The Emoji Factor: Humanizing the Emerging Law of Digital Speech

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Emoji are widely perceived as a whimsical, humorous or affectionate adjunct to online communications. We are discovering, however, that they are much more: they hold a complex socio-cultural history and perform a role in social media analogous to non-verbal behaviour in offline speech. This paper suggests emoji are the seminal workings of a nuanced, rebus-type language, one serving to inject emotion, creativity, ambiguity – in other words 'humanity' - into computer mediated communications. That perspective challenges doctrinal and procedural requirements of our legal systems, particularly as they relate to such requisites for establishing guilt or fault as intent, foreseeability, consensus, and liability when things go awry. This paper asks: are we prepared as a society to expand constitutional protections to the casual, unmediated 'low value' speech of emoji? It identifies four interpretative challenges posed by emoji for the judiciary or other conflict resolution specialists, characterizing them as technical, contextual, graphic, and personal. Through a qualitative review of a sampling of cases from American and European jurisdictions, we examine emoji in criminal, tort and contract law contexts and find they are progressively recognized, not as joke or ornament, but as the first step in non-verbal digital literacy with potential evidentiary legitimacy to humanize and give contour to interpersonal communications. The paper proposes a separate space in which to shape law reform using low speech theory to identify how we envision their legal status and constitutional protection.

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INTRODUCTION

Emoji are popular digital pictograms[2] that can appear in text messages, emails, and online social media platforms.[3] They are widely perceived as light-hearted semaphore and a comedic form of communication;[4] they can also serve

[2] Jeremy Burge, *5 Billion Emoji Sent Daily on Messenger,* EMOJIPEDIA (17 July 2017) https://blog.emojipedia.org/5-billion-emojis-sent-daily-on-messenger/ (noting that 6 million emoji are posted daily on Facebook). This paper uses the terms 'emoji', 'pictograms', 'pictographs', and 'icons' interchangeably.

[3] Luke Stark & Kate Crawford, *The Conservatism of Emoji: Work, Affect, and Communication,* SOC. MED. + SOC., 1 (abstract) (2015). The term 'emoji' is used herein to denote both singular and plural. *See further* Robinson Meyer, *What's the Plural of Emoji?* ATLANTIC (6 January 2016), https://www.theatlantic.com/technology/archive/2016/01/whats-the-plural-of-emoji-emojis/422763/.

[4] *Emojineering Part 1: Machine Learning for Emoji Trends,* INSTAGRAM ENGINEERING (30 April 2015) https://engineering.instagram.com/emojineering-part-1-machine-learning-for-emoji-trendsmachine-learning-for-emoji-trends-/; *Emoji,* EMOJI REPORT (2015) http://emogi.com/documents/Emoji Report_2015.pdf (reporting that emoji are used by 92% of the online population.)

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more malicious functions. For some, emoji hold a rich and complex sociocultural history that might inform efforts to translate communications via mobile devices using various digital platforms. Others view these virtual cartoon icons as online venting that can achieve bullying, defamatory messaging, harassment, or imminent threats.

Using icons to illuminate messages is not new; from the exclamation point (!) and asterisk (*) to the rebus puzzles designed for youthful education and entertainment, images and symbols have been favoured over time to clarify and humanize text. The rise of emoji popularity[5] has been explained with reference to the iconic "smiley" face of the past century as explored through "typographic habits, corporate strategies, copyright claims, and online chat rooms."[6] They have survived snubs by more conventional text users, confusion or dismissal by jurists,[7] as well as disputes by technical standards bodies.

Emoji serve many ends. They save  , reduce  , and can even breach the  divide.[8] Mostly genial and increasingly widespread,[9] emoji can provide a vernacular antidote to postmodern angst, echo chambers, and communication silos that mark our attempts at online sociality: they offer to 'smooth out the rough edges of digital life.'[10]

Those graphic symbols can be used to underscore tone, introduce youthful exuberance, and give individuals a quick and efficient way to infuse otherwise monochrome text with tenor and personality. Just as non-verbal cues such as intonation and gesture inform our verbal communications, emoji can

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[5] *See* Clive Thompson, *The Emoji is the Birth of a New Type of Language (? No Joke),* WIRED (19 April 2016) https://www.wired.com/2016/04/the-science-of-emoji/.

[6] Stark & Crawford, *supra* fn 3.

[7] Amanda Hess, *Exhibit A: ;-),* SLATE (26 October 2015) http://www.slate.com/articles/technology/users/2015/10/emoticons_and_emojis_as_evidence_in_court.html.

[8] Translation: "They save time, reduce confusion, and can even breach the gender equality divide."

[9] Burge, *supra* fn 2; *see also*, Vivian Rosenthal, *Why emoji and stickers are big business,* FORBES (19 August 2016) https://www.forbes.com/sites/vivianrosenthal/2016/08/19/why-emojis-and-stickers-are-big-business/, (claiming 67 emoji are sent daily by 'a typical millennial").

[10] Stark & Crawford, *supra* fn 3 at 1.

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improve our one-dimensional or peremptory texting because they can add emotional undercurrents that intensify our human networking. People employ emoji as they would use more traditional assistants to verbal communication in the offline sphere: to help them express themselves and to assist others to understand them.[11] Indeed, a facilitative function of emoticons, a predecessor to emoji, was noted by a British judge in the *McAlpine v. Bercow* defamation case.[12] Two days after the BBC wrongly linked a "leading conservative politician" to sexual abuse claims, the wife of the speaker of the House of Commons posted a message to Twitter: *Why is Lord McAlpine trending. *innocent face**. The role of the emoticon was central to consideration of whether the tweet was defamatory. The judge analyzed those words and suggested emoticons are a stage direction that focuses the attention of the reader of the tweet on the equivalent non-verbal behavior:

> Readers are to imagine that they can see the defendant's face as she asks the question in the tweet. The words direct the reader to imagine that the expression on her face is one of innocence, that is an expression which purports to indicate (sincerely, on the Defendant's case, but insincerely or ironically on the Claimant's case) that she does not know the answer to her question.[13]

The London High Court ultimately determined that such icons were not beyond the comprehension of non-digital speakers as their meaning could be clarified through the use of extrinsic aids like newspaper accounts.

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[11] *Leading Reasons for Using Emojis According to U.S. Internet users as of August 2015*, STATISTA, https://www.statista.com/statistics/476354/reasons-usage-emojis-internet-users-us/.

[12] Lord McAlpine of West Green v Bercow [2013] EWHC1342 (QB) (with Justice Tugendhat finding that "the reasonable reader would understand the words 'innocent face' as being insincere and ironical', [84]).

[13] Id, at para 7.

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Cartoons have long enjoyed popularity through combining text and drawings to convey meaning.[14] However, the emergence of emoticons and emoji, and their ready deployment in digital speech, democratized the use of visual icons, making them readily available to a proliferating sector of users.

Such is their enrichment capacity that today emoji are viewed as an emotional coping strategy, a device that generates joy, and a novel form of creative expression.[15] Their function in technology-enhanced communications has been given a label, 'graphical user interface', tech-speak for expanding technical aptitude through images, often with democratizing results.[16]

This paper addresses the gap in legal reform that the explosion in emoji use has revealed. Its method is exploratory, rather than inclusive, and proceeds as follows: Part I considers historical indicators of the rise of the modern emoji, as well as various factors that challenge its interpretation. Part II presents a selection of case studies that involve judicial emoji translation and that challenge traditional legal doctrine. Case reviews emerge from various jurisdictions to focus on traditional criminal law, as well as the laws of contracts and torts. Part III proposes a discrete space in which to build a legal response to digital speech, most immediately through an examination of the historical distinction between 'high' and 'low' forms of social communications in order to assign constitutional protection and legal liability.

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[14] Cartoons using emoji can still cause interpretation difficulties. *See further*, Phil Matier and Andie Ross, *'Allah Akbar' and a Bomb Emoji Prompt Uproar at USF,* SAN FRANCISCO CHRON., (25 January 2017), http://www.sfchronicle.com/bayarea/article/Allah-Akbar-and-a-bomb-emoji-prompt-uproar-10881282.ph-; Alex Hern, *WhatsApp makes its own unique emojis – that look similar to Apple's,* GUARDIAN (3 October 2017), https://www.theguardian.com/technology/2017/oct/03/whatsapp-unique-emojis-apple-ios-facebook-messenger?CMP=Share_iOSApp_Other (thereby "adding to general air of cross-platform confusion").

[15] M. A. Riordan, *Emojis as Tools for Emotion Work: Communicating Affect in Text Messages,* J. LANG. & SOC. PSYCH. http://journals.sagepub.com/doi/10.1177/0261927X17704238 (April 2017).

[16] Kat Lecky, *Humanizing the Interface,* DIG. PED. LAB (March 2014) http://www.digitalpedagogylab.com/hybridped/humanizing-interface/ ("This hybrid technology opens the same world up to the excluded and powerful alike").

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I CHALLENGES TO EMOJI TRANSLATION

A. Humble beginnings: From Emoticons to Emoji

Today's emoji have deep historical roots as devices of counter-gravitas. For example, in 2017, archaeologists unearthed a clay pot, dated around 1700 BCE, in what is now the war-torn Turkey-Syria border: the ancient relic sports a genial smiley face on its surface.[17] Meanwhile, in the former Czechoslovakian state, a smiley-faced pictogram accompanies another discovery: the signature of Bernard Hennet, Abbot of a Cistercian cloister in 1741, suggesting levity and sociality in the letter's contents.[18] In America, the literary figure Ambrose Bierce (1842-1914) identified a need for a "snigger point" or note of cacchination[19] to punctuation "every jocular or ironical sentence". His choice had a decided emoticon appearance: _/![20] Some social historians point to a 1960s children's television program as the genesis of the modern American smiley-faced icon.[21] Others attribute the surge in the icon's popularity to a marketing plan to defuse insurance customers' anger over a corporate merger.[22]

For more recent references, we can look to Japan of the mid-1990s when the smiley face was added as a special graphic feature to a brand of pager then popular with teenagers.[23] Shigetaka Kurita recognized that online

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[17] Amanda Borschel-Dan, *History's 'oldest smile' found on 4,000-year-old pot in Turkey,* TIMES OF ISRAEL (19 July 2017) http://www.timesofisrael.com/historys-oldest-smile-found-on-4000-year-old-pot-in-turkey/.

[18] Jessica Jones, *A Czech Abbot Used a Smiley Almost Three Hundred Years Ago,* PRAGUE MORNING, (8 March 2017) http://www.praguemorning.cz/czech-abbot-used-smiley-almost-three-hundred-years-ago/.

[19] "To laugh loudly or immoderately," MERRIAM-WEBSTER online, https://www.merriam-webster.com/dictionary/cachinnate.

[20] WILLIAM DEESE, *Emoticons,* in WRITTEN WORD 22 (Eugene F. Provenzo, Jr, Amanda Goodwin, Miriam Lipsky, Sheree Sharpe eds. 2011).

[21] Jon Savage, *A Design for Life,* GUARDIAN (21 February 2009), https://www.theguardian.com/artanddesign/2009/feb/21/smiley-face-design-history.

[22] Stark & Crawford, *supra* fn 3 (describing the merger in 1963 of State Mutual Life Assurance Company of Worcester, Massachusetts, and Ohio's Guarantee Mutual Company).

[23] Jessica Bennett, *Emoji have won the battle of words,* NYTIMES (27 July 2014) https://www.nytimes.com/2014/07/27/fashion/emoji-have-won-the-battle-of-words.html; Erin Allen, *A*

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communications were likely to focus on terse exchanges in contrast with Japan's earlier tradition of long handwritten letters. Drawing from street signs, Chinese characters, and symbols used in manga comics,[24] Kurita devised symbols representing emotions and other intangibles.[25]

Various accolades and online services pay tribute to the growing fondness of several million mobile users worldwide for the pictographs those Japanese graphics have inspired.[26]For example, a blog has emerged called Emojinalysis purporting to psychoanalyze users' emoji preferences;[27] there has been a suggestion that a combination of emoji might replace pin codes for online banking;[28] and the Unicode Consortium, a non-profit organization headquartered in Mountain View, California, has created a uniform emoji alphabet.[29] It is

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Whale of an Acquisition, LIBR. CONGR. (22 February 2013) http://blogs.loc.gov/loc/2013/02/a-whale-of-an-acquisition/ (Fred Benenson funded the project, contracting thousands of people to each translate one sentence of the book into emoji).

[24] Manga are comics created in Japan, in the Japanese language, in a style developed in late 19th century Japanese art. The etymology of the word 'manga' indicates whimsical or impromptu pictures. *See further,* Jean-Marie Bouissou, *Japan's growing cultural power: The example of manga in France,* HAL ARCHIVES-OUVERTES (3 April 2014) https://hal.archives-ouvertes.fr/hal-00972716/document.

[25] This paragraph is informed by Rachel Scall, *Emoji as Language and Their Place Outside American Copyright Law,* 8 NYU J INTEL. PROP. & ENTER. L. (JIPEL) (2016).

[26] For example, the ❤️ emoji was crowned the 2014 top-trending word by the Global Language Monitor (see *'Truth': The Top Trending Global English Word For 2017,* GLOB. LANG. MON. (2017) http://www.languagemonitor.com/top-words-of-the-year/global-language-monitor-top-global-english-word-of-2017-is-truth/); the "face with tears of joy" icon or 😂 was declared 2015 Word of the Year by the Oxford English Dictionary (see *Announcing the 2015 Oxford Dictionary Word of the Year,* OXFORD DICT. (17 November 2015) http://blog.oxforddictionaries.com/press-releases/announcing-the-oxford-dictionaries-word-of-the-year-2015/); an emoji day (17 July) has been designated (*Let's Celebrate Emojis,* WORLDEMOJIDAY.COM, http://worldemojiday.com); and an emoji musical has premiered in Los Angeles (Andrew Gans, *New Musical About Emojis Will Premiere in Los Angeles,* PLAYBILL (12 April 2016) www.playbill.com/article/new-music).

[27] Daniel Brill, *Emojinalysis*, TUMBLR, http://emojinalysis.tumblr.com (urging viewers, 'You send me your used emojis, I'll tell you what's wrong with your life").

[28] Nitya Rajan, *Emojis Could Soon Replace Online Banking Pin Codes,* HUFFINGTON POST (15 June 2015)http://www.huffingtonpost.co.uk/2015/06/15/emojis-could-replace-online-banking-passwords_n_7583488.html.

[29] Unicode® Emoji, UNICODE.ORG at http://www.unicode.org/emoji/ (reporting a total of 2623 approved emoji as of 6 August 2017. Unicode is defined on the unicode.org website as a non-profit

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devoted to standardizing images across platforms in response to inconsistent graphics from one application to the next. [30]

Research involving the more modest emoticon has much to teach its graphically flashier cousin, the emoji. To assume that all interpretations offered by emoticons can be applied holus bolus to emoji, however, is to underestimate the complexity of design and usage that emoji have assumed over their short lives. A Cornell University sociologist observes, "even young people in the same neighbourhood are not sure what different emoji mean."[31]

The older, monochrome emoticon is composed of keyboard characters from any updated digital device.[32] It has been characterized as a compensatory strategy in computer-mediated communications to overcome the lack of nonverbal cues that are prevalent in face-to-face human interactions. It is easily identified as a facial expression, once the recipient adjusts to reading it on the horizontal, as presented in western cultures.[33]

In linguistic terms, the face emoticon is a basic morpheme from which variations are created by slight alterations to the eyes or mouth, [34] or the inclusion or omission of a nose. It offers fewer complexities of meaning than

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corporation for the development, maintenance, and promotion of software internationalization standards and data, particularly the Unicode Standard, which specifies the representation of text in all modern software products and standards).

