

ADOPTIVE ADMISSIONS AND THE DUTY TO SPEAK: A
PROPOSAL FOR AN APPROPRIATE TEST FOR THE
ADMISSIBILITY OF SILENCE IN THE FACE OF AN
ACCUSATION

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INTRODUCTION

Federal Rule of Evidence 801(c) defines hearsay as an out-of-court statement offered to prove the veracity of its content.¹ Thus, if William—a witness—testifies that, “Adam told me that Ben shot Charlie,” this statement would not be admissible to prove that Ben did, in fact, shoot Charlie, because William is testifying about what Adam *said*, not about what Ben *did*. However, Federal Rule of Evidence 801(d)(2) exempts five types of opposing-party² statements from the definition of hearsay if the statements are offered as evidence against the party who made them.³ Pursuant to these exemptions, a statement made

¹ FED. R. EVID. 801(c).

² An opposing party is an adversary in a courtroom setting. For example, from the plaintiff’s perspective, the defendant is the opposing party. See Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57 (1998); Geoffrey C. Hazard, Jr., *The Lawyer’s Obligation to Be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181, 182 (1981) (“By ‘opposing parties’ is meant those persons, other than clients and officials of a tribunal, with whom vouching lawyers deal during the course of representing clients. . . . [T]he term specifically refers to persons of adverse interest . . .”).

³ Federal Rule of Evidence 801(d)(2)(A) exempts statements “made by the party in an individual or representative capacity;” Federal Rule of Evidence 801(d)(2)(B) exempts statements “the party manifested that it adopted or believed to be true;” Federal Rule of Evidence 801(d)(2)(C) exempts statements “made by a person whom the party authorized to make a statement on the subject;” Federal Rule of Evidence 801(d)(2)(D) exempts statements “made by the party’s agent or employee on a matter within the scope of that relationship and while it existed;” and Federal Rule of Evidence 801(d)(2)(E) exempts statements “made by the party’s

by a party and later offered against that party is admissible into evidence as a party admission.⁴ Therefore, if William's statement above were changed to "Ben told me that he shot Charlie," the statement would be defined as "not hearsay"⁵ and would be admissible in an action against Ben, if an opposing party offered it. In this second instance, instead of William relaying something that Adam told him about Ben, William is relaying a statement that Ben himself made.

In a third scenario, William could testify that, "Adam accused Ben of shooting Charlie and when Adam made this accusation, Ben was present, heard it, and reacted by saying, 'yes, that's right.'" Here, Adam's statement would be admissible because—though Ben never explicitly stated that he shot Charlie—he confirmed and, thereby, adopted Adam's statement that he did. Party admissions of this sort include any statements that the party has indicated to be true, even though he did not make them himself.⁶ Such an adoption can be made in many ways,⁷ including by silence.⁸ In a fourth situation, William would testify that, "Adam accused Ben of shooting Charlie, Adam did so in Ben's presence, and, despite the accusation, Ben stood silent." In this final example, a court could construe Ben's silence in the face of an accusation as an adoption of Adam's statement.⁹ In such a case, Ben's silence would be admissible as evidence that he shot Charlie. In fact, the admissibility of such silence traces its history back more than a century.¹⁰

Despite this history, some scholars have suggested that the admissibility of silence in the face of an accusation is based on

coconspirator during and in furtherance of the conspiracy." Notably, the exemptions are categorized by the Federal Rules of Evidence as "not hearsay," rather than as exceptions to the prohibition on hearsay. In addition to Federal Rule of Evidence 801(d)(2), the Federal Rules of Evidence lists exemptions from the hearsay rule in Federal Rule of Evidence 801(d)(1) and exceptions to the hearsay rule in Federal Rule of Evidence 803 and Federal Rule of Evidence 804.

⁴ FED. R. EVID. 801(d)(2)(A).

⁵ *Id.* ("A statement that meets the following condition[] is not hearsay: . . . The statement is offered against an opposing party and . . . was made by the party in an individual or representative capacity . . .").

⁶ FED. R. EVID. 801(d)(2)(B); FED. R. EVID. 801 advisory committee's note.

⁷ FED. R. EVID. 801 advisory committee's note ("Adoption or acquiescence may be manifested in any appropriate manner.").

⁸ *See id.*; *see also* BLACK'S LAW DICTIONARY 54 (9th ed. 2009) (defining an "admission by silence" as "[t]he failure of a party to speak after another party's assertion of fact that, if untrue, would naturally compel a person to deny the statement").

⁹ *See* FED. R. EVID. 801 advisory committee's note.

¹⁰ *See* WILLIAM MAWDESLEY BEST, A TREATISE ON PRESUMPTIONS OF LAW AND FACT 185–87 (1845), available at <https://archive.org/details/atreatiseonpres00bestgoog>. A number of late nineteenth century courts enforced this rule. *See, e.g.*, *Watt v. People*, 18 N.E. 340, 348–49 (Ill. 1888); *State v. Reed*, 62 Me. 129, 142 (1874); *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235, 237 (1847). For an analysis of the common law treatment of the admissibility of silence in response to an accusation, see Henry S. Hilles, Jr., Note, *Tacit Criminal Admissions*, 112 U. PA. L. REV. 210 (1963).

assumptions about behavior that do not comport with empirical data.¹¹ However, federal courts continue to admit silence as evidence of an adoptive admission.¹² The Federal Rules of Evidence's advisory committee's notes explicitly encourage this practice, stating that the results to which it has led in civil cases have been "satisfactory" and that criminal cases require no special considerations.¹³ However, the advisory committee provides courts with little direction as to the circumstances in which silence is admissible, stating only that the theory behind the admissibility of silence supposes that an individual would deny the statement if it were not true.¹⁴

While the Supreme Court has not opined on the admissibility of silence as an adoptive admission,¹⁵ it did address the issue of the

¹¹ Janet Ainsworth, *The Construction of Admissions of Fault Through American Rules of Evidence: Speech, Silence and Significance in the Legal Creation of Liability*, in *EXPLORING COURTROOM DISCOURSE* 177, 177 (Anne Wagner & Le Cheng eds., 2011); *see also* Peter Tiersma, *The Language of Science*, 48 *RUTGERS L. REV.* 1, 76 (1995). Tiersma, who discusses silence in a number of legal contexts, advocates for a three-part test for adoptive admissions by silence: (1) "the silence must come in response to an accusation of wrongdoing"; (2) "the accusation must be made by someone entitled to expect a response"; and (3) "failure to respond to overheard comments is not an admission that those comments are true." *Id.* at 80. Tiersma does not explain exactly who would be entitled to a response, beyond stating that "[i]f a stranger accuses me of wrongdoing, I am free to refuse to answer his charges." *Id.* This Note proposes that the answer to this question should be found by looking to the relationships that trigger other affirmative legal duties, such as the duty to rescue, and the nuances of the individual relationship between accuser and accused, at least partially based on cultural norms. *See infra* Parts III–IV; *cf.* Mompoloki Mmangaka Bagwasi, *Perceptions, Contexts, Uses and Meanings of Silence in Setswana*, 24 *J. AFR. CULTURAL STUD.* 184, 184 (2012) (exploring the meaning of silence in the Setswana culture and observing that "[i]n traditional Setswana culture, children are . . . expected to maintain silence when adults give them advice or *reprimand them for any wrongdoing*" (emphasis added)).

¹² *See, e.g.*, *United States v. Miller*, 478 F.3d 48, 51 (1st Cir. 2007) ("The law of evidence long has recognized 'adoptive admissions.' . . . This doctrine provides that, in certain circumstances, a party's agreement with a fact stated by another may be inferred from (or 'adopted' by) silence." (citations omitted)); *see also* KENNETH S. BRAUN ET AL., *MCCORMICK ON EVIDENCE* 405–06 (6th ed. 2006).

¹³ *FED. R. EVID.* 801 advisory committee's note. Curiously, the advisory committee's note points out a number of potential problems with the admissibility of silence, at least in a criminal context, stating that

the inference [between silence and adoption of a third-party statement] is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that "anything you say may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved.

Id. However, the advisory committee does not consider that the inference may be weak for reasons other than those it lists, concluding that "recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties." *Id.*

¹⁴ *Id.* ("When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior.")

¹⁵ *See* *Commonwealth v. Buford*, 197 S.W.3d 66, 74 (Ky. 2006).

admissibility of silence when used to impeach a party's testimony¹⁶ in *Jenkins v. Anderson*.¹⁷ In *Jenkins*, the Court held that the Fifth¹⁸ and Fourteenth¹⁹ Amendments are not violated when a defendant's prearrest silence is used to impeach the credibility of his testimony.²⁰ While *Jenkins* suggests that the Supreme Court will not impose an outright ban on the use of silence as evidence,²¹ the Court has never indicated what test, if any, it would impose to determine when silence would be admissible for purposes other than impeachment.²² Thus, the

¹⁶ To impeach a witness is "[t]o discredit the veracity of (a witness)." BLACK'S LAW DICTIONARY 820 (9th ed. 2009); see also *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) ("Use of . . . impeachment on cross-examination allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts."); Mary Jo White, *The Impeachment Exception to the Constitutional Exclusionary Rules*, 73 COLUM. L. REV. 1476, 1477 (1973) ("A witness' specific credibility is the likelihood of truthfulness of any specific statement in his trial testimony. This credibility can be impeached by cross-examining the witness on any of the assertions made in his testimony; by introducing evidence of prior inconsistent statements made by the witness; and/or by calling other witnesses to rebut statements made by the witness as to material facts." (footnotes omitted)).

¹⁷ 447 U.S. at 238–39.

¹⁸ U.S. CONST. amend. V; see also *Jenkins*, 447 U.S. at 235 ("The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial and prevents the prosecution from commenting on the silence of a defendant who asserts the right."). Even though *Jenkins* involved a state action, the right to remain silent also applies to the states via the Fourteenth Amendment. See *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) ("[T]he Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."); see also *Jenkins*, 447 U.S. at 234 (describing the procedural posture of the case).

¹⁹ U.S. CONST. amend. XIV; see also *Jenkins*, 447 U.S. at 238 (stating that the Fourteenth Amendment guarantees "fundamental fairness" at trial).

²⁰ *Jenkins*, 447 U.S. at 238.

²¹ *Id.* The Supreme Court has also indicated that some limit exists to the admissibility of silence, but again did so in the context of impeachment. See *United States v. Hale*, 422 U.S. 171, 180 (1975) ("Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.").

²² Ainsworth, *supra* note 11, at 185. In a criminal context, the United States Constitution imposes one further restriction: it bars the federal government from compelling any person "to be a witness against himself." U.S. CONST. amend. V. In order to ensure this protection, the Supreme Court held in *Miranda v. Arizona* that

the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. . . . Prior to any questioning, the person must be warned that he has a right to remain silent . . .

384 U.S. 436, 444 (1966) (footnote omitted). The Court clarified in *Doyle v. Ohio* that "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." 426 U.S. 610, 618 (1976). Because this restriction stems directly from the Constitution, where it is applicable it supersedes

circuit courts of appeals have devised a number of tests to determine when silence is admissible as an adoptive admission.²³ All of these tests impose a legal duty to speak on a party who does not want an accusation against him to be treated as if he had made the statement himself.²⁴ However, these tests are far more lenient than the tests used to determine when other affirmative legal duties, such as the duty to rescue, are enforceable.²⁵

While some scholars claim that at least partially abandoning the rule of adoptive admissions by silence may be the easiest solution to the numerous problems it creates,²⁶ courts, with three notable exceptions,²⁷ have been unwilling to take this step.²⁸ Further, while the drafters of the Federal Rules of Evidence did not address silence in the Rules themselves,²⁹ they did endorse the common law doctrine of tacit admissions by silence in the advisory committee's notes,³⁰ which the Supreme Court considers an authoritative guide to the meaning of the Federal Rules of Evidence.³¹

Given this history, the wholesale rejection of adoptive admissions by silence seems unlikely. However, the test used to determine when an adoptive admission by silence can be admitted into evidence has evolved over time.³² This Note argues that, as the test for admissibility continues to develop, courts should look to legal norms outside the realm of evidence law to draft a test that better comports with the legal system as a whole, and addresses some of the most persistent criticisms of the doctrine—specifically, this Note proposes that the duty to speak should not attach unless the accuser and the accused have a defined and known relationship with each other that would lead the accused to object to an accusation. This Note further proposes that such an assessment should involve (1) an inquiry into the type of relationship (e.g. parent-child)

all other rules discussed in this Note. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

²³ See *infra* Part I.B.

