create any sort of ill will may properly be considered an unwarranted incursion by that state into the foreign affairs field.[48]

It is difficult to determine just how "incidental or indirect" an effect state action of this sort will have. But the fact that the states were prompted to enact these laws indicates that the flow of property to alien beneficiaries must be sizable and steady, and that the governments concerned will certainly not be uninterested. A decision to cut off the flow should, therefore, be made with an understanding of the over-all problem, with the interests of the entire nation in mind, and with a realization of the consequences which might follow.[49] It should, in other words, be made by the federal government.

UNCOMMUNICATED THREATS

An uncommunicated threat is traditionally defined as the expression of an intention to harm a particular person which is never communicated to that person.[1] The threat comes before the court when the person who made it has been killed. The person toward whom the threat was directed is charged with murder and offers evidence of the threat in an attempt to substantiate his plea of self-defense. Uncommunicated threats are relevant to this issue because the expressed intention of the deceased tends to establish that he was the aggressor.[2]

[48] In discussing the relation between Congress and the President in the foreign affairs field, the Court has stated: "Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936). The states have been prohibited from interfering with the federal executive also. Thus, a state cannot refuse to give effect to the acts of recognized governments. United States v. Pink, 315 U.S. 203 (1941); United States v. Belmont, 301 U.S. 324 (1937). Nor can states refuse to grant sovereign immunity to an agency of a recognized government. Mexico v. Schmuck, 293 N.Y. 264, 56 N.E. 2d 577 (1944); see Lamont v. Travelers Insurance Co., 281 N.Y. 362, 24 N.E. 2d 81 (1939). In line with its disposition to treat executive power as supreme in the field of foreign affairs, were the Court to decide that friendly relations with a foreign nation constitute a definite executive policy, state disability would seem to follow.

[49] In holding unconstitutional a California statute regulating immigration, the United States Supreme Court asked: "If [the United States] should get into a difficulty which would lead to a war, or to suspension of intercourse, would California alone suffer, or all the Union?" Chy Lung v. Freeman, 92 U.S. 275, 279 (1875).

[1] The courts do not define uncommunicated threats, but the definition given is implicit in the application of the term to particular fact situations. Typical uncommunicated threat situations are: the deceased said that "he would kill defendant before he went to bed that night." Wiggins v. Utah, 93 U.S. 465, 470 (1876); "If I run in with him I am going to beat his brains out with this." (The speaker was swinging a rope with a half-pound weight attached while he spoke.) Salter v. State, 76 Ga. App. 209, 45 S.E. 2d 106 (1947); "So sure as my name is Jim Fisk [it was] I will kill him." Stokes v. New York, 53 N.Y. 164, 174 (1873).

[2] Wiggins v. Utah, 93 U.S. 465 (1876); State v. Vernon, 197 La. 867, 2 So. 2d 629 (1941); Banks v. Commonwealth, 227 Ky. 647, 126 S.W. 2d 1122 (1939); Trapp v. New Mexico, 225 Fed. 968 (C.A. 8th, 1915); Stokes v. New York, 53 N.Y. 164 (1873).

Evidence is relevant if it tends to make the truth of the proposition sought to be proved

Despite their relevancy, uncommunicated threats are not universally held admissible. The rules adopted range from complete admissibility[3] to complete inadmissibility.[4] Complete inadmissibility is arrived at by considering only the defendant's possible apprehensions and disregarding the relevancy of the uncommunicated threat to the subsequent conduct of the deceased.

In most jurisdictions the relevancy of the uncommunicated threat as an indication of the deceased's subsequent conduct is recognized. Nevertheless, admissibility is generally made contingent upon the fulfillment of other evidentiary requirements.[5] The most common of the intermediate positions hold evidence of the uncommunicated threat admissible (A) only where all of the evidence presented does not clearly establish that the defendant was the aggressor,[6] and (B) only where there is testimony by eyewitnesses (other than the defendant)[7] of an act of hostility or aggression by the deceased.[8] Both of these rules result in the exclusion of the evidence when it is most needed by the defendant. The former (A) is directed primarily at the elimination of needless delay and expense in the trying of cases. The rationale is that evidence of an uncommunicated threat is of little weight, and should, therefore, be excluded whenever the

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more probable than it would be in the absence of such evidence. 1 Wigmore, Evidence § 32 (3d ed., 1940); James, Relevancy, Probability and the Law, 29 Calif. L. Rev. 689 (1941).

No good reason appears why the uncommunicated threat concept should be limited to murder prosecutions as it would be equally applicable in an assault and battery case. However no case has been discovered in which evidence has been termed an uncommunicated threat in proceedings other than prosecutions for murder.

