

## THE CASE FOR EHEARSAY

*Jeffrey Bellin\**

On April 4, 2014, the Advisory Committee for the Federal Rules of Evidence convened the *Symposium on the Challenges of Electronic Evidence*. The purpose of the symposium was “to consider the intersection of the evidence rules and emerging technologies” and explore what rule changes, if any, might be warranted in light of sweeping changes in the way people communicate.<sup>1</sup> As an unapologetic advocate for changes to the hearsay rules, I thought it a happy coincidence that the symposium coincided with Seventh Circuit Judge Richard Posner’s call for sweeping hearsay reform.<sup>2</sup>

In a 2013 article, *eHearsay*,<sup>3</sup> I proposed a hearsay exception for “Recorded Statements of Recent Perception” (RSRPs).<sup>4</sup> The exception is designed to distinguish reliable from unreliable electronic communication (e.g., text messages and social media posts) and permit the former to be presented to fact-finders. The Advisory Committee invited me to present my RSRP exception at its symposium. After my presentation, a member of the Advisory Committee, Professor Paul Shechtman, provided formal comments on my proposal. Some of these comments resonated with a response Professor Colin Miller published to *eHearsay*, concurring in part and dissenting in part to my proposal.<sup>5</sup> This Essay responds to the various concerns about my proposed hearsay reform raised by Professors Miller, Shechtman, and others.

Change is never easy. Proponents of changes to the evidence rules fairly bear the burden of persuasion that any particular reform is preferable to the status quo. In this Essay, I aim to do just that, while also addressing Judge Posner’s suggestion for hearsay reform. While I agree with the judge’s call for a more permissive attitude toward the admission of hearsay, I believe

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\* Associate Professor, William & Mary Law School. I would like to thank Colin Miller and Paul Shechtman for their comments and critiques of my eHearsay rule and Dan Capra, Judge Sidney Fitzwater, and the members of the Advisory Committee for the opportunity to present my proposal at the *Symposium on the Challenges of Electronic Evidence*.

1. See Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 3, 2012, at 13 (Oct. 5, 2012), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2012-10.pdf>.

2. See *United States v. Boyce*, 742 F.3d 792, 800 (7th Cir. 2014) (Posner, J., concurring).

3. Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7 (2013).

4. *Id.*

5. See Colin Miller, *No Explanation Required? A Reply to Jeffrey Bellin’s eHearsay*, 98 MINN. L. REV. HEADNOTES 34 (2013).

his prescription—replacing the hearsay rules with a “residual” exception powered by judicial reliability assessments—is a recipe for evidentiary chaos. Instead, I continue to advocate for my proposed exception, which would permit a wide swath of recorded out-of-court statements to be introduced at trial, while retaining the class-based hearsay exception framework adopted by the Federal Rules of Evidence forty years ago, and all of the States.

#### I. THE PROPOSED eHEARSAY EXCEPTION

For ease of reference, I begin by setting out my RSRP exception. Accepting the framework of the Federal Rules of Evidence as a given, the proposed exception would necessitate compact additions to two existing rules of evidence: Rule 804, which lists hearsay exceptions that apply when the declarant is unavailable; and Rule 801, which applies when the declarant testifies. The proposed additions to those rules are set out below. Italicized text represents additions; non-italicized text (including the bolded titles) is unchanged from the existing federal rules and included for context.<sup>6</sup>

**Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable As a Witness**

...

**(b) The Exceptions.** 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) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

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6. In *eHearsay*, the proposed language appears in a text box for emphasis. See Bellin, *supra* note 3, at 36. This effort to emphasize the proposed text partially backfired. On Westlaw, the entire text box is omitted and replaced with: “TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE”; on Lexis, the proposed text is replaced with only: “Figure 1.” Consequently, those seeking out *eHearsay* would be well served to download it from HeinOnline; the Minnesota Law Review website (<http://www.minnesotalawreview.org/articles/ehearsay/>); or SSRN ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2232345](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232345)).

**(1) A Declarant-Witness's Prior Statement.** 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.

As explained in *eHearsay*, this exception represents a modified version of the hearsay exception for “Statements of Recent Perception” adopted by the Advisory Committee in 1969, but ultimately rejected by Congress.<sup>7</sup>

## II. APPLICATION OF THE RULE

I refer readers to *eHearsay* for justifications for the RSRP exception's precise language and illustrations of how various terms and phrases should be interpreted.<sup>8</sup> Here, I demonstrate the straightforward application of the exception with two examples drawn from recent case law.

### A. *State v. Petersen and Rule 804(b)(5)*

The first example comes from a 2013 Iowa case, where the prosecution charged Thomas Petersen with murdering his wife Judy.<sup>9</sup> The prosecution's evidence included a text message from Judy to a friend that claimed Thomas had threatened her over the weekend. According to Judy's text message: “He said he . . . planned on attending a funeral in two weeks and it wasn't his. . . . When I asked if he was threatening me he told me to figure it out.”<sup>10</sup>

The prosecution offered the recorded text message exchange (which also included a discussion of a custody battle) to prove the truth of the matter Judy asserted—i.e., that the defendant threatened to kill her shortly before her death due to ill will arising out of the custody battle.<sup>11</sup> Thus, as the State conceded, the message was hearsay.<sup>12</sup>

Applying my proposed exception, however, the text message would easily qualify for admission. The declarant (Judy Petersen) was unavailable. Her still-extant text message constituted a “recorded communication” from a known (i.e., not anonymous) sender. It described a “recently perceived” occurrence (the threats), and there was no indication that Judy sent the text message in contemplation of litigation.<sup>13</sup> Thus, Judy

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7. See Bellin, *supra* note 3, at 33–35.

8. See *id.* at 35–52.

9. *State v. Petersen*, No. 12-1114, 2013 WL 2370717, at \*1 (Iowa Ct. App. May 30, 2013).

