

APPLYING *CRAWFORD*'S CONFRONTATION RIGHT IN A DIGITAL AGE

*Jeffrey Bellin**

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I. INTRODUCTION

Much of the recent commentary on the Confrontation Clause focuses on the past. Commentators (and Supreme Court Justices) evaluate the evolving jurisprudence by comparing the confrontation right articulated in *Crawford v. Washington* and its progeny to the right that existed in 1791.¹ This Essay shifts the focus to the future, exploring how the Supreme Court's new Confrontation Clause jurisprudence will operate in a world where communication is increasingly informal and electronic.

A large and increasing portion of our social discourse takes place electronically, through email and texting, as well as on social media Internet sites such as Facebook and Twitter.² These communications are particularly

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1. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 46 (2004) (highlighting 1791 as the date the Sixth Amendment was ratified); Ellen Liang Yee, *Forfeiture of the Confrontation Right in Giles: Justice Scalia's Faint-Hearted Fidelity to the Common Law*, 100 J. CRIM. L. & CRIMINOLOGY 1495, 1515 & n.115 (2010) (discussing the historical record in 1791 but noting argument that the relevant time period was actually 1868 when the right was applied to the states by ratification of the Fourteenth Amendment).

2. See Joseph Goldstein, *In Social Media Postings, a Trove for Investigators*, N.Y. TIMES (Mar. 2, 2011), http://www.nytimes.com/2011/03/03/nyregion/03facebook.html?_r=0.

susceptible to use in litigation.³ Unlike oral communication, and even much of traditional written discourse, electronic communications are difficult to keep private because (1) they are often broadcast to multiple recipients; (2) they reside (or pass through) computer servers owned and operated by third parties; and (3) they are generally preserved, sometimes indefinitely, on the computers involved in their creation and transmission.⁴ As a consequence, this form of evidence can be discovered long after its creation by savvy investigators and presented to a jury in its original, and thus uniquely compelling, form.

Interestingly, the expanding category of electronic out-of-court statements seems to be left, after *Crawford* and *Michigan v. Bryant*, largely unrestricted by the Confrontation Clause.⁵ A modern-day Sir Walter Raleigh incriminated by an associate's emails, texts, or Facebook "status updates" will have his pleas for confrontation dismissed out of hand by a court faithfully applying the Supreme Court's recent case law. This is true regardless of doubts about the reliability of the e-hearsay accusations offered by the prosecution or the absence of any opportunity for cross-examination. Under *Crawford* and its progeny, the confrontation right only applies to "testimonial" hearsay—that is, as the *Bryant* Court defines the term, hearsay "procured with a primary purpose of creating an out-of-court substitute for trial testimony."⁶ The post-*Crawford* Confrontation Clause has "no application" to "nontestimonial" statements "even if they lack indicia of reliability."⁷ Excepting the rare occasions when people text, email, or instant message (IM) their observations to law enforcement officials, few electronic utterances appear to fall within the Court's definition of "testimonial."⁸ This means that, as far as the modern Confrontation Clause is concerned, and assuming a compliant hearsay exception, electronic communications—the bulk of out-of-court communication in an increasingly digital age—can be introduced by the prosecution in criminal cases without confrontation.

This Essay articulates the case that the post-*Crawford* Confrontation Clause doctrine renders the confrontation right surprisingly inconsequential in an age of casual, electronic discourse and briefly explores a handful of reform proposals that could alter this disquieting reality: (1) broadening the definition of testimonial to include any statement that could reasonably be anticipated to

3. See *id.*

4. See Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 355-56 & nn.90-91 (2012) [hereinafter Bellin, *Present Sense Impressions*].

5. See *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

6. *Bryant*, 131 S. Ct. at 1155 (explaining that statements are nontestimonial and not subject to the Confrontation Clause if they are "not procured with a primary purpose of creating an out-of-court substitute for trial testimony").

7. *Whorton v. Bockting*, 549 U.S. 406, 420 (2007).

8. See, e.g., Lisa Respers France, *Police Departments Keeping Public Informed on Twitter*, CNN (Mar. 13, 2009), http://articles.cnn.com/2009-03-13/tech/police.social.networking_1_twitter-and-facebook-twitter-user-departments?_s=PM:TECH; see also *Dallas Police Department*, FACEBOOK, <http://www.facebook.com/DallasPD> (last visited Oct. 18, 2012) (demonstrating that law enforcement agencies maintain a presence on Facebook and Twitter).

be used at trial; (2) reintroducing limits on the admission of nontestimonial hearsay, either by (2a) reintroducing a *Roberts*-type reliability screen or (2b) requiring a showing of unavailability prior to the admission of a declarant's nontestimonial hearsay; and (3) leaving the Confrontation Clause doctrine as is and policing the admission of unreliable nontestimonial hearsay through the Due Process Clause.

II. A NEW AGE OF COMMUNICATION

A new age of electronic communication is upon us.⁹ Status updates, tweets, emails, and texts are steadily replacing written letters, water cooler gossip, phone calls, and voicemail.¹⁰ The continued miniaturization of computing power, along with the increasing availability of wireless communication networks, has created a world in which people can (and do) communicate at all times of the day, and from any location, to virtually anyone and everyone on earth.¹¹ It may be true that a tree falling in the middle of a deserted forest does not make a sound, but if the tree is under forty, it probably has a smartphone¹² and can broadcast its predicament instantly with a "status update" on Facebook:

Just fell in the forest. Anyone around? CLAB!¹³

The new age of electronic communication is fostered by social media sites such as Facebook and Twitter.¹⁴ These Internet sites form the indispensable infrastructure for mass electronic communication, allowing users to effortlessly

9. Cf. ERIK QUALMAN, *SOCIALNOMICS: HOW SOCIAL MEDIA TRANSFORMS THE WAY WE LIVE AND DO BUSINESS* xxi (2011) (stating that "we are in the early stages of . . . [a] far-reaching revolution [that] is being driven by people and enabled by social media").

