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## ARTICLE

### FACEBOOK, TWITTER, AND THE UNCERTAIN FUTURE OF PRESENT SENSE IMPRESSIONS

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*The intricate legal framework governing the admission of out-of-court statements in American trials is premised on increasingly outdated communication norms. Nowhere is this more apparent than with the hearsay exception for “present sense impressions.” Changing communication practices typified by interactions on social media websites like Facebook and Twitter herald the arrival of a previously un contemplated—and uniquely unreliable—breed of present sense impressions. This Article contends that the indiscriminate admission of these electronic present sense impressions (e-PSIs) is both normatively undesirable and inconsistent with the traditional rationale for the present sense impression exception. It proposes a reform to the exception that would exclude*

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unreliable e-PSIs while simultaneously realigning the modern rule with its historical rationale. In so doing, this Article sounds an early warning to courts and legislators regarding similar challenges on the horizon, as modern communication norms continue to evolve beyond the contemplation of the drafters of the hearsay rules.

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INTRODUCTION

A breathtaking transformation in communication practices has unfolded over the past decade, and these changes seem more likely to accelerate than abate in the coming years.<sup>1</sup> When communication

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<sup>1</sup> See Laurie L. Baughman, *Friend Request or Foe? Confirming the Misuse of Internet and Social Networking Sites by Domestic Violence Perpetrators*, 19 WIDENER L.J. 933, 933 (2010) (noting that “[s]ocial networking over the Internet has taken the world by storm—revolutionizing the way people communicate by allowing users to publish their private lives on a world stage”); Nenagh Kemp, *Texting Versus Txtng: Reading and Writing Text Messages, and Links with Other Linguistic Skills*, 2 WRITING SYSTEMS RES. 53, 53 (2010) (describing the recent explosion in mobile phone ownership and text messaging, and noting that the average eighteen- to twenty-four-year-old text user sends nearly eight hundred messages a month); Larry D. Rosen et al., *The Relationship Between “Textisms” and Formal and Informal Writing Among Young Adults*, 37 COMM. RES. 420, 421 (2010) (reporting extensive usage by American teens of text messaging and noting that one study found that almost half of teens can text while blindfolded); Russell L. Weaver, *The Fourth Amendment, Privacy and Advancing Technology*, 80 MISS. L.J. 1131, 1133-34 (2011) (highlighting the ongoing “revolution in speech technology” brought about by “Internet-based devices like . . . Facebook, MySpace, Twitter and other communica-

norms change, it follows that evidence doctrine, and particularly the hearsay rules that control the admission of out-of-court statements, must change as well. New methods of communicating and manners of speaking require renewed assessment of the categories of statements traditionally excepted from the hearsay prohibition. In the coming years, venerable hearsay exceptions will need to be revised to better suit the modern era. For one exception, that time is already here.

The “present sense impression” exception to the hearsay prohibition is uniquely tethered to an oral, as opposed to electronic, communication norm. In fact, absent a previously unassailable assumption that statements describing contemporaneous events could only be communicated orally, America’s evidence codes would probably never have adopted this once-controversial exception.

Advocates of a hearsay exception for present sense impressions did not disguise their assumption that people would only communicate about unfolding events orally. Instead they exploited it. As the exception tentatively emerged from the common law fog of *res gestae*, its proponents disarmed critics by emphasizing the inevitability of corroboration.<sup>2</sup> In a time before smartphones or Twitter, a person who uttered a statement about an unfolding event (i.e., a present sense impression) would invariably be speaking to someone nearby who was also able to observe the same event. One of those persons would, of necessity, present the statement at trial and simultaneously corroborate its substance.

The seminal present sense impression case vividly illustrates these circumstances. In *Houston Oxygen Co. v. Davis*, a Texas appellate court famously concluded that a bystander’s out-of-court comment—that the occupants of a passing car “must [be] drunk” and will end up “somewhere on the road wrecked if they kept that rate of speed up”—was admissible even though it was hearsay.<sup>3</sup> The court emphasized

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tions technologies”); Kirsty Young, *Social Ties, Social Networks and the Facebook Experience*, 9 INT’L J. EMERGING TECHNOLOGIES & SOC’Y 20, 21 (2011) (describing the “phenomenal growth of Web 2.0 technologies,” including Facebook); Joseph Goldstein, ‘*On Tha Run for Robbin a Bank*’ and Other Online Postings That Investigators Love, N.Y. TIMES, Mar. 3, 2011, at A25 (reporting on authorities’ increasing reliance on online communications for evidence in criminal prosecutions “[a]s ‘Twitter, Facebook and other forms of public electronic communication embed themselves in people’s lives’”). For a further discussion of changing communication practices, see *infra* notes 73-85 and accompanying text.

<sup>2</sup> See *infra* notes 37-44 and accompanying text.

<sup>3</sup> 161 S.W.2d 474, 476 (Tex. 1942); see also FED. R. EVID. 803(1) advisory committee’s note (identifying *Houston Oxygen* as an “[i]llustrative” case for the exception); *Commonwealth v. Blackwell*, 494 A.2d 426, 432 (Pa. Super. Ct. 1985) (looking to *Hou-*

that the close temporal connection between the statement and the event it described minimized the dangers of misrecollection and insincerity.<sup>4</sup> The court also stressed that such statements “will usually be made to another (the witness who reports it) who would have equal opportunities to observe and hence to check a misstatement.”<sup>5</sup> True to form, the out-of-court statement in *Houston Oxygen* had been offered at trial through the testimony of both the bystander who originally uttered it and her two companions.<sup>6</sup> All three of these witnesses were able to testify and be cross-examined about the alleged reckless driving that gave rise to the statement’s utterance.<sup>7</sup>

In modern times, the assumption that a present sense impression will inevitably, or even usually, be corroborated by live witness testimony no longer holds. Thanks to technological wizardry and changing social norms, present sense impressions are not only becoming more widely available for use in litigation, but will commonly be both uncorroborated and of dubious reliability.<sup>8</sup> The phenomenon’s leading edge consists of the contemporaneous observations broadcast electronically, as opposed to orally, on Internet sites like Twitter and Facebook, as well as via text messaging.

Twitter could be the brainchild of mischievous evidence scholars. As described on its website,

Twitter is a real-time information network powered by people all around the world that lets you share and discover what’s happening now. Twitter asks “what’s happening” and makes the answer spread across the globe to millions, immediately.<sup>9</sup>

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*ston Oxygen* as the “leading case involving the present sense impression exception”); 2 MCCORMICK ON EVIDENCE § 271, at 251 (Kenneth S. Broun ed., 6th ed. 2006) (describing *Houston Oxygen* as “[t]he case most commonly cited to illustrate judicial recognition of the [present sense impression] exception”); James Donald Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L.A. L. REV. 203, 230 (1995) (identifying *Houston Oxygen* as the “seminal case in the development of the exception”).

<sup>4</sup> *Hous. Oxygen*, 161 S.W.2d at 476-77.

<sup>5</sup> *Id.* at 477.

<sup>6</sup> *Id.* at 476.

<sup>7</sup> *Id.* The trial court excluded the statement as hearsay, but the appellate opinion notes that the three percipient witnesses could have testified to its utterance if it had been admitted. *Id.* The opinion recounts that one of these witnesses testified that the car was “travelling ‘sixty or sixty-five miles’ an hour, about four miles from the scene of the accident and that as it went out of sight it was ‘bouncing up and down in the back and zig zagging.’” *Id.*

<sup>8</sup> See *infra* Part II.

<sup>9</sup> See John W. Clark et al., *Social Networking and the Contemporary Juror*, 47 CRIM. L. BULL. 83, 87 (2011) (reporting the same language from Twitter’s “About” page). Twit-

While of course not the intention of Twitter's creators, the service is, in essence, a vast electronic present sense impression (e-PSI) generator, constantly churning out admissible out-of-court statements. The same characterization applies to Facebook, a wildly popular social networking site that continually broadcasts autobiographical "status updates": short summaries of what users are currently seeing, doing, and feeling.<sup>10</sup>

Perhaps the most significant aspect of these modern developments is that under current evidence doctrine, inherent flaws in the reliability of uncorroborated e-PSIs will not preclude the statements' admissibility. Although the early champions and ultimate drafters of the modern present sense impression exception stressed that a percipient witness would corroborate the substance of statements admitted at trial, they failed to include any such corroboration requirement in the rule itself.<sup>11</sup> Consequently, modern courts generally decline to require this (or any) type of corroboration as a condition of admissibility.<sup>12</sup> All that is required for a statement to qualify as a present sense impression is contemporaneity, a requirement easily satisfied in the digital age.<sup>13</sup> In addition, the Supreme Court recently repudiated the constitutional doctrine that traditionally protected criminal defendants from the introduction of unreliable, informal ("nontestimonial") hearsay.<sup>14</sup> This means that any party, including the prosecution in a criminal case, can introduce an e-PSI without providing a live witness or other form of corroboration as to the event the statement describes. The modern day analogue of *Houston Oxygen* could be a reckless-driving prosecution of pop star Justin Bieber in which the prosecution

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ter's "About" page is regularly updated, and it no longer includes this precise language. See *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Nov. 15, 2011). The description remains accurate, however.

<sup>10</sup> See Young, *supra* note 1, at 27-28 (discussing Facebook status updates and reporting that many users employ them "from a belief that others want to know what they are thinking/doing/experiencing"); Wailin Wong, *Internet Connected with Presidential Election Like Never Before*, CHI. TRIB., Nov. 6, 2008, at 35 (describing Facebook status updates as "a brief line [of text] that explains what [someone is] doing or thinking").

<sup>11</sup> See *infra* notes 42-43 and accompanying text.

<sup>12</sup> See 2 MCCORMICK ON EVIDENCE, *supra* note 3, § 271, at 254 (noting that "most courts have not required" the "additional requirement of corroboration"); *infra* note 57 and accompanying text.

<sup>13</sup> See *infra* Part I and note 32.

<sup>14</sup> See *infra* Section II.C.

hinged its case on a pre-crash “tweet”:<sup>15</sup> “I just raced @justinbieber down Ventura in his Ferrari.”<sup>16</sup>

Evidence law’s most dashing champion, Sir Walter Raleigh, famously scorned the “paper accusation” admitted against him in his trial for treason.<sup>17</sup> Imagine Raleigh’s reaction to an incriminatory Facebook status update,

**Lord Cobham** Is wondering why **Sir Walter** is flying the Spanish flag?  
LOL<sup>18</sup>

or tweet,

**Lord Cobham** 5 minutes ago  
Talking treason over beers with @SirWalter, don’t tell the King! ☺

“What proof is this?” indeed.<sup>19</sup>

Questions about the reliability of present sense impressions are not new.<sup>20</sup> Dean Wigmore famously stalled judicial acceptance of the

<sup>15</sup> A “tweet” is a message sent out via Twitter. See *About Twitter*, *supra* note 9 (“At the heart of Twitter are small bursts of information called Tweets. Each Tweet is 140 characters in length, but don’t let the small size fool you—you can share a lot with a little space.”).

<sup>16</sup> This is a real tweet by celebrity Erik Schrody who tweets under the name “@OGEverlast.” OGEverlast, *I Just Raced @justinbieber*, TWITTER (Aug. 30, 2011), <https://twitter.com/#!/OGEverlast/status/108608075778375681>. According to news reports, Schrody posted this tweet “moments before Bieber collided with a Honda Civic in Studio City.” See *Justin Bieber Was Racing His Ferrari Before Accident*, PEREZ HILTON (Aug. 31, 2011, 6:00 PM), <http://perezhilton.com/2011-08-31-justin-bieber-was-racing-ferrari-with-house-of-pain-singer-everlast-in-los-angeles>. From other reports of the event, any connection between the purported street race and Bieber’s collision appears questionable. See Lorenzo Benet & Alison Schwartz, *Justin Bieber Crashes His Ferrari*, PEOPLE (Aug. 31, 2011, 7:55 AM), <http://www.people.com/people/article/0,,20524401,00.html> (indicating that the other vehicle involved crashed into Bieber’s car).

<sup>17</sup> DAVID JARDINE, *Trial of Sir Walter Raleigh*, in 1 CRIMINAL TRIALS 400, 418 (London, Charles Knight 1832); see also 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6342, at 258 (2010) (describing Raleigh as “[a] character as mighty as any Shakespeare placed upon the Elizabethan stage”).

<sup>18</sup> “LOL” is Internet shorthand for “laughing out loud.” See Kemp, *supra* note 1, at 65.

<sup>19</sup> JARDINE, *supra* note 17, at 429.

<sup>20</sup> See Moorehead, *supra* note 3, at 228-29 (questioning the assumption that “fabrication or misinterpretation is minimal when the declarant makes the statement with little or no time lapse between the underlying event and the statement”); Jon R. Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 875 (1981) (describing John Henry Wigmore’s opposition to the present sense impression exception); Steven Zeidman, *Who Needs an Evidence Code?: The New York Court of Appeals’s Radical Re-Evaluation of Hearsay*, 21 CARDOZO L. REV. 211, 236 (1999) (noting that “questions persist about the underlying rationale” for the present sense impression exception).

exception for decades,<sup>21</sup> and subsequent commentators echo Wigmore's skepticism that contemporaneity establishes reliability.<sup>22</sup> Until recently, however, the movement to abolish the present sense impression exception—if one can even be said to exist—lacked urgency. While the exception, now enshrined in the Federal Rules of Evidence and the overwhelming majority of state evidence codes,<sup>23</sup> has always been vulnerable to criticism, there was little reason to believe that present sense impressions played any significant role in American trials, either in terms of their quantity or potency as evidence.<sup>24</sup> In light of modern developments, both aspects of the relative insignificance of present sense impressions are now receding.<sup>25</sup>

With courts facing an approaching wave of *electronic* present sense impressions of questionable reliability, it is time to revisit the debate as to the merits of the exception that would allow their admission. To the degree the justification for the exception depends, as its initial proponents claimed,<sup>26</sup> on corroboration by a percipient witness,<sup>27</sup> the

<sup>21</sup> See EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 342 (1962) (observing, prior to the adoption of the Federal Rules, that "since Wigmore's great treatise became available . . . his theory [regarding excited utterances] has been generally accepted and Thayer's theory [on present sense impressions] neglected" by the courts); 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1757, at 238 (James H. Chadbourne ed., 1976) ("To admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test and to remove all limits of principle . . ."); Edward J. Imwinkelried, *The Need to Resurrect the Present Sense Impression Hearsay Exception: A Relapse in Hearsay Policy*, 52 HOW. L.J. 319, 327-28 (2009) ("By and large, the courts have found Wigmore's position persuasive. Until the adoption of the Federal Rules of Evidence, only a few jurisdictions recognized the present sense impression.").

<sup>22</sup> See *State v. Carpenter*, 773 S.W.2d 1, 9 n.3 (Tenn. Crim. App. 1989) ("The present sense impression exception, although embraced by the Federal Rules of Evidence, has been criticized by authorities as having virtually no indicium of reliability."); Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1, 28-30 (1987) (discussing flaws in the assumptions about cognitive processes that underlie the reliability argument); Moorehead, *supra* note 3, at 228 (arguing that the belief that little lapse in time results in minimal fabrication or misinterpretation is "questionable at best").

<sup>23</sup> See FED. R. EVID. 803(1); Imwinkelried, *supra* note 21, at 330 (explaining that "only six states" do not provide a hearsay exception for present sense impressions); Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 929 & n.131, 932-33 (2001) (noting that the present sense impression exception has been "accepted by the great majority of states" and providing an appendix that details the laws in each state).

<sup>24</sup> See *infra* note 62 and accompanying text.

<sup>25</sup> See *infra* Section II.B.

<sup>26</sup> See *infra* notes 39-40 and accompanying text.

