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COMMENTS

ADOPTIVE ADMISSIONS IN MINNESOTA:
THE DUPLESSIE RULE

I. INTRODUCTION

The doctrine of adoptive admissions has been called an "incongruous" doctrine that has gained "solemn authoritativeness." The admissibility of adoptive admissions, which are usually defined as silence, actions, or statements which manifest assent to the statements of another person, raises important evidentiary and constitutional questions, especially in criminal proceedings. In the recent case of State v. Duplessie, the Minnesota Supreme Court reversed a conviction based on an adoptive admission, on the basis of Miranda v. Arizona. In Duplessie, the defendant was arrested with three juveniles for attempted theft. The four were given Miranda warnings and interrogated en masse. At the defendant's trial, the arresting officer testified over strong and repeated objections that one of the juveniles had implicated the defendant at the time of the arrest and the defendant had responded by laughing and nodding his head. The trial court deemed the conduct an adoptive admission and the defendant was convicted. On appeal the defendant contended, inter alia, that the use of the officer's testimony violated his fifth amendment right against self-incrimination and sixth amendment right of confrontation. The Minnesota Supreme Court agreed and reversed, stating that an unequivocal adoptive admission, if proven, constitutes a waiver of those constitutional guarantees, but held that the state failed to prove the admission was unequivocal, positive, and definite. In so doing, the court based its decision on the Miranda mandate that "high standards of proof" are required for the waiver of

1. See Commonwealth v. Dravecz, 424 Pa. 582, 586, 227 A.2d 904, 906 (1967) ("How so incongruous a doctrine ever gained solemn authoritativeness might well be a subject for a long article in a law review.").

2. See 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(2)(B)(01), at 801-119 to -121 (1976) [hereinafter cited as WEINSTEIN & BERGER]. Words of another person can be received into evidence as admissions of the defendant if it can be shown that the defendant adopted the statements as his own. The party may designate by preappointment or reference a person whose statements he assents to as correct; he may assent to a statement already made by another; or the statements of another person having identity of interest with the party may be available as evidence. See 4 J. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §§ 1069-87 (J. Chadbourn rev. 1972) (discussion of ways in which statements made by another person will be considered adopted).

3. 304 Minn. 417, 231 N.W.2d 548 (1975).

constitutional rights\textsuperscript{5} and not on the traditional grounds of relevancy and hearsay. This raises questions concerning the admissibility of adoptive admissions when \textit{Miranda} is inapplicable or if \textit{Miranda} is overruled as some commentators anticipate. This Comment will analyze the \textit{Duplessie} rule in light of the constitutional and evidentiary problems inherent in adoptive admissions and will suggest that the rule be expanded to apply in all cases whether or not the \textit{Miranda} constitutional requirements are present.

II. THE \textit{Miranda} AND SIXTH AMENDMENT BASES OF \textit{Duplessie}

The \textit{Duplessie} court based its decision primarily on constitutional grounds, holding that the defendant's constitutional right against self-incrimination and right of confrontation were violated by allowing the equivocal adoptive admission because the high standard of proof for the waiver of these constitutional rights had not been satisfied.\textsuperscript{6}

A. \textit{The Miranda Basis}

The court was influenced by a footnote in \textit{Miranda v. Arizona}, which prohibited the use of adoptive admissions occurring after arrest and evidenced by the defendant standing mute when accused of criminal conduct.\textsuperscript{7} This restriction, consistent with the rest of the \textit{Miranda} opinion, is premised on the fifth amendment right against self-incrimination.\textsuperscript{8} As a necessary corollary to the concern that a defendant

\textsuperscript{5} See 304 Minn. 417, 424, 231 N.W.2d 548, 552-53 (1975). The court stated: The instant case provides an appropriate occasion for this court to announce guidelines for the use or exclusion of adoptive admissions in criminal proceedings . . . in conformity with the \textit{Miranda} mandate that “high standards of proof” are required for the waiver of constitutional rights. Indeed, the instant case is a compelling example of the necessity of such a stringent standard. \textit{Id.} at 424, 231 N.W.2d at 552.

\textsuperscript{6} See \textit{id.} at 421, 231 N.W.2d at 551. It should be noted, however, that if the defendant specifically had adopted the statements as his own, he voluntarily would have waived the constitutional right against self-incrimination and the right of confrontation would not exist. The statement becomes the defendant’s own and he has only himself to cross-examine. See 4 \textit{Weinstein & Berger, supra} note 2, ¶ 801(d)(2)[01], at 801-112.

\textsuperscript{7} In \textit{Miranda}, the Court stated that “[t]he prosecution may not . . . use at trial the fact that he stood mute or claimed his [fifth amendment] privilege in the face of accusation” during a custodial interrogation. 384 U.S. at 468 n.37.

\textsuperscript{8} The source of the fifth amendment right against self-incrimination is the maxim \textit{nemo tenetur prodere} (no man is bound to accuse himself). This maxim was used in England in the sixteenth century in protest against the inquisitorial methods of the ecclesiastical courts. \textit{Legislative Reference Service, Library of Congress, The Constitution of the United States of America: Analysis and Interpretation} 841 (1953). The amendment was added to the Constitution because of the conviction that “too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed.” \textit{Feldman v. United States}, 330 U.S. at 522.
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who has been arrested should not be compelled to incriminate himself, the *Miranda* Court concluded that a defendant who chooses to remain silent after arrest cannot be punished by allowing the fact of silence to be admitted at trial as evidence of guilt.⁹

*Miranda* was the first case in which the Supreme Court considered the constitutional implications of adoptive admissions in criminal proceedings.¹⁰ After *Miranda*, however, a conflict arose among the federal circuits as to whether *Miranda* prohibited the admission of evidence of silence in response to police interrogation.¹¹ To resolve the conflict, the Supreme Court first required the exclusion of adoptive admissions when the probative value was outweighed by the prejudicial impact.¹² Later it held the use of post-arrest silence for impeachment purposes denied the defendant due process.¹³ Thus *Miranda* and its progeny established

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⁹. 384 U.S. at 468 n.37.