²⁴ Ainsworth, *supra* note 11, at 185.

²⁵ See *infra* Part III.A.

²⁶ See Maria L. Ontiveros, *Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity*, 28 SW. U. L. REV. 337, 352 (1999); Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. LOUISVILLE L. REV. 21, 53–54 (2008).

²⁷ See *Ex Parte Marek*, 556 So. 2d 375, 382 (Ala. 1989); *People v. Bigge*, 285 N.W. 5, 6 (Mich. 1939); *Commonwealth v. Dravec*, 227 A.2d 904, 909 (Pa. 1967). For further discussion, see *infra* Part II.B.

²⁸ See *infra* Part I.B.

²⁹ See FED. R. EVID. 801(d)(2)(B).

³⁰ FED. R. EVID. 801 advisory committee's note.

³¹ See *Tome v. United States*, 513 U.S. 150, 160 (1995) (“We have relied on those well-considered Notes as a useful guide in ascertaining the meaning of the Rules. . . . The Notes disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary.” (citations omitted)).

³² See *infra* Parts I.A–B.

and (2) a fact-specific analysis of the likelihood that the particular accused would deny an accusation by the particular accuser. By adding this requirement to the test of whether a party has a duty to speak, the doctrine of adoptive admissions will avoid creating an affirmative legal duty that can be triggered by a stranger—a circumstance that the law has generally frowned upon.³³

Part I of this Note will discuss the history of adoptive admissions by silence, both before and after the enactment of the Federal Rules of Evidence. It will primarily focus on the various tests that courts have used to determine whether silence in response to an accusation is admissible as evidence. Part II of this Note will outline criticisms of adoptive admissions by silence and courts' reactions to those criticisms. Part III will suggest that courts should address the criticisms of adoptive admissions by silence by looking to affirmative legal duties, such as the duty to rescue. It will then discuss how the requirements of those duties can be applied to the duty to speak and why such an application would help address the common criticisms of the current rule. Part III will also explain why reforming the rule in this way would be more pragmatic and more effective than addressing these criticisms in any other way. Part IV will look at how this Note's proposed requirement would function in practice.

I. BACKGROUND

A. *Adoptive Admissions Before the Enactment of the Federal Rules of Evidence*

The admissibility of silence in the face of an accusation dates back at least to the 1815 case *Carrel v. Early*.³⁴ In *Carrel*, a statement made by a man's wife, and in his presence, was admissible against him as a tacit admission.³⁵ Realizing that such admissions could be of questionable probative value in certain instances, some early courts limited the doctrine.³⁶ For example, in *Moore v. Smith*,³⁷ the plaintiff sought to

³³ Thomas L. Haskell, *Taking Duties Seriously: To What Problems are Rights and Duties the Solution?*, in *THE PSYCHOLOGY OF RIGHTS AND DUTIES* 243, 243 (Norman J. Finkel & Fathali M. Moghaddam eds., 2005) ("Duty to strangers . . . lacks traction in our culture even when the stakes rise to life or death, even when no decent person could fail to see what duty requires.").

³⁴ 7 Ky. (4 Bibb) 270 (1815). *Carrel* refers to adoptive admissions as tacit admissions, as do some other sources that predate the adoption of the Federal Rules of Evidence. See, e.g., Hilles, *supra* note 10, at 210. For purposes of this Note the phrases "tacit admission" and "adoptive admission by silence" are used interchangeably.

³⁵ *Carrel*, 7 Ky. (4 Bibb) at 271.

³⁶ See, e.g., *Moore v. Smith*, 14 Serg. & Rawle 388, 393 (Pa. 1826).

³⁷ 14 Serg. & Rawle 388.

introduce evidence that the defendant adopted a third party's statement on the theory that the defendant had been present when the statement was made and did not object to it.³⁸ However, the court found no evidence that the defendant had actually heard the statement made and, therefore, determined that the defendant did not adopt the third party's statement.³⁹ The court reasoned that adoptive admissions by silence were dubious evidence at best.⁴⁰

But other early courts embraced the doctrine of tacit admissions.⁴¹ In contrast to the court in *Moore*, the court in *Hendrickson v. Miller*⁴² held that an adoptive admission by silence could occur where the evidence showed only that the plaintiff had repeatedly said to defendant that defendant owed him \$2000 and the defendant never objected.⁴³ However, the court provided little reasoning beyond reciting the relevant legal standard and pointing to authority that held that an adoptive admission by silence was possible.⁴⁴

By 1844, the doctrine was sufficiently ingrained in the legal system for William Mawdesley Best⁴⁵ to include it in his *A Treatise on Presumptions of Law and Fact (Best on Presumptions)*.⁴⁶ Best posited a two-part test to determine whether silence is tantamount to an admission. First, the court must conclude that the defendant heard and understood the accusation against him.⁴⁷ Second, the court should consider the likelihood that silence implied an admission based on (1) the forcefulness with which the accusation was made and (2) the identity of the party who made the accusation.⁴⁸ Notably, the explicit consideration of the identity of the accuser was often a factor in the admissibility tests of this era.⁴⁹

³⁸ *Id.* at 393.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Hendrickson v. Miller*, 8 S.C.L. (1 Mill) 296, 147 (S.C. Const. Ct. App. 1817).

⁴² 8 S.C.L. (1 Mill) 296.

⁴³ *Id.* at 147.

⁴⁴ *Id.*

⁴⁵ William Mawdesley Best was a nineteenth century legal scholar who wrote numerous treatises on evidence law. FREDERIC BOASE, MODERN ENGLISH BIOGRAPHY: A-H 61 (1892).

⁴⁶ BEST, *supra* note 10, at 186.

⁴⁷ *Id.*

⁴⁸ *Id.* Best presumed that the accusation would be made against the defendant because this portion of his treatise addressed criminal cases.

⁴⁹ See, e.g., *Pierce v. Goldsberry*, 35 Ind. 317, 321-22 (1871); *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235, 237 (1847) (“[W]here a . . . declaration is made in one’s hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts; first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge, or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it.” (emphasis added)).

In the early twentieth century, John Henry Wigmore⁵⁰ considered adoptive admissions, which he referred to as vicarious admissions, at length in his treatise on evidence (*Wigmore on Evidence*).⁵¹ Wigmore proposed that silence in the face of any statement made in a party's presence, which the party could hear, should be admissible, unless the potentially adopting party could prove that he did not have either the opportunity or motive to refute the accusation.⁵² Wigmore also rejected two potential requirements: (1) that the party understood the statement and (2) that the party had knowledge of the facts upon which the accuser based the statement.⁵³

By the mid-twentieth century, the common law had developed seven factors for courts to assess when determining whether silence constituted a tacit admission.⁵⁴ These included (1) whether the defendant was present when the accusation was made; (2) whether the defendant could hear the accusation; (3) whether the defendant understood the accusation; (4) whether the defendant had actual knowledge that the facts presented were true; (5) whether the defendant could physically speak; (6) whether the defendant felt at liberty to speak; and (7) whether the circumstances would logically demand a reply.⁵⁵ However, courts would rework these common law factors in response to the introduction of the Federal Rules of Evidence.

⁵⁰ John Henry Wigmore (1863–1943) was an expert in the law of evidence. He served as Dean of Northwestern Law School between 1901 and 1929 and is best known for his influential *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW*, first published in 1904, and for his development of the Wigmore Chart—a visual method of analyzing trial evidence. See WILLIAM R. ROALFE, *JOHN HENRY WIGMORE: SCHOLAR AND REFORMER* (1977); Jean Goodwin, *Wigmore's Chart Method*, 20 *INFORMAL LOGIC* 223, 223 (2000), available at http://ojs.uwindsor.ca/ojs/leddy/index.php/informal_logic/article/view/2278; David S. Ruder, *John Henry Wigmore: A Great Academic Leader*, 75 *NW. U. L. REV.* 1 (1981).

⁵¹ JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA* 553–64 (2d ed. 1923).

⁵² *Id.* at 555; see also *Kelly v. State*, 133 A. 899, 903 (Md. 1926) (citing 2 WIGMORE ON EVIDENCE §§ 1071–72 (2d ed. 1923)).

⁵³ WIGMORE, *supra* note 51, at 559.

⁵⁴ Hilles, *supra* note 10, at 213–14; see also, e.g., *State v. Kobylarz*, 130 A.2d 80, 85 (N.J. Super. Ct. App. Div. 1957); *State v. Farnsworth*, 383 P.2d 489, 489 (Utah 1963).

⁵⁵ See cases cited *supra* note 54; see also Hilles, *supra* note 10, at 213–14. Like Best, Hilles refers to the silent party as “the defendant” because he considered the doctrine in a criminal context. See *id.* at 212.

B. *Tests for the Admissibility of Silence as an Adoptive Admission Under the Federal Rules of Evidence*⁵⁶

The Federal Rules of Evidence, enacted in 1975,⁵⁷ codified the common law doctrine of tacit admissions in Rule 801(d)(2)(B).⁵⁸ While the rule itself does not refer to silence,⁵⁹ the advisory committee's notes explicitly state that silence in the face of an accusation can be considered an adoptive admission.⁶⁰ While the advisory committee's notes do not provide a test to determine when silence is admissible, they do speak to two important guidelines that courts should consider in deciding admissibility.⁶¹ First, the advisory committee posits that the accuser's statement must be such that, given the circumstances, an individual would object to it based on "probable human behavior."⁶² Second, the committee expressly eliminates the common-law requirement that the accuser have personal knowledge of the facts presented.⁶³

Since the enactment of the Federal Rules of Evidence, federal courts have generally considered whether a reasonable person⁶⁴ would

⁵⁶ Since the implementation of the Federal Rules of Evidence, many states have adopted a rule analogous to 801(d)(2)(B). *See, e.g.*, ILL. R. EVID. 801(d)(2)(B); OHIO R. EVID. 801(D)(2)(b). But not all have. *See, e.g., Ex Parte Marek*, 556 So. 2d 375, 382 (Ala. 1989); *People v. Campney*, 94 N.Y.2d 307, 311–12 (1999); *see also infra* Part II.B.

⁵⁷ STAFF OF H. COMM. ON THE JUDICIARY, 112TH CONG., FEDERAL RULES OF EVIDENCE IV (Comm. Print 2012).

⁵⁸ FED. R. EVID. 801(d)(2)(B).