10. See Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 MINN. L. REV. 1514, 1556 (2010).

11. See Steve Lohr, *Microsoft to Allow Partners to Alter Some Source Code*, N.Y. TIMES (Apr. 10, 2003), <http://www.nytimes.com/2003/04/10/business/technology-microsoft-to-allow-partners-to-alter-some-source-code.html> ("Steady advances in chip speeds and miniaturization have enabled manufacturers to begin putting more computing power in smaller devices."); Jacob Livingston, *Mixed Messages: Educators Blame Students' Errors on Texting Lingo*, SPOKESMAN-REV. (Nov. 15, 2009), <http://www.spokesman.com/stories/2009/nov/15/mixed-messages/> (noting that "the percentage of the U.S. population who are always connected has skyrocketed" and reporting on a Nielsen Company survey that found "77 percent of [American] teenagers have their own mobile phones and more than 80 percent of those teens use text messaging" and that "[d]uring the first quarter of 2009, American teens sent or received an average of 2,899 text messages per month—an increase of 566 percent in just over two years").

12. See Mike Snider, *Phone Buyers Getting Smarter*, USA TODAY (Mar. 30, 2012), at 1B.

13. "CLAB" is Internet slang for "[c]rying like a baby." Randi Bjornstad, *Ruth Retiring? OMG!: Secondhand Shop Owner May Hang It Up at Year's End*, REG.-GUARD (Sept. 12, 2010), <http://projects.registerguard.com/turin/2010/sep/12/ruth-retiring-omg/>. But cf. FED. R. EVID. 801(a) (defining hearsay as an assertion of "a person"). A version of this joke appeared in a footnote of an earlier article. See Bellin, *Present Sense Impressions*, *supra* note 4, at 355 n.88. I continue to find it amusing.

14. See Bellin, *Present Sense Impressions*, *supra* note 4, at 352.

communicate with large audiences of “friends” or “followers,” on traditional computers as well as mobile devices such as smartphones.¹⁵

Without a steady stream of user-provided content, sites such as Facebook and Twitter would be empty shells. Accordingly, these sites “are constantly trying to get more [content], inviting [users] to update, upload, post and publish.”¹⁶ These efforts have been successful. Facebook boasts more than 1 billion users, and an average of 552 million daily active users.¹⁷ Twitter reports a steadily increasing average of over 200 million “[t]weets” per day.¹⁸

Recent surveys illustrate the trend toward a world in which we all send and receive a constant stream of electronic communication. Seventy-eight percent of adults use the Internet, at least occasionally.¹⁹ Among online adults, two-thirds (66%) use “social media platforms” like Facebook and Twitter,²⁰ generating “open running diaries” of their lives.²¹ Cell phones, once a novelty, are now the norm, but talking on the phone is increasingly optional. The vast majority (83%) of American adults own cell phones, and almost three-quarters of them (73%) use their phones for texting.²² Among adults, those who use text messaging “send or receive an average of 41.5 messages on a typical day, with the median user sending or receiving 10 texts daily.”²³ As more Americans

15. See *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Oct. 18, 2012) (explaining Twitter’s service); Virginia Heffernan, *The Medium: Being There*, N.Y. TIMES (Feb. 10, 2009), http://www.nytimes.com/2009/02/15/magazine/15wwln-medium-t.html?_r=0 (reporting that the capability of mobile devices to access social networking sites “has made it more likely that when a pal—the Jägermeister-besotted Sean, say—writes that he’s stumbling home, he *is* stumbling home, right then, and simultaneously apprising his friends via his mobile”); Dhiraj Murthy, *Twitter: Microphone for the Masses?*, 33 MEDIA, CULTURE & SOC’Y 779, 781 (2011) (describing how Twitter works).

16. See MATT IVESTER, LOL . . . OMG!: WHAT EVERY STUDENT NEEDS TO KNOW ABOUT ONLINE REPUTATION MANAGEMENT, DIGITAL CITIZENSHIP AND CYBERBULLYING 17-18 (2011) (noting that “the average Facebook user posts ninety pieces of content on the site every month” and emphasizing that social media sites need content to survive and so “they are constantly trying to get more of it, inviting you to update, upload, post and publish”).

17. *Newsroom: Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Oct. 20, 2012).

18. *Your World, More Connected*, TWITTER BLOG (Aug. 1, 2011, 9:25 AM), <http://blog.twitter.com/2011/08/your-world-more-connected.html> (reporting that Twitter generates over 200 million tweets per day, up from 65 million tweets per day in 2010).

19. LEE RAINIE, PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AS A DIVERSION AND DESTINATION 6 (2011), available at http://pewinternet.org/~media/Files/Reports/2011/PIP_Logging-on-for-fun.pdf.

20. AARON SMITH, PEW INTERNET & AM. LIFE PROJECT, WHY AMERICANS USE SOCIAL MEDIA 2 (2011), available at <http://pewinternet.org/~media/Files/Reports/2011/Why%20Americans%20Use%20Social%20Media.pdf>.

21. See QUALMAN, *supra* note 9, at 4.

22. AARON SMITH, PEW INTERNET & AM. LIFE PROJECT, AMERICANS AND THEIR CELL PHONES 2 (2011) [hereinafter SMITH, AMERICANS AND THEIR CELL PHONES], available at <http://pewinternet.org/~media/Files/Reports/2011/Cel%20Phones%202011.pdf>; see also *United States v. Jones*, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring) (citing a June 2011 report that “there were more than 322 million wireless devices in use in the United States”).

