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## DEAD MEN TELL TALES: THIRTY TIMES THREE YEARS OF THE JUDICIAL PROCESS AFTER *HILLMON*

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*The author traces the development of the Hillmon doctrine, an exception to the hearsay rule that permits admissibility of a declaration of intent to do a future act as circumstantial evidence that the act was done. Arguing that the doctrine has been expanded—often by judicial inadvertence—to encompass acts of third parties and past acts, the author concludes that the courts should set about harnessing the exception before it abolishes the hearsay rule itself.*

### I. INTRODUCTION

THE *Hillmon* doctrine<sup>1</sup> was conceived from “dense darkness”<sup>2</sup> and born in a dictum. Little analytical light has illuminated the nine decades of its growth. In its purest form, this exception to the hearsay rule allows into evidence a declaration of a present state of mind to do an act in the future—an intention—as circumstantial evidence that the act was accomplished.<sup>3</sup> At the time *Hillmon* was decided, this “extraordinary”<sup>4</sup> doctrine marked a

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

2. Justice Horace Gray wrote the *Hillmon* opinion. His law clerk, Ezra Ripley Thayer, is attributed with this description of Justice Gray's analysis of the case. See Maguire, *The Hillmon Case—Thirty-three Years After*, 38 HARV. L. REV. 709, 711-12 (1925).

3. See generally 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 442 (1980); 6 J. WIGMORE, EVIDENCE § 1725 (Chadbourn rev. 1976); Seidelson, *The State of Mind Exception to the Hearsay Rule*, 13 DUQ. L. REV. 251 (1974).

4. *United States v. Pheaster*, 544 F.2d 353, 376 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977). Accord *People v. Lauro*, 91 Misc. 2d 706, 398 N.Y.S.2d 503 (Sup. Ct. 1977). For a discussion of *Pheaster*, see *infra* notes 72-81 and accompanying text.

(1)

“vigorous leap”<sup>5</sup> from prior cases. It has since been shaped by the judicial process; subsequent cases have extended its reach while jumping over logical analytical stopping places, often “inadvertently.”<sup>6</sup> In its maturity, the *Hillmon* doctrine has become to some “elusive” and “pernicious,”<sup>7</sup> to others “dangerous” and “promiscuous,”<sup>8</sup> and to many in difficult cases, “unintelligible.”<sup>9</sup>

This article argues that the *Hillmon* Court was presented with a classic choice between doing justice in the individual case and establishing a workable rule of law. The Court chose the former course by creating a new exception to the hearsay rule crafted especially for the unique factual circumstances of the case. Yet the Court’s novel approach did not go unnoticed; the new exception was launched into the stream of the judicial process and became a point of departure by which courts expanded the exception in the guise of applying it. Some courts expanded the exception knowingly, but others did so accidentally, for to some judges, “[t]he rule itself is more important than the theory on which it is founded.”<sup>10</sup>

As a hearsay exception grows, less of the hearsay rule remains. Consequently, the *Hillmon* doctrine has grown at the expense of the hearsay rule. An examination of the cases shaping the contours of the doctrine reveals that the tide is washing ever higher on the rule. Commentators have warned that the *Hillmon* doctrine may engulf the hearsay rule.<sup>11</sup> To some extent, this trend parallels the general loosening of all exclusionary rules of

5. Maguire, *supra* note 2, at 714.

6. Payne, *The Hillmon Case—An Old Problem Revisited*, 41 VA. L. REV. 1011, 1033 (1955).

7. Seidelson, *supra* note 3, at 251.

8. *United States v. Jenkins*, 579 F.2d 840, 845 (4th Cir.) (Widener, J., dissenting), *cert. denied*, 439 U.S. 967 (1978).

9. Maguire, *supra* note 2, at 731.

10. *State v. Perelli*, 125 Conn. 321, 325, 5 A.2d 705, 707 (1939).

11. In the first critical analysis of the *Hillmon* doctrine, the author warned, “to follow the *Hillmon* case consistently leads to the abolition of the hearsay rule.” Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146, 157 (1912). Several recent commentators have remarked on the same possibility. See Rice, *The State of Mind Exception to the Hearsay Rule: A Response to the “Secondary’ Relevance*,” 14 DUQ. L. REV. 219, 230 (1976); Seidelson, *supra* note 3. Cf. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 970 (1974). To the extent that the *Hillmon* doctrine allows a declaration of a present state of mind to include a memory, the hearsay rule evaporates because a memory will always in a sense be a present state of mind. If declarations of intention to undertake future actions are admitted, then logical consistency may require the admission of declarations of present memories of past actions undertaken. See *infra* notes 59-61 and accompanying text.

evidence.<sup>12</sup> Of all the exceptions to the hearsay rule, however, the state of mind exception has the greatest potential for turning the rule inside out. If this is what the courts desire, so be it. The problem is that this assault on the rule appears to be happening by default, and not by carefully reasoned design.

The time has probably passed for a counterattack aimed at eliminating the *Hillmon* exception. No court has rejected the doctrine outright, and it has been stamped with approval by Federal Rule of Evidence 803(3).<sup>13</sup> Yet, before courts extend the *Hillmon* doctrine further, its analytical basis and its step-by-step expansion should be explored. Then courts can decide, with full awareness of the consequences, whether to continue this relentless surge over the ramparts of the hearsay rule.

## II. THE HILLMON DECISION

### A. Facts of the Case

Few cases in American judicial history present more intriguing facts than *Mutual Life Insurance Co. v. Hillmon*.<sup>14</sup> Nearly every opinion or commentary which discusses the case repeats the factual situation at length and with editorial flourishes.<sup>15</sup>

The *Hillmon* story involves two men, John W. Hillmon and Frederick Adolph Walters. One of them ended up dead at Crooked Creek, Kansas, on March 17, 1879. The other disappeared, never to be heard from again.

The relevant events began some months earlier.<sup>16</sup> In Octo-

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12. See generally Evans, *Article Eight of the Federal Rules of Evidence: The Hearsay Rule*, 8 VAL. L. REV. 261 (1974); McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930); Younger, *Reflections on the Rule Against Hearsay*, 32 S.C.L. REV. 281 (1980). See also Wasserstrom, *The Incredible Shrinking of the Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

13. See FED. R. EVID. 803(3). Rule 803(3) provides for the following exception to the hearsay rule:

*Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

*Id.*

14. 145 U.S. 285 (1892).

15. See, e.g., *United States v. Pheaster*, 544 F.2d 353, 377 (9th Cir. 1976); 4 D. LOUISELL & C. MUELLER, *supra* note 3, § 442, at 545-47, 558-59; 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 803(3)[04], at 803-116 (1982).

16. The statement of facts is based in part on the Court's opinion and in larger part on the 40 page evidence summary and commentary in J. WIGMORE, *THE PRINCIPLES OF JUDICIAL PROOF* 856-96 (1913). One must take some care in

ber, 1878, Hillmon was married. Then, in the late fall of 1878, Hillmon, accompanied by friend Levi Baldwin, sought out life insurance purchases on four separate occasions. The four policies, each obtained in a separate transaction from three different companies, had combined face values of \$25,000. The annual premiums totalled about \$600. Hillmon had always been a poor man, and at the time had no regular gainful employment. He paid the first semiannual premiums part in cash and part by a note. His friend Baldwin vouched for Hillmon's character. Baldwin was reputed to be a wealthy cattleman, but later was found to be bankrupt.

Accompanied by another friend, John Brown, Hillmon went forth from Lawrence, Kansas, on March 5, 1879, to search for suitable ranch land to purchase.<sup>17</sup> What he intended to use for purchase money was not placed into the record. The search ended at Crooked Creek, Kansas, in the evening hours of March 17, 1879, when Brown allegedly accidentally shot Hillmon in the head. A body was soon buried at Medicine Lodge, although Sallie Hillmon, the widow, remained in Lawrence. She claimed the insurance money.

Agents for the insurance companies, stung by three recent fraudulent claims, raced to Medicine Lodge to investigate. They demanded the body be exhumed, and it was. The body was carried back to Lawrence where the coroner held an inquest. The jury found that the body was an unidentified man. The insurance companies refused the widow's claim for the insurance proceeds. The widow sued. The following summer, by investigation and chance, the insurance companies discovered that Frederick Walters had also disappeared in March, 1879, after leaving his family and his betrothed in Fort Madison, Iowa. Pictures of the body buried at Medicine Lodge were exhibited to Walters' relatives and they identified the body as Walters'.

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accepting the latter source, for it is taken almost completely from the report of Charles Glead to the Kansas Insurance Commissioner. Glead represented one of the defendant insurance companies in the case. Nevertheless, he did separate facts in evidence from his comments, and the facts summarized here are based on the evidence admitted at trial.

An extended journalistic account of the events of the case, complete with a picture of the corpse, is available in MacCracken, *The Case of the Anonymous Corpse*, AM. HERITAGE, June 1968, at 50.

17. Hillmon and Brown had apparently made an earlier trip in late December, 1878. The insurance companies suggested that this first trip had been a failure because Brown and Hillmon's hopes of finding a frozen body they could pass off as Hillmon's went unrealized. Brown signed an affidavit to this effect. J. WIGMORE, *supra* note 16, at 871.

The contending sides were thus set for litigation. The plaintiff widow alleged that Hillmon and Brown had travelled together in their search for ranch land to Crooked Creek where the accidental shooting occurred. The three defendant insurance companies alleged that Hillmon and Brown had lured Walters into travelling with them with promises of employment. In fact, they planned to kill Walters and use his body to collect the insurance proceeds. The defendant insurance companies alleged that Hillmon had shot Walters, and tried to place the head of the body into the campfire to obliterate its identity. Hillmon, they said, was hiding out waiting for his share of the illegal gains.

Six trials resulted in no final decision. Extensive evidence, giving meaning to the rule against cumulative evidence, was presented by both the widow<sup>18</sup> and the insurance companies.<sup>19</sup>

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18. Wigmore presents the plaintiff's evidence as follows. Sallie Hillmon, John Brown, Levi Baldwin, and four other witnesses swore the body was Hillmon's. Five other witnesses said that the body was that of the man they had seen with Brown in a wagon going west. Two other inferences favored the plaintiff. Undisputed evidence was that the corpse measured 5' 11 5/8" and had a vaccination mark on the arm. Although the defendants maintained that Hillmon was 5' 9" tall, the defendants' doctor had written 5 feet 11 inches on Hillmon's application for insurance. Only after the litigation arose did the doctor state that he had remeasured Hillmon, but had failed to change the application. The defendants' doctors had cut the vaccination mark from the arm of the body for examination, but had never returned the removed portion. J. WIGMORE, *supra* note 16, at 862-63.

19. Wigmore presents the defendants' evidence as follows. Primary reliance was placed on the characteristics of the body. At the time of his "death," Hillmon was 34 years old. Four doctors testified that the body was that of a man about 25 years old, which was Walters' age. The body was further described as having the following characteristics: height, 5' 11 5/8"; teeth, large, white, and perfect; face, long and thin; lips, parted; jaws, strong and square; scars, none on head or hands. Hillmon's army enlistment and discharge papers listed him at 5' 8". Eleven witnesses, including Hillmon's sister and other intimate friends, testified that his teeth were poor and he was missing an upper left incisor. Other witnesses testified that Hillmon had an egg-shaped face which tapered to the jaw, closed lips, and scars on the back of his head and on his hand. The body was clad in Hillmon's clothes, but the clothes appeared slightly too small for it. Twenty-two witnesses swore that the photograph of the corpse was that of Frederick Walters. One witness said he had seen Hillmon in Colorado, although this testimony is described as "not very satisfactory." J. WIGMORE, *supra* note 16, at 868.

The defendants produced additional evidence with dramatic impact. Before the body was returned to Lawrence from Medicine Lodge investigators attempted to obtain a description of her husband from Mrs. Hillmon. She responded only that he had more hair than one of the investigators, a Mr. Green. Since Mr. Green was bald, the defendants did not consider this an adequate response. For some weeks after the shooting, Mrs. Hillmon stayed at the home of a lawyer closely associated with the insurance companies. While in the lawyer's home, Sallie Hillmon signed a complete release of all claims. The release was later revoked because a creditor would not surrender the policies. In addition, John Brown, the sole eyewitness to the shooting, signed an affidavit to the

The trials focused on the single fact question of whose body had been found. The first two resulted in split decisions. At the third trial, the plaintiff widow received the verdict.

The only significant difference in the evidence presented to the third jury was the exclusion of two letters written by Walters. One was to his sister. She could not find the original, but remembered that her brother had written, "I expect to leave Wichita on or about March the 5th, with a certain Mr. Hillmon."<sup>20</sup> The other letter was sent to Walters' fiancée. Walters wrote,

I will stay here until the fore part of next week, and then will leave here to see a part of the country that I never expected to see when I left home, as I am going with a man by the name of Hillmon, who intends to start a sheep ranch, and as he promised me more wages than I could make at anything else I concluded to take it . . . .<sup>21</sup>

The letters were offered to support an inference that Walters had acted on his intention and gone with Hillmon; therefore, the body was his. At the third trial, the trial judge excluded evidence of the letters as hearsay.

The defendants sued out writs of error to the United States

effect that he, Hillmon, and Baldwin had conspired to defraud the insurance companies. He stated that he and Hillmon had befriended a drifter, called "Joe" for the purpose of presenting his body as Hillmon's. Pains had been taken that no one should see more than two people in the wagon on the road to the crime scene. At Crooked Creek, Hillmon killed the victim. Brown had signed the affidavit after the coroner's inquest jury implicated him feloniously in the murder. Only then did he name Hillmon as the murderer. Brown offered to trade this testimony in exchange for immunity from prosecution. When the deal fell through, he returned to his original story. At the trials, Brown testified on Mrs. Hillmon's behalf that he had accidentally shot Hillmon. *Id.* at 862-76.

Three other tantalizing items of evidence were admitted at trials two and three, although they were excluded in trial six, resulting in another Supreme Court reversal. *See infra* note 29. These three items were statements by the alleged coconspirator, Levi Baldwin. Before the shooting, Baldwin had asked the representative of a bank to delay foreclosure proceedings on his farm, saying that he would soon receive \$10,000 of Hillmon's insurance money. In the fall of 1878, Baldwin had questioned his doctor about the decomposition of bodies, and asked further if it "would not be a good scheme to get a good insurance on your life and go down south and get the body of some Greaser and pawn it off as your body and get the money[?]" *Connecticut Mutual Life Ins. Co. v. Hillmon*, 188 U.S. 208, 216 (1903). Finally, on March 10, 1879, Baldwin had said that he had a "brogue" under way with Hillmon. *Id.* at 217. Brogue is a Scottish word for trick or prank. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 281 (unabr. ed. 1976).

20. *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 288 (1892).

21. *Id.*

Supreme Court. Among nearly one hundred assignments of error were complaints of the consolidation of their cases, of the failure to allow each defendant its own peremptory challenges, and of the exclusion of the letters.

Members of the Court voted to reverse on general principles, leaving Justice Horace Gray to his own ingenuity to work out the theory of reversal.<sup>22</sup> Gray, writing for the Court, first approved the consolidation, but found reversible error because the trial court had not allowed each defendant the three peremptory challenges guaranteed by statute.<sup>23</sup> He then pressed forward to consider the evidence question. The defendants had argued for admission of the letters as business records, but this argument was summarily rejected.<sup>24</sup> With help from a nationally recognized evidence scholar,<sup>25</sup> Justice Gray devised a theory of admissibility. He decided on a new exception to the hearsay rule for a declaration of present intention to do an act, such declaration being circumstantial evidence that the intention was carried out and the act accomplished.<sup>26</sup> The pertinent portion of the opinion reads as follows:

When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.

The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be. . . .

The letters in question were competent . . . as evi-

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22. Maguire, *supra* note 2, at 711 (quoting Dean Ezra Thayer's working notes on evidence).

23. *Hillmon*, 145 U.S. at 293-94.

24. *Id.* at 295. See Maguire, *supra* note 2, at 711.

25. The assistance came from Professor James Bradley Thayer. Maguire, *supra* note 2, at 711-12.

26. 145 U.S. at 295-96. This is the rule of law for which the case is traditionally cited. The holding could be read more narrowly: "[A] statement indicating the intent of the declarant to embark upon a trip may be received as evidence that he did in fact embark upon that trip sometime later, at least where he is unavailable to testify at trial." 4 D. LOUISELL & C. MUELLER, *supra* note 3, § 442, at 546.



dence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention.<sup>27</sup>

The case was remanded to the trial court.

A fourth, a fifth, and a sixth trial were required before, finally, another jury returned a verdict.<sup>28</sup> This verdict, again for the plaintiff, was also appealed to the Supreme Court, and another reversal was ordered.<sup>29</sup> Apparently the parties finally settled the case.<sup>30</sup>

### B. *Analysis of the Hillmon Opinion*

Justice Gray's opinion had found reversible error in the failure of the trial court to grant each of the three defendants its own peremptory challenges. This error, said the Court, "entitles them to a new trial."<sup>31</sup> The case was decided.

Not satisfied with grounding the decision solely on the question of the number of challenges, Justice Gray determined to offer the Court's "opinion" on another issue: "There is, however, one question of evidence so important, so fully argued at the bar, and so likely to arise upon another trial, that it is proper to express an opinion upon it."<sup>32</sup> Such an introduction would seem a clear signal that the ensuing discussion is a dictum, albeit an extended dictum. Yet, even if the evidentiary discussion were viewed as an

27. 145 U.S. at 295-96.

28. The *Hillmon* litigation was exceptionally protracted, even by today's standards. The first trial, in 1882, lasted shortly more than two weeks. This jury and the jury which heard the case in June, 1885 were unable to reach a verdict. Finally, in 1888, a verdict was reached (for the plaintiff) after a three week trial. The fourth trial consumed portions of three months in 1895. The jury was unable to reach a verdict. The fifth trial, lasting over three weeks in 1896, resulted in another hung jury. The sixth trial, taking four weeks in 1899, resulted in another verdict for plaintiff. J. WIGMORE, *supra* note 16, at 856 n.2.

29. The result was affirmed by the circuit court, but reversed by the Supreme Court. See *Hillmon*, 107 F.2d 834 (8th Cir. 1901), *rev'd*, 188 U.S. 208 (1903). The reversal came on a seven to two vote. One of the two dissenting justices was Justice David Brewer, who had been the trial judge at the second trial.

30. J. WIGMORE, *supra* note 16, at 856-57 n.2.

31. *Hillmon*, 145 U.S. at 293-94. After consolidating the lawsuits, the trial court had granted only one set of three challenges to the defendants as a group, instead of the three to which each was entitled by statute. *Id.*

32. *Id.* at 294.

alternate holding,<sup>33</sup> such an interpretation hardly places it at the level of the rule of the case which is so commonly taken from the opinion.

Leaving aside the holding issue, we find that the Court's discussion of the evidence question condenses to two sentences:

[W]henver the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.

