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## Hearsay in the Smiley Face: Analyzing the Use of Emojis as Evidence

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## COMMENT

### HEARSAY IN THE SMILEY FACE: ANALYZING THE USE OF EMOJIS AS EVIDENCE

ERIN JANSSEN\*

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## I. INTRODUCTION

The purpose of this Comment is to address the issues that arise from the use of emojis as evidence. Currently, courts struggle with how messages, or symbols alone, should be presented as evidence.<sup>1</sup> Moreover, those in the legal field have difficulty determining how jurors should be instructed to understand the meaning of various symbols, their usage on the Internet, and the writer's intent.<sup>2</sup> When speaking with someone face-to-face, the meaning of words can be modified by using nonverbal cues such as body language, facial expressions, and surrounding circumstances.<sup>3</sup> However, in writing it is more difficult to establish the meaning of a message since a majority of these physical factors are not available to support the text.<sup>4</sup> The legal community must continuously modify evidence law to adapt to transformations in technology and increasing digital usage by a majority of the population worldwide.<sup>5</sup> This Comment will address the evidentiary issues emojis impose and how courts should interpret these visual symbols when they are introduced as evidence.

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1. See Lauren Foster, *Meaning of a Message: Emojis and Emoji Hashtags Become New Visual Evidence*, 79 TEX. B.J. 14, 14 (2016) (explaining the increasing popularity of emojis has only added to the difficulty attorneys have in proving the meaning of something that a client stated).

2. See Benjamin Weiser, *At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji*, N.Y. TIMES (Jan. 28, 2015), <http://www.nytimes.com/2015/01/29/nyregion/trial-silk-road-online-black-market-debating-emojis.html> [<https://perma.cc/QXG8-DAC9>] (commenting on emojis not only posing problems in their introduction as evidence in court, but also on how jurors should be instructed to evaluate new terms and symbols stemming from an evolving web culture).

3. See Pamela Peters, *Gaining Compliance Through Non-Verbal Communication*, 7 PEPP. DISP. RESOL. L.J. 87, 87 (2007) (acknowledging communication is based on more than words alone, such as “how the world of advertising persuades millions of consumers through the use of seductive images, or that look your mother gave which warned you that you were in trouble”).

4. See Madison Margolin, *Emojis in Court Evidence*, MEDIUM (Mar. 26, 2015), <http://medium.com/@margolinmadison/emojis-in-court-evidence-557eadb5758a> [<https://perma.cc/6NE2-YRCY>] (observing the lack of information “contained in words and grammar alone” prevents the addition of feelings in a message that context would otherwise provide).

5. See Josh Camson, *History of the Federal Rules of Evidence*, A.B.A. LITIG. NEWS (2010), [https://apps.americanbar.org/litigationnews/trial\\_skills/061710-trial-evidence-federal-rules-of-evidence-history.html](https://apps.americanbar.org/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html) [<https://perma.cc/ZE6C-3B4K>] (indicating the legal practice will see more changes in evidence law as our culture becomes more reliant on technology).

## II. BACKGROUND

### A. *Federal Rules of Evidence*

The Federal Rules of Evidence, drafted in 1975, have had small changes throughout the years; however, they remain fundamentally similar to the first draft proposed in 1969.<sup>6</sup> The Rules state that in order for an item to be admitted as evidence, the item must be relevant<sup>7</sup> and authentic.<sup>8</sup> Relevancy requires that the evidence offered “possesses sufficient probative value to justify receiving it into evidence.”<sup>9</sup> Regarding the admissibility of relevant evidence, Rule 402 provides that, “Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.”<sup>10</sup> For evidence to be authenticated or identified, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”<sup>11</sup>

The introduction of various new communications has altered the way people converse with one another.<sup>12</sup> These new methods of communication, brought on by advancements in technology, have had a tremendous impact on the hearsay rules.<sup>13</sup> The court in *Lorraine v. Markel American Insurance Company*<sup>14</sup> outlined the five questions courts use to determine whether electronically-stored information may be admitted into evidence.<sup>15</sup> Hearsay is defined in Rule 801,<sup>16</sup> with exceptions in Rules

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6. *Id.*

7. FED. R. EVID. 401.

8. *Id.* R. 901.

9. *Id.* R. 401 advisory committee’s note to 1972 proposed rules.

10. *Id.* R. 402.

11. *Id.* R. 901.

12. See Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 332–34 (2012) (crediting new technological advancements for having a large impact on the methods and devices that humans communicate through).

13. See *id.* at 332–33 (suggesting modifications should be made to rules governing statements that are traditionally excluded from hearsay).

14. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007).

15. See *id.* at 538 (asserting that when electronically stored information is offered as evidence, the court must consider: its relevancy; its authenticity; if it is hearsay covered by an exception; if it is an original or a duplicate; and whether its probative value is “substantially outweighed by the danger of unfair prejudice”).

803,<sup>17</sup> 804,<sup>18</sup> and 807.<sup>19</sup> The five questions to be answered in a hearsay analysis are:

- (1) [D]oes the evidence constitute a statement, as defined by Rule 801(a);
- (2) was the statement made by a “declarant,” as defined by Rule 801(b);
- (3) is the statement being offered to prove the truth of its contents, as provided by Rule 801(c);
- (4) is the statement excluded from the definition of hearsay by rule 801(d); and
- (5) if the statement is hearsay, is it covered by one of the exceptions identified at Rules 803, 804 or 807.<sup>20</sup>

The Federal Rules of Evidence “against hearsay ensure that only truly reliable testimony is given at trial—testimony that can be scrutinized by both parties to ensure that the best possible truth is revealed.”<sup>21</sup> In the future, the rules of evidence will continue to evolve as those in the practice of law increasingly utilize and rely on technology.<sup>22</sup>

#### B. *Free Speech and Technology*

The First Amendment to the United States Constitution provides, in relevant part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>23</sup> In 1956, the Supreme Court stated that the purpose of protecting speech and press under the First Amendment is “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>24</sup> Courts have upheld citizens’ rights to free speech to encourage

16. See FED. R. EVID. 801 (defining hearsay as a statement “the declarant does not make while testifying at the current trial or hearing; and . . . a party offers in evidence to prove the truth of the matter asserted in the statement”).

17. See *id.* R. 803 (providing exceptions to the hearsay rule regardless of the declarant’s availability as a witness).

18. See *id.* R. 804 (listing exceptions to the hearsay rule when the declarant is not available as a witness).

19. See *id.* R. 807 (consisting of a catch-all rule for exceptions to the hearsay rule).

20. *Lorraine*, 241 F.R.D. at 562–63.

21. Megan Uncel, “Facebook is Now Friends with the Court”: *Current Federal Rules and Social Media Evidence*, 52 JURIMETRICS J. 43, 56 (2011).

22. See Camson, *supra* note 5 (crediting the growth of technology and its impact on the changes made to the Federal Rules of Evidence).

23. U.S. CONST. amend. I.

24. *Roth v. United States*, 354 U.S. 476, 484 (1957).

them to communicate freely, in spite of the disadvantages that come with the allowance of this freedom.<sup>25</sup> The mediums used to convey speech today have distinctively changed from the way people communicated years ago.<sup>26</sup> Public personas are becoming less prevalent in today's society compared to emerging online identities, which have arisen through various Internet platforms.<sup>27</sup> As technology transforms communication and modes of speech, courts are forced to learn how to adapt to these changes.<sup>28</sup>

### C. *Emojis and Emoticons*

“An emoticon, as it is called in Internet vernacular, is a little cartoon face that can be added to the text of an instant message. The faces come in numerous expressions and are used to illustrate how the speaker is feeling or the intended meaning of what he or she has written.”<sup>29</sup> Emoticons were first drawn by graphic designer Shigetaka Kurita,<sup>30</sup> and generated by a Japanese communications firm called NTT DoCoMo in the late 1990s.<sup>31</sup> The term “emoji” is generated “from the Japanese 絵 (e □ picture) + 文字 (moji □ written character).”<sup>32</sup> The term “emoticon” is a

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25. See Brian D. Shapiro, *Elonis v. United States*, 135 *S. Ct.* 2001 (2015), 43 W. ST. L. REV. 275, 280 (2016) (examining the Court's views on the allowance of free speech “even if the speech casts a feeling of terror in those it was directed to”).

26. *Id.*; accord JO-ELLAN DIMITRIUS & MARK MAZZARELLA, *READING PEOPLE: HOW TO UNDERSTAND PEOPLE AND PREDICT THEIR BEHAVIOR—ANYTIME, ANYPLACE* 4–5 (New York: Random House 1st ed. 1998) (emphasizing the lack of in-person communication due to technology allowing people to speak with each other through the phone or Internet).

