

2012

## Don't Just Do Something! E-Hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process

Liesa L. Richter

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>



Part of the [Legal Education Commons](#)

---

### Recommended Citation

Richter, Liesa L. "Don't Just Do Something! E-Hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process." *American University Law Review* 61, no.6 (2012): 1657-1726.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

---

# Don't Just Do Something! E-Hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process

## **Keywords**

Evidence, Hearsay, Fair trial, Due process of law, Crawford v. Washington

# DON'T JUST DO SOMETHING!: E-HEARSAY, THE PRESENT SENSE IMPRESSION, AND THE CASE FOR CAUTION IN THE RULEMAKING PROCESS

LIESA L. RICHTER\*

*This Article weighs in on the cutting-edge debate regarding the effects of electronic hearsay or “e-hearsay” on the truth-seeking function of the trial process. Professor Jeffrey Bellin recently raised an urgent call to revise the present sense impression exception to the hearsay rule as a result of the explosion of hearsay on-line, recommending a “percipient witness” amendment to the rule. This Article responds to Professor Bellin and argues that a “percipient witness” requirement is not only unnecessary, but potentially deleterious to the goal of a rational and fair trial system to achieve accurate fact-finding.*

*While e-hearsay may be dressed up in contemporary vernacular and preserved in a novel format, it remains human communication. This Article argues that, because existing hearsay doctrine was designed to deal with human communication with all of its frailties and idiosyncrasies in whatever form it may take, amendments to account for e-hearsay are unnecessary. Further, this Article highlights the overlooked benefits of electronic present sense impressions to the trial process, particularly in the domestic violence context, where critical victim hearsay within other exceptions is now excluded by the Supreme Court’s Confrontation Clause jurisprudence in Crawford v. Washington and its progeny. This Article urges confidence in the ability of trial judges to regulate the latest installment in ever-evolving platforms of communication and counsels restraint in the rulemaking process.*

---

\* Thomas P. Hester Presidential Professor, University of Oklahoma College of Law. I would like to thank Thomas P. Hester and his family for their generous support, which helped to make this article possible. I would also like to extend a special thanks to Dan Capra, Katherine Guzman, Emily Meazell, Tom O’Neil, and Mike Seigel for taking the time to read prior drafts of this article and for many helpful comments. Finally, I would like to thank Professor Jeffrey Bellin for starting a truly fascinating conversation regarding hearsay in the age of the tweet.

*Finally, should trial courts demonstrably fail to regulate e-hearsay under existing rules when given the opportunity, this article outlines four potential alternatives to a “percipient witness” requirement that would preserve valuable evidence and be consistent with the goal of the Federal Rules of Evidence to ascertain “the truth and secur[e] a just determination.”*

#### TABLE OF CONTENTS

Introduction.....	1659
I. The Present Sense Impression Exception:	
Then and Now .....	1664
A. The Contours of the Contemporary Present Sense Impression .....	1664
B. The Checkered Past of the Present Sense Impression ...	1665
C. E-hearsay: The Era of Facebook, Twitter, and the Text.....	1668
D. The Present Sense Impression: Crossing the E-hearsay Frontier .....	1670
1. Human ingenuity and evolving methods of communication .....	1670
2. Limits on the e-present sense impression.....	1674
3. A cautious judicial approach to present sense impressions.....	1686
II. The <i>Crawford</i> Revolution and the Present Sense Impression .....	1691
A. The Federal Rules of Evidence and the Sixth Amendment Part Ways.....	1693
B. Domestic Violence and Present Sense Impressions.....	1699
C. Civil Cases .....	1703
III. The Case for Caution .....	1704
A. Haste Makes Waste .....	1704
B. Piecemeal Amendments to Hearsay Exceptions.....	1706
C. A “Percipient Witness” Is Not the Answer: Benefits of Electronic Evidence at Trial.....	1709
D. Amending the Present Sense Impression: Alternative Proposals .....	1718
1. Making personal knowledge express .....	1718
2. Eliminating “bootstrapping” once and for all .....	1719
3. Taking a cue from Rule 804(b)(3) .....	1722
4. Moving the present sense impression to Rule 804....	1724
Conclusion .....	1726

*“Don’t just do something—stand there!”<sup>1</sup>*

## INTRODUCTION

The last two decades have seen an explosion of technology into everyday existence. Ordinary citizens, including small children, walk around with hand-held devices that possess wireless capabilities reminiscent of Star Trek episodes of the late 1960s.<sup>2</sup> This technological revolution has enormous implications in multiple legal contexts, including criminal enterprise and its investigation, privacy, free speech, trademark, personal jurisdiction, and discovery, to name but a few.<sup>3</sup> In the past decade, legal scholars, practitioners, and legislators have launched a multitude of projects designed to reform existing legal standards to meet contemporary technological realities.<sup>4</sup> Predictably, academic journals are filled with proposed revisions to traditional legal rules and policies to accommodate swiftly advancing technology and communication norms.<sup>5</sup>

---

1. See ALICE IN WONDERLAND (Walt Disney Pictures 1951) (spoken by the white rabbit); see also THE EXECUTIVE’S BOOK OF QUOTATIONS 94 (Julia Vitullo-Martin & J. Robert Moskin, eds., 1994) (attributing quotation to George P. Shultz, former Secretary of State).

2. See David Allen Batchelor, *The Science of Star Trek*, NASA, [http://www.nasa.gov/topics/technology/features/star\\_trek.html](http://www.nasa.gov/topics/technology/features/star_trek.html) (last visited July 11, 2012) (discussing the technology Star Trek writers created to use in the show and its popularity in modern culture).

3. See, e.g., United State v. Jones, 132 S. Ct. 945 (2012) (holding that attachment of a GPS tracking device to a vehicle constitutes a search and seizure within the meaning of the Fourth Amendment); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., concurring in the judgment) (noting the contemporary problem of personal jurisdiction in the Internet age).

4. See, e.g., David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 409–10 (2010) (describing provisions and purposes of Communications Decency Act Internet immunity); Richard L. Marcus, *E-Discovery & Beyond: Toward a Brave New World or 1984?*, 25 REV. LITIG. 633, 647–59 (2006) (discussing amendment of the Federal Rules of Civil Procedure to account for electronic discovery); Christopher G. Clark, Note, *The Truth in Domain Names Act of 2003 and a Preventative Measure to Combat Typosquatting*, 89 CORNELL L. REV. 1476, 1505–07 (2004) (describing the Truth in Domain Names Act of 2003).

5. See generally David S. Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 NW. U. L. REV. 1987 (2008) (discussing the lack of law to govern businesses with “multi-sided platforms”); Mitchell P. Goldstein, *Congress and the Courts Battle Over the First Amendment: Can the Law Really Protect Children from Pornography on the Internet?*, 21 J. MARSHALL J. COMPUTER & INFO. L. 141 (2003) (arguing that the Supreme Court should clearly define its test for obscenity); Michael J. Madison, *The Narratives of Cyberspace Law (or, Learning from Casablanca)*, 27 COLUM. J.L. & ARTS 249 (2004) (discussing how the Internet lacks the material characteristics that define traditional copyright law); Robert K. Magovern, Comment, *The Expert Agency and the Public Interest: Why the Department of Justice Should Leave Online Obscenity to the FCC*, 11 COMMLAW CONSPECTUS 327 (2003) (positing that the FCC and Department of Justice should create and enforce regulations of obscenity on the Internet).

While amending rules and policies to keep pace with technology undoubtedly can be necessary, legal reformers should be wary of change for its own sake. Not all legal standards are similarly susceptible to changing cultural and communication media, and some circumspection is in order. Without careful analysis, rapid changes to first legal principles to address ongoing technological progress may usher in unintended negative consequences and serve to undermine long-standing legal standards of continuing significance. Further, such revisions may provide few long-term solutions as a result of the moving technological target they seek to hit. This Article will sound a cautionary note amid the clamor for change by highlighting the dangers of hasty revision of long-standing legal standards and illustrating the benefits of allowing such standards to evolve with technology in some instances.

This Article will examine the dangers of overreaction and the benefits of patience in connection with a recent proposal to amend the evidentiary hearsay doctrine to accommodate the technological transformation of communities through social media websites.<sup>6</sup> Because technology has dramatically altered the methods by which humans communicate, commentators are concerned about the potential impact on the hearsay doctrine, which limits the admissibility of human assertions made outside the courtroom. Technology promises to preserve voluminous hearsay evidence heretofore lost to the trial process. In fact, there is some indication that the current culture of online social media not only preserves hearsay information, but may also promote the creation of previously non-existent electronic hearsay or “e-hearsay” evidence. In the era of Facebook, Twitter, and YouTube, communication norms now contemplate the constant online posting and texting of real-time information about activities, events, thoughts, emotions, and observations. Courts and litigants will be forced to adapt existing doctrine to regulate the admissibility of this e-hearsay or develop new standards to control its flow into the courtroom.

One hearsay exception that has come under fire as ill-suited to the current communication climate is the exception for the present sense impression.<sup>7</sup> The present sense impression exception, which is recognized by the Federal Rules of Evidence, as well as by the majority of states, permits admission of a hearsay statement that describes or explains an event or condition while, or immediately

---

6. See Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 337–38 (2012).

7. *Id.*

after, the speaker perceives that event or condition.<sup>8</sup> The exception is currently listed prominently as the first hearsay exception in Federal Rule of Evidence 803.<sup>9</sup> Before its adoption in the Federal Rules, however, the present sense impression exception was subject to great debate, characterized by common law rejection, judicial resistance, and scholarly disagreement as to its merits.<sup>10</sup>

In light of the constant stream of observations, descriptions, and commentary on social media websites, Professor Jeffrey Bellin recently urged amendment of the present sense impression exception to prevent the free flow of social media e-hearsay into the trial process.<sup>11</sup> Due to the inherent unreliability of tweets, texts, status updates, and other e-hearsay, Professor Bellin recommends adding a “percipient witness” requirement as a condition of admissibility for present sense impression evidence.<sup>12</sup> This revision to the present sense impression exception would exclude such hearsay from the trial process in the absence of a testifying witness capable of corroborating the events it describes.

This Article argues that a percipient witness proposal should be rejected. First and foremost, amending the present sense impression exception to account for the rise of e-hearsay is unnecessary. E-hearsay may be dressed up in contemporary vernacular and preserved in a novel format, but it remains *human* communication. Existing hearsay doctrine was designed to deal with human communication with all of its frailties and idiosyncrasies in whatever form it may take.<sup>13</sup> The creation and preservation of hearsay in electronic form, therefore, provides no basis for charging in to refashion time-honored hearsay principles. E-hearsay is simply a convenient and modern platform from which to launch the same assault on the present sense impression that has plagued the hearsay exception from its inception.

Furthermore, adding a percipient witness requirement to the present sense impression exception would damage the trial process

---

8. FED. R. EVID. 803(1).

9. *Id.*

10. See generally, Edward J. Imwinkelried, *The Need to Resurrect the Present Sense Impression Hearsay Exception: A Relapse in Hearsay Policy*, 52 HOW. L.J. 319 (2009) (describing the history of the present sense impression, as well as judicial and scholarly rejection of the exception).

11. See Bellin, *supra* note 6, at 338 (suggesting that “courts and legislatures update the present sense impression exception by requiring corroboration by a percipient witness as a prerequisite to admission”).

12. *Id.*

13. See FED. R. EVID. 801(a) (defining a “statement” for purposes of hearsay as a “person’s oral assertion, written assertion, or non-verbal conduct, if the person intended it as an assertion”).

by eliminating relevant and reliable evidence. This Article will analyze the overlooked potential benefit of previously unavailable texts, tweets and status updates to the truth-seeking process, particularly in the domestic violence context where such e-hearsay can be expected to serve a critical role following the U.S. Supreme Court's landmark decision in *Crawford v. Washington*.<sup>14</sup> The Federal Rules of Evidence are designed to "ascertain[] the truth and secur[e] a just determination."<sup>15</sup> The availability of contemporaneous information regarding disputed events promises to advance the important goal of generating accurate trial outcomes.

Finally, because e-hearsay represents nothing fundamentally new in the communication landscape, trial judges can be expected to rise to the e-hearsay challenge and control the flow of electronic or "e"-present sense impressions into court using existing standards. In keeping with the strong common law tradition that is the backbone of the law of evidence, trial judges should, at a minimum, be afforded the opportunity to try—before rule-makers act—to protect the trial process from potentially improvident e-hearsay admission. Should there be a documented failure to regulate e-hearsay using existing requirements of the present sense impression, rule-makers could act, armed with a record to support potential modifications to the hearsay exception. Even then, the addition of a percipient witness requirement would be akin to prescribing decapitation to cure a headache. Such an amendment would largely undermine the utility of the present sense impression as a source of helpful information. If revision is pursued, rule-makers should first explore less draconian amendments that are more consistent with evidentiary policy.

Part I of this Article briefly describes the history of the present sense impression exception to the hearsay rule, as well as its existing requirements under Federal Rule of Evidence 803(1). Part I highlights the significant protections against the admission of wholly unsupported e-hearsay statements within the current framework of the Federal Rules. In addition, Part I reviews judicial treatment of the present sense impression, revealing a cautious and thoughtful approach to present sense impressions that promises to extend into the e-hearsay arena.

Part II of this piece explores the present sense impression in the context of the Supreme Court's recent Sixth Amendment jurisprudence outlined in *Crawford v. Washington* and its progeny. As

---

14. 541 U.S. 36 (2004).

15. FED. R. EVID. 102.

scholars have thoroughly documented, the *Crawford* paradigm excludes a substantial amount of “testimonial” hearsay evidence previously utilized in the context of domestic violence prosecutions, where victims routinely fail to appear at trial for cross-examination.<sup>16</sup> In the wake of *Crawford*, the present sense impression exception appears to be a significant source of constitutionally permissible “nontestimonial” hearsay. Part II demonstrates that revision of the present sense impression exception to add a percipient witness requirement threatens to close the door on this last source of evidence to protect victims of domestic violence. Part II concludes that allowing trial judges to utilize existing limitations on the admissibility of present sense impressions under the Federal Rules of Evidence may provide the best balance between the interests of criminal defendants and those of crime victims.

Part III of this Article articulates concerns regarding the timing, scope, and substance of any proposed amendment to the present sense impression exception to account for shifting norms of communication. Part III counsels against piecemeal amendment of individual hearsay exceptions in response to the e-hearsay explosion. To the extent that rule-makers perceive an urgent need to amend the present sense impression exception to account for e-hearsay, however, Part III argues that the proposed percipient witness requirement would largely eliminate the utility of present sense impressions by admitting them only when they are duplicative of live testimony. Part III also highlights the difficult interpretive issues that would be injected into the present sense impression by a percipient witness requirement. Finally, Part III proposes four potential amendments to the Federal Rules of Evidence that would better serve the policy underlying the present sense impression exception and the Rules generally, as alternatives to a stifling percipient witness requirement.

#### I. THE PRESENT SENSE IMPRESSION EXCEPTION: THEN AND NOW

Federal Rule of Evidence 802 prohibits the admission of hearsay

---

16. See, e.g., Clifford S. Fishman, *Confrontation, Forfeiture and Giles v. California: An Interim User's Guide*, 58 CATH. U. L. REV. 703 (2009) (observing that although *Crawford* did not involve the prosecution of domestic violence, the arresting impact the majority decision would have on testimony sought to be introduced at such prosecutions was “obvious”); 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, 115 (2010) (proffering that the *Crawford* majority’s interpretation of the Confrontation Clause “profoundly affected domestic violence cases, making it much harder to prosecute them successfully”).

statements in federal trials unless an enumerated hearsay exception applies to the particular out of court assertion at issue.<sup>17</sup> In so doing, Rule 802 continues the long-standing common law rejection of hearsay evidence of questionable reliability and insists upon in-court testimony under oath subject to contemporaneous cross-examination by witnesses with first-hand knowledge of events they describe.<sup>18</sup> The Federal Rules of Evidence provide numerous exceptions to the ban on hearsay evidence based upon notions of fairness, necessity, and reliability.<sup>19</sup> The hearsay exception allowing the admission of present sense impressions is contained within Federal Rule of Evidence 803.<sup>20</sup> The Rule 803 hearsay exceptions apply regardless of whether the declarant testifies at trial and, indeed, regardless of whether the declarant is available for trial.<sup>21</sup>

A. *The Contours of the Contemporary Present Sense Impression*

Present sense impressions are hearsay statements that explain or describe an event or condition made while the speaker perceives that very event or condition or “immediately thereafter.”<sup>22</sup> Because the hearsay statement is uttered contemporaneously with the observation or immediately thereafter, such a statement is free from significant concerns of failed memory—one of the pivotal concerns underlying the hearsay doctrine.<sup>23</sup> Further, the lack of time for reflection between observation and speech also lends to the statement’s perceived freedom from risks of deliberate insincerity.<sup>24</sup> By definition, the speaker must have personal knowledge of the event or

---

17. FED. R. EVID. 802.

18. See FED. R. EVID. art. VIII introductory note (offering that the requirement that a testifying witness be present, under oath, and subject to cross examination, evolved from the notion that a witness’s value is derived from her “perception,” “memory,” “narration,” and “sincerity” (citing Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948))). This preference for live testimony finds support in the Constitution to the extent that evidence is admitted against a criminal defendant. The Sixth Amendment preserves the right of the accused to confront his accusers, and thus limits the admission of hearsay evidence against a criminal defendant. 541 U.S. 36, 42 (2004).

19. See 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:31 (3d ed. 2007).

20. FED. R. EVID. 803(1).

21. *Id.*

22. *Id.*

23. See *United States v. Brewer*, 36 F.3d 266, 272 (2d Cir. 1994) (“Statements of present sense impression are considered reliable because the immediacy eliminates the concern for lack of memory and precludes time for intentional deception.” (quoting 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 438 (1980) (internal quotation marks omitted))).

24. See *id.* at 271–72.

condition described as well.<sup>25</sup> Based upon these factors and philosophies, the present sense impression is listed as the first exception to the hearsay rule in Federal Rule of Evidence 803(1).<sup>26</sup>

*B. The Checkered Past of the Present Sense Impression*

While the present sense impression enjoys a position of prominence as the first enumerated hearsay exception in Rule 803, it is a relative newcomer to the hearsay landscape. Throughout the evolution of the hearsay doctrine, distinguished evidence scholars have disagreed sharply over the viability of the present sense impression.<sup>27</sup> As a result, the exception struggled for recognition and did not gain widespread acceptance in federal or state courts until the enactment of the Federal Rules of Evidence in 1975.<sup>28</sup>

James Bradley Thayer, the most influential evidentiary scholar of the nineteenth century,<sup>29</sup> first extracted the concept of the present sense impression from the doctrine of *res gestae*.<sup>30</sup> Thayer emphasized the importance of the timing of the hearsay statement and concluded that substantial contemporaneity between the event perceived and the declarant's description were sufficient to justify an exception to the hearsay rule.<sup>31</sup> Indeed, Thayer postulated that present sense impressions were more accurate than traditionally accepted excited utterances.<sup>32</sup> He theorized that excitement can, in fact, decrease a declarant's ability to perceive and narrate events with accuracy, thus diminishing the reliability of excited utterances.<sup>33</sup> In contrast, the declarant's description of the more mundane events envisioned by the present sense impression is less susceptible to such concerns.<sup>34</sup> Moreover, Thayer noted motivational concerns in the context of excited utterances, where the required excitement in the

---

25. FED. R. EVID. 803 advisory committee's note ("In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge.").

26. FED. R. EVID. 803(1).

27. See Imwinkelried, *supra* note 10, at 326–29 (describing the conflict between Thayer's support for the present sense impression exception and Wigmore's rejection of it, and noting subsequent criticism of the present sense impression by both scholars and courts across the country).

28. *Id.* at 329 (finding "massive judicial rejection of the present sense impression exception").

29. Jay Hoor, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 5 (1993).

30. See James B. Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gestae*, 15 AM. L. REV. 71 (1881) (arguing for an exception to the rule against hearsay for declarations made contemporaneous with the fact under investigation).

31. *Id.* at 80–81.

32. *Id.* at 83.

33. *Id.* at 84–86.

34. *Id.* at 82–83.

declarant is produced by a startling event that becomes the subject of later litigation.<sup>35</sup> Because the present sense impression may describe more commonplace events as they unfold, the declarant may be unlikely to recognize the potential importance of the event at the time, further diminishing any incentive to deceive.<sup>36</sup> Therefore, Thayer proposed recognizing the present sense impression in addition to the well-accepted excited utterance exception to the hearsay rule.<sup>37</sup>

Due to common communication methodology in the late nineteenth century, Thayer's formulation of the present sense impression presupposed an oral hearsay statement regarding an unfolding event.<sup>38</sup> Accordingly, Thayer anticipated that present sense impressions would be introduced at trial by a witness who had overheard an oral present sense impression uttered by another.<sup>39</sup> In the typical case, a trial witness in a position to overhear an oral description of an ongoing event would have had a similar opportunity to observe the described event and be in a position to corroborate the hearsay statement at trial.<sup>40</sup> Later scholars favoring adoption of the present sense impression similarly presumed that such testimonial corroboration by a percipient witness would exist.<sup>41</sup> Although Thayer recognized the likely presence of such corroboration, he did not articulate "corroboration" of the statement as an independent requirement for the admission of the present sense impression.<sup>42</sup> Because of Thayer's significant influence, the concept of the present sense impression enjoyed some acceptance

---

35. *Id.* at 105–06.

