The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs

ABSTRACT

Social networking sites in general, and Facebook in particular, have changed the way individuals communicate and express themselves. Facebook users share a multitude of personal information through the website, especially photographs. Additionally, Facebook enables individuals to tailor their online profiles to project a desired persona. However, as social scientists have demonstrated, the image users portray can mislead outside observers. Given the wealth of information available on Facebook, it is no surprise that attorneys often peruse the website for evidence to dispute opponents’ claims.

This Note examines the admission and relevance of Facebook photographs offered to prove a litigant’s state of mind. Part I explores social science and evolving case law in the social networking arena, discussing courts’ tendencies to find Facebook photographs discoverable and admissible in civil and criminal litigation. Part II analyzes courts’ assessments of the relevance of Facebook photographs as proof of litigants’ remorse or happiness. Part III proposes mechanisms to aid fact-finders in evaluating Facebook photographs to better ensure a fair trial. In order to screen out irrelevant photographs before presentation to a jury, courts ought to be receptive to parties’ requests for in camera review of Facebook photographs. As to photographs admitted into evidence, courts should be open to litigants’ requests for expert and lay testimony on Facebook’s social norms. Finally, this Note stresses the need for litigants to educate themselves on Facebook, and advocates further study on the website for purposes of discerning the precise risks of taking Facebook photographs at face value.
TABLE OF CONTENTS

I. THE PHENOMENON OF SOCIAL NETWORKING AND THE USE
OF FACEBOOK CONTENT IN LITIGATION ........................................... 361
A. Facebook as a Social Networking Site ........................................ 361
B. Accurate or Idealized Selves? The Creation and
Perception of Image on Facebook .................................................. 364
C. Fair Game: The Discoverability of Facebook Content ............ 367
D. The Power of a Picture: Facebook Photographs in
Criminal and Civil Cases .......................................................... 373
   1. Criminal Proceedings ......................................................... 374
   2. Civil Proceedings ........................................................... 377

II. ANALYZING THE RELEVANCE OF FACEBOOK
PHOTOGRAPHS AS EVIDENCE OF STATE OF MIND ............. 378
A. Why Fact-Finders Ought to Scrutinize the Relevance of
Facebook Photographs Offered to Demonstrate a
Litigant’s Emotional State ......................................................... 379
B. Applying the Lessons of Expert Testimony on
Eyewitness Identification to Psychological Research on
Facebook .................................................................................. 382

III. LOOKING BEYOND THE FACE VALUE OF FACEBOOK
PICTURES .................................................................................... 385
A. Measures to Enhance the Fairness of a Proceeding
   Involving the Evidentiary Use of Facebook
   Photographs ........................................................................ 386
   1. In Camera Review ............................................................. 387
   2. Expert Testimony ............................................................... 389
   3. Lay Testimony ................................................................ 391

IV. CONCLUSION ........................................................................... 392

As the world’s preeminent social networking site, Facebook has
changed the way individuals share information about their lives.1
Since Mark Zuckerberg launched the website as a Harvard
undergraduate in 2004, 800 million users have joined Facebook,

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1. See danah m. boyd & Nicole B. Ellison, Social Network Sites: Definition, History, and Scholarship, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2007), available at http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html (defining social network sites as web-based services that allow individuals to: (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system); Lev Grossman, Person of the Year 2010: Mark Zuckerberg, TIME, Dec. 15, 2010, http://www.time.com/time/specials/packages/article/0,28804,2036683_2037183,00.html (naming Mark Zuckerberg the most influential person of 2010 and describing Facebook as changing the way human beings relate to each other).
furthering its mission to connect people. In recognition of Zuckerberg’s vision and the website’s far-ranging impact, *Time* magazine dubbed the then twenty-six-year-old its 2010 Person of the Year.

Facebook describes itself as a “social utility that helps people communicate more efficiently with their friends, family and coworkers” through “technologies that facilitate the sharing of information.” The website provides a framework through which users may share a wide range of personal information. While Facebook offers privacy settings as a means of sharing information with a selected audience, the website does not guarantee that this shield is impenetrable.

Social scientists have examined whether Facebook users present themselves as they are, or as they wish others to perceive them. In studies of primarily college-aged users, these researchers have identified Facebook features that equip individuals to present variant “online” and “offline” identities. For example, users may selectively post photographs that portray them as more physically attractive or socially active than they are in reality.

In its article on Zuckerberg, *Time* attributed this behavior to the multi-faceted nature of identity, but warned that it would be a “terrible mistake” to misinterpret an individual’s Facebook profile for the individual’s true identity.

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6. See *Data Use Policy, Facebook,* https://www.facebook.com/full_data_use_policy (last updated Sept. 23, 2011) (describing Facebook’s privacy settings); Grossman, *supra* note 1 (contending that Facebook is biased in favor of sharing in light of Zuckerberg’s vision to make the world more open and connected).


The average Facebook user creates ninety pieces of content each month, representing a potential gold mine for lawyers seeking information about their clients or adversaries. In recent years, US and Canadian courts have grappled with questions about the discoverability and admissibility of Facebook content in litigation. For example, criminal prosecutors have sought to prove a defendant’s lack of remorse by presenting Facebook photographs that portray the defendant as mocking the law. Likewise, the court in the high-profile murder trial of Casey Anthony admitted Anthony’s social networking site pictures to show her state of mind while her daughter was missing. In civil suits, defense attorneys have sought to challenge plaintiffs’ claims for “loss of enjoyment of life” by presenting Facebook photographs depicting them as happy and social. Considering social science research on users’ propensities to display enhanced personas, offering Facebook photographs to demonstrate a litigant’s emotional state raises troubling concerns that courts will erroneously interpret such pictures as contradicting the litigant’s claims and credibility.

This Note addresses litigants’ use of Facebook photographs as proof of state of mind and argues that courts should more critically analyze the relevance of such photographs. Part I introduces Facebook as a social networking site, evaluating social science research on the website, discussing the liberal discovery of its content, and analyzing Facebook photographs admitted in criminal and civil proceedings. Part II argues that fact-finders should scrutinize the relevance of Facebook pictures and posits that social science expert testimony would aid jurors in evaluating and weighing this evidence.

12. See Grimmelmann, supra note 2, at 1145-46 (discussing the rich stream of user-generated content that Facebook facilitates); Evan E. North, Facebook Isn’t Your Space Anymore: Discovery of Social Networking Websites, 58 U. Kan. L. Rev. 1279, 1286 (2010) (discussing the legal community’s growing awareness of the benefits and pitfalls of using information found on social networking sites).
16. See Romano, 907 N.Y.S.2d at 652.
Part III offers potential mechanisms to enhance the fairness of proceedings involving Facebook photographs, including in camera review of the photographs, admission of expert testimony by social scientists, and admission of lay testimony based on either personal knowledge of Facebook or of the litigant. Part IV concludes by emphasizing the need for courts and juries to be cautious when interpreting Facebook photographs as evidence of a litigant’s emotional state.

I. THE PHENOMENON OF SOCIAL NETWORKING AND THE USE OF FACEBOOK CONTENT IN LITIGATION

Facebook’s multitude of features allow users to post content, share it with others, and designate which users can view it. As social scientists have demonstrated, the website’s features equip users to portray a carefully crafted persona that could mislead outside observers. Compounding the risks of misinterpreting an individual’s profile are courts’ decisions to grant litigants’ broad discovery requests for their opponents’ Facebook content, which may violate users’ expectations about the privacy of their Facebook profiles. In criminal and civil proceedings, Facebook photographs have played a key role in demonstrating a litigant’s emotional or mental state, thus highlighting the risks of users’ manipulatable online personas.

A. Facebook as a Social Networking Site

Since its launch in February 2004, Facebook has become the Internet’s most popular and influential social networking site. The box office success of The Social Network, a 2010 film that purports to recount the website’s creation, demonstrates that Facebook has earned a place in American popular culture. When Facebook first
emerged as a social networking site, it distinguished itself by limiting membership to college students.24 Now open to anyone over age thirteen with an email address, Facebook’s membership spans demographics and includes over 800 million active users, half of whom log on daily.25 Paralleling Facebook’s exploding popularity is its rapid evolution, as the website changes its features constantly.26

Facebook’s variety of social networking tools enables its users to act as the broadcasters, producers, and stars of their Facebook profiles.27 To create a profile, an individual provides a full name, email address, desired password, gender, and birth date.28 Individuals may then upload pictures and complete forms with pre-set categories of information for the user’s friends to view.29 This design gives users flexibility in deciding how much information to reveal through their profiles, but the premise of the website favors sharing, rather than withholding, information.30 Thus, Facebook members can exchange private communications through the messaging feature, or they may publicize comments on a friend’s “wall” to anyone with the ability to view that profile.31

26. See Grimmelmann, supra note 2, at 1145 (describing the “blisteringly fast” pace of Facebook’s growth, and noting that it is common for Facebook users to log on and discover overnight changes to Facebook’s interface).
27. See id. at 1145-46; Pempek et al., supra note 8, at 237.
30. See Grossman, supra note 1, at 1149-50 (arguing that Facebook is biased in favor of sharing); Rosen, supra note 22, at 24 (describing the raison d’être of social networking sites as the “creation and conspicuous consumption of intimate details and images of one’s own and others’ lives”).
31. Rosen, supra note 22, at 19; Timeline, supra note 2; see Pempek et al., supra note 8, at 230, 235; see also Wall: How to use the Wall Feature and Wall Privacy, FACEBOOK, https://www.facebook.com/help/?page=174551209237562 (last visited Oct. 13, 2011) (describing the “wall” feature on Facebook users’ profiles). Additionally, the “news feed” and “mini feed” features allow friends to share, comment on, and “like” real-time updates about each other’s postings and activities on the website. News Feed Basics, FACEBOOK, https://www.facebook.com/help/?page=132070650292524 (last visited Oct. 15, 2011); Ruchi Sanghvi, Facebook Gets a Facelift, THE FACEBOOK BLOG (Sept. 5, 2006, 3:03 AM), http://blog.facebook.com/blog.php?post=2207967130. Facebook designed the “like” feature as a way for users to “give positive feedback” to others on the website, but Facebook has no corresponding “dislike” button. See Like, FACEBOOK, https://www.facebook.com/help/?page=773 (last visited Aug. 9, 2011).
Through its privacy settings, Facebook enables users to control which other users can view their profiles. Privacy settings do not provide complete control, however, as recipients of shared information can forward it to others—even those outside Facebook—without permission from the original sender.

