

SOME OBSERVATIONS ON THE LAW OF EVIDENCE: STATE OF MIND IN ISSUE*

Under the general American rule utterances revealing present state of mind are admissible to prove the speaker's state of mind before, after, or at time of speaking. The orthodox reason for the rule is well stated by Wigmore:¹ “. . . the judicial doctrine has been that there is a fair necessity, for lack of better evidence, for resorting to a person's own *contemporary statements of his mental or physical condition*. It is, indeed, possible to obtain by circumstantial evidence . . . some knowledge of a human being's internal state . . . , but in directness, amount, and value, this source of evidence must usually be decidedly inferior to the person's own contemporary assertions of those conditions.” To the suggestion that the person's own statements on the stand would satisfy the need for his testimonial evidence, Wigmore says:² “The answer is that statements of this sort on the stand, where there is ample opportunity for deliberate misrepresentation and small means of checking it by other evidence or testing it by cross-examination, are comparatively inferior to statements made at times when no inducement to misrepresentation existed, and the probability of trustworthiness was greater.” It will be observed that in this view hearsay testimony as to state of mind is not only better than circumstantial evidence, but also better than direct testimonial evidence. Here the great safeguards of cross-examination and the oath are regarded as inadequate. The statements of the speaker at the time when reported by one who can be sworn and cross-examined are more valuable than the testimony of the person whose internal state is the subject of discussion.

This exception to the hearsay rule has been recognized longest for statements of present pain.³ These are not generally limited to statements to physicians,⁴ and even if made *post litem motam* may be admitted in many states in the discretion of the judge.⁵ The important

* For the background of these articles and references to others in the series, see Hutchins and Slesinger, *Some Observations on the Law of Evidence: The Competency of Witnesses* (1928) 37 YALE L. J. 1017. The authors acknowledge their indebtedness to the Commonwealth Fund, and to O. S. Cox, an honors student in Evidence at Yale.

¹ 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1714.

² *Ibid.*

³ *Ibid.* § 1718.

⁴ *Ibid.* § 1719; see also *State v. North*, 217 N. W. 236 (Iowa, 1928); *Smith v. Wilson*, 296 S. W. 1036 (Mo. App. 1927). The New York rule restricting expressions of present pain to groans and screams must be regarded as an amusing eccentricity.

⁵ 3 WIGMORE, *op. cit. supra* note 1, § 1721; *Schulz v. St. Louis & S. F. Ry.*, 4 S. W. (2d) 762 (Mo. 1928). But see *Koske v. Delaware, L. & W. R. Co.*, 142 Atl. 43 (N. J. 1928).

limitation here is the exclusion of utterances of past pain.⁶ Descriptions of the circumstances of an injury, for instance, are inadmissible under this exception, since they are unnecessary, and "not naturally called forth by the present pain or suffering."⁷ Expressions of past pain, though as necessary as present, are excluded as untrustworthy, "for they are not naturally caused by the existing pain . . . , but, being deliberate accounts of past occurrences, are no better than statements of any other past events."⁸ Great reliance is placed on the power of present pain to call forth the truth.

The hearsay exception is by no means confined to statements of suffering. It covers the whole range of intent in civil and criminal cases, playing a particularly prominent part in those where threats are involved.⁹ Wherever the state of a person's affections is important his words may be used to prove it.¹⁰ In domicile,¹¹ in bankruptcy,¹² in the law of gifts¹³ this type of evidence may be resorted to for the purpose of showing with what intention a person did an act which it is admitted he performed. Indeed, in almost any case, unless the court is misled by the supposed rule against self-serving statements (and if it is, it simply indicates that it does not understand this exception)¹⁴ the extra-judicial utterances of an individual may be used to show his state of mind at that time, wherever his state of mind at another is material.