36. *Id.*

37. *Id.* at 82–83.

38. *Id.* at 83.

39. *Id.* at 107.

40. *See id.* at 107 (explaining that present sense impressions would describe "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").

41. *See* Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 439 (1928) ("With emotion absent, speed present, and the person who heard the declaration on hand to be cross-examined, we appear to have an ideal exception to the hearsay rule."); Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 236 (1922) (explaining that "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" and that "[t]he 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").

42. Imwinkelried, *supra* note 10, at 354 (noting that early proponents of the present sense impression assume the presence of corroboration by definition, without advocating it as an independent requirement).

among the judiciary during the late nineteenth century.<sup>43</sup>

“If Thayer was the . . . champion [of the present sense impression], Wigmore was its nemesis.”<sup>44</sup> Thayer’s protégé, John Henry Wigmore, assumed prominence for much of the twentieth century and his views of the proper scope and focus of the hearsay doctrine soon dominated the evidentiary sphere.<sup>45</sup> In contrast to Thayer, Wigmore emphasized the need for stress or excitement to create assurances of declarant sincerity.<sup>46</sup> According to Wigmore, present sense impressions lacking elements of excitement were likewise lacking in needed reliability.<sup>47</sup> Wigmore, thus, steadfastly rejected a hearsay exception for the present sense impression.<sup>48</sup> Although many academics continued to support Thayer’s approach to the exception, courts creating the common law of evidence at the time followed Wigmore’s approach and refused to recognize the present sense impression.<sup>49</sup>

In this common law climate, the drafters of the Federal Rules of Evidence considered the fate of the present sense impression.<sup>50</sup> By the 1970s when the Advisory Committee was drafting the Federal Rules of Evidence, research regarding testimonial accuracy and memory had proliferated.<sup>51</sup> Commentators were increasingly concerned with the significant risks of failed memory and testimonial error, in addition to risks of intentional insincerity.<sup>52</sup> In keeping with these contemporary concerns, the Advisory Committee went against

---

43. *Id.* at 327 (stating that “before Wigmore’s intervention, ‘[t]he exception to the hearsay rule for spontaneous exclamations in the absence of a startling event ha[d] been accepted by the courts fairly extensively when the statement relate[d] to an event.’” (alteration in original)).

44. *Id.*

45. *See id.* (explaining that “Wigmore, ‘Thayer’s most distinguished disciple,’ enjoyed the greatest stature in the field” (citation omitted)).

46. *See*, 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1747, at 195 (Chadbourn rev. 1976) (stating that “under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock”).

47. *Id.*

48. *See id.* § 1757, at 236.

49. *See* Hutchins & Slesinger, *supra* note 41, at 432 (advocating adoption of a present sense impression exception to the hearsay rule); Edmund M. Morgan, *Res Gestae*, 12 WASH. L. REV. 91 (1937) (describing circumstances in which it is appropriate to recognize a present sense impression, despite an inclination against the exception).

50. Imwinkelried, *supra* note 10, at 329 (describing consideration of Rule 803(1) against a “backdrop . . . of massive judicial rejection of the present sense impression exception”).

51. *Id.* at 322–23.

52. *Id.* at 323.

the grain of the common law and included the present sense impression in the Federal Rules of Evidence.<sup>53</sup> Although the exception proved controversial, it was ultimately retained by Congress and still enjoys its position as the first exception to the hearsay rule appearing in Federal Rule of Evidence 803.<sup>54</sup>

C. *E-hearsay: The Era of Facebook, Twitter, and the Text*

Dramatic changes in available communication platforms as a result of the technological revolution promise to have significant impact on hearsay evidence. Over the past decade, technology has developed methods of harnessing the power of the Internet in tiny hand-held devices capable of following users anywhere and everywhere.<sup>55</sup> As technology has advanced, private enterprise has been prolific in the creation of new platforms for communicating via the Internet. Computer and smartphone users are now able to engage in an infinite array of electronic activities—such as e-mailing, texting, tweeting, posting status updates, playing games, locating businesses or friends, or diagnosing illness—from anywhere in the world.<sup>56</sup> Importantly, such technology has allowed users to remain constantly connected to a network of designated friends and followers through sites such as Facebook and Twitter.<sup>57</sup>

A social media community has arisen as a result of these new platforms. This community has developed a culture of communication that is marked by a pervasive connection to one's network of on-line friends and the constant posting of updates, observations and activities. Participation in this online community is not limited to college students and teenagers. News outlets, politicians, businesses, government entities, celebrities, and people of

---

53. FED. R. EVID. 803(1) advisory committee's note.

54. See Imwinkelried, *supra* note 10, at 329 (noting opposition by the American Bar Association and the Association of Trial Lawyers of America to the initial inclusion of the present sense impression in the Rules).

55. See Jenna Wortham, *New Apps Connect to Friends Nearby*, N.Y. TIMES, Mar. 8, 2012, at B1 (describing the near ubiquity of smartphones and the ease with which users can correspond with friends given the meteoric rise of social networking via mobile "apps").

56. See, e.g., *Apps that Let You Share Cars, Photos and Money*, NPR (June 20, 2011), <http://www.npr.org/2011/06/20/137058934/apps-that-let-you-share-cars-photos-and-money> (describing how "[s]martphone apps let us play games, count calories, find cheap gas—just about anything developers can dream up"); Anushay Hossain, *Downloading Empowerment: Application Gives Citizens Control Over Crime*, FORBES (Feb. 2, 2012, 12:22 AM), <http://www.forbes.com/sites/worldviews/2012/02/01/downloading-empowerment-application-gives-citizens-control-over-crime>.

57. Twitter, Inc., 151 F.T.C. 162 (March 2, 2011) (consent order); *Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited June 9, 2012).

all ages are now plugged into the Facebook and Twitter communities as a matter of course.<sup>58</sup>

The possibilities for the creation and preservation of e-hearsay through these social media sites and other wireless capabilities are obvious. Indeed, Professor Bellin has aptly noted that “Twitter could be the brainchild of mischievous evidence scholars.”<sup>59</sup> One can readily appreciate how tweets, texts, videos, and status updates may contain hearsay statements describing events declarants are experiencing as they type. Indeed, the on-line community that has grown up around sites like Facebook and Twitter encourages and feeds the practice of posting constant electronic assertions regarding the daily activities and observations of users. Professor Bellin has expressed concern that this plethora of information will flood into the trial process through the present sense impression exception, threatening its integrity with unreliable and self-serving statements designed to entertain, spin, and socialize rather than to report accurately.<sup>60</sup> As a result, he claims that there is an urgent need to amend the requirements of the present sense impression under Federal Rule of Evidence 803(1) to prevent such wholesale admission of “tweets” and “status updates” and “texts” into American trials.<sup>61</sup> He recommends the addition of a “percipient witness” requirement to Rule 803(1) to foreclose the admissibility of uncorroborated e-hearsay.<sup>62</sup> Under this proposal, present sense impression evidence could only be introduced at trial through a witness with personal knowledge of the event or condition described by the hearsay statement.<sup>63</sup>

Although *wholesale* admission of such social media e-hearsay into the trial process would raise significant reliability concerns, the risk that courts will permit such indiscriminate use of tweets and texts under existing requirements of the present sense impression exception appears minimal. Because Twitter encourages users to answer the question “what’s happening?,” it is undoubtedly tailor-made to elicit e-hearsay containing the *subject matter* covered by the present sense impression. The subject matter requirement for the admissibility of present sense impressions represents only one

---

58. See Bellin, *supra* note 6, at 336 n.16 (discussing a tweet by a celebrity claiming to have raced with Justin Bieber shortly before Bieber collided with another vehicle); Barack Obama, TWITTER, <http://twitter.com/BarackObama>.

59. Bellin, *supra* note 6, at 334.

60. See generally Bellin, *supra* note 6.

61. *Id.* at 366.

62. *Id.* at 370.

63. *Id.*

requirement for admission, however. Trial judges must also ascertain that the event or condition described by the statement occurred or existed, that the declarant had personal knowledge of that event or condition, and that the declarant made the assertion while perceiving the event or condition or immediately thereafter.<sup>64</sup> These requirements will serve as important checks on the wholesale admission of ubiquitous tweets, texts, and status updates.

*D. The Present Sense Impression: Crossing the E-hearsay Frontier*

*1. Human ingenuity and evolving methods of communication*

There are many reasons to expect that trial and appellate courts will police e-hearsay effectively under existing requirements of the present sense impression. Most importantly, although social media and other e-hearsay may employ cutting-edge vernacular and originate from new locations, it remains *human* communication. Where the only change involves norms of communication methodology, existing hearsay rules are sufficient to regulate this form of human expression with all of its nuances and peculiarities. Trial judges have ample experience in adapting the requirements of the present sense impression exception, as well as other hearsay exceptions, to all forms of human communication.<sup>65</sup> This experience will allow courts to respond appropriately to the latest modification in the format of human communication—social media and other e-hearsay. Indeed, throughout the history of the hearsay doctrine, technology has constantly pushed human communication into new formats, requiring consideration by the courts.

Although communication norms at the time of Thayer's scholarship may have contemplated oral communication of a present sense impression to a percipient witness in the usual case, methods of human communication are inherently variable and defy precise prediction regardless of the era. Common methods of communication at the time of Thayer's work also raised the possibility of present sense impressions without a percipient corroborating witness. In the famous case of *Regina v. Bedingfield*,<sup>66</sup> which spurred Thayer's three-part essay on *res gestae*, Mrs. Rudd allegedly alighted from her bedroom with her throat cut and exclaimed: "Oh, aunt, see what Bedingfield has done to me."<sup>67</sup>

---

64. FED. R. EVID. 803(1).

65. See *infra* notes 105–09 (discussing application of hearsay doctrine to various forms of human communication prior to the Internet).

66. 14 Cox Crim. Cas. 341 (Crown Ct. 1879).

67. Orenstein, *supra* note 16, at 116.

Bedingfield was found in the bedroom with a shallow cut in his throat from which he recovered.<sup>68</sup> Although Bedingfield was quickly tried and hanged for Mrs. Rudd's murder, scholars decried the trial court's rejection of Mrs. Rudd's statement, noting the closeness in time between the event and the speech, the startling nature of the attack, the independent evidence suggesting that the event occurred, and Mrs. Rudd's personal knowledge of what had transpired in her room.<sup>69</sup> In this context, the victim's statement appears to meet the timing requirement of the present sense impression.<sup>70</sup> Because of the slight lapse in time permitted by the rule, as recognized by Thayer, the hearsay exception is capable of allowing a present sense impression made to a testifying witness who was not a witness to the underlying events at issue.<sup>71</sup> Even before advances in communication technology, therefore, an oral present sense impression without a percipient witness was not impossible or even unlikely.<sup>72</sup>

Furthermore, written communication was obviously common at the time of Thayer's work. The availability of written documentation creates another potential method for remote communication of present sense impressions. A nineteenth century businessman could easily have taken contemporaneous notes of a closed-door meeting and handed them to his assistant outside the door at the conclusion of the meeting. While the assistant could authenticate the notes and provide proof of the meeting, the timing of the notes, and the author's personal knowledge of the event, the assistant, who did not attend the meeting, would not constitute a percipient witness capable of corroborating events at the meeting.<sup>73</sup> Even in Thayer's era, therefore, one could not universally assume an oral present sense impression to another percipient witness.

Of course, technology has fundamentally altered the methods and speed of human communication. This communication revolution

---

68. *Bedingfield*, 14 Cox Crim. Cas. at 342.

69. Orenstein, *supra* note 16, at 117 (noting the firestorm of criticism generated by the trial court's decision to exclude the alleged statement).

70. FED. R. EVID. 803(1).

71. FED. R. EVID. 803(1) advisory committee's note (observing that a "slight lapse" between perception and speech is allowable).

72. Oral present sense impressions to a close witness who lacks personal knowledge of underlying events continue to appear even under modern communication norms. *See* *United States v. Danford*, 435 F.3d 682, 687 (7th Cir. 2005) (affirming use of present sense impression exception to allow immediate oral explanation of conversation to fellow store employee too far away to overhear conversation for herself).

73. *See* *United States v. Santos*, 65 F. Supp. 2d 802, 825 (N.D. Ill. 1999) (allowing admission of handwritten notes of conversation as present sense impression); *United States v. Ferber*, 966 F. Supp. 90, 97-98 (D. Mass. 1997) (allowing contemporaneous handwritten meeting notes into evidence through present sense impression).

did not begin with Internet or wireless connectivity, however. Remote communication technology started more slowly: “[r]apid signaling at a distance began with hand signs, smoke signals, flags, drumbeats, hornblowing, flashing mirrors and lanterns, cannon shots, beacons, carrier pigeons, and signaling positions (semaphores) of various kinds.”<sup>74</sup> Samuel F. Morse developed the idea of using short and long impulses corresponding to letters of the alphabet and patented his system in 1837.<sup>75</sup> With the arrival of the telegraph, it became possible for one person to communicate remotely with another about ongoing events as a routine matter.<sup>76</sup> Indeed, the telegraph was frequently used, much as social media is today, to make others far away aware of local events or conditions.<sup>77</sup> The telegraph’s resemblance to the modern use of abbreviated text messages sent from remote locations is powerful, thus illustrating that existing hearsay doctrine was designed to handle the fundamental and longstanding reality of remote human communication.

Further, Alexander Graham Bell invented the telephone in 1876, and long-distance service between New York and Chicago opened in 1892.<sup>78</sup> With the advent of this technology, human communication was forever transformed, allowing instantaneous transmission of human assertions to remote locations. Akin to current social media and other Internet capabilities, the telephone became widely available and utilized routinely by people around the world.<sup>79</sup> Importantly, although the drafters of the Federal Rules of Evidence clearly relied upon the research of Thayer and Morgan in recognizing the present sense impression, they were drafting in the early 1970s—a full century after development of telephone technology.<sup>80</sup> At this time in our technological evolution, telephones were a common part of daily existence, thus expanding the potential contexts in which a present sense impression could be made beyond

---

74. George Gerbner, *Communications*, in 7 *ENCYCLOPEDIA AMERICANA* 423, 425 (Int’l ed. 1979).

75. *Id.*

76. *See id.* (noting that telegraphy, “introduced in 1844, was a vital step on the road to instantaneous, worldwide communication”).

77. *See* SAMUEL F. B. MORSE, *EXAMINATION OF THE TELEGRAPHIC APPARATUS AND THE PROCESSES IN TELEGRAPHY* 16 (1869) (describing the telegraph as a means of communicating from a distance and distinguishing it from other forms of communication that existed at the time).

78. Gerbner, *supra* note 74.

79. *Id.*

80. *See* FED. R. EVID. 803(1) advisory committee’s note (demonstrating the influence past scholarship had on adopting the exception); *see also* Morgan, *supra* note 49, at 91 (promoting the addition of a present sense impression exception); Thayer, *supra* note 30, at 71 (introducing the argument for the present sense exception).

the face-to-face oral assertion to a percipient witness. Surely, the drafters of original Rule 803(1) were aware of and contemplated this not-esoteric probability.<sup>81</sup> Nonetheless, the drafters of the original Federal Rules of Evidence did not limit the admission of present sense impressions to those related by other percipient witnesses.<sup>82</sup> Because remote human communication that characterizes social media e-hearsay was prevalent when the present sense impression exception was originally recognized in the Federal Rules of Evidence, the proliferation of social media e-hearsay does not raise a new and different set of hearsay concerns necessitating a new and different type of regulation.

Finally, courts have successfully applied existing hearsay doctrine to e-mail communications for many years.<sup>83</sup> The ability to make instantaneous electronic assertions to remote witnesses about events those witnesses cannot perceive or corroborate is nothing new. The social media and text message revolution is simply an extension of the e-mail capabilities routinely available since the early 1990s. With a hand-held device, one can, in essence, keep a computer in a pocket to send an e-mail or text from anywhere. With Facebook and Twitter, one can broadcast an assertion to a wider audience more readily. Still, the fact remains that these are simply human assertions made to others at remote locations. To be sure, Twitter's question "what's happening?" and Facebook's encouragement of the "status update" may be spurring the creation of *more* potential present sense impressions. Still, those tweets and updates remain human communication to a remote audience that courts and lawyers have handled under existing rules for over 20 years.<sup>84</sup> Although the latest

---

81. Indeed, even pre-Rules cases used a common law precursor to the present sense impression exception to allow hearsay statements describing remote telephone conversations. See *Nuttall v. Reading Co.*, 235 F.2d 546, 551–52 (3d Cir. 1956) (allowing wife to testify to deceased husband's hearsay statements describing telephone call with his employer immediately after call ended).

82. See FED. R. EVID. 803(1) (requiring only that the statement describing an event be made while or immediately after the declarant perceived it).

83. See *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 554 (D. Md. 2007) ("[E]-mail evidence often figures prominently in cases where state of mind, motive, and intent must be proved. Indeed, it is not unusual to see a case consisting almost entirely of e-mail evidence."); *United States v. Ferber*, 966 F. Supp. 90, 99 (D. Mass. 1997) (evaluating and allowing e-mail message as a present sense impression).

84. Indeed, courts have rejected the notion that new and improved evidentiary rules are necessary to deal with electronic communication:

[E]ssentially, appellant would have us create a whole new body of law just to deal with e-mails or instant messages. The argument is that e-mails or text messages are inherently unreliable because of their relative anonymity and the fact that [they] . . . can rarely be connected to a specific author with any certainty . . . . However, the same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another's

technological innovations may provide a convenient platform for re-arguing the merits of the present sense impression, the recent change in the quantity and format of human communications leaves the fundamental substantive issues raised by the exception unaltered.<sup>85</sup> So long as e-hearsay remains human communication, trial and appellate courts are well-equipped to deal with the hearsay challenges it brings using existing doctrine.

## 2. *Limits on the e-present sense impression*

Despite the novel format of e-hearsay assertions, the existing requirements of the present sense impression exception remain more than adequate to deal with the reliability concerns they present. Trial courts evaluating e-hearsay in the form of texts, tweets, or status updates under the current present sense impression exception must determine that the statements were made contemporaneously with the declarant's personal observation of the underlying events or conditions.<sup>86</sup> Because Federal Rule of Evidence 104(a) authorizes the trial judge to assess the preliminary requirements of hearsay exceptions unrestrained by the rules of evidence, a trial judge may use the purported e-present sense impression evidence itself to demonstrate the occurrence of the event, declarant's personal knowledge of it, and the timing of the statement.<sup>87</sup>

In theory, therefore, an e-hearsay statement could appear to satisfy the requirements for its own admission under Rule 803(1) on its face. To illustrate this concern about e-hearsay and the present sense impression, Professor Bellin creates a fun and fictional tweet:

[@]Lord Cobham 5 minutes ago  
Talking treason over beers with @SirWalter, don't tell the King!  
☺<sup>88</sup>

He asks "what proof is this? Indeed."<sup>89</sup> This clever hypothetical suggests that this tweet alone could satisfy the requirements of Rule 803(1) because it purports to relate an ongoing event personally

---

typewriter; distinct letterhead stationary [sic] can be copied or stolen.  
*Lorraine*, 241 F.R.D. at 543.

85. *See id.* at 538 n.5 (noting that Federal Rule of Evidence 102 "contemplates that the rules of evidence are flexible enough to accommodate future 'growth and development' to address technical changes not in existence as of the codification of the rules themselves").

86. FED. R. EVID. 803(1).

87. *See* FED. R. EVID. 104(a) (providing that a trial judge is "not bound by evidence rules, except those on privilege," in deciding preliminary questions of admissibility); *Bourjaily v. United States*, 483 U.S. 171, 178 (1987).

88. Bellin, *supra* note 6, at 336.

89. *Id.* (internal quotation marks omitted).

observed by Lord Cobham and that Sir Walter Raleigh could be convicted in the American trial system on the basis of such questionable e-hearsay.<sup>90</sup> Putting aside for a moment whether the tweet could satisfy the requirements of the present sense impression exception by itself, it is important to keep in mind that this tweet, even if it were admissible, would be inadequate to support an indictment for treason, let alone a conviction.<sup>91</sup> Rule 803(1) governs the *admissibility* and not the *sufficiency* of trial evidence.<sup>92</sup> Without additional evidence, such as damning texts and tweets from Sir Walter Raleigh's own accounts and observations of Sir Walter with known enemies of the State engaged in malfeasance, a treason conviction is nothing more than whimsical fiction.<sup>93</sup> Side-by-side with other damning bits of evidence, however, Lord Cobham's tweet could potentially be admitted to assist the jury in resolving the disputed question of Sir Walter Raleigh's loyalty. This important reality eliminates any genuine danger of criminal convictions premised solely on uncorroborated Twitter present sense impressions.

Exploring whether e-hearsay will support its own admissibility as a present sense impression, imagine the following more commonplace tweet:

@Passenger 2 minutes ago

Drinking beers with Driver in his ride on the way home-cheers!<sup>94</sup>

This tweet suggests an event: That Driver and Passenger are in a vehicle heading home. It also indicates that Passenger is in the car with Driver and has personal knowledge of Driver's conduct in the car. It then describes Driver's drinking conduct in a manner that suggests that the tweet and Passenger's perception of Driver are occurring simultaneously. Therefore, the tweet itself may purport to satisfy all the requisites for admission of a present sense impression.

