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SOME OBSERVATIONS ON THE LAW OF EVIDENCE —CONSCIOUSNESS OF GUILT*

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In previous papers we discussed two aspects of state of mind: (1) where it was used to prove an act in issue;¹ and (2) where it was itself in issue.² In order to discuss it scientifically it was first necessary to dispose of linguistic differences between modern psychology and the law, because of the attitude of the former toward introspective studies of non-verifiable behavior. After discovering what behavior was referred to by the legal concept, that behavior was discussed in the light of recent psychological study.³ It then appeared that state of mind to prove an act and state of mind in issue were two different phenomena which easily became confused because of the tendency to use a single phrase to cover them both. Further analysis revealed that the concept could profitably be broken up according to the use to

*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, star note.

¹ Hutchins and Slesinger, *Some Observations on the Law of Evidence—State of Mind to Prove an Act* (1929) 38 YALE L. J. 283.

² Hutchins and Slesinger, *Some Observations on the Law of Evidence—State of Mind in Issue*, to appear in (1929) 28 COL. L. REV.

³ *Supra* note 1, at 291.

which the evidence was put in various cases. We finally concluded that the phrase "state of mind" was dangerous principally because of the inclination to regard it as a fact instead of looking upon it as a middle term hypothetically connecting observable behavior phenomena; and that as a phrase it is useful for getting certain evidence before the jury, but not as a criterion of such evidence.⁴

Consciousness of guilt is another state of mind that raises a new set of legal and psychological problems. Wigmore dramatically states its significance when he says:

"As an axe leaves its mark in the speechless tree, so an evil deed leaves its mark in the evil doer's consciousness."⁵

Again:

"The reliance is not upon the testimonial credit of a person, but upon psychologic forces closely analogous to the forces of external nature."⁶

As a result, we are not here concerned, as in the case of state of mind to prove an act, with the hearsay rule or an exception to it. We need not worry about finding a necessity for the introduction of the statements, or a guarantee of their trustworthiness. We are dealing with a firmly established notion in the law, based on an equally well-settled axiom of common sense. Mr. Wigmore puts it thus:

". . . a criminal act leaves usually on the mind a deep trace, in the shape of a consciousness of guilt, and from this consciousness of guilt we may argue to the doing of the deed by the bearer of the trace."⁷

Around this general axiom gather numerous corollaries, such as:

"Flight from justice, and its analogous conduct, have always been deemed indication of a consciousness of guilt. The wicked flee, even when no man pursueth; and the righteous are as bold as a lion."⁸

⁴ *Supra* note 1, at 298.

⁵ 1 WIGMORE, TREATISE ON EVIDENCE (2d ed. 1923) 544.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.* 560.

It appears, then, that consciousness of guilt is very important in legal scholarship. It seems equally accepted in legal decisions. Appellate courts rarely reverse judgments because testimony evidencing it has been admitted.⁹ And at least one trial judge in a recent celebrated case declined to grant a new trial because he gave such great weight to the evidence of consciousness of guilt.¹⁰ Whether jurors are more skeptical than judges we cannot positively assert until we know more about the behavior of juries. There are, however, two indications of their attitude that may be found in the Sacco-Vanzetti case. The defendants were radicals on trial for their lives in a period of intense popular feeling against all opposed to the established order. To counsel for the defense the evidence of consciousness of guilt seemed likely to have such tremendous effect on the jury, that he ran the risk of radical prejudice in order to get before them other reasons for the behavior offered to prove that consciousness.¹¹ Although he was aware of the great danger of presenting the unconventional background of the accused, he preferred to take his chances with that rather than leave their guilty behavior unexplained. That counsel for the defense had a real basis for his fears is brought out by the report of the committee appointed by Governor Fuller to consider this case. Two of its members were distinguished laymen; the other was a judge. It may be assumed that the jury attached no less importance to consciousness of guilt than did this committee. Its estimate of what the jury thought of the evidence is indicated by the statement that it "would in the case of New England Yankees, almost certainly have resulted in a verdict of murder in the first degree."¹²

We find, then, that to legal scholars, judges, lawyers, and, so far as we can see, to laymen, consciousness of guilt is an idea of almost irresistible appeal. When we come to consider what may be used to evidence it we find the rule as broad as it is pop-

⁹ *Ibid.* § 273.