Among Facebook’s most popular features is its photos application. Individuals upload photographs to the website and “tag” friends, linking each picture to the profile of each tagged friend, who may then “untag” the picture. Untagging a photo merely removes it from the user’s profile, but the photo remains on the website—only it no longer explicitly identifies the user. Until recently, Facebook employed a total opt-out model for untagging photos, allowing a person to remove a photo tag only after another user had posted it; this left people with no means to approve a tag before its posting. In response to complaints, Facebook created a “Profile Tag Review” that enables users to accept a photo tag before it appears on their profiles. However, this pre-approval is not a default feature, so

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33. See id. (stating that information shared on Facebook might be “copied or re-shared by anyone who can see it” and acknowledging the website’s inability to ensure that information shared on Facebook will be viewable by only authorized individuals). Furthermore, Facebook reserves the right to share user information with third parties in response to a bona fide legal request. Id. (reserving the right to disclose user information to third parties when Facebook has a good faith belief that the law requires disclosure).

34. See Dan Fletcher, How Facebook is Redefining Privacy, TIME, May 20, 2010, http://www.time.com/time/magazine/article/0,9171,1990798,00.html (stating that Facebook users add nearly one billion photos to Facebook each week); Justin Mitchell, Making Photo Tagging Easier, THE FACEBOOK BLOG (June 30, 2011, 7:16 PM), http://www.facebook.com/blog.php?post=467145887130 (noting that Facebook users add over 100 million tags to the website each day).

35. Timeline, supra note 2; see Daniel Findlay, Note, Tag! Now You’re Really “It” What Photographs on Social Networking Sites Mean for the Fourth Amendment, 10 N.C. J. L. & TECH. 171, 181 (describing the process of uploading photos to Facebook).

36. See Pempek et al., supra note 8, at 230 (noting that removing a tag does not erase the photograph from Facebook); Dan Fletcher, supra note 34 (stating that unless a photo is obscene or otherwise violates the website’s terms of use, the most a user can do is untag the photo so people will have a harder time finding the picture); Privacy for Photos, FACEBOOK, http://www.facebook.com/help/?page=831 (last visited Sept. 12, 2011) (indicating that Facebook will not require a user to delete a posted photo merely because another user dislikes it, but rather suggests that the displeased user ask the other user to remove it from the website).

37. Privacy for Photos, supra note 36 (indicating that Facebook automatically approves users’ tag requests, allowing the tagged user to later remove the tag from the photo); see Findlay, supra note 35, at 183-84 (noting that Facebook does not offer a grace period to allow a tagged individual to review the photograph prior to its posting); danah boyd, Facebook’s “Opt-out” Precedent, ZEPHORIA (Dec. 11, 2007), http://www.zephoria.org/thoughts/archives/2007/12/11/facebook_optou.html (arguing that Facebook’s opt-out model disrupts users’ sense of privacy).

individuals must adjust their privacy settings to activate it. Thus, the absence of a tag ultimately does not prevent others from visually associating the user with the picture.

B. Accurate or Idealized Selves? The Creation and Perception of Image on Facebook

As Facebook has become a key venue for its millions of members to communicate and express themselves, social scientists and legal commentators have examined the extent to which individuals use the website to present a genuine or idealized impression. While some studies portray Facebook users as conscious image-makers, other research concludes that people display online personas that more closely resemble their actual, “offline,” personalities.

When creating a Facebook profile, users have time to reflect about the impression they wish to present to their network of Facebook friends, which primarily includes their peers. Commentators have likened this process to painting a self-portrait, with each addition of information designed to create a flattering impression. As social scientists have recognized, Facebook’s privacy settings enable individuals to engage in “targeted performances” of their online identities by restricting certain users from viewing specific profile content, or by displaying different content to different friends. This practice may breed misperception, for viewers can

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39. See id. Another new feature is “tag suggestions,” which uses facial recognition software to identify users’ “friends” in the pictures that they upload and thus will likely expand the number of photographs associated with users’ profile. Mitchell, supra note 34.

40. See Findlay, supra note 35, at 184 (arguing that an untagged user continues to be at risk of other users’ visual verification of the individual in the picture); Cox, supra note 38.

41. See, e.g., Back et al., supra note 22, at 373; Grimmelmann, supra note 2, at 1152-53; Zhao et al., supra note 7, at 1820; Gosling et al., Personality Impressions Based on Facebook Profiles, INTERNATIONAL CONFERENCE ON WEBLOGS AND SOCIAL MEDIA (Mar. 2007), http://www.icwsm.org/papers/paper30.html; Strano, supra note 9.

42. See Back et al., supra note 22, at 374; Strano, supra note 9.

43. Pempek et al., supra note 8, at 237; see Theodora Stites, Someone to Watch Over Me (on a Google Map), N.Y. TIMES, July 9, 2006, http://www.nytimes.com/2006/07/09/fashion/sundaystyles.09love.html, quoted in Rosen, supra note 22, at 28 (describing each Facebook profile as a “carefully planned media campaign”).

44. Grimmelmann, supra note 2, at 1152 (“Each additional datum is a strategic revelation, one more daub of paint in your self-portrait.”).

45. See Zhao et al., supra note 7, at 1820-21, 1823, 1825, 1827; Rosen, supra note 22, at 22; danah boyd & Eszter Hargittai, Facebook Privacy Settings: Who Cares?, FIRST MONDAY (Aug. 2, 2010), http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/3086/2589 (contending that Facebook’s privacy settings encourage impression management by enabling users to control which information reaches which segment of their Facebook friend network).
misjudge a given profile as illustrating the individual’s offline behavior and identity.\textsuperscript{46}

Profile pictures create first impressions and as psychologists have shown, these impressions can be misleading.\textsuperscript{47} The profile picture is among the few elements of a Facebook profile that users cannot hide from others through privacy settings.\textsuperscript{48} Social scientists have described the choice of photograph as a way to signal “meaningful cues” to other members of the social networking site.\textsuperscript{49} A 2008 study identified the following as the most common reasons for selecting a particular picture: (1) the picture presents the user as attractive, (2) the picture shows the user having fun, (3) the picture shows the user in a humorous shot, and (4) the picture shows off the user’s romantic relationship.\textsuperscript{50} Additionally, a 2009 study highlighted the significance of physical appearance in a typical user’s self-presentation, concluding that people most often “untag” a photograph because of dissatisfaction with how they look in it.\textsuperscript{51}

Because social networking sites enable users to craft a desired image to display to others, social scientists have posited that outside observers can misinterpret that impression.\textsuperscript{52} An illustrator captured the disconnect between a user’s online and offline personas with a comic that depicts a skateboard-riding, guitar-wielding man as “[t]he [Facebook] version of you” and juxtaposes an image of the same man, reclining on a chair with cheese snacks and beer bottles as “[t]he [r]ealistic version of you.”\textsuperscript{53} The illustrator explained its meaning by

\begin{itemize}
\item \textsuperscript{46} See boyd, supra note 29, at 17 (recounting how a MySpace user’s profile nearly cost him his college admission after admissions officers perceived his profile to reflect gang affiliation, which conflicted with his admissions essay discussing gang problems within his community, and positing that admissions officers should have interpreted his profile as showing how he survived his community surroundings through acquiescing to its social norms).
\item \textsuperscript{47} Strano, supra note 9; see Rosen, supra note 22, at 15.
\item \textsuperscript{48} Data Use Policy, supra note 32 (stating that users’ profile pictures are always publicly available to anyone with access to the website in order to “help[ ] your friends and family recognize you”). Additionally, Facebook’s new “Timeline” feature enables users to choose a large “cover” photo to accompany their profile pictures. Add a Cover, FACEBOOK, https://www.facebook.com/help/timeline/cover (last visited Dec. 20, 2011) (describing cover photo feature); Introducing Timeline, FACEBOOK, https://www.facebook.com/about/timeline (last visited Dec. 20, 2011) (describing cover photo feature). Like the profile picture, users cannot hide their designated “cover” photo through privacy settings. Add a Cover, supra (stating that users have no option to apply privacy settings to cover photos). Commentators have noted that “Timeline” places greater emphasis on users’ photographs. See Krystal Peak, Ready or Not your Facebook will go the way of Timeline, VATOR NEWS (Dec. 28, 2011), http://vator.tv/news/2011-12-28-ready-or-not-your-facebook-will-go-the-way-of-timeline.
\item \textsuperscript{49} boyd, supra note 29, at 10.
\item \textsuperscript{50} Strano, supra note 9.
\item \textsuperscript{51} Pempek et al., supra note 8, at 233, 236.
\item \textsuperscript{52} See boyd, supra note 29, at 12.
\end{itemize}
saying, “I like to think of Facebook as this game where you try to see who can fabricate the most believable lie in a competition to see who has the best life.”

Other researchers argue that Facebook encourages users to align their profiles with their offline identities, rather than create an embellished persona. A 2008 study proposed that Facebook has a “nonymous” setting in which individuals use their real names and other identifying information instead of remaining anonymous. The researchers posited that this “nonymity” connects users to their “real” selves and enables a user’s offline friends to hold the individual accountable for an exaggerated or misleading online persona. Still, the study concluded that people display a “socially desirable,” group-oriented, “smiling” persona that, while not completely reflective of the person’s actual self, is also not totally idealized. Similarly, a 2010 study offered an “extended real-life hypothesis,” claiming that individuals use social networking sites as another medium to communicate their genuine selves. This study proposed that Facebook’s features, especially the “wall,” render users accountable for their profiles to “real-life” friends who may access the content and judge whether it reflects the person’s actual personality. While this hypothesis challenges the assumption that individuals self-aggrandize through their profiles, one psychologist criticized the 2010 study for analyzing just the “Big Five” personality dimensions. By measuring only those broad traits of openness, agreeableness, conscientiousness, extraversion, and neuroticism, the psychologist argued that the study ignored the nuances of identity that users may express through their profiles, including promoting one’s best traits.

