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The Federal Rules of Emojis: A Proposed Framework for Handling Emoji Evidence in Trial Contexts

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THE FEDERAL RULES OF EMOJIS: A PROPOSED FRAMEWORK FOR HANDLING EMOJI EVIDENCE IN TRIAL CONTEXTS

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Emojis are 3,633 ubiquitous symbols-as-communication used by 92 percent of internet users. These tiny yet influential pieces of evidence hold the power to complete, enhance, mitigate, and flip the meaning of surrounding text. Consequently, court references to emojis have grown exponentially in the last five years. As emojis have become a cornerstone of digital discourse, courts have increasingly encountered the significant impact of emojis on parties' legal claims. A guide for handling of emoji evidence under the Federal Rules of Evidence (FRE), therefore, is important to afford proper treatment to this relatively new evidentiary form.

This Note discusses how the FRE, in their current form, should apply to emojis as a commonplace form of symbols-as-communication. After analyzing expert testimony and the presentation of emoji evidence through the lenses of FRE 702, 701, 803(5), and 403, this Note argues that relevant emoji evidence should always be shown—not just read—to jurors on party request. Additionally, this Note argues that emojis cannot reasonably be ignored and that senders and recipients should always retain the opportunity to testify about their intended and understood emoji meanings. Finally, this Note advises courts to generally exclude third-party testimony on emojis' meanings.

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INTRODUCTION

In 1943, the U.S. Supreme Court declared that "[s]ymbolism is a primitive but effective way of communicating ideas."[1] Almost four decades later, a computer scientist first used the smiley face emoticon, :-), and suggested it could indicate the tone of a message board post.[2] Then, in 2008, Apple released emojis on its iPhone for the first time.[3] In the fourteen years since, emojis have taken digital discourse by storm. The Oxford English Dictionary hailed the "face with tears of joy" emoji (😂) as the 2015 "word of the year."[4] Five skin tone options later became available for hand gesture emojis,[5] and presidential candidate Hillary Clinton used emojis in campaign trail tweets to connect with the masses.[6] Recent reports indicate that business leaders now use emojis to connect with their teams,[7] and Elon Musk's tweet of the

1. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).
2. Theresa M. Senft, *Emoticon*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/emoticon [https://perma.cc/39MA-7SNT] (last visited Sept. 3, 2023).
3. Gabbi Shaw, *Here's What Your Favorite Emojis Looked Like When They Were First Introduced*, INSIDER (July 17, 2019, 9:49 AM), https://www.insider.com/then-and-now-emojis-10-years-2018-11 [https://perma.cc/YP35-XRHX].
4. Katy Steinmetz, *Oxford's 2015 Word of the Year Is This Emoji*, TIME (Nov. 17, 2015), http://time.com/4114886/oxford-word-of-the-year-2015-emoji/ [https://perma.cc/9M27-9TYG].
5. Alejandra Marquez Janse, Patrick Jarenwattananon & Asma Khalid, *What Skin Color Emoji Should You Use?: The Answer Can Be More Complex Than You Think*, NPR (Feb. 9, 2022, 5:00 AM), https://www.npr.org/2022/02/09/1078977416/race-chat-emoji-skin-tone-colors [https://perma.cc/6SLA-N4RT].
6. *See* Yena Oh, *Oxford Dictionaries 2015 Word of the Year Is an Emoji*, PBS NEWSHOUR (Nov. 17, 2015, 3:47 PM), https://www.pbs.org/newshour/nation/oxford-dictionary-says-the-2015-word-of-the-year-is-an-emoji [https://perma.cc/K6YE-SHFE].
7. *See* Bryan Robinson, *Emojis: An Essential Tool for Innovative Business Communication?*, FORBES (Sept. 7, 2019, 11:55 AM), https://www.forbes.com/sites/bryan

poop (💩) emoji appeared in a 2022 court filing on his litigious path to purchasing Twitter.[8]

As emojis have become a cornerstone of digital discourse, courts have increasingly encountered the issue of whether emojis are admissible as evidence and the impact of emojis on parties' legal claims.[9] A guide to handling emoji evidence under the Federal Rules of Evidence (FRE) is thus necessary to afford proper treatment to this relatively new evidentiary form.[10] Emojis can communicate far more than just the image of a noun that they depict, depending on such factors as the user's demographic and communication platform.[11] Emojis can also be highly consequential pieces of evidence and, in 2021, were notably cited in judicial opinions on employment discrimination, sexual predation, and murder.[12] In the future, emoji references could appear in any claim featuring online communications that purportedly support or detract from a party's claim or defense.[13] For these reasons, the evidentiary handling of emojis must be addressed now.

Current legal scholarship on emojis and the law is either descriptive, discussing only how emojis have been used in court,[14] or directed at addressing a non-evidentiary issue relating to emojis.[15] Only one Comment has applied a normative approach, arguing that the FRE should adopt new rules to apply to emojis.[16] This Note addresses how the FRE, as they exist, should apply to emojis as a commonplace form of symbols-as-communication.

This Note proposes standards for handling emoji evidence under the FRE. Part I provides the context necessary to evaluate the handling of emoji evidence. This part begins with an introduction to relevant FRE, followed

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robinson/2019/09/07/emojis-an-essential-tool-for-innovative-business-communication-really/ [https://perma.cc/K6YB-VUM8].

8. *See* Kathryn Rubino, *Wachtell Associates Tasked with Explaining Memes to Partners in* Twitter v. Musk *Legal Battle*, ABOVE THE L. (Nov. 1, 2022, 2:14 PM), https://abovethelaw.com/2022/11/wachtell-associates-tasked-with-explaining-memes-to-partners-in-twitter-v-musk-legal-battle/ [https://perma.cc/4VDQ-9XFB].

9. *See infra* Part I.A.

10. *See infra* Part I.A.

11. *See infra* Part I.A.

12. *See* Eric Goldman, *2021 Emoji Law Year-in-Review*, TECH. & MKTG. L. BLOG (Jan. 9, 2022), https://blog.ericgoldman.org/archives/2022/01/2021-emoji-law-year-in-review.htm [https://perma.cc/B93A-NQ9A].

13. John G. Browning & Gwendolyn Seale, *More than Words: The Evidentiary Value of Emoji*, FOR DEF., Oct. 2015, at 34.

14. *See, e.g.*, Leslie Y. Garfield Tenzer & Ashley Cangro, *An Emoji Legal Dictionary*, 83 PITT L. REV. ONLINE 1 (2022), http://lawreview.law.pitt.edu/ojs/lawreview/article/view/834 [https://perma.cc/UHD7-G4YD]; Elizabeth Kirley & Marilyn McMahon, *When Cute Becomes Criminal: Emoji, Threats and Online Grooming*, 21 MINN. J.L. SCI. & TECH. 37 (2019) [hereinafter *When Cute Becomes Criminal*]; Elizabeth Kirley & Marilyn McMahon, *The Emoji Factor: Humanizing the Emerging Law of Digital Speech*, 85 TENN. L. REV. 517 (2018); *see* Browning & Seale, *supra* note 13.

15. *See* Eric Goldman, *Emojis and the Law*, 93 WASH. L. REV. 1227, 1263 (2018); Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I 🔫U: Considering the Context of Online Threats*, 106 CAL. L. REV. 1886, 1907–09 (2018).

16. *See* Erin Janssen, Comment, *Hearsay in the Smiley Face: Analyzing the Use of Emojis as Evidence*, 49 ST. MARY'S L.J. 699, 724 (2018).

by a discussion of the evidentiary value of emojis and courts' treatments of emoji evidence. Part II of this Note examines whether emojis that function like words and emojis that serve as nonverbal social cues should be explained and displayed for the jury. Ultimately, this Note advocates that jurors should always be shown—and not just read—relevant emoji evidence upon party request. Further, this Note argues that emojis cannot reasonably be ignored and that senders and recipients of emojis should always be able to testify about their intended and understood emoji meanings. Finally, this Note directs judges to exclude third-party testimony on the meaning of emojis, unless law enforcement testimony reliably decodes the meaning of an emoji, or the sender and recipient of a culture-specific nonverbal social cue emoji are unavailable.

I. THE EVIDENTIARY VALUE OF EMOJIS

Part I provides context for evaluating how juries should make sense of emoji evidence. Part I.A introduces the FRE that are relevant for handling emoji evidence. Then, Part I.B considers the evidentiary value of emojis, which exists in tension with their potential for party manipulation and jury misinterpretation. Finally, Part I.C introduces the ways that courts have treated emojis.

A. FRE Relevant to the Handling of Emoji Evidence

Trial judges determine the admissibility of emoji evidence.[17] For an emoji to be admissible, it must tend to prove a fact in dispute.[18] If an emoji's tendency to prove a fact in dispute is "substantially outweighed" by a danger of unfair prejudice—defined as "an undue tendency to suggest [a] decision on an improper basis"[19]—a trial judge may exclude the emoji from evidence.[20] For example, a trial judge may exclude an emoji for cognitive prejudice if the jury may tend to overestimate the emoji's probative value.[21] Judges may also exclude emojis that risk wasting the court's time;[22] however, the tenor of FRE 403[23] indicates that this power should be exercised sparingly.[24] Additionally, trial judges oversee the method of presenting emojis and opinion testimony on emojis to the jury.[25]

The following sections describe the FRE that guide trial judges' treatment of opinion testimony and the presentation of evidence. Part I.A.1 introduces evidentiary standards governing expert opinion testimony (FRE 702)[26] and

17. FED. R. EVID. 104(a).
18. *Id.* 401.
19. *Id.* 403 advisory committee's note on proposed rules.
20. *Id.* 403.
21. *Id.*
22. *Id.*
23. *Id.*
24. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:12 (4th ed. 2022).
25. FED. R. EVID. 611(a).
26. *Id.* 702.

lay opinion testimony (FRE 701)[27]. Next, Part I.A.2 introduces evidentiary standards related to the presentation of evidence, including the handling of written recollections (FRE 803(5))[28] and considerations surrounding video evidence (FRE 403). Together, these sections provide the legal framework for considering proper treatment of emoji evidence.