[30] Bennett, *supra* fn 22. An email communication among World Wide Web Consortium staff dated 7 August 2017, (accessed at https://lists.w3.org/Archives/Public/public-css-archive/2017Aug/0502.html) confirmed that at present, "there is no way to supply a custom emoji font to browsers across platforms."

[31] Sam Stecklow, *Could Cops use Facebook Reactions to Target Criminals?* NY MAGAZINE, (7 March 2016), http://nymag.com/selectall/2016/03/could-cops-use-facebook-reactions-to-target-criminals.html, (citing Cornell University sociologist Desmond Patton).

[32] Conveyed as ASCII symbols. The origin of emoticon use has been attributed to Carnegie Mellon University computer science professor Scott Fahlman who, in 1982, proposed a joke marker to convey that postings on departmental chat boards were made in jest. *See further* Hess, *supra* fn 16.

[33] This paragraph is informed by Ilona Vandergriff, *A pragmatic investigation of emoticon use in nonnative/native speaker text chat,* 11 LANGUAGE@INTERNET (2014), http://www.languageatinternet.org/articles/2014/vandergriff. *See also,* J. B. Walther & K. P. D'Addario, *The impact of emoticons on message interpretation in computer-mediated communication*, 19 SOC. SCIENCE COMP. R., 324 (2001).

[34] In linguistics, a morpheme is the smallest grammatical or meaningful unit in a language.

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emoji in that there are fewer prototypes.[35] Its graphic simplicity suggests we can more quickly grow acclimatized to its basic message, expressing emotions through facial elements such as "happy face" :-) or "sad face" :-(or "winking face" ;-) or "face with tongue sticking out" :-P. Emoticon iconography has expanded to morpheme variants that offer gradients of emotions relating to a particular experience. For example, an anti-bullying website provides a specific inventory of emoticons for victims to express their emotional response to an experience: x-(("angry"), :> ("vicious"), :"> ("embarrassed), :-((("very sad") and the dismissive =; ("talk to my hand") when other emoticons fail to capture the desired sentiment.[36] In addition, MRI imaging has produced indicators that people find emotions in emoticons even when they are not perceived as faces at all.[37]

The eponymous emoticon (emotional + icon) thereby idealizes feelings and sentiments. That role brings social communicative valence. Such connection was identified in a 2007 study that found a linear correlation between the number of visual cues and the strength of the sender's emotional engagement as perceived by the recipient.[38] Other studies have found that emoticon users are perceived as more "socially present",[39] more dynamic than non-users[40] and "more emotionally stable".[41]

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[35] A. H. Huang, D. C. Yen, & X. Zhang, *Exploring the potential effects of emoticons*, 45 INFORM. & MGMT. (2008), 466-473; J.B. Walther, *Relational aspects of computer-mediated communication: Experimental observations over time*, 6 ORG. SCIENCE, 186-203 (1995).

[36] *What are the different kinds of emoticons?* NOBULLYING.COM (9 February 2015), *https://nobullying.com/emoticons/.*

[37] Masahide Yuasa, Keiichi Saito and Naoki Mukawa, *Emoticons convey emotions without cognition of faces: An fMRI study,* PROC. CONF. HUM. FACTORS COMP. SYS., Montréal, Québec, Canada (April 22-27, 2006).

[38] R. B. Harris & D. Paradice, *An investigation of the computer-mediated communication of emotion*, 3 J. APP. SCIENCE. RES., 2081-2090 (2007).

[39] M. Yamada & K. Akihori, K. *Social presence in synchronous CMC-based language learning: How does it affect the productive performance and consciousness of learning objectives?* 20 COMP. ASS. LANG. LEARN., 37- 65 (2007).

[40] D. Huffaker & S. L. Calvert, *Gender, identity and language use in teenage blogs,* 10 J. COMP-MED. COMM. (2005).

[41] C. Fullwood, S. Quinn, J. Chen-Wilson, D. Chadwick & K. Reynolds, *Put on a Smiley Face: Textspeak and Personality Perceptions.* CYBERPSYCH, BEHAVIOR & SOC. NET. (2015)

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The relaxed attitude to grammar, spelling, and punctuation within computer-mediated language determines usage: it assigns texting and icons to casual interactions but finds them "inappropriate in professional contexts".[42] One study of non-native English speakers cautions that emoticons can become a "pragmatic crutch" if used to mask an inability to communicate in a particular language.[43] Cultural differences in emoticon appearance have also been noted, as mentioned above with the practice of Asians to compose a smiley face with upright alignment[44] in contrast to the western preference for sideways display.[45] Since participants use emoticons for reasons of rapport and sociality, "cultural differences with respect to politeness and facework" are to be expected.[46]

Translation of icons is deceptively challenging. In 2010, a research team found that interpreting an emoticon as representative of a single emotion could be misleading. For example, the "winking face" ;-) might convey joking, but it might also signify teasing, flirting, or sarcasm.[47] Similarly, the meaning of "face with tongue sticking out" :-P has grown more nuanced with use, what linguists recognize as a fusional process over time that shortens or otherwise modifies the appearance of a language morpheme. Noting the lack of scholarly focus on the meaning of the protruding tongue across social situations and cultures, California psychologist Leon Seltzer wonders, "[n]uances abound: Is the tongue sticking straight out? To the left? Right? Hanging down? Or might it actually be

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https://www.researchgate.net/publication/273323519_Put_on_a_Smiley_Face_Textspeak_and_Personality_Perceptions. (Participants judged text-speak authors as less open but more emotionally stable.)

[42] Id.

[43] Id. *See also*, I. Averianova, *The language of electronic communication and its implications for TEFL*, 34 PROCEDIA – SOC. & BEHAVIORAL SCIENCES 34, 14-19 (2012).

[44] *_*

[45] :-).

[46] Vandergriff, *supra* fn 32.

[47] E. Dresner & S. C. Herring, *Functions of the nonverbal in CMC: Emoticons and illocutionary force,* 20 COMM. THEORY (2010) 249-268.

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curled?" [48] Historic referents of the curled tongue icon have been identified among the Maori as a prelude to battle; a show of tongue by the Tibetans is known to convey greeting or respect, and among adults in western cultures, tongue displays can be interpreted as childish or obnoxious behaviour. [49] Budapest linguist and icon scholar Agnes Veszelszki observes that recorded uses of a protruding tongue suggest it can punctuate a message with distinct meanings, such as "this is funny", "that made me smile", or "just joking".[50]

By comparison, emoji offer more detailed iconography, adding a wealth of design prototypes to expand the intricacies of messaging, such as coloured faces (red, green, blue, gray), skin tones, teeth, eyebrows, head coverings, gesturing arms and hands, and full bodies engaged in various activities. Those differences not only make emoji "more noticeable than emoticons"[51] but they appear to require more scrutiny to clarify translation. Expression is not limited to available keystrokes; faces are upright or upside down and encircled; features are graphic, not typographic; cues add detail, such as add-on hearts for eyes or streams for tears.

An entire research stream argues pictograms are more indicative of the *intention* of a user than any emotion. Communication theorists Dresner and Herring, for example, propose we focus on the "illocutionary force of an utterance", that is, what a speaker *means* to convey, rather than the non-intentional cues it contains.[52] One thinks of Erving Goffman's intentional facial

[48] Leon F. Seltzer, *What does it mean when we stick our tongues out?* PSYCH. TODAY (22 September 2015), https://www.psychologytoday.com/blog/evolution-the-self/201509/what-does-it-mean-when-we-stick-our-tongues-out.

[49] Id at 70.

[50] AGNES VESZELSZKI, DIGILECT: THE IMPACT OF INFOCOMMUNICATION TECHNOLOGY ON LANGUAGE (2017) 187.

[51] T. Ganster, S. Eimler, & K. Nicole, K. *Same But Different!? The Differential Influence of Smiles and Emoticons on Person Perception*, 15 CYBER., BEHAV. & SOC. NET., 226-230, doi:10.1089/cyber.2011.0179 (2012).

[52] Dresner and Herring, *supra* fn 46.

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expressions that aid in our presentation of self during day-to-day social interactions.[53]

A study of workplace emails supports that thinking.[54] Riordan *et al.* cite as example a smiley face emoticon used after a negative comment: it does not necessarily indicate the sender is smiling while saying something mean, but rather the contrary, that the comment was not intended in a malicious manner.[55] Within that context, emoticons serve as modifiers, "keying markers or contextualized clues",[56] nuance devices to signal that impact of a preceding message relies on hyperbole, irony, or sarcasm. Emoticons and their heirs apparent, emoji, thereby assume a modulating function for the written word.

B. The Development of Emoji as Digital Speech

The key function of language is to engage other humans in knowledge sharing and meaningful sociality. Communications theorist Marshall McLuhan wrote in the 1960s that a transformative leap in human cognition occurred in early tribal culture with the shift from pictographic to alphabetic writing.[57] He observed that the addition of a phonetic feature to "mere writing" could produce a visual code that resulted in a novel pattern of human interplay.[58] McLuhan stressed the ground-shifting importance of that innovative moment: he predicted that the "real sense of revolution" was to be found "in …[a] prolonged phase of 'adjustment' of all personal and social life to the new model of perception set up by the new technology."[59]

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[53] *See generally,* E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

[54] Karianne Skovholt, Anette Gronning, and Anne Kankaanranta, *The Communicative Functions of Emoticons in Workplace E-Mails: :-)* 19 J. COMP.-MED. COMM. (2014) 780–797, doi:10.1111/jcc4.12063.

[55] M. A. Riordan, R. Dale, R. J. Kreuz, & A. Olney, *Evidence for alignment in a computer-mediated text-only environment,* in PROC. 33RD ANN. MTG. COGNITIVE. SCI. SOC., 2411-2416, 2415 (2011).

[56] Vandergriff, *supra* fn 32.

[57] MARSHALL MCLUHAN, THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN, 22ff (1962) (noting the transformative progression from mere writing to a phonetic alphabet.)

[58] Id at 21.

[59] *See further* Neil Cohn, *Will Emoji Become a New Language?* BBC FUTURE (12 October 2015), http://www.bbc.com/future/story/20151012-will-emoji-become-a-new-language.

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McLuhan's recognition of the leap in language meaning through combined text and phonetics, coupled with his acknowledgement of the long tail of innovation, helps us appreciate the initial uncertainty surrounding the introduction of emoji to animate text in today's social media messaging. While it is early days to assess its linguistic and social value, the emoji phenomenon has triggered an emerging academic literature aimed at studying the icons as components of a discrete digital language.

As a result, emoticons and emoji are being recognized as shape-shifting devices in human literacy. Used alone, they revert to the modalities of hieroglyphics; partnered with phonetic text and made accessible online, they advance language sharing beyond any predecessor.[60] As Harvard linguist Stephen Pinker explains, "like a question mark or an exclamation point, they are there to convey some communicative force that would not be obvious just from the arrangement of words on the page."[61] Linguist Ben Zimmer has predicted that the "fascinating combinatorial possibilities" of emoji indicate a capacity, when used with existing communication symbols or text, to expand it into another language or dialect altogether.[62] He coins this the "technologization of language", that is, the unpredictable reshaping of language by new technologies and, simultaneously, the lessons about our language those technologies can teach us.[63]

The key follow-up question is: what is the nature of that "communicative force" that emoji infuse into digital messaging? What is its contribution to overall (online) literacy? Columbia University linguist John McWhorter recognizes a

[60] *See generally,* Deese, *supra* fn 19.

[61] Drake Baer, *A world-renowned Harvard linguist thinks emoji fill a gap in the English language,* BUS. INSIDER (12 August 2015), http://www.businessinsider.com/why-steven-pinker-loves-emojis-2015-8.

[62] As cited by Alice Robb, *How Using Emoji Makes Us Less Emotional,* NEW REPUBLIC (7 July 2014), http://www.newrepublic.com/article/118562/emoticons-effect-way-we-communicate-linguists-study-effects.

[63] Ben Zimmer, *Ben Zimmer on how technology is shaping language,* VISUAL THESAURUS (8 October 2013), https://www.visualthesaurus.com/cm/blogexcerpts/ben-zimmer-on-how-technology-is-shaping-language/.

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human contribution by identifying texting as "fingered speech", creating a novel interconnectedness of man and machine in order to animate human emotion.[64] With advancements in digital technology, emoji can combine with fingered speech to enable our sharing of what it is to be human in our daily transactions, however trivial or mundane.[65]

University of Toronto semiotics scholar Marcel Danesi suggests we look to "linguistic competence" in forming a new language, or the existence of a specific kind of shared knowledge.[66] He identifies the exchange as social and psycho-emotional in nature, usually transmitting much more that a sum of its constituent parts.[67] Danesi notes that emoji serve that function; in addition, they can serve a phatic function, that is, providing small talk or pleasantries to keep the conversation open and to set a pleasant tone.[68] Such utterances would be confined to casual, social exchanges within a defined circle of peers, only rarely included in dating site messaging or other social contexts where impressions of the speaker are crucial.[69] Outside of the dating environment, the use of emoji in more informal exchanges has been studied by a Taiwanese research team that concludes that their use on mobile phones contributes immensely to a sense of playfulness that drives social connectedness and identity formation, both very human pursuits.[70]

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[64] Michael V. Copeland, *Texting isn't Writing; it's Fingered Speech,* WIRED (1 March 2013), http://www.wired.com/2013/03/texting-isnt-writing-its-fingered-speech/.

[65] John McWhorter, *Txting is killing language. JK!!* TED2013 YouTube (February 2013), TED TALKS, http://www.ted.com/talks/john_mcwhorter_txtng_is_killing_language_jk?language=en.

[66] MARCEL DANESI, THE SEMIOTICS OF EMOJI: THE RISE OF VISUAL LANGUAGE IN THE AGE OF THE INTERNET, 6 (2017).

[67] Id. at 18.

[68] Id. at 19 (suggesting three subcategories of phatic statement: utterance opener, utterance ending, and silence avoider).

[69] The qualitative study involved over 300 text messages by undergraduates between 18 and 22 years of age.

[70] Sara H. Hsieh and Timmy H. Tseng, *Playfulness in mobile instant messaging: Examining the influence of emoticons and text messaging on social interaction,* 69 COMP. HUM. BEHAVIOR (2017) 405-414.

Electronic copy available at: https://ssrn.com/abstract=3068058

Emoji are often judged inadequate for inclusion in more formal and research-based treatises or scientific writing, unless the author is seeking to introduce an ironic or cynical note.[71] Emoji-speak in the hands of professionals has been criticized as inappropriate in an international study in that it makes the author appear less competent.[72] Emoji use was nonetheless valued by many of those participants: 33% expressed a wish to have better ways to express emotions when communicating in their workplaces and 75% were interested in using emoji more often to achieve that objective for professional communications.[73]

With the burgeoning uptake by all sectors of social media, emoji are gaining recognition as an alternate literacy vehicle for people challenged by traditional forms of writing and speaking. For example, the British Dyslexia Association has devised an emoji-only questionnaire directed at children who balk at printing or cursory writing to express their emotions and state of mind.[74] At Flinders University in Australia, the Department of Public Health reported in 2016 that emoji comprise a valid visual research method for giving voice to

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[71] Danesi, *supra* fn 65, 20.