Psychologists have demonstrated that profile viewers tend to obscure the truth even further by overestimating others’ outward

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54. Id.  
55. See Zhao et al., supra note 7.  
56. Id. at 1816, 1820-21, 1823, 1828, 1831; see Statement of Rights and Responsibilities, FACEBOOK, supra note 25 (stating that Facebook requires users to provide their real names or a username that closely relates to their actual names for their Facebook accounts).  
57. Zhao et al., supra note 7, at 1820-21, 1823, 1828, 1831.  
58. Id. at 1829, 1831; see also Adriana Manago et al., Self-Presentation and Gender on MySpace, 29 J. APPLIED DEVELOPMENTAL PSYCHOL. 446, 451 (2008) (positing that MySpace users manifest “incipient aspects of personal identity” and experiment with possible selves through their profiles).  
60. Id. at 372.  
expressions of happiness. In a 2011 study, psychologists tested their hypothesis that people have a skewed perception of others’ positive emotions. Positing that social norms favor the expression of a happy demeanor in social situations and disfavor the expression of negative emotions, the researchers found that outside observers seldom witness others’ negative emotions. Likewise, because people more readily witness other peoples’ positive emotional experiences, the study revealed that individuals underestimated the negative emotional lives of others. The researchers termed this the “expression-experience discrepancy,” or the difference between an individual’s outward expression and internal experience of an emotion. In line with social norms favoring individuals’ expression of positive emotions, they found that this discrepancy was greatest for negative emotions. By encouraging users to share “happy” updates about their social activities and post photographs in social settings, websites like Facebook magnify the expression-experience discrepancy. Thus, observers of social networking site profiles are especially likely to overestimate the happy emotions and underestimate the negative sentiments of other users.

C. Fair Game: The Discoverability of Facebook Content

Given the extent to which Facebook members share biographical information, pictures, and daily updates about their lives, attorneys consider the website a trove of evidence for information about litigants’ behavior or activities. For example, defense

64. Id. at 121.
67. Id. at 127-28.
68. Id. The researchers attributed this variance in part to the social-cognitive error by which individuals recognize that they display a skewed expression of their emotional lives to others, but fail to recognize that others may do the same. Id. at 132.
70. See id.
71. See North, supra note 12, at 1286 (positing that because the average civil litigant uses social networking sites, the social networking profile of a civil litigant will likely contain potentially relevant and discoverable information); Brian Grow, In U.S. Courts, Facebook Posts
attorneys may use information from Facebook to attack an opponent’s credibility by establishing that the party’s postings contradict the party’s testimony. Personal injury attorneys have fought back, with some advising clients to deactivate their social networking site accounts based on concerns that defense counsel will access the profile and seek to admit photographs that appear to contradict plaintiffs’ claims.

Emerging case law indicates that Facebook content is discoverable. Under the Federal Rules of Civil Procedure, parties may discover all “relevant” information so long as it is not “privileged” from discovery. Relevant information need not be admissible at trial if the discovery appears “reasonably calculated to lead to the discovery of admissible evidence.” Exceptions to this broad standard of discoverability apply in limited circumstances, such as when a court deems it necessary to protect a party or person from “annoyance, embarrassment, oppression, or undue burden or expense.” As commentators have noted, courts generally do not consider Facebook posts privileged, and as one court has announced, “any relevant, non-privileged information about one’s life that is shared with others . . . is fair game in today’s society.”

Become Less Private, REUTERS (Jan. 27, 2011, 2:40 PM), http://www.reuters.com/article/2011/01/27/us-facebook-privacy-idUSTRE70Q7EC20110127 (noting that attorneys now mine Facebook for content that might exculpate their clients by contradicting opponents’ claims); Statistics, supra note 2 (noting that the average user creates ninety pieces of content on Facebook each month).


74. See North, supra note 12, at 1293 (noting the liberal discovery regime under the Federal Rules of Civil Procedure); Ryan A. Ward, Note, Discovering Facebook: Social Network Subpoenas and the Stored Communications Act, 24 HARV. J.L. & TECH. 563, 581-82 (2011) (stating that courts have not adopted a uniform approach to discovery requests for social networking site information).


76. Id.


Courts have applied varying standards to assess the relevance of litigants’ Facebook content for discovery purposes.\(^80\) While some courts have restricted the scope of discovery to content pertinent to the legal claims at issue, other courts have granted discovery of litigants’ entire history of Facebook content.\(^81\) At least one court has referred to the 1986 Stored Communications Act (SCA) as a potential barrier to discovery of Facebook content, although it is uncertain whether the statute actually governs the website.\(^82\) In a landmark 2010 opinion, a California district court in *Crispin v. Christian Audigier, Inc.* first applied the SCA to Facebook.\(^83\) If the SCA were to govern Facebook, the Act would relieve the website of its obligation to disclose user information requested in a civil subpoena, but would not impede a litigant from requesting that content directly from the opposition.\(^84\)

\(^80\). Compare EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 436 (S.D. Ind. 2010) (limiting the scope of relevance to elements of claimants’ Facebook profiles during a specific time period that reveal, refer, or relate to any emotion, feeling, or mental state), and Ledbetter v. Wal-Mart Stores, Inc., No. 06-cv-01958-WYD-MJW, 2009 WL 1067018, at *1-2 (D. Colo. Apr. 21, 2009) (finding information sought within subpoenas issued to Facebook reasonably calculated to lead to discovery of admissible evidence relevant to plaintiffs’ alleged physical and psychological injuries), with Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 652 (Sup. Ct. 2010) (ordering discovery of claimant’s current and historical Facebook account postings, reasoning that limiting access to the public portions of claimant’s profile would deny the defense access to material and necessary information).

\(^81\). See Mackelprang v. Fidelity Nat’l Title Agency of Nev., Inc., No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, at *8-9 (D. Nev. Jan. 9, 2007) (approving discovery of private emails sent through MySpace that contain information regarding plaintiff’s sexual harassment allegations in the lawsuit or that discuss her alleged emotional distress, but precluding discovery of allegedly sexually explicit or promiscuous communications unrelated to plaintiff’s employment with defendant); Aaron Blank, Comment, *On the Precipice of E-Discovery: Can Litigants Obtain Employee Social Networking Web Site Information Through Employers?*, 18 COMMLAW CONSPECTUS 487, 497 (2010) (noting that Mackelprang suggests that courts should not permit parties to engage in fishing expeditions for information contained in plaintiffs’ social networking site accounts).

\(^82\). 18 U.S.C. § 2702 (2006); see North, supra note 12, at 1306-07 (predicting that the SCA could prohibit Facebook or MySpace from voluntarily divulging substantive content from a user’s profile without the user’s consent); Ward, supra note 74, at 570-76 (discussing *Crispin* and the many open questions it left about the SCA’s application to social networking site content); Alan Klein et al., *Is ‘Private’ Data on Social Networks Discoverable?*, LAW TECHNOLOGY NEWS (Aug. 25, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202471022686 (contending that because social networking sites facilitate new forms of communication, some of Facebook’s key content, such as a user’s history of activity, status updates, and “friend” lists have no clear analogue to pre-SCA technology).

\(^83\). *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 988-91 (C.D. Cal. 2010); see also Steven C. Bennett, *Civil Discovery of Social Networking Information*, 39 SW. U. L. REV. 413, 421-22 (2010) (arguing that social networking sites may fall outside the scope of the SCA’s protections because they were designed to be readily accessible to the general public).

\(^84\). See Eric B. Meyer, *Social Networking Sites Provide Litigation Treasure Trove*, 26 TEX. LAW. 12 (2010) (noting that many social networking sites point to the SCA in order to protect the privacy of user content); Mark S. Sidoti et al., *How Private Is Facebook Under the SCA? Courts Struggle with Social Networking Access Questions Under 1986 Stored*
The Act limits the extent to which a provider of an electronic communication service (ECS provider) or a remote computing service (RCS provider) may disclose its users’ information or communications. However, the Act contains an exception that permits ECS providers to intercept or access communications that are “readily accessible to the general public.” In Crispin, the court classified Facebook as both an ECS and RCS provider. Citing the SCA’s “general public” exception, the court reasoned that if the litigant had applied privacy settings to his wall postings, Facebook could not disclose them without his consent. The court thus vacated and remanded the case in order to address whether the plaintiff had applied such privacy settings. While Crispin announces that the SCA may shield Facebook content from discovery, the case will likely have a limited impact. Crispin will likely incentivize litigants to request Facebook information directly from their adversaries rather than through a subpoena to the website—an option that Facebook itself has encouraged.

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85. 18 U.S.C § 2702(a). The Act defines an ECS provider as “any service which provides to users thereof the ability to send or receive wire or electronic communications,” and states that, unless an exception applies, anyone providing an ECS “shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by” that ECS. Id. §§ 2510(15), 2702(a)(1). The SCA defines an RCS as a provider of “computer storage or processing services by means of an electronic communications system,” a system that the Act defines as “any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications.” Id. §§ 2711(2), 2510(14). The SCA states that without an exception, ECS and RCS providers must not knowingly divulge the contents of any communication that is stored, carried, or maintained on their services. Id. § 2702(a)(2).

86. Id. § 2511(2)(g)(i).

87. The court classified Facebook as an ECS provider by analogizing Facebook wall postings to restricted access electronic bulletin board services, which courts have interpreted to fall within the SCA. Crispin, 717 F. Supp. 2d at 980-89. Additionally, the court classified Facebook as an RCS provider because Facebook stores wall postings on its website and such postings may be viewable to only specified users. Id. at 990.

88. Id. at 991.

89. Id.

90. See Jonathan E. DeMay, The Implications of the Social Media Revolution on Discovery in U.S. Litigation, 40 BRIEF 55, 62-63 (2011) (stating that it is preferable for a civil litigant to seek social networking site content through a discovery request directed at the user rather than through a subpoena served on the website).