---

90. *Id.* at 335.

91. 18 U.S.C. § 2381 (2006) ("Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason . . .").

92. See *Bourjaily*, 483 U.S. at 175 ("The [Rule 104(a)] inquiry . . . is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary rules have been satisfied."); *People v. Hendrickson*, 586 N.W.2d 906, 911 (Mich. 1998) (Boyle, J., concurring) ("The role of the Rule 104(a) determination is not to determine the defendant's guilt; rather, the purpose is merely to determine whether the preliminary fact has been established by a preponderance of the evidence.").

93. 18 U.S.C. § 2381 (2006).

94. Tweets describing such driving conduct appear commonplace in the world of social media. See Bellin, *supra* note 6, at 336 n.16 (describing the tweet of a celebrity describing an automobile collision involving Justin Bieber).

If this hypothetical tweet can satisfy the requirements for its own admission, Driver might legitimately complain about the reliability of the information used to implicate him.

As noted by the Advisory Committee notes to Rule 803, this concern is largely academic.<sup>95</sup> Rarely will a proponent of a present sense impression need to rely exclusively on the hearsay statement itself to prove the threshold requirements for its admissibility.<sup>96</sup> In the typical case in which subsequent events have transformed a mundane present sense impression into important evidence, there will almost always be ample information available to evaluate the threshold requirements of the exception, apart from the statement itself.<sup>97</sup> For example, in a wrongful death case arising out of Driver's collision with another vehicle, the plaintiff would undoubtedly wish to admit Passenger's tweet to prove Driver's intoxication at the time of the accident. Where plaintiff can identify Passenger as a person riding in Driver's car at the time of the collision, plaintiff can demonstrate Passenger's ability to perceive Driver's conduct. Even evidence that Driver and Passenger were seen together at some point close to the time of the collision would tend to support Passenger's personal observation of Driver's conduct. Geolocation features on Twitter and Facebook could potentially even assist in placing Passenger in the vicinity of the collision at the time of the tweet.<sup>98</sup> In addition, a comparison between the time of the tweet and the time of the collision could demonstrate that the tweet was posted while Driver was on his way home, thus suggesting contemporaneous speech and observation. Finally, evidence that Passenger used the Twitter handle @Passenger and that he had a wireless device capable of tweeting in the car or that he commonly carried one, could serve to authenticate the tweet as Passenger's.<sup>99</sup> Thus, there is likely to be some circumstantial evidence, apart from the present sense impression itself, suggesting the threshold requirements of contemporaneous personal observation by the declarant once

---

95. FED. R. EVID. 803 advisory committee's note.

96. *See id.* (providing that in most cases there is at least some circumstantial evidence).

97. *Id.*

98. *See* David Ionescu, *Facebook, Twitter Ready Location-Based Features*, PCWORLD (Mar. 10, 2010, 5:10 AM), [http://www.pcworld.com/article/191151/facebook\\_twitter\\_ready\\_locationbased-features.html](http://www.pcworld.com/article/191151/facebook_twitter_ready_locationbased-features.html) (noting how Facebook and Twitter are among the increasing number of social networks integrating geolocation capabilities).

99. FED. R. EVID. 901 (delineating the requirement for authentication of evidence that "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is").

litigation arises.

Although Rule 803(1) does not demand it, there often will be some extrinsic evidence that actually corroborates the content of declarant's present sense impression as well. In the wrongful death case, the subsequent collision, of course, provides some independent corroboration that something was amiss with one of the drivers involved. Further, there may even be additional evidence to corroborate Passenger's Twitter present-sense impression, such as beers found at the scene, Driver's inebriated demeanor, or Driver's blood alcohol level after the collision. Therefore, when a lawsuit has arisen out of events related to a present sense impression and that lawsuit is sufficiently meritorious to reach the trial stage, the absence of any independent evidence supporting the requirements for admission of a relevant present sense impression is highly unlikely.

This reality notwithstanding, the theoretical possibility of admitting tweets like Passenger's, that are wholly uncorroborated, remains if one looks solely to Rule 803(1) because the Rule does not demand independent evidence to satisfy its threshold requirements.<sup>100</sup> It is this theoretical possibility that gives critics of the present sense impression exception pause.<sup>101</sup> This concern, however, is merely old wine poured into the contemporary carafe of e-hearsay. Allowing hearsay statements to lift themselves by their own "bootstraps" to satisfy the requirements of a hearsay exception was long prohibited under the common law of evidence as it existed before the Federal Rules.<sup>102</sup> In *United States v. Bourjaily*, a case involving the coconspirator exception to the hearsay rule, the Supreme Court found that the Federal Rules of Evidence reversed the common law prohibition on "bootstrapping" through Rule 104(a), which authorizes a trial judge to decide preliminary questions of admissibility unrestrained by evidentiary rules.<sup>103</sup> Where a proffered hearsay statement itself is merely one item of information available for the trial judge to consider in evaluating the admissibility of hearsay, the Supreme Court held that Rule 104(a) expressly authorizes its use.<sup>104</sup> The Court declined to decide whether a trial court must also find independent evidence apart from the hearsay

---

100. FED. R. EVID. 803(1).

101. See Bellin, *supra* note 6, at 335 (describing the potential for abuse of the present sense impression exception).

102. *Bourjaily v. United States*, 483 U.S. 171, 177 (1987) (noting that the Courts of Appeal had widely held that "in determining the preliminary facts relevant to co-conspirators' out-of-court statements, a court may not look at the hearsay statements themselves for their evidentiary value").

103. *Id.* at 177-78.

104. *Id.* at 178-79.

statement to support its admissibility because ample independent evidence existed on the facts of *Bourjaily*.<sup>105</sup> Therefore, consistent with *Bourjaily* and Rule 104(a), trial judges may undoubtedly utilize a proffered text or tweet itself to satisfy the requirements of the present sense impression exception.<sup>106</sup>

Merely considering the content of the e-hearsay itself is not problematic from a reliability standpoint. Rather, it is the use of the proffered e-present sense impression evidence *alone* to prove its own admissibility that raises reliability concerns. While there is nothing within the text of Rule 803(1) that prohibits a trial judge from utilizing the present sense impression alone to satisfy its requirements, a more holistic evaluation of the Federal Rules framework suggests that trial judges will look for some independent evidence to satisfy the requirements of the present sense impression before admitting e-hearsay into evidence. Thus, even under the current requirements of Rule 803(1), trial judges do not admit present sense impressions like Passenger's tweet without some independent evidence suggesting Passenger's personal knowledge of underlying events and the timing of his tweet.

First, the burden of proof applicable to a trial judge's preliminary findings counsels against use of a proffered hearsay statement alone to establish the requirements for its own admissibility.<sup>107</sup> The Supreme Court has held that a trial judge must make Rule 104(a) preliminary findings by a preponderance of the evidence.<sup>108</sup> If a tweet like Passenger's were the only evidence available to suggest that Passenger had personal knowledge of Driver's conduct and was tweeting as he observed it, the tweet alone would appear to be inadequate to fulfill even a preponderance standard. Without witnesses or other information suggesting the occurrence of the described event, declarant's personal knowledge of it, and the timing of the statement, a trial judge would be unable to find it "more likely than not" that declarant described the event while perceiving it. Therefore, the standard of proof applicable to preliminary findings should prevent pure "bootstrapping" in the e-present sense impression context.

Second, the co-conspirator exception in the Federal Rules of Evidence was amended following the Supreme Court's decision in

---

105. *Id.* at 181.

106. *Id.* at 178.

107. *Id.* at 177.

108. *Id.* at 175–76.

*Bourjaily*.<sup>109</sup> This amendment requires at least some independent evidence apart from the proffered hearsay statement itself to satisfy the standards for admitting a co-conspirator hearsay statement.<sup>110</sup> It provides that a trial court “must” consider the hearsay statement, but cautions that the proffered hearsay statement “does not by itself establish” the requirements for admissibility.<sup>111</sup> Thus, this provision of the Rules rejects pure “bootstrapping” in the context of the co-conspirator exception.

This concern over “bootstrapping” is not unique to the co-conspirator exception and indeed arises whenever a hearsay exception requires the existence of a certain relationship, type of event, or other factual condition precedent to admissibility.<sup>112</sup> The present sense impression, with its timing and personal knowledge requirements, presents similar concerns over “bootstrapping” and independent evidence.<sup>113</sup> Allowing Passenger’s tweet alone to satisfy the requirements for its own admissibility as a present sense impression is simply an example of pure “bootstrapping” in the Rule 803 context.<sup>114</sup> By amending the co-conspirator exception in 1997, the drafters of the Federal Rules of Evidence clearly signaled that trial judges must look for some independent evidence to support the existence of a conspiracy between a declarant and a party before admitting that declarant’s hearsay statement against the party.<sup>115</sup>

This independent evidence requirement should apply equally to present sense impressions in light of the similar purpose served by threshold requirements enumerated under the co-conspirator exception and Rule 803.<sup>116</sup> Within the context of the co-conspirator

---

109. FED. R. EVID. 801(d)(2) advisory committee’s note.

110. FED. R. EVID. 801(d)(2).

111. *Id.* (extending the independent evidence requirement to declarant’s speaking authority or the declarant’s employment relationship for purposes of admissions by speaking agents and other employees as well).

112. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 844 (4th ed. 2009) (noting similar issues in context of excited utterance exception).

113. *Id.*

114. *Id.*; see also FED. R. EVID. 803 advisory committee’s note (“[O]n occasion the only evidence may be the content of the statement itself . . .”).

115. FED. R. EVID. 801(d)(2) advisory committee’s note (noting that “the contents of the declarant’s statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated”).

116. From the standpoint of statutory construction, one could argue that the drafters of the Federal Rules of Evidence intended no independent evidence requirement for exceptions like the present sense impression and the excited utterance where the Rules fail to include any such express requirement. See *People v. Hendrickson*, 586 N.W.2d 906, 911 (Mich. 1998) (Boyle, J., concurring) (“[I]n stark contrast to the explicit language contained in [Rule] 801(d)(2)(E) and 804(b)(3), the requirement of extrinsic corroboration is clearly and conspicuously absent from the language of the rule [803] itself or the requisite elements.”).

exception, it is deemed *unfair* to introduce the hearsay statements of a declarant against a party absent some independent proof of the requisite co-conspirator relationship between them.<sup>117</sup> Hence, independent evidence of the co-conspirator relationship is needed to trigger the justification for admitting the hearsay. In the context of the present sense impression, the hearsay statement is not deemed sufficiently *reliable* absent a showing that the declarant had personal knowledge of an event and spoke as she observed it.<sup>118</sup> Hence, like the co-conspirator relationship requirement within the co-conspirator exception, these threshold factual findings are also necessary to trigger the justification for admitting these hearsay statements. Where the purpose of the preliminary requirements is the same, both should require the same method of proof with some information independent of the hearsay statement.<sup>119</sup> Indeed, there appears to be no logical counterargument in favor of pure “bootstrapping.”<sup>120</sup> Therefore, a rational examination of the requirements for admitting hearsay evidence counsels against the admission of tweets like Passenger’s, without independent information supporting the threshold requirements for its admissibility.<sup>121</sup>

---

117. FED. R. EVID. 801(d)(2) advisory committee’s note (“Admissions by a party opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.”).

118. FED. R. EVID. 803 advisory committee’s note (“The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.”).

119. See *United States v. Arnold*, 486 F.3d 177, 207 (6th Cir. 2007) (Moore, J., dissenting) (noting that “first principles demand that the excited utterance itself cannot constitute the only evidence of a startling event”).

120. See *id.* at 209 (“Although some of these authorities claim that admitting such statements is the ‘generally prevailing rule,’ they neither cite recent authority nor provide explanations of *why* such circular reasoning is permissible.” (citation omitted)); *State v. Post*, 901 S.W.2d 231, 234 (Mo. Ct. App. 1995) (noting that none of the commentators, suggesting that a hearsay statement alone can prove its admissibility, “explain with any detail the reasoning for their position”).

121. The principal support for “bootstrapping” in the Rule 803 context appears to come from the original Advisory Committee’s note to Rule 803. See FED. R. EVID. 803 advisory committee’s note (explaining that a declarant’s personal knowledge “may appear from his statement or be inferable from the circumstances” and that cases allowing use of a hearsay statement alone to prove the startling event for purposes of the excited utterance exception are “increasing”). Many treatises parrot the Advisory Committee statement that bootstrapping is the prevailing view. Contemporary cases and treatises suggest a more thoughtful approach following *Bourjaily*. See 2 MCCORMICK ON EVIDENCE § 272, at 257 (Kenneth S. Broun ed., 6th ed. 2006) (“The issue [of whether a hearsay statement alone can prove a startling event] has not yet been resolved under the Federal Rules.”). Even the original Advisory Committee notes recognized judicial reluctance to allow the hearsay statement of an

Furthermore, the trial courts policing the application of the present sense impression in the era of e-hearsay are likely to follow this approach. Given the common law rejection of *any* use of a hearsay statement in deciding its own admissibility, trial judges are unlikely to adopt the opposite approach and routinely allow hearsay statements alone to prove the requirements for their own admissibility.<sup>122</sup> If anything, courts are likely to retain some of their pre-*Bourjaily* aversion to utilizing the hearsay statement at all.<sup>123</sup> Indeed, after the Supreme Court expressly declined to decide whether trial courts must find independent evidence in *Bourjaily*, every federal court of appeals confronting the issue required “some evidence in addition to the contents of the statement.”<sup>124</sup>

Cases reviewing admissibility of hearsay through the Rule 803 exceptions illustrate this insistence upon independent evidence. First, the vast majority of cases examining the present sense impression and excited utterance exceptions, where the concern over independent evidence is especially salient, do not consider the question of “bootstrapping” and the need for independent evidence at all. The reason for this, as discussed above in connection with Passenger’s hypothetical tweet, is that there is typically ample independent information to support the threshold requirements of these hearsay exceptions and courts need not expressly consider whether information independent of the hearsay statement is required to support its admissibility. Where independent evidence is available, the question of “bootstrapping” is moot because the hearsay exception is satisfied regardless of the approach adopted. Thus, the issue of bootstrapping remains “largely academic” in the vast majority of cases.<sup>125</sup>

---

“unidentified bystander” alone to prove declarant’s perception of underlying events for purposes of the present sense impression. FED. R. EVID. 803 advisory committee’s note.

122. See *Bourjaily v. United States*, 483 U.S. 171, 177 (1987) (noting the common law rejection of “bootstrapping” approach to the admission of hearsay).

123. See *People v. Barrett*, 747 N.W.2d 797, 803–04 (Mich. 2008) (adopting *Bourjaily*, over twenty years after the decision was rendered, and permitting use of the hearsay statement in evaluating its admissibility for the first time).

124. FED. R. EVID. 801(d)(2) advisory committee’s note.

125. FED. R. EVID. 803(1) and (2) advisory committee’s note (“Whether *proof of the startling event* may be made by the statement itself is largely an academic question, since in most cases, there is present at least circumstantial evidence that something of a startling nature must have occurred.”); see also *United States v. Woodfolk*, 656 A.2d 1145, 1150 (D.C. 1995) (“[O]nly in the unusual case will there be a complete lack of evidence, direct or circumstantial, to indicate whether an event has occurred that could account for the excitedness of the utterance.”); 2 MCCORMICK ON EVIDENCE, *supra* note 121, § 272, at 217–18 (“Fortunately, only a very few cases need actually confront this knotty theoretical problem if the courts view the independent evidence concept broadly, as they should where the circumstances and content of

Moreover, the federal and state decisions that have specifically addressed the issue of “bootstrapping” confirm judicial insistence on some independent evidence in the context of Rule 803 exceptions. While most of the decisions squarely addressing this issue involve the excited utterance exception and the need for independent information to prove a “startling event,” the underlying analysis remains pertinent for the present sense impression.<sup>126</sup> The vast majority of courts require at least some evidence independent of the hearsay statement under consideration itself, to support a finding of admissibility under the Rule 803 exceptions and their state counterparts.<sup>127</sup> While the decisions vary with respect to the amount of independent evidence required, they agree that a Rule 803 hearsay statement alone should not establish its own admissibility.<sup>128</sup>

---

the statement indicate trustworthiness.”).

126. See *People v. Hendrickson*, 586 N.W.2d 906, 909 (Mich. 1998) (“Given the analytical similarity between the present sense impression and excited utterance exceptions, we conclude that their independent evidence requirements are similarly analogous.”).

127. See *United States v. Arnold*, 486 F.3d 177, 209 (6th Cir. 2007) (Moore, J., dissenting) (“Reaching the same conclusion that I have, various courts have held that a hearsay statement itself cannot serve as the sole evidence of the alleged startling event that spurred the statement.”); *United States v. McCullough*, 150 F. App’x 507, 509–10 (6th Cir. 2005) (noting that “an excited utterance can not establish its own underlying event”); *United States v. Mitchell*, 145 F.3d 572, 577 (3d Cir. 1998) (deciding that an anonymous note failed to satisfy personal knowledge requirement for admission as a present sense impression or excited utterance “given the total lack of information regarding the circumstances of the note’s creation”); *Miller v. Keating*, 754 F.2d 507, 511–12 (3d Cir. 1985) (finding the record “empty” of any circumstances from which the trial court could have inferred by a preponderance that the declarant saw the defendant cut in); *Woodfolk*, 656 A.2d at 1150 (“We may assume . . . that the mere making of the statement itself cannot alone serve as sufficient evidence of the occurrence of a startling event.”); *People v. Leonard*, 400 N.E.2d 568, 572–73 (Ill. App. Ct. 1980) (finding a hearsay statement was erroneously admitted as excited utterance without any independent evidence besides statement itself to establish startling event); *Hendrickson*, 586 N.W.2d at 910 (requiring extrinsic corroboration of the present sense impression); *State v. Kemp*, 919 S.W.2d 278, 281 (Mo. Ct. App. 1996) (noting that there must be at least some evidence of the basic event, independent of the declaration that accompanies it, in order for hearsay to be admitted as an excited utterance); *State v. Post*, 901 S.W.2d 231, 234–35 (Mo. Ct. App. 1995) (finding that when determining whether to admit hearsay statement under the excited utterance exception to the hearsay rule, the sound approach is to require some independent proof that the event giving rise to the utterance could have occurred); *People v. Brown*, 610 N.E.2d 369, 374 (N.Y. 1993) (“[B]efore present sense impression testimony is received there must be some evidence in addition to the statements themselves to assure the court that the statements . . . were made spontaneously and contemporaneously with the events described.”); *Commonwealth v. Barnes*, 456 A.2d 1037, 1040 (Pa. Super. Ct. 1983) (noting that an excited utterance cannot be admitted where there is no independent evidence that a startling event has occurred); *State v. Young*, 161 P.3d 967, 973–74 (Wash. 2007) (en banc) (finding that declarant’s statement alone is insufficient to corroborate the occurrence of the startling event, but that circumstantial evidence, independent of the bare words can corroborate that a startling event occurred).

128. See *McCullough*, 150 F. App’x. at 509–10 (noting that “an excited utterance

Therefore, the courts specifically examining this issue reject pure “bootstrapping” under Rule 803.<sup>129</sup> Consistent with this judicial trend, courts can be expected to seek some independent evidence beyond a proffered text or tweet to establish declarant’s personal observation of the events described and his contemporaneous assertion in applying the present sense impression to e-hearsay.<sup>130</sup>

Therefore, although reference to the language of Rule 803(1) alone might suggest that a tweet could prove its own admissibility through the present sense impression exception, a more holistic view of the Federal Rules of Evidence framework, applying contemporary precedent and evidentiary policies, reveals the need for *some* information apart from the e-hearsay itself to support admissibility. That said, the rules do not demand a specific form or type of information to fulfill this role. Purely circumstantial evidence suggesting declarant’s perception and the timing of the hearsay may serve this purpose. Nor do the rules require extrinsic evidence corroborating the content of the hearsay statement.<sup>131</sup> So long as there is sufficient information supporting declarant’s ability to perceive and his contemporaneous speech, independent verification

---

cannot establish its own underlying event”). *Compare Young*, 161 P.3d at 973–74 (allowing circumstantial evidence to suggest “startling event” for purposes of excited utterance exception), *with Hendrickson*, 586 N.W.2d at 910 (requiring proof completely independent of present sense impression to prove observed event).

129. Some courts that recognize the “bootstrapping” concerns inherent in the application of Rule 803 exceptions sidestep a holding regarding an independent evidence requirement by finding ample independent evidence to satisfy Rule 104(a)’s preponderance standard in the particular case. *See Arnold*, 486 F.3d at 185 (confronting the issue of whether the “uncorroborated content of an excited utterance should . . . be permitted by itself to establish the startling nature of the event” and finding that the issue “need not detain” it where “considerable non-hearsay evidence corroborated the anxiety-inducing nature of this event”).