10. See *id.* at \*2.

11. See *id.*

12. See *id.* The court went on to hold that the statement was admissible under the “residual exception” to the hearsay rule. See *id.* at \*2–4.

13. See Bellin, *supra* note 3, at 44–46 (discussing case law applying anticipation of litigation restriction); *id.* at 41–44 (describing recently perceived limitation). These limits are derived from similar provisions in Uniform Rule of Evidence 63(4)(c) and proposed Rule 804(b)(2). See *id.* at 41–46. The recently perceived limitation resembles the “fresh in the witness's memory” requirement in Rule 803(5)(B).

Petersen's text message could be shown to the jury as an RSRP under proposed Rule 804(b)(5).

*B. United States v. Blackett and Rule 801(d)(1)(D)*

The next example is from *United States v. Blackett*,<sup>14</sup> where a witness's testimony that she was bribed while serving as a juror was supplemented with the following text message she sent 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>15</sup>

Again, the text message (erroneously admitted in *Blackett* as a recorded recollection)<sup>16</sup> neatly fits within the proposed exception. The requirements are the same as described in the preceding example, except that for Rule 801(d)(1)(D), the (available) declarant must testify. Here, the declarant testified and her still-extant text message constituted a "recorded communication" from a known sender. It described a "recently perceived" occurrence (the bribery attempt), and there is no indication that the text message was made in contemplation of litigation. Thus, the text message could be admitted and shown to the jury as an RSRP under proposed Rule 801(d)(1)(D).

These examples illustrate two points. First, by using actual evidence offered in real cases, the examples provide realistic tests of the rule's application; these are not sanitized hypotheticals carefully calibrated to make the proposed rule look good (or bad). Second, the text messages described above are representative of the types of communications that have become an everyday part of our lives (relating recent occurrences to friends and family)—and are the kind of evidence that no rational person would ignore when trying to resolve a subsequent dispute.

### III. THE STATUS QUO AND THE RESIDUAL EXCEPTION

The RSRP exception would not be necessary if courts could achieve the same (or better) results in screening reliable from unreliable electronic utterances through the existing hearsay rules. In this section, I explain why the existing hearsay rules are inadequate.

*A. Relying on Existing Hearsay Exceptions*

At the outset, it is important to emphasize that it is not only the electronic medium of communication that necessitates changes to existing evidence rules but the parallel emergence of an entirely new communication norm. As surveys by the Pew Internet and American Life Project demonstrate, people are continuously texting and electronically messaging friends,

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14. 481 F. App'x 741 (3d Cir. 2012).

15. Brief for the Appellee at 8–9, *Blackett*, 481 F. App'x 741 (No. 2011-1556), 2012 WL 248361, at \*3–4.

16. See *Blackett*, 481 F. App'x at 742.

relatives, and acquaintances about recent events.<sup>17</sup> The communications are often preserved (with a precise time and date stamp). And because these communications generally arise before any litigation, they provide valuable and often otherwise unavailable (due to memory failings or lack of cooperation) insight into later-disputed facts. Existing hearsay rules might be able to process these communications correctly, but when they do, it is only happenstance. As I argued in *eHearsay*:

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.<sup>18</sup>

Thinking broadly about electronic communication, one can readily imagine the types of communications that, while relevant and reliable, will be lost to juries under existing hearsay doctrine. Communications that arise shortly, but not “immediately” after an observed event and are not uttered in a state of excitement or by the dying, will not qualify as present sense impressions, excited utterances, or dying declarations. Electronic statements (e.g., text messages) made by bystanders, other uninterested parties, or deceased victims will not qualify as statements of a party, or statements against interest. These compelling pieces of evidence, frozen in time and accessible in discovery, will be senselessly kept from juries.

Thus, while it is certainly the case that courts can continue to apply existing hearsay exceptions to determine the admissibility of out-of-court statements captured in email, text messages, and social media posts, the cost will be twofold: (1) valuable evidence will be excluded because it does not fall within an existing exception; and (2) courts will be tempted to distort the existing rules to admit reliable electronic messages like those described in Part II. For example, in *Blackett*, the trial court erroneously admitted the text message as a recorded recollection (Rule 803(5)) even though the witness had no trouble recollecting the described event.<sup>19</sup> And in *Petersen*, the Iowa Court of Appeals relied on the residual exception, finding reliability in one always-present aspect of recorded communication: “the text messages could be seen and evaluated by the trier of fact.”<sup>20</sup>

Judges are already struggling to fit modern electronic communications into the dusty hearsay framework. Many of the examples discussed in *eHearsay* come from appellate rulings that deem trial courts to have erroneously admitted text messages, social media posts, and the like under

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17. See Bellin, *supra* note 3, at 13–17 (reviewing survey data on new communication norm).

18. *Id.* at 24.

19. See *Blackett*, 481 F. App'x at 742; see also FED. R. EVID. 803(5)(A) (excepting hearsay statements concerning matters the declarant “once knew about but now cannot recall”).

20. State v. Petersen, No. 12-1114, 2013 WL 2370717, at \*3 (Iowa Ct. App. May 30, 2013).

an existing exception.<sup>21</sup> The temptation to do so is understandable. Courts are consciously or subconsciously applying a reliability norm and in so doing are 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. Thus, counter to the sentiment captured in the header of this section, the “status quo” is not a real option. Change is coming. The real question is whether this change will be reflected in the loss of valuable evidence and “increasing slippage between what the evidence rules allow and what (some) courts admit,”<sup>22</sup> or a new rule specifically tailored to harness the virtues of a world of electronic communication.