<sup>27</sup> The term "percipient" is used throughout this Article to refer to a witness who is present at the time of the uttering of a present sense impression and thus could poten-

exception must now either be narrowed to circumstances where such corroboration exists (excluding many e-PSIs) or justified on other grounds. In short, scholars and courts must finally resolve the conundrum that haunts the present sense impression hearsay exception. If corroboration by a percipient witness is a significant justification for the exception, why is it not a prerequisite to admission?

This Article relocates this unfinished debate in the modern context that urgently requires its resolution. Part I explores the evolution of the modern present sense impression exception to the hearsay rule and highlights the central role of corroboration by a percipient witness in the advocacy leading up to the adoption of the exception. Part II explains how the present sense impression exception flourished despite the unresolved ambiguity at its core and argues that modern developments, such as the widespread use of Facebook, Twitter, and text messaging, require this ambiguity to finally be addressed. Part III contends that the uncorroborated e-PSIs made possible by modern technology are insufficiently reliable to be admitted into evidence and suggests that courts and legislatures update the present sense impression exception by requiring corroboration by a percipient witness as a prerequisite to admission.

This Article focuses on the present sense impression exception, but the arguments presented here foreshadow similar challenges to other aspects of evidentiary doctrine. A renewed debate as to the efficacy of long-accepted evidence rules looms on the horizon as rules founded on a tradition dating back to the common law and beyond<sup>28</sup> clash with the technologically enhanced communication habits of the “Look at Me Generation”<sup>29</sup> and the generations to come.

#### I. THE TENSION BETWEEN THE MODERN PRESENT SENSE IMPRESSION EXCEPTION AND ITS HISTORICAL RATIONALE

The evidentiary dilemma created by electronic present sense impressions can best be understood by reviewing the history of the exception that now permits their introduction at trial. After introducing the modern present sense impression exception, this Part explains

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tially perceive the described event. For a discussion of the definition of “present” in this context, see *infra* Section III.B.

<sup>28</sup> See Mirjan Damaška, *Of Hearsay and Its Analogues*, 76 MINN. L. REV. 425, 434-39 (1992) (discussing analogues to hearsay prohibition in Roman law dating back to “the twilight of the Middle Ages, several centuries before English judges articulated the hearsay rule”).

<sup>29</sup> See *infra* notes 86-89 and accompanying text.



that while the modern exception allows the admission of uncorroborated e-PSIs, its historical rationale dictates the opposite result.

The most influential variant of the modern present sense impression exception is contained in the Federal Rules of Evidence. Rule 803(1)—which serves as the model for identical rules in most states<sup>30</sup>—excepts from the hearsay prohibition a statement “describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”<sup>31</sup> Once its proponent establishes these prerequisites by a preponderance of the evidence, an out-of-court statement is admissible for the truth of the matter asserted.<sup>32</sup> The statement is admissible even if the declar-

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<sup>30</sup> See Imwinkelried, *supra* note 21, at 329-30 (explaining that after the enactment of the Federal Rule, thirty-four states “adopted Rule 803(1) more or less verbatim” and “several states without evidence codes have adopted the exception by case law”); see also 2 MCCORMICK ON EVIDENCE, *supra* note 3, § 271, at 252 (“[T]he rulemaking process provided the principal impetus for recognition of the hearsay exception for unexcited statements of present sense impressions.”).

<sup>31</sup> FED. R. EVID. 803(1). The rule allows a “slight lapse” following the event to allow “enough flexibility to reach statements made a moment after” the described event without providing enough time “to allow reflection, which would raise doubts about trustworthiness.” CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.35, at 836 (4th ed. 2009); accord FED. R. EVID. 803(1) advisory committee’s note (“[I]n many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable.”). As part of the Federal Rules restyling project, Rule 803(1)’s language has been tweaked slightly, but no change in substance is intended. See FED. R. EVID. 803(1) (Proposed Draft 2010) (defining a present sense impression as a “statement describing or explaining an event or condition, made while or immediately after the declarant perceived it”).

<sup>32</sup> A proponent of a present sense impression must establish by a preponderance of the evidence that the statement satisfies both the immediacy and personal knowledge prerequisites for admission. See, e.g., *Bemis v. Edwards*, 45 F.3d 1369, 1373 (9th Cir. 1995). The requirement of personal knowledge stems from Rule 602, which requires that all witness testimony be supported by personal knowledge. FED. R. EVID. 602. This personal knowledge may be apparent “from [the] statement or be inferable from circumstances.” FED. R. EVID. 803 advisory committee’s note. It may be difficult in some cases to establish these prerequisites without evidence that corroborates the statement. See *Booth v. State*, 508 A.2d 976, 984 (Md. 1986) (“[E]xtrinsic evidence may sometimes be required to demonstrate the contemporaneity of the statement, or to show that it is the product of personal perception by the declarant.”). Nevertheless, the rule does not require any form of corroboration, and courts have allowed the content of the statement itself to establish the prerequisites. See *Miller v. Crown Amusements, Inc.*, 821 F. Supp. 703, 705-07 (S.D. Ga. 1993) (ruling that an anonymous 911 call was admissible as a present sense impression); *Talley v. Commonwealth*, No. 2003-SC-0869-MR, 2005 WL 387443, at \*1-2 (Ky. Feb. 17, 2005) (relying on the statement itself to reject the defendant’s challenge to the district court’s admission of an anonymous 911 call); *State v. Jones*, 532 A.2d 169, 172-73 (Md. 1987) (concluding that “in some instances the content of the statement may itself be sufficient to demonstrate that it is more likely than not the product of personal perception” and upholding the admission of anonymous statements by CB-radio operators); 2 MCCORMICK ON EVI-

ant does not testify and, for that matter, without any showing of the declarant's unavailability.<sup>33</sup>

As the rule's text makes clear, the present sense impression exception rests on an assumption that contemporaneity imparts reliability. Statements that fall within the exception are assumed to be accurate because the closeness in time between the perceived event and the declarant's description eliminates dangers of faulty memory.<sup>34</sup> These statements are also thought to be sincere because the absence of an opportunity for reflection "negative[s] the likelihood of deliberate or conscious misrepresentation."<sup>35</sup>

The ubiquity of the present sense impression exception in modern evidence codes masks the exception's tentative beginnings. American evidence scholars who persistently advocated for the rule's adoption did so against a "backdrop . . . of massive judicial rejection."<sup>36</sup> Despite its claim to the venerable *res gestae* bloodline,<sup>37</sup> a specific hear-

DENCE, *supra* note 3, § 271, at 252 & n.20 (recognizing that the first-hand knowledge requirement "can sometimes be proved entirely by the statement"). The experience of New York courts demonstrates that if corroboration is desirable, then corroborating the contemporaneity of the statement is insufficient. *See* *People v. Vasquez*, 670 N.E.2d 1328, 1334 (N.Y. 1996) ("Although we stated [previously] that 'there must be some evidence . . . that the statements sought to be admitted were made spontaneously and contemporaneously with the events described,' we did not mean by that language that such proof would suffice to satisfy the *entirely separate* requirement that the content of the communication be corroborated by independent proof." (emphasis added) (citation omitted)).

<sup>33</sup> *See* FED. R. EVID. 803 (explaining that the declarant's availability is immaterial to the applicability of the exceptions listed in Rule 803).

<sup>34</sup> *See* *United States v. Blakey*, 607 F.2d 779, 785 (7th Cir. 1979) ("The underlying rationale of the present sense impression exception is that substantial contemporaneity of event and statement minimizes unreliability due to defective recollection or conscious fabrication."), *overruled on other grounds by* *United States v. Harty*, 930 F.2d 1257, 1263 (7th Cir. 1991); MUELLER & KIRKPATRICK, *supra* note 31, § 8.35, at 835 (stating that contemporaneity means that "if the speaker does not anticipate what is to come, his statement may be free of the distortion that may result from events as they unfold"); *cf.* Edward J. Imwinkelried, *The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt—and Quickly Forgotten*, 41 FLA. L. REV. 215, 229-30 (1989) (emphasizing the importance of a declarant's potential failure of accurate recall as a key to explaining modern hearsay exceptions).

<sup>35</sup> FED. R. EVID. 803(1) advisory committee's note; *see also* MUELLER & KIRKPATRICK, *supra* note 31, § 8.35, at 835 ("[I]mmmediacy precludes time for reflection, eliminating or sharply diminishing the possibility of intentional deception."); *Blakey*, 607 F.2d at 785 (stating that the risk of intentional falsehoods decreases when there is contemporaneity between the event and the statement).

<sup>36</sup> Imwinkelried, *supra* note 21, at 329. The drafters of the Federal Rules instead relied on persuasive secondary sources. *Id.*

<sup>37</sup> The common law rules prohibiting hearsay contained a catch-all exception for "*res gestae*." The term's meaning obscured in "a dead and foreign tongue," the *res gestae*

say exception for present sense impressions was not widely accepted by American courts until the enactment of the Federal Rules of Evidence in 1975.<sup>38</sup>

American commentary urging the courts to adopt a hearsay exception for contemporaneous observations (i.e., present sense impressions) has a more impressive lineage, tracing as far back as the 1880s.<sup>39</sup> At that time, of course, the world was a very different place. At the dawn of the twentieth century and for decades afterward, the contemporaneity requirement of the proposed exception ensured that present sense impressions would be communicated to the trier of fact by a person (generally, the original speaker or the person to whom the speaker was communicating) who could also testify regarding the described event. Thus, early advocates of the exception framed the two-

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exception provided attorneys and judges with “relief at a pinch” from the frustrating limits of hearsay doctrine. Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 229 n.1, 230 (1922) (quoting James B. Thayer, *Bedingfield’s Case.—Declarations as a Part of the Res Gestae* (pt. 2), 15 AM. L. REV. 1, 10 (1881)). Predictably, commentators rebelled against the rule’s “exasperating indefiniteness” and, over time, succeeded in distilling its useful components into a handful of concrete hearsay exceptions that now populate modern evidence codes. *Id.* at 229-30. *Res gestae* as a hearsay exception is dead, but its progeny live on. One of these offspring is the present sense impression. See Peter Nicolas, *I’m Dying to Tell You What Happened: The Admissibility of Testimonial Dying Declarations Post-Crawford*, 37 HASTINGS CONST. L.Q. 487, 522 n.184 (2010) (explaining that “[a]t common law, the phrase ‘res gestae’ encompassed what today is encompassed by multiple different hearsay exceptions,” including the present sense impression exception); Aviva Orenstein, *Sex, Threats, and Absent Victims: The Lessons of Regina v. Bedingfield for Modern Confrontation and Domestic Violence Cases*, 79 FORDHAM L. REV. 115, 133 (2010) (“Modern courts rarely employ the term *res gestae*; it is a relic that served as a transitional device in the evolution of various hearsay exceptions and in honing the definition of hearsay.” (footnote omitted)).

<sup>38</sup> See 2 MCCORMICK ON EVIDENCE, *supra* note 3, § 271, at 251-52 (“[T]he rulemaking process provided the principal impetus for recognition of the hearsay exception for . . . present sense impressions.”); Imwinkelried, *supra* note 21, at 327-28 (explaining that despite widespread support among commentators “only a few jurisdictions recognized the present sense impression exception” prior to the adoption of the Federal Rules of Evidence); see also Charles W. Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204, 204-05 (1960) (emphasizing, in an article written before the Federal Rules’ adoption, the dim prospects for judicial adoption of the present sense impression exception). Both the Association of Trial Lawyers of America and the American Bar Association opposed the Advisory Committee’s proposed exception for present sense impressions. See Imwinkelried, *supra* note 34, at 231 (observing that the exception faced such opposition because “at common law, the exception was a distinct minority view”).

<sup>39</sup> See James B. Thayer, *Bedingfield’s Case.—Declarations as a Part of the Res Gestae* (pt. 3), 15 AM. L. REV. 71, 107 (1881) (advocating an expansion of what is permitted under the hearsay rules, including “declarations of fact which were very near in time to that which they tended to prove”).

fold justification for admitting present sense impressions (contemporaneity and corroboration) as one overarching reliability guarantee.<sup>40</sup>

In an influential article on the subject, the “granddaddy of the modern present sense impression,”<sup>41</sup> James Bradley Thayer, explained that a present sense impression relates “what was then present or but just gone by, and so was open, either immediately or in the indications of it, to the observation of the witness who testifies to the declaration, and who can be cross-examined as to these indications.”<sup>42</sup> Edmund Morgan similarly explained:

[S]ince the statement is contemporaneous with the event, it is made at the place of the event. Consequently the event is open to perception by the senses of the person to whom the declaration is made and by whom it is usually reported on the witness stand. The witness is subject to cross-examination concerning that event as well as the fact and content of the utterance, so that the extra-judicial statement does not depend solely upon the credit of the declarant.<sup>43</sup>

Other prominent commentators echoed these views, opining that since “the person who heard the declaration [would be] on hand to be cross-examined,” the present sense impression exception constituted “an ideal exception to the hearsay rule.”<sup>44</sup>

The drafters of the Federal Rules of Evidence referenced these scholars in adopting the present sense impression exception and ex-

<sup>40</sup> See *infra* notes 42-44 and accompanying text.

<sup>41</sup> Orenstein, *supra* note 37, at 133; see also Imwinkelried, *supra* note 21, at 326-27 (identifying Thayer as the “champion” of the movement to recognize the present sense impression exception near the end of the nineteenth century). Emphasizing the murky common law roots of the exception, Waltz characterizes Thayer as the exception’s “adoptive if not its natural father.” Waltz, *supra* note 20, at 892.

<sup>42</sup> Thayer, *supra* note 39, at 107.

<sup>43</sup> Morgan, *supra* note 37, at 236; see also Waltz, *supra* note 20, at 886-87 (“One reason for insisting upon almost near-perfect contemporaneity is that it will usually assure trial testimony concerning the declarant’s present sense impression by an equally or almost equally percipient witness.”). Morgan, along with Thayer and Wigmore, is viewed as one of the “three towering figures in the field of evidence law.” Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer’s Triumph*, 88 CALIF. L. REV. 2437, 2439 (2000).

<sup>44</sup> Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 439 (1928); see also M.C. Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224, 252 (1961) (emphasizing that “[i]n a great majority of the cases in which [present sense impressions] are admitted, . . . the witness hearing the declaration has had substantial opportunity to observe the event or condition to which the declaration relates”). As Imwinkelried points out, the early commentators seem to have consistently assumed that corroboration would be present, rather than argued that it must be. Imwinkelried, *supra* note 21, at 354.

PLICITLY endorsed their rationales.<sup>45</sup> Thus, it is not surprising that the modern rule follows the pattern suggested by its early proponents.<sup>46</sup> The rule requires that a qualifying statement be made at substantially the same time as the event described, while merely assuming that corroboration will follow.<sup>47</sup> Corroboration by a percipient witness is nowhere mentioned in the text of the federal rule (or in the text of the state rules that follow the federal model).<sup>48</sup> Rather, it appears only in the Advisory Committee's Note, which, citing Morgan, touts the inevitability of corroboration: "Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement."<sup>49</sup>

Anyone who followed the Advisory Committee's citation to Morgan's work would have located the seeds of the present dilemma. In the passage cited by the Advisory Committee, Morgan takes a subtly different approach than the rule's drafters by emphasizing corroboration by a percipient witness as the *central* justification for the exception, and contemporaneity as a secondary guarantee.<sup>50</sup>

<sup>45</sup> See FED. R. EVID. 803(1) advisory committee's note (citing MORGAN, *supra* note 21) (identifying the theories developed in common law as the basis for the present rule).

<sup>46</sup> Rule 803(1) can be traced to Rule 512 of the American Law Institute Model Code, advocated by Morgan as an expression of Thayer's views. MORGAN, *supra* note 21, at 340-42; see also McFarland, *supra* note 23, at 911-12 (describing the development of the present sense impression exception in the Uniform Rules, which were "drafted from the Model Code" less than a decade after the Code was rejected). Rule 512 states, in part: "Evidence of a hearsay statement is admissible if the judge finds that the hearsay statement was made . . . while the declarant was perceiving the event or condition which the statement narrates or describes or explains, or immediately thereafter . . ." ALL MODEL CODE OF EVIDENCE R. 512 (1942).