[72] Ella Glikson, Arik Cheshin, and Gerben A. van Kleef, *The Dark Side of a Smiley: Effects of Smiling Emoticons on Virtual First Impressions,* SOC. PSYCH. & PERS. SCIENCE (31 JULY 2017) http://journals.sagepub.com/ (reporting results of three workplace experiments from participants located in various countries).

[73] Id. See further, *Put an Emoji on it: Should you Use Emoji in Business Communications?* BUSINESS.COM (22 February 2017) https://www.business.com/articles/put-an-emoji-on-it-should-you-use-emojis-in-business-communication/ (commenting that emoji use at work might be appropriate for millennials); *see also,* Bourree Lam, *Why Emoji are Suddenly Acceptable at Work,* ATLANTIC (15 MAY 2015), https://www.theatlantic.com/business/archive/2015/05/why-emoji-are-suddenly-acceptable-at-work/393191/.

[74] *Literacy Leap – Building an Identification Toolkit Training Package*, British Dyslexia Association, BDADYSLEXIA.ORG (2017) http://www.bdadyslexia.org.uk/common/ckeditor/filemanager/userfiles/4_Sample_Pupil_Questionnaire_-_Younger_Learners.pdf.

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children ages 3 to 5 years regarding their well-being.[75] Similarly, a 2013 study at the University of Wolverhampton, Department of Psychology examined emoticon use in chatrooms and found an intriguing connection between users who prefer to participate without a profile picture and an increased use of winking emoticons.[76] That result was explained as conveying a more flirtatious intent, a riskier communication preferred when participants are less identifiable.

A reliable source of justifications for using emoji is the users themselves. A 2015 commercial survey in America revealed the most professed reasons for their inclusion in messaging: accurate expression of thoughts (70.4%), increase in readers' understanding (64.7%), the creation of a more personal connection with the reader (49.7%), and "a better fit than words for what I think" (41.1%).[77] Those admissions confirm the two uses most commonly stated by research: to clarify intention and to improve the human connection, both supporting what McLuhan identified as a novel form of interplay.

An online/phone self-assessment study in 2014 determined that most American workers would admit to being disconnected from co-workers while on the job. To correct that, 50% would use emoji more if they wanted to come across as more personable, friendly or casual; 40% would do so in order to show more of their personality; and 28% would do so if a larger variety of emoji were available.[78]

Danesi's Canadian study, introduced above, found that, as well as the necessity of a careful choice of occasion for emoji use, users needed to match image choice and message intention. For example, emoji accompanying a texted

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[75] Jennifer Fane, Colin MacDougall, Jessie Jovanovic, Gerry Redmond and Lisa Gibbs, *Exploring the use of emoji as a visual research method for eliciting young children's voices in childhood research,* EARLY CHILD. DEVELOP. & CARE (17 August 2016), http://dx.doi.org/10.1080/03004430.2016.1219730.

[76] Chris Fullwood, Lisa J. Orchard, and Sarah A. Floyd, *Emoticon convergence in Internet chat rooms,* 23 SOC. SEMIOTICS (2013), http://dx.doi.org/10.1080/10350330.2012.739000.

[77] Statista, *supra* fn 10.

[78] *Survey Finds 78 Percent of American Workers Are Emotionally Disconnected at Work,* COTCAP INC. (20 May 2014), http://www.marketwired.com/press-release/survey-finds-78-percent-of-american-workers-are-emotionally-disconnected-at-work-1912036.htm (online survey of 1,015 employed Americans ages 18 and over who own a smartphone).

Electronic copy available at: https://ssrn.com/abstract=3068058

invitation to a date could convey a range of intentions from romantic love to salaciousness, or even playful flirtation.[79] To some sensibilities and in some contexts, the wrong choice of images (illustrated below)[80] could misstate the sender's intentions so egregiously they could lead to a legal claim of harassment, threats, bullying, or other legal liability.

C. *Technical Issues that Alter Perception*

Unicode Consortium members routinely approve a new collection of ideograms and faces for worldwide emoji use. Design standards are broad; Unicode advises emoji designers that, "while the shape of the character can vary significantly, designers should maintain the same 'core' shape," because "[d]eviating too far from that core shape can cause interoperability problems."[81] Those problems might be immediately evident: while "a heart may be a heart on your phone, it may end up as a series of glitch squares on Facebook."[82] Such disambiguation is caused by technological incompatibility between different platforms (Google, Apple, Facebook), not in underlying computer code that is mandated by Unicode. Resultant confusion stems from the actual emoji design as seen by the user.

The Unicode website provides a full emoji list that displays those platform differences; upon closer examination of various images representing one idea or emotion, the icons appear sufficiently different in design from one platform to the next to suggest ample grounds for confusion and misinterpretation among

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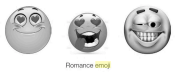
[79] Id. at 21.

[80] 

Danesi, *supra* fn 64 (offering this range of romantic emoji.)

[81] *See further* Meghan Neal, *What the Emoji You're Sending Actually Look Like to your Friends*, MOTHERBOARD (12 November 2015) https://motherboard.vice.com/en_us/article/78kzn9/what-the-emoji-youre-sending-actually-look-like-to-your-friends.

[82] Bennett, *supra* fn 22.

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message recipients.[83] The Full Emoji List also provides a 'Sample Fallback' image to show how different an emoji would appear on a recipient's device supporting a different platform.[84] By comparison, the earlier emoticons do not cause the same discrepancies because of their construction from keyboard letters and punctuation that are relatively standard across platforms.[85]

We can characterize the *cross-platform confusion* as a major challenge to current laws that require fixed standards of proof to establish an illegal act. For example, if a sender uses the 'grimacing face' emoji, the icon on the far left in Image 1, with the intention of conveying displeasure, the image might arrive on the recipient's device as any of the four versions below. Once received, the image can cause further confusion for the recipient who applies a subjective interpretation of the emoji. If she consults a dictionary, the recipient learns that "grimacing" could mean "disgust, disapproval, or pain";'[86] that translation would not be helpful if what she perceives from the image is a threat, a bullying action, a shocked expression, disagreement, or an attempt to harass or impose emotional distress.[87]

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[83]  The Unicode website explains: "Here are just some of the possible pictographs for U+1F36D LOLLIPOP, U+1F36E CUSTARD, U+1F36F HONEY POT, and U+1F370 SHORTCAKE," UNICODE.ORG, http://unicode.org/emoji/charts/full-emoji-list.html.

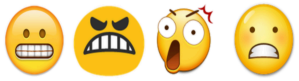
[84] *See further, Full Emoji List, V 5.0,* UNICODE.ORG, http://www.unicode.org/emoji/charts/full-emoji-list.html.

[85] *See further*, Walther & D'Addario *supra* fn 32. *See also Unicode's Emoji and Pictographs,* http://www.unicode.org/faq/emoji_dingbats.html (explaining that emoticons are specifically intended to depict facial expression or body posture as a way of conveying emotion or attitude in e-mail and text messages.)

[86] MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/grimace.

[87] Variations on Grimacing Face emoji as shown in Neal, *supra* fn 79 (pictographs are owned by Apple, Google, Samsung, and LG, left to right.) Neal comments on possible interpretations: "While Apple's grimace face is a sort of embarrassed "eek," Google's looks straight-up pissed, and Samsung's... I don't even know what's going on there.")

Electronic copy available at: https://ssrn.com/abstract=3068058

Image 1: 

Various software applications have emerged to address technical imperfections across platforms, to take the user outside of Unicode design choices locked in to standard platforms and give the user choice in which ideogram most closely conveys her original intent.[88] Even Unicode advises that embedded graphics, rather than Unicode designs, are the future of emoji because they are transmitted with more fidelity to the original because they are "not dependent on additional Unicode encoding."[89] For the interim, Unicode functions as the primary source of emoji standardization.

Technical interoperability is the goal for innovators to ensure that people can communicate with one another online. Copyright protection would not solve issues that impede interoperability: if every digital platform had to create its own computer code for emoji in order to avoid infringing another platform's copyright, then users on different platforms would never be able to send each other emoji.[90] That possible outcome exemplifies how law can sometimes obstruct innovation.

Overall, a novel mode of machine-mediated communication has been ushered in with the combination of emoji and text messaging, bringing a nimbleness of presentation that suggests seminal evidence of a new language. For enthusiasts like Rebecca Scall, for example, emoji value lies in their flexibility to serve variously "as punctuation [excited face], as emphasis [sob], as a replacement for [several] words ("Can't wait for [palm trees] [sun] [swim]!") or to

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[88] See, for example, *Emoji Switcher Lets You Switch In and Out [of] Emojis at Will,* XDA DEVELOPERS (16 July 2014) *https://www.xda-developers.com/emoji-switcher/; see also* Alex Hern, *supra* fn 13.

[89] Unicode® Technical Standard #51, para 8, "Long Term Solutions" (reporting that "a full solution requires significant infrastructure changes to allow simple, reliable input and transport of pictographs (stickers) in texting, chat, mobile phones, email programs, virtual and mobile keyboards, and so on.)

[90] Scall, *supra* fn 24 (arguing that, "given the ways in which emoji are used in American culture, they should not receive copyright protection and should be left to the public domain." For more on the copyright debate, *see for example,* Michael Adelman, *Constructed Languages and Copyright: A Brief History and Proposal for Divorce*, 27 HARV. J. L. & TECH. 543, 545 (2014).

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replace words altogether: 💗[91] In the commercial context, one research team comment\\, "Emoji create new avenues for digital feeling, while also remaining ultimately in the service of the market."[92]

D. Contextual Factors That Alter Meaning

Context is also critical in translating a sender's intentions. Meaning itself is a malleable function of the relationship between context and language, which includes emojis.[93] Ethnic, gender and other 'diversity-related' cues in the selection of emoji, their sequence in relation to other images, the number of repetitions of each image, and the nature of any accompanying text or acronyms color the meaning of messages as perceived by others.

1. Emoji Choice

The occasion that prompts a particular message can color the social appropriateness of emoji. A message of congratulations to a colleague on a job promotion might suggest a much more casual or quirky image while news of a pending hurricane or company restructure, would dictate a very different image or none at all. Some emoji might convey sexual innuendo 🍑 and others an unsettling violence  , both dependent on user choice and a willingness to risk offending the recipient.

Several services have emerged to assist emoji aficionados in making design choices and their meanings in the marketplace. Commercial enterprises, for example, are introducing their own emoji or stickers, thereby commodifying

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[91] Scall, Id. *See contra,* Eric Goldman, *Surveying the Law of Emojis*, SSRN (1 May 2017) https://ssrn.com/abstract=2961060 (noting "The simple designs of emojis don't leave much room for nuanced emotional expression.")

[92] Stark & Crawford, *supra* fn 3.

[93] Madison Margolin, *Emojis in Court Evidence*, MEDIUM CORPORATION (26 March 2015), https://medium.com/@margolinmadison/emojis-in-court-evidence-557eadb5758a.

Electronic copy available at: https://ssrn.com/abstract=3068058

the concept and marketing their versatility.[94] Apple has included emoji definitions within its settings to facilitate user choice.[95] There is a beta site, emoji.li, comprising the first emoji-only social network for those who prefer image-speak to text. An Emojitracker website utilizes Twitter to calculate the actual real time use of each emoji.[96] A geolocation positioning service, Emoji-Messenger, uses emoji submitted by tourists to direct them to nearby desired locations or services.[97] Perhaps the most promising of services in terms of how it integrates natural language and machine language is offered by Instagram: an algorithm that help to distinguish among the variety of meanings open to interpretation by recipients when only one meaning is intended by the sender.[98]

Emoji are increasingly tailored for specific utility. Distinctive designs have been adopted as cultural crests for specific ethnic and cultural groups. For instance, this icon  has emerged as unique brand for the New Zealand Maori;[99] similarly Twitter has released these flag icons  to represent the distinct culture of the Australian Indigenous and Torres Strait Islanders.[100] Skin

[94] Kristina Monllos, *Here's Why your Favorite Brands are Making their own Emoticons,* ADWEEK (9 March 2015) http://www.adweek.com/brand-marketing/here-s-why-your-favorite-brands-are-making-their-own-emoticons-163325/.

[95] Osas Obaiza, *Make Your IPhone Tell You the Secret Meaning of Emojis,* GADGET HACKS (15 September 2015), *https://ios.gadgethacks.com/how-to/make-your-iphone-tell-you-secret-meaning-emojis-0148108/.*

[96] EMOJITRACKER, http://www.emojitracker.com/.

[97] EMOJI-MESSENGER, https://emoji-messenger.klm.com.

[98] Megan Garber, *What we talk about when we talk about the raised hand emoji,* ATLANTIC (8 MAY 2015) https://www.theatlantic.com/technology/archive/2015/05/what-we-talk-about-when-we-talk-about-the-raised-hands-emoji/392774/.

[99] As marketed by commercial enterprise Emotiki © and based on pictographs developed by Te Puia in Rotorua.

[100] Rae Johnson, *Twitter Launches Aboriginal and Torres Strait Islander Flag Emojis,* GIZMODO (26 May 2017), https://www.gizmodo.com.au/2017/05/twitter-launches-aboriginal-and-torres-strait-islander-flag-emojis/; *see further,* Tacey Rychter, *New Emoji is a Meaningful Symbol for Indigenous Australians,* NY TIMES (26 May2017), https://www.nytimes.com/2017/05/26/world/australia/aboriginal-emoji-australia.html.