130. A few courts have purported to allow use of the hearsay statement alone to prove the requirements for Rule 803 exceptions. *United States v. Brown*, 254 F.3d 454, 459 (3d Cir. 2001) (stating that “the declaration itself may establish that a startling event occurred” (citing *United States v. Moore*, 791 F.2d 566, 570–71 (7th Cir. 1986))). Notably, *Brown* and *Moore* offer no rationale for allowing a hearsay statement alone to support its own admissibility. *Id.* Further, when these cases are examined closely, they reveal independent information beyond the hearsay statement itself to support the requirements for the applicable Rule 803 exception. *See id.* at 461 (addressing defendant’s argument that the government carried a “heavier burden” with respect to hearsay statements of anonymous bystanders and emphasizing the testimony of the arresting officer that he “almost immediately came upon Brown, who was visibly carrying a gun” and that he personally observed declarants “yelling,” “very excited,” “very nervous,” and “hopping around”); *see also Arnold*, 486 F.3d at 209 n.6 (Moore, J., dissenting) (noting that the cases cited in support of “bootstrapping” often involve independent evidence).

131. *See United States v. Ruiz*, 249 F.3d 643, 646–47 (7th Cir. 2001) (noting that the federal rule does not require corroboration); Imwinkelried, *supra* note 10, at 351–52 (opining that an independent corroboration requirement is “virtually impossible to rationalize as a matter of statutory construction” and that courts adding such a requirement are engaged in “unwarranted judicial legislation”).

of declarant's version of events is unnecessary.<sup>132</sup> The Rules certainly do not demand a percipient witness to corroborate the threshold event, declarant's observation of it, and the substance of declarant's hearsay statement.<sup>133</sup>

The proliferation of e-hearsay does not justify abandoning this methodology for evaluating the admissibility of the present sense impression. Indeed, it would be inconsistent with the clear policy underlying Rule 104(a) to add a rigid percipient witness requirement.<sup>134</sup> The Federal Rules are designed to allow the trial judge flexibility and discretion in the type and quantum of information needed to satisfy preliminary admissibility requirements. Utilizing the existing standards within the Federal Rules of Evidence framework, trial judges will have ample ammunition to prevent questionable tweets, texts, and status updates from flowing freely into the trial process. Tweets, like Passenger's in the foregoing example, will not be admitted as proof of disputed issues like Driver's consumption of alcohol on the road, absent at least some circumstantial evidence apart from the e-hearsay to suggest Passenger's personal knowledge and contemporaneous tweeting.

Finally, unlike oral present sense impressions repeated by live witnesses, e-hearsay will have to be authenticated pursuant to Article 9 of the Federal Rules before being admitted into evidence.<sup>135</sup> Litigants will be required to offer sufficient "foundation from which the jury could reasonably find that the evidence is what the proponent says it is."<sup>136</sup> Before a text message, tweet, or status update may be admitted, therefore, courts will have to find sufficient evidence from which the jury can ascertain that the e-hearsay actually originated from the purported declarant.<sup>137</sup> Indeed, "courts have

---

132. Imwinkelried, *supra* note 10, at 351 (noting that "[t]he text of the rule does not even hint at a general requirement for corroboration").

133. FED. R. EVID. 803(1).

134. See *People v. Hendrickson*, 586 N.W.2d 906, 914 n.19 (Mich. 1998) (Boyle, J., concurring) ("The effort by my colleague to impose by judicial fiat an extrinsic evidence requirement on hearsay exceptions in direct contravention of the clear and unambiguous language of [Rule] 104(a) is based primarily on distrust of the factfinder and the trial court judge, rather than any deficit in the rule itself.").

135. FED. R. EVID. 901; see also *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 541 (D. Md. 2007) ("In order for [electronically stored information] to be admissible, it also must be shown to be authentic.").

136. *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

137. See *United States v. Meienberg*, 263 F.3d 1177, 1181 (10th Cir. 2001) (analyzing admissibility of printouts of computerized records); *United States v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir. 2000) (authenticating e-mail with circumstantial evidence); *United States v. Tank*, 200 F.3d 627, 630-31 (9th Cir. 2000) (analyzing admissibility of exhibits reflecting chat room conversations); *United States v. Simpson*, 152 F.3d 1241, 1249-50 (10th Cir. 1998) (evaluating methods for authenticating a printout of a chat room discussion).

recognized that authentication of [electronically stored information (“ESI”)] may require greater scrutiny than that required for the authentication of ‘hard-copy’ documents.”<sup>138</sup> Trial judges may require witnesses to establish the declarant’s past practices with respect to e-hearsay, the location of the equipment used to post or send the electronic message, the declarant’s access to the equipment at the relevant time, and the access of anyone else at the relevant time, among other factors.<sup>139</sup> Unless a reasonable jury could determine by a preponderance of the evidence that the e-present sense impression came from the declarant, it will not be admitted.<sup>140</sup> Failure to produce witnesses or other information capable of adequately authenticating e-hearsay will also serve as an impediment to the free flow of e-present sense impressions into the trial process.<sup>141</sup> Therefore, existing evidentiary requirements applicable to the present sense impression can be expected to control the admission of unreliable e-hearsay.

### 3. *A cautious judicial approach to present sense impressions*

Not only are the existing requirements of the present sense impression exception adequate to exclude unreliable e-hearsay, trial and appellate judges can be expected to apply those requirements

---

138. *Lorraine*, 241 F.3d at 542–43.

139. *See, e.g.*, *State v. Damper*, 225 P.3d 1148, 1153 (Ariz. Ct. App. 2010) (noting that testimony of victim’s friend established that text message came from victim’s cell phone, that cell phone was found with body, that there was no evidence that anyone other than the victim had access to that phone at the relevant time according to defendant’s version of events); *Dickens v. State*, 927 A.2d 32, 37 (Md. Ct. Spec. App. 2007) (stating that evidence showing that a text message was sent from a phone in defendant’s possession and contained facts known only by defendant served to authenticate text).

140. FED. R. EVID. 104(b) (“When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.”). Authentication is an issue of conditional relevance to which 104(b) applies. The Supreme Court has held that a preponderance of the evidence standard applies to 104(b) findings. *Huddleston v. United States*, 485 U.S. 681, 690 (1988).

141. *See, e.g.*, *United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000) (explaining how proponent failed to authenticate exhibits taken from an organization’s website); *In re Vee Vinhnee*, 336 B.R. 437, 444–47 (B.A.P. 9th Cir. 2005) (detailing the various criteria for properly authenticating exhibits of electronically stored business records and holding that the proponent failed to meet these requirements through either witness testimony or other corroborating evidence); *St. Luke’s Cataract & Laser Inst., P.A. v. Sanderson*, NO. 8:06-CV-223-T-MSS, 2006 WL 1320242, at \*2 (M.D. Fla. May 12, 2006) (excluding exhibits showing content of web pages where affidavits used to authenticate exhibits were factually inaccurate and affiants lacked personal knowledge); *Rambus v. Infineon Techs. AG*, 348 F. Supp. 2d 698, 707 (E.D. Va. 2004) (showing that proponent inadequately authenticated computerized business records); *Griffin v. State*, 19 A.3d 415, 423–24, 428 (Md. 2011) (holding state’s failure to properly authenticate pages allegedly printed from victim’s profile on a social media website was reversible error).

cautiously and narrowly to e-hearsay if history is any guide. Despite gaining recognition in the Federal Rules, the present sense impression traditionally has encountered obstacles in the courtroom.<sup>142</sup> Courts have applied the existing requirements of the exception sparingly and strictly, and many have resisted application of the present sense impression by erecting additional common law barriers to admission outside the rules framework.<sup>143</sup> Indeed, commentators have noted that the present sense impression “has not proved useful as anticipated” due to judicial circumspection in its application.<sup>144</sup> Where history suggests that trial and appellate courts already carefully scrutinize present sense impressions before allowing them into evidence, there appears to be no urgent need for revision of Rule 803(1).

As any evidence student worth her salt will tell you, *timing* is the key to the present sense impression.<sup>145</sup> Because concerns over declarant memory and deceit regarding an event are significantly minimized only when declarant speaks as she observes, courts have carefully policed the timing requirement of the exception.<sup>146</sup> Consistent with the policy behind the exception, many courts require contemporaneous or nearly contemporaneous speech in order to admit hearsay through Rule 803(1).<sup>147</sup> Even courts that allow a “slight lapse” of time between the event and the assertion have rejected statements made more than a few minutes afterward.<sup>148</sup>

---

142. See Imwinkelried, *supra* note 10, at 325 (describing “courts’ conservatism in applying the present sense impression exception”).

143. See *id.* at 333–42 (identifying six different “judicial gloss[es]” placed upon the present sense impression by courts).

144. 4 MUELLER & KIRKPATRICK, *supra* note 19, § 8:67, at 561; see also Imwinkelried, *supra*, note 10, at 343 (noting that “[t]he courts have severely cramped Rule 803(1) by adding one restriction after another to the statute’s scope”).

145. See 4 MUELLER & KIRKPATRICK, *supra* note 19, § 8:67, at 559 (“The idea of immediacy lies at the heart of the exception.”).

146. See, e.g., *United States v. Cain*, 587 F.2d 678 (5th Cir. 1979) (refusing to admit evidence as a present sense impression in the absence of evidence showing that the declaration was made immediately after the event occurred).

147. See *United States v. Davis*, 577 F.3d 660, 668 (6th Cir. 2009) (admitting 911 call made “within thirty seconds to a minute after seeing Defendant”); *United States v. Shoup*, 476 F.3d 38, 42 (1st Cir. 2007) (admitting phone call made “only one or two minutes” after event); *United States v. Danford*, 435 F.3d 682, 687 (7th Cir. 2005) (allowing statement made less than sixty seconds after witnessing event); *United States v. Parker*, 936 F.2d 950, 954 (7th Cir. 1991) (statements made after walking approximately “100 feet” qualified as present sense impressions); *United States v. Santos*, 65 F. Supp. 802, 825 (N.D. Ill. 1999) (notes made within five to ten minutes of conversation qualified as present sense impression); see also DAVID F. BINDER, *HEARSAY HANDBOOK* § 8.3, at 257 (4th ed. 2011) (noting Colorado and Kansas rules requiring precise contemporaneity for admission of present sense impressions).

148. See *United States v. Green*, 556 F.3d 151, 156 (3d Cir. 2009) (rejecting statement made by confidential informant more than fifty minutes after drug

Further, in cases where the timing between the observation and speech has been extremely close, many courts have rejected application of the present sense impression where there appeared to be adequate time for the declarant to deliberate and make a conscious statement rather than a purely reflexive statement describing the event.<sup>149</sup>

Although e-present sense impressions reflect human communication in a modern format, we can expect trial and appellate courts to monitor their timing with the same care. Courts are certain to reject any tweet, text, or status update ostensibly describing past events.<sup>150</sup> Indeed, much of the information that is posted on a Facebook wall or included in a text message may relate to the declarant's past activities, rather than current observations and activities. These will clearly fail to survive judicial scrutiny of the all-important timing requirement. To the extent that e-hearsay statements, like tweets, do purport to describe ongoing events, courts can be expected to apply the same rigorous analysis that they have historically used in this context. Indeed, the electronic format of these hearsay statements that records the time of their transmission may assist judicial analysis of timing.<sup>151</sup> Once a trial judge finds information to locate the underlying event in time, the court will be able to measure the nexus between that event and the transmission of

---

transaction under present sense impression exception because "courts consistently require substantial contemporaneity"); *United States v. Manfre*, 368 F.3d 832, 840 (8th Cir. 2004) (finding that a statement made after "an intervening walk or drive" inadmissible); *United States v. Cruz*, 765 F.2d 1020, 1024 (11th Cir. 1985) (rejecting statements of undercover agent several days after the event took place as insufficiently contemporaneous); *United States v. Hamilton*, 948 F. Supp. 635, 639 (W.D. Ky. 1996) (rejecting photographic identification hearsay that came immediately after observation because photographic identification involves more than a present sense); *Warren v. State*, 774 A.2d 246, 253 (Del. 2001) (per curiam) (finding that statements made in 911 call about confrontation one hour earlier were too far removed from event to qualify as present sense impressions); *State v. Moore*, 921 P.2d 122, 138 (Haw. 1996) (rejecting application of present sense impression exception to statements made some time after shooting when declarant flagged down police).

149. See *Imwinkelried*, *supra* note 10, at 336 (describing jurisdictions that allow a time lapse "so long as it is short enough to exclude, negate, or negative the likelihood that the statement is the result of deliberation and reflection").

150. See *Thayer*, *supra* note 30, at 72 (requiring that a statement, to be distinguished from hearsay, must be "concomitant with the principle act" and so connected "as to be regarded as the mere result and consequence of the coexisting motives" (citation omitted)).

151. Although it is not impossible for a declarant to game the timing system with e-hearsay, metadata should be available to help determine the actual timing of any assertion in the event of a dispute about timing. See *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 548 (D. Md. 2007) (noting that metadata is a "useful tool for authenticating electronic records by use of distinctive characteristics").

the e-hearsay.<sup>152</sup> Finally, courts that have rejected near-contemporaneous present sense impressions that appear conscious and deliberate, as opposed to reflexive and spontaneous, may view any e-hearsay with suspicion.<sup>153</sup> Although the social media generation is admittedly quick on the draw when it comes to texting or tweeting, courts might find the act of composing a written message to an audience too deliberate to come within the spirit of the present sense impression exception.<sup>154</sup> Indeed, one noted evidence scholar has suggested that trial judges should perform a “thought experiment” in considering present sense impression evidence and exclude statements “when the declarant would have had to deliberately process the information before uttering the proffered statement.”<sup>155</sup> The speed at which many can pull the trigger on a text notwithstanding, the process of composing a message suggests a degree of deliberation likely to fail such a thought experiment.

Although not dictated by the requirements of Rule 803(1), some courts have rejected use of the present sense impression exception in cases where there is an indication that the declarant had some potential motive to shade or misrepresent the events at issue.<sup>156</sup> Courts engaging in this motivational analysis will likely continue in the context of e-hearsay.<sup>157</sup> In cases involving a typical text message originating with one declarant and sent to a single recipient, courts are likely to analyze the motivational component with traditional concerns in mind.<sup>158</sup> Courts can be expected to evaluate the

---

152. *State v. Damper*, 225 P.3d 1148, 1150 (Ariz. Ct. App. 2010) (noting that text message was sent three minutes before defendant claimed he fled victim’s house after argument).

153. *See Hallums v. United States*, 841 A.2d 1270, 1277 (D.C. 2004) (stating that the present sense impression exception should not be used to admit statements that were not truly spontaneous and that involve conscious reflection or recall from memory).

154. *See Imwinkelried*, *supra* note 10, at 345 (“When the thought process is complex, involving an intermediate step between the receipt of the present sense impression and the utterance, the utterance falls outside the ambit of Rule 803(1).”). *But see Damper*, 225 P.3d at 1152 n.3 (taking judicial notice of the speed with which a text message can be composed).

155. *Imwinkelried*, *supra* note 10, at 346.

156. *See id.* at 338–39 (describing federal and state applications of the present sense impression exception requiring “reliability” and rejecting present sense impressions otherwise consistent with the exception where declarant had a motive to falsify).

157. *See Boyd v. City of Oakland*, 458 F. Supp. 2d 1015, 1035–36 (N.D. Cal. 2006) (noting that “[m]otive or incentive to lie is an indicium of reliability,” and finding that “contemplation of litigation” and “anger” constituted motives to lie weighing against a finding of reliability); *Fischer v. State*, 252 S.W.3d 375, 385 (Tex. Crim. App. 2008) (excluding a statement based on declarant’s motive to falsify).

158. *See Boyd*, 458 F. Supp. at 1036 (refusing to admit evidence of a conversation between two people due to the declarant’s motives to falsify).

relationship between the declarant and the recipient and the purpose of the message.<sup>159</sup> Motivational issues in the case of e-present sense impressions to a mass audience may be more problematic. In keeping with concerns about the deliberate nature of posting a tweet or a status update, courts may be skeptical of the motivations of a declarant who is communicating with a large audience electronically. Such motivational concerns, although not prescribed by Rule 803(1), may continue to limit admissibility of e-hearsay through the present sense impression in these jurisdictions.

Courts historically have been extremely skeptical of “anonymous” present sense impressions.<sup>160</sup> In attempting to establish the hearsay declarant’s personal knowledge, as required by Rule 803(1), courts necessarily inquire into the identity and location of the declarant at the time of the assertion.<sup>161</sup> When hearsay statements are made by unidentified or anonymous bystanders, assessing personal knowledge and timing becomes more difficult and courts have been reluctant to allow such anonymous assertions under the present sense impression exception.<sup>162</sup> With the use of Twitter handles or Facebook identities unrelated to the real names of electronic declarants, courts are likely to reject assertions by unknown declarants for failure of the personal knowledge requirement. To the extent that a declarant can be identified through his Twitter handle, however, the problem of personal knowledge could be made easier through use of geolocation

---

159. See *Fischer*, 252 S.W.3d at 385 (rejecting trooper’s recorded present sense impression about a suspect’s performance on field sobriety tests due to officer’s motive to falsify the test results to advance the competitive enterprise of ferreting out crime).

160. See *United States v. Brown*, 254 F.3d 454, 461 (3d Cir. 2001) (noting that declarant seeking to admit a statement by an unidentified declarant carries a “heavier burden”); see also FED. R. EVID. 803(1) and (2) advisory committee’s note (stating that courts are generally hesitant to admit statements by anonymous or unknown declarants).

161. See *Brown v. Keane*, 355 F.3d 82, 89 (2d Cir. 2004) (“The present sense impression exception applies only to reports of what the declarant has actually observed through the senses, not to what the declarant merely conjectures.”); see also 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 803.03[2] (Joseph M. McLaughlin ed., 2d ed. 2011) (“The proponent of evidence under Rule 803(1) must show that the declarant personally perceived the event or condition about which the statement was made.”).

162. See *United States v. Mitchell*, 145 F.3d 572, 577 (3d Cir. 1998) (detailing how an anonymous note failed to satisfy personal knowledge requirement); *Miller v. Keating*, 754 F.2d 507, 511 (3d Cir. 1985) (finding inadequate evidence of declarant’s personal knowledge). *But see* *Miller v. Crown Amusements, Inc.*, 821 F. Supp. 703, 706 (S.D. Ga. 1993) (finding by a preponderance of the evidence that unidentified caller observed the accident based upon corroborating circumstances); *People v. Brown*, 610 N.E.2d 369, 374 (N.Y. 1993) (allowing present sense impression by 911 caller “Henry” where officer found circumstances at the scene that matched his description).

technology that locates a Twitter user at the time of a tweet.<sup>163</sup> Accordingly, under existing judicial interpretation of Rule 803(1), anonymous or unidentified e-hearsay is unlikely to flow freely into our trial process.

Still other courts already add an extrinsic corroboration requirement to the existing requirements of Rule 803(1), demanding verification of the content of a present sense impression before admitting it into evidence.<sup>164</sup> Some courts simply require “independent” evidence apart from the hearsay statement to support the content of the present sense impression, while others demand a specific type of corroboration by another percipient witness to the events.<sup>165</sup> Jurisdictions taking such a strict view of traditional present sense impressions under existing Rule 803(1) are unlikely to accept uncorroborated e-hearsay into evidence without requiring some additional support. A text message or tweet providing the *only* evidence of a disputed event without any independent showing of declarant’s personal knowledge and contemporaneous assertion will certainly be rejected by trial and appellate judges that read an independent corroboration requirement into the Rule.

In sum, unreliable e-hearsay is unlikely to take over the trial process. In light of the courts’ historical ability to adapt hearsay rules to constantly evolving human communication platforms, we may have confidence that judges will respond with appropriate care to the next generation of present sense impression evidence online. As outlined above, existing protections in the Federal Rules framework will guard against indiscriminate admission of e-present sense impressions. Further, the historic judicial resistance to the present sense impression portends little judicial tolerance for uncorroborated and unreliable e-present sense impressions. Thus, there is no urgent need to amend Rule 803(1) to close the door on casual social media

---

163. See *About the Tweet Location Feature*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/111-features/articles/78525-aboutthetweetlocationfeature> (last visited June 14, 2012) (describing “[t]weeting with . . . location,” which allows Twitter users to add location information to their tweets).

164. See, e.g., *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 303 (3d Cir. 1983) (noting that the exception is generally understood to require some corroborating testimony), *rev’d sub. nom. on other grounds by Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *People v. Vasquez*, 670 N.E.2d 1328, 1334 (N.Y. 1996) (requiring “some independent verification of the declarant’s descriptions of the unfolding events”); see also Imwinkelried, *supra* note 6, at 351–54 (noting judicial additions of independent corroboration and equally percipient witness requirements to present sense impression).

165. Compare *People v. Hendrickson*, 586 N.W.2d 906, 909–10 (Mich. 1998) (requiring extrinsic corroboration of the present sense impression), with *State v. Case*, 676 P.2d 241, 245 (N.M. 1984) (requiring an equally percipient witness).

chatter.