1. Opinion Testimony on the Meaning of Slang, Jargon, and Hand Signals: FRE 702 & 701

Trial judges decide preliminary questions about witness qualification.[29] FRE 702 requires that an expert possess "specialized knowledge" that "helps" the jury to "understand the evidence."[30] Testimony about the meaning of group-specific slang is helpful, so an expert could testify, whereas testimony reiterating the plain meaning of a communication would not be helpful.[31] Both those who study and those who are members of a community may qualify as experts on that community's jargon.[32]

Law enforcement officers and federal agents commonly testify as experts on slang, code, and hand signals.[33] Police sergeants, for example, have deciphered drug-related slang used in recorded jailhouse calls in which the encoded language made the conversations facially incoherent.[34] Likewise, special agents have decoded jargon communicated between pimps and sex workers.[35] Experts have also offered testimony connecting hand signals to specific gangs.[36]

Emojis used idiosyncratically implicate the gray area between common knowledge and coded language that requires an expert's guidance.[37] Although jurors need experts to decipher coded communications, expert testimony about a commonly understood emoji is unhelpful to jurors, who may nevertheless give the testimony prejudicial deference.[38] As an alternative to expert testimony, a knowledgeable coconspirator may offer lay opinion testimony[39] on the meaning of "code words" used by fellow coconspirators in a recorded conversation in which the witness participated.[40] Lay opinion testimony, though, is governed by FRE 701 and, unlike expert

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27. *Id.* 701.
28. *Id.* 803(5).
29. *Id.* 104(a).
30. *Id.* 702.
31. *See* MONIQUE C.M. LEAHY, 194 AM. JUR. PROOF OF FACTS 3D, § 40 (2022).
32. *See* DAVID H. KAYE, DAVID E. BERNSTEIN, ANDREW GUTHRIE FERGUSON, MAGGIE WITTLIN & JENNIFER L. MNOOKIN, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE § 2.5.3 (3d ed. 2022).
33. *See generally* LEAHY, *supra* note 31, § 40.
34. *See* State v. Berry, 272 A.3d 1, 9–10 (N.J. Super. Ct. App. Div. 2022).
35. *See* Poole v. State, 284 So. 3d 604, 605 (Fla. Dist. Ct. App. 2019).
36. *See* People v. Mazariego, 117 N.Y.S.2d 235 (App. Div. 2014).
37. An expert may not testify about matters of common knowledge. *See* FED. R. EVID. 701.
38. *See infra* Part II.A.1.
39. FED. R. EVID. 701.
40. *See* United States v. Valbrun, 877 F.3d 440, 443–44 (1st Cir. 2017).

testimony, requires that lay witnesses have personal knowledge to testify about the meaning of coded communications.[41]

2. Presenting Verbal and Nonverbal Evidence: FRE 803(5) & 403

FRE 803(5)[42] implicitly recognizes that juries tend to overvalue written recollections.[43] Because records remain with the jury during deliberations, a jury might subconsciously assign more value to recorded statements than to those offered only by a live witness on equivalent points.[44] To avoid "prejudicial emphasis,"[45] FRE 803(5) only allows recorded recollections to be shown to the jury when offered by an adverse party.[46] In all other instances, recorded recollections are read into the record.[47]

On the other hand, humans generally understand what they see better than what they hear.[48] When an individual's tone or expression is relevant and material to an issue in a case, judges may allow parties to play audiovisual recordings for the jury.[49] Per FRE 403, however, judges should consider the availability of similar evidence through in-court testimony when deciding whether to admit a videotape.[50] If a judge admits an audiovisual recording, they may limit presentation to only the relevant portions so as not to waste time.[51] The jury then determines whether the recording is credible and how much weight to give it.[52]

B. Emojis' Evidentiary Value Exists in Tension with Their Potential for Manipulation and Misinterpretation

Courts grapple with how to handle emoji evidence because of properties entirely unique to emojis.[53] Emojis are 3,633[54] ubiquitous symbols used over 10 billion times each day.[55] Inevitably, the same relatively fixed number of

41. FED. R. EVID. 701.
42. *Id.* 803(5).
43. *See* MUELLER & KIRKPATRICK, *supra* note 24, § 8:76; *see also* United States v. Judon, 567 F.2d 1289, 1294 (5th Cir. 1978) (ruling that the purpose of FRE 803(5) is to prevent the trier of fact from being "overly impressed" by writing).
44. 30B CHARLES ALAN WRIGHT & JEFFREY BELLIN, FEDERAL PRACTICE AND PROCEDURE § 6857 (2023).
45. *See* United States v. Casoni, 950 F.2d 893, 914 (3d Cir. 1991).
46. FED. R. EVID. 803(5).
47. *Id.*
48. *See* GEORGE L. BLUM, JOHN BOURDEAU, NOAH J. GORDON, ELEANOR L. GROSSMAN, JILL GUSTAFSON, GLENDA K. HARNAD, SONJA LARSEN, LUCAS MARTIN, KRISTINA E. MUSIC BIRO, KARL OAKES, KAREN L. SCHULTZ, JEFFREY J. SHAMPO, ERIC C. SURETTE & BARBARA J. VAN ARSDALE, 29A AM. JUR. 2D *Evidence* § 932 (2022).
49. *See* STEPHEN E. ARTHUR & ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK: CIVIL § 38:6 (2022).
50. *See* BLUM ET AL., *supra* note 48, § 974.
51. *See* ARTHUR & HUNTER, *supra* note 49, § 38:6.
52. *See id.*
53. *See supra* Part I.A.
54. *See Full Emoji List, v15.0*, UNICODE, http://unicode.org/emoji/charts/full-emoji-list.html [https://perma.cc/5ST8-H2GX] (last visited Sept. 3, 2023).
55. Phil Agnew, *6 Facts About Emojis Found Using New Analysis*, BRANDWATCH (Jan. 9, 2018), https://www.brandwatch.com/blog/6-facts-about-emojis-found-using-new-analysis

emojis will convey different meanings to the billions of people who use them globally.[56] This section discusses the ways that emojis can be used and resulting interpretive challenges. Part I.B.1 explains how emojis can serve as nonverbal social cues, which may be misinterpreted or misconstrued. Then, Part I.B.2 discusses emojis' potential to hold multiple meanings and contextual factors that can inform the plausibility of a party's proffered meaning.

1. Emojis That Serve as Nonverbal Social Cues May Be Misinterpreted and Misconstrued

People frequently use emojis to enhance meaning in methods similar to those employed in face-to-face spoken interactions.[57] In digital discourse, gesture emojis, like gestures themselves, can both reinforce verbal communication ("Yes 👍") and substitute for verbal communication ("👍" in lieu of "Yes").[58] Emojis might also indicate tone ("I love you ❤️"), which the sender can emphasize through repetition in a manner similar to speakers varying their volume or pitch ("I love you ❤️❤️❤️❤️❤️").[59] Anthropomorphic emojis—emojis that resemble human faces—inject tone through facial expression.[60]

The tone associated with an anthropomorphic emoji can materially alter the meaning of surrounding text when an emoji conveys facetiousness.[61] In court, the "rolling on the floor laughing" (🤣) emoji[62] and the "tongue out" emoticon (:P)[63] have been offered as indicative of a joke made by the sender. Similarly, the winking (😉) emoji has been offered to indicate that conversations were "not meant to be completely serious."[64]

Anthropomorphic emojis may also indicate sarcasm by placing the emoji and the surrounding text at odds.[65] Like a person might say "that will be fun" in a monotone voice, an unamused smiley (😒) emoji can substitute for the same effect in an online chat ("that will be fun 😒").[66] Readers can detect sarcasm when an anthropomorphic emoji and its surrounding text are at odds because there is a strong link between the way our brains comprehend irony

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[https://perma.cc/UT44-6FGQ]; *see also Emoji Statistics*, EMOJIPEDIA, https://emojipedia.org/stats [https://perma.cc/SF7H-R8YN] (reporting that 5 billion emojis are sent on Facebook Messenger every day) (last visited Sept. 3, 2023).

56. *See supra* Part I.A.2.

57. *See* VYVYAN EVANS, THE EMOJI CODE: THE LINGUISTICS BEHIND SMILEY FACES AND SCAREDY CATS 102, 125–36 (2017).

58. *See id.*

59. *See id.*

60. *See id.*

61. *See, e.g.*, State v. D.R.C., 467 P.3d 994, 1001 (Wash. Ct. App. 2020); Ghanam v. Does, 845 N.W.2d 128, 145 (Mich. Ct. App. 2014); Schram v. Zarak (*In re* E.Z.), No. 21-CV-06524, 2021 U.S. Dist. LEXIS 212008, at *22 (S.D.N.Y. Nov. 2, 2021).

62. *See D.R.C.*, 467 P.3d at 1001.

63. *See Ghanam*, 845 N.W.2d at 145.

64. *See Schram*, 2021 U.S. Dist. LEXIS 212008, at *22.

65. *See* Evans, *supra* note 57, at 125–36.

66. *See id.*

in words and in emojis.[67] At the same time, readers vary in the meanings that they attach to the unamused smiley (😒) when they view this emoji in isolation.[68] In one study, participants described it as depicting everything from depression to suspicion to being unimpressed.[69]

Other emojis susceptible to misinterpretation when viewed in isolation are those that contain positive cues, like a smile, alongside negative cues, like tears or shut eyes.[70] In the same study, 54 percent of respondents labeled Microsoft's "smiling face with open mouth and tightly shut eyes" (😆) as "positive," while 44 percent of participants labeled it as "negative."[71]

The meaning attributed to a nonverbal emoji can also vary between cultural communities.[72] Among native Arabic speakers, for example, the smiley emoticon, :), symbolizes "something more superficial" than happiness or joy, and "maybe even hides anger or sarcasm."[73] Similarly, an American reader might associate the clasped hands (🙏) emoji with religion, whereas a Japanese reader might see the same emoji as meaning "please" or "thank you."[74] The American reader might also see the hand making a circle with the thumb and index finger (👌) emoji as a gesture meaning "ok," whereas a Japanese person might see it as representing "money," and a French person might see it as a symbol for "zero."[75] In some countries, this same gesture is even an insult.[76]

Gesture emojis also hold different connotations among different generations.[77] Members of Gen Z have described the thumbs up (👍) emoji as "passive aggressive," whereas older generations generally see it as an

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67. *See* Benjamin Weissman & Darren Tanner, *A Strong Wink Between Verbal Comprehension and Emoji-Based Irony: How the Brain Processes Ironic Emojis During Language Comprehension*, PLOS ONE (Aug. 15, 2018), https://doi.org/10.13.71/journal.pone.0201727 [https://perma.cc/7FNE-JHJT].

68. *See generally* HANNAH MILLER, JACOB THEBAULT-SPIEKER, SHUO CHANG, ISAAC JOHNSON, LOREN TERVEEN & BRENT HECHT, "BLISSFULLY HAPPY" OR "READY TO FIGHT": VARYING INTERPRETATIONS OF EMOJI (Grouplens Rsch., Univ. Minn., ed., 2016), https://ojs.aaai.org/index.php/ICWSM/article/view/14757/14606 [https://perma.cc/DM68-C4HX].