The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention . . . is . . . direct evidence of the fact . . . .<sup>34</sup>

First, the Court indicates that the intention may be proved by the declaration of a *party*. This is careless writing, for the Court apparently means declarant. Indeed, the discussion would be senseless otherwise, for Walters the declarant is neither a party nor a predecessor in interest to a party.

What is left is the Court's requirement that the intention be a "material fact." The Court reasons that since the intention of Walters forms a link in the chain of circumstantial evidence leading to the ultimate conclusion that Hillmon is not dead, the intention is a material fact. Thus, Walters' declarations cannot be offered as "proof that he actually went away from Wichita," but instead as evidence that Walters "had the intention of going, . . . which made it more probable that he did go and that he went with Hillmon."<sup>35</sup>

At first glance, the Court's reasoning seems logically valid. If the intention is a material fact, then it may be proved by a declaration of intent. The existence of the intention is a material fact. Therefore, it may be proved by the declaration of intent. That is the elementary form of logical argument known as *modus ponens* followed in the crux of the opinion on this issue.

The fallacy in the Court's reasoning becomes apparent when one questions the minor premise. Although the opinion identi-

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33. The discussion devoted to the hearsay question does consume more than two-thirds of the opinion, and the closing language includes this statement: "[F]or the exclusion of these letters, as well as for the undue restriction of the defendants' challenges, the verdicts must be set aside, and a new trial had." *Id.* at 300. See 4 D. LOUISELL & C. MUELLER, *supra* note 3, § 442, at 559 n.20.

34. 145 U.S. at 295.

35. *Id.* at 296.

fies Walters' intention as a material fact, at no point does the Court support this bald assertion. Was the intention a material fact? Certainly the intention was not one of the elements of the plaintiff's or defendants' cases, which is the normal use of the concept.<sup>36</sup> The elements of the plaintiff's case were 1) offer and acceptance of the insurance contract, 2) valid consideration, and 3) death of the insured. The defense of the insurance companies was a negative one: they denied the death of the insured. Accordingly, the relevant material fact seems to be the death of Hillmon. The intention of Walters has probative value only as it tends to prove that Walters went with Hillmon. The intention is not itself a material fact because it is only circumstantial evidence that the body was Walters' and not Hillmon's.

Furthermore, Walters' intent is several steps removed from the material fact of Hillmon's death. Assuming the declarations prove that Walters intended to go on a trip with Hillmon, we first infer that Walters did go. From this we infer that Walters was present at Crooked Creek. From this we infer that Walters was shot. From this we infer that the body is not Hillmon's. From this we infer that Hillmon is not dead. In all, there are five levels of inference. Thus, contrary to the Court's assertion, Walters' intention seems to be little more than relevant evidence on the material fact of Hillmon's death.<sup>37</sup> As discussed below, this diminution in status significantly reduces the necessity for receiving Walters' statements into evidence.

The evidentiary necessity of the fact situation in *Hillmon* must be contrasted with cases where the declarant's mental state is clearly a material fact.<sup>38</sup> In these cases, mental state is "an opera-

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36. The pleading and practice definition of "material fact" is "[o]ne which is essential to the case, defense, application, etc., and without which it could not be supported." BLACK'S LAW DICTIONARY 881 (5th ed. 1979). By no stretch of the imagination could the intention of Walters to go on a trip be said to be essential to a life insurance claim on the life of another man. Neither was the intention essential to the defense. See *supra* notes 18-19 and *infra* note 43.

37. A critic might object to this argument by pointing out that the affirmative defense of fraud had likely been asserted by the defendants. In fact, should one assume fraud was at issue, the intention is no closer to being a material fact. If the intention were offered as some proof of fraud, additional inferential steps would be required. From the fact that Hillmon is not dead, we infer that Hillmon and Brown killed Walters. From this we infer that the killing was an act furthering the conspiracy to defraud the insurance companies. Again we reach the material fact. For the Court to say that the intention itself was a material fact cannot be supported.

38. For a general discussion of the cases where mental state is in issue, see C. MCCORMICK, EVIDENCE § 294 (3d ed. 1984); 4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 803(3)[03], at 803-11 to -115.

tive fact upon which a cause of action or defense depends.”<sup>39</sup> For instance, in a prosecution for kidnapping, the victim’s state of mind is a crucial issue if the defendant alleges consent.<sup>40</sup> In these situations where mental state is directly an issue, a declaration of that mental state is strong, needed evidence. Although state of mind can be proved by circumstantial evidence, there is little doubt that such evidence is inferior to the contemporaneous declarations of the only person who can know his state of mind—the declarant.<sup>41</sup>

If mental state is not directly an issue, as was the case in *Hillmon*, the probative value of a declaration of mental state is significantly diminished. As circumstantial evidence, it becomes further removed from the material fact. Also, the declaration will be fraught with the usual hearsay dangers, but will lack the counterbalancing force of being the best possible evidence. In the abstract, there is little need for state of mind evidence in these cases because other, more direct evidence of the fact is likely to be available. Particular cases may require state of mind evidence, but hearsay exceptions are generally considered and developed in the abstract.<sup>42</sup> Even so, the need for state of mind evidence in *Hillmon* is questionable, given the mass of evidence already available to both adversaries.<sup>43</sup>

Apparently, the Court’s requirement that the intention be a “material fact” derived from the primary precedent on which it relied, *Travelers Insurance Co. v. Mosley*.<sup>44</sup> Yet that case involved

39. C. McCORMICK, *supra* note 38, § 294, at 843.

40. See *United States v. Green*, 680 F.2d 520 (7th Cir.) (contemporaneous statements of a victim are admissible to prove lack of consent in a kidnapping prosecution), *cert. denied*, 459 U.S. 1072 (1982).

41. See 6 J. WIGMORE, *supra* note 3, § 1714, at 90.

42. “Where the need is peculiar to a given case, because of the accidental lack of other evidence, the courts in general have been unwilling to create new exceptions. This is the price we must pay for the hearsay rule if it is to remain workable at all.” Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394, 418 (1934). Cf. 5 J. WIGMORE, *supra* note 3, §§ 1420-1422, at 251-54.

43. See *supra* notes 18-19. The mistake of thinking that *Hillmon* involved a situation that greatly necessitated admission of the evidence has been made by both courts and commentators. See, e.g., *United States v. Mandel*, 437 F. Supp. 262, 266 (D. Md. 1977), *aff’d in part, vacated and remanded in part*, 591 F.2d 1347 (4th Cir.), *aff’d*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980); Hutchins & Slesinger, *Some Observations on the Law of Evidence—State of Mind to Prove an Act*, 38 YALE L.J. 283 (1929).

44. 75 U.S. (8 Wall.) 397 (1869). In this case, Mosley purchased a \$5000 life insurance policy, naming his wife as beneficiary. *Id.* at 397. The benefits were to be paid only if the insured died within three months of events involving “some outward and visible means, of which proof satisfactory to the company can be furnished.” *Id.* Following the insured’s death, his wife claimed the pro-

declarations of bodily pain, a mental state in issue. The *Mosley* Court stated, "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expression of such feelings are original and competent evidence."<sup>45</sup> Be that as it may for situations where bodily or mental feelings bear on the material issue of pain and suffering damages, this theory simply does not apply where the mental state—intention—is relevant only as it tends to provide an inference that an act took place.

The weakness of Justice Gray's use of precedent in *Hillmon* is that no distinction is made between state of mind actually in issue and state of mind relevant only insofar as it provides an inference of an act. Of the nineteen cases cited in the *Hillmon* opinion to support admission of the letters, all but two involved state of mind directly in issue. The cases cited by the Court involved declarations of a bankrupt on the issue of intent to defraud creditors, declarations of a servant on the issue of his reasons for leaving service, declarations of a person on the issue of intent to take passage on a train, declarations of a spouse on the issue of her affection in an action for criminal conversion, and declarations of a testator on the issues of fraud and undue influence when a will was questioned.<sup>46</sup> Of the remaining two cases, one was a will case in which the proponent of the evidence attempted to offer the testator's stated intention to prove the contents of a missing will.<sup>47</sup> This situation was not state of mind in issue, but was something very close.

The only precedent actually on point was a New Jersey case, *Hunter v. State*.<sup>48</sup> That case was a murder prosecution. The victim had declared his intention of journeying to Camden with the defendant. After an extended factual analysis, the New Jersey court admitted the declaration as part of the *res gestae* of the act of going, which was in turn regarded as part of the *res gestae* of the

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ceeds, asserting that the insured's death was caused by an accidental fall down a flight of stairs in the previous three months. *Id.* at 398. The insurance company denied liability, claiming that Mosley's death was caused by a brain disease. *Id.* While no one testified to having seen the fall, several witnesses, including the insured's wife and son, testified that Mosley had said that he fell down a flight of stairs and had complained of pain. *Id.* at 399-400. The Supreme Court affirmed the judgment entered for the plaintiff. *Id.* at 397, 409.

45. *Id.* at 404, quoted in *Hillmon*, 145 U.S. at 296.

46. See *Hillmon*, 145 U.S. at 296-98.

47. *Sugden v. Lord St. Leonards*, 1 C.P.D. 154 (1876). The case has been harshly criticized. See, e.g., *Hinton*, *supra* note 42, at 404 n.26.

48. 40 N.J.L. 495 (1878).

crime itself.<sup>49</sup> On that theory, and “on general principles,” the declaration was admitted.<sup>50</sup> Nowhere, however, did the court suggest that the declaration fell within an established exception to the hearsay rule.

Consequently, contrary to the *Hillmon* Court’s assertion, its resolution of the evidence question was supported by neither principle<sup>51</sup> nor authority.<sup>52</sup> No public policy was mentioned by

49. For a discussion of the *res gestae* doctrine and its relationship to the hearsay rule, see C. McCORMICK, *supra* note 38, § 288, at 835-36. Some commentators have criticized *res gestae* as a vague and meaningless doctrine. See, e.g., Hinton, *supra* note 42, at 300 n.20; Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229 (1922).

50. 40 N.J.L. at 540. The *res gestae* doctrine was likely misapplied to this situation. See Seligman, *supra* note 11, at 160.

51. See *supra* notes 34-43 and accompanying text. One could make another argument against the *Hillmon* doctrine by pointing out that the declaration of an intention to do an act is weak proof that the act was accomplished or even eventually undertaken. In support of this argument, one need only point to Walters’ letters. Walters not only told his fiancée that he intended to go with Hillmon but also told her, “I will drop you a letter occasionally until I get settled down . . . . When I get back you will get to see me in about the same way we parted (you bet).” J. WIGMORE, *supra* note 16, at 875. Clearly Walters fulfilled neither of these other intentions. While this argument diminishes the impact of the evidence substantially, some commentators suggest it goes to the relevance of the evidence rather than to admissibility as an exception to the hearsay rule. R. LEMPERT & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 428 (2d ed. 1982); 4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 803(3)[04], at 803-118.

Although the analysis employed by the *Hillmon* Court is faulty, support for the decision has been offered on other grounds. One court has cited *Hillmon* for the proposition that when a plaintiff must rely on circumstantial evidence, the court will be very generous in admitting evidence necessary to establish the case. See *Northwestern Mut. Life Ins. Co. v. Johnson*, 275 F. 757, 760 (8th Cir. 1921). This explanation of *Hillmon* fails because the defendants in *Hillmon* were the ones who offered the evidence and also because the case was not one of necessity. Ample evidence was available to all litigants without the letters. See *supra* notes 18-19 & 43.

Another commentator has said the *Hillmon* result makes sense because the jury would have drawn a negative inference from the absence of proof of Walters’ intent to travel, and that identification of the body by Walters’ relatives would have appeared suspicious without such evidence. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CALIF. L. REV. 1011, 1048-49 (1978). This argument also assumes that the defendants were faced with a paucity of evidence, and that Walters’ letters were necessary to establish the case of the insurance companies. Given the volume of other evidence available to the defendants, one must seriously doubt whether any juror would have drawn a negative inference in the absence of a declaration by Walters of an intent to travel.

In a subsequent article, the same commentator and a co-author pointed out that Tribe’s concept of triangulation of hearsay offers some support for the admission of the letters. See R. LEMPERT & S. SALTZBURG, *supra*, at 428 (citing Tribe, *supra* note 11). Professor Tribe used a “Testimonial Triangle” to demonstrate the basic hearsay problem of establishing a chain of inferences. See Tribe, *supra* note 11, at 959. The first link is from the act or utterance of a “person not subject to contemporaneous in-court cross-examination about the act or utter-

the Court, and indeed none seems applicable. One is forced to conclude that the result preceded the reasoning.<sup>53</sup> The history of the case indicates that a majority of the Court had decided that plaintiff Sallie Hillmon was pursuing a fraudulent claim. In order to reach the correct result, the Court engaged in tortured reasoning which incidentally yielded a new exception to the hearsay rule.<sup>54</sup>

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ance" to the belief held by the person responsible for the act or utterance. *Id.* at 958. Tribe noted that the first link is similar to a "trip" into the head of a person responsible for the act or utterance (the declarant) to see what she was really thinking when the act occurred." *Id.* The second link is from the declarant's belief to a conclusion to which the declarant's belief points. *Id.* Tribe saw the second link as "a trip out of the head of the declarant, in order to match the declarant's assumed belief with the external reality sought to be demonstrated." *Id.*

The Testimonial Triangle's chain of inferences can be met, however, only after the declarant has overcome certain obstacles. *Id.* at 959. In the first link, to go from the act or utterance to the belief, the "left leg" obstacles of the triangle—ambiguity and insincerity—have to be overcome. *Id.* In the second link, to go from the belief to the conclusion, the "right leg" obstacles of the triangle—memory and faulty perception—must be overcome. *Id.* According to Lempert and Saltzburg, no right leg problems (memory, perception) exist with regard to the declarations, although both left leg problems persist (ambiguity, insincerity). See R. LEMPERT & S. SALTZBURG, *supra*, at 428 (citing Tribe, *supra* note 11). While this analysis is accurate, the potentially severe left leg problems coupled with the relevance problem discussed above seemingly should combine to hold the offer out of evidence. That result would seem even more desirable in light of the expansions of the doctrine developed later in this article. For a discussion of Tribe's triangulation model, see *infra* notes 87-90 & 121 and accompanying text.

52. See *supra* text accompanying notes 44-50. The authority supporting the decision is further eroded by *Throckmorton v. Holt*, 180 U.S. 552 (1901), handed down by the Court only nine years after *Hillmon*. In *Throckmorton*, the declaration of a testator was offered to show that his intention was inconsistent with the terms of the will. The inference that the signature was forged followed. Without even mentioning *Hillmon*, the Court's opinion excluded the declaration as purely hearsay, "no more admissible than would be his unsworn declarations as to any other fact." *Id.* at 573. Logically, authorities supporting the admission of a declaration of intention to show that an act was accomplished should also support the admission of a declaration of intention to show that an act was *not* accomplished. The Court thought not. Cf. *Hinton*, *supra* note 42, at 412.

53. See Maguire, *supra* note 2, at 711-12.

54. Ironically, the Court need not have created the *Hillmon* doctrine because it had already decided to reverse for error in denying each defendant its own peremptory challenges. See *supra* note 31 and accompanying text. Apparently the Court believed that additional guidance on the evidence point was desirable for the next trial judge and jury, so that the appropriate result could be reached. This effort came to naught, as juries four and five disagreed and jury six returned another plaintiff's verdict. The defendants then advanced 108 assignments of error—mostly evidence rulings—but the circuit court affirmed. See *Connecticut Mut. Life Ins. Co. v. Hillmon*, 107 F. 834 (8th Cir. 1901), *rev'd*, 188 U.S. 208 (1903). The case thus returned from the grave to haunt the Supreme Court eleven years later.

Another questionably reasoned reversal followed, based on two evidence rulings. *Connecticut Mut. Life Ins. Co. v. Hillmon*, 188 U.S. 208 (1903). First,

The vice of the difficult case is its creation of a doctrine which is then set loose into the stream of judicial process. That process seizes on a rule of law created to do justice in a particularized fact situation and begins to apply it to other, analogous factual situations. As the years accumulate, the fact patterns thought by guile or inadvertence to be sufficiently analogous become more and more unlike the facts for which the rule was crafted.

After a brief section summarizing the early critical comment on *Hillmon*, this article will examine the development of the *Hillmon* doctrine. First, the development of the use of a declaration of intention to prove the actions of another person will be traced. Second, a declaration of present state of mind to prove a past act will be examined. This development met apparent death in *Shepard v. United States*,<sup>55</sup> but has been reborn, most notably in *United States v. Annunziato*.<sup>56</sup> Third, a proposal that admission of a declaration of intention be conditioned on the unavailability of the declarant will be analyzed.

### III. EARLY COMMENTARY ON *HILLMON*

Early commentary on *Hillmon* was apparently favorable,

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John Brown appeared at the sixth trial only by deposition. The trial judge allowed into evidence Brown's affidavit stating that Hillmon shot another, see *supra* note 19, but only for the limited purpose of impeaching the deposition. The Supreme Court held the affidavit constituted substantive evidence. The Court's theory for admitting the affidavit is not made clear. Brown was not a party, so the statement could not be his admission. A declaration against penal interest was not recognized at that time. The theory must have paralleled the admission by a coconspirator theory that was expressly used for admission on the second evidence question. This second question involved evidence of declarations of Levi Baldwin that created an inference of a conspiracy to defraud the insurance companies. See *supra* note 19. The trial court excluded evidence of the declarations. The Supreme Court reasoned the statements were admissible on the theory that they were admissions of a coconspirator, since Sallie Hillmon was a successor in interest to her coconspirator husband. That conclusion is highly doubtful. No evidence linked plaintiff Sallie Hillmon personally with the conspiracy, and she was not a successor in interest to her husband because the claim on the insurance policy did not arise until his alleged death. The Court's theory does not respond to these readily apparent weaknesses. Again, the Court seemed not about to allow the perceived scheme to succeed; it was willing to reach the necessary result by whatever reasoning process was required. We can only be thankful that the "admission by a successor in interest to a coconspirator" theory has not also flowered in the law of evidence.

The second opinion was written by Justice Henry Brown, which leads to the suggestion that the *Hillmon* litigation was not a matter of black and white, but rather shades of Gray and Brown.

55. 290 U.S. 96 (1933). For a discussion of *Shepard*, see *infra* notes 123-31 and accompanying text.