⁵⁹ *Id.*

⁶⁰ FED. R. EVID. 801 advisory committee's note.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Scholars have occasionally criticized the use of the objective "reasonable person" standard in determining whether an adoptive admission by silence has occurred. *See Ainsworth, supra* note 11, at 189. This is not the only place the Federal Rules of Evidence instructs courts to consider how a reasonable person would act. Federal Rule of Evidence 804(b)(3) outlines an exception to the hearsay rule for statements against interest. Such a statement is defined as a statement that:

a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability

FED. R. EVID. 804(b)(3)(A). However, unlike the rule for adoptive admissions, the rule for statements against interest requires the statement to be "supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability." FED. R. EVID. 804(b)(3)(B). Some scholars have also criticized the statement against interest exception on the grounds that reasonable people do not necessarily behave in the manner the rule assumes. *See, e.g., Richard A. Nagareda, Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1143 (1999). However, in both of these instances the objection tracks the more general criticism of the reasonable person standard: that "the reasonable person standard often collapses into subjectivity because of the inherent difficulty in defining what is reasonable." Jeffrey M. Hayes, *To Recuse or to Refuse: Self-Judging and the Reasonable Person Problem*, 33 J. LEGAL PROF. 85, 88 (2008). While this argument

object to an accusation in order to determine whether silence in the face of that accusation is admissible as an adoptive admission.⁶⁵ In order to make this determination, the circuit courts of appeals have devised a number of more specific tests to determine whether silence should be admitted.

The Fourth,⁶⁶ Sixth,⁶⁷ Ninth,⁶⁸ and Eleventh⁶⁹ Circuits all use a test originally outlined by the Ninth Circuit in *United States v. Moore*.⁷⁰ The *Moore* court held that a court, in deciding whether to admit silence as evidence of an adoptive admission, must consider (i) “whether the statement was such that under the circumstances an innocent defendant would normally be induced to respond” and (ii) whether “sufficient foundational facts have been introduced for the jury reasonably to infer that” “the defendant heard, understood, and acquiesced” to the statement the prosecution claims the defendant adopted.⁷¹

The First and Eighth Circuits have adopted similar tests. In the First Circuit, silence may be admissible if “(i) a statement is made in a party’s presence, (ii) the nature of the statement is such that it normally would induce the party to respond, and (iii) the party nonetheless fails to take exception.”⁷² In the Eighth Circuit, “when an accusatory statement is made in the defendant’s presence and hearing, and he understands it and has an opportunity to deny it, the statement and his failure to deny it are admissible against him.”⁷³

The Second Circuit, while still admitting silence, has indicated that a fairly high bar should be set for its admissibility.⁷⁴ The Seventh Circuit

may have some validity, it is not unique to adoptive admission by silence and scholars have analyzed it at length. See, e.g., MAYO MORAN, RETHINKING THE REASONABLE PERSON (2003); B. Sharon Byrd, *On Getting the Reasonable Man out of the Courtroom*, 2 OHIO ST. J. CRIM. L. 571 (2005). Given the breadth of the existing scholarship and the depth of analysis necessary to fully explore what would ultimately be a topic tangential to the proposal presented here, this Note will expressly avoid criticisms of adoptive admissions by silence that rely on the fact that reasonable people may not behave in the manner assumed by the current rule. Instead, this Note will argue that courts should *add* a requirement to their existing tests for the admissibility of silence as an adoptive admission in order to ensure that non-probative silence is not admitted, irrespective of whether these tests include a reasonable man analysis.

⁶⁵ Ainsworth, *supra* note 11, at 179.

⁶⁶ *United States v. Williams*, 445 F.3d 724, 735 (4th Cir. 2006).

⁶⁷ *United States v. Jinadu*, 98 F.3d 239, 244 (6th Cir. 1996).

⁶⁸ *United States v. Moore*, 522 F.2d 1068, 1075–76 (9th Cir. 1975).

⁶⁹ *United States v. Carter*, 760 F.2d 1568, 1579–80 (11th Cir. 1985).

⁷⁰ 522 F.2d at 1075–76.

⁷¹ *Id.* (citations omitted).

⁷² *United States v. Miller*, 478 F.3d 48, 51 (1st Cir. 2007) (citation omitted).

⁷³ *United States v. Lilley*, 581 F.2d 182, 187 (8th Cir. 1978) (citations omitted). While this test does not explicitly require courts to consider whether the statement is of the type that would normally induce a response, the court did undertake this analysis as part of its assessment. *Id.* Furthermore, the court favorably cited *United States v. Moore*, which included this requirement. 522 F.2d at 1075–76.

⁷⁴ See *United States v. Flecha*, 539 F.2d 874, 876–77 (2d Cir. 1976). In *Flecha*, the Second Circuit favorably quoted *Wiedemann v. Walpole*, [1891] 2 Q.B. 534 at 539 (Eng.), as stating that

Court of Appeals has also implicitly questioned the probative value of silence.⁷⁵ However, the Seventh Circuit,⁷⁶ along with all other federal courts, has not eliminated the rule outright.⁷⁷ But, despite the continued admissibility of silence as an adoptive admission in federal courts, a number of scholars and state courts have criticized the doctrine on various grounds.

II. CRITICISMS OF THE CURRENT RULE

A. *Criticisms of the Admissibility of Silence as an Adoptive Admission*⁷⁸

Skepticism about the probative value of silence appears even in some of the earliest cases in which it is discussed.⁷⁹ The Supreme Court of Pennsylvania, in the 1826 case *Moore v. Smith*, referred to adoptive admissions by silence as the most dangerous type of evidence and

“[s]ilence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not.” 539 F.2d at 877.

⁷⁵ See *United States v. Allen*, 10 F.3d 405, 413 (7th Cir. 1993).

⁷⁶ See *United States v. Ward*, 377 F.3d 671, 676 (7th Cir. 2004).

⁷⁷ *Id.*; see also *Green v. Haskell Cnty. Bd. of Comm’rs*, 568 F.3d 784, 803 n.12 (10th Cir. 2009) (citing adoptive admissions by silence favorably); *United States v. Lafferty*, 503 F.3d 293, 306 (3d Cir. 2007); *Miller*, 478 F.3d at 51; *United States v. Williams*, 445 F.3d 724, 735 (4th Cir. 2006); *United States v. Jinadu*, 98 F.3d 239, 244 (6th Cir. 1996); *United States v. Carter*, 760 F.2d 1568, 1579–80 (11th Cir. 1985); *Brown v. United States*, 464 A.2d 120, 124 (D.C. Cir. 1983); *S. Stone Co. v. Singer*, 665 F.2d 698, 702–03 (5th Cir. 1982) (recognizing the possibility of adoptive admissions by silence); *Lilley*, 581 F.2d at 187; *Flecha*, 539 F.2d at 876–77; *Moore*, 522 F.2d at 1075–76.

⁷⁸ The use of silence to prove an adoptive admission has also been criticized on constitutional grounds when the silence occurs in the course of police questioning. The United States Supreme Court held in *Doyle v. Ohio*, 426 U.S. 610, 617–18 (1976), that post-arrest, post-*Miranda* silence is not admissible, but has not ruled as to whether post-arrest, pre-*Miranda* or pre-arrest, pre-*Miranda* silence is admissible; the circuits are split on both of these questions. Thompson, *supra* note 26, at 29–36. However, no circuit has found the use of silence as evidence of an adoptive admission to be unconstitutional in all instances or made it universally inadmissible. See *supra* Part I.B. The Supreme Court most recently opined in this field in *Salinas v. Texas*, 133 S. Ct. 2174 (2013). In *Salinas*, the Court specifically looked at “whether the prosecution may use a defendant’s assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief,” but never reached that question, holding that the defendant never invoked the right to remain silent and that, therefore, it did not attach. *Id.* at 2179. This Note expressly avoids constitutional concerns, as much scholarship has already been devoted to this question. See, e.g., Benjamin Berkley, *Demeanor Evidence Does Not Demean Anything: How Exposure to Mass Media Provides a Solution to the Question of Whether Demeanor Evidence Should Be Admissible as Substantive Evidence of Guilt Post-Arrest and Pre-Miranda*, 42 SW. L. REV. 481 (2013); Meaghan Elizabeth Ryan, Comment, *Do You Have the Right to Remain Silent? The Substantive Use of Pre-Miranda Silence*, 58 ALA. L. REV. 903 (2007); Marty Skrapka, Comment, *Silence Should Be Golden: A Case Against the Use of a Defendant’s Post-Arrest, Pre-Miranda Silence as Evidence of Guilt*, 59 OKLA. L. REV. 357 (2006). Instead, this Note focuses on the appropriate test for the admissibility of silence as an adoptive admission where such an admission is otherwise constitutional.

⁷⁹ See *Moore v. Smith*, 14 Serg. & Rawle 388, 393 (Pa. 1826).

cautioned that they should only be used in limited circumstances.⁸⁰ More recently, courts and scholars have pointed to a number of assumptions implicit in the adoptive-admission rule that are problematic. These criticisms fall roughly into three categories: (1) that people remain silent in the face of an accusation for many reasons and that, therefore, such silence is of little probative value;⁸¹ (2) that the adoptive admission rule creates a duty to speak in the face of an accusation that is unrealistic, unenforceable, and unfair;⁸² and (3) that admissibility of silence in the face of an accusation in an informal setting is incongruent with the constitutional right to remain silent when accused in court.⁸³

1. People May Remain Silent in the Face of an Accusation for Many Reasons and Such Silence, Therefore, Lacks Probative Value

Scholars have argued that a party may remain silent in response to an accusation for a number of reasons.⁸⁴ When an individual faces an

⁸⁰ *Id.* (extolling that silence as evidence of an adoptive admission “never ought to be [admitted], unless the evidence is of direct declarations of that kind, which naturally calls for contradiction”).

⁸¹ See *infra* Part II.A.1.

⁸² See *infra* Part II.A.2.

⁸³ Where a defendant chooses to testify, the right to remain silent when accused in court no longer attaches. See *Harrison v. United States*, 392 U.S. 219, 222 (1968) (“A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives . . .”). Moreover, the right to remain silent is expressly limited to formal interrogations and court proceedings. See U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”); *Turner v. United States*, 396 U.S. 398, 432–33 (1970) (Black, J., dissenting) (“[The Fifth Amendment] privilege has been consistently interpreted to establish the defendant’s absolute right not to testify at his own trial unless he freely chooses to do so.”); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (“[T]he prosecution may not use statements, whether exculpatory or inculpatory, *stemming from custodial interrogation of the defendant* unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” (emphasis added) (footnote omitted)). Thus, any analysis of this criticism would be dependent on an analysis of the Supreme Court’s interpretation of the Fifth Amendment. Because constitutional concerns are outside of the scope of this Note, the third criticism is as well. However, it was best explained by the New York Court of Appeals in *People v. Page*, which states that

[i]t cannot be that there is any such anomaly in the criminal law as is involved in the proposition that an accused person, when charged with the offense in open court by indictment, may stand mute without prejudice to his innocence, while the same person is bound to deny neighborhood gossip with respect to his guilt at the peril of furnishing by silence evidence against himself when on trial upon the charge.

56 N.E. 750, 752 (N.Y. 1900).

⁸⁴ Even outside the realm of law, evidence exists that the meaning of silence is highly variable. See, e.g., Chad T. Brinsfield, *Employee Silence Motives: Investigation of Dimensionality and Development of Measures*, 34 J. ORGANIZATIONAL BEHAV. 671, 676–79 (2012) (identifying fifty-

accusation, he may remain silent out of fear or anger.⁸⁵ He may also remain silent because his family raised him to follow different cultural norms regarding silence than those the court follows.⁸⁶ For example, both Latin and Asian-American cultures often use and construe silence in a way that is not analogous to assent.⁸⁷ The effects of these cultural differences can be exacerbated where the accuser is in a position of authority over the accused because different cultures demand different levels of deference to authority figures.⁸⁸

Courts have also identified a number of reasons that a party may remain silent when accused of wrongdoing.⁸⁹ The individual may want to avoid an argument,⁹⁰ may believe he is not in a position to speak,⁹¹ or

nine possible motives for employee silence in the workplace); Wong Ngan Ling, *Communicative Functions and Meanings of Silence: An Analysis of Cross-Cultural Views*, 3 J. TAGEN BUNKA 125, 126 (2003), available at <https://www.lang.nagoya-u.ac.jp/bugai/kokugen/tagen/tagenbunka/vol3/wong3.pdf> (“[W]e need . . . to be aware of the multitude of meanings and functions that are served by interactive silence . . . in all of life’s interpersonal communicative situations.”).

