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The *Hillmon* Case, the MacGuffin, and the Supreme Court

by Marianne Wesson

When Sallie Hillmon of Lawrence, Kansas, bade farewell to her husband John in February 1879, she may have been feeling some apprehension about the errand he said he was undertaking—a winter trip by horse and wagon to find a good spot further west where a man might start a sheep ranch. But the 23-year-old waitress could not have anticipated that John Hillmon's failure to return from this expedition would provoke an epic lawsuit that would last for a generation and produce six trials, two decisions by the U.S. Supreme Court, and a new rule in the law of evidence.

The litigation bearing her name, brought against the three life insurance companies that had issued policies on John's life, is remembered today chiefly because of the law it created. In the course of disapproving the judge's exclusion from the third trial of certain epistolary evidence—a young man's letter to his sweetheart back home—the Supreme Court created an important exception to the hearsay rule for expressions of the intentions of the speaker or writer. Litigators certainly know the rule; it is now embodied in Federal Rule of Evidence 803(3) and corresponding exceptions recognized in most other American jurisdictions. But the story behind the case bears remembering as well.

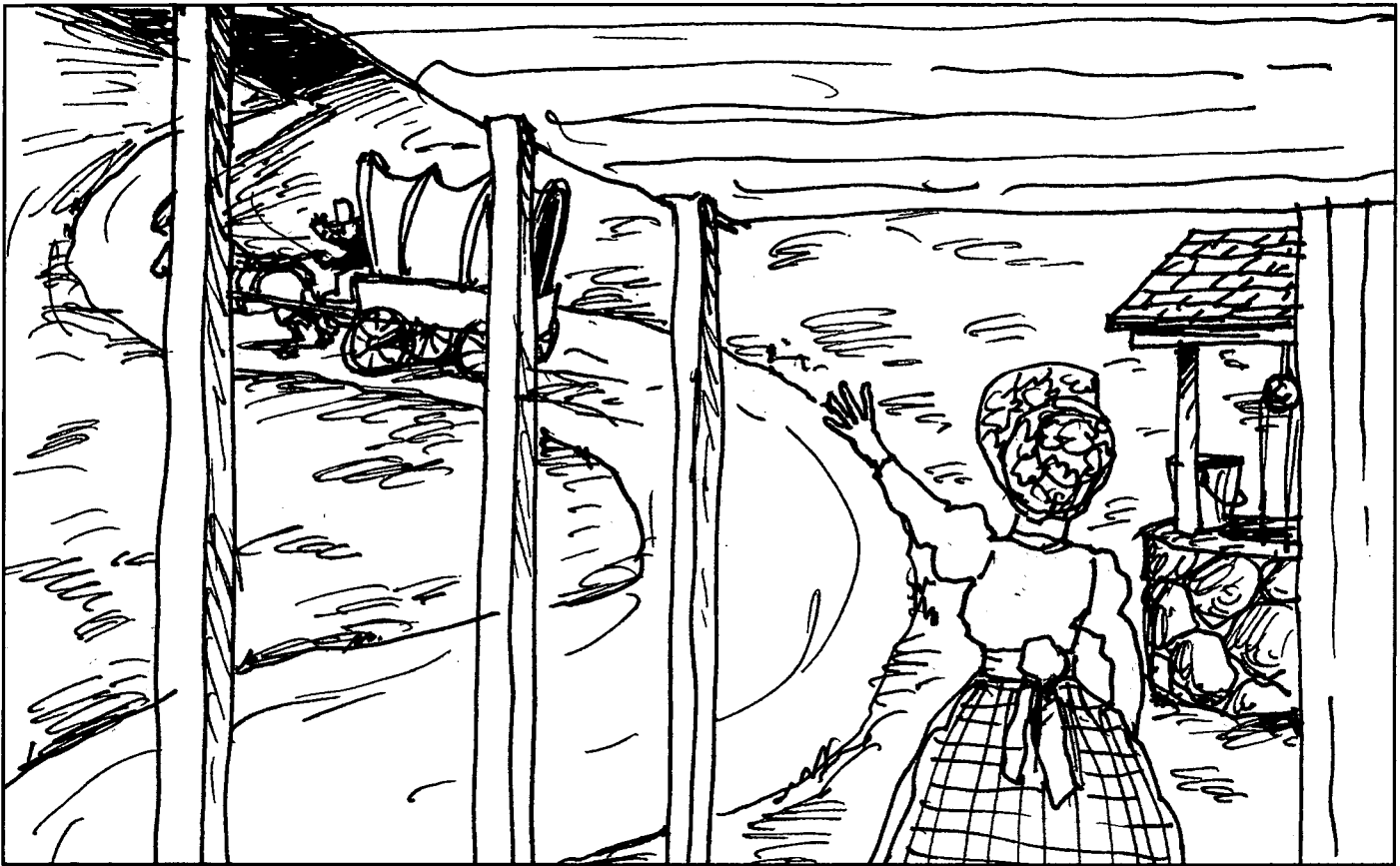
In the spring of 1879, Sallie Hillmon filed claims against policies totaling \$25,000 that three New York insurance companies had issued on the life of her husband, John; she reported that he had died in a firearms accident in rural southwest Kansas. Life insurance fraud was common, if not rife, in late-nineteenth-century America. The suspicious companies refused to pay the claims, maintaining that John Hillmon was not dead. In July of 1880, negotiations having broken down, Sallie commenced lawsuits against them; the three suits were eventually consolidated into one.