56. 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). For a discussion of *Annunziato*, see *infra* notes 163-68 and accompanying text.



although it failed to appreciate the “profound technical possibilities” of the doctrine.<sup>57</sup> Not until nearly twenty years after the decision was the first critical notice rendered, in an article by Eustace Seligman.<sup>58</sup> He argued that the *Hillmon* doctrine is antithetical to the hearsay rule because of its logical extensions. Even though the *Hillmon* case seemed only a small step from a declaration of intent to prove state of mind in issue to a declaration of intent to prove a subsequent act, Seligman argued that in fact the step is a leap which propels courts on the road to abolition of the hearsay rule. This is so because, as Seligman says, if such evidence is admissible, then logically all hearsay is admissible. If a declaration of intent to do an act is acceptable, then no logical reason exists for excluding a declaration of state of mind of having done an act.<sup>59</sup>

There is merit to Seligman’s argument. Certainly the out-of-court statement “I am in Crooked Creek” or “I was in Crooked Creek” cannot be admitted to prove the truth of the matter asserted under our law of evidence.<sup>60</sup> Yet these are declarations of present state of mind and past state of mind. Should these be excluded, what basis is there for admitting a statement of a present intention to do an act in the future? A declaration of past events involves the danger of faulty memory, but there is no memory problem with a present state of mind declaration. Perhaps the declarant may have a poorer perception of her present surroundings than of her own present state of mind of intention; but given the likelihood that an intention may be frustrated or changed, this difference appears insufficient to explain a different evidentiary result. Fortunately, we need not resolve this debate. We need only note that little analytical difference exists between the situations. And this is precisely Seligman’s point: if *Hillmon* makes future intent admissible, then present and past tense decla-

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57. Maguire, *supra* note 2, at 710. See also Morgan, *The Law of Evidence*, 1941-45, 59 HARV. L. REV. 481, 571 (1946).

58. See Seligman, *supra* note 11.

59. *Id.* at 155. According to Seligman, “I know I left A \$1000” is a statement of present mental condition. *Id.* at 156. See also Maguire, *supra* note 2, at 711 (quoting Thayer, *Observations on the Law of Evidence*, 13 MICH. L. REV. 355, 365 (1915)). Cf. R. LEMPERS & S. SALTZBURG, *supra* note 51, at 425.

60. See Hutchins & Slesinger, *supra* note 43, at 284. The analysis for the first statement may be different under rule 803(1), which allows a present sense impression to be admitted as an exception to the hearsay rule. See FED. R. EVID. 803(1). Hutchins and Slesinger agree that if statements of intent to do a subsequent act are admissible, exclusion of statements of presently existing state of mind to prove past or present facts would be logically absurd. See Hutchins & Slesinger, *supra* note 43, at 287.

rations should logically also be admissible. The logical path to the destruction of the hearsay rule is blazed.

To those who would argue that the courts can halt such logical extensions of the *Hillmon* doctrine, Seligman answered that evidence law must be consistent, rational, and analytical, not ad hoc.<sup>61</sup> This writer would also answer that such an argument fails to account for the natural, indeed inevitable, progression of the judicial process on a rule of law once it is announced and found workable. The *Hillmon* doctrine is workable in the day-to-day life of the practicing lawyer and trial judge; in fact, this is a major argument in support of the doctrine. The difficulty is that a principle unfettered by logic and tolerated only because it seems to work on a practical level will undoubtedly rise like water to its own level, and fill the logical void.

Professor Maguire, writing five years later, agreed with Seligman on the logical level, but disagreed on the practical level. Maguire recognized that the *Hillmon* doctrine initially appeared to be a "dynamite charge at the base of the hearsay rule," but then suggested that "slow poison" was a more apt metaphor.<sup>62</sup> He noted that no deleterious effects had been shown by the cases, and ventured that "[a]nalytically, the principle appears much more safely boxed in than Mr. Seligman believed."<sup>63</sup>

While recognizing that "[e]fforts to narrow the doctrine have not had much success," Maguire suggested two "obvious" limitations on the extension of the *Hillmon* doctrine.<sup>64</sup> The first pro-

61. "It is impossible, if the law of evidence is to be a rational science and not merely a collocation of arbitrary historical rules, to have the *Hillmon* case and the hearsay rule stand side by side." Seligman, *supra* note 11, at 157.

62. Maguire, *supra* note 2, at 731.

63. *Id.* In 1925, Professor Maguire argued that on an empirical basis, the *Hillmon* doctrine had not endangered the hearsay rule. His findings revealed that in the 33 years of judicial opinion since *Hillmon*, the doctrine had not been extended unduly. *Id.* The perspective of an additional six decades of decisions since Maguire's article, however, compels the conclusion that this empirical base is fast eroding, if it has not already washed out completely.

64. Maguire, *supra* note 2, at 715. Recognizing as he did that the *Hillmon* rule was well suited to the workaday world of the courts and that attempts to narrow the doctrine had already proved fruitless, perhaps Professor Maguire should have been more prescient about the probable trend of the judicial process. He should have realized that the courts would not carefully analyze future cases in terms of a science of evidence, but instead would use what worked. In *Hillmon* itself, the Court could easily have taken the apparently innocuous step of declaring a state of mind of a past act acceptable as an exception to the hearsay rule. Maguire, *supra* note 2, at 712. Maguire supposed that this was because the attack on the hearsay rule in *Hillmon* was "cloaked and disguised." *Id.* at 716. Although Maguire expected the courts to be "thoroughly awakened" to such attacks in the future, the decisions do not bear out his optimism. Indeed, the

vided that a *Hillmon* declaration should not be admissible to prove the acts of another person.<sup>65</sup> The second provided that a past fact could not be proved by such evidence; in other words, a *Hillmon*-type statement must relate to an intention to do an act in the future and not to an act already accomplished in the past.<sup>66</sup>

The development of these two suggested limitations will be discussed in turn. The courts have obliterated the first and despite a major setback, are in the process of cascading over the second.

#### IV. HILLMON DECLARATIONS TO PROVE AN ACT OF ANOTHER

When the declarant's statement includes not only his own intention to do an act but also another person's participation in that act, the analysis changes drastically. No longer is the declarant speaking only for his own state of mind. Instead, the statement now includes either the state of mind of another or the past act or declaration of another. Thus, to say that "[t]he letters in question were competent . . . as evidence that . . . [Walters] had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon,"<sup>67</sup> is construed to say that Hillmon had agreed to go with Walters. The statement could then be used to prove the state of mind of the other person, *viz.* Hillmon's intention to go with Walters. This, in turn, would be circumstantial evidence that the other person (Hillmon) acted on this intention.

##### A. The Cases

The modern line of cases on this point begins in 1944 with a California case, *People v. Alcalde*.<sup>68</sup> Defendant "Frank" Alcalde was charged with first degree murder. The circumstantial evidence of

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courts have oscillated from unblinking awareness to narcolepsy. Compare *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977) with *Brown v. Tard*, 552 F. Supp. 1341 (D.N.J. 1982).

65. Maguire, *supra* note 2, at 715. Maguire argued that in these situations the "risk runs so high and ulterior purpose is so apparent" the evidence should be excluded, although he recognized that there may be not only a dissenting opinion, but also a majority opinion which is "*contra* to the general run of authorities." *Id.* at 718.

66. *Id.* at 715. While generally approving the extension of the *Hillmon* doctrine, Professor Hinton also cautioned against this second collision with the hearsay rule. Hinton, *supra* note 42, at 422-23.

67. *Hillmon*, 145 U.S. at 295-96.

68. 24 Cal. 2d 177, 148 P.2d 627 (1944). There had been earlier cases with similar fact patterns. See *State v. Perelli*, 125 Conn. 321, 5 A.2d 705 (1939); *State v. Farnam*, 82 Ore. 211, 161 P. 417 (1916).

his guilt produced at trial was overwhelming. Defendant's only defense was alibi, and his two alibi witnesses directly contradicted him. As part of its evidence, the prosecution presented a statement made by the victim while she was dressing to go out for the evening. She said she was going out with Frank. Over a sharp dissent,<sup>69</sup> the statement was admitted to prove an inference that "the thing was done."<sup>70</sup> Thus, the victim's statement was admitted as circumstantial evidence of what a third person, the defendant, probably did. One cannot help but suspect that in this seminal case the court was so impressed with the weight of evidence against the defendant that it was little disposed to reverse the conviction for error.

Little reported activity occurred for more than thirty years, except for an occasional decision following *Alcalde*.<sup>71</sup> Then, in 1976, *United States v. Pheaster*<sup>72</sup> was decided. The facts paralleled *Alcalde* in what now appears to be an archetypal fact pattern.

Hugh Pheaster and Angelo Incisco were indicted for conspiracy to kidnap Larry Adell for ransom. Larry, sixteen years old, was with a group of his high school friends at a local restaurant, Sambo's North, in Palm Springs. At approximately 9:30 p.m., he left the restaurant and was never seen again. A long series of negotiations between Larry's father and the kidnapers began shortly after the disappearance. By telephone and then by ten letters, Larry's father was given instructions for paying ransom.

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69. See *Alcalde*, 24 Cal. 2d at 189-90, 148 P.2d at 633 (Traynor, J., dissenting). Justice Traynor pointed out that the declaration of the victim's intent to go out with the defendant also was a declaration that the defendant intended to go out with her, and that the jury would likely "conclude that it tended to prove the acts of the defendant as well as of the declarant . . ." *Id.* at 190, 148 P.2d at 633 (Traynor, J., dissenting). He reasoned that since the whereabouts of the victim at the time of the crime was not in issue, the only purpose of the statement would be to place the defendant with the victim, a purpose not allowed by the exception to the hearsay rule. Traynor concluded, "[h]er declarations cannot be admitted for that purpose without setting aside the rule against hearsay." *Id.*

70. *Id.* at 185, 148 P.2d at 631. In admitting the evidence, the majority relied on other corroborative facts, and also placed several limitations on the admission of such evidence. The court noted the unavailability of the declarant and the delivery of limiting instructions to the jury, and appeared to require circumstances of trustworthiness surrounding the declaration. *Id.* at 185-86, 148 P.2d at 632.

71. See, e.g., *United States v. Calvert*, 523 F.2d 895 (8th Cir. 1975) (deceased intended to speak to defendant about ending business relationship), *cert. denied*, 424 U.S. 911 (1976); *State v. Thornton*, 38 N.J. 380, 185 A.2d 9 (1962) (deceased stated intention to visit defendant), *cert. denied*, 374 U.S. 816 (1963); *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971) (declaration by victim he was going to take a trip with defendant), *cert. denied*, 414 U.S. 874 (1973).

72. 544 F.2d 353 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977).

One month after Larry left the restaurant, the kidnappers broke off communications. Two weeks after that, the defendants Pheaster and Incisco were arrested.

At trial, the evidence against Hugh Pheaster was "overwhelming."<sup>73</sup> The evidence against Angelo Incisco was much less weighty. It consisted in part of declarations by Larry of his intent to meet Incisco that night. Larry's date for the evening testified that Larry planned to meet Incisco at Sambo's North at 9:30 to "pick up a pound of marijuana which Angelo had promised him for free."<sup>74</sup> Another friend testified he was with Larry in the restaurant, and that when Larry got up to leave the table, he had said that "he was going to meet Angelo and he'd be right back."<sup>75</sup> These statements were offered by the government for "the limited purpose of showing the 'state of mind of Larry.'" <sup>76</sup> The trial judge admitted the declarations, and gave limiting instructions to the jury. The defendants were convicted.

Both defendants appealed their convictions to the Ninth Circuit. Judge Charles Renfrew, sitting by designation from the Northern District of California, filed a meticulous, well-documented opinion.<sup>77</sup> Despite his apparent distaste for the *Hillmon* doctrine,<sup>78</sup> Judge Renfrew wrote, "we cannot conclude that the district court erred in allowing the testimony concerning Larry Adell's statements to be introduced."<sup>79</sup> Recognizing the conceptual difficulties of applying *Hillmon* to acts of another, the court nevertheless held the evidence admissible on the strength of prior

73. *Id.* at 383.

74. *Id.* at 375.

75. *Id.*

76. *Id.* at 374 n.11. At trial, the government relied on three theories of admissibility. The evidence was said to be admissible: 1) as a declaration against penal interest (intention to obtain marijuana); 2) as showing the mental state of Larry (coupled with other statements of Larry—ultimately never introduced—regarding his fear of being kidnapped by Angelo); and 3) as a *Hillmon* declaration. On appeal, the government relied exclusively on the *Hillmon* doctrine for admissibility. *Id.*

77. *Id.* at 358. Circuit Judge J. Clifford Wallace joined the opinion. Circuit Judge Walter Ely dissented on the evidence question. *Id.* at 384 (Ely, J., concurring in part and dissenting in part).

78. Judge Renfrew began the discussion by noting "controversy and confusion" in the *Hillmon* doctrine, which he labelled an "extraordinary doctrine." *Id.* at 376. The opinion then identified the "theoretical awkwardness" of applying the doctrine to the act of another, and briefly outlined the arguments against that application. *Id.* at 377-79. Judge Renfrew noted that "the force of the objection to the application . . . has come from very distinguished quarters, both judicial and academic." *Id.* at 380 n.18.

79. *Id.* at 380.

decisions (primarily *Hillmon* and *Alcalde*), and the comments to the California Evidence Code<sup>80</sup> and the Federal Rules of Evidence.<sup>81</sup>

The *Pheaster* decision gave new impetus to this breach of the hearsay rule, and many recent decisions have followed the *Pheaster* court through the opening,<sup>82</sup> with only a few staying behind.<sup>83</sup> Today, the generally accepted rule is that a *Hillmon*-type statement is admissible to prove the act of another person.<sup>84</sup>

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80. Because the advisory committee comment to the California Evidence Code cites *Alcalde* with approval, the court inferred that the code supports application of *Hillmon* to the act of another. *Pheaster*, 544 F.2d at 379 (citing CAL. EVID. CODE § 1250 advisory committee comment (West 1966)).

81. Rule 803(3) allows admission of a statement of the declarant's intent. See *supra* note 13. Larry's statement showed his intent. The Advisory Committee noted that the *Hillmon* doctrine would be incorporated "undisturbed." FED. R. EVID. 803(3) advisory committee note. This, Judge Renfrew posited, indicated that *Hillmon* could be applied to the act of another. *Pheaster*, 544 F.2d at 379-80. See also *infra* notes 96-98 and accompanying text.

82. See, e.g., *State v. Abernathy*, 265 Ark. 218, 577 S.W.2d 591 (1979) (victim intended to go to meet defendant); *State v. Cugliata*, 372 A.2d 1019 (Me.) (victim intended to go on trip with defendant), *cert. denied*, 434 U.S. 836 (1977); *People v. Malizia*, 92 A.D.2d 154, 460 N.Y.S.2d 23 (1983) (victim intended to meet defendant); *State v. Fewell*, 38 N.C. App. 592, 248 S.E.2d 351 (1978) (victim going to meet defendant); *Commonwealth v. Lowenberg*, 481 Pa. 244, 392 A.2d 1274 (1978) (victim intended to confront defendant on financial matter). See also *Hayes v. State*, 395 So. 2d 127 (Ala. Civ. App. 1980) (admitted as *res gestae*); *Trostle v. State*, 588 S.W.2d 925 (Tex. Crim. App. 1979) (victim's intention to see defendant to tell him to move out of her boarding house admitted as *res gestae*). Compare *People v. Jones*, 84 Ill. App. 3d 896, 406 N.E.2d 112 (1980) (statement of victim concerning act of defendant admitted) with *People v. Cole*, 29 Ill. App. 3d 369, 329 N.E.2d 880 (1975) (*Hillmon* doctrine not to be applied to criminal cases).

83. See, e.g., *Gual Morales v. Hernandez Vega*, 579 F.2d 677, 680 n.2 (1st Cir. 1978) (dictum that statement by nonparty of intention to see defendant would not be admissible against that defendant); *Clark v. United States*, 412 A.2d 21 (D.C. 1980) (victim intended to meet defendant at location where she was killed); *People v. Lauro*, 91 Misc. 2d 706, 398 N.Y.S.2d 503 (Sup. Ct. 1977) (victim intended to present financial ultimatum to husband-defendant).

84. See *supra* note 82. In addition, several other courts have stated the general rule to be that *Hillmon*-type statements are admissible to prove the act of another. See, e.g., *United States v. Moore*, 571 F.2d 76, 82 n.3 (2d Cir. 1978) (courts have generally held that *Hillmon* declarations of intent are admissible as evidence of actions of intent of declarant and others) (dictum); *Brown v. Tard*, 552 F. Supp. 1341, 1352 (D.N.J. 1982) ("[u]nder the *Hillmon* doctrine, statements are admissible not only to prove the future conduct of the declarant but also the future conduct of other persons when the declarant's intention requires the action of these other persons if it is to be fulfilled"); *State v. Philbrick*, 436 A.2d 844, 862 (Me. 1981) ("[i]t seems clear that the *Hillmon*-[rule] 803(3) exception to the hearsay rule is broad enough to encompass . . . the involvement of other persons in the declarant's plan") (dictum). Cf. *United States v. Cicale*, 691 F.2d 95, 108 (2d Cir. 1982) (coconspirator's statement that he was going to meet a "friend" was acceptable with regard to a defendant whom the coconspirator met).

B. *Analysis*

To hold that state of mind declarations are admissible to prove not only the subsequent actions of the declarant but also the subsequent actions of another person presents conceptual and practical difficulties that will now be explored. For convenience and clarity, the fact situation of *Pheaster* will be employed.

The statement "I am going to meet Angelo" supports an inference that the declarant's state of mind—his intention—was to go and meet Angelo. In turn, the inference follows that the declarant went. So much is *Hillmon*. But in *Hillmon*, Walters' presence was the fact to be proved. The fact of Larry Adell's presence in the parking lot was not relevant to any issue in *Pheaster*. In *Hillmon*, the issue was the declarant's location; in *Alcalde*, *Pheaster*, and the cases following in their wake the issue was another person's location. A giant step has been taken.

This giant step from *Hillmon* to *Pheaster* requires additional inferences. Placing Larry at the scene of the crime has no probative value. To place Angelo at the scene is the fact to be proved. From our knowledge that Larry intended to meet Angelo, we infer that Angelo was present. Certainly the relevance of the statement is significantly diminished by the additional inference required. One person's intention to do an act is easily hindered. But easier still is hindering an intention which requires the cooperation of two. Larry's intention to meet Angelo might have been frustrated for any number of reasons affecting him alone. But in order for the meeting to occur, we must also consider Angelo's actions. Angelo, even assuming he intended to meet Larry, might also have had his intention frustrated at any time.

Arguably the addition of this second contingency speaks to relevance and not to the hearsay exception. For example, the *Pheaster* court thought the additional inference showed a difference in degree rather than kind.<sup>85</sup> The court is correct if one looks solely at the relevance analysis, but the difference of degree might be so extreme that it really amounts to a difference in kind.

What inferential steps are required to reach the crucial fact that the other person also was present? From Larry's statement of intention to meet Angelo, we infer that he had some reason-

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85. *Pheaster*, 544 F.2d at 376. The Ninth Circuit reasoned as follows: "The possible unreliability of the inference to be drawn from the present intention is a matter going to the weight of the evidence which might be argued to the trier of fact, but it should not be a ground for completely excluding the admittedly relevant evidence." *Id.* n.14.

able basis for his intention. From that we infer that Angelo had communicated with the declarant Larry to give him that reasonable basis. From that we infer that Angelo had agreed to meet Larry at the desired location. If we stop here, Larry's declaration becomes essentially, "Angelo has agreed to meet me in the parking lot at 9:30." No court would admit this bald hearsay statement.<sup>86</sup> Should we press further? From Angelo's agreement to meet Larry, we can infer that he had an intention to go to the parking lot himself. From Angelo's intention to go to the parking lot, we can infer that he did go. The circle is complete.

