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NOTE

Federal Rule of Evidence 803(3) and the Criminal Defendant: The Limits of the *Hillmon* Doctrine

Nobody should condemn the exclusionary legal rules of evidence until he has fully mastered their purposes and their practical effects. Hence from the very beginning a student of evidence must accustom himself to dealing as wisely and understandingly as possible with principles which impede freedom of proof. He is making a study of calculated and supposedly helpful obstructionism.[1]

I. INTRODUCTION

In a criminal trial, any evidence that aids the jury in its role as the trier of fact is "relevant" because anything that makes guilt or innocence more probable than not serves the ultimate purpose of a trial.[2] A primary function of the rules of evidence, however, is to withhold relevant but incompetent evidence from the jury, which consequently protects the defendant from a potentially erroneous verdict.[3] The rule that excludes as incompetent all hearsay statements reflects this tension between the desire to present all relevant evidence and the occasional need to prohibit it. Generally, a hearsay statement is considered incompetent evidence because the declarant does not make it in the presence of the jury, and therefore, he is not subject to cross-examination contemporaneous with the declaration.[4] Exceptions to this rule of obstruction developed at common law for certain types of evidence that were necessary to a fair trial and that had some indicia of reliability or circumstan-

1. J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 10-11 (1947).

2. Rule 401 of the Federal Rules of Evidence defines relevant evidence as "having any tendency to make the existence of a fact that is of consequence to determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

3. *See generally* C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, 579-86 (2d ed. 1972); 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 800-10 to -18 (1979).

4. *Id.*

tial guarantees of trustworthiness, which allayed the traditional fears normally associated with hearsay. The Federal Rules of Evidence codified this common-law system of a general exclusionary rule with exceptions.[5] In a recent decision regarding a challenge to an exception to the hearsay rule, the Supreme Court arguably immunized this system from constitutional attack under the confrontation clause.[6]

One exception to the rule against hearsay, codified by rule 803(3) of the Federal Rules of Evidence,[7] has its common-law roots in the 1892 Supreme Court decision of *Mutual Life Insurance Co. v. Hillmon*.[8] In *Hillmon* the Court ruled that statements by a declarant of his intention to perform a subsequent act are admissible both as direct and circumstantial evidence under the state-of-mind exception to the rule against hearsay.[9] Consequently, under this exception the jury not only may consider such a statement as direct proof that the declarant possessed the then-existing state of mind to perform the subsequent act, but also may consider the statement as circumstantial proof to support the inference that the declarant actually performed the intended act. The effectuation of the intended conduct by the declarant in *Hillmon,* however, required the cooperation of a third party. The Court failed to recognize the additional inference necessary to reach the ultimate conclusion that the future conduct expressed in the hearsay statements was indeed performed: that the third party was willing to participate, and that he did participate, in the intended conduct with the declarant.

Unique dangers arise when statements of future intent by the declarant that fall within the parameters of the *Hillmon* doctrine implicate the conduct of a third party who is the defendant in a trial for the murder of the declarant. Under the common-law *Hillmon* doctrine, the prosecution may use statements by the declarant of his intention to meet the defendant as circumstantial evidence to prove that the meeting took place. Notwithstanding limiting instructions,[10] the prosecution's real purpose in offering

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5. FED. R. EVID. art. VIII.

6. Ohio v. Roberts, 448 U.S. 56 (1980). The confrontation clause states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

7. For the text of Federal Rule of Evidence 803(3), see *infra* text accompanying note 92.

8. 145 U.S. 285 (1892).

9. *Id.* at 295-96.

10. The court gives a limiting instruction to the jury when a declarant's statement

these statements as evidence is to prove circumstantially that the *defendant* also intended to meet the deceased declarant and that the meeting provided an opportunity or motive for the murder. When the alleged meeting and the time of the murder coincide, these statements may be overwhelming evidence against the defendant. This Note examines the application of the *Hillmon* doctrine in this context. Part II analyzes the theoretical foundation of this exception to the rule against hearsay developed in *Hillmon*. Section A identifies briefly the underlying policy of the rule against hearsay. Section B discusses the facts and holding of *Hillmon*, and section C explores the potential applications of the *Hillmon* doctrine. Part III considers rule 803(3), which codified the common-law *Hillmon* doctrine, and examines the conflicting statements of legislative intent that leave unanswered the question whether the exception applies to hearsay statements that implicate the conduct of a third party. Part IV examines the case law to determine how courts have applied rule 803(3). Finally, part V discusses the safeguards various courts have used when confronted with these statements, and suggests that courts which are unwilling to limit *Hillmon* should adopt similar guidelines to ensure that the hearsay statements at least bear some indicia of reliability.[11]

II. THE THEORETICAL FOUNDATION OF THE *Hillmon* DOCTRINE

A. The Rule Against Hearsay

The rule against hearsay has withstood many years of intense scrutiny and criticism by the courts and legal scholars.[12] Although several commentators have recommended the abandonment of this rule of exclusion in favor of a rule of admission of all hearsay evi-

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implicates the defendant's conduct. This instruction directs the jury to consider the statement as proof of the declarant's conduct but not as proof of the defendant's conduct. *See infra* notes 73-80 and accompanying text.

11. In Ohio v. Roberts, 448 U.S. 56 (1980), the Court stated that it "has applied this 'indicia of reliability' requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence with them comports with the 'substance of the constitutional protection.'" *Id.* at 66.

12. The literature on the rule against hearsay is abundant. For some of the major law review works discussing the rule, see e.g., Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741 (1961); McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1929); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948); Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909 (1937); Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229 (1922).

dence subject only to the discretion of the trial judge,[13] the codification of the common-law rule and its exceptions in the Federal Rules of Evidence[14] ensures its continued vitality.[15] The Federal

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13. Irving Younger stated recently that "the hearsay theory has taken on a shape ungainly and ill-proportioned." Younger, *Reflections on the Rule Against Hearsay*, 32 S.C.L. REV. 281, 282 (1980). Based upon a "flawed attempt" to determine through a LEXIS search how often the rule against hearsay results in the exclusion of evidence, Younger concluded that "[t]here is no rule against hearsay [because] [h]earsay is usually admitted." *Id.* at 293. Characterizing the hearsay rule as "only a rule against unreliable evidence," *id.*, Younger proposed the following modification: "Hearsay is admissible . . . unless the court decides as a preliminary question that the hearsay could not be accepted by the finder of fact as trustworthy. The finder of fact remains free to disbelieve admitted hearsay." *Id.*

In 1961 then Professor Jack Weinstein proposed this same rule of judicial discretion. *See* Weinstein, *Symposium—Hearsay Evidence: Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961). To provide adequate safeguards for the opponent of hearsay evidence under a discretionary approach, Weinstein suggested that the proponent of hearsay give advance notice to his opponent of his intent to introduce the evidence at trial, *id.* at 340, that the opportunity of the trial judge to "comment freely on the weight of such evidence should be recognized," *id.* at 341, and that "[m]ore explicit recognition of the power of appellate courts in evaluating hearsay should also he recognized if a new hearsay approach is adopted." *Id.* Observing that trial courts admit most hearsay, Weinstein noted, "[S]o quickly has the exclusionary power of the hearsay rule waned that there are few cases today where the outcome of a well-tried case would have been different had it not been for the hearsay rule, where a good court was prevented from admitting persuasive hearsay." *Id.* at 343.

Two student notes bave questioned the policy justifications for tbe rule against hearsay. *See* Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1787 (1980) (courts should abolish rule against hearsay because it exhibits great mistrust for the jury system and because it serves simply to maintain "acceptable external appearances for our system of adjudication"); Note, *Abolish the Rule Against Hearsay*, 35 U. PITT. L. REV. 609, 627 (1974) ("the power of the courts to pass upon the weight and sufficiency of the evidence" and other similar safeguards will exist after the abolition of the rule).

In a footnote to his majority opinion in *Ohio v. Roberts*, however, Justice Blackmun stated,

> The complexity of reconciling the Confrontation Clause and the hearsay rules has triggered an outpouring of scholarly commentary . . . . Notwithstanding this divergence of critical opinion, we have found no commentary suggesting that the Court bas misidentified the basic interests to be accommodated. Nor has any commentator demonstrated that prevailing analysis is out of line with the intentions of the Framers of the Sixth Amendment. Convinced that "no rule will perfectly resolve all possible problems," . . . we reject the invitation to overrule a near-century of jurisprudence. Our reluctance to begin anew is heightened by this Court's implicit prior rejection of principal alternative proposals . . . ; the mutually critical character of the commentary; and the Court's demonstrated success in steering a middle course among proposed alternatives.

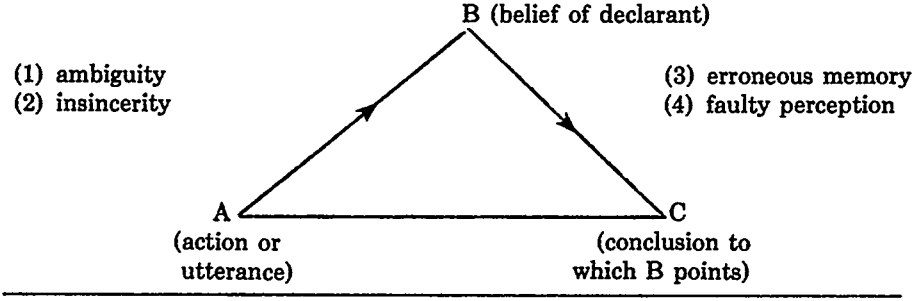
Ohio v. Roberts, 448 U.S. 56, 66 n.9 (1980) (citations omitted).

14. FED. R. EVID. art. VIII.

15. Arguments in favor of the codification of the rule excluding hearsay and its numerous exceptions include the predictability and certainty the rule provides litigants and the standards it establishes for trial judges and appellate courts. The Supreme Court arguably "constitutionalized" the exceptions to the rule against hearsay in Ohio v. Roberts, 448 U.S. 56 (1980), by essentially holding that these exceptions were coextensive with the sixth amendment. *See infra* text accompanying notes 29-34.

Rules of Evidence define hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[16] Four dangers plague the reliability of hearsay evidence: the potential ambiguity of the statement, and the insincerity, erroneous memory, and faulty perception of the declarant.[17] Therefore, all hearsay under both the common law and the Federal Rules of Evidence is inadmissible as evidence unless specifically excepted.[18] The exceptions to the rule against hearsay evolved as common-law trial courts perceived a need for hearsay evidence that had some circumstantial guarantees of trustworthiness.[19] The essential purpose of the rule, then, is to exclude inherently unreliable evidence.[20]

Professor Tribe developed a model to "aid in the analysis of the hearsay rule and its exceptions by exposing the rule's structure and the underlying values at stake."[21] Tribe characterized the hearsay dilemma as a "problem . . . of forging a reliable chain of *inferences,* from an act or utterance of a person not subject to contemporaneous in-court cross-examination about that act or utterance, to an event that the act or utterance is supposed to reflect."[22] To illustrate this concept, Tribe developed his "Testimonial Triangle":[23]



16. FED. R. EVID. 801(c). A "statement" under the Federal Rules of Evidence is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." FED. R. EVID. 801(a).

17. *See, e.g.,* Tribe, *Triangulating Hearsay,* 87 HARV. L. REV. 957 (1974).

18. Federal Rules of Evidence 803 and 804 contain twenty-seven enumerated exceptions to the rule against hearsay.

19. *See* authorities cited *supra* note 3.

20. *Id.*

21. Tribe, *supra* note 17, at 957.

22. *Id.* (emphasis added). This "chain of inferences" concept is especially important to the analysis of hearsay evidence under the *Hillmon* doctrine and rule 803(3). *See infra* notes 61-85 and accompanying text.

23. *Id.* at 959. Professor Tribe used this device as an aid in his course on evidence at Harvard. *Id.* at 961 n.11.

The line along the base of the triangle (from A to C) represents the usual form of testimony: the jury witnesses the declarant's action or utterance and reaches a conclusion. Reading the Triangle from A to B (the "left leg") and then from B to C (the "right leg"), Tribe stated, "When 'A' is used to prove 'C' along a path through 'B,' a traditional hearsay problem exists and the use of the act or assertion as evidence is disallowed upon proper objection in the absence of some special reason to permit it."[24] The following hypothetical illustrates the application of the Triangle to a hearsay statement. Assume that an issue at trial is whether John went to the Downtown Cinema on Friday night, but John is unavailable to testify. At the trial Mary testifies that John made the following statement to her on Saturday morning: "I went to the movie last night."[25] The statement is hearsay because the proponent is offering it to prove the truth of the matter asserted: that John went to the movies on Friday night. This statement may be used as circumstantial proof that John went to the Downtown Cinema. Point A on the Triangle represents the statement. To permit the jury to reach the step represented by B—that John believed he went to the movies on Friday night—risks the dangers of ambiguity and insincerity. Although John stated that he went to the movies, his statement is ambiguous because he may not have gone to the Downtown Cinema, especially if he could have chosen from more than one theatre. His statement could be insincere because he may have had some motive to deceive Mary. Even if certain circumstances exist that alleviate these dangers represented by the left leg of the Triangle, the conclusion represented by the right leg of the Triangle—that because John believed he went to the movies on Friday night he must therefore have actually done so—raises the dangers of erroneous memory and faulty perception. First, because John's statement referred to past conduct, the length of time

24. *Id.*

25. Professor Payne used a similar statement as an example to support his contention that under certain circumstances courts should admit hearsay statements referring to past conduct by extending the application of the *Hillmon* doctrine. *See* Payne, *The Hillmon Case—An Old Problem Revisited*, 41 VA. L. REV. 1011 (1955). He stated the example as follows: "Now we consider the use of statements to establish memory or belief which is to be used as circumstantial evidence of prior conduct . . . . Suppose a material fact in a given case is whether or not *A* went to the movies on Sunday. *A* is not available at trial." *Id.* at 1023 (emphasis in original). Weinstein and Berger's treatise also cited this example and quoted Professor Payne's analysis of his hypothetical. *See* 4 J. WEINSTEIN & M. BERGER, *supra* note 3, at 803-110 to -112. For a discussion of whether courts should admit statements pointing toward past conduct, see *infra* notes 199-224 and accompanying text.

between the conduct and his statement threatens the reliability of his memory. Second, the jury cannot evaluate the accuracy of John's perception of his conduct because he is unavailable. Furthermore, the lack of opportunity to cross-examine John about his conduct that Friday night—whether he in fact went to the Downtown Cinema—exacerbates the risk of admitting his statement into evidence. And yet, the statement made by John may be the only relevant evidence tending to prove whether he did or did not go to the Downtown Cinema.

