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Conviction on Interpretation, Advocate Adaptability, and the Future of Emojis and Emoticons as Evidence

Samantha K. Lyons*

ABSTRACT

The dawning of the digital age introduced new and unique interpretive quandaries for judges and litigators alike. These quandaries include (but are not limited to) misinterpretation of pictorial slang as used in instant messaging, new or collateral meanings invented by phrases paired with specific emoticons or emojis, and the existence of emojis alone as communicative accessories.

This Note analyzes how lawyers and judges have essential free reign to treat emojis as they see fit: a prosecutor can argue, even in good faith, that the inclusion of an emoji depicting an open flame means the sender knew the heroin he sold was laced with fentanyl. A family law attorney can presume a thumbs-up emoji meant informed consent to alleged parental kidnapping. The common consensus among jurists is that emojis are devoid of formality, irrelevant to courtroom analysis in most situations, and impossible to consistently interpret. While word-based slang is often addressed through means of experts, thorough interrogation, and witness testimony, picture-based slang has been relegated to gestures from the bench indicating sideline insignificance at best. While emoji meaning and intentionality often changes—even on a daily basis—litigators and judges do not have the luxury of ignoring them as a result. Emojis’ apparent ambiguity does not excuse willful ignorance any more than new and unfamiliar slang or code words can be ignored because their meaning is not plain-language apparent to the bench.

Litigators have a responsibility to understand how communication has changed in the digital age due to the introduction of pictorial slang. The steps to competency are threefold: 1) understand the interpretive consequences of copyright-derived cross-platform depiction

¹ A common pair of (and my personal favorite) “kaomoji,” which depicts a person flipping a table—typically used to signal frustration or passion. An alternate title to this essay can easily be interpreted as: “Falling for False Objectivity: Conviction on Interpretation, Advocate Adaptability, and the Future of Emojis and Emoticons as Evidence.”

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diversity; 2) determine meaning and intentionality from the parties themselves or the parties' communities (including racial, ethnic, and geographical factors); and 3) review and depict emojis in their natural habitat, the context in which they were originally seen, sent, and received.

INTRODUCTION

Evidence in the digital age: a months-long text message exchange between teenagers results in a manslaughter conviction in Massachusetts.² In Nebraska, a student is suspended for posting a fire emoji on a private forum.³ Internationally, a mother defends parental kidnapping charges with a single thumbs-up emoticon.⁴

In legal circles, the adage “never send an email you wouldn’t want read in court” has become tired and cliché. However, its cousin, “never send a *text message* you wouldn’t want read in court,” has yet to enter common parlance—despite the fact that text messages are valuable pieces of evidence, debatably even more so than emails.⁵ How much more challenging does this become when emojis and emoticons enter the picture? “Never send a text message with an emoji you wouldn’t want described in court,” perhaps?

There is a crisis of misunderstanding in the U.S. justice system today regarding parties’ written use of emojis, emoticons, kaomojis, and picture-based text accessories (henceforth: emojis),⁶ which has increased exponentially with the commonality of texts and emails used as evidence.⁷ For the purpose of this paper, emojis will refer to “graphical images” which are symbolic or system-generated and utilized to communicate an emotion, add peripheral meaning, or enhance underlying meaning to words.⁸ Text-based communication will only continue its upward trend of introduction as evidence of scienter in criminal proceedings,⁹ and lawyers and judges will continue to ascribe meaning to texts and emojis in every

² Commonwealth v. Carter, 115 N.E.3d 559, 567 (Mass. 2019).

³ J.S. v. Grand Island Pub. Schs., 899 N.W.2d 893, 896 (Neb. 2017).

⁴ Bardales v. Lamothe, 2019 U.S. Dist. LEXIS 186273 (M.D. Tenn. Oct. 25, 2019).

⁵ Laura M. Randall, *Comment: The Guarantees Of A Fair And Impartial Trial In The Midst Of A Surge Of Technological Advances: Should E-Mails And Text Messages Be Admissible As Evidence Against A Defendant In A Criminal Trial?*, 36 SEATTLE U. L. REV. 151, 160-61 (2008).

⁶ *Frequently Asked Questions: Emoji and Pictographs*, UNICODE (Nov. 29, 2020), https://unicode.org/faq/emoji_dingbats.html#1.05 [<https://perma.cc/2BDC-SCYR>] [hereinafter “Emoji and Pictographs”].

⁷ Eric Goldman, *Emojis and Emoticons in Court Opinions*, SANTA CLARA UNIVERSITY (Jan. 31, 2019), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2894&context=historical> [<https://perma.cc/PG3A-LUHS>].

⁸ This is my definition, but there are several others; see also *Emoji and Pictographs*, *supra* note 6 (emoji are “‘picture characters’ originally associated with cellular telephone usage in Japan, but now popular worldwide.” The word emoji comes from the Japanese 絵 (e = picture) + 文字 (moji = written character).).

⁹ Utesch v. Lannett Co., 385 F. Supp. 3d 408, 422 (E.D. Pa. 2019) (discussing at length how emails and text messages between corporate agents in the U.S. drug market proved scienter in a price fixing scheme).

phase of the legal fact-finding process. The COVID-19 pandemic of the early 2020s has amplified this phenomenon by shifting communication almost entirely to the digital space, where both text and meaning can vary wildly in both casual and professional contexts.

Lawyers and judges have a responsibility to research and stay informed on the true meanings of common texting phrases and emoji use, particularly in the communities with which they often interact.