The problem is that we have inferred into Angelo's mind, and he is not the declarant. The hearsay rule must break the chain of inferences at some point. Otherwise, the fabric of inference is stretched too thin and loses its body. In this case, the additional stretching has been necessary because the fact to be proved is the act of another person, not the act of the declarant. In addition to severe relevance problems, this extension to include the actions of another person introduces additional hearsay dangers.

The four traditional hearsay dangers are ambiguity, insincerity, memory, and perception.<sup>87</sup> Professor Tribe places the first two dangers on the left leg of a hearsay triangle, and the latter two dangers on a right leg.<sup>88</sup> The traditional statement of inten-

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86. *Cf. id.* at 377. *But cf. Annunziato*, 293 F.2d 373, 377 n.1 (suggestion by Judge Friendly that requiring assumption of prior agreement between declarant and third person may be overstatement).

87. *See* Tribe, *supra* note 11. The most recent edition of McCormick's treatise combines "ambiguity" and "sincerity" into one category which he labels "inaccuracy of narration." *See* C. MCCORMICK, *supra* note 38, § 245 at 726.

88. *See* Tribe, *supra* note 11. Tribe noted that these dangers may be reduced in three situations. *Id.* at 961. First, they may be overcome by prior or subsequent cross-examination in court. *Id.* A delayed subsequent cross-examination, however, will remove only the "left leg" dangers. *Id.* at 963. Second, these dangers are irrelevant in certain situations in which "a party has *no right to cross-examine* with respect to particular testimony." *Id.* For example, an "estoppel-like" responsibility is imposed on each party for its agent's statements. *Id.* at 964. Third, the dangers may be reduced by "specific attributes of the out-of-court act or utterance which are thought to reduce the triangle's weaknesses so substantially that the balance of untrustworthiness and likelihood of probative value favors admissibility of the evidence." *Id.* This category is further subdivided into two groups, each of which eliminates the dangers on one leg of the triangle. *Id.* Tribe explained that the clearest example of the first subgroup, which removes the left leg dangers, is the declaration against interest. *Id.* In this case, the sincerity question is resolved by the "assumption that a person is unlikely to make a statement adverse to himself unless he believes it to be true." *Id.* at 964-65. Moreover, the ambiguity danger is eliminated by admitting only unambiguous statements against the declarant's interest. In this situation, however, the "right leg" dangers remain significant. An example of the second sub-



tion to do an act involves no right leg problems because a declarant can certainly perceive his own mind (no psychological arguments here, please) and there is no danger of memory loss with a present intention. Left leg dangers do exist—the statement may be ambiguous or be uttered to mislead—but these dangers are not thought serious enough to warrant exclusion.<sup>89</sup>

When we use a declarant's statement of intention to infer the act of another, we immediately encounter all four hearsay dangers. The left leg dangers, ambiguity and insincerity, are heightened. Now both the declarant's and the other person's statements may be ambiguous. Insincerity is a vital concern given the possible criminal intent of the other person.<sup>90</sup> We also encounter the other two hearsay dangers full-blown. Perception problems spring up because the declarant may not have accurately perceived her agreement with the other person. Memory problems arise because the declarant is relying on her memory of the agreement. Given these hearsay dangers and the problems of relevance, it seems that the *Hillmon* doctrine has been stretched so thin as to snap the chain of inference.

The wrong of including the act of another in a statement of intention is that the statement must face both forward to the intention and backward to the prior agreement or statement by the other person. Statements which look backward are not generally admitted under the state of mind exception to the hearsay rule.<sup>91</sup>

Based on the foregoing discussion, one can see that the evidentiary analysis of a statement of intent that includes the act of

group, which removes the obstacles of the right leg, is statement of present physical or mental sensations. *Id.* "The closeness in time of statement to perception reduces memory problems to the de minimis level, and for a number of reasons, including the fact that what one perceives as his physical or mental sensations *are* his sensations, there is ordinarily no possibility of erroneous perception." *Id.* The left leg obstacles remain, however. *Id.*

89. R. LEMPERT & S. SALTZBURG, *supra* note 51, at 428.

90. Several courts have mentioned the circumstances surrounding a typical *Hillmon* statement as evidencing trustworthiness. They argue that a declarant would not likely lie to his relatives about his destination and the statement would be a natural incident of going. Also, it would be natural for the declarant to mention his travelling companion. *See, e.g.,* Hunter v. State, 40 N.J.L. 495 (1878) (in murder prosecution, victim had previously declared his intention to travel to a specific location with the defendant). Yet with the inclusion of the other person, these circumstances of trustworthiness evaporate. In fact, the other person, if possessing criminal intent, would have a strong motive indeed to fabricate. *See infra* text accompanying notes 227-28.

91. FED. R. EVID. 803(3). This rule embodies the pre-existing common law rule first announced in Shepard v. United States, 290 U.S. 96 (1933). The doctrine is discussed at length *infra* in Section V.

another is quite different in degree and character from a true *Hillmon* statement. Yet, no court has offered a carefully reasoned analysis that would support the admission of such statements.<sup>92</sup> Instead, courts rely on the force of precedent and an unexpressed

92. Most courts have simply cited to precedent, usually the landmark cases of *Hillmon*, *Alcalde*, or *Pheaster*. *Hillmon* did not discuss the issue. *Alcalde* said only that the "evidence was admitted for the limited purpose of showing the decedent's intention," and thus avoided the issue. 24 Cal. 2d at 185, 148 P.2d at 630. *Pheaster* recognized the issue, rejected *Alcalde*'s theory of limited purpose because of the prejudice involved, but then sidestepped by saying, "we cannot conclude that the district court erred in allowing the testimony . . . to be introduced." 544 F.2d at 375 n.12, 380.

Some commentators have suggested that the circumstances surrounding the statements justify the result in cases like *Pheaster* and *Alcalde*. See, e.g., R. LEMPERT & S. SALTZBURG, *supra* note 51, at 429-30; G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 224-26 (1978). For example, other evidence showed that the victim in *Alcalde* was making preparations to go out for the evening. Given those preparations, and her statement, she most likely would have gone out only with Frank, the person with whom she expressed an intention to leave. This may be so, but this strengthening of the inference appears to support only the increased relevance of the statement. It does not appear to affect the hearsay analysis.

Others have approved a "flexible view" which advocates admitting the statement as part of the "matrix of circumstantial evidence," relying on limiting instructions and the burden of proof to cure any problems. See C. MCCORMICK, *supra* note 38, § 270, at 574-75 (1954); 4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 803(3)[04], at 803-105. To say that the statement is part of a matrix of circumstantial evidence is to say little or nothing. To rely on limiting instructions and burdens of proof to remove prejudice is like trying to block the jurors' ears against the "reverberating clang of those accusatory words." *Shepard v. United States*, 290 U.S. 96, 104 (1933). Cf. *United States v. Layton*, 549 F. Supp. 903 (N.D. Cal. 1982) (court imposed numerous burdens on government before it would admit hearsay statements as statement of conspirator), *aff'd in part, rev'd in part*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984). The third edition of the McCormick treatise does not carry forward the suggestion. See C. MCCORMICK, *supra* note 38, § 295, at 846-51.

The problem with relying on limiting instructions can best be shown by the case of *State v. Cugliata*, 372 A.2d 1019 (Me. 1977). The victim of a murder had stated his intention of travelling to a drug deal. He intended to be accompanied by two people, one of whom was named Frank. The defendant's name was Frank. The trial court admitted the declaration with the following limiting instruction: "[T]he only thing . . . [the statement] will establish for you would be that there existed, if in fact you find that it does establish that, an intention in the mind of the decedent to make a trip, and also as bearing upon whether or not in fact he did make such a trip." *Id.* at 1026. Perhaps the intention did indeed tend to establish that the decedent took a trip. What that trip had to do with the issues of the case is not specified. Clearly, the only purpose of the statement was to name defendant as the deceased's companion on the trip. A realistic observer must doubt that the jury failed to glean that fact from the declaration, despite the limiting instructions. For further discussion of *Cugliata*, see *infra* note 189-92 and accompanying text. Judge Learned Hand pungently noted that the limiting instruction in criminal cases is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else [sic]." *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932). And Judge Jerome Frank thought the limiting instruction in the criminal case a "judicial lie" which "damages the decent administration of justice." *United*

reluctance to reverse the conviction of a person who is clearly guilty. Poorly reasoned use of precedent has triumphed over prudent hearsay analysis to create the general rule.<sup>93</sup>

Despite these difficulties, there are two analyses not previously discussed which may offer a basis for admission of the statement. In the first analysis, we start with the observation that since a statement of intent to meet another person is in reality a statement that the other person also intends to meet the declarant, the statement must necessarily look back to a prior declaration of the other person. Thus, implicit in Larry's statement "I intend to meet Angelo tonight" is a prior statement by Angelo to Larry, "I intend to meet you at 9:30 at Sambo's North, Larry." Given this, is not Larry's statement a matter of hearsay within hearsay? Larry is stating his present intention, but within that he is also stating Angelo's intention previously expressed to him. The statement is, "I intend to meet Angelo and he has stated his intention to meet me." The former portion of the declaration is admissible under the present contours of the *Hillmon* doctrine. The latter portion, to be admissible, must be supported by its own hearsay exception. But, if *Hillmon* allows a witness on the stand to say, "Larry told me, 'I intend to go to the parking lot,'" should not Larry in effect also be allowed to declare "Angelo told me, 'I intend to meet you in the parking lot' "? The *Hillmon* doctrine would thus serve to admit each level of hearsay in the entire statement.

The second analysis derives from a small group of cases previously classified only with the act of another group.<sup>94</sup> These few cases involve declarations of intent which do not inextricably bind the actions of the other person into the statement. Instead of declaring an intention to *meet* another (requiring a prior agreement or declaration of intent by the other person and thus looking backward), the declaration is of an intent to seek out another per-

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States v. Grunewald, 233 F.2d 556, 574 (2d Cir. 1956), *rev'd*, 353 U.S. 391 (1957).

93. See *supra* notes 82 & 84 and accompanying text.

94. See *United States v. Calvert*, 523 F.2d 895, 910 (8th Cir. 1975) ("[deceased] intended to speak to the defendant about cancelling the insurance and getting out of the partnership"), *cert. denied*, 424 U.S. 911 (1976); *Commonwealth v. Lowenberg*, 481 Pa. 244, 250, 392 A.2d 1274, 1278-79 (1978) ("[deceased] wanted to see appellant on a financial matter, ' . . . far worse than borrowing money' "); *Trostle v. State*, 588 S.W.2d 925, 929 (Tex. Crim. 1979) ("[deceased] was going to tell appellant to move out of the house"). *But see* *People v. Lauro*, 91 Misc. 2d 706, 707, 398 N.Y.S.2d 503, 503 (Sup. Ct. 1977) ("intention of the deceased to present to her husband . . . a financial offer in the nature of an ultimatum" rejected as requiring too many inferences).

son (requiring no prior agreement or intent by the other person and thus looking entirely forward). The fact pattern of these cases is from the same mold: the declarant states an intent to confront the defendant. The declarant is later murdered. The state offers the intention as some evidence of motive. Since no past action is involved, no problem of memory or perception is presented. The analysis is pure *Hillmon*, and it makes the small group of cases acceptable—if one first accepts the *Hillmon* doctrine.

### C. *Present Status of the Law*

The Advisory Committee drafting the Federal Rules of Evidence had the opportunity to deal with the conceptual problem of including the action of another in a declaration of intention, but commented only, "The rule of [*Hillmon*], allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed."<sup>95</sup> Whether that meant *Hillmon* could be interpreted to include the act of another was not addressed. When the Rules passed through Congress, however, the House Judiciary Committee made clear its disagreement with the *Pheaster* result:

[T]he Committee intends that the Rule be construed to limit the doctrine of [*Hillmon*], so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.<sup>96</sup>

No additional comment was made by the Senate Committee, so the intent of Congress as to the viability of cases like *Pheaster* remains ambiguous.<sup>97</sup> Given this ambiguity, and the prior inclination of courts to admit such statements, we can comfortably predict that Federal Rule of Evidence 803(3) will be broadly interpreted so as to continue to allow the admissibility of such statements. Indeed, that has been the result.<sup>98</sup>

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95. FED. R. EVID. 803(3) advisory committee note.

96. H.R. REP. NO. 650, 93d Cong., 1st Sess. 13-14 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051.

97. 4 D. LOUISELL & C. MUELLER, *supra* note 3, § 442, at 562.

98. While the courts have been reluctant to decide directly the issue of the scope of *Hillmon* after the adoption of rule 803(3), no court mentioning the problem has applied the suggested limitation of the House Judiciary Committee. *See* United States v. Cicale, 691 F.2d 95 (2d Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); United States v. Jenkins, 579 F.2d 840 (4th Cir.), *cert. denied*, 439 U.S.

This acceptance by the courts of the *Hillmon-Pheaster* result has lent impetus to additional attacks on the hearsay rule under the banner of *Hillmon*. Making *Hillmon-Pheaster* their point of departure, the courts continue to stretch the doctrine as the judicial process surges forward.

In two recent cases, the courts have moved beyond the scope of admissibility thought appropriate even by the proponents of the evidence. Both were criminal cases, and in both the government conceded that the evidence was not and could not be offered for the purpose for which the court eventually held it admissible.<sup>99</sup> The first of these cases is a decision by the Fourth Circuit, *United States v. Jenkins*.<sup>100</sup> The defendant was charged with perjury for giving a false reason for taking an automobile trip. He had said that he went to visit a friend. The prosecution contended that in fact he went to take a "Miss B" to an illicit transaction. Miss B would not testify that she had asked defendant Jenkins to drive her, so the government produced a tape recording. During the taped conversation between Miss B and an unidentified third person, Miss B agreed to consummate the transaction, and ended the conversation with the statement, "I'm on my way." The government offered this conversation merely to show that Miss B wanted to go to the rendezvous right away. Of course that would be irrelevant to a charge of perjury against her driver, so the court held that the statement could be admitted to show her intention to go to the meeting, which, when coupled with the physical evidence that Jenkins and Miss B appeared at the destination soon thereafter, allowed an inference that she had asked Jenkins to drive her there.<sup>101</sup> This did go to prove the perjury.

The statement of Miss B's intention was being used to prove the state of mind of another person. Miss B's intention to go to the meeting is unimportant. Only Jenkins' state of mind as he drove across town is important. Miss B would not have been allowed to testify by hearsay declaration that "Jenkins will drive me," but she was allowed to do just that by an even more indirect

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967 (1978); *United States v. Mangan*, 575 F.2d 32 (2d Cir.), cert. denied, 439 U.S. 931 (1978); *United States v. Moore*, 571 F.2d 76 (2d Cir. 1978).

99. See *United States v. Jenkins*, 579 F.2d 840, 844 n.1 (4th Cir.), cert. denied, 439 U.S. 967 (1978); *United States v. Cicale*, 691 F.2d 95, 109 n.1 (2d Cir. 1982) (Ward, J., concurring in part and dissenting in part), cert. denied, 460 U.S. 1082 (1983).

100. 579 F.2d 840 (4th Cir.), cert. denied, 439 U.S. 967 (1978).

101. *Id.* at 842.

hearsay declaration. Her state of mind of intention was proved, from which the inference followed that she acted on her intention, from which the inference followed that she informed defendant of her intention, from which the inference followed that defendant developed an intention to assist her, from which the inference followed that defendant acted on his intention to assist her. Thus, the court approved a circuitous chain of inferences to prove an action which could not be proved by a direct statement because of the bar of the hearsay rule.

A like case is the Second Circuit's decision in *United States v. Cicale*.<sup>102</sup> The declarant stated that he intended to meet an unnamed drug source. Other evidence was offered to show that shortly thereafter the declarant was seen with defendant Cicale. The court reasoned that the hearsay problem of using the declarant's statement to prove the subsequent actions of Cicale did not exist because Cicale's participation in the narcotics scheme was proved by other, independent evidence.<sup>103</sup> Again, the declaration of intent by one person was being used to prove the actions of another, and in a very different way from stating the name of a person who will accompany the declarant on a trip. All hearsay dangers were present, and given the criminal nature of the transaction, the danger of insincerity appears especially high.

If a hearsay declaration is allowed to *include* the state of mind of another, courts need make only a small leap in allowing a hearsay declaration to *prove* the state of mind of another. At least three cases appear to have allowed such a declaration into evidence. The first of these is *Brown v. Tard*.<sup>104</sup> The state contended that the defendant, a maintenance man, had murdered the declarant. The hearsay declaration at issue was a statement by the victim in a telephone conversation on the morning of her murder. She said she had "run into one of the guys in the building, the maintenance guys, and that he was going to come up to fix the air conditioner."<sup>105</sup> The declaration was admitted by the state trial

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102. 691 F.2d 95 (2d Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

103. *Id.* at 104. The Second Circuit reasoned as follows: "Statements by the declarant that he intends to carry out a plan are clearly admissible under [rule] 803(3), and, if a third party's participation is proven by independent evidence, the *Hillmon* issue does not arise." *Id.* The court appears to say that if other evidence supports a proposition, then the fact that incompetent evidence was admitted to prove the same proposition may be disregarded. Surely this is not a correct statement of the law of evidence.

104. 552 F. Supp. 1341 (D.N.J. 1982).

105. *Id.* at 1350-51. The declaration also included statements that her car had been broken into and would not run (a past state of mind), and that she was

judge as a present sense impression. The federal court, hearing a petition for a writ of habeas corpus, correctly doubted that the time lapse allowed admission under that theory, but held that the declaration was properly admitted as a present state of mind under the *Hillmon* doctrine since it indicated the victim's intention to await the repairman. This is doubtful. The declaration does not speak of her intention at all. The sole intention expressed is the intention of the maintenance man to fix the air conditioner. We have reached the next plateau of the judicial extension of *Hillmon*: now a declarant is allowed to declare the state of mind of another person!

Lest the reader believe that *Brown* is a sole piece of flotsam in the sea of judicial opinions, attention is directed to two other cases. In *State v. O'Daniel*,<sup>106</sup> the court allowed the declaration of a murder victim into evidence to prove her intention to obtain a divorce from defendant. So far nothing is new or unusual, but the letter also contained "the deceased's impression that the appellant is opposed to the divorce or separation."<sup>107</sup> Again, the court allowed the declaration of one person to prove the state of mind of another. The court thought that this statement permitted the inference that the other person acted on his state of mind and committed the crime.<sup>108</sup>

A second opinion, *Commonwealth v. Riggins*,<sup>109</sup> involved another murder prosecution. Again, the declarant was the victim. The witness was a friend. She testified that earlier on the evening of the crime she answered the telephone, recognized the voice of the defendant Louis, and handed the receiver to the victim-declarant. At the end of the conversation, the victim told the witness, "Louis will [be] over later on."<sup>110</sup> The appellate court approved admission of the evidence as "evidencing her intent to remain at the house and her willingness to admit him."<sup>111</sup> The

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waiting for the police (arguably an intention, but irrelevant to any of the issues in the case). *Id.* at 1350. See *infra* text accompanying notes 183-86.

