THE EMOJI FACTOR: HUMANIZING THE EMERGING LAW OF DIGITAL SPEECH

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Emoji are widely perceived as whimsical, humorous or affectionate adjuncts 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 behavior 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 nonverbal 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.

INTRODUCTION

Emoji can be defined as: “popular digital pictograms that can appear in text messages, emails, and online social media platforms.” They are widely perceived as light-hearted semaphore and a comedic form of communication; they can also serve more malicious functions. For some, emoji hold a rich and complex sociocultural history that helps translate communications via mobile devices using various digital platforms. Others view these virtual cartoons as online venting that can become 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 entertainment, symbols have often been used to clarify and humanize text. The rise of emoji popularity 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.” They have survived snubs by more

1. This paper uses the terms “emoji,” “pictograms,” “pictographs,” and “icons” interchangeably.
5. Stark & Crawford, supra note 2.
Emoji serve many ends. They save  🕒 , reduce  😘 , and can even breach the  ♂ ♀ divide. Mostly genial and increasingly widespread, 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.”

Those graphic symbols can be used to underscore tone, introduce youthful exuberance, and give individuals a quick 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 improve our one-dimensional texting because they add emotional undercurrents that intensify our human networking. People employ emoji as they would more traditional aids to verbal communication in the offline sphere: to help them express themselves and to assist others to understand them. Indeed, the facilitative function of emoticons, a predecessor to emoji, was noted by a British judge in the McAlpine v. Bercow defamation case.

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 suggested emoticons are a stage direction that focuses the attention of the reader on the equivalent non-verbal behavior:

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7. Translation: “They save time, reduce confusion, and can even breach the gender equality divide.”


11. Lord McAlpine of West Green v. Bercow [2013] EWHC (QB) 1342 [84] (Eng.) (with Justice Tugendhat finding that “the reasonable reader would understand the words ‘innocent face’ as being insincere and ironical”).

12. Id. at 3, 15.
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.14

Cartoons have long enjoyed popularity through combining text and drawings to convey meaning.15 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.16 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.17

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

13. Id. at 7.
14. Id. at 85.
17. 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.”).
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.

I. CHALLENGES TO EMOJI TRANSLATION

A. Humble Beginnings: From Emoticons to Emoji

Today’s emoji have deep historical roots as devices of counter-gravity. 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 shows a genial smiley face on its surface.\(^{18}\) Meanwhile, in the former Czechoslovakian state, a smiley-faced pictogram on a legal document accompanies the signature of Bernard Hennet, Abbot of a Cistercian cloister in 1741, suggesting levity and sociality in the letter’s contents.\(^{19}\) In America, the literary figure Ambrose Bierce identified a need for a “snigger point, or note of cachinnation”\(^ {20}\) to punctuate “every jocular or ironical sentence.”\(^ {21}\) His choice had a decided emoticon appearance: \(\_/\)\(^ {22}\) Some social historians point to a 1960s children’s television program as the genesis of the modern American smiley-faced icon.\(^ {23}\) Others attribute the surge in the icon’s popularity to a marketing plan to defuse insurance customers’ anger over a corporate merger.\(^ {24}\)


22. Id.


For more recent references, we can look to “Japan in the mid-1990s when [the smiley face] was added as a special graphic feature to a brand of pagers then popular with teenagers.” Shigetaka Kurita recognized a contrast between Japanese online communications, which were “short and terse,” and hand-written letters, which were traditionally lengthy and emotive. Kurita, “[d]rawing from street signs, Chinese characters, and symbols used in manga comics,” devised symbols representing emotions and other intangibles.

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. For example, a blog has emerged called Emojinalysis purporting to psychoanalyze users’ emoji preferences; there has been a suggestion that a combination of emoji


27. Manga are comics created in Japan, in the Japanese language, in a style developed in late 19th century Japanese art. Jean-Marie Bouissou, Japan’s Growing Cultural Power: The Example of Manga in France, in READING MANGA: LOCAL AND GLOBAL PERCEPTIONS OF JAPANESE COMICS 1 (Jacqueline Berndt & Steffi Richter eds., 2006). The etymology of the word “manga” indicates whimsical or impromptu pictures. Id.


might replace pin codes for online banking; and the Unicode Consortium, a non-profit organization headquartered in Mountain View, California, has created a uniform emoji alphabet. It is devoted to standardizing images across platforms in response to inconsistent graphics from one application to the next.

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. Desmond Patton, a Columbia University sociologist observes, “even young people in the same neighborhood are not sure what different emoji mean.”

The older, monochrome emoticon is composed of keyboard characters from any updated digital device. 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

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32. See Mark Davis & Peter Edberg, Unicode® Technical Standard #51, UNICODE (MAY 18, 2017), http://www.unicode.org/reports/tr51/#Identification (reporting a total of 2,666 approved emoji as of 18 May 2017. Unicode is defined on the unicode.org website as a non-profit 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).


35. 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 Hess, supra note 6.

as a facial expression, once the recipient adjusts to reading it on the horizontal, as presented in western cultures.\textsuperscript{37}

In linguistic terms, the face emoticon is a basic morpheme from which variations are created by slight alterations to the eyes or mouth,\textsuperscript{38} or the inclusion or omission of a nose. It offers fewer complexities of meaning than emoji in that there are fewer prototypes.\textsuperscript{39} 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.\textsuperscript{40} In addition, MRI imaging has produced indicators that people find emotions in emoticons even when they are not perceived as faces at all.\textsuperscript{41}

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.\textsuperscript{42} Other studies have found that emoticon users are perceived as more


\textsuperscript{38} In linguistics, a morpheme is the smallest grammatical or meaningful unit in a language.