<sup>47</sup> See FED. R. EVID. 803(1); see also Kathryn E. Wohlsen, Comment, *The Present Sense Impression Exception to the Hearsay Rule: Federal Rule of Evidence 803(1)*, 81 DICK. L. REV. 347, 355 (1977) (explaining, shortly after the rule was enacted, that "the requirement of contemporaneity" ensures "the opportunity to cross-examine the reporting witness concerning the fact and content of the statement").

<sup>48</sup> FED. R. EVID. 803(1); see also Imwinkelried, *supra* note 21, at 329 ("Thirty-four . . . states have adopted Rule 803(1) more or less verbatim."). See *infra* Section III.B and note 135 for a discussion of state rules that deviate from the Federal Rule on this point.

<sup>49</sup> FED. R. EVID. 803(1) advisory committee's note; see also Moorehead, *supra* note 3, at 230 ("[A]n initial justification for exceptions based solely on contemporaneity—the existence of corroborating testimony—was lost in the codification of the Federal Rules.").

<sup>50</sup> In language that parallels the Advisory Committee Note, Morgan explained: The reception of a [present sense impression will] . . . not require the trier to rely solely upon the credibility of the unexamined declarant. If the witness

While there remains room for debate as to what this historical record reveals about the precise intention of the drafters of the Federal Rules with respect to corroboration,<sup>51</sup> the simplest explanation is that the rule embodies its progenitors' unexamined assumptions. The drafters of the Federal Rules, much like Morgan and Thayer, viewed the world in light of then-extant technology and assumed that virtually all present sense impressions proffered at trial would include corroboration by a percipient witness. Even if the drafters recognized that a handful of the already small number of qualifying statements would lack such corroboration,<sup>52</sup> it is likely they felt these statements would not be so numerous or significant as to require the addition of an ex-

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were the declarant himself he could be fully examined as to the facts declared. If the witness were another, he could be cross-examined concerning his perception of the event or condition sufficiently to enable the trier to put a fair value upon the declarant's statement. Furthermore, the utterance must be substantially contemporaneous with the event or condition, and this would normally negative the probability of deliberate or conscious misrepresentation.

MORGAN, *supra* note 21, at 341; *see also* Edmund M. Morgan, *Res Gestae*, 12 WASH. L. REV. 91, 95-97 (1937) (reiterating the importance of the guarantee of reliability provided by a percipient witness); Waltz, *supra* note 20, at 894 (noting that Morgan interpreted Thayer's commentary to "plac[e] corroboration first as a condition justifying reception of present sense impressions").

<sup>51</sup> Scholars offer competing views as to whether the drafters of the Federal Rules intended to require corroboration by a percipient witness. *Compare* Imwinkelried, *supra* note 21, at 351-52 (highlighting the absence of any requirement of corroboration in the rule's text and pointing out, by reference to Rule 804(b)(3), that "[w]hen Congress wished to mandate corroboration, it did so explicitly"), *with* Waltz, *supra* note 20, at 889-92 (pointing out that the rule's drafters, as evidenced by Rule 406, "also knew how to strip a rule of a corroboration requirement that might otherwise have been a part of its common-law baggage" and discussing the Advisory Committee's "awareness of corroboration's role" as evidenced by citation to cases that required some form of corroboration and references to scholars, such as Morgan, who emphasized corroboration). *See also* *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 303 (3d Cir. 1983) (noting that "the rule is generally understood to require that, in addition to contemporaneity, there be some corroborating testimony" and upholding the trial court's exclusion of present sense impressions on the grounds that "there is reason to be skeptical" of the out-of-court statements at issue); *United States v. Blakey*, 607 F.2d 779, 785 (7th Cir. 1979) (responding to a party's claim that the availability of a percipient witness is "implicit in the present sense impression exception" by noting that "it is only necessary that the witnesses be able to corroborate the declarant's statement"), *overruled on other grounds by* *United States v. Harty*, 930 F.2d 1259 (7th Cir. 1991); *cf.* Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539, 1579-80 (1999) (arguing that courts should not attempt to discern the legislative intent behind the Federal Rules of Evidence, but instead must interpret them "in the context of the fluid common-law doctrines that the Rules represent").

<sup>52</sup> *See infra* Section II.A.

PLICIT (and not easily crafted<sup>53</sup>) corroboration requirement.<sup>54</sup> After all, the jury can always discount the weight of a present sense impression for the very same reasons that the statement might otherwise be deemed inadmissible.<sup>55</sup> In addition, to the extent the drafters worried about the admission of unreliable present sense impressions in criminal trials, this concern was tempered by emerging Confrontation Clause jurisprudence that purported to independently ensure the reliability of hearsay admitted against a criminal defendant.<sup>56</sup>

Whatever the intentions of the drafters, it is hardly surprising that, in light of the rule's unambiguous text, courts and commentators generally interpret the rule as written; corroboration by a percipient witness is a positive attribute of statements admitted under the present sense impression exception, but not a necessary one.<sup>57</sup> As a representa-

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<sup>53</sup> See *infra* Section III.B.

<sup>54</sup> See Imwinkelried, *supra* note 21, at 354 (“[I]t seems plausible that although the drafters thought that the usual availability of an equally percipient witness contributed to the wisdom of recognizing the exception, they did not intend to prescribe a formal limitation on the exception’s scope.”). When the Rules were enacted in 1975, a harbinger of modern developments had already emerged: the telephone. The drafters thus may have considered the possibility that a present sense impression could be communicated at trial by a person who was talking to the declarant on a home telephone. Cf. FED. R. EVID. 901(b)(6) (providing an illustration of means of authenticating “telephone conversations”); *Commonwealth v. Coleman*, 326 A.2d 387, 390 (Pa. 1974) (affirming the admission of a statement over a home telephone as a present sense impression).

<sup>55</sup> See, e.g., *Ernst v. Commonwealth*, 160 S.W.3d 744, 756 (Ky. 2005) (explaining that “corroboration is not an absolute prerequisite to admissibility” of a present sense impression and that “its absence affects only the weight of the evidence”).

<sup>56</sup> See FED. R. EVID. art. VII advisory committee’s introductory note (stating that “under the recent cases the impact of the [Confrontation C]ause clearly extends beyond the confines of the hearsay rule” and that consequently the exceptions in Rules 803 and 804 do not guarantee admissibility in criminal trials); *infra* Section II.C (discussing that prior to the Supreme Court’s decision in *Crawford v. Washington*, the Confrontation Clause required a demonstration of the reliability of the statement).

<sup>57</sup> See *United States v. Ruiz*, 249 F.3d 643, 647 (7th Cir. 2001) (“[C]ourts sometimes focus on the corroboration or the lack thereof in admitting or excluding present sense impressions, but the truth is that the rule does not condition admissibility on the availability of corroboration.” (citation omitted)); *Ramrattan v. Burger King Corp.*, 656 F. Supp. 522, 528 (D. Md. 1987) (“[C]orroboration is not required under Rule 803(1) . . . .”); *United States v. Obayagbona*, 627 F. Supp. 329, 339 (E.D.N.Y. 1985) (“Under the Federal Rules a present sense impression need not be corroborated, but where corroborating circumstances or witnesses are available, the hearsay gains in trustworthiness and probative force.”); *Hallums v. United States*, 841 A.2d 1270, 1278 (D.C. 2004) (surveying case law and concluding that “[m]any jurisdictions admit present sense impressions without requiring additional safeguards to ensure reliability,” while “[i]n contrast, a shrinking minority of jurisdictions requires corroboration before a hearsay statement will be admitted as a present sense impression”); *State v. Flesher*, 286 N.W.2d 215, 218 (Iowa 1979) (“We find nothing, however, in either the wording of the exception nor in its underlying rationale which requires corroboration

tive modern treatise explains, “the statement will *usually* have been made to a third person (the witness who subsequently testifies to it), who was also present at the time and scene of the observation.”<sup>58</sup> The treatise emphasizes that while this aspect of the prototypical present sense impression “is certainly an added assurance of accuracy,” a “general justification for admission is not the same as a requirement.”<sup>59</sup>

## II. PRESENT SENSE IMPRESSIONS: PAST AND FUTURE

The present sense impression exception has flourished despite its unpromising beginnings. The exception enjoys the prestige of being the first enumerated hearsay exception in the Federal Rules of Evidence<sup>60</sup> and has now been adopted, with little controversy, in virtually

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as a condition of its admissibility.”); *Booth v. State*, 508 A.2d 976, 983-84 (Md. 1986) (discussing the split of authority with regards to the corroboration requirement and concluding by “reject[ing] the contention that corroboration by an equally percipient witness is required as a condition to the admissibility of a statement of present sense impression”); *People v. Luke*, 519 N.Y.S.2d 316, 319 (Sup. Ct. 1987) (“Th[e] reference [to corroboration] by the Advisory Committee has generally not been interpreted by the Federal courts as an absolute requirement of corroboration.” (citation omitted)); see also 30B MICHAEL GRAHAM, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 7042, at 405-06 (2006) (“[N]othing in Rule 803(1) actually requires that the in court witness, in addition to the out of court declarant, have personal knowledge of the underlying event.”); 2 MCCORMICK ON EVIDENCE, *supra* note 3, § 271, at 254 & n.29 (explaining that “the underlying rationale” for the present sense impression exception “offers sufficient assurances of reliability without the additional requirement of corroboration, and the Federal Rule and most courts have not required it” (footnote omitted)); 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:67, at 560 (3d ed. 2007) (“Rule 803(1) does not *require* independent corroboration, as its silence on this point confirms.”); *Imwinkelried*, *supra* note 21, at 354 (concluding that corroboration should not be required by the rule).

One treatise states that “[m]ost federal courts . . . have read a corroboration requirement into Rule 803(1),” and that this is “a sensible approach,” but the authors appear to suggest that, while corroboration is not required by the rule itself, it is a *de facto* requirement, necessary to establish the prerequisites of the exception rather than to ensure the statement’s trustworthiness. 4 SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL (9th ed. 2006) § 803.02[2][b], at 803–15. The treatise continues, “To satisfy the timing, relationship, and event requirements, the witness in Court is probably going to have to be able to corroborate to some extent that the event actually occurred, unless the declarant is present to so testify or there is some other source of corroboration.” *Id.* § 803.02[2][b], at 803–16. The cases cited in the treatise do not further elucidate the conclusion drawn. See *id.* § 803.03[1], at 803–87. Further, there is no discussion of how a court would determine what constitutes corroboration, see *infra* Section III.B, given the rule’s silence on the question.

<sup>58</sup> 2 MCCORMICK ON EVIDENCE, *supra* note 3, § 271, at 251 (emphasis added).

<sup>59</sup> *Id.* § 271, at 254.

<sup>60</sup> See FED. R. EVID. 803(1).



every American jurisdiction.<sup>61</sup> The absence of continued criticism, however, should be attributed more to a recognition of the rule's relative unimportance than its underlying merits. As courts and scholars regularly note, the exception does not arise often and, when it does, the presence of corroborating witness testimony renders out-of-court statements admitted under the rule relatively insignificant.<sup>62</sup> But as this Part explains, the factors that once relegated the present sense impression exception to a minor role in American litigation are receding in the wake of technological and social changes.

#### A. *The Limited Significance of (Oral) Present Sense Impressions*

After the adoption of the Federal Rules of Evidence and nearly identical evidence codes in most states, the primary limitation on the use of present sense impressions at trial was not legal, but practical. Before any litigant would offer such a statement, the statement had to be (1) uttered, (2) preserved, and (3) tactically significant to a litigated dispute. For reasons inherent in the nature of present sense impressions, these obstacles were not easily overcome.

To see why this is so, contrast the present sense impression exception with the closely related hearsay exception for "excited utterances."<sup>63</sup> The excited utterance exception applies if a speaker makes a

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<sup>61</sup> A substantial majority of states have either adopted the rule as part of their rules of evidence or through case law. Inwinkelreid, *supra* note 21, at 329-30. California, Connecticut, Nebraska, Oregon, and Tennessee do not have a present sense impression exception. See *infra* note 135.

<sup>62</sup> See FED. R. EVID. 803(1) advisory committee's note (recognizing that because "unexciting events are less likely to evoke comment, decisions involving [present sense impressions] are far less numerous" than those involving excited utterances); Commonwealth v. Blackwell, 494 A.2d 426, 431 (Pa. Super. Ct. 1985) ("Cases involving the present sense impression exception to the hearsay rule are infrequent."); 2 MCCORMICK ON EVIDENCE, *supra* note 3, § 271, at 252 (noting the "relative infrequency" of cases involving present sense impressions); Ronald N. Boyce & Edward L. Kimball, *Utah Rules of Evidence 1983* (pt. 3), 1995 UTAH L. REV. 717, 764 (describing the present sense impression exception as "sometimes overlooked"); McFarland, *supra* note 23, at 912-13 (concluding based upon a "review of every one of the reported federal cases, as well as a substantial sampling of the reported state cases, decided in this quarter-century" that "the present sense impression exception is seldom used" (footnotes omitted)); Judith Lynn Schlossberg, State v. Jones: *Maryland's Flexible Present Sense Impression Exception*, 48 MD. L. REV. 537, 542 (1989) ("Although the exception is recognized today in most jurisdictions, cases dealing with present sense impression are relatively sparse."); Wohlsen, *supra* note 47, at 348 (commenting that "well-reasoned judicial discussion" of the present sense impression exception is "rare," in part because "unexciting events are unlikely to evoke comment").

<sup>63</sup> FED. R. EVID. 803(2). The "excited utterance" exception similarly arose out of the common law *res gestae* exception. See Goldman, *supra* note 22, at 27 ("Although the

statement relating to a “startling” event while “under the stress of [the resulting] excitement.”<sup>64</sup> As a practical matter, startling events and excited utterances frequently coexist. If a witness (a bystander, participant, or victim) is present, a startling event will invariably trigger excited statements intended for a broad audience: “Stop, thief!”; “An assassin shot the Vice President!” Due to their association with an often significant event, excited utterances are also likely to be preserved in the memories of others or documented (for example, by police responding to a crime scene). In fact, scientific studies suggest a biological advantage for excited utterances: adrenaline generated during a startling event stimulates memory formation.<sup>65</sup>

The analysis differs for present sense impressions. If a litigant is resorting to the present sense impression exception, the proffered statement arises not from a startling event, but from something more

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spontaneous exclamation and present sense impression exceptions rest upon slightly different underlying rationales, they share a common basis for their existence.” (footnotes omitted)); Morgan, *supra* note 37, at 238 (outlining the development of the excited utterance exception from the common law). Courts will face some of the same challenges described herein with respect to excited utterances. See FED. R. EVID. 803(2) advisory committee’s note (explaining that “in most cases there is present at least circumstantial evidence” in addition to the statement itself “that something of a startling nature must have occurred”). As the analysis, historical and otherwise, of the excited utterance exception is distinct from that of the present sense impression exception, discussion of potential limits on the excited utterance exception in response to technological change requires separate treatment.

<sup>64</sup> FED. R. EVID. 803(2).