The rule becomes particularly important in will cases on the issues of revocation and undue influence. To show the revoking mind statements at the time or not too remote are admissible.¹⁵ In dealing with undue influence, the courts generally manage to admit the utterances of the testator, if they seem to have any value, either by creating a special exception for them, or by saying that they indicate the susceptibility of the testator to pressure and deceit, or by saying that it is always per-

⁶ See (1920) 5 CORN. L. Q. 333; (1920) 34 HARV. L. REV. 88; (1914) 2 CALIF. L. REV. 243; *Zion's Co-op. Mercantile Institution v. Industrial Comm.* 262 Pac. 99 (Utah, 1927).

⁷ 3 WIGMORE, *op. cit. supra* note 1, § 1722.

⁸ *Ibid.*

⁹ *Ibid.* § 1732; (1921) 34 HARV. L. REV. 675; *Williams v. Great Southern Lumber Co.*, 48 Sup. Ct. 417 (U. S. 1928).

¹⁰ 3 WIGMORE, *op. cit. supra* note 1, § 1730; (1902) 15 HARV. L. REV. 582; (1915) 15 COLUMBIA LAW REV. 190; (1919) 33 HARV. L. REV. 315; (1920) 68 U. OF PA. L. REV. 187.

¹¹ 3 WIGMORE, *op. cit. supra* note 1, § 1727; (1916) 16 COLUMBIA LAW REV. 425.

¹² 3 WIGMORE, *op. cit. supra* note 1, § 1728; *Rawson v. Haigh*, 2 Bing. 99 (1824).

¹³ *In re Brown's Estate*, 130 Misc. 865, 226 N. Y. Supp. 1 (1927).

¹⁴ *Davis v. State*, 111 So. 645 (Ala. 1927); but *cf.* *Hawes v. State*, 112 So. 759, 761 (Ala. App. 1926, 1927); *State v. Liston*, 2 S. W. (2d) 780 (Mo. 1928). But see *Stapleton v. State*, 298 S. W. 578 (Tex. Crim. App. 1927).

¹⁵ 3 WIGMORE, *op. cit. supra* note 1, § 1737; *Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487 (1913).

missible to show the deceased's attitude toward specific persons.¹⁶ So general is the rule admitting these statements and so refined are the distinctions used to justify it that Mr. Wigmore concludes,¹⁷ "It would seem more sensible to listen to all the utterances of a testator, without discrimination as to admissibility, and then leave them to the jury with careful instructions as to how to use them."

We are dealing here, then, with a very broad rule; one which can be resorted to in almost any kind of case. The magic phrase, "state of mind," serves to secure the introduction of testimony that otherwise would be excluded as hearsay of the rankest sort. The availability or unavailability of the declarant is unimportant. This evidence is better than anything he might say on the stand. As we have suggested elsewhere,¹⁸ where these catchwords make admissible the statements of an available declarant to prove his commission of some act, the supposed necessity upon which their importance is grounded has disappeared. The speaker's testimony to the commission of the act is better than his hearsay remarks. The importance of those hearsay remarks depends on the use to which they are put. Using them to prove an act is one thing; using them to prove state of mind, when that is in issue, quite another. We must now take one further step and assert that even where state of mind is in issue, the use to which statements reflecting it are put should determine their admissibility. It may be that we shall find that the employment of a concept so general as state of mind to cover a vast multitude of different situations is misleading. Certainly it is somewhat confusing.

Before describing this wilderness more minutely or attempting to suggest roads out of it, we should perhaps intimate that we do not regard the battle between objective and mentalist psychologists about such concepts as state of mind as important or even germane to this discussion.¹⁹ This terminological dispute is as profitable as one on the relative merits of "bread" and "brot" as a description of a familiar household commodity. The legal "state of mind" is an inference from observable data. If it is treated as such it is harmless, and frequently useful. The only danger arises when a concept is endowed with powers of its own,

¹⁶ 3 WIGMORE, *op. cit. supra* note 1, § 1738; *Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709 (1906); *In re Cable's Will*, 213 App. Div. 512, 210 N. Y. Supp. 187 (3d Dept. 1925); *In re Allen's Estate*, 230 Mich. 584, 203 N. W. 479 (1925); *Ezell v. Mobley*, 160 Ga. 872, 129 S. E. 532.