69. *See id.*

70. *See id.*

71. *See id.*

72. *See* Goldman, *supra* note 15, at 1253.

73. *See Emotional Pictures*, U. ALBANY NEWS CTR. (Nov. 9, 2016), http://www.albany.edu/news/74747.php [https://perma.cc/63AC-82H8] (discussing research by Professor Laurie Beth Feldman).

74. *See* Alex Rawlings, *Why Emoji Mean Different Things in Different Cultures*, BBC: FUTURE (Dec. 11, 2018), https://www.bbc.com/future/article/20181211-why-emoji-mean-different-things-in-different-cultures [https://perma.cc/Q33B-464Y].

75. *See* Gayle Cotton, *Gestures to Avoid in Cross-Cultural Business: In Other Words, 'Keep Your Fingers to Yourself!,'* HUFFPOST (Aug. 13, 2013), http://www.huffingtonpost.com/gayle-cotton/cross-cultural-gestures_b_3437653.html [https://perma.cc/K6T6-WS44].

76. *See id.*

77. *See* Jack Hobbs & Alex Mitchell, *Gen Z Canceled the 'Hostile' Thumbs-Up Emoji and Wants to Ban These 9 Others*, N.Y. POST (Oct. 12, 2022), https://nypost.com/2022/10/12/gen-z-has-canceled-the-thumbs-up-emoji-because-its-hostile/ [https://perma.cc/U4SP-UGAK].

alternative for affirmative words like "yes" and "great."[78] Gen Z also uses the clap (👏) emoji to draw attention to or emphasize an idea, whereas older generations use this emoji to signify applause.[79] A peace sign (✌) emoji, jargon among younger generations for "I'm out," has also been offered as evidence of quitting a job.[80]

Nonverbal social cue emojis are not the only emojis that can hold different meanings among different groups. Emojis that substitute for words are also susceptible to misinterpretation when the emoji is offered for an idiosyncratic meaning.[81] The next section discusses idiosyncratic emojis and digital discourse conventions that may impact the plausibility of an emoji's proffered meaning.

2. Emojis Can Hold Idiosyncratic Meanings and Context Impacts the Plausibility of a Proffered Meaning

Emojis are frequently offered for their facial meaning.[82] For example, a trainwreck emoticon was offered as a part of the following online post: "walk into that federal courtroom with me and get ready for the biggest [trainwreck emoticon] ever."[83] The rat (🐀) emoji, a well-known symbol for a "snitch," has similarly been offered into evidence as a form of online "name calling,"[84] whereas three skull (💀💀💀) emojis sent hours after a murder were offered as indicative of premeditation.[85] The diamond ring (💍) emoji, often associated with marriage, has also been offered to show that a relationship was not, in fact, abusive.[86]

However, the facial meaning of an emoji is not always the intended meaning of an emoji. Emojis commonly hold coded meanings that further illegal activities. One study of online advertisements in the United States determined that sex traffickers frequently employ emojis to communicate about who they are making available for sexual exploitation.[87] This study

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78. *See id.*

79. Patrick M. Milott, *:-P Emojis and Emoticons in Court*, 44 THE REPORTER, no. 3, 2017, at 67.

80. *See* Crawford v. Mangos Caribbean Rest., No. 18-CV-4450, 2020 U.S. Dist. LEXIS 256007, at *17 (N.D. Ga. July 30, 2020).

81. *See infra* Part I.B.2.

82. *See* Ying Tang & Khe Foon Hew, *Emoticon, Emoji, and Sticker Use in Computer-Mediated Communication: A Review of Theories and Research Findings,* 13 INT'L J. COMM. 2457, 2468 (2019) (reporting that people use emojis to promote "accuracy, sociability, [and] efficiency").

83. This post provided grounds for a bad faith dismissal of a debt collection claim. *See* Scroggin v. Credit Bureau of Jonesboro, Inc., 973 F. Supp. 2d 961, 976 (E.D. Ark. 2013) (alteration in original) (quoting text message).

84. *See* People v. Smith, No. B284766, 2019 Cal. App. Unpub. LEXIS 1691, at *19 (Mar. 12, 2019).

85. *See* People v. Lopez, No. 341089, 2019 Mich. App. LEXIS 595, at *6 (Mar. 26, 2019).

86. *See* Commonwealth v. Hunt, No. 18-P-106, 2019 Mass. App. Unpub. LEXIS 142, at *7 n.4 (Feb. 22, 2019).

87. *See* Jessica Whitney, Murray Jennex, Aaron Elkins & Eric Frost, *Don't Want to Get Caught?: Don't Say It: The Use of EMOJIS in Online Human Sex Trafficking Ads*, *in* PROCEEDINGS OF THE FIFTY-FIRST HAWAII INTERNATIONAL CONFERENCE ON SYSTEM SCIENCES 4273, 4275–80 (2018).

specifically identified the growing heart (💗) emoji as a common symbol for a girl and the cherries (🍒) or cherry blossom (🌸) emojis as common codes for virginity.[88] At trial, prosecutors have also argued that emojis encoded communications about sex work.[89] A text message that read "is you down fo yo crown (👑)" has been offered for the proffered meaning that the "pimp is the king," whereas "[t]eamwork make the dreamwork" followed by high heel (👠) and money bag (💰) emojis purportedly signaled "human trafficking."[90] A string of emojis containing feet (👣), a money bag (💰), and either a dollar sign (💲) or a downward-pointing arrow (⬇️) have also been offered for the proffered meaning "ten toes down," jargon for a sex worker "walking a track," or working in their zone.[91]

Additionally, emojis can have encoded drug references. The deciduous tree (🌳) emoji has been offered for its relatively well-known meaning as a reference to marijuana,[92] whereas the cloud (☁️) emoji[93] and the fire (🔥) emoji[94] have also been offered as drug references. Both a single emoji, like the fuel pump (⛽),[95] and multiple emojis strung together, like a ghost and a star (👻⭐),[96] have also been offered to signal gang affiliation.

In determining whether a coded meaning is fair or fictitious, factfinders must remember that digital discourse is often governed by norms of informal spoken communication as opposed to formal written communications.[97] Emojis posted on social media may pose unique interpretive challenges because discourse conventions can vary among platforms and within platform subgroups.[98] These variations may be attributed, at least in part, to the generational gaps in platform user bases.[99] Social media culture is particularly performative and hyperbolic among younger groups.[100] Sometimes this communicative culture extends beyond social media and

88. *See id.* at 4280.

89. *See, e.g.*, People v. Jamerson, No. A153218, 2019 Cal. App. Unpub. LEXIS 940, at *5 (Feb. 6, 2019) (quoting text messages and witness testimony).

90. *Id.* at *6.

91. *See* People v. Webster, No. G055789, 2019 Cal. App. Unpub. LEXIS 4504, at *5–6 (July 2, 2019); People v. Flores, No. B304177, 2020 Cal. App. Unpub. LEXIS 6912, at *1–2 (Oct. 22, 2020).

92. United States v. Loethen, No. 19-CR-04035, 2019 U.S. Dist. LEXIS 208748, at *7 (W.D. Mo. Dec. 2, 2019).

93. United States v. Westley, No. 17-CR-171, 2018 U.S. Dist. LEXIS 118571, at *9 (D. Conn. July 17, 2018).

94. *See* Johnson v. State, 225 A.3d 769, 778–79 (Md. Ct. App. 2020).

95. *See Westley*, 2018 U.S. Dist. LEXIS 208748, at *14.

96. *See* State v. Snipes, No. W2020-00916, 2021 Tenn. Crim. App. LEXIS 464, at *19–20 (Oct. 4, 2021).

97. *See generally* RonNell Anderson Jones & Lyrissa Barnett Lidsky, *Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World*, 23 VA. J. SOC. POL'Y & L. 155, 166–67 (2016).

98. *See* KIM HOLMBERG & MIKE THELWALL, DISCIPLINARY DIFFERENCES IN TWITTER SCHOLARLY COMMUNICATION 1027 (2014) (discussing the varied ways that scholars use Twitter within different disciplines).

99. *See* Lidsky & Norbut, *supra* note 15, at 1912.

100. *See* Jessica Bennett, *OMG! The Hyperbole of Internet-Speak*, N.Y. TIMES (Nov. 28, 2015), https://www.nytimes.com/2015/11/29/fashion/death-by-internet-hyperbole-literally-dying-over-this-column.html [https://perma.cc/6Q46-28Q8].

influences discourse conventions over private forms of communication, like text messages.[101] Social media is also generally disinhibiting for users, which psychologists hypothesize is due to the apparent "distance" between the speaker and the audience.[102]

Emojis are a valuable yet complicated form of evidence. The next section considers how the unique properties of emojis have informed courts' treatment of emoji evidence.[103]

C. Courts' Treatments of Emojis

From 2017 to 2020, court references to emojis grew exponentially.[104] In 2021 alone, 154 court opinions referenced emojis.[105] When emojis are offered as evidence, two main questions govern their treatment: (1) what does the emoji mean[106] and (2) how should the jury be informed of that meaning?[107] Part I.C.1 describes different witnesses who have testified about an emoji's meaning, including senders, recipients, police officers, and federal agents. Next, Part I.C.2 considers one notable approach to presenting emoji evidence to jurors.

1. Sender, Recipient, and Law Enforcement Testimony on the Meaning of Emojis

Parties may present only relevant emoji evidence to the jury.[108] Generally, emojis are relevant to the extent that they communicate something about the sender or recipient.[109] When a party-sender's anthropomorphic emoji is offered against them, party-senders may testify about their intended meanings.[110] One juvenile, for example, testified that an emoji denoted sarcasm among their friends and thus indicated that the content of their message was not a threat.[111] Similarly, a resident defended against a local politician's defamation claim by arguing that an emoticon indicated their allegedly defamatory remarks were merely jokes.[112]

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101. *See id.*
102. Noam Shpancer, *Why You Might Share More Intimately Online*, PSYCH. TODAY (June 24, 2014), https://www.psychologytoday.com/blog/insight-therapy/201406/why-you-might-share-more-intimately-online [https://perma.cc/WS39-HFRS].
103. *See infra* Part I.C.
104. *See* Goldman, *supra* note 12.
105. *See id.*
106. *See infra* Part I.C.1.
107. *See infra* Part I.C.2.
108. FED. R. EVID. 402.
109. *See supra* Part I.A.
110. *See* State v. D.R.C., 467 P.3d 994, 1001 (Wash. Ct. App. 2020) (defendant to a threat charge testifying about their use of a smiley emoji); Ghanam v. Does, 845 N.W.2d 128, 145 (Mich. Ct. App. 2014) (the court discussing the use of an emoticons in a defamation claim); Scroggin v. Credit Bureau of Jonesboro, Inc., 973 F. Supp. 2d 961, 967 (E.D. Ark. 2013) (attorney testifying about their use of a smiley emoji).
111. *See D.R.C.*, 467 P.3d at 1001.
112. *See Ghanam*, 845 N.W.2d at 145.