## II. THE *CRAWFORD* REVOLUTION AND THE PRESENT SENSE IMPRESSION

Professor Bellin also posits that the recent revolution in Confrontation Clause jurisprudence creates an urgent need for amendment of the present sense impression exception.<sup>166</sup> In 2004, the Supreme Court turned Sixth Amendment analysis of hearsay upside down with its decision in *Crawford v. Washington*.<sup>167</sup> In *Crawford*, the Court discarded the long-standing “adequate indicia of reliability” test for admitting hearsay against a criminal defendant, outlined 24 years earlier in *Ohio v. Roberts*.<sup>168</sup> Writing for the majority, Justice Scalia announced a new paradigm for Confrontation Clause analysis of hearsay statements.<sup>169</sup> Under *Crawford*, Confrontation Clause protections apply only to “testimonial” hearsay statements.<sup>170</sup> Although the Court continues to struggle with the contours of the “testimonial” category, *Crawford* described “testimonial” statements as those hearsay “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>171</sup> Statements made to assist law enforcement agents in the investigation of a past crime are within the core of the testimonial category, although the Court has held that statements made to assist law enforcement officers responding to an “ongoing emergency” are not testimonial.<sup>172</sup>

In support of the new standard, Justice Scalia explained that the Sixth Amendment guarantees one procedure to test the accuracy of testimonial statements offered against an accused. According to *Crawford*, the Confrontation Clause promises a defendant the

---

166. See Bellin, *supra* note 6, at 357–61 (noting the “vanishing” constitutional limits on admission of the present sense impression).

167. 541 U.S. 36 (2004).

168. *Crawford*, 541 U.S. at 68–69, *abrogating* *Ohio v. Roberts*, 448 U.S. 56 (1980).

169. See *id.* (“[T]he Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”).

170. See *id.* (articulating Sixth Amendment demands for “testimonial” evidence); see also *Davis v. Washington*, 547 U.S. 810, 824 (2006) (holding that Sixth Amendment protections extend only to “testimonial” hearsay statements).

171. *Crawford*, 541 U.S. at 52 (citation omitted). The Court acknowledged concerns regarding its failure to “articulate a comprehensive definition” of the testimonial category, but stated that the term covers preliminary hearing testimony, grand jury testimony, trial testimony, and police interrogations, at a minimum. *Id.* at 68 & n.10.

172. See *Davis*, 547 U.S. at 828–29 (holding that statements made to meet “an ongoing emergency” are not testimonial but that statements in response to “structured police questioning” are testimonial (quoting *Crawford*, 541 U.S. at 53 n.4)).

opportunity to cross-examine those who give testimony against him and no substitute for that process of cross-examination is constitutionally acceptable.<sup>173</sup> *Crawford*, therefore, articulates the ultimate preference for live testimony, allowing “testimonial” hearsay to be admitted against a criminal defendant only if the declarant is “unavailable” for trial and the defendant had a previous opportunity to cross-examine.<sup>174</sup> If the declarant is available and testifies at trial and is subject to cross-examination, his “testimonial” hearsay statements are also constitutionally permissible.<sup>175</sup> The insistence upon cross-examination of all “testimonial” hearsay under *Crawford* has had the effect of excluding un-cross-examined hearsay statements by absent declarants in criminal cases that were previously admissible under the Supreme Court’s *Ohio v. Roberts* Confrontation Clause analysis.<sup>176</sup>

In developing the contours of the Sixth Amendment mandate following *Crawford*, the Supreme Court has made clear that there is no constitutional barrier to the admission of hearsay statements that are “nontestimonial” in nature.<sup>177</sup> Employing an originalist interpretation, Justice Scalia found that the framers of the Constitution designed the Confrontation Clause with an eye toward preventing admission of out-of-court witness statements and testimony as a substitute for live, confronted trial testimony.<sup>178</sup> Hearsay statements outside this “testimonial” category, therefore, were not the aim of the clause and are free from its control.<sup>179</sup> In the wake of the *Crawford* reformation, the Federal Rules of Evidence provide the only safeguard against admission of “nontestimonial” hearsay statements against a criminal defendant in the federal system.<sup>180</sup>

---

173. *Crawford*, 541 U.S. at 68–69 (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

174. *Id.* at 68.

175. *Id.* at 59 n.9.

176. *See id.* at 64–65 (identifying a series of federal cases in which the courts relied on *Roberts* to admit testimonial statements that had not been subject to cross-examination).

177. *See Davis*, 547 U.S. at 824 (explaining that statements not clearly involving testimony are not controlled by the Confrontation Clause).

178. *See Crawford*, 541 U.S. at 54 (arguing that the only exceptions to the Confrontation Clause that should be considered are the exceptions that were “established at the time of the founding”).

179. *See Davis*, 547 U.S. at 824 (noting that statements not considered “testimonial” fall outside the scope of the Confrontation Clause); *Crawford*, 541 U.S. at 51 (indicating that nontestimonial statements do not require the protection that the Confrontation Clause offers).

180. *Davis*, 547 U.S. at 824. Following *Davis*’s express removal of Sixth Amendment protection from nontestimonial hearsay, some state courts have

Within the *Crawford* framework, Professor Bellin suggests that most, if not all present sense impressions will, by definition, fall into the nontestimonial category because they describe ongoing events and cannot relate past occurrences in the way a witness giving testimony does.<sup>181</sup> For nontestimonial present sense impressions, evidentiary rules now offer the only protection against admissibility.<sup>182</sup> Professor Bellin argues that the Federal Rules of Evidence must respond by adding more stringent protections to prevent admission of nontestimonial present sense impressions against criminal defendants.<sup>183</sup> For several reasons, Rule 803(1) need not be amended to close constitutional gaps in protection. Further, adding a percipient witness requirement to the present sense impression would eliminate one of the few remaining sources of admissible hearsay in the domestic violence prosecutions that have already suffered significantly in *Crawford*'s wake.

A. *The Federal Rules of Evidence and the Sixth Amendment Part Ways*

To suggest that the Federal Rules of Evidence need to make up for perceived inadequacies in constitutional protection in the wake of *Crawford* is directly at odds with one of the principal policies underlying the *Crawford* Confrontation Clause revolution. Under the long-standing *Roberts* test for admission of hearsay against a criminal defendant, the Federal Rules of Evidence played a prominent role.<sup>184</sup> Under *Roberts*, the Sixth Amendment was interpreted to permit hearsay evidence against a criminal defendant when that hearsay demonstrated adequate "indicia of reliability."<sup>185</sup> The Court held that such constitutionally mandated reliability could be "inferred without more" in a case where the hearsay evidence fell within "a firmly rooted hearsay exception."<sup>186</sup> Over time, the Court designated

---

continued to apply the protection of the *Roberts* doctrine to nontestimonial statements pursuant to confrontation protections embodied in state constitutions. See, e.g., *State v. Camacho*, 924 A.2d 99, 116 (Conn. 2007) (applying *Roberts* to nontestimonial declaration against interest); *State v. Kaufman*, 711 S.E.2d 607, 621 (W. Va. 2011) ("[N]ontestimonial statements may be admissible in a criminal trial if it is shown that the witness was unavailable for trial, and that the witness's statement bore adequate indicia of reliability.").

181. See Bellin, *supra* note 6, at 358 ("[P]resent sense impressions will likely never be testimonial.").

182. *Davis*, 547 U.S. at 824.

183. See Bellin, *supra* note 6, at 358 (arguing that *Crawford* "actually makes present sense impressions easier for prosecutors to admit").

184. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (permitting inference of reliability where "evidence falls within a firmly rooted hearsay exception").

185. *Id.*

186. *Id.* The Court also held that the Confrontation Clause normally requires a showing of unavailability, *id.*, but suggested in a footnote that unavailability is not

many hearsay exceptions as “firmly rooted” for purposes of the Sixth Amendment analysis.<sup>187</sup> Even hearsay not admissible through firmly rooted exceptions could be admitted against a criminal defendant if it demonstrated “particularized guarantees of trustworthiness.”<sup>188</sup> In examining particularized guarantees of trustworthiness for purposes of the Sixth Amendment analysis, courts often drew upon requirements for admission of hearsay under evidentiary rules.<sup>189</sup> In the era in which *Roberts* reigned, therefore, the rules of evidence had the power to drive the constitutional analysis.<sup>190</sup> Under *Roberts*, therefore, the Federal Rules of Evidence bore a significant responsibility to protect constitutional safeguards, as well as other adversarial tenets.

Following *Crawford*, the Sixth Amendment analysis has been severed from any analysis of evidentiary rules. Indeed, Justice Scalia expressly rejected any connection between the Confrontation Clause and rules of evidence, giving the Sixth Amendment power and significance independent of trial rules.<sup>191</sup> Under this new confrontation paradigm, therefore, the Federal Rules of Evidence must serve concerns of a fair and rational trial process, but need not erect constitutionally important barriers to admissibility in criminal cases.<sup>192</sup> While the hearsay rules should not admit evidence the Constitution prohibits, they need not exclude evidence the Constitution permits, absent some compelling justification. Where *Crawford* has eliminated Sixth Amendment protection for nontestimonial statements, there is no *constitutional* need to create

---

always required, *id.* at 65 n.7.

187. *See id.* at 66 n.8 (approving hearsay admitted through former testimony exception, dying declarations exception and public and business records exceptions); *see also* *White v. Illinois*, 502 U.S. 346, 355 n.8 (1992) (noting wide acceptance and historical roots of excited utterances and hearsay statements made for purposes of medical treatment); *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (noting that the co-conspirator exception is firmly rooted).

188. *Roberts*, 448 U.S. at 66.

189. *See Idaho v. Wright*, 497 U.S. 805, 820 (1990) (holding that in evaluating particularized guarantees of trustworthiness, courts must consider “circumstances that surround the making of the statement and that render the declarant particularly worthy of belief”).

190. *See Roberts*, 448 U.S. at 66 (“[C]ertain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’”).

191. *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (“Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence . . .”).

192. Indeed, this state of affairs appears consistent with the original intentions of the Advisory Committee for the Federal Rules of Evidence. *See* FED. R. EVID. 803 advisory committee’s note (explaining that “a hearsay rule can function usefully as an adjunct to the confrontation right in constitutional areas and independently in non-constitutional areas”).

more stringent requirements.<sup>193</sup> In fact, the stand-alone *Crawford* approach to hearsay to some extent may relieve the rule-making process from constitutional concerns because the Federal Rules of Evidence no longer serve as the constitutional watchdog for hearsay statements offered against criminal defendants.<sup>194</sup> Because *Crawford* eliminates any connection between the rules and the Constitution, the *Crawford* revolution may make stringent requirements in evidentiary rules for the protection of Sixth Amendment concerns *less necessary* than they were in the *Roberts* era, rather than more so.

Furthermore, it appears that *Crawford's* non-protection of nontestimonial hearsay will result in little real change in the procedure for admitting present sense impressions against criminal defendants. During the *Roberts* era, the Supreme Court never decided whether the present sense impression exception to the hearsay rule was “firmly rooted” for purposes of Sixth Amendment analysis.<sup>195</sup> The majority of lower courts that addressed the issue, however, found the present sense impression “firmly rooted” as a result of its historic connection to the excited utterance and the *res gestae* category of hearsay exceptions.<sup>196</sup> Thus, in these jurisdictions, hearsay could automatically be offered against an accused if it fell within the present sense impression exception under the rules of evidence and no further constitutional inquiry was required.<sup>197</sup>

Under *Crawford*, testimonial present sense impressions will be

---

193. *Davis v. Washington*, 547 U.S. 813, 824 (2006) (noting that testimonial hearsay marks out not only the “core” of constitutional concerns, but its “perimeter” as well).

194. The hearsay rules were drafted to avoid tension with the mandate of the Confrontation Clause. See *United States v. Oates*, 560 F.2d 45, 66 (2d Cir. 1977) (recognizing the Advisory Committee’s awareness that the Confrontation Clause and the Federal Rules of Evidence function separately). Erecting higher barriers to admission than are required by the constitution is unnecessary to this purpose.

195. See *Gutierrez v. McGinnis*, 389 F.3d 300, 302–03 n.1 (2d Cir. 2004) (recognizing that the question of whether a present sense impression is firmly rooted “remains open”).

196. See *United States v. Walton*, 323 F. App’x 837, 842 (11th Cir. 2009) (per curiam) (finding present sense impression firmly-rooted because “*res gestae* is a historic concept that embodies declarations of present sense impressions”); *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006) (same); *United States v. Jones*, 299 F.3d 103, 113 (2d Cir. 2002) (same); *United States v. Vega*, 883 F.2d 1025 (9th Cir. 1989) (same); *United States v. Peacock*, 654 F.2d 339, 349–50 (5th Cir. 1981) (same), *vacated in part on other grounds*, 686 F.2d 356 (5th Cir. 1982) (per curiam); *Welch v. Sirmons*, No. 00-CV-0105-CVE-PJC, 2007 WL 927950, at \*10 (N.D. Okla. 2007) (same); *Wooten v. Cluff*, 69 Fed. R. Evid. Serv. (West) 863, 866 (D. Ariz. 2006) (same); *Reedus v. Stegall*, 197 F. Supp. 2d 767, 777 (E.D. Mich. 2001) (same); *People v. Hendrickson*, 586 N.W.2d 906, 910 (Mich. 1998) (same).

197. See 2 MCCORMICK ON EVIDENCE, *supra* note 121, § 252, at 161 (“[U]nder *Roberts*, hearsay falling within a traditional or ‘firmly rooted’ exception that does not require unavailability was automatically admitted under the Confrontation Clause.”).

excluded absent an opportunity for the accused to cross-examine the declarant, regardless of the applicability of the evidentiary rule.<sup>198</sup> Thus, *Crawford* increased protection of criminal defendants in the testimonial context. In the context of nontestimonial hearsay only, courts will be permitted to admit present sense impressions that satisfy evidentiary rules, just as they did under *Roberts* by classifying the present sense impression as “firmly rooted.”<sup>199</sup> In the majority of jurisdictions, therefore, the automatic admission of nontestimonial present sense impressions against an accused under *Crawford* represents no change in the level of protection afforded in the *Roberts* era.

Not all courts classified the present sense impression exception as “firmly rooted” under *Roberts*, however. Because of the common law rejection of the present sense impression, at least the Ninth Circuit declined to classify it as “firmly rooted” for purposes of *Ohio v. Roberts*.<sup>200</sup> Therefore, prior to *Crawford*, a trial judge in this jurisdiction would have conducted two distinct inquiries before admitting a present sense impression into evidence against an accused. First, the judge would determine that the hearsay statement met the requirements for admission under the evidentiary rules. Even if the statement qualified for admission under the rules, the judge would then have to determine that the statement in question displayed particularized guarantees of trustworthiness before allowing it into evidence.<sup>201</sup> With a nontestimonial present sense impression after *Crawford*, the hearsay statement may be allowed with no further inquiry if Rule 803(1) permits admission. To the extent that they

---

198. Some present sense impressions may fit into the testimonial category and will have to satisfy the *Crawford* cross-examination requirement prior to admission. See *United States v. Ruiz*, 249 F.3d 643, 647 (7th Cir. 2001) (admitting, as a present sense impression, statements made over a walkie-talkie by testifying police officer to another officer); *United States v. Campbell*, 782 F. Supp. 1258, 1262 (N.D. Ill. 1991) (finding that a police officer’s recorded statements to dispatcher during pursuit were present sense impressions). Even in the context of nontestimonial statements, courts have carefully reviewed trial courts’ admission of hearsay evidence against criminal defendants. See, e.g., *State v. Kaufman*, 711 S.E.2d 607, 624 (W. Va. 2011) (reversing defendant’s conviction due to admission of victim’s diary, notwithstanding its nontestimonial character).

199. *Reedus*, 197 F. Supp. 2d at 777.

200. See *United States v. Murillo*, 288 F.3d 1126, 1137 (9th Cir. 2002) (applying particularized guarantees of trustworthiness requirement in light of absence of case-law classifying the present sense impression as firmly rooted); *Guam v. Ignacio*, 10 F.3d 608, 614 (9th Cir. 1993) (declining to decide whether the present sense impression is firmly rooted and applying particularized guarantees of trustworthiness test); *Boyd v. City of Oakland*, 458 F. Supp. 2d 1015, 1033 (N.D. Cal. 2006) (suggesting that present sense impressions are not firmly rooted).

201. See, e.g., *Boyd*, 458 F. Supp. 2d at 1033 (requiring particularized guarantees of trustworthiness).

have lost the benefit of a separate analysis of trustworthiness, criminal defendants, in theory, enjoy less protection against admission of nontestimonial present sense impressions than they had prior to *Crawford*, at least in the Ninth Circuit.<sup>202</sup>

To argue that criminal defendants are entitled to greater protection against the admission of nontestimonial statements, however, is simply to chafe against *Crawford*'s testimonial/nontestimonial distinction and the lack of constitutional protection extended to nontestimonial hearsay in *Crawford*'s brave new world of confrontation. To be sure, there is a raging debate about the merits of *Crawford*, the validity and viability of the testimonial category, as well as the non-protection for statements outside that category.<sup>203</sup> Any concerns regarding criminal defendants' legitimate need for greater protection than that afforded by the prevailing interpretation of the Sixth Amendment ought to be addressed within the context of that larger debate.<sup>204</sup>

In the meantime, Rule 803(1) should not be amended to create obstacles to the admission of present sense impressions against criminal defendants unless it is shown that the existing requirements are inadequate to ensure a fair and rational trial process. To suggest that *Crawford* has made the present sense impression inadequately protective of criminal defendants is to suggest that the drafters of the Federal Rules of Evidence sanctioned an unreliable hearsay exception, counting on the Sixth Amendment to intervene to achieve a fair result in criminal cases. Such a suggestion is at odds with the design and operation of the Federal Rules of Evidence.<sup>205</sup> As detailed above, the current rule allows only a narrow category of hearsay statements made by a declarant while observing an event or condition

---

202. See *Crawford v. Washington*, 541 U.S. 36, 63 (2004) (noting absence of any meaningful protection for defendants under *Roberts*).

203. See, e.g., Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford's Birth Did Not Require that Roberts Had to Die*, 15 J.L. & POL'Y 685, 693 (2007) (explaining that *Crawford*'s procedural requirements are overly strict); Orenstein, *supra* note 16, at 162 (arguing that *Crawford*'s focus on testimonial statements only left defendants vulnerable to several other kinds of hearsay). But see Ariana J. Torchin, Note, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington*, 94 GEO. L.J. 581, 584–85 (2006) (arguing that *Crawford* helped to clarify the inconsistencies created by the reliability test in *Roberts*).

204. Many courts continue to apply *Roberts* analysis to nontestimonial hearsay notwithstanding the Supreme Court's holding that the Sixth Amendment requires no such analysis. See, e.g., *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006) ("Where a hearsay statement is found to be nontestimonial, we continue to evaluate the declaration under *Ohio v. Roberts*.").

205. See *supra* note 194 and accompanying text (discussing the well-recognized distinction between the Confrontation Clause and the Federal Rules of Evidence).

or immediately thereafter, describing the event or condition.<sup>206</sup> Trial and appellate courts carefully police these requirements and admit present sense impressions somewhat sparingly.<sup>207</sup> Accordingly, the protections the current requirements afford against indiscriminate admission of present sense impressions are significant.<sup>208</sup> Although *Crawford* creates its own constitutional testifying witness requirement for previously uncross-examined testimonial hearsay, it demands no such protection in the context of a nontestimonial present sense impression.<sup>209</sup> The Federal Rules of Evidence need not alter a now time-honored exception to the hearsay rule to impose requirements *beyond* those constitutionally mandated.

Finally, the Supreme Court's Sixth Amendment jurisprudence remains in flux. The Court's most recent confrontation installments in *Michigan v. Bryant*,<sup>210</sup> and *Williams v. Illinois*,<sup>211</sup> have revealed significant discord on the Court regarding the future interpretation of *Crawford* and the contours of the Confrontation Clause in the context of hearsay.<sup>212</sup> As discussed further in Part III, the Federal Rules of Evidence should not be amended in the wake of every shift in constitutional analysis from the high Court. Before adapting evidentiary rules to complement the Supreme Court's Confrontation Clause analysis, rule-makers would benefit from further clarification from the Court.

### B. Domestic Violence and Present Sense Impressions

Amending the present sense impression exception to require a testifying percipient witness in the wake of *Crawford* is not simply without justification. Rather, such an amendment would have collateral consequences that will harm the adversarial process as it exists post-*Crawford*. Adding a percipient witness requirement to Rule

---

206. See *supra* Part I.A (describing the basic requirements for qualification as a present sense impression).

207. See *supra* Part I.D.1 (considering reasons why trial and appellate courts will regulate admission of e-hearsay under the existing requirements of the present sense impression exception).

208. See *supra* notes 99–100 and accompanying text (highlighting the safeguards inherent in the rule).

209. *Crawford v. Washington*, 541 U.S. 36, 689 (2004) (allowing states to use their discretion when developing hearsay laws relating to nontestimonial statements).

210. 131 S. Ct. 1143 (2011).

211. 132 S. Ct. 2221 (2012) (plurality opinion).

212. *Williams*, 132 S. Ct. at 2265 (Kagan, J. dissenting) (explaining that “five justices specifically reject every aspect of [the plurality opinion’s] reasoning and every paragraph of its explication.”); *Bryant*, 131 S. Ct. at 1168 (Scalia, J. dissenting) (stating that the majority opinion “distorts our Confrontation Clause jurisprudence and leaves it in a shambles,” and that “[i]nstead of clarifying the law, the Court makes itself the obfuscator of last resort”).