The first two Hillmon trials, in 1882 and 1885, produced

hung juries, but the third resulted in a victory for Sallie Hillmon. It was this verdict, rendered in 1888, that led to the famous Supreme Court decision of 1892, reversing the judgment in her favor. Three more trials ensued, two ending with hung juries and the last in another verdict for Sallie Hillmon, which was once again overturned by the Supreme Court. The ultimate contested factual issue in all of the trials was the identity of the man who died of a gunshot wound in March 1879 at a campsite near Medicine Lodge, Kansas, whose death far predated the availability of twentieth-century methods of identification. Sallie Hillmon and her attorneys insisted that the corpse was her husband's; supportive evidence included identification of the body shortly after its demise by Sallie Hillmon and by many others who had known him, as well as early statements by Hillmon's traveling companion at the time, John H. Brown. In Brown's original account, given within hours of the death, he said he had shot Hillmon accidentally when unloading a rifle from a wagon while the two men were making camp at a place called Crooked Creek.

The insurance companies argued that the deceased was not Hillmon but an innocent victim, a man whom they claimed Hillmon and Brown had lured to Crooked Creek for the precise purpose of killing him and leaving his body to pass as Hillmon's. There also was some evidence that this was the case, including witnesses who had known Hillmon in life and swore that the body (or a photograph of it) could not have been Hillmon, and a written statement sworn to by John H. Brown a few months later, after a coroner's inquest had concluded that the dead man was not Hillmon. In this statement, Brown supported the companies' theory and said that the victim was an individual named "Joe" whom he and Hillmon had picked up in Wichita and persuaded to accompany them west. But before the first trial, John Brown repudiated this story and returned to his original one, claiming that the insurance company's lawyers had coerced him into signing the false affidavit.

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At the time of the first trial, the defendant insurance companies claimed that the corpse was that of Frederick Adolph Walters, once a citizen of Ft. Madison, Iowa, and the betrothed of Alvina Kasten, also of Ft. Madison. They produced witnesses, including Kasten and various Walters family members who identified the corpse from photographs as Frederick Walters's. It was agreed that young Walters had left Ft. Madison in March of 1878 for the purpose of bettering his condition and had traveled widely in the Midwest for a year or so. The insurance companies claimed that Walters found himself in Wichita in March of 1879, and it is here that a letter—the document a film theorist might call the MacGuffin—first makes its appearance.

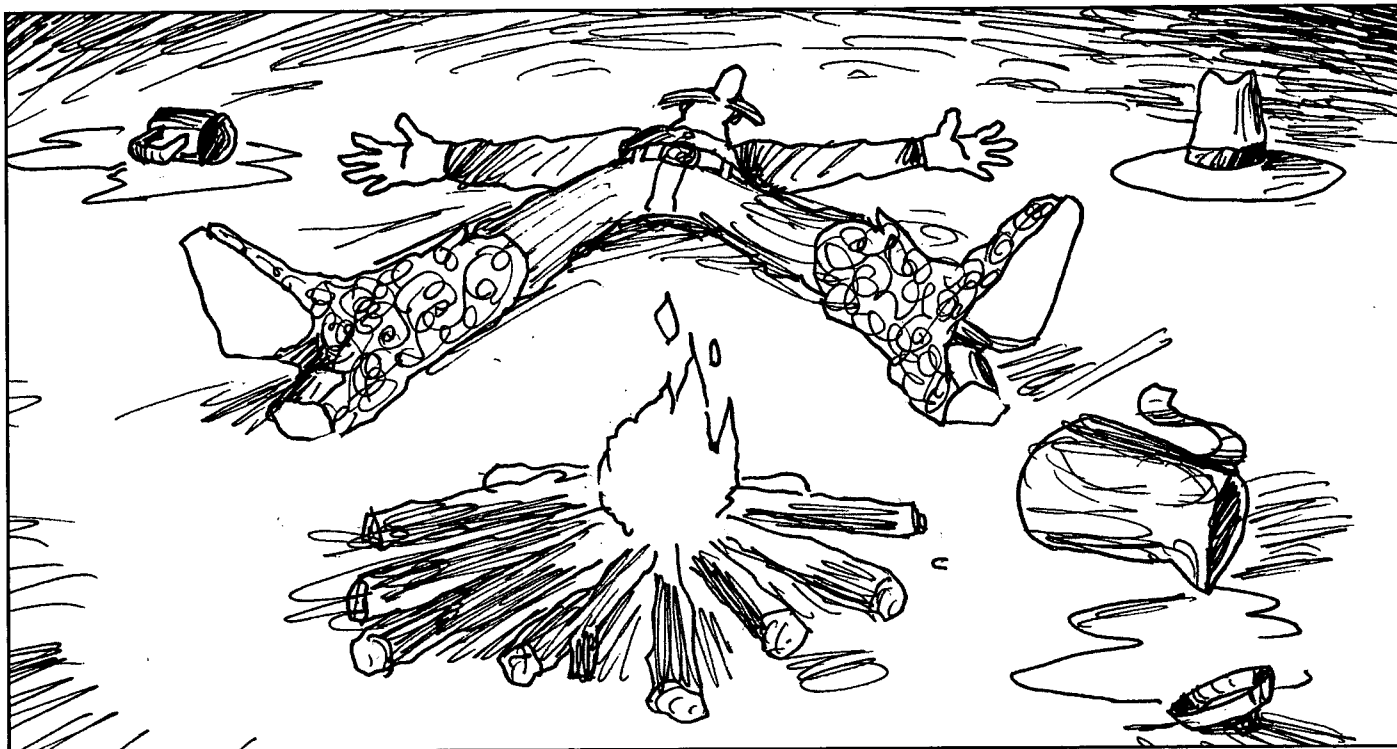
Kasten testified in a pretrial deposition that she had received a letter from her fiancé dated March 1, from Wichita; in it he wrote that he planned to leave that city soon with a "man by the name of Hillmon," a sheep trader. The letter, which was attached to the Kasten deposition transcript as an exhibit, explained the writer's decision to accompany this stranger by confiding that Hillmon had "promised me more wages than I could make at anything else." Kasten described this letter as the last communication she had enjoyed from Walters.