This article proceeds in two parts. Part I describes, with examples, the introduction of emoji usage as evidence in U.S. courts in recent years with examples of varying degrees of competency. Part II proposes a four-part process by which lawyers and judges may achieve base-level competency in interpreting emojis, discusses the higher stakes inherent to criminal cases, and finally concludes with a summary of the article's main points.

I. EMOJIS AS EVIDENCE

Emojis made their legal debut in 2004 when a Virginia court admitted a text exchange into evidence in a civil contract dispute, ascribing meaning to the commonly used “smiley” emoticon in an exchange between the parties during negotiation.¹⁰ The court ultimately interpreted the inclusion of the “smiley” to the detriment of the plaintiff, finding the emoji demonstrated the message was “clearly intended to be playful.”¹¹ A month later, in the same state, the court noted that—while it would include emoticons in its descriptions of exhibits—emojis were “not significant to the analysis” and were not included beyond a general gesture in their direction.¹²

Even though criminal prosecutors began introducing instant messages as evidence almost immediately after its widespread use in the late 20th century¹³ (attributing it to the easy analogy of “electronic mail” or “telegraph”), emojis took another three years¹⁴ to appear in the criminal justice system.¹⁵ While most forms of written communication since widespread literacy have included some variation of slang or acronyms,¹⁶ the insidious and apparently mysterious nature of emoji usage in criminal cases since 2007 poses a major threat to the pursuit of justice.

¹⁰ *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396, 404 (E.D. Va. 2004).

¹¹ *Id.*

¹² *See Xtreme 4x4 Ctr., Inc. v. Howery*, 65 Va. Cir. 469, 470 n.1 (Va. Cir. 2004).

¹³ *People v. Barrows*, 664 N.Y.S.2d 410, 411-12 (N.Y. Sup. Ct. 1997) (using photos sent through instant messaging as evidence for the first time in a criminal trial); *see also Ayer v. Western Union Tel. Co.*, 10 A. 495, 496-97 (Me. 1887) (the first case to use instant messages as evidence, describing the validity of a telegraph in a contracts dispute).

¹⁴ *See State v. Atchison*, 730 N.W.2d 115, 120 (Neb. Ct. App. 2007); *see also U.S. v. Cochran*, 510 F. Supp. 2d 470, 473 (N.D. Ind. 2007).

¹⁵ Goldman, *supra* note 7.

¹⁶ *A Dictionary of Victorian Slang*, THE PUBLIC DOMAIN REVIEW (Jan. 29, 2013), <https://publicdomainreview.org/collection/a-dictionary-of-victorian-slang-1909> [<https://perma.cc/34TJ-4HH3>].

Instant messaging’s proclivity for slang came as no surprise to linguists; then, the internet created a space in which individuals could send photos to one another—or post them publicly—in an instant. With this new technology, humans did what they do best: attempt to communicate better.¹⁷ Simple punctuation-based emojis like “:D” and “:(” had existed for decades, popularized by email and instant messaging. However, because the potential of miscommunication was high even with these simple emoticons (among other reasons), software companies developed small images which could be interwoven within texts to convey emotion or provide ancillary meaning.¹⁸

Today, according to Emojipedia, over 3,000 distinct emojis exist.¹⁹ This widespread accessory to communication has shown us that the legal field—attorneys operating in the criminal justice system in particular—must adapt accordingly. There is a measurable difference between cases featuring lawyers (and judges) who exercise base-level competency in texting’s use of emojis and those which do not. The outcomes are startling.

A. Adequate Competency

J.S. v. Grand Island Public Schools. This case involved an administrative hearing in which respondent J.S. appealed a school board’s decision to suspend her for fifteen school days due to an anonymous social media post.²⁰ The post read, “Tomorrow gonna be hella fire 🔥 [fire emoji] be there (School).” Another anonymous post, not demonstrably made by J.S. or connected to her in any way, allegedly threatened a school shooting during Homecoming celebrations. The administrative hearing overturned J.S.’s suspension after simply asking J.S. what “hella fire” means, concluding that “‘hella fire’ means ‘good’ or ‘cool.’”²¹ The respondent went on to explain that her post was a “sarcastic statement that school would be good or cool the next day and that the other students should be there.”²² The court’s actions in this case displayed basic emoji competence because the judge embarked on a path to understand the respondent’s intentions behind her use of emojis. Whether this method of determining an emoji’s intended meaning is sustainable is a separate issue; any criminal

¹⁷ See Drake Baer, *Emoticons Have Basically Saved Human Communication*, BUSINESS INSIDER (Sep. 24, 2015), <https://www.businessinsider.com/emoji-were-invented-33-years-ago-heres-why-theyre-so-crucial-today-2015-9> [https://perma.cc/4XEZ-RLEY].

¹⁸ Arielle Pardes, *The Wired Guide to Emoji*, WIRED (Feb. 1, 2018), <https://www.wired.com/story/guide-emoji/> [https://perma.cc/7ZNL-KVXK].

¹⁹ *Frequently Asked Questions*, EMOJIPEDIA (Nov. 29, 2020), <https://emojipedia.org/faq/> [https://perma.cc/4G2J-Q5BU].

²⁰ *J.S. v. Grand Island Pub. Schs.*, 899 N.W.2d 893, 896-98 (Neb. 2017).

²¹ *Id.* at 896.