[3] Wiggins v. Utah, 93 U.S. 465 (1876); Griffin v. United States, 183 F. 2d 990 (App. D.C., 1950); State v. Minton, 228 N.C. 15, 44 S.E. 2d 346 (1947); Riddick v. Commonwealth, 186 Va. 100, 41 S.E. 2d 445 (1947); People v. Wright, 294 Mich. 20, 292 N.W. 539 (1940); Trapp v. New Mexico, 225 Fed. 968 (C.A. 8th, 1915); Stokes v. New York, 53 N.Y. 164 (1873).

There are, of course, some reasons for excluding relevant evidence that apply to all situations, for example a showing of the prejudicial or confusing nature of the evidence. Shepard v. United States, 290 U.S. 96 (1933). "Complete admissibility" as used here must be qualified by these exclusionary rules.

[4] Gathus v. State, 129 Fla. 758, 176 So. 771 (1937).

[5] The courts fail to state the reasons behind these various rules of limited admissibility.

[6] State v. Vernon, 197 La. 867, 2 So. 2d 629 (1941); Commonwealth v. Peronace, 328 Pa. 86, 195 Atl. 57 (1937); Johnson v. State, 54 Miss. 430 (1877).

[7] The defendant's testimony cannot be considered by the court in determining the applicability of Rules A and B, since, if it were, evidence of the uncommunicated threat would always be admissible. This does not mean that defendant's testimony will be rejected, but only that it will not be considered in determining the admissibility of the uncommunicated threat.

[8] State v. Mason, 215 S.C. 457, 56 S.E. 2d 90 (1949); Salter v. State, 76 Ga. App. 209, 45 S.E. 2d 106 (1947); Commonwealth v. Rubin, 318 Mass. 587, 63 N.E. 2d 344 (1945), noted in 26 B.U.L. Rev. 63 (1946); Jenkins v. State, 80 Okla. Cr. 328, 161 P. 2d 90 (1945); Compton v. State, 74 Okla. Cr. 48, 122 P. 2d 819 (1942).

Wigmore lists another rule of limited admissibility in addition to Rules A and B mentioned above. 1 Wigmore, Evidence § 111(3) (3d ed., 1940). His third rule is that "the threat should be received only when there is no other direct evidence as to who was the aggressor, i.e., when there were no eyewitnesses." In view of the paucity of cases (none of which are followed today) upholding this rule, it cannot be considered important today.

prosecution's case is clearly established. Adherence to this rule appears to be an unwarranted encroachment on the jury's province of weighing the evidence.[9]

The application of rule B, requiring the testimony of eyewitnesses to an aggressive act by the deceased as a condition precedent to the admission of an uncommunicated threat, also involves a judgment by the court as to the weight of the evidence. It may be based on the premise that this type of evidence can be easily fabricated,[10] and a feeling that the jury should not be allowed to reach a conclusion solely on the evidence of the uncommunicated threat. Perhaps, rule B was founded on the same considerations that led the courts to require corroboration in the situations exemplified by the *Hillmon* case.[11]

Under the state of mind exception to the rule excluding hearsay, as applied in the *Hillmon* case, expressions of intention made at the time the intention existed in the mind of the declarant are admissible if corroborated by other admissible evidence. The rationale of this exception is that from such a statement there may be inferred a probability that the intention was carried out, or at least that there was an attempt to carry it out. Since the expression of an intention to harm a particular person corroborated by testimony of eyewitnesses satisfies these conditions, it would clearly be admissible via the state of mind exception to the hearsay rule. But a rule derived by analogy to the state of mind exception might well go even further since some courts have recently demonstrated a tendency to disregard the requirement of corroboration.[12] Therefore, both because uncommunicated threats are relevant to the issue of the deceased's conduct,[13] and because they would be admissible under a hearsay analysis, complete admissibility appears to be the proper rule.

If an uncommunicated threat is discovered after the defendant has been convicted, problems apart from admissibility must be considered in determining

[9] Compare Crumpton v. United States, 138 U.S. 361 (1891); Morton v. United States, 147 F. 2d 28 (App. D.C., 1945).

[10] See 1 Wigmore, Evidence § 111(3) (3d ed., 1940). Justice Murphy, dissenting in Griffin v. United States, 336 U.S. 704, 721 (1949), stated that the uncommunicated threat is far more difficult to fabricate than the communicated threat. The only apparent difference between the two is that in one case there may be a lying defendant (a communicated threat) and in the other he may have induced someone to lie for him (an uncommunicated threat).

[11] Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892). No uncommunicated threat case has been discovered in which these reasons have been made explicit. A discussion of the hearsay problems involved in uncommunicated threats, though without explicit reference to them, is contained in Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948).