In keeping with the common-law tradition, the Federal Rules of Evidence do not except statements that refer to past conduct, such as John's statement, from the rule against hearsay.[26] The hypothetical discussed above illustrates the tension that has characterized the evolution of the exclusionary system of hearsay evidence. Courts developed exceptions to the rule against hearsay when the need for such evidence outweighed certain dangers.[27] If admission of the statement does not risk one or more of the four dangers traditionally associated with hearsay, the courts created a categorical exception because that type of statement bears some circumstantial guarantees of trustworthiness or indicia of reliability that warrant disregard of the general rule of exclusion.[28]

The Supreme Court in *Ohio v. Roberts*[29] recognized that the question of the admissibility of hearsay under this scheme of exceptions requires a weighing of "competing interests."[30] The Court

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26. FED. R. EVID. 803(3). This exception states that it does not include "a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will." *Id.* The Advisory Committee stated that this limitation was "necessary to avoid the virtual destruction of the hearsay rule which would otherwise result." For discussion and analysis of this policy, see *infra* part III.

27. *See* authorities cited *supa* note 12.

28. Tribe, *supra* note 17, at 961-69. Professor Tribe divided the exceptions to the rule against hearsay into three groups. Those exceptions in Group I are "grounded upon the existence of an *adequate procedural substitute* for in-court cross-examination contemporaneous with the statement or action involved." *Id.* at 961 (emphasis in original). The Group II exceptions are "based on the view that there exist situations in which a party has *no right to cross-examine* with respect to particular testimony." *Id.* at 963 (emphasis in original). Tribe's Group III contains most of the rule 803 exceptions, including the *Hillmon* doctrine as codified by rule 803(3). These exceptions are "justified by specific attributes of the out-of-court act or utterance which are thought to reduce the triangle's weaknesses so suhstantially that the balance of untrustworthiness and likelihood of probative value favors admissibility of the evidence." *Id.* at 964. In other words, the Group III exceptions represent the halancing approach approved by the Court in Ohio v. Roberts, 448 U.S. 56 (1980). *See infra* notes 29-34 and accompanying text.

29. 448 U.S. 56 (1980).

30. *Id.* at 64.

identified the defendant's interests, in confronting the witnesses against him at trial and in cross-examining them as a "means of testing accuracy."[31] The Court noted that the Government's interest in producing hearsay statements against the defendant includes the need for the evidence, the "strong interest in effective law enforcement,"[32] and "the need for certainty in the workaday world of conducting trials."[33] The Court defined the formula for resolving this balancing analysis:

> In sum, when 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 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.[34]

This Note next examines the *Hillmon* doctrine—a "firmly rooted" hearsay exception codified by rule 803(3).

B. Mutual Life Insurance Co. v. Hillmon

Evidence of a person's state of mind can be relevant at trial under many varied circumstances.[35] This Note examines only one

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31. *Id.* The Court noted that cross-examination tests the demeanor, sincerity, and oath of the declarant before the jury. *Id.* at 63 n.6.

32. *Id.* at 64.

33. *Id.* at 66.

34. *Id.* (emphasis added).

35. State-of-mind evidence has seven possible uses:

(1) The declarant may testify concerning his own state of mind at a prior time. This testimony is not hearsay.

(2) Statements made by the declarant may be admissible for circumstantial use to prove the declarant's *state of mind* at the time of his declaration. The classic example of this use of state-of-mind evidence is the declaration, "I am Napoleon." Whether this statement is or is not hearsay has been the subject of debate among the commentators. *See* 4 J. WEINSTEIN & M. BERGER, *supra* note 3, at 803-97. The justification for the admission of this statement is that the proponent does not offer the statement to prove that the declarant was Napoleon (*i.e.*, the truth of the matter asserted); instead the proponent offers it as evidence of the declarant's state of mind (*i.e.*, that the declarant thought he was Napoleon). A discussion of this type of statement is beyond the scope of this Note.

(3) Under the verbal act doctrine, if the declarant's non-verbal conduct is ambiguous, statements that accompany that conduct and explain or otherwise allow the trier of fact to interpret it are admissible as non-hearsay. *See* C. MCCORMICK, *supra* note 3, at 589. Statements that accompany the actor's non-verbal conduct often may reveal his state of mind and therefore are relevant in explaining that conduct. For example, if the witness testifies that he saw the declarant hand *X* $1000 and state, "This money settles our debt," the jury reasonably may infer that the declarant intended the money to retire a preexisting debt to *X*.

use of state-of-mind evidence: the state of mind of the declarant not in issue[36] but nevertheless relevant first to prove his intent at the time of the declaration that indicated his then-existing state of mind, and second to prove circumstantially that he acted in conformity with that declaration.[37] A statement exhibiting the declarant's then-existing state of mind is hearsay if the proponent offers it to prove the truth of the matter asserted: that the declarant possessed the intent expressed in his declaration.

In 1892 the Supreme Court in *Mutual Life Insurance Co. v. Hillmon*[38] developed a common-law exception to the rule against hearsay to allow this type of state-of-mind declaration into evidence. Commonly called the *Hillmon* doctrine, the exception and the theoretical difficulties inherent in its application at the trial level have sparked controversy and criticism among commentators.[39] From "Witchita, March 1, 1879," a man named Walters

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(4) When the declarant's state of mind is *in issue*, the rule against hearsay does not apply. This exception developed because a person's state of mind often can be proved only through the declarant's own testimony (example (1) *supra*) or through statements he made contemporaneously with the conduct in issue. For example, statements to prove such states of mind as "motive, affection or alienation, or ill-will or intent" are admissible when state of mind is in issue. 4 J. WEINSTEIN & M. BERGER, *supra* note 3, 803-99 to -103. Rule 803(3) codified this common-law exception.

(5) Even when not in issue, the state of mind of the declarant nevertheless may be relevant to prove circumstantially that he subsequently acted in conformity with his expressed intention. The proponent offers this testimony for a hearsay use but the common-law *Hillmon* doctrine and rule 803(3) except it from the hearsay rule. The declarant's statement evidences his "then existing state of mind." This type of state-of-mind evidence is the topic of this Note.

(6) A declaration of a past event may reveal the declarant's then-existing belief that the past event occurred; nonetheless, the statement is inadmissible as hearsay because it points backwards in time. *See* Shepard v. United States, 290 U.S. 96 (1933); FED. R. EVID. 803(3); *infra* part III.

(7) Similarly, a declaration of past mental state falls within the rule against hearsay. 4 J. WEINSTEIN & M. BERGER, *supra* note 3, at 803-94 to -98.

36. Rule 803(3) excepts from the rule against hearsay a statement offered to prove state of mind in issue. Discussion of this exception is beyond the scope of this Note. For an example of this exception, see *supra* example (4) in note 35.

37. *See supra* example (5) in note 35.

38. 145 U.S. 285 (1892). Courts and commentators often cite *Hillmon* for its holding that a court may overrule the objection of an insurance company and order the consolidation of claims against different insurers on the same life. *See id.* at 292-94.

39. *See, e.g.*, Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394 (1934); Hutchins & Slesinger, *Some Observations on the Law of Evidence—State of Mind To Prove An Act*, 38 YALE L.J. 283 (1929); Maguire, *The Hillmon Case—Thirty-Three Years After*, 38 HARV. L. REV. 709 (1925); Payne, *The Hillmon Case—An Old Problem Revisited*, 41 VA. L. REV. 1011 (1955); Rice, *The State of Mind Exception to the Hearsay Rule: A Response to " 'Secondary' Relevance,"* 14 DUQ. L. REV. 219 (1976); Seidelson, *The State of Mind Exception to the Hearsay Rule*, 13 DUQ. L. REV. 251 (1974); Seligman, *An*

wrote his fiancée in Fort Madison to inform her that "I am going with a man by the name of Hillmon"[40] because Hillmon promised him wages and a free trip.[41] The letter indicated that part of their route would take them through Colorado.[42] On "March 4th or 5th or 3d or 4th—I don't know—1879," Walters wrote his sister and "all" in Fort Madison, "I expect to leave Wichita on or about March the 5th, with a certain Mr. Hillmon, a sheeptrader, for Colorado or parts unknown to me."[43] Two weeks later on March 18, 1879, an "accidental discharge of a gun"[44] killed a man at Crooked Creek, Kansas, and he fell into a campfire, which burned his face and prevented a positive identification.[45] Mrs. Hillmon, the beneficiary of three life insurance policies taken out by Hillmon, claimed the body was that of her husband.[46] The insurance company, however, claimed that the body was Walters, and introduced at trial the letters to his fiancee and his sister as evidence tending to place both him *and* Hillmon together in the vicinity of Crooked Creek on the night of the shooting.[47] The insurance company hoped to prove that Hillmon killed Walters in a plot to defraud the company into paying the policies on his life while he remained in hiding.[48] The trial court ruled that this evidence was

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Exception to the Hearsay Rule, 26 HARV. L. REV. 146 (1912). For an interesting account of this storied case, see MacCracken, *The Case of the Anonymous Corpse*, AMERICAN HERITAGE, June 1968, at 51.

40. 145 U.S. at 288.

41. *Id.* The letter stated, "I get to see the best portion of Kansas, Indian Territory, Colorado, and Mexico." *Id.* at 289.

42. *Id.* at 288.

43. *Id.* Since this letter was lost the insurance company could not introduce it, but Walters' sister stated "that she remembered and could state the contents of the letter." *Id.* at 287. Although the trial judge sustained the objection to the sister's testimony, the trial court preserved her testimony for the record.

44. *Id.* at 287.

45. MacCracken, *supra* note 39, at 52.

46. *Id.* at 286-87. Mrs. Hillmon contended that John H. Brown accompanied Mr. Hillmon to Crooked Creek. *Id.* at 286. The Court summarized Mrs. Hillmon's proof as follows:

> At the trial the plaintiff introduced evidence tending to show that on or about March 5, 1879, Hillmon and Brown left Wichita . . . and travelled together through Southern Kansas in search for a cattle ranch; that on the night of March 18, while they were in camp at a place called Crooked Creek, Hillmon was killed by the accidental discbarge of a gun; that Brown at once notified persons living in the neighborhood; and that the hody was thereupon taken to a neighboring town, where after an inquest, it was buried.

Id. at 286-87.

47. *Id.* at 287. Walters' fiancée and sister also testified "that during that time his family frequently received letters from him, the last of which was written from Wichita; and that he had not been heard from since March, 1879." *Id.*

48. *Id.* at 286. The insurance company alleged that Hillmon,

inadmissible "as memoranda in the ordinary course of business."[49] At oral argument before the Supreme Court, counsel for the insurance company apparently first stated that an alternative ground for admission of the letters was "state of mind or feeling" evidence.[50] The Court ruled that

> [t]he letters in question were competent, not as narratives of facts communicated to the writer by others, . . . but as evidence that, shortly before the time when other evidence tended to show that [Walters] went away, [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,* than if there had been no proof of such intention.[51]

The Court, however, failed to acknowledge that because its ruling allowed the jury to accept the letters as circumstantial proof that Walters actually carried out *his* stated intention, the jury also logically could accept the same evidence as circumstantial proof that Hillmon intended to go with Walters on the trip through Kansas.

The *Hillmon* decision is replete with nineteenth-century language that translates into a twentieth-century holding.[52] The Court cited several facts warranting admission of the letters. First, evidence of Walters' intentions during early March was relevant.[53] Second, other admissible evidence corroborated Walters' intention as stated in his letters.[54] Third, Walters' intention was a material fact to the case.[55] Fourth, because Walters was dead and thus unavailable to testify, the Court cited the great need for the only

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> together with John H. Brown and divers other persons, on or before November 30, 1878, conspiring to defraud the defendant, procured the issue of all the policies, and afterwards, in March and April, 1879, falsely pretended and represented that Hillmon was dead, and that a dead body which they had procured was his, whereas in reality he was alive and in hiding.

Id.

49. *Id.* at 295. The Court upheld this ruling. *Id.*

50. *Id.*

51. *Id.* at 295-96 (emphasis in original).

52. This "translation" parallels the analytical framework that many modern courts have applied to the *Hillmon* doctrine in criminal cases. *See infra* part V.

53. The Court stated that the letters were evidence of "a material fact bearing upon the question in controversy." *Hillmon,* 145 U.S. at 299-300.

54. The Court stated, "Evidence that just before March 5 [Walters] had the intention of leaving Wichita with Hillmon would tend to corroborate the evidence already admitted, and to show that he went from Wichita to Crooked Creek with Hillmon." *Id.* at 295. This evidence supported the contention that Walters was in Witehita "on or about March 5," that he "had not been heard from since," and that the body was Walters. *Id.* at 294.

55. The Court noted in several passages of the opinion that Walters' intention was a material fact. For example, the Court stated, "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." *Id.* at 295.

other available evidence tending to prove his intentions.[56] Fifth, the circumstances surrounding the letters indicated that they were trustworthy.[57] Last, admission of the letters risked no prejudicial effect on the jury.[58]

In summary, the *Hillmon* doctrine states that a declaration of a then-existing intent to perform a subsequent act is admissible as evidence of the declarant's state of mind at the time of the declaration to perform that act, and that declaration also may serve as circumstantial evidence to prove inferentially that the declarant acted in conformity with his stated intention.[59] The application of this seemingly simple concept has proved to be a difficult task for the courts. The possible variations of the exception and its potential effect upon the outcome of a trial prompted Professor Maguire to comment that the *Hillmon* doctrine "involve[s] distinctions of a refinement better suited to the philosophical laboratory than to the hurly-burly of a jury trial."[60] This Note next examines the possible applications of then-existing state-of-mind evidence under the *Hillmon* doctrine and applies the Testimonial Triangle to the exception to expose the dangers inherent in the use of this type of evidence.

C. *Theoretical Applications of the* Hillmon *Doctrine*

Four potential applications of then-existing state-of-mind evidence may occur at trial. Variations of the statements in *Hillmon*[61]

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56. The Court apparently assumed that even if the body were not Walters, most likely he was dead because of his long absence from home.

57. Several circumstances justified the conclusion that the letters were trustworthy. "Letters from [Walters] to his family and his betrothed were the natural, if not the only attainable, evidence of his intention." *Hillmon*, 145 U.S. at 295. Thus, Walters had no apparent motive to lie. The Court noted also that while Walters was 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." *Id.*

58. The Court stated, "In view of the mass of conflicting testimony introduced upon the question whether it was the body of Walters that was found in Hillmon's camp, this evidence might *properly* influence the jury in determining that question." *Id.* at 296 (emphasis added).

59. *Id.* at 298.

60. Maguire, *supra* note 39, at 731. In applying the common-law *Hillmon* doctrine to a statement implicating the defendant charged with the declarant's murder, the majority in United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976), noted "the theoretical awkwardness associated with the application of the *Hillmon* doctrine to facts such as those now before us, [but] the authority in favor of such an application is impressive, beginning with the seminal *Hillmon* decision itself." *Id.* at 377.

