* at 406.

387. *Id.* The newspaper articles described the victim as a woman living alone, working as a nurse's assistant. *Id.* The term "bludgeoned" to death was used; Linscott also used that expression. *Id.* Also, the articles indicated that the victim was "struck by a blunt instrument and that she suffered a head wound." *Id.* In addition, the articles stated that "the police suspected that the victim knew her attacker because there were no signs of forced entry into the apartment." *Id.*



and, therefore, tended to prove that Linscott was the likely perpetrator.<sup>388</sup> For the majority, the data was gathered from the newspaper articles describing the crime—and, therefore, tended to prove only that Linscott was a reader.<sup>389</sup>

I still do not know what to do with this story in my mind. I cannot make peace with it, confounded by the injustice of how things turned out in the “real world” for Steven Linscott. How could someone be sent to prison for murder on the basis of inexact DNA evidence and a wild dream? It shakes my faith in our criminal justice system and its alleged allegiance to rationality and an empirical episteme.

There was egregious misconduct on the part of the state’s attorney about the strength of the DNA evidence—the only empirical evidence introduced at trial. The only other evidence that the prosecution had in its arsenal was the dream talk. Perhaps the state’s attorney felt that he needed the dream talk because the physical evidence was so weak. Perhaps he was banking on at least some of the jurors having a premodern mindset; they could ignore the weakness of the DNA evidence based on the strength of the unknown and unknowable out-of-court declarant’s statement—the author of Steven Linscott’s dream. A number of other theories about dreams could have landed Steven Linscott in prison as well: for example, some Freudian version, that his dream was evidence of a Simpson-like “fatal obsession,” or that it expressed a wish that Karen Anne Phillips were dead. The use of this dream talk, along with the state’s attorney coming close to lying about how the hair and blood samples from the dead body of Karen Anne Phillips “matched” those of Steven Linscott, make his conviction particularly painful. The fact that the state’s attorney’s misconduct eventually resulted in the overturning of Linscott’s conviction, twelve years later, is of little comfort to me—and surely not to Steven Linscott and his family.

So even if—particularly if—I stay inside the dominant empirical episteme and the law’s commitment to rationality, what happened to Steven Linscott was a travesty of justice. To make the system work, we all have to play the game by the rules. The lawyers have to advocate with integrity. It would have helped if the defense attorney had been awake during the state’s closing argument to make an objection to the judge, who also must have been asleep, about what the prosecutor was

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388. *Id.* at 408 (McNamara, J., dissenting).

389. *Id.* at 406–07.

doing. If we are going to agree to only convict those defendants who have sufficient empirical evidence against them, then the state has to come up with it. If that empirical evidence is not there, then the defendant goes home. That is the deal we all signed on for.

Putting that aside—something I find extremely difficult to do—the wild dreamer in me wonders what exactly happened to Steven Linscott that October night over twenty years ago. If you throw open all the windows of your mind, there are many different theories about dreams that might apply. Perhaps Linscott was merely having a Freudian wish-fulfillment dream and expressing his unconscious desire that Karen Anne Phillips meet a violent end.<sup>390</sup> Or is it possible that somehow the images of violence that took place that night passed through the walls of the buildings on her block and seeped into the sleep of Steven Linscott? Maybe Karen Anne Phillips herself sent him the film footage—her sheer terror projected the clip out into the universe, and he was the first receptive member of the audience to view it. Or is it possible that Steven Linscott ended up dreaming someone else's dream—the dream of the perpetrator, the man whose hair and blood “match” the DNA found at the scene of the crime? Perhaps Steven Linscott was merely participating in the Jungian collective unconscious, dreaming the dream that belongs to us all?<sup>391</sup> Perhaps he was dreaming a dream that a seventeenth century Iroquois might have considered a warning of impending violence.<sup>392</sup> A Tibetan Buddhist might shrug his shoulders, and say: nothing happened to Karen Anne Phillips, either in her apartment that night or in Linscott's dream—both realities, the waking and the dreaming, are equally illusory. Karen Anne Phillips does not exist, neither does Steven Linscott, and neither do you.<sup>393</sup> Steven Linscott himself had some views about the source of his dream that could hardly be described as mainstream. “We felt maybe God had provided this dream, where I could give a description,” Linscott commented in an interview, “Now I think it was demonic.”<sup>394</sup>

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390. *See supra* Part I.C.

