

THE TALKING DEAD: SHOULD DECEDENTS' STATEMENTS FALL UNDER RULE 801(D)(2)(A)?

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There is a circuit split as to whether a decedent's statements can be entered into evidence under the exclusion from hearsay provided for party-opponent statements under Federal Rule of Evidence 801(d)(2)(A). The courts disagree as to the best characterization of decedents' statements—whether they should be understood as privity-based admissions that, while admissible under the common law, are no longer admissible under the Federal Rules of Evidence, or if the decedent should be considered a party to the litigation, in which case the statements are admissible under Rule 801(d)(2)(A). This Note first discusses the circuit split by explaining the concept of privity-based admissions, conducting a statutory interpretation of the Federal Rules to determine if the enactment of the rules abrogated the common law admissibility of privity-based admissions, and analyzing whether it is appropriate for a decedent to be considered a party to the litigation. The Note then discusses policy reasons for a rule favoring exclusion—namely, the concerns about perjury and ensuring equitable treatment of the estate that gave rise to states' Dead Man's acts, and the fact that there may be other rules under which to admit the evidence. The Note concludes that a rule favoring admissibility is preferable because the claims would not be in front of the court but for the decedent, and a rule favoring admissibility will lead to more consistent outcomes.

INTRODUCTION	1821
I. THE SPLIT AUTHORITY: PRIVACY OR PARTY	1824
A. <i>Privity-Based Admissions at Common Law</i>	1825
B. <i>Are Privity-Based Admissions Allowed Under the Federal Rules of Evidence?</i>	1828
C. <i>Can a Nonnamed Party Be Considered a Party to the Litigation?</i>	1833
II. POLICY ARGUMENTS AGAINST ADMITTING DECEDENTS' STATEMENTS AS PARTY-OPPONENT STATEMENTS	1836

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A. <i>Policy Considerations Driving States' Dead Man's Acts</i>	1837
B. <i>There Are Other Ways to Admit the Evidence</i>	1840
1. <i>Rule 804(b)(3): Statements Against Interest</i>	1840
2. <i>Rule 807: Residual Exception</i>	1843
III. PREVAILING POLICY REASONS FOR ADMITTING DECEDENT STATEMENTS AS PARTY-OPPONENT STATEMENTS	1846
A. <i>The Claim Is the Decedent's Chose in Action</i>	1847
B. <i>A Rule of Admissibility Leads to Consistency in Verdicts</i>	1849
CONCLUSION	1852

INTRODUCTION

A woman is driving a commercial truck down a winding road. Something goes wrong, and the truck jackknifes and catches fire. The woman survives the accident, but she is severely burned. Nine days later she dies in the hospital from the injuries she sustained in the accident. The woman's widowed husband is convinced that the fire that caused his wife's death was the result of a defect in the truck's design, so as administrator of his wife's estate, he brings a wrongful death product liability lawsuit against the truck's manufacturer on her behalf.

During the trial, the defendant manufacturing company calls the decedent's brother and wants to introduce into evidence a conversation he and his sister had during the decedent's stay in the hospital. During that conversation, the decedent purportedly told her brother that prior to the accident, her clothing had somehow caught fire, and in her effort to put it out, she lost control of her truck. The widowed husband's attorney objects to the testimony as hearsay, and the defendant truck manufacturer rebuts this objection by calling the court's attention to Federal Rule of Evidence 801(d)(2)(A), which says that statements made by a party opponent that are offered against that opposing party are not hearsay.¹ It is quite likely—for the sake of argument, let us presume it is dispositive—that if this evidence is admitted, the defendant will not be found liable, but if it is excluded, the defendant will be found liable. This issue presents two interrelated questions: Is the decedent a party to this action? Should the court allow the evidence under 801(d)(2)(A)?²

¹ FED. R. EVID. 801(d)(2)(A).

² The facts of this hypothetical are representative of *Huff v. White Motor Corp.*, 609 F.2d 286, 289–91 (7th Cir. 1979). In *Huff*, “[t]he district court excluded this testimony as

The Federal Rules of Evidence are a complex set of statutory rules.³ These rules can be difficult to understand, and none more so than the definition of hearsay and the exceptions to the prohibition of admitting hearsay into evidence.⁴ Parties must determine if the subject matter being discussed is in fact hearsay as defined by the rules, and potentially how many levels of hearsay are involved—such that every level either is not hearsay or meets an exception to the hearsay prohibition.⁵ This analysis can get confusing even when the facts and procedural circumstances are relatively straightforward; adding unusual facts and procedural postures can make the correct application of the rules seemingly opaque. Given the standard by which trial-level evidentiary decisions are reviewed on appeal, it makes little sense for potential appellants to challenge the trial-level rulings unless changes to these rulings would be dispositive on the trial's outcome.⁶ This pro-

hearsay, rejecting defendant's argument that Huff's statement was an admission under Rule 801(d)(2) or admissible under the residual exception, Rules 803(24) and 804(b)(5)." *Id.* at 290. The Seventh Circuit agreed with the district court that the testimony was inadmissible under Rule 801(d)(2). *Id.* at 290–91. But the court found that the testimony should have been allowed under the residual exception—currently styled Rule 807—subject to a determination by the trial court on remand that the decedent "possessed the requisite mental capacity" when the statements were made. *Id.* at 294.

³ The Federal Rules of Evidence were first enacted on January 2, 1975. An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified as amended at 28 U.S.C. app. at 347–434 (2012)). Prior to this act of Congress, the evidentiary rules were governed by common law. *See Huff*, 609 F.2d at 290 (recognizing that the Federal Rules of Evidence were controlling and altered the former common law evidentiary rules).

⁴ *See* Richard A. Posner, *On Hearsay*, 84 *FORDHAM L. REV.* 1465, 1467 (2016) ("The hearsay rule, with its multitude of exceptions, is too complex."); *CLE Mastering Hearsay and Hearsay Exceptions*, HARTFORD CTY. BAR ASS'N, http://hartfordbar.org/th_event/cle-mastering-hearsay-and-hearsay-exceptions/ (last visited Sept. 29, 2018) ("The rule against hearsay seems simple enough, but is confusing to understand and is difficult to apply, not to mention peppered with exceptions.").

⁵ *See* FED. R. EVID. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."); *Estate of Shafer v. Comm'r*, 749 F.2d 1216, 1220 (6th Cir. 1984) ("In order to be admissible, both levels of [hearsay] statements within the affidavits must be excluded from the hearsay definition.").

⁶ On appeal, evidentiary rulings are generally subject to an abuse of discretion review standard. *See* *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) ("We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings."). *But see* Matthew J. Peterson, *Discretion Abused: Reinterpreting the Appellate Standard of Review for Hearsay*, 6 *CHARLOTTE L. REV.* 145, 146–47 (2015) (discussing that there is a circuit split between reviewing hearsay objections under the abuse of discretion or reviewing these objections *de novo*). The abuse of discretion standard is highly deferential. *See* *Joiner*, 522 U.S. at 142 ("[C]ases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous." (quoting *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879))). Even if an appellant can overcome this standard of review, the court then conducts a harmless error review. *See* *United States v. Owens*, 789

cedural hurdle, likely leading to the strategic decision not to contest evidentiary rulings that are not dispositive, presumably leads to relatively fewer appellate decisions analyzing the correct application of these rules. Practitioners and trial-level judges alike are often left with little guidance and clarification. And given both the lack of clarity and the infrequency of evidentiary appeals, there is bound to be split authority in the exceptional, “gray-area” cases.

Such is the case with whether decedents can be considered party-opponents for purposes of Federal Rule of Evidence 801(d)(2)(A).⁷ Given the unique circumstances that must present themselves for this question to be at issue in the first instance, it is of little surprise that there is quite scant case law addressing this particular issue.⁸ The limited number of written opinions that have addressed the subject of decedent statements in contexts where the claim has been brought by the estate—either as wrongful death claims⁹ or other claims related to the settlement of the decedent’s estate¹⁰—have split as to whether the decedent is properly characterized as being in privity with the named party (the estate), or whether the decedent is a party in interest.¹¹ This split leads to the courts either analyzing the statements as privity-based admissions—based on a technical (or formalistic) approach as to who is considered a party—and therefore not admissible under

F.2d 750, 757 (9th Cir. 1986) (ruling that testimony was erroneously admitted under a hearsay exception, but then finding that the error was harmless), *rev’d*, 484 U.S. 554 (1988). Given the difficulty appellants face in having trial-level evidentiary rulings overturned based on this bifurcated review process, little is gained from challenging the trial-level rulings unless overturning the evidentiary ruling would be dispositive to the case’s outcome.

⁷ See *Ervine v. Desert View Reg’l Med. Ctr. Holdings LLC*, No. 2:10-CV-1494 JCM, 2011 WL 6139532, at *3–4 (D. Nev. Dec. 8, 2011) (recognizing the split authority on whether a decedent is a party for purposes of Rule 801(d)(2)(A) when an action is brought by the decedent’s estate on behalf of the decedent), *vacated in part, rev’d in part*, 753 F.3d 862 (9th Cir. 2014).

⁸ See 30B MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 7019 (Interim ed. 2011) (finding only four circuit court and two district court decisions that dealt with the decedent as a potential party).

⁹ See *Phillips v. Grady Cty. Bd. of Cty. Comm’rs*, 92 F. App’x 692 (10th Cir. 2004) (wrongful death claim); *Huff v. White Motor Corp.*, 609 F.2d 286, 289 (7th Cir. 1979) (same); *Ponzini v. Monroe Cty.*, No. 3:11-CV-00413, slip op. at 6–7 (M.D. Pa. Aug. 24, 2016) (same); *In re Cornfield*, 365 F. Supp. 2d 271, 277 (E.D.N.Y. 2004) (same), *aff’d*, 156 F. App’x 343 (2d Cir. 2005); *Schroeder v. de Bertolo*, 942 F. Supp. 72 (D.P.R. 1996) (same).

¹⁰ See *Estate of Shafer*, 749 F.2d 1216 (deciding an evidentiary issue related to the estate tax owed by the beneficiaries of the decedent’s estate).

¹¹ Compare *Huff*, 609 F.2d at 290–91 (discussing the decedent’s statements under the theory of privity-based admissions and declining to allow them under Rule 801(d)(2)(A)), *Ponzini*, slip op. at 6–7 (same), and *In re Cornfield*, 365 F. Supp. 2d at 277 (same), with *Phillips*, 92 F. App’x at 696 (stating that the decedent was a party through her estate), *Estate of Shafer*, 749 F.2d at 1220 (same), and *Schroeder*, 942 F. Supp. at 78 (same).