<sup>65</sup> See Adam J. Kolber, *Therapeutic Forgetting: The Legal and Ethical Implications of Memory Dampening*, 59 VAND. L. REV. 1561, 1571-74 & nn.59-61 (2006) (summarizing scientific research on the effects of stimulation on memory and explaining that “[w]hen encountering a vicious creature in the forest . . . the same adrenaline that helps you run away from it also helps you remember to avoid that path the next time”); see also Judith L. Alpert et al., *Comment on Ornstein, Ceci, and Loftus (1998): Adult Recollections of Childhood Abuse*, 4 PSYCHOL. PUB. POL’Y & L. 1052, 1054-55 (1998) (“[A] large body of evidence exists to suggest that, in contrast to normal memories, emotional (and, hence, traumatic) memories are encoded differently. Emotional memories have been described as detailed and accurate and not prone to error . . . [A] review of research on traumatic memories indicates the relative accuracy and persistence of traumatic memories as compared to more ordinary ones.” (citations omitted)).

As research into flawed eyewitness identifications reveals, the question of how stress influences memory is a complex one. Some research suggests that moderate levels of stress may enhance memory while higher levels will disrupt it. See Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT’L J.L. & PSYCHIATRY 265, 274 (2004) (noting the existence of “robust evidence that eyewitness memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error”).

mundane.<sup>66</sup> Ordinary events, however, do not invariably give rise to comment.<sup>67</sup> Almost by definition, these events occur in a predictable manner, often rendering verbal description redundant.

Further, even if an observer utters a contemporaneous description of a commonplace event—"the driver of the blue car is texting"<sup>68</sup>—others are less likely to pay attention to the statement, much less remember it, record it, or write it down. Descriptions of the ordinary will often go unnoticed and, as students across the world can attest, there is no biological mechanism that enhances memorization of the mundane.<sup>69</sup> In short, present sense impressions, even if uttered, will often be unavailable for presentation at trial simply because no one remembers them.

Unlike the statements that fall under virtually every other hearsay exception, present sense impressions have no clear connection to litigation or frequently litigated events. Other exceptions play a predictable role in litigation either because they permit admission of statements that describe predictable precursors to legal disputes (e.g.,

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<sup>66</sup> See *Blackwell*, 494 A.2d at 431 ("Commentators have generally characterized the occurrence giving rise to the declaration as an *unexciting event*."); Imwinkelried, *supra* note 21, at 331 (noting that "the event could be commonplace, dull, or mundane"); Moorehead, *supra* note 3, at 228 (explaining that the "exception for present sense impression generally involves an out-of-court statement describing an unexciting event"). The present sense impression could also be invoked when a person perceives a startling condition or event and remarks upon it, but does so without being influenced by the stress of the event or condition. See, e.g., *People v. Luke*, 519 N.Y.S.2d 316, 317, 320 (Sup. Ct. 1987) (rejecting the argument that a bystander's call to 911 to describe a robbery in progress was an excited utterance in light of "the declarant's verbal demeanor [which] indicated a dispassionate and deliberate narration of the events as they were unfolding," but concluding that the call was admissible as a present sense impression). The Advisory Committee's Note to the exception also suggests that the rule operates to avoid disputes ("needless niggling") about whether a person made a statement while under the stress of excitement. FED. R. EVID. 803(2) advisory committee's note. As the note explains, the two exceptions "overlap." *Id.* Litigants will often invoke both in arguing for the admission of the same or closely related pieces of evidence, such as a recording of a 911 call. See, e.g., *United States v. Price*, 58 F. App'x 105, 106-07 (6th Cir. 2003) (affirming the admission of a child's statements during a 911 call as both excited utterances and present sense impressions).

<sup>67</sup> Cf. FED. R. EVID. 803(1) advisory committee's note (noting that "unexciting events are less likely to evoke comment").

<sup>68</sup> An e-PSI along these lines would likely use "D.W.T."—Internet-speak for "driving while texting." Mark Leibovich, *Choice Syllables for 2008, You Betcha*, N.Y. TIMES, Dec. 21, 2008, at WK3.

<sup>69</sup> See Joshua Foer, *Secrets of a Mind-Gamer*, N.Y. TIMES, Feb. 20, 2011, § 6 (Magazine), at 28 (reporting on a memory study and noting that "[w]hen we see in everyday life things that are petty, ordinary and banal, we generally fail to remember them" (quoting RHETORICA AD HERENNIUM 219 (G.P. Gould ed., Harry Caplan trans., Harvard Univ. Press 1999))).

statements to a medical provider regarding the cause of an injury, dying declarations, or excited utterances), or because they encompass incriminating statements that invariably arise in the lead up to a criminal prosecution or business dispute (e.g., conspirator statements, statements against interest, or business records). Present sense impressions do not fit this mold. The mundane utterances of uninterested observers only become relevant to litigation by happenstance—something that, again, hobbles their proliferation as trial evidence.<sup>70</sup>

Finally, even if these practical hurdles are overcome and a present sense impression is uttered, remembered, and relevant to a litigated dispute, the statement itself will often have little tactical significance. So long as a present sense impression fits the typical *Houston Oxygen* pattern (an oral out-of-court statement recounted for the trier of fact by a percipient witness),<sup>71</sup> the statement merely supplements a witness's live testimony.<sup>72</sup> Given the availability of live witness testimony regarding the event described, an advocate might reasonably forego the introduction of the out-of-court statement due to its tactical insignificance.

In sum, while statements that fall under other hearsay exceptions will often be uttered, remembered, or recorded, and invariably accompany frequently litigated events (e.g., crimes, accidents, and business disputes), present sense impressions occupy a vastly different position. By their very nature, present sense impressions are relatively rare, easily forgotten, and generally of minimal consequence to litigation. Thus, it is no surprise that few cases hinge on the admission of present sense impressions, and that courts and scholars have felt little need to rigorously examine the exception's merits.

### B. *The Emerging Salience of Electronic Present Sense Impressions*

Advances in technology and changes in social norms foreshadow a greater role for present sense impressions in American litigation.<sup>73</sup>

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<sup>70</sup> See 2 MCCORMICK ON EVIDENCE, *supra* note 3, § 271, at 252 (“The relative infrequency of such cases results from the fact that unexciting events do not often give rise to statements that later become relevant in litigation.”).

<sup>71</sup> See *supra* notes 3-7 and accompanying text.

<sup>72</sup> Cf. *People v. Brown*, 610 N.E.2d 369, 373 (N.Y. 1993) (noting that a requirement that “the declarant’s descriptions of the events must be corroborated in court by a witness who was present with the declarant and who observed the very same events would deprive the exception of most, if not all, of its usefulness” because “[i]f such an eyewitness is available to testify to the events, there is certainly no pressing need for the hearsay testimony”).

<sup>73</sup> Examples of the phenomenon—particularly involving texting—are beginning to percolate in case reports. For example, in *State v. Damper*, the victim used her cell-

This increased role arises most directly out of two simultaneous technological advances. First, scientists have miniaturized massive computing power, leading to the widespread availability of handheld mobile devices with breathtaking capabilities.<sup>74</sup> A single device slightly larger than a credit card now serves as an Internet browser, music player, telephone, camera, and data storage device. Given this functionality, more and more people carry handheld communication devices at all times—at home, at work, and at play.<sup>75</sup> Second, advances in wireless

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phone to text her friend just prior to her murder: “Can you come over? Me and Marcus are fighting and I have no gas.” 225 P.3d 1148, 1150 (Ariz. Ct. App. 2010). An Arizona appellate court upheld the admission of the text, which provided evidence of a motive for the killing, as a present sense impression. *Id.* at 1152. The court also ruled that the text message was nontestimonial and thus not barred by the Confrontation Clause. *Id.* at 1151-52; *see also* State v. Ford, 778 N.W.2d 473, 482 (Neb. 2010) (rejecting, on procedural grounds, a challenge to the trial court’s ruling that a text message from the alleged rape victim—“I just got raped . . . By jake . . . I dont know what to do . . .”—was “both an excited utterance and ‘part of the res gestae of this crime’”); State v. Greer, No. 91983, 2009 WL 2574160, at \*1, \*7 (Ohio Ct. App. Aug. 20, 2009) (agreeing that a text sent from the victim to his friend two days before his death that stated, in reference to the defendant, “Girl, he trip’n,” should not have been admitted as a present sense impression because the text did not reference a specific event and might have been “a general reflection or conclusion regarding the defendant’s persona”); State v. Justice, No. W2008-01009-CCA-R3-CD, 2009 WL 1741398, at \*12 (Tenn. Crim. App. June 15, 2009) (stating that text messages admitted against the defendant in a murder trial “arguably fall under the state of mind exception to the rule against hearsay”); State v. Maxwell, No. 2 CA-CR 2010-0089, 2011 WL 3075720, at \*6-7 (Ariz. Ct. App. July 22, 2011) (implicitly agreeing that text messages revealing the victim’s “relationship issues” fell under the state of mind exception to the hearsay rule, but upholding their exclusion on the ground that the text messages were needlessly cumulative); State v. Robinson, 19 A.3d 259, 263-64 (Conn. App. Ct. 2011) (upholding the trial court’s exclusion of a MySpace posting as hearsay because the trial record was inadequate for appellate review). *See generally* Monique C.M. Leahy, *Pretrial Involving Facebook, MySpace, LinkedIn, Twitter, and Other Social Networking Tools* (“There is an ever increasing number of cases involving social networking communications, and these cases cover a broad range of areas of law. Often the communications in issue are postings on Facebook and MySpace.”), in 121 AM. JUR. PROOF OF FACTS 3d § 8 (2010).

<sup>74</sup> *See* Steve Lohr, *Microsoft to Allow Partners to Alter Some Source Code*, N.Y. TIMES, Apr. 10, 2003, at C7 (“Steady advances in chip speeds and miniaturization have enabled manufacturers to begin putting more computing power in smaller devices.”).

<sup>75</sup> *See* Jacob Livingston, *Mixed Messages: Educators Blame Students’ Errors on Texting Lingo*, SPOKESMAN-REVIEW (Spokane, Wash.), Nov. 15, 2009, at 11, available at 2009 WLNR 23513445 (noting that “the percentage of the U.S. population who are always connected has skyrocketed” and reporting on a Nielsen Company survey that found “77 percent of [American] teenagers have their own mobile phones and more than 80 percent of those teens use text messaging,” and that “[d]uring the first quarter of 2009, American teens sent or received an average of 2,899 text messages per month—an increase of 566 percent in just over two years”); John Timpane, *Years of Change for Web, World*, PHILA. INQUIRER, Dec. 28, 2010, at A1 (citing Lee Rainie, director of the Pew Research Center’s Internet and American Life Project, in reporting that “today about 57 percent of adults are mobilely connected with smart phones and other devices

technology have enabled these devices to be perpetually connected both to voice and data networks. As a consequence, at any given time, a substantial (and growing) percentage of the population can access a device, such as an iPhone, that allows instant broadcast and receipt of electronic communications.<sup>76</sup>

The ability to electronically communicate contemporaneous observations would be of little significance if people were not inclined to use it. The changes described above, however, coincide with changing social norms. This is likely no coincidence. As technology enabling instantaneous communication evolved, entrepreneurs created social networking sites to harness and encourage such communication. For example, Facebook, which boasts more than 800 million users,<sup>77</sup> enables these users, with a few keystrokes, to broadcast their “status” (i.e., what they are doing or perceiving) to a network of “friends,” and encourages regular updates, with commentary from recipients.<sup>78</sup> Twitter provides a similar service, allowing its users to “follow” individuals

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to the Internet” and “[i]ncreasingly, social media such as Facebook and Twitter are mobile, not deskbound” such that “[m]obile phoners do almost anything you can do on a desktop: e-mail, Web surf, upload content, download podcasts”).

<sup>76</sup> See Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 29, 41 (2008) (discussing the popularity of the iPhone and the amazing storage capacity of the device); Kemp, *supra* note 1, at 53 (reporting that half of American fifteen- to seventeen-year-olds send text messages daily (citing AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, TEENS AND MOBILE PHONES OVER THE PAST FIVE YEARS 12 (2009), available at <http://www.pewinternet.org/~media/Files/Reports/2009/PIP%20Teens%20and%20Mobile%20Phones%20Data%20Memo.pdf>)); Rosen et al., *supra* note 1, at 421 (discussing the prevalence of text messaging in American society); Andrew M. Grossman, Comment, *No, Don't IM Me—Instant Messaging, Authentication, and the Best Evidence Rule*, 13 GEO. MASON L. REV. 1309, 1311-12 (2006) (same); *Android Surges Among Handset Purchasers*, EMARKETER (Jan. 13, 2010), <http://www.emarketer.com/Article.aspx?R=1007462> (reporting survey results showing that forty-two percent of American consumers owned a smartphone in December 2009); see also Baughman, *supra* note 1, at 933-34 (providing detailed statistics demonstrating the widespread use of social networking sites, such as Facebook and MySpace (citing Amanda Lenhart, *The Democratization of Online Social Networks*, PEW INTERNET & AM. LIFE PROJECT (Oct. 8, 2009), <http://www.pewinternet.org/Presentations/2009/41--The-Democratization-of-Online-Social-Networks.aspx>)).

<sup>77</sup> *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Nov. 15, 2011).

<sup>78</sup> See Dhiraj Murthy, *Twitter: Microphone for the Masses?*, 33 MEDIA, CULTURE & SOC'Y 779, 780 (2011) (describing Facebook “status updates” as “short one- or two-line messages” that are often “trivially banal” but are “circulated as ‘news’” to “your group of ‘friends’ on the site”); see also Young, *supra* note 1, at 24-26 (exploring adult Facebook use through surveys and interviews and reporting that users view the service as a free and easy way to communicate “with large numbers of people at one time”); Devika Kewalramani, *You Can Tweet but You Can't Hide: Social Networking for Lawyers*, N.Y. L.J., June 30, 2010, at 4 (providing a primer for lawyers on social networking sites).

(celebrities, friends, family members, or business associates) who regularly broadcast their observations and activities in real time.<sup>79</sup> Both Facebook and Twitter distribute free software applications that enable convenient broadcast (and receipt) of tweets and status updates from handheld devices.<sup>80</sup> Like Facebook, Twitter's popularity is remarkable. The service reports a steadily increasing average of over 200 million tweets per day.<sup>81</sup> And lest anyone need access to a tweet from the past, all public tweets<sup>82</sup> are now archived by the Library of Congress.<sup>83</sup>

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<sup>79</sup> See Murthy, *supra* note 78, at 781 (describing how Twitter works); *About Twitter*, *supra* note 9 (explaining Twitter's service).

<sup>80</sup> See Virginia Heffernan, *The Medium: Being There*, N.Y. TIMES, § 6 (Magazine), Feb. 15, 2009, at 15 (reporting that the capability of mobile devices to access social networking sites "has made it more likely that when a pal—the Jägermeister-besotted Sean, say—writes that he's stumbling home, he *is* stumbling home, right then, and simultaneously apprising his friends via his mobile"); *Facebook for iPhone*, FACEBOOK, <http://www.facebook.com/iphone> (last visited Nov. 15, 2011) (offering a free download of the Facebook application for the iPhone); *Take Twitter with You. Get the App.*, TWITTER, <http://twitter.com/download> (last visited Nov. 15, 2011) (showcasing the Twitter application available for download for several mobile devices).

<sup>81</sup> See *Your World, More Connected*, TWITTER BLOG (Aug. 1, 2011, 9:25 AM), <http://blog.twitter.com/2011/08/your-world-more-connected.html> (reporting that Twitter generates over 200 million tweets per day, up from 65 million tweets per day in 2010). Anyone with an email account or text-messaging service can duplicate the effect of these services by texting or emailing status updates to friends and associates. Twitter and Facebook simply make this process easier and more efficient and exponentially magnify its effect. See Nicolas P. Terry, *Physicians and Patients Who "Friend" or "Tweet": Constructing a Legal Framework for Social Networking in a Highly Regulated Domain*, 43 IND. L. REV. 285, 290 (2010) (commenting that social networking sites, including MySpace and Facebook, allow users to communicate with friends and acquaintances who are also part of "predominantly offline networks"); KNOWLEDGE NETWORKS, ASSOCIATED PRESS-MTV, DIGITAL ABUSE SURVEY AUGUST 2011, at 2 (2011), available at <http://surveys.ap.org> (follow "September 27: AP-MTV – digital abuse" hyperlink) (reporting that 82% of poll respondents sent or received a text from a friend within the previous seven days (up from 77% two years earlier), 73% sent or received messages through a social networking site within the previous seven days (up from 66%); and 15% sent or received tweets on Twitter within the previous seven days). Google recently launched a social networking site to compete with Facebook called Google+. See GOOGLE+, <https://plus.google.com> (last visited Nov. 15, 2011).