27. See Shapiro, *supra* note 25, at 280 (“People have traded in their public voices for intimate online personas.”).

28. See Jacob Lammers, *Courts Adapting to Technology*, NEWS-HERALD (June 13, 2010, 12:01 AM), <http://www.news-herald.com/article/HR/20100613/NEWS/306139979> [<https://perma.cc/J4E4-EMU2>] (recognizing cell phones and social media have impacted the court during the electronic- information age).

29. *State v. Nero*, 1 A.3d 184, 190 n.9 (Conn. App. Ct. 2010).

30. Justin McCurry, *The Inventor of Emoji on His Famous Creations – and His All-Time Favorite*, THE GUARDIAN (Oct. 27, 2016 1:30 PM), <https://www.theguardian.com/technology/2016/oct/27/emoji-inventor-shigetaka-kurita-moma-new-york-text> [<http://perma.cc/VWN7-LZTE>].

31. Tanya Dua, *Emojis by the Numbers: A Digiday Data Dump*, DIGIDAY (May 7, 2015), <http://digiday.com/brands/digiday-guide-things-emoji/> [<https://perma.cc/7JMV-LU2S>].

32. *Emoji and Pictographs*, UNICODE, [http://www.unicode.org/faq/emoji\\_dingbats.html](http://www.unicode.org/faq/emoji_dingbats.html) [<https://perma.cc/KS8M-X6YK>] (last updated Mar. 9, 2018, 1:12 PM); accord *Oxford Dictionaries Word of the Year 2015 is . . .*, OXFORD DICTIONARIES, (Nov. 16, 2015), <http://blog.oxforddictionaries.com/2015/11/word-of-the-year-2015-emoji/> [<https://perma.cc/A9JB-NSFU>] (explaining the definition and rise to the word emoji).

combination of the words “emotion” and “icon.”<sup>33</sup> Currently, there are approximately 2,789 emoji symbols worldwide.<sup>34</sup> These emojis are “regulated by the Unicode Consortium, a nonprofit corporation that standardizes software and the representation of text internationally.”<sup>35</sup> Unicode is an independent group; they do not own the emojis, are not responsible for designing them, and are not at liberty to negotiate licenses for them.<sup>36</sup> Unicode began its database work in 1986, before the first emoji was ever generated.<sup>37</sup> It ensures that all of the emojis are provided with specific criteria to make sure each symbol is unique.<sup>38</sup> Specific data regarding each individual emoji is presented in charts, which include a magnitude of statistics such as an emoji’s visual depiction, name, and keywords relating to the symbol.<sup>39</sup> Additional data includes an emoji’s code (made up of a combination of letters and numbers) and visual pictures of the emojis on various electronic devices.<sup>40</sup> The charts also provide a name for each emoji, including a textual description of the symbol.<sup>41</sup> The Unicode Consortium standard has been largely embraced by leaders in the technology industry, including “Apple, Google, Microsoft, IBM, and more.”<sup>42</sup>

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33. *Oxford Dictionaries Word of the Year 2015 is . . .*, *supra* note 32.

34. See generally *Full Emoji List, v11.0*, UNICODE, <http://unicode.org/emoji/charts/full-emoji-list.html> [<https://perma.cc/JRB2-YFFG>] (last updated Apr. 14, 2018, 10:34 AM) (providing an illustrative list of the emojis currently in use).

35. Dua, *supra* note 31.

36. See Amy Weiss-Meyer, *A Peek Inside the Non-Profit Consortium that Makes Emoji Possible*, NEW REPUBLIC (June 27, 2014), <http://www.newrepublic.com/article/118421/emoji-made-possible-non-profit-consortium> [<https://perma.cc/9LSC-UYQ4>] (explaining vendors are responsible for the ownership, use, and availability of colorful emoji images).

37. See *Chronology of Unicode Version 1.0*, UNICODE, <http://www.unicode.org/history/versionone.html> [<https://perma.cc/4PXF-SMVV>] (verifying the launch of Unicode came from workers on a database map at Xerox in 1986 and 1987); see also McCurry, *supra* note 30 (noting the first emojis were drawn in the 1990’s, with the first color emoji released in 1999).

38. See *What is Unicode?*, UNICODE, <http://www.unicode.org/standard/WhatIsUnicode.html> [<https://perma.cc/VY8Z-MHFQ>] (last updated July 24, 2017, 1:02 PM) (“The Unicode Standard provides a unique number for every character, no matter what platform, device, application or language.”); cf. *Chronology of Unicode Version 1.0*, *supra* note 37 (illustrating the sequence of events that have occurred since the launch of Unicode).

39. *Full Emoji List, v11.0*, *supra* note 34.

40. *Id.*

41. *Id.*

42. Weiss-Meyer, *supra* note 36; see also *What is Unicode?*, UNICODE, <http://www.unicode.org/standard/WhatIsUnicode.html> [<https://perma.cc/VY8Z-MHFQ>] (last updated July 24, 2017, 1:02 PM) (“[Unicode] has been adopted by all modern software providers and

Research has shown there are approximately two billion smartphone users throughout the globe.<sup>43</sup> These users send roughly 41.5 billion electronic messages<sup>44</sup> and six billion emoticons each day.<sup>45</sup> Approximately 92% of online users utilize pictorial symbols at some level.<sup>46</sup> According to a survey of SwiftKey users (excluding iOS and Android operators) the most-used emojis are those that represent a wide array of facial expressions.<sup>47</sup> This is not surprising since faces have the ability to express emotions—something that cannot be communicated through text alone.<sup>48</sup> In addition to personal use on individual social media sites and other platforms, emojis are becoming more frequently used in many business communications,<sup>49</sup> although their usage in the workplace has been questioned due to doubts about their professionalism.<sup>50</sup> The appropriateness of their use in an office setting is heavily dependent upon demographics, customer preferences, and the medium of communication.<sup>51</sup> Emojis have also become prominent assets in many industry transactions due to the ease of their use and availability

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now allows data to be transported through many different platforms, devices and applications without corruption.”).

43. Dua, *supra* note 31 (citing *Smartphone Users Worldwide Will Total 1.75 Billion in 2014*, EMARKETER (Jan. 16, 2014), <https://www.emarketer.com/Article/Smartphone-Users-Worldwide-Will-Total-175-Billion-2014/1010536> [<https://perma.cc/9W4C-8HVZ>]).

44. *Id.*

45. *Id.*; accord *Who Needs Words When You Have Emojis?*, EMARKETER (May 12, 2015), <http://www.emarketer.com/Article/Who-Needs-Words-You-Have-Emojis/1012466> [<https://perma.cc/E4NL-M9JA>] (“[Six] billion emoticons or stickers are sent every day via mobile messaging apps worldwide.”).

46. See Emoji Research Team, *2015 Emoji Report*, EMOGI, at 4 (Sept. 2015), [http://cdn.emoji.com/docs/reports/2015\\_emoji\\_report.pdf](http://cdn.emoji.com/docs/reports/2015_emoji_report.pdf) [<https://perma.cc/W8LM-DZ2Q>] (graphing the number of people who do not use emojis as approximately 8% of the online population).

47. See Cara Rose DeFabio, *America Loves the Eggplant Emoji, and Other Lessons from a New Emoji Study*, SPLINTER (Apr. 21, 2015, 4:03 PM), <http://fusion.net/story/123789/america-loves-the-eggplant-emoji-and-other-lessons-from-a-new-emoji-study/> [<https://perma.cc/B3P3-332G>] (“Faces accounted for close to [60%] of emoji use in the study . . . which confirms that people are using emoji to convey something that text alone can lack: *emotion*.”).

48. *Id.*

49. See generally Pascal van Opzeeland, *How to Use Emoticons and Emojis in Business Communication*, USERLIKE (Dec. 15, 2016), <https://www.userlike.com/en/blog/emoticons-business-communication> [<https://perma.cc/F4KG-HJSZ>] (discussing how communications between businesses and customers have become more casual).

50. See *id.* (asserting the reason for a lack of emoticon usage comes from a fear of appearing unprofessional in the workplace).