Rule 801(d)(2)(A),¹² or as having been made by a party to the case—based on a more contextual (or functional) approach to who is considered a party—and therefore admissible as a party-opponent statement.¹³

This Note argues that because the claims under which this issue arises flow from the decedent's rights and because of the need to ensure consistency in verdicts, the statements of a decedent who was either a party when the action was instituted or would be the proper party if alive should be admitted under Rule 801(d)(2)(A). This Note proceeds in three parts. Part I discusses the differing rationales that have created the circuit split: Are the decedent's statements privity-based admissions or is the decedent a party? In assessing this split, Part I discusses the nature of privity-based admissions, their admissibility at common law, and their admissibility under Federal Rule of Evidence 801(d)(2)(A). Part I also discusses the functional versus formalistic approach the courts have taken when assessing whether the decedent is a party. Part II addresses policy arguments against allowing decedent statements to be admitted as party-opponent statements. First, Section II.A examines state-law Dead Man's acts and the motivating policy concerns. Then, Section II.B assesses other ways in which these statements could be introduced: as Rule 804(b)(3) statements against interest¹⁴ or under the Rule 807 residual exception.¹⁵ Finally, Part III discusses the arguments for admitting a decedent's statements under Rule 801(d)(2)(A)—namely, that the claim is the decedent's chose in action¹⁶ and allowing the statements will result in more consistent, predictable outcomes—and asserts that these reasons favor a rule of admissibility.

I

THE SPLIT AUTHORITY: PRIVACY OR PARTY

The distinguishing feature between courts' analyses as to whether the decedent's statements should be admitted as party-opponent statements boils down to whether the court characterizes the decedent as a party to the litigation or considers the decedent's statements to be

¹² *Huff*, 609 F.2d at 290–91 (discussing the decedent's statements under the theory of privity-based admissions and declining to allow them under Rule 801(d)(2)(A)); *Ponzini*, slip op. at 6–7 (same); *In re Cornfield*, 365 F. Supp. 2d at 277 (same).

¹³ *Phillips*, 92 F. App'x at 696 (stating that the decedent was a party through her estate); *Estate of Shafer*, 749 F.2d at 1220 (same); *Schroeder*, 942 F. Supp. at 78 (same).

¹⁴ See FED. R. EVID. 804(b)(3).

¹⁵ See FED. R. EVID. 807.

¹⁶ A chose in action, in this case, is defined as a "proprietary right in personam, such as . . . a claim for damages in tort." *Chose in Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

privity-based admissions made by a predecessor in interest.¹⁷ Privity-based admissions are statements that, while made by a nonparty to the litigation, are held to be admissions made by a party to the litigation.¹⁸ For example, in *Huff v. White Motor Corp.*, the defendants argued that statements made by the decedent, Mr. Jesse Huff, to the plaintiff's cousin's husband, Mr. Melvin Myles, were privity-based admissions, and, therefore, admissible against the plaintiff, Mrs. Helen Huff, as party-opponent admissions.¹⁹ The court rejected this argument,²⁰ initiating the distinction that has driven this circuit split. But why did the defendant argue these statements as privity-based admissions instead of arguing that Mr. Huff should really have been considered a party? And why does this distinction matter? To understand the answers to these questions, one must first look at how privity-based admissions were treated under the common law rules of evidence and then look at how the enactment of the Federal Rules of Evidence affected that common law treatment.

A. Privity-Based Admissions at Common Law

Privity is “[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property).”²¹ This “mutuality of interest”²² typically arises in a number of legal contexts, such as contracts, estates beneficiaries, property, and commercial transactions.²³ In the cases that have declined to allow a decedent's statements under Rule 801(d)(2)(A), the privity is said to exist between the decedent and the estate, as the estate is the successor in interest²⁴ of the decedent's claim.²⁵

¹⁷ See *supra* note 11.

¹⁸ CHARLES TILFORD McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 268 (2d ed. 1972).

¹⁹ 609 F.2d 286, 290 (7th Cir. 1979). For purposes of clarification, the Federal Rules of Evidence originally styled “[a]n opposing party's statements” as “[a]dmissions by [a] party-opponent.” See *infra* note 26.

²⁰ *Huff*, 609 F.2d at 291.

²¹ *Privity*, BLACK'S LAW DICTIONARY, *supra* note 16.

²² *Id.*

²³ The various sub definitions in Black's Law Dictionary illustrate the various legal contexts in which privity usually arises. *Id.*

²⁴ *Successor in Interest*, BLACK'S LAW DICTIONARY, *supra* note 16 (“Someone who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance.”).

²⁵ See *Huff*, 609 F.2d at 290–91 (discussing the issue of privity between the decedent and his estate); *In re Cornfield*, 365 F. Supp. 2d 271, 277 (E.D.N.Y. 2004) (same), *aff'd*, 156 F. App'x 343 (2d Cir. 2005).

Originally, the Federal Rules of Evidence styled “[a]n opposing party’s statements” as “[a]dmissions by [a] party-opponent.”²⁶ The idea that admissions could be used against a party had a long history in common law. In his famous treatise on the common law rules of evidence, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, John Henry Wigmore explained that admissions “pass[ed] the gauntlet of the Hearsay rule.”²⁷ Wigmore further explained that such admissions were not covered by the rule against hearsay because of the adversarial nature of the process:

[T]he party’s testimonial utterances . . . pass the [Hearsay] gauntlet when they are offered *against* him as opponent, because he himself is in that case the only one to invoke the Hearsay rule and because he *does not need to cross-examine himself*. . . . [T]he Hearsay rule is satisfied; . . . he now as opponent has the full opportunity to put himself on the stand and explain his former assertion. The Hearsay rule, therefore, is not a ground of objection when an opponent’s assertions are offered *against* him; in such case, his assertions are termed Admissions.²⁸

Even though a decedent does not have the opportunity to take the stand, prior to the enactment of the Federal Rules of Evidence, as noted by the *Huff* court, privity-based admissions were also generally admissible under the common law rules of evidence.²⁹ This common law rule was also explained in Wigmore’s treatise.³⁰ In his treatise, Wigmore cited excerpts from three court opinions in which “both

²⁶ Compare An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926, 1939 (1975) (codified as amended at 28 U.S.C. app. at 347-434 (2012) (titled Rule 801(d)(2) “Admission by party-opponent”), with FED. R. EVID. 801(d)(2) (“An Opposing Party’s Statement”), and FED. R. EVID. 801 advisory committee’s note to 2011 amendments (“Statements falling under the hearsay exclusion . . . are no longer referred to as ‘admissions’ The term ‘admissions’ is confusing because not all statements covered by the exclusion are admissions in the colloquial sense No change in application of the exclusion is intended.”).

²⁷ 2 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 1048, at 505 (2d ed. 1923). John Henry Wigmore was the preeminent expert in the law of evidence prior to the adoption of the Federal Rules of Evidence. His treatise, also commonly known as *Wigmore on Evidence*, is still cited today.

²⁸ *Id.*; see also Edmund M. Morgan, *Admissions*, 12 WASH. L. REV. & ST. B.J. 181, 182 (1937) (conceding that admissions are receivable and “can be explained only as a corollary of our adversary system of litigation”).

²⁹ See *Huff*, 609 F.2d at 290 (“At common law, privity-based admissions have been ‘generally accepted by the courts’” (quoting McCORMICK, *supra* note 18, at 647)); see also *Savarese v. Agriss*, 883 F.2d 1194, 1200-01 (3d Cir. 1989) (rejecting defendants’ argument “that since Bogen is now deceased, the admission into evidence of his statements is not justified as it cannot be accomplished within an ‘adversary’ context” (quoting FED. R. EVID. 801(d)(2) advisory committee’s note on proposed rules)).

³⁰ WIGMORE, *supra* note 27, § 1080, at 594-95.

[the] principle and policy [of admitting statements based on privity of title] are lucidly expounded from various points of view.”³¹ The third excerpt mentions the possibility of admitting a decedent’s statements:

[The owner’s] estate or interest in the same property, afterwards coming to another, . . . by any kind of transfer, whether it be the act of law or the act of the parties, whether the subject of the transfer be . . . choses in possession or *choses in action*, the successor is said to claim under the former owner; and whatever he may have said affecting his own rights, before departing with his interest, is evidence equally admissible against his successor [I]t makes no difference whether the declarant be alive or dead; . . . his admissions are receivable. This doctrine proceeds upon the idea that the present claimant stands in the place of the person from whom his title is derived; . . . [T]he law will not allow third persons to be deprived of that evidence by any act of transferring the right to another.³²

As Wigmore made clear through choosing to cite this passage, the policy of admitting privity-based admissions was to ensure that parties could not escape the statements made by a predecessor in interest simply by transferring ownership of property, including choses in action. Finally, Wigmore went on to discuss decedents specifically, stating, “No modern Court doubts that a decedent, whose rights are transmitted intact to his successor, is a person whose admissions are receivable against a party claiming the decedent’s rights as heir, executor, or administrator.”³³ Thus, prior to the Federal Rules of Evidence, the distinction between statements made by a party opponent and privity-based admissions was irrelevant: both types of statements were admissions that satisfied exceptions to the rules against hearsay.³⁴

³¹ *Id.* at 594.

³² *Id.* at 595 (emphasis added) (quoting ESEK COWEN & NICHOLAS HILL, JR., NOTES TO PHILLIPPS’ TREATISE ON THE LAW OF EVIDENCE 644–45 n.481 (Gould, Banks & Co. 2d ed. 1843)). *But see* Morgan, *supra* note 28, at 196–200 (criticizing Wigmore’s justification of vicarious admissions based on privity of title).

³³ WIGMORE, *supra* note 27, § 1081, at 598 (emphasis omitted). *But see id.* (discussing that a statutory wrongful death action is “of an anomalous nature; in some features it is an action for a surviving claim of the deceased, while in others it is an action for an injury to the dependent relatives; there is therefore some ground for holding that the deceased’s admissions are not receivable”). The *Huff* court refused to base the party-opponent statement admissibility decision on the fact that state law may dictate whether a wrongful death claim may either be derivative—essentially, a claim flowing through the deceased—or not derivative and thus held by the surviving family members. *See Huff*, 609 F.2d at 290 (“We agree with McCormick that [whether or not the action is derivative] should not be controlling, and that the exclusion by ‘some courts’ of statements of the deceased in wrongful death cases because the action is not ‘derivative’ is based on ‘a hypertechnical concept of privity.’” (quoting McCORMICK, *supra* note 18, at 648 n.51)).

³⁴ The historical admissibility of privity-based admissions at common law likely drove the defense’s decision to argue that Mr. Huff’s statements to Mr. Myles were admissible

But then in the 1960s, the federal courts decided to establish a standard set of rules to govern evidentiary decisions in federal courts, culminating in the enactment of the Federal Rules of Evidence in 1975.³⁵ With the passage of the Federal Rules of Evidence, the common law rules of evidence were replaced with statutory rules that governed district court decision making.³⁶ And at that point, the importance of the distinction between party-opponent statements and privity-based admissions emerged. This distinction raises two questions: Is the decedent a party, and if not, are privity-based admissions covered by Rule 801(d)(2)(A)? The answers to both questions depend on whether courts take a strict, technical, and textual approach, or whether courts look at the practical effects of interpreting the statutory rules.

B. Are Privity-Based Admissions Allowed Under the Federal Rules of Evidence?

We start by analyzing whether privity-based admissions are covered by Rule 801(d)(2)(A), because if they are, the distinction between the decedent being considered a party and the decedent's statements being characterized as privity-based admissions is of little practical consequence. This determination requires a statutory interpretation of Rule 801(d)(2)(A), which involves analyzing the plain meaning of the text, the language used in other parts of the Federal Rules of Evidence, and the advisory committee's notes to Rule 801 to glean their intent when writing the rule, as well as Congress's understanding of the rule's meaning at the time of enactment.