61. *See supra* notes 35-60 and accompanying text. Professor Tribe altered the facts in

in the following hypothetical illustrates these uses: An issue in the case is whether Hillmon and Walters met in Crooked Creek on a certain day but both are unavailable to testify. The insurance company offers a letter from Walters to his fiancee as proof of Walters' state of mind at the time he wrote the letter and as circumstantial evidence that Walters was in Crooked Creek, Kansas, on the day in question. The letter contained one of the following statements:

(1) The Declarant's Prior Act—"I returned from Crooked Creek today";
(2) A Third Party's Prior Act Implicated—"I returned from Crooked Creek today with Mr. Hillmon";
(3) The Declarant's Subsequent Act—"I will leave tomorrow for Crooked Creek";
(4) A Third Party's Subsequent Act Implicated—"I will leave tomorrow for Crooked Creek with Mr. Hillmon."

Each of these statements requires inferential reasoning by the trier of fact. First, the jury must accept the statement as credible and trustworthy evidence of the declarant's then-existing state of mind. Next, if the jury thus views the statement, it also may accept the inference that the conduct to which the statement refers occurred.

1. The Declarant's Prior Act

The statement "I returned from Crooked Creek today" contains traditional hearsay dangers. The first step in determining whether this statement is trustworthy is to examine Walters' assertion and the significance that the jury may attach to it in view of the statement's potential problems of ambiguity and insincerity.[62] Arguably the statement is simple enough to alleviate any fears of ambiguity. The danger of insincerity is also not so great if the jury reasonably may assume that Walters had no reason to deceive his fiancée. If, however, Walters knew that deception would further his interest in the litigation, then the danger of insincerity threatens

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Hillmon by positing a statement by Walters' fiancée that "*she was planning to meet him in Crooked Creek.*" Tribe, *supra* note 15, at 971 (emphasis in original). Tribe demonstrated that although this statement appears to face forward, it "is relevant only because it expresses an implied belief that she will meet Walters when she carries out her intention, a belief that points backward to the conclusion that past events had given her reason to expect him to be there." *Id.* Notes 199-224 *infra* and accompanying text discuss the difficulty of determining in which direction a statement points—to past acts or subsequent conduct.

62. These dangers comprise the left leg of the Testimonial Triangle. *See supra* notes 22-24 and accompanying text.

the trustworthiness of this out-of-court declaration.[63] The next step is to examine the dangers of erroneous memory and faulty perception inherent in Walters' apparent belief in the truth of his statement and the jury's conclusion by inference that he had been to Crooked Creek.[64] Because the statement refers to past conduct, these dangers are particularly acute. The statement on its face has no circumstantial guarantees of trustworthiness since Walters based it on his memory of participation in a past event. Thus, under traditional hearsay analysis, this statement is inadmissible as hearsay.

Several commentators, however, have concluded that because *Hillmon* admitted statements of intent pointing toward future conduct, if other circumstances indicate that a statement which points toward past conduct is trustworthy, then logically it should be admissible under the *Hillmon* Court's rationale.[65] Professor Payne

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63. *See* Payne, *supra* note 25, at 1024.

64. This analysis examines the dangers defined by the right leg of the Testimonial Triangle. *See supra* notes 22-24 and accompanying text.

65. Discussion of the potential applications of the *Hillmon* doctrine began in 1912 with Professor Seligman's article in the *Harvard Law Review*. *See* Seligman, *supra* note 39. Seligman contended that the logical application of the *Hillmon* doctrine demands that statements of then-existing state of mind pointing toward past conduct also not fall within the rule against hearsay. He feared that this extension of the doctrine would result in the admissibility of all hearsay evidence. *See id.* at 157. Seligman concluded that the necessity of admitting statements of then-existing state of mind does not exist when such statements serve only as circumstantial evidence. He reasoned that if "declarations of intention are admissible to prove a future act, logically they would be admissible to prove a past act," and "logically declarations of a present belief as to a past act would be admissible to prove a past act." *Id.* at 156. Therefore, "if hearsay declarations are admissible to prove past acts of the speaker, it would seem logically necessary to admit them in order to prove past facts of his observation." *Id.* at 157. Accordingly, Seligman concluded that a consistent application of the *Hillmon* reasoning results in the "abolition of the hearsay rule." *Id.* To avoid this result, Seligman recommended the eschewal of the *Hillmon* doctrine. *Id.* at 160.

Professor Maguire disagreed with Seligman's conclusions in a 1925 article. *See* Maguire, *supra* note 39. Maguire asserted that "even [Seligman] might well concede that in its ordinary, workaday application the [*Hillmon*] principle leads to more good than evil . . . . Analytically, the principle appears much more safely boxed in than Mr. Seligman believed. The same assertion may be ventured on an empirical basis." *Id.* at 731. Maguire also concluded that the extension of the *Hillmon* doctrine to include statements pointing toward past acts risks too many hearsay dangers. *Id.* at 721-23; *see supra* notes 62-64 and accompanying text.

In 1929 Hutchins and Slesinger proposed the extension of the *Hillmon* doctrine to include declarations of prior acts if the declarant is unavailable and adequate corroboration exists to ensure some circumstantial guarantees of trustworthiness. *See* Hutchins & Slesinger, *supra* note 39, at 294. They argued that because an exception at common law allowed statements of prior acts when the validity of the decedent declarant's will was in issue,

> [t]here is no logical or psychological reason for not extending the rule to cover all statements made either subsequent to or contemporaneous with the act in issue. The words are not cause or effect of the main act; they are part of the total situation, with a

argued that if the statement referred to a single act and the declarant made it shortly after the completion of that act with no apparent motive to falsify, the court should admit the statement under the *Hillmon* doctrine.[66] Accordingly, under Payne's analysis Walters' statement arguably is admissible as an exception to the rule against hearsay.[67] The potential ambiguity and insincerity of this statement is the same under either traditional hearsay analysis or the Payne approach. Problems of perception and memory are less severe, however, because Walters' statement occurred the same day that he ostensibly arrived from Crooked Creek. Indeed, following this reasoning, statements of memory are *more* reliable when these

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reasonably high probability of correlation with the other parts. Since the probability is only reasonably high, it might he misleading to admit the statements without corroboration. But when corroborated they are just as valuable, whether referring to past, present or future.

Id. at 295. The authors suggested that part of this corroboration should consist of a psychoanalytic examination of the declarant and the context of his statements to "be able to differentiate cases where the probable correlation between words and other overt acts is high from those where it is low, or possibly negative," *id.* at 297. They concluded that the court "should be wary of accepting the statements at their face value." *Id.* at 298.

In a 1934 article Professor Hinton agreed with Maguire that

[i]f the courts should sanction the inference from the recollection of the unsworn observer to the reality of the thing remembered, they would practically abolish the hearsay rule altogetber, hecause the most positive assertion of a past fact or event, if really made on personal knowledge, amounts to a shorter way of saying "I remember that I perceived thus and so." The state of mind called memory is thus proved by the statement of it.

Hinton, *supra* note 39, at 423.

More than twenty years later Professor Payne contended that statements pointing toward past conduct should be admissible because

[i]f we limit the reception of the evidence . . . to declarations made at a time when the declarant had no apparent motive to falsify, the evidence . . . would seem to be just as trustworthy as, and indeed more cogent than, the evidence admitted under the doctrine of the *Hillmon* case.

Payne, *supra* note 25, at 1024.

66. Professor Payne utilized this formula in his 1955 article. *See* Payne, *supra* note 25, at 1023-24. Payne posited the following:

Suppose a material fact in a given case is whether or not *A* went to the movies on Sunday. *A* is not available at trial. Under the doctrine of the *Hillmon* case, *W* would be permitted to testify that on Saturday he was witness to *A*'s declarations of intention to attend the movies on the following day . . . . Seligman argues that logically *W* should be permitted to testify that on Monday he was witness to *A*'s declarations that *A* had been to the movies on the previous day.

Id. at 1023. Payne concluded that the *Hillmon* doctrine should include trustworthy statements of past conduct as an exception to the rule against hearsay. For a discussion of this theory, see *infra* notes 199-224 and accompanying text.

67. Payne, *supra* note 25, at 1023-24. Payne "urg[ed] the abandonment of the effort to apply the conjectural and metaphysical distinctions sometimes involved in keeping the *Hillmon* doctrine in its place." *Id.* at 1057. Instead, he "advocates by way of substitution . . . a simple rule of judicial discretion." *Id.*

circumstantial guarantees of trustworthiness exist than are statements that point toward future conduct because "intervening circumstances"[68] or "alteration of intention"[69] may have thwarted that conduct.

2. A Third Party's Prior Act Implicated

The statement "I returned from Crooked Creek today with Mr. Hillmon" poses many of the same traditional hearsay dangers as the first statement. The analysis of this statement, however, is more complex because its use as evidence not only allows the jury to conclude that Walters had visited Crooked Creek, but also permits two additional inferences: Walters was with Hillmon in Crooked Creek, and he travelled with Hillmon on his return trip. The analysis of possible ambiguity and insincerity is the same as that for a statement which points only toward the declarant's prior conduct.[70] If the court is to admit this statement implicating the conduct of Hillmon as an exception, then Walters' perception and memory of both his conduct *and* the conduct of a third party must be trustworthy. Under the traditional common-law analysis the danger of the declarant's faulty memory outweighs any potential guarantees of trustworthiness, and the statement therefore is not admissible as an exception to the hearsay rule.

Professor Payne contended that "conceivably there are instances where an observer would be in a better position to perceive and remember than the actor or a participant in the conduct observed."[71] If surrounding circumstances tend to bolster the trustworthiness of Walters' statement that implied he was with Hillmon at Crooked Creek, Payne would admit the statement as evidence

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68. Tribe first used this term. *See* Tribe, *supra* note 17, at 971. Payne called this same concept "frustration of intention." *See* Payne, *supra* note 25, at 1027.

69. Payne first used this term. *See supra* note 25, at 1027. Tribe called this concept "change of mind." *See* Tribe, *supra* note 17, at 971.

70. *See supra* text accompanying notes 62-69.

71. Payne, *supra* note 25, at 1028. Payne asked, "Is the declarant apt to perceive and remember more accurately when the perception and memory relate to his own conduct or to acts in which he was a participant than when they relate to conduct or a condition or state of affairs with reference to which he was merely an observer?" *Id.* Concluding that "each case must turn on its own facts," *id.*, Payne cited the following "flimsy example" to illustrate the difficulty of generalization:

> It might be argued . . . that the parties to a marriage ceremony are apt to perceive and remember more accurately than an observer the time and details of the event. Suppose, though, the observer is a parent of one of the parties—say the traditionally disturbed mother of the bride. Would the argument still prevail?

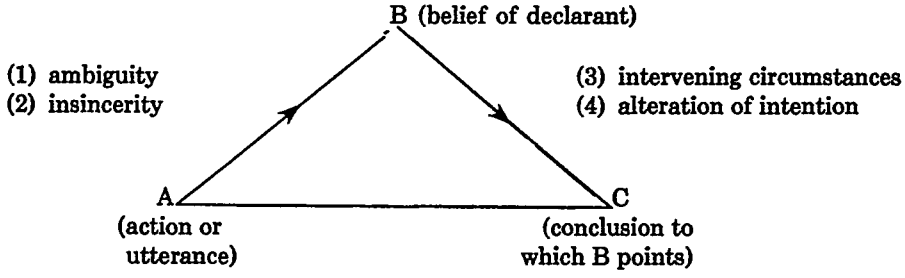
Id.

that Walters *and* Hillmon were in Crooked Creek at the same time.[72]

3. The Declarant's Subsequent Act

The statement "I will leave tomorrow for Crooked Creek" reveals Walters' state of mind at the time of the assertion to carry out his intention at a future date. If the court admits the statement, the jury may use it to infer that Walters left for Crooked Creek the next day; this inference makes the conclusion that he arrived in Crooked Creek more probable than not. The hearsay dangers inherent in this statement differ from those that accompany statements pointing toward past conduct.

The dangers of ambiguity and insincerity do not change in this situation.[73] Because this statement points toward *future* conduct, however, the traditional hearsay problems of erroneous memory and faulty perception are not apparent. Instead, two new dangers arise: the possibility that intervening circumstances prevented Walters from carrying out his intention or that Walters changed his then-existing intention to travel to Crooked Creek.[74] These new dangers warrant the revision of the Testimonial Triangle as follows:[75]



72. Professor Payne noted that in at least two exceptions to the rule against hearsay—excited utterances and dying declarations—"the very circumstances that supposedly promote veracity are apt to weaken seriously the declarant's perception and memory." *Id.* at 1028-29. He asserted that sincerity is perhaps the most important standard courts consider when confronted with hearsay declarations during trial. *Id.* at 1029.

73. *See supra* text accompanying notes 62-64.

74. *See* Payne, *supra* note 25, at 1027; Tribe, *supra* note 17, at 971.

75. Professor Tribe applied the *Hillmon* exception to his Testimonial Triangle in this manner. *See* Tribe, *supra* note 17, at 971. He stated, "The triangle on which the infirmities of 'intervening circumstances' and 'change of mind' replace memory and perception on the right leg is at least as untrustworthy as the Testimonial Triangle itself." *Id.*

This statement of intention to perform an act in the future is admissible under the common-law exception developed in *Hillmon*.[76] The traditional justification for this exception is the unique need associated with state-of-mind evidence.[77] Moreover, the jury arguably can recognize that the declarant's out-of-court statement of intent to perform a subsequent act is not sufficient evidence by itself to prove that he actually performed the act.[78] Accordingly, the jury should give this type of hearsay statement less credibility because intervening circumstances or alteration of intent may have precluded the effectuation of the declarant's intended conduct. Courts often attempt to confine the impact of these statements of intent by employing limiting instructions.[79] In addition, because this type of hearsay statement is only circumstantial evidence, ostensibly its use is solely to corroborate other evidence that the declarant actually performed the act indicated by his stated intention.[80]

4. A Third Party's Subsequent Act Implicated

The statement "I will leave tomorrow for Crooked Creek with Mr. Hillmon," like the statement in the third example, reveals Walters' intention to leave for Crooked Creek at a future date. When considering this statement, however, the jury may infer not only that Walters carried out that intention but also that Hillmon accompanied him. Additionally, the jury reasonably may infer that Hillmon was willing to go, and that he did go, with Walters to Crooked Creek. The analysis of potential hearsay dangers in this situation parallels the discussion of the hearsay dangers of state-

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76. *See supra* notes 38-58 and accompanying text.

77. *See supra* note 35.

78. *See* Payne, *supra* note 25, at 1024. Payne recognized "the substantial danger that the average juror might be less perceptive of the defects involved in the hearsay assertion [of past facts] than of those [statements of intention of subsequent conduct] involved in the circumstantial reasoning in the *Hillmon* situation." *Id.* Notwithstanding this conclusion, Payne rejected "drawing a semiarbitrary line between" these different statements because "perceptive judicial containment of the *Hillmon* doctrine along these lines seems a slim possibility." *Id.* at 1024-25.