²² *Id.* at 896-97.

defense attorney will testify that the answer to ambiguity simply cannot be “put the defendant on the stand.”²³

Johnson v. State. In another use of the infamous fire emoji, this case involved the sale of heroin lined with acrylfentanyl, which tragically led to the death of a user.²⁴ The decedent’s friend, who sold him the fatal drug, was found guilty by a lower court (in part) because of his use of the fire emoji in a text describing the heroin to be sold: “I’ll tell you what it’s some 🔥 [fire emoji].” The Maryland Court of Special Appeals overturned his manslaughter conviction (but upheld his possession and distribution conviction), finding that use of a fire emoji to describe the weed he was selling could not possibly imply he had any knowledge the buyer would overdose.²⁵ The prosecution in this case appallingly argued that “the evidence was sufficient because Mr. Johnson ... *described the heroin using a fire emoji.*” The court spent an inordinate amount of time determining what “fire” meant in the context of illegal drug use, despite the State’s own expert witness declaring it to mean the heroin was ambiguously “good” or of “high quality.”²⁶

People v. Jamerson.²⁷ This is a sex trafficking case in which the court relied heavily on a community expert to interpret the slang, emojis, and common tactics used by pimps to draw in potential “prostitutes.”²⁸ This case lands firmly in this category is because the court relied on 1) community significance through expert analysis of intended meaning, and 2) the parties’ own interpretation of the slang and emojis used. This expert witness here was a local police officer who conducted a thorough interrogation of the defendant’s alleged victim, including asking her the meaning behind text messages between herself and the defendant. The case discusses, in extreme detail, the slang and emojis used in prostitution and sex work. The court’s accepted meaning of these terms and emojis appears to have been derived from both the police officer’s opinions and context provided by the victim in a police interrogation. For example, the expert witness explained that “roses” is code for “money,” and a crown

²³ Anna Roberts, *Reclaiming the Importance of the Defendant’s Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping*, 83 UNIV. CHICAGO L. REV. 835, 875-76 (2016).

²⁴ *Johnson v. State*, 225 A.3d 769, 771-75 (Md. Ct. Spec. App. 2018).

²⁵ *Id.* at 780.

²⁶ *Id.* at 779 (emphasis added).

²⁷ *People v. Jamerson*, 2019 Cal. App. Unpub. LEXIS 940, at *1 (Cal. Ct. App. Feb. 6, 2019). As a note, this case is hindered by significant evidentiary problems, most notably the inclusion of the defendant’s rap music video, in which the lyrics vaguely mention prostitution. The appellate court found the inclusion of the rap video and lyrics, which were written and recorded before the victim and defendant ever met, to be harmless.

²⁸ See Eric Goldman, *Two Examples of How Courts Interpret Emojis*, TECHNOLOGY & MARKETING LAW BLOG (Mar. 17, 2019), <https://blog.ericgoldman.org/archives/2019/03/two-examples-of-how-courts-interpret-emojis.htm> [https://perma.cc/C6ZM-NTSK] (“Emojis develop community-specific dialects, so it makes sense for an expert from the community to explain those meanings... the court doesn’t need to know about the possible alternative meanings of the crown emoji; the court needs to know what the crown emoji means in the context of this thread between a putative pimp and a putative sex trafficking victim. For this type of inquiry, a community expert helps more than a linguistic expert.”).

emoji can mean the defendant seeks to have his alleged victim see him as a king.²⁹ An expert’s credibility is a judgment call made by the jury, regardless of whether these interpretations are accurate when viewed in the vacuum of legal academia.

The above cases demonstrate the varying degrees to which lawyers and judges seek to understand the importance of emojis as integral accessories to modern communication. This selection contrasts with the following cases, which either assume an emoji’s meaning is apparent, or (worse, perhaps) project a meaning which applies only to the judge’s own experience—or lack thereof.

B. Inadequate Competency

State v. D.R.C. In this case, a teenage daughter texted a friend venting frustrations regarding her mother’s unfair treatment of her. A selection of these texts include:³⁰

- “Can’t wait to fucking move out tired of this bullshit 🤔🔪”
- “Imma fucking kill this bitch. She is tryna make me go to my dads”
- “I’ll shank a hoe with my pencil or [ball] point pen let a bitch get ink poisoning and bleed out n die stupid hoe really trying me”
- “Lmfao I scare hella people ion care tho wtf 🤔🔪 a bitch wanna think she about it imma take her life 🤩 don’t fw my girls 🤔❤️ family over everything so if a bitch fw u lmk and imma fucking take her life or slam her face in the wall if she’s lucky. I love u too bitch ❤️❤️❤️.”

Upon discovering the texts, D.R.C.’s mother feared for her life—at one point sleeping with a knife under her pillow and changing the locks to her home.³¹ This case demonstrates incompetence because the court placed more weight on the significance of the emojis in D.R.C.’s texts when compared with the context of the evidence. Despite D.R.C.’s mother’s reaction, the court found that the respondent’s use of emojis proved she never intended to threaten her mother, since the texts were 1) not sent to her mother at all, but to multiple friends, and 2) included emojis. Indeed, the court based its judgment on the finding that the texts were “vaguely worded and peppered with smiling emojis.”³²

The court in *D.R.C.* does choose to include actual visual depictions of the emojis included in the texts, but their mere inclusion does not outweigh the overreliance on them, to the detriment of the surrounding context (the discovery of the texts driving D.R.C.’s mother to press charges in the first place). Though the court found that the texts did not measure up to a “true threat,”³³ one could make a strong argument that—regardless of the lighthearted emojis—the texts disturbed D.R.C.’s mother

²⁹ *Jamerson*, 2019 Cal. App. Unpub. LEXIS 940 at *6.

³⁰ *State v. D.R.C.*, 467 P.3d 994, 998-1000 (Wash. Ct. App. 2020).

³¹ *Id.* at 999.

³² *Id.* at 998.

