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The State of Mind Exception to the Hearsay Rule: A Response to " 'Secondary' Relevance"

*Paul R. Rice**

Observe everything
Inquire a lot
Criticize little

Chinese fortune cookie

In the spirit of this admonition I respond to a recent article appearing in this law review which was written by Professor David E. Seidelson.[1] My comments are addressed to what I believe to be a distortion of the concept that underlies the state of mind exception to the hearsay rule. I propose to show that under the theory of " 'secondary' relevance," Professor Seidelson so stretches this concept on his procustean bed that he outprocrusts Procrustes.[2]

Following a discussion of the rationale and limitations of the state of mind exception, his article is substantially comprised of a series of progressively difficult hypothetical situations through which he illustrates its application.[3] The more complex and difficult hypotheticals present situations in which a declarant's state of mind is proven, through utterances, for its circumstantially probative value in establishing the objective facts that gave rise to the state of mind. The Professor asserts that once it is assured, through circumstantial evidence, that the existence of the state is "relevant" to proving the objective fact, the statement that first tends to establish the state of mind is admissible under a concept which he calls " 'secondary' relevance."[4]

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1. Seidelson, *The State of Mind Exception to the Hearsay Rule*, 13 DUQ. L. REV. 251 (1974) [hereinafter cited as Seidelson].

2. In Greek mythology, Procrustes was a giant of Attica who seized travelers and tied them to an iron bedstead, after which he stretched his victims until they either became dismembered or fit his procrustean bed.

3. Seidelson, *supra* note 1, at 255-66.

4. *I.e.*, not directly relevant to the issue, but relevant because it tends to prove a fact

To understand the import of Professor Seidelson's state of mind analysis, we must begin with a discussion of logical relevance. The definition thereof most likely to prevail in the future, and the one which this paper will adopt, is that employed in the Federal Rules of Evidence:

> "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.[5]

The object of proof in this definition, the fact which the offered evidence is supposed to prove or disprove, must be found by the court to be of a consequential nature.[6] This is one side of the logical relevance coin. On the other side of the coin is the evidence that is presented as proof of the consequential fact, which need only *tend* to support a conclusion about the consequential fact.[7] If this tendency is found by the court, and if the evidence is otherwise admissible, it then becomes the responsibility of the finder of facts to estimate the probative worth of that evidence. This will turn, in large

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which, in turn, is directly relevant to the issue. *Id.* at 261. Professor Seidelson has suggested that the *degree* of relevancy depends upon the extent to which the state of mind declarations are factually well-founded. He concludes that

> [i]t is in these circumstances—where the declaration's relevancy is asserted not on a primary, independent basis, but rather for the purpose of proving another admittedly relevant fact and only to the extent that such "secondary" relevancy is factually well-founded—that the test of relevancy becomes most difficult.

Id. at 262.

5. FED. R. EVID. 401.

6. The drafters of the Federal Rules of Evidence adopted the term "consequence" in rule 401 in an effort to avoid the construction problems and ambiguities inherent in the term "material." That is, "[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of *consequence* in the determination of the action." FED. R. EVID. 401, 28 U.S.C.A. App. (1975) (Notes of Advisory Committee on Proposed Rules) (emphasis added).

7. In support of this "tendency" definition, the Advisory Committee concluded that relevancy is defined by the *relationship* between an item of evidence and a matter that is properly provable in the case. "The rule [401] summarizes this relationship as a 'tendency to make the existence' of the fact to be proved 'more probable or less probable.'" FED. R. EVID. 401, 28 U.S.C.A. App. (1975) (Notes of Advisory Committee on Proposed Rules). *See also* Caley v. Manicke, 29 Ill. App. 2d 323, 330,73 N.E.2d 209, 212 (1961) ("evidence that has a legitimate tendency to prove or disprove a given proposition that is material as shown by pleadings . . . a tendency to establish a fact in controversy, or to render a proposition in issue more or less probable"); State v. Wilson, 173 N.W.2d 563 (Iowa 1970) ("relevancy means the logical relationship between proposed evidence and a fact to be established, the tendency to establish a material proposition").

part, on the degree to which the fact finder is convinced of its trustworthiness.