10. As early as 1895, the Supreme Court allowed adoptive admissions, thus implying that adoptive admissions were not constitutionally infirm. See *Sparf v. United States*, 156 U.S. 51, 56 (1895). In *Sparf*, the Court ruled that the statements implicating the defendant were admissible because they had been made in his presence under circumstances warranting the inference that he naturally would have contradicted them if they had not been true. *Id.*. The Court, however, did not detail the circumstances or comment on the defendant being in custody at the time the statements were made.

11. Compare *Johnson v. Patterson*, 475 F.2d 1066 (10th Cir.) (cross-examination of defendant concerning his failure to tell police his story and reference to this during closing arguments infringed his fifth amendment right to remain silent), *cert. denied*, 414 U.S. 878 (1973) and *United States v. Semensohn*, 421 F.2d 1206, 1209 (2d Cir. 1970) (prosecution's references to defendant's failure to answer FBI agent's questions after his arrest violated the principle that inference of guilt cannot be drawn from silence after arrest) and *United States v. Brinson*, 411 F.2d 1057, 1060 (6th Cir. 1969) (evidence of defendant's failure following his arrest to tell FBI agents his version of story violated his right to remain silent) and *Fowle v. United States*, 410 F.2d 48 (9th Cir. 1969) (defendant's choice to exercise privilege against self-incrimination and to remain silent may not be used against him if he testifies in his own defense) *with United States ex rel. Burt v. New Jersey*, 475 F.2d 234 (3d Cir. 1973) (failure of defendant to disclose shooting to police after arrest on another charge could properly be used on cross-examination to refute credibility of defendant's testimony) and *United States v. Ramirez*, 441 F.2d 950, 954 (5th Cir.) (defendant's election to testify gave prosecution right to show his prior inconsistent act of remaining silent at time of his arrest), *cert. denied*, 404 U.S. 869 (1971).


The Court found that in light of the alternative explanations existing for pretrial silence, including intimidation by the secretive setting, fear, and possible preference to speak in the presence of an attorney or in open court, silence was not sufficiently probative of an inconsistency with testimony at his trial to allow admission. In addition to lacking probative value, the inference that can be drawn by the jury as to silence at the time of arrest is highly prejudicial. *See id.* at 179-80.

13. *Doyle v. Ohio*, 96 S. Ct. 2240 (1976). The state prosecutor sought to impeach the exculpatory testimony of a defendant who told his story for the first time at his trial. The defendant was cross-examined about his failure to tell his story after he was arrested and
that silence after arrest does not constitute an adoptive admission in criminal cases. The decision of the Minnesota Supreme Court in Duplessie thus was within the guidelines of Miranda. However, because the scope of the Miranda decision is too narrow to cover all adoptive admissions, reliance on constitutional grounds to create a general adoptive admissions standard may create problems.

At least three limitations imposed by use of Miranda as the basis for the admittance of adoptive admissions in Minnesota must be considered. First, Miranda applies only to criminal cases. Second, Miranda applies only when admissions occur after arrest. Third, Miranda may be overruled.

1. Miranda Basis of Decision Limits Rule to Criminal Cases

The court in Duplessie limited its "unequivocal, positive, and definite" adoptive admissions test to criminal cases because the rule was promulgated based on Miranda which applies only to criminal cases. It distinguished a more permissive Iowa adoptive admissions standard, which allowed a nod of the head as sufficient indication of adoption, on the basis that the Iowa standard was promulgated in a civil case, thereby leaving open the question of the applicability of Duplessie to non-criminal proceedings.

The propriety of placing restrictions on adoptive admissions in only criminal cases is questionable. Undoubtedly, a criminal defendant whose liberty is at stake deserves protection against involuntary waiver of his rights, yet the fundamental problems with adoptive admissions, lack of probative value and inherent prejudicial nature, make them given the Miranda warnings. The Miranda warnings implicitly assure the defendant that his right to remain silent carries no penalty. Subsequent use of the resulting silence thus violates due process. Id. at 2242-45.

14. The requirement of the Duplessie court that adoption of an admission be manifested by an unequivocal, positive, and definite response meets the mandate of Miranda that "high standards of proof for the waiver of constitutional rights" be set. 384 U.S. 436, 475 (1966).

15. The Miranda doctrine specifically applies only to individuals taken into custody or otherwise deprived of freedom of action in any significant way. See United States v. Mandujano, 96 S. Ct. 1768, 1778 (1976) (Miranda warnings need not be given to a witness called to testify before the grand jury about his alleged criminal activities because no custodial police interrogation was involved).

16. 304 Minn. at 425, 231 N.W.2d at 553.

17. The fifth amendment right against self-incrimination is limited to statements which may lead to criminal prosecution. See U.S. Const. amend. V; State v. Beckey, 291 Minn. 483, 486, 192 N.W.2d 441, 444 (1971). But see Prideaux v. State, Minn. , , , , 247 N.W.2d 386, 389 (1976) ("civil" label will not be allowed to obscure the quasi-criminal consequences of driver's license revocation for driving while intoxicated).


19. See notes 83-88 infra and accompanying text.
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unreliable in civil proceedings as well. The use of adoptive admissions should be restricted severely in all cases, civil and criminal. By limiting its decision to criminal trials, the court left open the possibility of a less restrictive standard in civil cases.

2. Miranda Basis of Decision Limits Rule to Admissions Occurring After Arrest

The reliance by the court on *Miranda* leaves open the standard to be applied in criminal cases when admissions occur before arrest. *Miranda* attempted to guard against self-incrimination after arrest unless the right voluntarily was waived with a full understanding of the constitutional rights involved and accordingly required a warning only if the defendant was subjected to custodial interrogation when he confessed. The *Miranda* Court apparently intended the same restriction to be applied to adoptive admissions because it stressed that silence during police custodial interrogation is not a waiver of fifth amendment rights. Thus, the application of the *Miranda* rule to pre-arrest adoptive admissions is uncertain.