803(1) would close one of the last remaining constitutionally appropriate avenues for admitting victim hearsay in domestic violence prosecutions.

As many scholars have noted, the *Crawford* shift in Sixth Amendment jurisprudence has had a significant impact on domestic violence prosecutions.<sup>213</sup> In that class of cases, victims often fail to appear at trial to testify live against their abusers subject to cross-examination.<sup>214</sup> Under the *Roberts* regime, the hearsay statements of absent domestic violence victims were admitted through firmly rooted exceptions to the hearsay rule or when the statements displayed particularized guarantees of trustworthiness.<sup>215</sup> Under *Crawford*, however, the same testimonial hearsay statements to law enforcement personnel reporting violence must be excluded from trial in the absence of some opportunity for cross-examination of a truly unavailable victim before trial.<sup>216</sup> For the same reasons that it is challenging to obtain trial testimony from victims of domestic violence, it is likewise difficult to ensure adequate cross-examination prior to trial.

Although the Supreme Court suggested that the doctrine of forfeiture by wrongdoing would pave the way for admission of hearsay statements by intimidated domestic violence victims, the Court subsequently interpreted the forfeiture doctrine narrowly to apply only in cases where a defendant “intentionally” engages in wrongdoing for the “purpose” of preventing the victim’s trial testimony.<sup>217</sup> While domestic violence victims may be reluctant to

---

213. See *Davis v. Washington*, 547 U.S. 810, 832 (2006) (“Respondents in both cases, joined by a number of their *amici*, contend that the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence.”); Tom Lininger, *Prosecuting Batterers after Crawford*, 91 VA. L. REV. 747, 768 (2005) (explaining that *Crawford* has had an especially large impact on domestic violence cases due to accusers’ frequent refusal to cooperate with the prosecution during trial).

214. See *Giles v. California*, 554 U.S. 353, 405 (2008) (Breyer, J., dissenting) (noting that domestic violence “is difficult to prove in court because the victim is generally reluctant or unable to testify”).

215. See Lininger, *supra* note 213, at 756 (recounting the requirements for admitting hearsay statements under *Roberts*); Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 320 (2005) (“*Roberts* provides a cost-free *pro forma* stamp of approval for all firmly rooted hearsay of unavailable declarants.”).

216. See *Giles*, 554 U.S. at 377 (reversing the admission of testimonial victim hearsay through California hearsay exception absent a finding of the defendant’s intent to prevent victim’s trial testimony as a necessary condition for forfeiture of Sixth Amendment right of confrontation); *Davis*, 547 U.S. at 834 (excluding “testimonial” victim statement admitted as excited utterance absent finding of forfeiture).

217. See *Giles*, 554 U.S. at 406 (Breyer, J., dissenting) (opining that “the Court breaks the promise implicit” in *Davis* concerning application of forfeiture doctrine

testify against their attackers for a variety of reasons, it is often difficult for a prosecutor to prove intentional intimidation for the purposes of preventing testimony.<sup>218</sup> Because of the nature of domestic violence, there is often inadequate evidence without the victim's reports to prove the crime.<sup>219</sup> Therefore, the *Crawford* regime has made it increasingly difficult, if not impossible, to prosecute domestic offenders in a large class of cases.<sup>220</sup>

In the wake of *Crawford*, courts have found present sense impressions and excited utterances reporting ongoing domestic attacks to 911 operators, other rescue personnel, and friends and neighbors to be nontestimonial under the Supreme Court's "ongoing emergency" doctrine outlined in *Davis v. Washington*.<sup>221</sup> Thus, these present sense impressions have been admitted in domestic violence prosecutions consistent with the demands of the Sixth Amendment articulated by *Crawford* and have allowed some level of continued enforcement in this important area.<sup>222</sup> Amending

---

in domestic violence prosecutions); *Davis*, 547 U.S. at 833 (noting that domestic violence victims are "notoriously susceptible to intimidation or coercion" and that the "Sixth Amendment does not require courts to acquiesce" when defendants intimidate victims).

218. See *Giles*, 554 U.S. at 387 (Breyer, J., dissenting) (observing "serious practical evidentiary problems" in applying purposeful intimidation standard of forfeiture and posing query: "Who knows precisely what passed through H's mind at the critical moment?"). But see *State v. Fry*, 926 N.E.2d 1239, 1262 (Ohio 2010) (admitting victim's testimonial statements to police after finding that defendant forfeited his Sixth Amendment right of confrontation by calling the victim from jail, coercing her to drop charges, and threatening her if she did not do so).

219. See *supra* note 213.

220. See Örenstein, *supra* note 16 (declaring that *Crawford* "has profoundly affected domestic violence cases, making it much harder to prosecute them successfully").

221. Indeed, Justice Scalia noted in *Giles* that nontestimonial victim statements would remain an important source of evidence in the domestic violence context after *Crawford*. *Giles*, 554 U.S. at 376; see also Imwinkelried, *supra* note 10, at 332–33 (noting that present sense impressions "often take the form of 911 calls in domestic violence cases" and that admissibility of 911 calls as present sense impressions can be determinative "[g]iven the tendency of domestic violence victims to recant").

222. See, e.g., *Davis*, 547 U.S. at 821, 834 (affirming the admission of nontestimonial excited utterance in domestic violence trial); *United States v. Davis*, 577 F.3d 660, 670 (6th Cir. 2009) (allowing 911 caller's statements admitted as present sense impression and finding no *Crawford* violation); *United States v. Arnold*, 486 F.3d 177, 189 (6th Cir. 2007) (finding 911 call to be nontestimonial under *Crawford*, using excited utterance exception); *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006) (finding 911 call fit present sense impression and was nontestimonial); *United States v. Kuo*, No. 10-CR-671 (S-1) (KAM), 2011 WL 145471, at \*9 (E.D.N.Y. Jan. 18, 2011) (finding 911 present sense impressions nontestimonial in context of non-domestic assault); *Compan v. People*, 121 P.3d 876, 886 (Colo. 2005) (finding excited utterances nontestimonial and admissible in domestic violence prosecution); see also *United States v. Price*, 58 F. App'x 105, 106 (6th Cir. 2003) (finding, pre-*Crawford*, that a child's 911 call reporting that "[m]y dad has a gun and is trying to shoot my mom" as a present sense impression); *United States v. Jackson*, 124 F.3d 607, 618 (4th Cir. 1997) (finding, pre-*Crawford*, that a mother's

the hearsay exception for the present sense impression to make its requirements more stringent—and specifically amending it to require a testifying percipient witness in all cases—promises to eliminate the utility of one of the last remaining sources of constitutionally competent evidence in domestic violence cases. Assuming that a victim makes a hearsay report to an absent 911 operator during or immediately following an attack where only the victim and the abuser are present, there will be no percipient witness to corroborate the victim's hearsay report as a condition of admissibility. Even if the 911 operator receiving the call could perceive the noise of a domestic disturbance during the call, that operator would be unable to confirm the identity of the attacker or the sequence of events from personal knowledge. Of course, the issues of identity and sequence of events would be the most salient in a domestic violence prosecution. With an added percipient witness requirement, therefore, the victim's statements to the absent 911 operator during this emergency call would be inadmissible under the present sense impression exception and unavailable in the prosecution of the alleged offender.

Further, the e-hearsay that is the purported catalyst for a percipient witness amendment may be a crucial source of constitutionally competent evidence in domestic violence cases. The culture of instant communication with hand-held devices allows otherwise isolated victims to reach out to remote friends and neighbors during an attack quickly and easily with an e-mail, phone call, or text message. When a victim is dead or otherwise unavailable at a trial arising out of the encounter, this contemporaneous window into the events as they unfolded may provide powerful evidence that the victim cannot. Requiring a percipient witness within Rule 803(1) will close the door on this valuable evidence.

The Arizona case of *State v. Damper*<sup>223</sup> illustrates the potential importance of e-present sense impressions in the domestic violence context.<sup>224</sup> In that case, Marcus Damper was convicted of the second-degree murder of his girlfriend.<sup>225</sup> Although the defendant admitted shooting the victim in her bed during a disagreement, he claimed that the shooting was accidental. Moments before the fatal shooting, however, a text message was sent from the victim's phone to her

---

statements to responders were present sense impressions).

223. 225 P.3d 1148 (Ariz. Ct. App. 2010).

224. *See id.* at 1150 (admitting into evidence a text message sent by the victim under the present sense impression rule).

225. *Id.*

friend stating, in essence, “Can you come over? Me and Marcus are fighting and I have no gas.”<sup>226</sup>

The defendant objected to the admission of this text message at trial as a present sense impression.<sup>227</sup> Damper argued that the text violated his Sixth Amendment confrontation rights, was inadmissible hearsay, and was inadequately authenticated prior to its admission.<sup>228</sup> The Arizona Court of Appeals rejected defendant’s arguments pursuant to the Sixth Amendment, finding that, whether the text was an “urgent cry for help” or a “casual request to a friend,” it was nontestimonial within the *Crawford* framework.<sup>229</sup> Further, the court held that the text was properly admitted as a present sense impression because it related an event of which the victim had personal knowledge—her argument with the defendant.<sup>230</sup> The court also looked to the timing of the text, as well as the victim’s use of the present tense in the text to decide that the text was created and sent during the argument or shortly thereafter.<sup>231</sup> Finally, the court found adequate evidence to authenticate the text as having come from the victim to justify its admission.<sup>232</sup> Thus, the admission of the text message was affirmed and Damper’s conviction upheld.<sup>233</sup>

The text message in *Damper* presents a classic example of the type of e-hearsay that may aid in the prosecution of domestic abuse consistent with the mandate of *Crawford*, that would be foreclosed by a percipient witness requirement. With an isolated victim like the deceased girlfriend in *Damper*, there will be no trial witness capable of corroborating the unavailable victim’s version of events. Although Professor Bellin suggests that remote declarants like the victim in *Damper* can “video chat” to allow contemporaneous perception by another witness, this remedy is plainly unrealistic in this context.<sup>234</sup> Further, the victim’s text message was within the core of the reliability justification for present sense impressions where there was ample

---

226. *Id.* The text was written “part in Spanish and text lingo,” but was translated by the recipient, as well as a police detective. *Id.*

227. *Id.*

228. *Id.* at 1150–51.

229. *Id.* at 1151.

230. *Id.* at 1152.

231. *Id.*

232. *Id.* at 1153 (pointing to the fact that the text came from the victim’s programmed number, the fact that the phone used to send the text was discovered next to the victim’s body, and finally, that there was no evidence that anyone other than the victim had access to the phone to send the text).

233. *Id.*

234. See Bellin, *supra* note 6, at 371 n.140 (“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.”).

evidence to support the requirements of Rule 803(1) apart from the text message itself. Although Damper characterized his interaction with the victim more benignly, he conceded that he and the victim had some discussion or disagreement on the morning of her death during which he shot her.<sup>235</sup> The victim clearly had personal knowledge of her own discussion with the defendant, demonstrating the first-hand information necessary to satisfy Rule 803(1). Further, it was clear that the text was sent contemporaneously with the argument that the victim was describing due to the timing of the text, as well as her use of the present tense in the text itself. Finally, the victim was found dead in her bed with her cell phone at her side.<sup>236</sup>

Such reliable e-hearsay can offer an invaluable and constitutionally sound window into domestic attacks that are often perpetrated without witnesses standing by. Existing requirements of Rule 803(1) will prevent admission of wholly uncorroborated accusations even without Sixth Amendment oversight. To amend the Federal Rules of Evidence to foreclose the use of reliable and constitutionally permissible evidence of vital importance in the domestic violence context would close one of the few remaining avenues for allowing victims' voices to be heard.

### C. Civil Cases

Finally, to the extent that addition of a percipient witness requirement to Rule 803(1) constitutes a reaction to *Crawford*, it represents an overly broad solution. Federal Rule of Evidence 803 defines twenty-three hearsay exceptions available in both criminal and civil federal proceedings.<sup>237</sup> An amendment to Rule 803(1) to add a percipient witness requirement, therefore, will affect the admission of present sense impressions in civil cases, as well as against the accused in criminal prosecutions. Such a broad amendment to a hearsay exception applicable in both the criminal and civil context will eliminate valuable evidence offered outside the criminal context. To the extent that any amendment to Rule 803(1) is justified by *Crawford* and its progeny, the amendment should be narrowly tailored to address this concern.

---

235. Indeed, the text message did not necessarily accuse defendant of any wrongdoing. It did not say Marcus is "hitting me" or "threatening me with a gun." Rather, it stated that the victim and Marcus were "fighting." *Id.* at 1150.

236. *Id.* at 1153.

237. FED. R. EVID. 803.

### III. THE CASE FOR CAUTION

As outlined in Parts I and II above, there is no urgent need to amend the present sense impression exception to account for e-hearsay. Should rule-makers consider a proposal to amend the exception, however, such a proposal should be approached with caution for several reasons. The timing and scope of any e-hearsay project should be carefully considered. A hasty or piecemeal modification of a single hearsay exception to account for changing norms of communication could create more problems than it resolves. To the extent that amendments to the present sense impression exception are considered, a percipient witness requirement should not be adopted. Requiring a percipient witness would undermine the utility of the exception and is at odds with the fundamental purpose of the Federal Rules of Evidence to achieve accurate and fair fact-finding.<sup>238</sup> Should rule-makers decide to consider a revision, there are several possible alternatives to a percipient witness requirement that would better serve the intended purpose of the present sense impression, while providing a measure of security against unreliable e-hearsay.

#### A. *Haste Makes Waste*

To the extent that rule-makers wish to consider amending the present sense impression exception, any amendment aimed at e-hearsay appears premature at this point in the development of the social-media revolution. Courts and litigants have substantial experience in adapting hearsay rules to constantly evolving methods of communication.<sup>239</sup> Consistent with the strong common law tradition that serves as the foundation for the Federal Rules of Evidence, trial and appellate judges should be given the first opportunity to address e-hearsay problems under existing doctrine. Indeed, courts are only beginning to issue rulings dealing with admissibility of text messages and the like.<sup>240</sup> There appears to be no reported case deciding admissibility of a tweet as a present sense impression.

Rule-makers should allow courts time to develop methodology for

---

238. See, e.g., FED. R. EVID. 102 (“These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”).

239. See *supra* Part I (discussing constant evolution of human communication that must be addressed by hearsay doctrine).

240. See Bellin, *supra* note 6, at 350 n.73 (collecting cases).

evaluating e-hearsay under the present sense impression exception before charging in to correct a potentially non-existent problem. If judges continue to carefully control admission of present sense impressions, there will be no need to alter the framework for the exception. If, however, courts appear unable to filter social-media and other e-hearsay using existing tools and tweets, texts, and status updates begin flooding the trial process with little restriction, rule-makers can act to correct the problem. By allowing courts time to handle e-hearsay in the first instance, drafters of the Federal Rules of Evidence may marshal valuable data regarding problem areas to inform any future amendment. Rule-makers could examine inconsistencies and infirmities in judicial opinions allowing e-hearsay and use perceived patterns to craft an amendment that will directly resolve genuine problems. Although technological progress moves at lightning speed, the rule-making process may benefit from a more measured pace.

Finally, to the extent that rule-makers are concerned that the social-media revolution could require reconsideration of the present sense impression, they should allow sufficient time for the electronic communication revolution to reach a point of relative stability before re-writing the exception. There can be no doubt that modern communication capabilities represent a moving target. New platforms for electronic communication emerge on an almost daily basis at this juncture in wireless communication development.<sup>241</sup> In order to craft revisions to the exception that adequately account for emerging methods of on-line communication, rule-makers should allow time for further development of technology and electronic communications to avoid drafting an amendment that is moot or inadequate before its effective date.<sup>242</sup>

#### *B. Piecemeal Amendments to Hearsay Exceptions*

In considering possible amendments to hearsay rules to account for evolving electronic modes of communication, rule-makers should carefully consider the scope and breadth of such an undertaking. Drafters should be wary of amending a single hearsay exception like the present sense impression without carefully considering the

---

241. See, e.g., Hossain, *supra* note 56 (describing “CrimePush” as new app available on iTunes to report ongoing crime with the push of a button).

242. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 537 (D. Md. 2007) (noting that e-discovery revision of the Federal Rules of Civil Procedure has “only heightened, not lessened” the discussion of discovery of electronically stored information).

ramifications of e-hearsay for the rest of Article Eight. The hearsay exceptions have a somewhat symbiotic relationship that requires a holistic assessment of all hearsay exceptions within the Federal Rules of Evidence before any attempt is made to revise or amend exceptions to account for the rise of social media. Revising hearsay exceptions individually to account for broad-reaching developments like technology and evolving Sixth Amendment jurisprudence threatens to be inefficient, to create collateral consequences with respect to unrevised exceptions, and to create ever-expanding labyrinthine hearsay rules. Hearsay already suffers from the greatest complexity within the Federal Rules of Evidence and has drawn constant attacks from scholars, practitioners, judges, and law students alike.<sup>243</sup> Piecemeal amendment promises to exacerbate this problem.

While the culture of social media, with its emphasis on constant publication of ongoing activities, certainly has special significance for the present sense impression exception, other hearsay exceptions are certain to be affected by the rise of e-hearsay.<sup>244</sup> Excited utterances covered by Rule 803(2) raise “bootstrapping” concerns reminiscent of those involved in interpreting the present sense impression that could arise in the e-hearsay context. A text or tweet could relate to a startling event and even describe it to social media followers. A court could conceivably find that the nature of the event described was “startling” within the meaning of the excited utterance exception

---

243. See Ronald J. Allen, *Commentary: A Response to Professor Friedman: The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 800 (1992) (concluding that the hearsay rule no longer seriously contributes in any robust way to substantial justice); Richard D. Friedman, *Toward a Partial Economic, Game Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723, 724 (1992) (arguing that the resolution of a hearsay dispute is “essentially a matter of deciding who should bear the burden of producing the declarant, or . . . how the court should allocate the burden”); Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 368 (1992) (acknowledging that “[p]racticing lawyers never tire of talking about hearsay and commentators in the academy never tire of reforming it”); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 54 (1987) (arguing for a distinction between civil and criminal cases); Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 894 (1992) (noting that “[t]he degree of consensus among twentieth-century evidence scholars concerning the intellectual bankruptcy of hearsay doctrine is nothing short of remarkable.”); I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 1 (observing that the Rules will redeem an important area of procedure from chaos); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1341 (1987) (arguing that the current hearsay rule “merely glosses over [problems for the trier of fact and for the party opponent] by purporting to sort more reliable hearsay from less reliable in advance”); Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 331 (1960) (supporting the Uniform Rules because present evidence rules “fall short of providing a satisfactory solution to the hearsay problem”).

244. See Bellin, *supra* note 6, at 374 n.152 (recognizing that “the state of mind exception may also be in need of updating in light of modern developments.”).

and that the tone and content of the tweet or text demonstrated that the declarant remained under the stress of excitement caused by the event while texting.<sup>245</sup> If such e-hearsay were sent to a friend or posted on Twitter or Facebook, a court could also find them to be nontestimonial for purposes of the Confrontation Clause. Thus, there is a possibility that uncorroborated social media excited utterances could be admitted through Rule 803(2).<sup>246</sup> Hearsay statements relating declarant's existing state of mind, motive, intent, plan, or emotional, sensory or physical condition covered by Rule 803(3) seem particularly likely to be made on Twitter or Facebook.<sup>247</sup> One can certainly envision dying declarations delivered via text message or tweet.<sup>248</sup>

Adding a rigid percipient witness requirement to the present sense impression exception will drive litigants to use similar hearsay exceptions where the percipient witness requirement cannot be satisfied. The *Damper* case illustrates this concern.<sup>249</sup> In that case, the deceased victim's text, "Can you come over? Me and Marcus are fighting. I don't have any gas," would no longer be an admissible present sense impression absent a percipient witness able to vouch for the message.<sup>250</sup> The prosecution could simply skip next door to the excited utterance exception and argue that a "fight" is by definition a "startling" event and that the declarant's excitement was reflected in her cry for help and efforts to flee the scene with the aid of her friend.<sup>251</sup> The prosecution could argue that the use of the present tense in the text demonstrated that the exciting event was still ongoing and that declarant's text was sent under the continuing stress of the fight. A court could conceivably accept such an

---

245. See *State v. Ford*, 778 N.W.2d 473, 482 (Neb. 2010) (rejecting challenge to admission of text message, "I just got raped . . . By Jake . . . I don't know what to do!" as an excited utterance).

246. FED. R. EVID. 803(2). As discussed with respect to the present sense impression above, this possibility also appears unlikely in light of existing evidentiary policies and judicial interpretation of the excited utterance. To the extent that courts would be inclined to admit present sense impressions wholly without foundation, however, a similar tendency would appear in the context of the excited utterance.

247. FED. R. EVID. 803(3).

248. See FED. R. EVID. 804(b)(2) (providing a hearsay exception for statements made by the declarant about the declarant's cause of death when the declarant believes her death is imminent).

249. *State v. Damper*, 225 P.3d 1148, 1151–52 (Ariz. Ct. App. 2010) (holding a text message to be nontestimonial because there was nothing to show that the sender intended it to be used for later prosecution).

250. *Id.* at 1150.