¹⁷ 3 WIGMORE, *op. cit. supra* note 1, § 1738.

¹⁸ Hutchins and Slesinger, *Some Observations on the Law of Evidence: State of Mind to Prove an Act* (1929) 38 YALE L. J. 283.

¹⁹ The arguments in favor of mentalism, for instance, because of similarity of concepts used by mentalism and the law. See ROBACK, *BEHAVIORISM AND PSYCHOLOGY* (1923) c. X, and GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW*.

which are not to be found in the facts on which it rests. As long as the logical problem is noted and logical errors are avoided; as long as there are observable data, there is little reason for restraining the mentalist or behaviorist from using the terms most useful to him. Here the phrase "state of mind" is used in its conventional legal sense; but we shall attempt at the same time to inquire into the situations it is promiscuously used to describe, and thus to determine its importance in terms of human behavior.

When state of mind is used to prove an act, the psychological problem may be simply stated. If two items of behavior are frequently found together, and seldom if ever apart,²⁰ we can infer the probable existence of the one from the observed existence of the other. We may assume different middle terms, that is, we may say that A and B are found together because of a connecting state of mind, or an intervening X. Regardless of the physical existence of the assumed connection, the fact remains that A and B are frequently found together. And that, when state of mind is used to prove an act, is all the court wishes to know.

Where state of mind is in issue, the problem is a different one. In the early stages of the development of the law, the courts used the phrase "state of mind" to describe the moral responsibility of the individual. Perhaps the phrase may now be usefully employed, not to shed light on the depravity of a man, but to permit the introduction of data which will assist the court in predicting human behavior.²¹ It will now be generally agreed that the function of a court is the control of human conduct. To control it, the court wishes to predict future behavior, which must of course be done from a knowledge of past behavior. Therefore the tribunal will desire to have in hand those data which will enable it to predict a future course of conduct. Some of these data may be called state of mind, which, in turn, may be evidenced by words or other acts.

These words or acts are important because they may indicate characteristic conduct, that is, the habitual behavior of an individual.²² We are aware that many courts do not give habit in the law of evidence much weight, on the ground that what a man did at one time is no

²⁰ RUSSELL, *PHILOSOPHY* (1923) p. 83.

²¹ The amount and type of data needed is indicated in WATSON, *PSYCHOLOGY FROM THE STANDPOINT OF A BEHAVIORIST* (1924) 6 *et seq.*, and the various case histories in such works as FREUD, *COLLECTED PAPERS* (1924), or ABRAHAM, *SELECTED PAPERS ON PSYCHOANALYSIS* (1927). These volumes are selected because they are right at hand; of course all psychological and psychiatric literature is concerned with that problem.

²² For elaboration of this point see forthcoming article on Habit and Character in the Law of Evidence by Adler and Michael.

indication of what he did at another.²³ Chickens and dogs²⁴ are influenced by their histories; but men have free will and can shake themselves loose from the past. This attitude finds little support in psychology. The tendency in psychology has been to attach greater and greater importance to habit.²⁵ Even at the time of William James habit was of the utmost significance.²⁶ Since his time it has become the focus of most psychological study. In psychiatry the bulk of a case history is an investigation of the individual's habits.²⁷ John Dewey points out that in studying normal people habit is as vital as it is in psychiatry. He says:²⁸ "Habits may be profitably compared to physiological functions like breathing, digesting." Habit means a "special sensitiveness or accessibility to certain classes of stimuli . . . rather than bare recurrence of specific acts. It means will." Again "the dynamic force of habit taken in connection with the continuity of habits with one another explains the unity of character and conduct."