[12] The only limitations upon the use of such assertions (assuming the fact of the design to be relevant) are that "the statement must be of a present existing state of mind, and must appear to have been made in a natural manner and not under circumstances of suspicion." Schlose v. Trounstine, 135 N.J.L. 11, 49 A. 2d 677 (1946). Research has disclosed only one case in which such evidence was excluded because of a failure of corroboration. State v. McLain, 43 Wash. 267, 86 Pac. 390 (1906). In the normal situation there is some corroborative evidence, however slight. This is true with respect to any case involving an uncommunicated threat, since by hypothesis the defendant and the deceased were together and involved in a fracas.

[13] Note 2 supra.

whether a new trial is warranted. Controlling in the federal courts is Rule 33 of the Federal Rules of Criminal Procedure which states that "[t]he court may grant a new trial to a defendant if required in the interests of justice. . . ." Rule 33 has been construed to mean that a new trial should be granted only when the probative value of such evidence is sufficient that its consideration would probably result in a different verdict.[14]

Recently both the Supreme Court and the Court of Appeals for the District of Columbia adopted the rule that in a capital case there need only be a reasonable possibility of a different verdict being reached to warrant the granting of a new trial on the basis of newly discovered evidence.[15] In applying this or any other rule for the granting of new trials a court must proceed on the questionable assumption that the jury would act reasonably in weighing the new evidence.[16] Otherwise a new trial would have to be granted whenever relevant evidence is newly discovered, since the actual, not the theoretical, jury might consider any evidence favorable to the defendant to be of sufficient weight to justify an acquittal.

Because of its generally clear and unambiguous character, the probative value of the traditional uncommunicated threat should be sufficient to raise this reasonable possibility of a different verdict and therefore should constitute grounds for the granting of a new trial.

The problems considered thus far were raised by two decisions based on the following facts. Griffin shot and killed Hunter after a quarrel which occurred during a card game. Griffin claimed self-defense, maintaining that Hunter "jumped up and started around the table with his hand in his pocket, and told me he would kick my teeth out of my head." Five witnesses testified that Hunter was shot ten minutes after the quarrel and that Griffin was the aggressor. On the basis of these facts the jury returned a verdict of murder in the first degree. Later the defense found out that Hunter had had an open penknife in his pocket at the time of his death. The prosecutor had been aware of this, but had considered the fact irrelevant since its presence was unknown to Griffin at the time of the fracas.[17] A motion for a new trial was denied by the district court. The court of appeals affirmed without opinion. On certiorari the Supreme Court held that the presence of the open penknife in Hunter's pocket was an uncommunicated threat. It then remanded the case to the court of appeals

[14] United States v. Memolo, 72 F. Supp. 747 (Pa., 1947); Weiss v. United States, 122 F. 2d 675 (C.A. 5th, 1941); Evans v. United States, 122 F. 2d 461 (C.A. 10th, 1941); Nee v. United States, 267 Fed. 84 (C.A. 3d, 1920).

[15] Griffin v. United States, 336 U.S. 704, 708–9 (1949), on remand 183 F. 2d 990, 992 (App. D.C., 1950). Compare The Substance of the Right to Counsel, 17 Univ. Chi. L. Rev. 718 (1950), which takes the position that in providing counsel for indigent defendants no distinction should be drawn between capital and noncapital cases.

[16] The court must also assume that the new jury would attach the same weight to the evidence presented at the original trial as was accorded it by the first jury.

[17] This was the basis of the district court's denial of Griffin's motion for a new trial. See also Gathus v. State, 129 Fla. 758, 176 So. 771 (1937).

with instructions to establish the rule for the District of Columbia controlling the admission of uncommunicated threats generally,[18] and, if found admissible in this case, to determine whether a new trial should be granted.[19] The court of appeals chose the rule of complete admissibility.[20] Then, reconsidering the request for a new trial, it reversed its previous holding and remanded the case to the district court saying that "[i]t would . . . be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."[21]

The Supreme Court's decision expanded the category. Previously an uncommunicated threat had always involved a fairly clear expression by the deceased of his intention to harm the defendant. But the fact of the presence of the open penknife is (1) nonassertive conduct,[22] (2) highly ambiguous in its implications, and (3) nondirective, i.e., not clearly directed towards any particular person.

The proper treatment of the traditional uncommunicated threat both as to admissibility and the granting of new trials has already been shown. Placing the nonassertive conduct situation inside the category means that the same consequences will attach. This, however, precludes a consideration by the court of its relevancy under any particular circumstances or of its weight when put forth as grounds for a new trial. The Griffin-type situation demands such a consideration because of its crucial deviations from the traditional uncommunicated threat. From such nonassertive conduct any inferences drawn concerning the actor's actual intentions are of extremely dubious validity. Quite as reason-

[18] Justice Frankfurter, for the Court, stated that "there is no federal rule on this subject." He then cited a passage from Wiggins v. Utah, 93 U.S. 465 (1876), whch clearly contradicted him. Justice Murphy, dissenting, stated that "complete admissibility is certainly the federal rule," and cited the same Wiggins case. The Wiggins case does, in fact, support the rule of complete admissibility.