\textsuperscript{40} \textit{What Are the Different Types of Emoticons?}, NOBULLYING.COM (Feb. 9, 2015), https://nobullying.com/emoticons.


socially present, more dynamic than non-users, and more emotionally stable.

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." 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. 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 in contrast to the western preference for sideways display. "Since participants use emoticons [for reasons of] rapport [and sociality], "cultural differences with respect to politeness and facework" are to be expected.

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, and sarcasm." 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?

44. David Huffaker & Sandra L. Calvert, Gender, Identity and Language Use in Teenage Blogs, 10 J. COMPUTER-MEDIATED. COMM. 1, 4 (2005).
45. Chris Fullwood et al., Put on a Smiley Face: Textspeak and Personality Perceptions, 18 CYBERPSYCH, BEHAV. & SOC. NETWORKING 147, 147 (2015) (noting that participants judged text-speak authors as less open but more emotionally stable).
46. Id.
47. Vandergriff, supra note 36; see also Irina Averianova, The Language of Electronic Communication and Its Implications for TEFL, 34 PROCEEDIA – SOC. & BEHAV. SCI. 14, 16 (2012).
48. * *
49. :-) .
50. Vandergriff, supra note 36.
Right? Hanging down? Or might it actually be curled? 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 behavior. 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.”

By comparison, emoji offer more detailed iconography, adding a wealth of design prototypes to expand the intricacies of messaging, such as colored 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, 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. The 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. One thinks of Erving Goffman’s intentional facial expressions that aid in our presentation of self during day-to-day social interactions.

A study of workplace emails supports that thinking. Riordan et al. cite as an 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...”

53. Id.
56. Dresner & Herring, supra note 51, at 261 (emphasis added).
was not intended in a malicious manner.”59 Within that context, emoticons serve as modifiers, “keying markers or contextualization clues,”60 nuance devices to signal that the 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.61 He observed that the addition of a phonetic feature to “[m]ere writing” could produce a visual code that resulted in a novel pattern of human interplay.62 McLuhan stressed the ground-shifting importance of that innovative moment: he predicted that the “real 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.”63 McLuhan’s recognition of the leap in language meaning through combined text and phonetics, coupled with his acknowledgment 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

60. Vandergriff, supra note 36.
62. Id. at 22.
As Harvard linguist Steven 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.” 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. He coined 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.

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 human contribution by identifying texting as “fingered speech,” creating a novel interconnectedness of man and machine in order to animate human emotion. 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.

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. He identifies the exchange as social and psycho-emotional in nature, usually transmitting much more than a sum of its constituent parts. Danesi notes that emoji serve that function; in addition, they can serve a

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64. See generally Deese, supra note 21.
71. Id. at 18.
phatic function, that is, providing small talk or pleasantries to keep the conversation open and to set a pleasant tone. 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. Outside the dating environment, the use of emoji in more informal exchanges has been studied by a Taiwanese research team which concluded that their use on mobile phones contributes immensely to a sense of playfulness that drives social connectedness and identity formation, both very human pursuits.

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. 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. 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.

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

72. Id. at 19 (suggesting three subcategories of phatic statement: utterance opener, utterance ending, and silence avoider).
73. The qualitative study involved over 300 text messages by undergraduates between 18 and 22 years of age.
75. DANESI, supra note 70, at 20.
76. Ella Glikson et al., The Dark Side of a Smiley: Effects of Smiling Emoticons on Virtual First Impressions, SOC. PSYCHOL. & PERSONALITY SCI., 1, 5 (July 2017) (reporting results of three workplace experiments from participants located in various countries).
questionnaire directed at children who balk at printing or cursory writing to express their emotions and state of mind. 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 children ages three to five years regarding their well-being. Similarly, a 2013 study at the University of Wolverhampton’s 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. 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%). Those admissions confirm that emoji are preferred to clarify intention and to improve the human connection, both identified by McLuhan as reasons to seek a novel form of interplay.

An online/phone self-assessment study in 2014 determined that most American workers would admit to being disconnected from coworkers 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.

83. Id.
Danesi’s Canadian study, introduced above, found that users needed to match image choice and message intention.\textsuperscript{84} For example, emoji accompanying a texted invitation to a date could convey a range of intentions from romantic love to salaciousness, or even playful flirtation.\textsuperscript{85} To some sensibilities and in some contexts, the wrong choice of images (illustrated below)\textsuperscript{86} 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.\textsuperscript{87} 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.”\textsuperscript{88} 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.”\textsuperscript{89} 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 message

\textsuperscript{84} DANESI, supra note 70, at 21.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 20 (offering this range of romantic emoji.)

\textsuperscript{88} Id.
\textsuperscript{89} Bennett, supra note 25.
recipients. The Full Emoji List also provides a sample fall-back image to show how different an emoji would appear on a recipient’s device supporting a different platform. By comparison, the earlier emoticons do not result in the same discrepancies because of their construction from keyboard letters and punctuation that are relatively standard across platforms.

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 below, with the intention of conveying displeasure, the image might arrive on the recipient’s device as any of the four versions shown 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[.]” 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.

Image 1:


92. See Walther, supra note 39; see also Unicode’s Emoji and Pictographs, UNICODE, http://www.unicode.org/faq/emoji_dingbats.html (last visited Feb. 22, 2018) (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).