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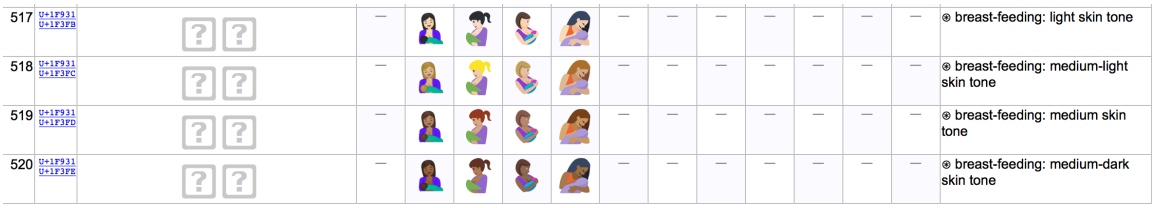
tones of anthropomorphic icons have grown in variety to a dizzying degree, as can be seen with emoji representing Santa Claus,[101] breastfeeding,[102] and "person wearing turban".[103] With the latter icons, Facebook Messenger and Google provide emoji that include women and young males (unbearded faces) while Samsung offers an older male icon (grey beard). Genies, zombies and heads sporting bunny ears appear in both genders, while images in various skin tones participate in a variety of curious movements (facepalming, receiving a massage) and situations (in steamy rooms, in a suit levitating, taking a selfie, and signalling with various combinations of fingers). Those images have inspired some interesting research into how emoji choices mirror cultural tendencies. We are learning, for example, that "French post more heart emojis than anyone else,

101

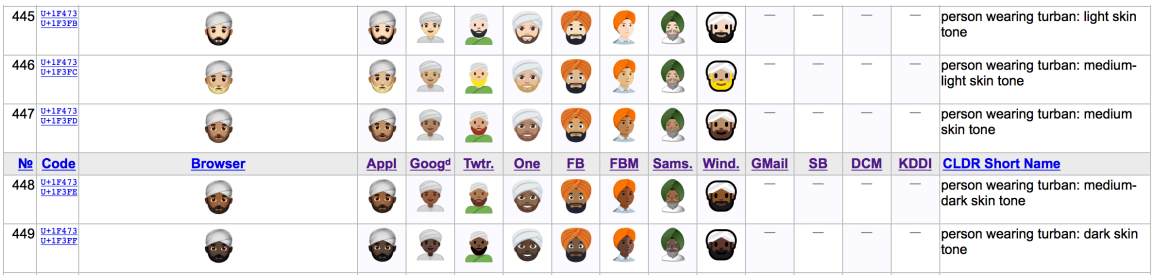
529	U+1F385 U+1F3FB									–	–	–	–	Santa Claus: light skin tone
530	U+1F385 U+1F3FC									–	–	–	–	Santa Claus: medium-light skin tone
531	U+1F385 U+1F3FD									–	–	–	–	Santa Claus: medium skin tone
532	U+1F385 U+1F3FE									–	–	–	–	Santa Claus: medium-dark skin tone
533	U+1F385 U+1F3FF									–	–	–	–	Santa Claus: dark skin tone

102



517	U+1F931 U+1F3FB		–					–	–	–	–	–	–	–	⊛ breast-feeding: light skin tone
518	U+1F931 U+1F3FC		–					–	–	–	–	–	–	–	⊛ breast-feeding: medium-light skin tone
519	U+1F931 U+1F3FD		–					–	–	–	–	–	–	–	⊛ breast-feeding: medium skin tone
520	U+1F931 U+1F3FE		–					–	–	–	–	–	–	–	⊛ breast-feeding: medium-dark skin tone

103



445	U+1F473 U+1F3FB									–	–	–	–	person wearing turban: light skin tone
446	U+1F473 U+1F3FC									–	–	–	–	person wearing turban: medium-light skin tone
447	U+1F473 U+1F3FD									–	–	–	–	person wearing turban: medium skin tone
№	Code	Browser	Appl	Goog	Twtr.	One	FB	FBM	Sams.	Wind.	GMail	SB	DCM	KDDI	CLDR Short Name
448	U+1F473 U+1F3FE										–	–	–	–	person wearing turban: medium-dark skin tone
449	U+1F473 U+1F3FF										–	–	–	–	person wearing turban: dark skin tone

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while Australians use the most alcohol-related emojis."[104] Finland, in turn, chooses to brand their nation as metalheads  and sauna users  .[105] In America, an online interactive map indicates emoji preferences for each state.[106]

The darker side of the web also offers emoji that serve ideological nefarious purposes: deep web analysts revealed in 2016 that ISIS followers employed a series of icons depicting beheadings and other macabre scenes to communicate with other Islamic State supporters.[107] Those activities are attributed with inspiring other groups—from Hezbollah in Lebanon to the Houthi rebels in Yemen—to devise stickers that praise jihadi fighters or call for the death of Israel.

Machine intelligence has contributed widely to our desire to fashion emoji for just the right purpose. For example, the website Emojini[108] will convert our photographs to correlating emojis. For example, when provided an Instagram image of a bouquet, the website will suggest the flower emoji. For a photograph of a horse race, it offers the horse and jockey emoji.[109] The machine intelligence behind the website, however, is designed to respond to non-semantic meanings for emoji, that is, the way people use certain symbols rather than the image reflecting the designer's intent or the corresponding physical object in the real

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[104] Vyvyan Evans, *Sorry, Emoji doesn't make you dumber,* PSYCH. TODAY (8 JUNE 2015).

[105] Peter Teffer, *Finland brands itself with sauna and headbanger emojis*, EUOBSERVER (4 November 2015), https://euobserver.com/digital/130962.

[106] Adrienne Cutway, *New map breaks down emoji use by state,* ORLANDO SENT. (20 August 2015) http://www.orlandosentinel.com/features/gone-viral/os-emojis-by-state-20150820-post.html.

[107] Gilad Shiloach, *EXCLUSIVE: ISIS inspires Terrorism Emoji Trend,* HUFFINGTON POST, http://www.huffingtonpost.com/vocativ/exclusive-isis-inspires-t_b_8989936.html (using the messaging application Telegram.)

[108] EMOJINI, https://emojini.curalate.com.

[109] Caitlin Dewey, *The Secret Double Meanings of Emoji,* WASH. POST (19 FEBRUARY 2016) https://www.washingtonpost.com/news/the-intersect/wp/2016/02/19/the-secret-meanings-of-emoji/?tid=a_inl&utm_term=.7e2d733ebacb.

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world. So, if presented with a photograph of a rose, the program will display the rose icon, but if presented with a rose tattoo, a syringe is produced.[110]

A final consideration in studying emoji choices is its correlation to gender. A 2004 analysis of online newsgroups by Alecia Wolf of the University of Texas found that the stereotype of emotional women and inexpressive men changed in mixed-gender forums. When encoding using emoticons, men tended to adopt the female standard of expressing more emotions; women in turn tended to infuse such activity with solidarity, support, and assertion of positive feelings including thankfulness.[111]

In conclusion, despite the best intentions of developers and the contributions of machine intelligence, many emoji remain difficult to interpret. The communication potential of many images is unclear: who would guess that  is used to convey anger, are "sweat droplets",  means "dizzy",  is "meat on bone", and  represents "hot springs"? In addition to this basic difficulty in deciphering the semantic and emotional intent of emoji, layers of complexity are added when we consider the placement of emoji within text.

2. Placement in Relation to Text and Other Emoji

The placement of an emoji in its textual context can determine its role as amplifier or modifier of the emotional range of a message.[112] Research by Novak et al. suggests that the typical emoticon user employs icons sparingly and preferably at the end of a sentence; emoji, in contrast, are more likely to be grouped and their placement determined by emotional content.[113]

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[110] Id.

[111] Alecia Wolf, *Emotional Expression Online: Gender Differences in Emoticon Us, 3* CYBERPSYCHOL. & BEHAVIOR (2004).

[112] Petra Kralj Novak, Jasmina Smailović, Borut Sluban, Igor Mozetič, *Sentiment of Emojis*, 10 PLoS ONE (2015), https://doi.org/10.1371/journal.pone.014429.

[113] Id.

Electronic copy available at: https://ssrn.com/abstract=3068058

A research team under Dr. Hannah Miller of the University of Minnesota set out to test the hypothesis of previous studies that emoji when added to text reduces message ambiguity.[114] They analyzed over 64 million tweets sent in 2016 over a two-week period using over 2,400 participants who interpreted emoji both in isolation and in various textual contexts. The team chose Twitter because it is a readily available source of communication that uses emoji, and because most tweets are public and so likely to be free of hidden interpersonal context. The study found that the hypothesis was not supported: in fact, text can increase emoji ambiguity as much as it can decrease it.[115] The analysis identified two reasons for that outcome: there was no provision in the test design for how to deal with sarcasm; and the tweet, confined to 140 characters, was found to be too short a model to offer detailed explanation. An interesting further study would involve examining the converse: whether text reduced the ambiguity posed by emoji.

Machine learning also holds potential for learning about the significance of emoji placement. First consider an Instagram study[116] that illustrates how context of a particular word or emoji can be predicted through natural language processing.[117] For example, when "apple" and "plum" are used interchangeably in a sentence ("I can find an apple/plum at the fruit section of the grocery store") natural language tells us they are similar words for purposes of understanding

[114] Hannah Miller, Daniel Kluver, Jacob Thebault-Spieker, Loren Terveen, and Brent Hecht, *Understanding Emoji Ambiguity in Context: The Role of Text in Emoji-Related Miscommunication,* Association for the Advancement of Artificial Intelligence (2017) http://www.brenthecht.com/publications/icwsm17_emojitext.pdf.

[115] Id at 9.

[116] Emojineering, *supra* fn 3.

[117] Natural language is defined by Merriam-Webster as "a language that is the native speech of a people" in comparison to machine language or code comprising "the set of symbolic instruction codes usually in binary form that is used to represent operations and data in a machine (such as a computer)".

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that sentence. Intuition, or 'distributional hypothesis' leads us to that conclusion.[118]

Machine reading works in a similar manner to identify emoji that represent similar words for purposes of deciphering the context of a statement. Again, consider an example from Instagram: algorithms could treat "dog" and "cat" as interchangeable words in the texted sentence, "The pet store sells dog/cat food". Emoji are thereby embedded together with similar meaning words into a common metric space where there are well-defined distances between them. Algorithmic programs read through text and images to predict its context. The algorithm can also improve on any of its incorrect predictions: it adjusts its internal settings for a more accurate result next time.[119] Such computer-mediated functions can thereby assist in the identification of the "potential welfare enhancing effects of emoji" when added to straight text."[120]

3. Purpose of the Communication as a Whole

The occasion that prompts a particular message provides clues to various intentions and meaning behind emoji use. Offering birthday congratulations to a friend can be achieved with a casual or quirky image; however, posting screenshots from a video of an assault on the sender, accompanied by raised fist icons and an invitation to 'like' her status on Facebook, suggests a more hostile and troubling use of emoji.[121] Similarly, an adult male who sends a pointed reference to an ostensible minor's "pussy" heightens the sexualised nature of the

[118] A basic assumption about the meaning of language in semantics states, "Words which are similar in meaning occur in similar contexts". *See* Magnus Sahlgran, *The distributional hypothesis,* 20 RIVISTA DI LINGUISTICA, *33-53* (2008).

[119] This paragraph is informed by Emojineering, *supra* fn 3.

[120] J. Jobu Babin, *A Picture Is worth a Thousand Words: Emojis,* Computer-Mediated Communication & Trust (11 November 2016) SSRN, https://ssrn.com/abstract=2883578. *See generally,* L.Y. Belkin and N.B. Rothman (2017) *Do I trust you? Depends on what you feel: Interpersonal effects of emotions on initial trust at zero-acquaintance*, 10 NEG. & CONFLICT. MGMT. RES. 3–27.

[121] *See* State of Iowa v McBride 889 N.W. 2d 700; 2016 Iowa App. LEXIS, 1246.

Electronic copy available at: https://ssrn.com/abstract=3068058

communication;[122] including a winking face emoji, however, could reduce its significance to a joke.[123]

On a broader scale, icons have the potential to convert written speech to verbal literacy. As noted above, the special feature of combining texting and emoji, in conjunction with transmission speed and convenience provided by a mobile device, produces a kind of "fingered speech", a human-machine interaction that is developing its own style, lexicon, and fluency. "Texting isn't written language," claims linguist John McWhorter: "[i]t much more closely resembles the kind of language we've had for so many more years: spoken language."[124] So why not write like we speak, he proposes: more casual, telegraphic, and less reflective? Primarily because until now we have lacked the right tools. Pencils, typewriters, even computers have been too slow to keep up with the pace of human speech. Voice activated texting, as seen in the texting aid 'Siri' on the Apple platform, greatly facilitates that function.[125]

Contrary to popular opinion that digital speech signals the demise of the written word, we might envision it as a harbinger of a more nuanced communication.[126] For example, McWhorter sees "lol" as something evolving into a far subtler message than simply "loving you lots". "It's a marker of empathy, of accommodation," he notes, what linguists call a "pragmatic particle" like the word "yo" in certain cultural contexts.[127] An example of the meanings

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[122] Fry v. Robinson, No. 16-3498 (6th Cir. 2017) case opinion from the U.S. Court of Appeals for the Sixth Circuit.

[123] Ben Fry was arrested for soliciting a minor during an undercover operation in which a police officer posed as a 14 year old minor and exchanged text messages with Fry. Fry's emoji choice for the question "anyone play with [your] pussy this weekend? 😉" provided argument that it negated his criminal intent. The case against Fry was later dismissed; Fry subsequently initiated a suit for false arrest and malicious prosecution.

[124] Copeland, *supra* fn 62.

[125] A few iOS mobile phones offer emoticons, but not emoji, when dictated to Siri. See further, *Use Siri to Dictate Emoticons* MAC OS X HINTS, (5 December 2011) http://hints.macworld.com/article.php?story=20111202172017331.

[126] McWhorter, *supra* fn 64.

[127] Id.

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that emoticons can illuminate, according to linguist Tyler Schnoebelen, can be found when we use "Ok" without any accompanying image. It can mean "I'm a little bothered" or I have reservations, depending on context. By adding a smiley emoticon, the message could be refined to "Ok :-)" meaning the situation *really is* okay"; adding a winky icon "OK ;-)" could convey humorous or flirtatious overtones; and a face with tongue out, such as "OK :-P", could produce a more subtle or less sombre message. [128]

The foregoing analysis suggests that a formal lexicon of emoji would more closely follow spoken than written speech, and prefer a looser and more flexible effect for casual conversation. But while this plasticity is part of what makes emoji fun and nimble, it can also obfuscate meaning. [129] This point is confirmed by research from Slovenia that investigated the sentiments attached to over 750 most commonly used emoji. [130] While some results were predictable – the "smiley icon" is used in positive contexts, while the "crying cat" suggests a negative inference – many other findings were perplexing and sometimes counter-intuitive, such as the negative tenor of a bento box emoji. [131]

Emoji become especially complex to decode when their graphics are anthropomorphic. This issue has been tackled by social psychologists in a number of ways. A study by Ella Glikson and colleagues, for example, used the smiley-face emoji to determine whether it performs a similar function to emotional expressions in face-to-face contact. [132] They found significant

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[128] Tyler Schnoebelen, *Do You Smile with Your Nose? Stylistic Variation in Twitter Emoticons*, 18 U. PENN. WORKING PAPERS LING. (2012), http://repository.upenn.edu/pwpl/vol18/iss2/14 (using tweets of American English speakers. *See contra* William Comcowich, *Can Facebook's new Reactions Emoji Help Improve Social Media Measurement?,* GLEAN.INFO (3 March 2016), http://glean.info/can-facebooks-new-reactions-emoji-help-improve-social-media-measurement/ (commenting on the limited utility of Facebook's 'like" function being expanded to six reactions for adding nuance to consumer reactions).

[129] Id.

[130] Novak et al., *supra* fn 111.

[131] Id.

[132] Ella Glikson, Arik Cheshin and Gerben Van Cleef, 'The Dark Side of a Smiley: Effects of Smiling Emoticons on Virtual First Impressions' (2017) 8(5) SOC. PSYCH. & PERS. SCIENCE, 1-12.

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differences in interpretation. While smiling generally increases perceptions of a person's warmth and competence in face-to-face interactions, the equivalent smiley face anthropomorphic emoji doesn't increase attributions of warmth and, in fact, decreases perceptions of competence. As a consequence, the amount of information that recipients share with the sender is reduced. Those effects relate to the formality of the social context; with business communications, for example, context might dictate that emoji are inappropriate for the formality of the message.[133] In essence, this research suggests that interpreting emoji may be distinctive from, and even more complex than, interpreting the equivalent non-verbal behaviour.

Similar complexities also lay behind Facebook's recent introduction of emoji to animate its "Like" button. Users can now expand their visual vocabulary by responding to others' posts with "Love", "Haha", "Wow", "Sad" or "Angry" emoji.[134] Facebook explains the enhancement as adding "cross cultural resonance" to messaging.[135] Its use has been interpreted, however, as an attempt to mollify the offense taken in some cultures to the thumbs-up icon,[136] to facilitate the "types of reactions people would want to use most,"[137] or to take the sting out of blatant expression of emotions by keeping it "respectful."[138] The result is an increase in the range of responses but also a potential increase in emotion-laden expressions and questionable context appropriateness.

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[133] Id at 9.