³³ *Id.*

to such a degree that she turned her own daughter over to the police, “changed the locks on the entry doors to the house, and slept with a knife under her pillow until she was able to obtain a stun gun.”³⁴ Further, even D.R.C.’s friends were shocked at the statements, responding with “u really scare me sometimes !!” and “Woh chill just beat her ass that's it lol.”³⁵ The court dismissed her friends’ and mother’s responses, preferring to focus on its manufactured perception of D.R.C.’s intentions and the absence of a likelihood that she wanted her mother to feel threatened. The exact opposite approach in interpreting emojis to ascribe intentionality of a true threat was used in the following case.

People v. Smith. This unpublished opinion out of California provides a courthouse interpretation of emojis allegedly assisting in witness intimidation.³⁶ T.R. was a witness in a case involving gang violence. After providing testimony in the trial of a gang member with whom she was associated, a tagged photo of T.R. sitting beside the prosecutor outside the courthouse was posted on Facebook with the caption:

“#RteNow yah lookn 🙄 at the bitch 🖕🖕🖕 dat tld on the homie Baby Ticc
👉👉👉👉👉 @TW 🚬🚬🚬🚬🚬🚬 share my post.”³²

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The court arrived at multiple significant conclusions regarding the emojis’ potential meaning in the post; the court did not, however, deign to provide its methodology for determining these meanings beyond what it inferred through an interpretation it considered reasonable.³⁸ Further, contrary to the court’s treatment of D.R.C.’s mother in Washington, the court strongly considered the subjective reaction of the victim when determining whether the post was intended to threaten or intimidate her.

Bardales v. Lamothe. This case involved family law attorneys in a custody case who elected to use a single text message exchange between

³⁴ *Id.* at 999-1000.

³⁵ *Id.* at 998-99.

³⁶ *People v. Smith*, 2019 Cal. App. Unpub. LEXIS 1691, at *2-4 (Cal. Ct. App. March 12, 2019).

³⁷ *Id.* Emojis added. The original emojis were not included in the court transcript, only their visual descriptions. The true court record reads: “#RteNow yah lookn [emojis representing two pairs of eyes] at the bitch [emojis of three fingers pointed down at the photograph] dat tld on the homie Baby Ticc [three emojis of a thumb and forefinger making a circle, plus four rat emojis] #T[.]W[.] [four gunshot and three gun emojis] share my post.”

³⁸ *Smith*, 2019 Cal. App. Unpub. at *19. (“The four gunshot emojis and three gun emojis were evidence [the poster] was seeking to encourage other viewers of his Facebook page to shoot T.R. His comments included three emojis, each representing a hand with the thumb and forefinger touching and the other fingers pointed up, representing the letter ‘b,’ a symbol of the Bacc Street Crips. The jury could have reasonably concluded from the photograph and comments that Smith intended to communicate that T.R. was a despised female who had told on [the gang member on trial], and she was therefore a ‘rat’ or snitch whom members of the gang should kill to assure she did not testify against [him] at his trial.”) Ignoring, for the moment, the odd use of “female” in the case opinion describing T.R., the court does not make its readers privy to how it came to the conclusion that a rat emoji objectively means ratting out a gang member. Where does this meaning originate? The poster’s liberty and criminal liability depends on this, and we are not given a reason.

two parents as definitive proof that the father had given consent for his child to move to a different country.³⁹ After the mother and the child arrived safely in the United States from Honduras, the mother sent a text to the father (who remained in Honduras), stating “Made it to the States.” He responded with “👍 [thumbs up].”⁴⁰ As painful as child custody and parental kidnapping cases can be, the mother’s attorney should not have rested the case on such a flimsy piece of evidence. Regardless of whether the father formally consented to the child living in the United States, the court had a responsibility to investigate the father’s intended meaning behind the thumbs-up, as well as how the mother interpreted it at the time. This, along with the fact that a thumbs-up emoji does not objectively mean “good” or “acknowledged” in many cultures (as it does in the United States), is never discussed.⁴¹ Finally, a thorough analysis as to *why* the removal of the child was a positive change would have served the mother’s argument better, since the child would otherwise be living in San Pedro Sula, Honduras (the murder capital of the world in 2013⁴² and second only to El Salvador in 2017 when the alleged kidnapping occurred).⁴³ *Bardales* provided the rule of thumb for emoji interpretation with which courts have arbitrarily complied ever since: emojis “are widely perceived to be, and in fact are, generally very casual communications, strikingly devoid of formality.”⁴⁴ The court fails to note that—under the required evidentiary rules and procedure—any selection of “casual communications” are admissible and persuasive in court, regardless of their degree of court-perceived “formality.”

Part II of this article presents steps judges and lawyers can take to resolve the fatal misinterpretation problem with emojis in criminal trials, where a defendant’s life and liberty are on the line. These extremely high-stakes cases often depend on the fact-finder’s understanding of the evidence—all the evidence—as presented by the litigators and the bench.

II. STEPS TO ACHIEVE COMPETENCY

Professor Eric Goldman of Santa Clara University—a nationally recognized expert on intellectual property and internet law—provides a comprehensive list of interpretation challenges courts face when handling emojis as evidence in his article *Emojis and the Law*.⁴⁵ The list includes—

³⁹ *Bardales v. Lamothe*, 423 F. Supp. 3d 459, 462-63 (M.D. Tenn. 2019).

⁴⁰ *Id.* at 472.

⁴¹ Meghan Jones, *Hand Gestures That Are Rude in Other Countries*, READER’S DIGEST (Feb. 10, 2023), <https://www.rd.com/article/common-hand-gestures-rude-in-other-countries/> [<https://perma.cc/KR5S-DJZT>].