79. For an example of a limiting instruction, see *infra* text accompanying note 166.

80. Evidence corroborating the subsequent act evidenced by a statement of future intention alleviates the dangers of intervening circumstances and alteration of intent. For example, a witness's testimony that he saw Walters in Crooked Creek near the time indicated by his statement enhances the statement's trustworthiness. A curious anomaly results, however, since availability of corroborative evidence diminishes the need for the hearsay statement. For a discussion of corroboration and its effects, see *infra* notes 234-42 and accompanying text.

ments of intention that implicate only the declarant's future conduct.[81] Because the effectuation of Walters' intention required Hillmon's cooperation, the dangers of intervening circumstances or alteration of intent arguably are greater.[82] Moreover, this statement standing alone does not provide any circumstantial guarantee that Hillmon intended to go with Walters to Crooked Creek. Under the common-law *Hillmon* doctrine, however, this statement is admissible to prove circumstantially that Walters carried out his stated intention.

The deletion of the reference to Hillmon or a limiting instruction confining the jury's consideration of the statement to the conduct of the declarant Walters could control the statement's impact.[83] In many cases, however, excising any reference to the third party would render a statement meaningless to the jury and thwart the very purpose for which the proponent offered it: to allow the jury to draw the inference that the third party acted in conformity with the declarant's intention.[84] On the other hand, when the implicated third party is the defendant in a criminal case, a limiting instruction is of dubious value in confining the jury's consideration of the statement solely to the declarant's act.[85] Notwithstanding a limiting instruction, the jury will consider the statement as direct evidence of the third party's alleged conduct.

Part III examines the policy choices Congress made when it codified the *Hillmon* doctrine as rule 803(3). Part IV analyzes how the courts have applied this exception to statements in criminal

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81. *See supra* notes 73-80 and accompanying text.

82. The majority in United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976), rejected the conclusion that the hearsay dangers of intervening circumstances or alteration of intention increase when the effectuation of the declarant's stated intention requires the cooperation of another.

> The inference from a statement of present intention that the act intended was in fact performed is nothing more than an inference. Even where no actions by other parties are necessary in order for the intended act to be performed, a myriad of contingencies could intervene to frustrate the fulfillment of the intention. The fact that the cooperation of another party is necessary if the intended act is to be performed adds another important contingency, but the difference is one of degree rather than kind. 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. at 376 n.14.

83. Either "remedy" would leave only the inference that Walters went to Crooked Creek.

84. *See infra* part IV.

85. *See infra* notes 248-53 and accompanying text.

cases and examines the various safeguards many courts have required to ensure that statements of the declarant's then-existing intention of future conduct that implicate the defendant are trustworthy.

III. RULE 803(3)

The Federal Rules of Evidence, as enacted by Congress in 1975, are the product of more than ten years of scrutiny by both Congress and the judiciary.[86] The intent behind each rule may be found among several sources. The Advisory Committee, through Chief Justice Burger, presented to Congress its final version of the proposed rules in 1972 with explanatory notes accompanying many of the rules.[87] The House and Senate Judiciary Committees

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86. The very idea of codifying the common-law rules of evidence into a single statute was controversial. A Special Committee on Evidence appointed by Chief Justice Warren in 1961, however, determined that uniform rules of evidence were "advisable and feasible," and recommended that such rules be "promulgated promptly." S. REP. No. 93-1277, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7051-52. Chief Justice Warren appointed the Advisory Committee on the Federal Rules of Evidence in March 1965, and it submitted its first draft of proposed rules to the Judicial Conference in March 1969. 46 F.R.D. 161, 173 (1969). After receiving comments and suggestions on the proposed rules, the committee submitted a revised draft. *See* 51 F.R.D. 315, 316 (1971). Finally, pursuant to his statutory authority "to govern procedure in the proceedings and to the extent set forth therein, the United States Court of Appeals, the United States district courts, . . . and before United States magistrates," 56 F.R.D. 183 (1972), Chief Justice Burger submitted the Advisory Committee's final draft to Congress in February 1973. S. REP. No. 93-1277, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7052.

To prevent automatic enforcement by statute of the proposed rules at the end of 180 days, Congress postponed their effectiveness indefinitely. *See* Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. In the House the "Subcommittee on Criminal Justice of the House Judiciary Committee . . . after extensive consideration in executive session published a committee print of H.R. 5463, the legislative embodiment of the proposed rules, in June of 1973." S. REP. No. 93-1277, 93d Cong., 2d Sess. 5-6, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7052. The Subcommittee's version of the proposed rules was the product of six days of hearings, a preliminary draft after seventeen "mark-up sessions," and a final draft after five "markup sessions." H.R. REP. No. 93-650, 93d Cong., 1st Sess. 4, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7077-78. The House Judiciary Committee approved the final draft and included explanatory notes to explain its views. *Id.*, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 7078.

In full committee the Senate Judiciary Committee considered the House version during two days of hearings and it amended the proposed rules according to its views as expressed by explanatory notes. S. REP. No. 93-1277, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7054.

Finally, a conference committee met twice and resolved the "more significant differences in the House and Senate versions of the bill," CONF. REP. No. 93-1597 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7098, producing the version that Congress eventually enacted on January 2, 1975.

87. 56 F.R.D. 183 (1972).

amended that draft several times until a conference committee approved the final version and Congress enacted it into law.[88] Unfortunately, the Conference Report did not resolve the Advisory Committee's conflicting statements of the intended scope of rule 803(3).[89]

Congress enacted rule 803(3) as an exception[90] to the rule against hearsay and entitled it "Then existing mental, emotional or physical condition." This rule codifies the *Hillmon* doctrine and reads in pertinent part,[91]

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) . . . A statement of the declarant's then existing state of mind, [or] emotion . . . (such as intent, plan, motive, [and] design . . .), 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.[92]

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88. *See infra* notes 103-08 and accompanying text.

89. The Federal Rules of Evidence underwent numerous revisions by the Advisory Committee to the Judicial Center and both the House and Senate Committees on the Judiciary before the inevitable compromise recommended by the Conference Report. One witness advised the House Subcommittee on Criminal Justice to avoid the predictable confusion the legislative process would create.

> To meet this problem we urge the House Judiciary Committee to issue a Report with the bill adopting the Rules which will contain a comprehensive set of notes, prepared in cooperation with the Advisory Committee. The Judiciary Committee's notes should bear the endorsement of the Advisory Committee. As the Rules undergo further refinement in the legislative process, the notes should be appropriately amended to reflect changes, and the concurrence of the Advisory Committee in the final set of notes should be sought. If these rules are in fact to clarify evidentiary rulings in the federal courts and not complicate such rulings with endless debate over the "legislative history" of particular rules, it is important that there be only one set of notes.

Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice (Formerly Designated As Special Subcommittee on Reform of Federal Criminal Laws) of the House Committee on the Judiciary on Proposed Rules of Evidence, 93d Cong., 1st Sess. 280 (1973) [hereinafter cited as *Hearings (Supplement)*] (statement by Charles R. Halpern).

Because the Senate Committee did not address the modification to the Advisory Committee's interpretation of rule 803(3) that the House Committee made in its explanatory note, the Conference Committee apparently failed to notice the conflicting statements of intent, which fulfilled Mr. Halpern's fears. *See* United States v. Mangan, 575 F.2d 32, 43 n.12 (2d Cir. 1978); *infra* notes 110-11 and accompanying text.

90. Rule 803(3) actually contains two exceptions. This Note discusses only the exception that allows hearsay declarations of then-existing state of mind as evidence to prove subsequent conduct by the declarant. Also excepted from the rule against hearsay by Rule 803(3) are hearsay statements of then-existing physical condition. 4 J. WEINSTEIN & M. BERGER, *supra* note 3, at 803-91 to -94.

91. This quotation does not include the language in rule 803(3) that excepts statements of then-existing physical condition from the rule against hearsay.

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

Congress explicitly excluded statements that refer to past conduct from this state-of-mind exception. The Advisory Committee noted that this was "necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind,"[93] and cited the Supreme Court's holding in *Shepard v. United States*.[94] In that case the Government sought to introduce a statement made by the defendant's wife that " 'Dr. Shepard has poisoned me.' "[95] Justice Cardozo noted in his opinion that the Government "used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband."[96] Cardozo's opinion set the limits on the admissibility of state-of-mind evidence under the *Hillmon* doctrine exception to the rule against hearsay. Recognizing that *Hillmon* had evoked substantial criticism from courts and commentators, Cardozo feared that the rule against hearsay would disappear if courts failed to distingnish between declarations of intent "casting light upon the future" and declarations of memory "pointing backwards to the past."[97] Ruling that the statement was inadmissible, Cardozo noted,

> The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and more than that, to an act by some one not the speaker. Other tendency, if it had any, was a filament too fine to be disentangled by a jury.[98]

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93. *Id.*

94. 290 U.S. 96 (1933).

95. *Id.* at 98.

96. *Id.* at 104. In an oft-quoted passage, Justice Cardozo stated,

> This fact, if fact it was, the Government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to someone else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown out all weaker sounds. It is for weaker minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

Id.

The risk of prejudice is also significant when the future conduct to which these statements by the declarant point requires the cooperation of a third party who is the defendant charged with the declarant's murder. *See infra* notes 243-53 and accompanying text.

97. Cardozo characterized *Hillmon* as the "high water line beyond which courts have been unwilling to go." 290 U.S. at 105-06.

98. *Id.*

Although this passage is dictum,[99] *Shepard* defined the scope of the *Hillmon* doctrine that subsequent courts have followed and that Congress eventually codified in rule 803(3).[100] Cardozo feared that the exclusionary hearsay rule would disappear if courts permitted state-of-mind evidence to prove past acts because logically statements that refer to past acts through observation would be admissible as well.[101] The only common-law exception to the *Shepard* limitation that Congress adopted in rule 803(3) allows statements that refer to past conduct when the validity of the deceased declarant's will is at issue. Unique need justifies this exception since only evidence of the decedent's state of mind can prove his intention and, because the decedent is unavailable, the only source of this evidence is his hearsay declarations.[102] Congress chose not to extend this principle to declarations by unavailable declarants in other situations.

Congress clearly intended to limit the state-of-mind exception to statements pointing toward future conduct. The extent to which this exception includes such statements, however, is not so easily determined. The Advisory Committee stated, "The rule of Mutual Life Ins. Co. v. Hillmon . . . , allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed"[103] by rule 803(3). Accordingly, if one accepts the Advisory Committee's interpretation, hearsay statements of intent that implicate a third party's conduct are admissible. The House Committee on the Judiciary, on the other hand, stated that "the Committee intends that the Rule be construed to limit the doctrine of Mutual Life Ins. Co. v. Hillmon . . . , so as to render statements of intent by a declarant admissible only to prove *his* future

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99. *See* 4 J. WEINSTEIN & M. BERGER, *supra* note 3, at 803-112 to -115. This treatise states that "although the dictum in . . . [*Shepard*] certainly supports [the rule] . . . , the facts support a much narrower holding." *Id.* at 803-112. This characterization of that part of *Shepard* which addressed the state of mind exception as dictum is based upon the introduction of Mrs. Shepard's statements at trial under the dying declaration exception. *Id.* The opinion's status as dictum, however, has not affected its impact upon the application of the *Hillmon* doctrine.

100. *Id.* at 803-115.

101. *See, e.g.*, Hinton, *supra* note 39, at 421-23; Maguire, *supra* note 39, at 721-23; *see also supra* note 65.

102. FED. R. EVID. 803(3). The Advisory Committee stated, "The carving out, from the exclusion [of statements that refer to past conduct] . . . , of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic." 51 F.R.D. 315, 424 (1971).

103. *See* 51 F.R.D. 315, 424 (1971).

conduct, not the future conduct of another person."[104] The House Subcommittee heard testimony proposing this limitation and the full Committee apparently adopted the recommendations in its explanatory note.[105] The statements of the Advisory Committee and

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104. *Id.*

105. For the legislative history of the Federal Rules of Evidence, see *supra* note 86. The House Subcommittee drafted two versions of the rules; the versions neither altered the Advisory Committee's proposed rule 803(3) nor contained explanatory notes for the proposed rules. *See Hearings (Supplement), supra* note 89, at 145, 357. In six days of hearings the House Subcommittee did not discuss the *Hillmon* doctrine as codified by the proposed rule 803(3). *See Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Committee on the Judiciary on Proposed Rules of Evidence*, 93d Cong., 1st Sess. 1 (1973). After publication of the first version, the Subcommittee solicited comments and suggestions on the proposed rules. *Hearings (Supplement), supra* note 89, at iii.

Three comments addressed proposed rule 803(3). First, the American College of Trial Lawyers recommended passage of the exception as drafted. *Id.* at 74. Second, the President of the Connecticut Bar Association recommended that the Subcommittee recast rules 803(1), (2), and (3) as rule 804 exceptions, which require the unavailability of the declarant as a prerequisite to admissibility. He stated,

> They are serious exceptions to the hearsay rule and subject to many frailties. The approach suggested by the Rule would appear to be fraught with danger as to possible prejudice even though the witness can he called by the opposing party for purposes of cross-examination. The burden should be upon the proposing party to bring the witness to court and to have him testify live and to give testimony which is clearly admissible.

Id. at 274 (statement of Harry S. Gaucher, Jr.). Last, the Chairman of the Study Committee on the Federal Rules of Evidence of the District of Columbia Bar Association approved the text of rule 803(3) but expressed concern for the scope of its application. Quoting the Advisory Committee's statement of intention to leave the *Hillmon* doctrine undisturbed, he stated,

> As phrased, the [Advisory Committee's] sentence may merely refer to the well accepted use of prior intention (as evidenced by a declaration or otherwise) as circumstantial evidence tending to show that the declarant probably carried out *his* intention. The [*Hillmon*] decision, however, also approved the use of the intention of A of going on a trip with B as evidence of what B later did. This gets before the trier the intention of someone other than the declarant. But the declarant, though he knows his own state of mind, can only know the intention of B through B's statements to A or through A's inference from circumstances or both. This hearsay exception is said to be reliable only as to A's statements of his *own* then existing intentions since A is conscious of his own inner state of mind and there are no memory problems. The rationale does not extend to A's statements of B's inner purposes, however, but only to B's declarations of his own existing intention. As Justice Traynor pointed out in his dissent in *People v. Alcalde*, 24 Cal. 2d 177, 148 P.2d 627 (1944), the declarations of the deceased that she was going out with the defendant later that night cannot be admitted for the purpose of proving the *defendant's* probable conduct that night "without setting aside the rule against hearsay." [*Id.* at 632; *see infra* notes 113-26 and accompanying text]. The Committee therefore recommends either that the Note be changed to expressly reflect the applicability of Rule 803(3) only to declarations of intention of A to prove A's probable future conduct or at least that the sentence approving *Hillmon* be deleted. The latter action would at least avoid foreclosing the raising of the above problem in future cases.