This letter was exceedingly helpful to the defense, both in suggesting an alternative identity for the corpse and in corroborating Brown's statement that he and Hillmon had lured a victim to accompany them on their journey. It's difficult for any reader of the Supreme Court's 1892 decision to resist the conviction, aroused by Justice Gray's description of the letter, that the Crooked Creek corpse must have belonged to Frederick Adolph Walters. John Brown's conflicting accounts might cancel each other out and leave one in doubt, as might various witnesses'

identification of the corpse as Hillmon or Walters, but the letter is a decisive tiebreaker. It is insupportable as coincidence that Walters encountered a man named Hillmon in Wichita shortly before the death at the campground, left that town with him, and was never heard from again; murder is the obvious explanation. Most students and scholars of the case, not only in this country but abroad as well, believe that the corpse was that of Walters.

Still, the first two juries were unconvinced, or at least enough of the jurors to produce two mistrials. But in the third trial, Judge Shiras of the circuit court in Topeka excluded the Kasten letter from evidence, accepting the arguments of Sallie Hillmon's lawyers that it was inadmissible hearsay. The jury, innocent of any knowledge of the letter, returned a verdict for her, and the insurance companies appealed. The Supreme Court's decision overturning that verdict contains its famous language about what has become known as the "state of mind" exception to the hearsay rule:

A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party



The rule applicable to this case has been thus stated by this court: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent, explanatory, or corroborative evidence it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury.

Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295-96 (1892), quoting *Insurance Co. v. Mosley*, 8 Wall. 397, 404-05 (1869). With this reasoning, the Court reversed the trial judge and sent the case back to be tried anew, directing that evidence of the letter be allowed.

The Court's explanation is not really persuasive, however, especially to a reader one century later. What could the Court mean when it suggests that expressions of intention are (at least sometimes) "verbal acts"? Today we reserve that description for utterances that per se transform the legal situation of the speaker and/or another, for example, words of gift, of contract, or of consent. It is characteristic of such locutions that they effect this transformation whether or not they are "true"; they are not actually hearsay at all because they are not offered to prove the truth of some matter asserted. Descriptions of one's intention to go to a certain place are not, ordinarily, in that category—certainly not when offered solely as proof that one *did* go to that place. Such declarations would be probative only if true—would be, that is, hearsay. The Court spreads the confusion around a bit by borrowing from

an earlier case the proposition that the "truth or falsity" of statements like those in the letters is "an inquiry for the jury." But the rule excluding hearsay, which the Court does not purport to repeal in this case or any other, rests precisely on the notion that determining the truth or falsity of some extrajudicial utterances is too challenging a task for a jury that has been deprived of a chance to observe the declarant and hear him cross-examined under oath.

There is yet another difficulty of the Court's opinion: Even if, as the Court held, the letter was properly admissible to prove that Walters intended to leave Wichita with Hillmon (and, apparently, also for its tendency to prove that he *did* leave Wichita with Hillmon), surely the letter's effect on the jury could not be confined to proving those propositions. If accepted as evidence of the truth of the propositions put forward by the letter writer, the letters argued just as surely that Hillmon had approached Walters in Wichita, promised him extraordinarily (perhaps suspiciously) good wages for his company, and intended to take Walters along when he and Brown decamped. None of these latter propositions concerns Walters's intentions; instead they describe either past events that the writer is recalling ("I met Hillmon and he promised me good wages") or the perceived intentions of another ("Hillmon intends to take me with him when he leaves Wichita"). Yet the Court did not acknowledge that the rule it announced had already overrun its premises.

What could account for the Court's unconvincing reasoning and doubtful rulemaking in the *Hillmon* case? Even a modest version of the hearsay exception for the expressed intentions of a hearsay declarant—that is, a version allowing expressions of intention to prove only the genuineness of the intention—does not rest on any plausible theory of reliability. It lacks any justification in the sort of armchair psychology that prompted the invention of, say, the exceptions for dying declarations or statements against interest. The former were thought reliable

because “no man would meet his Maker with a lie upon his lips”; the latter because persons who say things that disadvantage them must be motivated by a powerful need to tell the truth. But expressions of one’s *intentions*? It would seem to be easier to lie about one’s intentions than about nearly anything else, since the likelihood of being caught out in a lie is small—any discovery of later acts incompatible with the expressed intention can always be explained by the simple phrase “I changed my mind.” The more robust version of the exception endorsed by the *Hillmon* Court is even less grounded in reliability, since allowing an expression of intention as evidence that the intention was accomplished disregards the folk wisdom that there is “many a slip ’twixt cup and lip.”

There is something more powerful than conventional legal reasoning at work here: the urge to complete a just and intelligible narrative. It is impossible to come away from an encounter with the Supreme Court’s opinion without the impression that the trial judge’s exclusion of the evidence concerning Walters’s letter—the story’s MacGuffin—diserved the cause of truth. The letter, although barred from the jurors’ notice in the third trial, was part of the appellate record and was minutely described in the Court’s opinion. Once a reader of the Court’s opinion knows of the letter, it seems offensive to the idea of justice that the law would countenance a retrial in which the verdict could rest again on the jurors’ ignorance of evidence that seemed to prove, with near certainty, that the corpse belonged to Frederick Adolph Walters. The story, the true story, had to be the one that Brown told in his affidavit: Hillmon persuaded the credulous “Joe” (obviously, from the evidence of the letters, Frederick Adolph Walters) to accompany them on their journey and killed him at Crooked Creek, leaving his body to be taken for Hillmon’s. If the reader is left with this narrative anxiety about the availability of the indispensable MacGuffin, can the Court have been unmoved by the corresponding need to participate in the creation of an acceptable story—a story in which truth and justice are served in the end, rather than mocked?

Once invented, the *Hillmon* exception to the hearsay rule has carried enough prestige to fend off serious criticism for more than a century. Although later commentators raised doubts about the rule of *Hillmon*, especially the expansive version, its holding was incorporated 83 years after its announcement into Federal Rule 803(3). That rule reads (in pertinent part):

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . .

By itself (especially in light of the qualification of the last phrase), this rule might be read to exclude such materials as the Walters letter, or at least to require strict confinement of use of the material to proving the intentions of the declarant, and prohibition of its use to proving past acts or another’s intentions. But on the whole, it has not been read that way, in part because the influential Advisory Committee’s Note to that rule states: “The rule of *Mutual Life Insurance Co. v. Hillmon*, . . . allowing evidence of intention as tending to prove the doing of the act intended is, *of course*, left undisturbed.”

Since the *Hillmon* decision itself seemed to permit all uses

of the Walters letter, it is with some justification that most judges have accepted the case to mean that a declaration of the speaker’s intentions is admissible over a hearsay objection, even if it includes assertions about past conduct of the speaker or another, and even if it contains a claim about the intentions of someone else. This doctrinal result grows largely out of reverence for the rule of *Hillmon*—and because the disputed evidence in *Hillmon* itself described not only the intentions of the declarant Walters but that declarant’s claims about the past acts and intentions of another, Hillmon.

The power that this single letter seemed to hold over the development of the law of evidence eventually led my curiosity in this direction: Suppose a case were to be made for the truth of quite a different narrative, one in which the corpse belongs to John Hillmon after all? In particular, suppose that the story’s MacGuffin, the famous letter, were full of lies? What would this circumstance, if proven, bode for the state-of-mind exception?

The possibility of any such plausible narrative may seem small given the foregoing discussion, but that is in part because the provenance of the Walters letter is taken for granted; the lawyers’ quarrel over its admissibility as hearsay seems to exhaust skepticism about the circumstances of its creation. And it is also in part because partisans of the defendants have played a suspiciously large role in constructing the Hillmon story in historical memory.

The *Hillmon* exception to the hearsay rule has fended off serious criticism for more than a century.

Most persons familiar with the *Hillmon* case take their understanding of it from the same source: a report written by one of the attorneys for the insurance companies, who also happened to be the state’s insurance commissioner at the time. Considering the bias that colored this canonical source, I concluded that the most instructive information about the *Hillmon* case was to be found in contemporaneous newspaper accounts.

Putting aside the partisan arguments of the various newspapers, their more particular reports of the testimony and evidence tell a rather clear story. After John Brown reported the shooting death at Crooked Creek to some nearby rural residents, two inquests were conducted under the auspices of the coroner at Medicine Lodge, seat of Barbour County. The first coroner’s jury failed to agree whether the death was accident or homicide; the second concluded that the shooting was accidental. The body was then buried at Medicine Lodge, and Brown wrote a letter to Sallie Hillmon explaining what had happened and conveying his regret and condolences.

When the insurance companies that had issued policies on Hillmon’s life learned of the reported death of their policyholder, they lost no time moving into action. Agents of two of the companies, Theodore Wiseman (sometimes known by the

title "Major") and C. Tillinghast, traveled to Medicine Lodge and demanded that the body be exhumed for their examination. They were accompanied by a Colonel Walker, apparently a figure of some renown in Kansas. The first two gentlemen told the Medicine Lodge coroner that they knew Hillmon and wanted to assure themselves that he was the deceased. According to a contemporaneous report in the Medicine Lodge paper, the *Cresset*, "the identification was satisfactory" and the body, presumptively Hillmon's, was dispatched "to be returned to his relatives near Lawrence." When the body reached Lawrence, however, far from being returned to Sallie Hillmon or any other relative, it was delivered to two physicians described by the *Lawrence Standard* as "representing the insurance companies." These physicians were reported to be in doubt about whether the body, by then nearly a month dead and partially decomposed, was that of Hillmon. Three other persons who knew Hillmon were asked to look at the exhumed body, and all said they could not be certain whether or not it was Hillmon. Sallie Hillmon declined at first to examine the body, saying she preferred to remember her husband as he was in life, but later she did look at it and affirmed that it was John Hillmon. The body was then sent to a funeral home to be embalmed, although it was apparently taken out and shown to various persons during the ensuing days. The next day the coroner of Leavenworth County summoned a coroner's jury and commenced a third inquest.

Despite citizens' grumblings about its justification, the Lawrence inquest proceeded, an arduous affair of several days. Many witnesses testified, including John Brown, who gave the same account of an accidental shooting that he had given at Medicine Lodge. Sallie Hillmon testified that she had looked at the corpse after it was brought to Lawrence and knew it for her husband's. Similar testimony about the corpse's resemblance to Hillmon was given by Levi Baldwin, Sallie's cousin and the erstwhile employer of John Hillmon, who had gone to Medicine Lodge and accompanied the body back to Lawrence. The proprietor of the rooming house where the Hillmons lived also said he had seen the corpse and it was Hillmon.

The letter and the affidavit seem to reinforce each other.

It was mid-May when the coroner's jury returned its verdict of murder "at the hands of John Brown." (Curiously, it did not mention Hillmon as murderer or accomplice.) Brown must have been feeling alarmed, but he was not immediately accused, arrested, or charged. Instead, he was approached not long afterward by a lawyer named W.J. Buchan. The lawyer had several conversations with Brown during the summer, beginning in May, and eventually spoke to Brown's brother as well. In September, Brown signed and swore to a lengthy statement, prepared by Buchan, repudiating the story he had told about Hillmon's death and giving quite a different

account. The statement averred that John Hillmon and Sallie Hillmon's cousin Levi Baldwin had entered into a conspiracy to commit insurance fraud; Baldwin's part was to pay the premiums and Hillmon's (and Brown's) was to journey to the Southwest to "find a subject to pass off as the body of John W. Hillmon, for the purpose of obtaining the insurance money." The affidavit said that after leaving Wichita, the two men had encountered a stranger "the first day out of Wichita, about two or two and one-half miles from town." The stranger "said his name was either Berkley or Burgess, or something that sounded like that," but Brown and Hillmon "always called him Joe." Hillmon told Brown that Joe "would do for a subject to pass off for him," but Brown objected that murder was "something that I had never before thought of, and was beyond my grit entirely."