Although *Miranda* does not apply specifically to pre-arrest adoptive admissions, no satisfactory reasons exist for excluding such admissions from the rule. The right against self-incrimination does not apply only when a person is under arrest. It can be invoked whenever a person is asked to incriminate himself. Thus, the same right of silence extends beyond arrest and applies regardless of when the interrogation occurs. In *Duplessie*, the defendant's alleged adoptive admission occurred after arrest. The court, however, did not limit its holding to post-arrest admissions, but rather stated it was announcing guidelines to be applied whenever adoptive admissions “are sought to be introduced as evidence

20. See notes 84-88 infra and accompanying text.
22. 384 U.S. at 475. *Miranda*, it should be noted, applies only to situations of silence or where the privilege is actually claimed. Equivocal responses or conduct may not be included in the *Miranda* protection. See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 161, at 354 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].
23. "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. In any federal proceeding, a witness cannot be compelled to give evidence of a testimonial or communicative nature that might subject him to any criminal prosecution. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2252 (J. McNaughton rev. 1961). The privilege may be invoked in any judicial or quasi-judicial proceeding or investigation which may furnish a lead upon which a criminal prosecution may be based. See, e.g., *McCarthy v. Arndstein*, 266 U.S. 34, 42 (1924) (privilege available to a bankrupt appearing for examination concerning his estate); *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892) (one called before a grand jury can invoke the privilege).
against a defendant in a criminal proceeding." The Minnesota Supreme Court thus apparently did not limit the constitutional protections afforded defendants against involuntary adoptive admissions to post-arrest interrogations.

The scope of the *Miranda*-based restrictions on adoptive admissions may be limited further by the identity of the accuser, because the admission must be in response to accusations by a police officer or prosecutor. *Miranda* is premised on the assumption that the defendant is under police arrest and being questioned by police officers when the admission is made. Whether the *Miranda* rule on adoptive admissions applies to situations where a private party accuses the defendant of committing a crime and the defendant does not deny the accusation is still open to question. Thus, a private party might be allowed to testify to the refusal of the defendant to deny the accusation without fear of constitutional restrictions. The result is troublesome because the lack of probative value is inherent in most adoptive admissions, even if the right against self-incrimination as set forth in *Miranda* does not provide protection against informal conversation while not in custody. By premising an adoptive admissions rule almost solely on constitutional grounds, as was done in *Duplessie*, an uncertainty exists as to the admissibility of adoptive admissions which may be objectionable on merely evidentiary grounds. In *Duplessie*, however, the court did not limit specifi-
cally its standards to admissions during police interrogation, but rather adopted a rule which applies to all adoptive admissions in criminal cases. Thus, the *Duplessie* rule would apparently apply outside the custodial interrogation setting, but the facts in *Duplessie* itself did not require such an expansion; the alleged admission occurred after arrest in the presence of a police officer, and hence the issue as yet is unresolved in Minnesota.

3. The Status of *Miranda*

A final problem with relying solely on *Miranda* as support for an adoptive admissions rule is the possibility that the *Miranda* decision will be overruled. Several authorities have predicted such a ruling, observing that a majority of the Court may be hostile toward the policy of federal courts establishing rules on admissibility of evidence in state court cases. If *Miranda* is overturned, the expressed basis for the decision in *Duplessie* is severely undercut. Thus, a sounder approach would be to base objections to adoptive admissions on evidentiary as well as constitutional grounds and give consideration to the probative value, prejudicial impact, and hearsay characteristics of the testimony.

B. Right to Confrontation Basis

In addition to relying on *Miranda* and the fifth amendment right against self-incrimination, the *Duplessie* court held that the sixth

overcome the inherent hearsay characteristics. See notes 71-103 infra and accompanying text.

31. See 304 Minn. at 425, 231 N.W.2d at 553.

32. The trend of the Court has been to erode steadily the principles of *Miranda*. See, e.g., United States v. Mandujano, 96 S. Ct. 1768, 1778 (1976) (Court refused to expand right to *Miranda* warning to a grand jury witness called to testify about criminal activities in which he may have been involved); Oregon v. Hass, 420 U.S. 714, 722 (1975) (shield provided by *Miranda* does not prohibit confrontation after claiming privilege with prior inconsistent statements used for impeachment purposes); Michigan v. Mosley, 96 S. Ct. 321 (1975) (*Miranda* does not require discontinuance of questioning once right to remain silent has been exercised). But see Brewer v. Williams, 97 S. Ct. 1232 (1977) (the continued validity of the *Miranda* warnings was raised but the Court chose not to address the issue at this time).


34. See notes 71-103 infra and accompanying text.

However, even if the *Miranda* warnings are diluted by the Supreme Court, the Minnesota Supreme Court could require the same warnings based on the Minnesota state constitution to guarantee an accused is aware of his rights. It is likely that the court would do so. See, e.g., State v. Fossen, Minn. 255 N.W.2d 357 (1977).
amendment right to confrontation requires that admissibility of adoptive admissions be limited. In Duplessie, the accusatory statements were made by a juvenile who was arrested with the defendant. The prosecution introduced testimony by a police officer who observed defendant's reaction to those accusations. The court stressed that the primary effect of the officer's testimony was not simply to explain the defendant's reaction to the accusation, but instead to focus on the content of the accuser's statement, thereby seeking to "end run" the defendant's right of confrontation. For that reason, the court held the defendant's sixth amendment right was violated.

The court's ruling in Duplessie concerning the confrontation clause was undoubtedly proper given the facts of the case, but as with the Miranda aspects of Duplessie, the sixth amendment does not apply to all adoptive admissions. It is not applicable in civil cases, although the common-law hearsay rules serve much the same function. More importantly, the sixth amendment does not bar the admissibility of adoptive admissions introduced through testimony by the person who made them.