When an emoji is a well-known symbol of jest, the factfinder must determine what the party-sender was joking about.[113] In a copyright takedown action, for instance, Universal Music Corporation and a claimant alleging "substantial and irreparable harm" from a copyright takedown notice disputed whether a "winky," ;-), emoticon indicated that the claimant brought their suit in bad faith.[114] In the claimant's email exchange with a friend, the friend wrote "love how you have been injured 'substantially and irreparably' ;-)," to which the plaintiff responded "I have ;-)."[115] Universal Music Corporation argued that the winky, ;-), emoticon showed that the plaintiff did not believe that they were "substantially and irreparably" injured by a takedown notice.[116] Conversely, the claimant testified that they believed their friend's winky emoticon referred to the "lawyerese" that was the "substantially and irreparably harmed" language.[117] Thus, the party testified, their wink simply mirrored their friend's wink.[118] Ultimately, the court found for the sender-claimant.[119]

When an emoji is a lesser-known symbol of jest, the factfinder must determine whether the sender was actually joking. The merit of one ineffective assistance of counsel claim turned on whether the factfinder believed a party-sender's testimony that his inclusion of a smiley face (☺️) emoji indicated that an email offer to "stipulate that [their] client [was] guilty" was a joke.[120] A homicide prosecution similarly addressed whether a "grimacing" (😬) emoji, sent four seconds after a text stating "I haven't figured out a way to kill him yet without being caught," was a joke.[121] In both cases, the nature of the claim and surrounding text influenced whether the jury believed the party-sender. Although the factfinder accepted that a smiley face (☺️) emoji invalidated the sincerity of the attorney's offer to stipulate,[122] the "grimacing" (😬) emoji was not enough to overcome evidence that the defendant had committed murder.[123]

When the party-recipient's subjective understanding of an emoji matters, party-recipients have also testified about their emoji interpretation.[124] For example, one hostile work environment claimant testified about the derogatory meaning of a scissors emoji (✂️) because it supported their claim that they perceived their work environment as hostile.[125] Both the

113. *See, e.g.*, Lenz v. Universal Music Corp., No. C 07-3783, 2010 U.S. Dist. LEXIS 16899, at *11–12 (N.D. Cal. Feb. 25, 2010).
114. *See id.* at *11–12.
115. *See id.*
116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.* at *14.
120. *See* Scroggin v. Credit Bureau of Jonesboro, Inc., 973 F. Supp. 2d 961, 967 (E.D. Ark. 2013).
121. *See* People v. Addimando, 120 N.Y.S.3d 596, 607 (Ct. Cl. 2020).
122. *See Scroggin*, 973 F. Supp. 2d at 967.
123. *See Addimando*, 120 N.Y.S.3d at 597.
124. *See* Bellisle v. Landmark Med. Ctr., 207 F. Supp. 3d 153, 160 (D. R.I. 2016) (party offering testimony on an idiosyncratic meaning of the scissors (✂️) emoji).
125. *See id.*

party-sender and the party-recipient of a consequential thumbs up (👍) emoji also testified about their intended and understood meanings in one child abduction case.[126]

When senders and recipients are unavailable or unreliable, parties have relied on expert witnesses to inform the jury of an emoji's idiosyncratic meaning.[127] For this reason, law enforcement officers[128] and federal agents[129] have decoded emojis for the jury. One Bay Area detective testified that a certain phrase including particular emojis was "like a bumper sticker for human trafficking."[130] Likewise, two Los Angeles law enforcement officers at two separate trials testified that a string of emojis encoded jargon related to sex work.[131] One federal agent with experience investigating street gangs, firearm offenses, and narcotics trafficking testified that an encoded emoji, in context, referred to "drugs,"[132] whereas another expert in "drug related code words and jargon" testified that a different encoded emoji meant "really good" drugs.[133] Similarly, a local law enforcement officer testified that posting two specific emojis on social media was just one of a particular gang's many signals.[134]

2. Presentation of Emojis in the Prosecution of the "Dark Web" Bazaar

In addition to determining whether testimony is necessary to establish an emoji's meaning, one judge in the U.S. District Court for the Southern District of New York (S.D.N.Y.) considered whether jurors must see emoji evidence with their own eyes or whether reading the record to the jury sufficed.[135] In the 2015 trial of Ross Ulbricht, federal prosecutors sought to tie Ulbricht to the operation of an online black market known as the "Dark Web" bazaar by presenting Ulbricht's chat records to the jury.[136] Noting that the government did not respond to an inquiry on the presentation of "Internet

126. *See* Bardales v. Lamothe, 423 F. Supp. 3d 459, 472 (M.D. Tenn. 2019).

127. *See, e.g.*, People v. Jamerson, No. A153218, 2019 Cal. App. Unpub. LEXIS 940, at *6 (Feb. 6, 2019) (expert testifying that "down fo yo 👑" means "are you ready to be down and support me as your king."); United States v. Westley, No. 17-CR-171, 2018 U.S. Dist. LEXIS 118571, at *9 (D. Conn. July 17, 2018) (expert testifying that "☁️" is a reference to drugs); State v. Snipes, No. W2020-00916, 2021 Tenn. Crim. App. LEXIS 464, at *21 (Oct. 4, 2021) (expert testifying that use of "👻⭐" signals affiliation with the Ghost Mob gang).

128. *See Jamerson*, 2019 Cal. App. Unpub. LEXIS 940, at *6; People v. Webster, No. G055789, 2019 Cal. App. Unpub. LEXIS 4504, at *5–6 (July 2, 2019); *Snipes*, 2021 Tenn. Crim. App. LEXIS 464, at *19–21.

129. *See Westley*, 2018 U.S. Dist. LEXIS 118571, at *14.

130. *Jamerson*, 2019 Cal. App. Unpub. LEXIS 940, at *6.

131. *See Webster*, 2019 Cal. App. Unpub. LEXIS 4504, at *5–6.

132. *See Westley*, 2018 U.S. Dist. LEXIS 118571, at *26.

133. *See* Johnson v. State, 225 A.3d 769, 778–79 (Md. Ct. App. 2020).

134. *See* State v. Snipes, No. W2020-00916, 2021 Tenn. Crim. App. LEXIS 464, at *19–20 (Oct. 4, 2021).

135. *See* Benjamin Weiser, *At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji*, N.Y. TIMES (Jan. 28, 2015), https://www.nytimes.com/2015/01/29/nyregion/trial-silk-road-online-black-market-debating-emojis.html [https://perma.cc/MA5C-UA54].

136. Transcript of Oral Argument at 4, United States v. Ulbricht, 858 F.3d 71 (2d Cir. 2017) (No. 15-518).

evidence," the judge invited both the prosecution and Ulbricht to take positions.[137]

The prosecution argued that online chats were "records just like any other records" that could be read to the jury.[138] Comparing the conversations to wire transcripts, which are often read to the jury, the prosecution proposed that two paralegals read the messages as a conversation because this method of presenting evidence was "easier for the jury to understand" than "hav[ing] the whole [chat read] in one person's voice."[139] The prosecutor even noted that they had successfully presented wire transcripts in this manner and that this evidence would only be offered after a witness had testified.[140]

Ulbricht objected, arguing that "chats are designed to be absorbed through reading, not through hearing" and that emojis cannot necessarily be communicated orally.[141] Furthermore, Ulbricht argued that "the way that a person perceives and absorbs information is very much tied to the medium that it is in."[142] If a jury hears, but does not read, online communications, they are not experiencing the evidence in the way that it is meant to be received, nor are they perceiving the evidence in the way that it exists.[143] For the aforementioned reasons, Ulbricht argued that chats should only be shown to the jury.[144] This would not be abnormal, he stated, because juries often read transcripts alongside recordings that are difficult to hear.[145]

After considering both arguments, the judge ruled that "trials are about the typically sensory communication of evidence," so chats would be displayed on a screen.[146] The judge noted, however, that "it would be novel" to enter a document into evidence without some specific reference to the text through oral communication.[147] The judge also expressed an interest in the convenience of clearly conveying information to the jury and to the rest of the courtroom.[148] Thus, the judge also allowed the prosecutor to read the conversations alone or with a witness.[149] No other person who could appear to be an actor in any way, including paralegals, could read the conversations[150] out of concern that these individuals could "engage in certain inflections" supporting their party's position.[151] Additionally, a limiting instruction would follow.[152] This limiting instruction would state that the chats were "originally written" and "there is no indication that they

137. *See id.*
138. *See id.*
139. *See id.* at 5.
140. *See id.*
141. *See id.* at 8.
142. *See id.*
143. *See id.*
144. *See id.* at 9.
145. *See id.*
146. *See id.* at 10.
147. *See id.*
148. *See id.*
149. *See id.* at 9.
150. *See id.* at 10.
151. *See id.* at 7.
152. *See id.* at 9.

were orally communicated."[153] The judge would further instruct the jury to "read [the chats]," because "[t]hey are meant to be read," and to "note the punctuation and emoticons."[154]

Emojis hold evidentiary value, but their value must be deciphered with care. Emojis that serve as nonverbal social cues are susceptible to misinterpretation when the jury does not understand the sender's intended social cue.[155] Emojis that have idiosyncratic meanings are also at high risk for jury misunderstanding because the fewer people that are privy to an idiosyncratic emoji meaning, the more difficult it becomes to provide accurate opinion testimony.[156] Because emojis implicate the grey area between common and specialized knowledge, testimony about the emojis' meanings will not always be necessary.[157] Their independent meanings, though, make emoji evidence different from any other evidentiary form, with important implications for how parties present such evidence in court.[158]

II. EVALUATING POSSIBLE TREATMENTS OF EMOJI EVIDENCE IN THE TRIAL CONTEXT

Because emojis lack standard meanings, they are ripe for misunderstanding. Although the Unicode Consortium provides a short description of all the emojis that it defines, these definitions are not all-inclusive.[159] Subtle cultural differences can lead to miscommunication, especially when an emoji and its accompanying message involve cultural references.[160] Similarly, a smiley indicating sarcasm, a joke, or irony may only be detectable with personal knowledge of the sender's sense of humor.[161] Coded communications also use apparently neutral ideograms to actualize unlawful intentions.[162] Thus, complexity can arise when the meaning of an emoji is not clearly specified or an individual's understanding of the emoji's meaning is at issue.[163]

Part II examines possible treatments of emoji evidence in the trial context. Part II.A evaluates issues that arise while determining if and when courts should admit testimony—either expert or lay opinion—on an emoji's meaning. Part II.B analyzes other issues that arise when courts must determine how to present emoji evidence to the jury. Because emojis pose unique interpretive challenges associated with their proffered functions, this Note analyzes emojis that function as substitutes for words and social-cue emojis independently.