¹⁰ *Commonwealth v. Sacco*, 255 Mass. 369, 151 N. E. 389 (1926).

¹¹ FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* (1927) 60.

¹² The so-called Lowell report signed by Robert Grant, A. Lawrence Lowell and S. W. Stratton, reprinted by the Sacco Vanzetti Defense Committee (1928) 12.

ular. Flight is as important today as it was in Old Testament times.¹³ Silence under accusation shows guilt, unless under the circumstances a reply was not to be expected.¹⁴ Lying,¹⁵ going armed,¹⁶ resisting arrest,¹⁷ and nervousness¹⁸ all reveal a sense of guilt. Traveling under an assumed name will suggest commission of a crime.¹⁹ And even at the present day, with the apparent approval of Mr. Wigmore, refusal to take a superstitious test is evidence, not of guilt, but of consciousness thereof.²⁰ In other words, almost anything, if to the popular imagination it denotes a sense of shame, may be introduced to prove, inferentially, the commission of a crime.

Of course we do not mean to imply that weaknesses in this type of testimony have not been detected. Mr. Wigmore suggests that occasionally a man may act as though conscious of guilt as the result of a delusion.²¹ He says, too:

“The same symptom is often the result of exactly opposite psychological conditions. This sort of evidence is admitted because there is a certain degree of uniformity in its meaning, but the variations from uniformity are so frequent,²² and depend so much upon personal character and local circumstances that *no fixed rules should be laid down*. Repeated judicial warnings tell us that the evidence is merely to be estimated as best we can in the light of our knowledge

¹³ *People v. Lorraine*, 265 Pac. 893 (Cal. App. 1928); *Allen v. U. S.*, 164 U. S. 492, 17 Sup. Ct. 154 (1896); *Rowan v. U. S.*, 277 Fed. 777 (C. C. A. 7th, 1921), *certiorari* denied, 257 U. S. 660, 42 Sup. Ct. 187 (1922); *Ransom v. State*, 115 So. 208 (Miss. 1928); *Wilkinson v. State*, 108 Tex. Cr. App. 384, 300 S. W. 942 (1928).

¹⁴ *Commonwealth v. Kenney*, 12 Metc. 235 (Mass. 1847).

¹⁵ *Commonwealth v. Spezzaro*, 250 Mass. 454, 146 N. E. 3 (1925).

¹⁶ *Commonwealth v. Sacco*, *supra* note 10.

¹⁷ *People v. Anderson*, 57 Cal. App. 721, 208 Pac. 204 (1922); *Silver v. State*, 8 S. W. (2d) 144 (Tex. Cr. App. 1928).

¹⁸ *Springs v. Commonwealth*, 198 Ky. 258, 248 S. W. 535 (1923); *Commonwealth v. Gangi*, 243 Mass. 341, 137 N. E. 643 (1923); *State v. Anthony*, 117 So. 921 (La. 1928).

¹⁹ *Harlin v. State*, 100 Tex. Cr. App. 156, 272 S. W. 448 (1925).

²⁰ WIGMORE, *op. cit. supra* note 5, § 275. In support Wigmore cites *Gassenheimer v. State*, 52 Ala. 313 (1875) and *State v. Wisdom*, 119 Mo. 539, 24 S. W. 1051 (1894).

²¹ WIGMORE, *op. cit. supra* note 5, § 173.

²² If the variations were frequent enough, or wide enough, the probative force of the evidence would be considerably weakened.

of human nature in general²³ and of the accused in particular. . . . The general principle, as applied to the conduct of one accused of crime, finds illustration in a great variety of instances. In those which have led to judicial rulings, there has seldom resulted an exclusion, because usually none but conduct having at least plausibly a guilty significance is commonly offered.”²⁴

The defect in the evidence suggested by Wigmore has been observed, as he intimates, by the courts. In *Springs v. Commonwealth*²⁵ the prosecution showed consciousness of guilt by proving that when a bloodhound was brought to track down the person who had burned a barn the defendant displayed nervousness; and by proving that when arrested, he exclaimed, “Ain’t this hell!” The Court of Appeals held both items inadmissible because the nervousness might have been explained by the defendant’s anxiety about his wife, whom he had brought to town to have some work done on her teeth, and, as to the profane expression:

“It would be hard to imagine anything more calculated to make one nervous than to arrest him for a grave crime, particularly if he knew himself to be innocent; and what would be more natural than that he should make some remark expressive of his surprise and resentment because thereof.”²⁶

Considerations such as these led Ormond, J., to remark years ago that: “The conduct of one accused of crime is the most fallible of all competent testimony.”²⁷

Judge Ormond’s caution is particularly impressive in view of the potency of the concept of consciousness in the history of psychology. Professor Ladd of Yale, indeed, asserted that psychology is the explanation of the phenomena of consciousness;²⁸ and Dr. Calkins, about the same time, wrote: “All psychologists

²³ It is this knowledge of human nature that is the crux of the problem. Much has been learned since the days when innocent men behaved like lions.

²⁴ WIGMORE, *op. cit. supra* note 5, § 273.

²⁵ *Supra* note 18.

²⁶ *Springs v. Commonwealth, supra* note 18, at 264, 248 S. W. at 537.

²⁷ *Smith v. State*, 9 Ala. 990, 995 (1846).

²⁸ LADD, *OUTLINES OF DESCRIPTIVE PSYCHOLOGY* (1902) I.

will agree that psychology is the science of consciousness.”²⁹ To these scholars consciousness was not an hypothesis but a fact universally admitted, and the most important one that could be discovered about an individual. This attitude toward consciousness led to great emphasis on centrally initiated behavior (free will) and comparatively little study of external stimuli and resulting observable responses. It meant also that the established method of psychology was introspection.³⁰ Even the experiments of the apparently objective psycho-physicists were not actually objective, however much they may have seemed to be. They were concerned with the relation of phenomena of consciousness to certain physically measurable changes in the external world. The conscious phenomena were investigated by the introspective method of verbal report.³¹ The result of all these studies was an academic psychology with little relation to life.

It would be futile to deny the existence of consciousness; but it may be suggested that exclusive concern with it throws little light on human relations. It may even be entirely irrelevant as far as the behavior of people is concerned. Certainly it has no part in some important physiological processes which we know influence human conduct. The endocrine system, which some investigators believe is the basis of criminality,³² is not regulated by consciousness. And while no scientific evidence can be offered to prove or disprove the contention of the epiphenomenalists³³ that consciousness merely accompanied, but never caused, activity, such an hypothesis is no doubt a possibility. Results of recent investigations indicate that much can be learned about human activity without considering consciousness at all.³⁴

²⁹ CALKINS, INTRODUCTION TO PSYCHOLOGY (1902) 3.

³⁰ TITCHENER, TEXT BOOK OF PSYCHOLOGY (1917) 20, *et seq.*

³¹ These studies, referred to in Hutchins and Slesinger, *supra* note 1, at 291, led to such famous generalizations as Weber's Law.

³² BERMAN, GLANDS REGULATING PERSONALITY (1925) *passim*; SCHLAPP AND SMITH, THE NEW CRIMINOLOGY (1928) *passim*.

³³ MURPHY, HISTORICAL INTRODUCTION TO MODERN PSYCHOLOGY (1929) 122, n. 1.

³⁴ Behavioristic studies are not concerned with consciousness, nor are such studies of infant behavior as GESELL, CHILD STUDY (1925). Naturally students of animals (THORNDIKE, ANIMAL INTELLIGENCE, or KOHLER, MENTALITY OF APES [1926]) do not study consciousness, for that can only be investigated by the method of verbal report.

In the field of medicine modern developments have indicated that evidence from consciousness should be accepted with some hesitation. The conventional way of describing symptoms has always been in terms of awareness. "Do you feel dizzy?" "Have you a dark brown taste in your mouth?" "Where does it hurt you?" With the development of machinery making more objective methods possible, many of these introspective analyses have been found to be of little assistance. Some of them have proved to be misleading. The new attitude is summed up in the recent statement of a prominent physician that because certain types of patients are either insensitive or hypersensitive to pain³⁵ or are unable to locate it, all the text books concerned with symptoms will have to be re-written.

