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## RESPONSE

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### COMMUNICATIONS, TECHNOLOGY, AND PRESENT SENSE IMPRESSIONS

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In response to Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331 (2012).

#### INTRODUCTION

I was honored to be asked to respond to Professor Bellin's insightful article, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*.<sup>1</sup> Since I agree with much of what he says, my Response is limited to two tasks: parsing the relationship between modes of communication and the present sense impression exception, and assessing the extent to which at least certain types of electronic communication might be incorporated into the percipient witness requirement he proposes.

#### I. MODES OF COMMUNICATION

In the introduction to his article, Professor Bellin states that the present sense impression exception to the default rule barring hearsay "is uniquely tethered to an oral . . . communication norm."<sup>2</sup> He also notes that advocates of the exception assumed "that people would only communicate about unfolding events orally."<sup>3</sup>

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<sup>1</sup> 160 U. PA. L. REV. 331 (2012).

<sup>2</sup> *Id.* at 333.

<sup>3</sup> *Id.*

Professor Bellin argues that this assumption was, and is, an integral, essential component of the rationale for recognizing the present sense impression exception, because in an era of only oral communication, “a person who uttered a statement about an unfolding event . . . would invariably be speaking to someone nearby who was also able to observe the same event.”<sup>4</sup> He notes that the supporters of the exception contended that from this once-inevitable empirical circumstance, one could derive “two separate guarantors of reliability”—contemporaneity and corroboration.<sup>5</sup> I will assume, for the purposes of this analysis, that their contention was correct, i.e., that contemporaneity and corroboration are useful in ensuring the reliability of statements offered as present sense impressions.

However, I take issue with Professor Bellin’s comments insofar as they assume we can *only* derive these guarantors of reliability from oral communications. As I noted above, he argues that the present sense impression exception is “*uniquely* tethered to an oral” communication norm.<sup>6</sup> I disagree.

It is one thing to point out that because the exception originated in a world in which oral statements were the only way people could communicate spontaneously about contemporaneous events,<sup>7</sup> it is appropriate in that context. It is another to suggest that the exception is *only* appropriate in that context. I would argue that the fact that the exception is a *product* of proximate oral communication does not necessarily mean that it is *limited* to that type of communication.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 375.

<sup>6</sup> *Id.* at 333 (emphasis added).

<sup>7</sup> For the evolution of the present sense impression exception, see, for example, Edward M. Imwinkelried, *The Need to Resurrect the Present Sense Impression Hearsay Exception: A Relapse in Hearsay Policy*, 52 HOW. L.J. 319, 326-30 (2009). In the era in which the exception was evolving, people could communicate in writing, as well as orally, but writing tended to be used for formal communication, e.g., for correspondence or for news stories. Cf. Bellin, *supra* note 1, at 333-34. Prior to the rise of cyberspace, it was not common for average citizens to carry writing materials in order to jot down stray thoughts or document what they were “currently seeing, doing, and feeling.” *Id.* at 335. That, of course, has changed dramatically, as one court noted,

given the ubiquity of communications in electronic media (e-mail, text messages, chat rooms, internet postings on servers like “myspace” or “youtube” or on blogs, . . . etc.), it is not surprising that many statements involving observations of events surrounding us, statements regarding how we feel, our plans and motives, and our feelings (emotional and physical) will be communicated in electronic medium.

But that seems to be the premise of Professor Bellin's article: he appears to believe that the present sense impression exception and electronic communications are necessarily incompatible, apparently because he believes electronic communications cannot sustain the guarantors of reliability (contemporaneity and corroboration) that are associated with oral communications. I agree that electronic communications *can* fail to sustain either or both guarantors of reliability, but I do not agree that such failure is inevitable in either or both respects.