⁸⁵ Thompson, *supra* note 26, at 48–49; see also *Ex Parte Marek*, 556 So. 2d 375, 381 (Ala. 1989).

⁸⁶ Thompson, *supra* note 26, at 48.

⁸⁷ Ontiveros, *supra* note 26, at 345–48. Ontiveros argues that Latin American men may be part of “macho” culture that

combines passive silence—especially when feelings are discussed in the home—with aggressive domination and posturing—especially when conquest and competition are discussed in the street [and that] [e]ither part of this combination—passivity or posturing—can lead to silence in certain situations, even though the listener does not agree with a speaker’s statements.

Id. at 345–46 (footnotes omitted). Ontiveros also argues that

Asian Americans may actively use silence: as an active means of listening, understanding, and mediating between two or more cultures; in “contradiction or opposition to autonomous, self-directing Western liberal [expectations]”; as a means of exercising control over information by not disclosing it; and to control and diffuse a racially charged situation.

Id. at 347–48 (footnotes omitted).

⁸⁸ See Ontiveros, *supra* note 26, at 343 (“[D]eference to an authority figure may result in silence or equivocation. The adoptive admissions rule assumes that people make a direct denial when confronted with untrue statements, but many people may defer to others, especially authority figures, because of a combination of gender, race, class, and ethnicity, or due to any of these factors independently.”); see also MALCOLM GLADWELL, *OUTLIERS* 194, 204–05 (2008). Gladwell discusses how cultural differences in communication styles within a hierarchy can lead to disastrous consequences in a very different context: plane crashes. For a thorough discussion, see *id.* at 177–223.

⁸⁹ Courts have raised sufficient questions regarding the probative value of silence to prompt at least one scholar to devote a fifty-five-page article to the topic. See Thompson, *supra* note 26. That scholar concluded that the probative value of silence is so low—at least when it occurs in the context of a police interrogation—that silence in response to any police questioning, even questioning that occurs when no arrest has been made, should not be admissible. *Id.* at 53–55. However, the article does concede that silence may have probative value in other contexts, such as questioning by friends or family. *Id.*

⁹⁰ *State v. Clark*, 175 P.3d 1006, 1010 (Or. 2008).

⁹¹ *Commonwealth v. Vallone*, 32 A.2d 889, 898 (Pa. 1943) (Maxey, C.J., dissenting).

may believe that he has the right to remain silent based on the understanding of the law he has learned from the media.⁹²

The advisory committee's notes to the Federal Rules of Evidence state that the decision to admit silence should be based on "probable human behavior."⁹³ However, the above examples show that in many circumstances, such behavior is to remain silent, even when confronted with a direct accusation. In these instances, silence in the face of an accusation would lack probative value.

2. Admitting Silence as an Adoptive Admission Creates an Untenable Duty to Speak

By imposing a rule that silence in the face of an accusation is admissible as an adoptive admission, the Federal Rules of Evidence have imposed a duty to deny such accusations if the accused wishes to avoid criminal and civil liability.⁹⁴ Many courts throughout the history of the rule have found this result to be problematic.

In 1851, the Supreme Court of Vermont, in *Hersey v. Barton*,⁹⁵ held that a rule imposing a duty on Party A to object to Party B's statement to Party C that is against the interest of Party A would be "unsound."⁹⁶ The court reasoned that not only did it fail to find any authority for such a rule, but also that such evidence is of "doubtful character."⁹⁷

Other courts agreed with this assessment. For example, at the turn of the century, the New York Court of Appeals held, in *People v. Page*,⁹⁸ that people should have no legal duty to respond to a direct accusation.⁹⁹ In *Page*, the defendant, who was accused of rape, remained silent when a woman, who was housing his alleged victim, confronted him with the alleged victim's claim that he had raped her.¹⁰⁰ The court held that, in such an instance, the defendant should not be bound to deny the allegation because he would not be bound to deny a similar allegation if it were made in court.¹⁰¹

Courts have criticized the duty not only as unfair, but also as unrealistic.¹⁰² In a dissent to the 1943 decision *Commonwealth v.*

⁹² *Ex Parte Marek*, 556 So. 2d 375, 381 (Ala. 1989).

⁹³ FED. R. EVID. 801 advisory committee's note.

⁹⁴ Ainsworth, *supra* note 11, at 185.

⁹⁵ 23 Vt. 685 (1851).

⁹⁶ *Id.* at 688.

⁹⁷ *Id.*

⁹⁸ 56 N.E. 750 (N.Y. 1900).

⁹⁹ *Id.* at 752.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See, e.g., Commonwealth v. Vallone*, 32 A.2d 889, 900 (Pa. 1943) (Maxey, C.J., dissenting).

Vallone,¹⁰³ Chief Justice Maxey of the Pennsylvania Supreme Court argued that imposing a legal duty to speak in the face of an out-of-court accusation would be unworkable, as individuals often see no reason to respond in such situations.¹⁰⁴ This view is now backed by scientific evidence that indicates that individuals will not actually deny an accusation in many circumstances,¹⁰⁵ even though the current rule imposes a duty on individuals to speak when confronted with an accusation.¹⁰⁶ Therefore, the rule admitting adoptive admissions by silence may unintentionally admit silence where it is not tantamount to a confession.¹⁰⁷

B. *Courts' Reactions to the Criticisms of the Admissibility of Silence as an Adoptive Admission*

Three states—Alabama,¹⁰⁸ Michigan,¹⁰⁹ and Pennsylvania¹¹⁰—do not, under any circumstances, admit adoptive admissions by silence into evidence. An additional four states—Georgia,¹¹¹ Iowa,¹¹² Minnesota,¹¹³ and Oregon¹¹⁴—have abolished adoptive admissions by silence in criminal cases, but continue to allow such as evidence in a civil context.

In *Ex Parte Marek*, the Alabama Supreme Court noted that an individual may be silent in the face of an accusation for a number of reasons, including fear, anger, or his understanding of the Fifth Amendment right to remain silent.¹¹⁵ Thus, the court abolished the tacit admission rule in situations in which a party is silent in the face of an accusation,¹¹⁶ reasoning that such a step was warranted, because silence is not necessarily probative of guilt.¹¹⁷

The Michigan Supreme Court similarly held, in *People v. Bigge*,¹¹⁸ that silence is not evidence of an admission,¹¹⁹ but used a different

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See Ainsworth, *supra* note 11, at 189; Ontiveros, *supra* note 26, at 343; Thompson, *supra* note 26, at 48–49.

¹⁰⁶ See Ainsworth, *supra* note 11, at 185.

¹⁰⁷ *Id.* at 180.

¹⁰⁸ See *Ex Parte Marek*, 556 So. 2d 375, 382 (Ala. 1989).

¹⁰⁹ See *People v. Bigge*, 285 N.W. 5, 6 (Mich. 1939).

¹¹⁰ See *Commonwealth v. Dravec*, 227 A.2d 904, 909 (Pa. 1967).

¹¹¹ See *Jarrett v. State*, 453 S.E.2d 461, 463 (Ga. 1995).

¹¹² See *State v. Kelsey*, 201 N.W.2d 921, 925–27 (Iowa 1972).

¹¹³ See *Village of New Hope v. Duplessie*, 231 N.W.2d 548, 553 (Minn. 1975).

¹¹⁴ See *State v. Severson*, 696 P.2d 521, 524 (Or. 1985). *But see* *State v. Clark*, 175 P.3d 1006, 1013 (Or. Ct. App. 2008) (Rosenblum, J., dissenting) (“Oregon does not have a definitive rule prohibiting adopted admissions by silence in all criminal cases.”).

¹¹⁵ *Ex Parte Marek*, 556 So. 2d 375, 381 (Ala. 1989).

¹¹⁶ *Id.* at 382.

¹¹⁷ *Id.* at 381.

¹¹⁸ 285 N.W. 5 (Mich. 1939).

analysis to reach this conclusion. The Michigan Supreme Court reasoned that admitting adoptive admissions by silence would create an unfair duty to respond to accusations.¹²⁰

Finally, in *Commonwealth v. Dravec*,¹²¹ the Supreme Court of Pennsylvania eliminated the admissibility of tacit admissions by silence. The court cited a wide-range of sources—including the Constitution,¹²² case law,¹²³ and well-known proverbs¹²⁴—in order to attack the credibility of adoptive admissions by silence.

Of the four states that have eliminated adoptive admissions by silence in criminal cases, but that still admit silence in civil actions, one based its reasoning on constitutional concerns,¹²⁵ one based its reasoning on the low probative value of silence compared to its highly prejudicial nature,¹²⁶ one based its reasoning on both,¹²⁷ and one did not provide any reasoning at all.¹²⁸ Neither of the courts that considered

¹¹⁹ *Id.* at 6.

¹²⁰ *Id.* (“The time has not yet come when an accused must cock his ear to hear every damaging allegation against him and, if not denied by him, have the statement and his silence accepted as evidence of guilt.”).

¹²¹ *Commonwealth v. Dravec*, 227 A.2d 904, 909 (Pa. 1967).

¹²² *Id.* at 908 (“Was he sufficiently educated and trained in expression to analyze the wordy paper and specify what he regarded right and what he regarded wrong? The Supreme Court of the United States said in the monumental *Escobedo* case—‘No system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights.’” (quoting *Escobedo v. State*, 378 U.S. 478, 490 (1964))).

¹²³ *Id.* at 908–09 (favorably citing the highest courts of Pennsylvania, Vermont, and New York, as well as the Supreme Court of the United States).

¹²⁴ *Id.* at 906–07. The proverbs the court cited include “Silence is Golden”; “Closed lips hurt no one, speaking may”; “Speech is of time, silence is of eternity”; “For words divide and rend, but silence is most noble till the end”; “And silence like a poultice comes to heal the blows of sound”; and “Be silent and safe, silence never betrays you.” *Id.* at 907.

¹²⁵ See *State v. Kelsey*, 201 N.W.2d 921, 927 (Iowa 1972) (“[E]vidential use of ‘tacit admissions’ by an accused offends the proscription included in the Fifth Amendment of the United States Constitution against self-incrimination and is therefore no longer permissible in criminal trials within this jurisdiction.”).

¹²⁶ See *Jarrett v. State*, 453 S.E.2d 461, 463 (Ga. 1995) (“[T]he high degree of potential prejudice of any comment upon a defendant’s silence or failure to come forward far outweighs its minimal probative value . . .”).

¹²⁷ See *Village of New Hope v. Duplessie*, 231 N.W.2d 548, 552–53 (Minn. 1975) (“The prosecution here seeks to ‘end run’ the constitutional impediments at issue by attempting to categorize defendant’s conduct as an adoptive admission. The probative value of defendant’s conduct is minimal.”).