106. 62 Hawaii 518, 616 P.2d 1383 (1980).

107. *Id.* at 525 n.6, 616 P.2d at 1389 n.6.

108. *Id.* at 525, 616 P.2d at 1389. In another case, the government earnestly argued for admission of a similar statement through the creation of a "marital homicide" exception to the hearsay rule. This exception would allow statements of the decedent to show the defendant's feelings toward the decedent in a marital relationship. The court refused such an extension. See *Clark v. United States*, 412 A.2d 21, 27 (D.C. 1980).

109. 478 Pa. 222, 386 A.2d 520 (1978).

110. *Id.* at 226, 386 A.2d at 522.

111. *Id.* at 234, 386 A.2d at 526.

statement says neither of those things, but it does declare the state of mind of the other person. The court recognized that the evidence could not be used for the purpose of proving the conduct of the other person, but lamely concluded that the burden of requiring a limiting instruction was on the accused.<sup>112</sup> Even if an appropriate limited purpose were available, one must wonder if the illicit purpose of identifying the defendant could be kept from the minds of the jurors. Once again, a court has allowed the declaration by one person to prove the intention of another.

To sum up this section, one of the two major limitations on the *Hillmon* doctrine suggested by Maguire was to limit the declarations to proof of the act of the declarant only.<sup>113</sup> The courts soon stepped beyond this limitation, allowing inferences to be drawn as to the actions of a third person. This extension appears to be well established by such cases as *Pheaster*.<sup>114</sup> But the courts have extended *Hillmon* beyond this logical stopping place and have allowed the declarant's statement to prove the action of another person when the intention of the declarant is only marginally involved, if at all. This extension is perhaps almost inevitable given clever attorneys and courts that are unwilling to upset convictions supported by great volumes of evidence because of "minor" evidentiary rulings. Every one of the cases in this category is an appeal of conviction in a criminal case. These dynamics have clearly shaped the progress of the judicial process on the problem of including the action of a third person under the *Hillmon* doctrine.

## V. STATE OF MIND DECLARATIONS OF MEMORY

### A. *The Pure Metal of Memory*

Including the actions of third persons with the intention of the declarant poses some risk to the hearsay rule, but that risk appears small when compared to another trend which allows the declaration of present state of mind to include a memory of things past. This extension has the real potential of turning the hearsay rule inside out.<sup>115</sup>

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112. *Id.*

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

114. For a discussion of *Pheaster*, see *supra* notes 72-81 and accompanying text.

115. Some commentators have hailed the expansion of the state of mind exception and the decline of the hearsay rule. *See infra* notes 145-50 and accompanying text.



In his commentary on *Hillmon*, Seligman argued that if declarations of present state of mind to prove an act in the future were to be admitted, then logically a declaration of a present state of mind of an action occurring in the past should also be admissible.<sup>116</sup> The hearsay rule, he concluded, would thus be destroyed.<sup>117</sup> One might respond that the law of evidence need not be logical, and in fact is not in several areas. But beyond this rather weightless assertion, no one has seriously disputed Seligman's conclusion. Professor Maguire responded by suggesting the second major limitation on *Hillmon*: that declarations not be used to prove actions which took place in the past.<sup>118</sup>

The necessity for maintaining a sharp distinction between statements looking forward and statements looking backward is made plain by an analysis of the four traditional hearsay dangers.<sup>119</sup> In a statement of future intention, some potential dangers of ambiguity and insincerity are presented, but no problem with memory or perception is encountered.<sup>120</sup> Certainly a declarant can perceive her own present state of mind; and because a statement of future intention is a present state of mind by definition, no memory loss is possible. When the declarant looks backward, however, both of these dangers are encountered. The declarant may have a faulty memory of the past state of mind. This danger rises appreciably to the extent that the past state of mind includes memory of external events. There is also the danger of misperception of the past events. In looking backward, ambiguity will not be a greater danger, but the hearsay danger of insincerity is greatly magnified. A person might be insincere about her present intention to do an act, but at least the fact finder is always aware that unknowable future events may have hindered the declarant's intention. In contrast, when the event has already taken place, and the declarant is stating her preexisting state of mind, a person open to the lure of insincerity might easily vary her "preexisting" state of mind to comport with the actual course of circumstances.

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116. See Seligman, *supra* note 11, at 155-56. See also *supra* notes 58-61 and accompanying text.

117. Seligman, *supra* note 11, at 156.

118. See Maguire, *supra* note 2, at 715. See also *supra* notes 63-66 and accompanying text. Hinton also cautioned against this second collision with the hearsay rule. See Hinton, *supra* note 42, at 422-23.

119. For a discussion of the four traditional hearsay dangers, memory, insincerity, ambiguity and perception, see Tribe, *supra* note 11.

120. See *supra* notes 88-89 and accompanying text.

Despite these added dangers,<sup>121</sup> and the warning by Seligman, in the years after *Hillmon* a few courts began to admit declarations which included memory of past events.<sup>122</sup> The inexorable engulfment of the hearsay rule appeared to be continuing apace.

Into this milieu came the 1933 Supreme Court decision in *Shepard v. United States*.<sup>123</sup> Defendant Charles Shepard was accused of murdering his wife, Zenana, by poisoning her with bichloride of mercury. The defense contended that Zenana had committed suicide. The prosecution based its case on the motive of the defendant to be rid of his wife so that he could marry another, and on the opportunity of the defendant, a medical doctor, to gain access to the poison.<sup>124</sup> The defense argued that Zenana

121. Two other reasons for distinguishing between forward-looking and backward-looking statements have been advanced. First, the causal connection from intention to action is missing in a backward-looking statement. Second, the jury will be able to intuit how easily an intention can be frustrated, but will not so easily understand the risks in accepting a backward-looking statement. See 4 D. LOUISELL & C. MUELLER, *supra* note 3, § 442, at 571.

122. The three major cases are the English case of *Lloyd v. Powell Duffryn Steam Coal Co.*, 1914 A.C. 733 (1914) (declaration of intention to provide home for illegitimate child allowed to prove issue of paternity); *Williams v. Kidd*, 170 Cal. 631, 151 P. 1 (1915) (statements made during negotiations for sale of property allowed to disprove donative intent in delivery of deed three years earlier); *Mower v. Mower*, 64 Utah 260, 228 P. 911 (1924) (declarations of intended delivery made some three years after deed was placed in a safe deposit box). These cases have received much comment. *Lloyd* especially has been harshly criticized. See Hinton, *supra* note 42, at 420-21; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 209-12 (1948); Payne, *supra* note 6, at 1013; Comment, *Declarations Concerning Mental State*, 28 HARV. L. REV. 299 (1915). But see Maguire, *supra* note 2, at 719-24 (need for care in receiving this type of evidence, but admission "practical" and not a "terrifying prospect"). Commentators argue that *Williams* and *Mower* are less objectionable because they involve inferences to a past state of mind instead of a past act. See Maguire, *supra* note 2, at 724-27; Payne, *supra* note 6, at 1013-15. These authorities argue that an inference to a past state of mind only, and not a past act, is a supportable stopping place. The difficulty with this position is that it acts not as a barrier but rather as a springboard for the courts to jump forward toward admission of past acts. Payne would welcome this extension. See *infra* note 147 and accompanying text.

123. 290 U.S. 96 (1933), *rev'g* 62 F.2d 683 (10th Cir.).

124. 62 F.2d at 684-85. The prosecution offered the following evidence. The defendant left his wife at Ft. Riley, Kansas, to take a flight surgeon's course of study at Brooks Field, Texas. He met another woman during the course, and asked her to marry him if he could obtain a divorce. He wrote to her later that he was depressed because his wife had made an excessive financial settlement demand for the divorce. There was evidence that in March and April, 1929, he obtained bichloride of mercury tablets from the dispensary, although he later denied having done so. On May 20, 1929, he gave his wife a highball, after which she became violently ill. He told doctors she had ingested some bad liquor. He told others she was a chronic alcoholic and had a bad heart, but no evidence was found of those conditions. Dr. Shepard opposed an autopsy following the death on June 15, 1929. Later, he went back to Texas as soon as

was a chronic alcoholic, that she had expressed the desire not to live any more, and that certain physical findings were inconsistent with mercury poisoning.<sup>125</sup>

The evidence in question consisted of two declarations by Zenana to the nurse who took care of her after she had become sick. The nurse's first statement was "She said that she was being poisoned."<sup>126</sup> In response to a question calling for the exact words, the nurse testified, "She said: 'Dr. Shepard has poisoned me.'"<sup>127</sup> The trial judge admitted the statements into evidence. On appeal, the Tenth Circuit held that the statements were admissible for the purpose of showing that the victim's state of mind was inconsistent with a suicidal motive, and thus as some rebuttal of the defense of suicide.<sup>128</sup>

Justice Benjamin Cardozo, writing for the Supreme Court, disagreed. He pointed out that the testimony was neither offered

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possible, even though he had told others he was going to Denver (an interesting comment on the *Hillmon* doctrine). He applied for a transfer to Ft. Sam Houston, Texas, and set a wedding date for August 30, 1929. This intention was frustrated by his arrest for murder. *Id.*

125. *Id.* at 689. In his defense, the doctor offered the following evidence. The victim had expressed to others a desire not to live. On the evening she was first taken ill, the examining doctor made a diagnosis of polyneurotic alcoholic psychosis. After she became ill, Mrs. Shepard developed trench mouth. To cure that condition she had periodically gargled a mouthwash containing mercuric chloride; this could have been absorbed through the membrane of the mouth in quantities sufficient to have poisoned her. The autopsy revealed mercury poisoning, but normally in cases of bichloride of mercury poisoning, inflammation of the kidneys is present. No such finding was made in the autopsy. *Id.* at 689.

126. *Id.* at 685.

127. *Id.* Evidence of the statements was first revealed during the government's rebuttal to the defense of suicide, at which point the prosecutor asked that the evidence be stricken. This was done. The next day, after laying a foundation for the statements as dying declarations, the prosecutor put the evidence before the jury. Although the trial court admitted the evidence as a dying declaration, both the circuit court and the Supreme Court held that the evidence was inadmissible as a dying declaration because the prosecution had been unable to establish the certainty of impending death. 290 U.S. at 99-102; 62 F.2d at 686.

128. 62 F.2d at 685-86. Judge Orie Phillips dissented in the circuit court from the admission of the evidence on the state of mind theory. *Id.* at 686 (Phillips, J., dissenting). On appeal to the Supreme Court, Justice Cardozo agreed with Judge Phillips. 290 U.S. at 105-06. Despite this agreement, there is an interesting difference of interpretation between the two judges. Judge Phillips depicted Mrs. Shepard as being ill and mentally confused at the time she made the declarations (two days after being poisoned). He thought that this condition removed any guarantees of trustworthiness from the statements. He speculated that the statements may have been the revenge of a wife cast aside, who wished to take her husband with her. 62 F.2d at 688 (Phillips, J. dissenting). Justice Cardozo, in rejecting the evidence as a dying declaration, gave the following description of Mrs. Shepard's condition two days after the event: "her mind had cleared up, and her speech was rational and orderly." 290 U.S. at 99.

nor received for the narrow purpose proposed: "A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected."<sup>129</sup> Beyond that, he reasoned, the jury could not separate using the evidence for the narrow purpose from using it to prove that the defendant had in fact poisoned her. In often quoted prose he wrote, "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds."<sup>130</sup>

Having thus rejected the admission of the evidence, Justice Cardozo might have ended the opinion. However, apparently concerned by extension of the *Hillmon* doctrine to cover statements of past actions, he continued,

So also in suits upon insurance policies, declarations by an insured that he intends to go upon a journey with another, may be evidence of a state of mind lending probability to the conclusion that the purpose was fulfilled . . . . The ruling in that case marks the high water line beyond which courts have been unwilling to go. It has developed a substantial body of criticism and commentary. Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.<sup>131</sup>

Although this discussion is technically dictum, the directive of Justice Cardozo is clear: admission of declarations of state of mind must not be extended to include "declarations of memory, pointing backwards to the past."

With *Shepard*, the extension of the *Hillmon* doctrine to include statements of memory seemingly came to an abrupt halt. Most courts and the drafters of evidence rules have followed the lead of Justice Cardozo in *Shepard* to exclude "a statement of memory or belief to prove the fact remembered or believed."<sup>132</sup> Yet, despite

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129. 290 U.S. at 103 (citing *People v. Zackowitz*, 254 N.Y. 192, 200, 172 N.E. 466, 469 (1930)).

130. *Id.* at 104.

131. *Id.* at 105-06 (citing *Hillmon*, 145 U.S. at 297) (footnote omitted).

132. See, e.g., FED. R. EVID. 803(3); UNIF. R. EVID. 63(12) (1953) ("not including memory or belief to prove the fact remembered or believed") (superseded by UNIF. R. EVID. 803(3) (1980), which follows the language of the federal rule); CAL. EVID. CODE § 1250(b) (West 1966) ("[t]his section does not make admissible evidence of a statement of memory or belief to prove the fact

this general agreement, courts soon began anew to erode the face of the *Hillmon* rule by allowing declarations of memory to be admitted as present state of mind.

The first nick in *Shepard* appeared only five years later in *Lee v. Mitcham*.<sup>133</sup> An orphan asylum had loaned money to one John Bartlett. The loan was secured by deeds of trust to Bartlett's property. Twenty-three years later, Bartlett died, leaving the debt unpaid. The treasurer of the asylum wrote a personal check for the outstanding amount and paid the bank. He received Bartlett's notes, but they were marked "paid." Upon returning to his office, the treasurer wrote on each note, "The principal and unpaid interest . . . was paid . . . to be credited to The Washington City Orphan Asylum in order to save it from loss and not to extinguish the note and the same is to be held by me as my property . . . ." <sup>134</sup> In a later suit by heirs of Bartlett to have the deeds of trust released, the notes with the annotations were offered into evidence.

The issue for decision was the treasurer's intent at the time he paid the notes: a purchaser for value or a volunteer who acquired no rights? The court pointed out that only a short lapse of time had intervened between the payment at the bank and the treasurer's annotation on the notes. The court cited *Hillmon* for the "settled rule" that "whenever intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party."<sup>135</sup> A subtle transformation of the rule has occurred here. No attention was paid to the fact that in *Hillmon* the statement of intention looked entirely forward. In *Lee*, the important portion of the statement looked entirely backward. *Hillmon* was thus stretched to support a quite different rule.<sup>136</sup> Citation to *Shepard* is notice-

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remembered or believed"). See also MODEL CODE OF EVIDENCE Rule 513 (1942) (excluding declaration "stating his memory or belief of a fact when offered as tending to prove the fact remembered or believed"). Model Rule 503(2) does, however, allow admission of such a declaration when the declarant is unavailable. See *id.*

For state court decisions following the Cardozo position, see *State v. Christensen*, 129 Ariz. 32, 628 P.2d 580 (1981); *People v. Hamilton*, 55 Cal. 2d 881, 362 P.2d 473, 13 Cal. Rptr. 649 (1961) (en banc); *City of Indianapolis v. Swanson*, \_\_\_ Ind. App. \_\_\_, 436 N.E. 2d 1179 (1982).

133. 98 F.2d 298 (D.C. Cir. 1938).

134. *Id.* at 299-300.

135. *Id.* at 301 (citing *Hillmon*, 145 U.S. 285 (1892)).

136. A short passage of time would arguably mean the hearsay danger of memory loss would be minimal. Also, since the declaration is of a state of mind, the danger of misperception would be small. One would think, however, that

ably absent. Because, however, the inference backward is to a previous state of mind instead of a previous action, the extension of *Hillmon* is arguably a small one.<sup>137</sup>

A subsequent extension of *Hillmon* to prove a past action is more significant and troublesome. *State v. Thornton*<sup>138</sup> involved a prosecution for murder. The prosecution contended that defendant had lured his wife to his apartment where he killed her. To prove the inducement to go to the apartment, the state offered the testimony of the victim's cousin. The cousin testified that the victim talked to her on the telephone on the day of the crime and expressed an intention to go to the defendant's apartment. So far this is within *Hillmon*. The witness continued, however, and in response to a completely separate question gave evidence of a past action. The question shows the prosecutor realized he was treading on the thin ice of hearsay, and the answer proved him right: "Q. Don't tell us what you said. She asked you if you had seen her husband? A. Yes, and she said he had called her all day, had worried her about to death."<sup>139</sup> This statement involved not only a past action but also the past action of another, the husband.

The court found no difficulty in admitting the evidence, even though nothing in the second statement evidenced an actual intention of visiting the defendant. The court relied on cases which allow the inclusion of any natural incidents which accompany the expression of intention. For example, in the statement, "I am going to travel to Camden with X," the intention (to travel) comes in on the strength of *Hillmon*, and the accompanying expression (with X) comes in as a natural circumstance accompanying the statement.<sup>140</sup> The difficulty with this theory, even if it were accepted, is that the statement of the defendant's actions in *Thornton*

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the danger of insincerity would be enormous. That alone should require exclusion of the statements.

137. See *supra* note 122. A like case is *Garford Trucking Corp. v. Mann*, 163 F.2d 71 (1st Cir.), *cert. denied*, 332 U.S. 810 (1947). The agent of the defendant went on an errand and deviated from the appropriate route. The question was whether the agent had departed from the master's business to conduct his own. *Id.* at 72. Statements made by the agent from his hospital bed some 10 days after the accident were to the effect that he had taken the longer route because he thought it faster. This state of mind was held relevant to show the agent's intention for taking the longer route. *Id.* at 73-74.

138. 38 N.J. 380, 185 A.2d 9 (1962), *cert. denied*, 374 U.S. 816 (1963).

139. *Id.* at 388, 185 A.2d at 14.

140. See, e.g., *Hunter v. State*, 40 N.J.L. 495 (1878). The *Thornton* court also justified admission of the statement as a verbal part of an act. *Thornton*, 38 N.J. at 391, 185 A.2d at 15. This ground is completely inappropriate, however, since the combined act and statement did not affect any legal rights or duties. See C. McCORMICK, *supra* note 38, § 249, at 733.

involves in no way the “natural incidents” of the declarant’s statement of intention. All of the cases on which the court relied involved statements of intention that included the natural circumstances in virtually the same sentence. The statement in *Thornton* was separated from the intention and the precipitating actions both in time and space.