Hearings (Supplement), supra note 89, at 288 (statement of Joseph S. McCarthy).

the House Committee represent starkly contrasting viewpoints on the proper application of the *Hillmon* doctrine. Neither the Senate Judiciary Committee nor the subsequent Conference Committee addressed this conflict, and Congress retained both explanatory notes as statements of the legislative intent of rule 803(3).[106] Two possible reasons for this oversight are that no one altered the first version of rule 803(3) as drafted by the Advisory Committee,[107] and the exception itself provoked little controversy.[108] Nevertheless, the courts face two interpretations of the same rule in determining the proper limits of the *Hillmon* doctrine under rule 803(3).[109]

Since the codification of the *Hillmon* doctrine in rule 803(3), several courts have expressed confusion over the scope of the exception in light of the conflicting statements of legislative intent. In one opinion Judge Friendly noted that certain hearsay statements arguably were admissible under rule 803(3), but "[b]ecause of confusion generated by the Federal Rules of Evidence," he preferred to admit the statements under another exception.[110] Judge Friendly stated,

> The Senate Committee was silent and the Conference Report consequently did not comment. Are the Senate and the President or, for that matter, the members of the House who were not on the Committee to be considered to have adopted the text of the Rule, as glossed by the Advisory Committee's Note that Rule 803(3) enacted *Hillmon*, or the House Committee's "construction" which, in effect, seriously restricts *Hillmon*?[111]

The Supreme Court has not answered this question but most courts have applied rule 803(3) in the common-law tradition.

This conflict focuses on the propriety of allowing into evidence hearsay statements by the declarant that tend to prove circumstantially that he acted in conformity with his stated intention when that action required the cooperation of a third party. Section

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106. *See supra* note 35.

107. *See supra* note 105.

108. *See id.*

109. Weinstein and Berger in their treatise on the Federal Rules of Evidence inexplicably commented that Congress "expressed a legislative intent in the House Judiciary Committee's report with respect to Rules 803(3). . . . [T]he comments of the House Judiciary Committee to 803(3) . . . generally reflect the draftsman's intentions and will not significantly affect the result reached without this comment." 4 J. WEINSTEIN & M. BERGER, *supra* note 3, at 803-07 to -08.

110. United States v. Mangan, 575 F.2d 32, 43 n.12 (2d Cir. 1978). The court admitted the challenged hearsay statements under the co-conspirator exception of FED. R. EVID. 801(d)(2)(E).

111. United States v. Mangan, 575 F.2d 32, 43 n.12 (2d Cir. 1978).

4 of part II examined the inherent hearsay dangers that stem from the admission of such statements.[112] Other dangers arise when the hearsay statement implicates the conduct of a third party who is the defendant in a criminal trial. The next part analyzes the various policy rationales employed to resolve this issue and examines how state and federal courts have applied this exception in criminal trials.

IV. RULE 803(3) AND THE *Hillmon* DOCTRINE APPLIED

Rule 803(3) has its greatest impact on the outcome of a criminal trial when the hearsay statement implicates a third party who is the defendant charged with the murder of the declarant, and whose cooperation was imperative to the occurrence of the declarant's stated intention. In *People v. Alcalde*[113] the California court confronted this situation. The declarant in *Alcalde* told her friend "that she was going to dinner that night with 'Frank.' "[114] That night the declarant was murdered, and the Government charged Frank, the third party implicated by the deceased declarant's statement, with her murder.[115] A majority of the California Supreme Court upheld the trial court's admission of the incriminating statement under the common-law *Hillmon* doctrine.[116] The court examined the statement for any indicia of reliability to justify its admission.

> Elements essential to admissibility are that the declaration must tend to prove the declarant's intention at the time it was made; it must have been made under circumstances which naturally give verity to the utterance; it must be relevant to an issue in the case. . . . Unquestionably, the deceased's statement of her intent and the logical inference to be drawn therefrom, namely, that she was with the defendant that night, were relevant to the issue of the guilt of the defendant. But the declaration was not the only fact from which an inference could be drawn that the deceased was with the defendant that night. Other facts were in evidence from which the inference could reasonably be drawn. The cumulation of facts corroborative of the guilt of the defendant was sufficient to indicate that the trial court did not err in

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112. *See supra* notes 81-85 and accompanying text.

113. 24 Cal. 2d 177, 148 P.2d 627 (1944).

114. *Id.* at 181, 148 P.2d at 628.

115. *Id.* at 179, 148 P.2d at 628.

116. *Id.* at 185-88, 148 P.2d at 630-32. Citing *Hillmon*, the court stated,

> From the declared intent to do a particular thing an inference that the thing was done may fairly be drawn. Such declarations have been deemed admissible where they possessed a high degree of trustworthiness. Where they are relevant to an issue in the case and the declarant is dead or otherwise unavailable the necessity for their admission has been recognized.

Id. at 185-86, 148 P.2d at 631.

admitting the declaration.[117]

The trial court in *Alcalde* "took the precaution to state in the presence of the jury that the evidence was admitted for the limited purpose of showing the decedent's intention."[118] The majority's analysis, however, ignores the unique dangers of intervening circumstances and alteration of intention that accompany these types of statements.[119] The court approved the trial court's limiting instruction confining the impact of the statement to the deceased declarant's intentions but recognized that "the logical inference to be drawn therefrom . . . [was] that she was with the defendant that night."[120] Justice Traynor noted in dissent that the jury reasonably could not have confined the impact of the statement because the deceased's declaration "that she was going out with Frank is also a declaration that he was going out with her, and it could not be admitted for the limited purpose of showing that she went out with him at the time in question without necessarily showing that he went out with her."[121]

Justice Traynor recognized that the prosecution's true purpose in offering the statements was to prove circumstantially that the *defendant* intended to go out, and did go out with the deceased declarant on the night of her murder, which made it more probable than not that the defendant killed her.[122] Thus, the declarant's statement of intent also served to prove the defendant's intent. Moreover, the jury could not have accepted that the declarant actually possessed the then-existing state of mind to go out with Frank unless it also accepted that the declarant had some reason to believe that Frank intended to go out with her. That is, Frank's past acts must have caused the declarant to believe he intended to go out with her on the night of the murder. Statements that point toward past conduct, however, are inadmissible under both common law and rule 803(3)[123] because of the fear that such an exception would erode the rule against hearsay.[124] Arguably, every statement of the declarant's intended conduct that requires the cooperation of a third party implicitly refers to some past act of

117. *Id.* at 187-88, 148 P.2d at 632.
118. *Id.* at 185, 148 P.2d at 630.
119. *See supra* notes 73-82 and accompanying text.
120. 24 Cal. 2d at 188, 148 P.2d at 632.
121. *Id.* at 189, 148 P.2d at 633 (Traynor, J., dissenting).
122. *Id.* at 189-90, 148 P.2d at 632.
123. *See supra* notes 93-102 and accompanying text.
124. *See supra* notes 62-72 and accompanying text.

the third party upon which the declarant based his belief. Because statements such as the one in *Alcalde* do not refer expressly to these past actions, a majority of the courts have admitted them.[125]

The majority and dissenting opinions in *Alcalde* represent the conflict over the proper limits of the *Hillmon* doctrine. This conflict survived the codification of the *Hillmon* doctrine in rule 803(3) in the form of inconsistent statements of legislative intent. Most courts have used the common-law *Hillmon* doctrine or rule 803(3) to allow into evidence the deceased declarant's hearsay statements that implicate the defendant in the declarant's murder trial.[126] Ample authority justifies this application of the *Hillmon* doctrine. First, the *Hillmon* Court ruled that such statements which implicate the conduct of third parties are admissible as an exception to the rule against hearsay.[127] Although *Hillmon* was a civil case, the Court cited several criminal cases to support its holding.[128] Second, the Advisory Committee noted that it intended

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125. In most cases, the courts have not recognized that past acts that provided reason for the declarant's belief are the basis of all statements of future intention. Because the past acts are not expressed in these statements, arguably they are not before the jury and therefore, their admission does not risk the hearsay dangers of faulty perception and erroneous memory.

126. *See, e.g.*, United States v. Moore, 571 F.2d 76, 82 n.3 (2d Cir. 1978) (Coffrin, J.) (dictum); United States v. Stanchich, 550 F.2d 1294, 1297-98 n.1 (2d Cir. 1977) (Friendly, J.) (court declined to rule on statements admitted under the *Hillmon* exception, but indicated that with corroborative evidence these statements would be admissible) (cited as a majority holding in United States v. Moore, 571 F.2d 76, 82 n.3 (2d Cir. 1978)); United States v. Pheaster, 544 F.2d 353, 374-80 (9th Cir. 1976) (Renfrew, J.), *cert. denied*, 429 U.S. 1099 (1977); United States v. Calvert, 523 F.2d 895, 910 (8th Cir. 1975) (Heaney, J.) *cert. denied*, 424 U.S. 911 (1976) (court admitted deceased declarant's statement "he intended to speak to the defendant about cancelling the insurance and getting out of the partnership"); Hayes v. State, 395 So. 2d 127, 142-44 (Ala. Crim. App. 1980) (applying state common-law *res gestae* exception); State v. Abernathy, 265 Ark. 218, 219-22, 577 S.W.2d 591, 592-94 (1979) (applying state's version of rule 803(3)); State v. Cugliata, 372 A.2d 1019, 1027 (Me.) ("Maine law has recognized a 'present mental state' exception to the hearsay rule as applicable in criminal prosecutions, along the lines discussed by the Supreme Court . . . in *Hillmon* and as acknowledged, and continued in effect, by Rule 803(3) M.R., Evid"), *cert. denied*, 434 U.S. 856 (1977); State v. Sharbono, 175 Mont. 373, 385-86, 563 P.2d 61, 68 (1977) (statement of intent to spend weekend with defendant admissible under state common law); State v. Thornton, 38 N.J. 380, 389-90, 185 A.2d 9, 14-15 (1962) (statement of intent by deceased declarant "a few hours before she was shot, of her intention to visit her husband" admissible under state common law), *cert. denied*, 374 U.S. 816 (1963); State v. Vestal, 278 N.C. 561, 581-90, 180 S.E.2d 755, 768-73 (1971) (statement of intent to travel with defendant admissible under state common law), *cert. denied*, 414 U.S. 874 (1973); Commonwealth v. Lowenberg, 481 Pa. 244, 253-55, 392 A.2d 1274, 1278-79 (1978) (statement "offered to establish the intention of the deceased to see the appellant and confront him concerning a financial matter she considered serious" admissible under state common law).

127. *See supra* notes 38-59 and accompanying text.

128. Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 297 (1892).

rule 803(3) to leave the *Hillmon* doctrine undisturbed.[129] Third, the safeguards of limiting instructions and the allocation of the burden of proof to the government in a criminal trial arguably provide adequate protection for the defendant.[130] Last, these courts have applied the exception in most cases when the surrounding circumstances bolster the reliability of the *Hillmon* statements.[131]

No federal court has expressly refused to apply the common-law *Hillmon* doctrine or the "undisturbed" version of rule 803(3). In *United States v. Pheaster*[132] the facts of the case and the proffered statements closely parallelled those in *People v. Alcalde.*[133] Two witnesses at trial in *Pheaster* testified that the declarant stated his intention to meet the defendant in a parking lot in order to receive a free pound of marijuana.[134] These statements implicated the defendant, who was on trial with others for kidnapping the deceased declarant.[135] The defendant challenged the admission of this hearsay on the ground that the jury could not reasonably have complied with the trial court's limiting instruction that it consider the statement only as proof of the declarant's conduct.[136] Specifically, the defendant claimed that "there was no need to name the person with whom [the declarant] intended to meet, and that the limiting instruction was insufficient to overcome the prejudice to which he was exposed hy the testimony."[137]

The court upheld admission of the statements under the *Hillmon* doctrine.[138] Citing *Hillmon,*[139] California case law, and the California Evidence Code[140] to support its holding, the court also

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129. *See supra* notes 103-08 and accompanying text.

130. *See* C. McCORMICK, *supra* note 3, at 699-701.

131. These circumstances include (1) the relevance of the statement to a material issue in the case; (2) the existence of other corroborative facts tending to prove that the declarant indeed carried out bis stated intention; and (3) otber facts in tbe case that allay the traditional fears of potential insincerity and ambiguity inherent in all hearsay.

132. 544 F.2d 353 (9th Cir. 1976) (Renfrew, J.).

133. *See supra* notes 113-25 and accompanying text.

134. 544 F.2d at 375.

135. *Id.* at 358-59.

136. *Id.* at 375.

137. *Id.*

138. *Id.* at 374-80. The court noted that "the standard . . . of the Federal Rules of Criminal Procedure . . . governed at . . . the trial below." *Id.* at 375-76. Thus, "tbe District Court was required to decide issues concerning tbe 'admissibility of evidence' according to 'the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.' " *Id.* at 376.

139. *See supra* notes 38-59 and accompanying text.

140. Section 1250 of the state code codified tbe *Hillmon* doctrine and the comments to that section cited *Alcalde,* which tbe *Pheaster* court cited as precedent for rejecting the

examined the recently enacted Federal Rules of Evidence "for any light they might shed on the status of the common law at the time of trial."[141] The court noted that while the Advisory Committee comments to rule 803(3) suggest that the rule fully incorporates the common-law *Hillmon* doctrine, the House Committee notes indicate that the rule limits the *Hillmon* doctrine to disallow statements similar to those in *Pheaster*.[142] Although the *Pheaster* court recognized the danger of intervening circumstances when the accomplishment of the declarant's stated intent requires the cooperation of a third party,[143] the court refused to order exclusion of the statements, stating,

> [T]he difference is one of degree rather than kind. 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.[144]

Implicit in the *Pheaster* court's holding is the ruling that potential prejudice to the defendant is not a consideration in the analysis of *Hillmon* evidence. The court noted that the statements implicating the defendant might have prejudiced him if the trial court had admitted them solely to rebut the "issue created by the defense . . . that [the declarant] had not been kidnapped but had disappeared voluntarily as part of a simulated kidnapping designed to extort money from his wealthy father from whom he was already estranged."[145] The court intimated that such a situation might have warranted the excision of any reference to the defendant.[146] Because the statements fell within the *Hillmon* doctrine, however, their admission into evidence did not prejudice the defendant.[147]

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defendant's challenge. 544 F.2d at 379. *See supra* notes 113-26 for a discussion of *Alcalde*.

141. 544 F.2d at 379.

142. *Id.* at 379-80.

143. *Id.* at 376 n.14.

144. *Id.*

145. *Id.* at 375.

