

# The Enduring Quality of an Alluring Mistake: Why One Person’s Intentions Cannot—And Never Could—Be Evidence of Another Person’s Conduct

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## *Abstract*

*For over a century, some courts—relying upon the landmark Supreme Court opinion in Mutual Life Insurance Co. of New York v. Hillmon—have admitted one person’s intentions as evidence of what another person did. But Hillmon is wrong. The Supreme Court made an analytical error in its analysis. This Article seeks to expose and explain the error and therefore demonstrate that the state of mind exception to the general rule of exclusion of hearsay evidence should never support admission of one person’s stated intentions as evidence of what another person later did.*

## Introduction

If a person says they are meeting a buddy in the parking lot, and then the person is found dead in the parking lot, suspicion naturally focuses on the buddy. In a resulting murder trial, the secondhand recounting of the decedent’s stated intention could be key identity evidence—but is it too attenuated? For over a century, courts have struggled with this sort of question. This Article seeks to resolve that struggle.

Ever since the iconic 1892 United States Supreme Court opinion in *Mutual Life Insurance Co. of New York v. Hillmon*,<sup>1</sup> courts and commentators have had the doctrinal latitude to admit hearsay evidence of one person’s intentions to prove another person’s actions. As goes the theory,

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<sup>1</sup> 145 U.S. 285 (1892).

while the hearsay rule generally excludes out of court statements used “to prove the truth of the matter asserted,” an exception to the hearsay rule of exclusion is that out of court statements of intent are admissible if the declarant’s intent is relevant to an issue at trial; if an issue at trial is what were the declarant’s subsequent actions, then the declarant’s stated intention to take such action is circumstantial evidence relevant to whether the declarant later took such action; and if an issue at trial is what the someone else did, then the declarant’s stated intention to do some act with that other person is likewise circumstantial evidence relevant to what the other person did.<sup>2</sup> Put far more simply, if Kate says she is off to meet Will at the airport at noon, then that is at least some reason to think Will might be at the airport at noon.

As framed in the cases and the literature, the debate over this aspect of the *Hillmon* holding—that one person’s out of court stated intentions are admissible evidence of another person’s actions<sup>3</sup>—largely is not a debate about the application of the nuances of the hearsay rule. Rather, it is a debate over whether such evidence—which in the right case seems essential—is based on too many untestable inferences. After all, neither the declarant nor the actor is giving firsthand testimony, because if they were, then the seeming second- or thirdhand account would not be needed. In evidence jargon, this is a debate between relevance, probativeness, and unfair prejudice.<sup>4</sup> When framed as a relevance debate, it is nearly intractable because alluring and perhaps essential evidence nonetheless seems to stretch ideas of probativeness and prejudice beyond a breaking point.

The 1975 adoption of the Federal Rules of Evidence appeared to try to end this tension—to pick a side, as it were—but the Rules did not do

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<sup>2</sup> *Hillmon*, 145 U.S. at 295-300; FED. R. EVID. 801.

<sup>3</sup> *Hillmon*, 145 U.S. at 295-300.

<sup>4</sup> In evidence law, “probativeness” refers to the degree that a piece of evidence may help establish a fact of consequence; “unfair prejudice” refers to the degree that a piece of evidence may be overvalued by a fact finder and thus given more weight than the evidence actually deserves. Kenneth S. Klein, *Why Federal Rule of Evidence 403 Is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077, 1078 (2013). Every evidence code in the United States gives judges the discretion to exclude otherwise relevant evidence if the judge believes its probative value is substantially outweighed by its potential unfair prejudice—in other words, if it could be relied on too much and thus lead to an incorrect verdict. *Id.*

so explicitly (and perhaps not at all). Thus, the jurisprudential tension endures; it has become hard-wired into evidence jurisprudence.<sup>5</sup>

It is an unnecessary conundrum. The assumption that the out of court statement is admissible hearsay as a statement of intent is an analytical mistake the Supreme Court initially made in *Hillmon* and which has rarely, if ever, been fully acknowledged since.<sup>6</sup> In *Hillmon*, the Court was not actually confronted with intent evidence at all; rather, the Court was faced with memory evidence masquerading as intent evidence. Buried within the declarant's statement of the declarant's intentions was that the declarant was basing his intentions on some knowledge he had—a memory—of what he thought another person was going to do.<sup>7</sup> As to that other person, this was not intent evidence; it was memory evidence. Out of court statements of memory are not admissible under the hearsay rules.<sup>8</sup> And so the conundrum is never reached.

Simply put, in *Hillmon* the Supreme Court made a mistake in the way the Court described the evidence of the case. As a consequence, courts have struggled for more than a century with applying *Hillmon*. This

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<sup>5</sup> The notion of a hard-wired mistake is endemic and inevitable in evidence law. There is a conflict between theory and practice in evidence law. Evidence theory, like many complex areas of jurisprudence, often requires careful, deep analysis. Evidence practice, which largely occurs during the flow of trial, usually turns on instinctive, immediate decision-making. An evidence ruling that is analytically correct often requires a nuanced and sophisticated isolation of exactly what is the aspect of the evidence that is being offered, what is the logical set of inferences—or evidentiary hypothesis—the advocate is asserting, and how precisely the evidence fits within that hypothesis. Yet that ruling often is made in little over one second. Simply put, evidence is a ground war, and in the fog of war, mistakes are inevitable. This dynamic has ramifications to evidence jurisprudence. There simply are not very many appellate opinions on issues of evidence law. Evidence rulings are rarely appealed, even more rarely lead to doctrinal development or change, and virtually never reach the Supreme Court. So when the Supreme Court resolves an issue of evidence law, the opinion quickly becomes iconic. Many lawyers, judges, and law students can tick off of the top of their heads, by name, almost every one of them: *Crawford v. Washington*, 541 U.S. 36 (2004); *Old Chief v. United States*, 519 U.S. 173 (1997); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); and *Hillmon*, 145 U.S. 285. These cases are pillars of evidence theory, and are taken as articles of faith. Treating a holding as an article of faith inhibits reflection about whether the holding is wrong.

<sup>6</sup> *Hillmon*, 145 U.S. at 295-96.

<sup>7</sup> *Id.*

<sup>8</sup> FED. R. EVID. 803(3).

Article seeks to expose the mistake, and thus unwind the problem. The entire debate over using one person's intent as evidence of another person's actions has been difficult, intransigent, and unnecessary.

## I. What Happened in *Hillmon*

The best exploration and articulation of the underlying narrative that led to the *Hillmon* opinion is the excellent work by Professor Marianne Wesson.<sup>9</sup> *Hillmon* was a remarkable lawsuit by a widow seeking life insurance proceeds, in which it was equally plausible both that this was a scam by the widow, or a bad faith denial by the insurance companies based on falsified evidence.

In very short summary, in 1879 John Hillmon was reported dead by his travelling companion, John Brown; Brown said he accidentally shot Hillmon while the two were in Crooked Creek, Kansas.<sup>10</sup> There was a coroner's inquest—including but not limited to identification of the body both by Brown and by Hillmon's widow, Sallie—confirming the corpse was Hillmon.<sup>11</sup> And so Sallie Hillmon sought to collect as the beneficiary of Hillmon's life insurance; what was suspicious was that the coverage was under *three, all recently purchased*, insurance policies.<sup>12</sup>

Life insurance fraud was common at the time, and the insurers refused to pay the widow.<sup>13</sup> In the ensuing litigation over the insurer's denial of coverage, the insurers' defense was that the corpse *was not Hillmon*.<sup>14</sup> In order to establish this remarkable defense, the insurers produced one Alvina Kasten, who testified that her fiancé, Adolph Walters—who looked somewhat like John Hillmon<sup>15</sup>—had been in Wichita, Kansas at

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<sup>9</sup> See generally Marianne Wesson, "Particular Intentions:" *The Hillmon Case and the Supreme Court*, 18 L. & LITERATURE 343 (2006); Mimi Wesson, *The Hillmon Story*, THEHILLMONCASE.COM, <http://www.thehillmoncase.com/story.html> (last visited Jan. 28, 2014).