94. Variations on Grimacing Face emoji as shown in Neal, supra note 87 (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’ . . . I don't even know what's going on there.” Id.
Various software applications have emerged to address technical imperfections across platforms, to take the user outside of Unicode design choices locked into standard platforms and give the user choice in which ideogram most closely conveys her original intent.\textsuperscript{95} 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.”\textsuperscript{96} 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.\textsuperscript{97} 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 replace words altogether”.\textsuperscript{98} In the commercial context, one research team

\vspace{1cm}

\textsuperscript{95} See, e.g., Emoji Switcher Lets You Switch In and Out Emojis at Will, XDA DEVELOPERS (July 16, 2014), https://wwwxda-developers.com/emoji-switcher/; see also Hern, supra note 15.

\textsuperscript{96} Mark Davis, & Peter Edberg, Proposed Update Unicode® Technical Standard #51, UNICODE (FEB. 7, 2018), http://www.unicode.org/reports/tr51/tr51-13.html (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”)

\textsuperscript{97} Scall, supra note 26, at 384 (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, e.g., Michael Adelman, Constructed Languages and Copyright: A Brief History and Proposal for Divorce, 27 HARV. J. L. & TECH. 543, 545 (2014).

comments: “Emoji create new avenues for digital feeling, while also remaining ultimately in the service of the market."\footnote{99}

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.”\footnote{100} 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 the concept and marketing their versatility.\footnote{101} Apple has included emoji definitions within its settings to facilitate user choice.\footnote{102} An Emojitracker website utilizes Twitter to calculate the actual real time use of each emoji.\footnote{103} A

\footnote{99. Stark & Crawford, supra note 2, at 1.}
\footnote{101. Kristina Monllos, Here’s Why your Favorite Brands are Making their own Emoticons, ADWEEK (Mar. 9, 2015), http://www.adweek.com/brand-marketing/here-s-why-your-favorite-brands-are-making-their-own-emoticons-163325/.}
\footnote{102. Osas Obaiza, Make Your iPhone Tell You the Secret Meaning of Emojis, GADGET HACKS (Sept. 15, 2015), https://ios.gadgethacks.com/how-to/make-your-iphone-tell-you-secret-meaning-emojis-0148108/.}
\footnote{103. EMOJITRACKER, http://www.emojitracker.com/.”}
geolocation positioning service, Emoji-Messenger, uses emoji submitted by tourists to direct them to nearby desired locations or services.\textsuperscript{104} Perhaps the most promising of services in terms of how it integrates natural language and machine language is offered by Instagram: an algorithm that helps to distinguish among the variety of meanings open to interpretation by recipients when only one meaning is intended by the sender.\textsuperscript{105}

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\textsuperscript{106} has emerged as a unique brand for the New Zealand Maori;\textsuperscript{107} similarly, Twitter has released these flag icons\textsuperscript{108} to represent the distinct culture of the Australian Indigenous and Torres Strait Islanders.\textsuperscript{108} Skin tones of anthropomorphic icons have grown in variety to a dizzying degree, as can be seen with emoji representing Santa Claus.\textsuperscript{109}

\begin{table}
\centering
\begin{tabular}{|c|c|c|c|}
\hline
\textbf{Full} & \textbf{Emoji} & \textbf{List} & \textbf{supra} & \textbf{note} \\
\hline
2018 & 🎅 Santa Claus & 629 & 91 & \\
2020 & 🎅 Santa Claus: light skin tone & 630 & 91 & \\
2021 & 🎅 Santa Claus: medium-light skin tone & 631 & 91 & \\
2022 & 🎅 Santa Claus: medium skin tone & 632 & 91 & \\
2023 & 🎅 Santa Claus: medium-dark skin tone & 633 & 91 & \\
\hline
\end{tabular}
\caption{Santa Claus Emoji Variations}
\end{table}

\textsuperscript{105} Megan Garber, What We Talk About When We Talk About the Raised Hand Emoji, ATLANTIC (MAY 8, 2015), https://www.theatlantic.com/technology/archive/2015/05/what-we-talk-about-when-we-talk-about-the-raised-hands-emoji/392774/.
\textsuperscript{106} Amanda Cropp, Emotiki is the World’s First Maori Emoji Keyboard, STUFF (May 27, 2016), https://www.stuff.co.nz/business/80450522/emotiki-is-the-worlds-first-maori-emoji-keyboard.
\textsuperscript{107} As marketed by commercial enterprise Emotiki © and based on pictographs developed by Te Puia in Rotorua.
\textsuperscript{109} Full Emoji List, supra note 91.
breastfeeding, 110 and “person wearing turban”. 111 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 (face-palming, 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 the “French post more heart emojis than anyone else, while Australians use the most alcohol-related emojis.” 112 The Finnish, in turn, choose to brand their nation as metalheads 🤘 and sauna users 🟢. 113 In America, an online interactive map indicates emoji preferences for each state. 114

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

110. Id.

111. Id.


That 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 Emojini116 will convert our photographs to corresponding emojis. 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.117 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 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.118

A final consideration in studying emoji choices is their 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.119 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.120

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

118. Id.
119. Alecia Wolf, Emotional Expression Online: Gender Differences in Emoticon Us, 3 CYBERPSYCHOL. & BEHAVIOR 827, 827 (2000).
120. Id.
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 within text can determine its role as amplifier or modifier of the emotional range of a message. 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. 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. 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. 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.