*B. The Residual Exception As a Conduit for Electronic Evidence*

Those who would place their faith in the existing hearsay framework’s ability to handle electronic communication buttress their argument by pointing to the existing safety valve: the “residual exception” contained in Rule 807. As already noted, the *Petersen* court relied on this exception to admit the victim’s text messages.<sup>23</sup> If the existing exceptions are not up to the task, this argument goes, the residual exception can pick up the slack, as in *Petersen*. I disagree.

First, the residual exception was never intended to serve as a platform for the creation of broad hearsay exceptions. After it was proposed in two separate exceptions, the residual exception was rejected by the House of Representatives only to be resurrected by the Senate.<sup>24</sup> Responding to the House’s concerns of overuse, the Senate Judiciary Committee explained its understanding that the residual exception now found in Rule 807

will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action.<sup>25</sup>

Relying on the residual exception to routinely shepherd reliable hearsay found in email, text messages, and social media posts through the hearsay rules (as in *Petersen*) would constitute precisely what the Senate Judiciary Committee warned against: “[a] major judicial revision[] of the hearsay rule.”<sup>26</sup> The legislative history counsels that such a revision should be accomplished through “legislative action,” i.e., the normal rulemaking process, not Rule 807.<sup>27</sup>

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21. See Bellin, *supra* note 3, at 26 n.75 (collecting cases).

22. *Id.* at 26.

23. *Petersen*, 2013 WL 2370717, at \*2–4.

24. S. REP. NO. 93-1277 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7065.

25. *Id.* at 7066.

26. *Id.*

27. *Id.*

Second, even if the legislature had not expressed its intent so clearly, reliance on the residual exception in this context is unwise. The residual exception simply does not provide the precision necessary to regulate anything but truly exceptional, statement-specific circumstances. The exception's primary restrictions on the admission of hearsay are that: (i) the proffered statement contains "circumstantial guarantees of trustworthiness" that are "equivalent" to statements that would be permitted by "Rule 803 or 804"; and (ii) "admitting it will best serve the purposes of these rules and the interests of justice."<sup>28</sup> The first requirement is opaque given that statements that fall within Rule 803 or 804 exceptions contain widely varying guarantees of trustworthiness. Indeed, hearsay admitted under Rule 804(b)(6) (forfeiture by wrongdoing) contains no guarantee of trustworthiness whatsoever: the principle of admission is one of estoppel.<sup>29</sup> Statements admitted as excited utterances, present sense impressions, statements against interest, and dying declarations all suffer from well-known reliability flaws.<sup>30</sup> Statements falling under Rule 803(4) might provide a counterpoint, as statements to a medical provider for purposes of diagnosis or treatment seem quite trustworthy. But, that very exception breaks with the common law to include statements made "to a physician consulted only for the purpose of enabling him to testify"<sup>31</sup>—statements that, given the litigation context, are patently unreliable. A judge looking for concrete guidance in the "equivalent circumstantial guarantees of trustworthiness" requirement of Rule 807 will find none.

Little need be said about Rule 807's second "restriction." Statements that serve the "purposes of the[] rules"<sup>32</sup> will be difficult to identify with precision. Admittedly, there is a rule (Rule 102) that defines the "purpose" of the rules. It states: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."<sup>33</sup> But even if we accept this statement as expressing the *true* purpose of the rules, its application merely duplicates the next portion of Rule 807, which counsels admission only when it is in "the interests of justice."<sup>34</sup> Again, guidance is lacking.

Distilled to its essence, Rule 807 commands judges to admit statements that are roughly as reliable as statements admitted under the other hearsay exceptions, and that will help "ascertain[] the truth and secur[e] a just determination"<sup>35</sup> in "the interests of justice"<sup>36</sup>—a hopelessly amorphous

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28. FED. R. EVID. 807(a).

29. *See id.* 804(b)(6).

30. *See infra* notes 66 (dying declarations), 68 (statements against interest); *see also* Aviva Orenstein, "My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159, 180 (1997) (chronicling longstanding debate about the reliability of excited utterances).

31. FED. R. EVID. 803 advisory committee's note (1972) (Note to Paragraph (4)).

32. *Id.* 807(a)(4).

33. *Id.* 102.

34. *Id.* 807(a)(4).

35. *Id.* 102 ("Purpose").

command that trial judges could easily mistake for satire if it did not appear in so celebrated a legal compendium as the Federal Rules of Evidence. Thus, we return to where we started. The only true constraint on Rule 807 is the legislative history warning that Rule 807 should be used “very rarely, and only in exceptional circumstances.”<sup>37</sup> The evidentiary framework is fortunate that courts have, so far, taken this command seriously. The very existence of a residual rule in a class-based system of hearsay exceptions is an anomaly.<sup>38</sup> Regular reliance on the exception would undermine the entire enterprise, seeding boundless uncertainty into evidence law.<sup>39</sup>

If the rarity of its application is Rule 807’s saving grace, it stands to reason that the rule should not serve as the vehicle for admitting the countless reliable text messages and social media posts orbiting in cyberspace. Acquiescing to routine reliance on the residual exception to funnel electronic communications to fact-finders would, in essence, cede authority over the admissibility of evidence to judges, unconstrained by concrete rules. Such discretion means that different courts will treat the same evidence differently (admitting virtually identical text messages in some cases and excluding them in others), and given the traditionally deferential review of evidentiary rulings and amorphous wording of the residual exception, appellate courts will struggle to standardize trial practice.

Because the residual exception grants virtually unconstrained discretion to trial courts, its routine usage will create massive uncertainty for litigants. That is problematic in our system of justice because virtually all civil and criminal cases are resolved through settlements, dismissals, and guilty pleas.<sup>40</sup> The only way such a system can be justified is through an assumption that litigants model their pretrial agreements on the likely outcome at trial.<sup>41</sup> Such modeling is more difficult when the only way to forecast the admissibility of important evidence is by assessing whether a

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36. *Id.* 807(a)(4).

