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## Article

### eHearsay

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#### INTRODUCTION

A new kind of evidence is making its way to America's courts. Social media posts and text messages are surfacing in trials across the country, and the cases so far represent just the tip of the technological iceberg.<sup>1</sup> The potential enormity of the emerging evidentiary phenomenon is apparent in the changing habits of our own lives. Many of us, particularly those under thirty, constantly transmit observations and impressions through text messages and social media sites, no matter where we are and what we are (supposed to be) doing.<sup>2</sup> As "smartphone" ownership expands and younger adults—who already average over 100 text messages *per day*—replace their less technologically savvy elders, this new reality will become even more pronounced.<sup>3</sup> Our world is becoming digital. Our trials must surely follow.<sup>4</sup>

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[Editor's Note: For further discussion of *eHearsay*, see Colin Miller, *No Explanation Required? A Reply to Jeffrey Bellin's eHearsay*, 98 MINN. L. REV. HEADNOTES (forthcoming November 2013), <http://www.minnesotalawreview.org/headnotes>.]

1. See, e.g., *infra* notes 12–13 (identifying recent cases involving electronic communication evidence).

2. See Aaron Smith, *Americans and Text Messaging*, PEW INTERNET & AM. LIFE PROJECT 2 (Sept. 19, 2011), <http://pewinternet.org/~media/Files/Reports/2011/Americans%20and%20Text%20Messaging.pdf>.

3. See *id.*; see also Maeve Duggan & Lee Rainie, *Cell Phone Activities 2012*, PEW INTERNET & AM. LIFE PROJECT 5 (Nov. 25, 2012), [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_CellActivities\\_11.25.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_CellActivities_11.25.pdf) (reporting survey results that show "[t]exting is nearly universal among young adults, ages 18–29" and "[t]he vast majority of cell phone owners send and re-

The trial of Dharun Ravi, whose electronic snooping became front-page news, may be a harbinger of things to come. Ravi's trial revolved around "a pixelated paper trail" of "Twitter feeds, Facebook posts, text messages, e-mails and other online chatter," including Ravi's roommate's chilling last Facebook status update: "Jumping off the gw bridge sorry."<sup>5</sup> Similar examples of electronic evidence appear in the news with regularity. In a span of a few weeks this past year: a Dallas woman sent out a series of tweets before her untimely death, stating that she had "a [s]talker" who had tried to kill her "3 times before,"<sup>6</sup> a telephone repairman texted a friend to "CALL . . . AN AMBULANCE" since he had been "attacked wi[t]h a flat crowbar" and had his "head split open,"<sup>7</sup> an American diplomat killed in a terrorist attack in Libya transmitted an online chat message shortly before his death, prophetically stating: "[A]ssuming we don't die tonight. We saw one of our 'police'

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ceive text messages" with "the exception of mobile phone owners 65 and older"); *infra* Part I.A (discussing statistics for text messaging and social media usage).

4. See JOSHUA BRIONES & ANA TAGVORYAN, *SOCIAL MEDIA AS EVIDENCE* 5 (2013) ("There is . . . little question that litigation will regularly involve social media data as evidence."); Nicole D. Galli et al., *Litigation Considerations Involving Social Media*, 81 PA. B. ASS'N Q. 59, 59 (2010) ("Litigators today ignore social media outlets at their peril: jurors, judges, witnesses, clients and opponents all use social media, and so too must the savvy litigator . . ."); Scott R. Grubman & Robert H. Snyder, *Web 2.0 Crashes Through the Courthouse Door: Legal and Ethical Issues Related to the Discoverability and Admissibility of Social Networking Evidence*, 37 RUTGERS COMPUTER & TECH. L.J. 156, 203 (2011) ("[G]iven the explosion of social networking usage, an attorney may be violating their ethical duty by failing to investigate the case fully by searching for relevant online information."); Aviva Orenstein, *Friends, Gangbangers, Custody Disputants, Lend Me Your Passwords*, 31 MISS. C. L. REV. 185, 192 (2012) ("Increasingly, evidentiary issues concerning the admission of social media arise in both civil and criminal cases.").

5. David M. Halbfinger & Beth Kormanik, *In Digital Record, Jurors Say, They Found Reasons to Convict*, N.Y. TIMES, Mar. 17, 2012, at A18. In the text message, "gw" refers to the George Washington Bridge in New York City. *Id.*

6. Scott Goldstein, *In Final Tweets, Murdered Dallas Woman Said She Had Stalker, Received Death Threat*, DALL. MORNING NEWS CRIME BLOG (Aug. 21, 2012, 12:48 PM), <http://crimeblog.dallasnews.com/2012/08/in-final-tweets-murdered-dallas-woman-said-she-had-stalker-received-death-threat.html> (reporting final tweets of murdered woman that included the following: "Now Dude say He Gone KILL me. Wouldn't be so bad if he ain't tried 3 times before").

7. Andy Campbell, *AT&T Worker, Sends Haunting Texts Before Alleged Murder*, HUFFINGTON POST (Sept. 26, 2012, 1:33 PM), [http://www.huffingtonpost.com/2012/09/26/kevin-mashburn-att-worker-texts-murder-bryan-middlemas\\_n\\_1916515.html](http://www.huffingtonpost.com/2012/09/26/kevin-mashburn-att-worker-texts-murder-bryan-middlemas_n_1916515.html).

that guard the compound taking pictures.”<sup>8</sup> These examples are not anomalies; they represent an increasingly prevalent form of proof.<sup>9</sup>

Yet whether juries will, in fact, have access to the digital artifacts of litigated controversies remains an open question. Out-of-court statements offered to prove what they assert, even if uttered by a testifying witness, are “hearsay” in American courts and consequently admissible only through a hearsay exception.<sup>10</sup> Exceptions are legion, but each one is limited in scope.<sup>11</sup> As a result, many electronic utterances—like out-of-court statements generally—will fail to find any conduit for admissibility.<sup>12</sup> Venerable hearsay exceptions will, of course, accommodate some electronic communications, but when they do it will be a product of happenstance, rather than foresight.<sup>13</sup>

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8. Matt Smith, *Ex-SEALs, Online Gaming Maven Among Benghazi Dead*, CNN.COM (Sept. 13, 2012, 8:53 PM), <http://www.cnn.com/2012/09/13/us/benghazi-victims>.

9. See Grubman & Snyder, *supra* note 4, at 222 (“The explosive growth of social networking has already had an impact on the legal world, and the importance of social networking evidence will only increase as a larger percentage of the population becomes active online.”).

10. FED. R. EVID. 801–04.

11. See, e.g., FED. R. EVID. 803–04; *Chambers v. Mississippi*, 410 U.S. 284, 298–99 (1973).

12. See CAL. LAW REVISION COMM’N, TENTATIVE RECOMMENDATION AND STUDY RELATING TO UNIFORM RULES OF EVIDENCE: ARTICLE VIII: HEARSAY EVIDENCE 460 (1962) (“[M]uch, probably most, of what those now dead or otherwise unavailable once said or wrote cannot be considered in court, however much a litigant may need to have it considered to establish his claim or his defense.”). For examples in the present context, see *Versata Software Inc. v. Internet Brands*, No. 2:08-CV-313-WCB, 2012 WL 2595275, at \*1, \*9 (E.D. Tex. July 5, 2012) (excluding an email documenting a meeting whose “substance . . . was an important issue during the trial,” while acknowledging that the analysis “may appear to have a hypertechnical flavor to it”); *Gulley v. State*, 2012 Ark. 368, at 7 (2012) (recounting trial court ruling excluding murder victim’s texts to defendant as hearsay); cf. *Witt v. Franklin Cnty. Bd. of Educ.*, No. CV-11-S-1031-NW, 2013 WL 832152, at \*1 (N.D. Ala. Feb. 28, 2013) (noting that “Facebook messages” offered by plaintiffs in employment discrimination lawsuit “are classic hearsay”). Commentators debate the real world impact of the hearsay prohibition. See, e.g., Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 504 (1992). There is evidence to support the view of most practitioners that courts take the hearsay rule seriously and routinely exclude evidence in response to its perceived dictates. *Id.* at 501, 504 (concluding based on survey of published federal court opinions that the hearsay “rule is not being abolished de facto” and reporting results of survey of 169 prosecutors that show judges take the hearsay rule seriously); Sklansky, *infra* note 78, at 13 (noting that despite a proliferation of exceptions, “the rule still can show its teeth”).

13. See Grubman & Snyder, *supra* note 4, at 213–17 (discussing various

After all, the drafters of the evidence rules never contemplated digital communication.<sup>14</sup> Consequently, even if courts get the pertinent doctrinal analogies “right” (for example, is a search on “WebMD” analogous to an oral consultation with a family doctor?), there is no guarantee that those answers will sensibly separate electronic statements that should be admissible at trial from those that should not.

Fortunately, judicial manipulation of existing doctrine is not the only way to address the looming wave of electronic evidence. Although they tend to ossify, evidence rules are not set in stone.<sup>15</sup> The rules can change, and in this context, the prospects for change are real. The Advisory Committee on the Federal Rules of Evidence, charged with a “continuous study” of the rules in operation, has already signaled interest in the incipient academic debate regarding whether “the intersection of the evidence rules and emerging [communication] technologies” necessitates changes.<sup>16</sup> Even without federal action, states

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hearsay exceptions that might apply to social media evidence). Most commonly, electronic utterances of a party will be admissible if offered by the opposing party. See FED. R. EVID. 801(d)(2); see also, e.g., *United States v. Harry*, No. CR10-1915-JB, 2013 WL 684646, at \*30 n.24 (D.N.M. Feb. 19, 2013) (denying motion to suppress text messages sent by defendant responding to questions from friends about what happened on night of alleged sexual assault and noting that the messages constituted statements of a party).

14. See Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 341–43 (2012) (exploring outdated assumptions of drafters of present sense impression hearsay exception).

15. See 28 U.S.C. § 2072 (2012) (procedure for amending rules); FED. R. EVID. 1102 (same). See generally Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678, 686 (2000) (describing tenure of the Advisory Committee on the Rules of Evidence and criticizing the Committee’s relative inactivity in amending the rules). The Federal Rules of Evidence were recently revised solely to improve their style. See *United States v. Darden*, 688 F.3d 382, 385 n.2 (8th Cir. 2012).

16. Meeting Minutes, Federal Advisory Committee on Evidence Rules 13 (Oct. 5, 2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2012-10.pdf> (reporting that the members of the Committee “expressed strong support” for holding a “symposium in the [f]all of 2013 to consider the intersection of the evidence rules and emerging technologies” and citing Bellin, *supra* note 14, and Richter, *infra* note 65, for opposing views on the need for changes to federal hearsay rules); see Rice & Delker, *supra* note 15, at 686; COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE (1998), reprinted in 181 F.R.D. 18, 162–67 (1998) (describing responsibilities of the Committee).

could take the lead by amending their own evidence rules, spurring other jurisdictions to follow suit.<sup>17</sup>

With respect to the form that change should take, electronic hearsay presents a particularly appealing target for the familiar arguments in favor of easing the hearsay prohibition. Evidence rules exclude hearsay primarily because of fears of unreliability.<sup>18</sup> Statements broadcast on social media or via text messaging, however, are often quite reliable because they are (1) uttered while events are unfolding and so reflect participants' perceptions prior to the distorting effects of litigation (and time), and (2) preserved in precisely the form in which they were uttered.<sup>19</sup> If a proper framework for admitting such evidence over a hearsay objection can be constructed, juries could have access to a bounty of information that, more often than not, would advance the search for truth—a worthy goal.<sup>20</sup> Thus, changing communication practices present not just a challenge to existing legal doctrine, but also an opportunity. Scholars, judges, and policymakers can seize this “evidentiary

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17. Cf. Kathrine Minotti, *The Advent of Digital Diaries: Implications of Social Networking Websites for the Legal Profession*, 60 S.C. L. REV. 1057, 1074 (2009) (“In a world where hundreds of millions of people are actively using social networking web sites, ignoring this evidence places an impediment on the search for truth. States should . . . be proactive in accommodating this innovative evidence outlet.”).

18. See *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973) (“The hearsay rule . . . is . . . grounded in the notion that untrustworthy evidence should not be presented to the triers of fact.”); Edward J. Imwinkelried, *The Need to Resurrect the Present Sense Impression Hearsay Exception: A Relapse in Hearsay Policy*, 52 HOW. L.J. 319, 321–23 (2009) (chronicling hearsay dangers of “insincerity” and “misrecollection,” with the former being the primary concern of the common law and the latter an increasing focus of modern commentary); Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974) (discussing “testimonial infirmities” of hearsay: “ambiguity, insincerity, faulty perception, and erroneous memory”).

19. See *infra* note 41 (describing the use of mobile devices to provide real-time updates via social media outlets).

20. See *infra* Part I; cf. Michael Ariens, *A Short History of Hearsay Reform, with Particular Reference to Hoffman v. Palmer, Eddie Morgan and Jerry Frank*, 28 IND. L. REV. 183, 187 (1995) (recognizing that rules of evidence are traditionally “based on the premise that the trier of fact (usually a jury) was to hear evidence which allowed it to determine what really happened”); Mike Redmayne, *Rationality, Naturalism, and Evidence Law*, 2003 MICH. ST. L. REV. 849, 849 (“Evidence rules have many functions, but one important function, and therefore target of evaluation, is making accurate judgments about the facts of cases.”); Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 344–46 (1961) (summarizing scholarly criticism of hearsay rules based on their tendency to exclude evidence with significant probative value).

moment”<sup>21</sup> to advance a long-stalled agenda: reducing the much-criticized overbreadth of the hearsay prohibition in American courts.<sup>22</sup>

To take advantage of the opportunity presented by the emergence of the new electronic communication norm, this Article proposes a concrete change to existing evidence law: a novel “eHearsay” exception. The exception is designed to provide factfinders with access to a large swath of electronic evidence, while screening out the least reliable electronic statements for continued exclusion.<sup>23</sup> The Article makes the case for the exception in four parts. Part I describes the changing communication norm that invites revision of America’s evidence rules, and particularly its outdated hearsay framework. Part II discusses previous hearsay reform proposals that culminated in the “Statement of Recent Perception” (SRP) exception, an exception ultimately rejected by Congress in 1973.<sup>24</sup> As Part III explains, the SRP exception provides an ideal framework for a new hearsay exception specifically tailored to the admission of reliable electronic utterances. Part III also fleshes out the precise contours of the proposed “eSRP” or “eHearsay” exception—a variant of the original SRP exception updated for the digital era and fortified by a requirement that qualifying statements be “recorded.” Finally, Part IV discusses the implications of the new hearsay exception.

By adopting a hearsay exception like the one proposed here, judges and legislators would open the courts to terabytes

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21. The quoted phrase borrows from the concept of “constitutional moments”—times when events outside the legal system set the stage for substantial changes in the law. See, e.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

22. For criticism of the American hearsay prohibition, see *infra*, Part II. See also Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 373–84 (1992) (summarizing criticism of hearsay rules and separating “modern” from “post-modern” critiques). Other major legal systems “manage well” without a hearsay prohibition. Weinstein, *supra* note 20, at 347 (discussing European legal systems, arbitration, and administrative law tribunals); *id.* at 344–46 (criticizing hearsay prohibition while noting “surprising agreement” among scholars that the prohibition sweeps too broadly).

23. The proposal builds on my previous work, which argues at a more micro level that existing evidence doctrine is ill-tailored to the admission (or exclusion) of eHearsay. See Bellin, *supra* note 14, at 373 n.151 (raising the possibility that a “new electronic-communication hearsay exception” could address changing communication norms).

24. See *infra* note 102 and accompanying text (explaining rejection of proposed Rule 804(b)(2)).

of electronic evidence and, at the same time, considerably weaken the long-criticized American hearsay prohibition. The general principle behind the proposal is that more information leads to more truth.<sup>25</sup> Evidence rules often push against this principle, but when they do, strong justifications are required.<sup>26</sup> This Article applies that straightforward sentiment to reach a controversial conclusion: changes in culture and technology have led to the creation of a vast, new subset of recorded out-of-court statements that, while excluded by current evidence doctrine, cannot justifiably be kept from juries.

## I. THE NEW COMMUNICATION NORM

The analysis begins with a description of the new electronic communication norm. Any policy prescription for addressing this norm depends on an accurate understanding of what the norm entails. After describing the new norm, this Part explains why—contrary to the initial sentiments of the evidence community<sup>27</sup>—its emergence necessitates changes in existing evidence doctrine.

### A. THE SUBSTANCE OF THE NEW NORM

A new age of electronic communication is dawning.<sup>28</sup> Instant messages, email, “status updates,” “tweets,” and text messages are steadily replacing water cooler gossip, handwrit-

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25. Cf. Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 922 (1995) (arguing in a related context that “one can simultaneously reduce both false negatives and false positives only by bringing more information into a system” and that “[o]ur current system throws out too much information”).

26. See, e.g., FED. R. EVID. 403–11; *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (discussing evidentiary privileges, but emphasizing the general rule disfavoring them because “the public . . . has a right to every man’s evidence” (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950))).

27. See *infra* note 65.

28. See ERIK QUALMAN, *SOCIALNOMICS: HOW SOCIAL MEDIA TRANSFORMS THE WAY WE LIVE AND DO BUSINESS*, at xxi (rev. ed. 2011) (“[W]e are in the early stages of . . . [a] far-reaching revolution [that is] being driven by people and enabled by social media.”); Wesley MacNeil Oliver, *Western Union, the American Federation of Labor, Google, and the Changing Face of Privacy Advocates*, 81 MISS. L.J. 971, 986 (2012) (recognizing societal movement “from telephones to cell phones, e-mails, texts, and instant messages” and a future where “text messaging replaces cell phone calls”). A similar description of the new communication norm and its potential to create admissible evidence appears in my recent articles. Jeffrey Bellin, *Applying Crawford’s Confrontation Right in a Digital Age*, 45 TEX. TECH. L. REV. 33, 35–37 (2012); Bellin, *supra* note 14, at 350–57.

ten letters, phone calls, and voicemail.<sup>29</sup> The ascendance of electronic communication is propelled by two forces: the increasing prevalence of handheld wireless devices, and the astonishing popularity of “social media” Internet sites.