Even with this error, *Thornton* might be dismissed as an unimportant misapplication of *Hillmon* but for additional language of the court. Recognizing that the statements looked backward, the court opined that “[t]he additional statements which accompanied the expression of purpose to visit Thornton and the reasons in the *very recent past* which motivated the intention do not justify limitations of the testimony to the narrow statement of the plan to make the visit . . . .”<sup>141</sup> In this case, the state was attempting to prove that the victim had been lured to the defendant’s apartment. The entire value of the victim’s statements looked backward; her intention to go to the apartment was relevant only in the most marginal sense. All four of the hearsay dangers are present in the victim’s statement, and the leap beyond the barrier erected by *Shepard* is apparent. If out of court statements of actions from the very recent past which explain the motivation for the intention are admissible, there is no principled reason for not admitting statements of actions from the distant past that also explain the motivation for the intention.<sup>142</sup>

Allowance of statements in the very recent past leads naturally to a case such as *State v. Sharbono*<sup>143</sup> where, again, a husband was on trial for murdering his wife. The disputed evidence was a statement of the wife-victim to a friend that she was afraid to drive at night and would not go on a weekend trip unless her husband drove. Of course the evidence was offered to prove the intention of the victim, but the true purpose was to establish the identity of the husband. The reasoning of the court was remarkable: “when

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141. 38 N.J. at 390, 185 A.2d at 15 (emphasis added).

142. The rebuttal of this argument might be that as the time period following an action lengthens, the hearsay danger of faulty memory is enhanced. Consequently, the argument would run, a statement including a recent past act should be admitted because the loss of memory danger is small, whereas a statement including a distant past act should be excluded because the loss of memory danger is large.

The rejoinder to this is that there is no principled stopping place between recent and distant past events. Inevitably the lines drawn in the individual cases will recede inexorably from the present toward the more distant past until *Shepard*—and the hearsay rule—are but a memory.

143. 175 Mont. 373, 563 P.2d 61 (1977).

intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible . . . ."<sup>144</sup> The court suggests that the inference backwards is only to a prior state of mind; but clearly the state of mind in this case was relevant only insofar as it supported an inference to the action. The court's declaration of the "rule" is a dictum, but even so the language is quite provocative. The danger is that the language will be divorced from the facts of the case and applied to the next analogous factual situation. So moves the law. So recedes *Shepard*.

The stream of cases beginning to flow around and over the barrier of *Shepard* has been hailed by some commentators.<sup>145</sup> These writers are self-avowed no friends of the hearsay rule. They recognize that the continued extension of *Hillmon* will ultimately engulf the rule, and they accept that eventuality as a positive movement in the law.

The writers begin by diminishing Cardozo's opinion in *Shepard*. Cardozo's discussion of the dangers of "declarations of memory, pointing backwards to the past," is devalued, if not entirely dismissed, as dictum.<sup>146</sup> Yet, no one has ever disputed that Cardozo's warning is accurate: admission of backward-looking statements as present states of mind will lead to eventual abolition of the hearsay rule. Every memory is a present state of mind. Nothing would be left on which the hearsay rule could operate. Consequently, whether as dictum or holding, the danger is identified.

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144. *Id.* at 385, 563 P.2d at 68 (quoting *Thompson v. Steinkamp*, 120 Mont. 475, 481, 187 P.2d 1018, 1021 (1947)).

145. See, e.g. J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 803(3)[05], at 803-130; Hutchins & Slesinger, *supra* note 43, at 298; Payne, *supra* note 6, at 1056-58.

146. Weinstein and Berger attempt to dispose of the crucial passage in *Shepard* as dictum. See 4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 803(3)[05], at 803-128. Louisell and Mueller argue that the opinion can be read narrowly and suggest that declaration of a past state of mind of the declarant about *his own previous acts* is not necessarily proscribed. See 4 D. LOUISELL & C. MUELLER, *supra* note 3, § 442, at 567-68. This argument suggests that Cardozo was being quite careful not to decide *Shepard* too broadly. *Id.* The opinion does lend itself to a reading that only a backward-looking declaration incorporating the act of another is prohibited. However, this reading ignores the fact that Cardozo considered *Hillmon* a "high water line" that has "developed a substantial body of criticism and commentary." *Shepard*, 290 U.S. at 105 (citing *Hillmon*, 145 U.S. 285 (1892)). Followers of the Cardozo style will readily recognize sharp criticism in this apparently innocuous language. Justice Cardozo took great pains not to criticize other court opinions. His reference to *Hillmon* is tantamount to a direct expression that the case was wrongly decided, or at least that the law has changed.



Some commentators insist that there is no danger; instead, there is an opportunity to rid the law of the tortured and inconsistent rule against hearsay. Payne collects the cases extending into the past in defiance of *Shepard* and then urges "abandonment of the effort to apply the conjectural and metaphysical distinctions sometimes involved in keeping the *Hillmon* doctrine in its place."<sup>147</sup> He advocates a "simple" rule of judicial discretion for admission of this type of evidence. Weinstein and Berger agree. They suggest that such declarations should be controlled by the catch-all exception to hearsay which is embodied in Federal Rule of Evidence 803(24).<sup>148</sup> Other commentators concur.<sup>149</sup> Even the drafters of the Federal Rules of Evidence proposed an exception for statements of *recent* perception, but this effort was rejected by Congress.<sup>150</sup>

The post-*Shepard* cases are illustrative of the judicial process. A few cases depart from the general rule because the application of the fact patterns to the rule produces a result which the court believes is improper. Thus, a court alters the rule slightly to attain a result thought more desirable in that particular fact situation. But then other courts apply the alteration to increasingly diverse fact situations. Soon, sympathetic commentators collect the new cases and announce the new rule as established law. The

147. Payne, *supra* note 6, at 1057.

148. 4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 803(3)[05], at 803-130.

149. See, e.g., Hutchins & Slesinger, *supra* note 43, at 289. They note the objection that a past state of mind declaration will erode the hearsay rule, but then point out that the hearsay rule has already been eroded by exceptions "to which this would not greatly add." These writers fail to recognize the distinction between another exception to the rule and an exception which contains the inevitable creation of a new rule which will turn the old rule inside out.

150. Weinstein and Berger identified the reasoning behind Congress' rejection of the proposed exception:

Rule 804(b)(2), as promulgated by the Supreme Court, was eliminated by Congress for the following reason:

*Proposed Rule 804(b)(2)*

Rule 804(b)(2), a hearsay exception submitted by the Court, titled "Statement of recent perception", read as follows:

A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while this recollection was clear.

The Committee eliminated this rule as creating a new and unwarranted hearsay exception of great potential breadth. The Committee did not believe that statements of the type referred to bore sufficient guarantees of trustworthiness to justify admissibility.

4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 804, at 804-09 (quoting H.R. REP. NO. 650, 93rd Cong., 1st Sess. 6 (1973)).

rule is then ripe for adoption in fact patterns even further removed.

Two cases are especially illustrative of this process. In these cases, the courts issued opinions which substantially extend the *Hillmon* doctrine into the inclusion of past actions.

The first of these two decisions is *People v. Newman*,<sup>151</sup> where an appellate court concurred in a dissenting judge's analysis of the hearsay issue. The defendant had been convicted of voluntary manslaughter.<sup>152</sup> On appeal, the dissenting opinion rejected the defendant's argument that hearsay had been improperly admitted at trial. The questioned evidence consisted of statements made by the victim shortly before he was allegedly run down by defendant's automobile. The witness was a waitress in a late-night tavern. She testified that around 2 a.m. the victim came into the tavern and spoke to her:

He said to me, he said, "Sandy"—and his exact words—he said, 'do you know what that son of a bitch—'

And I said, "Who?"

He said, "Donny Newman [defendant] and John D tried to do to me just now?"

I said, "When?"

He said, "Just a while ago."

I said, "What's that?"

He said, "He tried to run me over."

I said, "Oh, you're kidding."

He said, "No." He said, "Donny Newman and John D. just now tried to run me over." He said, "He is trying to kill me."<sup>153</sup>

Surely this evidence, repeated twice, was enough, but the court approved the continuation:

I said, "You're kidding." I says, "Maybe it was just an accident."

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151. 107 Mich. App. 535, 309 N.W.2d 657, *app. denied*, 412 Mich. 890 (1981).

152. *Id.* At trial, the defendant had been prosecuted for first and second degree murder, as well as for voluntary manslaughter. The trial court instructed the jury on the defense of accident as it related to the first two offenses, but not the third. After the defendant was convicted of the third offense, voluntary manslaughter, the appellate court held that the failure to give the accident instruction on all counts was reversible error. *Id.* at 537-38, 309 N.W.2d at 657. As to the remaining claims of error, the court found "no merit" and concurred in the discussion of them by the dissenting judge. *Id.* at 538, 309 N.W.2d at 657.

153. *Id.* at 541, 309 N.W.2d at 659 (Bronson, P.J. dissenting).

He said, "No." He said he had already—"He's already been over. He told Joann [victim's wife] he's going to kill me."<sup>154</sup>

Apparently hearing the reverberating clang of the words at that point, the trial court cut off the exchange. But the end did not come before the jury had heard the victim "testify" that the defendant had tried to kill him (memory of a past event), that the defendant was trying to kill him (a present intent, but of another person),<sup>155</sup> and that the defendant had declared his intent to kill the victim (hearsay within hearsay within hearsay).

The trial court simply admitted the evidence as reflecting on the victim's state of mind, and the appellate court opined that the defendant's defense of accident made the victim's state of mind relevant.<sup>156</sup> In suggesting that the testimony of this witness was properly admitted, the court completely trampled *Shepard* in its unthinking approval of state of mind which looks entirely backward. The extension of *Hillmon* by the reasoning of this case—should it be followed by other courts—is substantial and, one must add, unprincipled.

*Gann v. Meek*<sup>157</sup> is another case which extends *Hillmon* without reasoned analysis. The litigation was between the wife and the mother of a Marine killed in combat. Both claimed the proceeds of his insurance policy. The wife was the named beneficiary, but the mother contended that her son had changed the policy to name her as the beneficiary. The jury awarded the proceeds to the mother. The mother's evidence consisted of a letter from her son to his brother in which he wrote, "Speaking of Mother Bud I did change my insurance if any one gets it Mom will get it all [sic] . . . ."<sup>158</sup>

The statement faces entirely backward to a past action. The inapplicability of *Hillmon* and the warning of *Shepard* are directly involved. Even so, the letter was admitted.<sup>159</sup> The court recog-

154. *Id.*

155. *See id.* The state of mind of the victim of a crime is normally irrelevant. This declaration is reminiscent of "Dr. Shepard is trying to poison me." *Cf. supra* text accompanying note 127.

156. 107 Mich. App. at 542, 309 N.W.2d at 659 (Bronson, P.J., dissenting) (citing *People v. White*, 401 Mich. 482, 257 N.W.2d 912 (1977)). The majority joined in Presiding Judge Bronson's resolution of the hearsay issue. *Id.* at 538, 309 N.W.2d at 657. Though the court cited *White* for this proposition, one must look in vain for the promised support in that opinion.

157. 165 F.2d 857 (5th Cir.), *cert. denied*, 334 U.S. 849 (1948).

158. *Id.* at 858 n.1.

159. *Id.* at 859. The court emphasized that the letter was genuine, which is,

nized that the letter, by itself, was insufficient to carry the case to the jury. Consequently, the court looked to other evidence. A corporal who had served with the deceased testified that the mail service in the South Pacific during the war was irregular and loss of mail was frequent. The court also took judicial notice that mail piled up in the office of the Veterans Administration and that eventually many letters were misplaced or lost. The inference, thought the court, was that the deceased's letter containing the change of beneficiary was lost. This was the total of the evidence. Holding that the evidence was "abundant" to show that the soldier had done all he could to change the beneficiaries, the court concluded that "justice requires that we invoke equitable rules in order to give effect to a plainly manifest intent."<sup>160</sup>

We lay aside the evidence of the difficulties in mail service as of little or no value. What remains is a letter in which the insured states that he had changed his beneficiary. To prove the change in beneficiary, the letter is plainly hearsay. Nevertheless, with a citation to *Hillmon* and a passing reference that the letter "almost" amounted to a dying declaration, the court admitted the evidence.<sup>161</sup> Of course the letter looked entirely backward. The hearsay dangers of ambiguity and misperception are present. The insured's actions may have been legally insufficient to change the beneficiary. In addition, the danger of insincerity looms large in view of other portions of the letter which refer to revelations apparently made about the wife in the brother's prior letter. The danger of loss of memory is substantial under the circumstances of a wartime combat zone. At least three, if not all four, hearsay dangers are present. Certainly the *Hillmon* doctrine furnishes no basis for admitting the evidence, as *Hillmon* requires an intention to do an act in the future. The admonition of *Shepard* against admitting statements which call up past action applies. The declaration is entirely backward-facing. No support in reason or precedent can be found for the result.

These two cases—*Newman* and *Gann*—represent the outer

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of course, irrelevant to the hearsay question. The court also suggested that admission of the letter was stipulated, although it then proceeded to determine whether the letter was admissible. *See id.*

160. *Id.* Perhaps one could explain the court's result by assuming that it was analogizing to will cases. Both forward- and backward-looking statements of mind have been admitted to determine the intent of the testator in will contests. *See infra* notes 195-98 and accompanying text. A court disposed to find for the mother against a war bride may have found the analogy persuasive, although the opinion does not mention this line of reasoning.

161. 165 F.2d at 859-60 (citing *Hillmon*, 145 U.S. 285 (1892)).

limits of the extension of *Hillmon*. Indeed, if *Newman* and *Gann* are good law, then *Hillmon* has been extended to the point at which the hearsay rule has passed from the scene. Such a result would be highly ironic, for Cardozo was the judge who warned against this course in *Shepard*. Cardozo was aware of the trend of the decisions following *Hillmon*. Not afraid to make new law, he was savvy enough to dress major changes in the law with cloakings of mere adjustments to existing, well-accepted rules.<sup>162</sup> Surely he must have seen the opportunity to reach into *Hillmon* and turn the hearsay rule—cloaked as a mere minor extension of the state of mind exception—into something structurally different. Cardozo not only refused the opportunity but added a dictum to his opinion in *Shepard* which flatly rejected it.

For five decades, the mighty weight of Cardozo helped preserve the rule against admission of backward-looking statements under the state of mind exception to the hearsay rule. Yet even if we dismiss *Newman* and *Gann* as badly decided and ill-considered opinions, additional cracks have appeared in the *Shepard* dike. Some have appeared by way of inadvertence, and others by conscious choice, as the discussion in this section indicates. As courts and commentators stand before the dike today and ponder whether to insert their fingers, they must realize that the vitality of the hearsay rule is at stake. If the rule is to be preserved, and not turned into a matter of judicial discretion, the courts must be more vigilant in applying the state of mind exception. Furthermore, the exception should be limited to admitting forward-looking intentions. Such a course for the stream of the judicial process would allow admission of the intention in the bulk of cases in which it is thought necessary but at the same time preserve the hearsay rule itself.

#### B. Annunziato: *The Alloy of Memory and Intention*

In contrast to Justice Cardozo's solicitousness for the hearsay rule is another judicial giant's willingness to weaken the rule. Judge Henry Friendly wrote the opinion for the Second Circuit in *United States v. Annunziato*,<sup>163</sup> where the court admitted evidence of

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162. The best example is his seminal products liability opinion in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). Judge Cardozo reached into the inherently dangerous exception to the rule requiring an injured party to be in privity with the manufacturer, and pulled out the modern law of products liability.

163. 293 F.2d 373 (2d Cir.), cert. denied, 368 U.S. 919 (1961).

a previous action when it was coupled with a present intention to do an act in the future.

Salvatore Annunziato, a union official, was charged with accepting bribes from a contractor for which his engineers were working. The bribes allegedly came from the president of the contractor, Harry Terker. Harry Terker was deceased by the time of the trial. To prove the passing of the money, the government called Richard Terker, the son of the deceased president, and himself the secretary-treasurer of the corporation. Richard Terker testified to a luncheon conversation he had had with his father:

The father informed the son "that he had received a call from Mr. Annunziato" and "that he had been requested by Mr. Annunziato for some money on the particular project in question, the Bridgeport Harbor Bridge. I asked him what he intended to do, and he had agreed to send some up to Connecticut for him."<sup>164</sup>

The defendant objected to the statement on the ground that it was hearsay. The trial court allowed the evidence as an admission by a coconspirator.<sup>165</sup> Judge Friendly approved admitting the evidence on this theory, but before taking up discussion of that ground, he chose to explore an alternate basis for admission: the exception for a state of mind to do an act begun in *Hillmon*. Judge Friendly's argument, as always, is scholarly, subtle, and suasive. In this case, however, the analysis cannot be sanctioned.

The discussion begins by hypothesizing that if the envelope with the money had popped out of Harry Terker's pocket and he had said, "this is money I'm sending up to Annunziato," the statement would be admissible under *Hillmon* as future intention. The opinion then asks rhetorically whether "a different result is demanded because here the declarant accompanied his statement of future plan with an altogether natural explanation of the reason, in the very recent past, that had prompted it."<sup>166</sup>

Conjuring up statements of what Harry Terker might have said is ultimately unproductive. Hypothetical statements can be concocted to fit within almost any exception to the hearsay rule.<sup>167</sup> An analyst must also question the court's characteriza-

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164. *Id.* at 376.

165. *Id.* at 377.

166. *Id.*

167. If Terker had said, "This money that I skimmed from the profits I am

tion of the statement as merely embodying a natural explanation of the reason for the intention. Close examination reveals that the testimony of the witness Richard Terker does not contain a "statement" at all. Rather, Terker is paraphrasing the conversation. The statement of intention to meet might well have been far separated in the conversation from the statements of "explanation" for the intention.

Leaving aside these threshold objections to the analysis, we proceed to the crux of the argument in *Annunziato*. After distinguishing *Shepard* as a case in which the testimony faced entirely backward, the discussion in *Annunziato* concludes as follows:

Here the "most obvious implications" of Harry Terker's statement looked forward—he was going to send money to Bridgeport. To say that this portion of his statement is sufficiently trustworthy for the jury to consider without confrontation, but that his reference to the telephone call from Annunziato which produced the decision to send money is not, would truly be swallowing the camel and straining the gnat. . . . True, inclusion of a past event motivating the plan adds the hazards of defective perception and memory to that of prevarication; but this does not demand exclusion or even excision, at least when, as here, the event is recent, is within the personal knowledge of the declarant and is so integrally included in the declaration of design as to make it unlikely in the last degree that the latter would be true and the former false. True, also, the statement of the past event would not be admitted if it stood alone, as the Shepard case holds; but this would not be the only hearsay exception where the pure metal may carry some alloy along with it.<sup>168</sup>

The basic premise of Judge Friendly's analysis is that the statement is primarily forward-looking. The pure metal carries with it some alloy.

On no basis can the statement be characterized as primarily

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sending to Annunziato," the statement would be a declaration against interest. See FED. R. EVID. 804(3). If Terker had accidentally dropped the envelope, and exclaimed in the cant of the construction industry, "Goodness gracious, that is the bribe for Annunziato; don't look!", that would be admitted as an excited utterance. See FED. R. EVID. 803(2). Such exercises are fruitless, for the "if" at the beginning of each sentence betrays the effort.