¹²⁸ See *State v. Severson*, 696 P.2d 521, 524 (Or. 1985) (stating that “[a] party may adopt a statement either expressly, impliedly, by conduct or, in a civil case, by silence,” but providing no reasoning for limiting the admissibility of silence). *Severson* cites the commentary to the Oregon Evidence Code for this rule. *Id.* However, that commentary states that the rule “should not be construed to allow the admission, for any purpose in a criminal case, of evidence of silence during police interrogation after the defendant has been informed of the right to remain silent.” OR. REV. STAT. § 40.450 (1981) 1981 conference committee commentary. While the facts of *Severson* did involve a police interrogation, the court did not limit its holding to such interactions. See 696 P.2d 521. In *State v. Clark*, the defendant argued that “silence, as opposed to verbal or nonverbal conduct, can never be sufficient to give rise to an adopted admission in a criminal prosecution” in

probative value in their decisions to eliminate adoptive admissions by silence in a criminal context explained why such reasoning would be inapplicable to civil cases.¹²⁹

However, despite the criticisms that have arisen, the vast majority of courts continue to show substantial support for the rule¹³⁰ and the Federal Rules of Evidence advisory committee has endorsed the admissibility of silence.¹³¹ Additionally, in the 2011 restyling of the rules,¹³² the advisory committee opted to not modify 801(d)(2)(B) to exclude or limit the admissibility of silence.¹³³ While the restyled rules' committee claimed the restyling made no substantive changes to the Federal Rules of Evidence,¹³⁴ no law or rule barred it from making such changes.¹³⁵

Furthermore, despite criticism of the rule throughout its history,¹³⁶ federal courts¹³⁷ and forty-five states¹³⁸ have endorsed the admissibility

light of *Severson*. 175 P.3d 1006, 1009 (Or. Ct. App. 2008). The court concluded that the "[d]efendant's contention is not clearly incorrect." *Id.* However, the court found that it did not need to reach a definitive answer, because "even if silence in the face of an accusatory statement could, in some situations, amount to an adoption of that statement, the silence in this case did not." *Id.* at 1010.

¹²⁹ See *Jarrett*, 453 S.E.2d 461 (Ga. 1995); *Duplessie*, 231 N.W.2d 548 (Minn. 1975).

¹³⁰ See *supra* Part I.B; see also *Commonwealth v. Babbitt*, 723 N.E.2d 17, 23 ("The hearsay exception for adoptive admissions, including admissions by silence, is firmly rooted.").

¹³¹ See FED. R. EVID. 801 advisory committee's note.

¹³² *Federal Rules of Evidence 2014*, FED. EVIDENCE REV. 10, <http://federalevidence.com/downloads/rules.of.evidence.pdf>.

¹³³ See FED. R. EVID. 401 advisory committee's note ("[The 2011] changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility."). Compare FED. R. EVID. 801(d)(2)(B) (a "statement . . . offered against an opposing party and . . . [that] the party manifested that it adopted or believed to be true" is not hearsay), with FED. R. EVID. 801(d)(2)(B) (1997) (repealed 2011) (a "statement . . . offered against a party . . . which the party has manifested an adoption or belief in its truth" is not hearsay).

¹³⁴ FED. R. EVID. 101 advisory committee's note.

¹³⁵ STAFF OF H. COMM. ON THE JUDICIARY, 112TH CONG., FEDERAL RULES OF EVIDENCE V (Comm. Print 2012).

¹³⁶ See *supra* Part II.A.

¹³⁷ See *supra* Part I.B.

¹³⁸ See *Doisher v. State*, 658 P.2d 119, 120 (Alaska 1983); *State v. Saiz*, 447 P.2d 541, 543 (Ariz. 1968); *Morris v. State*, 792 S.W.2d 288, 291 (Ark. 1990); *People v. Jennings*, 237 P.3d 474, 507–08 (Cal. 2010); *Alcorn v. Erasmus*, 484 P.2d 813, 818 (Colo. App. 1971); *State v. Pierre*, 890 A.2d 474, 494 (Conn. 2006); *Nasir v. State*, No. 24, 1986, 1986 WL 17829, at *4 (Del. Sept. 26, 1986); *Nelson v. State*, 748 So. 2d 237, 242–43 (Fla. 1999); *Jarrett v. State*, 453 S.E.2d 461, 463 (Ga. 1995) (eliminating rule in criminal context, but leaving it in place in civil cases); *State v. Hoffman*, 828 P.2d 805, 809–11 (Haw. 1992) (holding that defendant in that case did not adopt third-party statement by silence, but reaffirming that such adoptions are possible, as set down in *Territory v. Corum*, 34 Haw. 167, 174 (1937)); *People v. Jones* 265 N.E.2d 125, 127 (Ill. 1970); *Harris v. State*, 425 N.E.2d 154, 156 (Ind. 1981); *State v. Kelsey*, 201 N.W.2d 921, 925–27 (Iowa 1972) (holding that silence is inadmissible in criminal cases, but is admissible in civil cases); *State v. Betts*, 33 P.3d 575, 588 (Kan. 2001), *overruled in part and on other grounds by State v. Davis* 158 P.3d 317 (Kan. 2007); *Commonwealth v. Buford*, 197 S.W.3d 66, 74–75 (Ky. 2006); *State v. McClain*, 222 So. 2d 855, 856–57 (La. 1969); *Graybar Elec. Co. v. Sawyer*, 485 A.2d 1384, 1388 (Me. 1985); *Duncan v. State*, 494 A.2d 235, 237–38 (Md. Ct. Spec. App. 1985); *Commonwealth v. Babbitt*, 723 N.E.2d 17, 22–24 (Mass. 2000); *Village of New Hope v. Duplessie*, 231 N.W.2d 548, 553 (Minn. 1975)

of silence as an adoptive admission in at least some contexts. Thus, the wholesale abandonment of adoptive admissions appears unlikely. However, courts, within the confines of the Federal Rules of Evidence, can address the criticisms of the rule, while still otherwise enforcing it, by crafting better tests for exactly when silence in the face of an accusation is admissible. As the judges who will craft these tests are lawyers¹³⁹ and not psychologists,¹⁴⁰ they can best do so by addressing the second criticism outlined above: that the rule of adoptive admissions by silence creates an unrealistic duty to speak.¹⁴¹

Courts should look to the requirements of other affirmative duties, especially the duty to rescue, in order to build a rule that will not impose a duty to speak where it is inappropriate. Because the law is especially wary of imposing an affirmative duty on an individual vis-à-vis a stranger,¹⁴² the duty to speak should not attach when the accuser and accused have no prior relationship or such a relationship has not been proven.

(limiting its holding that adoptive admissions must be “[u]nequivocal, positive, and definite in nature, [c]learly showing that in fact defendant intended to adopt the hearsay statements as his own” to criminal cases); *Rogers v. State*, 928 So. 2d 831, 839 (Miss. 2006); *State v. Samuel*, 521 S.W.2d 374, 375–76 (Mo. 1975); *State v. Louie Won*, 248 P. 201, 204 (Mont. 1926); *Pierce v. State*, 113 N.W.2d 333, 338–39 (Neb. 1962); *Maginnis v. State*, 561 P.2d 922, 923 (Nev. 1977); *State v. Forbes*, 953 A.2d 433, 434–35 (N.H. 2008) (recognizing high bar for admission of silence as an adoptive admission and holding that defendant’s silence did not amount to adoptive admission, but declining to abolish rule outright); *State v. Kane*, 75 A.2d 894, 897 (N.J. Super. Ct. App. Div. 1950); *State v. Hatley*, 383 P.2d 247, 248 (N.M. 1963) (stating that evidence of silence as adoptive admission should be admitted cautiously, but that “[w]hether circumstances are such as to render the accused’s failure to reply to a statement made in his presence an admission is, in the first instance, a question for the trial court”); *People v. Campney*, 726 N.E.2d 468, 471 (N.Y. 1999) (stating that the rule should be applied narrowly, but declining to abolish it); *State v. Dills*, 180 S.E. 571, 572 (N.C. 1935); *Starr v. Morsette*, 236 N.W.2d 183, 189–90 (N.D. 1975); *Zeller v. State*, 176 N.E. 81, 82 (Ohio 1931); *Wauqua v. State*, 694 P.2d 532, 536 (Okla. Crim. App. 1985); *State v. Severson*, 696 P.2d 521, 524 (Or. 1985) (limiting admissibility of silence as adoptive admission to civil cases); *State v. Pacheco*, 481 A.2d 1009, 1014 (R.I. 1984); *State v. Nolan*, 456 S.E.2d 926, 928 (S.C. Ct. App. 1995); *State v. Fogg*, 115 N.W.2d 889, 892–93 (S.D. 1962); *Winfrey v. State*, 123 S.W.2d 827, 827 (Tenn. 1939); *Tucker v. State*, 771 S.W.2d 523, 535–36 & n.5 (Tex. Crim. App. 1988); *State v. Mortensen*, 73 P. 562, 567–68 (Utah 1903); *State v. Magoon*, 35 A. 310, 310 (Vt. 1896); *Owens v. Commonwealth*, 43 S.E.2d 895, 899 (Va. 1947); *State v. Goodwin*, 204 P. 769, 770–71 (Wash. 1922); *State v. Browning*, 485 S.E.2d 1, 7–8 (W. Va. 1997); *Caccitolo v. State*, 230 N.W.2d 139, 144 (Wis. 1975).

¹³⁹ Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 458 (2008).

¹⁴⁰ Samuel N. Faridin, *Duty of Care Jurisprudence: Comparing Judicial Intuition and Social Psychology Research*, 38 U.C. DAVIS L. REV. 1, 69–70 & n.219 (2004) (arguing that courts should incorporate empirical research into duty of care jurisprudence, even though “judges are not psychologists and they may have difficulty evaluating psychology research”).

¹⁴¹ See *supra* Part II.A.2.

¹⁴² See *supra* note 33.

III. PROPOSAL

A. *Courts Should Look to the Affirmative Duty to Rescue to Craft a Better Test for the Affirmative Duty to Speak*

Where the law imposes a duty upon an individual to take a specific action, courts need a method to determine whether such a duty has been triggered. By looking to the necessary triggers for these legal duties, courts can create a rule for the duty to speak that will address the common criticisms of the rule.

Perhaps most instructive is the duty to rescue.¹⁴³ Just as an individual may not respond to an accusation simply because he does not want to do so,¹⁴⁴ an individual may choose not to rescue another in peril because he does not want to do so.¹⁴⁵ However, the law limits the circumstances in which the duty to rescue will attach to a greater extent than it limits those in which the duty to speak will attach.¹⁴⁶

1. The Applicability of the Duty to Rescue to the Duty to Speak

While different circuits have slightly different tests to determine the admissibility of silence as an adoptive admission, they generally require that (1) the adopting party be able to hear and understand the accusation, (2) the party have an opportunity to respond and fail to do so, and (3) the accusation be of the type to which a reasonable person would object.¹⁴⁷ Nothing in these tests requires that the accuser and accused have any prior relationship. While such a relationship certainly exists in many instances,¹⁴⁸ the duty can attach without it.¹⁴⁹ In contrast,

¹⁴³ The principles of the duty to rescue are applicable to the duty to speak, as both respond to triggers of a second party. *See infra* Part III.A.1. Other affirmative duties, such as duties of owners and occupiers, are less applicable to the duty to speak as such special duties of care are not triggered by the actions of one party, but instead preemptively exist by virtue of the relationship. *See generally* Victor E. Schwartz & Christopher E. Appel, *Reshaping the Traditional Limits of Affirmative Duties Under the Third Restatement of Torts*, 44 J. MARSHALL L. REV. 319 (2011).

¹⁴⁴ *Commonwealth v. Vallone*, 32 A.2d 889, 900 (Pa. 1943) (Maxey, C.J., dissenting).

¹⁴⁵ *See* Martin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1452 (2008).

¹⁴⁶ *See infra* Part III.A.1.

¹⁴⁷ *See supra* Part I.B.