122. Id. at 1.
124. Id.
125. Id.
126. Id.
127. Id.
Machine learning also holds potential for learning about the significance of emoji placement. First, consider an Instagram study\textsuperscript{128} that illustrates how context of a particular word or emoji can be predicted through natural language processing.\textsuperscript{129} 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 that sentence. Intuition, or “distributional hypothesis,” leads us to that conclusion.\textsuperscript{130}

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.\textsuperscript{131} Such computer-mediated functions can thereby assist in the identification of the “potential welfare enhancing effects of emoji” when added to straight text.\textsuperscript{132}

\begin{flushleft}
\textsuperscript{128} Emojineering, supra note 3.
\textsuperscript{129} “Natural language” is defined “a language that is the native speech of a people. . . .” Natural Language, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/natural\%20language (last visited Feb. 20, 2018). “Machine language,” in comparison, is “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)”. Machine Language, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/natural%20language.
\textsuperscript{130} A basic assumption about the meaning of language in semantics states: “Words which are similar in meaning occur in similar contexts. . . .” Magnus Sahlgran, The Distributional Hypothesis, 20 RIVISTA DI LINGUISTICA, 33, 33 (2008) (quoting Herbert Rubenstein & John Goodenough, Contextual Correlates of Synonymy, 8 COMM. ACM 317 (1992)).
\textsuperscript{131} See Emojineering, supra note 3.
\end{flushleft}
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.\footnote{See State v. McBride, 889 N.W. 2d 700, 700 (2016).} Similarly, an adult male who sends a pointed reference to an ostensible minor’s “pussy” heightens the sexualized nature of the communication;\footnote{Fry v. Robinson, 678 F. App’x 313, 315 (6th Cir. 2017).} including a smiling face emoji, however, could reduce its significance.\footnote{Id. at 316. 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. Id. Fry’s emoji choice for the question “anyone play with [your] pussy this weekend? 😘” provided argument for the defendant that it negated his criminal intent. Id. at 316. The case against Fry was later dismissed; Fry subsequently initiated a suit for false arrest and malicious prosecution. Id. at 317.}

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.”\footnote{Copeland, supra note 68.} So why not write like we speak? McWhorter proposes more casual, telegraphic, and less reflective writing primarily now that we have 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.\footnote{A few iOS mobile phones offer emoticons, but not emoji, when dictated to Siri. See Use Siri to Dictate Emoticons, MAC OS X HINTS, (Dec. 5, 2011), http://hints.macworld.com/article.php?story=20111202172017331.}

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.\footnote{McWhorter, supra note 69.} For example, McWhorter sees “lol” as something evolving into a far subtler message than simply “loving you lots”. He explains that “It’s a marker of empathy, of accommodation,”
what linguists call a “pragmatic particle” like the word “yo” in certain cultural contexts. An example of the meanings 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 :-)”, could produce a more subtle or less sombre message.

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. This point is confirmed by research from Slovenia that investigated the sentiments attached to over 750 most commonly used emoji. 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.

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 her colleagues, for example, used the smiley-face emoji to determine whether it performs a similar function to emotional expressions in face-to-face contact. They found significant 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 warmth.

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139. *Id.*


143. *Id.* at 1, 10, 13.

144. Glikson et al., *supra* note 76.
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. In essence, this research suggests that interpreting emoji might be distinctive from, and even more complex than, interpreting the equivalent non-verbal behavior.

Similar complexities also lie 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. Facebook explains the enhancement as adding “cross cultural resonance” to messaging. Its use has been interpreted, however, as an attempt to mollify the offense taken in some cultures to the thumbs-up icon, to facilitate the “types of reactions people would want to use most,” or to take the sting out of blatant expression of emotions by keeping it “respectful.” The result is an increase in the range of responses but also a potential increase in emotion-laden expressions and questionable context appropriateness.

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.”

145. Id.
146. Id.
147. Id. at 9.
150. Gayle Cotton, Gestures to Avoid in Cross-Cultural Business: In Other Words, Keep Your Fingers to Yourself?, HUFFINGTON POST (Aug. 13, 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!”).
152. Matt Burgess, Get Angry: Facebook’s ‘Reaction’ Buttons are Here, WIRED (Feb. 24, 2016), http://www.wired.co.uk/article/facebook-reaction-buttons-what-why.
problematic is introducing a “dislike” button, an idea rejected by Facebook for the negative value it would bring to online sociality.\(^\text{154}\)

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, “[T]hink about how often you text versus how often you make a phone call.”\(^\text{155}\)

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,\(^\text{156}\) service important verbal and non-verbal communication centers in the human brain,\(^\text{157}\) and provide insight into the user’s personality.\(^\text{158}\) For example, it appears that, as non-verbal face-to-face cues diminish when we go online, emoji become a compensatory mechanism to reduce ambiguity and infuse an emotional tone into personal expression.\(^\text{159}\) Another study reveals that emoji users are generally attributed contextual awareness, as seen in how they tailor icon choice to the technological platform and purpose in question (higher use for texting, lower incidence for email).\(^\text{160}\)

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,

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154. Id.
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.\textsuperscript{161} The study identifies an optimism by many researchers towards improvements to security that would increase trust in online messaging, achieved through growing technological sophistication and regulation.\textsuperscript{162} The Pew study also 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 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.”\textsuperscript{163} We are just awakening to the potential role of emoji and emoticons in promoting trust in online communications.