The statement then related that Hillmon shot and killed the stranger at the Crooked Creek campground, dressed the dead man in his clothes, put his own daybook into the jacket pocket, told Brown to ride for assistance, and then vanished north with "Joe's" valise. Later, back in Lawrence, according to the statement, Brown had a conversation with Sallie Hillmon in which she assured him that "she knew where Hillmon was, and that he was all right."

From the insurance companies' point of view, a more useful document than this affidavit can scarcely be imagined. It accounts for all the facts then known, discredits not only Brown's earlier testimony but that of two of the most important witnesses (Levi Baldwin and Sallie Hillmon) who identified the corpse as Hillmon, and makes excellent use of what had before been the most suggestive circumstance in favor of the company's position: the suspiciously large amount of life insurance carried by a poor man like Hillmon.

Brown had also written (not just signed, as with the affidavit) another highly helpful document: a letter to Sallie Hillmon. In it he wrote, "I would like to know where John is, and how that business is, and what I should do, if anything. Let me know through my father. Yours truly, John H. Brown." Brown later would say that Buchan had dictated this letter to him.

Sallie Hillmon testified that she did not receive this letter, and Buchan admitted that he did not send it on to her; instead, he gave it to the insurance companies' representatives. Apparently it was never intended as an actual communication; it was a piece of evidence manufactured by Buchan, at a time he purported to be representing Brown, in favor of the insurance companies' theory that Brown and Sallie Hillmon were united in a continuing conspiracy. And by the time of the first trial of the Hillmon case in 1882, Brown had returned to his original account of the death at Crooked Creek, testifying for Sallie Hillmon and claiming that Buchan and the insurance companies had pressured him into swearing to the affidavit.

Apart from Brown's repudiated affidavit, the defendants had little to rest their case on but claimed variations between Hillmon's and the dead man's bodies, the oddness of a man like Hillmon having purchased so much life insurance, and the Walters letter. The letter and the affidavit (despite certain discrepancies between them) seem to reinforce each other, the one tending to quell doubts about the reliability of the other. But if the Brown affidavit is dismissed as the product of the interactions of an unscrupulous lawyer, a relentless set of adversaries, and a frightened and unlettered young man, the Walters evidence justly falls under new scrutiny, together with the famous decision that legitimized it.

The career of the letter through the various trials rewards further attention. There was no evidence produced of the letter at the Lawrence inquest, of course, because at that time the insurance companies had not yet learned of Walters's disappearance—or even of his existence. But after the inquest, the insurance companies inquired throughout the Midwest whether any families had suffered the recent disappearance of a young man; it was through this technique that they first learned of the Walters family and the missing Frederick Adolph. Eventually they took the deposition of Alvina Kasten, who (she said) furnished them with the famous “Dearest Alvina” letter. Judge Foster, presiding in the first trial, admitted the letter, together with the deposition in which she identified it; Kasten herself did not testify live at this trial (or any of the others). The judge kept the jurors in session overnight on a Saturday, but after seven ballots the jury remained divided 7-5 in favor of Sallie Hillmon, and a mistrial was declared.

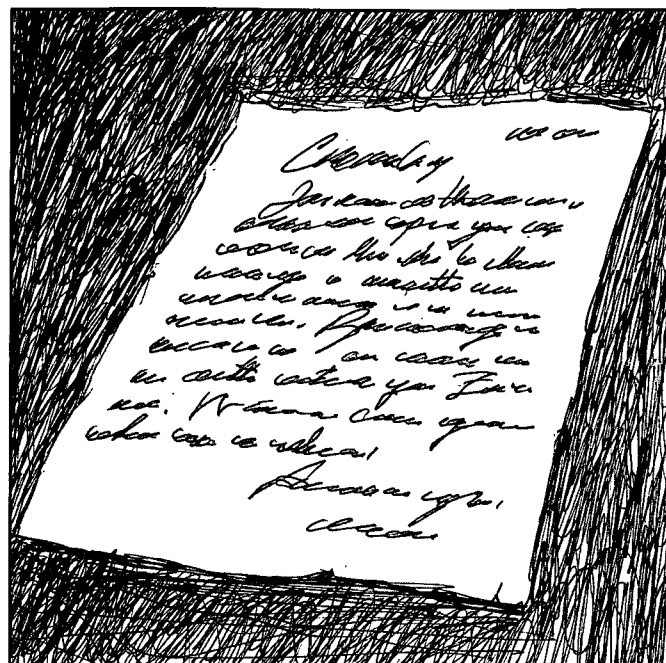
In the second trial, the Kasten deposition was again received in evidence, together with the letter. Again the jury hung, this time 6-6, but this time the letter seems to have been more important in their deliberations. One juror (who had voted for the plaintiff) suggested afterward to a newspaper reporter that if Walters had been in Wichita, as the letter suggested,

he would certainly have been seen and remembered by somebody. He would have had a boarding house; he became a cigarmaker, he would certainly have been remembered by someone of that craft. The fact that there was no attempt to bring anyone forward, who could say they had seen him in Wichita at that time, caused us to believe that there was something crooked about that letter.

Concerning Brown's two accounts, this juror said they “had considerable influence, although it was hard to tell which of his stories was true,” and also that “it will be hard to make me believe but what Buchan worked him pretty hard, to get his evidence for the companies.”

Apparently heeding this juror's skepticism, at the third trial in 1888 the defendants called several witnesses to testify that they had seen Walters, or someone who resembled him, in Wichita in early March 1879. And again they offered the Kasten deposition, together with its attached copy of the letter she said Walters had sent her. But this new and revived evidence availed the defendants little because Judge Shiras forbade any mention of the contents of the letter, reasoning that its assertions were hearsay (as they undeniably were). The jury found unanimously for Sallie Hillmon. The letters, it seems, had been essential to the insurance companies' earlier modest success in staving off a loss; without them they could not prevent a Hillmon victory. Of course it was this outcome that gave rise to review of the case by the U.S. Supreme Court, where the Court (per Justice Gray), after delivering its famous opinion, remanded the matter to be tried yet again before a jury fully apprised of the existence and content of the Walters letter.