⁴² Rafael Romo and Nick Thompson, *Inside San Pedro Sula, The ‘Murder Capital’ of The World*, CNN (Mar. 28, 2013), <https://www.cnn.com/2013/03/27/world/americas/honduras-murder-capital/index.html> [<https://perma.cc/AQD3-ZVJK>].

⁴³ Global Study on Homicide 2019. United Nations Office on Drugs and Crime (UNODC). [<https://www.unodc.org/unodc/en/data-and-analysis/global-study-on-homicide.html>].

⁴⁴ *Bardales*, 423 F. Supp. 3d at 472 n.9.

⁴⁵ Eric Goldman, *Emojis and the Law*, 93 WASH. L. REV. 1227, 1248-49 (2018).

but is not limited to—new emojis, combined emojis, unsophisticated users, depiction diversity, unsettled grammar, and facial expressions. Additionally, lawyers and judges encounter further obstacles in soliciting community participation and locating expert testimony. The following steps will assist criminal defense lawyers, prosecutors, and judges in achieving emoji competence, which will inevitably lead to greater success rates in pursuing truth and justice for defendants and victims in the courtroom.

First, legal operatives must understand the impact of cross-platform depiction diversity on legal interpretation, a phenomenon caused by copyright law which prevents an emoji from appearing the same from one operating system to the next. Second, the legal field must rely on the community which uses the slang and emojis at issue to interpret their meaning; pure, “objective” meaning, especially with facial expressions, is a myth which can easily result in severe misunderstandings. Third, the legal field must review slang and emojis in their original context, devoid of the formalities and rigidity of the courtroom.

A. Understand Cross-Platform Depiction Diversity

Emojis are rendered differently depending on the device used by the viewer and the sender.⁴⁶ This is referred to by internet law analysts as “cross-platform depiction diversity.”⁴⁷ Cross-platform depiction diversity is one of the many ugly sides of copyright law: because emojis are creative images, copyright protects them from depiction on platforms (hardware) that are incompatible with the software company which created them.⁴⁸ For example, Samsung phones would infringe on Apple’s copyrights to Apple-created emojis if Samsung’s messaging software used the same images (the *exact same* images) that Apple uses, since Apple emojis were developed by Apple-commissioned artists.⁴⁹ Therefore, each new platform company (which sought to develop a new operating system) had to hire its own artists and develop its own emoji arsenal, which may or may not be similar to the originals upon which they are based, or any other image.

This debacle has been soothed in part due to the existence of the Unicode,⁵⁰ which essentially allows all software products to apply a uniform code to their varying emojis across different platforms. This is why a “Face with Rolling Eyes” (U+1F644) emoji appears different on each messaging software, but the similarity is just close enough to allow

⁴⁶ Ashleigh Allsopp, *Lost in Translation: Android Emoji vs. iOS Emoji*, TECHADVISOR (Dec. 15, 2014), <https://web.archive.org/web/20141228093209/http://www.techadvisor.co.uk/opinion/mobile-phone/lost-in-translation-android-emoji-vs-ios-emoji/> [<https://perma.cc/5URG-SGXF>].

⁴⁷ GOLDMAN, *supra* note 45, at 1230, 1254.

⁴⁸ Rachel Scall, *Emoji as Language and Their Place Outside American Copyright Law*, N.Y.U. J. OF INTELL. PROP. & ENT. LAW 381, 402 (2016).

⁴⁹ *Cub Club Inv., LLC v. Apple Inc.*, No. 21-cv-06948-VC, 2022 U.S. Dist. LEXIS 28086 (N.D. Cal. Feb. 16, 2022).

⁵⁰ *About the Unicode Consortium*, <https://home.unicode.org/about-unicode/> (last visited March 1, 2023) [<https://perma.cc/E2YD-WZBW>].

the creators' intended meaning to get across in most contexts. But who decides what those meanings are?⁵¹ Arguably, Samsung's 2016 "Face with Rolling Eyes" was more excited than annoyed, and its "Cookie" was two crackers, not a sweet dessert.

While there are many examples of this phenomenon, the most jarring discrepancies located by this author are found in the chart below:

	Apple	Samsung	Google
Cookie			
Face with Rolling Eyes			
Framed Picture			

Say, for instance, a pair of friends travel to the Louvre Museum of Art in France in 2016.⁵² One has an Apple iPhone, and the other a Samsung Galaxy. The friends split up to see different parts of the museum, and the Samsung friend buys some crackers from the gift shop. In the afternoon, the friend with the Samsung texts the other, "Meet me at the [Framed Picture] for [Cookie]!" The iPhone friend receives the text, and laughs, thinking the generality of a single painting in a museum of paintings to be a joke, and the cookie to be a reference to a dessert shop. The iPhone friend responds with, "No way [Face with Rolling Eyes]." The Samsung friend receives what could reasonably be interpreted as excitement at seeing a famous art piece. The Samsung friend waits for an hour by the "Mona Lisa" for their friend to share the crackers, who never shows up. The two friends are left with a miscommunication, leading to frustration and annoyance. Cross-platform depiction diversity does not always end with such simple and relatively harmless miscommunications, however.⁵³

Suppose, instead, that Samsung's operating system had not yet developed a corresponding Unicode emoji for an Apple iOS software update, which includes long-advocated-for skin-tone variations.⁵⁴ An Apple user could send a specific skin-tone thumbs-up emoji to a Samsung

⁵¹ Eric Goldman, *Emojis and the Law*, 93 WASH. L. REV. 1227, 1233-37 (2018).

⁵² The museum where the "Mona Lisa" by Leonardo da Vinci is currently located, coincidentally.