It will at once be objected that even though new symptoms are found through X-ray photographs or temperature curves they will have to be interpreted through the consciousness of the doctor. This may be conceded, and is one reason why it is futile to deny consciousness. The special virtue of the temperature reading is that it can be interpreted through the consciousness of any number of observers. Because of the variability of the sensations of human animals it is a cardinal point of scientific method that all studies be *verified* by many observations of the same phenomena. Only the patient senses his own pain, but a large group of doctors can examine X-rays of his lungs. Verifiability then is the criterion of what can be scientifically studied. Non-verifiable phenomena like consciousness or psychic phenomena may be absolutely true; but they can hardly be scientifically true until they can be subjected to such study as will permit verification by numerous observers of the same, or almost the same, phenomenon. A scientific hypothesis is tested, not by argument, but by study of verifiable behavior deduced from the hypothesis. In the absence of verification, the hypothesis, though it may be absolutely true, must be discarded.

This analysis weakens the position taken by Roback and Sheldon Glueck on certain fundamental conceptions in psychology

³⁵ This also affects the legal doctrine of "present pain." See Hutchins and Slesinger, *supra* note 2.

and law. Glueck in *Mental Disorder and the Criminal Law* insists on the quaint psychology of Macdougall because:

"It is difficult to see . . . how, under a purely behavioristic conception of the human organism there is any room for belief in even a shred of free, self-directive, purposive and to that extent, responsible activity."³⁶

Later he goes on to state, since "these acts, in such a view of human nature are merely the *automatic* responses to *accidental* environmental stimuli. . . . Why should any one be held responsible for"³⁷ them? Again, if this view (behaviorism) is sound, then "the conscious—volitional—inhibitory basis of moral and legal responsibility must be abandoned."³⁸ Says Roback:

"To argue that intent is discoverable only through behavior, and is therefore not so vital as represented to be is a flagrant *ignoratio elenchi*, for the *issue before us is not the means of discovery but the object to be discovered*; and the very fact that the one is an indicator of the other amply proves which is the more significant of the two."³⁹

The first criticism by these authors of an objective psychology seems to be that it would strip the criminal law of some of its dearest phrases. But it is difficult to see why they should be so strongly in favor of retaining them. Certainly their use up to the present has not produced notable success in the prevention of crime or in the administration of the criminal law, that is, in the prediction and control of human behavior. In the face of this situation it seems curious that they should offer as a reason for embracing a doctrine that its language agrees with that of another which was formulated before the rise of modern psychology.

One must differ principally with Glueck and Roback, however, because they obviously regard consciousness as a fact and not as an hypothesis. The moment this confusion takes place,

³⁶ GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925) 16.

³⁷ *Ibid.* 100.

³⁸ *Ibid.* 132.

³⁹ ROBACK, *BEHAVIORISM AND PSYCHOLOGY* (1923) 132.

and the moment observable behavior is regarded as a mere manifestation of this hypothetical fact, instead of a test of it, we have removed our problem from the range of science. When, however, we look upon consciousness not as a truth, but as an assumption, we can readily discard it if, in any situation, it is found not to be useful. An hypothesis is useful when it not only describes the data already observed, but also suggests new data that can be studied by verifiable methods. Consciousness is an hypothesis which frequently does neither, and which therefore in the study of many important problems of human behavior had better be disregarded. Its existence is not denied; it is merely irrelevant in certain investigations.

It is readily conceded that, at present, many problems of human behavior remain unsolved, and perhaps cannot be solved by verifiable methods. We are very far from a psychology that is so completely worked out that "given the response the stimuli can be predicted; given the stimuli the response can be predicted."⁴⁰ And neither lawyer, nor doctor, can wait for that psychological Utopia. It will be necessary for a long time, probably always, to use a good deal of clinical intuition in diagnosing disease or predicting behavior. But intuition should be understood as such and not masquerade as science. And when a new intuitional domain is captured by science no one deserves credit who clings to the outworn phraseology. In science an hypothesis is abandoned as soon as it is found to be no longer of use; should it become useful later it will be employed again. Intuition should be just as willing to treat its major premises as hypotheses. And when, as in criminal law, the intuitions are neither theoretically sound, nor practically useful, there is no force in an argument in favor of retaining them as hypotheses, or using them as the basis of another doctrine.⁴¹

In previous articles we found that such concepts as memory and state of mind⁴² were of little value to the law as criteria of

⁴⁰ Watson, *Psychology as the Behaviorist Views It* (1913) 20 PSYCHOL. REV. 167.