35. Originally, at common-law, a party accused of a felony was not allowed to call witnesses to contradict testimony offered by the Crown because it would have been derogatory to the royal dignity. Later, witnesses were allowed to be called but they were not placed under oath and their testimony carried little weight until Queen Anne's time when the witnesses were put under oath. One source attributes the right of confrontation to the common-law reaction against the abuses of the Raleigh trial. See F. Heller, The Sixth Amendment to the Constitution of the United States 104 (1951). A crucial element in the trial of Sir Walter Raleigh for treason in 1603 was the statement of Mr. Cobham which implicated Raleigh in a plot to seize the throne. Although Raleigh received a written retraction, indicating that Cobham would testify in his behalf, the court ruled that Raleigh did not have the right to have Cobham called as a witness and Raleigh was convicted. See 9 W. Holdsworth, A History of English Law 216-17, 226-28 (7th ed. rev. 1956); 1 J. Stephen, A History of the Criminal Law of England 333-36 (1883).

The sixth amendment was enacted to preserve the common-law right. Salinger v. United States, 272 U.S. 542, 548 (1926). Until recently, the confrontation clause was not used extensively by the courts to exclude evidence because of its similarity to the hearsay rule. See Fed. R. Evid., art. VIII, Note of Advis. Comm., reprinted in 28 U.S.C.A. at 522-25 (1975). However, the Supreme Court has recognized confrontation as an aspect of procedural due process and the cases have expanded the clause beyond being merely a constitutional embodiment of the hearsay rule. See Gilbert v. California, 388 U.S. 263, 272 n.3 (1967); Parker v. Gladden, 385 U.S. 363, 364 (1966). The confrontation cases emphasize the importance of the personal presence of the witness at the trial and affording the opportunity for cross-examination. McCormick, supra note 22, § 252, at 606.

36. See 304 Minn. at 422, 231 N.W.2d at 551.
37. Id. at 419, 231 N.W.2d at 550.
38. "The prosecution here seeks to 'end run' the constitutional impediments at issue by attempting to categorize defendant's conduct as an adoptive admission." Id. at 424, 231 N.W.2d at 552-53.
39. See notes 94-103 infra and accompanying text. The controlling reason given by the courts for the rejection of hearsay is that allowing such evidence deprives the adversary party of his opportunity to cross-examine the out-of-court declarant at the time of the hearsay statement or conduct. See McCormick, supra note 22, § 245, at 583-84.
the accusation. In that situation, the defendant has a right to confront and cross-examine his accuser, thereby eliminating any confrontation clause objections. The evidence of the defendant's silence or non-committal response to the accusation, however, is still heard by the jury and the subtle implications, that a person who does not deny an accusation must be guilty, are still present.

An additional limitation on the use of the sixth amendment in adoptive admission cases is its possible inapplicability when the testimony actually is being presented only to show defendant's response to the accusation rather than as a method of introducing the content of the accuser's statement. A third party's testimony concerning an absent witness' accusation is inadmissible because the accusing party is not present for cross-examination. However, if a third person testifies as to his observations of the defendant's reaction to the accusation in such a case, then the sixth amendment may not be violated. The accuser's statement thus could be introduced without the right of confrontation on the theory that the truth of the statement is not relevant to the validity of the third person's testimony. Whether the court in Duplessie rejected this type of argument is not clear. The court stressed that the effect of the police officer's testimony was to admit the juvenile's accusation and that the testimony concerning the defendant's reaction was of minimal probative value.

C. Summary

The court's decision in Duplessie was correct based on the particular facts of the case. However, by expressing a general rule premised primarily on constitutional grounds, gaps may occur where the rule may not apply. A sounder approach would be to stress the relevancy problems with adoptive admissions. By expanding the basis of the rule to incorporate the requirements that evidence be probative without being unduly prejudicial and not be hearsay in addition to the requisite constitutional requirements, the Duplessie rule could be applied to cases in which the constitutional rights of an individual are not at issue.

40. If the witness testifying to the defendant's reaction to the incriminating statement is also the accuser, the defendant has the opportunity to cross-examine. However, the witness' statement may still be hearsay. See notes 97-103 infra and accompanying text.

As previously discussed, an unequivocal adoptive admission is a waiver of the sixth amendment right to confrontation. See State v. Duplessie, 304 Minn. at 421, 231 N.W.2d at 551.

41. A witness' testimony is generally admissible if it is based on his personal knowledge of the facts involved. For a discussion of the degree of knowledge necessary, see 2 J. Wigmore, Evidence in Trials at Common Law § 650-64 (3d ed. 1940).

42. See 304 Minn. at 424, 231 N.W.2d at 552-53.
III. COMMON-LAW PROBLEMS WITH ADOPTIVE ADMISSIONS

Historically, the admissibility of adoptive admissions has been restricted on common-law evidentiary grounds as well as constitutional grounds. To be admissible, the adoptive admission must be relevant and the probative value must not be outweighed by the danger of unfair prejudice. In addition, adoptive admissions must not be used to circumvent the hearsay rule.

A. Common-Law Restrictions on Adoptive Admissions

Although the constitutionally-based restrictions on the use of adoptive admissions are of relatively recent vintage, adoptive admissions long have been restricted on common-law evidentiary grounds. The ancient maxim *qui tacet consentire videtur*, silence gives consent, gave rise to the early rule that statements made in a person's presence and not expressly denied were admissible. Several early state supreme court decisions began to realize the evidentiary problems inherent in the doctrine and sought to dislodge its rigidity. In the leading case, *Commonwealth v. Kenney*, the rules governing admissibility of admissions adopted by silence were crystallized. In *Kenney*, the court held that silence did not constitute an adoptive admission to another person's statement unless (1) the statement was heard and understood by the accused person, (2) the truth of the statement was within that person's knowledge, (3) the person was at liberty to speak, and (4) the statement naturally called for a reply.

Unfortunately, subsequent cases failed to adhere closely to the standards of *Kenney*. The requirements for admissibility in criminal proceedings varied from jurisdiction to jurisdiction and even from case to case. The justification for the admittance of testimony as to one's silence is based on either of two theories. The first is the assumption that the party intended to express his assent and the second is the inference of the probable state of belief. *McCormick*, *supra* note 22, § 270, at 652.

See Moore v. Smith, 14 Serg. & Rawl. 388, 392-93 (Pa. 1826) (that silence means consent presupposes a statement that one is bound to deny or admit; "[n]othing can be more dangerous than this kind of evidence"); Vail v. Strong, 10 Vt. 457, 463 (1838) (while silence may raise an inference in certain circumstances, the mere silence of the party creates no evidence one way or the other).