391. *See supra* Part II.D.

392. *See supra* Part II.E.

393. *See supra* Part III.B.

394. Sullivan, *supra* note 351, at 1; *see also supra* Part I.A. Another defendant in a case involving dream evidence probably felt that “his” dream had a demonic source, although perhaps for a different reason. *See Cruz v. County of DuPage*, No. 96 C 7170, 1997 U.S. Dist. LEXIS 14397 (N.D. Ill. Sept. 15, 1997). In 1983, a ten-year-old child was abducted, sexually assaulted, and murdered, and grand jury indictments were obtained against the defendant, Cruz, and two others. *Id.* at \*2. On appeal, Cruz alleged a number of things, including that the DuPage County prosecutors

Or there is another possibility that would satisfy even a radical empiricist: maybe at that time, Steven Linscott had a multiple personality.<sup>395</sup> Maybe the second personality had an affair with Karen Anne Phillips, and for one reason or another, he killed her. Thus, what the first personality—the host—experienced with all the detail and vividness as a dream was indeed a memory, as the police, the prosecution, and the jury suspected; but not the memory of his own terrible experience—rather the memory of the other personality living within him.<sup>396</sup> The two men lived side by side, immured from one another, the presence of the second personality being unknown to the

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relied upon false evidence in deciding to go to trial. *Id.* at \*2–\*3. Cruz’s conviction and death sentence were reversed by the Illinois Supreme Court not once, but twice, and at his third trial in 1995, Cruz was acquitted. *Id.* at \*3. In his Section 1983 action against DuPage County, Cruz alleged that prosecutors “knowingly participated in the fabrication of false evidence to inculcate Cruz,” including the fabrication of an “inculpatory statement by Cruz in the form of a ‘dream’” that Cruz had reportedly related to the police on May 9, 1983. *Id.* at \*4–\*5. Cruz alleged that defendant Knight, a prosecutor, participated with the other defendants in the fabrication of this “dream statement,” through at least October 1995, and that he falsely reported to other DuPage County prosecutors that he had information that corroborated the “dream statement.” *Id.* at \*5. Knight’s motion to dismiss was denied. *Id.* at \*29. If Cruz’s version of the story is correct, here was a man who could have been put to death for a dream that he did not have at all—a dream that was fabricated by the state.

395. Multiple personality is the common name for what is called by mental health care professionals Dissociative Identity Disorder (DID). Crego, *supra* note 377, at 912. A person suffering from DID may have from two to hundreds of personalities inhabiting one body; they may differ in age, race, and gender. *Id.* at 913–14. The entire person, including all the personalities, is referred to as the “multiple,” and the “host” personality “refers to the personality in control of the body the greatest amount of time.” *Id.* at 914. The other personalities are called “alters.” *Id.* at 914–15.

396. The case of Billy Milligan, who was claimed to have twenty-four separate personalities, was one of the rare examples of a successful insanity defense for having a multiple personality. Juliette K. Orr, Comment, *Multiple Personality Disorder and the Criminal Court: A New Approach*, 28 SW. U. L. REV. 651, 657 (1999). Charged with raping three women near Ohio State University, Milligan was found innocent by reason of insanity. *Id.* at 659. There was considerable public outrage at the verdict, which contributed to making it more “difficult for a multiple personality defendant to prevail with this defense.” *Id.*

In a book written about the *Milligan* case, one psychiatrist was interviewing “Billy,” when he was in high school, and asked him to describe how it felt to experience the trance-like periods where he could not really remember what happened. DANIEL KEYES, *THE MINDS OF BILLY MILLIGAN* 160 (1981). “Billy” described it as being in a dream. *Id.* When asked, “What are your feelings?” he responded:

Like a dream that comes and goes. My dad hates me. I hear him screaming. I have a red light in my room. I see a garden and a road—flowers, water, trees and nobody there to yell at me. I see lots of things that aren’t real. There’s a door with all the locks on it, and someone is pounding to get out. I see a woman falling down, and suddenly she’s turning into a pile of metal and I can’t reach her. Hey, I’m the only kid who can take a trip without LSD.