168. *Annunziato*, 293 F.2d at 377-78 (footnote omitted).

forward-looking. The events described in Terker's statement may be parsed into three sections: 1) the declarant received a telephone call; 2) Annunziato asked for money; and 3) the declarant agreed to send money to him. Two of these three events face toward the past. The same result is reached when one looks to the purpose of the evidence in the government's case. The statement of intention to send money to Annunziato was completely meaningless. It was other evidence which linked a delivery of money to Annunziato. Only the backward-looking portion of the declaration held the vein of value. The relevance of Terker's statement was to tie Annunziato to a bribe request. This faced entirely to the past. Finally, inspection of the statement shows that even the statement of "intention" does not face forward. The statement is that Terker "had agreed" to send money. Only by inference from this prior agreement can an intention to send the money be found. In light of this analysis, a more accurate metaphor for the statement would be that the ton of base metal is carried in by the ounce of gold—or iron pyrite—found within it.

At the time it was decided, *Annunziato* appeared to pose real danger to the hearsay rule. Granted, the case applies only if the declaration of past action is coupled with a declaration of future intent, but litigants and courts can often find whatever they are seeking in a given statement. More than a score of years has now passed, however, and the danger seems to have been overestimated. Courts and commentators have given the *Annunziato* rationale a mixed reception. Judge Weinstein and Professor Berger, no friends of the hearsay rule, have been the strongest critics of *Annunziato*. They reject its basic premise that the statement in its "most obvious implications" looked forward.<sup>169</sup> A recent student note exploring the limits of the *Hillmon* doctrine agrees.<sup>170</sup> Professor Saltzburg calls the decision "disturbing" and

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169. 4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 803(3)[05], at 803-119. These authors reason as follows:

The difficulty with the conclusion in *Annunziato* is that the evidence was much more powerful and probative in looking backwards—to show that the defendant had requested the payment as a bribe—than in looking forward. The elephant of the past is pulled in by the tail of the future.

*Id.* (footnote omitted).

170. See Note, *Federal Rule of Evidence 803(3) and the Criminal Defendant: The Limits of the Hillmon Doctrine*, 35 VAND. L. REV. 659, 697 (1982) ("The *Annunziato* decision extended the *Hillmon* doctrine beyond its intended scope. . . . With his disarming language Judge Friendly deflected attention from the significant departure that *Annunziato* made from the *Shepard* limitation.").



approves a case criticizing *Annunziato*.<sup>171</sup> Professors Louisell and Mueller have approved the decision, although—significantly—they developed their own rationale supporting the result.<sup>172</sup> The courts, too, have shown an ambivalence about accepting the *Annunziato* doctrine. Surprisingly few decisions exist. Of the many cases citing *Annunziato*, most refer to the discussions of an admission by a coconspirator, a declaration against penal interest, the production of a document under the Jencks Act,<sup>173</sup> or a nonverbal part of an act.<sup>174</sup> Few reported decisions have discussed the admissibility of a statement containing both backward-looking and

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171. Saltzburg, *supra* note 51, at 1054 n.165. The case approved by Professor Saltzburg is *United States v. Mandel*, 437 F. Supp. 262 (D. Md. 1977) (mem.), *aff'd in part, vacated and remanded in part*, 591 F.2d 1347 (4th Cir.), *aff'd*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980). For a discussion of *Mandel*, see *infra* note 174.

172. 4 D. LOUISELL & C. MUELLER, *supra* note 3, § 442, at 572-76. Professors Louisell and Mueller advance a five-fold rationale to support the results in *Hillmon* and *Annunziato*. *Id.* They argue that in both cases the results follow from "application of the principles of trustworthiness and necessity which underlie hearsay exceptions." *Id.* at 574-75. They note that in both cases: 1) the declarant made the statement "to a person obviously close and trusted . . . on a serious matter under circumstances suggesting no motive to misrepresent"; 2) the declarant stated an intent "to embark upon a particular course of action for a specific reason"; 3) the declarant described an immediate course of action of a serious nature"; 4) the matter had been personally observed recently; and 5) the declarant had died or disappeared. *Id.* at 575-76.

This argument makes sense, but the fallacy is that it is dependent on the individual fact situations of the two cases. The hearsay exception announced in *Hillmon* and expanded in *Annunziato* is not tied so tightly to these five qualifying principles. Instead, the exception is established as rule of law and the courts are set free to match the facts of later cases to the rule without regard to these careful limitations and cautions. Courts seek out the kernels of earlier cases, not the excess baggage of cautions to application. Thus, the argument fails because hearsay exceptions must be based on principles of necessity and trustworthiness which are applicable to the class of cases falling under the exception, not to the facts of one or two cases. See *supra* notes 42 & 61 and accompanying text.

173. 18 U.S.C. § 3500 (1982). The Jencks Act concerns demands for production of statements and reports of witnesses in federal criminal prosecutions. See *id.*

174. See *Chambers v. Mississippi*, 410 U.S. 284 (1973) (declarations against pecuniary or proprietary interest are traditionally thought to be inherently reliable because motivated by extraneous considerations); *United States v. Overshorn*, 494 F.2d 894 (8th Cir. 1974) (hearsay statements made by coconspirator out of presence of the accused which seemed to inculcate declarant are admissible); *United States v. Glasser*, 443 F.2d 994 (2d Cir. 1971) (note found by shopowner after plate-glass window was destroyed was admissible as an utterance contemporaneous with a nonverbal act of throwing acid on the window); *United States v. Crisona*, 416 F.2d 107 (2d Cir. 1969) (erroneous ruling of trial court that tapes of telephone conversations were not required to be produced under the Jencks Act was not reversible error where tapes contained nothing that would have been additionally useful to defense); *United States v. Dinaldi*, 393 F.2d 97 (2d Cir. 1968) (statements by any member of an illegal joint enterprise are admissible against the others).

forward-looking portions, and not all of these cases cite *Annunziato*. To date, three courts have announced opposition to the rationale articulated in *Annunziato*, and five courts have adopted it.

Of the three cases disapproving *Annunziato*, two rejected the state of mind theory, but went on to admit the declaration as an admission of a conspirator, the alternate ground for admission in *Annunziato*.<sup>175</sup> The third case, also involving a bribery prosecution, rejected the *Annunziato* rationale, in part because no necessity was shown, but primarily because "if testimony of this character is received, it could open the door for widespread fabrication."<sup>176</sup>

Five cases have approved and applied the extension of *Hillmon* which was first expressed in *Annunziato*.<sup>177</sup> A straightforward application of the past-future state of mind dichotomy was accomplished in *Smith v. Slifer*.<sup>178</sup> The declarant was killed in an automobile accident allegedly caused by the negligence of her driver. The plaintiff offered three statements to show an agree-

175. *United States v. Margiotta*, 688 F.2d 108, 136 (2d Cir. 1982) (declarant reported intent to offer one-half of commissions to defendant if he secured town's insurance business as agreed; rejected as past act under rule 803(3), but admitted as admission by conspirator), *cert. denied*, 103 S. Ct. 1891 (1983); *United States v. Iaconetti*, 406 F. Supp. 554, 559 (E.D.N.Y.) (Judge Weinstein commented that *Annunziato* "probably went beyond the limits of Rule 803(3)," on the state of mind exception, but then allowed admission of the statement on other grounds), *aff'd*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

176. *United States v. Mandel*, 437 F. Supp. 262, 266 (D. Md. 1977) (mem.), *aff'd in part, vacated and remanded in part*, 591 F.2d 1347 (4th Cir.), *aff'd*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980). The trial judge spoke of his experience in trying cases involving a charge of aiding and abetting the operation of a moonshine still. He noted that the usual defense includes an offer to produce witnesses who will say that defendant told them of his intent to go rabbit hunting. The defendant then will claim that while hunting he stumbled onto the still. The possibility of fabrication is clear.

Also clear is the wide opening for fabrication to a person who is aware of this exception to the hearsay rule. Any self-serving statement looking to the past can be coupled with a future intent to allow the entire statement to be admitted. For example, assume a person is injured on his own time, but would be covered by workers' compensation had the injury occurred on the job. Could not the person tell his wife, "I hurt myself on the job today, so I will have to file a workers' compensation claim"? This would be a complete fabrication, but it would be admissible under *Annunziato*.

177. See *infra* notes 178-89 and accompanying text. A sixth case is *United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977). In this case, Judge Friendly had an opportunity to elaborate on the *Annunziato* doctrine, but declined to do so since the statement was admissible under the admission by a conspirator exception to the hearsay rule. *Id.* at 1299-300. A footnote does cite *Annunziato*, but then leaves "the argument as to the state of mind exception to another day." *Id.* at 1298 n.1.

178. 1 Cal. App. 3d 748, 81 Cal. Rptr. 871 (1969).

ment to share expenses of the ride in order to remove the case from the guest statute. The trial court excluded the statements and the plaintiff appealed. Declaration one was that defendant had run out of gas but it was not the declarant's fault as she had already paid for her ride that week. Since this statement faced entirely toward the past, the appellate court ruled it was properly excluded. Declaration two was that decedent would have to get change to pay defendant for her ride the next week. This statement looked entirely toward the future, and was admitted. Declaration three was that declarant had been required to pay for parking but could take it from the amount owed for the following week. This was the *Annunziato* statement, and the court ordered it admitted.<sup>179</sup>

A like result was reached by a South Dakota court in *Johnson v. Skelly Oil Co.*<sup>180</sup> The deceased's statement was offered to prove that she was performing duties for her employer at the time of her injury, so that workers' compensation benefits would be awarded. Her statement to her husband was that she had run out of stamps at work Friday, so she would mail the letters she brought home from work on Monday morning. She was seriously injured in an accident on Monday. The court approved admission of the evidence, citing *Hillmon* and *Annunziato*,<sup>181</sup> and affirmed the judgment that declarant had been injured while performing a work-related task.

These two cases reveal one of the seductive characteristics of the *Annunziato* rule. It is easy to apply. If a court can find a statement of intention in the declaration, the entire declaration rides into evidence. While ease of application is often a positive feature for a rule of law, it does not seem substantial enough in this instance to outweigh the possibilities of fabrication inherent in the exception.<sup>182</sup>

Three recent cases show the continued expansion of the exception. The first of these is *Brown v. Tard*.<sup>183</sup> In a prosecution

179. *Id.* at 754, 81 Cal. Rptr. at 875. The *Smith* court did not cite *Annunziato*.

180. 288 N.W.2d 493 (S.D. 1980). The state evidence rule in question was identical to rule 803(3). Compare FED. R. EVID. 803(3) with S.D. CODIFIED LAWS ANN. § 19-16-7 (1979).

181. *Id.* at 494.

182. See *supra* note 176.

183. 552 F. Supp. 1341 (D.N.J. 1982). Curiously, *Brown* cites a number of important state of mind cases, but not *Annunziato*. See *id.* at 1352 (citing *United States v. Cicale*, 691 F.2d 95 (2d Cir. 1982); *United State v. Jenkins*, 579 F.2d 840 (4th Cir.), *cert. denied*, 439 U.S. 967 (1978); *United States v. Pheaster*, 544

for murder, the state offered the declaration of the victim that “[s]he had ‘run into one of the guys in the building, the maintenance guys, and that he was going to come up to fix the air conditioner.’”<sup>184</sup> As discussed earlier, this statement involves the action of another person and the intention is not even that of the declarant.<sup>185</sup> Even if we stretch the statement to find that the declarant’s intention to meet the maintenance man is implied, the entire material value of the statement is contained in the portion which recites the past action. The state was attempting to prove the identity of the perpetrator, and the statement implicates the defendant only in its backward-facing aspects. To say that the forward-looking portion carries in this backward-facing portion seems truly to be “swallowing the camel and straining at the gnat.”<sup>186</sup>

The rubber tree of the past was also carried in by the ant of the future in *People v. Malizia*.<sup>187</sup> The state was attempting to prove the identity of the defendant as the person who shot and killed the victim-declarant. The declaration was that the victim owed the defendant money, he wanted to pay, he had received money to make a drug deal, and he was going to see if the defendant had any drugs. Here, at least, the portion identifying the defendant is found in the forward-looking portions of the statement. Yet the court fell into error when it faced the defendant’s objections that the statement of intention implicated the act of another. In responding to that argument, the court noted that even if all reference to the victim’s intent to meet the defendant were deleted, the acknowledgement of the debt to defendant would nevertheless support the inference that the victim was going to meet the defendant.<sup>188</sup> That is so, but the removal of the intention portion of the statement subtly removed all bases for admitting the statement. This problem went unnoticed.

One court extended *Annunziato* so far that it appears to have eliminated the requirement for a forward-looking portion of the declaration. The declarant in *State v. Cughlata*<sup>189</sup> was a small-time criminal, soon to become a murder victim. He made two declara-

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F.2d 353 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977)) (other citations omitted).

184. *Id.* at 1350-51.

185. *See supra* notes 104-05 and accompanying text.

186. *Annunziato*, 293 F.2d at 378.

187. 92 A.D.2d 154, 460 N.Y.S.2d 23 (1983).

188. *Id.* at 161-62, 460 N.Y.S.2d at 28.

189. 372 A.2d 1019 (Me.), *cert. denied*, 434 U.S. 856 (1977).

tions. In the first, he told a witness about arrangements to make a hashish purchase, and that he intended to go with two people, one of whom was named Frank (the name of one of the defendants). The court admitted this declaration over the objection that it included the action of others.<sup>190</sup> The other declaration was a written note, in which the victim said, "Split with John Meraites (or Miraites) and Frank Cogliata at 9:00 p.m. 14th of August. In case of no return check them for responsibility carrying \$2000.00 [sic]."<sup>191</sup> The second sentence of direct accusation of the defendants by the deceased declarant was tastefully excised by the court, but the first sentence was submitted to the jury. Over the defendants' hearsay objection that the note recited past events, the court gingerly placed both declarations together, cited *Annunziato*, and said "While there are minor references therein to the past, the assertions in essence look forward rather than back."<sup>192</sup> This interpretation of *Annunziato* is at least arguable as to the conversation with the witness. It is completely unsupportable as to the note. The note looks entirely backward.

As with the *Hillmon* case itself, the *Annunziato* decision not only greatly expands the state of mind exception to the hearsay rule but also is susceptible to elastic application. Judge Friendly did attempt to limit his opinion by requiring: 1) the statement must be recent; 2) the statement must be within the personal knowledge of the declarant; and 3) the past event must be so integrally included in the intention as to make it highly unlikely that the former is false though the latter is true.<sup>193</sup> As one might expect, these limitations do not appear in the later cases applying *Annunziato*.

To a judge searching the precedents for guidance in making a decision, the principle of the case is the thing. This allows the law to grow, but it also results in applications of the principle to cases where application is unwarranted.<sup>194</sup> Rarely doubting the wisdom of the precedential rule, the successor courts apply the principle to fact situations further and further removed from

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190. *Id.* at 1028-29. See *supra* note 92.

191. 372 A.2d at 1026.

192. *Id.* at 1027 n.4.

193. *Annunziato*, 293 F.2d at 378.

194. "Each [rule] has its origin in a justifiable holding in a particular fact situation. By lazy repetition the holding becomes a 'rule,' entirely divorced from its creative facts." *McKinney v. Yelavich*, 352 Mich. 687, 696, 90 N.W.2d 883, 887 (1958).

those which initially gave the principle life. This is both the genius and the glibness of the judicial process.

#### VI. ADDITIONAL EXPANSIONS OF *HILLMON*

Other expansions of the state of mind exception to the hearsay rule are not well established. The most defensible of these allows admission of a testator's declaration concerning her past intent in writing, executing, or revoking a will.<sup>195</sup> Even though this special exception allows statements of past intent as well as pure statements of future intention, thus running afoul of the caution in *Shepard*, the courts have uniformly admitted such statements because of the special necessity for receiving them.<sup>196</sup> The testamentary intent is known only by the testator, and by definition, she is unavailable.

Creation of this special class of admissible evidence is objectionable on logical grounds, but no argument will be made here as the law is solidly established. The courts should, however, be vigilant not to extend this rule beyond the narrow situation involving a will. Some courts have not been sufficiently vigilant. One court mentioned this line of cases, and then admitted into evidence a declaration by the decedent to "show that he had in fact executed a contract to make a will at some time in the past."<sup>197</sup> Another court approved the admission of a letter from a Marine killed in action which stated that he had changed the beneficiary on his life insurance policy.<sup>198</sup> These cases resemble the

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195. See FED. R. EVID. 803(3). Rule 802(3) provides the state of mind hearsay exception, excepts statements of memory, then provides an exception to the exception to the exception for will cases:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will [is not excluded by the hearsay rule].

*Id.*

196. The cases are uniform, beginning with *Sugden v. Lord St. Leonards*, 1 C.P.D. 154 (1876). Commentators have approved the group of cases as a class. See, e.g., 4 D. LOUISELL & C. MUELLER, *supra* note 3, § 443, at 385; C. MCCORMICK, *supra* note 38, § 296, at 853; 4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 803(3)[05], at 803-121; Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224, 238 (1961). Arguably the transgression of *Shepard* in these cases is insignificant because the evidence looks to a prior state of mind, not to a prior act. For a discussion of this issue, see *supra* note 122 and accompanying text.

197. *Quayle v. Mackert*, 92 Idaho 563, 568, 447 P.2d 679, 684 (1968).

198. *Gann v. Meek*, 165 F.2d 857 (5th Cir.), *cert. denied*, 334 U.S. 849 (1948). This case is discussed *supra* at notes 157-60 and accompanying text.

will cases, but closer scrutiny reveals that they leave the door open to admitting hearsay declarations in any case involving the disposition of property by a person now deceased. This would be a further expansion of the exception, and cannot be justified in view of the intrusion of the possibility of memory loss and the greater possibilities for insincerity and fabrication.

One article goes so far as to suggest that the exception should be broadened to include nontestamentary cases by analogy to these will cases.<sup>199</sup> The article recognizes that the hearsay rule would be broken down, but dismisses this difficulty by pointing out that there are already several exceptions to the rule.<sup>200</sup> Fortunately, in the fifty years since the article was written, no additional support for that position has appeared.

Since the will cases represent a special dispensation from the logic of the state of mind exception to the hearsay rule, we ought to be able to expect the courts to take care to keep that line of cases on the straight and narrow. Perhaps the language of Federal Rule of Evidence 803(3), which specifically limits the exception, will have the desired narrowing effect.<sup>201</sup>

Statements referring to past events are also admitted under the state of mind exception when defenses of self-defense, suicide, or accidental death are raised, on the theory that expressions of fear of the accused rebut such defenses.<sup>202</sup> Like the will cases, there is the potential for unwarranted expansion of this line of cases, as demonstrated by one notable California case<sup>203</sup> in which the court extrapolated that the victim's fear of the defendant was relevant to the defendant's intent to harm the victim.

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199. See Hutchins & Slesinger, *supra* note 43, at 298. These commentators do reserve a large measure of discretion in the trial judge to exclude "remote and suspicious statements." *Id.* at 298 n.59.