23. AARON SMITH, PEW INTERNET & AM. LIFE PROJECT, AMERICANS AND TEXT MESSAGING 1, 2 (2011), available at <http://pewinternet.org/~media/Files/Reports/2011/Americans%20and%20Text%20Messaging.pdf>.

move to smartphones—devices that make texting easier—these numbers will only increase. In addition, skyrocketing technology usage rates among younger generations foreshadow a not-so-distant future where everybody is plugged into the Internet, everybody uses social media, and everybody texts—all the time.²⁴

The ubiquity of electronic communication is only part of the equation. There are two facets of this new communication norm that make it particularly significant for litigation. First, electronic communications are more likely to become known to and retrievable by interested litigants.²⁵ E-communications are more public than the oral and written communications of an earlier era; these utterances quickly spread to numerous recipients and, in doing so, pass through and become preserved on the computers involved in their transmission and receipt.²⁶ Police and prosecutors can root out this electronic evidence with an Internet search or subpoena to Facebook, Twitter, or the cellphone service providers of the suspect and his friends.²⁷ Second, electronic communications are powerful evidence because they will be (or at least appear to be) preserved in their original form.²⁸ Memories fade, and witnesses lose interest or develop a bias at the time of trial. Electronic communications, however, sent in an unguarded moment to friends or acquaintances remain pristine. Often arising before the controversy, these statements may be viewed by juries as more reliable than in-court testimony because they were uttered closer in time to a disputed event and more incriminating because some witnesses may seem more candid when speaking to friends than testifying in court.

24. See, e.g., SMITH, AMERICANS AND THEIR CELL PHONES, *supra* note 22, at 6. 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. *Id.*; see also Joanna Brenner, *Pew Internet: Mobile*, PEW INTERNET & AM. LIFE PROJECT (Sept. 4, 2012), <http://pewinternet.org/Commentary/2012/February/Pew-Internet-Mobile.aspx> (“Cell owners between the ages of 18 and 24 exchange an average of 109.5 messages on a normal day—that works out to more than 3,200 texts per month—and the typical or median cell owner in this age group sends or receives 50 messages per day (or 1500 messages per month).”); AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, TEENS, KINDNESS AND CRUELTY ON SOCIAL NETWORK SITES 15 (2011), available at http://pewinternet.org/~media/Files/Reports/2011/PIP_Teens_Kindness_Cruelty_SNS_Report_Nov_2011_FINAL_110711.pdf (“Internet use is nearly universal among American teens.”).

25. See Ohm, *supra* note 10, at 1556.

26. See *id.* (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”); see also Seth P. Berman et al., *Web 2.0: What’s Evidence Between “Friends”?*, 53 BOS. B.J. 5, 5-6 (Jan.-Feb. 2009) (advising litigators that discoverable Facebook postings can be obtained either from the computers of participants in the conversation or “from Facebook itself”); Daniel de Vise, *Schoolyard Face-Offs Blamed on Facebook Taunts*, WASH. POST (Apr. 27, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/26/AR2008042601286.html> (noting that Facebook comments are “now immortalized on semi-public Web pages, where they can be viewed by thousands”); Jacob Leibenluft, *Do Text Messages Live Forever?*, SLATE (May 1, 2008, 6:15 PM), http://www.slate.com/articles/news_and_politics/explainer/2008/05/do_text_messages_live_forever.html (discussing the possibility that, depending on one’s cell phone service provider, even deleted text messages can be recovered from one’s phone, but noting that some providers delete text messages fairly rapidly).

27. See Jeff Bellin, *Finding Evidence on Facebook*, EVIDENCEPROF BLOG (Nov. 1, 2011), <http://lawprofessors.typepad.com/evidenceprof/2011/11/finding-evidence-on-facebook.html>.

28. See Leibenluft, *supra* note 26.

III. APPLYING *CRAWFORD*'S CONFRONTATION RIGHT TO DIGITAL COMMUNICATION

As litigators (and police investigators) become more and more attuned to the digital evidentiary cornucopia swirling in cyberspace, the application of the Confrontation Clause to electronic statements becomes increasingly important. As more and more communication migrates onto electronic platforms, defendant-incriminating statements will be made on these platforms in unguarded moments by witnesses (such as defendants' friends or partners in crime) who would likely refuse to testify or be impossible to locate. These witnesses are ordinarily useless to the prosecution, but their hearsay could be priceless. Prosecutors of the future may have placards in their office that read, "Who needs informants, when there is Facebook?" Assuming an applicable hearsay exception, Facebook commentary is, in fact, tactically superior to informant testimony because it can "testify" without damaging cross-examination.

As discussed below, the recent revitalization of the Confrontation Clause actually decreases the constitutional protections that apply to many electronic out-of-court statements. While an accomplice's statement during a police interrogation is now inadmissible absent confrontation, the same statement on a Facebook page or in a text message can be admitted without any Confrontation Clause scrutiny at all.²⁹

Prior to 2004, Confrontation Clause analysis was governed by *Ohio v. Roberts*.³⁰ As it came to be interpreted, *Roberts* condoned the admission of any hearsay exhibiting "indicia of reliability."³¹ Under *Roberts*, a judge could—consistent with the Sixth Amendment—admit a hearsay accusation without confrontation, so long as the statement fell within a "firmly rooted" hearsay exception or otherwise appeared trustworthy.³² *Crawford* famously overturned *Roberts*, rejecting the significance under the Sixth Amendment of a judicial determination of an out-of-court statement's reliability.³³ Under *Crawford*, whether an out-of-court statement implicates the Confrontation Clause depends on the manner in which the statement arose—i.e., the statement's "primary purpose."³⁴ If a statement is made or elicited primarily with an eye toward litigation, it is testimonial and with very limited exceptions inadmissible, absent

29. See *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004).

30. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004).

31. *Id.* (holding that unconfrosted hearsay offered by the prosecution "is admissible only if it bears adequate 'indicia of reliability'"). *Roberts* itself could be read to also require a showing of unavailability, but that reading of the case was later rejected. *White v. Illinois*, 502 U.S. 346, 353 (1992).

32. *Roberts*, 448 U.S. at 66 (holding that the prosecution can establish the requisite reliability either by showing "particularized guarantees" of a statement's "trustworthiness" or by showing that the statement "falls within a firmly rooted hearsay exception").

33. *Crawford*, 541 U.S. at 68-69.

34. *Id.* at 52 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.")

confrontation, against the defendant in a criminal trial.³⁵ Thus, with respect to testimonial hearsay, *Crawford* significantly strengthens the Confrontation Clause.

