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Rebecca A. Berels

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Take Me Seriously 🙄: Emoji as Evidence
by
Rebecca A. Berels

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William Shakespeare once wrote, “😊/😞👉?;” or, more accurately, “To be or not to be, that is the question.”¹ Herman Melville’s *Moby Dick* was also translated entirely into emoji, now available for purchase as *Emoji Dick*;² With literary classics being translated entirely into a new language of faces and symbols, it was only a matter of time until emoji turned up as evidence in American courts.³

Consider the recent and widely publicized “Silk Road” case.⁴ The defendant, Ross Ulbricht, was charged with narcotics trafficking conspiracy and various other charges based on his alleged affiliation with “the online black-market bazaar Silk Road,” a “website said to be responsible for nearly \$200 million dollars in drug sales.”⁵ Ulbricht argued that he was not the “Dread Pirate Roberts,” the alias of the mastermind behind the site.⁶ Early in the trial, the prosecution read into evidence an online statement that Ulbricht made, but made “no mention of the smiling symbol that followed” the statement, the emoji.⁷ Ulbricht objected to the prosecution’s failure to include this emoji, and the judge ruled that the jury “should take note of

¹ Josh Kaplan, *Twee JMU Grad Translates Shakespeare Into Emojis*, THE TAB (2015), <http://thetab.com/2015/08/20/twee-jmu-grad-translates-shakespeare-plays-into-emojis-50810>.

² *Emoji Dick* (last visited May 9, 2017), <http://www.emojidick.com/>.

³ Eli Hager, *Is an Emoji Worth 1,000 Words?*, THE MARSHALL PROJECT (Feb. 2, 2015), <https://www.themarshallproject.org/2015/02/02/is-an-emoji-worth-1-000-words#.AzRkFx6RJ>.

⁴ Debra Cassens Weiss, *Emoticons Matter, Judge Rules in Silk Road Trial*, ABA JOURNAL (Jan. 30, 2015),

http://www.abajournal.com/news/article/emoticons_matter_judge_rules_in_silk_road_trial/.

⁵ *Id.*

⁶ Benjamin Weisner, *At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji*, N.Y. TIMES (Jan. 28, 2015),

<https://www.nytimes.com/2015/01/29/nyregion/trial-silk-road-online-black-market-debating-emojis.html>.

⁷ *Id.*

any such symbols in messages,” which meant reading the emojis into the record, as well as allowing the jury to read the communications in their original form.⁸

Unfortunately, many courts are not as receptive to emoji evidence as the judge in the Silk Road case.⁹ From completely ignoring the presence of emoji, to allowing a jury to view an emoji in its original form, judges have taken a range of approaches when confronted with emoji as evidence.¹⁰ But as emoji usage increases, these inconsistencies could, at the very least, cause a great deal of confusion for those involved in litigation due to the inability to accurately predict when and how these emoji will be admitted as evidence. And failure to include emoji in statements presented as evidence could cause the true meaning of the statement to be completely lost. The solution is consistency: courts should analyze emoji evidence just as they would any other item of evidence.¹¹ Ultimately, this paper provides courts with a step-by-step process to do exactly that.¹²

Part I of this paper discusses social media, the steady increase of social media usage, the recent prevalence of emoji as a means of communication, and what that means for the interpretation of digital messages. Part II examines the interpretation and intended application of Federal Rules of Evidence, including the rule against hearsay, its exclusions and exceptions, and the rules pertaining to expert testimony. Part III explains the state of the law, providing an in-depth look at cases in which emoji and their older cousins, emoticons, have been evaluated as evidence, how courts have been inconsistent in their evaluations, and why consistency is

⁸ *Id.* See also *Next Witness: Will The Yellow Smiley Face Take The Stand?*, NPR (Feb. 8, 2015), <http://www.npr.org/2015/02/08/384662409/your-honor-id-like-to-call-the-smiley-face-to-the-stand>.

⁹ See *infra* Part III.

¹⁰ See *id.* and Silk Road discussion above.