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153. *See id.*
154. *See id.* at 9–10.
155. *See supra* Part I.B.1.
156. *See supra* Part I.B.2.
157. *See supra* Part I.A.1.
158. *See supra* Part I.A.2.
159. *See* UNICODE, *supra* note 54.
160. Kirley & McMahon, *When Cute Becomes Criminal*, *supra* note 14, at 70.
161. *See infra* Part II.A.2.
162. *See infra* Part II.A.2.
163. *See infra* Part II.A.2.

A. In or Out: When Should Courts Admit Testimony on the Meaning of an Emoji?

This part will evaluate issues that arise when courts determine whether to admit testimony on the meaning of an emoji. First, Part II.A.1 will consider when testimony on the meaning of an emoji that substitutes for words is helpful. Part II.A.1 will also consider the appropriateness of law enforcement testimony on the meaning of coded emojis when the sender and recipient of emojis are unavailable or unreliable. Finally, Part II.A.2 will examine whether testimony on the meaning of tone and gesture emojis is necessary or a waste of time when presented alongside threatening language.

1. Evaluating the Availability and Reliability of Testimony on the Meaning of Emojis that Substitute for Words

Although the Unicode defines every emoji based on its facial meaning, it does not provide idiosyncratic emoji definitions.[164] Juries need testimony on the idiosyncratic meaning of an emoji when they arguably lack the context necessary to interpret the emoji.[165] Consider, for example, the frog (🐸) emoji, which was once offered for its seldom-used meaning, "snitch," in a witness intimidation claim.[166] For the typical juror to understand this idiosyncratic emoji, testimony is not only helpful but necessary.[167] Conversely, consider the rat (🐀) emoji, also offered in a witness intimidation claim.[168] Because the rat (🐀) emoji visually encodes the word "rat," a common alternative for "snitch," testimony might be unnecessary.[169]

Presenting an emoji alongside its surrounding text can sometimes alleviate the need for testimony about an emoji's meaning. The jury may not connect the peanut (🥜) emoji, in isolation, with the meaning "nuts," a synonym for "crazy."[170] However, in the context of the surrounding text message, "is she just 🥜[?]" it becomes clearer that the peanut (🥜) emoji substitutes for the term "nuts."[171] Viewed alongside the recipient's response, "Yes. And you love the *crazy* lol"[172] the connection between "nuts" and "crazy" becomes so apparent that witness testimony may no longer be necessary.

Testimony is needed, however, in criminal contexts in which emojis encode terms central to illegal operations.[173] This need for testimony poses a unique challenge for prosecutors because both senders and recipients of

164. *See* UNICODE, *supra* note 54.
165. *See supra* Part I.B.1.
166. United States v. Ramirez, No. 15-CR-379, 2021 U.S. Dist. LEXIS 116327, at *19 (S.D.N.Y. June 22, 2021).
167. *See id.*
168. *See* People v. Smith, No. B284766, 2019 Cal. App. Unpub. LEXIS 1691, at *19 (Mar. 12, 2019).
169. *See id.*
170. *See* United States v. Sheppard, 17 F.4th 449, 452 n.2 (3d Cir. 2021).
171. *See id.*
172. *See id.* (emphasis added).
173. *See supra* Part I.A.2.

encoded emojis may be either unreliable or unavailable.[174] When an emoji is well-encoded, like a tree (🌳) encoding marijuana surrounded by references to "landscaping shrubs," "tractors," and a "lawn mowing business," the sender and recipient could claim that they were actually referring to a legitimate landscaping operation.[175] Moreover, if both the sender and recipient are criminal defendants, as was true of the sender and recipient of the tree (🌳) emoji,[176] both defendants could invoke their Fifth Amendment protection against self-incrimination and choose to avoid cross-examination by not taking the stand.[177] This would render the sender and recipient unavailable.[178]

Ultimately, law enforcement agents testified about the meaning of the encoded tree (🌳) emoji because a task force spanning the Drug Enforcement Administration; the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); and other federal agencies had been investigating one of the defendants, a known drug dealer, for months.[179] In this situation, law enforcement testimony on the meaning of emojis encoding a drug enterprise was similar to police testimony decoding drug-related slang used in recorded jailhouse calls.[180] Without such testimony, critical pieces of defendants' communications would be inaccessible to the average juror.

In another prosecution for various offenses stemming from several New Haven shootings, a special agent from the ATF similarly attested to the meaning of multiple emojis sent between defendants.[181] First, the agent opined that a gas (⛽) emoji in a text reading "I'm coming lil ⛽" symbolized a "gang," and a subsequent message reading "got a jugg" referenced a drug purchaser.[182] Later, the agent opined that "cloud" emojis referred to drugs.[183] One defendant challenged the admission of the agent's attestation, arguing that "much of the Facebook information [the agent] relied on to establish probable cause is 'gibberish,'" and that the agent "did not sufficiently explain [their] interpretation of the information."[184] The U.S. District Court for the District of Connecticut dismissed this argument and admitted the expert testimony, ruling that the agent sufficiently established probable cause by "provid[ing] interpretations of each piece of information gathered from the Facebook accounts based on [their] training and

174. *See* United States v. Loethen, No. 19-CR-04035, 2019 U.S. Dist. LEXIS 208748, at *7 (W.D. Mo. Dec. 2, 2019).
175. *See id.*
176. *See id.*
177. U.S. CONST. amend. V.
178. FED. R. EVID. 801(a)(1).
179. *See Loethen*, 2019 U.S. Dist. LEXIS 208748, at *2–9.
180. *See* Poole v. State, 284 So. 3d 604, 605 (Fla. Dist. Ct. App. 2019).
181. *See* United States v. Westley, No. 17-CR-171, 2018 U.S. Dist. LEXIS 118571, at *13–14 (D. Conn. July 17, 2018).
182. *See id.*
183. *See id.* at *25–26.
184. *See id.*

experience . . . investigating street gangs, firearms offenses, and narcotics trafficking."[185]

Perhaps the defendant's argument was too quickly dismissed, given that jurors might give undue deference to law enforcement officers who testify as experts and to their interpretations of emojis.[186] FRE 702 recognizes this risk and, accordingly, seeks to screen out expert testimony that is unnecessary and unreliable.[187] Law enforcement officers' testimony might be unnecessary or unreliable for several reasons. First, expert bias can develop when a prosecutor builds rapport with "their" law enforcement expert, whom the prosecutor might make an integral part of their team.[188] As a result, law enforcement officers might be compelled to present an opinion about an emoji in a way that favors the prosecution.[189]

Consequently, law enforcement officers are more likely than unretained witnesses to overstate the degree of consensus about an emoji's meaning.[190] Perhaps this was the case when a Bay Area detective testified that "teamwork make[s] the dream work 👠💰" was so ubiquitous among officers that it was "almost like a bumper sticker for human trafficking."[191] Absent the emojis, "teamwork make[s] the dream work" is a common colloquial phrase first coined by a clergyman in 2002.[192] Is it plausible that emojis sufficiently differentiate this phrase so as to call it a "bumper sticker for human trafficking"?[193] Similarly, might two Los Angeles police officers have overstated the connection between the phrase "ten toes down" and sex work when testifying that emojis encoded this message to mask two separate sex-trafficking operations?[194] In rap music, "ten toes down" commonly references devotion and commitment to someone or something.[195] Because

185. *See id.*

186. *See* Bennett Capers, *Crime, Legitimacy, Our Criminal Network, and the Wire*, 8 OHIO ST. J. CRIM. L. 459, 466 (2011) ("Society as a whole still tends to credit police testimony over other testimony.").

187. FED. R. EVID. 702.

188. *See* Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1139 (noting that the process of preparing witnesses "pushes the expert to identify with the lawyers on her side and to become a partisan member of the litigation team").

189. *See generally* Daniel C. Murrie, Marcus T. Boccaccini, Lucy A. Guarnera & Katrina A. Rufino, *Are Forensic Experts Biased by the Side That Retained Them?*, 24 PSYCH. SCI. 1889 (2013).

190. Law enforcement officers may overstate the degree of consensus about the meaning of an emoji in much the same way as an expert in a pharmaceutical case. Sander Greenland, *The Need for Critical Appraisal of Expert Witnesses in Epidemiology and Statistics*, 39 WAKE FOREST L. REV. 291 (2004).

191. *See* People v. Jamerson, No. A153218, 2019 Cal. App. Unpub. LEXIS 940, at *6 (Feb. 6, 2019).

192. *Learn and Grow: How Teamwork Makes the Dream Work*, IT'S YOUR YALE, https://your.yale.edu/learn-and-grow-how-teamwork-makes-dream-work [https://perma.cc/8SR2-2YGF] (last visited Sept. 3, 2023); *see also* JOHN C. MAXWELL, TEAMWORK MAKES THE DREAM WORK (2002).

193. *See Jamerson*, 2019 Cal. App. Unpub. LEXIS 940, at *6.

194. *See supra* note 91 and accompanying text; *see also supra* Part I.B.2.

195. *What Does "Ten Toes Down" Mean*, DAILYRAPFACTS, https://dailyrapfacts.com/27504/what-does-ten-toes-down-mean/ [https://perma.cc/7GTE-RTW4] (last visited Sept. 3, 2023).

officers tend to receive undue deference from jurors, the risk of an officer overestimating the degree of consensus on an emoji's meaning weighs in favor of excluding this testimony as prejudicial.

Additionally, juries might inconsistently interpret law enforcement testimony on emojis because attitudes toward police officers tend to diverge along racial lines.[196] Even when jurors are directed to treat police officer testimony as they would any other witness, "white jurors tend to credit police officers' testimony while jurors of color often approach that testimony with skepticism or even mistrust."[197] Juror skepticism might pose a problem in situations in which police testimony on the meaning of an emoji is helpful, visually verifiable, and the only available source of meaning. One local police officer testified that a local street gang used a "G" hand signal in person and the ghost (👻) and star (🌟) emojis online to signal gang-affiliation.[198] Supporting that officer's credibility was the fact that the gang was named the "Ghost Mob," with the ghost (👻) emoji substituting for "ghost" and the "G" hand gesture substituting for the first letter. In such cases when an officer is the only available source of emoji meaning, perhaps they should be allowed to offer such testimony.