Relevancy, however, is only a threshold problem. It is a hurdle over which all evidentiary offerings must pass to be admissible—but only the first of many hurdles for some pieces of evidence which, because of their nature, may detract from, rather than enhance, the probabilities of accuracy and fairness.[8] Hearsay is one such example.

Under the hearsay rule[9] a statement made outside the court and repeated in court by someone who heard it would be excluded because the degree of trustworthiness that must be present if the substance of the statement is to be accepted as true cannot reasonably be evaluated. An accurate evaluation is impossible because there is no effective way to test whether the statement was based on first-

8. A number of courts and textwriters have adopted the term "legal relevancy" to describe the process of excluding evidence having probative value but which is outweighed by counterbalancing factors of prejudice, confusion, surprise and undue time consumption. For examples of how the courts have balanced probative value against such dangers, see Shepard v. United States, 290 U.S. 96, 104 (1933); Lyda v. United States, 321 F.2d 788 (9th Cir. 1963); Herman Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906, 912 (2d Cir. 1962); Dankert v. Lamb Fin. Co., 146 Cal. App. 2d 499, 304 P.2d 99 (1965); Daniels v. Dillinger, 445 S.W.2d 410 (Mo. App. 1969); Hoag v. Wright, 34 App. Div. 260, 54 N.Y.S. 658 (1898).

9. There are a number of accepted definitions of hearsay worth noting:

> Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.

McCormick's Handbook of the Law of Evidence § 246 at 584 (2d ed. E. Cleary 1972) [hereinafter cited as McCormick].

Fed. R. Evid. 801(c) provides:

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Cal. Evid. Code § 1200(a) (West 1966) provides:

> Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

Professor Morgan, in *The Hearsay Rule*, 2 Wash. L. Rev. 1, 8 (1937), suggested that hearsay generally be defined

> so as to include (1) evidence of any conduct of a person, verbal or nonverbal, which is intended to operate as an assertion if it is offered either to prove the truth of the matter asserted or to prove that the asserter believed the assertion to be true, unless the assertion is subject to cross-examination by the party against whom it is offered at the trial at which it is offered, and (2) any conduct not intended to operate as an assertion if it is offered to prove both the state of mind of such person and the external event or condition which caused him to have that state of mind.

See also James, *The Role of Hearsay in a Rational Scheme of Evidence*, 34 Ill. L. Rev. 788 (1940); Wheaton, *What is Hearsay?*, 46 Iowa L. Rev. 210-11 (1961).

hand knowledge, whether the first-hand knowledge was experienced in a discernible way, whether the statement accurately reflects what was experienced in the past, or whether the statement was negligently or intentionally misrepresented. In short, there is no adequate way to test the perception, memory and sincerity of the speaker.[10] Such evidence is generally excluded—not because it is logically irrelevant, but because the dangers and unfairness in its use outweigh its benefits.[11] Such was the fate of evidence presented in one of the hypothetical situations which was posed by Professor Seidelson, and to which these comments are directed.[12]

The defendant *D* is charged with the murder of his wife *X*. At trial, the prosecution calls *W*, a practicing attorney, who represented the deceased in a separation action that was pending at the time of her death. *W* is prepared to testify that, while *X* was in his office the day before her death, *X* received a telephone call from *D*. Attorney *W* recognized the defendant's voice when he answered the telephone. During the conversation that occurred between *X* and *D*, *W* heard *X* say: "No . . . please, no . . . you wouldn't kill me after all these years . . . No, please don't say that . . . What would happen to the children . . . They need a mother . . . Oh, please, no . . . Don't say you'll kill me." The prosecutor wants to introduce these statements and the statement the deceased made when she hung up the phone, "I've got to get out of here. I've got to get away." An objection to the use of the evidence is interposed by defense counsel on the grounds that the statements are irrelevant and violate the hearsay rule.

As the facts are posed, logical relevance standards are clearly met. Once it is established through *W*'s testimony that he recognized *D* as being the caller, it cannot reasonably be denied that the statements made by *X* tend to prove the consequential facts that *D* threatened her and intended to kill her,[13] which tend to prove that *D* did kill *X*.[14]

The eventual admissibility of the statements, however, is a com-

10. *See* J. WIGMORE, EVIDENCE §478 (3d. ed. 1940); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 185-88 (1948); Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 485-86 (1937).