A statement is not testimonial if it is made or elicited with a primary purpose other than to create “an out-of-court substitute for trial testimony.”³⁶ After *Crawford* (and more precisely, *Davis*), nontestimonial statements no longer implicate the Confrontation Clause.³⁷ This is true regardless of reliability.³⁸ Thus, with respect to nontestimonial hearsay, *Crawford* weakened Confrontation Clause protection.³⁹ Prior to *Crawford*, nontestimonial hearsay, like all hearsay admitted against a criminal defendant, had to exhibit “indicia of reliability” to be admissible absent confrontation.⁴⁰ After *Crawford* (and *Davis*), even that minimal hurdle is removed.

Modern Confrontation Clause jurisprudence, thus, hinges on the definition of “testimonial” and the application of that term in various contexts. With respect to electronic utterances, this is not a positive development for proponents of a robust Confrontation Clause.⁴¹ Although the guidance is sparse, what we know so far indicates that the increasingly common electronic utterances of everyday life will almost always be nontestimonial.⁴²

The Court has so far defined “testimonial” largely in the context of cases considering statements elicited during police questioning or, what the Court calls, “colloquial[ly],” “interrogation.”⁴³ The Court analyzes the purpose of any such statement by distinguishing between whether an inquiring police officer is acting as a “first responder” or “criminal investigator.”⁴⁴ Statements obtained by an officer acting as a first responder (e.g., responding to an “ongoing

35. *Id.* *Crawford* declined to articulate a precise definition of testimonial. *See id.* at 68-69. The Court’s most recent guidance is reflected above. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) (explaining that “when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony,” the “admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause”).

36. *Bryant*, 131 S. Ct. at 1155.

37. *Id.*; *Whorton v. Bockting*, 549 U.S. 406, 419-20 (2007) (“[T]he Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability.”); Robert P. Mosteller, *Giles v. California: Avoiding Serious Damage to Crawford’s Limited Revolution*, 13 LEWIS & CLARK L. REV. 675, 679 (2009) (“Even though an incriminating, unconfrosted statement is offered to convict the defendant, it is not covered at all by the Confrontation Clause unless the statement is deemed testimonial.”).

38. *See Crawford*, 541 U.S. at 72.

39. *See id.*

40. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)), *abrogated by Crawford*, 541 U.S. 36.

41. *See Crawford*, 541 U.S. at 54-64.

42. *See, e.g., Davis*, 547 U.S. at 831-34.

43. *See Crawford*, 541 U.S. at 53 n.4 (emphasizing that “[w]e use the term ‘interrogation’ in its colloquial, rather than any technical[,] legal[] sense”).

44. *Michigan v. Bryant*, 131 S. Ct. 1143, 1161 (2011).

emergency”) fall into the nontestimonial category;⁴⁵ statements obtained by an officer acting in an investigative capacity are testimonial.⁴⁶

As the case law evolved, it became clear that the oft-cited “ongoing-emergency” purpose of police questioning has no inherent significance other than that it is *not* (primarily) an investigative purpose. The Court explained in *Bryant* that statements elicited or made with any purpose other than to “create a record for trial” are nontestimonial.⁴⁷ *Bryant* states,

When, as in *Davis*, the primary purpose of an interrogation is to respond to an “ongoing emergency,” its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. . . . Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.⁴⁸

Although it is certainly possible that the Court will change course in the future, the thrust of its opinions thus far is that the analysis in the police interrogation context maps directly onto hearsay statements that arise in other contexts. The Court emphasized, for example, in *Davis* that its framing of the testimonial-nontestimonial analysis in an interrogation context was solely a consequence of the facts of the case before it.⁴⁹ The Court noted that “[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation” and that “[p]art of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly not the result of sustained questioning.”⁵⁰

The conclusion seems unavoidable, then, that volunteered statements and statements elicited by friends and associates (as opposed to law enforcement authorities) will be measured by the same “primary purpose” analysis described in *Bryant*.⁵¹ Statements uttered or elicited to “create a record for trial” are

45. See, e.g., *Bryant*, 131 S. Ct. at 1148-49; *Davis*, 547 U.S. at 814.

46. See, e.g., *Davis*, 547 U.S. at 814-15; *Crawford*, 541 U.S. at 52.

47. *Bryant*, 131 S. Ct. at 1155.

48. *Id.* Justice Ginsburg proposed an all-purpose definition of testimonial in *Bullcoming*: “To rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.’” *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 n.6 (2011) (quoting *Davis*, 547 U.S. at 822). It does not appear that Justice Ginsburg sought to alter the definition applied in *Bryant*, as the footnote cited the portion of *Bryant* quoted in the text as authority for the definition. *Id.* (citing *Bryant*, 131 S. Ct. at 1155). In any event, only three Justices joined the footnote where the definition appeared, leaving the definition in *Bryant* as the authoritative definition going forward. *Id.*

49. *Davis*, 547 U.S. at 822 n.1.

50. *Id.*

51. *Cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 315-16 (2009) (analyzing the primary purpose of an out-of-court statement obtained outside of police interrogation context); *Bullcoming*, 131 S. Ct. at 2717 (similarly deeming a chemist certificate testimonial); *Bullcoming*, 131 S. Ct. at 2720 (Sotomayor, J., concurring) (“[F]or the reasons the Court sets forth the BAC report and Caylor’s certification on it clearly

testimonial and inadmissible absent confrontation; statements uttered or elicited for all other purposes are nontestimonial and trigger no Confrontation Clause scrutiny whatsoever.⁵² Given this framework, few electronic statements (tweets, texts, or even emails) will be deemed testimonial.