91. See Grow, supra note 71 (discussing Facebook’s motion arguing that defense lawyers should seek access to plaintiff’s online material directly, rather than through a subpoena to Facebook); Cecil A. Lynn III, Social Media Discovery: What You Need to Know to be Prepared, Daily Lab. Rep. (BNA) 74 DLR I-1 (Apr. 18, 2011) (advising attorneys to subpoena third parties rather than parties’ internet service providers, such as Facebook, in order to obtain information from parties’ profiles).
Other courts have ignored the SCA and permitted full discovery of Facebook content, relying on general principles of liberal pretrial disclosure. In *Romano v. Steelcase*, a New York trial court ordered a personal injury plaintiff to give the defense access to her entire Facebook profile, including all deleted postings, from the time she opened her account. The court rejected the notion that the plaintiff’s privacy settings should limit discovery, reasoning that litigants cannot reasonably rely on Facebook’s privacy settings to bar discovery of information they did not intend to share through the site. Moreover, the court emphasized that New York’s public policy favoring open disclosure militated against letting a party shield potentially relevant information through “self-regulated privacy settings.”

Still other courts have resolved discovery disputes by conducting or proposing to conduct *in camera* review to determine the relevance of Facebook content. In *Bass v. Miss Porter’s School*, a Connecticut district court reviewed the plaintiff’s Facebook account *in camera* to evaluate the relevance of postings the plaintiff sought to withhold from discovery. The court declined to limit discovery of the account, finding no meaningful distinction between the content the

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92. See Ward, supra note 74, at 576-81.

93. See Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 657 (Sup. Ct. 2010). Because the publicly viewable portions of plaintiff’s Facebook profile seemed to contradict her claims, the defendant requested access to plaintiff’s Facebook content hidden through privacy settings. *Id.* at 654.


95. *Romano*, 907 N.Y.S.2d at 652, 655. The court also cited New York’s legal standard for discovery, which provides for “full disclosure of all non-privileged matter which is material and necessary to the defense or prosecution of an action.” *Id.* at 652 (citing N.Y. C.P.L.R. 3101 (CONSOL. 2011)).


plaintiff had agreed to produce and the content the plaintiff deemed irrelevant. A Pennsylvania district court in Offenback v. Bowman, Inc. conducted a similar in camera inspection, but determined that only a small portion of the plaintiff's profile content was relevant enough to his personal injury lawsuit for discovery.

Despite the broad discoverability of Facebook content, other courts have signaled that litigants must establish the relevance of material sought and may not conduct “fishing expeditions” into the opposition’s Facebook account. The court in McCann v. Harleysville Insurance Company of New York did not require the plaintiff to disclose her Facebook photographs to the defense, determining that the defense established no factual predicate for the relevance of that evidence. Similarly, the Pennsylvania Court of Common Pleas in Piccolo v. Paterson denied the defendant access to the plaintiff’s Facebook postings. The defendant had requested that the plaintiff accept a “friend request” in order to view her Facebook photographs, but the plaintiff argued that the request was unduly burdensome. Because she had already provided opposing counsel with pictures of her face before and after her injuries, the plaintiff contended that defendant failed to demonstrate the need for her Facebook photographs. Although the court declined to explicate its reasoning, Piccolo appears to recognize that where the plaintiff has already provided the defense with relevant photographs, the plaintiff's mere possession of a Facebook account is an insufficient basis to order its discovery.

Nevertheless, as long as a litigant establishes a bare factual predicate for the relevance of Facebook content, courts will not

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101. McCann, at 615.
103. See Venkat Balasubramani, Plaintiff Can’t be Forced to Accept Defense Counsel’s Facebook Friend Request in Personal Injury Case—Piccolo v. Paterson, TECHNOLOGY & MARKETING LAW BLOG (May 19, 2011, 8:30 AM), http://blog.ericgoldman.org/archives/2011/05/court_snsr_plai.htm (discussing Piccolo and noting ethical concerns with providing opposing counsel with access to the party's Facebook profile for evidentiary purposes); Gina Passarella, Facebook Postings Barred from Discovery in Accident Case, THE LEGAL INTELLIGENCER (May 17, 2011, 10:00 AM), http://www.law.com/jsap/PA/PubArticleFriendlyPA.jsp?id=1202493920630.
104. See Passarella, supra note 103. The plaintiff also permitted the defense to photograph her at her deposition. Id.
hesitate to find it discoverable. While there are no barriers to
discovery of publicly accessible Facebook content, parties may still
discover content that a litigant hid from others through privacy
settings. Thus, in line with the broad standard for discovery under
the Federal Rules of Civil Procedure and under states’ policies
favoring liberal pretrial disclosure, contests over Facebook evidence
will occur at the admissibility—rather than discovery—stage of
litigation.

D. The Power of a Picture: Facebook Photographs in Criminal and
Civil Cases

Courts have evaluated Facebook photographs in the context of
criminal and civil proceedings. For instance, prosecutors have
presented Facebook photographs of criminal defendants to undercut
their claimed remorse. In criminal sentencing proceedings, courts
view remorse as an indicator of the defendants' characters, blameworthiness, and capacity to serve as law-abiding citizens.\textsuperscript{111} Therefore, a court may impose a harsher sentence where evidence indicates that a defendant lacks remorse.\textsuperscript{112} Parties also use Facebook photographs to demonstrate a civil plaintiff's happiness in a claim for "loss of enjoyment of life" damages.\textsuperscript{113} Considering the website's tremendous popularity, the evidentiary use of Facebook photographs to demonstrate an individual's state of mind has far-reaching implications for all Facebook users.\textsuperscript{114}

1. Criminal Proceedings

A single Facebook picture helped earn a college student a two-year prison sentence.\textsuperscript{115} The photograph depicted the student wearing a prison jumpsuit costume for Halloween two weeks after being charged with driving under the influence.\textsuperscript{116} At sentencing, the prosecutor introduced the photograph to the court—which he received from another victim of the crash—with the caption, "Remorseful?"\textsuperscript{117} Acknowledging the impact of this picture in his decision, the judge later stated: "I did feel that [the photograph] gave me some indication of how that young man was feeling a short time after a near-fatal accident, that he thought it was appropriate to joke and mock about


\textsuperscript{112} See Ward, supra note 111.

\textsuperscript{113} See Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 653-54 (Sup. Ct. 2010) (reviewing public portions of plaintiff's Facebook profile in relation to claims of permanent physical injuries and "loss of enjoyment of life").


\textsuperscript{115} Panciera, supra note 14; Tucker, supra note 110.

\textsuperscript{116} Tucker, supra note 110.

\textsuperscript{117} See sources cited supra note 115.
the possibility of going to prison.” The defendant’s attorney believed the photograph prompted the judge to misinterpret his client, insisting that it displayed a confused kid “who didn’t know what to do” two weeks after the crash.

In *State v. Altajir*, Facebook pictures factored into the court’s revocation of probation, and sentencing of the defendant to three years of incarceration. After a court convicted Altajir for operating a motor vehicle while intoxicated, she was released on probation, but re-arrested just three months later after another vehicular accident. During her probation revocation hearing, the state sought to introduce pictures from Altajir’s Facebook profile, claiming that they revealed she had violated her probation by leaving the state without permission. The state argued that because these out-of-state photographs showed Altajir drinking and socializing with friends, one could reasonably infer that Altajir had been driving under the influence, and thus lacked remorse for her earlier crime. On appeal, Altajir argued that the trial court credited unreliable evidence of her activities while on probation. Affirming the trial court’s revocation of her probation, the appellate court approved of using Altajir’s Facebook photographs to demonstrate her lack of remorse.

Jurors in the murder trial of Casey Anthony also viewed social networking site photographs as proof of the defendant’s state of mind. The court admitted three photographs that showed Anthony

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118. Tucker, supra note 110 (internal quotation marks omitted). The judge also stated that the defendant’s Facebook photographs “give new meaning to the phrase ‘one picture is worth a thousand words.’” Panciera, supra note 14 (internal quotation marks omitted).
119. Tucker, supra note 110 (internal quotation marks omitted).
121. Id. at 1026-27.
122. Id. at 1028-29. Before admitting the photographs into evidence at the hearing, the court permitted the defendant to examine them. Id. at 1029 n.7. Following Altajir’s review of the pictures, the state agreed not to introduce into evidence about half of the photographs. Id. at 1029 n.7. Additionally, the court considered Altajir’s Facebook photographs when determining her initial sentencing and probation agreement. See id. at 1029 n.6.
123. Id. at 1028-29.
124. Id. at 1033. Altajir argued that the photographs did not indicate that they were taken during her period of probation, but only indicated the dates on which they were posted to Facebook. Id.
125. Id. at 1034 (“The fact that the defendant seemed to be acting in the same manner while on probation that she did prior to incarceration led the court to believe that she had not reformed and had forgotten the seriousness of her situation.”). When reviewing the Facebook photographs that the prosecution submitted, the trial court judge stated: “I’m looking at these pictures, and all I can think of is, where is the remorse?” Id. at 1029 (internal quotation marks omitted).
126. See Michael, supra note 15. These photographs came from Anthony’s Photobucket account, rather than from Facebook. Photobucket is a website that allows people to upload and
dancing at a nightclub during the thirty-one days between her daughter's disappearance, and the date she was reported missing.\(^{127}\) The state argued that these photographs, by depicting Anthony's active social life, demonstrated her state of mind, and refuted her claim that she had been searching for her daughter at that time.\(^{128}\) In its motion in limine to exclude these "party pictures" from the trial, the defense argued that the photographs were irrelevant character evidence whose prejudicial effect in portraying Anthony as an irresponsible, promiscuous "party girl" far outweighed any probative value they might have.\(^{129}\) While the court limited the number of photographs admitted into evidence, Anthony's social networking site pictures still figured prominently as proof of state of mind at her homicide trial.\(^{130}\)

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128. Order on Mot. in Limine to Exclude Irrelevant Evidence of "Party Pictures" at 1, State v. Anthony, No. 482008-CF-0015606-O (Fla. Cir. Ct. May 10, 2010) (stating that the prosecution sought to use photographs to establish Anthony's activities during a specific time frame and to refute her claim to have been searching for her missing daughter); see Casey Anthony Party Photos Shown to Jury, KSBW.COM (May 25, 2011, 3:58 PM), http://www.ksbw.com/r/28022766/detail.html. The defense provided an alternative explanation for the seemingly remorseless defendant: After her daughter accidentally drowned in the pool, she masked her emotions, which her past alleged sexual abuse had taught her to do. Id.