Economist J. Jobu Babin studies trust involving emoji within the gaming environment. 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.\textsuperscript{164} That is achieved through voice intonation, facial expressions, and body language, “things that emoji attempt to emulate.”\textsuperscript{165} The study also concluded that affective content, skin tone, and gender signals embedded in emoji can alter sharing within the game framework.\textsuperscript{166} Those results provided information on the interaction between individual factors and cultural indicators. For

\begin{itemize}
\item \textsuperscript{161} Lee Rainie & Janna Anderson, \textit{The Fate of Online Trust in the Next Decade}, PEW RESEARCH CENTER: INTERNET & TECH. (Aug. 10, 2017), http://www.pewinternet.org/2017/08/10/the-fate-of-online-trust-in-the-next-decade/. This study was conducted in collaboration with Elon University’s Imagining the Internet Center. \textit{Id.}
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{See generally,} Babin, supra note 132.
\item \textsuperscript{165} \textit{Id.} (discussing a study that conducted linguistic analysis of game chat logs).
\item \textsuperscript{166} \textit{Id.} 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.” \textit{Id.} Such finding suggests that even dark-skinned players might discriminate against dark-skinned emoji.
\end{itemize}
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 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. 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. For each image, a version from each of Apple, Google, Microsoft, Samsung, and LG was used. 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 and indicating that no

167. Id.
170. Id. The Miller study used a data set of approximately 100 million random tweets collected between August and September 2015. Id. Twenty-five of the most popular anthropomorphic emoji (human and animal) were chosen. Id. N=334 using Amazon’s Mechanical Turk. Id.
171. Id. The differences between interpretations are calculated by assigned values from 1 (least agreement) to 10 (total agreement). Id.
agreement as to sentiment was achieved in 25% of cases.\textsuperscript{172} 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.\textsuperscript{173} 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.\textsuperscript{174} Those results suggest that 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”;\textsuperscript{175} the emoji resulting in the most

\begin{table}
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
 & Most/Least Within-Platform & Sentiment Misconstrual &  \\
 & Apple & Google & Microsoft & Samsung & LG  \\
\hline
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  \\
\hline
\hline
 & 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  \\
\hline
Average (SD) & 1.96 (0.77) & 1.79 (0.62) & 1.90 (0.54) & 1.84 (0.78) & 1.84 (0.59)  \\
\hline
\end{tabular}
\caption{Top-3 and bottom-3 most different in terms of sentiment. Higher values indicate greater response variation.}
\end{table}

\begin{table}
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
 & Most/Least Within-Platform & Sentiment Misconstrual &  \\
 & Apple & Google & Microsoft & Samsung & LG  \\
\hline
Top 3 & 0.87 & 0.97 & 0.96 & 0.96 & 0.96  \\
 & 0.96 & 0.95 & 0.95 & 0.95 & 0.95  \\
 & 0.95 & 0.94 & 0.95 & 0.95 & 0.93  \\
\hline
\hline
 & 0.73 & 0.75 & 0.64 & 0.72 & 0.73  \\
 & 0.63 & 0.73 & 0.63 & 0.72 & 0.69  \\
 & 0.12 & 0.72 & 0.54 & 0.71 & 0.69  \\
\hline
Average (SD) & 0.84 (0.111) & 0.84 (0.078) & 0.823 (0.112) & 0.844 (0.080) & 0.845 (0.087)  \\
\hline
\end{tabular}
\caption{Top-3 and bottom-3 most differently described renderings. Higher values indicate greater response variation.}
\end{table}

\textsuperscript{172} \textit{Id.} \textsuperscript{173} \textit{Id.} \textsuperscript{174} \textit{Id.} \textsuperscript{175} \textit{Id.}
confusion was Apple’s “unamused face.” Participants’ words used to describe the latter icon’s expression ranged from “disappointment” to “depressing,” “unimpressed,” and “suspicious,” indicating widely disparate emotions.

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. The most uncontroversial observation by the Miller research team is that the use of relatively unambiguous cues (tears, ‘zzz’ indicators, hearts) enhances interpretation.

Finally, it must be recognized 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 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.

Linguist Tyler Schnoebelen highlights the subjective dimension of emoji, noting that messages are imbued with choices that reveal much about the sender. He confirmed that impression through an empirical study of twenty-eight 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. 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

176. Id. 😞
177. Id.
178. Id.
179. Id.
180. Id.
181. Id.
183. Id.
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.\textsuperscript{184}

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
conversations. That objective, in 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,\textsuperscript{185}
Pitman Shorthand,\textsuperscript{186} gang symbols, marketing logos, and tattoos.\textsuperscript{187}
Scholars, in turn, engage in relevant discourse over whether online
messaging is speaking or writing,\textsuperscript{188} whether a machine can interpret
text as skilfully as a human; \textsuperscript{189} whether digital speech is becoming
sufficiently subtle in meaning as to create a new language;\textsuperscript{190} 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

\footnotesize
\begin{itemize}
\item \textsuperscript{184} \textit{Id.} at 193, 215.
\item \textsuperscript{185} See \textit{generally} MULTILITERACIES: BEYOND TEXT AND THE WRITTEN WORD (Eugene F. Provenzo, Jr. et al. eds., 2011).
\item \textsuperscript{186} See \textit{Jean Louis Halperin, Five Legal Revolutions Since the 17th Century: An Analysis of a Global Legal History} 59 (2016) (attributing the introduction of Pitman shorthand in 1837 to the growth in access and reliability of private law reports).
\item \textsuperscript{187} Carly Strocker, Comment, \textit{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, 176 (2011).
\item \textsuperscript{188} McWhorter, \textit{supra} note 69.
\item \textsuperscript{189} Elizabeth Kirley, \textit{The Robot as Cub Reporter: Law’s Unsettled Role in Cognitive Journalism}, 7 EUR. J. L. & TECH. (2016).
\item \textsuperscript{190} Is \textit{Texting Actually Advancing Language}, NPR (Dec. 13, 2013), http://www.npr.org/templates/transcript/transcript.php?storyId=248191096 (Linguist John McWhorter observed that the substrate of texting has become something quite subtle.); see also Elizabeth Kirley, \textit{Can Digital Speech Loosen the Gordian Knot of Reputation Law?}, 32 SANTA CLARA HIGH TECH. L. J. 171, 172 (2016).
\end{itemize}
being made every day by industry arbiters, or “delete squads” as hired by Facebook, Instagram, and other social media platforms, to deal with takedown requests from the public.