By way of contrast, and to indicate the prevailing legal attitude, we may consider the case of murder, in which the tribunal must inquire whether the killing was premeditated. Premeditation connotes control by the free will of the actor. This judicial faith in free will runs directly counter to the growing psychological faith in habit. If as James said years ago,²⁹ a man at thirty is nothing but a walking bundle of habits, it is clear that when we speak of an act as controlled, we merely mean that for the moment one set of habits is stronger than another.³⁰ Thus a habit of going to work at nine o'clock in the morning may conflict with one of staying in bed after having worked late the night before. Whether the individual gets up or stays in bed will be determined by which habit pattern is called into action by the total situation. These habit patterns and the stimuli which bring them into activity now constitute the chief material of the science of psychology. Indeed, any science would be unthinkable if free will played an important part in it. In the case of premeditation in murder, therefore, its existence indicates an interval between the initial stimulus and the response, the killing, in which a conflict of habits has taken place. The result is that we

²³ *Zucker v. Waitridge*, 205 N. Y. 50, 98 N. E. 209 (1912); *Noyes v. Boston & M. R. R.*, 213 Mass. 9, 99 N. E. 457.

²⁴ *Broderick v. Higginson*, 169 Mass. 482, 48 N. E. 269 (1897).

²⁵ PERRIN AND KLEIN, *PSYCHOLOGY* (1926) 124-130. Also the numerous references to habit in any modern textbook in psychology.

²⁶ JAMES, *PRINCIPLES OF PSYCHOLOGY* (1890) c. IV; X. BRIEFER COURSE, c. X.

²⁷ See case histories in volumes cited, *supra* note 21. Also WHITE, *LECTURES ON PSYCHIATRY* (1928) 7-10.

²⁸ DEWEY, *HUMAN NATURE AND CONDUCT* (1922) 14, 42, 43.

²⁹ JAMES, *op. cit. supra* note 26, 121, 127.

³⁰ OGDEN, *MEANING OF PSYCHOLOGY* (1926) 258; DEWEY, *op. cit. supra* note 28, 76 *et seq.*

may assume the ascendant pattern to be the usual or characteristic response to this type of stimulus. The killing might, on the other hand, have arisen suddenly, the result of an emotional stimulus that released a very unusual pattern response. The law is interested in these facts because it wishes to know not only what has happened, but what is likely to happen in the future when similar stimuli are brought to bear on the same or similar individuals.

In other fields of law the same interest in future behavior appears. When the question is what is the "state of mind" of the alleged donor of property, his words may be offered to reveal it. These words would indicate the probability of his attempting to reclaim the property at some future time, or to demand payment for it. Where the issue is domicile the courts wish to know the likelihood that the declarant will reside in New Haven in the future rather than in New York. Even when pain is proved by extra-judicial utterances of the sufferer, we are frequently concerned, as in *Insurance Co. v. Mosley*,³¹ not with pain as an end in itself, but as evidence of the extent and character of the injury. This in turn resolves itself into the probable effect of the bodily harm upon the future behavior of the injured person.

The law, then, is interested in the dynamics of behavior. It demands enough context, enough accompanying detail, so that it can assume a future course of conduct, which it will control according to its own philosophy. The courts now seem to feel that they have enough data if along with the specific act they learn what the actor said or did in relation to the act. It is usually necessary to resort to what he said; and what he said is what is admitted as showing his "state of mind."

Since whatever their limitations we cannot avoid the use of words, it might seem that the simplest way to learn about the state of mind of an individual is to ask him on the stand to tell what his state of mind was at a given time. Surely no one knows it better than the person who had it. In fact in all jurisdictions except Alabama it is permissible to learn about state of mind in just this way.³² When this method is followed what we get in civil cases is the witness's opinion of what his future course of conduct would have been. This opinion is based on data available only to him, and is consequently inferior to a more objective way of discovering it. In criminal cases, the net result of the witness's testimony is that he gives the jury his version of his character, his appraisal of his habits; in effect, his notion of whether or not he is the kind of man who would commit a crime. This again is based

³¹ 8 Wall. 397 (U. S. 1869).