The primary driver of the new communication norm is the ubiquity of handheld wireless devices capable of real-time electronic communication. Paul Ohm describes this development as “the rise of the ‘one device,’ the convergence of a person’s computing needs into a single, portable, high-powered machine, equipped with an always-on, high-speed connection to the Internet, and outfitted with dozens of sensors, including [cameras], a microphone, a GPS chip, and a digital compass.”<sup>30</sup> For now, the most ubiquitous form of the “one device” is the cell phone. Once a novelty, cell phones have become the norm, but *talking* on the phone is increasingly passé. The vast majority (83%) of American adults own cell phones, and almost three-quarters of them (73%) use their phones for “text messaging”<sup>31</sup>—the practice of typing and transmitting short blocks of text directly to specified recipients. Most basically, texters communicate their plans, estimated arrivals, and unanticipated delays to friends, family, and acquaintances.<sup>32</sup> More avid us-

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29. See Larry D. Rosen et al., *The Relationship Between “Textisms” and Formal and Informal Writing Among Young Adults*, 37 COMM. RES. 420, 421 (2010) (discussing the prevalence of text messaging in American society); Katy Steinmetz, *The Grid Is Winning*, TIME, Aug. 27, 2012, at 41, 42 (explaining that in light of texting, phone calls are now “reserved for the most formal, familiar or time-sensitive communications”); Meghan Keane, *Texting Overtakes Voice in Mobile Phone Usage*, WIRED, Sept. 29, 2008, <http://www.wired.com/business/2008/09/texting-overtak> (reporting on Nielsen survey that found that “by the end of the second quarter of [2008], an average mobile phone subscriber placed or received 204 calls, compared with sending or receiving 357 text messages”).

30. Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1314–15 (2012); Nancy Gibbs, *Your Life Is Fully Mobile*, TIME Aug. 27, 2012, at 32 (“It is hard to think of any tool, any instrument, any object in history with which so many developed so close a relationship so quickly as we have with our [mobile] phones . . . . A typical smart[phone] has more computing power than Apollo 11 when it landed a man on the moon.”).

31. Aaron Smith, *Americans and Their Cell Phones*, PEW INTERNET & AM. LIFE PROJECT 2 (Aug. 15, 2011), <http://pewinternet.org/~media/Files/Reports/2011/Cell%20Phones%202011.pdf>; see also *United States v. Jones*, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring) (citing June 2011 report that “there were more than 322 million wireless devices in use in the United States”); *supra* notes 28–29.

32. See Nenagh Kemp, *Texting Versus Txtng: Reading and Writing Text Messages, and Links with Other Linguistic Skills*, 2 WRITING SYS. RES. 53, 63 (2010) (listing common texting abbreviations including “omw” for “on my way”); Leslie Seifert, *A ‘Linguistic Renaissance’*, NEWSDAY, June 22, 2008, at



ers keep up a near-constant dialogue with close friends and associates through rapid-fire text exchanges.<sup>33</sup> Usage patterns track demographics. Adults who text send or receive “an average of 41.5 messages on a typical day, with the median user sending or receiving 10 texts daily.”<sup>34</sup> Cell phone owners between the ages of 18 and 24 average 109.5 messages a day, an impressive work rate that adds up to *more than 3200 texts a month*.<sup>35</sup> As more Americans purchase so-called smartphones—gadgets of dazzling complexity that truly approximate Ohm’s “one device”—these averages will only increase. Smartphone users (including 45% of American adults and 66% of young adults) almost all send or receive text messages (92%); 59% use their smartphones to access social media sites.<sup>36</sup>

Social media sites like Facebook and Twitter constitute the second important driver of the new communication norm. These sites form the indispensable infrastructure for mass electronic communication, providing easy access to large audiences of electronic “friends” or “followers” through home computers and mobile devices.<sup>37</sup> Social media sites rely on their users for content. Without a steady stream of posts, sites like Facebook and Twitter would be empty shells, so “they are constantly trying to get more [content], inviting [users] to update, upload,

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A57 (reprinting a text conversation between two fourteen-year-olds commiserating about a recent test); *infra* notes 135–36.

33. Amanda Lenhart, *Teens, Smartphones and Texting*, PEW INTERNET & AM. LIFE PROJECT 10 (Mar. 19, 2012), [http://www.pewinternet.org/~media/Files/Reports/2012/PIP\\_Teens\\_Smartphones\\_and\\_Texting.pdf](http://www.pewinternet.org/~media/Files/Reports/2012/PIP_Teens_Smartphones_and_Texting.pdf) (“63% of all teens say they exchange text messages every day with people in their lives.”).

34. Aaron Smith, *Americans and Text Messaging*, PEW INTERNET & AM. LIFE PROJECT 2 (Sept. 19, 2011), <http://pewinternet.org/Reports/~media/Files/Reports/2011/Americans%20and%20Text%20Messaging.pdf> [hereinafter Smith, *Americans and Text Messaging*]; cf. Ohm, *supra* note 30, at 1314–15 (noting that text messaging “obsoleted the short phone call and passed note,” allowing “[s]tudents [to] gossip in class; spouses [to] trade grocery lists[,] and employers (and drug lords) [to] direct underlings”).

35. Smith, *Americans and Text Messaging*, *supra* note 34, at 2.

36. Lee Rainie, *Two-Thirds of Young Adults and Those with Higher Income Are Smartphone Owners*, PEW INTERNET & AM. LIFE PROJECT 2 (Sept. 11, 2012), [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_Smartphones\\_Sept12%209%2010%2012.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_Smartphones_Sept12%209%2010%2012.pdf) (“45% of American adults own smartphones,” including 66% of those aged 18 to 29 and 59% of those aged 30 to 49); see *Investor Relations*, FACEBOOK, <http://investor.fb.com/releasedetail.cfm?ReleaseID=780093> (last visited Oct. 13, 2013) (“Mobile [monthly active users] were 819 million as of June 30, 2013.”); Smith, *Americans and Text Messaging*, *supra* note 34, at 3; cf. Gibbs, *supra* note 30, at 32 (“Three-quarters of 25-to-29-year-olds sleep with their phones.”).

37. See *infra* note 43.

post and publish.”<sup>38</sup> Their efforts have been successful. Facebook boasts more than 1 billion “active users.”<sup>39</sup> Twitter reports a steadily increasing average of over 400 million daily tweets.<sup>40</sup> Both sites permit users to communicate their observations 24-hours-a-day, either from a stationary computer or a mobile device.<sup>41</sup> In the words of a New York judge ordering Twitter to comply with a prosecutor’s subpoena, these services have become “a significant method of communication for millions of people across the world.”<sup>42</sup>

Facebook’s primary feature—the “status update”—keeps users updated on the latest happenings in their friends’ lives. The updates range from milestones (“We are celebrating Steve’s 40th birthday today!”) to banalities (“Carey kept us up all night . . . again”). The Facebook audience typically comments on each update, and the poster responds, creating a mini-conversation to supplement every post.<sup>43</sup> Those not inclined to

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38. See MATT IVESTER, LOL . . . OMG 17–18 (Serra Knight 2011) (“[T]he average Facebook user posts 90 pieces of content on the site every month.”).

39. *NewsRoom*, FACEBOOK, <http://newsroom.fb.com/Key-Facts> (last visited Oct. 13, 2013).

40. See *Celebrating #Twitter7*, TWITTER BLOGS (Mar. 21, 2013, 7:42 AM), <http://blog.twitter.com/2013/03/celebrating-twitter7.html> (announcing that Twitter has “well over 200 million active users creating over 400 million Tweets each day”).

41. Free software applications enable broadcast (and receipt) of tweets and status updates from smartphones or other variants of the “one device.” *Facebook Mobile*, FACEBOOK, <http://www.facebook.com/mobile> (last visited Oct. 13, 2013) (offering a free download of the Facebook application for the iPhone and Android mobile devices); *Wherever You Are, Twitter Brings You Closer*, TWITTER, <http://twitter.com/download> (last visited Oct. 13, 2013) (showcasing the Twitter application available for download on several mobile devices); see also Virginia Heffernan, *The Medium: Being There*, N.Y. TIMES MAG., Feb. 10, 2009, at 15 (reporting that the capability of mobile devices to access social networking sites “has made it more likely that when a pal—the Jägermeister-besotted Sean, say—writes that he’s stumbling home, he *is* stumbling home, right then”).

42. *People v. Harris*, 945 N.Y.S.2d 505, 507 (N.Y. Crim. Ct. 2012).

43. See NORA YOUNG, *THE VIRTUAL SELF* 24 (2012) (“[W]e increasingly engage [in] auto-reportage, a continual ticker tape registering of how and where you are, and what you’re doing.”); Kirsty Young, *Social Ties, Social Networks and the Facebook Experience*, 9 INT’L J. EMERGING TECH. & SOC’Y 20, 24–26 (2011) (exploring adult Facebook use through surveys and reporting that users view the service as a free and easy way to communicate “with large numbers of people at one time”); Amanda Lenhart et al., *Teens, Kindness and Cruelty on Social Network Sites*, PEW INTERNET & AM. LIFE PROJECT 22 (Nov. 9, 2011), [http://www.pewinternet.org/~media/Files/Reports/2011/PIP\\_Teens\\_Kindness\\_Cruelty\\_SNS\\_Report\\_Nov\\_2011\\_FINAL\\_110711.pdf](http://www.pewinternet.org/~media/Files/Reports/2011/PIP_Teens_Kindness_Cruelty_SNS_Report_Nov_2011_FINAL_110711.pdf) (reporting that among teens, “chatting and instant messaging, commenting on their friends’ posts, and posting their own status updates” are the most common activities

verbosity can express approval by “liking” the update, or even one of the subsequent comments. Twitter users post “tweets”—140-character messages—to similar effect, with “retweets” as opposed to “likes” serving as the customary form of endorsement.<sup>44</sup> Among online adults,<sup>45</sup> two-thirds (66%) use “social media platforms” like Facebook and Twitter, generating “open running diaries” of their lives.<sup>46</sup>

#### B. THE NEED FOR NEW LEGAL DOCTRINE

The startling usage statistics described above understate the changes looming on the horizon. Skyrocketing usage rates among younger generations foreshadow a future where everybody uses social media and everybody texts.<sup>47</sup> Scholars in all manner of disciplines have begun to explore the implications of this new electronic communication norm.<sup>48</sup> Changes in communication patterns have significant societal implications, including possible consequences for social movements, journalism,

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on social media sites); Aaron Smith, *Why Americans Use Social Media*, PEW INTERNET & AM. LIFE PROJECT 2 (Nov. 14, 2011), <http://pewinternet.org/Reports/2011/Why-Americans-Use-Social-Media.aspx> (reporting that adults primarily use social media platforms to maintain “connections with family members and friends (both new and old)”); Murthy, *infra* note 44, at 780 (describing Facebook “status updates” as “short one- or two-line messages” that are often “trivially banal” but are “circulated as ‘news’” to “your group of ‘friends’ on the site”).

44. See Dhiraj Murthy, *Twitter: Microphone for the Masses?*, 33 MEDIA, CULTURE & SOC’Y 779, 781 (2011) (describing how Twitter works).

45. Seventy-eight percent of adults use the Internet, at least occasionally. Lee Rainie, *The Internet as a Diversion and Destination*, PEW INTERNET & AM. LIFE PROJECT 6 (Dec. 2, 2011), <http://pewinternet.org/Reports/2011/Internet-as-diversion/Report.aspx>.

46. QUALMAN, *supra* note 28, at 4; see Smith, *supra* note 43, at 2.; see also Oliver, *supra* note 28, at 988 (“With Facebook and Twitter, Americans themselves have grown accustomed, not necessarily to government eavesdropping, but to broadcasting virtually every detail of their lives to anyone who cares to surf the web.”).

47. For example, while 95% of eighteen- to twenty-nine-year-olds with cell phones text, the number drops to 24% for those over sixty-four-years-old. Smith, *Americans and Their Cell Phones*, *supra* note 31, at 6; see Clare Wood et al., *A Longitudinal Study of Children’s Text Messaging and Literacy Development*, 102 BRIT. J. PSYCHOL. 431, 431 (2011) (“Text messaging and the use of mobile phones are part of the everyday lives of young people.”); Lenhart et al., *supra* note 43, at 15 (“Internet use is nearly universal among American teens . . .”).

48. See sources cited *infra* note 49. Legal scholars have reacted to these and related technological changes in other areas, such as Fourth Amendment protections. See, e.g., Symposium, *The Fourth Amendment: Views of the Future*, 81 MISS. L.J. 895 (2012) (featuring thirteen articles about how the Fourth Amendment should adapt to changes in technology).

elections, and the physical and mental development of a younger generation immersed in the digital medium.<sup>49</sup> The implications for courts may be equally profound.<sup>50</sup>

The evidentiary treatment of electronic communications is critically important not just because these communications are suddenly ubiquitous, but also because they are well suited to use in litigation. Electronic communications are both unusually public and surprisingly durable, a combination that means they will be easy for litigators to track down. The oft-quoted statement “privacy is dead . . . get over it” may be overheated, but it stems from a new and disconcerting online reality.<sup>51</sup> Electronic communication is inherently less private than the forms of communication it is replacing. Electronic utterances are often intentionally (and sometimes inadvertently) broadcast to large audiences. Even when this is not the case, these communications travel through and reside on computer servers and transmission hubs that belong to companies, such as Facebook and Verizon, that may not always be inclined (or able) to protect their customers’ privacy.<sup>52</sup>

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49. See NAOMI S. BARON, ALWAYS ON: LANGUAGE IN AN ONLINE AND MOBILE WORLD 4–7 (2008) (discussing scholars exploration of the implications of new communication norms); ALAN KIRBY, DIGIMODERNISM 58 (2009) (“[T]he digimodernist text is . . . really new, something genuinely never before seen . . . .”); Paula Devine & Katrina Lloyd, *Internet Use and Psychological Well-Being Among 10-Year-Old and 11-Year-Old Children*, 18 CHILD CARE IN PRACTICE 5 (2012) (finding that data indicated that the use of social-networking sites and online games related to poorer psychological well-being among girls, but not boys); Gwenn S. O’Keeffe et al., *The Impact of Social Media on Children, Adolescents, and Families*, 127 PEDIATRICS 800 (2011) (exploring the dramatic increase in the use of social media sites by adolescents and preadolescents and discussing the implications of their use); William Lafi Youmans & Jillian C. York, *Social Media and the Activist Toolkit: User Agreements, Corporate Interests, and the Information Infrastructure of Modern Social Movements*, 62 J. COMM. 315, 316 (2012) (citations omitted) (noting that the debate surrounding the utility of social media in revolutions “pits advocates of the Internet’s emancipatory promise against . . . ‘slacktivism,’ or superficial, minimal effort in support of causes”). In August 2012 *Time* magazine published “The Wireless Issue”; the centerpiece of the issue was a series of ten articles that chronicled the “10 Ways Mobile Technology Is Changing Our World.” *The Wireless Issue: 10 Ways Mobile Technology Is Changing Our World*, TIME, Aug. 27, 2012, <http://content.time.com/time/covers/0,16641,20120827,00.html>.

50. Grubman & Snyder, *supra* note 4, at 221–22 (emphasizing “the probability that social networking evidence will become an issue in a wide variety of litigation”).

51. David Ticoll, *Transparency: It’s Here to Stay: Get Used to It*, GLOBE & MAIL, Feb. 28, 2003, at C1, available at 2003 WLNR 14073422 (quoting Sun Microsystems CEO Scott McNealy).

52. See Ohm, *supra* note 30, at 1314–15; Junichi P. Semitsu, *From Face-*

Electronic statements are not just exposed to larger audiences. They are also preserved in a way that is distinct from most traditional forms of communication. As one commentator puts it, “[w]hat we do in the digital world often lasts *forever*.”<sup>53</sup> An oral assertion, such as a comment to a coworker about a supervisor’s improper advances, will be difficult to remember with any precision months or years after its utterance, and even more difficult to bring before a jury in admissible form. In addition to problems of memory, production of such communications at trial depends on the cooperation of the relatively few persons who heard them. By contrast, electronic utterances rarely dissipate completely. Much to the chagrin of some speakers, an email, text, tweet, or status update can be uncovered by savvy litigators reviewing electronic files long after its utterance.<sup>54</sup> Memory is irrelevant. And so is cooperation. An

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*book to Mug Shot: How the Dearth of Social Networking Privacy Rights Revolutionized Online Government Surveillance*, 31 PACE L. REV. 291, 338–42 (2011).

53. IVESTER, *supra* note 38, at 25; see QUALMAN, *supra* note 28, at 2–3 (noting that unlike other types of communications whose contents will degrade over time and distance, with electronic communications, the “digital string is passed intact”); see also Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 MINN. L. REV. 1514, 1556 (2010) (explaining that a key distinction between a “Facebook status update” and the casual utterances these status updates replace is that, unlike the stray “utterances that once floated through the air and then disappeared without a trace,” status updates are “not only . . . stored, but also they are accessible by a company that is not a party to the conversations”); Ohm, *supra* note 30, at 1315 (noting that text messaging “listens more and stores more than [the types of communications] it has replaced”); *Get To Know Twitter: New User FAQ*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/13920-get-to-know-twitter-new-user-faq#> (last visited Oct. 13, 2013) (“We store all your Tweets. You can . . . view up to 3200 of your most recent Tweets in your profile timeline.”).

54. See Seth P. Berman et al., *Web 2.0: What’s Evidence Between “Friends”?*, 53 BOS. B.J. 5, 6 (2009) (advising litigators that they can obtain discoverable Facebook postings either from the computers of participants in the conversation or “from Facebook itself”); Ohm, *supra* note 30, at 1314–15 (explaining that communicating messages on social media and via text messaging “store[s] copies of what is said on each endpoint and on network servers in the middle, too”); Daniel de Vise, *Schoolyard Face-Offs Blamed on Facebook Taunts*, WASH. POST, Apr. 27, 2008, at C1 (noting that Facebook comments are “immortalized on semi-public Web pages, where they can be viewed by thousands”); Tiffany Kary, *Twitter Turns Over Wall Street Protester Posts Under Seal*, BLOOMBERG NEWS (Sept. 14, 2012), <http://www.bloomberg.com/news/2012-09-14/twitter-turns-over-wall-street-protester-posts-under-seal.html> (explaining, in the context of the subpoena of the suspect’s Twitter account, that “Twitter . . . keeps as many as 3,200 posts” of its users); Jacob Leibenluft, *Do Text Messages Live Forever?*, SLATE (May 1, 2008), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2008/05/do\\_text\\_messages\\_live\\_forever](http://www.slate.com/articles/news_and_politics/explainer/2008/05/do_text_messages_live_forever)

electronic statement, unlike an oral analogue, can be presented to a jury with little (if any) assistance from a fact witness. A party merely needs to display the original electronic message at trial and can, if necessary, rely on a representative from T-Mobile or Facebook to lay the requisite foundation for its admission.<sup>55</sup>

Attorneys and investigators are just beginning to explore the numerous options for obtaining relevant out-of-court electronic utterances. Most obviously, they can discover this type of evidence by searching public online forums (like Twitter) or by happenstance when illicit actors inadvertently broadcast incriminating information to interested parties, such as police.<sup>56</sup> Investigators can also locate relevant text messages and social

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.html (discussing the possibility of recovering deleted text messages, but also noting that some providers delete messages fairly rapidly); Biz Stone, *Tweet Preservation*, TWITTER BLOG (Apr. 14, 2010), <http://blog.twitter.com/2010/04/tweet-preservation.html> (announcing Twitter's agreement to "donate access to the entire archive of public Tweets to the Library of Congress for preservation and research").