37. S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7066.

38. *See id.* (“[A]n overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind the codification of the rules.”).

39. H.R. REP. NO. 93-1597 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7105 (stating that the House rejected a broad residual rule “because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial”).

40. *See Missouri v. Frye*, 132 S. Ct. 1399, 1402, 1407 (2012) (citing U.S. Department of Justice calculations for the proposition that “97 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”); Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, BUREAU OF JUSTICE STATISTICS 1 (Apr. 9, 2009), <http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf> (reporting survey result of state courts that “trials . . . accounted for about 3% of all tort, contract, and real property dispositions in general jurisdiction courts”).

41. *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).



particular trial judge will agree that its admission serves the “purposes” of the evidence rules and the “interests of justice.”<sup>42</sup>

For all its faults, the existing class-based hearsay framework allows parties to evaluate the admissibility of evidence and the consequent likelihood of success with minimal judicial guidance, something that would be sacrificed if a significant portion of the hearsay rules was replaced with amorphous judicial discretion. This is exactly what the Advisory Committee sought to avoid when it championed a class-based system of exceptions.<sup>43</sup>

C. *Judge Posner’s Proposal: The Residual Exception  
As a Replacement for the Hearsay Exceptions*

As the discussion in Part III.B foreshadows, I disagree with the recent proposal by Judge Richard Posner to replace the hearsay exceptions with a discretionary regime modeled on the residual rule. Judge Posner succinctly states his proposal in *United States v. Boyce*<sup>44</sup>:

I don’t want to leave the impression that . . . I want to reduce the amount of hearsay evidence admissible in federal trials. What I would like to see is Rule 807 (“Residual Exception”) swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee. The “hearsay rule” is too complex, as well as being archaic. Trials would go better with a simpler rule, the core of which would be the proposition (essentially a simplification of Rule 807) that hearsay evidence should be admissible when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome.<sup>45</sup>

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42. See FED. R. EVID. Art. VIII advisory committee’s note (Introductory Note: The Hearsay Problem) (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”); *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”); Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 397 (1992) (noting in hearsay context that “[p]ractitioners strongly believe they need protection against broad judicial discretion”); Myrna S. Raeder, Commentary, *A Response to Professor Swift: The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Discretion?*, 76 MINN. L. REV. 507, 516–17 (1992) (decrying courts’ current overreliance 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”).

43. FED. R. EVID. Art. VIII advisory committee’s note (1972) (Introductory Note: The Hearsay Problem) (recognizing that abandoning the class-based system of exceptions in favor of “individualized treatment” would, among other things, “add[] a further element to the already over-complicated congeries of pretrial procedures”). This is the same reason I rejected the “good faith” requirement included in the original Statement of Recent Perception exception. See Bellin, *supra* note 3, at 47.

44. 742 F.3d 792 (7th Cir. 2014).

45. *Id.* at 802.

Judge Posner's suggestion resonates with a venerable tradition dating back well before the drafting of the Federal Rules of Evidence. In the modern era, Judge Jack Weinstein crafted perhaps the classic formulation of this argument.<sup>46</sup> Judge Weinstein argued that the class-based system of hearsay exceptions championed by John Henry Wigmore should be replaced with a rule permitting trial courts to determine the admission of hearsay by weighing its "probative force" against "the possibility of prejudice, unnecessary use of court time, and availability of more satisfactory evidence"<sup>47</sup>—roughly the sentiment now captured in Rule 403. In the process, he referenced similar proposals by other leading evidence scholars and implicitly endorsed a generous "residual exception" that could achieve much of his stated goal.<sup>48</sup> In crafting the Federal Rules of Evidence, the Advisory Committee considered and rejected Judge Weinstein's approach. It explained:

The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases.<sup>49</sup>

As explained above, all of the objections the Advisory Committee brandished against Judge Weinstein can similarly be brought to bear against Judge Posner. If anything, given ever-expanding dockets and increasing reliance on settlements and guilty pleas, the criticisms have gained strength since 1969.<sup>50</sup> Further, the passage of time has likely made it more difficult as a practical matter to abolish a class-based hearsay framework, given litigators' long experience with the framework and its adoption in every American jurisdiction. There is, in fact, no guarantee that if the Advisory Committee made such a drastic change, the states would follow suit. The result could be an even more convoluted system of American evidence law, where federal and state practitioners would need to learn two vastly different systems of hearsay rules.

For all of these reasons, my proposal to both reduce the almost universally maligned force of the hearsay prohibition and take advantage of the wealth of new electronic evidence adheres to the class-based hearsay

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46. See Jack Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961).

47. *Id.* at 338–39. In addition, Judge Weinstein would require a notice requirement, greater leeway for judges to comment on the weight of such evidence, and more stringent appellate review. See *id.* at 338–42.

48. *Id.* at 354–55.

49. FED. R. EVID. Art. VIII advisory committee's note (1972) (Introductory Note: The Hearsay Problem). The Committee also noted that permitting judges to exclude evidence on the basis that they did not "believe it"—i.e., rejecting a statement of a particular hearsay declarant as untrue—seemed "atypical" and divergent from the normal pattern of permitting the trier of fact to assess the weight of otherwise admissible evidence. *Id.*

50. See, e.g., Fed. Judicial Ctr., *1955–2004 Statistical Data Regarding Federal Courts*, 8 J. APP. PRAC. & PROCESS 21, 35 (2006) (providing chart documenting rising caseloads and decreasing reliance on trials in federal courts since 1965).

framework long ago adopted by the Advisory Committee, Congress, and all fifty states. It also builds directly on a hearsay reform proposal for Statements of Recent Perception embraced by the evidence community and the Advisory Committee at the time of the framing of the Federal Rules of Evidence.<sup>51</sup> In short, my proposal would permit the rules to move toward the goal urged by Judge Posner (increasing the admissibility of reliable hearsay evidence) through a more modest means. The proposed exception fits the pattern of the existing rules, would be viewed as less of a drastic change, and has the pleasant characteristic of being consistent with a proposal adopted by the Advisory Committee at an earlier time.