51. See *id.* (analyzing mediums to determine the different approaches to be taken and whether informal language can be used).



to the public at large.<sup>52</sup> In 2016, over 500,000 public payments on the mobile payment application Venmo were analyzed to determine what the most popular transactions were.<sup>53</sup> The study found that emojis have become a popular way to describe transactions made in the application, such as purchases of food, utilities, and travel expenses.<sup>54</sup>

According to reports, gender rather than age, is a greater factor in determining the types of people that use emojis.<sup>55</sup> It was discovered that women are more frequent users of emojis than men since they find these symbols to be more enriching.<sup>56</sup> Women stated that emoji usage helps them articulate thoughts more efficiently, and makes it easier for readers to comprehend their intended meaning.<sup>57</sup> Emojis are comparable to other punctuation marks in our language, since they have the ability to “convey some communicative force that would not be obvious just from the arrangement of words on a page.”<sup>58</sup>

In 2015, it was reported that 92% of individuals use emojis in text messages, or through social media, with a large contributing factor coming from the increase of mobile usage.<sup>59</sup> Recently, a survey determined that the most popular social media websites people connect to were Facebook, YouTube, and Twitter, respectively.<sup>60</sup> Facebook, the highest ranking social media site, is estimated to have 1.45 billion daily users log on to the platform.<sup>61</sup>

52. *See id.* (understanding emojis can be used in business settings although there is a higher risk of misinterpretation with the use of the symbols).

53. *See* Polly Mosendz, *This Is What Millennials Actually Use Venmo for*, BLOOMBERG (Sept. 29, 2016, 9:00 AM), <http://www.bloomberg.com/news/articles/2016-09-29/this-is-what-millennials-actually-use-venmo-for> [<https://perma.cc/22MM-K44R>] (citation omitted) (describing the specifics of the Venmo data that was analyzed).

54. *See id.* (illustrating results from a recent study the overall top three emojis utilized by Venmo users when sending payments through the application were pizza, money, and drinking glasses).

55. *See 2015 Emoji Report*, *supra* note 46, at 10 (providing charts that show women prevail over men in frequent usage of emojis, although these statistics are not affected by the age of the female or male users).

56. *Id.* at 11.

57. *Id.*

58. *Id.* at 34.

59. *Id.* at 4–5.

60. *See Top 15 Most Popular Social Networking Sites, July 2017*, EBIZ MBA, <http://www.ebizmba.com/articles/social-networking-websites> [<https://perma.cc/98T7-CYQM>] (displaying the top three social networking sites as of July 2017).

61. *See Stats*, FACEBOOK NEWSROOM, <http://newsroom.fb.com/company-info/> [<https://perma.cc/48QL-MBR5>] (reporting statistical information indicating that, as of March 2018,

## III. APPLICATION OF EMOJIS AS EVIDENCE

A. *Issues in Today's Society Regarding Emojis and Emoticons*

Emojis are used by Internet and telephone operators every day to enhance their texts and social media posts.<sup>62</sup> Sometimes it is difficult to decipher a writer's intent, leaving the most extreme cases to be evaluated by the courts.<sup>63</sup> In certain cases, their interpretations can change the meaning of a statement, thus posing new challenges for attorneys preparing for cases involving these symbols.<sup>64</sup> With a wide array of emoji symbols that can be used,<sup>65</sup> how are courts to know when these symbols cross criminal lines?<sup>66</sup> Emojis can remove ambiguity from text, but sometimes it may be difficult to comprehend the underlying message.<sup>67</sup> For instance, "[W]hen is a winky face a menace? Is poo a serious insult?

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there were 1.45 billion active daily users on Facebook); *see also* *Top 15 Most Popular Social Networking Sites, July 2017*, *supra* note 60 (estimating Facebook's monthly visitors at 1.5 billion).

62. *See* Opzeeland, *supra* note 49 (providing tips on use of emojis in a business environment); *see also* Neil Cohn, *Will Emoji Become a New Language?*, BBC (Oct. 13, 2015) <http://www.bbc.com/future/story/20151012-will-emoji-become-a-new-language> [<https://perma.cc/37NC-44LV>] (stating emojis have the ability to enhance or supplement text).

63. Justin Jouvenal, *A 12-Year-Old Girl Is Facing Criminal Charges for Using Certain Emoji. She's Not Alone.*, WASH. POST (Feb. 27, 2016), <https://www.washingtonpost.com/news/local/wp/2016/02/27/a-12-year-old-girl-is-facing-criminal-charges-for-using-emoji-shes-not-alone/> [<https://perma.cc/T46R-ZF4A>] (explaining a young girl's message was believed to be a threat, "but prosecutors and the judge will have to sort out whether the bomb, gun and knife emoji indicated a desire to threaten the school, simply anger, or something else entirely").

64. Nonverbal symbols are not restricted by particular definitions, unlike words alone. A single emoji, or a string of these symbols, can show the writer and reader's perceptions. *See* Gabriella E. Zicarelli, *What You Don't Know Can Hurt You: How Nonverbal Communication in Technology is Disrupting Litigation*, BLANKROME: INSIDE COUNSEL (June 13, 2016), <https://www.blankrome.com/index.cfm?contentID=37&itemID=3955> [<https://perma.cc/J8BF-EXXA>] (accentuating the importance of interpreting emojis and the power these symbols will have on the legal field when preparing for a court case).

65. *See Full Emoji List, v11.0*, *supra* note 34 (demonstrating 2,789 emoji characters include various expressions and types of symbols that correspond to faces, food, sports, and flags from around the world, plus many more).

66. *See* Lucy Bayly, *Virtually Violent? Arrests Over Emojis Raise New Legal Questions*, NBC NEWS (Mar. 12, 2016, 4:58 AM), <http://www.nbcnews.com/tech/tech-news/virtually-violent-arrests-over-emojis-raise-new-legal-questions-n533351> [<https://perma.cc/KA5G-J5RP>] (arguing that the differences between posting emojis that could result in criminal conduct, as compared to joking statements, lie in the context behind a statement).

67. *Compare* Cohn, *supra* note 62 (relating similarities between emojis and hand gestures, which have the ability to determine whether a statement made is to be understood in a different light), *with* Opzeeland, *supra* note 49 (warning about the risk for misinterpretation when using emojis).

And is there any legitimate reason to text somebody a knife or gun icon?”<sup>68</sup>

In early 2015, New York City courts were tested with one of these questions when a Brooklyn teen was arrested after posting an emoji-written message—in addition to written threats—on his online account, which raised concern for the safety of police officers in the area.<sup>69</sup> The emoji message included a face which resembled that of a cop, followed by three guns aiming towards the emoji face.<sup>70</sup> The attorney who represented the New York City teen said the post was not a threat directed at law enforcement, but only a statement made to show those reading the message that he was a strong individual.<sup>71</sup> Not long after the New York incident, a middle school girl was charged with making a threat to her school on an Instagram post using emojis that stated, “Killing [gun emoji] meet me in the library Tuesday [gun emoji] [knife emoji] [bomb emoji][.]”<sup>72</sup> Although the student’s mother did not think her daughter’s post was threatening, authorities had the duty to determine the thoughts behind the student’s message and to keep others out of danger.<sup>73</sup> In addition to these cases, the social media site, Instagram, banned the eggplant emoji—an emoji not ordinarily thought of as offensive—for its analogous meaning to a part of the human anatomy.<sup>74</sup> The purple fruit

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68. Bayly, *supra* note 66.

69. See Joseph Stepansky, *Brooklyn Teen Busted for Threatening Cops on Facebook*, N.Y. DAILY NEWS (Jan. 23, 2015, 6:32 AM), <http://www.nydailynews.com/new-york/nyc-crime/brooklyn-teen-busted-threatening-cops-facebook-article-1.2089216> [https://perma.cc/58WZ-74EY] (complaining Osiris Aristy’s social media Facebook post was a cause for concern for the New York City police as it contained a symbol matching the looks of a police officer).

70. *Id.*

71. Jouvenal, *supra* note 63 (portraying the charge against the Brooklyn teen as being an overreach by the New York City police since many people use the same emojis and are not charged with any crimes).

72. Lorelei Laird, *Middle Schooler Is Criminally Charged for Making Threats with Emojis*, ABA JOURNAL: JUVENILE LAW (Feb. 29, 2016, 2:55 PM), <http://www.abajournal.com/news/article/virginia-middle-schooler-is-criminally-charged-for-making-threats-with-emoji> [https://perma.cc/9ZTW-VF6X].

73. See *id.* (stating that although the school did not find the young girl’s Instagram post threatening, it would be up to authorities to work out exactly what the emojis meant); see also Jouvenal, *supra* note 63 (explaining the legal field will need to determine whether the intended meaning of the message was to make a threat, written only out of anger, or as a result of some other motive).