Rule 801, which provides definitions that apply to the rest of Article VIII, also sets forth statements excluded from the prohibition against hearsay.³⁷ Rule 801(d)(2) lists two main subheadings of statements that are not considered hearsay: "(1) A Declarant-Witness's

under Rule 801(d)(2)(A) under this theory instead of arguing that Mr. Huff himself should be considered a party to the action.

³⁵ Josh Camson, *The Federal Rules of Evidence: Half a Century in the Making*, PROOF: A.B.A. SEC. LITIG., Spring 2010, at 1, 1.

³⁶ See An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified as amended at 28 U.S.C. app. at 347-434 (2012)) ("[The Federal Rules of Evidence] apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice . . .").

³⁷ See FED. R. EVID. 801 (defining the terms statement, declarant, and hearsay in subsection (a)-(c) and providing a list of types of statements that are excluded from being considered hearsay).

Prior Statement”³⁸ and “(2) An Opposing Party’s Statement.”³⁹ Rule 801(d)(2) in turn lists five categories of opposing party statements:

(2) *An Opposing Party’s Statement*. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party’s conspirator during and in furtherance of the conspiracy.⁴⁰

As the text indicates, there is no explicit mention of statements made by a nonparty solely on the basis of privity, such as a predecessor or successor in interest.⁴¹ Interestingly, all the other types of statements Wigmore discusses as being admissions not subject to the hearsay rule are present in Rule 801(d)(2), with the notable exception of privity-based admissions.⁴² This would seem to imply that Congress intentionally abrogated the common law rule allowing privity-based admissions, as all other types of admissions allowed at common law are explicitly mentioned.⁴³

Another section of the Federal Rules of Evidence buttresses the interpretation that Congress intentionally abrogated the common law rule favoring admitting privity-based admissions. Federal Rules of Evidence Article V covers privileges generally, including attorney-client privilege.⁴⁴ Rule 501 explicitly mentions and incorporates the common law rules of evidence, stating, “The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules pre-

³⁸ FED. R. EVID. 801(d)(1).

³⁹ FED. R. EVID. 801(d)(2).

⁴⁰ FED. R. EVID. 801(d)(2).

⁴¹ See *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979) (“Privity-based admissions . . . are not among the specifically defined kinds of admissions that despite Rule 801(c) are declared not to be hearsay in Rule 801(d)(2).”).

⁴² See WIGMORE, *supra* note 27 (discussing admissions that appear in Rule 801(d)(2) as well as privity-based admissions, which do not appear in Rule 801(d)(2)).

⁴³ This interpretation is based on the *expressio unius est exclusio alterius* canon of statutory interpretation—“the principle that when a statutory provision explicitly expresses or includes particular things, other things are implicitly excluded.” JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 208 (2d ed. 2013).

⁴⁴ FED. R. EVID. art. V.

scribed by the Supreme Court.”⁴⁵ The express adoption of the common law rules governing privilege implies that other rules that do not expressly mention the common law have abrogated such common law rules.⁴⁶

Similarly, Rule 804(b)(1)(B) provides further support that Congress’s omission of privity-based admissions in Rule 801(d)(2)(A) was intentional. Rule 804(b)(1)(B) allows former testimony given under oath to be admitted “against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.”⁴⁷ Similar to the party-opponent statement rule, the former testimony rule allows the adverse party to offer the evidence.⁴⁸ Unlike Rule 801(d)(2)(A), however, Rule 804(b)(1)(B) specifically includes the term “predecessor-in-interest” when detailing when former testimony will be allowed as an exception to the hearsay rule.⁴⁹ The express inclusion of the predecessor-in-interest phrase in Rule 804(b)(1)(B) implies that the omission of any similar phrase in Rule 801(d)(2)(A) was intentional and meant to exclude privity-based admissions from the scope of the Rule 801(d)(2)(A) hearsay exclusion.

A counterargument to interpreting that the Federal Rules of Evidence abrogated the common law admissibility of privity-based admissions is that this interpretation violates the anti-derogation rule—the canon of statutory construction which states that if a statute doesn’t explicitly depart from common law, then a court should construe the statute narrowly to avoid conflict.⁵⁰ This argument, as

⁴⁵ FED. R. EVID. 501. The rule goes on to state, “But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.” *Id.*

⁴⁶ Again, the express mention that common law governs privilege would imply, using *expressio unius est exclusio alterius*, that the absence of language expressly adopting common law rules means those common law rules have been abrogated. See *Chicago v. Env’tl. Def. Fund*, 511 U.S. 328, 338 (1994) (“‘[I]t is generally presumed that Congress acts intentionally and purposely’ when it ‘includes particular language in one section of a statute but omits it in another.’” (alteration in original) (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993))); cf. Edward J. Imwinkelried, *A Brief Defense of the Supreme Court’s Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267, 278 (1993) (applying the *expressio unius* canon to show that “the omission of ‘common law’ in Rule 402 signals the demise of the common law power to enunciate evidentiary doctrine”).

⁴⁷ FED. R. EVID. 804(b)(1)(B).

⁴⁸ Compare FED. R. EVID. 801(d)(2) (“The statement is offered against an opposing party”), with FED. R. EVID. 804(b)(1)(B) (allowing “[testimony that] is now offered against a party”).

⁴⁹ FED. R. EVID. 804(b)(1)(B).

⁵⁰ The anti-derogation rule encompasses two individual canons: “Statutes in derogation of the common law will not be extended by construction” and “[s]tatutes are to be read in the light of the common law and a statute affirming a common law rule is to be construed in accordance with the common law.” Karl N. Llewellyn, *Remarks on the Theory of*

applied to the Federal Rules of Evidence, can be supported by Supreme Court cases like *United States v. Abel*⁵¹ and *Beech Aircraft Corp. v. Rainey*.⁵² In *Abel*, the Court decided that the omission of rules explicitly dealing with impeachment for bias did not abrogate the practice, which had been available under the common law rules of evidence.⁵³ And in *Rainey*, the Court recognized that the common law rule of completeness was intrinsic to Federal Rule of Evidence 106.⁵⁴

For every canon of construction, however, there is an equal and opposite canon.⁵⁵ The opposing canon to the anti-derogation rule is that “[t]he common law gives way to a statute which is in consistent [sic] with it and *when a statute is designed as a revision of a whole body of law applicable to a given subject it supersedes the common law.*”⁵⁶ And the two cases that would support the anti-derogation rule’s use as applied to the hearsay exclusions question are distinguishable. *Abel* and *Rainey* both dealt with evidentiary issues where the statutory rules were permissive, not exclusionary, and the court extended this permissiveness to actions that had also been allowed under the common law. This comports with the idea that “[r]elevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court.”⁵⁷ Rule 801(d)(2)(A), on the other hand, deals specifically with exclusions to a prohibition. Therefore, the general prohibition of hearsay “provides otherwise,” subject only to the specific exclusions listed in Rule 801(d)(2), as well as the specific exceptions provided for throughout the rest of the hearsay rules. Further, the *expressio unius est exclusio alterius* canon’s opposite—that

Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 401 (1950).

⁵¹ 469 U.S. 45, 50–52 (1984).

⁵² 488 U.S. 153, 171–72 (1988).

⁵³ *Abel*, 469 U.S. at 49, 51 (holding that “it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence just as it was permissible to do so before their adoption” despite the fact that the “Rules do not by their terms deal with impeachment for ‘bias’”); see also Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978) (“In principle, under the Federal Rules no common law of evidence remains. ‘All relevant evidence is admissible, except as otherwise provided’ In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.” (footnote omitted)).

⁵⁴ *Rainey*, 488 U.S. at 171–72 (“The common law ‘rule of completeness,’ which underlies Federal Rule of Evidence 106, was designed to prevent exactly the type of prejudice of which *Rainey* complains.”).

⁵⁵ See Llewellyn, *supra* note 50, at 401 (“Hence there are two opposing canons on almost every point.”).

⁵⁶ *Id.* (emphasis added).

⁵⁷ FED. R. EVID. 402.

“[t]he language may fairly comprehend many different cases where some only are expressly mentioned by way of example”⁵⁸—is inapplicable when interpreting Rule 801(d)(2), as the exclusions are meant to be an exhaustive list.⁵⁹

Finally, looking at the advisory committee’s notes to the 1972 proposed rules doesn’t clarify whether or not the exclusion of privity-based admissions was intentional. On the one hand, the advisory committee’s notes state, “The freedom which admissions have enjoyed from technical demands . . . when taken with the apparently prevalent satisfaction with the results, *calls for generous treatment of this avenue to admissibility.*”⁶⁰ On the other hand, the advisory committee’s notes on the 1972 proposed rules cite to John S. Strahorn, Jr.’s article *A Reconsideration of the Hearsay Rule and Admissions*, which takes a critical view of admitting vicarious admissions—a larger category of admissions which includes privity-based admissions—for narrative purposes.⁶¹ On balance, despite the advisory committee’s calling for generous treatment of admissions, general principles of statutory interpretation would counsel that privity-based admissions did not survive the enactment of the Federal Rules of Evidence.

The Seventh Circuit’s opinion in *Huff* comports with this statutory interpretation.⁶² As previously mentioned, the defendants presented the argument that Mr. Huff’s statements to Mr. Myles were

⁵⁸ Llewellyn, *supra* note 50, at 405.

⁵⁹ See *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979) (“Moreover, the very explicitness of Rule 801(d)(2) suggests that the draftsmen did not intend to authorize the courts to add new categories of admissions to those stated in the rule. No standards for judicial improvisation or discretion are provided in Rule 801(d)(2) . . .”).

⁶⁰ FED. R. EVID. 801 advisory committee’s note on the 1972 proposed rules (emphasis added) (citations omitted); see also *Savarese v. Agriss*, 883 F.2d 1194, 1201 (3d Cir. 1989) (“However, we also note that the Advisory Committee called for ‘generous treatment to this avenue of admissibility.’” (quoting FED. R. EVID. 801(d)(2) advisory committee’s note on the 1972 proposed rules)).

⁶¹ John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 564, 583–84 (1937) (“[T]he true explanation of vicarious admissions is not in terms of their trustworthiness as narrative, but rather in terms of their relevancy as the circumstantial conduct of persons whose conduct acquires relevance by virtue of the relation between the speaker and the party against whom the statement is offered.”). Strahorn limits his analysis of what should be admissible to statements made by a predecessor in title where “verbal conduct of an alleged former owner in denying or belittling his title.” *Id.* at 583.

⁶² While the *Huff* court did not conduct a thorough statutory interpretation analysis, the court did rely on the fact that the Federal Rules of Evidence controlled the decision, and the lack of an explicit reference to privity-based admissions in the Rule 801(d)(2)(A) exclusions meant that these types of statements did not survive the transition from the common law rules of evidence to the new statutory rules. See *infra* notes 64–65 and accompanying text. The *Huff* court’s statements are consistent with the first part of this Note’s statutory interpretation, which found that the list of exclusions is meant to be exhaustive. See *supra* notes 40–43, 59 and accompanying text. *Huff* is also consistent with

privity-based admissions and therefore should be admissible as party-opponent admissions under Rule 801(d)(2)(A).⁶³ The court, confronted with the argument presented this way, determined that the common law rules of evidence had been abrogated by the Federal Rules of Evidence.⁶⁴ And, because Rule 801(d)(2)(A) did not contain an explicit reference excluding privity-based admissions from the general rule prohibiting hearsay, the statements could not be entered under that rule.⁶⁵ Similarly, the District Court for the Eastern District of New York and the District Court for the Middle District of Pennsylvania followed the *Huff* court's characterization of decedent statements as privity-based admissions, as well as the *Huff* court's interpretation that privity-based admissions are no longer generally admissible under the Federal Rules of Evidence.⁶⁶ Thus, courts that have addressed a decedent's statements under the theory that the statements are privity-based admissions have found them to be inadmissible under the Federal Rules of Evidence, in line with the above statutory interpretation.