Id. at 237.

The following jurisdictions did not allow silence of one under arrest as an adoptive admission: McCarthy v. United States, 25 F.2d 298 (6th Cir. 1928) (defendant's silence during accusatory statements by companion not admissible because no duty to speak after arrest); Hauger v. United States, 173 F. 54 (4th Cir. 1909) (silence after arrest during interrogation of another party not admissible where defendant may have felt not at liberty...
case within a jurisdiction.\textsuperscript{50} Some courts established a per se rule that silence after an arrest is never an adoptive admission,\textsuperscript{31} while for other courts arrest is only one of the circumstances to be considered.\textsuperscript{52} In

\begin{itemize}
  \item Cook v. People, 56 Colo. 477, 138 P. 756 (1914) (silence not admissible unless circumstances show intent to commit oneself by that silence); State v. Ferrone, 97 Conn. 258, 116 A. 336 (1922) (questions to accused under arrest not admissible if defendant makes no reply); Weightnovel v. State, 46 Fla. 1, 35 So. 856 (1903) (state had burden of showing defendant ten feet away heard accusatory statements); Johnson v. State, 151 Ga. 21, 105 S.E. 603 (1921) (silence by accused during interrogation of third party insufficient evidence to sustain guilty verdict); Diblee v. State, 202 Ind. 571, 177 N.E. 261 (1931) (accusatory statements made in presence of accused who remains silent not competent evidence of admission); State v. Weaver, 57 Iowa 730, 11 N.W. 675 (1882) (failure to deny accusatory statements while in custody not admission); State v. Roberts, 149 La. 657, 89 So. 888 (1921) (accusatory statement and defendant's silence while under arrest inadmissible); State v. Diskin, 34 La. Ann. 919 (1882) (defendant's silence to accusatory statements while in custody not inference of admission); State v. Goldfeder, 242 S.W. 403 (Mo. 1922) (one under arrest under no duty to deny implicative statements); O'Hearn v. State, 79 Neb. 513, 113 N.W. 130 (1907) (defendant's refusal to make a statement while in custody after hearing companions' statements not assent to those statements); People v. Smith, 172 N.Y. 210, 64 N.E. 814 (1902) (in-custody defendant's silence at wife's deathbed not admissible as acquiescence in her conduct); Walker v. State, 37 Ohio App. 540, 175 N.E. 29 (1930) (jury not entitled to consider accused's silence in presence of accusations while under arrest); Vaughan v. State, 7 Okla. Crim. 685, 127 P. 264 (1911) (new trial granted where jury heard accusatory statements to which accused in custody had made no reply); State v. Epstein, 25 R.I. 131, 55 A. 204 (1903) (accused's silence under arrest raises no inference against him); Gardner v. State, 34 S.W. 945 (Tex. Crim. 1896) (evidence of silence in presence of accusatory statements while in custody not admissible).

The following jurisdictions required denial even when the accused was under arrest: Raymond v. State, 154 Ala. 1, 45 So. 895 (1908) (failure to deny accusation while under arrest is made in the nature of confession and is admissible); People v. McNamara, 85 Cal. App. 521, 224 P. 476 (Dist. Ct. App. 1924) (silence where direct, specific accusation is made is a quasi-confession); Territory v. Buick, 27 Hawaii 28 (1923) (in-custody defendant's silence and incomprehensible reply to accusations admissible); Ackerson v. People, 124 Ill. 563, 16 N.E. 847 (1888) (evidence that defendant under arrest hung head and was silent during accusations is implied admission); Diamond v. State, 195 Ind. 285, 144 N.E. 466 (1924) (defendant's silence where circumstances call for a reply to accusation admissible); Pierson v. Commonwealth, 229 Ky. 584, 17 S.W.2d 697 (1929) (direct accusation to defendant in custody calls for denial and silence is implied admission); People v. Courtney, 178 Mich. 137, 144 N.W. 568 (1913) (if circumstances call for reply, in-custody defendant's silence to accusatory statements admissible); State v. Won, 76 Mont. 509, 248 P. 201 (1926) (defendant's silence admissible if defendant heard and understood accusations); State v. Baruth, 47 Wash. 283, 91 P. 977 (1907) (statements made ten feet away from defendant presumed to have been heard); State v. Booker, 68 W. Va. 8, 69 S.E. 295 (1910) (if in similar circumstances an innocent man would deny accusation, defendant's silence admissible).

50. Compare State v. Goldfeder, 242 S.W. 403, 404-05 (Mo. 1922) (guilt will not be inferred from silence after arrest) \textit{with} State v. Murray, 126 Mo. 611, 617, 29 S.W. 700, 702 (1885) (arrest alone will not exclude presumption of adoption by silence).


52. See People v. Simmons, 28 Cal. 2d 699, 716-20, 172 P.2d 18, 27-29 (1946); State v.
addition, in criminal cases, some courts treated a non-committal response or reaction as silence, while others were more lenient in admitting such responses than they were in admitting responses based on silence. The courts also were split in civil cases with some treating admissions less stringently than in criminal cases, while others applied the same standards to both civil and criminal cases.

Prior to Duplessie, the Minnesota Supreme Court had not explicitly delineated the requirements for the admissibility of an adoptive admission. An examination of the early supreme court decisions indicates the requirements of Kenney generally were not stringently followed. The presence of the defendant at the time of the statement was a circumstance given a disproportionate amount of weight; the factfinder was not always required to consider the protective factors mandated by Kenney. Throughout the cases, however, the court emphasized that

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56. See Pulver v. Union Inv. Co., 279 F. 699, 705 (8th Cir. 1922) (admission must be certain, consistent, and definite in breach of contract case); Hudson v. Augustine’s Inc., 72 Ill. App. 225, 236-38, 218 N.E.2d 510, 516 (1966) (an admission of a party to be used against him in negligence suit must be unequivocal, positive, and definite in character).