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 in 2015 with the high profile trial of Ross Ulbricht, creator of Silk Road, an online illicit drug marketing enterprise investigated for over $200 million in illegal US drug sales. 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. 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 written text as repeated question marks (“???”) or extended words (“soooo”). Prosecutors maintain in such instances that novelties in online messaging are akin to wiretapped conversations and are hence best read aloud for jurors. A segment of the Silk Road trial transcript, provided here as


194. Benjamin Weiser, At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji, N.Y. TIMES, Jan. 29, 2015, at A22.

195. Id.

196. Id.

197. Id.
tweeted by a third-party observer, illustrates the weakness in that position due to the decoding challenge presented for jurors when provided with testimony, sans emoji, as transcribed by a human court reporter:\footnote{Sarah Jeong (@sarahjeong), TWITTER, (Jan. 22, 2015, 11:25 PM), https://twitter.com/sarahjeong/status/558480572662947841; see also Thomas Gorton, Judge Rules Emoticons Admissible in Silk Road Trial, DAZED DIGITAL (Jan. 29, 2015), http://www.dazeddigital.com/artsandculture/article/23440/1/judge-rules-emoticons-admissible-in-silk-road-trial.}

\begin{quote}
\textbf{psytellen duck}
\textit{Follow} \\

[Image]

He said “emoticon” literally every time there was an emoticon

\begin{verbatim}
1 Baroness: yeah, it seems to be running just fine
2 now." Emoticon.
3 "Me: sweet
4 Me: mind a programming question?
5 Baroness: No questions please. but you can ask me
6 a ques...on if you'd like." Emoticon.
7 "Baroness: I am the grammar facists
8 Me: i can tell." Emoticon.
\end{verbatim}
\end{quote}

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.\footnote{Weiser, supra note 194, at A25 (comparing the reading aloud of emoji-laden text with hiding a witness’s facial expression and having their words spoken by someone else); see also Schnoebelen, supra note 140, at 117–18.} “With smiles, there might be a politeness or a friendliness.”\footnote{Id.} 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. 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. 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.

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. 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. Also in 2016, days after the knifing death of a Member of the UK Parliament, one of his fellow Ministers of Parliament (MP) found a Facebook message “Another MP that needs . . .” followed by knife and gun emoji. The prosecution withdrew the charges for lack of clear evidence of what the emoji meant. Similarly, in New Zealand, a

201. Platform variations of “winking” emoji as provided by Google Images.


205. Id.


207. Id.
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.

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. 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. 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. 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 sequencing of emoji and their placement in relation to text has arisen as a legal issue in several recent American cases involving alleged threats. In Pennsylvania, both district and appellate courts convicted Anthony Elonis of threatening his estranged wife with violent lyrics and other postings on his Facebook account. One such message conveyed the suggestion that their son’s Halloween costume should include her head impaled on a stick. Part of Elonis’ defense was that this message, which had been followed by the tongue-out

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211. Id.
214. Id.
215. United States. v. Elonis, 730 F.3d 321 (3rd Cir. 2013). Elonis was charged under 18 U.S.C. § 875(c) which prohibits “transmitting in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another.” Id.
216. Id. at 324.
emoticon “:-P”, was posted in jest. 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. 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. The student was charged with computer harassment and threatening school personnel. Among the controversial postings was:

As of this writing almost two years later, it is not clear whether the matter has been resolved. The Washington Post noted: “[T]he case is one of a growing number where authorities contend the cartoonish [emoji] symbols have been used to stalk, harass, threaten or defame people.” The newspaper observed that emoji, “have no set definition and their use can vary from user-to-user and context-to-context.”

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217. Id. at 331; see also No Clear Cut Outcome for Supreme Court’s Internet Free Speech Case, CBS NEWS (Dec. 1, 2014), http://www.cbsnews.com/news/no-clear-cut-outcome-for-supreme-courts-internet-free-speech-case/ (highlighting comments 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.”).

218. G. Robert Blakey, Elonis v. United States, 129 HARV. L. REV. 181, 331 (2015). Blakey notes that 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. Id. The decision does not apply to state law.


220. Id.

221. Id.

222. Id.
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 five hundred followers over the course of three hours.223 The tweets included the messages “Aint nobody safe 😂”;224 “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 😂”.225 The student had employed over forty emoji, mostly the “laughing face” icon.226 She was convicted of committing a criminal threat despite her claims that she did not mean the statements and that they were a joke.227 The California Court of Appeal upheld the 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.228

Two other cases—one in New York in 2015,229 another in Illinois in 2016230—also illustrate liability when threats are deemed to be explicit and serious. In the New York case, Osiris Aristy was charged with making a terrorist threat on his Facebook page after posting the image below:

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224. Id. The 100 emoji is generally taken to refer to 100 percent.

225. Id. 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. Id.

226. Id. at *1.

227. Id. at *12.

228. Id. at *10, *14.


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. 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, apparently due in part to lack of clear intent.

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. Aggravating factors were inclusion of the officer’s street name 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. 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. And what exactly was the threat? That someone would be beaten (fist), leading to (pointed finger), hospitalization (ambulance).