Supreme Court dicta are thus far consistent with this conclusion. In *Crawford*, the Court explained that “testimony” is “typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’”⁵³ The Court highlighted “casual remark[s] to an acquaintance” and “off-hand, overheard remark[s]” as examples of out-of-court statements that would be nontestimonial.⁵⁴ In *Giles v. California*, the Court similarly noted that “[s]tatements to friends and neighbors about abuse and intimidation . . . would be excluded, if at all, only by hearsay rules.”⁵⁵ The dicta from *Giles* (quoted with approval in *Bryant*) speaks volumes.⁵⁶ In the universe of informal statements, statements about “abuse and intimidation” would be among the most likely to be of foreseeable interest in litigation (specifically, a criminal trial of the abuser).⁵⁷ Yet, the Court strongly suggests that unless the declarant (viewed as an objective matter) intends for her statement to be used in litigation, such statements are nontestimonial.⁵⁸

Putting together the Court’s scattered pronouncements and its underlying analysis, the significance of the testimonial-nontestimonial dichotomy for electronic communications is plain. Electronic communications—texts, status updates, tweets, and the like—will rarely be made “with a primary purpose of creating an out-of-court substitute for trial testimony.”⁵⁹ As a consequence, it is difficult to envision the new Confrontation Clause applying with any regularity to the informal electronic communications that will increasingly dominate our

have a ‘primary purpose of creating an out-of-court substitute for trial testimony.’” (quoting *Bryant*, 562 S. Ct. at 1155)).

52. *Cf. Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring) (“[T]his is not a case in which the State suggested an alternate purpose, much less an alternate *primary* purpose, for the BAC report.”).

53. *See Crawford v. Washington*, 541 U.S. 36, 51 (2004) (citing 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828)); *see also Bryant*, 131 S. Ct. at 1155 (“[T]he most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.”).

54. *See Crawford*, 541 U.S. at 51.

55. *Giles v. California*, 554 U.S. 353, 376 (2008).

56. *See id.*; *see also Bryant*, 131 S. Ct. at 1157 n.9 (quoting, with approval, the dicta from *Giles*).

57. *See Giles*, 544 U.S. at 376.

58. *See Bryant*, 131 S. Ct. at 1168.

59. *See id.* at 1155, 1168; *State v. Damper*, 225 P.3d 1148, 1151 (Ariz. Ct. App. 2010) (rejecting a Confrontation Clause challenge to a text message because the message was nontestimonial); *Hape v. State*, 903 N.E.2d 977, 989 (Ind. Ct. App. 2009) (holding that the Confrontation Clause did not bar the introduction of a text message because it was not testimonial); *Berman*, *supra* note 26, at 6 (noting that postings on social networks “tend to mimic casual spoken conversation rather than formal, written communication”); *cf. People v. Herrera*, No. 05-208, 2006 WL 758544, at *17 (N.Y. Sup. Ct. Mar. 22, 2006). Among electronic communications, it is most likely that email would be created for purposes of litigation, but most email will not fit that description. *See, e.g., United States v. Levy*, 335 App’x 324, 328 (4th Cir. 2009).

discourse. Whenever malleable hearsay rules oblige, prosecutors will be able to introduce electronic utterances of absent witnesses to prove a defendant's guilt.

IV. HOW DID IT COME TO THIS? TEXTUAL AND HISTORICAL TREATMENT OF NONTESTIMONIAL HEARSAY

Those disappointed by the realization that the admission of the electronic discourse of the future will be largely unregulated by modern Confrontation Clause doctrine may be cheered to know that neither the text nor history of the Sixth Amendment dictates this result. *Crawford's* exclusion of nontestimonial hearsay—and, thus, the bulk of informal, social communication—from the Confrontation Clause's reach depends on an unpersuasive analysis of the text and history of the Sixth Amendment. In fact, given how significant the Court's exclusion of nontestimonial hearsay from the scope of the Confrontation Clause is for the future, it is striking how cursory (and flawed) the Court's textual and historical analysis is on this point. Perhaps most surprising is the absence of dissent.

The Court first announced that nontestimonial hearsay fell outside the scope of the Confrontation Clause in *Davis*.⁶⁰ Only one Justice (Justice Thomas) did not join the majority opinion in *Davis*, and his disagreement was not that the Court's definition of witnesses was too narrow (i.e., that it excluded nontestimonial statements), but that it was not narrow enough (i.e., that more hearsay should be deemed nontestimonial and, thus, placed outside the scope of the Confrontation Clause).⁶¹ Although serious fault lines have emerged in subsequent Confrontation Clause jurisprudence, those fault lines do not include any Justice taking the position that nontestimonial hearsay triggers Confrontation Clause protection.⁶²

The Court's conclusion that nontestimonial hearsay receives no Confrontation Clause protection hinges on two prongs: one prong is textual and the other historical.⁶³ Both prongs are seriously flawed. Space precludes setting forth the complete argument—which has been made elsewhere—but a brief summary should suffice.⁶⁴ As a textual matter, there is no reason to

60. *Davis*, 547 U.S. at 824 (“A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core,’ but its perimeter.”); *see also id.* at 821 (“Only statements of this sort [i.e., testimonial statements] cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.” (citations omitted)). *Bryant* glosses over *Davis's* role in this evolution, suggesting erroneously that *Crawford*, not *Davis*, “limited the Confrontation Clause’s reach to testimonial statements.” *See Bryant*, 131 S. Ct. at 1153. The Court makes this same error in *Bockting*. *See Whorton v. Bockting*, 549 U.S. 406, 413-14 (2007).

61. *See Davis*, 547 U.S. at 835 (Thomas, J., concurring and dissenting).

62. *See id.* at 813.

63. *Id.* at 822.