251. FED. R. EVID. 803(2) (defining an excited utterance as "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused").

argument and allow the excludable present sense impression in through the excited utterance back door.<sup>252</sup> It makes little sense to single out the present sense impression for rigid controls and leave the excited utterance untouched, particularly where scholars have noted the inferior reliability of excited utterances.<sup>253</sup>

Although there will be a large class of cases in which such an argument for excitement will be unavailable based upon the mundane nature of e-hearsay, this continued avenue of admissibility in some cases undermines the utility of the single exception amendment at a minimum.<sup>254</sup> In addition, it is possible that courts and litigants could interpret a single exception amendment as a signal of approval for liberal admission of e-hearsay through other exceptions. By negative inference, judges could decide that rule-makers harbored particular concerns about the reliability of e-present sense impressions not raised by e-hearsay offered through other exceptions. Accordingly, judges could freely admit e-hearsay in other contexts secure in the understanding that rule-makers had provided special safeguards against e-hearsay where such protection was necessary.

To be sure, there are circumstances in which amendment of a single hearsay exception is appropriate where a particular policy consideration is unique to that exception.<sup>255</sup> When the perceived need for amendment derives from broad policy concerns that promise to touch all hearsay doctrine in some manner, however, an isolated review of any one hearsay exception is particularly inappropriate. The age of electronic communication and the Sixth Amendment revolution both represent far-reaching paradigm shifts that promise to reverberate throughout Article Eight. Any effort to

---

252. Attempts to utilize other hearsay exceptions to avoid rigid limitations in a specific exception are common under the Federal Rules. When Congress imposed a strict prohibition within the public records exception on the admission of matters observed or factual findings of law enforcement agents, litigants were quick to utilize its close cousin, the business records exception, in an effort to avoid the prohibition. *See United States v. Oates*, 560 F.2d 45, 71 (2d Cir. 1977). With a strong legislative history supporting the public records prohibition as absolute and a constitutional component to the prohibition, courts prevented its circumvention through the business records exception. *Id.*

253. *See Imwinkelried*, *supra* note 10, at 352 (“If there is no corroboration requirement for an inferior species of hearsay [excited utterances], it is nonsense to prescribe such a requirement for a superior type of hearsay evidence.”).

254. 4 MUELLER & KIRKPATRICK, *supra* note 19, § 8:67, at 567 (“The main utility of Fed. R. Evid. 803(1) is in cases where the utterance is clearly contemporaneous but nothing startling happened.”).

255. *See* FED. R. EVID. 804(b)(3) (recently amended to make former one-way corroboration requirement for an inculpatory hearsay statement offered by a criminal defendant equally applicable to prosecution use of declarations against interest).

amend the hearsay rules to account for either of these shifts in the litigation landscape should involve a comprehensive review of the entire structure of Article Eight, rather than a targeted amendment to the hearsay exception for present sense impressions.

*C. A “Percipient Witness” Is Not the Answer: Benefits of Electronic Evidence at Trial*

Critics of the present sense impression exception have proposed various changes to the Federal Rule.<sup>256</sup> One oft-proposed revision, recently advocated by Professor Bellin, would require corroboration for the present sense impression in the form of a percipient witness—“someone who was present at the time the statement was made . . . and who ‘received’ (or made) the statement.”<sup>257</sup> According to Professor Bellin, this percipient witness should be able to “clarify, vouch for, and, if necessary, discredit the out-of-court statement.”<sup>258</sup> While such an amendment would certainly eliminate reliability concerns regarding the hearsay statement, it promises to undermine the value of the present sense impression in the very cases where it can be most useful. Fixing Rule 803(1) by adding a percipient witness requirement will serve its purpose, but it comes at too great a cost.<sup>259</sup>

While proponents of the original present sense impression exception may have expected the presence of a percipient witness in the typical case, the present sense impression has proved a powerful tool in disputed cases where the hearsay declarant is alone or without a witness who is able to perceive the described event and relate it to the jury at trial. Even where the witness relating the present sense impression is physically present at the time of declarant’s hearsay statement, there are circumstances in which that witness is not capable of perceiving and corroborating the event in question. In the classic telephone conversation cases, the declarant has a phone conversation while the trial witness listens only to the declarant’s side

---

256. See Imwinkelried, *supra* note 10, at 344–54 (chronicling various “judicial gloss[es]” added by trial and appellate courts).

257. Bellin, *supra* note 6, at 370; see also Jon Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 884 (1981) (arguing that legislative history of Rule 803(1) justifies a percipient witness requirement).

258. Bellin, *supra* note 6, at 370.

259. See *People v. Brown*, 610 N.E.2d 369, 373 (N.Y. 1993) (“Insisting 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.”).

of the conversation.<sup>260</sup> Upon hanging up the telephone, the declarant describes the other side of the conversation to the witness.<sup>261</sup> Finding that the declarant had personal knowledge of the full conversation and described that event immediately after perceiving it, courts have allowed the physically present witness to testify to declarant's present sense impression regarding the entire conversation, even though the trial witness cannot corroborate, clarify or discredit declarant's description.<sup>262</sup> Adding a percipient witness requirement to Rule 803(1) could exclude statements like these reported by even physically present witnesses.

In other cases, the present sense impression exception has been used to admit declarants' statements to remote or absent witnesses. Sometimes, these statements are made before the occurrence of any "startling event," making the present sense impression the only available hearsay exception.<sup>263</sup> In the classic case, a victim of subsequent violence relates the presence of the defendant to a remote witness over the telephone.<sup>264</sup> In cases where the witness on the other end of the line overhears the arrival of someone, the witness has some ability to perceive the event in question.<sup>265</sup> Still, that witness would not be "equally percipient" and would be unable to corroborate or disavow the most important point—the identity of the

---

260. See, e.g., *Nuttall v. Reading Co.*, 235 F.2d 546, 551–52 (3d Cir. 1956).

261. See *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 322–23 (4th Cir. 1982) (allowing present sense impression describing telephone conversation); *United States v. Early*, 657 F.2d 195, 197–98 (8th Cir. 1981) (admitting evidence of a self-reported conclusion about the identity of the person on the other end of a phone conversation); *Nuttall*, 235 F.2d at 551–52 (admitting husband's hearsay characterization of a phone conversation to his wife who only overheard his side of the conversation); *Knudson v. Director, N.D. Dep't of Trans.*, 530 N.W.2d 313, 317 (N.D. 1995) (explaining the present sense impression exception).

262. See, e.g., *Nuttall*, 235 F.2d at 553 (explaining that contemporaneous characterizations of phone conversations are less likely to involve conscious misrepresentation).

263. See 4 MUELLER & KIRKPATRICK, *supra* note 19, § 8:67, at 559 (explaining that present sense impressions may be more reliable than excited utterances simply because the "speaker is not distracted by the pull of an emotional upheaval").

264. See, e.g., *Brown v. Tard*, 552 F. Supp. 1341, 1351 (D.N.J. 1982) (admitting statement made in the course of a telephone conversation that "the guy is here to fix the air conditioner"); *Bray v. Commonwealth*, 177 S.W.3d 741, 744 (Ky. 2005), *overruled by* *Padsett v. Commonwealth*, 312 S.W. 3d 336 (Ky. 2010) (admitting victim's telephone statement to sister in murder trial that defendant was "sitting at the bottom of the hill"); *State v. Salgado*, 974 P.2d 661, 663 (N.M. 1999) (admitting murder victim's greeting, "[h]ey Timo, what's up," to visitor shortly before his death overheard by telephone witness). Present sense impressions to remote witnesses have been important in other contexts as well. See *State v. Wright*, 817 A.2d 600, 605 (R.I. 2003) (admitting statement over phone by defendant's mother describing her sudden discovery of victim's purse).

265. See *Tard*, 552 F. Supp. at 1350–51 (admitting evidence when the witness overheard the arrival of the air-conditioning repairman over the phone).

arriving assailant. In other cases, the remote witness will have no way of perceiving or corroborating the arrival of someone else at all.<sup>266</sup> Where the remote witness can verify that the declarant was describing ongoing events within her personal knowledge at the time—who was present, near, or arriving—courts have found the present sense impression applicable.<sup>267</sup> When the subsequent murder of the declarant unequivocally supports declarant's statement that someone indeed arrived, these hearsay statements present few reliability concerns.<sup>268</sup> The present sense impression has also been an important source of evidence in 911 cases, after an emergency or startling event has arisen.<sup>269</sup> In these cases, a remote 911 operator cannot corroborate the events described by the caller.

It is in these cases, where the declarant is isolated at the time of the hearsay assertion and dead or otherwise unavailable for trial, that the exception has its greatest utility to the adversary process. As described in Part I, the existing framework of the rules guarantees significant protection against admission of present sense impressions wholly without foundation, even in this context.<sup>270</sup> Adding a percipient witness requirement to the rule would eliminate the use of the exception in cases like these where it can add the most. Allowing the use of a present sense impression only where a percipient witness is able to confirm the events related by the hearsay statement would mean present sense impressions would only be admitted when they were truly superfluous and duplicative of existing live testimony.<sup>271</sup> Although present sense impressions that duplicate live testimony could serve to reinforce or emphasize the testimony, a percipient

---

266. See, e.g., *Commonwealth v. Blackwell*, 494 A.2d 426, 434 (Pa. Super. Ct. 1985) (victim's statements to police over phone not within present sense impression where police could not hear corroborating noise in the background).

267. See *Tard*, 552 F. Supp. at 1350–51.

268. See *Salgado*, 974 P.2d at 663 (admitting murder victim's greeting to visitor, which was overheard by telephone witness, shortly before his death).

269. See, e.g., *United States v. Shoup*, 476 F.3d 38, 43 (1st Cir. 2007) (admitting 911 report that man with tag number 8549VZ had threatened a caller and was carrying a gun); *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006) (admitting an anonymous caller's statement to a 911 operator because it was nontestimonial); see also *People v. Brown*, 610 N.E.2d 369, 373 (N.Y. 1993) (“If corroboration by an ‘equally percipient witness’ were required in this case . . . the 911 tape should not have been admitted. The police who testified to the conditions and events at the scene were not present when the calls were made and could not have observed the events at the precise moment that they were being described by the 911 caller.”).

270. See *supra* Part I.D.2.

271. See *Brown*, 610 N.E.2d at 373 (“If such an eyewitness is available to testify to the events, there is certainly no pressing need for the hearsay testimony.”); see also *Bellin*, *supra* note 6, at 350 (noting that a present sense impression related at trial by a percipient witness “merely supplements a witness's live testimony”).

witness requirement will relegate the present sense impression to a supporting role.

While the recent call to amend Rule 803(1) comes in response to the rise of social media and other wireless communication opportunities, it is important to note that the addition of a percipient witness requirement will alter the application of the exception in more traditional communication contexts. A percipient witness requirement, ostensibly designed to address unreliable e-hearsay, could require the exclusion of present sense impressions even when communicated orally. An amendment designed to deal with concerns over technological advancement and the constant churning out of tweets, texts and status updates will have an impact on previously admissible hearsay that is not the product of the social media revolution at all.

This impact of a percipient witness requirement reveals the proposal for what it really is—an attempt to revisit the present sense impression exception altogether. Throughout its history, the present sense impression has had detractors who would eliminate it as inadequately reliable.<sup>272</sup> The social-media revolution has not fundamentally altered the operation of the present sense impression exception.<sup>273</sup> It has simply provided a new and vogue opportunity to launch the same criticisms and arguments against its viability that have plagued the exception since its recognition.

Finally, a percipient witness requirement would introduce thorny problems of interpretation that would further diminish the value of the present sense impression exception. First, courts would be required to decide what level of “perception” was required. An amendment that demanded an “equally percipient witness” would involve courts in determining declarant’s perspective, compared to that of the percipient witness. Even a physically present witness may have an inferior vantage point and level of personal knowledge than the declarant. Questions regarding equality of perception threaten to introduce inconsistency and unpredictability into the application of the exception. Although Professor Bellin suggests that requiring equal percipience is “unwarranted,”<sup>274</sup> judges and litigants are certain to struggle with identifying the optimal level of percipience needed to allow the trial witness to vouch for or discredit the present sense impression. An amendment to the present sense impression could, as Professor Bellin proposes, endorse trial testimony by a

---

272. *See supra* Part I.B.

273. *See supra* Part I.B.

274. Bellin, *supra* note 6, at 371.

“partially percipient witness.”<sup>275</sup> Should drafters of a revision specifically allow a witness with a lesser opportunity to perceive the events in question than the hearsay declarant, courts would be forced to grapple with the minimum level of percipience needed to satisfy the reliability concerns of the amended exception. Undoubtedly, there is a sliding scale of perception, with some witnesses being as percipient as the hearsay declarant, while others will be far less percipient. A percipient witness amendment will require courts and litigants to struggle with the array of fact patterns along this spectrum, which will introduce inefficient complexities into the already labyrinthine world of hearsay exceptions.

Any proposal to foreclose the use of e-hearsay through a percipient witness requirement also overlooks the net positive that the texting and tweeting revolution may bring to the trial process. Contemporary technology generates and preserves millions of hearsay statements each day.<sup>276</sup> Rather than crafting rules to rigidly exclude such e-hearsay, evidence scholars should consider the potential improvements to the adversary process from additional electronically preserved information. The Federal Rules of Evidence are designed to ensure that the truth may be ascertained and proceedings justly determined.<sup>277</sup> The availability of contemporaneous information regarding disputed events promises to advance the important goal of generating accurate trial outcomes.<sup>278</sup> The Federal Rules of Evidence should be amended to foreclose access to such information only when it undermines this goal.

Because of the proliferation of communication through electronic outlets, more hearsay information will be generated and preserved for potential use in litigation.<sup>279</sup> To the extent that such e-hearsay provides previously unavailable insights into disputed factual issues at trial, the existence of Facebook status updates and tweets may improve the accuracy of trial outcomes. Imagine the personal injury plaintiff seeking damages for permanent physical injuries that

---

275. *Id.*

276. Marshall Kirkpatrick, *Twitter Hits 50 Million Tweets Per Day; Still Dwarfed by Facebook & YouTube*, READWRITEWEB (Feb. 22, 2010) [http://www.readwriteweb.com/archives/twitter\\_hits\\_50\\_million\\_tweets\\_per\\_day\\_remains\\_dwa.php](http://www.readwriteweb.com/archives/twitter_hits_50_million_tweets_per_day_remains_dwa.php) (comparing number of messages, posts, and videos that are added to the various social-media outlets).

277. FED. R. EVID. 102.

278. See Seigel, *supra* note 243, at 896 (“Achieving justice in the context of the fact-finding portion of a trial means determining the truth—that is, obtaining an accurate, unbiased picture of a historical event.”).

279. See Bellin, *supra* note 6, at 355 (indicating that modern communication devices make it more likely that hearsay will be preserved for trial).

allegedly diminish her quality of life, who posts photographs of herself on Facebook dancing with friends after the date of the accident in question. Contemplate the damaging text messages sent between co-conspirators during the pendency of a conspiracy. Imagine the defendant in a wrongful death suit arising out of a car accident who, seconds before the fatal crash, tweeted:

@defendant1

On my way home—OMG traffic!

Such admissions are becoming increasingly important in contemporary litigation.<sup>280</sup> In these examples, e-hearsay unavailable before the advent of social media sites like Facebook and Twitter, may be instrumental in resolving hotly disputed issues at trial. Thus, the culture of electronic communication and social media promises to be a boon to the truth-seeking process by producing and preserving information about contested trial issues.<sup>281</sup> Of course, the present sense impression exception would be unnecessary to the admission of the e-hearsay assertions in these hypothetical cases. The admissions doctrine could be used to admit them against the posting parties or their co-conspirators—to the extent that a hearsay exception was deemed necessary.<sup>282</sup>

Imagine, however, the contemporary social media counterpart to the seminal present sense impression in *Houston Oxygen Co. v. Davis*.<sup>283</sup> Suppose a passenger in defendant's car tweets moments before a fatal accident:

---

280. See, e.g., John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 S.M.U. SCI. & TECH. L. REV. 465, 465 (2011) (explaining that these types of scenarios are occurring more frequently due not only to the pervasiveness of social media, but also due to the "legal profession's eagerness to exploit the treasure trove of information to be mined from social networking sites").

281. *Id.*

282. For example, the posting of the photograph could be viewed as hearsay to the extent that the plaintiff was asserting: "this is me dancing with my friends on November 30, 2011." Even so, the admissions doctrine would allow it to be admitted against her. FED. R. EVID. 801(d)(2)(a). The tweet by the wrongful death defendant would not need to be used for its truth to demonstrate careless behavior. The fact of any tweet while operating a vehicle seconds before the impact could indicate negligence, regardless of the content of the tweet. This could be argued to be true even with new voice recognition capabilities given the need to handle the wireless device while driving at all. Cf. FED. R. EVID. 801(c) (defining hearsay as out-of-court statements admitted to "prove the truth of the matter asserted"). Therefore, this tweet would be unlikely to be characterized as hearsay—to the extent that it were so treated, the admissions doctrine would also allow it in against the tweeting defendant. FED. R. EVID. 801(d)(2)(a).

283. 161 S.W.2d 474, 476 (Tex. Comm'n App. 1942) (automobile passenger referred to another car, saying "they must have been drunk" and "we would find them somewhere on the road wrecked if they kept that rate of speed up").

@passenger10 5 minutes ago

Driving down Gandy in Dan's black Rover—about to take FLIGHT!!

Admitting this against the defendant who crashed his black Land Rover into the plaintiff's car on Gandy Street moments after this tweet, to prove defendant was speeding at the time of the crash, would require a hearsay exception.<sup>284</sup> Because the tweet is not the defendant's own assertion, it would not be admissible through the admissions doctrine.<sup>285</sup> If the passenger were available to testify at trial and testified in defendant's favor that he was *not* speeding at the time of the accident, the inconsistent tweet would be admissible to impeach the passenger, but would not be admissible as an inconsistent statement to prove speeding as it would fail to satisfy the oath and prior proceeding requirements of Federal Rule of Evidence 801(d)(1)(A).<sup>286</sup> If the passenger died in the accident and was unavailable to testify, his tweet would likewise not be admissible under Federal Rule of Evidence 804.<sup>287</sup>

The present sense impression exception, as currently configured, would be an ideal fit, however. There would certainly be independent evidence of the event in question—that defendant's black Land Rover was driving down Gandy Street at the time of the tweet—given the collision moments later. Furthermore, the all-important timing requirement of the present sense impression exception would be satisfied if the time of the tweet was within moments of the collision. The passenger was describing an event—the speed of the Land Rover—*while* perceiving it drive down Gandy Street. Where subsequent events demonstrate that the declarant was in defendant's car at the time, the passenger's personal knowledge of the Land Rover's speed immediately beforehand would be established for purposes of the exception. The use of technology to record the e-hearsay may further help to establish this personal knowledge requirement as some social media sites are now tracking GPS information for log-in locations.<sup>288</sup> Indeed, Twitter may be able to place the passenger on Gandy Street close to the scene of the

---

284. FED. R. EVID. 801(c).

285. FED. R. EVID. 801(d)(2)(a).

286. If the passenger testified for the plaintiff that the defendant was speeding, the tweet would not be admissible through current Rule 801(d)(1)(B) unless the defendant charged the passenger with an improper motive or recent fabrication. FED. R. EVID. 801(d)(1)(B).

287. See FED. R. EVID. 804(a)(4).

288. See *About the Tweet Location Feature*, *supra* note 163 (describing how to “selectively add location information to your Tweets”).

accident at the time of the tweet, which would further solidify the timing and personal knowledge requirements.

While fairness and reliability clearly weigh in favor of admitting this tweet for its truth to resolve a disputed issue at trial, a percipient witness amendment to the present sense impression exception would eliminate its use absent a witness who could corroborate passenger's tweet about the speed of the Rover. As the defendant driver would be the only likely available percipient witness, such corroboration seems unrealistic. This is but one example of the ways in which e-hearsay may benefit the trial process by providing juries with new sources of information to resolve factual conflicts. One could argue that it would be better to call the passenger to testify at trial to report his observation of the black Land Rover to the jury subject to cross-examination than to rely on this e-present sense impression to help resolve a critical issue. As illustrated above, circumstances will certainly arise where live testimony is either unattainable or inferior to the contemporaneous observation.