146. *Id.* at 375 n.12. Quoting *Shepard*, the court stated, "Were this the only theory under which the testimony could come in, we would tend to agree with [the defendant]. In such a context, the potential prejudice would far outweigh the potential relevance of the testimony, and a limiting instruction would not sufficiently safeguard the defendant." *Id.*

147. *Id.* at 375. The court acknowledged "the theoretical awkwardness associated with the application of the *Hillmon* doctrine to facts such as those now before us, [but] the authority in favor of such an application is impressive, beginning with the seminal *Hillmon* decision itself." *Id.* at 377. The court cited this precedent in rejecting the defendant's argument that the jury could not comply with the trial court's limiting instruction to use the statements only "for the limited purpose of showing the 'state of mind of [the declarant],'

Although Judge Ely concurred in this part of the *Pheaster* holding,[148] he conceded that the statements' admission into evidence was not reversible error in light of the *Hillmon* doctrine.[149] Citing *Shepard*[150] and the Traynor dissent in *Alcalde*,[151] Ely asserted that courts should limit the *Hillmon* doctrine according to the guidelines suggested by the House Judiciary Committee in its explanatory note to rule 803(3).[152] He recognized the prejudice suffered by the defendant when the trial court admitted the declarant's hearsay statements implicating him. Ely acknowledged that because the declaration "was the strongest evidence linking [the defendant] to the conspiracy," the risk was substantial that the jury would rely on it to prove both the acts of the declarant and the acts of the defendant, notwithstanding limiting instructions.[153]

In *United States v. Moore*[154] the burden of proof requirement mitigated any potential prejudice that the admitted hearsay statements may have caused the defendant. In *Moore* the Government charged the defendants with interstate transportation of a kidnap victim.[155] The trial court admitted into evidence an out-of-court declaration by one of the alleged conspirators that "they would probably take [the victim] Huggins 'out of the states where he would never be found.' . . . However, he did not say to whom the word 'they' referred."[156] The Second Circuit did not rule on the admissibility of the statement.[157] The appellate court stated that even if the statement were admissible it was insufficient by itself

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. . . and not for 'the truth or falsity of what [he] said.'" *Id.* at 374-75.

148. *Id.* at 385.

149. *Id.* Judge Ely stated, "I am obligated by the almost century-old precedent of . . . *Hillmon* . . . to concur in the majority's decision that the trial court did not commit reversible error in admitting" the challenged statements. "Nevertheless, while my Brother Renfrew is doubtless correct that a majority of courts have adhered to the *Hillmon* doctrine, it is also true that the holding has been subjected to severe criticism by some of our Nation's most distinguished judicial scholars." *Id.* (citations and footnote omitted).

150. *See supra* note 94 and accompanying text.

151. *See supra* notes 113-21 and accompanying text.

152. 544 F.2d at 385. Ely concluded,

> The fact that the members of the House Judiciary Committee specifically noted their intent to limit the *Hillmon* doctrine in Rule 803(3) of the new Federal Rules of Evidence indicates that the sound criticisms voiced by those two eminent members of the judiciary, as well as other legal scholars, are now widely believed to be valid.

Id. (footnote omitted). *See supra* part III.

153. 544 F.2d at 385.

154. 571 F.2d 76 (2d Cir. 1978).

155. *Id.* at 78.

156. *Id.* at 79 (citations omitted).

157. *Id.* at 82.

"to prove that any *actual* interstate transportation of [the victim] ever occurred."[158] The court indicated that if the Government had presented "additional, more concrete evidence of interstate or foreign transportation, [the defendant's] statement of intent . . . might have been more probative of the fact that the intent was actually carried out."[159] In a footnote the court indicated that had the Government proffered such corroborative evidence at trial, it would have upheld the trial court's admission of the statement of intent.[160] Although the appellate court recognized the House Judiciary Committee's limitation on rule 803(3), it nevertheless agreed with the Government that the Advisory Committee's Note left the *Hillmon* doctrine "undisturbed," and that "courts have held that *Hillmon* declarations of intent are admissible as evidence of actions of the declarant and others."[161]

Most state courts apply the traditional common-law approach or their own state's version of rule 803(3) to *Hillmon* statements. For example, in *State v. Cugliata*[162] the Supreme Judicial Court of Maine rejected the defendant's contention that the jury was incapable of complying with the limiting instruction of the trial judge.[163] In *Cugliata* the prosecution offered into evidence a statement by the deceased declarant that he was "planning to buy 10 pounds of hashish at midnight, August 14," and "that two other people, one of whom was named 'Frank' . . . , were to accompany [him]."[164] The prosecution charged Frank with the murder of the declarant, which "occurred sometime between 11:00 p.m. August 14 and 3:00 a.m. August 15."[165] The trial court admitted the statement and gave the following limiting instruction to the jury when the witness recounted the deceased declarant's statement and during the final charge to the jury:

> "[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 declarant to make a trip, and also as bearing upon whether or not in fact he did make such a trip. But for no . . . other purpose will you receive this testimony or give it any application."[166]

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158. *Id.* at 82 (emphasis in original).
159. *Id.*
160. *Id.* at 82 n.3.
161. *Id.*
162. 372 A.2d 1019 (Me.), *cert. denied*, 434 U.S. 856 (1977).
163. *Id.* at 1029.
164. *Id.* at 1026.
165. *Id.* at 1022. Frank was one of two defendants charged with murder.
166. *Id.* at 1026.

Citing *Hillmon* and the exception "preserved by the Maine Rules of Evidence as Rule 803(3),"[167] the court noted that the need for the evidence,[168] "added indicia of reliability,"[169] and "abundant corroboration that [the declarant's] plan was real and, in fact, carried out"[170] compelled admission of the statement. The court noted that the holding in *Hillmon* was intended to except from the rule against hearsay "so much of the declarant's plan to take future action as included the involvement of other persons in the plan."[171] The *Cugliata* court concluded that "[t]he law did not require the limitations imposed by the [trial judge]"[172] and that "any harm resulting to the defendants because the jury might be unable to comply with the formal instruction would not be a legally impermissible form of prejudice."[173]

The New York Supreme Court in dictum limited the application of the common-law *Hillmon* doctrine to the single inference that the declarant carried out his stated intention to meet the third party implicated in the statement.[174] At trial in *People v. Lauro*[175] a Government witness planned to testify about "the *intention* of the deceased to present to her husband, a few days before her death, a financial offer in the nature of an ultimatum at a time when marital relations between them were strained"[176] in order to prove that the defendant had an opportunity and a motive to murder his wife.[177] Because no one witnessed the killing, the Government's evidence against the defendant was entirely circumstantial.[178] The *Lauro* court recognized that the

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167. *Id.* at 1027. The Maine Rules of Evidence were not in effect during the trial. *Id.* at 1027 n.3. The court stated that rule 803(3) of the Maine Rules of Evidence "acknowledged" and "continued in effect" the common-law application of the *Hillmon* doctrine by the Maine courts in criminal prosecutions. *Id.* at 1027.

168. *Id.* at 1028. "[L]ike the communications in *Hillmon* . . . [the declarant's] statements concerned future travel plans. [The declarant's] unavailability as a witness also parallels [that case and] accentuates the necessity for admission of the hearsay there recognized." *Id.*

169. *Id.* "[S]ome of the elements" of the coconspirator and declaration against penal interest exceptions convinced the court that the statement was reliable. *Id.*

170. *Id.* Other circumstantial evidence tended to place the deceased declarant and defendant together on the night of the murder. *Id.*

171. *Id.* at 1029.

172. *Id.*

173. *Id.*

174. *See* People v. Lauro, 91 Misc. 2d 706, 710, 398 N.Y.S.2d 503, 505 (Sup. Ct. 1977).

175. *Id.*

176. *Id.* at 707, 398 N.Y.S.2d at 503 (emphasis in original).

177. *Id.*, 398 N.Y.S.2d at 504.

178. *Id.* at 708, 398 N.Y.S.2d at 504.

> prosecution intended for the jury [to] draw the following series of inferences: (1) that [the declarant] did *perform the act intended,* i.e., confront the defendant with her "ultimatum" financial offer; (2) that [defendant] reacted adversely to such a proposal; . . . (3) [that this reaction] provided the defendant with a motive to kill; and (4) ultimately led him to actually kill [the declarant] with a shotgun.[179]

The court stated that these inferences went beyond the scope of *Pheaster*[180] and *Alcalde,*[181] in which the victim's statements of intent to meet the defendant provided "some proof that they were in fact together on the night of the crime, from which the jury might infer guilt."[182] The court also noted that in both *Pheaster* and *Alcalde* other direct evidence corroborated the assertion that the declarant and defendant actually met on the day of the murder.[183]

Two state courts have limited application of the *Hillmon* doctrine. They recognized the potential prejudice to the defendant risked by the admission of these hearsay statements and the failure of limiting instructions to the jury to restrict their impact.[184] In

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179. *Id.* at 710, 398 N.Y.S.2d at 505 (emphasis in original).

180. *See supra* notes 133-54 and accompanying text.

181. *See supra* notes 113-22 and accompanying text.

182. 91 Misc. 2d at 710, 398 N.Y.S.2d at 505.

183. *Id.* at 710 n.4, 398 N.Y.S.2d at 505 n.4.

184. In the federal courts only dissenting opinions have proposed to limit application of the *Hillmon* doctrine. *See, e.g.:,* United States v. Jenkins, 579 F.2d 840, 844-45 (4th Cir.) (Widener, J., dissenting) (contended that majority accepted the House limitation in rule 803(3) but its application was "erroneous"), *cert. denied,* 439 U.S. 967 (1978); United States v. Pheaster, 544 F.2d 353, 384 (9th Cir. 1976) (Ely, J., dissenting) (recognizes majority rule but notes agreement with *Shepard,* the *Alcalde* dissent, and the House Judiciary Committee limitation), *cert. denied,* 429 U.S. 1099 (1977).

Although the *Jenkins* court apparently accepted the House Judiciary Committee's limitation, which would place this court in the minority, in effect it applied the common-law *Hillmon* exception and the Advisory Committee's interpretation of rule 803(3) to the hearsay statement. *See* 579 F.2d at 843. The Government charged the defendant in *Jenkins* with lying before a grand jury. Observers had seen the defendant driving Johnson, with whom he lived, to the home of a heroin dealer. He dropped Johnson off, waited, and then drove her back to their home. He gave the grand jury conflicting answers to questions concerning his knowledge of a drug transaction between Johnson and an accomplice that allegedly occurred while he waited for Johnson. *Id.* at 341-42. A police wiretap of Johnson's phone produced the only evidence of defendant's intent—a statement in which Johnson told her accomplice "I'm on my way." *Id.* at 842. The court upheld the admissibility of this statement under rule 803(3) "both to show [Johnson's] intent and to promote an inference that she actually effectuated her intent and set out for" her accomplice's home. *Id.* at 842-43. Citing *Hillmon,* the court held that the defendant's challenge under the House Judiciary Committee's limitation of rule 803(3) was "misplaced."

> Instantly, Johnson's salutation to [her accomplice], "I'm on my way," (or even a statment that she would come over *with* [the *defendant*]) would be inadmissible under the Congress's limitation *if* offered *solely* to prove that [the defendant] did accompany Johnson. However, the purpose of the proffer here was not to show that [the defendant] drove to the [accomplice's] residence—substantial independent evidence was in-

Clark v. United States[185] the District of Columbia Court of Appeals considered the admissibility of a statement by the deceased declarant that "while she expected to attend classes as usual, because of her fear of [the defendant], she was uncertain as to whether she would meet him before class."[186] The Government sought to admit the statement under the *Hillmon* doctrine not as circumstantial evidence tending to prove that the declarant intended to meet with the defendant, but as circumstantial evidence of the defendant's intent to meet with the declarant. Although one question at trial was "whether [the defendant] was present at the scene of the crime on the day it was committed,"[187] the court ruled that since neither the location of the murder nor the identification of the declarant as the deceased was in dispute,[188] declarant's state of mind was not relevant to "a material issue in the case,"[189] and

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troduced on that point—but rather *solely* to show *why* [the defendant] left home in the middle of the night, drove across town, and let Johnson out in the 1200 block of North Ellwood Avenue.

Id. at 843 (emphasis added). The court, notwithstanding its apparent acceptance of the minority view limiting the *Hillmon* doctrine, justified admission of this statement because its purpose was "only to show *why* [the defendant] behaved as he did. [It] was not to show his conduct on the night in question." *Id.* at 844 (emphasis in original). The court viewed the statement as relevant since Johnson's "state of mind was material, given the circumstances of this case." *Id.*

Commentators have criticized this holding: "The majority's conclusion . . . that Johnson's state of mind is material seems erroneous since the issue is whether the defendant lied, not whether Johnson lied." 4 J. WEINSTEIN & M. BERGER, *supra* note 3, at 803-103 n.1. Even if this statement arguably were relevant, the dissent exposed the flawed analysis of the majority in *Jenkins*.

> I think the majority's application of Rule 803(3) . . . is erroneous. As the court correctly observes, the hearsay exception for statements of a declarant's existing state of mind is applicable only to admit proof of the declarant's future conduct, not that of third persons. [quoting the House Judiciary Committee limitation] . . . Thus, if Johnson had stated, "Jenkins [the defendant] is about to drive me over," clearly the statement would be inadmissible to prove that [the defendant] did so. The majority concedes this much, yet it is willing to accept the introduction of a hearsay statement, the only relevance of which is to prove the same thing as the just-quoted statement, only to do so inferentially, rather than directly. The point is that the tapes were not introduced merely to prove that Beatrice Johnson went to visit [her accomplice] . . . . They were introduced to prove by inference something that they would be inadmissible to prove directly, that Johnson asked [the defendant] for a ride to [the accomplice's] house, that [the defendant] knowingly complied with that request, and therefore that [the defendant] lied to the grand jury.

579 F.2d at 845.

185. 412 A.2d 21 (D.C. 1980) (Newman, J.).

186. *Id.* at 29.

187. *Id.* at 28-29.

188. *Id.*

189. *Id.* at 30.

therefore, the statement was inadmissible. The court stated,

> We accept the approach taken in the House Report not only because it admits statements of intention consistent with the standards applied to the admission of other state-of-mind evidence, but also because the declarant's statements, if reliable at all, are only reliable as to the declarant's own intention. Needless to say, if the statements not only involve the declarant's intention but also those of the defendant, and the declarant's intention is not an issue in dispute, the prejudice to the defendant is compounded. . . . The logic of Justice Traynor's dissent in *People v. Alcalde* is as persuasive today as when it was first written. . . . Clearly, to admit such evidence where the victim's intentions are irrelevant violates one of the fundamental concepts of the state-of-mind exception: that the declarant's own state of mind be relevant to a material issue in the case.[190]

The court in *Clark* adopted the minority view that statements of intention implicating third parties are inadmissible. Therefore, even if the declarant's intention had been a material issue and her statement expressed her intent to meet the defendant at a certain time and place, the court would not have admitted the statement "due to the prejudice to the defendant that results from the departure from traditional state-of-mind concepts."[191]

An Illinois district court in *People v. Cole* held that the common-law *Hillmon* doctrine did not apply to criminal cases.[192] Although the court ruled that the admission of the hearsay was harmless error, it found "no basis for establishing in a criminal case 'the declaration of mental state' or 'a statement of intention' as an exception to the hearsay rule in derogation of the defendant's rights of confrontation and cross-examination as assured by the constitution."[193] A special concurring opinion rejected the majority's limitation and noted that "such testimony would appear to be admissible under Rule 803(3) of the Federal Rules of Evidence,"[194] to become effective one month after the *Cole* decision.