C. *Can a Nonnamed Party Be Considered a Party to the Litigation?*

Assuming that this interpretation is correct—that privity-based admissions are no longer admissible under the Federal Rules of Evidence—the privity-party distinction becomes relevant and the analysis turns back to whether the decedent can be properly characterized as a party to the action. The question of whether the decedent is a party depends on whether the court assumes that the term “party” refers only to the named parties to the suit (the technical or formalistic approach), or whether the term “party” can be defined more broadly (the contextual or functional approach).⁶⁷ The Supreme Court has not opined on who is a party for purposes of interpreting

the conclusion that privity-based admissions did not survive the enactment of the Federal Rules of Evidence.

⁶³ *Huff*, 609 F.2d at 290.

⁶⁴ *Id.*

⁶⁵ *Id.* at 291.

⁶⁶ *Ponzini v. Monroe Cty.*, No. 3:11-CV-00413, slip op. at 6–7 (M.D. Pa. Aug. 24, 2016); *In re Cornfield*, 365 F. Supp. 2d 271, 277 (E.D.N.Y. 2004), *aff'd*, 156 F. App'x 343 (2d Cir. 2005).

⁶⁷ For instance, Black's Law Dictionary defines “party” many ways, including “[o]ne by or against whom a lawsuit is brought; anyone who both is directly interested in a lawsuit and has a right to control the proceedings, make a defense, or appeal from an adverse judgment; litigant” and “[s]omeone concerned in or privy to a matter.” *Party*, BLACK'S LAW DICTIONARY, *supra* note 16. The numerous sub-definitions contained in this Black's Law Dictionary entry illustrate that the term “party” is used in many ways in the law, not necessarily only as a technical term of art meaning the named party.

the Federal Rules of Evidence. But this question is not unique to interpreting the Federal Rules of Evidence. The term “party” is used in other procedural statutes, such as the Federal Rules of Civil Procedure⁶⁸ and the Federal Rules of Appellate Procedure,⁶⁹ and the Court has not always limited the definition of a party in those statutory rules to only those parties that are actually named in the case.⁷⁰

For example, the Supreme Court dealt with the issue of determining who was a party when interpreting the interaction between Rule 23(e) of the Federal Rules of Civil Procedure, which governs class action settlement agreements,⁷¹ and the right to appeal final decisions under the Federal Rules of Appellate Procedure. In *Devlin v. Scardelletti*, the question of who was a proper party to a case was litigated in a class action in the context of whether nonnamed class members had standing to appeal class action settlements without first intervening.⁷² The Court held that “nonnamed class members like [the] petitioner who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening.”⁷³ In working through the analysis, the Court chose not to establish a bright-line rule defining the rights of named versus nonnamed parties, stating instead that “[n]onnamed class members, however, may be parties for some purposes and not for others. The label ‘party’ does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.”⁷⁴ Thus, in the class action setting, the Court took a functional approach to defining who could be considered a party for purposes of deciding various procedural issues.

In his *Devlin* dissent, Justice Scalia favored a more formal, bright-line interpretation of the term “party.” Justice Scalia argued that the

⁶⁸ See FED. R. CIV. P. 23(e) (stating that “parties seeking approval [of a class action settlement] must file a statement identifying any agreement made in connection with the proposal,” but that “[a]ny class member may object to the proposal if it requires court approval under this subdivision”).

⁶⁹ See FED. R. APP. P. 3(c)(1) (requiring that the notice of appeal must “specify the party or parties taking the appeal by naming each one in the caption or body of the notice”).

⁷⁰ See *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) (determining that nonnamed class members who did not intervene could still appeal class action settlements as a matter of right despite not being named parties in the case, abrogating four circuit court cases that held that nonnamed class members must be granted the right to intervene, and thus become named parties, before they had the right to appeal).

⁷¹ FED. R. CIV. P. 23.

⁷² 536 U.S. at 3–4.

⁷³ *Id.* at 14.

⁷⁴ *Id.* at 9–10.

“‘parties’ to a judgment are those named as such—whether as the original plaintiff or defendant in the complaint giving rise to the judgment, or as ‘[o]ne who [though] not an original party . . . become[s] a party by intervention, substitution, or third-party practice.’”⁷⁵ Justice Scalia also addressed the privity-party distinction, rejecting the idea that those nonnamed parties in privity with a named party may appeal, “notwithstanding his or her interest in the subject matter of the case.”⁷⁶ Thus, in *Devlin*, the Court chose to determine the applicability of the term “party” by conducting a contextual, functional analysis over the objections of dissenters who preferred a formal, bright-line rule. All of this is to say that, notwithstanding the fact that the Federal Rules of Evidence are a distinct set of procedural rules, in the context of other procedural statutes, the Court has employed a functional approach rather than a formal approach to determine who can be considered a party to the action.

Similar to the majority opinion in *Devlin*, courts that have admitted decedents’ statements under Rule 801(d)(2)(A) have done so under the theory that though the decedent is not a named party, they are a real party in interest, and, therefore, their statements are admissible as party-opponent statements. For example, in *Estate of Shafer v. Commissioner*—the first circuit court case to admit decedent statements under Rule 801(d)(2)(A)—the Sixth Circuit, citing *Wigmore*, stated, “Since [the decedent], through his estate, is a party to this action, his statements are a ‘classic example of an admission.’”⁷⁷ Similarly, the Tenth Circuit in *Phillips v. Grady County Board of County Commissioners* quoted the previous passage from *Estate of Shafer* when finding the decedent’s statements admissible under Rule 801(d)(2)(A).⁷⁸ Thus, courts that take a functional approach to the definition of “party,” considering the decedents themselves to be parties, have admitted the statements under Rule 801(d)(2)(A).⁷⁹

It is this disagreement—whether the term “party” should be defined narrowly or broadly in the context of the definition of

⁷⁵ *Id.* at 15 (Scalia, J., dissenting) (alterations in original) (quoting *Karcher v. May*, 484 U.S. 72, 77 (1987)). Justice Scalia was joined in his dissent by Justices Kennedy and Thomas. *Id.* Justice Scalia also stated, “As the Restatement puts it, ‘[a] person who is named as a party to an action and subjected to the jurisdiction of the court is a party to the action.’” *Id.* (alteration in original) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 34(1) (AM. LAW INST. 1980)).

⁷⁶ *Id.* at 19 n.3 (internal citation omitted).

⁷⁷ *Estate of Shafer v. Comm’r*, 749 F.2d 1216, 1219–20, 1219 n.6 (6th Cir. 1984) (quoting FED. R. EVID. 801(d)(2)(A) advisory committee’s note).

⁷⁸ 92 F. App’x 692, 696 (10th Cir. 2004).

⁷⁹ *See id.*; *Estate of Shafer*, 749 F.2d at 1220; *Schroeder v. de Bertolo*, 942 F. Supp. 72, 78 (D.P.R. 1996).

hearsay—that illuminates the privity-party distinction in cases involving decedent statements. A contextual analysis has informed courts' opinions that have admitted decedents' statements under Rule 801(d)(2)(A).⁸⁰ In contrast, courts that have considered the decedent's statements to be privity-based admissions use a narrow, technical definition of the term "party."⁸¹ Both ways of defining the term have merits. But given that the claim in front of the court flows from the decedent's rights—as the real party in interest—and not the named party, it would seem to make sense that in cases initiated by the estate on the decedent's behalf, or where the estate is substituted as a party in place of the decedent, the decedent could be considered a party.⁸² This idea will be discussed further in Section III.A.

II

POLICY ARGUMENTS AGAINST ADMITTING DECEDENTS' STATEMENTS AS PARTY-OPPONENT STATEMENTS

Part I addressed the major point of contention driving the circuit split concerning admitting decedent statements under Rule 801(d)(2)(A): Are these statements best characterized as privity-based admissions or is it instead appropriate to characterize the decedent as a party? Part II addresses additional arguments against admitting a decedent's statements under the party-opponent statement rule—namely, the concern over perjury when people attest to the

⁸⁰ See *Phillips*, 92 F. App'x at 696 (discussing how the court in *Estate of Shafer* stated that "[a] decedent, 'through his estate, is a party to [an] action,' so that the decedent's statements 'are a classic example of an admission'" (alterations in original) (quoting *Estate of Shafer*, 749 F.2d at 1220)); *Estate of Shafer*, 749 F.2d at 1220 ("Since Arthur, through his estate, is a party to this action, his statements are a 'classic example of an admission.'" (quoting FED. R. EVID. 801(d)(2)(A) advisory committee's note) (citing WIGMORE, *supra* note 27, § 1081, at 598)); *Schroeder*, 942 F. Supp. at 78 (stating that the decedent, Rosita, was a party to the action despite being deceased because "[i]f plaintiffs had succeeded in obtaining a verdict against defendants, Rosita's estate would have received a monetary award"). *Savarese v. Agriss* is an outlier because the decedent at issue, Dan Bogen, "was a party to [the] action in his official capacity despite the fact that he was deceased at the time of trial." 883 F.2d 1194, 1201 (3d Cir. 1989).

⁸¹ The very fact that these courts assess the decedents' statements as privity-based admissions means that the courts assumed the decedents were not a party to the action for purposes of the party-opponent statement rule.

⁸² The argument that the decedent is a party is strengthened in a situation where the decedent is substituted by the estate as a party after the litigation has already initiated; however, as Justice Scalia recognized, in that situation a decedent would likely be considered a party even under a more formal definition. See *Devlin v. Scardelletti*, 536 U.S. 1, 15 (2002) (Scalia, J., dissenting) ("The 'parties' to a judgment are those named as such—whether as the original plaintiff or defendant in the complaint giving rise to the judgment, or as '[o]ne who [though] not an original party . . . become[s] a party by intervention, substitution, or third-party practice.'" (alterations in original) (emphasis added) (quoting *Karcher v. May*, 484 U.S. 72, 77 (1987))).

statements of deceased persons, which drove the enactment of state-level Dead Man's acts, and the fact that if the evidence is so probative there are other ways to admit it.