55. The message will need to be authenticated to be admissible, but can be authenticated (if necessary) through the service provider's records. See *United States v. Blackett*, No. 11-1556, 2012 WL 1925540 (3d Cir. May 29, 2012), *mandamus denied*, No. 13-2544, 2013 WL 4517154 (3d Cir. Aug. 27, 2013) (noting the prosecution's presentment of a text message through the custodian of records from Sprint); *Gulley v. State*, 2012 Ark. 368, at 12–15 (2012) (rejecting the challenge to the authentication of text messages introduced through testimony of a Verizon employee); *Symonette v. State*, 100 So. 3d 180, 183 (Fla. Dist. Ct. App. 2012) (rejecting the authentication challenge to the photographs of text messages saved on the defendant's phone); *United States v. Kilpatrick*, No. 10-20403, 2012 WL 3236727, at \*3 (E.D. Mich. Aug. 7, 2012) (holding authenticity of pager messages sent by defendant and alleged co-conspirators was established through representative of SkyTel); *State v. Blake*, 974 N.E.2d 730, 741–42 (Ohio Ct. App.), *appeal denied*, 133 Ohio St. 3d 1490 (Nov. 28, 2012) (holding text messages were authenticated by a Cincinnati Bell representative). Attorneys will also need to navigate the lenient, but often misapplied, "best evidence" rule. See FED. R. EVID. 1001–04.

56. *E.g.*, *Errant Text Message Lands Suspected SM Drug Dealers in Jail*, SANTA MARIA TIMES (May 30, 2012), [http://santamariatimes.com/news/local/errant-text-message-lands-suspected-sm-drug-dealers-injail/article\\_261a7a04-aa86-11e1-88c0-001a4bcf887a.html](http://santamariatimes.com/news/local/errant-text-message-lands-suspected-sm-drug-dealers-injail/article_261a7a04-aa86-11e1-88c0-001a4bcf887a.html); Greg Leuthen, *Errant Text Message Lands Missouri Woman in Jail on Drug Charges*, KSPR NEWS (Sept. 1, 2011), [http://articles.kspr.com/2011-09-01/jail-on-drug-charges\\_30103988](http://articles.kspr.com/2011-09-01/jail-on-drug-charges_30103988); Jamie Lynn, *Errant Text Message Leads to Arrest of a Wanted Man*, KOMONEWS.COM (Mar. 27, 2012), <http://www.komonews.com/news/local/Errant-text-message-leads-to-the-arrest-of-a-wanted-man-144534555.html>; Mary Beth Quirk, *Asking a State Trooper for Illegal Alcohol by Text Message Won't Work Out Well*, CONSUMERIST (May 17, 2012), <http://consumerist.com/2012/05/asking-a-state-trooper-for-illegal-alcohol-by-text-message-wont-work-out-well.html>; *cf.* *Barnes v. Zaccari*, 669 F.3d 1295, 1299 (11th Cir. 2012) (noting that a college president "was monitoring [the] Facebook webpage" of a student activist).

media posts saved on suspects' and victims' mobile electronic devices or on smartphones and computers left at a crime scene.<sup>57</sup> For more enterprising investigators, social media sites provide new avenues for surreptitious evidence-gathering. New York City's undercover officers seem particularly adept at "friending" members of criminal gangs on Facebook and obtaining access to their online conversations.<sup>58</sup> Informants use Facebook too and, like undercover officers, can provide access to their associates' postings—free of Fourth Amendment scrutiny—under the aptly named "false friends" doctrine.<sup>59</sup> To uncover communications by more discrete consumers of the electronic medium, authorities can obtain a subpoena or search warrant to compel third-party service providers such as Facebook and Verizon to disclose the contents of their customers' accounts.<sup>60</sup>

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57. See *Symonette*, 100 So. 3d at 183 (noting the prosecution's introduction of text messages recovered from defendant's phone); *State v. James*, 288 P.3d 504, 514–15 (Kan. Ct. App. 2012) (upholding an officer's warrantless inspection of a cell phone as a search incident to arrest and rejecting hearsay challenges to admission of text messages obtained from phone); Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27 (2008).

58. Jose Martinez, *Cop Tracked Brooklyn Gang Brower Boys by 'Friending' Them Online*, N.Y. POST, May 31, 2012, [http://www.nypost.com/p/news/local/brooklyn/facebook\\_em\\_gang\\_busted\\_5ZTTJeeMG2U5BJVztT4CjN](http://www.nypost.com/p/news/local/brooklyn/facebook_em_gang_busted_5ZTTJeeMG2U5BJVztT4CjN); Aman Ali, *Gang Members Arrested After Boasting of Murders on Facebook*, REUTERS (Jan. 19, 2012), <http://www.reuters.com/article/2012/01/19/us-crime-gang-socialmedia-idUSTRE80I2CI20120119> (recounting the murder arrests supported by evidence that the arrested "gang members, ages 15 to 21, bragged about the shootings on the social media sites Twitter, Facebook and YouTube"); see also Bill Archer, *'Like' Button Leads to Obstruction of Justice Charge*, BLUEFIELD DAILY TELEGRAPH, Sept. 14, 2012, <http://bdtonline.com/local/x2056647583/-Like-button-leads-to-obstruction-of-justice-charge/print> (chronicling how police located a fugitive through information obtained after his girlfriend "liked" the police department's Facebook page); cf. Grubman & Snyder, *supra* note 4, at 205–06 (summarizing the developing legal restrictions on such tactics).

59. *United States v. Meregildo*, 883 F. Supp. 2d 523, 525–26 (S.D.N.Y. 2012) (denying motion to suppress Facebook evidence obtained by police through cooperating witness who was the defendant's Facebook "friend"). See generally *On Lee v. United States*, 343 U.S. 747, 757–58 (1952) (holding that the "use of informers, accessories, accomplices, [and] false friends" to obtain information about suspects does not implicate the Fourth Amendment).

60. See *Meregildo*, 883 F. Supp. 2d at 525 (noting the issuance of a warrant for defendant's Facebook account); *Gulley*, 2012 Ark. 368, at 3–4 (rejecting the challenge to the prosecutor's obtaining of defendant's text messages through a subpoena to Verizon and the admission of the texts through testimony of a Verizon employee); Brief of Appellant at 9, *Blackett*, 2012 WL 1925540 (No. 11-1556), 2011 WL 6935515, at \*9 (noting that the text message introduced against defendant was "introduced into evidence by the custodian of records for the service company—Sprint"); BRIONES & TAGVORYAN, *supra*

In fact, despite often (understandably) breathless media coverage to the contrary, there is nothing *legally* noteworthy about obtaining private communications from social media sites or cellphone service providers.<sup>61</sup> If relevant information exists, the government is entitled to use judicial process to obtain it—as are private litigants—whether the information is held by a private citizen, Citizens & Southern National Bank, or Facebook.<sup>62</sup> The only thing that is changing is that investigators are starting to realize the breathtaking evidentiary potential of these electronic sources. Facebook quietly maintains a website (the “Law Enforcement Online Requests System”) for “law enforcement officials seeking records from Facebook” and provides alternative links for “private party requests, including requests from civil litigants and criminal defendants.”<sup>63</sup> With

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note 4, at 35–38; Semitsu, *supra* note 52, at 360; Jeffrey Bellin, *Finding Evidence on Facebook*, EVIDENCEPROF BLOG (Nov. 1, 2011), <http://lawprofessors.typepad.com/evidenceprof/2011/11/finding-evidence-on-facebook.html>.

61. See *People v. Harris*, 945 N.Y.S.2d 505, 513 (N.Y. Crim. Ct. 2012); Wendy Ruderman, *Court Prompts Twitter to Give Data to Police in Threat Case*, N.Y. TIMES, Aug. 8, 2012, at A14 (reporting on Twitter’s compliance with court order to provide subscriber information); Joseph Ax, *Twitter Surrenders Occupy Protester’s Tweets*, REUTERS (Sept. 14, 2012), <http://www.reuters.com/article/2012/09/14/twitter-occupy-idUSL1E8KE6QN20120914>.

62. See *Fisher v. United States*, 425 U.S. 391, 401 (1976) (rejecting the argument that the Fifth Amendment “serve[s] as a general protector of privacy”); *United States v. Miller*, 425 U.S. 435, 437–38 (1976) (holding that the enforcement of a government subpoena directed to the depositor’s records did not violate the depositor’s Fourth Amendment rights); *United States v. Nixon*, 418 U.S. 683, 709–10 (1974) (citations omitted) (internal quotation marks omitted) (endorsing “ancient” maxim that where no privilege applies, “the public . . . has a right to every man’s evidence”); *Juror No. One v. Superior Court*, 142 Cal. Rptr. 3d 151, 161–62 (Ct. App. 2012) (upholding courts’s authority to subpoena juror’s Facebook posts); Grubman & Snyder, *supra* note 4, at 189–97 (summarizing the application of the discovery rules to social media evidence).

63. *Information for Law Enforcement Authorities*, FACEBOOK, <https://www.facebook.com/safety/groups/law/guidelines> (last visited Oct. 17, 2013); see also Jeff John Roberts, *A New U.S. Law-Enforcement Tool: Facebook Searches*, REUTERS (July 12, 2011), <http://www.reuters.com/article/2011/07/12/us-facebook-idUSTRE76B49420110712> (reporting that “U.S. law-enforcement agencies are increasingly obtaining warrants to search Facebook, often gaining detailed access to users’ accounts without their knowledge”); *Law Enforcement & Third-Party Matters: How Does Facebook Work with Law Enforcement?*, FACEBOOK, <https://www.facebook.com/help/473784375984502> (last visited Oct. 13, 2013) (“We may disclose information pursuant to subpoenas, court orders, or other requests (including criminal and civil matters) if we have a good faith belief that the response is required by law.”); *Transparency Report*, TWITTER, <https://transparency.twitter.com/information-requests/2012/jul-dec> (last visited Oct. 13, 2013) (reporting the receipt of 815 domestic law enforcement requests for user information in last six months of 2012, and compliance with 69% of the requests).



respect to cell phones, law enforcement agencies already routinely obtain location information for subscribers' mobile devices, and experts believe the "next surge in surveillance is text messaging."<sup>64</sup>

Given the bounty of discoverable electronic evidence generated by the new communication norm and the potential for much of this evidence to constitute a compelling form of proof, the obvious evidentiary question becomes how to funnel these communications to fact-finders. The doctrinal status quo is, of course, one option, and seemingly the preferred option for the few commentators who have weighed in so far.<sup>65</sup> But it is not at all clear how evidence rules designed for an era of oral communication, water-cooler gossip, quill, and parchment will apply in a new world of digital communication—and there is little reason to think that we will like the results.

At an intuitive level, it is clear that evidence doctrine, and specifically the rules governing the admissibility of out-of-court statements, should change in response to changing communica-

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64. Massimo Calabresi, *The Phone Knows All*, TIME, Aug. 27, 2012, at 30–31 (quoting chief of detectives in Rockland County, New York saying that "[t]here is a mobile device connected to every crime scene" and reporting the belief of "industry experts" that "the next surge in [law enforcement] surveillance is text messaging"); see John P. Mello Jr., *DEA Can't Get Around iMessage Encryption Roadblocks*, MACNEWSWORLD (Apr. 5, 2013), <http://www.macnewsworld.com/story/77717.html> (describing the complaints of the Drug Enforcement Agency regarding its inability, despite court order, to obtain text messages sent through a specific texting application).

65. See Susan W. Brenner, *Communications, Technology, and Present Sense Impressions*, 160 U. PA. L. REV. PENNUMBRA 255, 261 (2011) (asserting that "we will have little difficulty adapting the [present sense impression] exception so that it can accommodate our use of social networking and whatever communication technologies evolve in the future"); Orenstein, *supra* note 4, at 221 (arguing that the "byzantine hearsay structure works well" in adapting to social media communication, with the possible exception of the present sense impression exception); Liesa L. Richter, *Don't Just Do Something!: E-Hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process*, 61 AM. U. L. REV. 1657, 1661 (2012) (contending that the "[e]xisting hearsay doctrine was designed to deal with human communication . . . in whatever form it may take" and the "creation and preservation of hearsay in electronic form, therefore, provides no basis for charging in to refashion time-honored hearsay principles"); Megan Uncel, Comment, *Facebook Is Now Friends with the Court?: Current Federal Rules and Social Media Evidence*, 52 JURIMETRICS J. 43, 56 (2011) (arguing that "social media evidence can be presented within the current Federal Rules of Evidence and new rules are unnecessary"); Randy Wilson, *Admissibility of Web-Based Data*, 52 THE ADVOCATE 31, 31 (2010) ("At first blush, the decades-old evidence rules would seem ill-suited for the task of establishing admissibility of electronic evidence. Yet, these rules have proven to be surprisingly flexible . . .").

tion norms.<sup>66</sup> After all, the hearsay rules, and particularly the hearsay exceptions, identify subsets of out-of-court statements that are sufficiently reliable to be admissible without contemporaneous cross-examination. Assumptions about the way people communicate drive this process.<sup>67</sup> If the assumptions change—as they must when communication norms change—reliability assessments change as well. A set of rules that arose at a time when people communicated in a completely different manner (i.e., in person, by letter, and through landline phones) is unlikely to account for the dangers or benefits of out-of-court statements communicated on social media sites, in Internet chat rooms, and via text messaging.

Viewed from the perspective of individual hearsay exceptions, the dilemma comes into sharp relief. Courts and litigants are already facing difficult questions as the dusty hearsay rules clash with digital communication, and many more are on the horizon:

- Do CAPITALIZED text messages constitute “excited utterances”?<sup>68</sup>
- Are status updates “present sense impressions”?<sup>69</sup>

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66. See *Mass. Bonding & Ins. Co. v. Norwich Pharmacal Co.*, 18 F.2d 934, 937 (2d Cir. 1927) (Learned Hand, J.) (decrying as “especially disastrous” the “sluggishness of the law” in creating a business records hearsay exception in response to the changing “routine of modern affairs”); UNIF. R. EVID. 1 (1999), (recognizing that “[s]ocietal changes, advances in . . . science and improvements in information technology have exposed many problematic evidentiary situations routinely faced by lawyers and judges” and an “increasing” trend where existing “rules fail to fit into a new environment, or alternatively, if they fit, they produce measurable inequity”); Judson Falknor, *The Hearsay Rule and Its Exceptions*, 2 UCLA L. REV. 43, 44 (1954) (quoting Professor Charles T. McCormick’s view that as exceptions to the hearsay rule “seemed most needed in the first half of the eighteen hundreds” including an exception for “book entries,” they “crystallized into exceptions to the hearsay rule”).

67. See, e.g., Bellin, *supra* note 14, at 333 (explaining how assumptions of an oral communication norm drove adoption of the present sense impression exception); cf. Orenstein, *supra* note 4, at 198 (highlighting the present sense impression exception as one example where rules might require change).

68. See FED. R. EVID. 803(2) (recognizing a hearsay exception for “excited utterances”); see also Campbell, *supra* note 7 (chronicling text messages sent by assault victim, who subsequently died of injuries, that included the text: “I NEED[] YOU TO CALL ME AN AMBULANCE[]; I HAVE BEEN ATTACKED” and recounted details of the assault); Gregory Connolly, *York Call Center Among First in Nation to Offer Text-to-911 Service*, WILLIAMSBURG YORKTOWN DAILY, Dec. 11, 2012, <http://wydaily.com/2012/12/11/york-call-center-among-first-in-nation-to-offer-text-to-911-service> (reporting adoption of technology that permits people to text 911 for emergency response).

69. FED. R. EVID. 803(1) (recognizing a hearsay exception for “present sense impressions”); see e.g., Bellin, *supra* note 14.

- Can WebMD searches be “statements made for medical diagnosis”?<sup>70</sup>
- Do routine work-related emails qualify as “business records”?<sup>71</sup>
- Does a “retweet” or “like” constitute an “adoptive admission”?<sup>72</sup>

The only honest answers to these and the host of related questions are: “maybe,” “sometimes,” or, perhaps most candidly, “we’ll see.” This uncertainty is itself a concern in a world where most cases are resolved prior to trial by guilty plea or settlement.<sup>73</sup> *Ex ante* clarity as to the admissibility of evidence is critical in such a system, whose legitimacy depends on the idea that litigants can accurately forecast trial outcomes, and thus conform pretrial settlement to those forecasts.<sup>74</sup> Accuracy, not certainty, however, could be the primary casualty of doctri-

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70. FED. R. EVID. 803(4) (recognizing a hearsay exception for certain “statements made for medical diagnosis”); *id.* at 803(3) (hearsay exception for certain statements of emotional, sensory, or physical conditions).

71. FED. R. EVID. 803(6)(B) (recognizing a hearsay exception for records “kept in the course of a regularly conducted activity of a business”); *see, e.g.*, *Abdelrahim v. Guardsmark*, No. B207270, 2009 WL 3823283, at \*3 (Cal. Ct. App. 2009) (rejecting hearsay challenge to email detailing alleged cause for termination on the ground that email fell within the business records exception because the author regularly wrote emails as part of her job).