I think it is better to analyze the potential for failure discretely by dividing electronic communications into categories—tweets, texts, emails, Facebook status updates, and so forth—and analyzing the extent to which communications in each category have the potential to sustain the guarantors of reliability we have long assumed are associated with oral communications. As to the actual reliability of the latter part of this analysis, Professor Bellin notes that declarants could fabricate oral observations by communicating them directly to others, recording them on a dedicated recording device, or leaving them on a voicemail system.<sup>8</sup> But he dismisses the risk of unreliability in this context, concluding that the “facial absurdity” of orally fabricating such evidence would render it “of little value.”<sup>9</sup>

There are, however, reported cases that involve the fabrication of just such evidence.<sup>10</sup> This, along with the fact that different types of electronic communication may vary in the extent to which they can support the guarantors of reliability Professor Bellin attributes to oral communications, suggests that the two are not unitary constructs, i.e., that one is inherently likely to be reliable while the other is inherently likely *not* to be reliable.

Since this Response is brief, I have neither the space nor the ambition to engage in a detailed analysis of the comparative reliability of oral versus electronically mediated communications. But before I leave this issue, I would like to comment on two other points.

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<sup>8</sup> See Bellin, *supra* note 1, at 362-63.

<sup>9</sup> *Id.* at 363.

<sup>10</sup> This commonly arises with fabricated 911 calls. See, e.g., *United States v. Dixon*, No. 09-6046, 2011 WL 4829718, at \*3 (W.D.N.Y. Oct. 12, 2011); *People v. Roche*, 772 N.E.2d 1133, 1138-39 (N.Y. 2002); *People v. Dalton*, 629 N.Y.S.2d 86, 86 (N.Y. App. Div. 1995). It is reasonable to assume that these are the exceptions, i.e., that there are other reported and unreported cases in which the fabrication of oral evidence did not come to light.

A. “*Mischievous Evidence*”

In his introduction, Professor Bellin cites Twitter and Facebook’s status updates as examples of electronic communication modalities that are likely to be the source of “mischievous evidence,”<sup>11</sup> a point he returns to in a later section of his article. In the later section, he emphasizes the ease with which electronic communications can be used to fabricate present sense impression evidence.<sup>12</sup> He argues, first, that the (presumed) “absence of other observers” makes it “more likely” that someone will generate a “false or misleading statement,” and attributes the lack of observers to the fact that Twitter and other electronic communication media “physically distanc[e] the speaker” from others.<sup>13</sup>

Electronic communication media do tend to distance us physically from those with whom we communicate; a spatial disconnect is common, but not inevitable.<sup>14</sup> However, this distance is not necessarily an engine of fabrication. Courts have held, for example, that 911 emergency calls can qualify as a present sense impression.<sup>15</sup> In other words, some courts have found that a physical disconnect between the party who initiates oral communication and the party who receives such communication is not a necessary indicator of fabrication. Indeed, these courts tended to consider the time in which the caller had to fabricate a story as the critical issue in determining whether the call qualified under the present sense impression exception.<sup>16</sup>

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<sup>11</sup> Bellin, *supra* note 1, at 334-35.

<sup>12</sup> *See id.* at 362-66.

<sup>13</sup> *Id.* at 362.

<sup>14</sup> Conference attendees, law students, and others in similar situations, for example, have been known to use texts, emails, tweets, and other electronic means to communicate with each other even though they simultaneously occupy the same physical space.

<sup>15</sup> *See, e.g.,* United States v. Boyce, No. 10-0533, 2011 WL 5078186, at \*3 (N.D. Ill. Oct. 26, 2011); United States v. Campbell, 782 F. Supp. 1258, 1260-61 (N.D. Ill. 1991); People v. Crow, No. 293645, 2010 WL 4628685, at \*3 (Mich. Ct. App. Nov. 16, 2010); People v. Spencer, 928 N.Y.S.2d 607, 607 (App. Div. 2011); Wilder v. Commonwealth, 687 S.E.2d 542, 546 (Va. Ct. App. 2010); State v. Seals, No. 63883-1-I, 2011 WL 1226896, at \*2 (Wash. Ct. App. Apr. 4, 2011). *But see supra* note 10 and accompanying text.