A. Policy Considerations Driving States' Dead Man's Acts

The problem of how to treat decedent statements is not unique to the federal forum. State courts have also had to deal with this issue, most often in the probate context.⁸³ The claims most often arise when survivors contest wills or when plaintiffs file state-law tort claims against a decedent's estate.⁸⁴ The concern is that allowing self-interested witnesses to testify about conversations with decedents creates a substantial risk of perjury and potential harm to decedents' estates.⁸⁵ As mentioned in Section I.A, however, at the common law, decedent statements were generally admissible as admissions against estates and successors in interest.⁸⁶

In the nineteenth century, in order to combat the risks of self-interested witnesses perjuring themselves, many states passed Dead Man's acts.⁸⁷ These statutes negated the common law rule of admission in order to put the estate on equal footing as the claimants.⁸⁸ The common saying was, "when the lips of one party to a transaction are

⁸³ See Sylvie L.F. Richards, *New York's Dead Man's Statute: Some Preliminary Considerations*, FROM THE LAW OFFICE OF SYLVIE L.F. RICHARDS, PLLC (Apr. 28, 2011), <https://richardsesq.wordpress.com/2011/04/28/new-yorks-dead-mans-statute-some-preliminary-considerations/> (recognizing that the legislative concern that drove the enactment of the New York Dead Man's statute was keeping self-interested parties from perjuring themselves because the witness's "self-interest would prevail when [that witness] testified in a civil matter involving conversations with a now-deceased person where the witness had a pecuniary interest in the outcome of the case" and that "concern persists today and is *particularly evident in the area of Wills and trusts*" (emphasis added)).

⁸⁴ See Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and a Proposal for Change*, 53 CLEV. ST. L. REV. 75, 76 (2005) ("[T]he majority of Dead Man's statute case law centers around an interested witness being refused the right to testify in a probate proceeding.").

⁸⁵ See *id.* at 78–79 (2005) (discussing legislatures' desire to protect estates after getting rid of interested witness prohibitions, and discussing that, in cases involving decedents, the "temptation to falsehood and concealment in such cases is considered too great, to allow the surviving party to testify in his own behalf" (quoting *Owens v. Owens's Adm'r*, 14 W. Va. 88, 95 (1878))).

⁸⁶ See *supra* Section I.A (discussing the admissibility of decedent's statements against the estate and Wigmore's justification for the common law rule).

⁸⁷ See Wallis, *supra* note 84, at 78–79 (stating that states began abolishing interested witnesses prohibitions in the mid-1800s and began enacting Dead Man's statutes in their place).

⁸⁸ See Jerry C. Lagerquist, *Exceptions to the Dead Man's Act*, 45 CHI.-KENT L. REV. 60, 62 (1968) ("The rationale for allowing a witness disqualified by the Dead Man's Act to testify to facts occurring after the death of the decedent is that the *inequality in availability of proof, which the Act seeks to prevent*, does not exist between the parties as to facts that occur after death." (emphasis added)).

closed by death, the lips of the other party are closed by law.”⁸⁹ These statutes declared otherwise competent witnesses who could testify about discussions with the decedent to be incompetent.

A key distinction between the application of the Dead Man’s acts and the issue related to hearsay is that the Dead Man’s acts only exclude testimony by *interested* witnesses.⁹⁰ These statutes generally dictate who is competent to testify, as opposed to dealing with the hearsay issue. Notably, the main concern—that *interested* witnesses would perjure themselves—is not present in every case where the decedent statement may be introduced over a hearsay objection. A perfect example is the testimony in *Huff*. The witness in *Huff*, who was the plaintiff’s cousin’s husband,⁹¹ would likely not have been considered an interested witness under a Dead Man’s Act, as he had no stake in the outcome of the trial, and therefore was not a “party in interest.”⁹² This distinction alone, however, is not sufficient to completely dismiss the concerns that led to the enactment of Dead Man’s acts because there will be situations captured by the hearsay rule of inclusion proposed where the testifying witness will also be an interested party.⁹³

More important to this discussion is that the support for these statutes has waned over time. Notably, the statutes were complicated and full of exceptions.⁹⁴ As a result, the rationales supporting the Dead Man’s acts have been consistently attacked by many critics.⁹⁵ The main criticisms of the Dead Man’s acts are that they “encourage litigation, prevent the enforcement of many honest claims, and are

⁸⁹ *Satterthwaite v. Estate of Satterthwaite*, 420 N.E.2d 287, 289 (Ind. Ct. App. 1981) (citing 1A G. Henry, *THE PROBATE LAW AND PRACTICE* 158 (Grimes ed., 1978)).

⁹⁰ See Steve Planchon, Comment, *The Application of the Dead Man’s Statutes in Family Law*, 16 J. AM. ACAD. MATRIM. LAW. 561, 563 (2000) (discussing the statutes’ sole concern with the admissibility of testimony of interested witnesses).

⁹¹ *Huff v. White Motor Corp.*, 609 F.2d 286, 290 (7th Cir. 1979).

⁹² See, e.g., WASH. REV. CODE § 5.60.030 (2018) (stating that “a party in interest or to the record” is not competent to testify to a decedent’s statements). Black’s Law Dictionary defines a party in interest as a “person entitled under the substantive law to enforce the right sued on and who generally, but not necessarily, benefits from the action’s final outcome.” *Real Party in Interest*, BLACK’S LAW DICTIONARY, *supra* note 16.

⁹³ There are a host of situations where this issue will not arise, however. Much hearsay that could be brought in under the party-opponent statement rule could be documentary, such as texts, emails, etc., and not direct testimony by a witness.

⁹⁴ See Wallis, *supra* note 84, at 79 (“In time, however, commentators began to point to the confusing nature and unfairness of these statutes . . .”); see also Lagerquist, *supra* note 88 (detailing the exceptions to the Illinois Dead Man’s statute). One of the notable exceptions is that when there is corroborative evidence, the interested witness is allowed to testify. *Id.* at 70–72.

⁹⁵ See Wallis, *supra* note 84, at 100–01 (stating that “Dead Man’s statutes have been criticized by nearly all famous legal scholars over the past 150 years,” including by Wigmore).

ineffective to prevent perjury by witnesses whose interest does not fall within the statutory ban.”⁹⁶ For example, Wigmore thought these types of rules were flawed because they showed a preference for the dead over the living and presupposed that there would be no other way to root out dishonest claims.⁹⁷ Therefore, “for the sake of defeating the dishonest man who may arise, the rule is willing to defeat the much more numerous honest men who are sure to possess just claims.”⁹⁸ Wigmore also thought Dead Man’s acts “encumber[ed] the profession with a profuse mass of barren quibbles over the interpretation of mere words.”⁹⁹ Edmund Morgan agreed and stated that Dead Man’s acts did more to injure valid, honest claims than they did to prevent perjury.¹⁰⁰ And Professor McCormick stated that “refusing to listen to the survivor is . . . a ‘blind and brainless’ technique,” which, in an effort to “avoid injustice to one side,” “creat[es] injustice to the other.”¹⁰¹ McCormick went further to state that “[t]he temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard.”¹⁰² Therefore, three of the leading evidentiary scholars thought the statutory solution to the threat of perjured testimony against a decedent’s estate—Dead Man’s acts—did more harm than good, particularly in light of the fact that there were other ways to deal with the issue, including the weight and credibility the factfinder would give the proffered evidence.

Today, very few states have Dead Man’s statutes that act as an absolute bar to interested witnesses testifying to conversations with decedents.¹⁰³ In contrast, thirty-two states have explicitly rejected the

⁹⁶ 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 601.05[1][a] (Mark S. Brodin ed., 2d ed. 2018); *see also* Wallis, *supra* note 84, at 76 (“More importantly, these statutes are unfairly prejudicial to those truly honest people who have valid claims but are nevertheless prevented from testifying in court.”).

⁹⁷ 4 WIGMORE, *supra* note 27, § 2065, at 389.

⁹⁸ *Id.* In contrast, the rule of inclusion advanced *infra* Section III.B is supported by Wigmore’s critique because it avoids excluding all evidence on the basis that some potentially problematic situations may arise.

⁹⁹ Wallis, *supra* note 84, at 101 (quoting 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 578, at 823 (James H. Chadbourn ed., 1979)).

¹⁰⁰ *See id.* at 101 (stating that Dead Man’s acts “persist in spite of experience which demonstrates that they defeat the honest litigant and rarely, if ever, prevent the dishonest from introducing the desired evidence” (quoting EDMUND M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 188 (1956))).

¹⁰¹ *Id.* at 101 (quoting CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 65, at 251 (John William Strong ed., 4th ed. 1992)).

¹⁰² *Id.* at 101 (quoting MCCORMICK, *supra* note 101).

¹⁰³ *See* Shawn K. Stevens, Comment, *The Wisconsin Deadman’s Statute: The Last Surviving Vestige of an Abandoned Common Law Rule*, 82 MARQ. L. REV. 281, 282 n.5

premise of having a Dead Man's Act, and either no longer have provisions governing this issue or expressly allow for interested witnesses to testify to conversations with a decedent.¹⁰⁴ Given that so many states have rejected a rule of exclusion to address the policy concerns underlying the Dead Man's acts, it makes little sense for the Federal Rules of Evidence to embrace these same policy concerns as a basis for a rule of exclusion regarding the treatment of decedents' statements as hearsay.

B. There Are Other Ways to Admit the Evidence

Another counterargument against a rule of admissibility is that if the evidence is highly probative, there are other exceptions to the hearsay rule under which the evidence could be admitted. The two main exceptions that would be available for a decedent's statements are Rule 804(b)(3)¹⁰⁵—statements against interest—and Rule 807¹⁰⁶—the residual exception. Each of these rules is discussed in turn.

1. Rule 804(b)(3): Statements Against Interest

The Federal Rules of Evidence allow for a host of exceptions to the rule prohibiting hearsay.¹⁰⁷ The exceptions contained in Rule 804 apply when a declarant is unavailable as a witness.¹⁰⁸ Rule 804(b)(3) contains an exception to hearsay when a declarant makes a statement that is against the declarant's interest.¹⁰⁹ These statements are consid-

(1998) ("There are currently only eleven other states in addition to Wisconsin that have Deadman's Statutes that serve as an absolute bar prohibiting testimony from an interested witness as to transactions with the deceased."). Since Stevens's comment was published in 1998, three of the eleven states listed in his footnote have gotten rid of their Dead Man's statutes. Alabama's Dead Man's Act was superceded by the enactment of Alabama Rule of Evidence 601. *See* Schoenvogel *ex rel.* Schoenvogel *v.* Venator Grp. Retail, Inc., 895 So. 2d 225, 258 (Ala. 2004). Florida's legislature repealed its statute in 2005. *See* FLA. STAT. § 90.602, *repealed by* Act of July 1, 2005, ch. 2005-46, 2005 Fla. Laws 1. And in 2013, the Supreme Court of Appeals of West Virginia invalidated its state statute. *See* State Farm Fire & Cas. Co. *v.* Prinz, 743 S.E.2d 907, 918 (W. Va. 2013). Additionally, Wisconsin repealed its Dead Man's Act in 2017. *See* WIS. STAT. ANN. §§ 885.16–.17 (West Supp. 2017).

¹⁰⁴ *See* Memorandum in Support of Petition of Wisconsin Judicial Council for an Order Repealing Wis. Stats. §§ 885.16, 885.17, 885.205; and Amending Wis. Stat. § 906.01 at app. 1, *In re* Wis. Statutes §§ 885.16, 885.17, 885.205, 906.01 (Wis. 2017) (No. 16-01) (noting thirty-one states other than Wisconsin in which Dead Man's statutes have either been repealed by the state legislatures, abrogated by court rules or decisions, or in which there are express rules permitting testimony of interested witnesses).

¹⁰⁵ FED. R. EVID. 804(b)(3).

¹⁰⁶ FED. R. EVID. 807.

¹⁰⁷ *See* FED. R. EVID. 802–807.

¹⁰⁸ FED. R. EVID. 804.