#### IV. CRITIQUES

Having sketched the case for the RSRP exception and disparaged potential alternatives, this portion of the Essay responds to specific critiques of my proposal.

##### A. A Response to Professors Miller and Shechtman

As part of the symposium on Electronic Evidence, Professor Paul Shechtman presented a critique of my proposed rule. Professor Shechtman emphasized that the rule was as much about hearsay as electronic hearsay and that there were instances where the rule might let in statements that should be excluded and exclude statements that should be admitted. That said, he indicated that the proposal was “a very good thing to be talking about.”<sup>52</sup> In an article published shortly after the appearance of *eHearsay*, Professor Colin Miller endorsed half of the proposal (proposed Rule 801(d)(1)(D)), but disagreed that statements falling within proposed Rule 804(b)(5) possess sufficient reliability to be excepted from the hearsay prohibition.<sup>53</sup> This portion of the Essay responds to the two professors’ critiques.

As I acknowledged in my presentation and in *eHearsay*, the proposed RSRP exception is not limited to “electronic” hearsay. I view this as a strength of the proposal. It permits the proposed exception to encompass reliable out-of-court utterances expressed in any medium (much like the other hearsay exceptions) and provides the flexibility for growth as communication norms and technologies evolve. Professor Shechtman also correctly points out that my proposal is a direct outgrowth of hearsay reform proposals that arose prior to the emergence of electronic communication. Again, this is something I happily acknowledge, viewing it as a positive attribute of the proposal. As I emphasized in my presentation at the symposium, the proposed rule is a direct evolution of the

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51. See Bellin, *supra* note 3, at 33–35.

52. Paul Shechtman, Advisory Comm. on Evidence Rules, Remarks at the Symposium on the Challenges of Electronic Evidence (Apr. 4, 2014), 83 *FORDHAM L. REV.* 1163, 1216 (2014).

53. See Miller, *supra* note 5, at 46–47, 69. Professor Miller generously concludes that “*eHearsay* makes an extraordinarily important contribution to the scant scholarship on the intersection between electronic evidence and the rules of evidence.” *Id.* at 71.

Statement of Recent Perception exception previously adopted by the Committee.<sup>54</sup> This should give observers some comfort that the rule is not a fleeting or radical sentiment but instead builds on a long tradition of evidence thought. In addition, the rule, while not limited to electronic communication, is tailored to accommodate that medium of expression and particularly text messages—and for the foreseeable future it is to text messages that the rule will likely be most commonly applied. Thus, the proposed rule is both about broadening the amount of evidence that is admissible over a hearsay objection generally and about accommodating the rising tide of reliable electronic hearsay.

Professor Shechtman's other critique—essentially that the rule is both over- and under-inclusive—is also meritorious. My response is that this is the case with all the existing hearsay exceptions. One can easily conjure out-of-court statements that qualify for admission under existing hearsay exceptions, but could be prudently excluded:

- A murder suspect's mother's exclamations to arriving police that the suspect acted in self-defense: admissible as excited utterances.
- A jailhouse informant's testimony (in exchange for leniency) that the defendant, who he met for a few minutes in the jail, admitted culpability: admissible as a statement of a party.
- An accomplice confession that implicates a defendant in a crime: admissible as a statement against interest.

The list is endless. To ensure consistency and predictability, any evidence rule must draw lines. Once lines are drawn, statements can readily be hypothesized that fall on the “wrong” side of those lines. The RSRP exception is no different. Recognizing this unassailable fact, the question becomes not whether one can imagine statements that fall on the wrong side of the exception, but whether on balance the exception does more good than harm.

Professor Shechtman's critique also motivates me to emphasize a critical point: my proposal is intended as a starting point, not a *fait accompli*. If the rule can be improved that is not a reason to reject it, but rather it is a reason to adopt it with those improvements. One potential improvement is to restore the “good faith” safeguard from the Statement of Recent Perception exception.<sup>55</sup> Although I would prefer a more concrete rule, an RSRP exception with a good faith requirement is preferable to no RSRP exception at all. It bears emphasis as well that the admission of an unreliable hearsay statement is not fatal to the cause of accurate fact-

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54. Proposed FED. R. EVID. 804(b)(2), 46 F.R.D. 161, 377 (1969); *see also* 5 Christopher B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:108 (4th ed. 2013) (explaining Committee's inclusion of Rule 804(b)(2) but its subsequent rejection by Congress).

55. *See* JUDICIAL CONFERENCE OF THE U.S., COMM. ON RULES OF PRACTICE & PROCEDURE, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES 205 (1969) (proposing Rule 804(b)(2), which required a qualifying statement to have been “made in good faith”).

finding. The adversary system contemplates vigorous debate over the proper weight to be given any item of evidence. The same arguments that counsel exclusion of hearsay will, if compelling, cripple its power as evidence. In an era of receding jury paternalism, there is little to say for the notion that, while we all might reasonably rely on the text messages and social media posts of knowledgeable parties to ascertain facts ourselves, juries cannot be trusted to evaluate them in litigation.

Professor Miller's critique touches on some of the same concerns as those raised by Professor Shechtman, although in some ways it is much narrower. Professor Miller relies on a comparison of the relative reliability of statements falling under the present sense impression (PSI) hearsay exception (Rule 803(1)) and those falling under the proposed RSRP exception.<sup>56</sup> Because Professor Miller believes that statements falling under the proposed exception would be less reliable than those falling under the analogous PSI hearsay exception, he deems my proposed Rule 804(b)(5) exception problematic.<sup>57</sup> My response is twofold.