74. David Goldman, *Instagram Blocks ‘Offensive’ Emoji Hashtag*, CNN TECH (Apr. 29, 2015, 8:23 AM), <http://money.cnn.com/2015/04/29/technology/eggplant-instagram-offensive/> [https://perma.cc/6P4Z-EK3V].

posed a concern for Instagram's community standards; at the time of its removal, however, the gun, knife and bomb emojis were allowed on the site.<sup>75</sup>

B. *Comparing Emojis and Emoticons to Other Nonverbal Communications*

Interpreting emojis and emoticons is similar to how courts treat other nonverbal communications.<sup>76</sup> Most words have distinct definitions, but can be altered to convey a different meaning by various nonverbal factors, even if that meaning is not universally understood.<sup>77</sup> Nonverbal communication is divided into two categories: visual cues and paraverbal cues.<sup>78</sup> Over half of communication is based on visual cues, including outside appearances, facial expressions, and body language.<sup>79</sup> Paraverbal cues are cues that surround speech such as the pitch, tone, and delivery of a statement.<sup>80</sup> For example, when court interpreters are used to restate someone else's original statement, they have the difficult task of recreating the speaker's rendition of the events while safeguarding "the speaker's

75. *See id.* (searching for photos and videos on Instagram tagged with controversial symbols, such as banana and peach emojis, was still permitted even though they too are used to describe parts of the human anatomy, as well as searches for posts tagged with the gun and bomb emojis).

76. Emojis and emoticons are mainly thought to be a part of our everyday communications outside of our jobs. However, usage of these symbols is also prolific in the workplace setting. Thus, the way a court interprets emojis is just as important as the intent of the person using them. *Compare* FED. R. EVID. 801(a) advisory committee's note to 1972 proposed rules ("Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement."), *with* Zicarelli, *supra* note 64 (explaining emojis and emoticons "can make or break a case"); *see also* Opzeeland, *supra* note 49 (asserting emojis have the ability to enhance written messages in the same way as nonverbal communications because a majority of our communications rely on nonverbal cues).

77. *See* Peters, *supra* note 3, at 87 (recognizing tone, volume, and other signals can alter the meaning of words); *see also* Jouvenal, *supra* note 63 (expressing words are understood differently, in a way that symbols and images cannot be, because there are no set definitions for symbols and images "and their use can vary from user-to-user and context-to-context").

78. *See* Siegfried L. Sporer & Barbara Schwandt, *Moderators of Nonverbal Indicators of Deception: A Meta-Analytic Synthesis*, 13 PSYCHOL. PUB. POL'Y & L. 1, 2 (2007) (illustrating the two classes of nonverbal communication).

79. *See* Pamela Peters, *supra* note 3, at 87 ("[A]pppearances, movement, expressions, and body language make up 55% of our communications . . ."); *see also* Sporer & Schwandt, *supra* note 78 (documenting examples of visual cues, which include the movement of parts of the body and changes in facial expressions).

80. Sporer & Schwandt, *supra* note 78, at 2.

style, including 'pauses, hedges, self-corrections, hesitations, and emotion,' as well as the content of the message."<sup>81</sup>

One important similarity between emojis and other nonverbal communications is their ability to insinuate different gestures relating to the message.<sup>82</sup> Although, similar to nonverbal communications, this too can often be hard to analyze.<sup>83</sup> *Michaels v. Loftus*<sup>84</sup> was one such case where a court looked into nonverbal communications made by an individual.<sup>85</sup> The court interpreted evidence of hand gestures made by Michaels, an attorney, towards his opposing counsel to determine if his nonverbal gestures hindered the court in administering justice.<sup>86</sup> Furthermore, a case in Arizona, *State v. Printz*,<sup>87</sup> pointed out the types of gestures that can be admissible or inadmissible in a courtroom.<sup>88</sup> Examples of inadmissible communications are described as "a nod of the head in response to a question or the deliberate pointing of a finger as a method of identification."<sup>89</sup> Conversely, instances of admissible behaviors would be the "raising of an umbrella in order to provide protection from precipitation . . . ."<sup>90</sup>

In another case involving nonverbal communications, *McCorquodale v. Balkcom*,<sup>91</sup> potential jurors were asked to stand if they disapproved of the death penalty, and then to step forward if it would prevent them from

81. Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 14 (1997). Parts of speech, outside of the words alone, play a great part in getting a specific message across. In the courtroom, this becomes especially important when interpreters are used to make sure an original rendition of the original speaker's message is portrayed. See *id.* (indicating only a small number of individuals are able to be court interpreters because of the need to accurately reproduce a speaker's communication to the jury in the same way as the speaker intended).

82. Hand signal emojis create gestures that are similar to those made in face-to-face speaking engagements. See *Full Emoji List, v11.0*, *supra* note 34 (illustrating the various types of emojis similar to physical gestures such as dancing, clapping, and hand signals).

83. See Zicarelli, *supra* note 64 (stressing the notion that what one emoji means to the sender may mean something different to a receiver, judge, jury, or attorney in a case).

84. *Michaels v. Loftus*, 139 So. 3d 324 (Fla. Dist. Ct. App. 2014).

85. See *id.* at 325, 336 (overturning a contempt of court conviction for the use of a hand gesture).

86. See *id.* at 332–33 (explaining how gestures made by an attorney to opposing counsel, along with muttered statements in another language, were not sufficient to find the attorney in contempt).

87. *State v. Printz*, 609 P.2d 570 (Ariz. 1980).

88. See *id.* at 573 (differentiating nonverbal conduct as admissible or inadmissible by whether the one performing has intended to make an assertion).

89. *Id.*

90. *Id.*

91. *McCorquodale v. Balkcom*, 721 F.2d 1493 (11th Cir. 1983).

voting for this punishment against a guilty party.<sup>92</sup> This procedure, used to choose members of the jury, was challenged by the petitioner because he believed the veniremen's nonverbal responses were insufficient to determine whether they would rule in favor of the death penalty, or would refuse its implementation no matter the circumstances.<sup>93</sup> The court held that nonverbal communications in a jury voir dire were not the best method to retaining jury responses as they are more susceptible to error.<sup>94</sup> However, because this method did not fail the court's standard for questioning jurors, the court found that the jurors' nonverbal responses were acceptable.<sup>95</sup>

Continuing the analysis using implied messages, the Supreme Court addressed the waiver of a suspect's Miranda rights in *Berghuis v. Thompkins*<sup>96</sup> to determine if a suspect impliedly waived his right to remain silent in an interrogation about a shooting.<sup>97</sup> The suspect was read his Miranda rights before being questioned by detectives.<sup>98</sup> For three hours he was quiet, although he never stated that he was not going to talk to officers, or that he wanted to contact counsel.<sup>99</sup> At the end of the interrogation, the suspect was asked whether he prayed to God, and whether he asked God to forgive him regarding the shooting.<sup>100</sup> Due to his verbal utterance, the court held that the waiver of the right to remain silent could be expressed or implied, and, therefore, the suspect's statement implied that he was waiving his right to remain silent.<sup>101</sup>

### C. *Symbols and Text*

Words alone do not show the sender's tone, facial expressions, or other aspects important to getting the writer's meaning across.<sup>102</sup> However,

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92. *Id.* at 1495–96.

93. *Id.* at 1495 (citing *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

94. *Id.* at 1498.

95. *Id.*

96. *Berghuis v. Thompkins*, 560 U.S. 370 (2010).

97. *See id.* at 373–74 (providing the procedural history of the case and the findings of the lower courts).

98. *Id.* at 374–75. Although *Thompkins* did not sign the Miranda form provided, he was read such rights from a form that was provided to him at the time of his arrest. *Id.*

99. *Id.* at 375.

100. *Id.* at 376.

101. *Id.* at 388–89.

102. Experts believe nonverbal communication is the most important aspect of becoming an effective communicator. Nonverbal cues can help improve a speaker's credibility, make a good first impression, and gain rapport with their listeners, giving them an advantage over other

inserting an emoji into text can help the receiver better understand the meaning of the writer's context, preventing an incorrect interpretation of a message based on words alone.<sup>103</sup> In 1943, the Supreme Court referenced nonverbal communications by declaring, "Symbolism is a primitive but effective way of communicating ideas."<sup>104</sup> Teachers have even used emojis as a fun activity to help enhance students' analytical skills by understanding the meaning of a statement through context clues.<sup>105</sup> For example, when a smiley face ("P") is used in conjunction with text, it is obvious the writer intends that the reader make the determination that the statement is a joke.<sup>106</sup> In *Lenz v. Universal Music Corp.*,<sup>107</sup> the defense argued that the use of a winking emoji in a message meant that the plaintiff was not injured and had brought the case in bad faith.<sup>108</sup> The plaintiff argued that she had used a winking face emoji as a mirror response to her friend's statement that she loved how Lenz had "been injured 'substantially and irreparably' ;-)."<sup>109</sup> The court reviewed the messages and agreed with Lenz that her statement did not show that she was uninjured, but that she was just echoing her friend's declaration.<sup>110</sup>

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communicators. See Peters, *supra* note 3, at 87 (explaining that communication depends upon more than just the text; in fact "appearances, movements, expressions, and body language make up 55% of our communications; tone, inflection, and sound another 38%, which leaves only 7% for content, our words").