¹⁰⁹ FED. R. EVID. 804(b)(3).

ered to be acceptable despite the general rule against hearsay because it is presumed that a declarant would not say anything that contradicts his personal interests unless the statement were true.¹¹⁰

Unlike party-opponent statements, which do not need to satisfy any further criteria to be admitted,¹¹¹ in civil cases,¹¹² statements against the interest must meet three criteria. In order to meet the hearsay exception for statements against the interest, the declarant must: 1) be unavailable at the time of trial;¹¹³ 2) be aware at the time of making the statement that the statement is against the declarant's interest;¹¹⁴ and 3) lack an alternate, self-serving motivation (in order to attribute sufficient reliability of truthfulness to the statement).¹¹⁵ A

¹¹⁰ See FED. R. EVID. 804(b)(3) (stating that the exception is for when a declarant makes 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 . . . expose[d] the declarant to civil or criminal liability”).

¹¹¹ See *Savarese v. Agriss*, 883 F.2d 1194, 1200–01 (3d Cir. 1989) (discussing that party-opponent statements are not subject to trustworthiness or against the interest analyses and should be allowed generous treatment when determining admissibility).

¹¹² Subparagraph (B) requires an additional criterion to be met for evidence to be admitted under this exception in criminal cases. See FED. R. EVID. 804(b)(3)(B) (requiring that the statement “is 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”). The rule’s former version read, “[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” FED. R. EVID. 804(b)(3) (2009) (amended 2010). The purpose of the 2010 Amendment was “to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal trials.” FED. R. EVID. 804 advisory committee’s note to 2010 amendment. Thus, the corroborating circumstances requirement in subparagraph (B) should only apply to statements that implicate a penal interest. The amendment is silent on whether the corroboration requirement is necessary for statements against a penal interest offered in civil cases. *Id.*

¹¹³ Rule 804 exceptions only apply when the witness is unavailable to testify at trial, as reflected by the title of the rule “Exceptions to the Rule Against Hearsay—*When the Declarant Is Unavailable as a Witness*” and the criteria for unavailability listed in Rule 804(a). FED. R. EVID. 804 (emphasis added). This rule contrasts with Rule 803, which provides “Exceptions to the Rule Against Hearsay—*Regardless of Whether the Declarant Is Available as a Witness.*” FED. R. EVID. 803 (emphasis added).

¹¹⁴ See *Roberts v. City of Troy*, 773 F.2d 720, 725 (6th Cir. 1985) (“Hearsay under the declaration against interest exception is unreliable *unless the declarant is aware at the time of making the statement* that it is against his interest.” (emphasis added) (first citing *Donovan v. Crisostomo*, 689 F.2d 869 (9th Cir. 1982); then citing *Workman v. Cleveland-Cliffs Iron Co.*, 68 F.R.D. 562 (N.D. Ohio 1975))). *But see* *United States v. Lozado*, 776 F.3d 1119, 1128 n.6 (10th Cir. 2015) (construing *Roberts* to require proof of subjective awareness of danger to the declarant’s interest and declining to follow, instead applying an objective standard of what a reasonable person would know because of the frequent unavailability of proof of state of mind).

¹¹⁵ See *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1280 (11th Cir. 2009) (finding that the declarant’s interest in spreading blame, even falsely, for criminal liability may have been at least as significant of a factor when he made the statement as the declarant’s

decedent will always meet the exceptions criteria for unavailability.¹¹⁶ Therefore, the main issues complicating a party's attempt to enter a decedent's statements into evidence under 804(b)(3) will be the second and third requirements.

The first hurdle a party will face when attempting to enter a decedent's statement into evidence under 804(b)(3) is showing that the decedent was aware that the statement was opposed to the decedent's interest at the time the decedent made the statement.¹¹⁷ This means that the party offering the evidence will have to present additional evidence that shows the decedent's subjective understanding and state of mind at the time the decedent made the statement, or in the absence of information regarding subjective understanding, evidence that would lead an objective person to believe the decedent understood the impact of the statement at the time the statement was made.¹¹⁸ Gathering information regarding the decedent's subjective understanding will be difficult and will create a significant hurdle to entering the statements under 804(b)(3), particularly in courts that favor the subjective approach.

In addition to gathering additional evidence regarding the decedent's subjective understanding—that at the time the decedent made the statement, that statement would be against his interest—a party proffering the statement would also have to make a showing that the statement was “so contrary” to the declarant's financial interest or “had so great a tendency to invalidate the declarant's claim.”¹¹⁹ This part of the rule presents two important issues. First, the statement must be against the declarant's interest, and not some other party's

potential financial loss given his part ownership in one of the companies, and therefore the evidence was inadmissible because it did not bear the requisite indicia of reliability); *Donovan*, 689 F.2d at 877 (finding that an immigrant worker's statement that he was paid properly could reasonably be motivated by the desire to “avoid the wrath of his employer” and was therefore inadmissible as a statement against the interest to prove the employer was paying the employees properly in a Fair Labor Standards Act case).

¹¹⁶ FED. R. EVID. 804(a)(4).

¹¹⁷ *Roberts*, 773 F.2d at 725.

¹¹⁸ When there is evidence substantiating a declarant's subjective belief, courts have utilized a subjective determination. See *Lozado*, 776 F.3d at 1126–29 (discussing the rationale for favoring the application of the subjective standard when evidence of subjective belief is available). Absent evidence of a declarant's subjective understanding, however, the *Lozado* court found that this requirement may be relaxed. See *id.* at 1129–30 (stating that absent evidence of the declarant's subjective awareness, the rule allows the court to utilize an objective reasonable person standard). In so finding, the court recognized a disagreement over whether a subjective awareness was required to meet the Rule 804(b)(3) exception and decided not to extend the subjective awareness requirements of previous courts and commentators. *Id.* at 1128 n.6.

¹¹⁹ FED. R. EVID. 804(b)(3)(A).

interest.¹²⁰ Second, the declarant must not have other plausible, self-serving motives for making the statement.¹²¹

As can be seen from these additional requirements, the exception for statements against the interest is much narrower than the exclusion from the hearsay rule for party-opponent statements. While some probative decedent statements may be able to meet these additional restrictions, a vast swath of statements will likely be excluded if the courts rely solely on admitting such statements under Rule 804(b)(3). Thus, relying on this exception, as opposed to creating a rule favoring admissibility under the party-opponent exclusion, will not adequately resolve the issue, as it will only allow the evidence in under serendipitous circumstances that allow the party offering the evidence to show subjective awareness and an absence of other plausible motives for making the statement.

2. *Rule 807: Residual Exception*

In addition to Rule 804(b)(3), the Rule 807 residual hearsay exception is another avenue that parties may use to introduce decedent statements.¹²² In order for statements that would otherwise be prohibited as hearsay to be entered into evidence, five requirements must be met: 1) “the statement has equivalent circumstantial guarantees of trustworthiness;” 2) “it is offered as evidence of a material fact;” 3) “it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;” 4) “admitting it will best serve the purposes of these rules and the interests of justice;” and 5) “before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the

¹²⁰ See *Williamson v. United States*, 512 U.S. 594, 604 (1994) (holding that only truly self-inculpatory declarations and remarks are admissible under Rule 804(b)(3)); *Goodman v. Kimbrough*, 718 F.3d 1325, 1333 n.2 (11th Cir. 2013) (“[T]he statements at issue must also be against the interest of the *declarant* . . . in order to fall within the exception’s terms.” (citing *United Techs. Corp.*, 556 F.3d at 1279–80)). Only the portion of the statement that is against the declarant’s interest is admissible, and absent severability, the entire statement should be excluded. *Williamson*, 512 U.S. at 599–602 (considering the admissibility of so-called “collateral statements” in extended declarations and concluding that only the self-inculpatory statements within extended declarations are admissible); *id.* at 606 (Scalia, J., concurring) (same).

¹²¹ See *supra* note 115.

¹²² In fact, this is the method the *Huff* court used as a potential avenue for the defendants to enter the decedent’s statements into evidence, provided that on remand the district court found Mr. Huff was competent at the time he made the statement to Mr. Myles. *Huff v. White Motor Corp.*, 609 F.2d 286, 294 (7th Cir. 1979).

statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it."¹²³

The residual exception seems like a plausible solution to admit decedent statements given its purpose to allow judges to deal with new evidentiary situations.¹²⁴ Using the residual exception as a solution, however, creates two potential problems: It will severely curtail the number of statements that will be deemed admissible, despite being reliable and probative, and it is subject to significant judicial discretion. Both of these issues will potentially exacerbate the issue of inconsistent outcomes.

First, the residual exception was intended to be used only in rare and exceptional cases.¹²⁵ As with the potential for using the statements against the interest exception, utilizing this rule in place of a rule favoring admissibility as party-opponent statements would lead to very few decedent statements being admissible.¹²⁶ This assertion is supported by a survey of cases in which Rule 807 was invoked to admit potentially probative hearsay evidence.¹²⁷ The survey showed that "[c]ourts are excluding well more than admitting" and that it can be "tentatively concluded that the residual exception in many courts is applied in such a way as to exclude reliable and necessary hearsay."¹²⁸

Second, the residual exception is left largely to the court's discretion, which may lead to varying standards based on how the courts

¹²³ FED. R. EVID. 807; *see also Huff*, 609 F.2d at 292–95 (listing and applying the five requirements that "[h]earsay evidence must fulfill . . . to be admissible under the residual exception"). The *Huff* court was analyzing the former residual exceptions under Rules 803(24) and 804(b)(5). *Id.* at 291 & n.4. These two separate residual exceptions were combined and transferred to Rule 807 in the 1997 Amendments, and "[n]o change in meaning was intended." FED. R. EVID. 807 advisory committee's note.

¹²⁴ *See United States v. Mathis*, 559 F.2d 294, 299 (5th Cir. 1977) ("Rule 803(24) was designed to encourage the progressive growth and development of federal evidentiary law by giving courts the flexibility to deal with new evidentiary situations which may not be pigeon-holed elsewhere.").

¹²⁵ *See Huff*, 609 F.2d at 291 ("We also recognize that Congress 'intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances.'" (quoting S. REP. NO. 93-1277, at 20 (1974), *as reprinted in* 1974 U.S.C.A.N. 7051, 7066)); *see also United States v. Kim*, 595 F.2d 755, 764–65 (D.C. Cir. 1979) (reaching the same conclusion based on the same legislative history); *United States v. Bailey*, 581 F.2d 341, 346–47 (3d Cir. 1978) (same). Professor Capra has noted that "[t]o a number of courts, the phrase 'rare and exceptional' is part of the text of the Rule rather than just legislative history." Daniel J. Capra, *Expanding (or Just Fixing) the Residual Exception to the Hearsay Rule*, 85 *FORDHAM L. REV.* 1577, 1604 (2017).

¹²⁶ *Cf. Capra, supra* note 125, at 1579 (discussing the pushback the Advisory Committee received over the potential for eliminating the ancient documents hearsay exception because of the "perceived difficulty of trying to fit ancient documents into the existing, limited residual exception").

¹²⁷ *See id.* at 1601–08 (describing the survey of cases and the results of the survey).