<sup>10</sup> Marianne Wesson, *supra* note 9, at 344-45.

<sup>11</sup> *Id.* at 345.

<sup>12</sup> *Id.* at 343-44; Mimi Wesson, *supra* note 9.

<sup>13</sup> Marianne Wesson, *supra* note 9, at 344.

<sup>14</sup> *Id.* at 345.

<sup>15</sup> Mimi Wesson, *supra* note 9.

the time, writing to her regularly, when suddenly the letters stopped and she never heard from him again.<sup>16</sup> The last letters conveniently stated (from the insurance companies' perspective) that Walters was off to parts unknown *with a fellow named Hillmon*.<sup>17</sup> The theory was that Hillmon conspired with his wife and Brown to buy a lot of insurance, murder someone who looked like Hillmon, and collect the money.<sup>18</sup> There were numerous reasons to believe both that the letters were fakes and that Kasten's testimony was perjurious.<sup>19</sup> After three separate jury trials, the case went to the Supreme Court to consider, among other things, whether the letters should get to a jury at all.<sup>20</sup>

*Hillmon* is the singular foundation for the contemporary boundaries of statements of intention as falling within the state of mind exception to the hearsay rule of exclusion.<sup>21</sup> The letters in question were competent not as narratives of facts communicated to the writer by others, nor as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention.<sup>22</sup> In other words, the witness Kasten recounted an out of court declaration by the declarant Walters about Walters's intentions.<sup>23</sup> Because intent is a state of mind, the statement was admissible hearsay as evidence that Walters was truthfully describing his intent, and Walters's intent was relevant, circumstantial evidence that Walters did what he intended to do.<sup>24</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> Marianne Wesson, *supra* note 9, at 346. Similar testimony comes from Walters's sister, although the sister never produces the letters she describes. *Id.*

<sup>18</sup> Mimi Wesson, *supra* note 9.

<sup>19</sup> Marianne Wesson, *supra* note 9, at 375-81.

<sup>20</sup> *Id.* at 347.

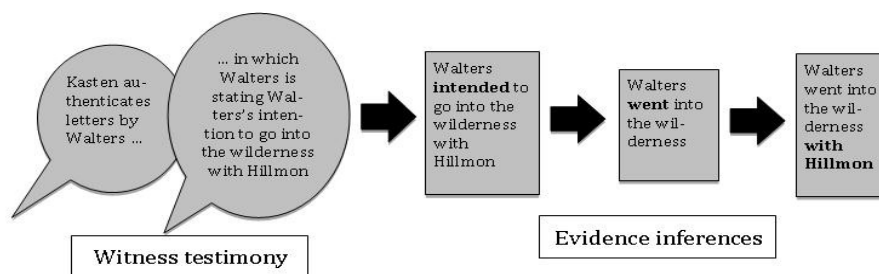
<sup>21</sup> See FED. R. EVID. 803(3) (the hearsay exception for "[a] statement of the declarant's then-existing state of mind").

<sup>22</sup> *Hillmon*, 145 U.S. at 295-96.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 296.

If we chart this evidential hypothesis—that Walters’s letters place Walters and Hillmon together in Crooked Creek—it looks like this:



The first aspect of this holding—that a hearsay statement of “intent” is admissible to argue by inference that the declarant had that intent<sup>25</sup>—was largely unremarkable. The second aspect—that having drawn the inference, it could support a second inference that the declarant acted as he intended<sup>26</sup>—was intriguing, but debatable. The third aspect—that Walters’s intentions could be evidence that Walters later did something *with Hillmon*<sup>27</sup>—initially was little discussed but was and remains a novel evidentiary construct. Nonetheless, *Hillmon* immediately became the go-to precedent for three evidence rules that remain part of contemporary evidence law: An out of court statement of a declarant’s “intention,” offered for the truth of the matter asserted, is a “state of mind” encompassed within the state of mind exception to the general rule of exclusion of hearsay evidence.<sup>28</sup> Evidence of a person’s intentions is relevant and material<sup>29</sup> to what the person later does. Evidence of a person’s intentions to do something in concert with another person is relevant and material to what the other person later does.

<sup>25</sup> *Id.* at 295-300.

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *Id.*

<sup>29</sup> Federal Rule of Evidence 401 now collapses into one definition the old common law dichotomy of relevance and materiality.

## II. The Post-*Hillmon*, Pre-Federal Rules of Evidence Debate about *Hillmon*

In the years in between the Supreme Court's 1892 decision in *Hillmon* and the adoption of the Federal Rules of Evidence in 1975, academics and appellate courts struggled with the *Hillmon* opinion. The year after *Hillmon*, the *Harvard Law Review* reported it, without introspection or critique, as a decision recognizing as an exception to the hearsay rule, that "letters written . . . to show [the writer's] intention" are admissible "to prove that a man" shortly thereafter acted as he intended.<sup>30</sup> Similarly, the first edition of Professor Wigmore's Evidence treatise accepted the ruling without concern or comment.<sup>31</sup> Twenty years after the *Hillmon* opinion, however, an article authored by Eustace Seligman began a doctrinal conversation about *Hillmon* that endures even today.<sup>32</sup>

To fully appreciate the Seligman position, a quick review of basic evidence theory may be helpful. Evidence law, and in particular the hearsay rule, reflects the common-sense notion that firsthand information is better than secondhand information. This is for a host of reasons. Before relying on a person's recounting of events, a fact finder might want to have possible ambiguities in the story clarified, to be aware of the person's bias or sincerity, to know something of the ability of the person to accurately perceive the facts, and to test the quality of the person's memory. Cross-examination gives the opportunity to test firsthand accounts in this way. Secondhand accounts largely are immune from these tests, because the account of events is not being given as live firsthand testimony, but rather as a secondhand recounting of what the firsthand account was. Thus, in order to admit necessary evidence in the most reliable way, hearsay—secondhand evidence—generally is excluded in order to force the introduction of firsthand accounts.<sup>33</sup>

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<sup>30</sup> Note, *Evidence—Admissions of Declarations to Prove the Intention of the Declarant*, 7 HARV. L. REV. 117, 117-18 (1893).

<sup>31</sup> 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1725 (1st ed. 1904).

<sup>32</sup> See Eustace Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146 (1912).

<sup>33</sup> See PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 31.05 (2d 2006).

But as every lawyer and law student knows, there are *many* exceptions to the hearsay rule. Broadly speaking, exceptions can be divided into three bins: instances where the secondhand account is the only evidence available;<sup>34</sup> instances where the evidence is a secondhand account but the person giving the firsthand account is available to explain or expand upon the secondhand account if they wish;<sup>35</sup> and instances where the context in which the firsthand account arose is one which gives it more reliability than so-called “ordinary hearsay.”<sup>36</sup>

The exception for “state of mind” is within this third bin. A person’s contemporaneous statement of the thought that is in their mind at a particular moment is likely better evidence of what the person is thinking at that moment than a later memory by that person of what they were thinking at a point in the past. So if the fact of having a particular thought at a particular moment is relevant to some issue at trial, and if there is a witness who can testify that the person enunciated that thought at that moment, then the evidence is admissible despite the hearsay rule.

But buried within the “state of mind” exception to the hearsay rule is a problem. The problem is that one kind of thought a person can have is a memory. And if the state of mind exception can be used to admit hearsay statements of memory as some circumstantial—and thus relevant—evidence of the thing remembered, then the exception would swallow up the entire hearsay rule. By definition every secondhand account is a recounting of someone else’s enunciated, firsthand memory. For example, if the issue at trial is whether the light was red, and the evidence is Jane testifying at trial that Paul said the light was red, then that is just Jane saying Paul told her his memory of the color of the light.

So this sets the stage for Seligman’s concerns. Seligman focused only on the use of Walters’s statements of intent as evidence of Walters’s later actions.<sup>37</sup> Seligman argued first that it made sense to allow statements of intent as some circumstantial evidence of what a declarant later did, but it made equal sense to admit statements of memory as some

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<sup>34</sup> See FED. R. EVID. 804, advisory committee note. These are the so-called “declarant unavailable” exceptions.