[134] Sam Thielman, *Facebook recrafts 'like' button with Reactions, complete with an angry face,* The Guardian (24 February 2016), https://www.theguardian.com/technology/2016/feb/24/facebook-reactions-like-button-angry-love-haha-wow-sad-faces-heart.

[135] Id.

[136] Gayle Cotton, *Gestures to Avoid in Cross-Cultural Business: In Other Words, 'Keep Your Fingers to Yourself?'* HUFFINGTON POST(13 August 2013), http://www.huffingtonpost.com/gayle-cotton/cross-cultural-gestures_b_3437653.html (reporting that the "thumbs up gesture" in Australia, Greece, or the Middle East means essentially 'Up yours!' or 'Sit on this!').

[137] Sammi Krug, *Reactions Now Available Globally,* FACEBOOK NEWSROOM (24 February 2016), https://newsroom.fb.com/news/2016/02/reactions-now-available-globally/.

[138] Matt Burgess, *Get Angry: Facebook's 'Reaction' Buttons are here,* WIRED (24 February 2016), http://www.wired.co.uk/article/facebook-reaction-buttons-what-why.

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Facebook acknowledges the challenges of emoji: founder and CEO Mark Zuckerberg comments, "It's surprisingly complicated to make an interaction that you want to be that simple."[139] Equally problematic is introducing a "dislike" button, an idea rejected by Facebook for the negative value it would bring to online sociality.[140]

Those debates heighten the need for an inclusive emoji lexicon to assist users and researchers but also to guide law reform and, as we shall consider in Part II below, ultimately the courts. The urgency of our need for interpretative assistance can be seen in Schnoebelen's comment, "Think about how often you text versus how often you make a phone call."[141]

4. Individual Factors and Cultural Cues

There is an emerging literature exploring the effect of emoji on individuals. Research is showing they shed light on the cultural milieu and communicative intent behind online messaging,[142]service important verbal and non-verbal communication centers in the human brain,[143] and provide insight into the user's personality.[144] For example, it appears that, as non-verbal face-to-face cues diminish when we go online, emoji become a compensatory mechanism to

[139] As quoted by Josh Constine, *Facebook Is Building An Empathy Button, Not 'Dislike'. Here's How It Could Work",* TECHCRUNCH (15 September 2015), https://techcrunch.com/2015/09/15/the-sorry-button/ (citing Zuckerberg.)

[140] Id.

[141] Id.

[142] Linda K. Kaye, Helen J. Wall, & Stephanie A. Malone, *Turn that frown upside-down*, 60 COMP. HUM. BEHAVIOR (July 2016), 463-467 (identifying reasons for using emoticons such as aiding personal expression, establishing emotional tone, and reducing ambiguity).

[143] Masahide Yuasa, Keiichi Saito, & Naoki Mukawa, *Brain activity when reading sentences and emoticons: an FMRI study of verbal and nonverbal communication*, ELECTR. COMM. JAP. (APRIL 2011), DOI:10.1002/ecj.10311.

[144] David Marengo, Fabrizia Gianotta, & Michele Settanni, *Assessing personality using emoji: An exploratory study,* 112 PERS. & IND. DIFF. (2017) 74–78.

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reduce ambiguity and infuse an emotional tone into personal expression.[145] Another study reveals that emoji users are generally attributed contextual awareness, as seen in how they tailor icon choice and use to the technological platform and purpose in question (higher use for texting, lower incidence for email).[146]

The influence of trust on the use of emoji is an area of growing interest in an environment of fake news, cyber scams, revenge porn, user anonymity, and indiscriminate dissemination of messages. A 2017 Pew Research study into the future of online life confirms human ambivalence regarding the importance of the trust factor.[147] Some researchers are optimistic about improvements to security that would increase trust in online messaging, achieved through growing technological sophistication and regulation; others emphasize our normative acceptance of risk in exchange for online access and convenience.[148] The Pew study determines that trust has strong social capital, a significant connection to personal happiness, and positive links to collective problem solving, economic development, and social cohesion. Conversely, when trust is absent, societal deficits arise in the form of interpersonal chaos and increased risk-aversion. Those risks are abstract but very real: trust must be negotiated with those we cannot see, involving circumstances we are not aware of, amid a sea of

[145] Linda K. Kaye, Stephanie A. Malone, and Helen J. Wall, *Emojis: Insights, Affordances, and Possibilities for Psychological Science,* 21 TRENDS COG. SCIENCE. (FEBRUARY 2017) DOI: http://dx.doi.org/10.1016/j.tics.2016.10.007.

[146] Kaye et al., *supra* fn 66.

[147] In collaboration with Elon University's Imagining the Internet Center.

[148] Lee Rainie and Janna Anderson, *The Fate of Online Trust in the Next Decade,* PEW CENTER REPORT, (10 August 2017), http://www.pewinternet.org/2017/08/10/the-fate-of-online-trust-in-the-next-decade/.

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information with uncertain provenance. While not addressing emoji or similar icons directly, the report cites participants' concerns that "[w]e have to construct protocols to respond to this new phenomenon that is changing our sense of reality" in the face of the growing portability of our identities that can be "manipulated, stolen, recast, [and] taken from us."[149] We are just awakening to the potential role of emoji and emoticons in promoting trust in online communications.

Economist J. Jobu Babin studies trust in the gaming environment involving emoji. In a 2015 study of investment games at the University of Memphis, he determined that trust is generated by a show of sympathy between players and other emotional responses conveyed face-to-face. That is achieved through voice intonation, facial expressions, and body language, "things that emoji attempt to emulate."[150] The study also concluded that affective content, skin tone, and gender signals embedded in emoji can alter sharing within the game framework.[151] Those results provided information on the interaction between individual factors and cultural indicators. For example, use of a dark skinned person emoji can have a negative effect on trust for both light and dark skinned players. Another general takeaway is that emoji suggesting a partner is a woman garners more trust in other players. In this way, computer-mediated communication could lead to reduced gains for dark-skinned persons and

[149] Id.

[150] Babin *supra* fn 45. [The study conducted a linguistic analysis of game chat logs.]

[151] The study reports, "a strong negative association with trust levels when one receives a dark pigmented emoji, remaining persistent across both light and dark skinned subjects." Such finding suggests that even dark-skinned players might discriminate against dark-skinned emoji.

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increased gains for women. Yet this conclusion is not warranted in Babin's view: all demographic groups act in a trustworthy manner, he insists, exhibiting strong preferences for equitable splits.[152] Those results highlight the complex social judgment that motivates trust between rivals within the gaming frame.

Individual discrepancies in the meaning of emoji and measurement of their emotional valence were explored by Hannah Miller et al. from the University of Minnesota. Twenty-two Unicode standard emoji were presented to 334 participants in an online survey.[153] For each image, a version from each of Apple, Google, Microsoft, Samsung, and LG was used.[154] The variety of possible interpretations was tested through *perceived sentiment* (asking for impressions on a scale from very negative to very positive) and *semantics* (asking, "what does the emoji mean?").

The results for the sentiment rating are shown in Table 1, measured in misconstrual incidents[155] and indicating that no agreement as to sentiment was

[152] *See further,* Linda K. Kaye & C.R. Pennington *'Girls can't play': The Effects of Stereotype Threat on Females' Gaming Performance*, 59 COMP. HUM. BEHAVIOUR. 202-209. doi: 10.1016/j.chb.2016.02.020.

[153] Hannah Miller, Jacob Thebault-Spieker, Shou Chang, Isaac Johnson, Loren Terveen & Brent Hecht, *"Blissfully Happy" or "Ready to Fight": Varying Interpretations of Emoji,* PROC. TENTH INT. AAAI CONF. WEB & SOC. MED. (ICWSM 2016), 259-68.

[154] The Miller study used a data set of approximately 100 million random tweets collected between August and September 2015. Twenty-five of the most popular anthropomorphic emoji (human and animal) were chosen. N=334 using Amazon's Mechanical Turk.

[155] The differences between interpretations are calculated by assigned values from 1 (least agreement) to 10 (total agreement).

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achieved in 25% of cases.[156] The three most misconstrued images within platforms involved face or hand emoji and the most misconstrued platform emoji is Microsoft's "smiley face with open mouth and tightly shut eyes"; the least misconstrued is Apple's "sleepy face" that includes the letters 'zzz' across the forehead.[157] Misconstruing faces could be explained by images that contain conflicting information, such as a mixture of positive cues (smiles) along with negative elements (tears, shut eyes). Overall, the least misconstrued images were frequently embellished with popular interpretation aids such as hearts, tears, or dominant upturned or downturned mouths.[158]Those results suggest that

	Most/Least Within-Platform Sentiment Misconstrual				
	Apple	Google	Microsoft	Samsung	LG
Top 3	3.64	3.26	4.40	3.69	2.59
	3.50	2.66	2.94	2.36	2.53
	2.72	2.61	2.35	2.29	2.51
...	...		...		
Bottom 3	1.25	1.13	1.12	1.23	1.30
	0.65	1.06	1.08	1.09	1.26
	0.45	0.62	0.66	1.08	0.63
Average (SD)	1.96 (0.77)	1.79 (0.62)	1.90 (0.54)	1.84 (0.78)	1.84 (0.59)

Table 1. Top-3 and bottom-3 most different in terms of sentiment. Higher values indicate greater response variation.

156

[157] Id.

	Most/Least Within Platform Semantic Misconstrual				
	Apple	Google	Microsoft	Samsung	LG
Top 3	0.97	0.97	0.96	0.96	0.96
	0.96	0.95	0.95	0.95	0.96
	0.95	0.94	0.95	0.95	0.93
...	...		...		
Bottom 3	0.73	0.75	0.64	0.72	0.73
	0.63	0.73	0.63	0.72	0.69
	0.52	0.72	0.54	0.71	0.69
Average (SD)	0.841 (0.111)	0.844 (0.078)	0.823 (0.115)	0.844 (0.080)	0.845 (0.087)

Table 3. Top-3 and bottom-3 most differently described renderings. Higher values indicate greater response variation.

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added features are effective in clarifying meaning provided a conflicting feature is not present.

The results of testing for the second indicator, semantics, reveal a similar range of individual interpretations of what the emoji mean. The emoji with the *least* semantic misconstrual was Apple's "smiling face with heart-shaped eyes";[159] the emoji resulting in the most confusion was Apple's "unamused face".[160] Participants' words used to describe the latter icon's expression ranged from "disappointment" to "depressing", "unimpressed", and "suspicious", indicating widely disparate emotions.[161]

The researchers conclude that misconstrued meanings could be reduced through more standardization of images across platforms, a suggestion that calls on Internet companies to be less concerned with using emoji to build brand and more focused on enabling subscribers' cross-platform messaging. Further research is called for to understand the relationship between graphic detail and misconstrual.[162] The most immediate observation by the Miller research team is that the use of relatively unambiguous cues (tears, 'zzz' indicators, hearts) enhances interpretation.

Finally, it must be recognised that individuals frequently imbue emoji with highly subjective attributes, deliberately chosen to convey their desired nuance but sometimes actually adding to ambiguity. A "winking face", for example, could

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159 😍

160 😒

161 Miller et al. *supra* fn 82 at 264.

162 Id at 267.

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be used to distance the sender from a provocative text message that makes her appear too aggressive, keen, or committed to a proposal. Injecting the icon could alternatively add a tone of flirting, jesting, exaggeration, or contradiction to the original message.[163]

Linguist Tyler Schnoebelen highlights the subjective dimension of emoji,[164] noting that messages are imbued with choices that reveal much about the sender. He confirmed that impression through an empirical study of 28 of the most used emoticons in Twitter messaging during 2012; he focused on how senders varied their messages through subjective choices with face icons involving mouth shape, face direction, frowns, winks and the inclusion or omission of a nose.[165] Those variants were, in Schnoebelen's view, "preserving part of what happens in actual speech," while compensating for those face-to-face verbal cues (voice pitch, face and body movements) that digital icons lack. His study concludes that, when focusing on interpretative resources used by people rather than on the general meaning attached to particular icons, we see that meanings are an "emergent property of social relations", not something an icon (emoji or emoticon) inherently possesses.[166]

In summary, despite interpretation difficulties presented by emoji, their increasing inclusion in online messaging speaks to our social need to expand meaning and emotional expression in our online conversations. That objective in

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[163] Id.

[164] Tyler Joseph Schnoebelen, EMOTIONS ARE RELATIONAL: POSITIONING AND THE USE OF AFFECTIVE LINGUISTIC RESOURCES (2012) PhD dissertation, Stanford University, 190ff, http://purl.stanford.edu/fm335ct1355.

[165] Id. at 126.

[166] Id. at 124.

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turn has created a need for a legal response to digital speech that can confuse, threaten, defame, and otherwise offend its target, as we shall see in the following case studies.

II CASE STUDIES ANALYSIS

Courts in a few common law jurisdictions have shown receptiveness to expanding the rules of evidence to include emoji. Legal interpretation of nonverbal messaging is not new to the judiciary, as seen in decisions involving American sign language,[167] Pitman Shorthand,[168]gang symbols, marketing logos, and tattoos.[169] Scholars, in turn, engage in relevant discourse over whether online messaging is speaking or writing;[170] whether a machine can interpret text as skilfully as a human; [171] whether digital speech is becoming sufficiently subtle in meaning as to create a new language;[172] and whether governance of online speech is beyond the confines of legal doctrines as we know them. Of concern regarding the latter are non-reviewable decisions about language and graphic imaging standards being made every day by industry arbiters or "delete

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[167] See generally, MULTILITERACIES: BEYOND TEXT AND THE WRITTEN WORD, Eugene F. Provenzo, Jr, Amanda Goodwin, Miriam Lipsky, Sheree Sharpe (eds), (2011).

[168] JEAN LOUIS HALPERIN, FIVE LEGAL REVOLUTIONS SINCE THE 17TH CENTURY: AN ANALYSIS OF A GLOBAL LEGAL HISTORY, 59 (attributing the introduction of Pitman shorthand in 1837 to the growth in access and reliability of private law reports).

169 Carly Strocker, Comment, *These Tats Are Made for Talking: Why Tattoos and Tattooing Are Protected Speech Under the First Amendment*, 31 Loy. L.A. ENT. L. Rev. 175, 179 (2011).

[170]McWhorter, *Texting, supra* fn 64.

[171]Owen Bowcott, *Interpreters stay away from court in protest at privatised contract,* GUARDIAN (12 March 2012) https://www.theguardian.com/law/2012/mar/02/interpreters-courts-protest-privatised-contract; *see further*, Elizabeth Kirley, *The Robot as Cub Reporter: Law's Unsettled Role in Cognitive Journalism,* 7 EUR. J. L. & TECH. (2016).

[172] *Is Texting Actually Advancing Language*, NPR (13 December 2013), http://www.npr.org/templates/transcript/transcript.php?storyId=248191096 (as linguist John McWhorter observes that the substrate of texting has become something quite subtle) see further, Elizabeth Kirley, *Can Digital Speech Loosen the Gordian Knot of Reputation Law?* 32 SANTA CLARA HIGH TECH. L. J. (2016) 171.

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squads"[173] hired by Facebook, Instagram, and other social media platforms to deal with take down requests from the public.[174]

In this section we examine case law in three areas of practice: criminal law, contract law, and tort (defamation) law, to identify interpretative challenges that arise when traditional legal doctrine and procedure are applied to emoji-laden content.