72. FED. R. EVID. 801(d)(2)(B) (recognizing a hearsay exception for statements against an opposing party where that party adopted the statement); *see, e.g.*, Molly D. McPartland, *An Analysis of Facebook “Likes” and Other Nonverbal Internet Communication Under the Federal Rules of Evidence*, IOWA L. REV. (forthcoming November 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2256936](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256936) (supporting the view that Facebook likes should be considered adoptive admissions and excluded from hearsay objections); Allison L. Pannozzo, *Uploading Guilt: Adding a Virtual Records Exception to the Federal Rules of Evidence*, 44 CONN. L. REV. 1695, 1706 (2012) (collecting cases discussing whether forwarding email constitutes an adoptive admission and noting analogy to Facebook “liking”).

73. *See Missouri v. Frye*, 132 S. Ct. 1399, 1402, 1407 (2012) (citing Department of Justice calculations for the proposition that “[n]inety-seven percent of federal convictions and 94 percent of state convictions are the result of guilty pleas” and echoing commentators’ contention that “plea bargaining is . . . not some adjunct to the criminal justice system; it is the criminal justice system”); Thomas H. Cohen & Lynn Langton, *Civil Bench and Jury Trials in State Courts, 2005*, BUREAU OF JUST. STAT. 1 (Apr. 9, 2009), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=554> (reporting survey result of state courts that “trials . . . accounted for about 3% of all tort, contract, and real property dispositions in general jurisdiction courts”).

74. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2465 (2004) (discussing literature that largely justifies a system of plea bargains and settlements on the basis of a “shadow-of-trial” model).

nal inertia. Forcing courts to apply an outdated hearsay framework to a new form of evidence will inevitably keep reliable out-of-court utterances from juries, decreasing the accuracy of their verdicts. At the same time, courts will be tempted to contort existing evidence rules either to admit reliable electronic utterances that do not fit traditional hearsay exceptions, or exclude unreliable electronic utterances that do. Errors involving the admission or exclusion of electronic utterances are already common; many of the examples discussed below in this Article are drawn from cases where trial courts sensibly, but erroneously, admitted electronic utterances over a hearsay objection, and appellate courts—reluctant to get in the way of good evidence—deemed the error “harmless.”<sup>75</sup> This is likely the real status quo; increasing slippage between what the evidence rules allow and what (some) courts admit, as the rules fail to track individual judges’ views of what constitutes reliable electronic evidence.

A final consideration is that courts cannot fully control jurors’ access to publicly available online information, like posts on Twitter and (to some degree) Facebook. Individual jurors—able to access these sites on their smartphones—will be tempted to fill obvious evidentiary gaps through their own online sleuthing.<sup>76</sup> A system that refuses to allow electronic evidence

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75. See, e.g., *United States v. Blackett*, 481 F. App’x 741, 742 (3d Cir. 2012) (deeming apparently erroneous admission of text message “harmless”); *People v. Logan*, No. 303269, 2012 WL 3194222, at \*6 (Mich. App. 2012) (ruling that the “text messages [admitted at trial] were hearsay to which no exception applied,” but deeming their admission harmless error); *Funches v. State*, No. 57654, 2012 WL 436635, at \*1 (Nev. 2012) (agreeing that a text message implicating defendant should not have been admitted, but declaring it “harmless” as defendant admitted the truth of the information on his own); cases cited *infra* note 177; cf. *Commonwealth v. Koch*, 615 Pa. 612, 44 A.3d 1147 (2012), *rev’g* 39 A.3d 996, 1002, 1006 (Pa. Super. Ct. 2011) (holding that trial court erred in admitting text messages sent from the defendant’s phone and granting a new trial); Jonathan L. Moore, *Time for an Upgrade: Amending the Federal Rules of Evidence to Address the Challenges of Electronically Stored Information in Civil Litigation*, 50 JURIMETRICS J. 147, 176 (2010) (“[T]he flexibility of the rules to adapt and address the challenges of [electronically stored information] does not necessarily mean that amendments are not needed. . . . [S]ome of the changes wrought by technology have no common law analog, making it difficult for judges to resolve them.”).

76. See Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 8–17 (2012) (recounting examples of social media use during trials); John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 17, 2009, <http://www.nytimes.com/2009/03/18/us/18juries.html?pagewanted=all&r=0> (“The use of BlackBerrys and iPhones by jurors gathering and sending out infor-

through the front door may find it filtering into the jury room through other portals.

In sum, leaving the courts to apply existing evidence doctrine to digital communication is an option, but it comes at a cost. Litigants will face uncertainty as to the admissibility of their electronic evidence; judges will be tempted to fill the void between the rules and intuition by distorting doctrine; jurors may seek online what they do not receive in court; and reliable evidence will be kept from juries. Given this reality, policymakers, judges, and evidence scholars should, at a minimum, explore alternative approaches, particularly when the status quo takes the form of an antiquated hearsay framework that has long been crying out for reform.

## II. REFORMING THE HEARSAY RULES

As the previous Part suggests, the greatest obstacle to any effort to introduce online chatter, social media posts, email, and text messages into evidence at trial is the venerable hearsay prohibition.<sup>77</sup> The now-codified prohibition, with its many discrete exceptions, is the most distinctive feature of American evidence law.<sup>78</sup> It is also the most controversial.<sup>79</sup> While evidence

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mation about cases is wreaking havoc on trials around the country. . . ."); Brian Grow, *As Jurors Go Online, U.S. Trials Go off Track*, REUTERS (Dec 8, 2010), <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208> (reporting that despite warnings, jury members continue to search for case information online through search engines and social media, and there has even been at least one instance of a jury member contacting a defendant through MySpace); *cf.* *Juror No. One v. Superior Court*, 142 Cal. Rptr. 3d 151, 151 (Ct. App. 2012) (proceeding for juror misconduct after juror posted Facebook status updates regarding day-to-day events of trial). In an informal survey, jurors self-reported some temptation to do Internet research during trial, but claimed not to have succumbed. Eve & Zuckerman, *supra*, at 21–23.

77. Another obstacle is authentication, but authentication is likely to fade as a unique difficulty for admitting electronic communication as judges and litigants become familiar with the technology involved. *See* FED. R. EVID. 901(a); Orenstein, *supra* note 4, at 222 (commenting that like written documents, electronic documents can be forged, but there are likewise appropriate verification techniques); *see also supra* note 55.

78. *See, e.g.*, FED. R. EVID. 801–04; *Chambers v. Mississippi*, 410 U.S. 284, 298–99 (1973) (recognizing that “[t]he hearsay rule . . . has long been recognized and respected by virtually every State”); 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1365, at 28 (Chadbourn ed. 1974) (describing hearsay prohibition as the “most characteristic rule of the Anglo-American law of evidence—a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system”); David Alan Sklansky, *Hearsay’s Last Hurrah*, 2009 S. CT. REV. 1, 28 (characterizing modern hearsay framework as “a strict rule of evidentiary exclusion, accom-

scholars actively shaped evidence doctrine over the years,<sup>80</sup> the current hearsay framework exists in spite of, not because of, their efforts. In fact, the history of American hearsay rules can be characterized as a series of efforts by eminent commentators and code drafters to weaken the hearsay prohibition, and the prohibition's surprising resiliency.<sup>81</sup>

To strengthen the case for an eHearsay exception and foreshadow its contours, this Part presents a (very) brief history of the American hearsay prohibition, highlighting the recent efforts of would-be hearsay reformers, and the culmination of those efforts in a proposed, but ultimately rejected, federal hearsay exception for "Statements of Recent Perception." The largely forgotten SRP exception is surprisingly well suited to regulating the admission of electronic utterances and could serve as a sturdy base from which to craft an alternative to the status quo: a new "eHearsay" exception.

#### A. THE HEARSAY PROHIBITION

American evidence rules prohibit the introduction of any out-of-court statement offered as proof of the "matter asserted" by the out-of-court speaker, or "declarant."<sup>82</sup> This "hearsay" prohibition applies even to the out-of-court statements of witnesses who testify at trial.<sup>83</sup> Thus, if I post a Facebook status update that says, "my boss hit me this morning for being late,"

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panied by a long and confusing set of exceptions").

79. See *California v. Green*, 399 U.S. 149, 184 (1970) (Harlan J., concurring) (noting "disagreement among scholars over the value of excluding hearsay and the trend toward liberalization of the exceptions"); Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 *FORDHAM L. REV.* 1301, 1308 (2011) (lampooning "the Swiss cheese-like rule against hearsay with its thirty or so exceptions"); Falknor, *supra* note 66, at 43–45 (summarizing views of Wigmore, McCormick, and Professor Edmund M. Morgan to support changes to hearsay doctrine); Michael S. Pardo, *Testimony*, 82 *TUL. L. REV.* 119, 148 (2007) (criticizing "the Byzantine structure of the [hearsay] rules" and questioning whether "the rule contributes to or detracts from just results"); Sklansky, *supra* note 78, at 20 (describing federal rules' prohibition of hearsay as "a categorical rule riddled with a labyrinthine series of exceptions").

80. See *Tome v. United States*, 513 U.S. 150, 160 (1995) (acknowledging the influence of the "academic community" in shaping the Federal Rules of Evidence); Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 *B.C. L. REV.* 949, 950–51 (2006) (discussing the "distinguished history" of evidence scholarship in shaping evidence law).

81. See *infra* Part II.A.

82. *FED. R. EVID.* 801–02.

83. See, e.g. *id.* at 801(c); *VA. R. EVID.* 801(c); *CAL. EVID. CODE* § 1200.

a prosecutor cannot later use that update to prove that my boss, in fact, hit me. The out-of-court statement is hearsay and inadmissible (absent a hearsay exception) even if I testify in court. In practice, the prohibition is designed to force the parties to bring the most knowledgeable witnesses to court and rely on their live testimony, rather than written affidavits or second-hand accounts.<sup>84</sup>

Modern hearsay law traces its roots to the early 1700s.<sup>85</sup> The English common law exclusion of out-of-court statements began to emerge about that time, grounded in the notion that “statements used as testimony must be made where the maker can be subjected to cross-examination.”<sup>86</sup> This justification still resonates with the modern conception that an adversary system requires live testimony, not out-of-court statements, as its inputs.<sup>87</sup> Live witnesses testify under oath at a public trial, under the gaze of interested observers, judge, and jury.<sup>88</sup> These witnesses are subject to cross-examination—the “greatest legal engine ever invented for the discovery of truth”—which probes for untoward influence by the sponsoring party, or bias and other flaws on the part of the witness.<sup>89</sup>

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84. Sklansky, *supra* note 78, at 11.

85. John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1172, 1187 (1996) (noting there are “examples of hearsay appearing in the Old Bailey Sessions Papers from 1678 into the 1730s”).

86. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364 at 16 (Chadbourn ed. 1974); Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1891–92 (2012) (discussing uncertainty regarding hearsay prohibition in English and early American courts); Langbein, *supra* note 85, at 1172 (contending, contrary to Wigmore, that the hearsay rule “hardened only in the last decades of the eighteenth century”); see also Mirjan Damaška, *Of Hearsay and Its Analogues*, 76 MINN. L. REV. 425, 434–39 (1992) (discussing analogues to hearsay prohibition in European law).

87. MODEL CODE EVID. 218 (1942) (noting that “the hearsay rule is the child of the adversary system”); Mueller, *supra* note 22, at 378 (explaining that “[t]he central premise of the hearsay doctrine is that live testimony is preferable to remote statements”).

88. See *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973) (noting as one of the reasons to exclude hearsay, that “[o]ut-of-court statements . . . are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements”); *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (professing the value of a live witness so the jury “may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief”).

89. *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, EVIDENCE § 1367 (3d ed. 1940)); Charles T. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV.

The necessary corollary to the sentiments expressed above is that an adversary process is not so well equipped to ferret out spurious *out-of-court* statements. Out-of-court speakers rarely speak under oath and need not fear perjury prosecution or even particularly severe moral condemnation for lying. More significantly, cross-examination, the critical adversarial tool for unearthing hidden flaws, is blunted when the real subject of the examination is absent from court.<sup>90</sup>

The American hearsay prohibition thus stands on firm theoretical ground. Yet skeptics persist. As will quickly become apparent, reformers traditionally focus on the prohibition's two most dubious facets. First, why does the prohibition apply to the out-of-court statements of *testifying* witnesses who can, in fact, be cross-examined? Second, encouraging parties to bring live witnesses to trial may be a worthy goal, but the prohibition extends to out-of-court statements of declarants who are deceased or otherwise unavailable to testify. Applying the hearsay prohibition to statements by unavailable witnesses deprives juries of evidence that, while imperfect, is often the best the circumstances allow.

#### B. THE MODEL CODE OF EVIDENCE

In recent history, the most direct assault on the hearsay prohibition came in the 1942 "Model Code of Evidence" promulgated by the American Law Institute (ALI). The Model Code represented the studied efforts of the era's evidence luminaries to codify the unruly, judge-made evidence law of the time.<sup>91</sup> The Model Code's drafters had a second objective as well—to work a "radical change[]" in the common law hearsay prohibition.<sup>92</sup> The drafters derided "the law governing hearsay" as a "conglomeration of inconsistencies" with little thematic purpose, adding that "[t]he courts by multiplying exceptions [to the prohibition] reveal their conviction that relevant hearsay evidence normally has real probative value, and is capable of valuation by a ju-

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573, 576 (1947) (asserting that "the major safeguard of the veracity of testimony and its main factor of superiority to out-of-court statements is its subjection to the test of cross-examination").

90. See *Green*, 399 U.S. at 158.

91. See MODEL CODE EVID., at III, XII (1942) (listing members of ALI "Committee on Evidence," including Learned Hand, Mason Ladd, Charles McCormick, and the reporter, Edmund Morgan, and noting that Wigmore served as "Chief Consultant").

92. *Id.* at III, Comment to Rule 503, at 232; *id.* at 47 ("[I]t is in the chapter on Hearsay that the Code departs most widely from the common law.").



ry.”<sup>93</sup>

The Model Code’s drafters attempted to transform the hearsay prohibition into a rule of necessity. Section 503 of the Model Code made hearsay admissible whenever the declarant is “unavailable as a witness.”<sup>94</sup> The Code also made hearsay admissible whenever the declarant was “present and subject to cross-examination.”<sup>95</sup> As a result, under the Model Code, hearsay would almost always be admissible, save for circumstances where the proponent of a statement could procure the declarant’s live testimony, but declined to do so. In part because of this “radical attitude toward hearsay reform,” no state adopted the Model Code.<sup>96</sup> Some jurisdictions, such as California, spurned it with a “vehemence bordering upon anger.”<sup>97</sup>

### C. THE UNIFORM RULES OF EVIDENCE

In 1953, evidence scholars again tried to dilute the American hearsay prohibition.<sup>98</sup> Building from the wreckage of the

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93. *Id.* at 223–24 (1942); *cf.* Edmund M. Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 19 (1937) (scorning the exceptions and inconsistencies of the hearsay rule).

94. MODEL CODE EVID. 503 (1942).

95. *Id.* at 231–32; Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 52–53 (1987) (describing the Model Code’s approach to hearsay); *see also* Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477, 480 (1998). With respect to the admission of hearsay by an unavailable declarant, the Model Code mirrored older views, including those of Jeremy Bentham. *See* James H. Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 945 (1962).

96. Park, *supra* note 95, at 53; *see* Charles W. Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204, 217 (1960); Sklansky, *supra* note 78, at 20 (2009) (“The hearsay provisions of the Model Code of Evidence helped ensure that it was never adopted anywhere.”) The Code’s sometimes impenetrable syntax also deserves some of the blame. *See, e.g.*, MODEL CODE EVID. 306(3), at 513; Charles T. McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 TEX. L. REV. 559, 559–60 (1955) (attributing rejection of Model Code to perception that it was “over-radical in its reforms, especially in opening the door too far for the admission of hearsay” and that it was “over-academic in its form of expression”).

97. Chadbourn, *supra* note 95, at 945.

98. *See id.* at 946 (recognizing Uniform Rule 63(4)(c) as “a substitute” for the Benthamite rejection of the hearsay prohibition proposed by the Model Rules); *see also* 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5005 (2d ed. 2005) (opining darkly that “[t]he flowers had hardly wilted on the grave of the Model Code when the A.B.A. began searching for a new bride to wear the weeds of reform”); Quick, *supra* note 96, 214–15 (contrasting the Uniform Rules’ moderate attempt to

Model Code, and in consultation with the Code's drafters, a reconstituted committee of prominent jurists and scholars drafted the "Uniform Rules of Evidence."<sup>99</sup> Designed in part to soften aspects of the Model Code that were "too far-reaching and drastic for present day acceptance," the Uniform Rules left the traditional hearsay prohibition intact, but proposed a novel and potentially expansive new hearsay exception.<sup>100</sup> Awkwardly titled "Statements Admissible on Grounds of Necessity Generally," Uniform Rule 63(4)(c) excepted from the hearsay prohibition:

[A] statement [of an unavailable witness] narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action.<sup>101</sup>

The Commentary to the rule acknowledged that the exception was "new" but justified it as meeting a "vital need" to "prevent miscarriage of justice resulting from the arbitrary exclusion of evidence which is worthy of consideration, when it is the best evidence available."<sup>102</sup> In concert with the Uniform Rules' treatment of out-of-court statements of testifying witnesses as non-hearsay,<sup>103</sup> Rule 63(4)(c) again promised to substantially unravel the American hearsay prohibition.<sup>104</sup> The Uniform

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alter existing hearsay doctrine with the Model Code's effort to "knock down all barriers to the admission of . . . hearsay").

99. UNIF. R. EVID. 161-62 (noting that the drafters of the Uniform Rules, including Mason Ladd and Charles McCormick, used the Model Code "as a basis from which to work" and consulted with Professor Morgan and, through him, the ALI Committee that drafted the Model Code).

100. *Id.* at 161. The drafters of the Uniform Rules explicitly distanced themselves from the Model Code. *Id.* at 198 cmt. (explaining that their approach was a "drastic variation from the A.L.I. Model Code"); *cf.* FED. R. EVID. art. VIII advisory committee's introductory note (noting that the "draftsmen of the Uniform Rules chose a . . . more conventional position" than the drafters of the Model Code with respect to hearsay); Mason Ladd, *Witnesses*, 10 RUTGERS L. REV. 523, 523 (1956). McCormick characterized the Uniform Rules' approach as a "strategic retreat." Charles T. McCormick, *Hearsay*, 10 RUTGERS L. REV. 620, 624 (1956).