³² *State v. Holland*, 193 N. C. 713, 138 S. E. 8 (1927); *Prince v. State*, 215 Ala. 276, 110 So. 407 (1926); *State v. Phillips*, 279 S. W. 749 (Mo. 1926); cf. *Hall v. State*, 216 Ala. 336, 113 So. 64 (1927).

on data available only to him. These data are for the most part what Mr. Watson calls implicit responses,³³ for the study of which few objective methods have yet been devised. Besides these difficulties there is the added problem of the unreliability of report where the implicit response is an emotional one.³⁴ Of course the jury probably take some of these points into consideration. If they do so, however, their criteria are those of common sense and general experience, which are not always infallible.

The other principal method of proving state of mind is one which may be resorted to even when the person whose internal state is in issue has taken or can take the stand. That is the method made possible by the exception to the hearsay rule for extra-judicial utterances supposedly revealing state of mind. On the face of it, this would seem to be free from the difficulties that we have noted in connection with the person's own report of his previous state of mind. It looks objective; the witness is under oath and subject to cross-examination; the witness can observe and report other overt conduct of the speaker tending to qualify, support, or explain the words to which he testifies; there is the possibility that other witnesses may be able to check the story that this witness tells. The statement of the person at the time is likely to be a more accurate picture of his state of mind than his memory of it later on. This is the basis of the strong position taken by Wigmore³⁵ in favor of admitting extra-judicial utterances in this connection. What is overlooked by the courts and learned commentators is that the memory of some witness is always involved, whether the statement is hearsay or direct testimony to state of mind. The witness to extra-judicial utterances remembers words. The witness testifying to his own previous state of mind remembers what Wigmore calls his internal state at an earlier time. But it is well known that the memory of words is a most unreliable type of recollection.³⁶ This does not mean that the hearsay exception should be abolished or that the courts and commentators are wrong in thinking that a contemporary assertion more accurately reflects actual conditions than the person's own later memory. It does mean that we have to deal with some person's later memory in any case, and that the memory involved in the hearsay exception, the memory of words, is so weak as to qualify somewhat our enthusiasm for extra-judicial as against testimonial reports of state of mind.

³³ WATSON, *op. cit. supra* note 21, 218, 343, 346.

³⁴ Hutchins and Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations* (1928) 28 COLUMBIA LAW REV. 432.

³⁵ *Loc. cit. supra* note 1.

³⁶ Compare, for instance, the figures in WOODWORTH, *PSYCHOLOGY* (1921) 351 and 352.

We have now discussed the two general methods of proving what is called state of mind, and shall consider the hearsay exception in greater detail. In dealing with what is called state of mind to prove state of mind, we are not concerned with words to prove other overt acts. We are concerned with words to prove circumstantially implicit responses or what the courts call state of mind. When the words establish overt conduct, there are other ways of doing the same thing, so that the unavailability of the speaker may well be required as a condition precedent to the admission of his extra-judicial utterances. When implicit responses are in issue, they can be proved satisfactorily only by the words of the person experiencing them. His death or absence from the jurisdiction will therefore not generally be a prerequisite to the admission of his reported language.

Another difference in the two types of case is that when state of mind is used to prove an overt act the tense of the statement is comparatively unimportant.³⁷ When the utterances are regarded as establishing implicit responses, the time to which they refer may have considerable significance. In the latter case, when the words precede the overt act they are supposed to qualify; they indicate, to use Woodworth's terminology,³⁸ a mechanism ready to behave in a certain way. We have the same situation when the words accompany the act in question. "I'll get you,"³⁹ or "The next time she passes here, I am going to kill her,"⁴⁰ indicate that upon an appropriate stimulus this mechanism will behave in this way. The past relations were a stimulus which put the mechanism in readiness. The appearance of the other party put the mechanism in drive. The period of readiness has given opportunity for the conflict of behavior patterns to take place.⁴¹ The association of the words and the other overt acts suggests that those acts have a history which makes repetition of them likely.⁴² The general attitude of the courts is that statements of presently existing state of mind, though admissible when remote from the main act, are progressively weaker as they get farther away from it in time.⁴³ This conclusion is quite justified when the words are employed to prove the commission of the main act. When their importance is in the light they throw on the established behavior patterns of the individual, remoteness, within limits, may be an advantage. Expressions of a desire to kill a man whom it is admitted the

³⁷ Hutchins and Slesinger, *op. cit. supra* note 18.