⁴¹ Hutchins and Slesinger, *Some Observations on the Law of Evidence—Memory* (1928) 41 HARV. L. REV. 860.

⁴² Hutchins and Slesinger, *supra* notes 1 and 2.

relevancy. Consciousness is not only of slight value, but may also be confusing. Wigmore, for example, seems to accept consciousness as a fact, absolutely and ultimately true. His attitude is apparent from his analogy of the mark of the axe on the speechless tree.⁴³ He states such important objections to the use of consciousness of guilt as the fact that its manifestations are equivocal;⁴⁴ it may be caused by guilt of another crime than the one charged;⁴⁵ or it may be caused by other emotional disturbances.⁴⁶ The objections are all to the various means of evidencing consciousness of guilt, not to the consciousness or its relevancy to prove the act. No one doubts, says Wigmore, that the state of mind called guilty consciousness is the strongest evidence that the person is indeed the evil doer.⁴⁷ The question to him is merely how to evidence the guilty consciousness.

That is not the scientific problem, however. We must determine the relevancy of "consciousness of guilt," itself. Since, to the scientific mind, consciousness of guilt is only an hypothesis, the relevancy with which we are concerned is not of consciousness of guilt to prove commission of crime but of certain observable behavior like flight or lying to prove its commission. To assume consciousness of guilt in the first instance is to assume a solution, not to set a problem. Our inquiry therefore will be directed toward seeing how many hypotheses may equally well explain any given set of facts, and will then suggest ways of testing the various hypotheses in order to see which is of most use in any given situation.

In order to do that we must study the verifiable data which are offered in support. Fleeing from arrest, according to Wigmore, is universally admitted because flight evidences fear, which, in turn, evidences a known cause of apprehension.⁴⁸ Sometimes the inference may be direct, and not through fear. The fear re-

⁴³ WIGMORE, *loc. cit. supra* note 5.

⁴⁴ WIGMORE, *op. cit. supra* note 5, § 273.

⁴⁵ WIGMORE, *PRINCIPLES OF JUDICIAL PROOF* (1913) 285.

⁴⁶ *Smith v. State, supra* note 27.

⁴⁷ WIGMORE, *op. cit. supra* note 5, § 267.

⁴⁸ WIGMORE, *op. cit. supra* note 5, § 273.

action, including both explicit and implicit responses, seems to be part of our native equipment, appearing even in infants.⁴⁹ Their explicit response is starting, crying, and general bodily tension. Flight, naturally, is impossible. By conditioning or association, practically anything may be made a stimulus to the fear reaction, while it is also possible that the maturing nervous system automatically selects certain stimuli and provides certain responses not possible to the new-born infant. Whatever the process we find adults showing fear reactions of various kinds to many different sorts of stimuli.

In adults these reactions are more complex and variable than in infants because of the increase in possible avenues of escape for the nervous impulse and because responses may be trained, or conditioned, like stimulus selection. In general the explicit behavior of adults is increased tension, certain facial expressions, trembling, erection of hair, or flight.⁵⁰ At the same time there are a number of implicit reactions which exert a great deal of influence on explicit behavior. The chief implicit response is a shifting of endocrine balance, particularly the releasing of adrenalin from the adrenal glands.⁵¹ Adrenalin in the blood stream acts as an energizing agent by forming sugar (energy), increasing heart rate, slowing digestion, and sending blood to the periphery where it can be readily used in muscular activity.⁵² The same implicit pattern is the basis of various emotional states⁵³ which are differentiated by the stimulus which calls forth the emotion, and the general character of the explicit response.

In the fear-flight behavior in legal situations what we most frequently find is that the stimulus is the appearance of the arm of the law, some days after the crime has been committed. The accused is running away from, or displaying fear, only in the presence of the policeman. He has not been running constantly

⁴⁹ WATSON, BEHAVIORISM (1926); GESELL, *op. cit. supra* note 34, at 229.

⁵⁰ CANNON, BODILY CHANGES IN PAIN, FEAR, HUNGER AND RAGE (1920) 44.

⁵¹ *Ibid.* c. 4.

⁵² *Ibid.* cs. 5, 11.