<sup>16</sup> *Compare Campbell*, 782 F. Supp. at 1260-61 (concluding that a call qualified as a present sense impression because the caller did not have time to fabricate a story), *with* People v. Dalton, 629 N.Y.S.2d 86, 86 (App. Div. 1995) (indicating that the record showed the caller had time to “possibly fabricate” a story (quoting People v. Wilson, 506 N.Y.S.2d 760, 760 (1986))). According to one source, an empirical study shows that “the truth took longer to get out than a previously conceived lie, and . . . a lie fabricated on the spur of the moment required less than three seconds to create and utter.” Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 917 (2001) (citing John O. Greene et al., *Planning and Control of Behavior During Deception*, 11 HUM. COMM. RES. 335, 350-59 (1985)).

And that brings us back to whether, for the purposes of this analysis, there is a legitimate distinction between oral and electronic communications. It *might* be easier to fabricate a textual communication than an oral communication, but unless and until we have evidence that clearly supports this proposition, it necessarily remains in the realm of speculation. For now, it seems reasonable to assume (or, perhaps more accurately, to continue to assume) that some observers will be inclined to fabricate statements and will utilize whatever means are at their disposal to achieve this end. The mere possibility of fabrication is not, I submit, enough to warrant imposing excessive restrictions on the use of electronically generated statements. That solution would be overinclusive, in that it could deny courts access to reliable evidence. The appropriate response is to utilize countermeasures, such as corroboration, that provide some assurance of the integrity of a declarant's statements.<sup>17</sup>

### B. *Fabricating, Spinning, and Puffing*

Professor Bellin also notes that “[i]ntentionally false statements are only part of the problem.”<sup>18</sup> He expresses concern about people

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Electronic communications tend to increase the speed with which we communicate, but it is difficult to see how this circumstance alone undermines the integrity of the present sense impression exception. As courts have noted, a pivotal inquiry in determining the applicability of that exception is not the speed with which the lie travels, but instead our presumptive ability to fabricate the lie in the time that elapses between our observing the event at issue and the communication of our “sense impression” to others. *See, e.g.,* *United States v. Green*, 556 F.3d 151, 157 (3d Cir. 2009) (noting that “the fundamental premise behind the present-sense impression exception” is “that contemporaneity ensures reliability because there is no time for deliberate fabrication”). *See generally* *McFarland, supra*, at 917 (finding that it took, on average, 2.967 seconds to create a “spontaneous lie”). One could, therefore, argue that insofar as electronic communications increase the speed with which we communicate, they reinforce the reliability of the present sense impression. *But see* *Bellin, supra* note 1, at 335-37 (noting limitations of contemporaneity as a guarantor of reliability).

The increased speed with which electronic communications travel also inferentially supports the reliability of recorded present sense impressions since it ensures that there is less of a gap between observation and communication of one's impressions of what one observed. James Bradley Thayer, who is perhaps the original champion of the exception, supported it because he believed the temporal proximity between event and declaration eliminated “any substantial concern about the quality of the declarant's memory.” *Imwinkelried, supra* note 7, at 327.

<sup>17</sup> Because the possibility of fabrication in this context substantially preexists the rise of electronic communication media, many courts have “read the [present sense impression] exception to require such corroboration.” *United States v. McElroy*, 587 F.3d 73, 85 n.13 (1st Cir. 2009).

<sup>18</sup> *Bellin, supra* note 1, at 364.

(1) intentionally fabricating evidence in anticipation of litigation and/or (2) exaggerating, “spin[ning],” or engaging in “puffery” in their “postings on a social networking site.”<sup>19</sup> His concern here is that if “declarants take creative license with the truth in electronic postings, their misleading assertions will be difficult to untangle from the electronic record itself.”<sup>20</sup>

My response to his first area of concern, i.e., prospective litigants fabricating evidence designed to support their position, is that this is nothing new. Prosecutions for attempts to obstruct justice by falsifying or fabricating evidence are far from unusual in our court systems.<sup>21</sup> While it would be naïve to assume that the authorities detect and prosecute all such attempts, it can be extraordinarily difficult to succeed in such an endeavor. Computer forensic analysts can ascertain when, how, and by whom evidence was created, which can often reveal the evidence’s true character; even if the evidence withstands such scrutiny, other evidence presented at trial will often reveal that it is inconsistent with the known facts and therefore fabricated.<sup>22</sup> In other words, it is one thing to fabricate evidence, but quite another to successfully utilize it to one’s advantage.