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.” 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 humor 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.

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, and in pre-contractual inquiries about whom to enter into negotiations with; they have functioned as indicators of enthusiasm and optimism without having contributed to substantive negotiations, contractual terms, or any alleged breach.

A case from Israel illustrates the potential significance of those visual icons. A couple involved in a text exchange with a landlord concerning a property he listed for rent 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

237. Mike Flacy, Two Men Arrested For Sending Threatening Emoji Over Facebook, DIGITAL TRENDS (June 10, 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. Id.

238. Id. The emojis depicted were in the following order: 🍰 👨‍xbf 👉 🚑. Id.

239. Luckerson, supra note 229.

240. SD Protection, Inc. v. Del Rio, No. 06-CV-5571, 2008 WL 5102249, at *8 (E.D.N.Y. Nov. 21, 2008); see also DANESI, supra note 70.


questions about setting up a viewing time.\textsuperscript{243} The landlord subsequently removed the listing, relying on what he believed was a firm contract.\textsuperscript{244} The couple then stopped returning the landlord’s messages.\textsuperscript{245} He sued, claiming that he had relied on the messages to indicate consensus. In small claims court, the judge focused 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.\textsuperscript{246} 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” contrary to a statutory obligation in Israel to negotiate in good faith.\textsuperscript{247} The couple was fined one month’s rent as damages.\textsuperscript{248}

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 conveyed very specific intention to be bound. On its face, the text message 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.\textsuperscript{249} Nevertheless, the centrality attributed to the emoji highlights its potential role in assisting courts to interpret pre-contractual communications.

\textbf{C. Tort Law}

Given the impulsive nature of social media and the possibility of


\textsuperscript{244} Id.

\textsuperscript{245} Id.


\textsuperscript{247} Id.

\textsuperscript{248} Colin Daileda, \textit{Your Emojis Might One Day Be Used Against You in Court}, MASHABLE (May 19, 2017), http://mashable.com/2017/05/19/emoji-lawsuit-israel/#DBRhZZQz_kqr.

\textsuperscript{249} Id.
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, clearly raise the potential for various criminal offenses 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 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.

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. 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.” The court found, as a matter of fact, that it was “patently clear” the :P emoticon “indicat[es] a joke, sarcasm, or disgust.” 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. During the course of a vigorous campaign by

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


253. Id. at 133.

254. Id. at 145–46.

255. Id. at 133 n. 4.

256. Id. at 145.

one company (Axcelar) against a competitor (AvePoint), an Axcelar employee included #MadeinCHINA in a tweet, intending a negative comment on AvePoint’s services.\textsuperscript{258} As both companies provided services to the United States 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 foreign manufacture.\textsuperscript{259}

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.\textsuperscript{260} 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.\textsuperscript{261}

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 twenty years 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.”\textsuperscript{262} 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.

\begin{itemize}
\item \textsuperscript{258} Id. at 520.
\item \textsuperscript{259} Id. at 520–21.
\item \textsuperscript{260} Id. at 509.
\item \textsuperscript{261} Id. at 508.
\end{itemize}
Regarding constitutional issues generally, protections only arise where governments or public entities are involved as a potential litigant. For the cases 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 is working to protect the status quo.

Free speech protection for emoji has not arisen in any reported cases except where they serve as adjunct to text that is tendered as evidence. In Elonis v. United States, as mentioned 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. The United States Supreme Court disagreed, stating that despite the intention of the accused the harm to the victim was the same. 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 has incorporated them in his written judgment. With emoji use 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 where the use of emoji invites consideration of protections offered by the First Amendment to the United States Constitution and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Already in New York, an action

266. U.S. CONST. amend. I.
267. Article 10 of the ECHR states:
by the 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.  

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” attracts less constitutional protection than more studied and mediated speech.

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.” Hence the development, over time, of a content-neutral jurisprudence to identify the purpose of speech; if


270. Two cases of the U.S. Supreme Court introduced the low-value speech concept: Roth v. United States, 354 U.S. 476 (1957); Valentine v. Chrestensen, 316 U.S. 52 (1942).

271. Lakier, supra note 269, at 2172.
such purpose does not violate the prevailing political, moral, or social order, it generally merits constitutional protection.\footnote{272}

Reading those values becomes more difficult, however, in digital spaces where dissemination can be 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.\footnote{273}

American jurisprudence illustrates that “the First Amendment does not reach all language, let alone all expressive conduct”.\footnote{274} 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.\footnote{275} 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,\footnote{276} burning of a flag,\footnote{277} tattooing\footnote{278} and, occasionally, dancing nude.\footnote{279} 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.

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

\begin{footnotes}
\item[272] See Patrick Leerssen, \textit{Cut Out by the Middle Man: The Free Speech Implications of Social Network Blocking and Banning in the EU}, 6 J. INTELL. PROP. INFO. TECH. & ELECTRONIC COMM. L. 99–100 (2015) (discussing the limits of free speech using social media messaging that addresses the political debates (e.g. #jesuischarlie, Arab Spring)).
\item[275] \textit{Id.} at 1442–56.
\item[278] Strocker, \textit{supra} note 187.
\end{footnotes}
information, and the freedom to receive information.” Article 10 thereby particularizes speech freedoms, unlike the First Amendment in the United States, and is designed to simplify its application but which, in effect, often renders it more uneven in its results. 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 principles need 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.”

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.” This provision reflects the 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 speech, unless one is a public figure; that qualification engages the public interest/personal privacy balancing debate.