¹¹ See *infra* Part IV

¹² *Infra* Part IV.

important. Finally, Part IV offers a solution to this inconsistency, presenting a step-by-step process courts should follow when faced with an emoji as evidence.

I. An overview of social media

Social media is defined as “forms of electronic communication (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).”¹³ Social media is an all-encompassing term used to describe popular websites such as Facebook, Twitter, and Instagram.¹⁴

A. Social media sites

Facebook was created in 2004 as a way for college and university students to interact and stay connected with one another.¹⁵ As Facebook’s customer base continued to grow from college and university students to high-school students and beyond, its mission changed from connecting college students to “giv[ing] people the power to share and make the world more open and connected.”¹⁶ As Facebook grew, so did its services. It now provides users with a profile where they can “express who [they] are and what’s going on in [their] life,” a newsfeed where users can “see a regularly updating list from . . . connections . . . [where] people can like or comment on what they see,” use of an application (called “Messenger”) through which users

¹³ *Social Media*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/social%20media> (last visited May 9, 2017). The first known usage of the phrase “social media” in the English language was in 2004, making it a relatively new term. *See generally* Perrin, *infra* note 14.

¹⁴ Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RESEARCH CTR. (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/>.

¹⁵ *See generally* *Company Info*, FACEBOOK, <http://newsroom.fb.com/company-info/> (last visited May 9, 2017).

¹⁶ *Id.*

can “reach people instantly on their phones,” the ability to upload photos and videos, and various other services and products.¹⁷ As of December of 2016, Facebook had 1.23 billion daily active users.¹⁸

Twitter, which was launched in 2006, is described as “a service for friends, family, and coworkers to communicate and stay connected through the exchange of quick, frequent messages.”¹⁹ These messages are called “Tweets, which may contain photos, videos, links and up to 140 characters of text. These messages are posted to your profile, sent to your followers, and are searchable on Twitter search.”²⁰ Twitter’s mission is “[t]o give everyone the power to create and share ideas and information instantly, without barriers.”²¹ Estimates as of June 2016 place the number of monthly average users of Twitter at 313 million.²²

Instagram was released in 2010 as a photo-sharing platform.²³ It allows users to “share [their] life with friends through a series of pictures” by uploading a photo, choosing a filter to “transform your photos into professional-looking snapshots,” and “share it (instantly) on multiple services.”²⁴ Currently, Instagram has over 600 million users.²⁵

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *New User FAQs*, TWITTER, <https://support.twitter.com/articles/13920> (last visited May 9, 2017).

²⁰ *Id.*

²¹ *Company*, TWITTER, <https://about.twitter.com/company> (last visited May 9, 2017).

²² *Id.*

²³ Raisa Bruner, *A Brief History of Instagram's Fateful First Day*, TIME (July 16, 2016), <http://time.com/4408374/instagram-anniversary/>.

²⁴ *FAQ*, INSTAGRAM, <https://www.instagram.com/about/faq/> (last visited May 9, 2017).

²⁵ *About Us*, INSTAGRAM, <https://www.instagram.com/about/us/> (last visited May 9, 2017).

B. Social media usage

Since 2004, the population's use of social media has unquestionably exploded. For example, in 2005, only 7% of all adults in the United States used social media.²⁶ After only a decade, in 2015, the number of all adults in the United States who used social media increased to nearly two-thirds (65%).²⁷ Just over a year later, in November 2016, the number of all adults in the United States who used social media increased yet again to 69%.²⁸

When considering the numbers broken down by age group, the increase is even more prevalent.²⁹ In 2005, 7% of adults in the United States aged 18 to 29 used social media.³⁰ In 2016, this number increased to 86%.³¹ Similarly, 6% of all adults in the United States aged 30 to 49 used social media in 2005.³² For the same age group, the number increased to 80% in 2016.³³ The number of adults in the United States aged 50 to 64 increased from 4% in 2005 to 64% in 2016.³⁴ Finally, only 3% of adults in the United States aged 65 and above used social media in 2005, while 34% of the same age group used social media in 2016.³⁵

The increase in social media usage is not specific to the United States.³⁶ In 2016, 31% of the global population used social media, up from only 14% in 2010.³⁷ The number of social

²⁶ *Id.*

²⁷ *Id.* These statistics must also be read with an understanding that 15% of all adults in the United States did not even use the Internet. *Id.*

²⁸ *Social Media Fact Sheet*, PEW RESEARCH CENTER (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/social-media/>.