<sup>35</sup> See, e.g., FED. R. EVID. 803, advisory committee note to paragraphs 1 & 2. These are the so-called “declarant available” exceptions.

<sup>36</sup> See, e.g., FED. R. EVID. 803, advisory committee note to paragraphs 5 & 11.

<sup>37</sup> Seligman, *supra* note 32, at 155.



circumstantial evidence of what a declarant previously had done—or for that matter, as evidence of *any* fact now claimed to be remembered—after all, a statement of memory is a state of mind which, just like an admissible statement of intent, is circumstantial evidence of the truth of the matter remembered or intended.<sup>38</sup> But, second, admitting hearsay statements of memory as evidence of the thing remembered would essentially eviscerate the hearsay rule.<sup>39</sup> Thus, third, *Hillmon* should be repudiated—statements of intent should not be admissible as evidence of later action.<sup>40</sup>

For his purposes, Seligman had no reason to ponder whether Walters’s letters also contained a statement of memory as to Hillmon—this was not Seligman’s analytical focus. So Seligman never considered whether if the letters could be used as evidence of what Walters did, then they also could be used as evidence of what Hillmon did.

In 1925, John MacArthur Maguire was the first commentator to discuss distinguishing between using the letters as evidence of the acts of Walters and using the letters as evidence of the acts of Hillmon.<sup>41</sup> Much of Maguire’s article revisited the same conundrum Seligman posed, but Maguire also considered whether the *Hillmon* doctrine at least should be limited “to proof of nothing beyond the acts of the declarant.”<sup>42</sup> On this question, Maguire concluded that in order to use the declarant’s hearsay intentions as evidence of the acts of another, the actions also should be at least “partially attributable to the acts of the declarant,” and even then the evidence should be used “hesitatingly and only after cautions to the jury.”<sup>43</sup> Put in contemporary evidence language, Maguire was arguing that using intent to prove the acts of another is a special case where the state of mind exception applies, but should be limited in the absence of other components of the evidence. In other words, Maguire treated Walters’s letters purely as statements of intent, but nonetheless

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<sup>38</sup> *Id.* at 156-57.

<sup>39</sup> *Id.* at 157-58.

<sup>40</sup> *Id.* at 158.

<sup>41</sup> See John MacArthur Maguire, *The Hillmon Case—Thirty-Three Years After*, 38 HARV. L. REV. 709, 715 (1925).

<sup>42</sup> *Id.* at 715.

<sup>43</sup> *Id.* at 719.

argued that this intent evidence could be sufficiently reliable to be admitted for one purpose, while simultaneously too unreliable to admit for another purpose. This is not a *hearsay* argument, but a relevance argument on familiar probativeness/prejudice lines.

Simultaneous with the writing of Seligman and Maguire, courts developed a patchwork approach to when statements of intentions could be offered as evidence of actions. In 1933, the Supreme Court summarized this body of case law in *Shepard v. United States*:<sup>44</sup>

There are times when a state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent. Thus, in proceedings for the probate of a will, where the issue is undue influence, the declarations of a testator are competent to prove his feelings for his relatives, but are incompetent as evidence of his conduct or of theirs. In suits for the alienation of affections, letters passing between the spouses are admissible in aid of a like purpose. In damage suits for personal injuries, declarations by the patient to bystanders or physicians are evidence of sufferings or symptoms, but are not received to prove the acts, the external circumstances, through which the injuries came about. Even statements of past sufferings or symptoms are generally excluded, though an exception is at times allowed when they are made to a physician. So also in suits upon insurance policies, declarations by an insured that he intends to go upon a journey with another may be evidence of a state of mind lending probability to the conclusion that the purpose was fulfilled. The ruling in that case marks the high-water line beyond which courts have been unwilling to go. It has developed a substantial body of criticism and commentary. Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.<sup>45</sup>

In other words, the Supreme Court, cognizant of the concerns initially raised by Seligman, concluded that *Hillmon* largely should be limited to its facts.<sup>46</sup> Out of court statements of intention could be used as evidence of intention, when intention itself was relevant. But out of court statements of intention could not be used as evidence of action except in unusual circumstances, essentially mirroring *Hillmon*.

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<sup>44</sup> 290 U.S. 96 (1933).

<sup>45</sup> *Shepard*, 290 U.S. at 104-06 (citations omitted).

<sup>46</sup> *Id.*

Completing our summary tour of the state of the law and commentary pre-Federal Rules of Evidence is the 1955 article by Professor James Payne, Jr.<sup>47</sup> Payne agreed with Seligman but reluctantly came to the opposite conclusion:

[T]he *Hillmon* rule . . . is probably too deeply imbedded . . . to be uprooted at this late date as Seligman would have done in an earlier time. That being true, we are here urging the abandonment of the effort to apply the conjectural and metaphysical distinctions sometimes involved in keeping the *Hillmon* doctrine in its place.<sup>48</sup>

In other words, Payne argued—like Seligman—that *Hillmon* made a false dichotomy between intent and memory, but concluded—inapposite to Seligman—that therefore both intent and memory should be exceptions to the general hearsay exclusion. Payne apparently also assumed that if the letters could be used as evidence of what Walters did, then they also could be used as evidence of what Hillmon did. In this way, Payne also never considered whether Walters’s letters contained two hearsay statements—one concerning Walters’s own intentions and another concerning Hillmon’s intentions—rather than one hearsay statement being used for two purposes.

None of these courts or commentators did an analysis of whether Walters’s letters were actually not only two hearsay statements, but two different kinds of hearsay statements—one a statement of intent and the other a statement of memory. If doctrinally *Hillmon* had been framed this way, then the doctrinal concerns these articles and cases raised would have been settled by the explicit text of the Federal Rules of Evidence. Rule 803 explicitly provides that intent is admissible to prove the act intended, while memory is not admissible to prove the fact remembered.<sup>49</sup> Similarly, while some hearsay exceptions require corroboration as part

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<sup>47</sup> See generally James W. Payne, Jr., *The Hillmon Case—An Old Problem Revisited*, 41 VA. L. REV. 1011 (1955).

<sup>48</sup> *Id.* at 1057.

<sup>49</sup> See FED. R. EVID. 803(3) (“The following are not excluded by rule against hearsay . . . A statement of the declarant’s then existing state of mind (such as . . . intent) . . . but not including a statement of memory or belief to prove the fact remembered . . .”).

of the admissibility foundation,<sup>50</sup> the state of mind exception<sup>51</sup> does not. And while some rules of evidence codify a bias in favor of exclusion due to unfair prejudice,<sup>52</sup> the state of mind exception is subject to the general approach of Federal Rules of Evidence 403, which has the opposite approach.

### III. The Post-Federal Rules Debate About *Hillmon*

As I wrote at the beginning of this Article, if a person says they are meeting a buddy in the parking lot, and then the person is found dead in the parking lot, it is tempting to suspect the buddy. That is the allure of the broad holding of *Hillmon*.

The 1975 adoption of the Federal Rules of Evidence could be read as closing the door on that use of the *Hillmon* opinion. But that door only was closed if a *Hillmon*-like statement was seen as having a memory component to it. Federal Rule of Evidence 803 states, in pertinent part:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

....

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.<sup>53</sup>

There is a counterpart to this rule in every state code or common law of evidence.<sup>54</sup>

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<sup>50</sup> See, e.g., FED. R. EVID. 801(d)(2)(E) (technically removing co-conspirator admissions from the definition of hearsay but functionally indistinguishable from a hearsay exception).

<sup>51</sup> See FED. R. EVID. 803(3).

<sup>52</sup> See FED. R. EVID. 609(b)(1).

<sup>53</sup> FED. R. EVID. 803.

<sup>54</sup> See ALA. R. EVID. 803(3); ALASKA R. EVID. 803(3); ARIZ. R. EVID. 803(3); ARK. R. EVID. 803(3); CAL. EVID. CODE § 1250; COLO. R. EVID. 803(3); CONN. CODE EVID.