Any limitation of the common-law *Hillmon* doctrine or rule 803(3) represents the minority view. Most courts confronted with *Hillmon* statements, however, have exhibited an acute awareness of the dangers posed by these statements. One reason for the continued vitality of this doctrine appears to be that courts are naturally reluctant to overrule or limit a longstanding common-law tradition. Part V suggests a framework for examining *Hillmon* statements to determine what dangers they may pose in a criminal

190. *Id.* at 30 (citation omitted).
191. *Id.* at 29.
192. 29 Ill. App. 3d 369, 329 N.E.2d 880 (1975).
193. *Id.* at 374, 329 N.E.2d at 885.
194. *Id.* at 381, 329 N.E.2d at 890 (concurring opinion).

trial and to evaluate their admissibility as evidence.

V. ANALYSIS

Statements of future intent admitted into evidence under the *Hillmon* doctrine risk four hearsay dangers: ambiguity, insincerity, frustration of purpose, and alteration of intent.[195] Congress chose to accept these dangers when it codified the common-law exception in rule 803(3).[196] Whether Congress intended this exception to apply to statements that implicate the conduct of a third party is unclear from the legislative history because of conflicting statements of legislative intent,[197] but an overwhelming majority of courts have applied rule 803(3) in the common-law tradition.[198] Thus, in most jurisdictions statements of future intent are admissible as circumstantial evidence that the declarant's intended conduct occurred even if performance of that conduct required the joint action or cooperation of a third party. The use of these statements as evidence particularly risks the dangers of frustration of purpose and alteration of intention. In part IV this Note examined the cases in which the prosecution used the *Hillmon* exception to admit statements of intent by the deceased declarant that implicated the defendant charged with the declarant's murder. Admission of statements of future intent that place the defendant and declarant together at or near the time of declarant's murder endangers the defendant's right to a fair trial if the jury does not restrict the use of this circumstantial evidence only to proof of the *declarant's* probable conduct. Because of the potential prejudice to the defendant in this situation, the trial court must consider carefully the admissibility of each statement on a case by case basis and avoid perfunctory application of this exception.

A. Past or Future Conduct

The first step a trial court must take is to determine whether a statement falls within the parameters of the *Hillmon* doctrine. The most important limitation on this exception is that it applies only to statements of intention to engage in future conduct rather than to statements referring to conduct that occurred in the past. This

195. *See supra* part II.
196. *See supra* part III.
197. *See supra* notes 103-09 and accompanying text.
198. *See supra* part IV.

requirement exists both at common law[199] and under rule 803(3),[200] but confining the doctrine in this manner is often difficult in practice. The most obvious example of a statement that falls outside the scope of the *Hillmon* doctrine is one that refers only to a past event, such as the statement: "I returned from Crooked Creek today."[201] Conversely, the doctrine clearly includes a statement of future conduct, for example, "I will leave tomorrow for Crooked Creek."[202] Justice Cardozo ruled in *Shepard v. United States*[203] that the first statement falls outside the *Hillmon* doctrine. The second statement represents the traditional type of hearsay admissible under this exception: a statement of intention referring to future travel plans. Between these two extremes lies a third type of hearsay statement that often defies characterization based upon the time period to which it points because it may refer simultaneously to past, present, and future events.

Judge Friendly in *United States v. Annunziato*[204] defined the analysis that many courts have applied to statements referring to both past and future conduct. In that case the deceased declarant told his 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.' "[205] The declarant's son repeated these statements with the trial court's permission and then testified that "I asked him what he intended to do, and he had agreed to send some up to Connecticut for him."[206] The issue before the court was the admissibility of the statements because 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."[207] Concluding that this statement was admissible under the common-law *Hillmon* doctrine, Judge Friendly stated that "the 'most obvious implications' of [the declarant's] statement looked forward—he was going to send money to Bridgeport."[208] He acknowledged that

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199. *See supra* notes 99-103 and accompanying text.
200. *See id.*
201. *See supra* notes 62-69 and accompanying text.
202. *See supra* notes 73-80 and accompanying text.
203. 290 U.S. 96 (1933). *See supra* notes 94-102 and accompanying text.
204. 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961).
205. *Id.* at 376.
206. *Id.*
207. *Id.* at 377.
208. *Id.* Judge Friendly derived this "most obvious implications" test from language in *Shepard*. *See supra* notes 94-102 and accompanying text.

if the Government had offered only the statement referring to the phone conversation with the defendant—the past event—then the *Shepard* limitation would have required exclusion of the evidence.[209] Because the testimony included a statement of intention to engage in future conduct, however, Judge Friendly ruled that the entire declaration was admissible.[210] He stated,

> 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.[211]

The *Annunziato* decision extended the *Hillmon* doctrine beyond its intended scope. Weinstein and Berger's treatise on evidence expresses cogently the holding's flaw: "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."[212] The effect of the *Annunziato* analysis was to allow highly incriminating statements into evidence under the cloak of the *Hillmon* doctrine.[213] With his disarming language Judge Friendly deflected attention from the significant departure that *Annunziato* made from the *Shepard* limitation. "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 the money is not, would truly be swallowing the camel and straining at the guat."[214] Judge Friendly should not have relied upon the admission of statements referring to past events because they accompanied statements of future intent.[215] Justice Cardozo rejected the use of state-

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209. *Id.* at 378. Judge Friendly stated, "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." *Id.*

210. *Id.* at 376-78.

211. *Id.* at 378.

212. 4 J. WEINSTEIN & M. BERGER, *supra* note 3, ¶ 803(3)[05], at 803-119.

213. At the time of the *Annunziato* decision in 1961, the exceptions to the rule against hearsay were still developing, and Judge Friendly could not rely upon the declaration against penal interest exception. "In the *Hillmon* and *Annunziato* cases . . . there was a pressing need for the hearsay testimony." United States v. Mandel, 437 F. Supp. 262, 265 (D. Md. 1977) (mem.) (Taylor, J., by designation).

214. 293 F.2d at 377-78.

215. Judge Friendly distinguished *Shepard* by stating,

ments that refer to past conduct because such an exception threatened to swallow the hearsay rule;[216] the dangers inherent in their admission do not diminish because they accompany statements admissible under the *Hillmon* doctrine. Moreover, Judge Friendly's extension of the *Hillmon* doctrine was unnecessary because he also ruled that the statements were admissible under the common-law coconspirator exception.[217]

When certain circumstances are present to allay the traditional hearsay fears, a number of courts rely on *Annunziato* to skirt the rule against hearsay and justify admission of statements that refer to past conduct.[218] The circumstances that induced

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Shepard . . . does not hold that a declaration of design is rendered inadmissible because it embodies a statement why the design was conceived. In that case there was no relevant declaration of design; the statement, "Dr. Shepard has poisoned me," was wholly of past fact and was offered and received as a dying declaration, erroneously as the Supreme Court held.

Id. at 377.

216. See *supra* notes 94-102 and accompanying text for an explanation of why such an exception threatens the exclusionary hearsay rule. See *supra* note 65 for a discussion of *Seligman*.

217. 293 F.2d at 378. "Judge Friendly had an alternative basis for admitting the testimony of the son about what his father told him. The father, although dead and not a defendant, was a co-conspirator, and the statements were made in furtherance of and during the course of the conspiracy." United States v. Mandel, 437 F. Supp. 262, 266 (D. Md. 1977) (mem.) (Taylor, J., by designation).

218. *See, e.g.*, State of Thornton, 38 N.J. 380, 185 A.2d 9 (1962). In *Thornton* the prosecution presented a "luring" theory to the jury and introduced statements that indicated that the defendant carried out his plan to entice his wife, who was the deceased declarant, to his apartment to kill her. *Id.* at 393-94, 185 A.2d at 17. The court quoted the testimony at trial:

'Q. Now you had a conversation with Geraldine Thornton. Is that correct? A. It is.

Q. What did Geraldine Thornton tell you on the pbone? A. She asked me had I seen her husband.

Q. Don't tell us what you said. She asked you if you had seen her husband? A. Yes, and she said be had called her all day, had worried her about to death.'

. . . .

'Q. Did you have a conversation with Mrs. Thornton in which she indicated to you where she was going?

THE COURT: Answer yes or no. A. Yes.

* * * * * * * *

Q. What did she say about where she was going? A. She didn't tell me where she was going. She said she thought as he was sick she should go and see about it.

Q. At what time was this? A. That was about 4 o'clock.'

Id. at 388-89, 185 A.2d at 14. The trial court ruled in response to an objection that it would limit the testimony "to the portion of the conversation dealing with the decedent's intention to make the visit." *Id.* at 388, 185 A.2d at 14. At the time the witness testified, however, defense counsel did not object to the portion of the testimony that referred to the past event—that the defendant had called the declarant all day. *Id.* Citing *Annunziato*, the court ruled that the trial court had properly admitted the entire testimony.

Judge Friendly to admit the statements refering to past events could serve more appropriately as the basis for admission under the residual exception of rule 803(24) in the current Federal Rules of Evidence.[219] Other exceptions now in effect that allow those same statements into evidence significantly erode the vitality of the holding.[220] Thus, courts should not cite *Annunziato* as precedent for allowing statements referring to past events into evidence under either the common-law *Hillmon* doctrine as defined by *Shepard* or rule 803(3) since both exceptions exclude such statements from evidence.

Justice Traynor in *People v. Alcalde*[221] recognized another theoretical difficulty with the past/future distinction in *Hillmon* statements. In *Alcalde* the declarant's statement that she intended to go out with Frank the night of her murder implicitly referred to a past event that gave her a reason for her helief: Frank must have told the declarant that he intended to go out with her.[222] Because the statement does not expressly refer to the past act, it is easily distinguishable from the statements admitted in *Annunziato*. Nevertheless, the implicit reference to a past event arguably presents the same dangers that compel the exclusion of statements referring expressly to past events. The reliability of statements of future in-

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> Many cases are to be found where a statement of the reason which accompanied the expression of intention to take a described trip or to do a certain act have been admitted. The reasons qualify for probative value so long as they appear to be integrally and naturally related to the declared purpose, to have a natural association with it, and to have been uttered as a normal, unsuspicious incident of it.

Id. at 391-92, 185 A.2d at 16. For the "luring" theory to have prevailed, however, the jury must have accepted those statements of past events. The prosecution clearly intended for the testimony to have its probative force as evidence of past events rather than of future intent under the *Hillmon* doctrine. This use violated the *Shepard* limitation. Other state courts have recognized that such statements are inadmissible under the *Hillmon* doctrine. *See, e.g.*, People v. Hamilton, 55 Cal. 2d 881, 895, 362 P.2d 473, 481, 13 Cal. Rptr. 649, 657 (1971), ("declarations directly asserting the existence of a mental condition on tbe part of the decedent-declarant, and not including a description of the past conduct of a third person that may have caused that mental condition, are and should be admissible"); State v. Abernathy, 265 Ark. 218, 222, 577 S.W.2d 591, 593 (1979) ("statements . . . about the past, not statements of an existing state of mind" are inadmissible).

219. For a discussion of tbe application of the residual exception, see *infra* notes 253-54 and accompanying text.

220. "In *Annunziato*, Judge Friendly noted that the exception for declarations against interest 'would itself be applicable here but for the rather indefensible limitation that it does not relate to statements only against penal interest.' " 293 F.2d at 378. Rule 804(b)(3) repudiates this limitation." 4 J. WEINSTEIN & M. BERGER, *supra* note 3, ¶ 803(3)[05] n.30, at 803-119.

221. 24 Cal. 2d 177, 148 P.2d 627 (1944); *see supra* notes 113-26 and accompanying text.

222. *See supra* text accompanying note 114.

tent that do not require the cooperation of a third party, on the other hand, is not contingent upon a past event. Although the declarant's own mental state depends upon some motivating factor, he need not have relied upon outside cooperation for its effectuation. The House Committee's interpretation of rule 803(3) would limit the scope of the exception to this type of statement. Judge Friendly, however, dismissed the significance of an implicit reference to a past event in *Annunziato,*[223] and courts both at common law and under rule 803(3) are in accord.[224]

B. Relevance: A Material Fact

All courts have agreed that *Hillmon* statements are relevant only to prove directly the declarant's then-existing state of mind and to prove circumstantially that the *declarant* subsequently carried out his stated intention. Limiting instructions are designed to confine the impact these statements have upon the jury when the statements implicate defendant's conduct. Under rule 401 of the Federal Rules of Evidence,[225] evidence that makes the existence of a material fact more probable than not is "relevant" if it is of consequence to the case.[226]

When the declarant's conduct is a material issue in the case, a statement of intent to carry out that conduct is necessarily relevant. If the time of the conduct's performance coincides with the time of the declarant's murder, the statement is a crucial element to a "larger matrix of circumstantial evidence"[227] that tends to es-

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223. Judge Friendly stated,

> As Professor Morgan has pointed out, . . . the famous letter from Walters, oral evidence of which was held admissible in the Hillmon case, was actually a declaration of Walters' intention not simply to travel to Colorado but to travel with Hillmon, and the inference the jury would almost certainly draw was that this represented a previous arrangement between them.

Annunziato, 293 F.2d at 377 (footnote omitted). He noted, however, that "Professor Morgan may overstate this slightly when he says 'that to draw the inference that Walters went with Hillmon required an assumption that he had made an arrangement with Hillmon before Walters wrote the letter." *Id.* at 377 n.1. For a discussion of the *Hillmon* case, see *supra* notes 38-60 and accompanying text.

224. *See* authorities cited *supra* note 126.

225. FED. R. EVID. 401 states, " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

226. For a discussion of the role that relevance plays in state-of-mind evidence, see Rice, *supra* note 39; Seidelson, *supra* note 39.