I am somewhat puzzled by Professor Bellin’s articulated concern about exaggeration, spinning, and puffery in postings on social networking sites. One of the sources he cites for this proposition notes (quite accurately, from what I know) that adolescents commonly blur “lines between fact and fiction” in their postings on Facebook and other sites.<sup>23</sup> My immediate reaction to that observation was that it understates the phenomenon, i.e., I do not believe it is only adolescents who blur the lines between “fact and fiction” in their postings on social networking sites. While I suspect people tend to be “reasonably” accurate in the personal information they post on such sites, they are, after all, “social” networking sites.

As such, it seems reasonable to put about as much credence into postings from those with whom you are not personally acquainted as you would into comments from someone you met at a bar or a party

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<sup>19</sup> *Id.* at 363.

<sup>20</sup> *Id.* at 364.

<sup>21</sup> *See, e.g.*, *United States v. Thorson*, 633 F.3d 312, 321 (4th Cir. 2011) (affirming the sentence of a defendant who falsified, fabricated, and produced documents during an Internal Revenue Service audit and a grand jury investigation).

<sup>22</sup> *See, e.g.*, Brief of Appellee at 13, *Thorson*, 633 F.3d 312 (No. 07-4787) (providing results of forensic computer analysis as evidence of guilt).

<sup>23</sup> Bellin, *supra* note 1, at 363 n.116 (citing Katie Roiphe, *The Language of Fakebook*, N.Y. TIMES, Aug. 15, 2010, at 2ST).

or any other event that brought together people with no preexisting connections. I, for one, do not see how the proliferation of online postings from those who choose to frequent social networking sites has any particular empirical relevance for the application of the present sense impression exception, aside from creating a mass of data to which it may, or may not, apply.

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I could, perhaps, comment further on particular aspects of Professor Bellin's views on how and why the rise of electronic communication media has the potential to have a negative impact on the application of the present sense impression exception to the default rule barring hearsay. I assume—and I hope—that is not necessary.

I hope that I have made my point: electronic communication media certainly create new opportunities for statements that may be offered into evidence under the present sense impression exception. That is only to be expected, since we have already dealt with one such opportunity.

As Professor Bellin explains at the beginning of his article, the early proponents of the exception assumed it would apply (only) to statements made to “someone nearby who was also able to observe the same event.”<sup>24</sup> But it soon became apparent that it could also apply to comments communicated over the telephone, a circumstance courts eventually integrated into the exception.<sup>25</sup> We therefore have experience in adapting the present sense impression exception to the realities created by emerging technologies. I suspect we will have little difficulty adapting the exception so that it can accommodate our use of social networking and whatever communication technologies evolve in the future.

## II. PERCIPIENT WITNESS

Professor Bellin ultimately concludes that two approaches can be used to limit the admissibility of “uncorroborated” statements trans-

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<sup>24</sup> *Id.* at 333.

<sup>25</sup> Compare *Commonwealth v. Blackwell*, 494 A.2d 426, 434-35 (Pa. Super. Ct. 1985) (concluding that the victim's statements made in a phone call to the police dispatcher describing his victimization were inadmissible under the present sense exception because they were not made in the presence of another person), with *State v. Essa*, 955 N.E.2d 429, 448 (Ohio Ct. App. 2011) (determining that a statement the defendant's wife made in a phone conversation with her friend just before she died was admissible under the present sense impression exception).