The three trials that ensued after the Supreme Court's 1892 decision produced outcomes that eerily replicated the first three trials': two more hung juries, followed by a verdict for Sallie Hillmon (destined to be overturned by the Supreme Court when the litigation reached it for the second time). But the letter, having by then enjoyed the Court's attention, under-



went a more focused and searching scrutiny in the last three trials than in the first two.

The fourth trial, which took place in Topeka in 1895, was the longest, occupying nearly three months of the court's time. On this occasion the insurance companies produced evidence that no previous jury had heard: Major Wiseman testified for the first time that he had received a letter (not produced) from the patriarch of the Walters family asking him for help in locating a “lost son who wrote home last that he was going west with a man by the name of Hillmon to herd sheep for him.”

Kasten's deposition and its accompanying letter had not, of course, changed since it was admitted at the first trial. There was another deposition witness who claimed to have been the recipient of correspondence from Walters: H.S. Spreen of Ft. Madison deposed that he had gotten a letter from Walters dated Wichita, on March 5 or 6, informing Spreen that the writer “was going west to herd sheep for a man.” According to Spreen, the business purpose of the letter, which was not produced, was to request a statement of Walters's account with “the lodge” (apparently the Odd Fellows Lodge, of which Walters was a member). Although Spreen had testified at the first trial merely to say that Walters had a mole on his back and that a picture (apparently of the corpse) “look[ed] a good deal like Walters,” this was the first mention of any letter Spreen had received from him. And then there was a brother, C.R. Walters, who at the time of Frederick Adolph's disappearance lived in Missouri, who remembered (as he had in the first trial) a letter he said he had received during February 1879, postmarked Wichita. But his memory of this missing letter had grown a bit more particular with time: This time he said it related that his brother “had made arrangements to drive cattle for a man by the name of Hillmon” in Colorado and wished to postpone plans the two brothers had made to meet and go to Leadville for the gold mining until after his engagement with Hillmon. This brotherly letter, like Spreen's, was not produced, but another one was, by Sallie Hillmon's lawyers: a letter that C.R. Walters had written to the sheriff of

Leavenworth in 1880, after the inquest but before any of the trials, stating that his brother Frederick Adolph had a gold filling in a tooth. This letter was inconvenient to the defendants because their proof had been as adamant on the untouched perfection of the corpse's teeth as on any point in the litigation. The jury in this trial hung, 11-1 in favor of Sallie Hillmon.

The fifth trial followed the fourth by a year; it began and ended in March 1896. There were the Kasten deposition and

Heeley's testimony, in retrospect, seems altogether dubious.

the familiar disagreements about resemblances and disparities between the living Hillmon and the corpse, and evidence of the contradictory accounts given by John Brown. There was also a rather spectacular defense witness who was heard in this trial for the first time, a Patrick Heeley of St. Louis. Heeley testified that 17 years earlier, in the winter of 1879, he had known Frederick Adolph Walters in Wichita—for about two months prior to March 1 of that year. Walters worked for him, said Heeley, helping sell railroad excursion tickets, and the two men had seen each other at least once a day. On about March 1 he saw Walters with another man whom Walters introduced as John Hillmon; on a later occasion, he saw Walters alone, and Walters said he was going with Hillmon to start a cattle ranch. This testimony must have been very impressive at the time, and seems not to have been much impeached. But in retrospect it seems altogether dubious. If Heeley had not been quite so certain of the two-month duration of his acquaintance with Walters, and of having seen him at least once every day in Wichita during that time, his testimony might carry some historical weight. Unfortunately for Heeley's credibility, at the sixth trial Frederick Adolph's sister, Elizabeth Rieffenach, produced a letter from her brother postmarked February 9, 1879, in Emporia, in part to prove that its handwriting resembled that in the Kasten letter. Its contents belie Heeley's testimony: Walters writes that he is staying in that city (it was about 80 wintry miles from Wichita) and had not had much employment recently. This highly impeaching evidence was not known, however, to the jurors of the fifth trial. They also hung, a majority of the jurors apparently in favor of the defendants.

The sixth trial began in a manner that resembled the others but offered several significant new revelations. Alvina Kasten again did not testify, but her deposition and the letter performed the same office they had in most of the earlier trials, and several familiar witnesses from the earlier trials appeared. There also was a surprise rebuttal witness for the plaintiff, a man named Arthur Simmons, who owned a cigar factory in Leavenworth.

Simmons testified that for three weeks in May of 1879—that is, two months *after* the death at Crooked Creek—he had employed Frederick Adolph Walters in his factory as a cigarmaker. Nor was his testimony the only proof of these events;

Simmons produced records of employment corroborating this claim. He knew the young man as F. Walters, and he identified a photograph of the young Frederick Adolph as one of the men who had made cigars for him. He testified that, even after the intervening years, he had a good recollection of the young cigarmaker because

[h]e was a man who was all the time talking to the men about him and telling of his many travels. He had been in a large number of towns in different places and he also talked a great deal of his love scrapes and how he had gotten out of them.

This testimony apparently made an impression on the sixth jury, which returned a unanimous verdict for Sallie Hillmon. Although the companies continued their appeals to higher courts, and eventually succeeded in overturning this victory as well in the Supreme Court, in the end they all settled with her—nearly 25 years after the death at Crooked Creek.