57. See State v. Postal, 215 Minn. 427, 434-35, 10 N.W.2d 373, 377-78 (1943) (undenied accusations made against defendant of violation of charter provisions admissible); State v. Rediker, 214 Minn. 470, 480, 8 N.W.2d 527, 532 (1943) (accusations that defendant beat his wife made directly to defendant replied to evasively or with silence admissible as admissions); State v. Graham, 176 Minn. 164, 167, 222 N.W. 909, 910 (1929) (defendant’s failure to deny accusations that he was drunk at time in question admission by conduct); State v. Kerr, 162 Minn. 309, 310, 202 N.W. 727, 727 (1925) (undenied accusation made by accident victim to police in defendant’s presence that defendant was drunk admissible); State v. Quirk, 101 Minn. 334, 339, 112 N.W. 409, 411-12 (1907) (defendant’s silence when wife told third party that defendant had shot man who had harmed wife’s daughter admissible); State v. Plym, 43 Minn. 385, 386, 45 N.W. 848, 848 (1890) (Mitchell, J.) (silence in face of charge that defendant had living wife in Sweden an admission).


In 1890, Justice Mitchell held silence, in the face of a charge, was in the nature of an admission of the facts encompassed in that charge. See State v. Plym, 43 Minn. 385, 386, 45 N.W. 848, 848 (1890). Subsequent cases ruled that the jury had to decide whether silence under the circumstances was an admission that the statement was true. See State v. Rediker, 214 Minn. 470, 480, 8 N.W.2d 527, 532 (1943); State v. Brown, 209 Minn. 478, 482-83, 296 N.W. 582, 585 (1941). In State v. Quirk, 101 Minn. 334, 339, 112 N.W. 409, 411-12 (1907), the following jury instruction was ruled to have been proper:
the evidence could not be offered "as proof of a fact asserted but only as a predicate to the showing of the reaction of the accused thereto." 5

In 1941, the Minnesota Supreme Court hinted in dictum that arrest might destroy any basis for an inference of adoption by silence and that silence might not be acquiescence where the statements were not addressed to the defendant. 6 The court, however, admitted that this was still an open question in the state. 7 Twelve years later the court ruled that an adoptive admission was not admissible as substantive evidence because no testimony was presented as to the conduct or response of the defendant to accusatory statements other than that the statements were made in her presence. 8 The court held that without further foundation, the admission of the statements was clearly erroneous. 9 In addition, because the defendant was under arrest at the time, under advice of counsel, and the evidence was unclear whether the statements were directed at the defendant, the court expressed considerable doubt that the statements would be admissible even if more than the mere presence of the defendant had been shown. 10

Although the Minnesota court has not looked kindly upon admissions based on silence, it has treated adoptive admissions with less hostility when the accused person did something other than remain silent. 11 The response "What is this all about?" was held to be admissible as evidence of adoption; the court reasoned that the rule is only for the benefit of those who remain silent. 12 This distinction, however, apparently was restricted by the Duplessie rule which limits the use of adoptive admissions based on non-committal responses as well as those based on si-

Now, it is for you to say whether such statements should be taken as admissions of the defendant on account of his silence and failure to deny them, if you believe that the circumstances were such as to require him to deny them, or whether his failure to deny them was due to his determination not to speak at that time, as it is claimed that he asserted at the time. However, the only circumstance considered by the court on review of a case in which the defendant was involved in an automobile accident was the proximity of the defendant to the policeman when the other accident victim reported that the defendant was drunk. The defendant's mental and physical condition and the physical surroundings were not considered. State v. Kerr, 162 Minn. 309, 310, 202 N.W. 727, 727 (1925). See State v. Gulbrandsen, 238 Minn. 508, 514, 57 N.W.2d 419, 423 (1953).

60. State v. Brown, 209 Minn. 478, 296 N.W. 582 (1941).
61. Id. at 482, 296 N.W. at 585.
62. Id.
63. See State v. Gulbrandsen, 238 Minn. 508, 57 N.W.2d 419 (1953).
64. Id. at 513, 57 N.W.2d at 423.
65. Id. at 514, 57 N.W.2d at 423. The court warned against the possible results if such testimony was admitted. An overzealous prosecutor was envisioned examining witnesses in front of a defendant and building an entire case on hearsay. Id.
67. Id. at 483, 296 N.W. at 585.
ence. Duplessie, however, involved a post-arrest admission which came within the realm of the Miranda decision, while the non-committal response held admissible in the earlier case occurred prior to the defendant's arrest.

B. Relevancy

If the evidence presented does not tend to establish or disprove a material proposition, it is inadmissible because of its lack of probative value. This requirement of relevancy exposes the principal shortcoming of adoptive admissions. The underlying theory of adoptive admissions is that when a person is accused, he would naturally deny the accusation unless he is guilty as charged. This assumption, however, is questionable at best. Silence or a non-committal response to an accusation is explainable by influences which have no relationship to the guilt of an accused person in criminal proceedings or the liability of a person in civil proceedings.

No empirical data exist to explain the probable motivation for silence in the face of an accusation. When accused of a crime, a person might remain silent for several reasons. He may fear any reply will be distorted, misquoted, or unfairly used against him; believe his security is best promoted by his silence; desire not to communicate with his accuser; be unsure of his rights; not want to dignify the accusations with a response; or simply be startled or afraid. Since Miranda, moreover,

68. See 304 Minn. at 424, 231 N.W.2d at 552-53.
69. Id. at 422, 231 N.W.2d at 549-50.
70. See State v. Brown, 209 Minn. 478, 482, 296 N.W. 582, 585 (1941).
71. See Boland v. Morrill, 270 Minn. 86, 98-99, 132 N.W.2d 711, 719 (1965); MINN. R. EVID. 401. For a discussion of relevancy, see MCCORMICK, supra note 22, at § 185.
72. See 4 WEINSTEIN & BERGER, supra note 2, at 801-120.
73. See notes 75-81 infra and accompanying text.
74. See Note, Tacit Criminal Admissions in Light of the Expanding Privilege Against Self-Incrimination, 52 CORNELL L.Q. 335, 342 (1967).
77. See Fowle v. United States, 410 F.2d 48, 51 (9th Cir. 1969); 4 WEINSTEIN & BERGER, supra note 2, at 801-121 n.7.