²⁹ *See generally id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *See generally Number of Social Media Users Worldwide from 2010 to 2020 (in billions)*, STATISTA, <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> (last visited May 9, 2017).

media users is still expected to grow.³⁸ The amount of time the average user spends on social media websites each day has also increased across the globe.³⁹ In 2012, the average user spent about 96 minutes on social media sites each day, while in 2016, the average user spent about 118 minutes on social media daily.⁴⁰

Social media sites such as these provide users with a myriad of benefits.⁴¹ They allow for the rapid spread of information (including breaking news), improvement of relationships, development of professional networks, facilitation of political change, and an enhanced feeling of connection to the community.⁴² But social media sites also have many drawbacks.⁴³ Some of the information that rapidly spreads through social media may be false.⁴⁴ Overuse can cause a decline in productivity of students and professionals.⁴⁵ Users are more vulnerable to cyber attacks, such as hacking, identity theft, and computer viruses.⁴⁶ Further, it facilitates

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Daily Time Spent on Social Networking by Internet Users Worldwide from 2012 to 2016 (in minutes)*, STATISTA, <https://www.statista.com/statistics/433871/daily-social-media-usage-worldwide/> (last visited May 9, 2017).

⁴⁰ *Id.*

⁴¹ *See generally Are Social Networking Sites Good for Our Society?*, ProCon.org, <http://socialnetworking.procon.org/> (last visited May 9, 2017) [hereinafter ProCon.org].

⁴² *Id.* For example, Facebook recently launched a feature called “Safety Check,” which allows users located near a disaster to communicate immediately to their friends and family that they are safe. Amit Chowdhry, *Facebook 'Safety Check' Tells Your Friends That You Are Safe During A Disaster In The Area*, FORBES (Oct. 16, 2014), <https://www.forbes.com/sites/amitchowdhry/2014/10/16/facebook-launches-disaster-notification-feature-safety-check/#3455b7e363f8>.

⁴³ *See generally* ProCon.org, *supra* note 41.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

cyberbullying, the “use of technology to write aggressive, embarrassing, or hateful messages to/about peers in order to intimidate, harass, shame, and control.”⁴⁷

C. An overview of emoji

Since its inception, social media has caused sweeping changes throughout the world.⁴⁸ One such change is the increasing use of emoji as a form of communication.⁴⁹ An emoji is “any of various small images, symbols, or icons used in text fields in electronic communication (as in text messages, e-mail, and social media) to express the emotional attitude of the writer, convey information succinctly, communicate a message playfully without using words, etc.”⁵⁰

Emoji are often confused with emoticons, which are defined as “a group of keyboard characters (as :-)) that typically represents a facial expression or suggests an attitude or emotion and that is used especially in computerized communications (as e-mail).”⁵¹ Unlike emoji, which are based on Unicode and look different depending on the platform on which the emoji is viewed, emoticons “are typed using the keyboard on your phone or computer.”⁵² Because

⁴⁷ Paul Malcore, *Teen Cyberbullying and Social Media Use on the Rise [INFOGRAPHIC]*, Rawhide (Oct. 26, 2015), <https://www.rawhide.org/blog/wellness/teen-cyberbullying-and-social-media-use-on-the-rise/>.

⁴⁸ See generally Alejandra Guzman, *6 Ways Social Media is Changing the World* (Apr. 7, 2016), <https://www.weforum.org/agenda/2016/04/6-ways-social-media-is-changing-the-world/>.

⁴⁹ See generally *Oxford Dictionaries Word of the Year 2015 is...* 🙄, OXFORD DICTIONARIES, <http://blog.oxforddictionaries.com/2015/11/word-of-the-year-2015-emoji/> (last visited May 9, 2017) and *Realtime Emoji Use on Twitter*, EMOJITRACKER, <http://www.emojitracker.com/> (last visited May 9, 2017).