³⁸ WOODWORTH, *DYNAMIC PSYCHOLOGY* (1918) 36.

³⁹ *State v. Ballard*, 191 N. C. 122, 131 S. E. 370 (1926).

⁴⁰ *State v. King*, 159 La. 972, 106 So. 461 (1925).

⁴¹ DEWEY, *op. cit. supra* note 28.

⁴² Simply because we have more (though not all) of the data necessary.

⁴³ (1920) 20 COLUMBIA LAW REV. 800; and see threat cases referred to *infra*.

defendant killed, made thirteen months,⁴⁴ or two years before the shooting⁴⁵ reflect the history of relations between him and the deceased more impressively than words uttered a few moments before the gun went off.

When the words follow the admitted act they may not reflect the relations between the parties, because of the strong possibility that they were a response to the admitted act itself. Where the evening after the difficulty, the defendant remarked that he hoped the son of a bitch would die,⁴⁶ the elegant language employed may indicate a past history, but may, on the other hand, merely indicate an animus felt as a result of the difficulty. Where there is other evidence of the relations of the parties these words may be profitably used for corroboration; but where they alone are used to prove state of mind they have elements of weakness.

What has been said applies with particular force to threats. Threats when used to prove the commission of a crime have slight probative value.⁴⁷ There they may simply show personality type, rather than implicit readiness for certain future behavior. When the act is conceded, however, previous threats are not open to this objection. Here the question is not whether something was done, but whether something that was done is likely to be done again. A previous threat, therefore, signifies that the act had a past, on the basis of which we may predict the future behavior of the individual. Threats made after the act are subject to the general criticism that has been suggested of any words that follow the situation they qualify.

Another important use of words in this exception to the hearsay rule is to prove the presence or absence of undue influence in will cases. Here, as Wigmore suggests,⁴⁸ the words actually go to show undue influence whatever may be the theoretical basis of their admission. The question is, did the will carry out the testator's wishes or those of someone else, against the wishes of the testator? To answer it the mere words of the testator at any time will not suffice. In order to infer the probable disposition of his property after his death one must know a good deal about his attitudes during his lifetime. This will be shown in part by words at various times, but much more clearly by other overt incidents in the testator's past. Although statements to relatives, for example, may very well be misleading, the fact that in twenty years the testator

⁴⁴ State v. Hanson, 53 N. D. 879, 207 N. W. 1000 (1926).

⁴⁵ State v. Ross, 160 La. 661, 107 So. 481 (1926); People v. Singh, 260 Pac. 327 (Cal. App. 1927). The point of view here favored is suggested in People v. Frank, 327 Ill. 393, 158 N. E. 712 (1927).

⁴⁶ Watson v. State, 105 Tex. Cr. App. 152, 287 S. W. 265 (1926).

⁴⁷ Hutchins and Slesinger, *loc. cit. supra* note 18.

⁴⁸ *Op. cit. supra* note 16.

visited his nephew living on the next block but once need arouse no special scepticism on the part of the jury.