⁵³ *Ibid.* 275. WATSON, PSYCHOLOGY FROM THE STANDPOINT OF A BEHAVIORIST (2d ed. 1924) 219, *et seq.*

since the commission of the crime; if he had been, or if he were caught red-handed, so to speak, running away, not from the officer, but from the crime, that would be a strong argument that the crime was the stimulus, though it would yet remain to be proved that the accused had committed it. The casual passerby is almost as likely to flee from the scene of the murder as the perpetrator of the gloomy deed. But where flight is from the scene of the crime at least the presence of the suspect at that scene has been established by the "guilty" conduct. In the former situation only the presence of the officer is directly evidenced by the guilty behavior.^{53a}

The hypothetical explanation of this behavior set forth by the courts and commentators is that the flight results from consciousness of guilt, caused by the performance of a (probably the) guilty deed. Or we might say that the murder has put the murderer in a state of readiness to flee from any one who tries to capture him. The appearance of the arresting party merely stimulates an organism in readiness to behave in a certain manner, to react in that particular way.

Certainly that is a plausible hypothesis and we do not doubt that that is precisely what happens a good many times. The question is: can an equally plausible hypothesis be offered, not involving guilt, but quite as adequately explaining the observed behavior? If so, and if we recall that consciousness of guilt is not a fact, but one of the several hypotheses, then the probative force of any one is greatly reduced in the absence of other data. All that either hypothesis does is to indicate the particular verifiable data to be sought in any individual case. If, for example, fear has been proved, fear of arrest even, and the alternative hypotheses offered are: (1) fear of arrest was caused by consciousness of guilt following commission of a crime; and (2) fear of being prosecuted for radical activities as a friend was; these hypotheses are to be tested in the light of further evidence. Since no special weight is to be given to one as a *fact*, against the other, *merely an hypothesis*, judgment may be based upon cor-

^{53a} For comment on a recent case see Editorial, *Massachusetts Justice Again* (1929) 58 NEW REPUBLIC 58.

roborative data. When undue weight is given to one explanation, we believe it is frequently because the hypothetical nature of consciousness has been overlooked, and it has been considered as absolutely true.

Besides alternative hypotheses in individual cases there are some general ones that may be taken into consideration. Some students of human nature believe that emotion in the presence of authority is a very common phenomenon, and that it results from what they call an unconscious sense of guilt, or the need to be punished.⁵⁴ According to one theory it arises because of conflict between one's childish desire for the parent of the opposite sex and the ego which represses the wicked desire. Very little of this conflict is supposed to be conscious, but it manifests itself in a strong desire for punishment, which in some cases assumes pathological importance. When it does, the subject may either undergo voluntary torture, or may deliberately commit crimes in order to be punished.⁵⁵ As an example, a young girl at preparatory school, who had led a quite exemplary life, and was respected by both parents and teachers, found herself impulsively confessing the commission of various misdemeanors. Another, an older woman this time, but one of equally good character, started, turned pale, and almost fled when a policeman stopped her in order to warn her away from road construction and blasting. In neither case was the "guilty" behavior associated with consciously known "crime."⁵⁶

Whether the elaborate theories advanced to explain the behavior in these cases are right or not is beyond the province of this paper. For our purposes, however, the verifiable observations are of the utmost significance. These observations are that "guilty" behavior frequently appears although any guilty act may be remote, imagined, or entirely unconscious. And further, people behaving thus guiltily without apparent cause are frequently found able to remember similar desires, acts, etc., that occurred

⁵⁴ Feuchel, *Clinical Aspect of the Need for Punishment* (1928) 9 INT. J. PSYCHOANALYSIS 47; FREUD, *THE EGO AND THE ID* (1927) 72, n.; Reich, *The Need for Punishment and Neurosis* (1928) 9 INT. J. PSYCHOANALYSIS 227.

⁵⁵ Feuchel, *supra* note 54.

⁵⁶ Unpublished psychiatric case material.

in early childhood. Whether these early experiences are the stimuli whose response was the later guilty behavior, and how they became so, is beside the point. That the cases are frequent, and that the "guilty" behavior is correlated with *no* crime whatever is important. For here we have a general hypothesis covering many cases which has as good a chance of being usable in any particular instance as the guilty consciousness hypothesis.