103. See Marissa King, *Using Emojis to Teach Critical Reading Skills*, EDUTOPIA (Oct. 13, 2016), <https://www.edutopia.org/article/using-emojis-to-teach-critical-reading-skills-marissa-king> [<https://perma.cc/2LYZ-KJZ4>] (indicating emojis are similar to words since they can have various meanings depending upon the context); see also Opzeeland, *supra* note 49 (asserting messages written with words alone can be misunderstood; thus, the addition of emojis or exclamation marks has proven to be helpful in reducing negative interpretations of a written message).

104. Caitlin Housley, Note, *A Uniform Test Isn't Here Right Now, But Please Leave a Message: How Altering the Spence Symbolic Speech Test Can Better Meet the Needs of an Expressive Society*, 103 KY. L.J. 657, 659 (2014) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)).

105. See King, *supra* note 103 (refreshing the classroom by adding student's social media expertise to teach context clues).

106. *Ghanam v. Does*, 845 N.W.2d 128, 145 (Mich. Ct. App. 2014).

107. *Lenz v. Universal Music Corp.*, 2010 WL 702466 (N.D. Cal. Feb. 25, 2010).

108. *Id.* at \*4-5; accord Karen A. Henry and Jason Harrow, *Exhibit A—Winky Face: Emoticon Evidence Enters Courts*, LAW360 (Nov. 17, 2015, 10:50 AM), <http://www.law360.com/articles/727700/exhibit-a-winky-face-emoticon-evidence-enters-courts> [<https://perma.cc/BHT2-2RG6>] (arguing the plaintiff was not "substantially and irreparably injured" due to evidence presented in an email exchange).

109. *Lenz*, 2010 WL 702466, at \*5.

110. *Id.*; see also Zicarelli, *supra* note 64 (stating the court sided with Lenz in determining that a winky face was just a response to her friend's initial message using the same symbol).

In *Elonis v. United States*,<sup>111</sup> the Supreme Court addressed whether a man's Facebook posts, addressed to his ex-wife, co-worker, and local elementary schools constituted true threats, rendering them unprotected speech under the First Amendment.<sup>112</sup> Similar to the plaintiff's renditions in *Lenz v. Universal Music Corp.*, Elonis argued that he inserted an emoji with its tongue sticking out adjacent to his text to show that the post was just a prank and was not intended to be taken seriously.<sup>113</sup> Using a winking emoji could be a signal for the reader to take a harshly written statement lightly.<sup>114</sup> However, this is not necessarily the case unless in every instance the writer uses a winking emoji they intend it to be a joke.<sup>115</sup> Therefore, every statement made needs to be viewed separately to see if the symbol is intended for sarcasm, or another meaning.<sup>116</sup>

#### D. *Difficulty of Introducing Symbols As Evidence*

The focus of the law has been primarily utilized to debate the meaning of words.<sup>117</sup> However, with the emergence of pictograms in conversations, lawyers are faced with interpreting not only words, but visuals as well.<sup>118</sup> The admissibility of emojis into evidence is a widely debated topic.<sup>119</sup> The greatest problem facing the courts, in regard to these cartoonish symbols, is how to determine the sender's intended

111. *Elonis v. United States*, 135 S. Ct. 2001 (2015).

112. *See id.* at 2002 (illustrating the background behind Anthony Elonis's graphic lyrics that he made on Facebook using an alias). Although the posts were disclaimed by Elonis as being fabricated with no malicious intent towards anyone, "[a] state court granted [his ex-wife] a three-year protection-from-abuse order." *Id.* at 2006; *see* Megan Chester, Note, *Lost in Translation: The Case for the Addition of a Directness Test in Online True Threat Analysis*, 23 *COMMLAW CONCEPTS* 395, 396 (2014) (explaining "true threats" on a social platform are not protected under the First Amendment); *see also* Shapiro, *supra* note 25 (indicating the FBI viewed defendant's social media posts as threats).

113. *See* Margolin, *supra* note 4 (describing that the use of a smiling emojis meant that the graphic lyrics, which were believed to be in reference to defendant's ex-wife, indicated that the post was made in "jest").

114. *See id.* (analyzing Elonis' Facebook post to determine if his use of emojis was to change the tone of the written statement, or something else entirely).

115. *Id.*

116. *See id.* (stating that unless it is proven an emoji is intended to mean the same thing every time it is used, every statement made with an emoji needs to be reviewed individually to decipher the writer's true intent).

117. *See* Foster, *supra* note 1, at 15 (recognizing the practice of "law used to be a discussion of the meaning of words").

118. *See id.* (asserting words are being replaced in the legal field with visuals).

119. *See* Jouvenal, *supra* note 63 (showcasing an attorneys' argument on whether emojis should be presented as evidence to juries).



message when a particular emoji is used.<sup>120</sup> One symbol can change the meaning of a message.<sup>121</sup> What makes emojis so difficult to understand is their close relationship to emotions, something that is not seen in basic text.<sup>122</sup> Although people may want these visual symbols to have unambiguous meanings every time they are used, it is improbable that this will ever occur because it is difficult to place specific definitions on emotions.<sup>123</sup> Additionally, having two or more emojis together can further change the meaning of a message.<sup>124</sup>

No matter how experienced someone is using the keyboard on their phone or computer, they may accidentally hit the wrong button.<sup>125</sup> Other times, someone else may have stepped on, touched, or used the keyboard to type something that was not intended.<sup>126</sup> This poses a great concern for courts when it is unclear how an individual meant to use an emoji, or even if they meant to use one at all.<sup>127</sup> The confines of the evidence rules are continually pushed as cases involving these visual symbols become more prevalent, and courts are faced with the task of evaluating these difficult questions.<sup>128</sup>

Learning how to understand people in everyday situations can be problematic, especially with the changes that society and technological advances pose.<sup>129</sup> Every day people interact with individuals around the

120. *See id.* (asserting one of the biggest problems for courts is to establish an offender's intent).

121. *See Zicarelli, supra* note 64 (affirming the notion that how and when emojis are used can be important to any case).

122. *See Margolin, supra* note 4 (indicating the difficulty words have in articulating people's emotions people—something that emojis are able to do).

123. *See id.* (expressing there will probably never be a dictionary for emojis because feelings cannot be defined the way that words are able to).

124. *See Bayly, supra* note 66 (“Two emojis together can instantly heighten the worry surrounding a conversation just as easily as they can dispel that concern.”).

125. Yaara Lancet, *Oops I Did It Again: 7 Keyboard Shortcuts Users Keep Hitting by Mistake*, MAKEUSEOF, (Oct. 9, 2012), <http://www.makeuseof.com/tag/oops-7-keyboard-shortcuts-users-hitting-mistake/> [<https://perma.cc/LJX9-GEJU>].

126. *See id.* (explaining situations when a keyboard can be compromised, including a child's use of the keyboard, an animal stepping on it, or mistakenly typing in the wrong program on the computer).

127. Jouvenal, *supra* note 63. “Attorneys have argued over whether emoji should be presented to juries as evidence. Experts say the biggest problem is simply determining in court what a defendant actually intended by sending a particular emoji.” *Id.*

128. *See id.* (warning cases involving these symbols are quickly emerging).

129. *See* DIMITRIUS & MAZZARELLA, *supra* note 26, at 4–5 (emphasizing the difficulties faced in understanding others). One of the reasons it is so difficult to understand others is the lack of close

globe online, decreasing the amount of in-person contact that we have with each other.<sup>130</sup> Since we are able to communicate through different platforms—some even reducing face-to-face interaction—it can be determined that “[a]ll forms of communication are not equal.”<sup>131</sup> People who are effective communicators, such as Steve Jobs or Oprah Winfrey, have the ability to connect with their audiences by playing into their emotions and making their stories interesting.<sup>132</sup> Gender also plays an important role in communications between individuals.<sup>133</sup> Two approaches—“dominance” and “cultural”—have been analyzed to see the differences between gender and language.<sup>134</sup> The “dominance” approach occurs when one individual maintains dominance over the other during a conversation.<sup>135</sup> The “cultural” approach recognizes that there are various cultural influences that can affect language due to various factors such as “ethnic, regional, and class backgrounds.”<sup>136</sup>

With the enormous growth of social media, courts have struggled to address how to deal with an introduction of evidence from these platforms.<sup>137</sup> Furthermore, social media has also “created a broad debate among courts over how best to address issues of discoverability, admissibility, and authentication standards for social media evidence.”<sup>138</sup> According to “general discovery principles, data found on social media

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relationships with “important people in our lives” due to changes in our society and the way that we communicate with each other. *Id.*

130. *See id.* at 5 (discussing the various options people have when needing to connect with someone, including options that avoid all visuals and other cues, or interacting with the person a great amount).