In his funeral oration on Roscoe Conkling, Robert G. Ingersoll said: "He was maligned, misrepresented and misunderstood, but he would not answer. He was as silent then as he is now—and his silence, better than any form of speech, refuted every charge." George Bernard Shaw said: "Silence is the most perfect
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the defendant's reasons for remaining silent are increased by the commonly-held belief that under Miranda a person has a right to remain silent. Although the decision was based on constitutional grounds, the court in Duplessie seemed cognizant of these factors because its rule apparently bars admissibility of any alleged admission based on the defendant's silence in criminal cases. Duplessie requires the trial court to determine whether the alleged admission was "manifested by conduct or statements which are unequivocal, positive, and definite." The requirement of "conduct or statements" would thus appear to preclude the use of silence, both protecting the defendant's constitutional rights and satisfying the evidentiary requirement of relevancy. The Duplessie rule also is not limited to post-arrest situations as was Miranda. Therefore, silence should never be used against a defendant in a criminal case in Minnesota.

In civil cases, the status of adoptive admissions based on silence in Minnesota is unclear, because the Duplessie rule is limited to criminal cases. The reason for this limitation presumably is that the constitutional right to remain silent and right to confrontation apply only to criminal cases. Even in civil cases, however, silence may not be an indication of liability, and if it is not, then evidence of silence would be of no probative value and thus would be inadmissible on evidentiary grounds. In civil, as well as in criminal, cases a defendant may be motivated to remain silent for many reasons other than admitting wrongdoing. He may be confused, afraid, indignant, timid, or under the belief that to protect himself from liability he should not respond to the accusation. Inquiry into human behavior is difficult. A person's expression of scorn."

The immortal Abraham Lincoln summed up his philosophy on this subject in characteristic fashion: "If I should read much less answer, all the attacks made upon me this shop might as well be closed for any other business."

Id. at 585 n.1, 227 A.2d at 906 n.1. See also Matthew 27: 11-14 (Christ stood mute in the face of Pilate's accusations).


81. It is the common belief that there is a constitutional right to remain silent and few persons realize that the rule of adoptive admissions may be an exception to this right. See Note, Tacit Criminal Admissions in Light of the Expanding Privilege Against Self-Incrimination, 52 CORNELL L.Q. 335, 344 (1967).

82. 304 Minn. at 424, 231 N.W.2d at 553 (emphasis in original).

83. Id.

84. See notes 73-75 supra and accompanying text.

85. However, the constitutional rights of Miranda are not applicable to civil cases. See notes 17-20 supra and accompanying text.

86. See notes 75-81 supra and accompanying text.

87. See Note, Tacit Criminal Admissions in Light of the Expanding Privilege Against Self-Incrimination, 52 CORNELL L.Q. 335, 342 (1967).
silence in most circumstances is so ambiguous, and can be justified by such a multitude of explanations, that it is almost impossible to determine whether his silence was an expression of agreement or disagreement with his accuser's statement. Thus, his silence lacks probative value. The Duplessie rule, therefore, should not be limited to criminal cases but should be applied to bar admissibility of admissions based on silence or equivocal conduct regardless of the nature of the proceeding.

The Duplessie court treated admissions based on actions or statements differently from those based on silence, allowing the former to be admitted into evidence if they are "unequivocal, positive, and definite." Because of the unlimited variety of statements or actions possible in response to an accusation, the Duplessie prohibition against the use of silence and equivocal statements is sound. If the Duplessie rule is followed in both criminal and civil cases, the major problems with adoptive admissions should be eliminated in Minnesota.

C. Prejudicial Impact

Even though evidence of an adoptive admission may satisfy the relevancy requirement, it nonetheless should be excluded if its probative value is outweighed by the danger of unfair prejudice. The probative value of the admission must therefore be balanced against the prejudicial harm likely to result from its admission. Adoptive admissions are peculiarly susceptible to unfair prejudicial impact. Of primary concern is the content of the accuser's statement, which may be both incriminating and inflammatory. If the defendant's response to the accusation is not highly probative, then admission of the accuser's statement might unfairly prejudice the defendant. Even if the jury is instructed to consider the statement only as a basis for judging the reaction of the defendant, the members of the jury may be unable to remove the statement from their minds during deliberations and may improperly consider the statement as proof of the matters asserted. A clear limiting instruction is essential when admitting relevant adoptive admissions, and if the content of the accusation is especially inflammatory or if the probative value of the defendant's reaction to the accusation is weak, then the evidence should be excluded.

Although the constitutional requirements were the primary basis for

89. MINN. R. EVID. 403, effective July 1, 1977, provides in pertinent part that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice... or misleading the jury... ."
92. See 4 WEINSTEIN & BERGER, supra note 2, at 801-125 to -126.
the opinion, in *Duplessie* the court also seemed to be cognizant of the possible prejudicial impact of adoptive admissions, stressing that the probative value of the defendant’s conduct was minimal while the effect of the accuser’s statement was great. The court thus balanced the value of the alleged admission with the impact of the content of the accuser’s statement and decided that the evidence should not have been heard by the factfinder. This balancing approach is proper and should be utilized in all adoptive admission cases whether or not the constitutional protections are available.

**D. Hearsay**

The hearsay rule, as it developed at common-law, excludes statements made out of court which are offered as proof of the facts asserted. Rule 801(a) of the new Minnesota Rules of Evidence includes in the definition of “statement” the “nonverbal conduct of a person, if it is intended by him as an assertion.” Thus the prohibition against the introduction of hearsay applies to nonverbal conduct that is intended as an assertion. Nonverbal conduct that is not intended as an assertion is not a statement and is therefore not affected by the hearsay rule. The key to the definition is that nothing is an assertion unless it is intended to be one.