¹²⁸ *Id.* at 1603–04 (emphasis omitted).

within different jurisdictions have to strain to fit clearly probative evidence within the residual exception.¹²⁹ The *Huff* court felt that “such circumstances [were] present”¹³⁰ to invoke the residual exception, but the court was presented with a unique procedural position whereby the defendants had waived their argument to admit the evidence under the Rule 804(b)(3) statements against the interest exception.¹³¹ Yet, the court still relied on Rule 804(b)(3) to reason that the statements should be entered under the residual exception. In the court’s trustworthiness analysis,¹³² the court utilized the requirements of the statements against the interest exception¹³³ in order to meet the “equivalent circumstantial guarantees of trustworthiness” requirement of the residual exception.¹³⁴ The court specifically stated that Huff’s statement was against his pecuniary interest and thus had equivalent circumstantial guarantees of trustworthiness.¹³⁵

Although the *Huff* court was presented with unique circumstances that allowed it to analogize to another rule that seemed to be on point, this reasoning illustrates how the “circumstantial guarantees of trustworthiness” requirement of Rule 807 could be subject to varying standards in order to fit clearly probative evidence into the residual exception. While the *Huff* court’s analysis is viable in some circuits to admit the statement under Rule 804(b)(3) because it shows that an objective reasonable person should have been aware that the statement was against his pecuniary interest, in other circuits the state-

¹²⁹ Professor Capra has suggested that relaxing Rule 807 would “alleviat[e] the pressure on a court to distort the contours of a standard exception by admitting ill-fitting but reliable hearsay that should instead be admissible under a flexible residual exception.” *Id.* at 1580. For a related discussion on the phenomenon of courts trying to fit proffered electronic communications evidence into existing rules, see Jeffrey Bellin, *The Case for eHearsay*, 83 *FORDHAM L. REV.* 1317, 1321 (2014).

¹³⁰ *Huff*, 609 F.2d at 291.

¹³¹ *See id.* at 290 (“On appeal, defendant argues that the evidence was admissible . . . as a statement against interest under Rule 804(b)(3). We do not consider the latter argument, because Rule 804(b)(3) was not mentioned to the district court as a basis for admitting the evidence.” (footnote omitted)).

¹³² *See id.* at 292–94 (applying the residual exception’s trustworthiness requirement to Huff’s statement).

¹³³ *See Huff*, 609 F.2d at 292 (“There was no reason for him to invent the story of the preexisting fire in the cab. The story was contrary to his pecuniary interest, *cf.* Rule 804(b)(3) . . .”).

¹³⁴ *FED. R. EVID.* 807(a)(1).

¹³⁵ *Huff*, 209 F.2d at 292. The court noted that Huff’s statement was against his pecuniary interest regardless of his awareness of a possible future claim against the vehicle manufacturer because “[a] fire of unexplained cause on Huff’s clothing would tend to indicate driver error and to fix the responsibility for the accident, with attendant adverse pecuniary consequences, on him.” *Id.*

ment would fail to meet the 804(b)(3) requirements due to a lack of evidence of the declarant's subjective awareness.¹³⁶

Courts have noted the need to guard against using the residual exception too liberally as well as avoid inconsistent or ill-defined standards.¹³⁷ However, the *Huff* court's analysis shows that courts have significant discretion to choose what constitutes "equivalent circumstantial guarantees of trustworthiness," and using this method to admit decedent statements could lead courts to use Rule 807 more liberally to admit clearly probative statements.¹³⁸ Ultimately, the *Huff* court recognized that "[u]nless the hearsay is admitted, there will be no direct evidence on [whether there was a fire in the cab immediately before the crash]," and that excluding this evidence "was so prejudicial as to require a new trial."¹³⁹ Thus, using the residual exception in the way the *Huff* court did illustrates the significant problems the federal courts face in relying on Rule 807 to admit decedent statements.¹⁴⁰ These problems could be avoided by instead using a party-opponent rule of admissibility for decedent statements.

III

PREVAILING POLICY REASONS FOR ADMITTING DECEDENT STATEMENTS AS PARTY-OPPONENT STATEMENTS

Part II addressed the major counterarguments to admitting a decedent's statements under Rule 801(d)(2)(A)—policy concerns related to the potential for perjury that drove the enactment of state Dead Man Acts, and the fact that there are other hearsay exceptions that may provide for the admissibility of decedent statements. In Part III, this Note argues that because of the fact that the claim arises

¹³⁶ See *supra* notes 117–18 and accompanying text.

¹³⁷ See *United States v. Mathis*, 559 F.2d 294, 299 (5th Cir. 1977) (noting that while the residual exception's purpose was to give "courts the flexibility to deal with new evidentiary situations which may not be pigeon-holed elsewhere . . . tight reins must be held to insure that this provision does not emasculate our well developed body of law and the notions underlying our evidentiary rules"). For a discussion of relaxing Rule 807 such that it would "swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee," see Posner, *supra* note 4, at 1467.

¹³⁸ Professor Capra has stated, "[t]he major problem is that, given the wide range of options for comparison, a court can use 'equivalence' as a result-oriented device. So if the court wants to admit the hearsay, it can rely on comparison with exceptions that are at the bottom of the reliability barrel." Capra, *supra* note 125, at 1582.

¹³⁹ *Huff*, 609 F.2d at 295.

¹⁴⁰ See Capra, *supra* note 125, at 1580 ("Many lawyers believe that any increase in reliable hearsay that might be admitted by an expansion of the residual exception is far outweighed by the costs that would be raised by injecting more judicial discretion into the hearsay system.").

through the decedent's rights—i.e., but for the decedent, the claim would not even be litigated—and because of the threat of inconsistent outcomes, the appropriate rule is to admit all decedent statements under Rule 801(d)(2)(A) when the decedent is a real party in interest.

A. *The Claim Is the Decedent's Chose in Action*

A chose in action is “[t]he right to bring an action to recover a debt, money, or thing.”¹⁴¹ As the definition states, a chose in action is an intangible right to bring an *action*, not a possessory right.¹⁴² This distinction is important to understand, especially in terms of claims that are brought by an estate on behalf of a decedent, because such personal injury tort claims are often inalienable and unassignable.¹⁴³ Generally, in cases of wrongful death and survival actions, the chose in action for the personal injury tort that gives rise to the statutory claim lies with the decedent.¹⁴⁴ The decedent was the one harmed, and the damages are due to the decedent as a result of the interaction between the decedent and the tortfeasor.¹⁴⁵

So why does it matter that the claim at issue is the decedent's chose in action? Because this principle illustrates one reason why the decedent should be considered a party. Fundamentally, these cases are only in front of the court as a result of the decedent and the decedent's tort rights.¹⁴⁶ In other words, but for the decedent and the circumstances involving the decedent that led to the decedent's estate

¹⁴¹ *Chose in Action*, BLACK'S LAW DICTIONARY, *supra* note 16.

¹⁴² See W.S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997, 997 (1920) (defining a chose in action as a “legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession” (quoting *Torkington v. Magee* [1902] 2 KB 427 at 430 (Eng.)); Patrick T. Morgan, Note, *Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims*, 66 MO. L. REV. 683, 688 (2001) (recognizing that a chose in action is not historically a possessory right).

¹⁴³ See Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 74–82 (2011) (stating that “the most important current limitation [on assignability] . . . prohibits the assignment of causes of action for personal injuries” and discussing that the prohibition against assignment of personal injury claims is based on the “common law maxim *actio personalis moritur cum persona* (“a personal cause of action dies with the person)”) (quoting ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 354 (2d ed. 2008)); Morgan, *supra* note 142, at 683 (“Tort rights are personal and cannot be separated from the person.”).

¹⁴⁴ See Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 564 (1985) (recognizing that regardless of whether the action is a statutory survival action or wrongful death action, the cause of action is “the one the decedent would have had if the wrongful act had not taken his life”).

¹⁴⁵ See Morgan, *supra* note 142, at 683 (“This is unlike the proprietary right between an owner and his *res*: tort rights are interpersonal, existing between the tort victim and the tortfeasor.”).

¹⁴⁶ See Steinglass, *supra* note 144.

filing the action, there would be no claim at all.¹⁴⁷ Therefore, including the decedent as a party would recognize the decedent's rights in the action.

Holding that a decedent is a party to the litigation, and therefore subject to having statements entered under the party-opponent statement exclusion to hearsay recognizes that the decedent is the real "owner" of the original cause of action.¹⁴⁸ This comports with the idea expounded upon by Wigmore that a person's rights, such as a chose in action, should not be subject to different rules of evidence simply because they appear to have been transferred to a successor in interest.¹⁴⁹ Instead, the same rules should apply with equal force to a person's claims, whether that person is alive to pursue their own claim, or is deceased and a claim is brought on their behalf.¹⁵⁰ In other words, because the chose is owned by the decedent in either case, it should be subject to the same rules, no matter the procedural posture in which it is brought.

Furthermore, even if personal injury tort claims become more freely alienable,¹⁵¹ treating the decedent as a party under the Federal Rules of Evidence would still be consistent with the way decedents' claims are already treated for the purposes of diversity of citizenship in federal court and the defense of contributory negligence more generally. When determining the citizenship of a decedent's estate for purposes of federal diversity of citizenship subject matter jurisdiction, "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent."¹⁵² Additionally, while comparative and contributory negligence rules vary by state, the majority rule is that a decedent plaintiff's contributory negligence, while not a bar to recovery, is usually imputed to the estate and the beneficiaries, diminishing the amount that may be recovered.¹⁵³

¹⁴⁷ See *id.* ("[T]he action is the one the decedent would have had but for his death . . .").

¹⁴⁸ As previously discussed, the chose in action is an intangible right, not a typical property right. See Morgan, *supra* note 142 (discussing the differences between property and tort rights). Because choses in action are not typical property rights, the term "owner" is used here to distinguish the idea that, as an intangible right, the chose in action should follow the decedent, and should not be wholly transferred to a third party.

¹⁴⁹ See *supra* note 32 and accompanying text.

¹⁵⁰ See *supra* notes 32–33 and accompanying text.

¹⁵¹ See Sebok, *supra* note 143, at 74–82 (noting that the original common law rule prohibiting assignment of tort claims has almost been completely abandoned and arguing that even personal injury claims should be freely alienable).

¹⁵² 28 U.S.C. § 1332(c)(2) (2012).

¹⁵³ See, e.g., 46 U.S.C. § 30304 (2012) (reducing the amount a decedent's estate can recover in maritime actions); MISS. CODE ANN. § 11-7-15 (West 2008) (requiring that the jury diminish damages in proportion to the negligence of the person injured); N.Y.

Therefore, recognizing that a decedent is a party for purposes of the Federal Rules of Evidence aligns with the other procedural and substantive rules governing decedents' actions that recognize the decedent as a real party in interest.

B. A Rule of Admissibility Leads to Consistency in Verdicts

So far, this Note has recounted the ways in which real cases have played out in court. As discussed above, this issue tends to present itself in very narrow circumstances, such as wrongful death and estate cases.¹⁵⁴ While the rule this Note advocates can be applied to the previously mentioned cases with equal force and would result in optimal outcomes, a hypothetical construct better illustrates why a rule favoring admissibility is superior to a rule of exclusion.