*Id.*

first. Guilt and shame may have effaced the wall of amnesia between them; or perhaps it was a malevolent act of will on the part of the second personality, the perpetrator, who wanted to get the first Steven Linscott into trouble. Thus, Steven Linscott, the one who stood trial for the crime—the squeaky clean Bible student and father of three small children, the man who purportedly had a dream about the killing—was not in fact the person who committed the crime, but someone else who lived in his body.<sup>397</sup>

We will probably never know who killed Karen Anne Phillips. I am willing to believe Steven Linscott that he did not.<sup>398</sup> I am willing to mourn for him, and with him, for the years he went to prison, and for the years those multiple appeals cast a dark shadow over his future. I am also resigned to live in a state of ignorance about how it happened that Steven Linscott had a dream about Karen Anne Phillips' murder. I do not think the answer to that question is currently knowable, but I do believe there is an answer. Maybe our current understanding of human consciousness is too crude and too shallow to explain it now. Someday,

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397. Somewhat related to an alter personality who commits the crime is when an individual who is in a deep sleep commits the crime. Known as the REM Sleep Disorder, it is possible for the normal muscle relaxation to fail during the dream stage of sleep, and the sleeper then acts out his dream. *State v. Jones*, 527 S.E.2d 700, 703 (N.C. Ct. App. 2000). In *Jones*, the defendant woke up to a loud bang and found a gun lying next to the face of his bleeding wife. *Id.* at 702. Jones said he did not remember shooting her, and a doctor testified that he suffered from REM Sleep Disorder, and that the sleeper did not always remember his dreams. *Id.* at 702–03. The defendant suffered from REM Sleep Disorder from two to three times a year, and had while sleeping, “kicked and damaged a wall, kicked a bedpost, squeezed and grabbed his wife and put his hand in her mouth, jumped out of bed and ran into a wall, and beat and scratched himself.” *Id.* at 703.

The jury was instructed on the defense of unconsciousness or automatism, but found the defendant guilty. *Id.* at 703–04. Under the defense of automatism in North Carolina, “when a person commits an act without being conscious of it, the act is not a criminal act even though it would be a crime if it had been committed by a person who was conscious.” *Id.* at 706; *see also* *United States v. Blaney*, 50 M.J. 533, 544 (A.F. Ct. Crim. App. 1999) (where defendant experienced a sleep-walking episode in which he engaged in oral sodomy in his sleep); *People v. Saunders*, No. 194742, 1998 WL 1991719, at \*1 (Mich. Ct. App. Apr. 21, 1998) (where defendant acted out a sexual dream because of his REM behavior disorder and sexually abused his son); *Hempel v. Palmateer*, 66 P.3d 513, 513 (Or. Ct. App. 2003) (where defendant argued that if he touched the victim, he did so only in his sleep, while having a dream); *State v. Taylor*, No. M1999-02358-CCA-R3-CD, 2002 WL 799695, at \*5–\*6 (Tenn. Crim. App. Apr. 29, 2002) (where defendant argued she was having a night terror about stabbing an assailant when she was in fact stabbing her mother); *supra* note 2.

398. I know that the law does not agree with me, but if I were correct and Steven Linscott had a multiple personality, I would argue that it was not Steven Linscott who committed the crime, but one of his alternative, submerged personalities. If Linscott as host personality had no knowledge of the commission of the crime, it is contrary to our system of justice to hold him criminally liable for it. The most that the law would be willing to do with Dissociative Identity Disorder is to consider it as the basis for an insanity defense. *See Orr, supra* note 396, at 651.

some future historian will be reading through the judicial opinions and legal literature of the late nineteenth to the whatever centuries, looking for how our theory about consciousness manifested itself in judicial decisions, and will stumble across these meditations, and smile.

To my colleague and fellow time traveler who is not yet born, I salute you. We have all moved on by now, Steven Linscott, O.J. Simpson, Robert H. and Terry G., Ayla, Glenville Smith, the writer of this article, and the reader of this article—all the wild dreamers. You may find our questions quaint, but my guess is: you will not. You will know more than we do now about dreaming, but you will have your own state of ignorance to be resigned to. Almost four hundred years ago, Shakespeare wrote, “We are such stuff/As dreams are made on, and our little life/Is rounded with a sleep.”<sup>399</sup> Four hundred years from now, will you have figured out that sleep? The Tibetan Buddhists think there is a connection between our little life here—both in our waking and dreaming states—and that sleep. Have you figured that one out yet?