First, I quibble with Professor Miller's comparative reliability assessment. Although he is correct that there are some respects in which PSIs may be more reliable than RSRPs (e.g., PSIs must be made closer in time to the perceived event),<sup>58</sup> there are many in which they are not. On this front, Professor Miller discounts the reliability enhancements in my proposed exception, which requires a (1) recorded, (2) communication, (3) not made or obtained in contemplation of litigation, (4) transmitted by a known sender. None of these reliability safeguards are found in the present sense impression exception. Three quick examples illustrate the point:

- An *anonymous* text message sent to Frank that, "I just saw Mike shoot your brother in cold blood," could be admitted as a present sense impression via Frank's *testimony*, even if Frank had deleted the text message and was describing it at trial from memory (to prove Mike's guilt) a year later. Such *testimony about* an electronic communication would not be permitted under the RSRP exception, which requires the actual recorded communication to be presented to the fact-finder and specifically excludes anonymous messages.
- If a police investigator wearing a recording device recorded her ongoing impressions of an interaction with a defendant suspected of drunk driving ("his eyes are bloodshot, etc."), the recording would qualify for admission over a hearsay objection as a present sense impression even if the officer *never* testified. Such a recording would not be admissible under the RSRP exception because it was "made in contemplation of litigation."

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56. See Miller, *supra* note 5, at 62.

57. See *id.* at 71–72.

58. See *id.* at 63–64 (contrasting the immediacy required for a present sense impression with the more flexible time constraint in my proposed exception).

- A passenger in a car could draft, but not send, an email that described the car's progress ("we are stuck in traffic"), save the email, and later introduce it (perhaps to support an alibi claim) as a "present sense impression." The draft email would satisfy the prerequisites of the present sense impression exception but would not qualify as an RSRP because, having never been sent, it did not constitute a "communication."

In sum, there are concrete reliability safeguards in the RSRP exception that are absent from the PSI exception, leaving open the question of whether statements falling under the RSRP or PSI exception are more reliable.

My second (larger) problem with Professor Miller's critique, however, is that his comparison is a loaded one. The present sense impression exception is located in Rule 803. Rule 803 exceptions permit the admission of hearsay evidence, "regardless of whether the declarant is available as a witness."<sup>59</sup> The Advisory Committee Notes explain that Rule 803 "proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available."<sup>60</sup> Stated another way, the Advisory Committee viewed hearsay falling under Rule 803 exceptions to be superior, or at the very least equivalent, in terms of reliability, to the declarant's live testimony. Consequently, Rule 803 exceptions must meet a very high bar of reliability.<sup>61</sup>

The portion of my proposed exception that Professor Miller criticizes<sup>62</sup> falls within Rule 804, not Rule 803. The key difference between the two rules, of course, is that Rule 804 is only triggered when the declarant is "unavailable."<sup>63</sup> As the Advisory Committee explains, this crucial requirement reflects that Rule 804

proceeds upon a different theory [than Rule 803]: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted [under Rule 804] if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant.<sup>64</sup>

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59. FED. R. EVID. 803.

60. *Id.* 803 advisory committee's note (1972 Proposed Rules).

61. *See id.* 804 advisory committee's note (1972) (Note to Subdivision (b)) ("Rule 803, *supra*, is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility.").

62. Professor Miller endorses my proposed Rule 801(d)(1)(D). *See Miller, supra* note 5, at 35, 58, 72.

63. FED. R. EVID. 804(a).

64. *Id.* 804 advisory committee's note (1972) (Note to Subdivision (b)).

Thus, it is uninformative to evaluate a Rule 804 exception by comparing the reliability of statements falling under that exception to statements that would qualify for admission under Rule 803. The framework of the rules anticipates that *all* Rule 804 exceptions will fail this test. Rule 804 exceptions are not based on an assumption that qualifying hearsay is just as reliable as live testimony. Instead, Rule 804 exceptions must only meet the standard that hearsay passing through them is preferable to the “complete loss of the evidence of the declarant.”<sup>65</sup> Consequently, the proper test of whether proposed Rule 804(b)(5) meets the requisite reliability standard would be to compare statements admitted under the proposed rule to those admitted under *other Rule 804 exceptions*, like dying declarations, statements against interest, and forfeiture by wrongdoing. Here, the proposed exception stacks up quite well.

Reliability flaws in the Rule 804 exceptions are well established. As virtually everyone acknowledges, the dying declaration exception (Rule 804(b)(2)) is: (1) based on untested spiritual assumptions and (2) presumes a counterintuitive measure of lucidity on the part of the dying that science does not support.<sup>66</sup> Skepticism of “statements against interest” (Rule 804(b)(3)) is also widespread, drawing on the exception’s now abandoned historical limitation to statements against pecuniary or proprietary interest,<sup>67</sup> and the rule’s failure to acknowledge the virtual impossibility of a voluntary statement that is truly thought by its speaker to be against one’s own interest.<sup>68</sup> The exception permitting hearsay statements of a person rendered unavailable by a party’s wrongdoing (Rule 804(b)(6)) makes no pretense at all to reliability.<sup>69</sup> It is intended to reduce anti-witness violence

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65. *Id.*

66. *See, e.g.*, John J. Capowski, *Statements Against Interest, Reliability, and the Confrontation Clause*, 28 SETON HALL L. REV. 471, 475 (1997) (“[D]ying declarations may be highly unreliable. . . . Despite the potential unreliability of such statements, the exception was established in homicide cases to compensate for the unavailability of the declarant.”); Bryan A. Liang, *Shortcuts to “Truth”: The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229, 237–43 (1998) (highlighting scientific evidence that casts doubt on the reliability of statements of the dying); *see also* FED. R. EVID. 804 advisory committee’s note (1972) (Note to Subdivision (b) Exception (2)) (acknowledging that “the original religious justifications for the exception may have lost its conviction for some persons over the years”).