Although the availability of a knowledgeable coconspirator's testimony on the meaning of an emoji would avoid the challenges surrounding police testimony, this practice remains uncommon. This may be because coconspirator testimony is difficult to secure for the same reasons as sender and recipient testimony. The next part discuses testimony on the meaning of emojis that serve as nonverbal social cues when witness testimony is generally available.

2. Examining the Necessity of Testimony on the Meaning of Emojis that Serve as Nonverbal Social Cues

When emojis serve as nonverbal social cues, they function as substitutes for actual gestures, vocal tone, and facial expressions.[199] Because the intent behind a nonverbal social cue is specific to the sender, that individual's meaning usually governs.[200] For this reason, party-senders often testify about their intended meaning of a nonverbal social cue emoji.[201]

In online threat cases, specific plans of causing harm are more likely to be considered threats than mere vagaries.[202] Some argue that emojis that convey tone may "reasonably [be] ignore[d]" when "unequivocal language

196. Carol Steiker, Randall Kennedy, Kim Taylor-Thompson & Harvey Silverglate, *Contemporary Challenges in the Criminal Justice System*, 43 N.Y.L. SCH. L. REV. 79, 86 (1999).

197. *See id.*

198. *See* State v. Snipes, No. W2020-00916, 2021 Tenn. Crim. App. LEXIS 464, at *19–20 (Oct. 4, 2021).

199. *See supra* notes 57–64 and accompanying text.

200. *See supra* notes 124–26 and accompanying text.

201. *See supra* notes 124–26 and accompanying text.

202. *See* State v. Locke, 307 P.3d 771, 777–78 (Wash. Ct. App. 2013).

is used."[203] A California appellate court, for example, determined that the plain meaning of a teen's tweet was not a joke, per the teen's testimony, just because it included multiple laughing (😂) and clapping (👏) emojis.[204] The teen's messages included threats to "shoot up" the "c wing" of their school during "1st period," warnings for "everybody [to] duck," and statements that they were "get[ting] [their] cousin['s] gun."[205] Because the teen's language made a clear threat and described steps they were taking to carry out that threat, a digital gloss of a "joke" through smiley emojis did not flip the meaning of the surrounding text.[206]

In cases like this, testimony on the meaning of an emoji that allegedly signals jest would only waste time—an outcome FRE 403 seeks to avoid.[207] To evaluate the meaning of the clapping (👏) emoji, for example, the jury would need to determine the intended audience and whether they would perceive the emoji as a symbol of applause or a clap between words for emphasis.[208] This distinction does not ultimately matter because the juvenile defendant would have difficulty framing either as a compelling symbol of jest alongside the text. Thus, testimony from the juvenile defendant on the meaning of the clapping (👏) emoji would probably only waste time.

On the other hand, the tenor of FRE 403 indicates that a judge's power to exclude evidence for waste of time should be sparingly exercised.[209] Furthermore, because the line between an actionable and non-actionable threat is imprecise, emojis offered for tone can provide valuable insight into whether a message objectively threatens harm.[210] This is particularly important in juvenile threat cases, in which a young person's hyperbolic post could be misconstrued.[211]

In *State v. D.R.C.*[212], the Washington State Court of Appeals held that the State did not meet its burden of proving a true threat when a juvenile defendant texted two friends separate messages, each containing emojis, about killing her parent.[213] The juvenile defendant testified that she did not intend her texts to be taken seriously and that the messages were a form of venting and expressing emotion.[214] The juvenile defendant also testified that violent and exaggerated language was common among her friends but not intended to be taken literally.[215] Furthermore, the juvenile defendant asserted that she and her friends often denoted sarcasm through emojis.[216]

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203. *See* MILOTT, *supra* note 79, at 66.
204. *See In re* L.F., No. A142296, 2015 WL 3500616, at *2 (Cal. Ct. App. June 3, 2015).
205. *See id.* at *1.
206. *See id.* at *3.
207. *See supra* Part I.A.
208. *See supra* Part I.B.1.
209. *See* MUELLER & KIRKPATRICK, *supra* note 24.
210. *See supra* Part I.B.2.
211. *See supra* Part I.B.2.
212. *See* State v. D.R.C., 467 P.3d 994, 998 (Wash. Ct. App. 2020).
213. *See id.*
214. *See id.* at 999.
215. *See id.*
216. *See id.*

The court found it significant that the juvenile defendant had previously texted one recipient tears of joy (😂), shrug (🤷‍♀️), face with horns (😈), zany face (🤪), and red heart (❤️) emojis, which, the court ruled, conveyed an "unmistakable message of sarcasm."[217] In the relevant message to that same recipient, the juvenile defendant again prefaced her message with the tears of joy (😂) emoji.[218] Immediately after the juvenile's text to the second recipient, she sent the rolling on the floor laughing (🤣) emoji.[219] For these reasons and others, the court ruled that the juvenile's texts were not true threats.[220]

In sum, a sender's intended meaning of a nonverbal social cue emoji can often be discerned through the sender's own testimony.[221] However, when unequivocal threatening language is used, emojis may be insufficient to flip the meaning of the surrounding text.[222] Although internet hyperbole is common among teens, courts vary in the weight that they give this context.[223]

B. Show or Tell: How Should Courts Present Emoji Evidence to the Jury?

If juries are to visually interpret emojis, they must see the emoji as the relevant party saw it, accounting for platform and software version so as not to distort the emoji's meaning.[224] This part will analyze additional issues that arise when courts must determine how to present emoji evidence to the jury. Part II.B.1 will evaluate problems that come with presenting emojis that substitute for verbal communications to the jury. Then, Part II.B.2 will analyze issues that arise when emojis that substitute for nonverbal social cues are presented to the jury.

1. Presenting Emojis that Substitute for Words to the Jury

When an emoji substitutes for verbal communication, the meaning of the emoji can be translated into words because the emoji functions as a word.[225] Like verbal emojis, slang is also verbal and parties describe the meaning of slang for the jury verbally.[226] This gives slang the same weight as other testimony.[227] If slang were instead written and offered to the jury as an exhibit, it would likely receive prejudicial emphasis.[228] As FRE 803(5) recognizes, juries tend to weigh written records more heavily than live witness testimony on equivalent points because exhibits are accessible to the

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217. *See id.* at 1002.
218. *See id.* at 1001.
219. *See id.*
220. *See id.*
221. *See supra* Part I.C.2.
222. *See D.R.C.*, 467 P.3d at 998.
223. *See id.*
224. *See* Goldman, *supra* note 15, at 1276.
225. *See supra* Part I.B.1.
226. *See supra* Part I.A.1.
227. *See supra* Part I.A.1.
228. *See* WRIGHT & BELLIN, *supra* note 44, § 6857.

jury during deliberation.[229] If emojis that substitute for words are to receive the same weight as oral testimony, then emojis must be read into the record like slang.

Allowing parties to show emojis to the jury could serve as a vehicle for prejudicially bolstering surrounding text—what FRE 803(5) seeks to protect against.[230] Because emojis are best understood in context, a crafty lawyer could argue that a verbal emoji must be seen in the context of the entire digital exchange to be understood.[231] Yet presenting emojis to the jury in their surrounding context could create a pathway for getting influential written statements into jury deliberations.[232] To prevent such prejudice, emojis that substitute for words would have to be read and not displayed.

Describing emojis also prevents jurors from ascribing their own meaning to the emoji based on its image.[233] The risk of jurors transposing their own meaning is particularly acute when the emoji's facial meaning does not align with its proffered meaning.[234] A fire (🔥) emoji offered for the coded meaning "really good drugs," for example, has no relation to the image of fire.[235] For this reason, showing the jury the fire (🔥) emoji, even in context, would do little to further the jury's comprehension and would invite jurors to ascribe their own meanings to the symbol.[236] Similarly, showing jurors a cloud (☁️) emoji when it is offered as a coded reference to drugs may waste time or cause confusion.[237] These risks are greatest when the jury sees a coded emoji and does not find testimony on the coded meaning credible.[238]

On the other hand, evidence that is seen is "a most convincing" form of evidence.[239] Applied to emojis, this supports displaying emojis in their relevant contexts, rather than describing emojis verbally. Because jurors are probably senders and recipients of emojis, they are well positioned to evaluate the meaning of a verbal emoji.[240] This poses a problem because the only way for jurors to ascribe meaning to an emoji is to see the emoji in its relevant context.[241] Although emojis are not necessarily intended to be orally communicated, they are intended to be read in the context of the sender's entire message.[242] Thus, emojis may need to be shown to the jury.[243]

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229. *See id.*
230. *See id.*
231. *See* Goldman, *supra* note 15, at 1263.
232. *See id.*
233. *See supra* Part I.B.
234. *See supra* Part I.B.2.
235. *See* Johnson v. State, 225 A.3d 769, 778–79 (Md. Ct. App. 2020).
236. *See id.*
237. *See id.*
238. *See supra* Part II.A.1.
239. *See* BLUM ET AL., *supra* note 48, § 932.
240. Emojis are used by 92 percent of the online population. Brandy Shaul, *Report: 92 Percent of Online Consumers Use Emoji*, ADWEEK (Sept. 30, 2015), https://www.adweek.com/performance-marketing/report-92-of-online-consumers-use-emoji-infographic/ [https://perma.cc/PQ6V-AYAY].
241. *See* Transcript of Oral Argument, *supra* note 136, at 8.
242. *See id.*
243. *See id.* at 9–10.