## CONCLUSION

The sad truth is: wild dreamers do not fare all that well with the law. They would be well advised to keep their mouths shut. In all reported cases having to do with the admissibility of dreams, dream talk as evidence never inured to the benefit of any wild dreamer—whether it be in a criminal case or in family court. If the dream foretold of violence, the wild dreamer was always implicated in that violence—whether it happened or not. Even if his dream was prophetic of nothing in particular, the wild dreamer was punished for his prescience.

In short, all evidence of dream talk should be excluded from evidence. The law is too wedded to rationality; it belongs too squarely within the dominant empirical episteme. The law cannot accommodate any claim of knowledge considered “supernatural,” “archetypal,” or from the “unconscious.” Judges who live with, and inside, the law, are more than likely going to apply a theory of dreaming consistent with empiricism. If the dream predicts the future, the judge will probably opt for some version of a Freudian explanation and regard the dream as an expression of a wish.<sup>400</sup> If the dream relates the past, the judge will probably regard the dream as a memory—in short, a confession.<sup>401</sup>

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399. WILLIAM SHAKESPEARE, *THE TEMPEST* act 4, sc. 1.

400. *See supra* Part I.C.

401. *See supra* Part IV.

To make matters worse, the members of the jury may ascribe to their own theories of dreaming, and apply them to the wild dreamer's detriment. At least when judges are admitting dream evidence, their theory of dreaming is embedded in the record. Their justification for listening to a wild dreamer is subject to public scrutiny. Not so with the jury. They may draw all kinds of inferences about the source of the dream and its consequent meaning. They may be operating out of an entirely different set of epistemological and metaphysical assumptions.<sup>402</sup> But we will never know because the jury operates secretly, and there is no need for them to justify their conclusions.<sup>403</sup>

Criminal trials, as well as matters in family court, have a tremendous impact on the lives of the parties involved. In those cases, only the most reliable evidence should be admitted. Because everyone in the courtroom is sufficiently indoctrinated in the dominant episteme, we accept the requirement that the parties prove their case on the basis of sense data—on physical evidence, or on first-hand information about events observed.<sup>404</sup> In this realm, there is some agreement about what constitutes a valid claim of knowledge, and what does not.<sup>405</sup>

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402. Jurors may also base their opinions about guilt or innocence on an incorrect understanding of one theory about dreaming or another. This is particularly true with some of the more difficult theorists such as Freud or Jung. *See supra* Parts I.C, II.D.

403. *See generally* THEODORE PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 106–38 (Butterworth & Co. Ltd. 1956) (1929) (providing a history of trial by jury).

404. Our ability to perceive reality is particularly impaired during the transition between the sleeping and the waking states. Many cases involving dreams are about experiences related or utterances made just as the victim of a crime is either in, or coming out of, a dream state. The dream state has been used by the victim to explain why he did not protest some act of unwanted sexual aggression. *See, e.g.,* United States v. Feltham, 58 M.J. 470, 471–72 (C.A.A.F. 2003) (where victim made inculpatory statements and remembered waking up from a wet dream at the same time as he was ejaculating into the defendant's mouth); People v. Telle, 2003 WL 22922961, at \*1 (Cal. Ct. App. 2003) (where victim did not protest a sexual assault because she was drifting “in and out of sleep, ‘felt like [she] was in a dream’ and wondered, ‘what is going on, why is this, who is this’”) (alteration in original); State v. Judge, 758 So. 2d 313, 316 (La. 1999) (where victim was asked repeatedly about her state of awareness because she was in a deep sleep when her uncle started kissing her); State v. Stevens, 53 P.3d 356, 359 (Mont. 2002) (where victim did not protest a sexual assault during a massage because she became “glued to the table” in a “deeply relaxed ‘dream state’ or ‘sleep rem stage’”); State v. Cooke, 785 A.2d 934, 937 (N.J. 2001) (where victim went back to sleep after an act of fellatio was performed on him during sleep because he thought “he may have had a bad dream”).