67. *See, e.g.*, FED. R. EVID. 804 advisory committee’s note (1972) (Note to Subdivision (b) Exception (3)) (acknowledging common law limitation).

68. *See, e.g.*, *Lilly v. Virginia*, 527 U.S. 116, 131 (1999) (describing suspicion of unreliability that attaches to accomplice confessions); *Herbert v. Lankershim*, 71 P.2d 220, 230 (Cal. 1937) (noting in the context of a statement against interest that, “[o]n the subject of oral admissions, unless corroborated by *satisfactory* evidence, this court, in [a prior case], rates it as the weakest of testimony that can be produced”); John P. Cronan, *Do Statements Against Interest Exist? A Critique of the Reliability of Federal Rule of Evidence 804(b)(3) and a Proposed Reformulation*, 33 SETON HALL L. REV. 1, 3 (2002) (describing psychological factors that undermine the assumptions of the rule and arguing that “research and common experience reveal myriad reasons why persons make untrue, self-incriminating statements”).

69. *See* FED. R. EVID. 804 advisory committee’s note (1997) (Subdivision (b)(6)) (justifying the rule as a “prophylactic rule to deal with abhorrent behavior ‘which strikes at the heart of the system of justice itself’” (citation omitted)).

and intimidation, regardless of the reliability of the witness's potential testimony or hearsay statements.

In sum, defenders of the Rule 804 exceptions search in vain for definitive support for the reliability of qualifying statements. The key to understanding these exceptions is necessity. While there is some measure of reliability in statements that fall under the rule, their admission can best be explained as a choice of evils. In light of the declarant's unavailability, Rule 804 permits the jury to hear the out-of-court statements (e.g., an alleged accomplice's confession, the victim's dying accusations, or the silenced witness's previous words) in lieu of depriving jurors of that declarant's evidence altogether. My proposed exception embodies this same philosophy. Proposed Rule 804(b)(5) applies only when the declarant is unavailable. Thus, the question is not whether a preserved text message from an unavailable witness relating relevant events will always be reliable. Instead, it is whether the jury should be permitted to view such a text message given that it will never hear from the declarant. My confidence that the answer to this question is "yes!" stems not only from the necessity factor, but also the reliability enhancement of the RSRP exception (missing from all the other Rule 804 exceptions), that the absent witness's communication can be shown directly to the jury. Unlike an oral "statement against interest" or "dying declaration" relayed to the jury by a police officer, jailhouse informant, or other interested party who may have reason to embellish (or manufacture) a critical statement, an RSRP comes to the jury preserved in its original form.

*B. Prejudice to Defendants, Evidence Fabrication, and Misunderstanding*

Another objection to the portion of my proposal that admits certain hearsay statements of unavailable declarants stems from a sense that admitting such evidence aggrieves criminal defendants. In reality, the proposed rule enables defendants and prosecutors as well as civil litigants to provide reliable evidence to juries. Criminal defendants would likely invoke the rule to introduce evidence of third-party perpetrators or to support alibi testimony. Nevertheless, it is undoubtedly the case that the rule will be more commonly invoked in the criminal context by prosecutors, largely because criminal defendants present evidence less frequently.

Still, rules drafters should be cautious in evaluating this critique. Due to the "reasonable doubt" standard and the allocation of the burden of proof, criminal defendants generally benefit more from evidentiary gaps than prosecutors or civil litigants. Thus, criminal defendants will view the fact-finders' ignorance of even reliable information with an understandable but undeniably partisan relish. Drafters of evidence rules should not adopt this same perspective. Criminal defendants do, of course, receive special dispensation in the rules of evidence, but that dispensation is largely a product of constitutional, not rule-based, considerations and primarily, in this context, the Sixth Amendment Confrontation Clause.<sup>70</sup>

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70. Crawford v. Washington, 541 U.S. 36 (2004).



These constitutional considerations are important, but as the Advisory Committee has recognized, they need not be incorporated into the rules themselves.<sup>71</sup> For this reason, the hearsay exceptions are crafted as “exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility.”<sup>72</sup> As is currently the case, prosecution evidence may make it through a hearsay exception only to be barred by the Sixth Amendment. The RSRP exception follows the same pattern. That said, because the RSRP carves out statements made in contemplation of litigation, there will be few occasions where the post-*Crawford* Confrontation Clause mandates exclusion of evidence admitted under the proposed exception.<sup>73</sup>

The most powerful remaining defense-focused objection is that evidence admitted under the proposed objection is particularly unreliable in a manner not apparent to jurors. If a rule permits evidence to be introduced, that same rule can be abused through: (1) the creation of fabricated evidence that appears to meet its requirements; or (2) the admission of authentic evidence that appears to mean one thing when it actually means something else.

Focusing more precisely on the potential for intentional abuse of the proposed exception suggests there is no heightened need for concern here. The RSRP exception attempts to minimize the risk of abuse by excluding the types of communications most likely to be fabricated: communications made to investigators or made in contemplation of litigation, as well as recorded statements like “notes to self” or diary entries that are not “communications.”

One of the key protections against fabricated evidence incorporated into the RSRP exception is requiring proof that a communication was made.<sup>74</sup> By requiring a “recorded” communication, the RSRP exception forces those who would seek to abuse the rule to produce physical evidence at significant peril. In the electronic context, recorded communications generally pass through numerous servers and devices. Someone who attempts to manufacture a text message, for example, would be vulnerable to disproof by evidence obtained from the (purported) participants’ phones or the phone company.<sup>75</sup>

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71. FED. R. EVID. Art. VIII advisory committee’s note (1972) (Introductory Note: The Hearsay Problem) (emphasizing the “separateness of the confrontation clause and the hearsay rule”).