The Advisory Committee Notes to the Federal Rules of Evidence state, “[t]he 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.”<sup>55</sup> The House Committee on the Judiciary report on the proposed Rules states, “[T]he Committee intends that the Rule be construed to limit the doctrine of [*Hillmon*] . . . so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.”<sup>56</sup>

So this would seem to resolve the issue. Statements of intent could be used as evidence of one’s own later acts, but not as evidence of the acts of another. Professors Mueller and Kirkpatrick certainly think this is what the rule stands for, arguing that the legislative history of Rule 803(3) is in harmony and clear in rejecting the broader interpretation of *Hillmon*.<sup>57</sup>

That may be true, but many courts have continued to allow hearsay statements of intent as evidence of acts by someone other than the declarant.<sup>58</sup> Even within just the first decade following the adoption of

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§ 8-3(4) (West 2008); DEL. R. EVID. 803(3); FLA. STAT. ANN. § 90.803(3) (West 2014); GA. CODE ANN. § 24-8-803(3) (West 2013); HAW. R. EVID. 803(b)(3); IDAHO R. EVID. 803(3); ILL. R. EVID. 803(3); IND. R. EVID. 803(3); IOWA R. EVID. 5.803(3); KAN. STAT. ANN. § 60-460(1) (West 2006); KY. R. EVID. 803(3); LA. CODE EVID. ANN. art. 803(3) (2006 & Supp. 2011); ME. R. EVID. 803(3); MA. R. EVID. 803(3)(B)(i); MD. R. EVID. 5-803(b)(3); MICH. R. EVID. 803(3); MINN. R. EVID. 803(3); MISS. R. EVID. 803(3); 22A MO. PRAC., MISSOURI EVIDENCE § 803(3):1 (4th ed. 2013); MONT. R. EVID. 803(3); NEB. REV. STAT. ANN. § 27-803(2) (West 2013); NEV. REV. STAT. ANN. § 51.105(2) (West 2013); N.H. R. EVID. 803(3); N.J. R. EVID. 803(c)(3); N.M. R. EVID. 11-803(3); N.Y. C.P.L.R. 4518 (McKinney 2013); N.Y. CRIM. PROC. LAW § 60.10 (McKinney 2013); N.C. R. EVID. 803(3); N.D. R. EVID. 803(3); OHIO R. EVID. 803(3); OKLA. STAT. ANN. TIT. 12, § 2803 (West 2013); OR. REV. STAT. ANN. § 40.460 (West 2013); PA. R. EVID. 803; R.I. R. EVID. 803(3); S.C. R. EVID. 803(3); S.D. CODIFIED LAWS § 19-16-7 (2009); TENN. R. EVID. 803(3); TEX. R. EVID. 803(3); UTAH R. EVID. 803(3); VA. SUP. CT. R. 2:803(3); VT. R. EVID. 803(3); WASH. R. EVID. 803(3); W. VA. R. EVID. 803(3); WIS. STAT. ANN. § 908.03(3) (West 2009); WYO. R. EVID. 803(3).

<sup>55</sup> FED. R. EVID. 803(3) advisory committee’s note (citation omitted).

<sup>56</sup> H.R. REP. NO. 93-650, at 12 (1973), reprinted in 1974 U.S.C.C.A.N. 7051, 7075, 7087.

<sup>57</sup> CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.39, at 824-25 (3d ed. 2003).

<sup>58</sup> See Joseph A. Devall, Jr., *Whether Federal Rule of Evidence 803(3) Should Be Amended to Exclude Statements Offered to Prove the Subsequent Conduct of a Nondeclarant: Guidance From Louisiana*, 78 TUL. L. REV. 911, 916-35 (2004).

the Federal Rules of Evidence, the circuits were divided over the use of one person's intentions as evidence of another person's actions.<sup>59</sup> Over the next two decades, the divide widened and invaded the state courts.<sup>60</sup>

Why is the broader holding of *Hillmon* so enduring? Consider how Professor Wesson answered the question of why the Court promulgated the broader holding in the first place: "What could account for the Court's unconvincing reasoning and doubtful rulemaking in the *Hillmon* case? [N]arrative exigencies, rather than any policy views regarding the advisability of a hearsay exception for statements of intention, drove the Court's 1892 decision in the *Hillmon* case."<sup>61</sup> In other words, a good story and an emotionally compelling piece of evidence can lead to bad law.<sup>62</sup> Professors Merritt and Simmons attribute the same psychology to the continuing vitality of the broad interpretation and application of *Hillmon* in the courts, noting that when a person states an intention to go meet someone, and that is the best evidence that they did so, "the temptation to follow *Hillmon*'s broader holding is strong."<sup>63</sup>

Of course, no court is explicitly, intentionally flouting a clear command of the rules of evidence. But nowhere in the Rule or the Advisory Notes is there any explicit statement that *Hillmon* is understood to be a fact pattern involving two statements—one a statement of intent and the other a statement of memory.

Rule 803(3) allows admission of hearsay statements of intent as evidence of the acts intended and excludes hearsay statements of memory as evidence of the thing remembered. The Advisory Committee, in explaining the Rule, could have held either of two views—each consistent with the text of the Rule:

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<sup>59</sup> See Diane Kiesel, *One Person's Thoughts, Another Person's Acts: How the Federal Circuit Courts Interpret the Hillmon Doctrine*, 33 CATH. U. L. REV. 699, 716-30 (1984).

<sup>60</sup> See Joseph A. Devall, Jr., *Whether Federal Rule of Evidence 803(3) Should Be Amended to Exclude Statements Offered to Prove the Subsequent Conduct of a Nondeclarant: Guidance From Louisiana*, 78 TUL. L. REV. 911, 916-35 (2004).

<sup>61</sup> Marianne Wesson, *supra* note 9, at 348, 350.

<sup>62</sup> See Glen Weissenberger, *Judge Wirk Confronts Mr. Hillmon: A Narrative Having Something to Do with the Law of Evidence*, 81 B.U. L. REV. 707, 734 (2001).

<sup>63</sup> DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE* 521 (2d ed. 2012).

1. Walters's statement is making two assertions, one of Walters's intent to do something and the other of Walters's recollection of something he knows (and remembers) about Hillmon.
2. Walters's statement of intent is sufficiently probative to be admissible evidence of what Walters did, but is not sufficiently probative to be admissible evidence of what Hillmon did.

The Advisory Committee Notes do not tell us which view the Committee took. And by not doing so, the Advisory Committee left room for later courts to assume the second view, and thus apply the rule as written; this, in turn, under Federal Rule of Evidence 403, gives courts discretion to come to a different probativeness/prejudice balance than did the Advisory Committee. Thus, if a court understands a *Hillmon*-like statement as purely a single statement of a declarant's intent—not of memory—and then admits that statement as evidence of a non-declarant's actions, then the rule as phrased would still allow that. The court would simply be exercising its authority granted under Federal Rule of Evidence 403 to come to a different conclusion—on the facts of the particular case at hand—than the one the Advisory Committee presaged would generally apply.

And indeed, it appears that virtually every court that applies Rule 803(3) today sees the matter purely as a probativeness/prejudice balance—a matter generally and typically within the discretion of the court to resolve on a case-by-case basis.<sup>64</sup> Courts simply do not see the possibility that a *Hillmon*-like statement contains two statements—one of memory and one of intent—and so do not engage in an analysis on that basis. And so *Hillmon*-like statements continue to be a problem courts encounter, struggle with, and differ on.<sup>65</sup>

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<sup>64</sup> See Lynn McLain, "I'm Going to Dinner With Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker—And the Role of the Due Process Clause, 32 CARDOZO L. REV. 373, 389-416 (2010) (providing a review of court approaches); see, e.g., *United States v. Pheaster*, 544 F.2d 353, 376 n.14 (9th Cir. 1976) ("[T]he possible unreliability of the inference to be drawn from the present intention [of the declarant] is a matter going to the weight of the evidence."), *cert. denied*, 544 F.2d 353 (1977); see also *Coy v. Renico*, 414 F. Supp. 2d. 744, 766-72 (E.D. Mich. 2006).

<sup>65</sup> McLain, *supra* note 64, at 389-416.