405. Suzanna Sherry made a similar point about the virtues of relying upon the rationalist/empiricist epistemology in public forum:

First, the question I am addressing is not whether the Enlightenment reliance on reason and empiricism is in fact the only epistemology, but whether we ought to proceed as if it were, at least in the public arena. Even if there are multiple and contradictory truths, some may be better suited for public adoption than others. There is a difference between objective truth and

Because there are a myriad of theories about the meanings of dreams, however, we have developed no criteria by which to judge their credibility. We share no assumptions about dreams—where they come from or what they mean—that are necessary to make sense of each other's dream talk. Neither is there a dreaming culture in which to publicly debate and arrive at some consensus about the meaning of dreams. In Wittgensteinian parlance, we are not engaged—and cannot presently engage—in a language game about dreams.<sup>406</sup> We have no shared store of symbols, the meaning of which is sufficiently determinate, to play that game. Even in therapeutic circles, the meanings of dream symbols are tossed about in what can best be described as a fluid professional debate.

And so I conclude: Given the dominance of rationalism and the empirical episteme in our courts of law, dream talk should not be admissible. In modern western culture in the early part of the twenty-first century, we are just not ready to make dreams the basis of knowledge, at least not in a public arena where the task is the resolution of conflict and the meting out of justice. Jurors are too unpredictable. We do not know what their theories about the meaning of dreams might be, and their silent role at trial allows for no way to detect their metaphysical and epistemological assumptions. We therefore cannot allow the determination of guilt or innocence to be based upon dream talk. Wild dreamers abound. There is too much at stake.

It is unlikely that the situation will change for wild dreamers in the near future. I do not think the dominant episteme is going to soon yield its firm grasp on the imagination of most of those who live with and in the law. Neither do I think it is going to soon yield its firm grasp on the imagination of almost anyone else who belongs to the dominant culture. On the other hand, empiricism is not here to stay forever—not if you take seriously the history of ideas. The history of ideas suggests that our beliefs about ways of knowing, and about how the world is put together and why, will continue to change over time.<sup>407</sup> My guess is that we are in

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justified beliefs, and suggesting that only beliefs informed by reason are justified does not take any stand on the existence or accessibility of objective truth.

Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 473 (1996).

406. See LUDWIG J. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 2, at 3e (1953).

407. The traditional view of the evolution of science was that its progress was gradual and linear. Thomas Kuhn turned that traditional view on its head in his work, *The Structure of Scientific Revolutions*. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1962); see Dudley Shapere, *The Structure of Scientific Revolutions*, 73 PHIL. REV. 383 (1964) (discussing Kuhn). According to Kuhn, who based his theory on the hard sciences such as physics and

the halcyon days of the empiricist regime, but that within a century or two, perhaps sooner, we might well discover that our original premise—that there are only five senses with which to collect data—is inadequate. We might well discover that the union of our human body and mind and spirit has far more potential as a percipient being than we have ever imagined, and that from an enhanced understanding of our consciousness, we will also discover new ways of knowing.

But we are incarnate, and captives of our own particularity. Each of us has been born into a certain body that begins and ends its life over a certain historical period that dictates how we experience the world and give it meaning. Lawyers practicing in the early twenty-first century are no exception. It is our job to understand how the law in our historical period is defined by the dominant culture's episteme and metaphysics, and how our legal system operates. It is our job to help clients use that legal system, to settle their disputes, to distribute wealth, to determine who raises their children, to remedy wrongs, and when harm is done, to ensure that justice prevails. For those lawyers who try cases, that means they must know the rules of evidence and apply them with skill as they zealously represent their clients.

And here is where the role of the wild dreamer comes in, just in case you had despaired. We do have utility. A lawyer armed with the knowledge that there are alternative epistemes and competing metaphysical assumptions, is a better lawyer. For one thing, when dream talk comes up in a case, the wild dreamer will already be acutely aware of the potential harm that a cleverly placed dream narration might do to the client—and will loudly protest its introduction into evidence.<sup>408</sup> For another, when dream talk comes up in a case, the wild dreamer may take seriously the importance of that dream to the client, maybe not in the traditional role as an advocate, but in his or her role as a fellow human being. Surely if there had been a wild dreamer around when Ayla had first revealed her dream of being murdered by her father, her story would have turned out differently. And for all of the other wild dreamers I have written about, a wild dreamer as counselor would have known

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chemistry, change in science does not always follow a logical, gradual progression, but is marked by abrupt, almost revolutionary, changes in paradigms. Shapere, *supra*, at 391–93. The dominant paradigm, or widely accepted model of looking at reality, with its shared assumptions that best describe the world, and how to learn more about it, are challenged by competing schools, causing an eventual paradigm crisis. *Id.* Eventually, the dominant paradigm is thrown out, and the scientific community embraces a radically different world view. *Id.*

408. And if in need of authority, these meditations can serve as footnote fodder. O.J. Simpson's Dream Team had almost nothing to rely upon. See *supra* notes 66–70 and accompanying text.



immediately what to advise the client once the specter of litigation or prosecution loomed: Shut up.