101. UNIF. R. EVID. 63(4)(c), at 199-200.

102. UNIF. R. EVID. 63(4), at 200 cmt.; McCormick, *supra* note 100, at 624 (describing the rule as "an attempt to answer a need which many judges and writers have expressed for a wider use of declarations of persons deceased or otherwise unavailable"); M.C. Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224, 253-54 (1960) (supporting 63(4)(c)).

103. *See* UNIF. R. EVID. 63(1), at 198 (removing from the hearsay prohibition any "statement previously made by a person who is present . . . and available for cross examination").

104. *See* CAL. LAW REVISION COMM'N, *supra* note 12, at 459 (describing the

Rules, however, “were only slightly more successful than the Model Code,” achieving lasting acceptance only in Kansas, the home state of the chairman of the Committee that drafted the rules.<sup>105</sup>

#### D. THE FEDERAL RULES OF EVIDENCE

Evidence reformers tried one last time to liberalize the hearsay prohibition in the next, and most successful, effort to create a uniform system of American evidence law: the Federal Rules of Evidence adopted by Congress in 1975 and shortly thereafter in most state jurisdictions.<sup>106</sup> While purporting to adopt “the approach to hearsay . . . of the common law,” the Federal Rules’ drafters included an exception unknown to the common law, Rule 804(b)(2), “Statement of Recent Perception.” This rule, which borrowed heavily from Uniform Rule 63(4)(c), excepted from the hearsay prohibition:

A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollec-

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rule as “clearly a new exception of broad scope and of large importance” and endorsing its adoption in California; the Commission rejected the suggestion of its consultant); Quick, *supra* note 96, at 215 (forecasting that among the innovations in the Uniform Rules, Rule 63(4)(c), “the most far reaching exception,” will “be under especially heavy attack”).

105. See 21 WRIGHT & GRAHAM, *supra* note 98, § 5005 (explaining that Kansas enacted the Uniform Rules “pretty much as is,” New Jersey adopted them with significant modifications, and Utah adopted them “only to turn around in 1983 and adopt a new set of rules based on the Federal Rules of Evidence”); Michael S. Ariens, *The Law of Evidence and the Idea of Progress*, 25 LOY. L.A. L. REV. 853, 863 & n.47 (1992) (explaining that “the Uniform Rules had only slightly more impact” than the Model Code since “only four jurisdictions adopted [versions of] the Uniform Rules”: Kansas, New Jersey, Utah, and the Virgin Islands). The Virgin Islands followed Utah in switching to the Federal Rules of Evidence, essentially leaving Kansas as the only state with the Uniform Rules of Evidence. See *Thomas v. People*, No. 2010-0087, 2012 WL 1522263, at \*4 n.11 (V.I. May 2, 2012) (noting that in 2010, the Virgin Islands “repealed the local URE and replaced it with the Federal Rules of Evidence”); *State v. Simpson*, No. 105,182, 2011 WL 4563106, at \*6 (Kan. App. Sept 30, 2011), *review granted* (Mar. 9, 2012) (“Our Kansas Rules of Evidence came from the 1953 Uniform Rules of Evidence . . . .”); McCormick, *supra* note 96, at 560 (“[T]rial judge, Spencer A. Gard of Kansas, was . . . chairman.”).

106. See *United States v. Matlock*, 415 U.S. 164, 172 n.8 (1974) (referencing new rules); Edward J. Imwinkelried, *Declarations Against Social Interest: The (Still) Embarrassingly Neglected Hearsay Exception*, 69 S. CAL. L. REV. 1427, 1445 (1996) (noting “the passage of the Federal Rules of Evidence and their subsequent adoption in most states”).

tion was clear.<sup>107</sup>

The proposed rule was approved by the Supreme Court, but rejected by Congress.<sup>108</sup> The House Judiciary Committee explained that it could not endorse this “new and unwarranted hearsay exception of great potential breadth” because it “did not believe that statements of the type referred to bore sufficient guarantees of trustworthiness.”<sup>109</sup> Congress, being the final word on the matter, prevailed. Consequently, the Federal Rules and, with four exceptions,<sup>110</sup> the evidence codes governing state jurisdictions (which largely mirror the enacted federal rules) contain no provision analogous to the SRP exception. Although these evidence codes contain numerous hearsay exceptions distilled from the common law, including, in many cases, an ill-defined “residual” exception intended for use in “rare” and “exceptional” circumstances,<sup>111</sup> adherents to the sta-

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107. PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR UNITED STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161, 377–78 (1969). As with the other exceptions in Rule 804, proposed Rule 804(b)(2) only applied if the declarant was “unavailable.” *Id.* After the proposed rule was benched, its number was given to the exception for dying declarations. *See* FED. R. EVID. 804(b)(2).

108. H.R. REP. NO. 93-650, at 6 (1973) (explaining rejection of proposed Rule 804(b)(2)).

109. *Id.*

110. Hawaii and Wisconsin adopted Rule 804(b)(2) verbatim. *See* HAW. R. EVID. § 804(b)(5) (2012); WISC. STAT. § 908.045(2) (2012). Wyoming adopted the exception for civil, but not criminal, cases. *See* WYO. R. EVID. § 804(b)(5) (2012). Kansas continued to apply a precursor to Rule 804(b)(2) based on Uniform Rule 63(4)(c). *See* KAN. STAT. ANN. § 60-460(d)(3) (2012). New Mexico adopted the exception, but later abandoned it. *See* *State v. Ross*, 919 P.2d 1080, 1086 (N.M. 1996).

111. Federal Rule of Evidence 807 provides a “residual exception” for hearsay that possesses “guarantees of trustworthiness” equivalent to those in the other enumerated exceptions. FED. R. EVID. 807; *cf.* *Dallas Cnty. v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961) (applying analogous residual exception prior to Federal Rules); 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE, at T-214–19 (Joseph M. McLaughlin ed., 2d ed. 2011) (identifying twenty-six states with statutory evidence codes that follow the federal model with respect to a residual exception and fourteen states that do not). Relying on the rule’s legislative history, courts emphasize that the residual exception should “be used only rarely, in truly exceptional cases.” *United States v. El-Mezain* 664 F.3d 467, 498 (5th Cir. 2011) (internal quotation marks omitted); *see also* *United Tech. Corp. v. Mazer*, 556 F.3d 1260, 1279 (11th Cir. 2009); *Parsons v. Honeywell, Inc.*, 929 F.2d 901, 907–08 (2d Cir. 1991); Myrna S. Raeder, *A Response to Professor Swift*, 76 MINN. L. REV. 507, 514 & n.23 (1992) (reporting results of survey of reported federal cases that found about fourteen cases a year over a fifteen-year period where the residual exception was successfully invoked, including cases where it was relied on as an alternative ground for admission, a rate

tus quo have largely turned back modern efforts to liberalize hearsay doctrine.<sup>112</sup>

### III. A NEW HEARSAY EXCEPTION FOR ELECTRONIC STATEMENTS OF RECENT PERCEPTION

One explanation for the failure of the Statement of Recent Perception (SRP) exception is that the proposed exception came a half-century too early.<sup>113</sup> With a few modifications, the exception provides a robust grounding for a new “eSRP” or “eHearsay” exception tailored to the changes in modern communication norms described in Part I. In concert with the increasing prevalence and preservation of electronic utterances, this largely forgotten piece of evidence history could open American courtrooms to reliable records of electronic communications and (finally) ease the heavy hand of the American hearsay prohibition.

This Part sketches the contours of an eSRP exception—modeled on the original SRP exception—that would admit, over a hearsay objection, a broad array of electronic (and even non-electronic)<sup>114</sup> statements that are sufficiently reliable to be placed before the finder of fact. For reasons outlined in the subsequent text, the proposed exception actually consists of two exceptions: one appended to Federal Rule of Evidence 801 (statements of testifying witnesses), and the other to Federal

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Professor Raeder found “clearly high given that the exception was intended to cover the ‘exceptional’ case”). Even if courts more broadly embraced the exception, its vague and amorphous nature renders it unsuitable to regulate eHearsay. *See id.* at 516–17 (decrying routine reliance on the residual exception as permitting “total erosion of the hearsay rule by judicial discretion” and resulting in “the worst of all worlds for litigators who must decide which cases to try by evaluating the potentially admissible evidence”).

112. *See Chambers v. Mississippi*, 410 U.S. 284, 298–99 (1973); Sklansky, *supra* note 78, at 28; Mueller, *supra* note 22, at 369 (explaining that the “modernists” who “proposed simplified rules aimed at admitting more hearsay . . . did not prevail, as can be seen in the adoption and spread of the Federal Rules, which retain the exclusionary principle and detailed categorical exceptions”); Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969) (explaining that the federal hearsay exceptions constitute a “synthesis” of “the many exceptions to the hearsay rule developed by the common law”).

113. *Cf. McCormick*, *supra* note 100, at 631 (expressing hope that “some decades hence,” a broader reform to the hearsay prohibition would emerge that allows hearsay to be introduced, and permits jurors the “responsibility for valuing such evidence only for what it is worth”).

114. *See infra* Part III.F.

Rule of Evidence 804 (statements of unavailable declarants).

Precise language for the proposed exception appears below. Italicized text represents additions to the current Federal Rules of Evidence. Non-italicized text (including bolded text) is unchanged from the existing federal rules, but included, where necessary, to provide context.

**Rule 804. Exceptions to the Rule Against Hearsay – When the Declarant Is Unavailable as a Witness**

...

(b) The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

...

*(5) **Recorded Statement of Recent Perception.** A recorded communication that describes or explains an event or condition recently perceived by the declarant, but not including: (A) a statement made in contemplation of litigation, or to a person who is investigating, litigating, or settling a potential or existing claim; or (B) an anonymous statement.*

**Rule 801. . . . Exclusions from Hearsay**

. . . (d) A statement that meets the following conditions is not hearsay:

(1) The declarant testifies and is subject to cross-examination about a prior statement, and the statement: . . . (D) *would qualify as a Recorded Statement of Recent Perception under Rule 804(b)(5) if the declarant were unavailable.*

The proposed rule borrows heavily from the original SRP exception, but also modifies that rule to a significant degree. Piece-by-piece analysis justifying both the borrowed provisions and the new language follows.

A. THE REQUIREMENT OF THE DECLARANT’S UNAVAILABILITY OR PRESENCE AT TRIAL

“the declarant is unavailable as a witness” or “[t]he declarant testifies”

The proposed eSRP exception contains two parts. The determination of which part to apply depends on a single variable: whether the hearsay declarant testifies at trial. If the declarant does not testify, Rule 804(b)(5), the heart of the proposal, controls and requires a showing that the declarant is “unavailable” as that term is (already) defined in existing Federal Rule of Evidence 804(a). If the declarant testifies, proposed Rule 801(d)(1)(D) governs and permits her otherwise qualifying

eSRPs<sup>115</sup> to be admitted as substantive evidence (i.e., for the truth of the matter asserted in the out-of-court statement).<sup>116</sup>

The two components of the proposed exception sweep broadly. In the spirit of the ALI's Model Code of Evidence, the exception excludes otherwise qualifying out-of-court statements in only one circumstance: when the statement was made by a declarant who is available to testify at trial, but not called as a witness.<sup>117</sup> In that circumstance, the exception cannot be invoked. The rationale is both familiar and straightforward. The eSRP exception applies either: (1) when the necessity for admitting hearsay is greatest—i.e., when the declarant is unavailable (804(b)(5)); or (2) when the justifications for the hearsay prohibition are weakest—i.e., when the declarant can be cross-examined at trial (801(d)(1)(D)). In addition to paralleling the broad approach of the Model Code, the structure set forth above mirrors the original SRP exception and Uniform Rule 63(4)(c).<sup>118</sup> As the drafters of both provisions recognized, statements of recent perception, while valuable to juries in all other circumstances, are not preferable to available live testimony from the hearsay declarant.

#### B. RECORDED STATEMENTS

“[a] recorded communication”

A key reliability-enhancing trait of electronic out-of-court statements is that they are invariably recorded. Unlike many traditional out-of-court statements (e.g., a suspect's oral confession to a jailhouse informant), text messages, email, and status updates can be shown directly to the jury. Taking advantage of

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115. “eSRPs” is used here as a convenient shorthand for statements that meet the requirements of the proposed eSRP hearsay exception.

116. *See infra* Part III.A.

117. *See supra* Part II.B (discussing Model Code's approach to hearsay generally).

118. While Uniform Rule 63(4)(c) required the declarant to be “unavailable,” another Uniform Rule permitted the introduction, over a hearsay objection, of *all* prior statements of a testifying witness. UNIF. R. EVID. 63(1). The Model Evidence Code also removed prior statements of testifying witnesses from the hearsay prohibition. *See* MODEL CODE EVID. 503(b). The original SRP exception, however, does not apply unless the declarant is unavailable. *See* PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR UNITED STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161, 377–78 (1969) (providing proposed FED. R. EVID. 804(b)(2) exception for a “statement of recent perception”).

this attribute, the proposed eSRP exception requires qualifying statements to be “recorded.”<sup>119</sup> This requirement represents a novel and important supplement to the original SRP exception, while simultaneously circling back to the exception’s obscure roots in a nineteenth-century proposal by James Bradley Thayer to exempt *written* statements of deceased witnesses from the hearsay prohibition.<sup>120</sup>

The reliability advantages of recorded out-of-court statements are widely recognized. When an in-court witness relates another person’s hearsay statement, a danger arises that the *in-court* witness’s testimony is unreliable. The testifying witness may mishear, misremember, miscommunicate, or (worst of all) manufacture the out-of-court speaker’s statement.<sup>121</sup> This concern with the in-court witness’s reliability recedes when the out-of-court statement was expressed in writing or otherwise recorded.<sup>122</sup> The in-court witness, in fact, becomes superfluous. As with a recording of a 911 call, jurors can cut out the middleman and “hear” the out-of-court statement for themselves.

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119. Cf. Lisa Kern Griffin, *The Content of Confrontation*, 7 DUKE J. CONST. L. & PUB. POL’Y 51, 69 (2011) (emphasizing that “verbatim recordings” are generally more useful to jurors than oral renditions of disputed statements); McCormick, *supra* note 89, at 588 (noting the “hazard of error or falsity in reporting oral words” and that this hazard “is very much lessened in the case of previous written statements”).

120. See JAMES BRADLEY THAYER, *LEGAL ESSAYS* 303–04 n.1 (The Boston Book Co. 1908) (reprinting Thayer’s letter to Suffolk County Bar Association advocating above-described hearsay exception that would become enacted, after modification, in 1898); UNIF. R. EVID. 63(4)(c) cmt. (citing 1898 Massachusetts statute as general precursor to the rule); MASS. ANN. LAWS ch. 233, § 65 (2009); *infra* note 149.

121. Park, *supra* note 95, at 71 (noting that “the existence of hearsay exceptions that manifest a preference for recorded statements suggests concern about the danger of misreport and fabrication by the in-court witness”); McCormick, *supra* note 89, at 588 (noting that a generally overlooked hearsay danger is the “hazard of error or falsity in the reporting of oral words”).

122. Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477, 504–05, 531 (1998) (emphasizing as a factor in assessing hearsay evidence: “whether the statement was recorded or otherwise verified as actually made by the declarant such that the factfinder need not rely solely on the credibility of the in-court witness”); Park, *supra* note 95, at 57, 71–72 (recognizing that “[t]he danger that the in-court witness will distort or fabricate a statement is increased by the difficulty of detection” and suggesting that hearsay exceptions that “apply only to documentary or other recorded hearsay” are supported, in part, on the ground that it “is harder to forge a document than to fabricate an oral statement”); cf. CAL. EVID. CODE § 1370(5) (2013) (permitting statement explaining the receipt of an injury if, *inter alia*, “[t]he statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official”).



Anything memorialized by mechanical or electronic means as the speaker communicates counts as “recorded” for purposes of the eSRP exception. This includes email typed on a laptop computer, text messages tapped on a cellphone keypad, Facebook status updates posted at a desktop computer, or tweets entered on a smartphone. In fact, the bulk of hearsay that is intended to be captured by the exception—text messages, emails, and social media posts—will easily qualify as “recorded.” These out-of-court statements are always contemporaneously memorialized by the computer software that enables their existence.<sup>123</sup>

Importantly, the exception does not encompass statements that are initially unrecorded, even if they are subsequently memorialized. Thus, a witness’s oral statement taken down by a police officer at a crime scene on a tablet computer would not qualify. While the officer’s transcription of the statement is “recorded,” the witness’s statement is not, and normal hearsay-within-hearsay principles apply to exclude the combined statement.<sup>124</sup> Relatedly, the eSRP exception, like the “business records” exception, requires the proponent to introduce the “recorded communication” itself, as opposed to *testimony* about the communication.<sup>125</sup> Consequently, if a text message, social media

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123. Written statements would also qualify as “recorded” and, as detailed below, are potentially admissible under the exception if an unavailable (or testifying) declarant communicated in writing about a relevant, recently perceived event. *See infra* note 124.

124. *See* FED. R. EVID. 805 (requiring each part of a “combined statement” to conform to an exception to the hearsay rule). Similarly, if a police officer writes down a witness’s excited utterance, the officer’s written report is not admissible as an excited utterance because the officer’s written statement describing the utterance constitutes a second layer of hearsay. *See id.* If, on the other hand, the officer recorded a witness’s oral statement with a digital recorder, the statement is “recorded,” satisfying that aspect of the eSRP exception. The statement would still not fall within the eSRP exception, however, due to the exclusion of statements made to investigators. *See infra* Part III.D.

125. *See* FED. R. EVID. 803(6) (providing exception for “[a] record of” a business); *United States v. Wells*, 262 F.3d 455, 461 (5th Cir. 2001) (holding that admission of oral testimony about allegedly lost business records was error, and noting that “[t]he government has not cited a case in which testimony was allowed to suffice as secondary evidence of a business record under Rule 803(6)"); *State v. Johnson*, No. A08-1138, 2009 WL 2150671, \*4 (Minn. Ct. App. July 21, 2009) (“[A] witness may not testify as to the content of business records that are not admitted into evidence.”); 5 CLIFFORD S. FISHMAN, JONES ON EVIDENCE § 33:18 (7th ed. 1992) (explaining that, under the business records exception, “the record itself must be introduced” and thus “[i]t would not suffice for a witness to testify that he has examined a company’s record and then relate from the witness stand what the record said”).

post, or email could no longer be recovered (and shown to the jury), testimony about its contents could not be admitted under the eSRP exception.<sup>126</sup>

The excerpted text that leads off this section also includes a subtle but important deviation from the original SRP exception. The eSRP exception substitutes the word “communication” for “statement.” The intent of this change is to exclude from the exception’s scope the small percentage of “statements” that are not also “communications.” For example, diary entries, memos-to-file, draft emails or “notes to self” could constitute “statements,” but not “communications” if the statements, when uttered, were not intended for any audience.<sup>127</sup> Such statements would not be admissible under the proposed exception.