¹⁴⁸ *See, e.g.*, *United States v. Williams*, 445 F.3d 724, 728, 734–36 (4th Cir. 2006) (holding that defendant's failure to respond to his "main drug supplier", from whom he bought "hundreds of dollars worth of crack every other day", when the supplier asked whether defendant had killed someone constituted an adoptive admission by silence); *United States v. Ward*, 377 F.3d 671, 675–76 (7th Cir. 2004) (holding that trial court did not abuse its discretion in admitting, as adoptive admission, statement made by defendant's sister in his presence and to which he did not react); *Ewell v. State*, 180 A.2d 857, 860 (Md. 1962) (holding that individuals can be expected to deny accusations of a friend).

the duty to rescue generally requires that (1) one of a class of “special relationships” existed between the rescuer and rescuee, (2) the potential rescuer created the danger that led to the need of rescue, or (3) the rescuer had begun, and then abandoned, a rescue attempt.¹⁵⁰

In the category of special relationships, courts have found that parents have a duty to rescue their children, school officials have a duty to rescue students, and landowners have a duty to rescue invitees.¹⁵¹ In each of these instances, the duty to rescue attaches, in part, because the rescuer has a defined and known relationship with the rescuee.¹⁵² This same principle could easily be applied to the duty to speak.

Additionally, if the potential rescuer created the danger, that rescuer must have either known or should have known that he created the danger in order for the duty to attach.¹⁵³ A similar principle applies to rescue attempts: once undertaken, the duty will attach only if the rescuer knew, or should have known, that his actions were, in fact, a rescue.¹⁵⁴ Thus, a duty to rescue a stranger only occurs in two very limited circumstances,¹⁵⁵ both of which require a predicate action on the part of the rescuer that directly impacts the rescuee.¹⁵⁶

¹⁴⁹ See, e.g., *United States v. Carter*, 760 F.2d 1568, 1579–80 (11th Cir. 1985) (holding that comment made by one individual and heard by another, to which latter did not respond, was admissible against latter as adoptive admission, even though no proven relationship existed between the men at the time of trial); *United States v. Alker*, 255 F.2d 851 (3d Cir. 1958) (holding that the defendant, who was executor of an estate, adopted by silence the statements of a witness to the opening of safe belonging to the deceased, even though no evidence of a relationship between the executor and the witness was proven); *People v. Zavala*, 85 Cal. Rptr. 3d 734, 739–40 (Ct. App. 2008) (holding that participation in a conversation is sufficient to indicate that a reasonable person would have responded to an accusation).

¹⁵⁰ Scordato, *supra* note 145, at 1460–62 & n.63; see also McCall C. Carter, *Morality, Law and the Duty to Act: Creating a Common Law Duty to Act Modeled After the Responsibility to Protect Doctrine*, 2 WASH. U. JURISPRUDENCE REV. 138, 141–44 (2010). Some scholars add two more categories in which a duty to rescue attaches: statutory duties, such as “hit-and-run” statutes, and duties formed in a contract, such as a lifeguard who contracts with a public pool to save drowning swimmers. See Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 425–26 (1985). Because this Note does not propose any statutory changes, the former category is inapplicable; because a contract would have no reason to include a clause mandating that one party speak if the other accuses him of something, the latter is as well.

¹⁵¹ Silver, *supra* note 150, at 425–26.

¹⁵² Scordato, *supra* note 145, at 1460–61; see also Silver, *supra* note 150, at 426 (“Courts have recognized this duty only in relationships of the greatest intimacy and dependence, or in which some economic benefit flows to the burdened party.”).

¹⁵³ See DAN B. DOBBS, *THE LAW OF TORTS* § 316, at 856–57 (2000).

¹⁵⁴ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 43 (2011).

¹⁵⁵ See *supra* Part III.A.1.

¹⁵⁶ In fact, the lack of a duty to rescue strangers is so ingrained in our legal system that even well-publicized instances of an individual dying because no one came to her aid have been insufficient to lead to a change in this rule. See Silver, *supra* note 150, at 423. Among these, arguably the most studied is the story of Catherine Genovese. For a thorough explanation of what transpired and an analysis of the events, see Jim Rasenberger, *Kitty, 40 Years Later*, N.Y. TIMES, Feb. 8, 2004, <http://www.nytimes.com/2004/02/08/nyregion/kitty-40-years-later.html?pagewanted=all&src=pm>.

In every circumstance in which the duty to rescue attaches, some relationship that would logically call for a rescue is present.¹⁵⁷ This relationship may be formed prior to the incident that creates the need for rescue or at the moment rescue is necessitated. In the latter instance, it attaches because the potential rescuer either created the risk or decided to undertake a rescue.¹⁵⁸ In contrast, the legal duty to speak may currently be triggered even if no relationship exists.¹⁵⁹ By adding a relationship requirement to the tests for the admissibility of silence, courts can both bring the duty to speak in line with other affirmative duties and address many of the criticisms of the current rule.

2. Distinctions Between the Two Duties

An important distinction exists between the aforementioned affirmative duties and the duty to speak: the former are legal standards used to determine the culpability of the defendant,¹⁶⁰ while the latter is a legal standard used to determine whether a piece of evidence is admissible in court.¹⁶¹ This distinction is significant, as evidence must merely be probative and have some effect on the outcome of the case to be admitted,¹⁶² while the existence of the other legal duties must be proven either by a preponderance of the evidence—as in most civil cases¹⁶³—or beyond a reasonable doubt—as in criminal ones.¹⁶⁴

However, the criticisms of the admissibility of silence as an adoptive admission speak directly to its probative value; they each assert, for a variety of reasons, that silence has no such value in certain instances.¹⁶⁵ Courts need a test that will more effectively ensure that silence is admitted only where it is actually probative. The best way to do so is to look to other affirmative legal duties, such as the duty to rescue, because these duties—while not an identical analogue—are similar in a key regard: they require a citizen to take a specified action in response to a defined trigger. Thus, in order to better effectuate the goal of only admitting probative evidence, courts should adapt the tests for other affirmative duties to the duty to speak.

¹⁵⁷ See *supra* Part III.A.1.

¹⁵⁸ *Id.*

¹⁵⁹ See cases cited *supra* note 149.

¹⁶⁰ See *supra* Part III.A.1.

¹⁶¹ See *supra* Part I.

¹⁶² FED. R. EVID. 401.

¹⁶³ Neil Orloff & Jerry Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159, 1159 (1983).

¹⁶⁴ *In re Winship*, 397 U.S. 358, 364 (1970).

¹⁶⁵ See *supra* Part II.A.

3. Adapting the Requirements of the Duty to Rescue to the Duty to Speak

The relationship requirement of the duty to rescue ensures that the duty will not attach if the rescuer and rescuee are strangers.¹⁶⁶ Similarly, the duty to speak should not attach when the accuser and the accused have no defined and known relationship. Therefore, such a relationship should be necessary for the duty to speak to arise.

However, because evidence law requires that courts admit only probative evidence,¹⁶⁷ the relationships required by the duty to speak should be those in which the accused would actually respond to an accusation. This will likely vary among individuals; for example, while some individuals would deny an accusation made by a sibling, others would not.¹⁶⁸ Therefore, the type of relationship should not be sufficient to satisfy the relationship requirement for the duty to speak. Instead, courts should consider not only the *type* of relationship, but also the *specific* relationship between the accused and the accuser. Thus, this Note proposes that courts should add a two-part requirement to the current tests for the admissibility of silence as an adoptive admission. This requirement would ask (1) whether the accuser and the accused have a defined and known relationship and (2) if so, whether, given the dynamics of that relationship, the accused would deny an accusation.¹⁶⁹ The accused's silence would only be admissible as an adoptive admission if the answer to each of these questions were "yes."

B. *Advantages of the Proposed Requirement*

This proposal has a number of advantages. First, courts could add the proposed requirement to the current tests for the admissibility of silence with ease, because they would not need to revamp the entire test for the admissibility of silence as an adoptive admission to incorporate the requirement.¹⁷⁰ Rather, they could merely add the new requirement to the end of the existing tests. Second, the proposed requirement would address both the criticism that silence in the face of an accusation may

¹⁶⁶ See *supra* Part III.A.1.

¹⁶⁷ FED. R. EVID. 401(a).

¹⁶⁸ See Ontiveros, *supra* note 26, at 345–47.

¹⁶⁹ While this Note refers to "the court" making this determination, it does so for the sake of consistency. It expresses no opinion on whether these would be questions of law for the judge or questions of fact for the jury. Such an opinion would require extensive argument and the answer would be tangential to the stated goal of this Note: to propose a requirement that would both address the criticisms of the current rule and allow evidence of silence where, and only where, it is probative.

¹⁷⁰ See *infra* Part III.B.1.

not always be analogous to assent and the criticism that admitting such silence creates an untenable duty to speak.¹⁷¹ Third, adding the new requirement to the tests for admissibility of silence would be both more effective and more pragmatic than the solutions that courts have previously implemented.¹⁷²

1. Courts Could Update the Test for Admissibility with Ease

Courts will not need to build the new requirement from scratch. Instead, courts should adopt the basic parameters of the relationships that would be covered under the new rule from the class of special relationships that trigger the duty to rescue. Some of these—such as parent to child, spouse to spouse, and employer to employee¹⁷³—would likely apply to the duty to speak as well. Others—such as storekeeper to customer and landowner to invitee¹⁷⁴—would likely need to be assessed on a case-by-case basis, as courts may find that these relationships are insufficiently intimate for a response to be expected in the face of an accusation. While every relationship that falls under the duty to rescue may not ultimately trigger the duty to speak, the existence of such categories gives courts a framework within which they can consider the relationship in a specific case.

In the context of the duty to speak, an additional relationship to those that trigger the duty to rescue will often exist: coconspirator and conspirator.¹⁷⁵ Courts have found adoptive admissions by silence to be especially probative in such circumstances.¹⁷⁶ However, unlike the coconspirator exception—codified in Federal Rule of Evidence

¹⁷¹ See *infra* Part III.B.2.

¹⁷² See *infra* Part III.B.3.

¹⁷³ Silver, *supra* note 150, at 425.

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., *United States v. Aponte*, 31 F.3d 86, 87 (2d Cir. 1994); *Robinson v. United States*, 606 A.2d 1368, 1370–73 (D.C. Cir. 1992); *State v. Schiappa*, 728 A.2d 466, 482–86 (Conn. 1999). A second relationship that is not related to the duty to rescue is also often present in adoptive admission cases: police officer and suspect. See, e.g., *United States v. Hampton*, 843 F. Supp. 2d 571, 574–76 (E.D. Pa. 2012); *United States v. Lafferty*, 387 F. Supp. 2d 500 (W.D. Pa. 2005); *People v. Jennings*, 237 P.3d 474, 487, 507–11 (Cal. 2010). Because silence in the context of a police interview may be inadmissible on constitutional grounds, the necessary analysis is largely outside of the scope of this Note. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); see also *supra* note 78. Where a suspect or defendant has waived his *Miranda* rights, the court would need to determine whether that individual would respond to an accusation of a police officer. Some have argued that this largely depends on cultural considerations. See *Ontiveros*, *supra* note 26, at 348–50; *Thompson*, *supra* note 26, at 40–41.

¹⁷⁶ *Brown v. United States*, 464 A.2d 120, 124 (D.C. Cir. 1983) (“A defendant’s failure to object to or deny a codefendant’s statements at the time they were made is especially probative of the defendant’s acquiescence if they are made in the presence of a third party who was not an accomplice in the crime.” (citation omitted)).

801(d)(2)(E)¹⁷⁷—no predicate finding of the coconspirator relationship is required for an adoptive admission.¹⁷⁸ Under the proposal in this Note, the coconspirator relationship would likely satisfy the defined and known relationship requirement, but would need to be established before the silence of a coconspirator would be admitted.

Just as courts would not need to build the new requirement from scratch, they also would not need to build a test for the existence of a coconspirator relationship anew; such a test is already used by courts in enforcing the coconspirator exception to the ban on hearsay.¹⁷⁹ This test can be adopted directly. Thus, if the defined and known relationship in a particular case is that of coconspirators, the court should not merely use the statement itself as proof of a conspiracy, but rather should look for extrinsic evidence that a conspiracy exists.¹⁸⁰ As courts already perform this analysis under the coconspirator exception,¹⁸¹ applying it to adoptive admissions by silence would not impose any difficulty to which courts are not already accustomed.