Commentators have done little to resolve that struggle. In 1985, Professor Douglass McFarland asserted that using one person's statement of intent as evidence of the actions of another person was a "giant step," for which "no court has offered a carefully reasoned analysis that would support the admission of such statement."<sup>66</sup> McFarland then offers that analysis: "implicit in [the declarant's] statement . . . [of] his present intention is also [the non-declarant's] intention previously expressed to him" and so "[t]he *Hillmon* doctrine would thus serve to admit each level of hearsay in the entire statement."<sup>67</sup> In other words, McFarland saw two statements within *Hillmon*-like evidence, but saw both as statements of intent, each of which needed its own admissibility analysis, but ultimately each of which could survive a hearsay screen. He did not identify that one of those levels might not be a statement of intent at all, but rather a statement of memory.

Six years later, Professor Glen Weissenberger saw the same necessity for a two-level analysis, did the analysis slightly differently, and also concluded that the statement of one person's intentions could be used as admissible evidence of another person's actions.<sup>68</sup> Weissenberger argued, "under the Federal Rules of Evidence, an indirect statement, whether its reference is internal or external, is not hearsay because it does not intentionally assert the matter sought to be proven by the out-of-court conduct or utterance."<sup>69</sup> And thus he returned to the traditional approach to the broad *Hillmon* rule: "Whether these statements may be received as proof of subsequent events is a matter of relevancy and circumstantial proof."<sup>70</sup>

The only place I can find an explicit articulation that the broad holding of *Hillmon* is absolutely wrong—that the *Hillmon* Court's opinion fails to see the embedded statement of memory—is in two evidence texts. In their coursebook, Professors Merritt and Simmons recognize that a *Hillmon*-like statement of intent "breaks into two parts . . . the declarant's intention . . . and . . . his belief [about another]," and then draw the

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<sup>66</sup> Douglas D. McFarland, *Dead Men Tell Tales: Thirty Times Three Years of the Judicial Process After Hillmon*, 30 VILL. L. REV. 1, 22, 25 (1985).

<sup>67</sup> *Id.* at 26.

<sup>68</sup> Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 TEMPLE L. REV. 145, 146-58 (1991).

<sup>69</sup> *Id.* at 152.

<sup>70</sup> *Id.* at 158.



conclusion that the part that is the “declarant’s belief . . . is not admissible.”<sup>71</sup> The evidence treatise by Mueller and Kirkpatrick similarly gives a mixed treatment to the broad holding of *Hillmon*.<sup>72</sup> The authors characterize the broad holding of *Hillmon* as a “backward-looking” inference, but then seem to approve of this inference as proper evidence.<sup>73</sup>

Of course, in the broad context of evidence law, this particular corner of a specialized application of a particular aspect of an exclusion to the hearsay rule is a small doctrinal corner. Given the nature of a course book or treatise surveying the entirety of evidence law, neither of these two texts explain their position at any length, and so it is not surprising that the problems with *Hillmon* endure without articulated introspection.

#### IV. Unpacking *Hillmon*

So this then brings us to the point of this Article: while the language of the Federal Rule of Evidence 803(3) may have left wiggle room, the correct underlying analytical frame actually does not. There is no analytically defensible way to characterize the broad holding of *Hillmon* as a rule about the use of intent evidence.

Walters actually was making more than one assertion, and the assertion that actually matters was not an assertion of Walters’s intent. Rather, it was a statement of memory, offered to prove the truth of the matter being remembered. That is inadmissible hearsay. That is the analysis that the Advisory Committee apparently made, assumed everyone saw, and so did not actually explain. And that is the explanation that courts have failed to see, which in turn has led to a continued misapplication of the state of mind exception to the hearsay rule of exclusion.<sup>74</sup>

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<sup>71</sup> MERRITT & SIMMONS, *supra* note 63, at 520. For a more typical discussion of *Hillmon*, see RICHARD O. LEMPET ET AL., *A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES* 619 (4th ed. 2011) (“There is, however, good reason to allow a statement of intent to do something with another to show both the speaker’s and the other’s action . . . .”) or RONALD L. CARLSON ET AL., *EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES* 494-99 (7th ed. 2012) (no discussion of the details of *Hillmon*).

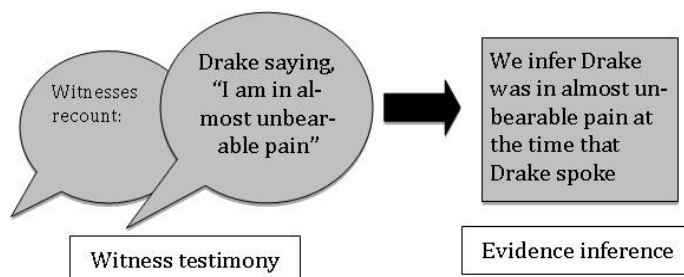
<sup>72</sup> MUELLER & KIRKPATRICK, *supra* note 57, at 815.

<sup>73</sup> *Id.* at 815, 816-17.

<sup>74</sup> As typically framed in the courts and in the Code, there is arguable legitimacy to both a “yes” or a “no” answer to the question: Is one person’s intention admissible evidence of another person’s actions? The “yes” position is that especially in light of

Carefully unpacking first the state of mind exception and then *Hillmon* exposes why.

The starting point is to juxtapose two examples in order to focus on precisely what hearsay content the state of mind exception removes from the general hearsay exclusion. The first example is a car accident. Drake, the driver of one of the cars, eventually dies of his injuries. But he dies only after several days of hospitalization. His estate brings a lawsuit against Otto, the other driver. One of the aspects of damages is compensation for the pain that Drake was in in the days in between the accident and Drake's death. In order to prove an entitlement to pain and suffering damages, the plaintiffs call several witnesses to testify that after the accident and before his death, Drake described to the hospital staff and to his family that he was feeling "almost unbearable pain":



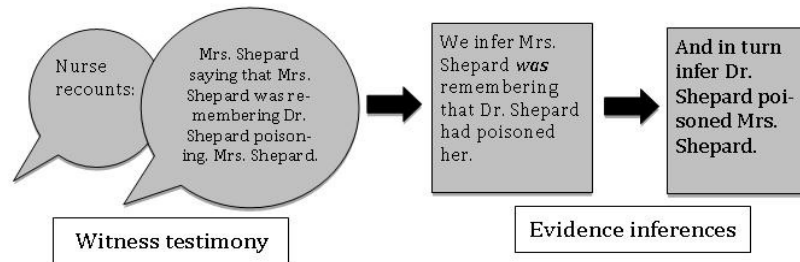
This is precisely the kind of evidence the state of mind exception is designed to allow in. The witnesses' testimony are recounting out of court statements. Those statements assert something the declarant is feeling. What the declarant is feeling is relevant to the case. And so this is admissible hearsay because it fits within the state of mind exception.

Our second example is the above-quoted, infamous case of Dr. Sam Shepard. Dr. Shepard was charged with murdering his wife. Mrs. Shepard died of poisoning. Dr. Shepard claimed it was suicide. Several weeks elapsed in between when Mrs. Shepard swallowed the poison and her eventual death. In order to prove that Dr. Shepard was a murderer,

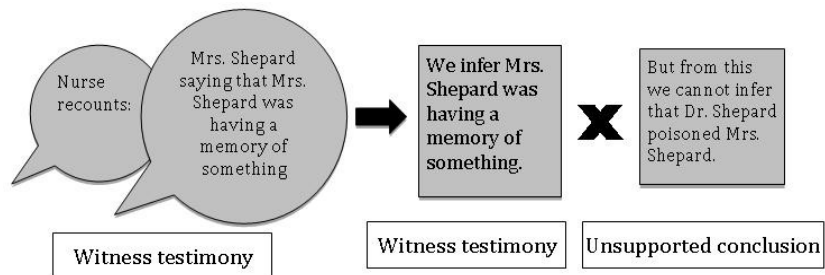
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the liberal definition of relevance codified in Federal Rule of Evidence 401, and the liberal bias for admissibility codified in Rule 403, the evidence is admissible and the fact finder will make of it what they will. The "no" position has been that the inference is so attenuated that it simply is a bridge too far.

the prosecutor called a nurse to testify that at some juncture during these weeks of hospitalization, Mrs. Shepard was awake, lucid, and seemingly recovering, and said to a nurse, “Dr. Shepard has poisoned me.” A diagram of this evidence looks like this:



Now this might, at first blush, look almost indistinguishable from the diagram of the testimony about what Drake said. But to truly make the diagram analytically pertinent to the state of mind exception, we would have to strip out the content of what Mrs. Shepard said substantively, and only look at what she said was her state of mind:



We now can see at a glance that, diagrammed this way, the state of mind assertion provides no relevant evidence of who poisoned Mrs. Shepard. There is no dispute that, at some point, Mrs. Shepard was lucid and capable of memory. It does not advance any trial position. What we need for the trial testimony to be relevant is *what* Mrs. Shepard remembered. But that is an unsupported conclusion from the admissible evidence.