There are two reasons to limit the exception to “communications.” First, the presence of an intended audience can create an incentive for sincerity.<sup>128</sup> Second, and more important, limiting the eSRP exception’s scope to “communications” decreases

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126. See, e.g., *State v. Espiritu*, 176 P.3d 885, 891 (Haw. 2008) (rejecting challenge to testimony about deleted text messages allegedly received from defendant, which were admissible as statements of a party, stating that “if evidence is hearsay admissible under an exception to the rule against hearsay, then testimony about such evidence is admissible”); *Funches v. State*, No. 57654, 2012 WL 436635, at \*1 (Nev. Feb. 9, 2012) (reviewing challenge to witness’s “testimony that he received a text message from another witness stating that [the defendant] and two other people had ‘jumped’ the victim”). The “Best Evidence” rule will sometimes require the same result, although its strictures are lenient. FED. R. EVID. 1002, 1004 (requiring an original to prove the content of any writing, but providing an exception where, absent bad faith, the original or a duplicate cannot be obtained).

127. The definition of hearsay in the Federal Rules of Evidence requires that a qualifying utterance be “intended . . . as an assertion.” FED. R. EVID. 801(a). Thus, there is an argument that statements not intended to communicate anything to another person are not hearsay at all. See Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1139 (1935).

128. See HERBERT PAUL GRICE, *Logic and Conversation*, in *STUDIES IN THE WAY OF WORDS* 22, 27 (1989) (theorizing as general assumption of participants in a conversation that neither will “say what you believe to be false”); H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar’s Tale*, 42 DUKE L.J. 776, 792 (1993) (“[P]eople generally tell mostly the truth to most people most of the time . . . .”); cf. Charles F. Bond & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 229, 231 (2006) (describing empirical support for the concept that factfinders can more easily discern the truth of a statement if the statement is uttered “in the midst of social interaction”); Imwinkelried, *supra* note 18, at 321 (“In ‘everyday life’ when we receive a letter, we typically take it at face value and presume it to be genuine.”). But see Judson F. Falknor, *The “Hear-Say Rule” as a “See-Do” Rule: Evidence of Conduct*, 33 ROCKY MTN. L. REV. 133, 136 (1961) (noting that non-assertive conduct is unlikely to suffer from hearsay dangers because people rarely lie to themselves).

the potential for parties to abuse the exception by introducing self-serving out-of-court statements generated for litigation (or posterity). Most problematic would be statements that conveniently appear during litigation and purport to narrate disputed events in a way that benefits the offering party.<sup>129</sup> In fact, many such statements would already fall outside the exception since they are “made in contemplation of litigation.”<sup>130</sup> But courts will struggle to assess whether something like a diary entry or draft email was generated with legal proceedings in mind. Explicitly excluding such non-communicative statements from the scope of the exception decreases the pressure on judges to smoke out fabricated statements that appear to satisfy the literal demands of the exception but suspiciously surface during litigation, rather than in real time. Conveniently, the primary targets of the eSRP exception—text messages, email, or social media postings (and their present and future analogues)—will virtually always satisfy the “communication” requirement.

### C. DESCRIBING RECENTLY PERCEIVED EVENTS

“that describes or explains an event or condition recently perceived by the declarant”

Uniform Rule 63(4)(c) and the original SRP exception limit the subject matter of qualifying statements. A statement that falls within the exceptions must “narrate[], describe[], or explain[] an event or condition recently perceived by the declarant.”<sup>131</sup> This limitation primarily serves to exclude statements describing events of the more distant past.<sup>132</sup> The eSRP excep-

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129. See 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:70, at 599 (3d ed. 2007) (discussing similar problem in context of statements admitted under Rule 803(3)).

130. See *Fischer v. State*, 252 S.W.3d 375, 376 (Tex. Crim. App. 2008) (deeming as inadmissible hearsay a police officer’s “factual observations of a DWI suspect, contemporaneously dictated on his patrol-car videotape”); *infra* Part III.D.

131. FED. R. EVID. 804(b)(2) (proposed 1979); see also UNIF. R. EVID. 63(4). The limitation also excludes opinions and speculation, but such statements (whether in or out-of-court) are generally excluded by other rules. See FED. R. EVID. 602 (requiring testimony to be based upon “personal knowledge”); FED. R. EVID. 701 (providing limitations for testimony that is based upon “opinion”).

132. Predictions about future events, general speculation, and opinions (also excluded by this requirement) are already barred by other rules. See FED. R. EVID. 602 (requiring testimony to be based on “personal knowledge”); FED. R. EVID. 803 advisory committee’s note (explaining that a hearsay declarant

tion maintains this limitation which, as explained below, translates nicely into the digital age.

Requiring qualifying statements to be descriptions of “recently perceived” events enhances the reliability of statements admitted under the proposed exception, while only marginally restricting its scope. In terms of reliability, recorded descriptions of the distant past engender increased concerns about inaccuracy. Motives for shading or distorting descriptions of past events are more likely to arise and solidify with the passage of time.<sup>133</sup> In addition, memories steadily degrade as the time between an event and a statement describing that event expands.<sup>134</sup>

The reliability gains of the eSRP exception’s subject matter limitation come at little cost. The new wave of electronic utterances described in Part I most commonly involves descriptions of, or reactions to, recent events. This is a function of the purpose of the new communication tools. Facebook, Twitter, and texting services are designed to keep others, including often our family and friends, apprised of recent and ongoing occurrences.<sup>135</sup> We use these tools—and tolerate their shortcomings—to

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must, like a trial witness, be speaking from personal knowledge).

133. See Bellin, *supra* note 14, at 340 (describing similar rationale for hearsay exception for present sense impression exception); Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 193 (1948) (suggesting that “the opportunity for reconsideration and for baneful influence by others” is “more likely to color . . . later testimony than [a] prior [out-of-court] statement[]”); see also CAL. LAW REVISION COMM’N, *supra* note 12, at 313 (Comment to Rule 63(1)) (stating that in “many cases” a “prior inconsistent statement is more likely to be true than the testimony of the witness at trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy which gave rise to the litigation”).

134. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 13 (2009) (“[M]ore memory is lost in the first hour than in the second hour, more in the first day than the second day, more in the first week than in the second week, and so on.”); McCormick, *supra* note 89, at 577 (discussing scientific findings on memory degradation at various intervals, which support intuition that “[t]he fresher the memory, the fuller and more accurate it is”).

135. See *generally* About, TWITTER, <https://twitter.com/about> (last visited Oct. 13, 2013) (describing Twitter as “a real-time information network” where users can get “up-to-the-second information” regarding “the latest stories, ideas, opinions and news about what you find interesting”); About, FACEBOOK, <http://www.facebook.com/facebook/info> (last visited Oct. 13, 2013) (explaining that “[m]illions of people use Facebook every day to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet”).

fill relatively short temporal gaps between our current transmission and our last electronic or in-person communication.<sup>136</sup> Electronic statements can, of course, describe more remote or even historic events. However, those that do, like lengthy blog posts, word processing documents, or emails summarizing past milestones, resemble familiar analogues such as books, letters, and diaries. There is little need to tailor the eSRP exception to such statements. Existing hearsay exceptions crafted with these traditional forms of communications in mind should suffice.

The only real dilemma with respect to the subject matter limitation arises in its application. A “recently perceived” limitation raises an obvious line-drawing concern: how recent? Case law applying state variants of Uniform Rule 63(4)(c) and the original SRP exception provides some guidance. Courts applying the “recently perceived” language have, with little controversy, extended the gap between event and statement up to eight days.<sup>137</sup> Longer delays invite more searching scrutiny, but do not necessarily require exclusion.<sup>138</sup> Indeed, in one “unusual

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136. Amanda Lenhart et al., *Teens and Mobile Phones*, PEW INTERNET & AM. LIFE PROJECT 35–37 (Apr. 20, 2010), <http://www.pewinternet.org/Reports/2010/Teens-and-Mobile-Phones.aspx> (reporting that when asked why they text, teens’ most common responses were “to just say hello and chat,” “to report where you are or check where someone else is,” and “to coordinate where you are physically meeting someone”).

137. See *State v. Berry*, 575 P.2d 543, 545 (Kan. 1978) (affirming admission of victim’s statement to detectives eight days after shooting); see also *State v. Peterson*, 696 P.2d 387, 395 (Kan. 1985) (affirming admission of statement under Kansas variant of Uniform Rule 63(4)(c) where statement was “made on the same day or the following day” after the described event); *State v. Brown*, 556 P.2d 443, 447 (Kan. 1976) (explaining that the “recently perceived” restriction “allows for a considerable passage of time, so long as the statement was made at a time when the event could still be reasonably classified as ‘recent’”). But see Ted Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682, 707 (1962) (suggesting that a statement made “a full week after” the thing perceived would “not qualify as having been made ‘at a time when the matter had been recently perceived’”); CAL. LAW REVISION COMM’N, *supra* note 12, at 462 (illustrating the operation of the temporal limit in the Uniform Rule with a dichotomy of a statements describing the cause of injury made “the day after [the] injury,” as opposed to “two months later”).

138. See *Brown*, 556 P.2d at 447 (explaining that statement “made three days after” event described “could reasonably” meet recently perceived limitation); *Staggs v. State*, No. 94,271, 2006 WL 1816339 at \*1 (Kan. Ct. App. June 30, 2006) (noting admission of victim’s hearsay statement that was made “several days after” beating described in statement); *State v. Kreuser*, 280 N.W.2d 270, 273 (Wis. 1979) (rejecting challenge to admission of statement made “within a day” after event described); cf. *State v. Broyles*, 36 P.3d 259, 271 (Kan. 2001) (rejecting challenge to exclusion of statements offered under the exception that were made “some 20 months later” than the described event).

case,” an “eight to ten week” delay was permitted because the declarant—a victim of an accident—was physically unable to make an earlier statement.<sup>139</sup> The Wisconsin Supreme Court explained:

The mere passage of time, while important . . . is not controlling . . . .

A determination regarding recency of perception depends on the particular circumstances of the case, including whether there were any intervening circumstances, such as injuries, which precluded or limited an earlier statement.<sup>140</sup>

As the preceding excerpt makes clear, the “recently perceived” restriction is principally concerned with suspicious delays in reporting an alleged event (as opposed to fading memories), and it should be applied in that spirit. Unnatural gaps between an event and its description constrict the permissible time period under the eSRP exception, while more natural gaps due to injuries (or Wi-Fi outages) expand it.<sup>141</sup> This flexibility will admittedly leave some gray areas for judicial interpretation, but given the nature of electronic communication, the vast majority of utterances in text messages and social media will fall comfortably within the exception’s temporal bounds.

#### D. OUTSIDE THE SHADOW OF LITIGATION

“not including . . . a statement made in contemplation of litigation or to a person who is investigating, litigating, or settling a potential or existing claim”

The eSRP exception—like the original SRP exception and Uniform Rule 63(4)(c)—attempts to maximize the reliability of qualifying statements and minimize the dangers of abuse by excluding from the rule’s scope any statement made in the “shadow of litigation.”<sup>142</sup> The concept is simple and intuitive (if

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139. *Kluever v. Evangelical Reformed Immanuel’s Congregation*, 422 N.W.2d 874, 875–76 (Wis. Ct. App. 1988).

140. *Id.* at 877.

141. *Cf. Kreuser*, 280 N.W.2d at 273 (discounting delay in making of statement where “delay was occasioned by the fact that” the declarant had to track down the telephone number of the recipient). The original SRP exception contained a distinct safeguard of a “clear” recollection to ensure that the declarant’s memory had not degraded, but how trial courts were supposed to apply this requirement to absent declarants is unclear, and it is omitted from the current proposal.

142. *See also* Thayer, *LEGAL ESSAYS*, *supra* note 120, at 303 n.1 (reprinting

not “too obvious to require comment”<sup>143</sup>): the specter of litigation has a distorting effect, causing some witnesses to deviate from honest narration.<sup>144</sup> Further, litigation creates powerful incentives for parties to attempt to influence witness statements.<sup>145</sup>

Concerns about the distorting effects of litigation arise even before formal legal proceedings are initiated, and so the proposed eSRP exception adopts the original SRP exception’s broad interpretation of the applicable shadow of litigation. A statement will not be admissible as an eSRP if it was elicited during an investigation of a legal claim or otherwise “made in contemplation of litigation,” even if a suspect had not yet been arrested or a lawsuit not yet filed when the statement was made. By contrast, the Uniform Rule permitted statements obtained during a pre-litigation investigation so long as legal action had not formally “commenc[ed].”<sup>146</sup>

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Thayer’s proposal advocating exception to the Massachusetts hearsay rule that required statements to be “made in writing *ante litem motam*,” i.e., before the litigation).

143. See CAL. LAW REVISION COMM’N, *supra* note 12, at 463 (stating that the necessity for the Uniform Rule’s *ante litem motam* requirement is “too obvious to require comment”).

144. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 n.9 (2011) (suggesting that out-of-court statements that are “made for a purpose other than use in a prosecution” are more likely to be trustworthy); CAL. LAW REVISION COMM’N, *supra* note 12, at 313 (Comment to Rule 63(1)) (noting that testimony at trial is often less credible than certain out-of-court statements because, among other things, the statements are “less likely to be influenced by the controversy which gave rise to the litigation”). In addition to eliminating an incentive to lie, pre-litigation statements are less likely to be planned, making them easier for jurors to correctly evaluate. See Bond & DePaulo, *supra* note 128, at 227 (conducting meta-analysis of studies about the ability to detect false statements and finding evidence that people “achieve higher lie-truth detection accuracy when judging unplanned rather than planned messages”).

145. See *Bryant*, 131 S. Ct. at 1157 n.9 (“Many . . . exceptions to the hearsay rules . . . rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution and therefore should not be barred by hearsay prohibitions.”); *Johnson v. United States*, 333 U.S. 10, 14 (1948) (highlighting the “often competitive enterprise of ferreting out crime”); *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943) (finding an employee’s injury report inadmissible because the report was “calculated for use . . . in the court, not in the business”).

146. Compare *State v. White*, 673 P.2d 1106, 1112 (Kan. 1983) (statements to police officers investigating unattended child admissible under Uniform Rule), and *State v. Berry*, 575 P.2d 543, 545 (Kan. 1978) (affirming admission of victim’s statements to detective in hospital room eight days after shooting under Uniform Rule), with *State v. Barela*, 643 P.2d 287, 290 (N.M. Ct. App. 1982) (explaining that because victim’s out-of-court statement was “made at the instigation of the officer[,] the [SRP] exception . . . is inapplicable”). Of

Given the nature of the electronic communication norm described in Part I, the reliability gains obtained by excluding statements tainted by the shadow of litigation are, once again, fairly costless. Text messages and social media posts are rarely generated by investigators' queries or otherwise created in contemplation of litigation.<sup>147</sup> Those that are, such as an email response to a detective's inquiry about a crime, parallel non-electronic statements that existing hearsay rules comfortably handle.<sup>148</sup>

#### E. NO EXPLICIT "GOOD FAITH" REQUIREMENT

"but not . . . an anonymous statement"

Both Uniform Rule 63(4)(c) and the original SRP exception apply only to out-of-court statements "made in good faith." The thinking behind this requirement, which can be traced to the Thayer-influenced 1898 Massachusetts statute referenced earlier, is understandable.<sup>149</sup> In fact, it is hard to argue that any

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course, the mere fact that a statement describes something unlawful will not render it inadmissible because made "in contemplation of litigation." As with the analysis of "testimonial" under the Confrontation Clause, this requirement is intended to exclude statements made with a "primary purpose" of influencing litigation. *Bryant*, 131 S. Ct. at 1155.

147. For cases considering the contemplation of litigation restriction under the SRP exception, see *State v. Haili*, 79 P.3d 1263, 1277 (Haw. 2003) (rejecting the argument that the SRP exception did not apply because the domestic violence victim may have been contemplating divorce proceedings); and *State v. Ross*, 919 P.2d 1080, 1086 (N.M. 1996) (rejecting a challenge to admission of evidence under the SRP exception where the victim may have been contemplating obtaining a restraining order).

148. The proposed exception does not adopt the original SRP exception's proviso that only litigation "in which [the declarant] was interested" triggers exclusion. Courts will have difficulty determining whether an absent declarant has an "interest" in potential litigation, and the inquiry has little utility. *See, e.g., State v. Ballos*, 602 N.W.2d 117, 123 (Wis. Ct. App. 1999) (concluding, somehow, that anonymous callers to 911 "were not involved in or anticipating litigation in which they were interested").

149. *See supra* Part III.B; *see also* UNIF. R. EVID. 63(4)(c) cmt. (citing 1898 Massachusetts statute as general precursor to the rule); MASS. ANN. LAWS ch. 233, § 65 (2009) (excepting a statement of a decedent in civil cases "if the court finds that it was made in good faith and upon the personal knowledge of the declarant"); PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR UNITED STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161, 382-84 (citing the Massachusetts statutes in the advisory committee notes following



hearsay statement should be admitted unless it was made in good faith. The difficulty is determining precisely what “good faith” means in this context and, relatedly, applying the standard in a coherent and predictable manner. As explained below, these difficulties render an explicit “good faith” requirement more trouble than it is worth. Consequently, the eSRP exception takes the different and more common approach of relying on predefined attributes of qualifying statements to determine reliability (and thus admissibility) in lieu of an amorphous “good faith” requirement.