Furthermore, precedent exists for the inclusion of a relationship requirement in tests for the admissibility of silence as an adoptive admission. Some courts explicitly analyze the relationship between the accuser and the accused where the accusation is in written form.¹⁸² While modern tests for the admissibility of silence as an adoptive admission do not require any defined relationship between accuser and

¹⁷⁷ For the statement of a coconspirator to be admissible irrespective of the general ban on hearsay, the statement must be “made by the party’s coconspirator during and in furtherance of the conspiracy.” FED. R. EVID. 801(d)(2)(E). However, “[t]he statement . . . does not by itself establish . . . the existence of the conspiracy or participation in it under (E).” FED. R. EVID. 801(d)(2).

¹⁷⁸ See FED. R. EVID. 801(d)(2). Even in instances in which the accuser and accused are coconspirators, the coconspirator exception would only apply if the accuser made the accusation while commissioning the crime; statements made recounting the crime are outside the scope of the exception. FED. R. EVID. 801(d)(2)(E) (requiring that the statement be “made by the party’s coconspirator *during and in furtherance of the conspiracy*” for the coconspirator exception to apply (emphasis added)).

¹⁷⁹ See FED. R. EVID. 801(d)(2)(E) advisory committee’s note (“[The 1997] amendment resolves an issue on which the [Supreme] Court had reserved decision. It provides that the contents of the declarant’s statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement.”).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, 262 F. Supp. 2d 251, 259 (S.D.N.Y. 2003) (“In the case of written statements, such as letters or other documents, mere non-response is generally considered insufficient. However, if the declarant and the party are engaged in such a relationship that the recipient of a written statement would have been expected to take issue with the contents if he or she disagreed with them, adoption may be established.” (citations omitted)).

accused generally,¹⁸³ some common law tests do.¹⁸⁴ For example, *Best on Presumptions* posits a two-part test.¹⁸⁵ The first prong of the test requires that the accused both hear and understand the accusation.¹⁸⁶ Current tests for admissibility continue to require this.¹⁸⁷ The second part of the test considers both the forcefulness of the statement made and the identity of the accuser.¹⁸⁸ Modern tests often require the statement to be of the type that would normally induce an innocent party to respond.¹⁸⁹ This largely tracks with Best's forcefulness consideration—both require an analysis of the type of statement made. Because all other parts of Best's test for admissibility are still in use, courts would not be creating a brand new test, but would be reestablishing a requirement that has fallen into disuse.

Additionally, many common law tests from the twentieth century called for an analysis of the accused's motive to reply¹⁹⁰ or the circumstances that surrounded the accusation.¹⁹¹ However, the tests used since the adoption of the Federal Rules of Evidence have morphed these considerations into a requirement that focuses on the statement itself; they require that the statement be of the type that naturally calls for a response.¹⁹² Therefore, reinstating the identity of the accuser as a relevant consideration would be in line with the historical implementation of the rule.

2. Requiring a Defined and Known Relationship Between the Accuser and the Accused for an Adoptive Admission by Silence to Be Admissible Would Address the Common Criticisms of the Current Rule

The proposed addition to the tests for the admissibility of silence as an adoptive admission would address the criticism that silence often

¹⁸³ See *supra* Part I.B.

¹⁸⁴ See cases cited *supra* note 49; see also BEST, *supra* note 10, at 186.

¹⁸⁵ BEST, *supra* note 10, at 186.

¹⁸⁶ *Id.*

¹⁸⁷ See *supra* Part I.B.

¹⁸⁸ BEST, *supra* note 10, at 186.

¹⁸⁹ See, e.g., *United States v. Miller*, 478 F.3d 48, 51 (1st Cir. 2007); *United States v. Moore*, 522 F.2d 1068, 1075 (9th Cir. 1975).

¹⁹⁰ WIGMORE, *supra* note 51, at 555; see also *supra* Part I.A.

¹⁹¹ Hilles, *supra* note 10, at 214; see also *supra* Part I.A.

¹⁹² See, e.g., *Miller*, 478 F.3d at 51; *Moore*, 522 F.2d at 1075. In fact, the test espoused in *Moore*—adopted from a common law test outlined in *Arpan v. United States*, 260 F.2d 649 (8th Cir. 1958)—refers to the “statement . . . under the circumstances . . .” *Id.* While such language does not preclude the court from considering the identity of the accuser in relation to the accused, it also does not mandate it. Additionally, it makes the circumstances secondary to the statement itself, rather than a consideration in their own right. Therefore, a court can easily make the required analysis without giving any consideration to the identity of the accuser, as happened in *Moore* itself.

lacks probative value, as well as the criticism that the rule creates an untenable duty to speak. By requiring a defined and known relationship in which the accused would be expected to object to the accuser's accusation, (1) courts would exclude the admission of silence in situations in which it is not probative¹⁹³ and (2) the duty to speak would be limited to an extent that it would be realistic to expect those accused to object.¹⁹⁴

a. The New Rule Would Ensure that Admitted Silence Has Probative Value

The updated rule should require that the relationship between the accuser and the accused be such that the accused would object to the accusation. Thus, as discussed above, the court should look for a defined and known relationship between the parties. However, the type of relationship alone should be necessary, but not sufficient, for the duty to attach. Once the court identifies the relationship, it should then determine whether an objection to an accusation would be expected, given the unique relationship of the individuals involved.

This would address a number of situations in which silence lacks probative value. For example, the court could take into account the cultural norms of the accused and how those cultural norms inform the meaning of silence within the identified relationship.¹⁹⁵ The court could also determine whether, given the relationship, the accused would be especially wary of an argument¹⁹⁶ or would not feel entitled to speak.¹⁹⁷ The court could even consider whether the relationship is such that the accused would feel afraid to deny the accusation.¹⁹⁸ Therefore, by considering the relationship between the parties, courts could ensure that silence that lacks probative value is not admitted. While some may argue that such an inquiry would be unnecessarily time consuming, the current tests already require courts to make a predicate determination of whether the individual circumstances call for a response.¹⁹⁹ Under the proposed requirement, courts will simply analyze the relationship between the accuser and the accused as part of this existing assessment.

¹⁹³ See *infra* Part III.B.2.a.

¹⁹⁴ See *infra* Part III.B.2.b.

¹⁹⁵ See generally Thompson, *supra* note 26, at 49.

¹⁹⁶ See generally State v. Clark, 175 P.3d 1006, 1010 (Or. 2008).

¹⁹⁷ See generally Commonwealth v. Vallone, 32 A.2d 889, 898 (Pa. 1943) (Maxey, C.J., dissenting).

¹⁹⁸ See generally *Ex Parte* Marek, 556 So. 2d 375, 381 (Ala. 1989); Thompson, *supra* note 26, at 48–49.

¹⁹⁹ See *supra* Part I.B.

b. The New Rule Would Not Create an Untenable Duty to Speak²⁰⁰

The second common line of criticism stresses that the existing admissibility of silence as an adoptive admission rule creates an untenable duty to speak on the part of the accused. By limiting that duty in the manner described above, courts will bring it in line with other affirmative duties.²⁰¹ While individuals would still have an affirmative duty to speak in certain situations, this duty would be far more circumscribed than that imposed by the current rule.

Furthermore, this duty would better comport with the advisory committee's intention that silence be admitted in circumstances in which an individual would naturally protest to an accusation.²⁰² At times, the current rule imposes a duty to speak in a situation in which a denial would not be likely.²⁰³ By limiting this duty to relationships in which a denial would actually occur, the proposed requirement would free courts from the concern that such a duty is unrealistic and unworkable.²⁰⁴

3. Updating the Test for the Admissibility of Silence as an Adoptive Admission to Require a Defined and Known Relationship Would Be More Pragmatic and Effective than Other Solutions

Courts that have found adoptive admissions by silence to be problematic have implemented one of two solutions: (1) abolishing the rule entirely or (2) limiting its use to civil cases.²⁰⁵ However, neither of these options is satisfactory, because both unnecessarily lead to the exclusion of probative evidence.

Eliminating all adoptive admissions by silence would almost certainly exclude evidence that is highly probative.²⁰⁶ While courts that

²⁰⁰ Arguably, the new requirement could eliminate the applicability of the duty framework entirely, as it would eliminate adoptive admissions by silence where an individual would not think to object to an accusation. In such a case, the second criticism would be rendered moot.

²⁰¹ See *supra* Part III.A.

²⁰² See FED. R. EVID. 801 advisory committee's note.

²⁰³ See *Commonwealth v. Vallone*, 32 A.2d 889, 900 (Pa. 1943) (Maxey, C.J., dissenting) (“[A]n individual accused by another, and [sic] especially if that other be a disreputable person, does not ordinarily deem it incumbent upon himself to make a denial of the accusation . . .”).

²⁰⁴ See *generally supra* Part II.A.2.

²⁰⁵ See *supra* Part II.B.

²⁰⁶ See, e.g., *United States v. Hale*, 422 U.S. 171, 176 (1975) (“Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation.”); *United States v. Ward*, 377 F.3d 671, 676 (7th Cir. 2004) (finding that silence had probative value where the accused's sister said “that's the money they got when they robbed the bank” and defendant did not respond); *Brown v. United States*, 464 A.2d 120, 124 (D.C. Cir. 1983) (“A defendant's failure to object to or deny a codefendant's statements at the time they were made is especially probative

have eliminated the rule have identified a number of problems with it, they have not claimed that silence lacks probative value in all instances.²⁰⁷ The court in *Ex Parte Marek*²⁰⁸—one of the courts that abolished adoptive admissions by silence—supported its holding with the premise that silence does not necessarily indicate guilt,²⁰⁹ but failed to recognize that, even though much evidence substantiates this premise,²¹⁰ it does not follow that silence will never have significant probative value.²¹¹ Elimination of adoptive admissions by silence would solve both the problem of admitting non-probative evidence and the problem of creating an untenable duty to speak. However, this Note’s proposal would solve these problems, while also allowing courts to admit probative evidence that elimination of the rule would otherwise prohibit.

Limiting adoptive admissions by silence to civil suits would also be a less effective solution than adding a requirement that the accuser and accused have a relationship in which the accused would object to an accusation. Courts that have eliminated adoptive admissions in only a criminal context have done so on two grounds: (1) that silence has little probative value and (2) that admitting silence violates the constitutional rights of a criminal defendant.²¹²

The courts that adopt the first line of reasoning do not make clear why it applies to criminal cases and not civil ones;²¹³ logically the probative value and potential unfair prejudice would be the same

of the defendant’s acquiescence if they are made in the presence of a third party who was not an accomplice in the crime.” (citation omitted)).

²⁰⁷ See cases cited *supra* note 27.

²⁰⁸ 556 So. 2d 375 (Ala. 1989).

²⁰⁹ *Id.* at 381 (“[The] underlying premise, that an innocent person *always* objects when confronted with a baseless accusation, is inappropriately simple, because it does not account for the manifold motivations that an accused may have when, confronted with an accusation, he chooses to remain silent. Confronted with an accusation of a crime, the accused might well remain silent because he is angry, or frightened, or because he thinks he has the right to remain silent that the mass media have so well publicized. Furthermore, without [the] premise that silence in the face of an accusation means that the accused thinks he is guilty, the tacit admission rule cannot withstand scrutiny, because the observation that the accused remained silent could *not necessarily* lead to the inference that the accused knew that he was guilty; without the premise that silence in the face of accusation necessarily results from guilt, the tacit admission rule merely describes two concurrent events, accusation and silence, without giving the reason for the concurrence of the two events.” (emphasis added)).

²¹⁰ See *supra* Part II.A.