11. *See* note 7 *supra*.

12. Seidelson, *supra* note 1, at 262-63.

13. This assumes, of course, that the statements are found to be trustworthy, and therefore believable, by the finder of facts.

14. *See* note 6 *supra*. The consequential facts need not be the ultimate facts.

plex problem since they fall within the definition of the hearsay exclusionary rule.[15] Their admissibility will now turn on whether the evidence also falls within one of the numerous recognized exceptions to the hearsay rule, which have developed because extrinsic assurances of trustworthiness are believed to exist when certain kinds of hearsay statements are made, or when hearsay statements are made under certain circumstances.[16]

One such exception—the state of mind exception—admits hearsay evidence when the statements reflect, directly or impliedly, the present state of the declarant's mind, and such statements are offered to prove that state of mind.[17] The following diagrams will help explain the reasons for this exception.

The hearsay concept is characterized in *Diagram A* as operating in a circular fashion. The triangle, figure #1, represents the objective facts. In Professor Seidelson's hypothetical situation it would represent *D*'s alleged threats to kill *X*. The square, figure #2, represents the experiencing of the objective facts by the declarant. In the case under discussion it would represent the telephone conversation engaged in by the deceased, *X*. The rectangle, figure #3, represents the statements that were made about the experienced facts and which are offered to prove the truth about that which was experienced and expressed. Of course, the statements are being related in the courtroom by a third party, *W* in the assumed facts, who witnessed only the making of the statements in figure #3. The statements are introduced because of their tendency to prove the fact that *D* threatened *X* and, therefore, killed her. The evidence is excluded under the general hearsay rule because its value depends entirely on the perception, memory and sincerity of the speaker, *X*, which cannot be adequately explored by the finder of facts because she is no longer available.

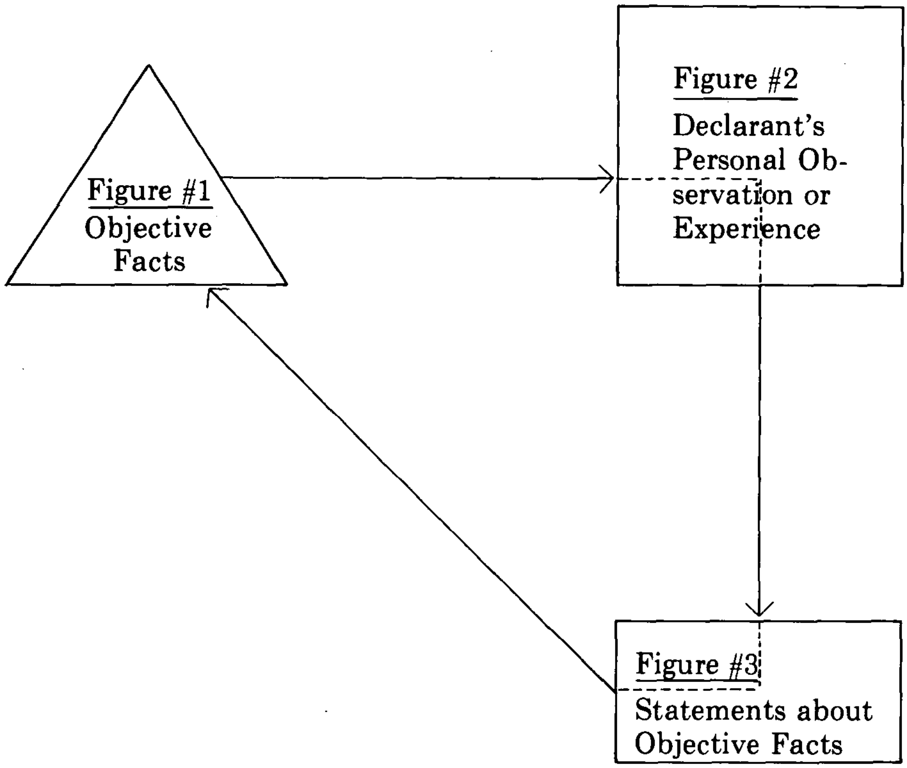
15. *See* notes 7, 8 and accompanying text *supra*.