⁵⁰ *Emoji*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/emoji> (last visited May 9, 2017).

⁵¹ *Emoticon*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/emoticon> (last visited May 9, 2017).

⁵² Amrita Khalid, *Emoji vs. Emoticon: What’s the Difference?*, DAILY DOT, <https://www.dailydot.com/debug/emoji-vs-emoticon-differences-explained/> (last updated Feb. 24, 2017) and see *infra* Section I(C)(2).

emoticons are text-based rather than code-based, they look the same regardless of the platform used to view them.⁵³

Emoji had their debut in the mid-1990s in Japan.⁵⁴ Their creator, Shigetaka Kurita, was searching for “a new, shorter way to express the [emotional] connotations of a traditional writer's written word.”⁵⁵ His solution: a set of 176 symbols that “represent[ed] emotions and other abstract ideas.”⁵⁶ Though emoji have been around in Japan since the mid-1990s, they did not become popular internationally until 2011, when Apple released the iPhone 5.⁵⁷ Fast forward to the present: there are now almost 2,600 symbols, known as emoji, that users of almost any communication device can add to their online communications.⁵⁸

1. Emoji usage

Since their introduction, the use of emoji has increased to such an extent that, in 2015, 😂 was the Oxford Dictionaries Word of the Year.⁵⁹ It was chosen “to reflect the sharp increase in popularity of emoji across the world” in 2015.⁶⁰ In its press release announcing the Word of the Year, Oxford Dictionaries noted that, “[a]lthough emoji have been a staple of texting teens for some time, emoji culture exploded into the global mainstream” in 2015.⁶¹ In a 2016 Emoji

⁵³ Khalid, *supra* note 52; see *infra* Section I(C)(2).

⁵⁴ Rachel Scall, *Emoji as Language and Their Place Outside American Copyright Law*, 5 N.Y.U. J. INTEL. PROP. & ENT. L. 381, 385 (2016).

⁵⁵ *Id.* at 382.

⁵⁶ *Id.* at 382-83.

⁵⁷ Marc Schenker, *The Surprising History of Emojis*, WEB DESIGNER DEPOT (Oct. 11, 2016), <http://www.webdesignerdepot.com/2016/10/the-surprising-history-of-emojis/>.

⁵⁸ *Emoji Statistics*, EMOJIPEDIA, <http://emojipedia.org/stats/> (last visited May 9, 2017).

⁵⁹ *Announcing the Oxford Dictionaries “Word” of the Year 2015*, Oxford Dictionaries (Nov. 17, 2015), <http://blog.oxforddictionaries.com/press-releases/announcing-the-oxford-dictionaries-word-of-the-year-2015/>.

⁶⁰ *Id.*

⁶¹ *Id.*

Report, it was estimated that 2.3 trillion mobile messages would contain emoji over the next year.⁶² Overall, about 92% of the online population uses emoji in their online communications.⁶³

But this increase in emoji use is not limited to individual users. “Brands are using emoji[] to communicate with their target audience, to infiltrate their mobile phones, to demonstrate that they are on top of the latest communications trends, and also to convey messages in elegantly simple ways.”⁶⁴ In fact, in 2016, the “[y]ear-over-year growth of [ad] campaigns using emoji[] has been 777%.”⁶⁵

Individual social media users include emoji in their online communications for a variety of reasons.⁶⁶ In August 2015, 70.4% of social media users incorporated emoji because “[t]hey help me more accurately express what I am thinking.”⁶⁷ Other reasons provided in the same survey for using emoji ranged from “[m]ak[ing] it easy for other people to understand me,” to “[o]ther people are using them, so I use them[,] too.”⁶⁸ Additionally, 41.1% of social media users found that emoji are “a better fit than words for the way I think,” and 23.6% of social media users believed that emoji are “a more contemporary way to communicate.”⁶⁹

⁶² EMOJI RESEARCH TEAM, 2016 EMOJI REPORT (Nov. 16, 2016), https://static1.squarespace.com/static/58876b67e6f2e1097e94beaa/t/58a20ae7b3db2b8884d93085/1487014671280/2016+Emoji+Report+_Final.pdf

⁶³ Brandy Shaul, *Report: 92% of Online Consumers Use Emoji (Infographic)*, ADWEEK (Sept. 30, 2015), <http://www.adweek.com/digital/report-92-of-online-consumers-use-emoji-infographic/>.