And so with this we can see our first state of mind principle: (1) *The state of mind exception applies to the state of mind, not to the reason for*

*the state of mind.* Put another way, sometimes an out of court statement has to be parsed. For example, if the out of court declarant says, “I am angry because my son just called me a bad name,” the hearsay is admissible to prove the truth of the asserted state of mind (“I am angry”), but not to prove the truth of the reason for it (“because my son just called me a bad name”). The “because” part is not a state of mind; rather, it is a memory of a past factual occurrence. It is precisely the kind of thing the hearsay rule is meant to exclude. The state of mind exception does not encompass it.

And this is why the state of mind exception applies to the car accident example but not to the Shepard murder trial. Let us recast each out-of-court declaration into a “because” format: (1) Drake: “I am in almost unbearable pain BECAUSE I was in a car accident” and (2) Mrs. Shepard “My memory is back and I need to talk to you BECAUSE I just remembered that Dr. Shepard poisoned me.” In both declarations, the information before the “because” is a state of mind and so admissible hearsay, but everything after the “because” is hearsay which is not a state of mind but rather an assertion of external facts. In the first example, the state of mind of feeling pain is relevant to the issues in the case. In the second example, the state of mind of remembering something is not, in and of itself, relevant to the case.<sup>75</sup> And while the cause of the state of mind (memory) is circumstantial evidence of something that is relevant to the case—that the thing remembered did, in fact, occur—Federal Rule of Evidence 803(3) explicitly excludes memory evidence offered for this purpose.

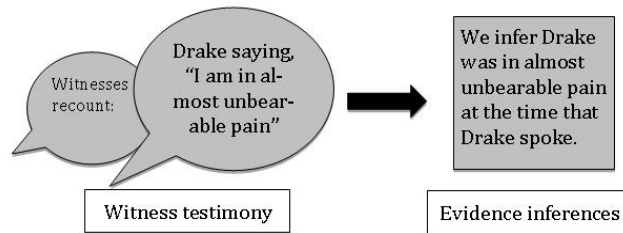
This, then, highlights the second and third state of mind principles: (2) *The state of mind exception does not in and of itself result in the admission of hearsay evidence; hearsay evidence that is state of mind still may be excluded unless it is relevant to the issue the proponent is seeking to prove;* and (3) *having a memory of something, while relevant*

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<sup>75</sup> In our first example, the state of mind was feeling pain. We needed it to be true that Drake was feeling pain. The parallel to that in this second example is that we need it to be true that Mrs. Shepard was remembering something. But in this second example, that is *not* what we need to be true. Rather, what we need to be true is that *what* Mrs. Shepard remembers is true. And that is *not* an internal thought or feeling (a “state of mind”), rather it is an external fact. And so it is hearsay to which the state of mind exception does not apply.

*to whether that event occurred, is not admissible as relevant evidence that it occurred.*

Principle (3)—and how it works differently for memory as opposed to other states of mind—can be illustrated by returning again to our first example:

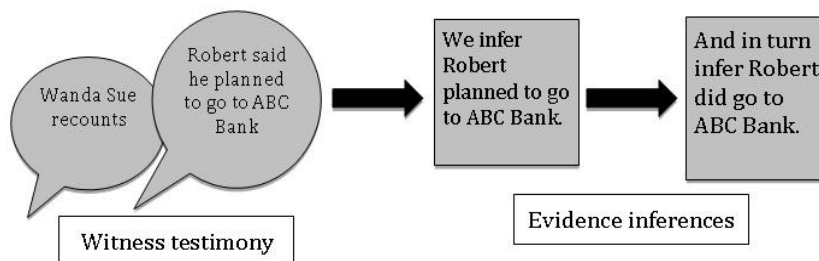


In the example, Drake’s statement of how he is feeling at a particular moment in time is used as direct evidence of that exact question—how was Drake feeling at that moment in time? But what if the question was whether Drake was in pain the day before, or the day after, Drake spoke? In both instances, again, the statement is admissible because now it is circumstantial evidence of both positions. A person in pain one day is somewhat more likely than not to be in pain the day before, or the day after. But then slightly alter Drake’s statement, where he says, “I was in unbearable pain yesterday.” Is it still admissible as circumstantial evidence of Drake’s pain the day before Drake spoke? No. Here, Rule 803(3) explicitly provides that “[a] statement of the declarant’s then-existing state of mind [is admissible] . . . but [does] not includ[e] a statement of memory or belief to prove the fact remembered or believed.”<sup>76</sup>

And that gets us to our next hypothetical and principle. This hypothetical illustrates the particular utility of the state of mind exception when the “state of mind” is “intent/plan.” Robert is accused of armed robbery of ABC Bank. Robert is exercising his Fifth Amendment right to remain silent. There is only a fuzzy surveillance video of the robbery, and while the forensic or witness identification evidence is suggestive, it is not conclusive that Robert is the robber. But the prosecutor does have evidence that Robert had no accounts or other business with the

<sup>76</sup> FED. R. EVID. 803(3).

bank. So if the prosecutor can place Robert at the bank, this is some further evidence that Robert was the robber. So in order to prove that Robert went to the bank, the prosecutor calls Robert's sister, Wanda Sue, to testify that Robert said he intended to go to the bank:



This evidence is admissible under 803(3) and 401. Wanda Sue is the witness. She is recounting from her personal knowledge that an out of court declarant (Robert) made a statement of his intentions (“I am going to ABC Bank this afternoon”). This is hearsay testimony if offered for the truth of the matter asserted in the statement (Robert intends to go to ABC Bank that afternoon). An intent or plan is a state of mind. The evidence is relevant because a person having an intention to do something, while far from conclusive, is some circumstantial evidence that the person later did that thing. Thus, the evidence comes in. This isolates a fourth state of mind principle: (4) *The state of mind exception recognizes intent or plan as states of mind, and intent/plan are relevant and admissible as circumstantial evidence of later conduct in accordance with the intent or plan.*<sup>77</sup>

Now let us move a step closer to *Hillmon* through an example of a statement where part of what is being asserted is not being *explicitly* asserted. This is a particularly fun example because we isolate the state of mind principle by seeing that the same evidence is admissible under either of two logical paths, one of which is a hearsay use while the other is not.<sup>78</sup>

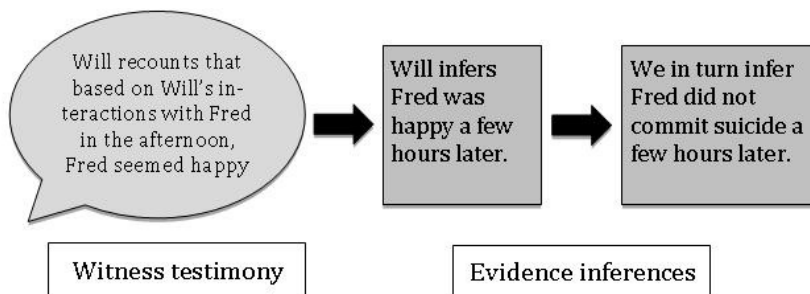
<sup>77</sup> Making this distinction between intent and memory may seem nonsensical as a theoretical precept. That certainly was Seligman's point. But it is a point explicitly rejected by the text of Rule 803(3). FED. R. EVID. 803(3).