To be sure, information admitted at trial to aid the truth-seeking process must be sufficiently reliable to generate superior results.<sup>289</sup> Therefore, the use of the present sense impression exception to admit similar Facebook and Twitter e-hearsay must be accompanied by some guarantee of trustworthiness. As discussed above, trial judges carefully scrutinize the requirements of the present sense impression and have demonstrated a will to exclude hearsay that fails on any score.<sup>290</sup> Therefore, e-hearsay admitted as a present sense impression under the existing regime enjoys sufficient freedom from concerns of memory and reliability to justify its use by the fact-finder. That is not to say that all e-present sense impressions on Facebook or Twitter are inherently reliable or that the existing present sense impression exception could not admit some that are potentially flawed. For example, although the passenger in the earlier example had personal knowledge of the general speed at which he was traveling, he may not have carefully noted the speed of the vehicle in which he was riding before tweeting. In tweeting "about to take FLIGHT," the passenger may not have been describing the speed of the vehicle at all—perhaps he was simply expressing his appreciation for the look or ride of the vehicle in Twitter jargon. The defendant's trial counsel can and should make all of these arguments in response to the admission of the tweet. The jury is free to consider all of these

---

289. See Seigel, *supra* note 243, at 904 (noting that "misinformation can be worse than no information at all").

290. See *supra* Part I.D.

potential flaws of the e-hearsay and decide how much weight to give a tweet in assigning fault in the case. Eliminating the tweet from the consideration of the fact-finder altogether, however, deprives the trial process of potentially helpful information.<sup>291</sup>

This debate reflects the age-old discussion as to whether a particular evidentiary concern should determine the admissibility of an item of evidence or whether the concern should affect only the weight given the evidence by the fact-finder.<sup>292</sup> Although commentators have long criticized jurors' abilities to discount or ignore evidence of questionable reliability, much contemporary analysis suggests that jurors may be more perceptive in this regard than previously believed.<sup>293</sup> In light of the benefits of more, rather than less information, to the trial process and the recognition that jurors are capable of divining evidentiary weakness with the aid of skilled legal advocacy, other areas of evidence doctrine have evolved to allow the fact-finder access to information despite its potential imperfections.<sup>294</sup> Rather than amending evidentiary rules to foreclose access to electronically preserved information, therefore, rule-makers should consider the positive impact such additional evidence may have on the trial process.

*D. Amending the Present Sense Impression: Alternative Proposals*

For the reasons explored above, a revision of the present sense

---

291. See Seigel, *supra* note 243, at 900–01 (“[T]he accuracy of an inductively reasoned conclusion is highly dependent on the amount of information upon which it is based.”).

292. Indeed, this debate surfaced in the Supreme Court's most recent Sixth Amendment case dealing with hearsay and confrontation rights. See *Williams v. Illinois*, 132 S. Ct. 2221, 2265 (2012) (Kagan, J., dissenting) (reflecting disagreement among Justices as to whether expert witness' reliance on hearsay information affects weight or admissibility of expert testimony).

293. See *People v. Hendrickson*, 586 N.W.2d 906, 914 (Mich. 1998) (Boyle, J., concurring) (“[T]he consequence of such an unfounded and unnecessary requirement [of extrinsic corroboration of a present sense impression] is that many trustworthy statements would be excluded simply out of adherence to a formula premised on an unfounded distrust of the finder of fact.”); see also Mueller, *supra* note 243, at 374 (describing how today's well-educated jurors are “far more discerning than the simple tests courts apply in excluding hearsay”).

294. For example, common law prohibitions on the admission of interested party testimony were abolished in the Federal Rules of Evidence. FED. R. EVID. 601 & advisory committee's note. Rather than exclude relevant testimony by interested parties or convicted felons, the Federal Rules of Evidence elected to permit such testimony freely, but to allow counsel to impeach testimony by such witnesses—it is up to the jury to weigh the credibility of such witnesses and determine whether to accept and reject such testimony. Rather than exclude relevant information that could be helpful in resolving a dispute due to reliability concerns, the Federal Rules of Evidence chose to allow the evidence and let the jury utilize lay experience with human nature in deciding how much weight to give such self-serving testimony.

impression exception appears to be ill-advised and, at least, premature. To the extent that concerns mount regarding the improvident admission of social-media e-hearsay, however, an amendment to the exception that controls for reliability concerns, while maintaining the utility of the exception, would be superior to a percipient witness requirement. Four possible alternatives, which represent revisions that bring increasingly dramatic change to the operation of the present sense impression exception, follow.

1. *Making personal knowledge express*

Although the personal knowledge of the declarant is currently required for admission of hearsay through the present sense impression exception, the personal knowledge requirement is not expressly enumerated in the text of Rule 803(1).<sup>295</sup> One way to emphasize this guarantor of reliability for trial judges utilizing the exception is to list the personal knowledge requirement directly in the text of Rule 803. The recently re-styled Federal Rules of Evidence make liberal use of a bullet point format in an effort to make interpretation and application of the rules more readily accessible.<sup>296</sup> The drafters could adopt a bullet-point format for Rule 803(1) that makes the personal knowledge requirement overt and express. For example, the amended Rule 803(1) could read:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.*

A statement describing or explaining an event or condition

Made by a declarant with personal knowledge of the event or condition

Made while or immediately after the declarant perceived it.

Bringing the silent personal knowledge requirement into the body of the rule could reinforce its importance and ensure that trial judges give adequate consideration to the existing information supporting the declarant's first-hand knowledge before admitting a present sense impression.

As discussed above, however, amending any single hearsay exception in isolation threatens unintended collateral consequences

---

295. See FED. R. EVID. 803(1) (requiring personal knowledge of hearsay declarants).

296. See FED. R. EVID. 101 advisory committee's note ("Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists.").

for others. Adding an express personal knowledge requirement within Rule 803(1) only could create negative implications for other rules—litigants and trial judges could perceive that the drafters of the rules only intended a personal knowledge requirement where one was expressly enumerated. Thus, it would be necessary to amend all Rule 803 exceptions to reflect the remaining personal knowledge requirement to protect against this statutory construction. From an efficiency standpoint, the amendment could be made to the Rule 803 preamble to express a personal knowledge requirement applicable to all provisions. What this would add in efficiency, however, it might sacrifice in efficacy. The emphasis on the personal knowledge requirement as it applies to the present sense impression could be lost by its placement in the generally applicable preamble. In addition, the placement of any such personal knowledge requirement within the preamble would need to be drafted to reflect Rule 803 hearsay exceptions with relaxed or distinct personal knowledge requirements, like the business records exception.<sup>297</sup>

2. *Eliminating “bootstrapping” once and for all*

To the extent that trial judges begin indiscriminately admitting social media e-hearsay, there are other alternatives to a percipient witness requirement that could bolster the reliability of present sense impressions. The Advisory Committee for the Federal Rules of Evidence could consider adding an “independent evidence” requirement to Federal Rule of Evidence 802.

As discussed above, Rule 104(a) requires a trial judge to decide “preliminary questions” concerning the admissibility of evidence.<sup>298</sup> According to the United States Supreme Court, a trial judge must find such requirements by a preponderance of the evidence.<sup>299</sup> The requirements of the hearsay exceptions constitute such preliminary questions. As discussed in Part I, such a preponderance standard within Rule 104(a) arguably forecloses use of a hearsay statement alone to fulfill the threshold requirements for its own admissibility.<sup>300</sup> Some information independent of the hearsay statement must lend support to those threshold requirements before a preponderance standard can be satisfied. Indeed, the Federal Rules of Evidence specifically require independent evidence to support the existence of

---

297. See FED. R. EVID. 803(6) (requiring source with personal knowledge, but allowing declarants in hearsay chain without such knowledge).

298. FED. R. EVID. 104(a).

299. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

300. See *supra* Part I.D.2.

the requisite relationship or conspiracy necessary to support admissibility of hearsay statements by speaking agents, employees, or co-conspirators under Federal Rule of Evidence 801(d)(2).<sup>301</sup>

To the extent that trial judges begin allowing texts, tweets, or status updates to serve as the only evidence of the event in question, the timing of the statement, and the personal knowledge of the declarant, the Advisory Committee could consider adding the independent evidence requirement that currently appears in Rule 801(d)(2) to the present sense impression exception.<sup>302</sup> That independent evidence requirement provides some guarantee of the innate fairness of admitting employee and co-conspirator hearsay against a party through verification of the relationship between the declarant and the party.<sup>303</sup> Although the Rule 803 exceptions to the rule against hearsay are premised upon reliability rather than innate fairness, reliability concerns about e-present sense impressions and other e-hearsay could be addressed through a similar requirement.

Such an amendment would require the trial judge to find some independent evidence, apart from the e-hearsay statement itself to demonstrate the declarant's personal knowledge of the described event or condition, as well as the contemporaneity of the statement. This amendment would prevent the admission of wholly uncorroborated tweets and Facebook posts like the mischievous fictional tweet that could have incriminated Sir Walter Raleigh.<sup>304</sup> Without some independent evidence suggesting that Lord Cobham and Sir Walter Raleigh were together at the time of the tweet, the tweet could not qualify as a present sense impression.<sup>305</sup> Although this would not require a "percipient witness" who could verify the content of any conversation between the two, it would, at least, require some independent evidence placing Lord Cobham with Sir Walter Raleigh at the critical time to demonstrate Lord Cobham's personal knowledge of a conversation between the two and the timing of the tweet while the conversation was ongoing. Applying

---

301. FED. R. EVID. 801(d)(2).

302. *Id.*

303. *See supra* Part I.D.2 (describing how the independent evidence requirement prevents hearsay statements alone from being used to support their own admissibility in the Rule 801(d)(2) context).

304. *See supra* notes 88–90 and accompanying text.

305. If this hearsay statement were offered against Sir Walter Raleigh at a criminal trial, it would, of course, also have to satisfy the mandate of *Crawford v. Washington*, as well as the hearsay rules. It remains to be seen whether tweets could ever be considered testimonial given the absence of any official law enforcement nexus with this mode of communication. *But cf.* Hossain, *supra* note 56 (describing "CrimePush" as new app available on iTunes to report ongoing crime with the push of a button).

this proposal to the hypothetical wrongful death case involving the black Land Rover above, the proponent of the tweet would have to provide the trial judge with some independent evidence—apart from the tweet itself—to establish the passenger’s personal knowledge and observation of the vehicle at the time of the tweet in order to admit it through the present sense impression exception.

The addition of an independent evidence requirement has several advantages over a percipient witness requirement. As provided by Rule 104(a), evidence need not be admissible at trial to aid the trial judge in assessing threshold requirements of admissibility.<sup>306</sup> Therefore, an independent evidence requirement would allow a trial judge flexibility with respect to the information utilized to establish the event at issue, the timing of the statement, and the declarant’s personal knowledge. It would enhance reliability without the rigidity of a percipient witness requirement that threatens to undermine the utility of the present sense impression in cases where such a witness is unavailable or nonexistent. Although independent evidence would be required by the rule, it would be up to the trial judge to determine the appropriate quantum of independent evidence to satisfy the threshold present sense impression requirements. Finally, this independent evidence requirement is an existing feature of the Federal Rules of Evidence, with which trial and appellate judges have experience that can be brought to bear. Rather than introducing a previously non-existent percipient witness requirement that will embroil litigants and trial judges in complex problems of interpretation with no useful precedent to guide them, the recognized independent evidence requirement could be utilized in the context of the present sense impression.

Drafting such an express independent evidence requirement would have to be done with care due to the application of the doctrine outside the limited context of the present sense impression.<sup>307</sup> Perhaps, a revision could be crafted to apply an independent evidence requirement throughout Article Eight, capturing all hearsay exceptions raising bootstrapping concerns. Although there are multiple possibilities for the placement of such an amendment, Federal Rule of Evidence 802 seems to represent the best location for a broadly applicable independent evidence requirement.<sup>308</sup> Federal Rule of Evidence 802 currently reads: “Hearsay is not admissible unless any of the following provides

---

306. FED. R. EVID. 104(a).

307. See *supra* Part III.B (discussing problems with single exception amendments).

308. FED. R. EVID. 802.

otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.”<sup>309</sup> A second sentence could be added to Rule 802, providing that:

In evaluating the admissibility of hearsay, as defined by Rule 801(c), under these rules, the contents of the hearsay statement shall be considered, but are not alone sufficient to establish the requirements for admissibility.<sup>310</sup>

This amendment would create an independent evidence requirement in the application of all hearsay exceptions within Article Eight and could ensure that trial judges do not indiscriminately admit wholly uncorroborated social media e-hearsay without some independent foundation.

### 3. *Taking a cue from Rule 804(b)(3)*

The present sense impression is not the only hearsay exception to raise concerns about reliability. Federal Rule of Evidence 804(b)(3) allows hearsay statements that are contrary to an unavailable declarant’s interest to be used substantively in a case.<sup>311</sup> Although not admissible at common law, declarations against a declarant’s penal interest or those that may subject the speaker to criminal liability are admissible under Rule 804(b)(3).<sup>312</sup> Such declarations against penal interest were not admissible at common law out of fear that criminal defendants would concoct hearsay statements by third parties accepting responsibility for their crimes.<sup>313</sup> In permitting such hearsay statements through Rule 804(b)(3), drafters of the rule accounted for this continuing concern with a requirement that such statements were not admissible unless “corroborating circumstances [] clearly indicate[d] [the] trustworthiness [of the statement].”<sup>314</sup> This hearsay exception was recently amended to make this limitation applicable to such declarations against interest offered by the

---

309. *Id.*

310. One potential drafting difficulty would arise from the designation of prior statements of testifying witnesses and admissions under Rules 801(d)(1) and (2) as “not hearsay.” Including the modifier “as defined by Rule 801(c)” could serve to signal that even those statements would be covered by the Rule 802 independent evidence requirement because statements allowed in through 801(d)(1) and (2) fall within the definition of hearsay provided by Rule 801(c).

311. FED. R. EVID. 804(b)(3).

312. *Id.*

313. *Id.*; see also FED. R. EVID. 804 advisory committee’s note (“The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic . . .”).

314. FED. R. EVID. 804(b)(3).

prosecution, as well as the accused in a criminal case.<sup>315</sup>

Adding a similar requirement of clear corroboration to Rule 803(1) represents another alternative to a percipient witness requirement. This amendment would reflect a significant change in the existing requirements for admissibility of a present sense impression and would certainly call for exclusion of present sense impressions admissible under the previous two proposals. While an amendment requiring clear corroboration would be more stringent than existing requirements, it would still allow for more flexibility than a rigid percipient witness requirement.<sup>316</sup> A trial judge would have to find strong corroboration of a present sense impression before admitting it, but would be able to draw such corroboration from multiple sources and would not be limited to verification by a percipient trial witness.<sup>317</sup> Like the independent evidence requirement explored above, the clear corroboration requirement already exists within the framework of the Federal Rules of Evidence.<sup>318</sup> Because trial judges and litigants have experience applying this requirement in the context of Rule 804(b)(3), this standard could be applied to the present sense impression with ease.

This amendment might foreclose admissibility of Lord Cobham's tweet, absent any corroboration of the content of the conversation between Lord Cobham and Sir Walter Raleigh.<sup>319</sup> It would still allow the admission of the tweet by the Land Rover passenger in light of the subsequent collision involving that vehicle and the passenger's obvious personal knowledge of the speed of the vehicle in which he was riding.<sup>320</sup> Importantly, it would also likely allow text messages like the one admitted in the *Damper* case, where the defendant admitted shooting the victim and corroborated some discussion or

---

315. *Id.*; FED. R. EVID. 804 advisory committee's note ("Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases.").

316. Professor Bellin rejects the utility of a corroboration amendment to the present sense impression because it leaves courts "free to accept virtually anything as corroboration." *See Bellin, supra* note 6, at 367 (discussing New York's approach to present sense impressions).

317. *See* 4 MUELLER & KIRKPATRICK, *supra* note 19, § 8:131, at 200 ("[T]he requirement is satisfied by independent evidence that directly or circumstantially tends to prove the same points for which the statement is offered.").

318. FED. R. EVID. 804(b)(3)(B) advisory committee's notes ("The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.").

319. *See supra* Part I.D.2.

320. *See supra* text accompanying note 286 (stating that the admission of a passenger's tweet to prove the driver was speeding would require a hearsay exception).

disagreement with the victim that caused him to reach for his gun.<sup>321</sup>

#### 4. *Moving the present sense impression to Rule 804*

Another alternative for the amendment of the present sense impression exception to protect against the indiscriminate admission of e-hearsay would be to transfer the present sense impression exception to Federal Rule of Evidence 804.<sup>322</sup> This transfer would permit the admission of present sense impressions only in the event that the declarant is unavailable to testify at trial.<sup>323</sup> The existing requirements of unavailability would control access to a present sense impression.<sup>324</sup> The current description of the present sense impression could be moved to Rule 804(b).<sup>325</sup>

This amendment would be consistent with the emphasis on the Best Evidence principle that has pervaded evidence scholarship.<sup>326</sup> It would ensure that litigants do not strategically utilize ambiguous and powerful e-hearsay in place of available live testimony that promises to supply the fact-finder with superior information about underlying events. If such live testimony could be had, a present sense impression exception within Rule 804(b) would not allow the hearsay.<sup>327</sup> When an available declarant testifies at trial regarding the events described by her present sense impression, she could, at least, be impeached with the statement to the extent that her testimony is inconsistent with the prior statement. To the extent that her trial testimony is consistent with the present sense impression, the witness could potentially be rehabilitated with the present sense impression following impeachment. Some present sense impressions may fit within the existing hearsay exception under Rule 801(d)(1)(B) for prior consistent statements where the declarant testifies.<sup>328</sup> Placing the present sense impression within Rule 804 would thus preserve the

---

321. *State v. Damper*, 225 P.3d 1148, 1152 (Ariz. Ct. App. 2010).

322. Although Professor Bellin briefly mentions this as a possible alternative to a percipient witness requirement, *see* Bellin, *supra* note 6, at 373, he rejects it in favor of a percipient witness amendment as the optimal fix for the present sense impression in the Twitter age, *id.* at 375.

323. *See* FED. R. EVID. 804(a) (listing several ways in which a witness can be considered unavailable).

324. *Id.*

325. Indeed, there is currently an available position within Rule 804(b)(5) where the present sense impression could fit. FED. R. EVID. 804(b)(5).

326. *See, e.g.,* Seigel, *supra* note 243, at 904 n.39 (“[T]he best evidence rule permits alternative evidence to be offered when the best evidence is unavailable.”).

327. FED. R. EVID. 804(a) (requiring unavailability of a declarant for purposes of the Rule 804 hearsay exceptions).

328. *See* FED. R. EVID. 801(d)(1)(B) (allowing for the substantive use of a prior consistent statement where the witness has been charged with recent fabrication or improper motive or influence).

strong preference for trial testimony over hearsay, without eliminating the present sense impression from consideration entirely.

Where such live testimony is truly unavailable within the meaning of Federal Rule of Evidence 804(a), however, the present sense impression could provide important information that would otherwise be lost to the trial process with a percipient witness amendment. Rather than *excluding* evidence *because* alternative evidence is inaccessible (a percipient witness), an unavailability requirement would *admit* evidence when it is most needed—when alternative information is unattainable. Indeed, an amendment that favors admissibility in the absence of alternative avenues of proof is more consistent with underlying values in the Federal Rules framework, like those found in the ubiquitous Rule 403.<sup>329</sup> The existing requirements for the admission of present sense impressions would provide adequate insurance that e-hearsay is free from the risks of faulty memory and mendacity to justify their admission when the declarant is unavailable.

This amendment would also foreclose use of the present sense impression of Lord Cobham, where he was famously available but not brought to confront Sir Walter Raleigh.<sup>330</sup> To the extent that the passenger in the hypothetical wrongful death scenario described above was alive and available to testify, his present sense impression would also be excluded, but could be used to impeach any testimony contrary to his tweet.<sup>331</sup> Importantly, in domestic violence cases and murder cases like *Damper*, where the victim is unavailable to testify, the present sense impression would not be lost to the trial process.<sup>332</sup>

Eliminating the present sense impression exception as it currently stands in Rule 803(1) and moving it to Rule 804 has significant drawbacks, however. One of the fundamental reasons for the existence of the present sense impression is the potential for such hearsay statements to provide information that is actually *superior* to live testimony.<sup>333</sup> Because the statements describe underlying events or conditions contemporaneously, they do not suffer from the problems of faulty or reconstructed memory that often plague trial

---

329. FED. R. EVID. 403.

330. See Bellin, *supra* note 6, at 336.

331. See *supra* text accompanying note 280 (presenting a scenario where a tweet about the traffic was admitted in wrongful death litigation).

332. See *State v. Damper*, 225 P.3d 1148, 1153 (Ariz. Ct. App. 2010) (authenticating a text message through the use of testimony and circumstantial evidence).

333. See *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2000) (emphasizing the importance of the caller “speaking about the events as they were actually happening, rather than describ[ing] past events” (internal citations omitted)).

testimony given months or years after the events in question. Further, the contemporaneous nature of the assertions and observations can sometimes alleviate possible changes in witness incentives that intervene between events at issue and the trial process. Allowing present sense impressions to be admitted only when the declarant is unavailable ignores their potential superiority over live testimony even when the declarant is available. Thus, although it is preferable to a percipient witness amendment, transferring the present sense impression exception to Rule 804 would result in a net loss of evidence available to resolve trial disputes.

#### CONCLUSION

It is, without doubt, the height of fashion to suggest changes to long-standing legal principles to adapt to contemporary communication norms. While vigilance is important to ensure that modern technology does not undermine traditional legal protections, not all doctrine is equally susceptible to transformation by the technological revolution. Because the hearsay doctrine has proved equal to the task of regulating human communication in all of its evolving formats, it represents one area that need not be overhauled to adjust to the contemporary culture of communication. Specifically, the present sense impression exception is capable of controlling admission of this emerging brand of e-hearsay. As described by this article, e-present sense impressions may add new value to the trial process. As such, proposals to undermine the exception by imposing a rigid percipient witness requirement should be viewed with caution. As the technological e-hearsay revolution races forward, we need not charge in to “do something,” but may safely elect to “stand” by and allow judges and litigants to adapt using existing evidentiary rules.