If an emoji is visually encoded, presenting the emoji to the jury in context would help the jury evaluate the credibility of a party's proffered meaning. One well-known example of a visually encoded emoji is Apple's peach (🍑) emoji, a widely-known euphemism for a butt.[244] If the peach (🍑) emoji were offered in a trial, jurors would best be able evaluate the credibility of this proffered meaning if they could actually see the peach's "crack."[245] Likewise, when the deciduous tree (🌳) emoji is offered as a coded reference to marijuana, the jury would benefit from seeing the emoji because Apple's depiction of the deciduous tree looks like a bud of marijuana.[246] In the well-concealed context of a landscaping operation, this platform-specific visual encoding of drugs provides critical support for the prosecution's case.[247] Thus, presenting emojis to the jury for visual inspection can be critical to the fair evaluation of an emoji's proffered meaning.[248]

2. Presenting Emojis that Serve Nonverbal Social Cues to the Jury

To describe emojis that serve as nonverbal social cues to the jury, the offering party must precisely define the nonverbal emoji in a way that makes sense to the jury. A precise description is necessary, for instance, when describing an anthropomorphic emoji that indicates jest.[249] "Face with tears of joy" emoji (😂) more strongly indicates that a message is a joke than does the simple descriptor "smiley face," which evokes only the most basic visual (🙂).[250] An oversimplified descriptor could, in context, materially alter a jury's understood meaning.[251]

With a proper description, describing—and not showing—an emoji to the jury is beneficial when jurors could ascribe their own cultural meanings to a gesture emoji.[252] Absent testimony, jurors could, for example, misinterpret the hands clasped (🙏) emoji as a religious gesture, rather than a display of thanks.[253] Older jurors could also misinterpret the victory hand (✌) emoji as a symbol of peace, rather than a symbol for "I'm out," popular among younger generations.[254] To protect against jurors imposing their own cultural meaning onto an emoji, it would be best to describe, and not show, the emoji to the jury.

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244. When the peach emoji is displayed on Google (🫦), the visual depiction is so different that the associated meaning disappears. *See* Goldman, *supra* note 15, at 1254.
245. *See id.*
246. *See* United States v. Loethen, No. 19-CR-04035-SRB-7, 2019 U.S. Dist. LEXIS 208748, at *7 (W.D. Mo. Dec. 2, 2019).
247. *See id.*
248. *See id.* at *8 (translating statements regarding four "landscaping shrubs" as code for purchasing four ounces of marijuana).
249. *See supra* Part I.B.1.
250. *See* Steinmetz, *supra* note 4.
251. *See supra* Part I.B.1.
252. *See id.*
253. *See* Rawlings, *supra* note 74.
254. *See* Crawford v. Mangos Caribbean Rest., No. 18-CV-4450, 2020 U.S. Dist. LEXIS 256007, at *43 (N.D. Ga. July 30, 2020).

Furthermore, gang-affiliated hand signals convey meaning visually but are often described to the jury.[255] Because only the connection between the hand signal and the gang matters, showing the jury an image of the hand signal would do little to further juror understanding of the relevant issues.[256] Rather, displaying the emoji risks wasting time, which FRE 403 seeks to protect against.[257] To promote convenience and efficiency, clearly describing an emoji to the jury is thus preferable.[258]

Describing an anthropomorphic emoji offered for tone also ensures that anthropomorphic emojis are not visually misinterpreted.[259] Emojis that contain positive and negative cues, like a smile and tears, are susceptible to misinterpretation when displayed in isolation.[260] It is unclear the degree to which showing an anthropomorphic emoji in context ameliorates this risk.[261] Even if an anthropomorphic emoji is displayed in context, native Arabic speakers, for example, typically ascribe different tones to facial expressions than native English speakers raised in the United States do.[262] Thus, describing, in lieu of showing, the jury anthropomorphic emojis is in the interest of accuracy when jurors come from diverse backgrounds.[263]

Yet simply telling juries what meaning to ascribe to an emoji poses its own unique challenges. When an emoji is offered to convey tone, a party might be incentivized to bolster the strength of their proffered meaning through vocal inflection.[264] Additionally, when a juror needs a fuller understanding of how an emoji is used, "the simple identifier of [smiling emoji] is already inadequate because there are different types of smiles, skin tones, and some smiling emojis may have other defining characteristics."[265]

Audiovisual recordings are admissible when an individual's tone or expression is relevant.[266] Because emojis similarly convey tone, this suggests that it may be proper to show the jury tonal emojis when relevant.[267] Yet when determining whether to play audiovisual recordings for the jury, judges consider whether the same evidence could instead be provided through in-court testimony.[268] When in-court testimony is available, some scholars argue that preference should be given to presenting evidence through a live witness and not an audiovisual recording.[269] This would ensure that the evidence does not receive the prejudicial emphasis that often

255. *See* People v. Mazariego, 117 N.Y.S.2d 235, 238 (App. Div. 2014).
256. *See supra* Part I.C.2.
257. *See* FED. R. EVID. 403.
258. *See* Transcript of Oral Argument, *supra* note 136, at 4.
259. *See* MILLER ET AL., *supra* note 68.
260. *See id.*
261. *See id.*
262. *See Emotional Pictures*, *supra* note 73.
263. *See id.*
264. *See* Transcript of Oral Argument, *supra* note 136, at 4.
265. *See* Milott, *supra* note 79, at 67 (alteration in original).
266. *See* ARTHUR & HUNTER, *supra* note 49.
267. *See id.*
268. *See* BLUM ET AL., *supra* note 48, § 974.
269. *See id.*

accompanies the accessibility of exhibits during deliberations.[270] For this reason, live witness testimony describing a tonal emoji would similarly ensure that tonal emojis receive the same weight as other testimony on equivalent points.[271]

Despite all the reasons to describe, rather than show, emojis to the jury, allowing the jury to read digital communications, which include emojis, is the only way for the jury to experience nonverbal social cue emojis in their original form.[272] Nonverbal social cue emojis, like expressions and gestures, are intended to be seen, not orally communicated.[273] As mentioned in Part II.B.1, jurors are probably senders and recipients of emojis and thus visually interpret emojis with varying degrees of regularity.[274] Even when emojis convey sarcasm—for example, by placing a smiley face emoji and the surrounding text at odds—human brains process this as sarcasm in the same way that human brains process a sarcastic tone.[275] For these reasons, jurors have the capacity to discern the meaning of emojis offered for tone when they see the evidence in its original context.

III. A FRAMEWORK FOR HANDLING EMOJI EVIDENCE IN TRIAL CONTEXTS BASED ON EMOJIS' FUNCTIONS

This part offers a framework for handling emoji evidence in trial contexts based on interpretive issues that can arise from an emoji's proffered meaning. To properly present emoji evidence to the jury, judges must first identify whether an emoji is being offered as a substitute for a word or a nonverbal social cue.[276] Emojis that are not offered as gestures, expressions, or symbols of tone[277] substitute for words.[278] Part III.A recommends a new evidentiary test in which emojis that substitute for words must be classified as conveying either their facial meaning or an idiosyncratic meaning. Further, this part argues that only senders and recipients may attest to the proffered meaning of an emoji offered for its facial meaning, whereas a qualified witness must attest to the proffered meaning of an idiosyncratic emoji. Finally, Part III.A advocates that emojis that substitute for words should always be shown to the jury at a party's request.

Part III.B recommends that senders and recipients should always have the opportunity to testify about their intended meaning of a nonverbal social cue emoji, which should be displayed for the jury on party request. Additionally, Part III.B recommends that courts should generally exclude third-party testimony about an emoji's meaning.

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270. *See supra* Part I.A.2.
271. *See id.*
272. *See* Transcript of Oral Argument, *supra* note 136, at 8.
273. *See id.*
274. *See supra* Part II.B.1.
275. *See* Weissman & Tanner, *supra* note 67.
276. *See supra* Part II.
277. A red heart (❤️) emoji, for example, is a symbol of tone conveying love. *See supra* note 59 and accompanying text.
278. *See supra* Part I.B.2.

Whatever an emoji's proffered function, defining the emoji is necessary for it to be offered as testimony.[279] If the meaning of an emoji is disputed, judges should instruct the jury as follows: "Emojis are symbols that communicate independent meaning. Different people might use the same emoji to convey different meanings. You are to determine what the emoji means to [the relevant party]."

A. Judges Must Determine Whether the Proffered Meaning of an Emoji That Substitutes for Words Is Facial or Idiosyncratic

The proper handling of symbols-as-communication offered as substitutes for words requires a new threshold test. This test would instruct judges to determine whether the proffered meaning of an emoji is facial or idiosyncratic.[280] To make this determination, the judge must consider what the emoji depicts in isolation, whether the meaning of the emoji changes when viewed alongside accompanying text, and whether a typical juror in the community would understand the meaning of the emoji. When the proffered meaning of the emoji is at odds with the image, the meaning of the emoji changes when viewed in context, or a typical juror in the jurisdiction would not understand the meaning of the emoji, then the emoji is offered for an idiosyncratic meaning.[281] Otherwise, the emoji's meaning is facial.[282] The following examples illustrate this test in practice.

When a plaintiff enters an emoticon into evidence for the meaning "trainwreck," the judge must first confirm that the emoji in fact depicts a trainwreck.[283] Once this is confirmed, the judge must then identify whether the meaning changes when the emoji is viewed in context—for example, "walk into that federal courtroom with me and get ready for the biggest [trainwreck emoticon] ever."[284] Because the meaning of the emoji does not change in context, the judge must finally confirm that jurors in the community would understand that this emoji compares the anticipated disastrousness of courtroom proceedings to that of a train collision.[285] Jurors in any community are probably capable of making this determination, so the emoji is being offered for its facial meaning.

On the other hand, the crown (👑) emoji, depicting an ornamental headdress, is being offered for an idiosyncratic meaning when the proffered meaning is a sex-trafficking reference.[286] Viewing the emoji in its surrounding context—"is you down fo yo 👑"—further confirms that the typical juror in any community would need witness testimony to understand

279. *See supra* Part I.C.2.
280. *See supra* Part II.A.1.
281. *See supra* Part II.A.1.
282. *See supra* Part II.A.1.
283. *See* Scroggin v. Credit Bureau of Jonesboro, Inc., 973 F. Supp. 2d 961, 967 (E.D. Ark. 2013).
284. *See id.*
285. *See id.*
286. *See* People v. Jamerson, No. A153218, 2019 Cal. App. Unpub. LEXIS 940, at *6 (Feb. 6, 2019).

the emoji's intended meaning.[287] Likewise, the rat () emoji, depicting a rodent and offered for the meaning "snitch," is also idiosyncratic.[288] Although some jurors may understand that calling someone a "rat" is a synonym for calling that person a "snitch," other jurors in a community would probably need testimony drawing out this connection.[289] When in doubt, judges should treat emojis as if they are idiosyncratic and allow reliable sender, recipient, expert, or coconspirator testimony on an emoji's meaning.[290]

1. Only Senders and Recipients May Attest to the Proffered Meaning of an Emoji Offered for Its Facial Meaning

When an emoji is offered for its facial meaning, the sender and recipient should have the opportunity to testify about their intended or understood meaning. Senders and recipients of emojis are often party to suits in which emoji evidence is offered.[291] Although sender and recipient testimony on an emoji's facial meaning is not exceptionally helpful to the jury, it has confirmatory value.[292] Third-party opinion testimony, on the other hand, is not helpful to the jury because the jury is equally capable of determining an emoji's facial meaning by seeing the emoji in context.[293] Thus, testimony on emojis that are used for their the facial meaning should be limited to senders and recipients.