mitted via electronic technology.<sup>26</sup> One would require “corroboration, in any form, of the substance of the statement”; the other, “narrower approach would require corroboration in a specific form—a percipient witness.”<sup>27</sup> He opts for the narrower approach, essentially because he finds the broader approach’s reliance “on judges to make ad hoc assessments” as to the reliability of corroborated statements offered under the exception “unsatisfying.”<sup>28</sup>

I tend to agree with Professor Bellin’s views on the importance of corroboration. While I believe, as I explained above, we can incorporate the use of electronic communication technology into the present sense impression, I, too, am concerned about the possibility of opening trials up to potentially unreliable evidence. I think corroboration is the obvious way to address this concern. I am not sure whether I share Professor Bellin’s reservations about the broader approach to achieving corroboration, but for the initial purposes of this analysis, I will accept his views and only address the position for which he advocates.

That position—the narrower 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>29</sup> I can see the possible utility of this requirement, but I am unable to evaluate its specific utility in the present context because Professor Bellin does not define what it means for the witness to be “present” at the time the statement was made. “Presence” was an implicit, assumed element of the present sense impression exception when it was first developed because, as I noted earlier, it assumed face-to-face communication between two people.

Electronic communication moves us far beyond traditional face-to-face communication, at least in the spatial sense. For that reason, I assume Professor Bellin would not limit the applicability of this narrower approach to instances in which the “speaker” and “recipient” were physically proximate. To include such a limitation would take us

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<sup>26</sup> Bellin, *supra* note 1, at 366. Professor Bellin is concerned about the fact that, while those who lobbied for the adoption of the exception assumed that statements offered under the exception would be corroborated by testimony from a “percipient witness,” the latter requirement “no longer applies to a large subset of present sense impressions.” *Id.* at 361. For the definition of percipient witness, see *infra* text accompanying note 29. The two approaches he refers to are designed to restore this requirement. See Bellin, *supra* note 1, at 366-74 (describing how the “corroboration” and “percipient witness” approaches impose checks on the admissibility of present sense impressions).

<sup>27</sup> Bellin, *supra* note 1, at 366.

<sup>28</sup> *Id.* at 367.

<sup>29</sup> *Id.* at 370.



back to where we started—doing nothing to integrate electronically transmitted communications involving two or more nonphysically proximate people into the present sense impression exception.

I wonder if Professor Bellin would be willing to modify the traditional definition of “presence” so that it could also accommodate a concept of “electronic” presence? I wonder that because as I read his article, a scenario occurred to me that incorporates the concept of “electronic” presence and seems to address the concerns Professor Bellin notes with regard to the admission of uncorroborated electronic communications.

Assume a version of events that occurred recently in the metropolitan area in which I live:<sup>30</sup> A young man and a young woman are sitting in their car at an intersection waiting for a red light to change when John Doe, driving at a very high rate, crashes into their car. Both are killed instantly. Assume, further, that the incident occurred at 6:30 p.m. on a Friday, when the nearby sidewalks were full of pedestrians who were circulating between bars or on their way to nearby restaurants.

Assume, even further, that many of the pedestrians observed the collision. While some called 911, others immediately began tweeting and texting about what they had just seen. The driver of the car later is charged with reckless driving and negligent homicide. The prosecutor would like to introduce some of the pedestrians’ tweets and texts at trial under the present sense impression exception.

All of these people were clearly present when the accident happened. Does that mean they or, more properly, their texts and tweets satisfy the requirements Professor Bellin would impose on the admissibility of such evidence? Who would be the percipient witness(es)? Would those who read the tweets and texts qualify as such a witness? Should they be considered to have been “present” when the statement was made? And how does their being “present” at that place and on that occasion (assuming we can apply these concepts in this context) enhance the credibility of their testimony? All they really know is that they read one or more electronic communications that purported to describe accurately the accident and its aftermath.

I do not know the answers to those questions. I raise this scenario because I think it illustrates another way electronic communications can satisfy the corroboration requirement Professor Bellin (and I) see as essential to applying the present sense impression exception in this context.