200. *Id.* at 289-90.

201. See *supra* note 195.

202. The cases supporting these rules have solidified from repeated balancing by the courts of the prejudice of the evidence against its probative value. They are collected in *United States v. Brown*, 490 F.2d 758, 767-69 (D.C. Cir. 1974); see also 4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 803(3)[04], at 803-108 to -110; Slough, *supra* note 192, at 235-36.

203. See *People v. Merkouris*, 52 Cal. 2d 672, 344 P.2d 1 (1959), *cert. denied*, 361 U.S. 943 (1960). In *Merkouris*, the California Supreme Court allowed the victim's declaration of fear of the defendant to weigh on the "probability that the fear had been aroused by the victims' knowledge of the conduct of defendant indicating his intent to harm them . . ." *Id.* at 682, 344 P.2d at 6. Clearly, this allowed the declarant to state the intent of the defendant. Other state courts have allowed similar statements, which prompted a federal court to say that the opinions show "various errors in reasoning or [a] simple lack of concern." *United States v. Brown*, 490 F.2d 758, 772 (D.C. Cir. 1973).

However, that case has been rejected by the California Evidence Code,<sup>204</sup> commentators,<sup>205</sup> and other, recent cases in which similar arguments were presented.<sup>206</sup> At least for the present, these lines of cases seem safely bound, although enterprising attorneys continue to press expansion of the hearsay rule when opportune to their clients.<sup>207</sup> A court which is not careful to reason the hearsay analysis may again start the attack on the hearsay rule from this quarter.

Various commentators have advocated additional expansions of the state of mind exception, but without case support. After mentioning cases involving the intent of an insured, and by analogy to the will cases, Weinstein and Berger suggest that there is as much special need for the statement of a deceased insured as there is for the statement of a deceased testator. Consequently, they argue for the creation of a similar exception.<sup>208</sup> The other arguments are more ephemeral. Payne has argued for a rule of straight discretion on the part of the trial judge when hearsay state of mind evidence is presented.<sup>209</sup> Weinstein and Berger have also advocated increased use of the catch-all exceptions allowed by the Federal Rules of Evidence to admit a greater number of "trustworthy" statements.<sup>210</sup>

These latter expansionary pressures have not as yet borne fruit. One cannot but expect that some day in the near future, an appropriate fact pattern will come before a court sympathetic to these arguments, and new impetus will be imparted to the undercutting of the hearsay rule through the use of the state of mind exception set in motion by *Hillmon*.

204. CAL. EVID. CODE § 1250 advisory committee note (West 1966).

205. See R. LEMPERS & S. SALTZBURG, *supra* note 51, at 426-27.

206. The leading case is *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973). See also *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980); *State v. Christensen*, 129 Ariz. 32, 628 P.2d 580 (1981).

207. In *Brown*, the prosecution offered and the trial court permitted the following testimony:

Q: You mentioned, Mrs. Parks, that [the victim] was frightened. What was he frightened of?

A: Frightened that he may be killed.

Q: And who did he say he was frightened was going to kill him?

A: Mr. Roland Brown [defendant].

490 F.2d at 762. The appellate court reversed. *Id.* at 782.

208. 4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 803(3)[05], at 803-122.

209. See Payne, *supra* note 6, at 1057. Accord Weinstein, *Symposium—Hearsay Evidence: Probative Force of Hearsay*, 46 IOWA L. REV. 331, 338 (1961).

210. See 4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 803(3)[05], at 803-115. Cf. 4 D. LOUISELL & C. MUELLER, *supra* note 3, § 442, at 581.



## VII. A PROPOSED RULE: AVAILABLE MEN SHOULD TELL NO TALES

Some exceptions to the hearsay rule require that the declarant be unavailable to testify at the trial, while other exceptions allow the declaration to come into evidence without regard to the availability of the declarant.<sup>211</sup> The *Hillmon* doctrine has always been classed with the latter, larger group of exceptions.<sup>212</sup> This is so despite the fact that the declarant Walters was either dead or missing in the *Hillmon* case itself.<sup>213</sup> This section develops the argument that the *Hillmon* doctrine should be conditioned on the unavailability of the declarant.

Hearsay is a declaration made out-of-court which is offered for the truth of the matter asserted in the declaration.<sup>214</sup> It depends on the credibility of the out-of-court declarant, and so is objectionable because the jury is unable to observe the witness being cross-examined under oath.<sup>215</sup> Exceptions to the ban of the hearsay rule have been created for situations which provide a combination of necessity and reliability which the courts regard as an adequate substitute for the information conveyed to jurors by in-court witnesses.<sup>216</sup> The more important of these two considerations is the reliability or trustworthiness of the circumstances surrounding the declaration, with less consideration given to the necessity for receiving the evidence.<sup>217</sup>

Necessity for receiving the evidence exists when the *Hillmon* declarant is unavailable. Does necessity exist when the declarant may be called to the stand to testify to the act inferred from the intention? Some commentators and courts have argued that necessity exists because the hearsay testimony is more reliable than the declarant's later testimony from the witness stand of his prior state of mind.<sup>218</sup> Memory of an earlier state of mind might suffer

211. Compare FED. R. EVID. 803 (availability of declarant immaterial) with FED. R. EVID. 804 (declarant must be unavailable).

212. See FED. R. EVID. 803(3).

213. See *supra* text accompanying notes 16-17.

214. FED. R. EVID. 801(c).

215. C. McCORMICK, *supra* note 38, § 245, at 583; J. WIGMORE, *supra* note 3, § 1362, at 3-10.

216. J. WIGMORE, *supra* note 3, § 1420, at 251-53.

217. Cf. FED. R. EVID. 803, 804 advisory committee comments; J. WIGMORE, *supra* note 3, §§ 1420-1422, at 251-55.

218. J. WIGMORE, *supra* note 3, § 1714, at 90-91. This view apparently derives from the *Hillmon* opinion, which pointed out that after the death of the declarant there can be no other way of proving his intention, and proceeded to say,

from both memory loss and insincerity. But, of course, a *Hillmon*-type statement is not offered to prove the earlier intention. It is offered only for the inference that the intended action later was accomplished.<sup>219</sup> The fact to be proved is the subsequent act. Given the ever-present possibility of frustration of intention, the reliability of an intention to prove an act can hardly be of equal weight to the testimony of the actor that the act was undertaken.<sup>220</sup>

The real necessity for this exception arises when the declarant is unavailable.<sup>221</sup> When the declarant is available, the necessity for receiving the out-of-court declaration vanishes.<sup>222</sup>

If the act be in issue, and the declarant be available, the proponent of the evidence will have testimony to support the act. Other evidence in the form of witnesses to the act is likely to be at hand. One cannot argue there was necessity on the facts of the *Hillmon* case, and conclude therefore, that necessity exists for this exception. There was no real necessity for the evidence on the individual facts of *Hillmon*;<sup>223</sup> but even if there had been, the necessity for a hearsay exception must arise from the inherent nature of a situation as an archetype, not from the unique facts of a

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[W]hile he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation.

Mutual Life Ins. Co. v. *Hillmon*, 145 U.S. 285, 295 (1892). See also *Oberman v. Dun & Bradstreet, Inc.*, 507 F.2d 349, 352 (7th Cir. 1974).

219. See *supra* text accompanying note 26.

220. Reduced inherent reliability would appear to place the *Hillmon* doctrine closer to the unavailability required exceptions collected in rule 804 than to the availability irrelevant exceptions collected in rule 803:

[A] hearsay statement falling within one of [rule 803's] exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard.

FED. R. EVID. 804 advisory committee comment.

221. See *Seligman, supra* note 11, at 155-58. Cf. *Hutchins & Slesinger, supra* note 43, at 285.

222. Professors Louisell and Mueller point out that when conduct of a person is at issue, "It simply will not do to say that his prior statement of intent is likely to be better evidence of conduct than his own letter testimonial recollection of that conduct . . ." 4 D. LOUISELL & C. MUELLER, *supra* note 3, § 442, at 542.

223. Contrary to popular belief, see, e.g., *Hutchins & Slesinger, supra* note 43, at 288, a plethora of evidence was available and was presented by both sides in the *Hillmon* litigation. See *supra* notes 18-19 & 42.

single case.<sup>224</sup> In situations involving the use of a statement of intention to prove a later action, the probabilities are that other evidence will be available, and that the other evidence will be more reliable because the witnesses will be in court before the jury.

The lack of reliability of a *Hillmon*-type statement when the declarant is available also points to a requirement of unavailability for this hearsay exception. This is so whether the witness is a person who heard the declaration or the declarant herself.

Should the witness be the declarant, the danger of fabrication looms large.<sup>225</sup> A witness could recall stating whatever intention convenience requires that he possessed. The only purpose would be corroboration of the witness' testimony that the act later took place. In effect, the witness is allowed to make a prior consistent statement. This defeats the carefully-drawn compromise for admission of a prior statement of a witness found in Federal Rule of Evidence 801(d). That rule takes a middle ground and allows prior statements of witnesses only under specific conditions.<sup>226</sup> Allowing the admission of prior statements of intent by an available declarant would seriously erode this rule:

The situation is little improved when the witness is a companion of the declarant. When the declarant has become unavailable, the circumstances surrounding the statement are most likely to have been relatively trustworthy. *Hillmon* is a good example. In *Hillmon* and the other cases, the ultimate action, usually becoming the victim of a murder, was not anticipated. In effect, the statement was made before any motive to falsify arose.<sup>227</sup> On the

224. See *supra* note 42.

225. Two commentators say that when the witness is available, she will always be asked about the act rather than an earlier declaration of intention, and so the danger is only theoretical. R. LEMPERT & S. SALTZBURG, *supra* note 51, at 429. This view misses the possibility of use of the declaration to corroborate the testimony of the act. See *infra* note 226 and accompanying text.

226. See FED. R. EVID. 801(d). Rule 801(d) provides in pertinent part that a statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him . . . .

*Id.*

227. Cf. *Great Am. Indem. Co. v. McCaskill*, 240 F.2d 80, 82-83 (5th Cir. 1957) (statements of intent to travel made to family or associates are trustworthy

other hand, when the declarant is available, the guarantee of trustworthiness provided by this unanticipated turn of events is missing. The witness may well have been an accomplice.<sup>228</sup>

This danger of insincerity is so large that the statement should be excluded if the declarant remains available. Two cases in which *Hillmon* statements were offered even though the declarant remained available illustrate this danger. Both involved criminal prosecutions in which the defendants offered their own prior declarations of intent to exonerate themselves.<sup>229</sup> The defendant in each case offered a declaration of intent to show an innocent purpose for going to the crime scene. Given that one who premeditates a crime would likely wish to cover his tracks, it seems that a logical method for so doing would be to tell other persons a false reason for an intended act. If someone wished to commit a murder and later explain the occurrence as an accident, telling another person an innocent purpose for going to see a victim would be expected.

These cases suggest that a statement of intention is made under trustworthy circumstances when the declarant is surprised by later events, but not when the later events are anticipated. This would be a unique requirement for a hearsay exception, but what it amounts to in practical terms is that the declarant has become unavailable,<sup>230</sup> likely as a result of the events. If the declar-

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because made before motive to fabricate arises). The events in these situations, in a sense, have proved the declaration of intention to be against the declarant's interest.

228. The statement would not be an admission by a coconspirator since it would not be offered against that party. *See* FED. R. EVID. 801(d)(2)(E).

229. *State v. Young*, 119 Mo. 495, 24 S.W. 1038 (1894) (charge of murder; defendant offered prior stated intention to visit victim's home to pick up his clothes); *Williams v. State*, 112 Tex. Crim. 482, 17 S.W.2d 1057 (1929) (charge of manufacturing intoxicating liquor; defendant offered prior stated intention to go to home of an acquaintance; evidence showed he encountered a still on the way).

A like analysis applies to *United States v. Williams*, 704 F.2d 315 (6th Cir.), *cert. denied*, 104 S. Ct. 481 (1983). In *Williams*, the defendant alleged that the money found on his person had been intended for payment of taxes. Two months before, the defendant had told an IRS agent that if his mother were able to sell her house, he would bring the \$3,300 owed in back taxes. Surely no one would accept this "check is in the mail" type of declaration as reliable. The court was forced to resort to a relevance rationale to keep this evidence from the jury. 704 F.2d at 320-21.

230. Even when the declarant is unavailable, reliability may be missing. *See Morrison v. Bradley*, \_\_\_ Colo. \_\_\_, 655 P.2d 385 (1982). Enterprising plaintiffs in *Morrison* sued for wrongful death of their father. Even though the evidence was undisputed that the deceased was earning a salary of \$8,500 per year, the trial court allowed the son to testify to the decedent's statements of intent to buy the son a truck and to pay for his schooling as a heavy equipment operator. The

ant remains available, the guarantee of reliability is much diminished because the declarant has had an opportunity—and likely a motive—to fabricate.<sup>231</sup>

To assert that the *Hillmon* doctrine should be limited to cases in which the declarant is unavailable is not novel. Several courts have apparently applied such a de facto requirement, or at least have mentioned approvingly that the declarant is not available.<sup>232</sup>

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evidence shows what a crafty litigant can do with this exception. The intermediate appellate court rejected the evidence on a relevance rationale, but, incredibly, the Supreme Court of Colorado agreed with the trial court and held that the father's out-of-court statement of intention to give his son financial support was admissible. *Id.* at \_\_\_, 655 P.2d at 387-88.

A relevance rationale for excluding a similar statement was rejected in *State v. McKenney*, 459 A.2d 1093 (Me. 1983) (shoplifting prosecution). The defendant testified that she had intended to pay for a television set with \$2,000 she had on her person at the time of her arrest. Her brother, however, had said to a store employee earlier that he had to leave the store to cash a check to pay for the set. This statement of intention was offered to impeach the defendant's contention that she would pay for the set. Relevance was marginal at best, because she was charged with taking a police band scanner, not the television set.

231. Professor Wigmore has collected three classes of reasons supporting exceptions to the hearsay rule:

- a. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;
- b. Where, even though a desire to falsify might present itself, other considerations such as the danger of easy detection or the fear of punishment would probably have been detected and corrected;
- c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

J. WIGMORE, *supra* note 3, § 1422, at 254. When the declarant remains available, he may conveniently state his prior intention as anything that conforms to the later course of events. Consequently, the circumstances do not support sincerity; no danger of detection is present; and no publicity surrounds the declaration of intention. The residue supporting the exception is only the necessity created by the unavailability of the declarant.

232. *United States v. Pheaster*, 544 F.2d 353, 379 (9th Cir. 1976) ("declarant should be dead or otherwise unavailable"), *cert. denied*, 429 U.S. 1099 (1977); *People v. Alcalde*, 24 Cal. 2d 177, 186, 148 P.2d 627, 631 (1944) ("dead or otherwise unavailable"); *State v. Sharbono*, 175 Mont. 373, 385, 563 P.2d 61, 68 (1977) ("speaker is incapable of being present"); *State v. Vestal*, 278 N.C. 561, 585, 180 S.E.2d 755, 771 (1971) ("deceased persons"), *cert. denied*, 414 U.S. 874 (1973). *See also* *Brown v. Tard*, 552 F. Supp. 1341 (D.N.J. 1982) (murdered declarant "indisputably was 'unavailable'"); *Long v. Asphalt Paving Co.*, 47 N.C. App. 564, 268 S.E.2d 1 (1980) (declarant "deceased at the time of trial"). *Cf.* *United States v. Calvert*, 523 F.2d 895, 910 (8th Cir. 1975) (deceased declarant "unavailable"), *cert. denied*, 424 U.S. 911 (1976). Two cases have stated that the declarant need not be unavailable, but then refused to admit the declaration because other evidence was available. *See* *Redhead v. United States*, 686 F.2d 178 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 1190 (1983); *United States v. Mandel*, 437 F. Supp. 262 (D. Md. 1977), *aff'd in part, vacated and remanded in part*, 591 F.2d 1347 (4th Cir.), *aff'd*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980).

Some commentators have advocated this same step.<sup>233</sup> A requirement of unavailability may even be mandated by the confrontation clause.<sup>234</sup>

### VIII. CONCLUSION

The *Hillmon* doctrine was created by misapplying earlier holdings to fit a fact pattern so unique that it amounts to a *sui generis* case. The judicial process has since expanded this initially inelastic doctrine along several lines, the most objectionable of which are use of the declaration to prove the action of another person and the use of the declaration to prove an action in the past. Despite conceptual problems, the doctrine has become so firmly accepted as an exception to the hearsay rule that the drafters of all of the major rules systems have embraced it.<sup>235</sup>

The *Hillmon* doctrine, despite its fits and starts, appears to be headed on the road toward ultimate elimination of the hearsay rule. A less distant journey would be to allow into evidence any declaration which appears reliable and which was made by an unavailable person.<sup>236</sup> Should the hearsay rule ultimately be swal-

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233. See C. McCORMICK, *supra* note 38, § 295, at 848; Hutchins & Slesinger, *Some Observations on the Law of Evidence: State of Mind in Issue*, 29 COLUM. L. REV. 147, 154 (1929). *But see* Hinton, *supra* note 42, at 415-17. Louisell and Mueller suggest that a new exception be created under rule 804, which requires unavailability. See 4 D. LOUISELL & C. MUELLER, *supra* note 3, § 442, at 581. Tribe argues that the declarant should be unavailable because cross-examination will be effective only after the events when a statement of future intention is involved. See Tribe, *supra* note 11, at 969-71.

234. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). In *Roberts*, the Court reasoned as follows:

[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

*Id.* (footnote omitted). Arguably a *Hillmon* statement falls within a "firmly rooted hearsay exception." The above discussion has shown, however, that the indicia of reliability are absent for an available declarant.

235. See FED. R. EVID. 803(3) advisory committee comment ("The rule of [*Hillmon*] allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed.") For a collection of other evidence rules relying on the *Hillmon* doctrine, see *supra* note 132.

236. See, e.g., MASS. GEN. LAWS ANN. ch. 233, § 65 (West 1974) ("[i]n any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay . . . if the court finds that it was made in good faith and upon the personal knowledge of the declarant"); MODEL CODE OF EVIDENCE Rule 503(a) (1942) ("[e]vidence of a hearsay declaration is admissible if the judge finds that the declarant . . . is unavailable as a witness"); J. WIG-

lowed, the judicial process will have accomplished the deed. Since almost no one advocates abolition of the hearsay rule, however, the courts ought not to do indirectly that which they choose not to do directly. Accordingly, the *Hillmon* doctrine, if it is not to eradicate the hearsay rule entirely, should be narrowly construed in those cases where it applies. Certainly one useful narrowing would be to require unavailability of the declarant. Perhaps then the hearsay rule and the *Hillmon* doctrine can lie side by side in quiet waters.

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MORE, *supra* note 3, § 1427, at 257 (“[t]he next and needed step in the liberalization of the rule is the adoption of the general exception for *all statements of deceased persons*”) (emphasis in original).