<sup>78</sup> This excellent hypothetical can be found in the Teacher's Manual to the book, DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE* 521 (2d ed. 2012).

Fred fell from a tenth story balcony and died. It might be suicide. It might be an accident. And the lawsuit is by the beneficiaries of the life insurance policy suing the insurance company, which has denied coverage based on a conclusion of suicide. At trial, the plaintiffs call Will as a witness who testifies that on the afternoon of the death, Fred told Will that Fred had just accepted a job offer. The evidence is admissible as relevant to the issue of whether Fred committed suicide. But it is interesting to isolate exactly *why* that is so. There are two equally valid evidentiary hypotheses that get to the same result.

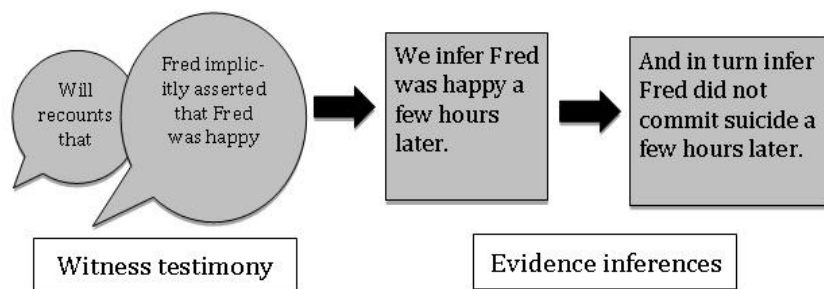
Under the first evidentiary hypothesis, there is no hearsay testimony, and so there is no state of mind issue. Under this construct, Will is testifying from memory and personal knowledge that Will observed Fred on the afternoon of the day in question, and that Will observed Fred to be in a good mood. Will reached these conclusions based upon perhaps a variety of observations or perceptions of Fred, one of which is that Fred reported nominally good news in Fred's life. In other words, Will is giving personal knowledge testimony of matters Will personally perceived (the words Fred said, tone of voice Will heard Fred speak in, and so on) and Will is drawing a conclusion from those perceptions that Fred was in a good mood on the afternoon in question, which in turn makes suicide that evening less likely. The actual testimony is Will's conclusion about Fred's mood. That conclusion is not hearsay.<sup>79</sup>

Diagrammed, this evidentiary hypothesis looks like this:



<sup>79</sup> Indeed, the conclusion is not even based on hearsay. Will simply is testifying that, upon perceiving Fred saying certain things in a certain tone and presenting in a certain manner, Will drew a conclusion: that person is in a positive frame of mind—*not suicidal*. The testimony Will is offering—Fred was in a good mood—is opinion testimony, but it certainly is admissible lay opinion.

Under the alternative evidentiary hypothesis, Will’s testimony is hearsay, but it is hearsay that is admissible under the state of mind exception. Under this construct, Will is testifying from memory that Fred said that Fred had just accepted a new job. It is hearsay because Will is testifying that while Fred did not literally utter the words, “I am in a good mood,” that essentially this is what Will understood Fred to be asserting. Put another way, Will is describing an out of court declaration that contains *two* asserted matters. The first is Fred’s explicit assertion—“I just accepted a new job.” The second is Fred’s *implicit* assertion—“I am in a great mood.” It is the second assertion, the implicit one, that we are keenly interested in at trial—it is what is relevant—because people in a great mood in the afternoon are less likely to be suicidal in the evening. In other words, in contrast to our first construct, which is non-hearsay, here we have hearsay evidence. But, it is admissible state of mind evidence. And that evidence is relevant circumstantial evidence of whether the decedent committed suicide because a person reciting good news is implicitly asserting they are in a good mood, which is circumstantial evidence that they would not be suicidal just a few hours later, which in turn is circumstantial evidence that they did not commit suicide. Diagrammed, this evidentiary hypothesis looks like this:



So this hypothetical elegantly illustrates that sometimes we have to parse a sentence, and that the parsing requires a deeper dive than just sentence diagramming words.<sup>80</sup> Sometimes words can have two or more

<sup>80</sup> This notion of identifying an implicit assertion within hearsay is perhaps more familiar to us when looking at other exceptions, such as the “business records exception.” FED. R. EVID. 803(6). That exception allows the person making the record to



assertions within them, one or more of which is *implicit* rather than explicit.<sup>81</sup> And in this example, when we do that deeper dive, we see our next and last two state of mind principles: (5) *The assertion that we analyze under the state of mind exception may be explicit or implicit*, and (6) *a statement can be making more than one assertion; if so, each assertion is separately analyzed*.

Finally, let us now turn to a much more *Hillmon*-like example. This example shows how all of these state of mind principles work together, and where *Hillmon* and similar cases get confused. And as a predicate, let's remember what those state of mind principles are:

1. The state of mind exception applies to the state of mind, not to the reason for the state of mind;
2. The state of mind exception does not in and of itself result in the admission of hearsay evidence; hearsay evidence that is state of mind still may be excluded unless it is relevant to the issue the proponent is seeking to prove;
3. Having a memory of something, while relevant to whether that event occurred, is not admissible as evidence that it occurred;
4. The state of mind exception recognizes intent or plan as states of mind, and intent/plan are relevant as circumstantial evidence of later conduct in accordance with the intent or plan;
5. The assertion that we analyze under state of mind exception may be explicit or implicit; and
6. A statement can be making more than one assertion; if so, each assertion is separately analyzed.

Here is our hypothetical: Victor has been found dead on the steps in front of the library. There is no forensic evidence helping to identify

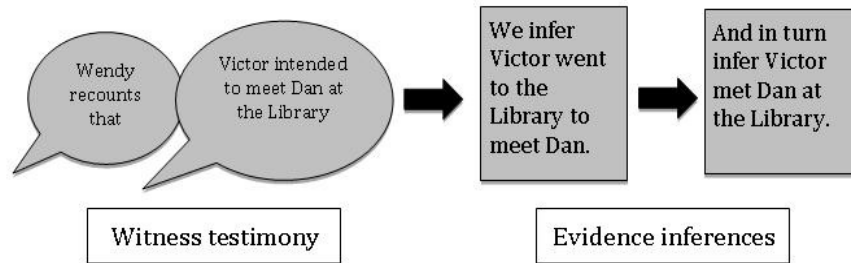
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compile information from other persons within the business. Although this constitutes hearsay within hearsay, it is still within the scope of the exception. So, when looking at a business record, we do not worry that implicitly it is compiling data from multiple sources of information within the business. Yet, undeniably, that is what is occurring—the business record has implicit assertions within it.

<sup>81</sup> Another evidence doctrine where the lesson that sometimes assertions are implicit is illustrated in the doctrine of non-verbal assertive conduct. It is well understood that non-verbal conduct—such as pointing as a way of identification—can be hearsay. The notion is that implicit in the conduct is an assertion.

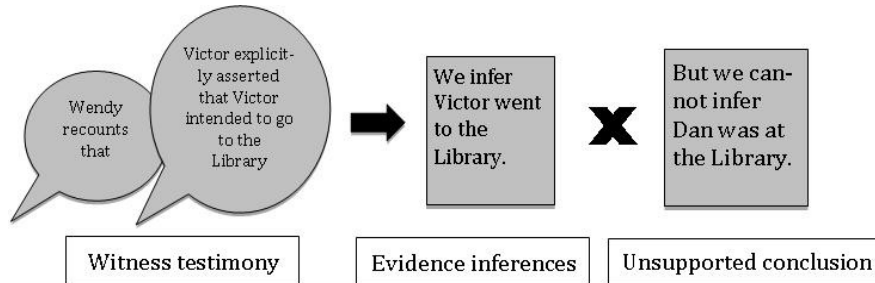
Victor’s killer. But Wendy recounts that she had lunch with Victor one hour before the murder, and Victor said to Wendy that Victor intended to go to the library to talk to Dan.