227. 4 J. WEINSTEIN & M. BERGER, *supra* note 3, ¶ 803(3)[04], at 803-105 (quoting C. MCCORMICK, EVIDENCE § 270, at 574 (1954)).

tablish the defendant's guilt.[228] Statements of intent by the declarant may also be relevant to establish a motive for the declarant's murder if the jury assumes that the declarant carried out his intended conduct.[229] The trial court, however, should scrutinize carefully whether the *Hillmon* statement proffered by the prosecution is relevant to proof of a material fact in the case. For example, in *Clark v. United States*[230] the court noted that whether the deceased declarant intended to go to the school where her murder took place was not in dispute: "her body was found there and there has been no dispute as to the identification of her body."[231] In *Clark* the prosecution sought to introduce the declarant's statement of intent to meet the defendant at the scene of her murder.[232] The court refused to allow the prosecution to link the defendant and the deceased declarant through a *Hillmon* statement, because proof of the declarant's conduct was not material to the case.[233]

C. *Corroboration*

Several courts that recoguized the peculiar dangers associated with *Hillmon* statements justified their admission on the grounds that other evidence corroborated the inference that the declarant carried out his intention.[234] For example, in *People v. Al-*

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228. *See, e.g.*, Hayes v. State, 395 So. 2d 127, 144 (Ala. Crim. App. 1980) ("These statements . . . can be fairly said to be part of the 'res gestae of the act being performed or immediately contemplated by the declarant, the act of beginning or contemplating the trip or journey' however short."); People v. Alcalde, 24 Cal. 2d 177, 188, 148 P.2d 627, 632 (1944) ("Unquestionably, the deceased's statement of her intent and the logical inference to be drawn therefrom, namely, that she was with the defendant that night, were relevant to the issue of the guilt of the defendant."); State v. Thornton, 38 N.J. 380, 389, 186 A.2d 9, 14 (1962) ("When a person's engagement in a course of conduct or an act (here, the decedent's visit to defendant's apartment) is relevant to the resolution of a controversy over an occurrance wbich becomes the subject of subsequent litigation (here, the homicide), declarations of the person of his present intention or plan to do so, are competent, substantive, and original evidence of his probable engagement in the course of conduct or act.").

229. *See, e.g.*, United States v. Calvert, 523 F.2d 895, 910 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976) ("The evidence was admitted for the purpose of showing that it was likely that [the declarant] had in fact approached the defendant and sougbt to back out of the partnership and cancel the insurance; . . . . Whether he had so acted was a material fact since, if true, it would establish the immediate motivation for the defendant's visit to Alsop."); State v. Vestal, 278 N.C. 561, 583, 186 S.E.2d 755, 769 (1971) ("The testimony . . . as to the destination and purpose of the trip contemplated by the deceased, was relevant to the questions of motive.").

230. 412 A.2d 21 (D.C. 1980); *see supra* notes 185-91.

231. 412 A.2d at 28.

232. *Id.* at 29.

233. *Id.* at 28-30.

234. *See, e.g.*, United States v. Calvert, 523 F.2d 895, 910 (8th Cir. 1975) (Heaney, J.)

calde[235] the deceased declarant told both her roommate and her brother-in-law that she was going out with Frank—the defendant—that night.[236] Several witnesses testified that they saw the declarant with the defendant on the night of her murder, and one witness testified that he saw a car similar to the defendant's distinctive car around the time of the murder and at the scene where the police eventually found the declarant's body.[237] Other physical evidence also incriminated the defendant.[238] All these facts corroborated the declarant's statement and increased the likelihood that she carried out her intention to date Frank on the night of the murder. The majority ruled that the deceased declarant's statements were admissible against the defendant: "The cumulation of facts corroborative of the guilt of the defendant was sufficient to indicate that the trial court did not err in admitting the declaration."[239] In his dissent Justice Traynor cited the overwhelming prejudice and inability of the jury to comply with the limiting instruction as reasons to exclude the declarant's statements.[240] He also questioned the statements' relevance because there was "no dispute as to the identity of the deceased or as to where she was at the time of her death . . . [so that] no legitimate purpose could be served by admitting her declarations of what she intended to do [that] evening."[241]

Justice Traynor's reasoning is particularly persuasive because the existence of other corroborating evidence obviates the tradi-

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(*Hillmon* statement "would also corroborate . . . testimony that the defendant had stated that the shooting must be accomplished quickly because the victim 'wanted to cancel the policies or get out.' "), *cert. denied*, 424 U.S. 911 (1976); Hayes v. State, 395 So. 2d 127, 144 (Ala. Crim. App. 1980) (witnesses saw deceased declarant dancing with defendant on night of murder; statement that she and " 'the good looking guy she was dancing with,' who by all fair inferences was the [defendant], . . . might 'pull off on the side of the road' " admissible); State v. Cugliata, 372 A.2d 1019, 1028 (Me.) ("evidence independent of the hearsay corroborated its accuracy"), *cert. denied*, 434 U.S. 856 (1977); State v. Thornton, 38 N.J. 380, 389, 186 A.2d 9, 14 (1962) ("A realistic inference is that she intended to visit her husband because she thought he was sick. And the fact of her later presence there provides adequate support for the inference."), *cert. denied*, 374 U.S. 816 (1963); State v. Vestal, 278 N.C. 561, 583, 180 S.E.2d 755, 770 (1971) (defendant himself corroborated deceased declarant's statement of intent to visit him).

235. 24 Cal. 2d 177, 148 P.2d 627 (1944); *see supra* notes 113-22 and accompanying text.

236. 24 Cal. 2d at 181, 148 P.2d at 628.

237. *Id.*, 148 P.2d at 628-29.

238. *Id.* at 181-82, 148 P.2d at 629.

239. *Id.* at 188, 148 P.2d at 632.

240. *Id.* at 190, 148 P.2d at 633 (Traynor, J., dissenting).

241. *Id.*, 148 P.2d at 633.

tional justification for *Hillmon* statements—necessity.[242] Therefore, corroborating evidence reduces greatly the probative force of the declaration and the ostensible purpose for admitting it to prove that the declarant actually carried out her stated intention. Independent evidence of that fact arguably makes the statement of intention cumulative and the risks of prejudice that would result from its admission both unnecessary and unfair to the defendant. Thus, courts that have conscientiously required corrohorative evidence before allowing *Hillmon* statements into evidence have unwittingly and needlessly exposed the defendant to the dangers this requirement seeks to avoid. Because these statements create such great risks, if corroborative evidence exists that tends to prove the same material fact, a court should consider excluding the *Hillmon* statement and avoid this anomalous result.

D. Rule 403: Prejudice

Once the court resolves these questions in favor of admissibility—whether the statement refers to past or present conduct; whether the statement is relevant to a material fact in issue; and what effect corroborative evidence has on the admissibility of the statement—it must evaluate one more question: whether admission of a *Hillmon* statement that implicates the conduct of the defendant prejudices his right to a fair trial.[243] Rule 403 of the Federal Rules of Evidence defines the formula to answer this challenge: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair

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242. *See supra* notes 35-58 and accompanying text. Declarations of a person's state of mind often are the only evidence available.

243. The purpose of the rule against hearsay is to exclude incompetent evidence, that is, evidence which the jury should not consider because it is inherently unreliable. *See* authorities cited *supra* note 3. Allowing the jury to consider incompetent evidence would prejudice the defendant's right to a fair trial.

In their treatise Weinstein and Berger suggest that rule 403 should apply to a *Hillmon* statement

> if the judge finds that the statement was made in circumstances which do not negate the presence of a motive to misrepresent, and the inference to be drawn that the declarant acted in a particular way is highly prejudicial . . . . In reaching this decision, the possihility of bad faith [by the declarant] is but one factor for the judge to consider. He must weigh all the factors on both sides of the equation—those affecting relevancy (such as the legitimacy of the inference from statement of intent to act) and those bearing on the dangers stemming from admission (as, for example, whether tbis is a civil or criminal case).

4 J. WEINSTEIN & M. BERGER, *supra* note 3, ¶ 803(3)[04], at 803-108. Other commentators recognized that prejudice to the defendant might result in the admission of a *Hillmon* statement. *See, e.g.*, C. MCCORMICK, *supra* note 3, at 699-700; Maguire, *supra* note 39, at 718.

prejudice . . . ."[244] Professor Maguire suggested several points of inquiry that a court should make when examining the reliability of a *Hillmon* statement "because it is not customary to accept one man's extra-judicial assertions as evidence of another's mental state."[245]

> No simple formula can solve all variations. It will be necessary to consider the amount of cooperation required from the other person involved by the declarations; the difficulty or ease of obtaining from him such cooperation; the emotional or other impulses tempting the triers of fact to swallow the declarations whole; and sundry additional matters peculiar to each case.[246]

Implicit in Maguire's cautious approval of the *Hillmon* doctrine is the recognition that in considering a statement of intention that implicates the defendant, a jury often may not be able to confine the statement's impact only to proof of inference of the declarant's acts. Of course, the court's limiting instructions will direct the jury to confine its consideration of the evidence accordingly.[247]

The efficacy of limiting instructions in restricting the jury's consideration of *Hillmon* evidence is difficult to determine. The Advisory Committee's explanatory note to rule 403 expressly includes this consideration as part of the court's analysis of the potential prejudicial effect relevant evidence might have on the jury.[248] Moreover, the Committee also stated that the "availability of other means of proof may also be an appropriate factor."[249] Using a rule 403 analysis, the court should examine *Hillmon* statements on a case by case basis since the facts of each case and the relative importance of each statement will determine the admissibility of the statement. When the *Hillmon* statement plays an integral role in the "larger matrix of circumstantial proof"[250] against the defendant, this Note concludes that a limiting instruction to the jury will not prevent it from making the inference which the

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244. FED. R. EVID. 403.

245. Maguire, *supra* note 39, at 717.

246. *Id.* at 719.

247. "Despite the danger that juries will be neither willing nor able to make the distinction, courts have tended to admit the statements in these cases with limiting instructions directing the jury to consider them only on the issue of the declarant's actions." C. MCCORMICK, *supra* note 3, at 699. For an example of a jury instruction, see *supra* note 218.

248. "In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction." FED. R. EVID. 403 advisory committee note.

249. *Id.* Thus, the availability of corroborative evidence reduces the probative force of the potentially prejudicial statement, and "the danger of unfair prejudice" consequently outweighs the relevant, but prejudicial, evidence even more.

250. Maguire, *supra* note 39, at 717.

prosecution really intends it to make: that the defendant acted in conformity with or in response to the declarant's stated intention. This conclusion is not the result of mistrust for the jury or skepticism for its ability. Indeed, "[i]t is difficult to believe that even the trained mind of a psychoanalyst could thus departmentalize itself sufficiently to obey the mandate of the limiting instruction. Certainly a lay mind could not do so."[251] Many courts and commentators disagree with this view and instead rely upon the perceived ability of today's jury.[252] Furthermore, the burden of proof requirement arguably ensures that any prejudice caused by the admission of a *Hillmon* statement will not result in the conviction of the defendant.[253] This justification, however, ignores the tainted jury verdict that misuse of a *Hillmon* statement as proof of the defendant's conduct would cause: the jury could use the statement as direct evidence to bolster an otherwise weak case. Rule 403 was designed to prevent this kind of prejudice to the defendant.

VI. CONCLUSION

This Note has examined the use of the common-law *Hillmon* doctrine and rule 803(3) in a limited context. Several approaches are available to a court that considers whether to admit a *Hillmon* statement. A court in a jurisdiction that still applies the common-law hearsay rule may adhere to the status quo. Ample authority exists to permit this approach. Nevertheless, because admission of a *Hillmon* statement risks certain inherent dangers, a common-law court should avoid a perfunctory application of the exception. In-

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251. People v. Hamilton, 55 Cal. 2d 881, 896, 362 P.2d 473, 481, 13 Cal. Rptr. 649, 657 (1961) (footnote omitted) (statements referring to past acts inadmissible but those referring to future conduct admissible).

252. *See., e.g., id.* at 904, 362 P.2d at 487, 13 Cal. Rptr. at 663 (dissenting opinion) ("To me it seems a sad commentary upon the intelligence of jurors, in the light of the court's constant, painstaking and specific admonitions, to say that they were unable to follow them or that in violation of their sworn obligations as jurors they cast aside such admonition."). *See also* 1 J. WEINSTEIN & M. BERGER, *supra* note 3, which states,

> Universality of education and the almost instantaneous disposal of information through modern technology have created a citizenry with a remarkable and historically unique breadth of knowledge, perception and sophistication. These mature men and women should be treated with the respect they deserve. Excluding information on the ground that jurors are too ignorant or emotional to evaluate it properly may have been appropriate in England at a time when a rigid class society created a wide gap between royal judges and commoner jurors, but it is inconsistent with the realities of modern American informed society and the responsibilities of independent thought in a working democracy.

Id. at iii.

253. *See, e.g.*, C. MCCORMICK, *supra* note 3, at 701.

stead, the court must examine carefully each *Hillmon* statement to ensure that it does not prejudice the defendant's right to a fair trial. Part V suggested that such an analysis includes consideration of (1) the past/future distinction; (2) the statement's relevance to a material issue in the case; (3) the existence of corroborative evidence; and (4) the risk of potential prejudice. Although most courts likely will resolve these questions in favor of admissibility, the analysis provides a court bound by a jurisdictional rule through *stare decisis* a basis upon which to exclude certain *Hillmon* statements when the facts of the case warrant it. All courts must impose the *Shepard* limitation on *Hillmon* statements; both common law and rule 803(3) mandate confining the exception to statements of intention that point only toward future conduct. The continued vitality of the rule against hearsay necessitates strict compliance with this requirement.

In the federal courts and in those states that have adopted rule 803(3), a court may accept either the majority or minority approach. The common-law precedent and the Advisory Committee's explanatory note to rule 803(3) provide a solid foundation for the continued application of the *Hillmon* doctrine to statements of intention that implicate the conduct of the defendant. This majority approach will continue to prevail in the future because of its long-standing precedent. Courts that apply this approach, however, should also scrutinize each *Hillmon* statement under the analysis suggested in part V.

Finally, a court may adopt a jurisdictional rule limiting the application of the *Hillmon* doctrine as codified by rule 803(3) to statements of intention that refer only to the conduct of the declarant. This restriction of the *Hillmon* doctrine has considerable support. First, the dangers risked by the admission of a *Hillmon* statement warrant this restriction. Second, the House Judiciary Committee issued the only statement of legislative intent and it expressly noted that the purpose of rule 803(3) is to limit the scope of the *Hillmon* doctrine to the minority view. The Committee heard testimony that contained this limitation. Last, since 1892 when the Supreme Court first developed the common-law *Hillmon* doctrine, other exceptions have evolved that greatly expanded the categorical exemptions from the exclusionary rule and have lessened the need for the broad *Hillmon* exception. The residual exception, which is available under the Federal Rules, is particularly applicable to a statement of intention implicating the conduct of the defendant but outside the minority application of the doc-

trine.[254] This exception forces both counsel and the court to engage in a considered analysis of such a statement and requires notice to the opponent to afford him the opportunity to demonstrate that the statement is not trustworthy. Because *Hillmon* statements that implicate the conduct of the defendant may prejudice his right to a fair trial, courts should scrutinize them in the manner prescribed by the residual exception rather than admit them under rule 803(3) without careful analysis.

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254. FED. R. EVID. 803(24). The exception states,

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .

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