<sup>82</sup> The default setting on Twitter renders tweets "public," meaning that they can be viewed by anyone (even nonusers) who accesses the site. Users can alter the default setting to make their tweets available only to preapproved followers. See *Twitter Privacy Policy*, TWITTER, <http://twitter.com/privacy> (last updated June 23, 2011) ("Most of the information you provide to us is information you are asking us to make public. . . . Our default is almost always to make the information you provide public but we generally give you settings. . . to make the information more private if you want.").

<sup>83</sup> See *Tweet Preservation*, TWITTER BLOG (Apr. 14, 2010, 11:56 AM), <http://blog.twitter.com/2010/04/tweet-preservation.html> (announcing Twitter's agreement to "donate access to the entire archive of public Tweets to the Library of Congress for preservation and research").

Past tweets can also be accessed through Twitter's public search engine<sup>84</sup> or through third-party Twitter search services.<sup>85</sup>

These recent technological and social changes eliminate many of the once-daunting obstacles to the widespread availability of present sense impression evidence. First, these changes encourage people to constantly express contemporaneous observations about nonstartling events. This changing norm is most evident among people born within the last twenty years—the “Look at Me Generation”—described by social commentators as a group that has “been documented like no group before them, most especially by themselves.”<sup>86</sup> This generation employs text messaging, Twitter, and Facebook, as well as other social media tools, to communicate their activities and observations (from the exciting to the banal) to the rest of the world.<sup>87</sup> Furthermore,

<sup>84</sup> See *Search*, TWITTER, <http://search.twitter.com> (last visited Nov. 15, 2011).

<sup>85</sup> See, e.g., TOPSY, <http://topsy.com/tweets> (last visited Nov. 15, 2011) (presenting a publicly accessible search engine that provides “[r]eal-time search for the social web”).

<sup>86</sup> Jennie Yabroff, *Here's Looking at You, Kids*, NEWSWEEK, Mar. 24, 2008, at 66, 67; see also Eric Adler, *Thanks to Digital Cameras and Facebook, a Generation Documents Itself Like Never Before*, KAN. CITY STAR, Sept. 6, 2008, at F1, available at 2008 WLNR 16878241 (“Over the last five years, scholars say, the meteoric rise of social media sites, including MySpace, Facebook, YouTube and Twitter, has sparked a public explosion in self-documentation, making the ‘me’ in multimedia more prominent than ever.”); Steven Johnson, *In Praise of Oversharing*, TIME, May 31, 2010, at 39 (discussing the newly evolving social norm of sharing private, personal information, including life-changing events, via Twitter and Facebook); Mary Elizabeth Williams, *Are Facebook Users Really More Narcissistic?*, SALON.COM (Sept. 9, 2010, 11:01 AM), [http://life.salon.com/2010/09/09/facebook\\_narcissists](http://life.salon.com/2010/09/09/facebook_narcissists) (discussing the merits of the self-promotion that occurs on Facebook). The online, user-generated Urban Dictionary describes the “Look at Me Generation” as “anyone born between 1990 and 2000” who “favors youtube, reality tv, constant status updates, twitter posts, bright clothing, and anything else that may attract attention to oneself.” Candy Kid, *Look at Me Generation*, URBAN DICTIONARY (Oct. 28, 2009), <http://www.urbandictionary.com/define.php?term=look+at+me+generation>.

<sup>87</sup> Seth P. Berman et al., *Web 2.0: What's Evidence Between “Friends”?*, BOS. B.J., Jan–Feb. 2009, at 5, 5 (describing the modern practice of “posting mundane aspects of your life in short and incessant online posts”); Elizabeth Bernstein, *How Facebook Ruins Friendships*, WALL ST. J., Aug. 25, 2009, at D1 (complaining to Facebook friends that “I don’t give a hoot that you are ‘having a busy Monday,’ your child ‘took 30 minutes to brush his teeth,’ your dog ‘just ate an ant trap’ or you want to ‘save the piglets.”); Joe Posnanski, *Tweet Nothings*, SPORTS ILLUSTRATED, Feb. 7, 2011, at 74, 74 (recounting hilariously mundane and often incoherent tweets posted by famous athletes); Consuelo Reinberg, *Are Tweets Copyright-Protected?*, BPCOUNCIL NOTES (BP Council, Geneva, Switz.), reprinted in WIPO MAG., Aug. 2009, at 11, 11 (describing the content of Twitter posts as mostly concerning “facts,” ranging from “talking about the weather, to communicating what one had for dinner the night before, to complaining about the morning traffic”); *Times Topics: Twitter*, N.Y. TIMES, <http://topics.nytimes.com/top/news/business/companies/twitter/index.html> (last visited Nov. 15, 2011) (“While some of these tweets have the profundity of haiku, most are mundane, like ‘Sure is pretty out tonight’ or ‘My eyes itch. I am very aggravated.’”).



real-time communication devices ensure that no one is ever alone.<sup>88</sup> No matter how remote the declarant's location or what time of day, there is an audience for her perceptions and thus greater reason to express them. Electronic updates of peoples' observations ("the number seven bus is late"), activities ("I'm watching a movie with Cathy"), and locations ("I'm at a diner in Kalamazoo") increasingly populate cyberspace.<sup>89</sup>

Second, modern communication devices make it more likely that present sense impressions, once uttered, will be preserved for trial. A stray oral comment to an acquaintance will easily be forgotten. Even if remembered, it may be lost to future litigants when the declarant or acquaintance becomes unavailable through death, inconvenience, lack of diligence, or the absence of common cause. An electronic observation, on the other hand—say, a "tweet" to dozens of friends—is

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<sup>88</sup> If a tree falls in the forest with no one around, its voice can now be heard so long as it possesses an iPhone:

**Cedar29** 2 minutes ago

Just fell in the forest. ☹ Any1 around? CLAB.

"CLAB" is Internet slang for "[c]rying like a baby." Randi Bjornstad, *Ruth Retiring? OMG!*, REGISTER-GUARD (Eugene, Or.), Sept. 12, 2010, at E35, available at 2010 WLNR 20502905. The example is slightly unrealistic, of course, because statements by trees do not constitute hearsay. See FED. R. EVID. 801(a) (defining hearsay as an assertion "of a person").

<sup>89</sup> Statements such as these that discuss the speaker's own activities fall within the present sense impression exception. See *United States v. Murillo*, 288 F.3d 1126, 1137 (9th Cir. 2002) (noting the defendant's concession that the statement "I'm with Diana . . . and Rico" was a present sense impression); *Booth v. State*, 508 A.2d 976, 977, 985 (Md. 1986) (holding that statements made over the phone describing the caller's activities were admissible as present sense impressions); *State v. Sziva*, No. 23384, 2007 WL 2809924, at \*6 (Ohio Ct. App. Sept. 28, 2007) (concluding that the declarant's statements during a phone call that "described where he was and what he was doing . . . were present sense impressions"). Statements like "I am in my living room" are substantively identical to statements like "I perceive myself to be in my living room" or "I perceive around me the things I normally associate with my living room." Cf. Lynn McLain, *"I'm Going To Dinner With Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other than the Speaker—And the Role of the Due Process Clause*, 32 CARDOZO L. REV. 373, 398 n.144 (2010) (suggesting that a statement that someone else is present "would qualify as a present sense impression under Rule 803(1)"); Waltz, *supra* note 20, at 889 (explaining that the Iowa Supreme Court admitted an out-of-court statement of a deceased victim—"It's Joan"—as a present sense impression (citing *State v. Flesher*, 286 N.W.2d 215, 216, 218 (Iowa 1979))). Statements regarding the declarant's feelings, such as "I like my living room," fall within a separate hearsay exception. See *Cardenas v. State*, 115 S.W.3d 54, 62-63 (Tex. App. 2003) (holding that the statement that another person "is in my apartment" was admissible as a present sense impression while the statement that the person "is making me uncomfortable" was admissible as an expression of a state of emotion). For further discussion of the state of mind exception, see *infra* note 152.

more likely to be available to litigants due to the increased number of people who might potentially recall it and have an interest in presenting it at trial.<sup>90</sup> Even more significantly, these communications can now be uncovered by savvy litigators reviewing electronic files. Electronic communications, unlike the present sense impressions of Thayer's day, will often be preserved on the numerous computers involved in their transmission and receipt.<sup>91</sup>

The increased quantity of present sense impressions available to litigants is only one facet of the dramatic changes currently unfolding in the evidentiary landscape. A potentially more significant development is the change in the quality (i.e., reliability) of statements now encompassed by the present sense impression exception.

Unlike its oral counterpart, a typical e-PSI is not likely to be accompanied by the powerful form of corroboration once inherent in all present sense impressions—a percipient witness who can testify about the event described.<sup>92</sup> As an initial matter, it is unlikely that an e-PSI will be communicated to someone who is physically present at the location where it is uttered. There is usually no need to tweet or text your observations to someone who is standing next to you.<sup>93</sup> An e-

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<sup>90</sup> Some Twitter users have hundreds of thousands or even millions of followers. For example, Ashton Kutcher (an actor and early adopter of Twitter) had over eight million followers at the time of writing. See *Ashton Kutcher*, TWITTER, <http://twitter.com/#!/aplusk> (last visited Nov. 15, 2011); see also Berman et al., *supra* note 87, at 5-6 (noting that “[s]ome Facebook users have tens of thousands of . . . ‘friends’”).

<sup>91</sup> See Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 MINN. L. REV. 1514, 1556 (2010) (explaining that a key distinction between a “Facebook status update” and the casual utterances these status updates replace is that, unlike the stray “utterances that once floated through the air and then disappeared without a trace,” status updates are “not only . . . stored, but also they are accessible by a company that is not a party to the conversations”); Berman et al., *supra* note 87, at 6 (advising litigators that discoverable Facebook postings can be obtained either from the computers of participants in the conversation or “from Facebook itself”); Daniel de Vise, *Schoolyard Face-Offs Blamed on Facebook Taunts*, WASH. POST, Apr. 27, 2008, at C1 (noting that Facebook comments are “now immortalized on semi-public Web pages, where they can be viewed by thousands”); Jacob Leibenluft, *Do Text Messages Live Forever?*, SLATE.COM (May 1, 2008, 6:51 PM), <http://www.slate.com/id/2190382> (discussing the possibility that, depending on one’s cell phone service provider, even deleted text messages can be recovered from one’s phone, but noting that some providers delete text messages fairly rapidly).

<sup>92</sup> See *supra* notes 39-44 and accompanying text.

<sup>93</sup> There are times, however, when a person will transmit an e-PSI to someone who is able to contemporaneously observe the subject of the text in question: for example, this may occur when two participants are in a meeting, classroom(!), or movie, where verbal communication would be viewed as impolitic. Such communications are analogous to verbal communications contemplated by the advocates for the present sense

PSI's author will most naturally be alone or in the presence of people who either are not part of the statement's intended audience, or whose identities are unknown at the time of trial.

More importantly, litigants will not be forced by the absence of alternatives to introduce e-PSIs through the testimony of a percipient witness. Unlike oral present sense impressions, e-PSIs will be preserved in electronic records or, failing that, can be introduced through the testimony of text message recipients, Facebook "friends," or Twitter "followers" who, like the bare documentary record, cannot speak to the veracity of the statements' contents. Thus, particularly where the substance of an e-PSI might be contradicted by a percipient witness, litigants will be able to introduce the statement at trial by alternate means.

In sum, the new breed of present sense impression evidence—typified by text messages, tweets, and Facebook status updates—is distinct from its historical analogue in both quantity and quality. Electronic present sense impressions will be more readily available to modern litigators and, most significantly, can be presented at trial—for tactical reasons or out of necessity or sloth—without any corroborating witness testimony.<sup>94</sup>

### C. *Vanishing Constitutional Limits on the Admission of Present Sense Impressions*

Evolving technologies and changing social norms are not the only modern developments that compel a closer look at present sense im-

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impression exception and, as discussed in Section III.B, should be admissible if introduced through one of the participants under the reform proposed in this Article.

<sup>94</sup> See 2 MCCORMICK ON EVIDENCE, *supra* note 3, § 271, at 252 (“[A]s growing use of all cell phones, instant messaging, and electronic monitoring devices expands the number of occasions when contemporaneous statements of observations are narrated to others, the [present sense impression] exception may see expanded application.” (footnote omitted)); Baughman, *supra* note 1, at 951-52 (explaining that due to “the instantaneous nature of social networking,” the present sense impression exception “will prove to be a useful tool to admit evidence of the victim’s fear or the abuser’s intent when such comments are posted on a social networking Internet site”); Steven C. Bennett, *Look Who’s Talking: Legal Implications of Twitter Social Networking Technology*, N.Y. ST. B. ASS’N J., May 2009, at 10, 13 (suggesting that Twitter “messages may become potent evidence in the event of litigation, just as e-mail has become”); Susan W. Brenner, *Internet Law in the Courts*, J. INTERNET L., Dec. 2009, at 16, 16-18 (noting the potential application of Rule 803(1)–(3) to Twitter); Imwinkelried, *supra* note 21, at 342 (“In a growing number of instances in the future, the declarant will use a modern means of communication, such as a cell phone, to describe an ongoing event that the witness at trial did not have an opportunity to observe.”).

pression doctrine. Another important development in this context is the “paradigm shift” in Confrontation Clause jurisprudence introduced by the Supreme Court’s 2004 decision in *Crawford v. Washington*.<sup>95</sup> As explained below, since present sense impressions will likely never be “testimonial”—the new buzzword of Confrontation Clause jurisprudence—*Crawford*’s celebrated revitalization of the confrontation right actually makes present sense impressions *easier* for prosecutors to admit.

The Sixth Amendment’s Confrontation Clause guarantees a criminal defendant’s right “to be confronted with the witnesses against him.”<sup>96</sup> This right provides a check on out-of-court statements admitted under state or federal hearsay rules in a criminal trial.<sup>97</sup> Prior to 2004, the Supreme Court interpreted the Confrontation Clause to bar the introduction of hearsay statements offered against the accused absent either an opportunity to cross-examine the declarant, or a showing that the statements bore “adequate ‘indicia of reliability.’”<sup>98</sup> “Indicia of reliability” could be shown through “particularized guarantees of [the specific evidence’s] trustworthiness” or, more generally, by establishing that the evidence fell “within a firmly rooted hearsay exception.”<sup>99</sup> Although the question was never settled, many lower courts and most commentators resisted the conclusion that the present sense impression exception was “firmly rooted.”<sup>100</sup> Further, as discussed in

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<sup>95</sup> 541 U.S. 36 (2004); see also Josephine Ross, *After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 161 (2006) (noting that the *Crawford* ruling represents a “paradigm shift”).

<sup>96</sup> U.S. CONST. amend. VI.

<sup>97</sup> See *Crawford*, 541 U.S. at 51 (explaining that some, but “not all[,] hearsay implicates the Sixth Amendment’s core concerns”); *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (“The Confrontation Clause operates . . . to restrict the range of admissible hearsay.”).

<sup>98</sup> *Roberts*, 448 U.S. at 66.

<sup>99</sup> *Id.*; see also Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521, 525-28 (1992) (discussing the pre-*Crawford* test for the constitutionality of the admission of hearsay).