But I have not forgotten that I undertook to persuade you that the "Dearest Alvina" letter was a fake. Consider the testimony of Arthur Simmons. If this testimony was true (and no reason appears that a cigar factory owner should have perjured himself for Sallie Hillmon's sake, much less manufactured business records), then of course Walters did not die at Crooked Creek. And if he did not, the same argument against coincidence that made the "Dearest Alvina" letter such convincing proof of his death at the hands of Hillmon must be reconsidered—as an argument that the letter was not genuine. Curiously, Mrs. Hillmon's lawyers do not seem to have pursued the possibility that the letter was inauthentic, perhaps because they had quietly investigated and, even before Walters's sister produced a cache of old letters from him in the sixth trial, had an opportunity to compare the letter's handwriting with exemplars and concluded that the letter was written by Walters. But that circumstance does not necessarily imply that the letter was written when it is dated, nor that the assertions in it are true.

Walters's long absence from home and failure to write to his loved ones were circumstances too suggestive for the defendant insurance companies not to make use of them. All that was needed to transform the cigarmaker's disappearance into strong proof that Hillmon had not died at Crooked Creek was a document to tie Walters to the Crooked Creek corpse and a witness to authenticate it. The Kasten letter and Alvina Kasten satisfied these needs almost perfectly—if the letter could be manufactured, and if she could be persuaded to testify in a deposition that she had received the letter shortly after the date that appeared on it.

The mind resists this last possibility because it requires us to conclude that Alvina Kasten lied when she testified in her deposition that she had received the letter on March 3, 1879. We must also credit the insurance companies' agents and lawyers with sufficient dishonesty to create a brazenly inauthentic document and suborn the perjury of these witnesses. Can this rather extravagant hypothesis be supported? I believe that it is not only supportable but nearly irresistible, and that a narrative that accounts for all of the known facts must lead us to the conclusion that the Kasten letter was not authentic—at least not authentically a letter written when dated—and further, that it makes many assertions that are not true.

We know that the lawyer Buchan, an attorney who eventually conceded that he worked for and was paid by the insur-

ance companies, employed coercion to persuade John Brown to sign the “Joe Burgess” affidavit, a document shown to be false by the later testimony of Major Wiseman. We also know that not long before Alvina Kasten gave her deposition (the only occasion when she ever swore to her receipt of the letter), Buchan dictated to John Brown the language of a letter addressed to Sallie Hillmon—a letter suggesting that the writer and the addressee were conspirators in a plot and that John Hillmon was still alive. That there was never even any pretense of actually mailing the letter to Mrs. Hillmon—that Buchan sent it directly to the insurance company lawyers—suggests both the nakedness of Buchan’s motive for having Brown write it and the clumsiness of his methods. Buchan was no stranger to the fabrication of evidence—epistolary evidence—nor was he too scrupulous to pressure an individual into swearing to propositions that were not true.

But if the defendants’ lawyers were capable of such chicanery as document fakery and subornation, what would have induced such a respectable woman as Alvina Kasten and various Walters family members to perjure themselves? As to the Walters family, a possible explanation appears in a newspaper account of the second trial. The reporter concludes a rendition of the day’s testimony with the following:

It is not generally known that there was an insurance on the life of young Walters, who is said to have been the dead body taken to Lawrence and passed for the body of Hillmon. A reporter for The Times was informed yesterday afternoon that Walters’ life was insured and that the insurance money was paid, on the evidence elicited in the Hillmon trial, of his death.

If the defendants wished to induce members of the Walters family to testify (as they did) about correspondence from Frederick Adolph that mentioned the name Hillmon, what better method of compensating them for their trouble than retrospectively issuing a policy of insurance on his life, then paying the proceeds to his bereaved family—a gesture splendidly in synchrony with their insistence that he had died at Crooked Creek? But beyond pecuniary motives, I credit that the Walters family did truly come to believe that the photographs of the dead man were those of their lost son and brother Frederick Walters. A little suggestion and an adroit presentation of the photos of the corpse would go a long way toward persuading a baffled and worried family, whose loved one had suddenly ceased writing, that his death at the hands of the murderer John Hillmon was the explanation. If they believed this much, they would also have believed that John Hillmon was in hiding, waiting to enjoy the proceeds of his crime. Their conviction that Frederick Adolph had died at Crooked Creek may have nudged the family (as well as Alvina Kasten) toward participation in perjury, if they thought it would produce justice for their missing loved one.

Alvina Kasten’s deposition was taken in June of 1881, a year before the first trial, in her hometown of Ft. Madison. It is this deposition that served thereafter as the defendant’s evidence concerning the famous letter. In it, she identifies an exhibit as a letter beginning “Dearest Alvina” received by her on March 3, 1879; she says she recognizes the handwriting as that of her fiancé F.A. Walters, from whom she testified she had received a letter every two weeks, or week and a half, since his departure from Ft. Madison nearly a year earlier. The letter contains the familiar description of his encounter with

“a man by the name of Hillmon who intends to start a sheep range” and his intention to accept the man’s offer of employment at “more wages than I could make at anything else.” Kasten testified that she had given this letter to Tillinghast, New York Life Insurance Co.’s representative, in January 1880. (What of the other 25 or so letters she had received from her swain? She claimed in the deposition that she had destroyed them because she “was sick at the time and did not expect to get over my sickness and destroyed all my letters.”)

What might have been Alvina Kasten’s motives for lying under oath? If threats or inducements prompted her deposition testimony identifying the letter, they are not evident from the record. Still, her account of her relationship with Adolph, as she said she called him, suggests some modest pride in her betrothed status. Perhaps it would have been hard for her to acknowledge that her fiancé simply had chosen not to come home to her and to stop writing; his death at the hands of Hillmon may have been a less painful explanation for his disappearance, not to mention one that would spare her public humiliation. And once recruited to this theory, perhaps she (like the Walters family) was easily enlisted in denying the wicked Hillmons the proceeds of their crime, in her case by agreeing to say that a letter she was given by the lawyers had actually been received by her in the post shortly after the date shown on it. She may have been persuaded that the letter was intended for her and had somehow gone astray, and told that it would benefit the Hillmons were she to say truthfully how it had come to her. She may also have been promised that she needed only to testify at a deposition and would never have to appear before a judge (as a resident of Iowa she was not susceptible to a subpoena to appear in federal court in

What would have induced a respectable woman and various family members to perjure themselves?