2. A Witness Must Attest to the Proffered Meaning of an Idiosyncratic Emoji

A witness must testify about the meaning of an idiosyncratic emoji because jurors may otherwise ascribe to the emoji its facial meaning.[294] Because reliability and credibility issues can stem from law enforcement testimony, judges should require that the government prioritize coconspirator testimony on the idiosyncratic meaning of coded emojis when available.[295] If a coconspirator is unavailable, independent evidence should corroborate police officer testimony. The sender using or receiving the same coded emoji similarly in another conversation would be an example of independent corroborating testimony. Likewise, an unretained witness could also testify that the emoji is being offered for its proffered meaning. Requiring corroborating evidence ensures that police officer testimony is both reliable and credible.[296]

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287. *See id.*
288. *See* People v. Smith, No. B284766, 2019 Cal. App. Unpub. LEXIS 1691, at *19 (Mar. 12, 2019).
289. *See id.*
290. *See supra* Part III.A.2.
291. *See supra* Part I.B.2.
292. *See supra* Part I.B.2.
293. *See infra* Part III.A.3.
294. *See supra* Part II.A.1.
295. *See supra* Part II.A.1.
296. *See supra* Part II.A.1.

The government should also be required to provide evidence corroborating the testimony of federal agents, even when the agent is an expert in decoding and has intercepted the party's online communications for months.[297] Because the same federal agents are testifying as experts on coded emojis in multiple trials,[298] federal agents may develop adversarial biases.[299] Consequently, federal agents may offer opinion testimony favoring the government or may frame literally true information in a manner favorable to the government.[300] To ensure that officer testimony is reliable, the government should thus present independent evidence corroborating federal agent testimony on the meaning of an emoji as well. Such a requirement is not unnecessarily restrictive and ensures the reliability and credibility of a federal agent's testimony.

If the judge admits law enforcement testimony, they should accompany it with a limiting instruction to minimize the risk of juror deference to the testimony of law enforcement officers.[301] This limiting instruction should be similar to the following: "The meaning of a communicative symbol comes from the sender's [community or conspiracy]. This witness is not a member of the sender's [community or conspiracy]. It is your job, as the factfinder, to determine the meaning of the emoji to [the perspective that matters]."

3. Emojis that Substitute for Words Must Be Displayed for the Jury in Relevant Context on Party Request

Because trials are about the "typically sensory communication of evidence," jurors must experience communicative evidence as it exists and is intended to be interpreted.[302] For this reason, jurors must see emojis that substitute for words. As likely senders and recipients of emojis, jurors can and should evaluate the meaning of emojis that substitute for words, which can only be done through seeing how surrounding text impacts an emoji's meaning.[303] Even with witness testimony about the meaning of an emoji, jurors understand what is seen better than what is heard.[304] When an emoji holds an idiosyncratic meaning based on the platform-specific depiction of an emoji, it is especially important that jurors see the connections between the emoji and its proffered meaning.[305] For these reasons, emojis must be displayed for jurors in their relevant contexts.

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297. *See supra* Part II.A.1.

298. One federal agent has testified about the meaning of coded emojis in multiple trials in the last three years. *See* United States v. Loethen, No. 19-CR-04035, 2019 U.S. Dist. LEXIS 208748, at *7 (W.D. Mo. Dec. 2, 2019); United States v. Westley, No. 17-CR-171, 2018 U.S. Dist. LEXIS 118571, at *13–14 (D. Conn. July 17, 2018).

299. *See supra* Part II.A.1.

300. *See supra* Part II.A.1.

301. *See supra* Part I.A.

302. *See* Transcript of Oral Argument, *supra* note 136.

303. *See supra* Part II.B.1.

304. *See supra* Part II.B.1.

305. *See supra* Part II.B.1.

Criminal defendants against whom coded emojis are offered should have the right to show emojis to the jury because the dissonance between the emoji's facial and proffered meanings could undermine the government's claim.[306] Although the jury may, as a result, ascribe the facial meaning to an emoji that is actually encoded, this risk is outweighed by a criminal defendant's right to cast doubt on the government's case. Displaying an emoji in its relevant context can thus be foundational to a criminal defendant's defense and should not be categorically barred.

Judges should limit the text surrounding an emoji to only that which is necessary for juror comprehension because displaying emojis in surrounding contexts creates a pathway for parties to get influential emoji-filled statements into jury deliberations.[307] The amount of text that is necessary to properly evaluate the meaning of an emoji will vary based on the communicative platform, the nature of the conversation, and what the conversation is being offered to prove. This approach balances the need for the jury to determine the meaning of an emoji with the minimization of prejudicial emphasis.[308]

B. Senders and Recipients May Always Testify About Their Intended Meaning of a Nonverbal Social Cue Emoji, Which Should Be Displayed for the Jury on Party Request

This section advocates that senders and recipients of nonverbal social cue emojis should always have the opportunity to testify about their intended or understood meanings of nonverbal social cue emojis. Further, this part advocates that nonverbal social cue emojis must be displayed for the jury on party request to protect against distortion and to allow the jury to determine the facts. Part III.B.1 explains the benefit of sender and recipient testimony on the meaning of tone emojis.[309] This section also explains why tone emojis accompanying unequivocal text cannot reasonably be ignored.[310] Part III.B.2 argues that the jury should always see gesture emojis, despite the possibility of jurors ascribing their own cultural meaning.[311]

1. Tone Emojis That Accompany Unequivocal Text Cannot Reasonably Be Ignored

If a party-sender offers emoji evidence or emoji evidence is offered against them, the party-sender of a tonal emoji should always have the opportunity to testify about their intended meaning.[312] Tone emojis, like expression, pitch, vocal inflection, and volume, can complement, reinforce, enhance, or

306. *See supra* Part II.B.1.
307. *See supra* Part II.B.1.
308. *See supra* Part II.B.1.
309. *See infra* Part III.B.1.
310. *See infra* Part III.B.1.
311. *See infra* Part III.B.2.
312. *See supra* Part I.B.1.

materially alter the meaning of a piece of text.[313] The meaning conveyed by tone emojis is sender-specific, thus making senders a valuable source of testimony that should always be admitted.[314] Recipient testimony should similarly be admitted because senders communicate to be understood by their intended audience.[315]

To properly evaluate the meaning of a tone emoji, the jury must see a tone emoji in context to discern how it alters or enhances the surrounding text.[316] A well-known emoji for jest, like the tears of joy (😂) emoji, must be seen in context to decide what part of the text is intended as a joke.[317] Similarly, jurors must see a smiley face (🙂) emoji alongside negative text to determine whether the sender's message is sarcastic or serious.[318] Jurors are capable of making this determination because human brains process sarcasm in emojis the same way they process sarcasm in tone.[319]

Allowing the offering party to read the emoji into the record might impede the search for truth because the offering party might be incentivized to distort the meaning of an emoji-filled message by reading the entire text in the proffered tone.[320] The importance of protecting against distortion of evidence far outweighs the remote risk that jurors might use tone emojis to get important text into jury deliberation rooms.[321] Moreover, when jurors need a fuller understanding of a tone emoji, a simple identifier, like "smiley face," may be insufficient.[322] For the jury to objectively discern the meaning of a tone emoji, the jury must thus experience emoji evidence in its purest form.

Even when tone emojis accompany unequivocal text, tone emojis cannot reasonably be excluded.[323] Because social media discourse tends to be hyperbolic, particularly among young people, tone emojis can provide critical context in evaluating whether threatening text is, in fact, a true threat.[324] Even if the jury ultimately determines that a tone emoji does not flip the meaning of surrounding text, this determination must be made by the factfinder. Preventatively excluding evidence for a perceived waste of time would go against the tenor of FRE 403 and impede the search for truth.[325] For these reasons, all defendants must have the opportunity to argue their proffered meaning before the factfinder in open court.

313. *See supra* Part I.B.1.
314. *See supra* Part I.B.1.
315. *See supra* Part II.A.
316. *See supra* Part I.B.1.
317. *See supra* Part I.B.1.
318. *See supra* Part I.B.1.
319. *See supra* Part I.B.1.
320. *See supra* Part I.B.1.
321. *See supra* Part I.B.1.
322. *See supra* Part I.B.1.
323. *See supra* Part II.B.2.
324. *See supra* Part I.B.1.
325. *See supra* Part I.A.2.

2. Expert Witnesses May Testify About the Meaning of a Nonverbal Social Cue Emoji When the Sender and Recipient Are Unavailable and the Jury Would Not Otherwise Understand the Gesture

Like tone emojis, the meaning attributable to a gesture emoji is sender-specific, and senders should thus be able to testify about their attached meaning.[326] If the sender and recipient of a gesture emoji are unavailable, then an expert witness can testify about the sender's culture-specific interpretation of a gesture when it is different from the meaning the jury would otherwise assign.[327] To qualify as an expert on the meaning of a gesture emoji, the witness must be a part of the same relevant cultural community as the sender or have specialized knowledge on the sender's relevant cultural community.[328] The jury must see gesture emojis on request, despite the risk of jurors ascribing their own culture-specific meaning, because testimony on an emoji's meaning mitigates this risk.

CONCLUSION

Emojis that substitute for words and nonverbal social cues should always be shown to the jury so that jurors experience communicative evidence as it exists and as it is intended to be interpreted. Excluding emoji evidence for waste of time goes against the tenor of FRE 403, and displaying emojis in only the context necessary for accurate emoji interpretation ensures that this privilege is not abused to prejudicially emphasize accompanying text. To aid the jury in interpreting emoji evidence, sender and recipient testimony should always be admitted.

Judges must classify emojis that substitute for words as conveying either their facial or idiosyncratic meaning because third-party witnesses may only testify about the meaning of idiosyncratic emojis. Coconspirators are generally more reliable sources of emoji meaning than law enforcement officers and should receive preference. When law enforcement officers testify about the meaning of an emoji, they must present independent corroborating evidence as a safeguard against potential adversarial bias. Any person with personal knowledge of the sender's cultural community should also be allowed to testify about the meaning of a gesture emoji when the sender and recipient of the emoji are unavailable. Tone emojis cannot reasonably be ignored because tone emojis hold the potential to complement, reinforce, enhance, or materially alter the meaning of a piece of text.

326. *See supra* Part I.B.1; *see also supra* Part II.
327. *See* Part I.B.1.
328. *See supra* Part I.A.1.