16. *E.g.*, declarations against interest, spontaneous declarations, and declarations made in contemplation of death. *See generally* McCORMICK, *supra* note 9, §§ 276-98.

17. *See generally id.* § 294.

As to the development of the state of mind exception to the hearsay rule, *see generally* Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394 (1934); Hutchins & Slesinger, *Some Observations on the Law of Evidence—State of Mind in Issue*, 29 COLUM. L. REV. 147 (1929); Hutchins & Slesinger, *Some Observations on the Law of Evidence—State of Mind to Prove an Act*, 38 YALE L.J. 283 (1929); Maguire, *The Hillmon Case—Thirty-Three Years After*, 38 HARV. L. REV. 709 (1925); McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930); Morgan, *The Law of Evidence, 1941-45*, 59 HARV. L. REV. 481, 568 (1946); Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224 (1961).

DIAGRAM A



The statements in figure #3 about the objective facts are offered to prove the truth of what they state (the contents of figure #1). Therefore, the flow returns to figure #1.

As a contrast to the logical theory of the basic hearsay problem, *Diagram B* illustrates the theory of the state of mind exception. To factually illustrate the principle, however, we must alter the hypothetical so as to make *X* the defendant for allegedly killing her husband; the rest of the facts remain the same. If the defense of self-defense were asserted by *X*, the statements she made during and immediately after the telephone conversation with her husband would be offered to prove that she feared for her life and, therefore, may have acted in her own defense in killing her husband. If the case arises in a jurisdiction which recognizes the defense of self-defense when one actually believes that his/her life is in peril, even though that belief may be unreasonable,[18] the statements would be admissible.[19] It is irrelevant that the statements may not fairly and accurately reflect what the husband said and meant during the conversation. They are not offered to prove actual threats. They are important because they tend to reflect how *X* interpreted what was said and meant. Under this interpretation of the defense of self-defense, the state of mind of the defendant is of central importance—independent of whether the basis for it is actually true. This is illustrated in *Diagram B.*

Although the wife's statements relate facts about the threats, they are relevant because they tend to prove what the wife believed both when the statements were made and later when she killed her husband.[20] Under the substantive law of self-defense, this state of mind has independent significance—independent relevance. The fact that the wife's mental state may have been based on inaccurate facts, either in that threats were not made, or if made, were not intended, is irrelevant. If she believed her life to be endangered when she killed her husband, she is not culpable.

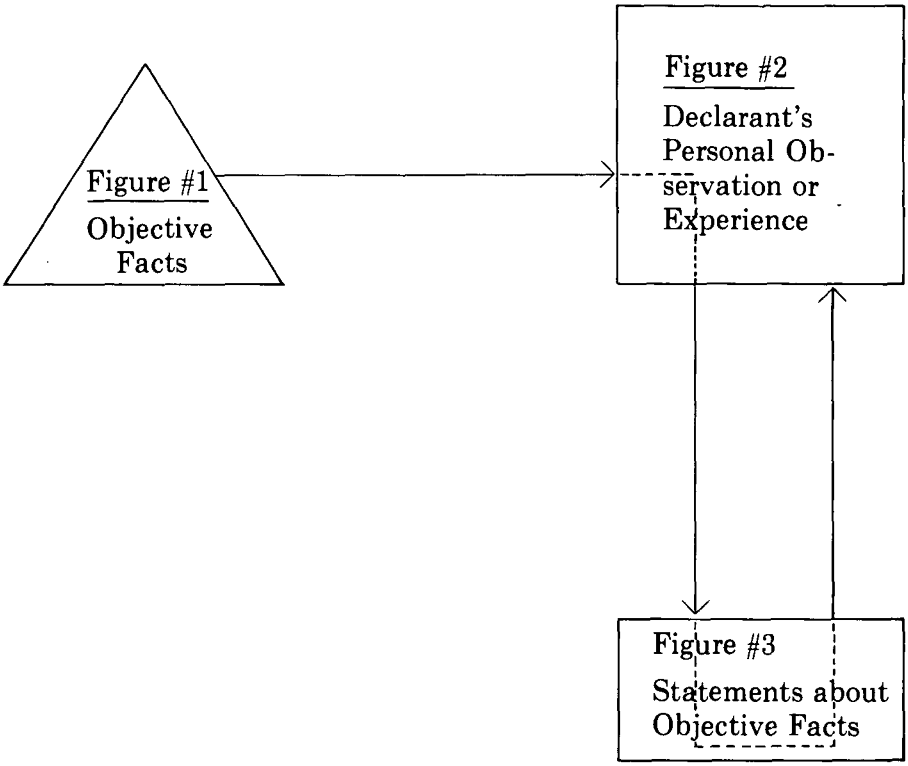
A real problem is now posed. The contemporaneous out-of-court statements of the defendant are technically hearsay when related in court for the truth of their content by a third party—but without that evidence, the finder of facts may reject, out of hand, the defense if its success must rely solely on the self-serving testimony of the accused. Coupled with this necessity for the evidence is the fact