²¹¹ Of course, where silence is admissible under the test proposed by this Note, it would still be subject to Federal Rule of Evidence 403. FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”); see, e.g., *United States v. Hampton*, 843 F. Supp. 2d 571, 580–83 (E.D. Pa. 2012).

²¹² See *supra* Part II.B.

²¹³ See *Jarrett v. State*, 453 S.E.2d 461 (Ga. 1995); *Village of New Hope v. Duplessie*, 231 N.W.2d 553 (Minn. 1975).

irrespective of whether the action is civil or criminal.²¹⁴ Regardless, under this scheme, probative evidence will be inadmissible in some instances, just as occurs when courts eliminate adoptive admissions by silence outright.

The courts that adopt the second line of reasoning cite Fifth Amendment concerns,²¹⁵ which are limited to criminal cases.²¹⁶ However, adoptive admissions by silence that occur outside of a police interrogation do not fall under the authority of the Fifth Amendment.²¹⁷ While the admissibility of silence that occurs during a pre-*Miranda* police interrogation varies among circuits,²¹⁸ the holding of *Miranda v. Arizona* explicitly states that it applies only to police interrogations.²¹⁹ Furthermore, the United States Supreme Court has indicated that *Miranda* does not apply unless the right is explicitly invoked, with two narrow exceptions that could only apply if the defendant were in custody.²²⁰ Thus, the assertion that all adoptive admissions by silence in criminal cases run afoul of the Fifth Amendment right to remain silent is faulty.

Additionally, limiting adoptive admissions by silence to civil cases and eliminating them entirely have not been popular options. Forty-one states have declined to take either of these steps.²²¹ Furthermore, Michigan eliminated the rule in 1939,²²² Pennsylvania did so in 1967,²²³ and Alabama did so in 1989.²²⁴ That these decisions are twenty-eight and twenty-two years apart, respectively, and that no court has eliminated adoptive admissions by silence in more than twenty years, indicates that other courts are reluctant to follow this precedent.

²¹⁴ See FED. R. EVID. 403 (making no distinction between civil and criminal cases in balancing probative value with unfair prejudice).

²¹⁵ See *State v. Kelsey*, 201 N.W.2d 921, 927 (Iowa 1972); *Duplessie*, 231 N.W.2d at 553.

²¹⁶ See U.S. CONST. amend. V (“No person shall . . . be compelled in any criminal case to be a witness against himself . . .”).

²¹⁷ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

²¹⁸ See *supra* note 78.

²¹⁹ See *supra* note 22.

²²⁰ See *Salinas v. Texas*, 133 S. Ct. 2174, 2179–80 (2013) (explaining that right to remain silent only attaches if it is expressly invoked, with two exceptions: (1) “that a criminal defendant need not take the stand and assert the privilege at his own trial” and (2) “that a witness’ failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary”); see also, e.g., *Howes v. Fields*, 132 S. Ct. 1181 (2012) (holding that *Miranda* protections do not apply to a prisoner who is formally questioned regarding an offense other than the one for which he is incarcerated, because the officials told the prisoner he could leave the interview and return to his cell at any time); *Illinois v. Perkins*, 496 U.S. 292, 294 (1990) (holding that “*Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement” and that statements made in this context are admissible).

²²¹ See cases cited *supra* note 138.

²²² See *People v. Bigge*, 285 N.W. 5 (Mich. 1939).

²²³ See *Commonwealth v. Dravec*, 227 A.2d 904 (Pa. 1967).

²²⁴ See *Ex Parte Marek*, 556 So. 2d 375 (Ala. 1989).

Similarly, no state has eliminated adoptive admissions by silence in only a criminal context since 1995.²²⁵

Given the hesitancy of other courts to adopt the two solutions implemented by a small number of states, both suggestions, even if they were ideal, would not be realistic. Instead—and more consistent with courts' continued admission of silence²²⁶—the current tests for the admissibility of silence as an adoptive admission should be amended to include a requirement that the accuser and the accused have a defined and known relationship that indicates that the accused would object to an accusation.

IV. THE UPDATED TEST FOR THE ADMISSIBILITY OF SILENCE IN PRACTICE

This Note's proposal would not eliminate the existing requirements for silence to be admitted as an adoptive admission. For example, circuits that currently require (1) that the jury be able to reasonably infer that the accused "heard, understood, and acquiesced" to the statement and (2) that the circumstances be such that "an innocent [party] would normally be induced to respond"²²⁷ would simply add the proposed requirement as a third prong to this test.

To see how this requirement would work in action, consider the hypothetical from the Introduction of this Note. If William testified that, "Adam accused Ben of killing Charlie and Ben stood by silently," in addition to the current analysis, the court would explicitly consider the relationship between Adam and Ben. If they were strangers, the duty to speak would not attach. If they were coconspirators, the court would look for independent evidence that they were both part of a conspiracy. If they were brothers, the court would consider, given the nature of their specific relationship, whether a denial would be expected.

While the new requirement may lead to the same result as the existing tests in some cases, it would have prevented the introduction of evidence with little to no probative value in a number of instances. For example, in the Eleventh Circuit decision *United States v. Carter*,²²⁸ the court found an adoptive admission by silence where the defendant, sitting in the backseat of a car, could overhear his coconspirator, who was sitting in the front seat, telling a third party that the coconspirator and the defendant had committed a crime together.²²⁹ However, the court offered no proof of the conspiracy other than the statement made

²²⁵ See *supra* Part II.B.

²²⁶ See *supra* Parts I.B, II.B.

²²⁷ *United States v. Moore*, 522 F.2d 1068, 1075–76 (9th Cir. 1975).

²²⁸ 760 F.2d 1568 (11th Cir. 1985).

²²⁹ *Id.* at 1579–80.

by the individual in the front seat and the defendant's contemporaneous silence.²³⁰ Had the court implemented the requirement proposed by this Note, it would have needed to determine whether a defined and known relationship—in this case that of coconspirators—existed between the accuser and the accused. As no evidence of the conspiracy other than the statement itself existed,²³¹ a coconspirator relationship would not be established and the evidence would not be admissible as an adoptive admission.²³²

The proposed requirement would also be important in cases such as *People v. Medina*,²³³ in which the defendant did not respond when his sister asked him, “why did you have to shoot those three poor boys?”²³⁴ First, the court would consider the *type* of relationship between the accuser and the accused. Here, the relationship of brother and sister would likely meet the requirement that the accused and the accuser have a defined and known relationship. However, this would not be the end of the analysis. Second, the court would consider the *specific dynamic* of that *particular* relationship. Here, to provide insight into his relationship with his sister, the defendant might point to his cultural norms to show that his failure to speak may have been a result of a culture in which silence does not equal assent.²³⁵ The court could then determine whether, based on this evidence, he would have objected to an accusation made by his sister.²³⁶

The new requirement would also be useful in instances in which the accusatory statements are transmitted via a third party. In *United*

²³⁰ *Id.* at 1579–81.

²³¹ *Id.*

²³² In *Carter*, the court also considered whether the statements could be admitted under the coconspirator exception codified in Federal Rule of Evidence 801(d)(2)(E). *Id.* at 1580–81. The court held that the coconspirator's statements were admissible under this exception. *Id.* However, the court used the adoptive admissions rule to create a loophole in the requirement that independent evidence of the conspiracy exist for the coconspirator exception to apply. Specifically the court held that the statements made by the individual in the front seat were adopted by silence by the defendant. The court then reasoned that this adoption meant the statements could be attributed to the defendant. Thus, the court determined that the statements were independent evidence of themselves, even though the defendant took no action. *Id.* The requirement proposed in this Note would close this loophole, because independent evidence of the conspiracy would need to be established before the court could consider the statement adopted by silence.

²³³ 299 P.2d 1282 (Cal. 1990).

²³⁴ *Id.* at 1294–95.

²³⁵ Ontiveros, *supra* note 26, at 345–47 (“[I]n personal, family situations, for many Latino men, a ‘cult of silence’ exists, where feelings are not discussed or expressed. In *Medina* [sic], it might have been natural for the defendant to refuse to discuss things with his sister, even if he did not kill the three boys . . . [His silence] does [not] necessarily signify that the listener committed the act described.”).

²³⁶ Arguably, this could lead to a court basing its decisions on stereotypes. However, this Note proposes not that the court would determine that *all* members of a culture would act a certain way and that, therefore, a certain individual did as well, but that the court should consider whether cultural norms regarding silence informed the accused's silence.

States v. Higgs,²³⁷ the court found that a jury could reasonably construe the defendant's silence in response to listening to a friend read a newspaper article over the phone as an adoptive admission, where the newspaper article reported on a trial of an alleged coconspirator, during which the alleged coconspirator implicated the defendant in the crime.²³⁸ The court made no attempt to determine exactly who was accusing the defendant:²³⁹ was the accuser the friend, the newspaper, or the alleged coconspirator? Under the proposed requirement, the court would need to determine who the accuser was, in order to then determine whether a denial would be expected in that relationship. While a literal interpretation of the events would lead to the conclusion that the alleged coconspirator was the accuser, this determination would lead to absurd results. Because the alleged coconspirator could not hear a denial made by the defendant, the defendant would have no reason to consider his relationship with the coconspirator in determining whether to make a denial. Therefore, in cases such as this one, the court would look to the individual to whom the accused would *actually* make the denial: the friend on the other end of the telephone. The court would then consider whether, given this relationship, the accused would feel the need to proclaim his innocence.²⁴⁰

CONCLUSION

Courts find themselves in a quandary when determining whether to admit silence as an adoptive admission. While a few states have eliminated the admissibility of such silence entirely,²⁴¹ most have been hesitant to take this step.²⁴² The long history of the rule²⁴³ and the belief that silence is probative in at least some instances²⁴⁴ ensure that outright elimination of the rule is unlikely.

However, the numerous criticisms of the current rule must be addressed. A rule that admits silence in instances in which it has no probative value violates a requirement of the Federal Rules of

²³⁷ 353 F.3d 281 (4th Cir. 2003).

²³⁸ *Id.* at 309–10.

²³⁹ *Id.*

²⁴⁰ In *Higgs*, the court described the person reading the newspaper over the telephone as the defendant's "former D.C. jailhouse friend" *Id.* at 309. To know whether the duty to speak would attach with the proposed requirement in place would require more information than the decision supplies.

²⁴¹ See cases cited *supra* note 27.

²⁴² See cases cited *supra* note 138.

²⁴³ See *supra* Part I.A–B.

²⁴⁴ *Brown v. United States*, 464 A.2d 120, 124 (D.C. Cir. 1983).

Evidence.²⁴⁵ Where silence is not tantamount to an adoption, that silence should not be admitted. This is clear from the very words of Federal Rule of Evidence 801(d)(2)(B): “[a] statement . . . is not hearsay . . . [if] the statement is offered against an opposing party and . . . is one the party manifested that it adopted or believed to be true.”²⁴⁶ Thus, where silence does not indicate that a “party manifested that it adopted” an accusation, silence should not be admitted. The tests used to determine the admissibility of silence as an adoptive admission would better comport with Rule 801(d)(2)(B) if they also included the requirement that this Note proposes.

Where no defined and known relationship between the accuser and the accused exists or where the relationship is such that a denial of an accusation would not occur, continuing to admit silence as an adoptive admission is at odds with the Federal Rules of Evidence. In order to ensure that silence only be admitted in instances in which it is truly probative of the truth, courts should add to the test for determining the admissibility of silence as an adoptive admission the requirement that the accuser and the accused have a defined and known relationship that would lead the accused to object.

²⁴⁵ FED. R. EVID. 401(a) (“Evidence is relevant if: . . . it has any tendency to make a fact more or less probable than it would be without the evidence . . .”); FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

²⁴⁶ FED. R. EVID. 801(d).