In this hypothetical, plaintiff *P* has a potential claim against defendant *D*. For the sake of argument, let us say *P* is bringing a § 1983 case¹⁵⁵—alleging some type of police misconduct—to unquestionably bring it within federal question jurisdiction, so that the Federal Rules of Evidence apply and we can avoid dealing with any issues of substantive state law.¹⁵⁶ *P*'s case appears strong, containing plenty of circumstantial evidence benefitting *P*'s version of events as well as an emotional narrative. Now, let us also assume that at some time, in close proximity to the event that led to the lawsuit, *P* made a statement to witness *W* that would lead any reasonable juror to find that defendant *D* was in fact not liable.¹⁵⁷ Finally, let us assume that nothing at the time the decedent made the statement to *W* would have tended to make anyone think *P* was either aware that the statement was against his pecuniary interest or that it would give rise to any other circumstantial guarantees of trustworthiness.¹⁵⁸

C.P.L.R. 1411 (CONSOL. 2012 & Supp. 2017) (diminishing otherwise recoverable damages proportionally to the culpable conduct of the claimant or decedent).

¹⁵⁴ See cases cited *supra* notes 9–10.

¹⁵⁵ This hypothetical relies on a claim being survivable; otherwise there would be no issue regarding the decedent's statements at trial. Section 1983 claim survival depends on state survival laws, so long as those laws do not conflict with the underlying policies of Section 1983. *Robertson v. Wegmann*, 436 U.S. 584, 589–90 (1978). Though a full analysis of this issue is outside the scope of this Note, “[m]ost courts that have entertained § 1983 actions involving wrongful killings have rejected state policies that require the decedent’s personal action to abate.” Steinglass, *supra* note 144, at 635.

¹⁵⁶ See discussion *supra* note 33. This Note does not deal with the various substantive laws governing derivative versus non-derivative state law claims.

¹⁵⁷ This assumption is used to ensure that the dispositive statement, if entered, would make the outcome subject to judgment as a matter of law, either by the trial judge, regardless of a jury’s verdict, or on appeal. FED. R. CIV. P. 50(a)(1).

¹⁵⁸ Circumstances that either implicate Rule 804(b)(3) (statements against the interest) or Rule 807 (the residual exception) would present the court with alternative grounds for admitting the decedent’s statements. This Note uses this hypothetical to show that these

Applying two scenarios to this hypothetical will help illustrate why a rule that favors admitting the statements under Rule 801(d)(2)(A) is superior to a rule that rejects the statements under the privity-based admissions characterization. Add to the factual details above a rule of law that allows for party-opponent statements to be admitted when the person is a named party but treats statements made by nonnamed parties strictly as privity-based admissions that are not excluded from the hearsay prohibition. In Scenario 1, *P* is alive, brings the lawsuit on her own behalf, and *W* is allowed to take the stand and testify to the statement *P* made eliminating *D*'s culpability. Given that the statement is dispositive—in that any reasonable juror hearing it would have to find that *D* was not liable—*P* would lose her own case and not be entitled to any damages.

In Scenario 2, however, *P* passes away some time before the claim is initiated.¹⁵⁹ Estate *E* now brings the claim on behalf of *P*. Given that *P* is no longer a named party, *W* will not be able to testify to *P*'s statement negating *D*'s responsibility. And given that the statement was the dispositive piece of evidence determining liability, *P*'s estate, *E*, will win a judgment against *D*, something that *P* herself could not have done had she survived and initiated the action on her own, as explained in Scenario 1. We are left with inconsistent results because the admissibility of *P*'s statement is contingent on *P* surviving through the litigation's initiation.¹⁶⁰

statements should be admitted as party-opponent statements irrespective of whether the statements meet these other recognized grounds for admission. For a discussion of why the requirements for these alternative methods of admitting evidence would likely not be present, see *supra* Section II.B.

¹⁵⁹ It is irrelevant, for the purposes of this hypothetical, whether the cause of death is directly related to the circumstances that created the potential claim.

¹⁶⁰ This Note has only dealt with situations in which the decedent's estate has initiated the action after the decedent's death. A similar situation could arise, however, if the decedent originally survived and instigated the action on his own, but then passed away prior to trial. For example, in *Savarese v. Agriss*, one of the named parties, Dan Bogen, "was a party to [the] action in his official capacity despite the fact that he was deceased at the time of trial." 883 F.2d 1194, 1200 (3d Cir. 1989). This case is an outlier, however, because most decedents will not continue as named parties in action. Typically, in such a case, the estate would be substituted as a party in order for the action to continue. See, e.g., *Givens v. U.S. R.R. Ret. Bd.*, 469 U.S. 870 (1984) (mem.) (granting a party's motion to substitute the estate in place of the decedent). At this point, the decedent would no longer be a named party, and the issue might then arise as to whether the decedent would be in privity with the estate or whether they would still be a real party in interest. The same arguments made in Part III would apply with equal force to the situations in which the decedent initially instigates the action prior to passing away and then is substituted as a party by the decedent's estate. The argument that the decedent should be considered a party is strengthened in such a situation, however, as even Justice Scalia recognized that a decedent would likely be considered a party under a more formal definition. See discussion *supra* note 82.

If we change the rule of law applied to the hypothetical, such that the decedent could still be considered a party and the court would not characterize the statement as a privity-based admission, this inconsistency is resolved. In both cases, *P* would be considered a party for the purposes of Rule 801(d)(2)(A), and *W* would be able to take the stand and testify about *P*'s statement. Regardless of the procedural technicalities, both *P* and *E* would lose in either of the respective scenarios while defendant *D* would, quite rightly, escape liability.

There is an argument that this rule could also lead to consistently incorrect outcomes. This argument is based on the premise that a statement's dispositive nature, as relayed by *W*, could be taken out of context or otherwise be explained away—for example, that *P* was being sarcastic or under the influence of medication. In Scenario 1, where *P* survives, *P* could take the stand and provide the context that either reduces the weight of the evidence or eliminates its significance altogether. In Scenario 2, where *P* is a decedent, *E* will likely not have the benefit of providing this context. Given a rule of law excluding a decedent *P*'s statements under the privity-based admission characterization, *E* is protected from a potential inconsistent outcome that may result if *P* could successfully explain away the purported dispositive statement in Scenario 1.

While this counterargument raises a legitimate concern, it fails to illustrate why a rule of exclusion would be superior to a rule of inclusion. A rule of exclusion, based solely on protecting the courts from potentially admitting statements that may be taken out of context or otherwise explained away, would remove all statements from the factfinder, both the correct and probative as well as the potentially problematic. This would provide absolute protection against potentially problematic statements at the expense of all potentially dispositive probative statements, leaving no way for the latter to become admissible (outside of meeting the further requirements imposed by Rule 804(b)(3) and Rule 807). A rule of inclusion, however, would allow the probative statements to be admitted under the party-opponent statement rule, while also allowing for the possibility of mitigating the impact of problematic statements by allowing parties to present additional evidence that would impact the weight and credibility of the party-opponent statements. For example, if *P* could have been under the influence of medication or was suffering from a similar debilitation that would bring the purported dispositive statement into question, *E* would likely be able to present evidence to that effect, destroying the otherwise dispositive nature of the statement. Ultimately, this issue is best addressed, not as a question of the rule of admissibility, but as a question of the appropriate weight such state-

ments should be given by triers of fact after these statements have been admitted.¹⁶¹ Given the Federal Rules of Evidence's general inclination toward admitting relevant evidence rather than excluding it, a rule favoring admissibility best comports with this general principle.

In addition to creating a rule that promotes consistent outcomes, irrespective of unforeseeable contingencies, a rule favoring admissibility would also preclude undesirable strategic litigation behavior. For example, if there was known to be an unfavorable statement made by a plaintiff that could be admitted as a party-opponent statement, a plaintiff would be more likely to either delay filing a lawsuit—subject, of course, to relevant statutes of limitation—or would be more likely to engage in stall tactics if there was a reasonable chance that the plaintiff would not survive through trial. This would be especially true in the cases where the plaintiff has life-threatening injuries, suffers from a terminal illness, or is elderly. While these parades-of-horrible may seem far-fetched, one only needs to look back at the narrow set of circumstances that implicate such a rule to see that these are realistic policy considerations.

CONCLUSION

There is currently a circuit split in the federal courts as to whether a decedent's statements can be admitted into evidence under Federal Rule 801(d)(2)(A), which excludes party-opponent statements from the definition of hearsay. It is clear from surveying the cases involved in this circuit split that the courts diverge based on whether they determine that the decedent should be treated as a party, and thus their statements considered within the scope of the rule, or whether they determine that the decedent should be considered a predecessor in interest, and thus their statements characterized as privity-based admissions not within any of the excluded categories defined by the rule.

Prior to the enactment of the Federal Rules of Evidence, this distinction was of little consequence, as both privity-based admissions and party-opponent statements were admitted over hearsay objections. However, as the statutory rules have replaced the common law rules, this distinction has become important. A statutory interpretation of Rule 801(d)(2)(A) shows that courts that characterize these types of statements as privity-based admissions are probably correct

¹⁶¹ Cf. Joseph A. Colquitt & Charles W. Gamble, *From Incompetency to Weight and Credibility: The Next Step in an Historic Trend*, 47 ALA. L. REV. 145, 152–56 (1995) (arguing for the abrogation of statutory definitions of witness competency, such as Dead Man's statutes, in favor of having such issues be assessed by the trier of fact under principles of weight of evidence and credibility).

that the statements should not be admissible under Rule 801(d)(2)(A). An analysis using the *expressio unius est exclusio alterius* canon of statutory interpretation indicates that the Supreme Court and Congress intentionally abrogated the rule allowing privity-based admission because all of the other common law exceptions are specifically listed as subcategories under Rule 801(d)(2)(A) and because another section of the Federal Rules of Evidence, dealing with privilege, specifically calls out adherence to the common law rules of privilege. The advisory committee notes are ambiguous, and thus, on balance, privity-based admissions are likely not covered by the Federal Rules of Evidence's exclusions from hearsay.

There are, however, strong arguments in favor of the decedent being considered a party. The Supreme Court has, in the class action context, deemed nonnamed parties to have rights in cases. And given that the claims at issue in these cases flow from the decedent's rights, it seems equitable that the decedent be considered a party to the action for the purposes of the party-opponent statement rule.

There are, of course, issues with admitting statements by decedents. Almost all states at some point passed Dead Man's acts, which disallow statements made by decedents under the presumption that allowing such statements would lead to greater risk of perjury. The fact that the deceased would not be able to refute what is being said would appear to conflict with the common law understanding that party-opponent statements are admissible because of the adversarial nature of our system. Yet most states have rescinded these Dead Man's acts, instead preferring rules that favor admissibility.

Additionally, if the evidence is probative, there may be other ways to admit it, such as Rule 804(b)(3) and Rule 807—the statements against interest and residual exceptions, respectively. But it is unlikely that many statements that could be admitted as party-opponent statements would meet the heightened requirements of these other rules. And given that the claim is essentially the decedent's chose in action, it seems inequitable to disadvantage the defendant based solely on whether the claim survives the decedent.

Applying a rule of exclusion in a case where the decedent's statement would be dispositive in proving liability would lead to absurd results, with the plaintiff losing while alive and winning in death. But applying a rule of admissibility would result in a consistent outcome in both scenarios. Further, it would discourage undesirable strategic litigation behavior. Given the prevailing legal and policy arguments, courts should find decedents to be parties for purposes of admitting decedents' statements under Rule 801(d)(2)(A) in order to promote consistent, predictable outcomes.