If history is important in showing the probable wishes of the testator, it is no less so where undue influence is suspected as a cause of the will's not being in accord with expectations based upon behavior. The real problem here is the suggestibility of the deceased with regard to the suspected stimulus. His words again are of some use in this connection. But they alone will not show whether he was more or less suggestible. In order to show this counsel will wish to present an account of his past behavior under various circumstances. If in other circumstances he appeared to be suggestible, there is ground for inference that he may have been so in drawing his will. This is substantially the attitude of the courts toward this kind of testimony. In order to come somewhat closer to scientific accuracy in presenting and appraising this type of evidence courts and counsel might familiarize themselves with the clinical and laboratory material on the subject. This would perhaps provide more definite notions of the particular facts which should be sought for and proved.⁴⁹

The purpose of admitting utterances of present pain is frequently to reveal the extent of the injury, and its effect, therefore, on the future behavior of the sufferer. The external manifestation of pain is an avoidance reaction sometimes accompanied by vocal expression.⁵⁰ In fact it is more than possible that these avoidance reactions and the concomitant sounds actually are what we commonly call pain. Marston reports⁵¹ that during the last few years he was able on three occasions to prevent the avoidance reaction to stimuli that would ordinarily have caused pain. On those occasions he was conscious of no pain whatever. On the other hand, this type of reaction may arise as a conditioned response. Most people have had the experience of cringing in the dentist's chair, although what the dentist did at the moment turned out not to be painful. Thus it would seem that there are some limitations on the effective use of pain as disclosing the extent of an injury. A further limitation may arise in dealing with that comparatively small group who because of a neurosis complain of pain for which no physical

⁴⁹ The type of data required will depend upon the results of such studies as those of BROWN, *Individual and Sex Differences in Suggestibility* (1916) 2 U. OF CALIF. PUBLICATIONS IN PSYCHOLOGY No. 6; Otis, *A Study of Suggestibility of Children* (1924) ARCHIVES OF PSYCHOLOGY No. 70; and MORGAN, *THE PSYCHOLOGY OF ABNORMAL PEOPLE* (1928) 431 *et seq.*

⁵⁰ CANNON, *BODILY CHANGES IN PAIN, HUNGER, FEAR AND RAGE* (1915) 185 *et seq.*

⁵¹ MARSTON, *EMOTIONS OF NORMAL PEOPLE* (1928) 178-182; and Marston, *Motor Consciousness as a Basis for Emotion*, (1927) 22 JOURNAL ABNORMAL AND SOCIAL PSYCH. 140.

cause can be found.⁵² Here the uncorroborated reports of bodily condition are not of much value. In the absence of a simple and effective technique for giving psychiatric examinations as part of the apparatus of legal procedure, all that court and counsel can do to detect these neurotics is to become aware of that material collected by psychiatrists and psychologists which will disclose their external characteristics.

It therefore appears that the concept "state of mind" has produced the admissibility of evidence in widely diverse fields. When we examine the actual situation it would seem that the human data in those various fields are so diverse as to make the utility of the concept doubtful. Professor Chafee⁵³ has made the interesting suggestion that statements of presently existing state of mind are admissible whether they refer to the future or the past because "the stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up or down the current." Our analysis would lead us rather to believe that this peaceful stream is full of eddies and rapids. When a threat is used to prove an act it is poor evidence; when used to show a tendency it is good. A statement in the past tense may be useful in proving the occurrence of an act, although less useful when the implicit responses accompanying the act are in issue. In some cases, words are valuable, although unsupported; in others, to have much importance, they should be corroborated. The law, then, may well come to the same conclusion to which psychology came when it gave up the concept of the faculties and substituted for it studies of specific behavior.⁵⁴ The general concept "state of mind" may prove to be too broad to be useful. From the practical point of view it will be more effective to replace state of mind with mental states. Then the admissibility of the evidence in any case will depend on the use to which it is put.

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⁵² FREUD, *INHIBITION, SYMPTOM AND ANXIETY* (1927); ROSANOFF, *MANUAL OF PSYCHIATRY* (6th ed. 1922) 55, 147.

⁵³ *The Progress of the Law* (1922) 35 HARV. L. REV. 302, 443, 444.

⁵⁴ WOODWORTH, *op. cit. supra* note 38, 60, 61.