For obvious reasons, the prosecutor thinks Dan is the killer. Here is the evidentiary hypothesis:

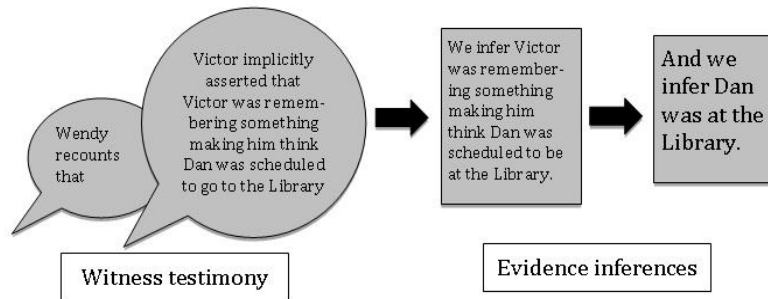


But to diagram the evidence this way actually obscures that Dan made two assertions to Wendy, and unpacking one from the other exposes an evidentiary problem—one assertion is admissible under the state of mind exception but is not relevant to whether Dan went to the Library, while the other is relevant to whether Dan went to the Library but not admissible under the state of mind exception:

*Admissible as State of Mind but not Relevant (to whether Dan went to the Library):*



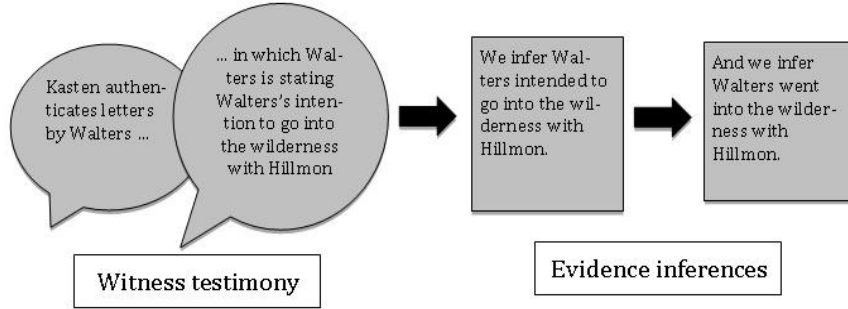
*Relevant (to whether Dan went to the Library) but not Admissible as State of Mind:*



In other words, Victor is stating his intention to go to the Library to meet Dan. But per state of mind principle 6, Victor’s statement has more than one assertion—an explicit assertion of Victor’s intent and an implicit assertion of Dan’s schedule—and for purposes of analysis each assertion must be analyzed separately. Per state of mind principle 5, it does not matter that one of the assertions—Victor knows something that gives him reason to believe that Dan will be at the Library in one hour’s time—is implicit. Per state of mind principle 4, Victor’s first assertion is of Victor’s intent that qualifies as a state of mind that can be used to prove that Victor went to the Library. But per state of mind principle 2, this is insufficient for the first assertion to be admissible on the issue the prosecutor is trying to establish—that Dan was at the Library. And per state of mind principles 1 and 3, the second assertion, which is relevant to that issue, does not fit within the state of mind exception.

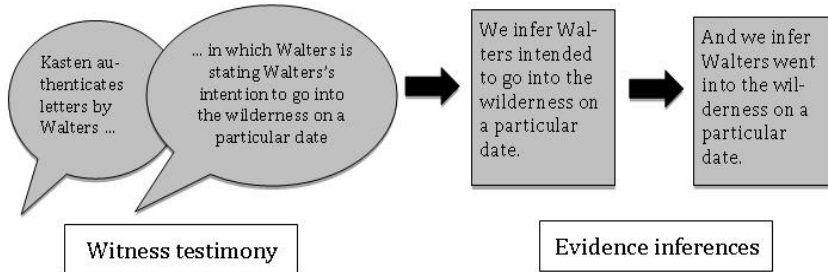
Stated yet another way, Victor’s assertion is highly relevant. It puts Dan in the right place at the right time. But it is built on some unspoken and unknown source of information. Perhaps Victor and Dan had discussed the matter. Perhaps Victor simply knew of Dan’s regular habits. Perhaps Victor had stolen a glance at Dan’s calendar on Dan’s iPhone. Or perhaps someone else had told Victor that Dan was going to be at the Library. We will never know. Victor is not alive anymore to recount *why* Victor thought Dan would be at the Library in one hour’s time. We cannot test either the accuracy of Victor’s belief or even Victor’s sincerity. It is “rank” inadmissible hearsay that neither is nor should be subject to Rule 803(3).

So now let us return to *Hillmon*, and its evidentiary hypothesis.

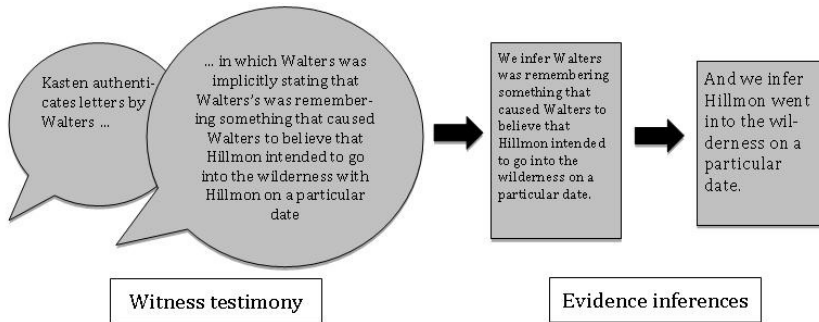


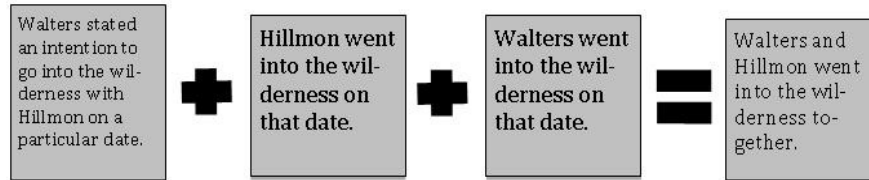
We now can see that it is actually conflating *three* evidentiary claims.

*Evidentiary Claim 1:*



*Evidentiary Claim 2:*



*Evidentiary Claim 3:*

The second of this triumvirate is the one of interest. Once exposed it is a blatant violation of state of mind principles because it is using the declarant's statement of memory as evidence of the truth of the facts remembered.

Now, one of my colleagues, Professor Mario Conte, responds to this by saying: "How do you know that Walters was remembering something; he might have been standing right next to Hillmon and writing as Hillmon was talking?" To which I say, "That's possible, but then you would be arguing for admissible hearsay under the recorded recollection and/or present sense impression exception, but because Walters is dead you have no way to lay the foundation."

Indeed, this exemplifies why *Hillmon*-like statements are inadmissible hearsay. We do not know how Walters knows whatever he knows. Maybe he is speaking to Hillmon. Maybe he spoke to Hillmon in the near past, or the far past. Maybe they have a mutual acquaintance and communicated secondhand. Maybe Walters has just heard some loose talk about Hillmon, and hopes he can tag along with Hillmon, assuming the talk is true. We do not know, and we cannot ever know. Walters recounting a memory is the most likely explanation, but not the theoretically only possible one. But what we do know is that whatever the explanation, the foundation for an exception cannot be provided. To the contrary, the evidence—because of its unknown and untestable nature—is precisely the sort of thing hearsay is meant to exclude.

## Conclusion

So as we can now see, the *Hillmon* decision was wrong. The Supreme Court did not recognize that it was dealing with a hearsay assertion of a memory, and so allowed the evidence. Once the Court defined—albeit

erroneously—the terms of its analysis, the mistake in definition was never explicitly revisited. But once it is explicitly revisited, the flaw in *Hillmon* is patent, and the contemporary debate about intent evidence melts away. A declarant’s statement of intent simply is not admissible evidence of a non-declarant’s actions.

Unfortunately, lawyers and judges these days are almost as unlikely to read law review articles or essays as they are to read law school texts or treatises. So what should be done? Here is a modest proposal: Add one line to Rule 803(3): “Under no circumstances, however, shall this section apply to result in a statement of the declarant’s then existing state of mind to be admissible as evidence of the later actions of someone other than the declarant.” That ought to minimize the instances in the future of courts falling prey to an alluring and enduring jurisprudential error.