131. *Id.*

132. *See* BERT DECKER, YOU’VE GOT TO BE BELIEVED TO BE HEARD 17–21 (New York: St. Martin’s Press, rev. ed. 2008) (showing examples of new and old communicators in today’s society who are able to connect with audiences effectively).

133. *See* Deborah Tannen, *Introduction* to GENDER AND CONVERSATIONAL INTERACTION 3 (Deborah Tannen ed., Oxford Univ. Press 1993) (explaining the relationship gender and language have with one another).

134. *See id.* at 4 (presenting the two theories described by gender and language analysts).

135. *See id.* at 4–5, 9 (describing the characteristics of the dominance theory of communications between genders).

136. *Id.* at 5.

137. *See* Elizabeth Flanagan, Note, *#Guilty? Sublet v. State and the Authentication of Social Media Evidence in Criminal Proceedings*, 61 VILL. L. REV. 287, 290–291 (2016) (advocating for a clearer standard for introducing social media evidence as their introductions into the courtroom increase); *see also* Jouvenal, *supra* note 63 (emphasizing the increase in cellphone usage and statements made on the Internet, and how many more courts will see emojis being submitted as evidence in cases).

138. Flanagan, *supra* note 137, at 291.

websites should only be discoverable if relevant.”<sup>139</sup> However, there is much debate on the topic of social media discovery since the broad allowances set forth in evidence law teeter between maintaining privacy for those making statements online and allowing courts to obtain details set forth through an open medium.<sup>140</sup> In order to authenticate evidence obtained from any social networking website to be admitted, “the trial judge must determine that there is proof from which a reasonable juror could find that the evidence is what the proponent claims it to be.”<sup>141</sup> Content used as evidence from social media sources is feared by courts since “[t]he Federal Rules of Evidence in and of themselves do not significantly impede the admission of social media evidence.”<sup>142</sup> Worried about hearsay and authentication problems, courts seem to put a higher standard on these areas of evidence, and sometimes tend to exclude relevant evidence for fear of making an error.<sup>143</sup> Even so, statements that might otherwise be beneficial to a case may have their relevancy challenged due to the unreliability of statements made on the Internet.<sup>144</sup> The allowance of information acquired from social media evidence can greatly alter the outcome of a case and should be analyzed and introduced carefully.<sup>145</sup>

One way evidence from social media can be admissible and introduced as evidence is under a hearsay exception, if it is offered by the opposing party, as long as “no other evidentiary problems, such as providing impermissible character evidence under Rule 404 or being so unfairly prejudicial so as to substantially outweigh the probative value of the statement under Rule 403,” exist.<sup>146</sup> When a party to a case declares

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139. Agnieszka A. McPeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 WAKE FOREST L. REV. 887, 892 (2013).

140. *See id.* at 948 (“Overly broad social media discovery is not supported by either the existing rules governing discovery or by notions of privacy.”).

141. *Sublet v. State*, 113 A.3d 695, 698 (Md. 2015).

142. Uncel, *supra* note 21, at 44.

143. *See id.* (“To err on the side of caution, some courts apparently would rather exclude social media evidence than allow it to be authenticated and admitted using the existing Rules of Evidence.”).

144. *See* McPeak, *supra* note 140, at 889–90 (warning posts on social media can be irrelevant to a case due to the inaccuracy of a statement, or the misunderstanding of the post itself made by the reader, or one entering the post into evidence).

145. *See id.* (allowing just one statement made online can change the ending of a case, “especially as to damages or sentencing”).

146. *See* Aviva Orenstein, *Friends, Gangbangers, Custody Disputants, Lend Me Your Passwords*, 31 MISS. C. L. REV. 185, 196 n.63 (2012) (stating that evidence may be admitted through the

anything on a social media site, or performs an act, the statement is admissible under Rule 801(d)(2).<sup>147</sup>

In *United States v. Ulbricht*,<sup>148</sup> also known as the Silk Road case, a U.S. district court judge directed the jury to evaluate the defendant's social media utterance, along with an emoji, to observe the statement in the same way that the defendant had written it.<sup>149</sup> The jury instruction was given after the prosecutor had read aloud the defendant's post without including the missing smiley face.<sup>150</sup> Judge Katherine B. Forrest ruled that the emoticon should be read to the jury since it was significant to determining the meaning of the message.<sup>151</sup> This is just one case where the courts have had to decide whether to allow emojis in as evidence and how to handle the situation when it arises.<sup>152</sup>

Another problem facing courts, when faced with words alone, is determining the tone of a conversation.<sup>153</sup> Although emojis are not audible, they can deliver a "visual equivalent to tone of voice."<sup>154</sup> Pitch,

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introduction by an opposing party as long as all other evidentiary criteria are met and no problems arise).

147. *See id.* at 196 (spelling out the importance the hearsay exemption has on valuable evidence that can be introduced through social media platforms); *see also* FED. R. EVID. 801(d)(2), declaring an opposing party's statement is not considered hearsay if: "The statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's coconspirator during and in furtherance of the conspiracy").

148. *United States v. Ulbricht*, 79 F. Supp. 3d 466 (S.D.N.Y. 2015).

149. *See Weiser*, *supra* note 2 (outlining the allowance of an emoji into evidence occurred after an "unusual debate, taking place out of the presence of the jury in Federal District Court in Manhattan, arose after a prosecutor finished reading the text of an Internet post").

150. *Id.*

151. *See id.* (showing Judge Katherine B. Forrest's explanation behind her choice to instruct a jury to hear a reading of a statement along with an emoticon, because it was "part of the evidence of the document"); *see also* Foster, *supra* note 1, at 14 (professing the importance of the jury to have all of the information available when reading a statement on social media, including any emojis that were written along with text).

152. *See Weiser*, *supra* note 2, at 14 (emphasizing the judge's belief that the emoji be included with the message in order to have a fair trial).

153. *See Margolin*, *supra* note 4 (explaining the difficulty readers can have when establishing the "tone of voice in text message[s] or Internet exchanges").

154. *Id.*

volume, and the overall sound of a voice can indicate various emotions of the speaker.<sup>155</sup>

The sound of the voice often describes what emotion a person feels. The most documented vocal sign of emotion is pitch, which becomes higher with anger, fear or excitement, and drops with sadness. Louder faster speech is associated with anger and fear, [] softer slower speech with sadness. These changes in the voice are produced by emotion and are not easy to conceal. Equally, no pitch change or emotion can be cause for alarm. Detection apprehension will produce the sound of fear in someone's voice. Deception guilt often sounds like sadness.<sup>156</sup>

Communications involving words are less subjective than nonverbal communication because they are more neutral and harder to skew.<sup>157</sup> For members of the legal community to prepare for trial and evaluate nonverbal communications, they must look towards the perceptions, context, and surroundings around the sender and receiver of a message.<sup>158</sup> "A purported 'smoking gun' text message emoji chain presents a unique problem. What emoji evidence means to the sender, may not have meant the same thing to the receiver, let alone the same thing to a court or jury."<sup>159</sup> Therefore, it is important to analyze messages in their totality, along with any additional information related to the message.<sup>160</sup>

The way emojis are sent, received, and displayed can pose a large problem for lawyers and juries alike.<sup>161</sup> One proposed example of this

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155. See Anthony L. DeWitt, *Trial Technique: Detecting Deception During Voir Dire*, 39 AM. J. TRIAL ADVOC. 25, 41 (2015) (affirming a spoken voice can be used to determine a speaker's emotions, giving the listener the ability to detect any deception in the speaker's statement).

156. *Id.* (quoting STU DUNN, TRUE LIES: A GUIDE TO READING FACES, INTERPRETING BODY LANGUAGE AND DETECTING DECEPTION IN THE REAL WORLD 128 (2013)).

157. See Zicarelli, *supra* note 64 ("Nonverbal communication evokes a more subjective meaning than verbal communication").

158. See *id.* (recognizing nonverbal communication does not pertain to definitions, differentiating from verbal communications, but instead from the "sender and receiver's perceptions, experiences, and context").