Nonverbal conduct, such as the act of identifying a suspect in a lineup by pointing is clearly the equivalent of words and assertive in nature, and thus is governed by the hearsay rule. However, nonverbal conduct may be offered as evidence that the person acted as he did because of a belief in the existence of the condition sought to be proved, from which

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93. 304 Minn. at 424, 231 N.W.2d at 553.
94. Prior to the end of the sixteenth century, testimony attributable to hearsay was received without question. As objections to such practice grew, hearsay was limited to admissions only when offered in support of non-hearsay testimony. By the middle of the eighteenth century courts were generally rejecting hearsay, citing a lack of oath and lack of opportunity to confront witnesses as the reasons for the rejection. The hearsay rule had been accepted at common-law for almost one hundred years before the Bill of Rights was drafted. The Bill of Rights contained a clause requiring that in criminal cases the accused be confronted with the witnesses against him. For a historical development of the hearsay rule, see 5 J. Wigmore, *Evidence in Trials at Common Law* §§ 1364-65 (J. Chadbourn rev. 1974). Rule 802 of the new rules of evidence reinforces the principles of the hearsay rule: “Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by the Legislature.” MINN. R. EVID. 802.
95. MINN. R. EVID. 801(a)(2).
96. MINN. R. EVID. 801(a), comment.
97. See Fed. R. Evid. 801(a), Note of Advis. Comm., *reprinted in* 28 U.S.C.A. at 527-28 (1975). The preliminary comment to the Minnesota Rules of Evidence indicates that because the recommended rules were modeled after the federal rules, the Minnesota bar should look to the federal advisory committee notes for guidance. See MINN. R. EVID., preliminary comment.
belief the existence of the condition may be inferred. For example, a party's silence in response to accusatory statements of fault at the scene of an auto accident may not be intended by him as an admission of fault, but nevertheless his silence may be deemed to reflect an awareness of fault.

Thus, the hearsay rule is not violated if the testimony is only as to the defendant's nonassertive conduct and the party testifying was also an observer. Equivocal adoptive admissions, as nonassertive conduct, therefore could be used as a method of bypassing the hearsay rule and achieving the admission of a damaging accusation without granting the defendant the opportunity to confront and cross-examine the accuser. The admission is not being admitted to prove the substance of the accuser's statement, but rather as a predicate to the showing of the defendant's reaction to the statement. In other words, it is the nonassertive conduct or reaction of the accused in view of the statements that may be admissible; the statements alone are not admissible as proof of their substance.

However, it is difficult to justify the distinction which allows testimony as to the nonassertive conduct. Where such conduct is offered as proof of some fact, it is an implied assertion of the actor's beliefs regarding such fact and hence is just as objectionable as an express assertion.

In addition, the jury may be prejudiced by the evidence of the accuser's statement. To determine the proper interpretation of the defendant's silence or failure to deny an incriminating statement, the jury must consider closely the content of the statement made by the accuser. In so doing it may be difficult for the jury to disregard the content

99. State v. Rediker, 214 Minn. 470, 480, 8 N.W.2d 527, 532 (1943).
100. State v. Gulbrandsen, 238 Minn. 508, 513-14, 57 N.W.2d 419, 423 (1953). Originally adoptive admissions were recognized as an exception to the hearsay rule. The Model Code of Evidence, adopted and promulgated by the American Law Institute, proposed that adoptive admissions be an exception to the hearsay rule and incorporated this position in rule 507: "Evidence of a hearsay statement is admissible against a party to the action if the judge finds that . . . (b) the party with knowledge of the content of the statement by words or other conduct manifested his adoption or approval of the statement or his belief in its truth." Model Code of Evidence rule 507 (1942).

However, the new Minnesota rules of evidence follow the common-law tradition, adopt the position that adoptive admissions are not hearsay, and exclude them from the definition of hearsay. See Minn. R. Evid. 801(d)(2)(B).

102. See notes 89-93 supra and accompanying text.
103. While the defendant's response to the accusatory statement is excluded from the definition of hearsay, it is necessary to admit the inculpatory statement to explain the reaction. This is true even though by itself the statement would be excluded as hearsay. See Comment, Adoptive Admissions, Arrest and the Privilege Against Self-Incrimination:
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of the statement. Adoptive admissions by their nature require an awareness by the factfinder of both the content of the statement and the defendant's response, and the defendant may be prejudiced if the unavailable source of the accusation lends such a great deal of credibility that the jury is swayed. For example, if the witness testified that a priest accused the defendant of wrongdoing, the jury may be heavily influenced by the occupation of the accuser and accept the content of the statement.

The court in Duplessie faced the hearsay problem, but did so under the guise of the confrontation clause. The court held that the characterization of otherwise hearsay testimony as an adoptive admission is improper if the primary effect of the testimony is to admit damaging hearsay accusations and the defendant's reaction is of little probative value. Once again, although basing the opinion on constitutional grounds, the court was sensitive to the hearsay problems inherent with adoptive admissions. This concern should be followed by the courts in all adoptive admissions cases, whether or not the sixth amendment confrontation clause is at issue.

V. CONCLUSION

In Duplessie, the Minnesota Supreme Court promulgated the rule that adoptive admissions are admissible only if they are unequivocal, positive, and definite. The court's decision was based primarily on constitutional grounds and its rule was limited to criminal cases. The Duplessie rule expresses a valid concern for the use of adoptive admissions and represents a solution to the problems they raise in criminal cases. Although basing its decision on the nature of the defendant's response, the court also weighed the probative value of the statement and cautioned against using such testimony if the primary effect was to admit damaging hearsay accusations. Thus, a two-part test can be developed which deals with the constitutional problems and the problems of relevancy, prejudice, and hearsay and which is applicable to both criminal and civil proceedings. The traditional common-law rules governing relevancy, prejudice, and hearsay, which were mentioned by the court, would provide the first part of the test for adoptive admissions in both criminal and civil proceedings. In criminal cases, the second part of the test must also be satisfied—an unequivocal, positive, and definite adoption is necessary to evidence a waiver of constitutional rights. Thus, both the probative value and the nature of adoptive admissions must be examined to determine their admissibility.


104. See notes 35-42 supra and accompanying text.