Besides the more or less usual types of behavior in unusual situations, which are referred to by Mr. Wigmore in his *Principles of Judicial Proof*,⁵⁷ there is an abnormal type of response to be considered. Healy reports a seventeen-year-old boy under arrest for vagrancy telling a horrible story about his stepfather being a professional thief, and having concealed all sorts of stolen goods about the house.⁵⁸ A girl of sixteen appeared five times in court, telling how her parents had murdered a younger child.⁵⁹ Another girl, aged nineteen, after a revival meeting gave her pastor a "circumstantial account of her own life as a prostitute."⁶⁰ None of these young people was telling the truth, although each was convinced for the time being that what was related had actually occurred.

As before we are not concerned with the theories advanced to explain what is called pathological lying;⁶¹ that it is impulsive, is correlated with early upsetting sex experiences; is mostly indulged in by people with a defective heredity; or who are subject to rare epileptic attacks, chorea, hysteria, traumatic neurosis, etc.⁶² What is of importance is that people exist who lie with no apparent immediate cause, and that when their past histories are explored we find a certain similarity in their backgrounds.

We find then, that in three important cases, fear, flight, and lying, alternative general hypotheses can be offered to explain the

⁵⁷ *Loc. cit. supra* note 45.

⁵⁸ HEALY, *INDIVIDUAL DELINQUENT* (1927) 732.

⁵⁹ *Ibid.* 740.

⁶⁰ *Ibid.* 748.

⁶¹ Many foreign studies of pathological lying have appeared. An excellent one in English is HEALY, *PATHOLOGICAL LYING, ACCUSATION AND SWINDLING* (1915).

⁶² HEALY, *op. cit. supra* note 58, at 730; HEALY, *loc. cit. supra* note 61.

"guilty" conduct. Which is most likely to be true in any given case depends upon the other evidence offered. Where it overwhelmingly points to guilt, the time of the court need not be taken up in explaining and testing the other hypothesis. But where the other evidence is overwhelming, there is small need to add to it the equivocal consciousness of guilt, any more than there is to add innumerable other slightly relevant items. On the other hand, in those cases where the guilty conduct is the only, or the most important evidence to be offered, the pathological possibilities should be carefully considered in the light of psychiatric study. In past papers where such study would have been illuminating it was not always favored for court-room use because of the time it would take.⁶³ But then we were considering witnesses, and suggested certain sources of information, or lay criteria, in order not to place too great a burden on the court. We can hardly be so considerate when not the conduct of a witness, but the behavior of the accused himself is the issue. There, however cumbersome the procedure, it should be such as to safeguard his legitimate opportunities to defend himself.

Again, as in our discussions of state of mind,⁶⁴ we find a general concept covering so wide a variety of situations as to be misleading when applied to any particular case. It is more fruitful to break up the concept into various types of behavior, and not lay too much emphasis on time-honored hypotheses. When we did that in the previous studies it became necessary to suggest the admission of one and the exclusion of another type of evidence, though legally both would have met the same fate under the state of mind concept. Further, in one situation, threats, we were forced to the conclusion that they were relevant or irrelevant according to the use to which the state of mind they supposedly indicated was put. It was therefore suggested that they be excluded when offered to prove an act, but be admitted when, the act being otherwise proved, the question arose as to the probability of the act being repeated or continued.⁶⁵

⁶³ Hutchins and Slesinger, *supra* note 2.

⁶⁴ Hutchins and Slesinger, *supra* notes 1 and 2.

⁶⁵ Hutchins and Slesinger, *supra* note 2.

The types of behavior described by consciousness of guilt should likewise be separately considered, although all of them seem somewhat equivocal. Their exclusion cannot be recommended, for as many commentators have intimated,⁶⁶ it is probably unfortunate to exclude any evidence that may be of assistance unless we can be absolutely certain that it will mislead the jury. Still, since the lay and legal view is that consciousness of guilt is a fact and an extremely impressive fact, it would seem that this is one of the cases where there is grave danger that the jury will be misled. With the current American rules limiting the power of the judge to comment on the evidence, it is apparent that the danger is greater in the United States than it is in England. It is important, therefore, that when consciousness of guilt is relied on by the prosecution, careful attention be given to the alternative explanations of his conduct advanced by the accused, including such data as may appear through a psychiatric examination.

⁶⁶ WIGMORE, *op. cit. supra* note 5, § 273, citing Brickell, C. J., in *McAdory v. State*, 62 Ala. 154, 159 (1879).