⁵³ Patrick Kiger, *Back to the Caveman: Are Emojis Replacing Words?*, HOWSTUFFWORKS.COM (July 10, 2018), <https://computer.howstuffworks.com/back-to-caveman-emojis-replacing-words.htm> [<https://perma.cc/2XUY-G6JQ>].

⁵⁴ Dalvin Brown, *An Emoji Update in 2021 Will Give Couples More Skin Tone Variations to Choose From*, USA TODAY (Sept. 19, 2020), <https://www.usatoday.com/story/tech/2020/09/19/emoji-update-2021-more-skin-tone-variations-couples/5838273002/> [<https://perma.cc/A3G4-SC5W>].

user, who would receive a blank square. As the courts have demonstrated, a thumbs-up emoji is all that is needed to bring the parties to litigation.⁵⁵

When emojis are used as evidence, the actual image in the text received or sent by the defendant matters greatly. Professor Goldman acutely describes the cause and a potential solution for this unfortunate consequence of emoji usage here:

The resulting depiction variations disrupt our ability to effectively communicate with each other. Several steps can be taken to reduce this unwanted consequence, including restricting the scope of IP protection for emojis, and encouraging platforms to do more to mitigate the consequences of emoji depiction diversity.⁵⁶

This solution will not cover every base of misunderstanding, however. The first step to emoji competence is identifying the impact of cross-platform depiction diversity, but it is not the last: even when two individuals using the same system send or receive emojis, understandings of those images can differ wildly.⁵⁷ This is why a multi-tiered approach to the problem of emojis as evidence is necessary.

B. Solicit Community Input

Before introducing emojis and text language as evidence of intention, legal operatives should ask a representative of the defendant's age group, culture, race, or peer group what they believe the emoji means in context.⁵⁸ Further, justice would best be served if prosecutors took multiple sources of potential interpretation into consideration, including but not limited to geographically local members of the defendant's ethnic or racial community, geographic region, and family.⁵⁹ When courts fail in this regard, trusting only themselves or online sources unknown to the defendant at the time of using the emoji, they disregard the pursuit of truth and justice.

The following sections explain and demonstrate the two largest communities from which emoji meaning should be derived: i) involved parties and witnesses, and ii) the defendant's racial, ethnic, or cultural community.

⁵⁵ See *Nunez Bardales v. Lamothe*, 423 F. Supp. 3d 459 (M.D. Tenn. 2019).

⁵⁶ GOLDMAN, *supra* note 45, at 1230-31.

⁵⁷ *Id.* at 1240-41.

⁵⁸ GOLDMAN, *supra* note 28.

⁵⁹ *People In Int. of R.D.*, 464 P.3d 717, 734 (Colo. 2020).

sometimes down to a small geographical area.⁶³ Only members active in (or originating from) these communities will be able to accurately explain how certain emojis are used, what they mean, and how they would have been interpreted by an inter-or-extra-community recipient.⁶⁴

According to Stanford University's Department of Linguistics, Black Americans are more likely to use new and original slang terminology (which is then used in text message exchanges introduced as exhibits),⁶⁵ have their intentions misunderstood by the courts,⁶⁶ and experience systematic erasure of their culture through strategic silencing or careless misinterpretation.⁶⁷ Prison sentences in the United States are unreasonably extensive, and procedure-based initiatives to shorten sentences for nonviolent crimes have gained significant traction.⁶⁸ However, from an equity standpoint, community input may be the substantive key to assist these efforts and facilitate judicial leniency toward more appropriate sentences and fewer faulty guilty verdicts. The U.S. prison population is egregiously large,⁶⁹ with a disproportionate number of inmates representing the Black community.⁷⁰ Assuaging this disproportionality begins with evaluating conviction methods and common missteps in the arrest-to-prison process; in the realm of emoji law, proper interpretation of emojis at the trial level is paramount. Often, courts and advocates will attempt to avoid the tough issue of emojis by simply scrubbing them from the court record entirely, opting instead to

⁶³ Jiamin Pei & Le Cheng, *Deciphering Emoji Variation in Courts: A Social Semiotic Perspective*, HUMAN. & SOC. SCI. COMMUN 9, 445 (2022).

⁶⁴ *Id.* (“...in the U[.]S[.] case *Taylor Dumpson v. Brian Andrew Ade et al.*, the court ruled that... monkey emojis, especially in combination with banana emojis, are commonly used as a form of racist insult to dehumanize, belittle[,] or intimidate African Americans. The monkey emoji does not connote a negative meaning in China since monkeys in Chinese culture are considered clever or playfully naughty ... By contrast, the monkey can receive a derogatory perception in the U[.]S[.] context where racism against [African Americans] has been deeply embedded in American culture (Gadlin, 1994). Consequently, the same emoji can have radically different implications in different cultural contexts, making emojis’ meanings enacted in specific social and cultural settings. It is suggested that the judges perceive emojis as a “culturally constituted sign-system” (Wagner et al., 2020b: p. 239) and interpret such emojis through the prism of tacit knowledge such as culture, particularly when dealing with emoji cases caused by cross-cultural miscommunication and when ascertaining the parties’ actual intentions in such cases.”).

⁶⁵ Sharese King, *African American Slang: A Linguistic Description*, 92(2) LANGUAGE J. LINGUISTIC SOC’Y OF AM. 477-480 (2016) (book review).

⁶⁶ John Eligon, *Speaking Black Dialect in Courtrooms Can Have Striking Consequences*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/us/black-dialect-courtrooms.html> [<https://perma.cc/NM7W-7Z4M>].

⁶⁷ Cassie Owens, *Study Says Court Reporters Not Accurate with Black Dialect*, AP NEWS (Feb. 2, 2019), <https://apnews.com/article/1327e0e430324944b4074384719d9799> [<https://perma.cc/GG3F-YTT6>].