130. When the prosecution offered to admit the Photobucket photographs at trial, the defense again objected, and in a sidebar discussion with counsel outside the jury's hearing, the judge instructed the prosecution to "pick your best three [pictures]." Anthony Colarossi, Casey Anthony Trial: Sidebar Chat Shows Baez Worried Casey Looked Like a Lesbian in Photos, PALM BEACH POST (June 8, 2011, 10:57 PM), http://www.palmbeachpost.com/news/casey-anthony-trial-sidebar-chat-shows-baez-worried-1527867.html (internal quotation marks omitted).
2. Civil Proceedings

In civil proceedings, defense attorneys have sought to admit plaintiffs’ Facebook photographs in order to refute their claims for emotional injuries. Facebook photographs have served a pivotal role in US and Canadian cases involving claims for “loss of enjoyment of life” damages. This category of damages compensates victims of physical injuries for their loss of pre-injury capabilities. Because Facebook users upload pictures depicting themselves in activities they regularly enjoy, claimants’ pre- and post-injury Facebook photographs could be relevant to assessing their damages, especially if pictures capture them engaging in activities that they claim to no longer be able to enjoy.

The 2010 decision in Romano v. Steelcase demonstrates the role of Facebook photographs in exhibiting a personal injury claimant’s lifestyle. Plaintiff Kathleen Romano claimed that she sustained permanent injuries after falling from a defective chair, which limited her ability to participate in certain activities and lessened her

131. See, e.g., EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 436 (S.D. Ind. 2010) (discussing appropriate scope of relevance of plaintiffs’ social networking site profiles relating to any emotion, feeling, or mental state); Romano v. Steedcase Inc., 907 N.Y.S.2d 650, 654 (Sup. Ct. 2010) (finding plaintiff’s Facebook photographs relevant to her claim for loss of enjoyment of life partly based on pictures found on publicly viewable portions of her Facebook profile); Murphy v. Perger, 2007 CarswellOnt 9439 (Can. Ont. S.C.J.) (WL) (finding plaintiff’s Facebook photographs potentially relevant to her claims for pain and suffering and loss of enjoyment of life).


133. Rick Swedloff & Peter H. Huang, Tort Damages and the New Science of Happiness, 85 Ind. L.J. 553, 580, 582-83 (2010) (describing jury instructions and jury awards in cases involving a claim for loss of enjoyment of life); Annotation, Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury, 34 A.L.R.4th 293 (1984) (noting that courts have recognized loss of enjoyment of life in plaintiffs’ diminished abilities to participate in sports or recreational activities, engage in desired vocations or avocations, and to taste or smell).

134. See Murphy v. Perger, 2007 CarswellOnt 9439 (Can. Ont. S.C.J.) (WL) (explaining that Facebook photographs could impeach plaintiff’s credibility about the impact of the accident on her lifestyle, and provide a means of assessing the value of her claimed damages; see also Simply Storage Mgmt., LLC, 270 F.R.D. at 436 (“It is reasonable to expect severe emotional or mental injury to manifest itself in some [social networking site] content, and [that] an examination of that content might reveal whether onset occurred, when, and the degree of distress.”).

135. Romano, 907 N.Y.S.2d at 650.
enjoyment of life.\textsuperscript{136} To discredit her claims, the defense offered publicly accessible portions of Romano’s Facebook profile with its motion for access to her entire account, arguing that the content demonstrated Romano’s active lifestyle during the relevant period, including travels to other states.\textsuperscript{137} The court concluded that the pictures showed Romano “smiling happily . . . outside the confines of her home despite her claim that she . . . is largely confined to her house and bed.”\textsuperscript{138} The court asserted that there was a reasonable likelihood that Romano’s privately accessible Facebook content contained further material information about her enjoyment of life.\textsuperscript{139}

Additionally, Romano favorably cited Kourtesis v. Joris, a Canadian case in which the defense used the plaintiff’s Facebook pictures to contradict her claim of loss of enjoyment of life.\textsuperscript{140} The Kourtesis court deemed the photographs—which showed the woman while on vacation—of a “celebratory nature, completely at odds, even if inadvertently,” with most of the evidence she presented to support her claim.\textsuperscript{141} Noting that the plaintiff explained the photographs as “posed,” the court still found that the pictures showed her in an “active social life setting” and concluded that she “enjoys life.”\textsuperscript{142}

II. ANALYZING THE RELEVANCE OF FACEBOOK PHOTOGRAPHS AS EVIDENCE OF STATE OF MIND

Given the broad discoverability of Facebook, the battleground over Facebook evidence will be at the admissibility stage.\textsuperscript{143} The Federal Rules of Evidence (FRE), which govern only jury trials, permit admissibility of all relevant evidence under Rule 402.\textsuperscript{144} Rule 401

\begin{itemize}
  \item \textsuperscript{136} Id. at 651; Noeleen G. Walder, \textit{Judge Grants Discovery of Postings on Social Media}, \textit{New York Law Journal} (Sept. 24, 2010), http://www.law.com/jsp/article.jsp?id=1202472483935.
  \item \textsuperscript{137} Romano, 907 N.Y.S.2d at 653. The defendant then requested access to Romano’s complete Facebook account in order to discover further evidence that might contradict her claims. Id. at 651.
  \item \textsuperscript{138} Id. at 654 (emphasis added).
  \item \textsuperscript{139} Id.
  \item \textsuperscript{140} Romano, 907 N.Y.S.2d at 655 (citing Kourtesis v. Joris, 2007 CarswellOnt 4343 (Can. Ont. S.C.J.) (WL)).
  \item \textsuperscript{141} Kourtesis, 2007 CarswellOnt 4343 (Can. Ont. S.C.J.) (WL).
  \item \textsuperscript{142} Id.
  \item \textsuperscript{143} See supra notes 106-108 and accompanying text.
  \item \textsuperscript{144} Fed. R. Evid. 401; Fed. R. Evid. 402. The FRE do not govern proceedings in state courts, but states often model their evidence rules after federal evidence rules. See Fed. R. Evid. 1101(a) (stating that the FRE apply to federal proceedings). Additionally, while the FRE are not binding in bench trials in which only the judge serves as fact-finder, the FRE serve as persuasive evidence for judges to consider. See Fed. R. Evid. 1101(d)(1). Furthermore, the FRE do not govern criminal sentencing or probation proceedings. See Fed. R. Evid. 1101(d)(3). Neither state nor federal evidence rules explicitly address social networking site content. See Kathrine Minotti,
defines “relevant evidence” as that which “has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” Relevant evidence is admissible under Rule 402. However, under FRE 403, a court may exclude even relevant evidence if its probative value is “substantially outweighed” by the danger of “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Thus, so long as a party establishes the relevance of Facebook photographs, and the evidence does not meet an exception for admissibility, the opponent must pass a high bar to show that the court should exclude the evidence. However, a party may submit a pretrial motion in limine to request that the court exclude evidence from trial. Counsel for both sides have the opportunity to contest the admissibility of the evidence, outside the jury’s presence, before a judge decides whether or not the evidence will be admitted.

A. Why Fact-Finders Ought to Scrutinize the Relevance of Facebook Photographs Offered to Demonstrate a Litigant’s Emotional State

The admission of Facebook photographs in litigation carries the risk that fact-finders will place undue emphasis on potentially inaccurate evidence when assessing a litigant’s emotional state. While photographs depicting an individual’s lifestyle could be relevant to examining a litigant’s remorse or capacity to enjoy particular

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The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession, 60 S.C. L. REV. 1057, 1061 (2009) (indicating that the FRE, FRCP, and applicable state rules do not address social networking sites as a unique form of evidence). Commentators have indicated that courts will likely apply the existing evidentiary framework to social networking sites rather than craft explicit rules addressing that content. See id.


146. Fed. R. Evid. 402. This rule ensures that courts admit all probative evidence not clearly excluded by law or policy, and exclude anything not logically probative of a matter to be proven at trial. 2-402 Hon. Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence § 402.02(1) (Hon. Joseph M. McLaughlin ed., 2d ed. 1997).


148. See Fed. R. Civ. P. 16(c)(2)(C) (stating that a pretrial conference enables a court to rule in advance on the admissibility of evidence); Fed. R. Evid. 104(a) (providing that courts must decide any preliminary question about the admissibility of evidence, and that the court is not bound by the evidence rules in making this determination).


activities, photographs may fail to capture the larger picture of a person's life. As one federal judge has stated, courts must recall the key questions applicable to all photographic evidence when assessing Facebook pictures, including whether they are probative, relevant, and not unfairly prejudicial. Thus, courts should critically examine the evidentiary relevance of Facebook photographs to ensure that litigants receive a fair trial.

When presented for the proper purpose, Facebook photographs could play a pivotal role in establishing a litigant's credibility, or lack thereof. In the Canadian case of *Bagasbas v. Atwal*, the plaintiff's Facebook photographs depicted her kayaking, hiking, and bicycling, which undermined her claimed loss of ability to do those activities. Likewise, in *Offenback v. Bowman, Inc.*, a US case, the plaintiff claimed psychological injuries resulting from a vehicular accident, including inability to ride his motorcycle, and nervousness around other vehicles. The court determined that while most of the plaintiff's Facebook account was "largely irrelevant," several pieces of content were relevant to his post-accident physical capabilities and transportation-related activities: a photograph of a Harley Davidson motorcycle he might have recently purchased, a list of interests that included "motorcycles," and a post suggesting he had traveled to West Virginia via motorcycle. The court limited discovery to those relevant items. Thus, when litigants post Facebook photographs demonstrating their ability to engage in activities specifically referenced in their claims for loss of enjoyment of life, courts should admit such content as relevant to assessing those claims.