64. *See, e.g.*, Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, B.U.L. REV. (forthcoming 2013) (manuscript at 13) [hereinafter Bellin, *Shrinking Confrontation Clause*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1956748; Randolph N. Jonakait, “Witnesses” in the Confrontation Clause:

conclude, as the Court does, that the term witnesses in the Sixth Amendment is limited to persons who speak “with a primary purpose of creating an out-of-court substitute for trial testimony.”⁶⁵ The Court relies on the fifth definition of “witnesses” in Noah Webster’s 1828 dictionary (“those who ‘bear testimony’”) to reach this conclusion,⁶⁶ but even accepting this methodological approach to constitutional interpretation, Webster’s dictionary includes a third definition (“[a] person who knows or sees any thing”)⁶⁷ that sweeps more broadly, and the Court has never explained why this definition does not also apply.⁶⁸

The Court’s historical argument is similarly unavailing. The Court asserts that it cannot locate any “early American case[s]” in which courts excluded unconflicted, nontestimonial hearsay.⁶⁹ Strangely, one such case clearly exists—and was mentioned by both the majority and dissent in *Crawford* (but ignored in *Davis*): an 1807 opinion of Chief Justice Marshall presiding at the treason trial of Aaron Burr.⁷⁰ Further, treatise writers of the Framing era expressed what appears to be a consensus view that the admission of hearsay of any stripe created tension with the common law confrontation right.⁷¹ If there was any Framing-era consensus, it was the opposite of the one the Court found: the prosecution could not—at least officially—rely on any hearsay (nontestimonial or otherwise) to prove a criminal defendant’s guilt.⁷²

V. ALTERNATIVE APPROACHES

If, as I and others have argued, the Court’s critical conclusion—that the introduction of nontestimonial hearsay does not implicate the Confrontation Clause—flows from an erroneous textual and historical analysis, there is obviously room for the doctrine to progress in another direction. There are three alternate approaches that the Supreme Court could adopt to expand

Crawford v. Washington, *Noah Webster*, and *Compulsory Process*, 79 TEMP. L. REV. 155, 157 (2006); Thomas Y. Davies, *Not “The Framers’ Design”*: *How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL’Y 349 (2007).

65. See *Bryant*, 131 S. Ct. at 1155.

66. *Crawford v. Washington*, 541 U.S. 36, 51 (2004); 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828).

67. WEBSTER, *supra* note 66; accord *Maryland v. Craig*, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting).

68. See Bellin, *Shrinking Confrontation Clause*, *supra* note 64 (manuscript at 17-18).

69. *Davis v. Washington*, 547 U.S. 813, 824 (2006) (“We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve [testimonial statements].”).

70. *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694) (excluding a nontestimonial statement of a coconspirator from the trial and stating, “I know not why . . . a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him”).

71. See, e.g., Davies, *supra* note 64, at 350.

72. Bellin, *Shrinking Confrontation Clause*, *supra* note 64 (manuscript at 26); Davies, *supra* note 64, at 380-81; see also David Alan Sklansky, *Hearsay’s Last Hurrah*, 2009 SUP. CT. REV. 1, 5 (noting that the hearsay doctrine in the eighteenth century was “less developed” than its modern day counterpart).

Confrontation Clause protection to informal, electronic utterances. Each is discussed briefly below.

A. *Redefine “Testimonial”*

As noted above, the absence of Confrontation Clause restrictions on electronic utterances is a function of two doctrinal developments: (1) the Court’s limiting of Confrontation Clause protection to testimonial hearsay and (2) its narrow definition of testimonial. One way to change the Confrontation Clause treatment of electronic utterances is to target the latter development and expand the definition of “testimonial.”

Indeed, even accepting the Court’s focus on the fifth of Noah Webster’s definitions of “witness,” *Bryant*’s narrow definition of “testimonial” hearsay—statements “procured with a primary purpose of creating an out-of-court substitute for trial testimony”—is not inescapable.⁷³ *Crawford* itself posited as one potential definition of “testimonial,” “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”⁷⁴ Under this (never adopted) definition, many electronic communications, including casual social statements, could be deemed testimonial. While the people who utter statements via Twitter, Facebook, texts, or emails rarely *intend* that their statements will be used in litigation, they will often (objectively viewed) “reasonably . . . believe” in, or recognize, that possibility.⁷⁵ Other definitions of testimonial, including a more functional definition that focuses on how the statement is used at trial, rather than on how the statement came into being, would accomplish a similar goal: exposing more informal communication to Confrontation Clause scrutiny, including electronic utterances.⁷⁶

Although altering the definition of testimonial may be the least disruptive way to fold electronic utterances into existing Confrontation Clause doctrine, it is not an ideal solution. As I argue elsewhere, the *Bryant* Court’s definition of testimonial provides a clean line demarcating a single category of hearsay whose admission most offends the Confrontation Clause.⁷⁷ Statements created

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

74. *Crawford*, 541 U.S. at 52; *cf. Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting) (proposing a similar definition). Richard Friedman proposed a similar definition, statements that are made “with the anticipation that, in all likelihood, the statement will be presented to the factfinder at trial.” Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1039 (1998).

75. See *Crawford*, 541 U.S. at 52 (emphasis added).

76. See Michael D. Cicchini & Vincent Rust, *Confrontation After Crawford v. Washington: Defining “Testimonial,”* 10 LEWIS & CLARK L. REV. 531, 543 (2006) (arguing that the “term testimonial should be defined as all accusatory hearsay, i.e., hearsay that tends to establish in any way an element of the crime or the identification of the defendant”); Josephine Ross, *After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 193 (2006) (proposing that the Court “adopt[] a functional approach to the term testimonial [that considers] whether the evidence functioned as testimony against the accused at the trial”).

77. Bellin, *Shrinking Confrontation Clause*, *supra* note 64 (manuscript at 4).

with an eye toward litigation are qualitatively different from all others, and the reason they must be forbidden absent confrontation is plain. If such statements were allowed, the defendant's basic right to cross-examination could easily be subverted through simple expedients such as affidavits and videotaped examinations.⁷⁸ This was, after all, the powerful critique launched by scholars like Richard Friedman and Akhil Amar, which ultimately foretold *Roberts*'s demise.⁷⁹ If the stark prohibition of testimonial hearsay is tethered to this functional argument, it makes sense both on policy and interpretive grounds. The government cannot obtain statements from witnesses (e.g., affidavits or videotaped examinations) and use those statements at trial in lieu of live witnesses to prove the defendant's guilt.⁸⁰ Permitting such practices would render the confrontation right a nullity—clearly bad policy and a poor interpretation of the constitutional text. Thus, *Bryant* provides a useful definition of a minimal, core class of testimonial statements that cannot be admitted without confrontation (although, as explained above, the Court's explanation for how it arrived at the definition is seriously flawed).⁸¹

Broadening the term—"testimonial" beyond the narrow contours articulated in *Bryant* creates difficult line drawing problems. Relatedly, by untethering the testimonial label from the functional rationale described above, this approach would enhance the specter of illegitimacy. *Crawford*'s testimonial-nontestimonial dichotomy is itself novel, and further expanding the definition of "testimonial" will only increase the strain on its pseudo textual and historical roots.⁸² At least while alternative doctrinal approaches remain plausible, the definition of testimonial should be left where it lies after *Bryant*, and the functional rationale sketched in the preceding paragraph substituted for the textual-historical analysis relied on by the Court.