[19] Griffin v. United States, 336 U.S. 704, 708–9 (1949).

[20] Griffin v. United States, 183 F. 2d 990 (App. D.C., 1950). Judge Clark, dissenting, criticised the expansion of the uncommunicated threat category, saying "the opinion of this court extends that doctrine without limitation to a degree . . . which has never been heretofore dreamed of in any court." Ibid., at 993. In determining the admissibility of evidence, federal courts are bound by Rule 26 of the Federal Rules of Criminal Procedure which provides that "[t]he admissibility of evidence . . . shall be governed by the principles of the Common Law as they may be interpreted by the courts of the United States in the light of reason and experience." Rule 26 is based on Funk v. United States, 290 U.S. 371 (1933), and Wolfle v. United States, 291 U.S. 7 (1933). This problem is discussed in The Search for "Reason and Experience" under the Funk Doctrine, 17 Univ. Chi. L. Rev. 525 (1950.)

[21] Griffin v. United States, 183 F. 2d 990, 992 (App. D.C., 1950). The interpretation that the court of appeals adopted the "reasonable-possibility" rule is substantiated by the agreement of both the prosecutor and the defense that this was the proper rule to be applied. But if "significance" means any degree of significance, no matter how slight, the ruling goes even beyond a requirement of a reasonable possibility of a different verdict.

[22] Morgan has written several important articles on this point. Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948); The Hearsay Rule, 12 Wash. L. Rev. 1 (1937); Hearsay and Non-Hearsay, 48 Harv. L. Rev. 1138 (1935).

able as any other would be the conclusion that the owner of a penknife carried it for the purpose of trimming his nails. If a loaded pistol is substituted for the open penknife, the range of inferences is narrowed and the relevance increased correspondingly. If a closed penknife is substituted for the open one, relevancy approaches the vanishing point.

A determination of the admissibility of nonassertive conduct of the Griffin type should depend on a consideration of whether, in view of the particular facts of the case, evidence of this bit of the deceased's conduct prior to the homicide increased the likelihood of subsequent aggressive conduct on his part toward the defendant.[23] When evidence of the nonassertive conduct is newly discovered and a new trial is sought, an application of the reasonable-possibility test demands a close examination of all of the relevant facts,[24] a case-to-case determination, not the drawing of conclusions based on generalizations.[25]

LEGISLATIVE PROGRESS AND JUDICIAL RELUCTANCE IN ILLINOIS DIVORCE REFORM

By declaring the Domestic Relations Act of 1949 unconstitutional in *People ex rel. Bernat v. Bicek*,[1] the Illinois Supreme Court again invalidated legislative experiments for a new approach to divorce. The Act was designed to obviate the objection to, and achieve the same ends as its ill-fated predecessor, the Domestic Relations Act of 1947.[2] The earlier Act was held to be a special law because it limited the establishment of a divorce division to Cook County.[3] The 1949 Act provided for the establishment of a divorce division in any circuit where the majority of circuit court judges so voted,[4] thus rendering the

[23] At trial, a doubt as to the relevancy of the evidence might properly be resolved in favor of admissibility.

[24] A showing that the deceased habitually carried a weapon, for example, would detract from the probative value of evidence that he carried a weapon on the occasion of the homicide.

[25] There is great difficulty in applying any standard depending on the weight of evidence. Harmless Error Rule Reviewed, 47 Col. L. Rev. 450 (1947). Perhaps in allowing Griffin a new trial the Court of Appeals simply demonstrated its reluctance to utter the final word condemning him to death. But if the evidence of the type put forth in the Griffin case is of sufficient weight to raise the necessary reasonable possibility it is difficult to see how any relevant evidence discovered after the trial could fail to meet that standard.

[1] 405 Ill. 510, 91 N.E. 2d 588 (1950).

[2] Ill. Rev. Stat. (1947) c. 37, § 105.

[3] Hunt v. Cook County, 398 Ill. 412, 76 N.E. 2d 48 (1947); Ill. L. (1947) 813. The divorce division proposed in the 1947 Act was to perform the same functions as the divorce divisions proposed in the 1949 Act, discussed herein. The basic difference was that the 1947 Act applied only to Cook County. For a full discussion of the 1947 Act see Unconstitutionality of Illinois Divorce Act, 15 Univ. Chi. L. Rev. 770 (1948).

[4] Ill. Rev. Stat. (1949) c. 37, § 105.20. In Cook County the circuit and superior courts were to establish the divorce division by joint resolution, the city courts having no vote. See note 10 infra.