18. MODEL PENAL CODE § 3.04(1) (Proposed Official Draft, 1962), reflecting a minority view, requires only that the actor "believe" that the use of force is necessary. The theory behind the proposal is that "there should be no conviction of a crime requiring intentional misconduct of one who is guilty only of negligence in making the unreasonable mistake." *See also* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 53, at 394 (1972).

19. The definition of self-defense which is generally recognized requires that the defender's belief that he was in danger of imminent harm be reasonable. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 53, at 393-94 (1972). If such a definition were employed here, the hypothetical case, as changed, would pose exactly the same hearsay problem as that posed in the original hypothetical with the husband as defendant. Since the reasonableness of the wife's response could only be evaluated if statements made by the husband were proven, the wife's utterances would have to be used for that purpose.

20. *See* Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892).

DIAGRAM B



The statements in figure #3, about the objective facts in figure #1, are not offered to prove the truth of what they directly assert. Even though the state of mind of the declarant, figure #2, may have been caused by the facts in figure #1, the statements in figure #3 are offered to prove the truth about the existence of the state of mind of the declarant, which they impliedly assert. Therefore, the flow returns to figure #2.

that there is no better evidence available of one's subjective state of mind than that person's spontaneous or contemporaneous objective characterizations of it, assuming, of course, that those characterizations are sincere. Therefore, if it can be shown that circumstances surrounding the utterances gave assurance of sincerity, and if memory problems are avoided by their spontaneous or contemporaneous nature, courts will assume, with some obvious risk, that the declarant accurately perceived his state of mind and will admit the evidence.[21]

Returning now to the hypothetical as originally posed, where the husband is being tried for the death of his wife, the question of whether the wife's statements are admissible under the state of mind exception to prove *D* threatened to kill her remains unanswered. Professor Seidelson suggests that the statements should fit within this exception because exhaustive circumstantial guarantees of trustworthiness make the statements "secondarily" relevant to prove the state of the wife's mind, which circumstantially proves the objective fact that caused the state of mind.[22] *Diagram C* illustrates the flow of this logic.

In his analysis Professor Seidelson ignores a basic limitation of the state of mind exception, which he had previously acknowledged.[23] It is essential to the application of this exception that the state of mind of the declarant have *independent relevance.* That is to say, the existence of the state of mind must either be an issue in the cause of action,[24] or circumstantially tend to prove the cause of its