72. *Id.*

73. See Jeffrey Bellin, *Applying Crawford’s Confrontation Right in a Digital Age*, 45 TEX. TECH. L. REV. 33 (2012) (arguing that the Confrontation Clause will rarely apply to text messages and social media communications); Bellin, *supra* note 3, at 59 (emphasizing that exclusion of statements made in contemplation of litigation conforms to recent Confrontation Clause jurisprudence).

74. Cf. Judson Falknor, *The Hearsay Rule and Its Exceptions*, 2 UCLA L. REV. 43, 53–54 (1954) (advocating for requiring proof of an actual statement as an element of an analogous hearsay exception).

75. To avoid these problems, a person might actually send a text message they planned to use in later litigation, but this is a risky stratagem; such a message could just as easily be used to implicate them in wrongdoing as exonerate them.

As this discussion suggests, the primary protection against abuse is not excluding vast chunks of valuable evidence or writing earnest verbal protections into existing hearsay rules (“good faith” or “interests of justice”), but rather the same constraints that protect against evidence fabrication generally. Authentication requirements dictate that proponents of any evidence offer sufficient evidence to support a finding that the evidence “is what the proponent claims it is.”<sup>76</sup> Thus, statements offered under the proposed exception will have to be shown to be, in fact, actual text messages, tweets, or Facebook status updates from the person claimed. In addition, the proponent of fabricated evidence takes a huge risk. The criminal law buttresses the authentication requirements with severe penalties for falsifying evidence<sup>77</sup> and, even apart from those, parties risk loss at trial (and severe litigation sanctions) if they sponsor evidence that is exposed as fraudulent.

It is also important to stress that the existing evidence rules already tolerate a great deal of potential for abuse. To the extent someone is interested in fabricating evidence, there are abundant ways to do so under existing rules. Most obviously a person can falsify live testimony. A more discreet miscreant can, of course, manufacture admissible out-of-court statements that will be admissible through an existing hearsay exception. Perhaps the most obvious form of abuse is to falsely assert that the opposing party admitted guilt. The classic example is the jailhouse “snitch” or the corrupt police officer who testifies that the defendant confessed. Looking more specifically at electronic communications, these too can already be fabricated in a manner that permits them to fall within a wide variety of exceptions: as present sense impressions, recorded recollections, state of mind, business records or, if all else fails, the residual exception. Hypothesize for a moment a bad actor intent on fabricating electronic evidence. Why wouldn’t this scoundrel simply fabricate a text message from the defendant (or plaintiff) and offer it, without controversy, as a statement of a party, rather than attempt the more complicated task of admitting it as a non-party’s RSRP. In short, someone bent on fabricating evidence can already do so. The Recorded Statement of Recent Perception exception, like any rule of admission, slightly increases the menu of options, but any difference is of degree rather than kind.

The separate concern about potential misunderstandings must be conceded to a degree. The abbreviations, slang, and shorthand often present in hurried, terse electronic communication certainly lend themselves to later misunderstandings, a danger supplemented by the phenomenon of “autocorrect.” In this respect, Professor Miller cleverly uses my own warnings regarding the vagaries of electronic communications against me.<sup>78</sup> There are, of course, some protections. There is almost always some context for electronic statements. Social media posts and text messages are

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76. FED. R. EVID. 901(a).

77. *See, e.g.*, 18 U.S.C. § 1519 (2012); CAL. PENAL CODE § 132 (West 2013).

78. Miller, *supra* note 5, at 70 (quoting Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 364–65 (2012)).

generally components of a broader exchange that includes responses and comments that can shed light on potential ambiguity. Similarly, significant autocorrect errors are often noted by the participants in the effected communication. Finally, there must be some allowance for attorneys to exercise advocacy and jurors to apply their common sense. Autocorrect errors can be highlighted and alternative explanations for terms or abbreviations suggested. The time is near, if it has not arrived already, when jurors will understand the vagaries of electronic communication well enough that the potential for misunderstanding will be deemed precisely equivalent to that of oral communication. For those immersed in the electronic medium, there is little doubt that the potential for misunderstanding a recorded text message is in the same ballpark as that of misunderstanding an “excited utterance” or “dying declaration,” particularly as the latter are presented secondhand (through the recollection of a potentially interested witness), while the former are presented to the jury precisely as originally uttered.

Finally, it is worth noting that there is a strange irony underlying these objections. Abuse and misunderstanding objections garner most of their persuasive force not because recorded, electronic communications are more easily fabricated or misunderstood than other evidence, but because they may be unusually persuasive. This logic cannot win out, however. It would be a strange system of evidence that shrank from a hearsay exception on the ground that evidence that falls within the exception was suspect because it is widely viewed by regular people (i.e., jurors) as a reliable source of information. After all, that type of consensus is quite close to the point of having hearsay exceptions in the first place.

#### CONCLUSION

As Professors Shechtman and Miller easily establish, my proposed RSRP exception is not perfect. Like all hearsay exceptions it is over- and under-inclusive. Hearsay admitted under the exception will sometimes be less reliable than live witness testimony. That is not the test, however. The question, given the contours of the proposed Rule 804 exception, is whether statements falling within its requirements should be kept from the jury even when jurors will not be able to hear from the declarant. I welcome suggestions as to how the exception might be improved, including, perhaps, a “good faith” proviso to ease concerns about outlier statements. In my view, however, an exception along the lines of my proposal is the best path forward and far superior to the more drastic suggestion of hearsay reform offered by Judge Posner and others. And that may prove to be the critical inquiry. Given the most recent communication revolution, the question may not, in fact, be whether the evidentiary landscape should change, but instead what role the Advisory Committee will play in the inevitable changes emerging on the horizon.