A. Criminal Law

Emoji took a significant step towards legal legitimacy with the high profile trial of Ross Ulbricht in 2015, creator of Silk Road, an online illicit drug marketing enterprise investigated for over $200 million in illegal US drug sales.[175] The prosecutor in Manhattan's Federal District Court read into evidence the text of an Internet post created by Ulbricht, without referencing the included smiley-faced emoji. The text read "I'm so excited and anxious for our future, I could burst." Judge Katherine B. Forrest subsequently instructed counsel and jury members to incorporate the emoji in their deliberations of the accused's intentions.[176] She adopted the argument of defense counsel that all Internet communications be shown to the jury, not read aloud, so as to avoid distorting the author's intended meaning through voice inflection or omission of such

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[173] Jeffrey Rosen, *The Delete Squad: Google, Twitter, and Facebook and the new global battle over the future of free speech* NEW REP. (29 Apr. 2013), http://www.newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules (Delete Squad). *See also* Jeffrey Rosen, *The Deciders: Facebook, Google, and the Future of Privacy and Free Speech*, in JEFFREY ROSEN & BENJAMIN WITTE, EDS, CONSTITUTION 3.0: FREEDOM AND TECHNOLOGICAL CHANGE, 69-82 (2011).

[174] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech* SSRN, https//ssrn.com/abstract=2937985 (February 2017).

[175] *United States Of America v. Ross William Ulbricht, A/K/A Dread Pirate Roberts, A/K/A , A/K/A Sealed Defendant 1*, A/K/A DPR, Docket No. 15-1815 (31 May 2017) http://caslaw.findlaw.com/us-2nd-circuit/1862572.html; *see further,* Olivia Marshall, *Your Emoji May be Used Against You in a Court of Law,* JETLAW (22 November 2016), http://www.jetlaw.org/2016/11/22/your-emoji-may-be-used-against-you-in-a-court-of-law/#.

[176] Benjamin Weiser, *At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji,* NY TIMES (28 January 2015), https://www.nytimes.com/2015/01/29/nyregion/trial-silk-road-online-black-market-debating-emojis.html?_r=0.

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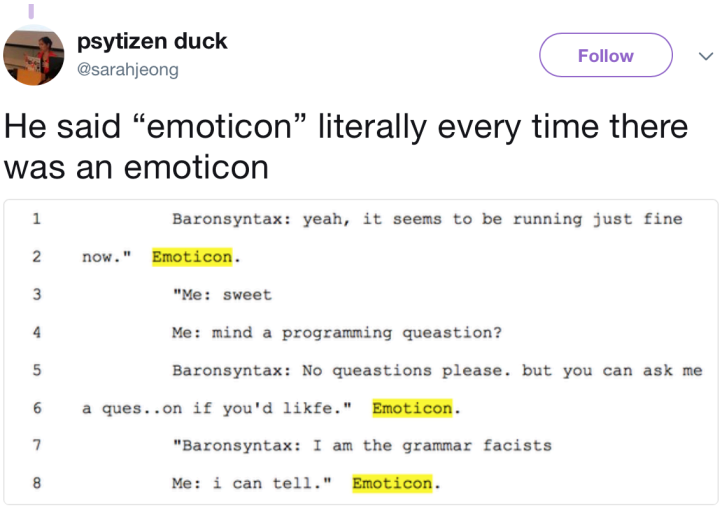
written text as repeated question marks ("???") or extended words ("soooo").[177] Prosecutors maintain in such instances that novelties in online messaging are akin to wiretapped conversations and hence best read aloud for jurors. A segment of the Silk Road trial transcript, provided here as tweeted by a third party observer, illustrates the weakness in that position due to the decoding challenge for jurors when provided with testimony, sans emoji, as transcribed by a human court reporter:[178]



The omission of typographic emoticons provides interpretative hurdles to the jury; thus the judge's insistence they be included.

As a matter of law, once judges or jurors are provided with an emoji-inclusive exhibit, they are tasked with finding criminal intent or civil liability in its message. Without the assistance of linguistic, semiotic or other digital literacy expertise, jurors continue to be challenged to find the specific meaning intended by emoji. Judges face the equally difficult task of weighing that information against the legal evidentiary standards of probity and relevance. Schnoebelen points out the nuanced value added by emoji to a texter's intentions: "If it's a 'winkie,' there's flirtatiousness or a sort of a fun to it," he advises. "With smiles,

[177] Id.

[178] As reproduced in Thomas Gorton, *Judge Rules Emoticons admissible in Silk Road Trial,* DAZED DIGITAL (29 January 2015) http://www.dazeddigital.com/artsandculture/article/23440/1/judge-rules-emoticons-admissible-in-silk-road-trial.

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there might be a politeness or a friendliness."[179] For others, the objective might be to raise a veil of ambiguity, show terror, or convey non-committal deliberation – all gradients of emotion not observable in a face icon. A similar decoding challenge is presented by the "tongue in cheek" or "winking" emoji.[180] All of those factors relate to the dynamics behind the personal choices of messaging icons made by the accused or defendant.

Not all judges are as attuned to the helpful role of emoji as was the case with *Silk Roads*. Although the significance of emoji in criminal cases has arisen repeatedly in cases of sexual assault and domestic violence, the court's understanding of their evidentiary contributions is not always available in judgments. For instance, in the 2011 *Kinsey v. State* sexual assault prosecution in Texas, the accused argued the victim had consented to sex through an exchange of several text messages prior to the event.[181] The exchange had concluded with the victim texting a "winkie face" emoji. The court disagreed without further interpretative analysis, the accused was convicted, and the decision was affirmed at the appellate level.[182]

Courts in other countries are facing similar interpretative issues. Thus, a court in France recently convicted a young man for sending a text by mobile phone to his ex-girlfriend containing a "death threat in the form of an image" that included a gun emoji.[183] The court determined that the communication was a "real threat", again without detailed interpretative analysis, and sentenced the defendant to six months imprisonment and a one thousand euro fine.[184] Also in

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[179] Schnoebelen, *supra* fn 127 (comparing the reading aloud of emoji-laden text with hiding a witness's facial expression and having their words spoken by someone else.)

[180] Platform variations of "winking" emoji as provided by Google Images. 

[181] *Kinsey v. State*, No. 11-12-00102-CR, 2014 WL 2459690, at 4 (Tex. App. May 22, 2014). *See further,* Rebecca A. Berels, *Take Me Seriously: Emoji as Evidence* (2017) http://digitalcommons.law.msu.edu/king/261.

[182] Id at 1.

[183] Henry Samuel, *Frenchman Jailed for Three Months for Sending Ex-Girlfriend Gun Emoji,* TELEGRAPH (31 March 2016), http://www.telegraph.co.uk/news/2016/03/31/frenchman-jailed-for-three-months-for-sending-ex-girlfriend-gun/ (last accessed 26 August 2017).

[184] Id.

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2016, days after the knifing death of a Member of the UK Parliament, one of his fellow MPs found a Facebook message "Another MP that needs…" followed by knife and gun emoji.[185] The prosecution withdrew the charges for lack of clear evidence of what the emoji meant. Similarly, in New Zealand, a judge was bewildered by the role of emoji in a message sent by a man to his ex-partner, telling her "You're going to fucking get it ✈". Concluding generally that the message indicated the defendant was "coming to get" his ex-partner, the judge pronounced a sentence of 8 months in jail on a charge of stalking.[186]

Indicating a more receptive stance to emoji, a judge of the High Court in Lancashire County, England, incorporated a "smiley face" emoji in his judgment when reviewing the evidence in a family law matter.[187] The actions of the father raised criminal law issues of domestic abuse, kidnapping, illegal gun purchases, and terrorist activities. The judgment might represent the first time that a High Court document has included an emoji as evidence.[188] The judge explained that the image communicated to the children why they should have only limited contact with their father who planned to take the children to Syria under the guise of a trip to Disneyland Paris.[189] He noted the mother had included the smiley faced emoji in a note to relatives, but did not accept that she was thereby admitting her complicity in her husband's deceit. The judgment is significant for its use by the judiciary to clarify intent of a possible co-conspirator.

The sequencing of emoji and their placement in relation to text has arisen as a legal issue in several recent American 'threat' cases. In New York, both district and appellate courts convicted Anthony Elonis of threatening his estranged wife with violent lyrics and other postings on his Facebook account.

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[185] Crown Prosecution Service, *Man charged over Facebook 'death threat' sent to PM will not face trial,* GUARDIAN (18 August 2016) http://www.mirror.co.uk/news/uk-news/tory-mp-sent-emoji-death-8246136.

[186] *Judge Stumped by 'Emoji' Threat*, N. Z. HERALD (18 January 2017), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11779883.

[187] Lancashire County Council v M & Ors, (Rev 1) [2016] EWFC 9 [13].

[188] Tshepo Confidence Mashilem, *Think before you Emoji,* DEREBUS (1 April 2017), http://www.derebus.org.za/think-before-you-emoji/.

[189] John Bingham, *Smile: High Court judge uses emoji in official ruling,* TELEGRAPH (14 September 2016),http://www.telegraph.co.uk/news/2016/09/14/smile-high-court-judge-uses-emoji-in-official-ruling/.

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One such message conveyed the suggestion that their son's Halloween costume should include her head impaled on a stick.[190] Part of Elonis' defence was that this message, which had been followed by the tongue-out emoticon ":-P", was posted in jest.[191] The Supreme Court briefly noted that the rise of social media use has made such domestic violence tactics more commonplace, then reversed Elonis' conviction on an erroneous jury instruction on the requisite mens rea.[192] The Court thereby circumvented the opportunity to rule on the evidentiary value of emoji as digital speech; to date, the Court has not deliberated on that issue.

More detailed consideration of the role of emoji in threats comes from a series of American cases. The first involves a minor student from Fairfax, Virginia whose Instagram posts were intercepted by police in 2015 following concerns that the combination of text and a gun, knife, and bomb emoji, and their placement next to each other, conveyed a credible threat of violence to be performed in the library of the school she attended.[193] The student was charged with computer harassment and threatening school personnel. This is the controversial posting:

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[190] *United States v. Anthony Douglas Elonis*, Case No. 12-3798 (14 June 2013), US App. Ct. 3rd Cir. Elonis was charged under 18 U.S.C. § 875(c) which prohibits "transmi[tting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another."

[191] As commented by John Elwood, one of Elonis' attorneys: "That is a risk on the Internet, where you're frequently speaking to people…without the context of tone of voice, body gestures, and frequently talking to people who you don't even know in the physical world." *See, No clear cut outcome for Supreme Court's Internet free speech case,* CBS NEWS (1 December 2014), http://www.cbsnews.com/news/no-clear-cut-outcome-for-supreme-courts-internet-free-speech-case/.

[192] *Elonis v United States*, 575 U.S. (2015) The Court left unresolved the questions of 1) whether an accused can be convicted of threats under federal law absent proof that of subjective intention to threaten; and 2) if the statute does not require such evidence, whether the First Amendment would, (as discussed by G. Robert Blakey, *Elonis v. United States* 129 HARV. L. REV. 331 (10 November 2015), https://harvardlawreview.org/2015/11/elonis-v-united-states/.) The decision does not apply to state law.

[193] Justin Jouvenal, *A 12-year-old girl is facing criminal charges for using certain emoji. She's not alone*, WASH. POST (27 February 2016) https://www.washingtonpost.com/news/local/wp/2016/02/27/a-12-year-old-girl-is-facing-criminal-charges-for-using-emoji-shes-not-alone/?utm_term=.5122292da1db.

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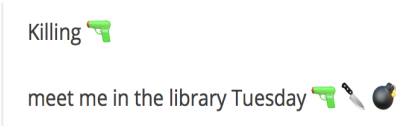

As of this writing almost two years later, it is not clear whether the matter has been resolved. The *Washington Post* noted "The case is one of a growing number where authorities contend the cartoonish [emoji] symbols have been used to stalk, harass, threaten or defame people."[194] The newspaper observed that emoji, "have no set definition and their use can vary from user-to-user and context-to-context."[195] As a result, the case for the prosecution is problematic, lacking a clear intention to kill, a direct link of any such intention to the accused, or even illicit action on the student's part. That case illustrates how placement of emoji in sequence, the context of the message, and the texter's choice of image can all challenge more conventional evidentiary standards.

Liability in another threat case was more readily established when a high school student sent a series of tweets to her 500 followers over the course of three hours. The tweets included the messages "Aint nobody safe 💯";[196] "Mfs wanna test me now 👏👏👏 you crazy I'm crazy too let's die shooting"; and "I really wanna challenge shooting at running kids not fun 😂".[197] The student had employed over 40 emoji, mostly the "laughing face" icon. She was convicted of committing a criminal threat despite her claims that she did not mean the statements and that they were a joke. The California Court of Appeal upheld the

[194] Elizabeth Nolan Brown, *Child Faces Criminal Charges After Using Weapon Emojis on Instagram,* WASH. POST (February 27, 2016), https://www.washingtonpost.com/news/local/wp/2016/02/27/a-12-year-old-girl-is-facing-criminal-charges-for-using-emoji-shes-not-alone/?hpid=hp_hp-more-top-stories_no-name%3Ahomepage%2Fstory&utm_term=.7cffb12cc82d. The original gun emoji has now been replaced in news accounts by a water pistol image.

[195] Id.

[196] *In Re L.F.* 2015 Cal. App. Unpub. LEXIS 3916. The 100 emoji is generally taken to refer to 100 percent.

[197] The laughing emoji placed at the end of this message was central to the defendant's argument that her messages were humorous rather than threatening in nature.

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conviction, noting that the tweets had manifested specific intent because the wording provided the requisite degree of specificity and had caused sustained and reasonable fear in the victims.[198]

Two other cases – one in New York in 2015, [199] another in Illinois in 2016[200] - also illustrate liability when threats are deemed to be explicit and serious. In the New York case a teenager was charged with making a terrorist threat on his Facebook page for posting the image below:

The prosecutor in the case argued the images constituted a threat to police, making them feel intimidated and harassed, creating fear for their safety and causing alarm and annoyance.[201] Features of the emoji that caused particular concern were the clear identification of the victim prototype, repetition of the weapon image that added immediacy to the message, the urgency indicated by placement of the weapons close to the officer's head, and the number of preceding postings that evening containing violent messages from the teenager. A grand jury declined to indict the defendant, due in part to lack of clear intent.[202]

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[198] In Re L.F. *supra* fn 210.

[199] Victor Luckerson, *Kids Are Facing Criminal Charges for Using Emoji,* TIME (29 February 2016), http://time.com/4241846/emoji-crimes/.

[200] *Emojis Taken as Threat Against Officer Lead to Probation for Preoria Man'*, CHI. TRIB. (17 September 2016) http://www.chicagotribune.com/news/local/breaking/ct-emojis-threat-peoria-20160917-story.html.

[201] Mashilem, *supra* fn 184.

[202] Julia Greenberg, *That ;) You Type Can And Will Be Used Against You In a Court of Law,* WIRED (12 February 2015) https://www.wired.com/2015/02/emoji-in-court-cases/, (giving context of the incident: Osiris Aristy opened up Facebook, posted a photo of a gun and wrote, "feel like katxhin a body right now." Later that night, he added, "Nigga run up on me, he gunna get blown down" and followed that with an emoji of a police officer and three gun emoji pointing at it. After an hour, he posted similar message.)

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One year later in Illinois a defendant pleaded guilty to a charge of attempted aggravated intimidation after posting a message on his Facebook page that included an expletive, a photograph in which he made a vulgar gesture toward a police officer (who is depicted in the background) and emoji of a handgun pointed at a police officer and a bomb.[203] Aggravating factors were inclusion of the officer's street address in the posting and the claim by the prosecutor that the bomb signified the defendant's membership in a street gang called the Bomb Squad.[204] The accused was sentenced to a year's probation.