<sup>100</sup> See, e.g., *Gutierrez v. McGinnis*, 389 F.3d 300, 302 n.1 (2d Cir. 2004) (recognizing that “the question of whether the present sense impression is a ‘firmly rooted’ hearsay exception remains open”); *United States v. Murillo*, 288 F.3d 1126, 1137 (9th Cir. 2002) (explaining that “[t]he government admits that there is no case law holding that the present sense impression exception to the rule against hearsay is ‘firmly rooted’” and “[t]herefore, the focus of the inquiry is whether there is a particularized guarantee of trustworthiness with respect to this statement”); *Guam v. Ignacio*, 10 F.3d 608, 614 (9th Cir. 1993) (“Neither the Supreme Court nor this court has ruled as to whether or not the present sense impression exception is a ‘firmly rooted’ exception to the rule against hearsay.”); Goldman, *supra* note 22, at 31 (“[N]either the spontaneous

Part I, even if a present sense impression exception was “firmly rooted,” its historical roots arguably included a corroboration component that the modern variant lacks.<sup>101</sup> Thus, until 2004, case law provided a constitutional barrier to admission of present sense impressions offered against the accused where, as with many uncorroborated e-PSIs, the statements failed to exhibit indicia of reliability.<sup>102</sup>

The Supreme Court’s decision in *Crawford v. Washington* dismantled the potential constitutional bar to the admission of unreliable present sense impressions. Under *Crawford*, the dispositive question for Confrontation Clause analysis is not reliability, but rather whether a statement is “testimonial.”<sup>103</sup> As the Supreme Court confirmed in a later case, after *Crawford* “the Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability.”<sup>104</sup>

exclamation nor present sense impression exceptions should qualify as firmly rooted.”); Samuel C. Kaplan, “*Grab Bag of Principles*” or *Principled Grab Bag?*: *The Constitutionalization of Common Law*, 49 S.C. L. REV. 463, 486-87 (1998) (explaining that “[a]t least two federal courts and one state court have declared [the present sense impression] exception to be firmly rooted for purposes of the Confrontation Clause” but suggesting flaws in this analysis); Rose Margaret Casey, *Developments in the Law*, 68 ST. JOHN’S L. REV. 285, 291 n.33, 293 n.41 (1994) (noting the unsettled nature of the question but concluding that “the present sense impression exception does not share the history of reliability of the firmly rooted exceptions”). *But see* *United States v. Peacock*, 654 F.2d 339, 350 (5th Cir. Aug. 1981) (implying that the present sense impression exception is firmly rooted), *vacated in part on other grounds*, 686 F.2d 356 (5th Cir. Unit B 1982).

<sup>101</sup> See Nicolas, *supra* note 37, at 500-01 (describing with approval lower courts’ reluctance to find hearsay exceptions that are “broader in scope than their common law counterparts” to be “firmly rooted”). *But cf.* Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 TEMP. L. REV. 145, 167, 172 (1991) (arguing that Confrontation Clause analysis of out-of-court statements admitted under the state of mind exception “must proceed on a case-by-case basis to determine whether particularized guarantees of trustworthiness are present,” while conceding that the Supreme Court, in a footnote evaluating the modern conspirator hearsay exception, “held that even when certain aspects of an exception are liberalized, the exception does not lose its status as ‘firmly rooted’” (citing *Bourjaily v. United States*, 483 U.S. 171, 184 n.4 (1987))).

<sup>102</sup> See *Roberts*, 448 U.S. at 66 (allowing the admission of hearsay testimony if the declarant is unavailable for trial, provided that the evidence “bears adequate ‘indicia of reliability’”), *overruled in part by Crawford*, 541 U.S. 36.

<sup>103</sup> See *Crawford*, 541 U.S. at 68-69 (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demand is the one the Constitution actually prescribes: confrontation.”).

<sup>104</sup> *Whorton v. Bockting*, 549 U.S. 406, 420 (2007); see also Orenstein, *supra* note 37, at 161-62 (discussing the removal of Confrontation Clause protection from nontestimonial hearsay).

Although the Supreme Court continues to grapple with the implications of *Crawford*, its pronouncements thus far suggest that present sense impressions will rarely, if ever, be “testimonial.” While declining to provide any “precise articulation” of the term “testimonial,” the *Crawford* Court explained that “testimony” is “typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact’”<sup>105</sup> and highlighted “casual remark[s] to an acquaintance” and “off-hand, overheard remark[s]” as examples of out-of-court statements that would not qualify as “testimonial.”<sup>106</sup> In *Giles v. California*, the Court similarly noted that “[s]tatements to friends and neighbors about abuse and intimidation . . . would be excluded [from evidence], if at all, only by hearsay rules.”<sup>107</sup> Most recently in *Michigan v. Bryant*, the Court characterized testimonial hearsay as statements “procured with a primary purpose of creating an out-of-court substitute for trial testimony”—a formulation that, to state the obvious, does not capture the typical e-PSI.<sup>108</sup> This guidance, along with the underlying analysis in the post-*Crawford* cases, makes it fairly clear that, going forward, the Confrontation Clause will pose no obstacle to the admission of most, if not all, e-PSIs.<sup>109</sup>

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<sup>105</sup> *Crawford*, 541 U.S. at 51 (citing 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828)); see also *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) (“[T]he most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.”).

<sup>106</sup> *Crawford*, 541 U.S. at 51.

<sup>107</sup> 554 U.S. 353, 376 (2008).

<sup>108</sup> 131 S. Ct. at 1154-55; see also *id.* (emphasizing a critical distinction between nontestimonial statements concerning “events as they were actually happening” and testimonial statements that “describ[e] past events” (emphasis omitted) (quoting *Davis v. Washington*, 547 U.S. 813, 827 (2006))); Berman et al., *supra* note 87, at 6 (noting that postings on social networks “tend to mimic casual spoken conversation rather than formal, written communication”).

<sup>109</sup> See, e.g., *United States v. Danford*, 435 F.3d 682, 687 (7th Cir. 2006) (rejecting a Confrontation Clause challenge to the admission of a present sense impression that was “more akin to a casual remark than . . . to testimony in the *Crawford*-sense”); *State v. Damper*, 225 P.3d 1148, 1151 (Ariz. Ct. App. 2010) (rejecting a Confrontation Clause challenge to a text message admitted as a present sense impression because the message was nontestimonial); *Hape v. State*, 903 N.E.2d 977, 989 (Ind. Ct. App. 2009) (holding that the Confrontation Clause did not bar the introduction of a text message because it was not testimonial); *People v. Herrera*, No. 05-208, 2006 WL 758544, at \*17 (N.Y. Sup. Ct. Mar. 22, 2006) (concluding that a present sense impression did not implicate the Confrontation Clause because the statement was made without “government participation in the conversation,” “was clearly not formal in nature,” and “its subsequent use in a criminal prosecution could not be foreseen”). Arguing that casual statements may be just as accusatory as formal accusations, Josephine Ross proposes

The often overlooked, pro-prosecution aspect of the *Crawford* line of cases sharpens concerns about the new breed of present sense impressions. Under the Supreme Court's current approach to the Confrontation Clause, unreliable electronic utterances that fall within the present sense impression exception will be admissible not only when offered by civil litigants and criminal defendants, but also in the paramount circumstance where reliability is needed—when offered by the prosecution to establish the guilt of the accused.<sup>110</sup>

### III. REALIGNING RULE AND RATIONALE TO EXCLUDE UNRELIABLE PRESENT SENSE IMPRESSIONS

As explained in Part I, the leading proponents of the present sense impression exception successfully advocated for its adoption by emphasizing not only that contemporaneous statements were generally reliable, but also that such statements would inevitably be corroborated by percipient witness testimony. As the latter rationale no longer applies to a large subset of present sense impressions, legislators and courts must finally address the unresolved quandary of whether the present sense impression exception can stand on contemporaneity alone.<sup>111</sup> As discussed below, the potential unreliability of e-PSIs suggests that this question should be answered in the negative.

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that the Court adopt a different approach to defining “testimonial” that focuses on the function of the out-of-court statement in the trial. Ross, *supra* note 95, at 209.

<sup>110</sup> In a recent Confrontation Clause decision, the Supreme Court cryptically hinted that, as it cuts back on Confrontation Clause protections, a new form of constitutional protection rooted in the Due Process clause might arise. See *Bryant*, 131 S. Ct. at 1162 n.13 (“[T]he Due Process Clause[] . . . may constitute a further bar to admission of, for example, unreliable evidence.”). The relegation of this statement to a footnote, the Court’s use of “may,” and the two citations that follow (to quotations discussing flawed rules of evidence and repeated evidentiary violations) do not inspire confidence that any robust due process protections are forthcoming in this context. See *id.*

<sup>111</sup> Not all commentators are convinced of the efficacy of a corroboration requirement. See Imwinkelried, *supra* note 21, at 352-54 (arguing that neither the legislative history of Federal Rule of Evidence 803(1) nor sound policy considerations support a corroboration requirement for present sense impressions); William Gorman Passanante, Note, *Res Gestae, The Present Sense Impression Exception and Extrinsic Corroboration Under Federal Rule of Evidence 803(1) and its State Counterparts*, 17 *FORDHAM URB. L.J.* 89, 106 (1989) (“To require an extra element of corroboration of the substance of the declarant’s statement is imprudent, as it confuses the process of *admission* of evidence with the question of *weight*, which is properly for the jury.”).

A. *The Potential Unreliability of Electronic Present Sense Impressions*

Wigmore long ago railed against the present sense impression exception, stating: “To admit hearsay testimony simply because it was uttered at the same time something else was going on is to introduce an arbitrary and unreasoned test and to remove all limits of principle.”<sup>112</sup> While the rhetoric may be overheated, the point is a compelling one: contemporaneity is a meager guarantee of reliability. Wigmore’s criticism becomes even more convincing in the context of e-PSIs.<sup>113</sup>

The first area of concern centers on sincerity. It has long been recognized that someone is more likely to utter a false or misleading statement regarding a purported event if the audience for the statement does not include any observers of the event described. The absence of other observers eliminates the prospect of immediate contradiction and thus revelation of the declarant’s insincerity.<sup>114</sup> In modern times, communication via Facebook, Twitter, and text messaging exacerbates this concern. By physically distancing the speaker from her audience and thus minimizing the possibility of contradiction, these technologies enable exaggeration and deceit.

Electronic present sense impressions also present a unique opportunity for interested parties to fabricate admissible evidence in anticipation of litigation. Declarants can electronically utter intentionally false present sense impressions under their own name or, through fairly simple mechanisms, generate observations anonymously or with false attributions of authorship.<sup>115</sup> It is true that the potential for such

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<sup>112</sup> WIGMORE, *supra* note 21, § 1757, at 238.

<sup>113</sup> See *supra* Section II.B (discussing how e-PSIs differ from oral present sense impressions in this respect).

<sup>114</sup> See Boyce & Kimball, *supra* note 62, at 765 (noting that in the presence of another witness to the same event “the declarant would risk disagreement or ridicule if he spoke falsely” about it); Imwinkelried, *supra* note 21, at 342 (“[T]he declarant’s realization of the witness’s opportunity to observe the event gives the declarant an incentive to be truthful; the declarant is aware that if he or she misstates the facts, the witness can detect and correct the misstatement.”).

<sup>115</sup> All it would take to broadcast a status update or tweet appearing to come from someone else is knowledge of that person’s Twitter or Facebook username (often, simply and predictably, an e-mail address) and password. As with other forgeries, there are means of discovering such duplicity. Communications sent from a designated IP address can often be traced to an originating computer, although the process is far from foolproof. See Grossman, *supra* note 76, at 1316-17 (discussing how the actual sender of an online communication will often be identifiable through an archived IP address, but also noting that the true IP address can be obscured in various ways and that in those cases only “laborious investigation and luck” will allow the communication to be “traced back to a source computer”). The reliability questions involved here are addressed to some degree by authentication requirements. See FED. R. EVID. 901(a)



mischievous always existed: a declarant could walk the streets loudly voicing false observations or, in more recent times, record such observations on a tape recorder or in a voicemail message. Yet the facial absurdity of such behavior would render the resulting evidence of little value. By contrast, the normalcy of expressing contemporaneous observations through text messaging and on social media sites renders the resulting observations—whether accurate or not—significantly more potent as evidence. At the same time, the potential absence of a perceptive witness at trial exacerbates the danger that these present sense impressions will appear reliable even when false. If no one can vouch (correctly or incorrectly) for the statement's truth, cross-examination as to the event described is impossible, and juries will struggle to distinguish fabricated electronic statements from truthful ones.

Dangers of insincerity remain even if an electronic declarant is not intentionally falsifying the documentary record. There are many reasons to exaggerate or “spin” one's postings on a social networking site. Many people use the sites to spur business or social opportunities, creating an incentive for puffery. Indeed, contemporary Internet culture seems to revel in the “blurry . . . lines between reality and ‘reality.’”<sup>116</sup> At the extreme, users maintain Facebook pages and send out

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(requiring the proponent of evidence to come forward with “evidence sufficient to support a finding that the matter in question is what its proponent claims”). Nevertheless, the authentication standard is a permissive one. *See, e.g.*, *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996) (explaining that under Rule 901 a party offering evidence “need only make a prima facie showing of authenticity so that a reasonable juror could find in favor of authenticity or identification” and that “[o]nce the prima facie case for authenticity is met, the probative value of the evidence is a matter for the jury” (internal quotation marks omitted)). For a discussion of authentication requirements in the social-media context, see Ira P. Robbins, *Writings on the Wall: The Need for an Authorship-Centric Approach to the Authentication of Social-Networking Evidence*, 13 MINN. J.L. SCI. & TECH. 1 (2011).

<sup>116</sup> Yabroff, *supra* note 86, at 67; *see also* Murthy, *supra* note 78, at 785 (cautioning that in the context of Twitter journalism “[t]weets regarding breaking news, disasters, and public health epidemics can be misleading, incorrect, or even fraudulent,” and providing examples); Shanyang Zhao et al., *Identity Construction on Facebook: Digital Empowerment in Anchored Relationships*, 24 COMPUTERS HUM. BEHAV. 1816, 1830 (2008) (noting that people's “Facebook selves appeared to be [the] highly socially desirable identities individuals aspire to have offline but have not yet been able to embody for one reason or another,” a result that “is consistent with the findings of Internet dating studies”); Tom Meltzer, *Social Networking: Failure to Connect*, GUARDIAN (London), Aug. 7, 2010, at 24, available at 2010 WLNR 15693961 (“In this status-update culture, we don't really live experiences, we live them to report them. We're editing ourselves rather than actually being ourselves.” (internal quotation marks omitted)); Katie Roiphe, *The Language of Fakebook*, N.Y. TIMES, Aug. 15, 2010, at 2ST (describing how adolescents blur the lines between fact and fiction on Facebook and noting that “in general Facebook feeds on fiction; it consumes it, and spits it out in every direction”).

Twitter updates on behalf of fictional characters.<sup>117</sup> If declarants take creative license with the truth in electronic postings, their misleading assertions will be difficult to untangle from the electronic record itself.

Intentionally false statements are only part of the problem. A second broad area of concern involves the dangers of misperception and miscommunication. The author of an e-PSI may erroneously perceive or describe an event, or she may characterize it in a way that is later misunderstood. These concerns exist, of course, with all present sense impressions. In fact, the immediacy requirement of the present sense impression exception<sup>118</sup> lends itself to errors of this kind.<sup>119</sup> Importantly, these dangers were traditionally mitigated by the presence of a corroborating witness who could dispel ambiguity and reveal innocent errors at trial.<sup>120</sup> Electronic present sense impressions, however, are not only amenable to presentation at trial without any corroborating witness testimony, but often arise in informal contexts that foster ambiguity and miscommunication. For a variety of reasons, text messages, “status updates,” and 140-character tweets must be brief; thus the preferred format involves extreme abbreviations, symbols (“emoticons”), and other shorthand.<sup>121</sup> Typists working on cramped

<sup>117</sup> See Roiphe, *supra* note 116, at 2ST (describing a fictional Facebook character created by two young adult novelists, thus “merging” art and life so the boundaries between reality and fiction are no longer discernible).