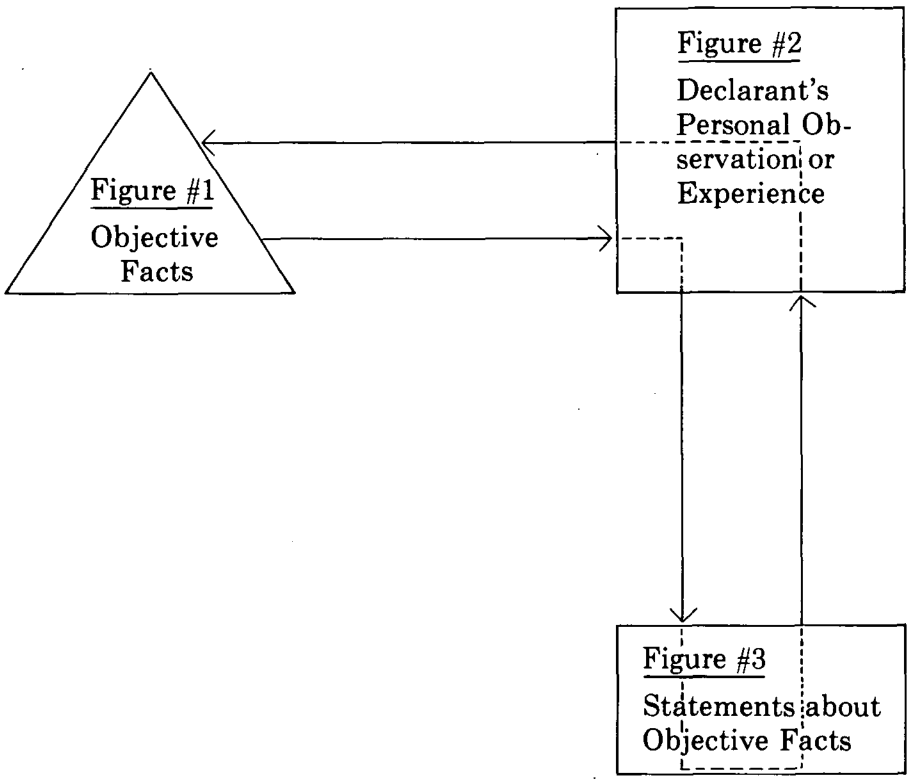
21. *See* Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670, 683 (S.D.N.Y. 1963) ("the determination that a statement is hearsay does not end the inquiry into admissibility; there must still be a further examination of the need for the statement at trial and the circumstantial guaranty of trustworthiness surrounding the making of the statement"); Elmer v. Fessenden, 151 Mass. 359, 24 N.E. 208 (1889) (such declarations must be "made with no apparent motive for misstatement"); Hall v. American Friends Serv. Comm., Inc., 74 Wash. 2d 467, 445 P.2d 616 (1968) (state of mind declarations must be shown to have a "circumstantial probability" of trustworthiness).

22. Seidelson, *supra* note 1, at 262, 276.

23. *Id.* at 262.

24. Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670 (S.D.N.Y. 1963) (answers to survey questions showing that the declarant mistakenly believed that an unmarked cigarette lighter was a particular brand); Casey v. Casey, 97 Cal. App. 2d 874, 218 P.2d 842 (1950) (statements of declarant made after conveyance offered to establish whether the conveyance was intended as a gift or in trust); *In re* Newcomb's Estate, 92 N.Y. 238, 84 N.E. 950 (1908) (declarations in letter showing testatrix's intent to make the city of New Orleans her permanent home offered to establish domicile); Missouri, K. & T. Ry. v. Linton, 141 S.W. 129 (Tex. Civ. App. 191) (declarant's statements of mental suffering offered to prove damages for mental anguish).

DIAGRAM C



Although the purpose for the use of the statements in figure #3 is to prove the truth of the facts asserted therein [see DIAGRAM A], it is argued that they do so indirectly by proving the state of the declarant's mind about those facts, which, in turn, is circumstantial evidence that the facts are true.

existence, a fact which is in issue.[25] In either instance the importance of the state of mind is dependent upon the facts giving rise to it. Neither instance requires a belief in the truth of the foundation of the state of mind. The reason for this limitation is made apparent in *Diagram C*.

Although the statements by the wife tend to prove the threats by her husband—and if used directly for that purpose would be excluded as hearsay, since their value depends upon the untested, and therefore, unmeasurable perception, memory, and sincerity of the speaker[26]—they also tend to prove what she was thinking about those threats at the time the statements were made.[27] The statements, if offered to prove the speaker's state of mind which they reflect, would be hearsay, but admissible under the state of mind exception *if* the substantive law of the action gave it independent significance.[28] Under the substantive law of this homicide case, however, the state of the wife's mind does not have independent significance, but is only significant if used as a tool to admit evidence which if offered directly would be inadmissible.

Professor Seidelson argues that this evidence is nevertheless admissible under the exception because of its secondary significance in *circumstantially* tending to prove the fact that her husband actually did threaten her.[29] This reasoning, however, does not avoid

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25. Smith v. Slifer, 1 Cal. App. 3d 748, 81 Cal. Rptr. 871 (1969) (declarant's statement that she intended to pay for automobile ride was offered to prove that such payments were actually made); Maryland Paper Prods. Co. v. Judson, 215 Md. 557, 139 A.2d 29 (1958) (declarations of deceased that he intended to stop off on the way to work to pick up a gear wheel were offered to prove that he picked up the wheel).