Finally, a case in Spartanburg County, South Carolina demonstrated that the use of emoji alone, without the interpretative aid of text, could get the perpetrators arrested for stalking.[205] And what exactly was the threat? That someone would be beaten (fist), leading to (pointed finger), hospitalization (ambulance).[206]

Those cases illustrate the problems confronting courts trying to decipher the significance of emoji in threat cases. "You understand words in a particular way," comments Dalia Topelson Ritvo, assistant director of the Cyber Law clinic at Harvard Law School. "It's challenging with symbols and images to unravel that."[207] Courts frequently arrive at conclusions of fact without providing adequate reasoning. For example, posts by teenagers are routinely interpreted as intentional threats with little analysis of the alternative explanation, that is, ill-advised but not intentionally harmful humour or sounding off. All the above cases present various legal challenges and differing outcomes. They confirm that emoji present novel challenges in criminal cases calling for more consistent and principle-based decision making by the judge.

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[203] *Emoji Taken as Threat Lead to Probation for Peoria Man,* DAILY HERALD (16 September 2016) http://www.dailyherald.com/article/20160916/news/309169718/.

[204] Id.

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[206] Mike Flacy, *Two Men Arrested For Sending Threatening Emoji Over Facebook*, DIGITAL TRENDS (10 June 2015), https://www.digitaltrends.com/social-media/two-men-arrested-for-sending-threatening-emoji-over-facebook/. (The defendants had threatened or attacked the recipient on a prior occasion).

[207] Luckerson, *supra* fn 196.

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B. Contract Law

Emoji and emoticons have performed only a peripheral role to date in online text communications relevant to contractual negotiations. Smiley-face emoji have been included in salutations,[208] and in pre-contractual enquiries about whom to enter into negotiations with;[209] they have functioned as indicators of enthusiasm and optimism without having contributed to substantive negotiations, contractual terms, or any alleged breach.[210]

A case from Israel illustrates the potential significance of those visual icons. A couple conducting a messaging exchange with a landlord concerning a property he listed for rent[211] included a message with a string of emoji (a smiley face, a comet, champagne bottle, dancing figures and more) interspersed with an expression of interest and questions about setting up a viewing time. The landlord subsequently removed the listing, relying on what he believed was a firm contract. The couple then stopped returning the landlord's messages. He sued, claiming that he had relied on the messages to indicate consensus. In small claims court, the judge relied on the defendants' repeated expressions of interest, their misleading messages with festive icons, and a smiley face at the end of the negotiations to find for the plaintiff.[212] He reasoned that, while the messages containing the emoji did not constitute a binding agreement, their inclusion "support[ed] the conclusion that the defendants acted in bad faith"

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[208] SD Protection, Inc v Del Rio, 2008 U.S. Dist. LEXIS 112043 (E.D.N.Y. Sept.10, 2008). (*See further* Danesi's phatic function, *supra* fn 64).

[209] Parcel Management Auditing and Consulting Inc. v Dooney and Bourke Inc. 2015 U.S. Dist. LEXIS 22247 (D. Conn. Feb. 25, 2015).

[210] SD Protection, supra fn 205.

[211] Raisa Bruner, *Judge Rules Couple Owes Money After Using These 'Misleading' Optimistic Emoji,* TIME (22 MAY 2017) http://time.com/4788547/emoji-court-ruling/.

[212] Gabriella Ziccarelli and Eric Goldman, *How a Chipmunk Emoji Cost an Israeli Texter $2,200*, ERICGOLDMAN.ORG (May 2017), http://blog.ericgoldman.org/archives/2017/05/how-a-chipmunk-emoji-cost-an-israeli-texter-2200.html.

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contrary to a statutory obligation in Israel to negotiate in good faith. The couple were fined one month's rent as damages.[213]

The Israeli case turns on its unique facts and the good faith statutory obligation in the particular jurisdiction. Most would agree that no contract had been formed in that circumstance, unless the emoji convey very specific intention to be bound. On its face, the texted message here merely stated that the prospective tenant was 'interested' and essential details remain unspecified. Most significantly, absent Israel's statutory requirement of good faith bargaining, it is unlikely that other common law jurisdictions would find legally actionable consequences arising from the 'bad faith' actions of the defendants.[214] Nevertheless, the centrality attributed to the emoji in this case highlight their potential role in assisting courts to interpret the significance of pre-contractual communications.

C. Tort Law

Given the impulsive nature of social media and the possibility of immediate and widespread dissemination, it is unsurprising that emoticons and emoji have featured in several defamation cases and claims for intentional infliction of emotional distress. Sending nearly naked selfies and sexually explicit messages, increasingly common activities,[215] clearly raise the potential for various criminal offences as well as tortious claims. In relation to the latter, such communications can constitute the basis of an action for the infliction of emotional harm. As this action requires that the plaintiff experience some verifiable form of emotional harm, responses to the communications are critically important. A recipient who responds to semi-naked photographs and a

[213] Colin Dailida, *Your emoji can prove intent in court,* MASHABLE (19 May 2017) http://mashable.com/2017/05/19/emoji-lawsuit-israel/#DBRhZZQz_kqr.

[214] Id.

[215] The Pew Research Center found that 9 percent of cell phone owners reported having sent a suggestive picture or video, while 20 percent had received one. Those figures constitute a significant increase from figures obtained in 2012. Pew Research Center, *Couples, the Internet and Social Media* (2014), http://www.pewinternet.org/2014/02/11/main-report-30/.

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picture of a penis by informing the sender that she misses him and embellishing the text message with an emoji blowing him a kiss is likely to find an unsympathetic court.[216]

Cases claiming defamation can illustrate the disseminative power of online communication and the central role of emoji in altering their perceived meaning. In *Ghanam v. Does,* the Michigan Court of Appeals attributed considerable significance to the presence of an emoticon when considering the defamatory potential of an online message.[217] The plaintiff, the deputy superintendent of a city's department of public works, alleged that an Internet message board posting wrongly tied him to corruption and theft. It stated that the city was "only getting more garbage trucks because [the plaintiff] needs more tires to sell to get more money for his pockets :P."[218] The court found, as a matter of fact, that it was "patently clear" the :P emoticon "indicat[es] a joke, sarcasm, or disgust."[219] The court concluded that, from the perspective of the reasonable reader, the emoticon transformed a potentially harmful and defamatory statement into a jocular observation.

The role of an ancillary visual device, the hashtag, has also figured in defamation actions.[220] During the course of a vigorous campaign by one company (Axcelar) against a competitor (AvePoint), an Axcelar employee included #MadeinCHINA in a tweet, intending a negative comment on AvePoint's services.[221] As both companies provided services to the U.S. federal government (which is required to give preference to domestic products), any potential implication that a company's products were manufactured overseas was likely to be significant. AvePoint sued for defamation and other wrongs; one of the many bases of the defamation claim was that the hashtags within the tweet helped to confuse AvePoint customers into falsely believing that its products were of

[216] Stewart v Durham et al., 2017 U.S. Dist. LEXIS 88656.

[217] Ghanam v. Does, 845 N.W.2d 128 (Mich. Ct. App. 2014).

[218] Id.

[219] Id.

[220] AvePoint, Inc v. Power Tools, Inc, 81 F. Supp. 2d 496 (W.D. Va 2013).

[221] Id at 520.

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foreign manufacture.[222]

A federal district judge refused the defendant's claim for dismissal finding that the hashtags were implied statements of fact and that a reasonable Twitter user would interpret the tweets as an implied (and incorrect) factual assertion that the plaintiff's products were made in China. The significance of the hashtag was interpreted within the surrounding and linked message content, and the standard of a 'reasonable Twitter user' was employed to determine the likely impact of the message.[223]

In summary, while diverse and clearly circumscribed by the limited facts of each case, these torts cases demonstrate that emoji, emoticons and hashtags can perform an important moderating role in relation to digital speech, with defendants essentially arguing that these visual icons take the 'sting' out of otherwise defamatory material.

III A LEGAL RESPONSE TO DIGITAL SPEECH

A. Constitutional Protections and "Low Speech" Theory

Low value speech theorist Jeffrey Shaman predicted over 20 year ago that, "Perhaps the greatest danger of the low-value speech theory is the temptation it poses for expanding its application to new kinds of speech."[224] The rapid emergence of novel forms of digital expression and the hesitation in several jurisdictions to deliver well-reasoned judgments on their constitutional protection indicates that Shaman's prediction might very well be true.

Regarding constitutional issues generally, protections only arise where governments or public entities are involved as a potential litigant.[225]For the cases

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[222] Id.

[223] Id at 508.

[224] Jeffrey M. Shaman, *The Theory of Low-Value Speech,* 48 SMU L. Rev. 297, 348 (1995) http://scholar.smu.edu/smulr/vol48/iss2/2.

[225] For greater clarity, *see,* A. J. Willingham, *The First Amendment doesn't guarantee you the rights you think it does,* CNN (8 August 2017), http://www.cnn.com/2017/04/27/politics/first-amendment-explainer-trnd/index.html.

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we have examined in Part II above, free speech issues arise in criminal cases, primarily 'threat' speech used by students involved in educational institutions or between ex-partners, and conflict including public authorities. The issue of free speech is important where it applies, because ideally it works to redress any imbalance in state power that, in principle, is working to protect the status quo.

Free speech protection for emoji has not arisen in any reported cases except where they serve an adjunct role to text that is tendered as evidence. In *Elonis v. California,* as analyzed above, the accused argued that his egregiously violent statements attracted first amendment protection because they served a "'therapeutic' " purpose, "to 'deal with the pain' . . . of a wrenching event," or for "cathartic" reasons.[226] The US Supreme Court disagreed, stating that despite the intention of the accused the harm to the victim was the same.[227] Although facing a welcome opportunity to do so, the court made no mention of the purpose or effect of the emoticon on Elonis' free speech claim. The judgment did raise the possibility that social media postings presented the court with unique challenges given their wide dissemination.

At trial and appellate levels, judicial treatment of emoji has been infrequent and not analytical. As we have seen, some jurists have ignored the icons, while a few have welcomed them into evidence and one into his judgments. With the use of social media, and emoji, accelerating as a dominant communications tool, a consistent legal response to their presence in litigation will become increasingly in demand.

There will be future cases to address free speech as it might apply to emoji focusing on the First Amendment to the United States constitution[228] and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[229] Already in New York, an action by the

[226] Petitioner's Brief, 52-53.

[227] Elonis, *supra* fn 186.

[228] U.S. CONST. amend. I.

[229] Art.10 ECHR, "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public

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National Restaurant Association has been filed arguing that local health requirements that menu items with high salt content be indicated with a salt shaker emoji violate restaurant owners' first amendment rights.[230]

In both American and European jurisdictions, jurists have employed the low value speech analysis in determining whether the social, political, and democratic value of particular expression is of sufficient public value to attract free speech protection. As a general constitutional principle shaped since the 1940s in America and more recently within the European Union, speech that is more conversational, less studied or mediated, or that violates "dominant norms of civility, decency, and piety"[231] attracts less judicial protection than more studied and mediated speech.[232]

Determining the value of speech therefore calls for passing judgment on its communicative role. In America, high-value speech has not historically been the subject of prior government restraint based on content, that is, on the expression's "message, its ideas, its subject matter, or its content."[233] Hence the development, over time, of a content neutral jurisprudence to identify the

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authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises; (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[230] James Eli Shiffer, *Salt shaker emoji sparks a menus fight over free speech,* STAR TRIBUNE (15 February 2015), http://www.startribune.com/salt-shaker-emoji-sparks-a-menu-fight-over-free-speech/368731131/; Tim Cushing, *Judge Decides Free Speech Is Still A Right; Dumps Prior Restraint Order Against Mattress Review Site,* TECHDIRT (20 March 2017), https://www.techdirt.com/articles/20170318/11382836946/judge-decides-free-speech-is-still-right-dumps-prior-restraint-order-against-mattress-review-site.shtml.

[231] Genevieve Lakier, *The Invention of Low-Value Speech,* 128 HARV. L. REV. 2166, 2168. This paragraph is inspired by Lakier.

[232] Two cases of the US Supreme Court introduced the low value speech concept: Valentine v Chrestensen, 316 U.S. 521 (1942); Roth v. United States, 354 U.S. 476 (1957).

[233] Lakier, *supra* fn 230, 2172.

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purpose of speech; if such purpose does not violate the prevailing political, moral, or social order, it generally merits constitutional protection.[234]

Reading those values becomes more difficult, however, in digital spaces where dissemination can be to unknown persons, instantaneous, anonymous, asynchronous, and lacking in authentication. Also a challenge to judging the need for constitutional protection is the libertarian ethos in which the Internet was created and which still shapes the expectations of many Internet users and scholars.[235]

American jurisprudence illustrates that "the first Amendment does not reach all language, let alone all expressive conduct".[236] To garner protection, language must further the values traditionally espoused by Americans, such as individual participation in the marketplace of ideas, growth of autonomy, and democracy.[237] Jurists have tended to avoid a definitive meaning of free speech, preferring examples from the cases as they arise. Hence protection has extended in America to such non-verbal or "expressive" conduct as the wearing of armbands to protest war,[238]burning of a flag,[239] tattooing[240] and, occasionally, dancing nude.[241] Meaning is usually the focus of debates around expanding the limits of protected speech. Speech will not be curtailed merely because it is offensive, racist, even abhorrent, in that purpose or meaning.

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[234] *See further* P. Leerssen, *Cut Out by the Middle Man: The Free Speech Implications of Social Network Blocking and Banning in the EU.* 6 JIPITEC (2015) urn:nbn:de:0009-29-42717, (discussing the limits of free speech using social media messaging that addresses the political debates (#jesuischarlie, Arab Spring).

[235] See further on this point, Jacob H. Rowbottom, *To Rant, Vent and Converse: Protecting Low Level Digital Speech* (2 April 2012) 71 CAM. L. J. (2012) 1.

[236] Joseph Blocker, *Nonsense and the Freedom of Speech: what meaning means for the First Amendment,* 63 DUKE L. J., 1423 (2014). "[N]onsense is multifarious, widespread, and sometimes intertwined with traditional First Amendment values like the marketplace of ideas, autonomy, and democracy." (abstract)

[237] Id at 1442-1456.

[238] Tinker v. Des Moines, 393 U.S. 503 (1969).

[239] Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990).

[240] Strocker, *supra* fn ?

[241] See further, Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts The G-String*, 80 N.Y. L. REV. 1109 (2005).

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ECHR Article 10 jurisprudence is influential on national courts of member states of the European Union. Like the American free speech jurisprudence, Article 10 cases support the avoidance of prior restraint on speech, not unexpected given the explicit provision for "the freedom to express one's opinion, the freedom to communicate information, and the freedom to receive information."[242] Article 10 thereby particularizes speech freedoms, unlike the US First Amendment, and is designed to simplify its application but which, in effect, often renders it more uneven in its results.[243] Courts tend to give strongest protection to expression on political matters, offering little support to the everyday online conversations that might have nothing to do with public interest topics. Writing from the European perspective, law academic Josh Rowbottom argues that free speech needs to offer some protection for things people say in the heat of the moment or when letting off steam on any topic. The protection need not be absolute, however, and "some proportionate sanctions may be appropriate."[244]

Those provisions differ from the American first amendment in that the ECHR highlights "duties and responsibilities" of individuals who claim protection, aiming at preventing "the irresponsible and dangerous use of democracy."[245] That provision reflects concern of the EU Parliament and Commission that all states be held to a uniform standard of speech values regardless of their national differences in political, social, or moral beliefs or practices. The ECHR recognizes the right to enjoy individual reputation and private life as part of free

[242] See Article 10, *supra,* fn 226.