However, litigants' use of Facebook photographs to prove a party's emotional state poses a greater risk of unfair prejudice through misrepresenting the party. In both *Altajir* and *Romano*, the courts acknowledged that Facebook photographs could elicit reasonable inferences about the litigant's culpability or happiness. Yet, given the serious implications of probation revocation in *Altajir*, it seems at

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151. See *supra* note 134 and accompanying text.
152. *Jones, supra* note 72.
155. *Id.* at *1-2.
156. *Id.*
157. See *id.*
158. See *supra* notes 69-70 and accompanying text (describing the experience-expression discrepancy in relation to Facebook).
best premature, and at worst unfairly prejudicial, for the court to have accepted the inferences the prosecution drew from Altajir’s Facebook photographs—an argument that Altajir’s counsel has raised on appeal to the Supreme Court of Connecticut. Similarly, the Romano court seemed too willing to deem the photograph of Romano standing outside her home as damaging to Romano’s claim that her injuries “largely confined” Romano to her house and bed.

Legal commentators have critiqued courts’ perfunctory analyses of Facebook photographs as evidence of litigants’ true emotional states. One observer, satirizing how the Romano court accepted the defendant’s characterization of the plaintiff’s photographs as proving her enjoyment of life, declared regarding her appeal, “I hope Romano’s working on uploading a lot of new photos to her ‘Look How Miserable My Life Actually Is’ Facebook photo album.” This quip highlights the superficial manner by which courts have analyzed Facebook photographs. Indeed, courts’ failures to examine the context of such photographs suggest their lack of appreciation for users’ complex psychosocial motives when posting content.

Furthermore, in examining a civil claimant’s loss of enjoyment of life, or a criminal defendant’s level of remorse, courts should not overlook the distortive effects of social norms that promote smiling in photography. Litigants’ internal sentiments do not necessarily

160. Altajir, 2 A.3d at 1033. Altajir’s counsel has appealed to the Supreme Court of Connecticut, arguing that the appellate court failed to recognize the sentencing court violation of Altajir’s due process rights by relying on unfounded inferences drawn from (Facebook) photographs. See Brief of the Defendant-Appellant, State v. Altajir, 2 A.3d 1024 (Conn. App. Ct. 2010) (No. S.C. 18706), 2010 WL 7697926, at *4. Furthermore, Altajir’s appellate brief emphasizes the unreliability of using Facebook photographs to judge an individual’s level of remorse. Id. at *16-17 (“[i]t was inappropriate to penalize her for appearing happy and then speculating that because she occasionally appeared happy or was happy, that she was remorseless regarding the underlying offense. Random photographs of the Defendant, expressing joy or sadness, are superficial and unreliable barometers for measuring whether she was remorseful.”).

161. Romano, 907 N.Y.S.2d at 654.

162. See, e.g., Hill, supra note 114; see Venkat Balasubramani, It May be Best to Shut Down Your Facebook Account While You are on Probation—State v. Altajir, TECHNOLOGY & MARKETING LAW BLOG (Nov. 2, 2010, 4:43 PM), http://blog.ericgoldman.org/archives/2010/11/defendant_dinge.htm (stating the importance of the timing of the photographs in Altajir and stating that the court fails to discuss whether the trial court examined their authenticity or reliability). Noting the court’s failure to address the date of the photographs in Romano, Romano’s attorney announced his intention to dispute the issue, arguing that the pictures predated Romano’s injuries. See John Riley, Privacy Comes Down, NEWSDAY, Sept. 26, 2010, at A9 (discussing the reaction of Romano’s attorney to Romano).

163. Hill, supra note 114.

164. See id.

165. See Amy Y. Chou & Billy B.L. Lim, A Framework for Measuring Happiness in Online Social Networks, 11 ISSUES INFO. SYS. 198, 198 (2010) (noting that most people smile in
manifest in observable form, and therefore emotionally damaged or remorseful litigants would likely not post pictorial evidence of their true feelings on Facebook.166 Because social norms encourage taking photographs of happy moments, individuals are unlikely to capture shameful, regrettable, or lonely moments with a camera.167 On Facebook, where the convention is to portray a smiling and social persona, users’ pictures arguably present biased impressions of their complex emotional lives.168 As social scientists have demonstrated, smiles are outward representations of a range of emotions, thus requiring examination of context and cultural norms to assess the meaning of a smile in a photograph.169 Consequently, when an attorney aims to refute a claim for loss of enjoyment of life by offering the claimant’s “happy” Facebook pictures, courts’ admission of those photographs may mislead fact-finders about the individual’s true emotional state. Jurors may not realize that people might use Facebook as a means of “keeping up appearances” by portraying their lives as happy, thus belying litigants’ actual emotional states at the time of taking the photographs.170 With respect to criminal defendants awaiting sentencing, courts may not consider that defendants may delay their expression of remorse, rendering premature counsels’ emphases on a single photograph as proof of the presence or absence of that emotion.171

B. Applying the Lessons of Expert Testimony on Eyewitness Identification to Psychological Research on Facebook

Given litigants’ use of Facebook photographs as evidence, it is reasonable to question whether fact-finders understand the social norms of websites like Facebook when courts ask them to assess this

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166. See Ward, supra note 111, at 134 (asserting that if remorse is an inwardly possessed feeling, one might not expect a criminal defendant to outwardly manifest that sentiment, and noting that subjectivity, deception, cultural values, developmental limitations, and psychological problems may also impact the presence or absence of remorse).

167. See Jaffe, supra note 65 (noting that American culture encourages expressing emotions while other cultures discourage such expression).

168. See supra note 68 and accompanying text. Indeed, it would be the strange person who posts a picture depicting the individual in an undesirable or despondent light. See supra notes 58, 62 and accompanying text.

169. See Jaffe, supra note 65.

170. See Weatherford, supra note 111, at 686-87 (positing that information shared on social networking sites may present a distorted view of defendants, whose desire to appear “cool” may result in an online persona divergent from their true characters).

171. See Ward, supra note 111, at 146-57.
evidence. Psychologists’ studies of Facebook indicate that people may present an enhanced image of themselves on their profiles, which may not be immediately apparent to juries tasked with interpreting a Facebook photograph offered to prove its subject’s emotional state. In analyzing jurors’ abilities to assess Facebook evidence, a similar issue in the law may provide valuable insight—namely psychological errors in eyewitness identifications.

Social scientists’ revelations of the psychological errors contributing to eyewitness misidentifications prompted courts to begin admitting expert testimony in cases involving an identification implicating the defendant. Researchers demonstrated that a variety of psychological errors could result in identifying the wrong individual, including the lack of correlation between a witness’s confidence in, and the accuracy of, an identification. Through controlled experiments, researchers have shown that an eyewitness’s confidence strongly influences jurors to believe that the identified individual is the actual offender. Further, social scientists have determined that eyewitness confidence in an identification is the strongest predictor of guilty verdicts, a troubling finding given the psychological influences fostering that confidence. Juries tend to place significant weight on eyewitness identifications, and thus a

172. See supra notes 50-51 and accompanying text (describing Facebook members’ use of profile photographs to project desired personas).


175. Id.; Gary L. Wells, Eyewitness Identification: Systemic Reforms, 2006 WIS. L. REV. 615, 620-21 (discussing controlled experiments revealing the correlation between confidence and accuracy in eyewitness identification to be +.40 on a scale where +1.0 is a perfect correlation and 0.0 is zero correlation).

176. Barbara H. Agricola, Note, The Psychology of Pretrial Identification Procedures: The Showup is Showing Out and Undermining the Criminal Justice System, 33 L. & PSYCHOL. REV. 125, 133 (2009). Beyond researchers’ recognition that eyewitness identifications are unreliable, the US Supreme Court has condemned eyewitness misidentifications as the leading cause of wrongful convictions, and the US Department of Justice has issued guidance to assist law enforcement in avoiding mistaken identifications. See United States v. Wade, 388 U.S. 218, 228-29 (1967) (stating that “[t]he identification of strangers is proverbially untrustworthy” and noting that eyewitness misidentification is often attributed to the suggestiveness with which the prosecution presents suspects to the eyewitness for identification); NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), available at http://www.ojp.usdoj.gov/nij/pubs-sum/178240.htm (acknowledging the fallibility of eyewitness evidence and stating that DNA evidence has been used to exonerate individuals convicted primarily based on eyewitness testimony).
mistaken identification may indirectly result in false convictions.\textsuperscript{177} Indeed, a study of exonerations between 1989 and 2003 revealed that 64 percent of wrongful convictions involved a mistaken identification.\textsuperscript{178}

Today, many courts recognize that expert testimony on eyewitness misidentification mitigates the risk that fact-finders will assign excessive weight to an identification.\textsuperscript{179} However, this recognition arose only after social science studies, exonerations of falsely convicted individuals, and commentators’ advocacy for expert testimony in eyewitness identification cases.\textsuperscript{180} To be sure, courts rarely admitted such expert testimony before research on eyewitness error emerged in the 1980s, and even today, courts do not universally admit expert testimony on eyewitness misidentification.\textsuperscript{181} After courts began admitting such testimony, studies indicated that it significantly promoted jurors’ understanding of the unreliability of eyewitness identifications.\textsuperscript{182} Commentators noted that where expert witnesses presented research findings on eyewitness misidentification, jurors were less likely to assign excessive weight to an eyewitness’s testimony at trial.\textsuperscript{183}