If a statement reflects the present state of mind of the declarant, the state may be relevant and necessary to prove facts that either precede or follow the existence of the state. *See, e.g.*, Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892)(where a statement of present intent was held admissible to prove continued intent and consequent doing of the intended act); *In re* Anderson's Estate, 185 Cal. 700, 198 P. 407 (1921) (where a statement of present fear of beneficiaries in the declarant's will was held admissible to prove the existence of fear at an earlier time when the declarant was living with the beneficiaries and had executed the will).

It should be noted that in all cases where a state of mind is offered as circumstantial evidence of another fact, the fact to be proven is one over which the declarant has control or is intimately involved. The statements are not useable under the state of mind exception to prove an objective fact observed by the declarant.

26. Professor Seidelson would, however, disagree that these values are immeasurable. *See* Seidelson, *supra* note 1, at 260-61.

27. If the statements were made under conditions of apparent sincerity, they are the best and most accurate evidence available. Under the facts of the hypothetical situation, sincerity would not be a necessary inquiry.

28. *See* McCormick, *supra* note 9, § 294, at 694.

29. Seidelson, *supra* note 1, at 264-65.

the trustworthiness problems that exist if the statements are used to *directly* prove the threats. Since the state of the wife's mind only has significance to the extent that it accurately reflects what the husband did, new perception and memory problems are added. We now must be concerned not only with the speaker's perception in accurately knowing her own mental state, but also with her ability to have reliably experienced that which gave rise to the state of knowledge. With memory, we now have a problem that did not previously exist with contemporaneous statements that had independent relevance—accuracy in remembering what preceded and caused the state. In effect, nothing has been gained by the logical circumlocution. Unresolved problems of perception and memory are identical to those of the basic hearsay statement that is excluded.

If, by disregarding the independent relevance limitation of this exception, we ignore these perception and memory problems, we destroy the entire hearsay concept by consuming it within the exception.[30] This happens because virtually every sincere statement that is uttered reflects the state of mind of the speaker concerning the facts about which he speaks. If sincere statements about the existence of that state of mind, without more, are acceptable proof of the truth of the facts which the mind possesses, there is nothing to which the hearsay rule could apply. The concept that underlies the hearsay rule, the need for demonstrable trustworthiness, is destroyed because it is ignored.

The Professor's analysis, however, does not go quite so far. He is aware of the additional perception and memory problems which, if ignored, would destroy the hearsay concept, and he addresses them through a theory which he calls " 'secondary' relevance." The substance of the theory is that when the reliability of the statements is clear from circumstances surrounding their utterance, the state-

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30. The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.

FED. R. EVID. 803(3), 28 U.S.C.A. App. (1975) (Notes of Advisory Committee on Proposed Rules).

See also Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394, 421-23 (1934); Maguire, *The Hillman Case—Thirty-Three Years After*, 38 HARV. L. REV. 709, 719-31 (1925).

ments should be admissible. Since the statements of the wife, in our hypothetical situation, were uttered almost simultaneously with the occurrence of the objective facts, which they tend to prove, the memory problem is virtually non-existent. Likewise, since the parties involved were married, that intimate relationship would give them special capacities to understand the import of the other's words; therefore, perception problems are minimized.

The first problem raised by this " 'secondary' relevance" concept is that it is a misnomer. The issue of logical relevancy, whether primary or secondary, is a threshold question that must be resolved before additional evidentiary problems can be dealt with. In the absence of logical relevance, the evidence would be summarily rejected. Upon establishing the probative worth of a statement (*i.e.*, that it logically tends to prove a consequential fact), evidentiary considerations, for hearsay purposes, turn to *measurable probative worth* as reflected in the trustworthiness and reliability of the evidence concerned. Although the Professor's characterization of the problem as one of " 'secondary' relevance" may be inaccurate, it does not appear to reflect the nature of his concern since the possibility of factual error (trustworthiness) was decisive to him on the issue of relevance.