⁶⁸ Jorge Renaud, *Eight Keys to Mercy: How to Shorten Excessive Prison Sentences*, PRISON POLICY INITIATIVE (Nov. 2018), <https://www.prisonpolicy.org/reports/longsentences.html> [<https://perma.cc/Q8QW-342T>].

⁶⁹ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/AMM3-D7RU>].

⁷⁰ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project> [<https://perma.cc/C76F-LVXT>].

include bracketed descriptions of emojis (with particular over-reliance on the Unicode), as the court understands them.⁷¹ However, sterilizing communication in this way removes so much of the meaning in a text containing emojis that the resulting communication often carries little to no semblance of the effect intended by the original sender, nor the impression gleaned by the original recipient.

These misunderstandings—and the systematic erasure of African American vernacular in American courts—can be partially addressed by the simple principle of community input. If emojis are viewed and interpreted by the legal system as an accessory to cultural slang, rather than objective images which have only one possible meaning, the possibility of misinterpretation diminishes substantially. Public defenders across the country have disparaged their lack of resources and understaffed offices for decades,⁷² and increasing judicial accommodation for community emoji and slang interpretations (when they are presented as evidence of criminal intent or behavior) is one small way lawyers can adjust their advocacy and seek justice for those most in need of it.

C. Emphasize Context Significance

The final step which must be taken by lawyers and judges when emojis are presented in judicial proceedings is, comparatively, the simplest: evaluate the context in which the emojis are used. Contrary to popular belief, emojis are not a universal language. There is no singular, “objective” interpretation of every emoji, and by their very nature, they cannot contain the same precise meaning to each person who perceives them.⁷³ Context is already a pillar of judicial interpretation principles.⁷⁴ judges must rely on the defendant’s entire course of action to determine guilt beyond a reasonable doubt,⁷⁵ and the evidentiary doctrine of completeness dictates an incomplete writing must be supplemented with context to expose any obfuscated true meaning therein.⁷⁶ The following cases demonstrate the importance of context in judicial proceedings, even without the added variable of interpreting the meaning of emojis.

⁷¹ See *People v. Smith*, No. B284766, 2019 WL 1122768 (Cal. Ct. App. Mar. 12, 2019).

⁷² Teresa Wiltz, *Public Defenders Fight Back Against Budget Cuts, Growing Caseloads*, PEW TRUSTS (Nov. 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/21/public-defenders-fight-back-against-budget-cuts-growing-caseloads> [<https://perma.cc/34W4-N7X2>].

⁷³ Samantha Murphy Kelly, *Emojis Are Increasingly Coming Up in Court Cases. Judges Are Struggling with How to Interpret Them*, CNN (July 8, 2019), <https://www.cnn.com/2019/07/08/tech/emoji-law/index.html> [<https://perma.cc/QT2L-BGBT>]; see also *Burrows v. Houda*, 2020/213348, NSWDC 485 [Proc.] (Aug. 20, 2020), <https://www.caselaw.nsw.gov.au/decision/1742d2614c447c83bbc6d457> [<https://perma.cc/Z4Q5-ZCD3>] (discussing the necessity of each party’s interpretation of the emojis used in a Twitter exchange).

⁷⁴ GOLDMAN, *supra* note 28.

⁷⁵ Pi, Daniel, Francesco Parisi, and Barbara Luppi, *Quantifying Reasonable Doubt*, 72 RUTGERS U. L. REV. 455 (2020).

⁷⁶ Fed. R. Evid. 106.

In *Commonwealth v. Carter*, the Massachusetts Supreme Court ruled that the defendant should be held accountable for texts she sent to her boyfriend the night he committed suicide.⁷⁷ *Carter* introduces the involuntary manslaughter principle of “overcoming an individual’s will to live,” later used to support a physician’s conviction for providing assisted suicide medication to terminally ill patients.⁷⁸ In *Carter*, the decedent’s death was ruled a suicide early on in the case,⁷⁹ but further investigation revealed the defendant sent multiple texts encouraging the decedent to follow through with the plan, despite her foreknowledge of his vulnerability and history of depression.⁸⁰ The only evidence supporting the defendant’s involvement in her boyfriend’s death was a string of text messages (strikingly devoid of formality), one of which was sent to a friend after the incident confessing her involvement.⁸¹ The court’s thorough and extensive analysis of the underlying context of the decedent’s death led to accountability for a crime made possible only by modern technology: involuntary manslaughter on the basis of encouraging suicide via instant messaging and telephone calls.⁸² The court ultimately ruled that the defendant’s wanton and reckless conduct (arising perhaps to the level of coercion) resulted in a high likelihood of substantial bodily harm to the decedent in law and in fact.⁸³ The prosecution in *Carter* emphasized the importance of context to paint a full picture of the scene: two teenagers who were ill equipped to handle the dangers of suicidal ideation, and the unusual cruelty employed by one of them to bring it to fruition.⁸⁴

Without context, courts may never make fully informed decisions⁸⁵—particularly so in criminal trials, where life and liberty are at stake. While *Carter* displays the importance of the principle, the following case lays the groundwork for transferring it from theory to fact in U.S. courts.

In *People ex rel. R.D.*, the Colorado court articulates the best context rule to project into emoji law.⁸⁶ In *R.D.*, the court reviewed a Twitter interaction between two students in the days following a school shooting. The court discussed that:

⁷⁷ *Commonwealth v. Carter*, 115 N.E.3d 559, 567 (Mass. 2019).