The experience of the few states that apply variants of the SRP exception provides a useful perspective on how a “good faith” requirement works in application. The Wisconsin courts—which have grappled with this issue more explicitly than others—explain that “whether a statement is made in ‘good faith’ depends on ‘the declarant’s incentive to accurately relate the event or condition.’”<sup>150</sup> In Wisconsin, this means that statements are made in “good faith” if they are communicated to others with whom the speaker has some connection, for example: a statement made to the declarant’s “girlfriend, who was the mother of his son and presumably someone he trusted and in whom he confided,”<sup>151</sup> statements made to the declarant’s “good friend” and his friend’s son;<sup>152</sup> and statements “made to people to whom [the declarant] was close.”<sup>153</sup> Less intuitively, “[b]y their nature, 911 calls are presumably ‘made in

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proposed FED. R. EVID. 804(b)(2)); *cf.* R.I. R. OF EVID. 804(c) (“A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.”); Roger Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057, 1065 n.32 (1986) (tracing lineage of Uniform Rule to Massachusetts statute). Striking a common chord with the eSRP exception, Thayer’s proposal, upon which the Massachusetts statute was based, did not include a “good faith” requirement and applied solely to written statements. *See* THAYER, LEGAL ESSAYS, *supra* note 120, at 303 n.1; Chadbourn, *supra* note 95, at 942–43 (discussing same).

150. *State v. Manuel*, 697 N.W.2d 811, 820 (Wis. 2005).

151. *State v. Manuel*, 685 N.W.2d 525, 530 (Wis. Ct. App. 2004), *aff’d*, 697 N.W.2d 811 (Wis. 2005).

152. *State v. Weed*, 666 N.W.2d 485, 492 (Wis. 2003); *cf.* *State v. Maestas*, 584 P.2d 182, 189 (N.M. Ct. App. 1978) (affirming admission of statements “made by the victim to [her] sister and sister-in-law”).

153. *State v. Kutz*, 671 N.W.2d 660, 682 (Wis. Ct. App. 2003); *cf.* *State v. Burke*, 574 A.2d 1217, 1223 (R.I. 1990) (affirming admission of statement made “to a blood relative”).

good faith” for purposes of the exception.<sup>154</sup> In Kansas, we learn that statements made by young children satisfy the requirement, since “[i]t is highly doubtful [a] six-year-old would make . . . statements except in good faith.”<sup>155</sup>

This state court case law interpreting the “good faith” requirement demonstrates its weaknesses. In essence, courts apply the “good faith” requirement by making an intuition-based judgment about an out-of-court declarant’s sincerity.<sup>156</sup> A witness’s credibility, however, is typically a jury question, and there is little reason to deviate from that default principle here.<sup>157</sup> Questions about whether an out-of-court speaker would lie to a loved one, prevaricate in a 911 call, or make a false statement at a young age can be left to the jury, without any sacrifice of reliability.<sup>158</sup> If the jury determines that the out-of-

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154. State v. Ballos, 602 N.W.2d 117, 123 (Wis. Ct. App. 1999).

155. State v. White, 673 P.2d 1106, 1112 (Kan. 1983).

156. See *Manuel*, 685 N.W.2d at 530 (affirming finding of “good faith” where “[n]othing in the record suggests . . . that [the declarant] lied”); Peter Nicolas, *I’m Dying to Tell You What Happened’: The Admissibility of Testimonial Dying Declarations Post-Crawford*, 37 HASTINGS CONST. L.Q. 487, 532–33 (2010) (describing function of “good faith” requirement in the “few states” that apply it); CAL. LAW REVISION COMM’N, *supra* note 12, at 463 & n.10 (explaining that “good faith” requirement in Uniform Rule “probably means that the judge, acting *pro hac vice* like a juror, may simply conclude ‘I do not believe his statement’”).

157. See FED. R. EVID. art. VIII advisory committee’s introductory note, at 405 (“For a judge to exclude evidence because he does not believe it has been described as ‘altogether atypical, extraordinary . . . .’”); Chadbourn, *supra* note 95, at 947 (criticizing Uniform Rule’s provision for exclusion of out-of-court statement not made in “good faith” as violating the “time-honored formula” that “credibility is a matter of fact for the jury, not a matter of law for the court”); cf. *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012) (“[T]he jury, not the judge, traditionally determines the reliability of evidence.”); *Kansas v. Ventris*, 556 U.S. 586, 594 n.\* (2009) (“Our legal system . . . is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses . . . .”).

158. Cf. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 596 (1993) (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”); FED. R. EVID. 806 (permitting a party to impeach the credibility of a hearsay declarant “by any evidence that would be admissible for [that] purpose[] if the declarant had testified as a witness”). That is not to say that juries are particularly adept at this task, just that judges would be no better. George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 707 (1997) (discussing research that shows that “juries have no particular talent for spotting lies”); Richard L. Marcus, *Completing Equity’s Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 759 (1989) (“[C]urrent psychological research provides no basis for believing that assigning the task of evaluat-

court speaker cannot be trusted, it can discount the statement accordingly.

In lieu of a “good faith” requirement, the proposed eSRP exception identifies specific attributes of out-of-court communications, and particularly electronic communications, that enhance reliability.<sup>159</sup> This approach places concrete limits on trial court discretion and creates a measure of predictability and consistency for litigants.<sup>160</sup> *Ex ante* predictability is particularly important in modern times, since most cases are resolved in advance of trial.<sup>161</sup>

In assessing the reliability of electronic communications, one particular characteristic exudes unreliability: anonymity. As noted in a preceding section, accountability helps to ensure reliability.<sup>162</sup> Anonymous statements avoid accountability by design.<sup>163</sup> The proposed eSRP exception thus excludes “anony-

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ing demeanor to judges would result in significant improvements in deception detection.”).

159. *Cf.* Victor J. Gold, *Do the Federal Rules of Evidence Matter?*, 25 LOY. L.A. L. REV. 909, 920 (1992) (criticizing evidence rules that “utiliz[e] undefined terms” and “rather than providing a clear rule regulating admissibility,” rely on judicial discretion thus “invi[t] the judiciary to assume an undisciplined, ad hoc approach to applying the Rules”). The Massachusetts statute from which the “good faith” requirement is drawn required only unavailability (through death) and “good faith.” *See supra* note 149, a more sensible approach than tacking “good faith” onto a handful of specific characteristics.

160. *Cf.* *Tome v. United States*, 513 U.S. 150, 164–65 (1995) (noting that the drafters of the Federal Rules consciously rejected a “statement-by-statement balancing approach” because “[i]t involves considerable judicial discretion[,] . . . reduces predictability[,] and . . . enhances the difficulties of trial preparation”); FED. R. EVID. art. VIII advisory committee’s introductory note, at 405 (rejecting proposal for “individual treatment [of hearsay] in the setting of the particular case” as “involving too great a measure of judicial discretion, minimizing the predictability of rulings, [and] enhancing the difficulties of prepar[ing] for trial”); Mueller, *supra* note 22, at 397 (noting in hearsay context that “[p]ractitioners strongly believe they need protection against broad judicial discretion”).

161. *See supra* note 73. These same concerns counsel against any attempt to broadly filter electronic communications through the residual hearsay exception in Rule 807. *See supra* note 111.

162. *See supra* Part III.C; *supra* note 128.

163. *See* Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1559 (2007) (“Anonymous speech . . . is, on average, *less* valuable than nonanonymous speech to speech consumers (audiences) who often use speaker identity as an indication of a work’s likely truthfulness . . . .”); Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 193–94 (2003) (discussing arguments against anonymous speech in the First Amendment context, including that a “person who contributes to public debate anonymously lacks accountability and therefore reliability” and

mous” statements, which are quite common in the digital world; comments on blog posts, tweets, or texts will only fall within the exception if they were made by someone whose identity is discernible to the communication’s recipients.<sup>164</sup> As already discussed, the proposed exception’s requirement that a qualifying statement be a “communication” similarly ensures some accountability for insincerity.<sup>165</sup> These complementary requirements dictate that any qualifying eSRP has an identifiable sender and an intended recipient, a low hurdle for the vast bulk of electronic utterances, and a useful reliability safeguard. Other mandates of the eSRP exception, including that the qualifying statements arise outside the shadow of litigation and relate to “recently perceived” events, also protect against the admission of unreliable statements. These requirements, working in concert, separate the bulk of facially unreliable from facially reliable out-of-court electronic statements. The rest of the work can be left to juries, the traditional arbiters of the weight to be given to relevant evidence.<sup>166</sup>

To the extent concerns about deception through “bad-faith” electronic utterances remain, other constraints applicable to all evidence have a role to play. In particular, authentication re-

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“anonymity creates a greater potential for deception and frivolity”).

164. See, e.g., *Rodriguez v. State*, 273 P.3d 845, 850 (Nev. 2012) (analyzing admissibility of text messages sent to assault and robbery victim’s boyfriend via victim’s cell phone by then-unknown perpetrators of offense). Anonymous communications will also be difficult to admit due to the independent requirement of personal knowledge, although personal knowledge may be apparent “from [the] statement or be inferable from circumstances.” FED. R. EVID. 803 advisory committee’s note; see also *Booth v. State*, 508 A.2d 976, 984 (Md. 1986) (noting that extrinsic evidence may demonstrate that a statement results from the declarant’s personal perception); Ira P. Robbins, *Writings on the Wall: The Need for an Authorship-Centric Approach to the Authentication of Social-Networking Evidence*, 13 MINN. J.L. SCI. & TECH. 1, 29–31 (2012) (cautioning against inferring authorship of electronic communications that are insufficiently authenticated); cf. Criminal Justice Act, 2003, c. 44, § 116(1)(b) (U.K.) (limiting admission of hearsay statements under certain provision to circumstances where “the person who made the statement . . . is identified to the court’s satisfaction”).

165. See *supra* Part III.C.

166. See Margaret Bull Kovera et al., *Jurors’ Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703, 704 (1992) (concluding from results of empirical analysis of mock juror study that “jurors are, in fact, skeptical of hearsay evidence and capable of differentiating between accurate and inaccurate hearsay testimony”); Mueller, *supra* note 22, at 374 (summarizing argument that juries can be trusted to weigh hearsay); Weinstein, *supra* note 20, at 353 (“There is little reason to believe that jurors . . . are not . . . capable of assessing hearsay’s force without giving it undue weight.”); see also sources cited *supra* note 157.

quirements dictate that proponents of electronic evidence offer sufficient evidence to support a finding that statements offered under the exception are, in fact, actual text messages, tweets, or Facebook status updates from the person claimed (i.e., that the evidence “is what the proponent claims it is”).<sup>167</sup> Finally, Federal Rule of Evidence 403 permits courts to exclude cumulative, misleading or unfairly prejudicial evidence of minimal probative significance.

#### F. NO EXPLICIT LIMITATION TO “ELECTRONIC” STATEMENTS

The proposed hearsay exception is intended to provide the factfinder with useful information captured in the ubiquitous electronic communications chronicled in Part I. It is important to recognize, however, that the exception does not require that qualifying statements be “electronic.” The twofold reasoning for this is explained below.

First, it is hard to precisely define “electronic” in this context, and likely to become increasingly difficult. There are admittedly easy cases. Statements typed on computer keyboards are electronic, and statements written on paper are not. But what about a digital recording of an oral statement, or writing with a stylus on an electronic tablet? The line drawing will become increasingly difficult as technology allows people to interface with computers in myriad ways, blurring the distinction between oral, written, and “electronic” communication.<sup>168</sup>

Second, explicitly distinguishing between electronic and non-electronic communications would be almost as unhelpful as it is challenging. As technology evolves, virtually every type of statement will be utterable with, or without, the assistance of an electronic device. Assuming all other contextual factors are

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167. FED. R. EVID. 901(a); *United States v. McGraw*, 62 F. App'x. 679, 681 (7th Cir. 2003) (discussing procedure for proving authenticity of evidence and stating that “the court's role is to examine the evidence to determine whether the jury could reasonably find the conditional fact by a preponderance of the evidence”); *State v. Harris*, 358 S.W.3d 172, 175 (Mo. Ct. App. 2011) (“[T]he proponent of such evidence [as text messages] must present some proof that the message[s] were actually authored by the person who allegedly sent them.”); *Rodriguez v. State*, 273 P.3d 845, 850 (Nev. 2012) (concluding that ten text messages were erroneously admitted because not properly authenticated); Orenstein, *supra* note 4, at 202 (discussing authentication and new social media); Robbins, *supra* note 164; *see supra* note 55.

168. *See* Claire Cain Miller, *Joining the Party, Not Crashing It: Google Aims for Less Intrusive Ways to Fit into Daily Life*, N.Y. TIMES, Oct. 14, 2012, at B1 (discussing technological innovations, such as Siri and Kinect, that allow people to interface with computers through voice and gestures).

equal, it is difficult to articulate any inherent reliability advantage based on the medium used to express the same recorded message. As the drafters of the Federal Rules of Evidence recognize, it is not the medium itself, but how the medium is used that informs the reliability of a resulting statement.<sup>169</sup>

Taking the preceding points together, it appears that any effort to limit the proposed exception to “electronic” communications would be both unruly and unhelpful. Thus, the proposed rule follows the lead of traditional hearsay rules (as well as Uniform Rule 63(4)(c) and the original SRP exception) by not limiting its application to any particular medium of communication. The bulk of statements likely to be admitted under the proposed rule will fall within some colloquial definition of “electronic,” but that does not mean that the rule itself must be limited to such statements.

#### IV. IMPLICATIONS OF AN “eHEARSAY” EXCEPTION

The preceding sections articulate the justifications for, and the precise contours of, the proposed “eHearsay” or “eSRP” exception to the American hearsay prohibition. This Part discusses the likely implications of adopting the exception. In particular, it examines the types of statements that, while excluded under existing evidence doctrine, will be admitted by the new rule. There are three broad categories of such statements: (1) eSRPs of testifying witnesses, (2) eSRPs of unavailable victims, and (3) eSRPs of unavailable third-party witnesses and accomplices.<sup>170</sup> Each category is discussed below.

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169. See, e.g., FED. R. EVID. 101(b)(6) (“[A] reference to any kind of written material or any other medium includes electronically stored information.”); *id.* at 803(6) advisory committee’s note (stating that use of term “data compilation” in business records exception was intended to cover “any means of storing information other than the conventional words and figures in written or documentary form,” including “electronic computer storage”). By contrast, authentication rules vary more naturally across mediums. See *id.* at 901 (illustrating various means of authenticating evidence).

170. Another potential category, eSRPs of a non-testifying criminal defendant, is likely precluded by FED. R. EVID. 804(a)’s proviso that the rule’s unavailability requirement is not satisfied “if the statement’s proponent procured or wrongfully caused the declarant’s unavailability as a witness in order to prevent the declarant from . . . testifying.” FED. R. EVID. 804(a)(5); see *United States v. Bollin*, 264 F.3d 391, 413 (4th Cir. 2001) (holding that defendant who invokes Fifth Amendment privilege not to testify could not invoke Rule 804, because he “made himself unavailable for the purpose of preventing his testimony”); *United States v. Peterson*, 100 F.3d 7, 13 (2d Cir. 1996) (holding that a person who invokes Fifth Amendment privilege “is considered to be unavailable to others for purposes of Rule 804”); *Commonwealth v. Labelle*, 856

Out-of-court statements made by a testifying witness comprise the first category of eSRPs that would routinely be admitted under the exception. A recent bribery trial illustrates how eSRPs might be used in this context. In *United States v. Blackett*, a witness's testimony that she was bribed while serving as a juror was supplemented with the following text message that she sent to her sister after the alleged bribe attempt:

You see why I tell you I ain't want to be no damn juror. Some dude just come by my house and tell me he going pay me money to say not guilty.<sup>171</sup>

Under existing law, the text—erroneously admitted as a “recorded recollection”—should not have been admitted over the defendant's hearsay objection. (The best the appellate court could say for the ruling was that it was “harmless.”)<sup>172</sup> But under the proposed eSRP exception, the text would be admissible without doing any violence to other hearsay exceptions (or harmless error principles), providing the jury with valuable information about the charged crime. An even more compelling example comes from *People v. Lewis*, where a prosecutor introduced “enlarged photocopies” of text messages from a sexual assault victim.<sup>173</sup> The prosecutor relied on the messages (which sought help from friends in dealing with a “guy . . . in my apartme[n]t” who was “trying to be all o[ve]r me”), and a ques-

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N.E.2d 876, 879 (Mass. App. Ct. 2006) (following “the view proffered by several of the Federal Circuit Courts of Appeal that a defendant cannot create[ ] his own unavailability by invoking his [F]ifth [A]mendment privilege against self-incrimination”) (internal quotation marks omitted).

171. *United States v. Blackett*, No. 11-1556, 2012 WL 1925540 (3d Cir. May 29, 2012); Brief for the Appellee at 8–9, *United States v. Blackett*, 481 F. App'x 741 (2012) (No. 11-1556), 2012 WL 1925540, at \*3 (providing text of disputed text message).

172. *Blackett*, 2012 WL 1925540, at \*742. The text should not have been admitted as a recorded recollection since the witness did not have any difficulty remembering *the bribery attempt*. Brief for the Appellee, *supra* note 171, at 2; see also FED. R. EVID. 803(5) (requiring statement to concern a matter the declarant “now cannot recall”); Brief of Appellant Ikim Elijah Blackett at 14–15, *United States v. Blackett*, 481 F. App'x 741 (2012) (No. 11-1556), 2011 WL 6935515 (stating defendant's argument to this effect). The Third Circuit punted the question of admissibility, concluding only that the text's admission “was harmless.” *Blackett*, 2012 WL 1925540, at \*742. The defendant was likely nonplussed as even the prosecution had not claimed that the ruling could be upheld on that ground. Brief for the Appellee, *supra* note 171. Additional factual development might have revealed that the text was a present sense impression, but that exception was not cited by either party or the appellate court. See FED. R. EVID. 803(1) (describing present sense impression exception to the hearsay rule).

173. *People v. Lewis*, No. 1-10-3576, 2012 WL 6861248, at \*3 (Ill. App. Ct. Dec. 28, 2012).

tionable hearsay ruling, to rebut the defense's contention that the victim fabricated her testimony about the assault.<sup>174</sup>

Although perhaps not as valuable to juries as eSRPs of absent declarants, eSRPs of testifying witnesses will often constitute compelling evidence. If the eSRP is consistent with the witness's testimony, as in *Blackett* and *Lewis*, it will flesh out that testimony and make it more credible.<sup>175</sup> The jury will see what the witness said about the event, exactly as she said it, during the time period when the event was freshest in her mind. It is hard to justify a system that would keep text messages like those described above from a jury, and by clearly permitting such evidence, the proposed exception improves current doctrine.<sup>176</sup> In addition, by providing a clear conduit for admissibility, the eSRP exception reduces the pressure to distort existing rules (as occurred in *Blackett* and *Lewis*) to admit this compelling form of proof.<sup>177</sup>

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174. *See id.* at \*3–4, \*12. The trial court admitted the statements over a hearsay objection solely to show the victim's "state of mind." *Id.* at \*3. But in response to a defense contention that the lengthy text exchanges admitted at trial went well beyond that limited purpose, the appellate court deemed the messages admissible for all purposes as prior consistent statements. The court ruled that while such prior statements are "[g]enerally . . . inadmissible," defense counsel's claim in the opening statement that the victim fabricated her account to explain the defendant's presence "in her bed" could be answered by the text messages, which were uttered (just) prior to the defendant's appearance in that location. *Id.* at \*11–12.