The second, and more important problem, relates to the devastating impact which this interpretation of the state of mind exception would have on the hearsay rule if accepted. Since his interpretation could require a decision to be made in each case with regard to the total reliability of the offered hearsay statements (reliability both in the sense that they accurately reflect what was believed and in the sense that the belief accurately reflects what was perceived), the hearsay *concept* will not be destroyed. Yet the very fact that a conscious decision may have to be made with regard to each hearsay issue accomplishes the equally deleterious result of emasculating this exception to the hearsay *rule* by abolishing its predictability. Every such hearsay issue would be subject to a judgmental decision based on the demonstrated reliability of the statements. This would not only impair the ability of practitioners to prepare for trial but would also tend to encourage and prolong litigation.

Some may find the demonstrated trustworthiness of the evidence in Professor Seidelson's hypothetical situation to be compelling, thereby making an exception to the hearsay rule appropriate. As it has been shown, however, it cannot reasonably be argued that state of mind is the appropriate exception.

While it is possible that an established exception may not be available, this should not preclude the courts from creating new exceptions where the ends of justice will be best served.[31] It is when courts fail to recognize this authority, by failing to recognize that the rules are themselves court-made, that they place themselves in the position of having to torture and stretch the principles of established exceptions to reach the "good result" in the "hard case."[32] It was with this recognition that Congress approved the flexible provisions of rules 803(24)[33] and 804(b)(5)[34] of the new Federal Rules of

31. One of the leading cases adopting this philosophy is Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961). A lower court decision admitting a fifty-eight-year-old newspaper article regarding a courthouse fire in 1901 was affirmed. The court of appeals refused to rest its decision on the "business record" or "ancient document" exceptions to the hearsay rule. Instead it admitted the evidence on the basis of the two common sense principles of *necessity* (unless the hearsay is admitted, the benefit of the evidence may be lost entirely) and *probability of trustworthiness* (circumstances surrounding the statement insure its reliability). *See generally* McCORMICK, *supra* note 9, § 351. *See also* Zippo Mfg. Co. v. Rogers Imports, Inc. 26 F. Supp. 670 (S.D.N.Y. 1963), *supra* note 21.

32. Many commentators have endorsed the proposition that the hearsay rule must remain flexible enough to avoid having to torture and stretch the principles of established exceptions. However, there is disagreement as to whether such flexibility should take the form of numerous new exceptions or be embodied in a single, broadly-construed "residual exception." *See* Cross, *The Scope of the Rule Against Hearsay*, 72 L.Q. REV. 91, 115-16 (1956); Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 774 (1961); McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A.J. 507, 512 (1938); Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 354 (1961).

33. FED. R. EVID. 803(24) provides:

> Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

34. FED. R. EVID. 804(b)(5) is identical in wording to FED. R. EVID. 803(24).

As originally proposed, these two provisions provided for admission of any hearsay statement not specifically covered by any of the stated exceptions, if the statement was found to have "comparable circumstantial guarantees of trustworthiness." *See* FED. R. EVID. 803(24), 28 U.S.C.A. App. (1975) (Notes of Committee on the Judiciary, Senate Report No. 93-1277, Note to Paragraph (24)).

In this abbreviated form the House Committee on the Judiciary rejected the sections because of the belief that their flexibility "injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for

Evidence. Those provisions allow the introduction of hearsay statements which do not fit within the specifically enumerated common law exceptions, if circumstantial guarantees of trustworthiness, equivalent to those of common law exceptions, are shown to exist.

Hard cases sometimes make bad law only because we refuse to recognize that we have made new law. The stretching of concepts is a common phenomenon in the law, but some concepts are without elasticity. When it comes to the state of mind exception, and its limitation that only states of mind that have independent relevance are admissible, there is no play. It is the skeletal foundation of the exception that is essential to the preservation of the hearsay rule itself.

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trial." FED. R. EVID. 803(24), 28 U.S.C.A. App. (1975) (Conference Committee Notes, House Report No. 93-1597, Note to Paragraph (24)).

The Senate Committee on the Judiciary disagreed with the total rejection of a residual hearsay exception, believing that without a separate residual provision that provided for a broader construction and interpretation of the rules, "the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed)." FED. R. EVID. 803(24), 28 U.S.C.A. App. (1975) (Notes of Committee on the Judiciary, Senate Report No. 93-1277, Note to Paragraph (24)). With limitations on the use of the provision, the latter view prevailed.