159. *Id.*

160. It is important, when analyzing the meaning of a message, to account for the overall context of the situation, not just the message itself. For example, if two individuals have a history of hostility, the meaning of a message can be greatly altered. See Bayly, *supra* note 66 (arguing circumstances can change the meaning of a message).

161. Attorneys need to be cognizant of ever-changing technology as it can pose great challenges to the way that they analyze and use evidence in preparing for cases. See Henry & Harrow, *supra* note 108 (cautioning courts and litigants when using emojis as evidence since emojis can be seen differently when displayed on separate platforms); see also Zicarelli, *supra* note 64 ("Once

difference in interpretation, is that “the ‘alien monster’ emoji looks playful in LG Electronics Inc.’s character set, like an old video game alien on an iPhone, but downright scary in Samsung Electronics Co. Ltd.’s Galaxy S5 set.”<sup>162</sup> This is one of many emojis that can appear differently when viewed on different platforms, and in practice it is almost impossible to quantify all such variations.<sup>163</sup> For instance, if a person makes a statement saying “I’m going to kill you,” this could have different meanings depending on the nature and circumstances of the situation, especially where emojis are used.<sup>164</sup> The same five-word phrase included in the lyrics of a song “performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a real person.”<sup>165</sup> Conversely, if the statement uses a social media forum, it is more likely to be taken as a serious threat to the person to whom it is directed.<sup>166</sup>

#### E. *Nonverbal Communication Across Cultural Lines*

Different gestures can have different meanings among various countries and can have a large impact on communication; thus, parties need to be aware of these differences when communicating with others globally.<sup>167</sup> When trying to understand what an emoji represents, the location and

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evidence containing emojis is found, counsel needs to be cognizant of which platform an emoji was sent on *and* received on. This can entirely change the perception of the message conveyed by the emoji because different systems represent the same Unicode emoji completely differently.”)

162. Henry & Harrow, *supra* note 108.

163. See Zicarelli, *supra* note 64 (illustrating how different providers have emojis that vary from one another). Another example is the dancing emoji, which “is a lady in a ruffled red dress” on Apple iPhones” and “a gentleman in casual clothes” on a Samsung phone. *Id.*

164. Making a statement, such as “I’m going to kill you[,]” can be said in a joking or threatening way depending on the circumstances leading up to the utterance, tone of the speaker or writer, surroundings of the overall situation, and other contexts. All factors must be put together to determine what a speaker or writer intended the utterance to mean. See *Corbin v. State*, 840 N.E.2d 424, 429 (Ind. Ct. App. 2006) (explaining a threat to kill also may manifest an intent to kill when additional circumstances such as the firing of a deadly weapon at the individual); see also *Elonis v. United States*, 135 S. Ct. 2001, 2017 (2015) (treating whether the writer ensured the recipient would see online threats as a factor in analyzing the seriousness of the threats made).

165. *Elonis*, 135 S. Ct. at 2016 (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969)).

166. See *id.* (determining the same words can be considered as more or less threatening depending on whether they are aimed towards a particular victim versus shown to a broad array of people).

167. See 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](http://www.huffingtonpost.com/gayle-cotton/cross-cultural-gestures_b_3437653.html) [https://perma.cc/V2AS-DVG3] (advising communicators to be aware of the large influence body language has on communications because gestures can mean something drastically dissimilar in a different country).

background of the emoji user will be an important factor in determining the meaning of the statement.<sup>168</sup> An emoji used in America can mean something totally different in another country.<sup>169</sup> One example of this is a basic signal used by many Americans which involves making a circle with their thumb and index finger to indicate that they are “OK.”<sup>170</sup> However, this same signal means “money” in Japan, “zero” in France, and is an offensive gesture in many other countries.<sup>171</sup> President George W. Bush was criticized for a hand gesture he made on Inauguration Day in 2005.<sup>172</sup> The “hook ’em” sign he gave to The University of Texas band had negative connotations, as it means “your wife is cheating on you” for Italians, or a curse in parts of Africa.<sup>173</sup> Sometimes the non-textual signals can have more impact on the meaning of a message than the words themselves.<sup>174</sup> Therefore, it is important, when analyzing communications across cultural boundaries, to make sure a gesture is not interpreted to mean something totally different from what the writer or speaker intended.<sup>175</sup>

#### F. *Emojis and Law Around the World*

Communications across the globe are constantly changing as people are “becoming more interconnected” through new communication

168. See Yutaro Hayashi, *Emojis Interpreted Differently Across Cultures*, ARBITER (Apr. 19, 2016), <https://arbiteronline.com/2016/04/19/emojis-interpreted-differently-across-cultures/> [<https://perma.cc/D8VG-M2DC>] (warning misunderstandings may occur when people from various countries use emojis).

169. See *id.* (positing the various interpretations of emojis between the East and West are due primarily to the fact that Western cultures look at the mouth of an emoji, while Eastern cultures look at the eyes to determine the type of emotion conveyed); see also Margolin, *supra* note 4 (contending the specificity emojis have in various cultures and communities—enabling them to have different meanings and usages to different people—prevents them from being universally defined).

170. Cotton, *supra* note 168.

171. See *id.* (noting the American “OK” gesture has adverse connotations in other countries around the world).

172. *Id.*

173. *Id.*; see also *Bush Shocks Foreigners with ‘Satanic’ Sign*, FOX NEWS (Jan. 21, 2005), <http://www.foxnews.com/story/2005/01/21/bush-shocks-foreigners-with-satanic-sign.html> [<https://perma.cc/2WHV-7ZWV>] (reporting President George W. Bush’s hand gesture portraying a “hook ’em” sign shocked foreigners. This gesture is “popular among heavy metal groups” and also viewed as a salute to Satan for residents of Norway).

174. See Cotton, *supra* note 168 (“[B]ody language often conveys more than the words we use. At times, it can completely change—or even nullify—our words’ meaning.”).

175. See *id.* (emphasizing the importance of being cognizant of potentially different meanings when using gestures to communicate with other cultures).

forums.<sup>176</sup> International communications have been altered as “[t]echnology and social media are widening [the] horizon and creating new cultures that have nothing to do with shared nationality or demographics.”<sup>177</sup> When communicating with people from all over the world, it is important to realize that not everyone thinks and expresses their views the same way.<sup>178</sup>

Communication is not only about producing messages you want other people to hear. It is about understanding what moves the listener. And in order to be able to do that, you need to know the listener’s points of reference, their culture, their values, their ways of relating to the world.<sup>179</sup>

For example, when facilitating a mediation between parties of different cultures, mediators must be careful with their body language and cues that they make during communications with the parties.<sup>180</sup>

One overseas case involving the use of emojis in conjunction with text is *McAlpine v. Bercow*.<sup>181</sup> In 2012, a broadcast in the United Kingdom made accusations against a former Conservative party member who allegedly committed child abuse, although the report never named a specific individual.<sup>182</sup> A libel and slander case arose two days after the broadcast when the defendant issued a post on Twitter stating, “Why is Lord McAlpine trending? \*Innocent face.\*”<sup>183</sup> The court had the job of determining whether the insertion of the words “\*Innocent face\*” were to be read literally, or were disingenuous and insinuated that Lord McAlpine was a pedophile.<sup>184</sup> The court looked to the defendant’s Twitter

176. See SILVIA CAMBIÉ & YANG-MAY OOI, INTERNAL COMMUNICATIONS STRATEGY: DEVELOPMENTS IN CROSS-CULTURAL COMMUNICATIONS, PR AND SOCIAL MEDIA viii (2009) (understanding the increase in globalization and changes in communication have engrossed cultures with one another).

177. *Id.*

178. See *id.* at 3 (realizing effective communication requires communicators to understand the listener’s perspective when trying to correspond with them effectively).

179. *Id.*

180. See Dominguez-Urban, *supra* note 81, at 49 (explaining that mediators should be aware of their own and body language and body language from others in cross-cultural mediations to prevent any problems in the mediation process).

181. *McAlpine v. Bercow* [2013] EWHC 1342 (QB).

182. See *id.* at 10], [15] (reciting the previous circumstances leading up to the reasons why the defendants post could be portrayed as defamatory towards Lord McAlpine).