Kansas). She may even have been offered assurances similar to those John Brown said he was offered—that his affidavit would never be used in court and employed only to persuade Sallie Hillmon to abandon her claim. We know that Kasten never *did* appear in court, which prompts the question, why not? Would it not have behooved the defendants (who brought in many witnesses from much further away than Iowa) to persuade the bereaved fiancée to travel to the trial? Yet they did not do so.

But how would the companies have persuaded young Walters to write the famous letter? We know that the companies’ agents had learned from his family that he had stopped writing to them at about the time of the death at Crooked Creek. If they found him shortly after that time working for Simmons’s cigar factory in Leavenworth and explained their interest to him, would not Walters then have written home,

and by this act relieved the sorrow of those who loved him and mourned his supposed demise? If he was the young man described by Arthur Simmons, an adventurer and traveler and a bit of a rake with a tiresome fiancée back home, maybe not. Perhaps he would have preferred to remain lost, especially if the insurance companies that had placed so much stock in his death were eager to subsidize his adventures away from home. And if this deal were struck, what would have been more sensible than for one of the companies' agents (my money would be on Buchan) to require that Walters, for his part, write a letter, its contents partly dictated, to someone back home? The letter penned by Walters could then serve as evidence for the companies' propositions about the corpse at Crooked Creek. In such a case, the handwriting similarity between the "Dearest Alvina" letter and the letters known to

Judges may not think of themselves as storytellers, but this role is not easily abandoned.

have been written by Walters would be no coincidence or forgery; they would indeed have been written by the same hand. And the mystery of why F.A. Walters, if he were still alive, had not turned up in so many years would be solved.

Of course the letter to Alvina Kasten, having been created some time after the inquest, would have required a Wichita postmark of a date some months preceding the insurance companies' involvement. Unfortunately the original cannot be examined; both the letter and the envelope were made exhibits to the Kasten deposition and spent many of the years between Alvina Kasten's 1880 deposition and the later trials in the safekeeping of a lawyer for the insurance companies, after he supplied the record with a substitute copy. This copy, having been made before the advent of copying machines, was written by hand; the original is missing from the court's archive. The copy that remains available for inspection represents that the original was postmarked "Wichita—Mar 2, 1879." But nineteenth-century American postmarks, or cancellations, were neither distinctive nor uniform. Forging one would not have been much of a challenge, and there is no suggestion that any of Sallie Hillmon's lawyers scrutinized the mark or the letter with any suspicion.

As for Sallie Hillmon, by the time the case was over, she retained none of the settlement proceeds; before the last trial she had assigned her interest in them to other parties. Perhaps by then the decision whether to continue her exhausting quest for affirmation that her husband was no murderer was not hers at all. But of her we do know this one thing: Years earlier, before the Supreme Court first heard the Hillmon case and while there was still some prospect that she would collect the policy proceeds, Sallie Hillmon remarried. It is possible that an unschooled waitress in her 20s pulled off a devastating double-cross of her first husband, knowing that he would be compelled to remain hidden while she and her second

husband enjoyed their bigamy and his life insurance proceeds. But isn't it far more likely that she always knew the truth of what she had claimed from the first moment she viewed the body that had been brought to Lawrence from Crooked Creek—that John Hillmon was dead?

One proponent of narrative legal theory quotes the maxim *da mihi facta, dabo tibi jus* ("give me the facts, then I will give you the law"), and several scholars have remarked upon the inseparable character of the activities of lawmaking and fact-finding (or storytelling). I have suggested that the legal rule propounded by the Court in the *Hillmon* case was created because the only story the Court could bring itself to endorse demanded it. And I have undertaken to persuade my readers that this story was untrue.

Of course, I cannot claim to be immune myself from the seductions of narrative. I have here only told another story, albeit one that I believe to be better justified by the evidence than the historical version. I have tried in telling my version to lash myself to the mast of truth, but I confess I've enjoyed telling what I believe to be an excellent tale, and possibly its siren call has deceived me as well.

But what if I am right? What if the letter from Frederick Adolph Walters to Alvina Kasten was written not when it was dated and postmarked but later, and not because the writer really wished to inform Kasten of his whereabouts and plans, but because some agent of the three insurance companies manufactured this evidence with the assistance of Walters, who was paid for his contribution? At the very least, if we are persuaded of this proposition, we might be able to look at the exception to the hearsay rule for statements of intention with an eye less deceived by the MacGuffin that has always bound this fragment of legal doctrine to a charming but mendacious story.

Recent Supreme Court discussions about other hearsay exceptions have cast a severely critical eye on proponents' easy claims about the inherent credibility of certain categories of extrajudicial statement. Suppose this renewed skepticism were applied to statements of a declarant's intentions, as exemplified by the Walters letter. Those I have persuaded about the letter's origins must look soberly at the statements of Frederick Adolph Walters in the letter to his dearest Alvina, for if I am correct, it is full of falsehoods, from the implicit assertion contained in the date at the top ("Today is March 1, 1879"); to its assurance to Kasten that "I am about as Anxious to see you as you are to see me"; to its recitation of the writer's intentions to look for a place to start a sheep ranch with John Hillmon, who had promised him "more wages than I could make at anything else." One might respond that a single counterexample does not unmake the wisdom of a general rule, but at least the wisdom of the rule must be defended without reference to that particular example. This enterprise is one that the law of evidence, in the 112 years post-*Hillmon*, has not seriously undertaken.

But even if they do not prompt revision of the law of evidence, these investigations may serve to illustrate the powerful and often unacknowledged contribution of the narrative imperative—the need to construct an acceptable story—to the creation of law. Judges may not think of themselves as storytellers, but this role is not easily abandoned even when disclaimed. Perhaps the maxim *da mihi facta, dabo tibi jus* undervalues the other determinants of common-law decision making, but it is a rare narrator who is willing to throw the MacGuffin overboard. □