In the process of writing this article, I have also answered my own submerged questions about the place of wild dreamers in the academy. We have three sacred tasks. Count them: one, two, three; I am a lawyer after all. I know that you do not trust me—maybe the one, two, three of things will make you feel safer.

The three sacred tasks of the wild dreamer law professor are as follows.

*One:* Academic wild dreamers have the sacred task of training other wild dreamers to practice law without losing their hearts and souls to the dominant episteme and its bleak metaphysical underpinnings. Sometimes the wildest of dreamers drift into law school, and find it a cold and lonely place; they quickly discover that their ways of experiencing and understanding the world are regarded not only as foreign, but unacceptable. They leave or drop out; sometimes they just give up on their alternative ways of knowing and sign on, part and parcel, to the dominant episteme. The profession is the worse for it. We need to nurture and protect them. Dullards who live with and in the law abound. Wild dreamers do not.<sup>409</sup> Our profession needs the outsider's perspective of the wild dreamer, as well as their propensity to ignore the sharp distinctions between established categories of thought—and to redefine them.

*Two:* Academic wild dreamers have the sacred task of engaging in dream talk under the guise of legal scholarship. We have the time and space both to daydream, and to dream in our sleep. Not only that, we are expected to travel through time in both directions—to figure out how and why things were done in the past, and to imagine how and why things might be done in the future. We frequently engage in

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409. More wild dreamers are lured into the humanities or the arts; professions like the law and medicine do not usually call their names. James believes that the range of mystical experiences is much wider than most people believe, from the full blown revelatory experiences of the Christian saints and Hindu or Buddhist yogis, to the experiences that we have in our everyday lives. JAMES, *supra* note 5, at 295. He gives examples:

Most of us can remember the strangely moving power of passages in certain poems read when we were young, irrational doorways as they were through which the mystery of fact, the wildness and the pang of life, stole into our hearts and thrilled them. . . . We are alive or dead to the eternal inner message of the arts according as we have kept or lost this mystical susceptibility.

*Id.* There are some poets who enter law school, and many of them worry that the experience will beat out of them altogether their receptivity to the eternal inner message of the arts.

conversations with the dead,<sup>410</sup> and the not-yet-living. These are luxuries not afforded to the practitioner. The conjunction of freedom and time and imagination—that is our greatest gift, and our greatest responsibility. It enables those of us lucky enough to spend our lives in the academy a chance to drift endlessly in the dream world. Some may laugh and say: Dreamy drifting could hardly be described as socially useful. But they would be wrong. That dreamy drifting may take us out to uncharted seas—to find new routes for passage, escape, perhaps for salvation.

*Three:* There is no three. I just made up the list of three so that you would feel better. And perhaps to leave you with an empty space—a space for you to confront some empty space, perhaps to have a wild dream in.

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410. After Machiavelli had just been released from prison, he wrote:

I return to my house and go into my study. At the door I take off my clothes of the day, covered with mud and mire, and I put on my regal and courtly garments; and decently reclothed, I enter the ancient courts of ancient men, where, received by them lovingly, I feed on the food that alone is mine and that I was born for. There I am not ashamed to speak with them and to ask them the reasons for their actions; and they in their humanity reply to me. And for the space of four hours I feel no boredom, I forget every pain, I do not fear poverty, death does not frighten me. I deliver myself entirely to them.

Letter from Niccolò Machiavelli to Francesco Vettori (Dec. 10, 1513), in NICCOLÒ MACHIAVELLI, *THE PRINCE* 107–08 (Harvey C. Mansfield, Jr., trans., 1985). I found this quote in a wonderful piece by Mary Ann Glendon in which she extols the virtues (and vices) of interdisciplinary scholarship. She writes about finding this letter written by Machiavelli: “On the other hand, one need not find one’s intellectual companions in one’s own discipline, or one’s own nation-state, or even in one’s own time. In fact, the most moving account of reaching across margins that I have ever seen is about friendship with the dead.” Mary Ann Glendon, *Why Cross Boundaries?*, 53 WASH. & LEE L. REV. 971, 979 (1996).