It seems reasonable to me to treat the authors of our hypothetical tweets and texts as percipient witnesses whose electronic communica-

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<sup>30</sup> See Doug Page, *Man Charged in Fatal Crash; Students at Carroll, CJ Mourning the Deaths of 2 Young Friends*, DAYTON DAILY NEWS, Nov. 22, 2011, at B1.

tions inferentially corroborate each other. Some courts have taken this approach with 911 calls. In *State v. Naugler*, an Ohio court found that 911 calls from two independent callers reporting that the driver of a “gold Saturn automobile with Pennsylvania license plates,” which was “traveling eastbound on Interstate 70,” was pointing either a gun or “his finger as if it were a gun” in the direction of other motorists.<sup>31</sup> At the driver’s trial for carrying a concealed weapon, the prosecutor sought to introduce these statements, but the driver’s attorney objected that they were hearsay.<sup>32</sup> The Ohio Court of Appeals held that the calls were properly admitted because the callers were describing an event as they perceived it and because the statements corroborated each other, i.e., they came from two independent callers, one from Texas and one from Arizona, each of whom accurately described the vehicle and its license plate number accurately to within one digit.<sup>33</sup> Other courts have reached similar conclusions.<sup>34</sup>

I offer this suggestion because I have, for well over a decade, devoted much of my time to researching and writing about how our use of cyberspace sometimes requires us to modify existing legal rules but often does not. As I explain when I speak and write on this topic, law—except for specialized areas such as patent and copyright—is concerned with people, not with technology, as such. Given that, I believe we need to be careful not to overestimate the impact technology has on existing law; in many instances, it may be possible to accommodate uses of technology with rules as they exist or by tweaking them only slightly.

Here, it seems to me that our legal system has an opportunity to take advantage of the tremendous amount of data our use of social networking technology creates. Much of this data is worthless as far as the law of evidence is concerned, but it can also create scenarios, like the one outlined above, in which we have the recorded coincident reactions of people who fortuitously observed the same event. It seems to me that such data offers a new source of evidence and a new

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<sup>31</sup> No. CA2004-09-003, 2005 WL 3148081, at \*1 (Ohio Ct. App. Nov. 28, 2005), *aff’d*, 855 N.E.2d 456 (Ohio 2006).

<sup>32</sup> *Id.* at \*3.

<sup>33</sup> *Id.* at \*4.

<sup>34</sup> *See, e.g.*, *Miller v. Crown Amusements, Inc.*, 821 F. Supp. 703, 706-07 (S.D. Ga. 1993) (admitting present sense impressions where one known 911 caller and one unknown 911 caller made nearly identical statements shortly after an accident); *Wooten v. Newcon Transp., Inc.*, 632 S.E.2d 525, 529 (N.C. Ct. App. 2006) (admitting present sense impressions where two unknown 911 callers made nearly identical statements shortly after an accident).

way to validate the reliability of that evidence: if we find consistency in the independent, coincident tweets or texts of people who were reacting to the same event, then why should we not use the consistency of their recorded observations to corroborate their accounts and thereby establish the reliability of this evidence?

I, for one, am not particularly concerned about the possibility that such data would be the product of fabrication. It is, of course, possible that individuals who have no other ties and are located in various parts of the country could conspire to fabricate evidence on a given occasion, but that would mean they would have to have prior knowledge of the liability-generating event. If such a scenario were to occur—if a group conspired to use social networking to fabricate favorable evidence admissible under the present sense impression exception—then it should not be difficult to uncover the plot. As I noted earlier, computer forensic examiners are very skillful at finding hidden clues—such as prior, relevant communications or other connections between the conspirators.<sup>35</sup>

#### CONCLUSION

Looking back at what I have written, I fear I may have given Professor Bellin a bit of a hard time. That was definitely not my intention. I found his article thought-provoking, and have taken advantage of this opportunity to share some of those thoughts with you. I think he has initiated what will no doubt be an ongoing, highly complex discussion of this very important issue.

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<sup>35</sup> See *supra* text accompanying note 22.