In summary, broadening the definition of testimonial may be a plausible mechanism to place e-hearsay within the Confrontation Clause. But it is, in my view, unconvincing as an interpretive approach to the Sixth Amendment. A broader definition of testimonial would certainly capture more electronic statements, but it would untether the critical term "testimonial" from its already tenuous connection to the Sixth Amendment text and history, with predictably bad consequences for the doctrine's legitimacy and longevity.

78. See *id.* (manuscript at 3-4, 10).

79. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 129 (1997); Friedman, *supra* note 74, at 1025-26.

80. See Bellin, *Shrinking Confrontation Clause*, *supra* note 64 (manuscript at 28-29).

81. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1166-67 (2011).

82. See *Crawford v. Washington*, 541 U.S. 36, 69-70 (2004).

B. Extending Confrontation Clause Protection to Nontestimonial Statements

Assuming that the definition of “testimonial” remains narrowly drawn as in *Bryant*, the next potential doctrinal approach to limiting the admission of electronic utterances under the Confrontation Clause is to expand Confrontation Clause protections to nontestimonial hearsay. This solution becomes particularly attractive (and may be required as an interpretive manner) once the Court’s flawed claim to have located an explicit textual source for the nontestimonial-testimonial dichotomy is exposed.⁸³

Most commentators, and the Court itself, seem to agree that applying the strict post-*Crawford* limits on testimonial hearsay to all hearsay would be a step too far. As the *Roberts* Court recognized, interpreting “the Clause [to] abrogate virtually every hearsay exception” is “a result long rejected as unintended and too extreme.”⁸⁴ Constitutional protections can be applied to nontestimonial hearsay, however, without those protections reaching the level necessary to regulate the admission of testimonial hearsay. As noted above, testimonial hearsay (as that category is defined in *Bryant*) must be prohibited absent confrontation so that the prosecution cannot extinguish the defendant’s most basic right to cross-examination through simple expedients like affidavits and videotaped examinations. This proposition is supported by both the Court’s historical analysis in *Crawford* and the functional analysis described in the preceding section.⁸⁵ The admission of *nontestimonial* hearsay is not as powerful an affront to the confrontation right and, thus, can be restricted less severely.

One approach to limiting nontestimonial hearsay is to apply *Roberts*’s reliability analysis to such statements. At least one prominent scholar has suggested this approach,⁸⁶ and some state courts already follow suit.⁸⁷ A *Roberts*-esque indicia of reliability test would certainly prevent the admission of some electronic utterances.⁸⁸ Electronic utterances are often painfully informal, ambiguous, error ridden, and can easily be uttered anonymously or with false attribution.⁸⁹ One obvious flaw of *Roberts* in this regard, however, was that it permitted an artificial shortcut to a finding of reliability. Under *Roberts*, sufficient indicia of reliability existed—as a matter of law—with

83. See *supra* Part II.

84. *Roberts*, 448 U.S. at 63.

85. See *Crawford*, 541 U.S. at 43-53; *supra* Part III.

86. Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford’s Birth Did Not Require that Roberts Had to Die*, 15 J.L. & POL’Y 685, 722 (2007) (advocating reviving *Roberts* to provide “weaker” constitutional protections for “problematic,” but not testimonial, hearsay).

87. See, e.g., *Sharifi v. State*, 993 So. 2d 907, 930 (Ala. Crim. App. 2008) (suggesting that the *Roberts* era analysis continues to apply to nontestimonial hearsay); *State v. Fields*, 168 P.3d 955, 968 (Haw. 2007) (applying Hawaii’s Constitution).

88. See *Roberts*, 448 U.S. at 66.

89. Bellin, *Shrinking Confrontation Clause*, *supra* note 64 (manuscript at 12-15).

respect to any hearsay admitted under a “firmly rooted” hearsay exception.⁹⁰ Even assuming this “loophole” remains, a *Roberts* screen might still exclude a significant amount of electronic evidence, particularly e-hearsay offered under not-so-firmly rooted exceptions, such as the catch-all (residual) exceptions, modern exceptions for child-victim statements and the exception for present sense impressions.⁹¹

Another approach to applying less restrictive constitutional limits on the admission of nontestimonial hearsay is an unavailability requirement.⁹² This limit would permit nontestimonial hearsay of absent witnesses only after a showing that the witness could not be brought to trial. An unavailability requirement appears with some regularity in both the history of the Anglo-American confrontation right as well as the Supreme Court’s Confrontation Clause jurisprudence.⁹³ The requirement enforced a traditional “preference” for live testimony over hearsay—a preference that few would contend is not captured in some form in the Sixth Amendment confrontation right. An unavailability requirement (with exceptions for certain uncontroversial business and public records) would require the prosecution to choose live witness testimony, and not hearsay, whenever such a choice existed. For this approach—an approach with some promise—to work, courts must strictly enforce the requirement of unavailability to prevent prosecutorial gamesmanship.⁹⁴

C. A Role for Due Process?

A final possibility for limiting the admissibility of nontestimonial, electronic utterances under the modern interpretation of the Confrontation Clause is through a separate constitutional provision, the right to “due process.” Indeed, *Bryant* asserts in a footnote that a new form of constitutional protection rooted in the Due Process Clause “may” arise to address nontestimonial