<sup>118</sup> See FED. R. EVID. 803(1) (requiring a statement to be made “while the declarant was perceiving the event or condition, or immediately thereafter”).

<sup>119</sup> See MUELLER & KIRKPATRICK, *supra* note 31, § 8.35, at 835 (explaining the justifications for the present sense impression exception and noting that while the potential for inaccurate memory and deliberate fabrication are diminished, the risks of “ambiguity and misperception” remain); McFarland, *supra* note 23, at 914 (same).

<sup>120</sup> See *supra* Part I.

<sup>121</sup> See Kemp, *supra* note 1, at 53-54 (describing the widespread use of abbreviations, acronyms, and symbols that arose in response to the “laborious method of entering characters” to compose text messages on handheld devices, as well as the increased financial cost to the user of longer messages); *id.* at 61 tbl.3, 63 tbl.4, 65-66 (discussing one study that found that college students abbreviate the same words and phrases in multiple different ways and that participants were often confused by or unfamiliar with the abbreviations used by other participants in the study); Murthy, *supra* note 78, at 780 (noting that Twitter posts are “at best eloquently terse . . . and at worst heavily truncated speech”); Rosen et al., *supra* note 1, at 421 (“Text messages often include shortcuts because they are restricted to 160 characters . . . and because they have become part of common communication slang.”); see also State v. Dampier, 225 P.3d 1148, 1150 (Ariz. Ct. App. 2010) (noting that the text message admitted against the defendant was “written part[ly] in . . . text lingo” (internal quotation marks omitted)); State v. Justice, No. W2008-1009-CCA-R3-CD, 2009 WL 1741398, at \*5 n.4 (Tenn. Crim. App. June 15, 2009) (explaining that the text messages admitted against the defendant were actually “written in text message shorthand” and then interpreted at trial); Streeter Seidell, *Don't Go Blaming Me. I Voted on 'Hot or Not.'* N.Y. TIMES, Jan. 20, 2008, at 2 WK

keypads inevitably mistype important words, simplify complex events, and omit critical details. Software innovations designed to counteract these limitations correct perceived spelling mistakes in real time and even attempt to predict the typist's words, sometimes with limited success.<sup>122</sup> Sarcasm, irony, and humor will likely be lost on jurors reviewing statements out of context and without knowledge of the speaker's mood or proclivities.<sup>123</sup>

In sum, the potential absence of a corroborating witness at trial exacerbates significant flaws in the reliability of e-PSIs, undermining the value of such statements as evidence. Given these flaws, admission of e-PSIs based on contemporaneity alone should be recognized for what it is—an uncharted adventure in evidence law. This type of evidence simply lacks the safeguards normally associated with out-of-court statements admitted for their truth, particularly when the declarant is absent from trial. In addition, because uncorroborated present

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(musing that the so-called “look at me” generation has “invented a secret language that cannot be understood by anyone over thirty and 100k5 50m3th1n6 11k3 th1s”).

<sup>122</sup> See Kemp, *supra* note 1, at 54, 62-64 (describing the increasing popularity of “predictive texting software,” and contrasting the widespread errors made by college students asked to interpret text messages from other students with the relative absence of interpretive errors when the texters were forced to write out the same messages without abbreviations and texting shorthand); Murthy, *supra* note 78, at 780 (stating that Facebook communication is an “asymmetric” mode of expression in that the unintended audience has an incongruous understanding of what the speaker may have actually intended”). There are a number of websites dedicated to finding humor in such mistakes and misunderstandings. One of the most popular such sites is [damnyouautocorrect.com](http://damnyouautocorrect.com). The site includes such goofs as a mother texting one of her children that a sibling was “adopted” instead of “accepted” (to Yale), a family member texting that grandma is “gone” instead of “home,” and a disturbing number of texting errors that appear to inadvertently trigger the end of intimate relationships. The site reports hundreds of submissions per day. See *Damn You Autocorrect: Frequently Asked Questions*, DAMN YOU, AUTO CORRECT! (July 27, 2011), <http://damnyouautocorrect.com/10785/damn-you-autocorrect-frequently-asked-questions>. Journalist David Pogue asked his Twitter followers to submit their “most memorable [autocorrect] glitches” and posted a list of his favorites on his blog. David Pogue, *Autocorrect Follies*, POGUE’S POSTS (June 21, 2010, 2:45 PM), <http://pogue.blogs.nytimes.com/2010/06/21/autocorrect-follies>. In another particularly tragic example in England, a man was convicted of manslaughter after a misunderstanding over a text led to a violent fight. See *Victim Stabbed to Death over Text Message Mix-Up*, BOLTON NEWS (Eng.), Feb. 2, 2011, available at [http://www.theboltonnews.co.uk/news/8826815.Victim\\_stabbed\\_to\\_death\\_over\\_text\\_message\\_mix\\_up](http://www.theboltonnews.co.uk/news/8826815.Victim_stabbed_to_death_over_text_message_mix_up).

<sup>123</sup> Cf. Berman et al., *supra* note 87, at 6 (noting that modern social networking sites “promote very informal means of communication,” including “stream-of-consciousness statements”); Amy Harmon, *Internet Changes Language for :-)* & :-), N.Y. TIMES, Feb. 20, 1999, at B7 (explaining that in online chat rooms, “a correctly spelled word is a sign of the inarticulate and an innovative abbreviation is prized above all else”).

sense impressions will be admissible against criminal defendants,<sup>124</sup> they must be viewed with a particularly critical eye.

In light of the foregoing, legislators and courts face two alternatives: (1) acquiesce in a new normal, where uncorroborated e-PSIs are regularly presented to jurors as substantive evidence; or (2) fashion stricter requirements for the admission of present sense impressions.<sup>125</sup> As discussed above, it is difficult, if not impossible, to justify the admission of e-PSIs on contemporaneity alone. The better alternative is to salvage the present sense impression exception for modern usage by excluding uncorroborated e-PSIs from its reach.

### B. *Excluding Unreliable Present Sense Impressions Through a Percipient Witness Requirement*

There are at least two distinct evidentiary approaches to limiting the admissibility of uncorroborated e-PSIs. The broadest approach would condition the admissibility of present sense impressions on a showing of corroboration, in any form, of the substance of the statement. A narrower approach would require corroboration in a specific form—a percipient witness. This Section discusses the relative merits of these approaches and, ultimately, endorses the narrower approach.

Under the broad approach, present sense impressions would be admissible once the content of the statement was corroborated by evidence of any nature. For example, a tweet about a reckless driver (as in the Justin Bieber example discussed earlier) could be corroborated by evidence that the driver crashed shortly after the statement's broadcast. New York provides an example of this approach. In New York, the courts consciously deviate from the federal model by permitting present sense impressions only if "the content of the communication [is] corroborated by independent proof."<sup>126</sup> The New York Court of Appeals, however, has not further specified what the corroboration requirement entails, instead stating that "[b]ecause of the myriad of situations in which the problem may arise, it would not be productive

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<sup>124</sup> See *Damper*, 225 P.3d at 1151 (allowing a text message written by the victim to be admitted as evidence in a murder trial); *supra* Section II.C.

<sup>125</sup> A third alternative would limit the admissibility of e-PSIs, while crafting a separate hearsay exception for electronic communications. Obviously, the contours of such an exception would be the subject of great debate.

<sup>126</sup> *People v. Vasquez*, 670 N.E.2d 1328, 1334 (N.Y. 1996); see also Moorehead, *supra* note 3, at 231 (ascribing New York's corroboration requirement to the increased use of telephones to promptly report crimes); Zeidman, *supra* note 20, at 235-36 (describing New York's deviation from the Federal Rules of Evidence in *Vasquez*).

to attempt to fashion a definitive template for general application.”<sup>127</sup> As a result, New York trial courts are free to accept virtually anything as corroboration, as in *People v. Williams*, where the trial court ruled that a gunshot victim’s statement identifying the perpetrator was admissible as a present sense impression.<sup>128</sup> The court explained that “the shots themselves,” which had been heard by others, constituted “sufficient corroboration.”<sup>129</sup> A related approach that likely leads to similar results is to require, as do Florida and Ohio, that a present sense impression be excluded whenever the “circumstances indicate its lack of trustworthiness.”<sup>130</sup> Similar to the New York approach, this reformulation of the present sense impression exception places the ultimate determination of reliability not in a predetermined set of characteristics of the qualifying statements, but in a statement-by-statement analysis conducted by the trial judge. The judge allows present sense impressions into evidence whenever the statements are, in the judge’s view, sufficiently reliable.<sup>131</sup>

Relying on judges to make ad hoc assessments of reliability is unsatisfying on many levels. For one thing, this practice deviates from the general pattern of codified hearsay exceptions. The common law and the rule-based evidence codes in use today largely reject an approach to hearsay that relies on judges’ statement-by-statement assessments of reliability, adopting instead explicit categorization of admis-

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<sup>127</sup> *Vasquez*, 670 N.E.2d at 1334. The court further elaborated that “[t]he corroboration element of the present sense impression exception is more complex and concomitantly more difficult to delineate” than the other elements but concluded that, “in all cases the critical inquiry should be whether the corroboration offered to support admission of the statement truly serves to support its substance and content.” *Id.* at 1334-35.

<sup>128</sup> No. 8203/2005, 2007 WL 1805628, at \*5 (N.Y. Sup. Ct. June 25, 2007).

<sup>129</sup> *Id.*

<sup>130</sup> FLA. STAT. ANN. § 90.803(1) (West 2009); *see also* OHIO R. EVID. 803(1); *De-parvine v. State*, 995 So. 2d 351, 369-71 (Fla. 2008) (affirming the trial court ruling admitting as a present sense impression a statement made over a cell phone that the declarant was “following Rick and the guy that bought the truck”); *State v. McNeal*, No. 1-01-158, 2002 WL 1376177, at \*5 (Ohio Ct. App. June 18, 2002) (affirming the admission of a tape of an anonymous 911 call despite internal contradictions in the call because, when the court considered the “totality of the circumstances,” the discrepancies did not “so undermine[] the trustworthiness . . . as to preclude admission of the tape as a present sense impression”).

<sup>131</sup> New Mexico appears to follow a similar approach. *See State v. Case*, 676 P.2d 241, 244-45 (N.M. 1984) (explaining that trial judges have “broad discretion” to determine whether present sense impressions are reliable and thus admissible in light of their “view of the type of case, the availability of other evidence, the verifying details of the statement and the setting in which the statement was made”).

sible out-of-court statements.<sup>132</sup> As the Supreme Court explained in *Tome v. United States*, the drafters of the Federal Rules of Evidence consciously rejected a “statement-by-statement balancing approach” due to its inherent flaws: “It involves considerable judicial discretion; it reduces predictability; and it enhances the difficulties of trial preparation because parties will have difficulty knowing in advance whether or not particular out-of-court statements will be admitted.”<sup>133</sup> It is un-

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<sup>132</sup> See FED. R. EVID. art. VIII advisory committee’s introductory note (noting that the rules’ approach to hearsay “is that of the common law, i.e., a general rule excluding hearsay, with exceptions” and rejects “[a]bandonment of the system of class exceptions in favor of individual treatment in the setting of the particular case” as “involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparing for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases”); Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 373 (2003) (identifying the drafters’ rejection of a statement-by-statement approach to hearsay in favor of “a lengthy list of specific exceptions to the rule against hearsay” as one of the “most significant choices between rules and standards in American law”); Glen Weissenberger, *Reconstructing the Definition of Hearsay*, 57 OHIO ST. L.J. 1525, 1535 (1996) (explaining that the drafters rejected proposals that would have relied on judicial discretion in favor of the common law system of “an exclusionary rule, a hearsay definition, and formal exceptions”).

Admittedly, there are a few exceptions. See FED. R. EVID. 803(6)–(8) (allowing judges to exclude business records and public records and reports where the “sources of information or other circumstances indicate lack of trustworthiness”); FED. R. EVID. 804(b)(3) (requiring the exclusion of a statement made against the declarant’s penal interest in a criminal case unless “corroborating circumstances clearly indicate the trustworthiness of the statement”); see also *United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995) (explaining that while “the precise nature of the corroboration required by Rule 804(b)(3) cannot be fully described, the courts have identified several factors” to consider, including “the nature and strength of independent evidence relevant to the conduct in question”); MUELLER & KIRKPATRICK, *supra* note 31, § 8.74, at 979 (recognizing that although “[i]t is hard to say what is meant [in Rule 804(b)(3)] by ‘corroborating circumstances,’” “[t]he requirement is satisfied by independent evidence that directly or circumstantially tends to prove the same points on which the statement is offered” as well as by evidence “supporting the veracity of the speaker”).

<sup>133</sup> 513 U.S. 150, 164-65 (1995). These objections also speak to the possibility of policing e-PSIs through Federal Rule of Evidence 403, which permits the exclusion of otherwise admissible evidence where its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Trial courts’ ad hoc assessments of the probative value and potential for “misleading the jury” of particular hearsay statements under Rule 403, however, would result only in an inconsistent and unpredictable patchwork solution. In addition, it is unclear that a court can legitimately apply Rule 403 to essentially countermand the reliability assessment built into Rule 803(1). Rule 803(1) represents the drafters’ view that statements falling within the exception are sufficiently reliable to be presented to the trier of fact. While other hearsay exceptions expressly grant the trial court discretion to exclude otherwise admissible statements on grounds of reliability, see *supra* note 132, Rule 803(1) does not. See FED. R. EVID. art. VIII advisory committee’s introductory note (describing an alternative approach where “[a]dmissibility [of hearsay] would be de-

clear why these difficulties should be ignored when determining the admissibility of the subset of statements that otherwise qualify as present sense impressions. Indeed, grafting a generic trustworthiness requirement onto the exception smacks of simply ducking the question of whether the exception itself is warranted. A host of categories of statements, including a completely contrary exception for “solemn statements made upon reflection,” could equally plausibly be excepted from the hearsay bar, so long as the exception included a backstop requirement that the judge deem the statements trustworthy.

Perhaps the most basic criticism of the amorphous present sense impression exceptions used in New York, Florida, and Ohio is that there has not been any case made for them. In essence, these jurisdictions recognize the flaws in the Federal Rule of Evidence, but then decline to grapple with that recognition in any serious way.<sup>134</sup> Rather than choose between rejecting the exception (a choice made by five states),<sup>135</sup> or engaging in the difficult task of fashioning an alternative,

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terminated by weighing the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence” but rejecting that approach “as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparing for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases”). Stated another way, Rule 403 is not a sufficient check on unreliable e-PSIs for the same reason that Rule 403 is not a sufficient check on hearsay generally. Questions about the reliability of out-of-court statements are properly addressed by the hearsay rules, not by trial courts assessing the credibility of absent declarants under Rule 403.

<sup>134</sup> See, e.g., *People v. Vasquez*, 670 N.E.2d 1328, 1334 (N.Y. 1996) (explaining that New York judges “added a requirement of corroboration to bolster these assurances of reliability” with respect to present sense impressions, but failing to provide any overall justification for the new hybrid exception).