\textsuperscript{177} McMurtrie, supra note 173, at 1278.
\textsuperscript{178} Agricola, supra note 176, at 134.
\textsuperscript{179} Saul M. Kassin et al., On the “General Acceptance” of Eyewitness Testimony Research, 56 AM. PSYCHOLOGIST 405, 412 (2001) (noting that 77 percent of eyewitness experts surveyed believed their primary purpose was to educate the jury on eyewitness testimony); Shelton, supra note 173, at 958.
\textsuperscript{181} See Michael R. Leippe, The Case for Expert Testimony About Eyewitness Memory, 1 PSYCHOL. PUB. POL’Y & L. 909, 911 (1995) (noting that before courts recognized eyewitness expert testimony, courts assumed that traditional devices would suffice to ensure a fair trial, including cross-examination, rules designed to bar admission of identifications resulting from suggestive or coercive police procedures, and cautionary jury instructions); David A. Sonenshein & Robin Nilon, Eyewitness Errors and Wrongful Convictions: Let’s Give Science a Chance, 89 OR. L. REV. 263, 293-300 (2010) (discussing courts’ disagreements on whether to admit expert eyewitness testimony due to courts’ contrary determinations of whether jurors require assistance in evaluating identification evidence); see also Wells, supra note 175, at 615-16 (indicating that psychologists began conducting scientific experiments regarding eyewitness identification in the mid 1970s).
\textsuperscript{182} O’Hagan, supra note 180, at 756.
\textsuperscript{183} Leippe, supra note 181, at 940-41 (discussing jurors’ heightened skepticism of eyewitness testimony following expert testimony on eyewitness misidentification errors); O’Hagan, supra note 180, at 756.
The lessons of social science in substantiating eyewitness misidentification inform the evidentiary relevance of Facebook photographs.\textsuperscript{184} Like jurors’ tendencies to place undue weight on eyewitness identifications, fact-finders may assign excessive weight to a Facebook photograph admitted to demonstrate a litigant’s emotional state.\textsuperscript{185} Just as evidence of eyewitness identification errors aided fact-finders in assessing the weight of a given identification, social science on Facebook pictures—such as research concerning users’ motivations for posting or removing photographs—may serve a similar purpose in aiding fact-finders to assess the relevance of such pictures.\textsuperscript{186}

\section*{III. LOOKING BEYOND THE FACE VALUE OF FACEBOOK PICTURES}

Given the broad discovery allowances under the Federal Rules of Civil Procedure, critical analysis of the evidentiary uses of Facebook photographs should focus on admissibility rather than discoverability.\textsuperscript{187} To reduce the risk that liberal discovery will permit the admission of irrelevant Facebook content, one commentator has proposed that courts adopt a rebuttable presumption of discoverability for such content, allowing litigants to present evidence about how they restricted access to the content in order to refute the presumption.\textsuperscript{188} However, this solution would likely fail, as courts’ permissive discovery standard for Facebook profiles indicates that courts would likely reject any rebuttal attempt—such as evidence of privacy settings—and ultimately order the content discoverable.\textsuperscript{189} Thus, targeting the admissibility of Facebook photographs would more

\begin{itemize}
\item \textsuperscript{184} See McMurtrie, \textit{supra} note 173, at 1276 (noting that research reveals expert testimony on memory and eyewitness identification to be the only effective way to sensitize jurors to eyewitness errors).
\item \textsuperscript{185} See, \textit{e.g.}, \textit{supra} note 118 and accompanying text (discussing the court’s interpretation of a criminal defendant’s Facebook photograph in demonstrating his lack of remorse).
\item \textsuperscript{186} See \textit{supra} note 68 and accompanying text.
\item \textsuperscript{187} See Bennett, \textit{supra} note 83, at 416 (stating FRCP framers’ intent to broadly interpret e-discovery); Shari Claire Lewis, \textit{Courts Grapple with Discovery of Posts}, \textit{NEW YORK LAW JOURNAL} (Feb. 15, 2011), \url{http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202481896869} (noting the strong public policy of open disclosure in discovery).
\item \textsuperscript{188} See Ramasastry, \textit{supra} note 17 (suggesting that courts could allow parties to rebut the presumption of discoverability based upon the manner in which a litigant shared or restricted a given posting on a social networking site); see also North, \textit{supra} note 12, at 1309 (arguing that an overly broad discovery order of a litigant’s social networking profile risks disclosure of irrelevant content).
\item \textsuperscript{189} See Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 654 (Sup. Ct. 2010) (pointing to New York’s liberal disclosure policy as justifying discovery of plaintiff’s restricted Facebook content to defendant).
\end{itemize}
effectively ensure the fairness of proceedings in which parties present Facebook photographs for evidentiary purposes.

When a litigant offers an opponent’s Facebook photographs to prove state of mind, the opponent may request an in camera review to determine whether the court should exclude any photographs as irrelevant, unfairly prejudicial, or otherwise inadmissible under FRE 403. Additionally, litigants could request the admission of expert testimony from a social scientist about Facebook and its users’ abilities to project misleading images. Finally, a litigant may seek to offer testimony from a lay witness, whose personal experience with using Facebook, or whose knowledge of the litigant’s emotional state at the relevant time, could aid the jury in interpreting a Facebook photograph.

A. Measures to Enhance the Fairness of a Proceeding Involving the Evidentiary Use of Facebook Photographs

To advocate for the admission of only relevant evidence, litigants may seek to exclude specific Facebook photographs before trial through in camera review, or they may propose to introduce witnesses to testify about Facebook and its users’ social norms. In camera inspection offers litigants a means to exclude Facebook photographs before presentation to a juries. By contrast, expert and lay witness testimony serve to assist fact-finders in interpreting Facebook photographs already admitted into evidence. Expert witness testimony may identify the social norms surrounding Facebook photographs and the psychological factors that could lead to misinterpreting a subject’s emotional state. Additionally, lay witness testimony may aid jurors in weighing Facebook photographic evidence either through a lay witness’s personal knowledge of Facebook’s social norms, or through testimony concerning the witness’s knowledge of the litigant’s emotional state at the relevant time. In ruling on parties’ requests for in camera review or for the admission of witness testimony, courts assume an active role in assuring that fact-finders have an adequate opportunity to

190. See Fed. R. Evid. 403 (stating that “relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”).
191. See Fed. R. Evid. 702 (providing for expert witness testimony).
192. See Fed. R. Evid. 701 (providing for lay witness testimony).
193. See supra notes 184-185 (discussing the potential role of social science in preventing erroneous interpretations of a litigant’s Facebook photographs as proof of state of mind).
understand the context of Facebook photographs offered to prove a litigant’s state of mind.\textsuperscript{194}

1. \textit{In Camera} Review

Courts ought to be receptive to parties’ motions \textit{in limine} requesting pretrial review of Facebook photographs as a means of excluding irrelevant evidence.\textsuperscript{195} This process, called \textit{in camera} review, would enable courts to distill the relevant information from the minutiae of Facebook content subject to discovery.\textsuperscript{196} By narrowing the scope of admissible Facebook photographs, this process eliminates those photographs that have no relevance to the case, would serve only to distract or confuse the jury, or unfairly prejudice the litigation.\textsuperscript{197}

Moreover, \textit{in camera} inspection would allow attorneys to present judges with social science studies of Facebook before a jury sees any of the Facebook pictures at issue.\textsuperscript{198} As commentators have noted, educating judges—along with litigants—on the potential for Facebook content to present a distorted view of a litigant’s emotional state would reduce the risk that juries will give excessive weight to such photographs.\textsuperscript{199} Attorneys could use \textit{in camera} review to alert judges to research on how Facebook fosters an aspirational

\textsuperscript{194} See supra note 179 (noting that social science influenced courts’ willingness to admit expert testimony on eyewitness misidentification).

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self-presentation—a phenomenon that fact-finders should be aware of in analyzing the context of Facebook photographs.\textsuperscript{200}

However, \textit{in camera} review undeniably requires additional judicial resources in sorting out the relevant Facebook photographs suitable for admission to a jury.\textsuperscript{201} In \textit{Zimmerman v. Weis Markets, Inc.}, a Pennsylvania state court rejected the plaintiff’s request for \textit{in camera} review of his Facebook content in order to decide which portions he must release per the defendant’s motion to compel disclosure.\textsuperscript{202} \textit{Zimmerman} rejected the \textit{in camera} mechanism because it would place an “unfair burden” on the court.\textsuperscript{203} Additionally, the \textit{Zimmerman} court doubted its own ability to distinguish relevant from irrelevant content, stating that \textit{in camera} inspection would require “guess[ing] as to what is germane to defenses which may be raised at trial.”\textsuperscript{204} Considering the multitude of information that individuals post on Facebook, \textit{in camera} review may simply not be a feasible means of assessing the relevance of individual pieces of Facebook content.\textsuperscript{205}

Furthermore, while \textit{in camera} inspection is a potentially powerful mechanism for ensuring that courts admit only relevant Facebook photographs, its effectiveness depends on courts’ willingness to critically examine those pictures. As Romano and Altajir illustrate, this approach may be premature given courts’ assessments of a litigant’s emotional state by viewing only a few photographs.\textsuperscript{206} Thus, for \textit{in camera} review to successfully filter out irrelevant content, attorneys ought to call courts’ attention to social science revealing

\begin{itemize}
  \item \textsuperscript{200} See supra note 68 and accompanying text. Moreover, attorneys could present studies on how Facebook’s privacy settings facilitate divergent images of a user to the individual’s intended audience(s). See supra notes 52-53 and accompanying text.
  \item \textsuperscript{201} See Offenback v. L.M. Bowman, Inc., No. 1:10-CV-1789, 2011 WL 2491371, at *2-3 (M.D. Pa. June 22, 2011) (questioning the court’s need to review plaintiff’s Facebook postings through \textit{in camera} review and submitting that it would have been “appropriate and substantially more efficient” for plaintiff to have initially reviewed his Facebook profile and then objected to specific content if he deemed it warranted); see also Venkat Balasubramani, \textit{Court Conducts in Camera Review of Plaintiff’s Facebook Page to Resolve Discovery Dispute—Offenback v. Bowman, TECHNOLOGY & MARKETING LAW BLOG} (June 24, 2011, 9:45 AM), http://blog.ericgoldman.org/archives/2011/06/court_conducts.htm (discussing \textit{Offenback} and noting the conflicting privacy and evidentiary interests in such discovery disputes).
  \item \textsuperscript{203} Id. at n.2. Addressing these efficiency concerns, the court noted that \textit{in camera} inspection would necessitate the time and resources to thoroughly search the social networking sites on which the plaintiff posted content. \textit{Id.}
  \item \textsuperscript{204} \textit{Id.}
  \item \textsuperscript{205} See \textit{Statistics, supra} note 2 (noting that the average user creates ninety pieces of content on the website each month).
  \item \textsuperscript{206} See supra notes 125, 138-139 and accompanying text.
\end{itemize}
observers’ tendencies to misinterpret the emotional state depicted in a Facebook photograph.\textsuperscript{207}

2. Expert Testimony

Litigants may seek to mitigate the evidentiary problems of Facebook photographs admitted into evidence by requesting to present expert testimony on the risks of using such content to prove a party’s emotional state. The US Supreme Court has recognized trial courts’ gatekeeping role in this area, granting judges ample discretion to admit expert testimony on a range of fields, and affording expert witnesses wide latitude to offer their opinions.\textsuperscript{208}

FRE Rule 702 permits courts to qualify a witness as an expert through a showing of “knowledge, skill, experience, training, or education.”\textsuperscript{209} Expert witnesses may present testimony in the form of an opinion if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.\textsuperscript{210}

Because the FRE state that admission of an expert witness hinges on the individual’s “knowledge, skill, experience, training, or education,” this rule enables courts to admit experts from a broad range of disciplines.\textsuperscript{211}

In cases involving Facebook photographs, parties may invoke these evidentiary rules to request that the court qualify an expert in

\textsuperscript{207} See supra notes 84-85 and accompanying text.