175. McCormick, *supra* note 100, at 622 (noting that "[a]n early written statement may often give needed and legitimate corroboration to the witness's testimony, where though his veracity has not been challenged, his testimony is met by contrary evidence"); *see, e.g.*, *Tucker v. Clarke*, No. 0037-12-4, 2012 WL 2886713, at \*3 (Va. Ct. App. July 17, 2012) (affirming trial court exclusion of emails sent by mother to third party as hearsay, where email was offered by mother, who testified in custody proceeding, to corroborate her explanation of why she acted out in child's classroom).

176. *Cf.* UNIF. R. EVID. 63(1), cmt., (1953) (asserting that "[w]hen sentiment is laid aside there is little basis for objection" to introduction of a testifying witness's out-of-court statements as substantive evidence); Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192 (1948) (expressing similar sentiment).

177. *See supra* notes 172, 174; *see also* *Abdelrahim v. Guardsmark*, No. B207270, 2009 WL 3823283, at \*3 (Cal. Ct. App. Nov. 17, 2009) (affirming trial court ruling admitting email as non-hearsay, and ruling that it was admissible solely to show that an email "was sent" or, alternatively, as a business record and, in any event, its admission was harmless); *Funches v. State*, No. 57654, 2012 WL 436635, at \*1–2 (Nev. Feb. 9, 2012) (concluding that "the district court erred by admitting, under the present-sense-impression hearsay exception, a witness's text messages regarding earlier events" because "[t]he text messages . . . were written . . . shortly after she woke up" and "involved events that occurred before she went to sleep approximately one to two hours



An eSRP that is inconsistent with the declarant's live testimony will be even more valuable to juries and, indeed, is already admissible for the non-hearsay purpose of impeachment.<sup>178</sup> Under current doctrine, when a testifying witness's inconsistent hearsay statement is introduced, the court instructs the jury (upon request of a party) that the out-of-court statement is admissible not for assessing the truth of the matter asserted (i.e., not as "substantive" evidence), but only to show that the witness said different things at different times and, consequently, may not be credible.<sup>179</sup> The practice of instructing juries on this nuanced distinction between impeachment and substantive evidence is widely ridiculed.<sup>180</sup> Consistent with a now-pending rules amendment for past consistent statements offered to rehabilitate a witness,<sup>181</sup> the eSRP exception abandons the (likely futile) effort, and allows jurors to con-

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earlier" but suggesting that the messages "were admissible under the excited utterance exception" (despite the intervening period of sleep!) and, in any event, were harmless); *Robinson v. State*, No. 05-10-01022-CR, 2012 WL 130616, at \*3 (Tex. App. Jan. 18, 2012) (declining to decide whether email from testifying witness attaching cell phone picture of suspect, and identifying the suspect—"im not sure if they are good enough pics but this is tyrone"—constituted hearsay, but deeming its admission harmless).

178. See FED. R. EVID. 613 (discussing procedures for impeaching witnesses with prior statements). If the declarant testifies but cannot recall the incident described in the eSRP, the eSRP could, under existing doctrine, be used to refresh the declarant's memory, *id.* at 612, and if necessary, be introduced as a "recorded recollection," *id.* at 803(5); see also 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:19, at 116, § 8:35, at 304 (3d ed. 2007) (noting that such hearsay statements "are still admissible for impeachment purposes" and citing cases).

179. See, e.g., *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 763 (5th Cir. 2008) (holding that district court did not abuse its discretion in allowing extrinsic evidence in to impeach witness's inconsistent statements); cf. FED. R. EVID. 801(d)(1)(A) (permitting small subset of prior inconsistent statements to be introduced as substantive evidence).

180. See McCormick, *supra* note 96, at 562 (characterizing proposal in Uniform Rules to allow "prior consistent or inconsistent statements of a witness as substantive evidence of the facts" as "well justified" in part because it "avoids the empty ritual of instructing the jury not to consider the statement as substantive evidence"); Morgan, *supra* note 176, at 193 (describing instruction to jury to consider prior statements solely for impeachment as "indulging in a pious fraud").

181. See PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 214 (Preliminary Draft 2012), available at <http://www.uscourts.gov/uscourts/rules/rules-published-comment.pdf> (proposing to amend Rule 801(d)(1)(B) to permit prior consistent statements offered to rehabilitate witness's credibility to be used as substantive evidence due to doubt that jurors can follow limiting instruction).

sider eSRPs of testifying witnesses as substantive evidence.<sup>182</sup> While scholars and policymakers have raised thoughtful objections to eliminating hearsay treatment of a testifying witness's out-of-court statements, none of those objections apply with any force to the types of statements that are admissible as eSRPs.<sup>183</sup>

The second important category of statements that would become admissible as eSRPs consists of electronic utterances of victims who are "unavailable" to testify at trial. In fact, eSRPs could potentially play a critical role in domestic violence and sexual abuse prosecutions, where a victim's status update, online chat, or text messages to friends about abuse will be admissible even if the victim refuses to testify, invokes a privilege, cannot be located, or is deceased at trial. A representative example is a murder victim's text message (stating that she and the defendant were "fighting") offered by the prosecution in *State v. Damper* to establish the defendant's motive.<sup>184</sup> *People v. Logan* provides another example.<sup>185</sup> In that case, a trial court erroneously admitted text messages sent by a deceased victim "hours before [her] shooting" which the prosecution used to demonstrate that the killing by her ex-boyfriend was premeditated.<sup>186</sup> There are unfortunately countless other examples, in-

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182. See *supra* Part III.A.

183. The objection raised by the Federal Rules Advisory Committee was the potential for "the general use of prior prepared statements as substantive evidence." FED. R. EVID. 801 advisory committee's note; cf. CAL. LAW REVISION COMM'N, *supra* note 12, at 313 (articulating same objection). Roger Park adds that Congress feared that permitting substantive use of prior inconsistent statements would incentivize untoward pretrial interrogation. Park, *supra* note 95, at 78–79. Since the eSRP exception excludes statements made to investigators or otherwise "in contemplation of litigation," both of these concerns drop away. Judson Falknor's concern that prior inconsistent statements might be fabricated if they could be used substantively is mitigated by the precise fix Falknor proposed: requiring proof that the prior statement was made (here, in the form of a recording of the statement). Falknor, *supra* note 66, at 53–54.

184. *State v. Damper*, 225 P.3d 1148, 1150, 1152 (Ariz. Ct. App. 2010) (rejecting challenge to trial court's admission of text—"Can you come over? Me and Marcus are fighting and I have no gas"—as follows: "we cannot conclude the superior court abused its discretion in ruling the text message constituted a present-sense impression"); see Bellin, *supra* note 14, at 344–45 (arguing that present sense impression exception was never intended to apply to circumstances like *Damper* where the out-of-court statement is presented without any corroborating witness); cf. *Gulley v. State*, 2012 Ark. 368, at 12 (2012) (recounting circuit court ruling admitting defendant's texts but excluding murdered victim's texts in response as hearsay).

185. *People v. Logan*, No. 303269, 2012 WL 3194222, at \*2–3, \*6 (Mich. Ct. App. Aug. 7, 2012).

186. The Court does not specify the content of the text messages, but summarizes that they "indicated that [the] defendant sought to cause 'conflict' or 'a

cluding many of the tweets, texts, and related communications referenced in the introduction to this Article.<sup>187</sup> In fact, the proposed eSRP exception resonates with a prominent commentator's proposal that state legislators enact the original SRP exception to counteract recently stiffened Confrontation Clause restrictions on the admission of hearsay statements by victims of violent crime.<sup>188</sup>

The third important category of admissible eSRPs consists of communications of uncooperative witnesses. When witnesses refuse to testify, invoke a privilege, or cannot be brought to trial, their candid statements on social media and in email and text messages could fill the evidentiary void. One can readily imagine criminal defendants' friends and associates, as well as uninvolved bystanders, unwittingly generating an electronic archive of statements regarding later-litigated events.<sup>189</sup> A re-

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problem' for the victim because he was upset about losing her." *Id.* at \*6. In a familiar pattern, the appeals court noted that the "text messages were hearsay to which no exception applied" and thus erroneously admitted, but deemed their admission harmless error. *Id.*

187. See, e.g., *State v. Petersen*, No. 12-1114, 2013 WL 2370717, at \*2 (Iowa Ct. App. May 30, 2013) (relying on residual exception to reject hearsay challenge to admission of victim's text message to sister recounting husband's threats); *State v. Ford*, 778 N.W.2d 473, 482 (Neb. 2010) (rejecting, on procedural grounds, challenge to trial court ruling admitting the following text message in rape prosecution: "I just got raped . . . By jake . . . I dont know what to do . . ."); Martin Fricker & Danny Buckland, *Great Ormond St Doc Is Suspended Over Abuse Claim*, MIRROR, Apr. 7, 2011, available at 2011 WLNR 6692242 (describing evidence against prominent heart surgeon accused of child abuse that includes "text messages and voice recordings between two witnesses"); John Hult, *Man Accused of Tying Up, Beating Woman*, ARGUS LEADER, Feb. 23, 2011, available at 2011 WLNR 3565811 (reporting statement of Minnesota prosecutor that "[v]ictims might send text messages or emails describing violent incidents but change their story and decline to testify after an arrest is made" in which case "electronic messages are considered hearsay and are inadmissible in court"); Beth Hundsdorfer, *Sheri Coleman Told Friends About Marital Problems*, BELLEVILLE NEWS-DEMOCRAT, Apr. 29, 2011, available at 2011 WLNR 8360616 (describing prosecution's effort to introduce text messages from deceased victim to friends stating that, among other things, "her husband beat her"); Michelle R. Smith, *Odin Lloyd Texts Key Evidence in Aaron Hernandez Murder Charge*, WASH. TIMES, June 27, 2013, <http://www.washingtontimes.com/news/2013/jun/27/odin-lloyd-texts-evidence-aaron-hernandez-murder/?page=all> (highlighting text message from alleged murder victim stating that he was with "NFL" shortly before death); cf. McCormick, *supra* note 100, at 624 (noting that Uniform Rule 63(4)(c) would "open the door to statements by victims of crime").

188. See Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 320-21 & n.274 (2006).

189. See, e.g., *State v. Cassano*, No. 97228, 2012 WL 2580750, at \*5 (Ohio Ct. App. July 5, 2012) (noting that "[a] major portion of the state's case con-

cent Nevada battery trial illustrates a typical scenario. In *Funches v. State*, the trial court (erroneously) admitted testimony regarding a text message sent to the defendant's brother informing the brother that the defendant and two other people had "jumped" the victim.<sup>190</sup> In another example, a student texted his mother after a 2010 school shooting that "there was a boy who had his hand in his pocket, and when he pulled it out he shot this other boy in the head in the ninth-grade hall."<sup>191</sup> These types of text messages, while likely inadmissible under current hearsay rules, would fit under the eSRP exception, even if the sender of the message refused to testify, invoked a privilege, or could not be located at trial. The rule will also aid criminal defendants with claims of innocence grounded in the guilt of a third party. If a defendant claims that another person committed the charged crime, or could provide exculpatory testimony, the third party's relevant electronic utterances can be admitted as eSRPs even if the third party raises (as is common in such circumstances) a Fifth Amendment privilege or is otherwise unavailable to testify.<sup>192</sup>

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sisted of the text messages sent from [an alleged accomplice's] telephone on the night of the robbery"); *Commonwealth v. Koch*, 39 A.3d 996, 1002, 1006 (Pa. Super. Ct. 2011) (holding that trial court erred in admitting text messages sent from the defendant's phone that indicated the sender's "intent to deliver controlled substances" because statements were hearsay and, since defendant could not be identified as sender, not statements of a party); *Sorry, Wrong Number! Drug-Sale Text Message Goes to Police Instead*, CBS CONN. (Jan. 23, 2012, 3:51 PM), <http://connecticut.cbslocal.com/2012/01/23/sorry-wrong-number-drug-sale-text-message-goes-to-police-instead> (describing drug arrest initiated by text message advertising illicit drugs for sale mistakenly sent to police officer, and noting that the investigation was ongoing with police seeking the source of the drugs).

190. *Funches v. State*, No. 57654, 2012 WL 436635, at \*1 (Nev. Feb. 9, 2012). In *Funches*, the Nevada Supreme Court recognized that no existing hearsay exception permitted the testimony about the text message, but in a familiar pattern, deemed the error "harmless." *Id.* In the same opinion, the Nevada Supreme Court also recognized that the trial court erred in admitting "a witness's text messages regarding earlier events" as present sense impressions, but deemed that error harmless as well. *Id.*

191. *Teen Shot at Ala. Middle School Dies; Student Held*, DAILY RECORD, Feb. 6, 2010, available at 2010 WLNR 2539972.

192. See, e.g., *United States v. Whiteford*, 676 F.3d 348, 363 (3d Cir. 2012) (explaining legal doctrine governing strict standard for conferring immunity on a defense witness against prosecution's will); *United States v. Hardrich*, 707 F.2d 992, 993-94 (8th Cir. 1983) (describing scenario where defendant's effort to introduce exculpatory testimony was frustrated by witness's invocation of Fifth Amendment privilege); cf. *United States v. Meregildo*, 920 F. Supp. 2d 434, 438-39 (S.D.N.Y. 2013) (evaluating government's *Brady* obligations to turn over informant's Facebook account containing potentially excul-

Finally, since many of the examples noted above arise in criminal cases, it is worth emphasizing that the admission of eSRPs is fully consistent with the Confrontation Clause, a constitutional provision whose mandate to exclude certain unconfrosted hearsay trumps the hearsay exceptions.<sup>193</sup> The Supreme Court recently revised its Confrontation Clause jurisprudence so that the Clause applies only to the admission of “testimonial” hearsay.<sup>194</sup> Testimonial hearsay, the Court explains, consists of statements “procured with a primary purpose of creating an out-of-court substitute for trial testimony.”<sup>195</sup> By definition, eSRPs cannot be procured or uttered “in contemplation of litigation.”<sup>196</sup> Consequently, they will always be “nontestimonial” and admissible under the Confrontation Clause even if offered by the prosecution in a criminal case.

The inapplicability of the Confrontation Clause to eSRPs is particularly salient because resistance to liberalization of the hearsay rule is sometimes justified on the ground that easing hearsay restrictions will create a chasm between civil and criminal evidence rules.<sup>197</sup> The chasm forms, in theory, because the Sixth Amendment guarantee of confrontation in “all criminal prosecutions”<sup>198</sup> counteracts any loosening of the hearsay prohibition in criminal, but not civil, trials.<sup>199</sup> These concerns are absent with respect to the eSRP exception due to the above-described confluence of the requirements of the proposed exception with the Supreme Court’s Confrontation Clause jurispru

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patory posts, but ultimately rejecting claim, in part because defendant had already obtained access to the account through a private investigator); *State v. Riggins*, No. 1CA-CR09-0311, 2010 WL 5545203, at \*12 (Ariz. Ct. App. Dec. 28, 2010) (ruling that had defendant argued it, trial court’s erroneous exclusion as hearsay of text messages that supported defendant’s self-defense claim would be found harmless).

193. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”); *cf.* Bellin, *supra* note 28, at 40–42 (discussing nontestimonial electronic statements, stating that they do not trigger the Confrontation Clause).

194. *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004).

195. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011).

196. *See supra* Part III.D.

197. *See, e.g.*, FED. R. EVID. art. VIII advisory committee’s introductory note, at 405 (pointing to the “split between civil and criminal evidence” that would arise, due to the application of the Confrontation Clause, as a reason to maintain the hearsay prohibition); Sklansky, *supra* note 78.

198. U.S. CONST. amend. VI.

199. FED. R. EVID. art. VIII advisory committee’s introductory note, at 405.

dence.<sup>200</sup> Consequently, the proposal should please both evidence realists and purists; eSRPs will be fully admissible even in criminal prosecutions, and the evidence rules will continue to apply with substantial uniformity in civil and criminal litigation.

### CONCLUSION

As a result of technological innovations and changing social norms, an unparalleled wealth of recorded, out-of-court statements resides on computers and mobile electronic devices, waiting to assist the finder of fact. Often uttered to family and friends outside the shadow of litigation, and preserved in their original form, these statements could prove invaluable to juries. Unfortunately, this compelling evidence will often be inadmissible due to hearsay rules crafted in an era when electronic communication was unknown.

Since the hearsay rules are tools of our own making, the most direct response to the recent shift in communication norms is to craft a new hearsay exception tailored to the unique attributes of electronic communication. Such an exception would decrease uncertainty, discourage contortions of existing hearsay rules, and most importantly, give juries access to a cornucopia of useful information. The exception should also strive to screen out the subset of electronic evidence, such as anonymous statements and statements made in contemplation of litigation, that is most susceptible to fabrication and abuse.

The daunting task of crafting an “eHearsay” rule is considerably eased by the efforts of a previous generation of evidence scholars, who proposed the ultimately unsuccessful “Statement of Recent Perception” hearsay exception with the Federal Rules of Evidence in 1969. That exception provides a solid base upon which to build a new exception tailored to the attributes of modern electronic communication. An eHearsay exception will allow jurors to see precisely what observers of disputed events were saying about those events while the events were fresh, and prior to the distorting (and often silencing) effects of litigation. Jurors, well aware of the electronic communications that populate their own lives, will increasingly expect access to this

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200. See Lininger, *supra* note 188, at 320–21 & n.274 (“The [SRP] exception seems particularly well-suited for the Supreme Court’s new confrontation jurisprudence because the rule explicitly bars statements when the declarant was contemplating litigation or when the declarant was responding to investigators.”).

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electronic “paper trail.” With a proper framework in place, there is no reason to keep it from them.