<sup>135</sup> Consistent with the consensus that existed prior to the promulgation of the Federal Rules of Evidence, California, Connecticut, Nebraska, Oregon, and Tennessee do without the exception altogether. See *State v. Torelli*, 931 A.2d 337, 347 n.12 (Conn. App. Ct. 2007) (“Neither our state case law, nor the Connecticut Code of Evidence includes a present sense impression exception to the hearsay rule.”); *State v. Carpenter*, 773 S.W.2d 1, 9 (Tenn. Crim. App. 1989) (finding that there is no precedent in Tennessee for a present sense impression but affirming the trial court’s decision to admit the evidence on the alternative ground that it was an excited utterance); *McFarland*, *supra* note 23, at 933 (chronicling state evidence codes and noting that Nebraska, Oregon, and Tennessee omit the present sense impression exception altogether). Edward Imwinkelreid includes Minnesota in a list of states that do not have the exception. Imwinkelreid, *supra* note 21, at 330. Under Minnesota law, present sense impressions are only admissible in the narrow circumstance where the declarant is subject to cross-examination at trial. MINN. R. EVID. 801(d)(1)(D). For the purposes of e-PSIs, this causes the exception to overlap to a degree with the recorded recollection exception. See FED. R. EVID. 803(5) (excepting recorded statements of the testifying witness). California’s evidence code includes an exceedingly narrow analogue to the exception.

these states simply “paper over” the problem with a vacuous trustworthiness requirement.

The second, narrow approach to ensuring the reliability of present sense impressions admitted at trial corrects for the flaws in the first by steeping itself in the justifications historically offered for the present sense impression exception. This approach requires statements admitted as present sense impressions to be communicated at trial by a percipient witness (i.e., someone who was present at the time the statement was made) who “received” (or made) the statement.<sup>136</sup> The justifications for such a requirement are the same as those originally offered for the present sense impression exception by Thayer, Morgan, and others, including the drafters of the Federal Rules.<sup>137</sup> Inevitable flaws in the reliability of present sense impressions can be remedied by the ability to cross-examine a percipient witness (either the declarant or the person to whom the declarant was speaking) who can clarify, vouch for, and, if necessary, discredit the out-of-court statement. This combination of a witness who can be cross-examined regarding the event described and the contemporaneity requirement

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See CAL. EVID. CODE § 1241 (“Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and (b) Was made while the declarant was engaged in such conduct.”).

<sup>136</sup> In 1985, a Pennsylvania appellate court implemented this form of the corroboration requirement. See *Commonwealth v. Blackwell*, 494 A.2d 426, 434-35 (Pa. Super. Ct. 1985) (ruling that a statement did not fall within the present sense impression exception because the declarant “did not make his descriptive statements in the presence of another person who also was at the scene” and that the “requirement that there be such a person is critical to providing the assurance of reliability needed to warrant admission of a statement as within the present sense impression”). Subsequent case law abandoned this requirement. See *Commonwealth v. Peterkin*, 513 A.2d 373, 379 (Pa. 1986) (holding that the declarant’s statements made over the telephone were admissible under the present sense impression exception even though they had not been made in the presence of another person also at the scene); *Commonwealth v. Harris*, 658 A.2d 392, 395 (Pa. Super. Ct. 1995) (“The stated requirement that the recipient of the statement be also at the scene does not appear to represent the commonly accepted understanding of this important exception to the hearsay rule . . .”). When Pennsylvania later codified its evidence rules, the pertinent rule omitted any corroboration requirement, relying solely on contemporaneity. See PA. R. EVID. 803(1) & cmt. (“The trustworthiness of the statement arises from its timing. The requirement of contemporaneity, or near contemporaneity, reduces the chance of premeditated preparation or loss of memory.”). Minnesota employs an even stricter variant of this requirement, dictating that *the declarant* must testify for the present sense impression to be admissible. See MINN. R. EVID. 801(d)(1)(D) committee cmt. (“The committee was concerned with the trustworthiness of such statements when the declarant was not available to testify at trial.”).

<sup>137</sup> See *supra* notes 39-45 and accompanying text.



suffice to place the statement within the category of those out-of-court statements that justifiably pass over the hearsay bar. In short, reconnecting the exception to its historical justifications results in “an ideal exception to the hearsay rule.”<sup>138</sup>

Various definitions of the word “present” could be used in applying the proposed percipient witness requirement. At one extreme, the modified exception could dictate that the out-of-court statement must be presented to the factfinder by an “equally percipient” witness (i.e., someone whose ability to perceive the described event was equivalent to that of the declarant). This extreme position is unwarranted. Even Thayer did not assume an *equally* percipient witness, but required only the existence of a testifying witness who observed the “indications” of the event and could “be cross-examined as to these indications.”<sup>139</sup> Drawing on Thayer’s views, a more sensible definition of “present” would admit present sense impressions communicated at trial by partially percipient witnesses—i.e., persons able to observe some aspect of the event described, including the event’s immediate aftermath or as little as the conditions that would (or would not) have permitted the claimed observation.<sup>140</sup> No matter how “present” is defined, however, the percipient witness requirement will exclude statements that were presented at trial through bare electronic rec-

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<sup>138</sup> Hutchins & Slesinger, *supra* note 44, at 439.

<sup>139</sup> Thayer, *supra* note 39, at 107; *see also* Waltz, *supra* note 20, at 898 (arguing that a witness who could testify to “corroborating ripples,” representing the surrounding circumstances of the event described, would be sufficient under Thayer’s view of the exception); *cf.* FED. R. EVID. 803(1) advisory committee’s note (explaining that if “the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement”); *People v. Brown*, 610 N.E.2d 369, 373 (N.Y. 1993) (rejecting the equally percipient witness requirement, in part, because “[i]nsisting that the declarant’s descriptions of the events must be corroborated in court by a witness who was present with the declarant and who observed the very same events would deprive the exception of most, if not all, of its usefulness”).

<sup>140</sup> This partial percipience could arguably permit a witness to testify to present sense impressions heard over the phone, or captured in a recorded 911 call, where the witness or recording provides some corroboration (or absence of corroboration) for the declarant’s statements. One example would be the aftermath of a domestic violence incident where the recorded 911 call includes the sound of a car driving away while the declarant makes the statement, “he’s driving away now.” *See* Waltz, *supra* note 20, at 888 (explaining that “[a] few state court opinions” have permitted present sense impressions transmitted by telephone when the testifying witness was at least “capable of providing some corroboration in the way of significant surrounding circumstances”). In a more modern context, this would permit present sense observations communicated, for example, during a video chat, where the person who relays the observation to the jury was viewing a similar (virtual) reality as the declarant at the time of the statement.

ords, or by witnesses who, having perceived nothing of the event described in the statement, received word of it electronically.

Requiring the statement to be communicated to the factfinder by someone who was present at the time of the out-of-court statement suffers from the principal failing that it will lead to the exclusion of statements that seem intuitively reliable and therefore of value to a jury.<sup>141</sup> This flaw, however, is not particularly damning as it inheres in any limitation on the admissibility of out-of-court statements, including the hearsay prohibition itself. Reliable out-of-court statements are regularly excluded from evidence because they do not quite fit within applicable exceptions, such as statements made by persons who believe they are seriously injured, but do not believe that “death [is] imminent,”<sup>142</sup> in documents not quite “twenty years” old,<sup>143</sup> in transcripts of proceedings at which the opposing party did not have “an opportunity and similar motive to develop the testimony,”<sup>144</sup> and so on. Yet few would argue that the requirements of each of these exceptions should be relaxed and replaced with a catch-all trustworthiness condition. Instead, to the extent such wiggle room is desirable, modern evidence codes include specific “residual” hearsay exceptions.<sup>145</sup> These exceptions, intended to be invoked sparingly,<sup>146</sup> capture statements that, while not falling within a particular hearsay exception, exhibit “equivalent circumstantial guarantees of trustworthiness.”<sup>147</sup>

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<sup>141</sup> See, e.g., *State v. Jones*, 532 A.2d 169, 171-75 (Md. 1987) (upholding the admissibility of anonymous statements by CB-radio operators that were testified to by a state trooper who was not present at the scene and instead merely overheard the statements on his radio).

<sup>142</sup> FED. R. EVID. 804(b)(2).

<sup>143</sup> *Id.* 803(16).

<sup>144</sup> *Id.* 804(b)(1).

<sup>145</sup> See, e.g., FED. R. EVID. 807 (delineating situations where a statement not covered by Rule 803 but having “equivalent circumstantial guarantees of trustworthiness” is not excluded by the hearsay rule).

<sup>146</sup> See *United States v. Peneaux*, 432 F.3d 882, 893 (8th Cir. 2005) (recognizing that “Congress intended the residual hearsay exception to ‘be used very rarely, and only in exceptional circumstances’” (quoting S. REP. NO. 93-1277, at 20 (1974))); *State v. McClendon*, 730 A.2d 1107, 1114 (Conn. 1999) (“[T]he residual hearsay exceptions [should be] applied in the rarest of cases’ . . .” (quoting *United States v. DeVillo*, 983 F.2d 1185, 1190 (2d Cir. 1993))); *State v. Anderson*, 695 N.W.2d 731, 755 (Wis. 2005) (Bradley, J., concurring) (“The residual hearsay exception should be sparingly used.”); Huhn, *supra* note 132, at 373-74 (noting legislative history indicating “that Congress intended for this exception to be applied only in exceptional circumstances” as well as disagreement among scholars as to whether this intent is being implemented by the courts).

<sup>147</sup> FED. R. EVID. 807. Weinstein’s treatise contains a table identifying the practice of each state that has adopted statutory hearsay rules. 6 JACK B. WEINSTEIN & MARGA-

In lieu of the approach to corroboration recommended above, other narrower measures could be adopted that, while not fully addressing the dangers of unreliable e-PSIs, might mitigate the damage they cause. One such measure would restrict the admissibility of present sense impressions (either as described above or altogether) offered by the prosecution in a criminal trial.<sup>148</sup> This would eliminate the prospect of unreliable e-PSIs being used to deprive a criminal defendant of life or liberty. Alternatively, the present sense impression exception could be moved to Federal Rule of Evidence 804 and, like the other exceptions contained in that rule, conditioned on a demonstration of the declarant's unavailability.<sup>149</sup> It seems beyond dispute that a party should not be able to rely on an electronically preserved tweet as a tactical alternative to the declarant's live testimony regarding the event described.<sup>150</sup>

Assuredly this is a discussion that must be continued among legislators, judges, and scholars in the coming years. Indeed, even more sweeping revisions of the hearsay rules may be required to respond to the changing ways people communicate.<sup>151</sup> The proposal presented

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RET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, at T-214 to -19 (Joseph M. McLaughlin ed., 2d ed. 2011). The table identifies twenty-six states, Puerto Rico, Guam, and the Military, which follow the federal model with respect to a residual exception and identifies fourteen states that do not have the exception. *Id.*

<sup>148</sup> Such a limitation would not be unfamiliar to the Federal Rules. *See* FED. R. EVID. 804(b)(2) (limiting use of hearsay exception for dying declarations to civil cases and prosecutions for homicide).

<sup>149</sup> *See* FED. R. EVID. 804 (setting forth examples of circumstances where the declarant will be deemed "unavailable" and limiting use of subsequent hearsay exceptions to circumstances where "the declarant is unavailable as a witness," including a lack of memory); *see also* FED. R. EVID. 803(5) (allowing for recorded recollections of a testifying witness). A related alternative would be to move the present sense impression exception to Rule 801(d) and treat it like other prior statements of a witness that are "not hearsay," provided that the declarant "testifies at the trial or hearing and is subject to cross-examination concerning the statement." FED. R. EVID. 801(d)(1). This is the approach adopted by Minnesota. *See* MINN. R. EVID. 801(d)(1)(D); *supra* note 135.

<sup>150</sup> *See* FED. R. EVID. 803 advisory committee's note (explaining that the exceptions in Rule 803, including the present sense impression exception, concern statements that "possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available"). The fact that the opposing party can subpoena the declarant will mitigate this concern to a degree, but only if the opposing party is sufficiently diligent, sophisticated, and motivated to take this step, and the declarant is identified, locatable, and willing to cooperate.

<sup>151</sup> A new electronic-communication hearsay exception may ultimately emerge, supported by the reliability inherent in communications to friends and family, or that follows from the knowledge of widespread dissemination and preservation of an out-of-court statement. As with the other hearsay exceptions, however, such an exception would need to be subject to rigorous analysis and debate.

here can, perhaps, be viewed as a step along that path, as alterations in the present sense impression exception will undoubtedly reverberate beyond the exception itself.<sup>152</sup> In the end, however, the present sense impression exception is the hearsay exception that is both most immediately undermined by recent technological changes and, given its distinct history, most easily updated to respond to these changes.

### CONCLUSION

The law does not evolve in the abstract. Rather, it responds to specific needs of time and place. As a result, one of the challenges of evidence law (as in other disciplines) is to recognize moments when changing technologies and social norms undermine the justifications

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<sup>152</sup> As it becomes more difficult to admit uncorroborated statements as present sense impressions, litigants will try to fit such statements into related exceptions, such as the state of mind exception, FED. R. EVID. 803(3), the excited utterance exception, FED. R. EVID. 803(2), or even the recorded recollection exception, FED. R. EVID. 803(5).

The state of mind exception warrants additional comment. In the coming years, the hearsay exception for expressions of a “then existing state of mind” will similarly open the courthouse to countless electronic utterances. See FED. R. EVID. 803(3) (allowing for a “statement of the declarant’s then existing state of mind” without commenting on the type of medium in which this statement might be preserved, seemingly keeping the door open for all types of electronic communications). Yet due to their inherently subjective nature, expressions of a person’s state of mind were never subject to corroboration and cannot now be so conditioned. See, e.g., *Mut. Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295-96 (1892) (determining that the declarant’s written letter that he intended to go to Wichita was admissible as reflecting state of mind without requiring further corroboration). In fact, courts and scholars have long criticized the state of mind exception as occupying less stable footing than the present sense impression exception. See, e.g., Morgan, *supra* note 37, at 233, 236 (acknowledging the accuracy of declarations of a state of mind, but only if “made naturally and without circumstances of suspicion,” and placing no such limitation on the exception for present sense impressions). Weinstein’s treatise goes so far as to cite numerous cases for the proposition that courts will not admit a statement under the exception unless there are “no suspicious circumstances.” WEINSTEIN & BERGER, *supra* note 147, § 803.05[2][a], at 803-31. As Eleanor Swift notes, this assertion overlooks disagreement in the judiciary. See Eleanor Swift, *The Problem of “Trustworthiness” in the Admission of State of Mind Hearsay Under California and Federal Evidence Law*, 36 SW. U. L. REV. 619, 639-45 (2008) (noting “conflicting federal authority” in discussing the courts’ division between the adoption of either the “categorical” or “trustworthiness” approaches to Rule 803(3)). Nevertheless, Weinstein’s sentiment correctly captures the fact that courts already screen out statements offered under the state of mind exception that they perceive to be unreliable, either through a finding of “lack of contemporaneousness” or by shifting the analysis to “principles of relevance, and Rule 403” and deeming the state of mind expressed to be distinct from the state of mind at issue. 2 MCCORMICK ON EVIDENCE, *supra* note 3, § 274, at 267 n.8. So while the state of mind exception may also be in need of updating in light of modern developments, the problems presented by that exception are distinct from those discussed herein, and the solution (if any) must be as well.

for longstanding legal doctrines. When these moments pass unnoticed, previously sound doctrines lose their footing and frustrate, rather than facilitate, the proper functioning of the judicial system. This Article contends that one of these moments is at hand.

The present sense impression exception to the hearsay prohibition was historically justified by two separate guarantors of reliability: contemporaneity *and* corroboration by a percipient witness. In anticipation of a new wave of (electronic) present sense impressions whose reliability is no longer assured by the second of those guarantors, courts and legislators must revisit the exception and align its requirements with its underlying rationale. The realignment proposed here is straightforward: present sense impressions should not be admitted at trial unless they are presented through a recipient of the statement (or its maker) who was present when the out-of-court statement was uttered. This solution to the challenges posed by changing times fits neatly into the modern hearsay framework and restricts the discretion of courts to indiscriminately pick and choose among otherwise admissible present sense impressions. It also fittingly echoes the justifications for the present sense impression exception that swept the exception into the nation's evidence codes in the first place.