\textsuperscript{208} Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147-48 (1999) (extending Daubert’s holding to all expert testimony, not merely “scientific” testimony); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592, 594-95, 597 (1993) (establishing trial courts’ gatekeeping role to determine admissibility of expert testimony). Before a court admits expert witness testimony, the testimony must meet three basic prerequisites: (1) evidence must be based on specialized knowledge and must be useful to the fact-finder in understanding the evidence or making factual determinations necessary to decide the ultimate factual issue, (2) the proposed witness must be qualified to provide the fact-finder with that assistance, and (3) the proposed testimony must be reliable or trustworthy. See 4-702 HON. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 702.02 (Hon. Joseph M. McLaughlin ed., 2d ed. 1997).

\textsuperscript{209} Fed. R. Evid. 702.

\textsuperscript{210} Id.

the field of social networking psychology. A court may certify a social psychologist with demonstrated “knowledge, skill, experience, training, or education” in social networking sites as possessing the kind of “specialized knowledge” that would aid jurors in weighing the evidentiary value of Facebook photographs.

As with social science on witness misidentification, expert testimony on the psychology of Facebook could sensitize fact-finders to the risks of reviewing Facebook photographs too superficially, thereby informing their assessment of the evidence presented at trial. Consequently, the educational mechanism of expert testimony would reduce the risk that fact-finders would automatically construe a litigant’s Facebook persona as reflecting the litigant’s emotional state at the time captured in the photograph.

The fact that social science research on Facebook is so recent could hamper litigants’ abilities to admit expert testimony on the distortive potential of Facebook photographs. Because FRE 702 requires that an expert’s opinion testimony derive from “sufficient facts or data,” a court could refuse to qualify an expert in the area of social networking research, reasoning that the evidence is too preliminary or anecdotal. Thus, as social scientists continue to examine Facebook users’ behaviors in controlled studies, courts may be more likely to admit expert testimony on the psychology of social networking sites.

212. See Fed. R. Evid. 702.
213. See Fed. R. Evid. 702; Romano, supra note 211.
214. See supra notes 175-176 and accompanying text.
215. See supra note 124 and accompanying text (discussing Altajir’s argument that the prosecution in Altajir did not verify the dates of the photographs offered to show her lack of remorse).
216. Fed. R. Evid. 702. To determine whether sufficient facts or data support the proposed expert testimony, courts consider factors such as whether the witness proposes to testify based on matters naturally growing out of research the individual conducted independently of the litigation, or whether the witness’s opinions developed solely for purpose of testifying at trial. See 4-702 Hon. Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence § 702.05 (Hon. Joseph M. McLaughlin ed., 2d ed. 1997). Additionally, if the court finds that the proposed testimony relies unduly on anecdotal evidence, the court may find that the testimony is not adequately based on facts. See id. Courts may also exclude testimony under Rule 403 if its probative value is substantially outweighed by its potential for unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. See Fed. R. Evid. 403.
217. See Fed. R. Evid. 701.
3. Lay Testimony

Aside from expert testimony, parties have other means of directing fact-finders to critically assess the relevance of Facebook photographs already admitted into evidence. Under FRE 701, a court may admit lay opinion testimony so long as it is “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of [the rule on expert witness testimony].” Trial courts have broad discretion to decide whether to admit lay opinion testimony. Like expert testimony, lay opinion testimony is designed to aid fact-finders in understanding a fact in dispute, such as a litigant’s emotional state.

In cases involving Facebook photographs, a litigant may present lay witness testimony to explain the social norms of Facebook users. Thus, lay witnesses who hold a Facebook account and have used the “Photos” application, can testify about their personal experience with the application and their observations of how others present themselves through their profiles. Witnesses may also testify about their perceptions of Facebook’s social norms, specifically regarding whether the website encourages users to post photographs depicting social or “happy” moments.

Moreover, a party may present lay opinion testimony by witnesses with personal knowledge of the litigant’s emotional state at the time captured in the photograph. Lay witnesses may testify about another’s emotional state so long as they are sufficiently acquainted with the litigant to have a rational basis for rendering the opinion, and the testimony meets all requirements of Rule 701.

218. Id. With respect to the first requirement, lay witnesses may offer testimony about their personal observations of the event or situation in question. See 4-701 Hon. Jack B. Weinstein & Margaret A. Berger, WEINSTEIN’S FEDERAL EVIDENCE § 701.06 (Hon. Joseph M. McLaughlin ed., 2d ed. 1997). Next, lay opinion testimony must be rationally derived from the witness’s personal perceptions, and the witness may rely on prior personal experiences to interpret perceptions if the prior experiences were sufficiently numerous or informative. See id. As to the third requirement, the lay witness’s testimony must help the fact-finder understand the witness’s testimony or determine a disputed fact. See id. Finally, the lay opinion testimony must not be based on specialized knowledge in the domain of expert witnesses. See id.

219. See Weinstein & Berger, supra note 218, at § 701.06. The trial court must also determine whether the probative value of the lay opinion testimony is substantially outweighed by the risk of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. See Fed. R. Evid. 403.

220. Fed. R. Evid. 701; see Fed. R. Evid. 702.

221. See Fed. R. Evid. 701.

222. See id.

223. See Weinstein & Berger, supra note 218, at § 701.03.
Thus, where an adversary uses Facebook photographs to contradict a litigant’s claimed remorse or loss of enjoyment of life, lay witnesses can support those claims by testifying about their personal perceptions of the litigant’s emotional state.

By informing fact-finders about Facebook’s social norms, lay opinion testimony on users’ self-presentation may have a stronger impact on a jury than similar testimony by an expert witness. A juror may find a lay Facebook user’s personal perceptions more persuasive than an expert’s indirect testimony about the website’s users. However, because jurors will likely be Facebook members themselves, they may disregard lay testimony if it does not align with their own perceptions of the website’s social norms. Expert witness testimony on Facebook may persuade such jurors on the theory that social science findings based on a larger population of users are more reliable than a single user’s testimony.

IV. Conclusion

As Facebook continues its reign as the most popular social networking site, the website likely will play an increasingly significant role in the courtroom through the admission of Facebook content as evidence. While the legal community has recognized Facebook as a valuable source of information, courts and litigants have yet to appreciate the nuances of the website and how observers interpret users’ profiles. As social scientists have demonstrated, social norms, both outside and inside Facebook, may prompt individuals to display an enhanced image of themselves through their profiles. Given the broad discoverability of Facebook content and the low standard for admissibility under US evidence rules, introducing litigants’ Facebook content will likely become common practice.

In order to enhance the fairness of a proceeding involving Facebook content, courts ought to ensure that fact-finders view only relevant evidence, and that they understand the context of the photographs through information about Facebook users’ social norms. The proposed measures of in camera review, expert testimony, and lay testimony would each guide fact-finders in interpreting Facebook photographs. In camera inspection would enable courts to screen out irrelevant Facebook photographs prior to their presentation to fact-finders. The specialized knowledge of a social science expert

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224. See supra notes 50-51, 53 and accompanying text.
225. See supra notes 106-108 and accompanying text.
226. See supra notes 144-147 and accompanying text.
227. See supra notes 195-196 and accompanying text.
witness would aid fact-finders in interpreting Facebook photographs admitted into evidence.228 Similar to how eyewitness misidentification testimony helps fact-finders interpret identification evidence, expert witnesses can aid fact-finders to interpret Facebook photographs through testimony regarding factors that contribute to misinterpreting the emotional state depicted in a picture.229 Finally, lay witness testimony describing Facebook’s social norms or the litigant’s emotional state would aid fact-finders in assessing whether a Facebook photograph accurately portrays the party’s state of mind.230

In evaluating the evidentiary relevance of Facebook photographs, trial courts should adhere to their gatekeeping role231 by excluding evidence that is irrelevant, unfairly prejudicial, or otherwise inadmissible under the FRE. The proposed solutions of in camera review, expert testimony, and lay testimony would reduce the risk that fact-finders will make misleading inferences from a litigant’s Facebook pictures. Social scientists have revealed how observers may misinterpret the emotion displayed in a Facebook photograph.232 and further study would be helpful in substantiating the risks of taking Facebook pictures at face value. Given that social networking sites have become part of today’s culture, courts and litigants ought to understand the background social norms of these websites if their content is to play a role not only in facilitating friendships—but also in granting or denying legal rights, benefits, and obligations.

Kathryn R. Brown*

228. See supra note 213 and accompanying text.
229. See supra note 212 and accompanying text.
230. See supra notes 221-223 and accompanying text.
231. See supra notes 80-81 (noting courts’ broad discretion to determine the relevance of evidence).
232. See supra notes 64-66 and accompanying text.
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