183. See *id.* at [1], [3], [15].

184. See *id.* at [33]–[34] (detailing the court’s dilemma on the meaning of a descriptive emoticon).



followers, the followers' knowledge of the broadcast, and the defendant's interests in political affairs.<sup>185</sup> The court held that a reasonable reader, along with the evidence, would believe that the statement was an innuendo leading to the claim that the plaintiff was a child abuser, and found the defendant guilty.<sup>186</sup> This case demonstrates that language in a litigant's post—portraying a descriptive emoticon or emoticons themselves—can be utilized to show the writer's intended meaning.<sup>187</sup> Nevertheless, writers of posts on social media should note that the utilization of an emoji, emoticon, or similar device, does not permit an individual to escape liability when defamatory statements are made.<sup>188</sup>

### G. *What Courts Should See in the Future*

The popularity of these pictorial characters has risen quickly.<sup>189</sup> Emojis and emoticons are now replacing netspeak,<sup>190</sup> or Internet slang such as “OMG”<sup>191</sup> or “LOL”<sup>192</sup> in communications.<sup>193</sup> In 2016, an Apple

185. *See id.* at [10], [81].

186. A reasonable person could have seen the message and determined Bercow was insinuating that Lord McAlpine was a child abuser, although none of the text specifically said this. *See id.* at [83]–[84], [90]; *see also* Julian Pike, *Defamation on Social Media*, LAW SOCIETY GAZETTE (June 17, 2013), <https://www.lawgazette.co.uk/practice-points/defamation-on-social-media/71314.article> [<https://perma.cc/4XED-T7L7>] (“Bercow’s followers were probably people who shared her interest in politics and current affairs and who, by the date of the tweet, would also be familiar with the key elements of the Newsnight story . . .”).

187. *See* Pike, *supra* note 186 (stressing the exercise of emoticons and their equivalents can help readers determine the writer’s state of mind).

188. *See id.* (warning liability will shadow any wrongful statement made connecting a person and an unlawful activity, regardless of any symbol inserted by a sender that they believe is ironic or humorous).

189. *See* Clive Thompson, *The Emoji Is the Birth of a New Type of Language (? No Joke)*, WIRED (Apr. 19, 2016, 5:27 AM), <https://www.wired.com/2016/04/the-science-of-emoji/> [<https://perma.cc/5E6U-W52S>] (discussing the rise of emojis and emoticons online and on various messaging platforms such as iOS and Android).

190. *See* *Netspeak*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/dictionary/english/netspeak> [<https://perma.cc/5BLP-3K5E>] (defining netspeak used on the Internet as “words, abbreviations, etc. that people use when communicating on the internet”).

191. *See* *Omg*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/omg> [<https://perma.cc/65U5-PGX9>] (describing the term *OMG* as a “written abbreviation for Oh my God: used when someone is surprised or excited about something”).

192. *See* *Lol*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/lol> [<https://perma.cc/US3K-NF4Z>] (defining *LOL* as an “abbreviation for laughing out loud”: used in text messages and on social media to indicate something is intended as a joke).

193. *See* Thompson, *supra* note 189; *see also* Dua, *supra* note 31 (illustrating Internet slang and other words have been replaced by emojis, such as a smiley face with tears of joy representing laughter or meaning “lol” and a thumbs-up emoji used to tell someone “good job”).

update for iOS users created a tap-and-replace option for emojis that automatically gave users the ability to replace words in their messages with corresponding emojis.<sup>194</sup> Most recently, Apple revealed a new feature on the iPhone 8 and iPhone X to create custom 3D animated emojis.<sup>195</sup> In Apple's press release they explained, "[T]he TrueDepth camera captures and analyzes over [fifty] different facial muscle movements, then animates those expressions in a dozen different Animoji . . ."<sup>196</sup> These animojis are in the shapes of cartoon characters such as pandas, unicorns, and robots.<sup>197</sup> Following Apple's footsteps, Samsung also released a similar feature called Augmented Reality Emoji, or AR Emoji, which allows a user to turn a photograph of themselves into a realistic cartoon emoji.<sup>198</sup> As explained by Samsung's AR Emoji design team, "a large part of communication is 'self-expression.'"<sup>199</sup> The modern feature was added as a way to satisfy the demand by smartphone users to express a range of emotions, by analyzing more than one hundred facial features, to create a new form of visual communication.<sup>200</sup> These new technologies may be cause for additional concern, raising questions about how reliably the images depict the actual facial expressions of the user.

The Internet has helped to increase creativity in the social world as people share their life experiences.<sup>201</sup> Facebook Vice President for Europe, the Middle East, and Africa, Nicola Mendelsohn, has even

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194. See Oscar Raymundo, *How to Use Messages in iOS 10, from Special Effects to iMessage Apps*, MACWORLD (Sept. 27, 2016, 4:52 AM), <http://www.macworld.com/article/3124609/iphone-ipad/how-to-use-messages-in-ios-10-from-special-effects-to-imessage-apps.html> [<https://perma.cc/8MNL-JJ8R>] (illustrating the new tap-and-replace feature on Apple's iOS 10 update).

195. See Press Release, Apple, *The Future Is Here: iPhone X* (Sept. 12, 2017), <https://www.apple.com/newsroom/2017/09/the-future-is-here-iphone-x/> [<https://perma.cc/2Q33-LZYV>] (introducing innovative features on the newly released iPhone 8 and iPhone X).

196. *Id.*

197. *Id.*

198. See *The Galaxy S9's AR Emoji Designers: Creating New Tools for Visual Communication*, SAMSUNG NEWSROOM (Mar. 30, 2018), <https://news.samsung.com/global/interview-the-galaxy-s9s-ar-emoji-designers-creating-new-tools-for-visual-communication> [<https://perma.cc/6Q2F-HXU3>] (explaining the background behind the AR Emoji feature on the newly-released Samsung Galaxy S9 and Samsung's partnership with Disney to create cartoon AR Emojis).

199. *Id.*

200. See *id.* (describing the facial recognition technology features on the Galaxy S9's camera that are used to create an AR Emoji).

201. See Cassie Werber, *Facebook Is Predicting the End of the Written Word*, QUARTZ (June 14, 2016), <https://qz.com/706461/facebook-is-predicting-the-end-of-the-written-word/> [<https://perma.cc/4ML7-YDX9>] (arguing the Internet has increased people's creativity, even if it is a small increase, because of the many technological changes and ability for self-expression).

proposed that written text will be superseded by moving images in as little as five years.<sup>202</sup> In order for attorneys to be prepared for the future, they must be prepared for changes in technology and must gain valuable knowledge about the challenges these new ways of communicating will pose to the legal profession.<sup>203</sup>

#### IV. CONCLUSION

The prevalence of moving images over written text in everyday communications will require courts address how they will deal with the introduction of emojis as evidence.<sup>204</sup> The foundations set today in reference to the admission of emojis as evidence will establish a precedent as new technology emerges.<sup>205</sup> Modifications to the Federal Rules of Evidence to match up with evolving social media networks will give courts the resources needed to handle cases involving emojis.<sup>206</sup> For now, courts can look to the steps taken in analyzing nonverbal communications in the courtroom.<sup>207</sup> Overall, to keep up with changes in the way that people communicate with each other, the legal community needs to

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202. *See id.* (predicting, during a recent conference, that Facebook “will be definitely mobile, it will be probably all video” within the next few years and suggesting statistics “showed the written word becoming all but obsolete”).

203. Effective attorneys recognize new challenges and will strive to create strategies to stay one step ahead of others. Having knowledge about technological advances and learning how to deal with these changes will help an attorney become more effective at their job. *See Zicarelli, supra* note 64 (declaring that, in addition to understanding and being prepared for the basic concepts that the Federal Rules of Evidence pose for spoken and written context, “savvy litigators and corporate counsel can include nonverbal communication strategy as a part of a company’s litigation tactic to stay ahead of the curve and the opposition”); *see also Jouvenal, supra* note 63 (highlighting issues involving emojis in the legal profession will only continue in the future since people are increasingly using their phones and the Internet to make statements).

204. *See Dua, supra* note 31 (noting emojis have grown increasingly popular, replacing the use of Internet slang online); *see also Foster, supra* note 1, at 14–15 (stating usage of emojis has been on the rise and has entered courtrooms, forcing judges and attorneys alike to determine the proper way to address these symbols).

205. *See Camson, supra* note 5 (expressing the continued evolution of the Federal Rules of Evidence to keep up with a society dependent on technology); *see also Margolin, supra* note 4 (noting the allowance of emojis as evidence in the Silk Road case has provided opportunities for courts to reform the way that they deal with introducing online or written evidence).

206. *Cf. Margolin, supra* note 4 (emphasizing the difficulty and time it would take to change the Federal Rules of Evidence to include rules on how to deal with emojis, especially since the courts are in constant struggle trying to keep up with changes in social media).

207. *See* FED. R. EVID. 801 (determining a nonverbal statement can be used under a hearsay exemption if an individual intended it to be an assertion).

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enhance the rules of evidence and take a proactive approach in dealing with advancements in technology.