90. See *Roberts*, 448 U.S. at 66 (“Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”).

91. Bellin, *Present Sense Impressions*, *supra* note 4, at 358.

92. See *State v. Moore*, 49 P.3d 785, 792 (Or. 2002) (applying Oregon’s Constitution); Bellin, *Shrinking Confrontation Clause*, *supra* note 64 (manuscript at 34-37); Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 307 (2006) [hereinafter Lininger, *Reconceptualizing Confrontation*] (advocating that legislatures amend hearsay rules to require prosecutors to make a showing of unavailability prior to introducing nontestimonial hearsay); Tom Lininger, *Yes, Virginia, There Is a Confrontation Clause*, 71 BROOK. L. REV. 401, 406 (2005) [hereinafter Lininger, *Yes, Virginia, There Is a Confrontation Clause*] (citing Oregon courts’ requirement of unavailability as an “attractive alternative” to the Supreme Court’s abandonment of Confrontation Clause protection for nontestimonial hearsay) (“This requirement helps to avoid the gamesmanship of the pre-*Crawford* era, when prosecutors called police to recount victims’ hearsay statements even when the victims were available to testify.”).

93. Bellin, *Shrinking Confrontation Clause*, *supra* note 64 (manuscript at 7-13); Graham C. Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 212-15 (1984) (explaining that while the eighteenth century “Anglo-American decisions” are not “totally harmonious, a prevailing principle threads throughout them: if the declarant was living and could be produced, he must appear at trial”).

94. See Lininger, *Yes, Virginia, There Is a Confrontation Clause*, *supra* note 92, at 406.

hearsay.⁹⁵ Whether the Court will truly follow through on erecting due process protections in this context is questionable. The Court's 8-1 ruling in the 2012 case of *Perry v. New Hampshire* suggests that the Court has no intention of employing the Due Process Clause to police the admission of unreliable, out-of-court statements.⁹⁶ In *Perry*, the Court roundly rejected a due process challenge to the admission of an eyewitness's out-of-court identification of a car burglary suspect.⁹⁷ The Court placed its ruling in a larger context, stating "[w]e have concluded in other contexts, . . . that *the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair.*"⁹⁸

The Court's reluctance to erect a due process-based limit on the admissibility of evidence is understandable. It is difficult to imagine precisely what contours such a rule might possess and the sources of authority from which to craft those contours. More likely, the Court will continue, as it did in *Perry*, to leave the assessment of the reliability of otherwise admissible evidence to juries and, absent government malfeasance (generally lacking in the creation of nontestimonial hearsay), eliminate constitutional restrictions in this context. Due process protections will, of course, continue to play a role in assessing the overall "fairness" of a criminal trial. At the extremes, the unfair admission of unreliable and uncontroverted statements (like the admission of any questionable incriminating evidence or exclusion of favorable evidence) may tip the balance in an otherwise problematic trial. But, that is likely all *Bryant* is saying in this context, and it is nothing new.⁹⁹

VI. CONCLUSION

A vast, and increasing, portion of our discourse takes place in an informal manner in a digital medium. This discourse, while readily susceptible for use at trial, is left largely unrestricted by the post-*Crawford* Confrontation Clause. It is possible that any dangers this conclusion might foretell can be addressed

95. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1162 n.13 (2011) ("[T]he Due Process Clause . . . may constitute a further bar to admission of, for example, unreliable evidence."). A similar provision exists in the English Criminal Justice Act of 2003 § 125 (requiring trial court to dismiss cases in which hearsay evidence is so central to a case against the defendant that a conviction would be suspect).

96. See *Perry v. New Hampshire*, 132 S. Ct. 716, 730 (2012).

97. *Id.*

98. *Id.* at 728 (emphasis added).

99. See *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996) (noting that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"); *Dutton v. Evans*, 400 U.S. 74, 96-97 (1970) (Harlan, J., concurring) (arguing that constitutional limits on hearsay are "far more appropriately performed under the aegis of the Fifth and Fourteenth Amendments' commands that federal and state trials, respectively, must be conducted in accordance with due process of law"); see also *Michigan v. Bryant*, 131 S. Ct. 1143, 1162 n.13 (2011) (citing the above cases on this point). But see *United States v. LeMay*, 260 F.3d 1018, 1027 (9th Cir. 2001) (rejecting the due process challenge to FEDERAL RULE OF EVIDENCE 414 and explaining that "[a]pplication of Rule 403 . . . should always result in the exclusion of evidence' that is so prejudicial as to deprive the defendant of his right to a fair trial" (alteration in original) (quoting *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998))).

through hearsay rules, and not the Confrontation Clause.¹⁰⁰ State and federal hearsay rules can certainly limit the admissibility of unreliable out-of-court statements, including electronic statements.¹⁰¹ There is no guarantee that this will happen, however, and legislators may, in fact, move in the opposite direction—taking advantage of the newfound constitutional flexibility with respect to the admission of nontestimonial hearsay. With such freedom, and to a significant extent even under existing law, prosecutors can introduce out-of-court statements from social media sources, as well as text messages and email, and rely on these cyber-accusations, in lieu of live witnesses, to establish a defendant's guilt.¹⁰² One can hear the echoes of Sir Walter Raleigh's protestations (on Twitter) now:

SirWalter @CJPopham what proof is this against me but the sayings of some mad tweeter? #massacred-by-hearsay

CJPopham nay @SirWalter incrimination on social media is strongest of all proofs and, under *Crawford*, admissible to boot #guilty-as-charged¹⁰³

100. See DEAN WIGMORE, 5 WIGMORE ON EVIDENCE § 1397, at 158 (Chadbourn ed. 1974). Dean Wigmore long ago emphasized that the hearsay rules address the same concerns that animate the Confrontation Clause. See *id.*

101. See Lininger, *Reconceptualizing Confrontation*, *supra* note 92, at 307.

102. See *supra* note 59 and accompanying text.

103. The exchange that follows is loosely paraphrased from DAVID JARDINE, *Trial of Sir Walter Raleigh*, in 1 CRIMINAL TRIALS 400, 420, 428-29 (1832).