Emoji pose a particular challenge for constitutional scholars and jurists in that they are non-representational in their presentation. Similar free speech challenges have been recognized in Jackson Pollock’s drip paintings, for example, and speech that lacks familiar speech reference points (beat poetry), as well as speech that aims to communicate with non-cognitive functions in the human brain, such as subliminal advertising. Particular emoji raise similar difficulties in identifying speech without recognizable representational

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280. See ECHR, art. 10, supra note 267.
283. Id.
284. Flauss, supra note 281, at 810 (discussing ECHR, art. 10(2)).
meaning. 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. Many styles of emoji, even some approved by the Unicode Consortium, can be viewed as nonsensical to some viewers due to various impediments to interpretation. 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.

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

By assigning a social or public value to speech over the past century, American jurists have shaped a theory of low speech that excludes particular forms of communication from constitutional protection. 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.

287. Cass Sunstein, Pornography and the First Amendment, 35 DUKE L. J., 589, 606 (1986); see also Tushnet, Chen, & Blocher, supra note 286, at 168 (arguing that increased constitutional scrutiny of image advertising has been justified because it communicates a “generalized aesthetic impact producing an emotional response”); O. Lou Reed, Should the First Amendment Protect Joe Camel? Toward an Understanding of Constitutional ‘Expression’, 32 AM. BUS. L. J. 311, 349 (1986) (addressing subliminal advertising as speech).


289. See Part II above.


291. Id. at 2404–15 (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).

language, insults as defamation, and commercial speech. 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. 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: to remove from the marketplace of ideas those it finds distasteful or running counter to prevailing mores, thereby protecting the speech status quo in any event.

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.

Many cases before the European Court of Human Rights (ECtHR) address high value speech as interpreted by Article 10 of the ECHR. 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. Low value speech, by comparison, is defined by more spontaneous, amateurish expression like day-to-day conversation aimed at one’s social peers, and implies

297. See Rowbottom, supra note 273, at 355.
298. Id. at 357.
less social responsibility for its message.\textsuperscript{299} Criminal prosecutions and defamation cases occupy a significant amount of the low speech conflicts that are decided by the ECtHR.\textsuperscript{300} In addition, much everyday speech posted online or transmitted on message platforms does not fall into the high-value range because it is viewed as private, not professional and hence of little public interest.\textsuperscript{301}

The ongoing question of whether and when offensive digital speech attracts legal protection is far from self-evident.\textsuperscript{302} It calls on “patient work with both legal doctrine and more general theories of speech.”\textsuperscript{303} The low-value theory discussed herein is offered as a conceptual starting point for those deliberations.

\section*{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.\textsuperscript{304} 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. Given the idiosyncrasies of digital speech (cryptic, casual, hyperbolic, asynchronous), and the impediments to litigation for conflict resolution (high cost, delay, unwanted publicity), the creation of a discrete legal space for sharing expertise could produce quicker, more nimble solutions to messages that cause 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

\begin{itemize}
\item[299.] \textit{See} Saul Levmore & Martha C. Nussbaum, \textit{Introduction, in} THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION 5–9 (Saul Levmore & Martha C. Nussbaum eds., 2010).
\item[300.] Rowbottom, \textit{supra} note 282, at 356.
\item[301.] \textit{Id.} at 366–69.
\item[302.] \textit{See} Nicole Pelletier, \textit{The Emoji that Cost $20,000: Triggering Liability for Defamation on Social Media}, 52 WASH. U. J. L. \\& POLY 227, 252 (2016) (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 . . . ”).
\item[303.] Levmore, \textit{supra} note 299, at 6.
\item[304.] McLuhan, \textit{supra} note 61.
\end{itemize}
acceptance of traditional media accounts, is often suppressed or absent in online accounts. As cues about authority and status of either the writer or sources are also often hidden. Hence its reliability is “restrained and incomplete.” As one psychological study of Internet behavior points out, in cyberspace, what mostly influences an audience is not the speaker’s professional status at all but skill in communicating coupled with “persistence, the quality of one’s ideas, and technical know-how.” 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.

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 business communications, they often convey confusing messages that can make their way to the in-house legal department and, eventually, into the courts. Excesses include conveying an inappropriate sexual emotion or threat; directing a co-worker by emoji to breach a company legal obligation; or commenting on a co-worker’s performance with emoji that fail to clarify whether company policies or legal principles have been breached.

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 virtual 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.

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306. Id. at 231.
309. Id. at 858.
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 laws.

CONCLUSION

We humanize digital speech by injecting it with emotion, contradiction, nuance, and ambiguity. 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, we face challenges to our traditional criminal, tort, and contract laws. The constitutional protection of such “low-value speech” is currently undermined.

This paper has examined the resulting disparate legal responses to the increasing appearance of emoji in social media messaging. Isolated cases are emerging in which the judiciary acknowledge their presence as valid 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 written judgment, there has been a noticeable lack of considered judicial thought on the non-verbal contributions of emoji. Most cases have been resolved at first instance and on other grounds. The reluctance of the United States 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.311

From the litigant’s perspective, defenses such as “just kidding” in 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 modifiers. Experts from various disciplines have found that emoji can also serve such linguistic functions as phatic markers (indicating small talk),

311. Elonis argued that his postings had First Amendment protection because they were creative, similar to words uttered by rappers in public performances and recordings.
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.312

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.313 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 pattern of interplay” between people.314 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: an informed perspective on how to respond to misuse or misinterpretation of emoji with expertise and sensitivity. One such space would be 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

314. McLuhan, supra note 61, at 23.
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.