[243] Jean-Francois Flauss, *The European Court of Human Rights and Freedom of Expression,* 84 IND. L. J. 809 (2009).

[244] Jacob Rowbottom, *Casual comments and legal controls: watch what you say online,* INFORRMS BLOG (13 April 2012), https://inforrm.wordpress.com/2012/04/13/casual-comments-and-legal-controls-watch-what-you-say-online-jacob-rowbottom/.

[245] Id at 810 (discussing Article 10(2))

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speech, unless one is a public figure; that fact engages the public interest/personal privacy balancing debate.[246]

Emoji would be particularly challenging for constitutional scholars and jurists in that they are speech that is non-representational in its presentation. Similar constitutional challenges have been recognized as free speech regarding Jackson Pollock's drip paintings, for example, or speech that lacks familiar speech reference points (beat poetry), or that aims to communicate with non-cognitive functions in the human brain (subliminal advertising).[247] More novel modes of communication, such as variations on a particular emoji, raise similar difficulties in identifying speech without recognizable representational meaning.[248] "Man in Suit Levitating" and "Fish Cake" emojis are examples at hand.

It has been argued that nonsensical content should be protected, albeit of low value, because its consideration has much to teach us about the "meaning of meaning", or the way that words are used.[249] Many styles of emoji, even some approved by the Uniform Code, can be viewed as nonsensical to some viewers due to various impediments to interpretation.[250] Debates over the free speech merit of emoji could pose a challenge to those general principles in that their meaning is often obscured or their use provokes a purely emotional response.

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[246] As seen in the *Berkow* decision considered in Part III above and Pfeifer v. Austria, App. No. 12556/03 (Eur.Ct.H.R. Nov. 15, 2007) http://www.echr.coe.int/echr/; and, in America, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (the seminal call for privacy rights against novel media intrusion).

[247] MARK V. TUSHNET, ALAN K. CHEN, AND JOSEPH BLOCHER, FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENt, Introduction (2017) kindle edition.

[248] Cass Sunstein, *Pornography and the First Amendment*, 35 DUKE L. J., 589-627, 606 (1986), http://scholarship.law.duke.edu/dlj/vol35/iss4/1 (arguing that increased constitutional scrutiny of image advertising has been justified because it communicates a "generalized aesthetic impact producing an emotional response"); see also O. Lou Reed, *Should the First Amendment Protect Joe Camel? Toward an Understanding of Constitutional 'Expression',* 32 AM. BUS. L. J. 311, 349 (1955) (addressing subliminal advertising as speech).

[249] Blocker, *supra* fn 223 (citing Wittgenstein).

[250] *See* Part II above.

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US jurists have not dealt consistently with emotional speech over time. They tend to distrust it, according to constitutional scholar Rebecca Tushnet[251] who urges more acceptance of emotion as deserving of constitutional protection because "human thought is emotional."[252] Under that premise, emoji should attract free speech protection as visual cues that invoke the sharing of human feelings.

American jurists, by assigning a social or public value to speech over the past century, have shaped a theory of low speech that excludes particular forms of communication from constitutional protection.[253] The low speech theory involves a balancing question: is the social value of such speech outweighed by the harm it causes? Jurists have not applied that balancing test consistently according to some critics, specifically when challenged by difficult cases involving fighting words, profanity, non-pornographic but sexually specific language, insult as defamation, and commercial speech.[254] One reason offered is the changing nature of social values that sets the bar on tolerance of expression. Another is the suspected injection of personal values into constitutional decisions.[255] That observation has been made by a few constitutional observers, one of whom writes that a practical result of limiting protection to low value speech is the intrusive engagement of government in value judgments whereby it achieves what it is constitutionally forbidden to do: it removes from the

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[251] Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment,* 127 HARV. L. REV. (2014) 2392.

[252] Id., 2408, particularly when discussing R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1208 (D.C. Cir. 2012) (related to whether images on cigarette packaging are too emotional to convey factual information).

[253] See, for example, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (upholding the constitutionality of any "offensive, derisive, or annoying word" (569). Shaman, *supra* fn 221, (attributing the theory's origins to an exchange between Larry Alexander, *Low Value Speech,* 83 NW. U. L. REV. 547 (1989) and Cass R. Sunstein, *Low Value Speech Revisited,* 83 NW. U. L. REV. 555 (1989).

[254] Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech,* 58 WASH. & LEE L. REV. (2001) 195; Lakier, *supra* fn 230, *passim.*

[255] Lakier, *supra* fn 230 (noting "value judgments in fact pervade (US) first amendment law,"); *see further* Helen Norton, *How Do We Know When Speech is of Low Value?,* JOTWELL (8 May 2015) (reviewing Genevieve Lakier, *The Invention of Low-Value Speech,* HARV. L. REV. 2166).

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marketplace of ideas those it finds distasteful or running counter to prevailing mores, and arguably achieves the status quo in any event.[256]

In European Union member states speech is highly regulated but within the frame of their duties to refrain from interfering with fundamental rights of its citizens. Under Article 10 of the ECHR, when considering the necessity of those measures in a democratic society and the 'fair balance' test, a number of factors must be taken into account, such as the nature of the speech affected, the public interest that an injunction would serve, and the measure's proportionality in relation to speech freedom.[257]

Many cases before the European Court of Human Rights (ECtHR) address high value speech as interpreted by Article 10 of the ECHR.[258] Ideas are expressly protected. Decisions are framed within deliberations on different types of speech: political, artistic, commercial, gossipy, pornographic, and hateful as considered in order of increasing severity. The ECtHR further distinguishes expression by professionals from speech aimed at a wide audience, and well thought-out and researched expression as opposed to reflexive responses or unmediated citizen journalism.[259] Low value speech, by comparison, defines more spontaneous, amateurish expression like day-to-day conversation, aimed at one's social peers, and implies less social responsibility for its message.[260] Criminal prosecutions and defamation cases occupy a significant amount of the low speech conflicts that are decided by the ECtHR;[261] in addition, much everyday speech posted online or transmitted on message platforms do not fall

[256] Id. Also denounced as "viewpoint discrimination" in R.A.V. v City of St. Paul, 505 U.S, 377 (1992).

[257] DAVID HARRIS, MICHAEL O'BOYLE, EDWARD BATES, AND CARLA BUCKLEY, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, (2014, 3rd).

[258] Rowbottom, *supra* fn 234.

[259] Id.

[260] *See further,* SAUL LEVMORE AND MARTHA C. NUSSBAUM (eds) THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION, Introduction, (2010).

[261] Rowbottom, *supra* fn 234, 2.

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into the high-value range because they viewed as private, not professional and hence of little public interest.[262]

Emoticons have been the subject of study in that determination and found to convey a less professional context. For example, in a 2017 American study of emoticon use in office emails, nearly half the responders rated them of very low "professional" importance.[263]

The ongoing question of whether and when offensive digital speech attracts legal protection is far from self-evident.[264] It calls on "patient work with both legal doctrine and more general theories of speech."[265] The low-value theory discussed herein is offered as a conceptual starting point for those deliberations.

B. A Discrete Legal Space

A separate space to think and learn about the importance of emoji in online messaging would serve McLuhan's observation that when innovation shifts our perceptions we need a prolonged phase of adjustment to all consequent changes, personal, social, and political.[266] Legal expectations must shift as well: with emoji presenting jurists and lawyers with novel challenges to rethink principles of law, we become aware that what we ask law to do might be less realistic than we have envisioned. As our case reviews have suggested, emoji serve to embellish meaning but they also bring uncertainty or contradiction.

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[262] Id at 12.

[263] Rubin Tomlinson LLP, *Emojis, exclamation points and ALL-CAPS: the pet-peeves and pitfalls of inter-office emails*, LEXOLOGY.COM (11 August 2017), https://www.lexology.com/library/detail.aspx?/. (The email stated: "Hi John, I saw that you came in at 9:15 this morning Keep in mind that the work day starts at 9am – Steve.").

[264] *See further, however,* Nicole Pelletier, *The Emoji that Cost $20,000: Triggering Liability for Defamation on Social Media,* 52 WASH. U. J. L. & POLICY 227 (2016), http://openscholarship.wustl.edu/law_journal_law_policy/vol52/iss1/15 (arguing for a new US law of social media: "The parallels between privacy torts and social media torts, and the inadequacies of privacy law that exist today, supports the proposal of new legislation…" Fn 174.)

[265] Id.

[266] McLuhan, *supra* fn 56.

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Given the idiosyncrasies of digital speech (cryptic, casual, hyperbolic, asynchronous), and the impediments to litigation for conflict resolution (high cost, delay, publicity), the creation of a discrete legal space for sharing expertise could produce quicker, more nimble answers to how to shape a legal response when messaging causes harm, but where the availability of speech constitutional protections are less certain.

Digital environments often merit a different legal response to errant activity. For example, credibility of sources, so critical to public acceptance of traditional media accounts, is often suppressed or absent in online accounts.[267] Cues about authority and status of either the writer or sources are also often hidden. Hence its reliability is "restrained and incomplete." [268] As one psychological study of Internet behavior points out, in cyberspace what mostly influences audience is not the speaker's professional status at all but skill in communicating coupled with "persistence, creative ideas and technical know-how."[269]As to style, conversations can be distracted and hyperbolic; it is the side-by-side existence of that cryptic speech and more elevated styles of communications that creates uncertainty about the verifiability of digital speech.[270]

The exuberant childishness of emoji tends to mask the harm in the workplace they can inflict. People choose them for their humor and economy of expression, and to say what words cannot, without awareness of the offense they might cause. In company communications, they often convey confusing messages that can make their way to the in-house legal department and, eventually, into the courts.[271] Excesses include conveying an inappropriate sexual emotion or threat; directing a co-worker by emoji to breach a company legal

[267] Yuval Karniel, *Defamation on the Internet: A New Approach to Libel in Cyberspace,* 2 J. INTL. MED. & ENTER. 215, 216 -219 (2008).

[268] Id at 231.

[269] John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCH. & BEHAV. 324 (2004).

[270] Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace,* 49 DUKE L.J. 855, 863 (2000).

[271] Id at 356.

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obligation; or commenting on a co-worker's performance with emoji that render unclear whether company policies or legal principles have been breached. [272]

Creating a bifurcated online space is one solution to the dual nature of online speech, that is, speech that contains references that are more traditional/reliable in one space and spontaneous and graffiti-like in another. As such, one space could foster the perpetuating of good speech and articulate debate while the other would be more of a village commons. Emoji use would inhabit the latter space. Both spaces would call for some sort of standard of care, a measurement of responsibility to one's neighbor under privacy law.

In terms of the particular aim and scope of the law that would emerge from this space, the mandate of judges or mediators would be to seek an understanding of what constitutes a welcoming communicative environment, to place that determination as much as possible in the hands of individual participants, and to create a tone of edification and leniency, not one of exacting retribution so prevalent in today's legal solutions. Lawmakers would need to take a page from policymaking colleagues who strive for technologically neutral language when drafting technology-focused law.

CONCLUSION

To inject emotion, contradiction, nuance, and ambiguity into interpersonal communications is to humanize them. Increasing the emoji factor achieves that objective and, due to the expanding stylistic choices of icons, lack of cross-platform interoperability, and confusing placement of images amid text, much confusion has resulted, much of it challenging our traditional criminal, tort, and contract laws. The constitutional protection of such "low value speech" is currently undermined.

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[272] *EMOJI-GOSH! How Emojis in Workplace Communications Can Spark Lawsuit (Or Make It Harder To Defend One)* NAT. L. REV. (20 NOVEMBER 2015), https://www.natlawreview.com/article/emoji-gosh-how-emojis-workplace-communications-can-spark-lawsuit-or-make-it-harder.

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This paper examines the resulting disparate legal responses to the increasing appearance of emoji in social media messaging. Isolated cases are emerging where the judiciary acknowledge their presence as written evidence but provide little principled analysis of the role or importance of emoji. Despite the decision in the American *Silk Road* case that emoji should be included in text provided to the fact finder, and the inclusion of a smiley face pictograph in a British judgment, there has been a noticeable lack of considered judicial thought on the non-verbal contributions of emoji. Almost all cases have been resolved at first instance and on other grounds. The reluctance of the US Supreme Court in the *Elonis* decision to provide some direction to our interpretation of nonverbal, digital speech has signalled a need for more informed guidance than can be provided by trial or appellate courts at this time.[273]

From the litigant's perspective, defences such as "just kidding" in the Elonis and various criminal threat cases, "not ready to commit" within in the Israeli contract scenario, or irony in the Bercow defamation case, support the thesis that emoji serve as message modifier. Experts from various disciplines have found that emoji can also serve such linguistic functions as phatic markers (indicating small talk), contextualized modifiers (reversing meaning), deliberate equivocators (clouding meaning), and emotional punctuation.

Cases examined in this paper establish that emoji have much to contribute to humanizing digital speech. They can humor, tease, delight, and confuse their audience who, in turn, look to emoji to decode and emotionally frame social messaging. With such a vital role, those symbols are increasingly emerging in legal controversies concerning requisite elements of intent, consent, relevance and probity – all critical to establishing liability. The principal challenge in this explosion of digital interactions is in figuring out how law can be simultaneously an instrument of continuity and innovation. [274]

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[273] Elonis argued that his postings had First Amendment protection because they were creative, similar to words uttered by rappers in public performances and recordings.

[274] See further, AUSTIN SARAT, LAWRENCE DOUGLAS & MARTHA MERRILL UMPHREY (eds), IMAGINING NEW LEGALITIES: PRIVACY AND ITS POSSIBILITIES IN THE 21ST CENTURY, Introduction, 2 (2012).

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Hurdles to translation of emoji include technological disparities across platforms and personal choices of confusing or inappropriate images. Those hindrances are exacerbated by the idiosyncrasies of machine-mediated messaging: knowledge sharing is unedited and instantaneous. Positively, the online environment offers features of scale, message mobility, growing digital literacy, and even an environment of casual playfulness.[275] Increased use of images to embellish, contradict or deliberately ambiguate text suggests that emoji can add media richness and a human intensity to McLuhan's "novel interplay" between people.[276] As we gain awareness of gradients of human emotion and meaning injected by emoji, we open the door to experts from various disciplines such as linguistics, semiotics, machine learning, psychology, and communications to inform us about our changing expectations of law's role in resolving conflict.

This paper proposes we create a discrete legal space to achieve just that: informed perspective on how to respond to misuse or misinterpretation of emoji with expertise and sensitivity. Such research could lead to the formation of a specialty court, similar to those currently providing tailored conflict resolution in areas such as mental health, intellectual property, indigenous, and juvenile justice law. Within that discrete space we are tasked with determining under what circumstances emoji deserve free speech protections. We then have a basis on which to modify the law's sting and evidentiary standards in light of constant and rapid technological changes in interpersonal communications.

[275] *See further on this point*, Anders litmøller and Jacob Lauring, *When Global Virtual Teams Share Knowledge: Media Richness, Cultural Difference and Language Commonality,* 48 J. WORLD. BUS. 398-406 (2013).

[276] McLuhan, *supra* fn 56.

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