⁷⁸ *Kliger v. Healey*, 2020 WL 736968, at *2 (Mass. Super. Jan. 14, 2020), *aff’d in part, remanded in part sub nom. Kliger v. Att’y Gen.*, 198 N.E.3d 1229 (Mass. 2022).

⁷⁹ *Carter*, 115 N.E.3d at 562.

⁸⁰ *Id.* at 562-63.

⁸¹ *Id.* fn. 2; *see also, Id.* at 565.

⁸² *Id.* fn. 3-5.

⁸³ *Id.* at 574.

⁸⁴ *Id.* at 562, 574.

⁸⁵ *See Taliani v. Dortch*, 2023 U.S. Dist. LEXIS 64067 (C.D. Ill. April 12, 2023) (discussing a prison policy which prohibits any use of emojis due to the risk of coded messages, even to the point of preventing emails with heart emojis to be sent to loved ones).

⁸⁶ *People In Int. of R.D.*, 464 P.3d 717, 734 (Colo. 2020).

Words communicated online and without the interpretive aid of body language are easily misconstrued ... The chance of meaning being lost in translation is heightened by the potential for online speech to be read far outside its original context ... [Courts should] consider the context in which the statement was made. Particularly where the alleged threat is communicated online, the contextual factors courts should consider include, but are not limited to (1) the statement's role in a broader exchange, if any, including surrounding events; (2) the medium or platform through which the statement was communicated, *including any distinctive conventions or architectural features*; (3) the manner in which the statement was conveyed (e.g., anonymously or not, privately or publicly); (4) the relationship between the speaker and recipient(s); and (5) the subjective reaction of the statement's intended or foreseeable recipient(s).⁸⁷

This rule may easily be re-framed and projected into the realm of emojis as evidence. Paraphrasing Colorado Supreme Court Justice Márquez' factors, the U.S. legal community would be best served by considering:

1. The emoji's role in the single text in which it was sent, as well as its role in the broader exchange and surrounding events;
2. The medium or platform from which (and to which) the emoji was sent, including any cross-platform depiction diversity at play;
3. The forum in which the emoji was sent, including sender or recipient anonymity and public or semi-public access;
4. The relationship between the sender and recipient at the time the emoji was sent; and
5. The subjective reaction of the intended recipient(s) to the use of the emoji in the exchange.

Inclusion of a full context analysis may not always serve a criminal defendant, but it often does. In *State v. D.R.C.*, a Washington court weighed a defendant's use of emojis *against* the plain language meaning of the text.⁸⁸ If a depiction of the defendant's texts without the inclusion of emojis had been admitted into the evidence record, it is very likely the court may have found the defendant much more willing and serious about the alleged threats made. Regardless of the court's arguable

⁸⁷ *Id.* Emphasis added.

⁸⁸ *State v. D.R.C.*, 467 P.3d 994, 998 (Wash. Ct. App. 2020).

overreliance on the emoji's lightheartedness in *D.R.C.*, the attorneys operating in this case were responsible enough to include the entire context, allowing the court to make a judgment based on what the defendant *actually* sent and what the recipient *actually* received, not descriptions thereof.⁸⁹

When presenting emojis as evidence, the legal field must view the images in their natural habitat: the conversation and communication style in which they were sent and received. The same way a single sentence or interaction, out of context, should not be enough to find a defendant guilty, a text message exhibit without an accurate depiction of emojis should never reach the factfinder.

CONCLUSION

Each state in the United States approaches slang and emoji interpretation differently, with wildly different rates of success at doing so. A Washington prosecutor sought a "true threat" conviction against a minor, the primary evidence being a text message riddled with emojis, sent from the teenage defendant to an unrelated third party.⁹⁰ A Nebraska school association introduced a single social media post with a fire emoji as evidence of an attempted school shooting, the result of critically misunderstanding the seriousness of high school emoji use.⁹¹

Criminal prosecutors, public defenders, and civil litigators alike have a responsibility to inform factfinders of the truth behind the parties' use of emojis, with all the tools available to them. However, the path to true emoji fluency is steep: judges must consider 1) the effect of cross-platform depiction diversity on the evidence, 2) community interpretation from parties involved in the case, as well as the defendant's own community, and 3) the exponential difference in viewing an emoji in the sterility of the courtroom as opposed to the context in which it was sent and received.

When emojis are presented to establish *mens rea*, *scienter*, in criminal convictions, the prosecution must carefully ensure their meaning is clear to the factfinder in terms with which the defendant and the defendant's community would agree. When emojis are presented to accessorize or amplify the *meaning* of a defendant's peripheral communication regarding an alleged crime or activity, both sides of the aisle (and, indeed, the bench itself) must take steps to ensure the emoji is interpreted and presented properly in context, as well as rely on common community usage and the significance thereof. Only then will justice truly be served in the U.S. legal system's handling of emojis as evidence.

With the U.S. prison system overpopulated and overrepresented by racial minorities, U.S. judges and lawyers simply do not have the luxury

⁸⁹ *Id.* at 998-1000.

⁹⁰ See *State v. D.R.C.*, 467 P.3d at 994.

⁹¹ See *J.S. v. Grand Island Pub. Sch.*, 899 N.W.2d 893, 898 (2017).

of dismissing slang and intended meaning, however it may appear in the courtroom. As written communication migrates almost entirely to the digital space, the issue of instant messages as exhibits will continue its exponential rise in establishing both meaning and intentionality. If the court intentionally ignores emojis included in text messages because it believes them insignificant, “strikingly devoid of formality,” what else will it ignore for the sake of efficiently obtaining yet another conviction? [Thinking Face (U+1F914)] [Shrug (U+1F937)].