⁶⁴ Michael Brenner, *The Rise of Emoji for Brand Marketing*, GUARDIAN (Jan. 26, 2015), <https://www.theguardian.com/media-network/2015/jan/26/rise-emoji-brand-marketing>.

⁶⁵ Jesse Tao, *Emojis Are Now Used In 777% More Campaigns Than Last Year [Infographic]*, RELATE (Mar. 24, 2016), <https://www.appboy.com/blog/emojis-used-in-777-more-campaigns/>.

⁶⁶ *Leading Reasons for Using Emojis According to U.S. Internet users as of August 2015*, Statista, <https://www.statista.com/statistics/476354/reasons-usage-emojis-internet-users-us/> (last visited May 9, 2017).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

2. Emoji design

But these symbols are not just tiny pictures of people, places, or things.⁷⁰ Instead, “each emoji is a unique piece of computer code;” specifically, Unicode.⁷¹ “Unicode provides a unique number for every character, no matter what the platform, no matter what the program, no matter what the language.”⁷² For example, the basic smile emoji, called the “grinning face,” 😊, has a code of U+1F600.⁷³ Though this code is unique for each symbol and signals to the computer which emoji to display on the user’s screen, it does not determine the design of the emoji.⁷⁴ That is left up to the brands and services that implement emoji.⁷⁵

And each brand may have very different ideas as to how emoji should look.⁷⁶ Consider the “pistol” emoji, which has a code of U+1F52B.⁷⁷ On an Apple device, the emoji appears as a green squirt gun, 🍷, while on all other platforms, such as Facebook, it looks like a cartoon version of a real gun, 🖱️.⁷⁸ Still, in its emoji design guidelines, Unicode notes that, “[w]hile the shape of the character can vary significantly, designers should maintain the same “core” shape, based on the shapes used mostly commonly in industry practice.”⁷⁹

⁷⁰ Scall, *supra* note 54, at 385.

⁷¹ *Id.* Unicode standardized emoji in 2010. Austin Carney, *The History of Emoji*, CityMac (Nov. 2, 2015), <http://www.citymac.com/blog/2015/11/02/the-history-of-emoji>.

⁷² *What is Unicode?*, UNICODE, <http://www.unicode.org/standard/WhatIsUnicode.html> (last visited May 9, 2017).

⁷³ *Full Emoji List, v5.0*, UNICODE, <http://unicode.org/emoji/charts/full-emoji-list.html> (last visited May 9, 2017) [hereinafter *Full Emoji List*].

⁷⁴ Scall, *supra* note 54, at 386.

⁷⁵ Meghan Neal, *What the Emoji You’re Sending Actually Look Like to Your Friends*, MOTHERBOARD (Nov. 12, 2015), https://motherboard.vice.com/en_us/article/what-the-emoji-youre-sending-actually-look-like-to-your-friends.

⁷⁶ *See generally id.*

⁷⁷ *Full Emoji List, supra* note 73.

⁷⁸ *Id.*

⁷⁹ *Design Guidelines*, UNICODE, http://www.unicode.org/reports/tr51/index.html#Design_Guidelines (last visited May 9, 2017).

Even though emoji are largely standardized based on the Unicode “core” shape requirements, the interpretation of what an emoji means can vary widely.⁸⁰ A study found that, when viewing the same emoji design, *i.e.*, viewed on the same platform, people disagreed 25% of the time on whether the emoji had a positive, neutral, or negative connotation.⁸¹ When viewing the emoji designs across different platforms, the study found that the disagreements only increase.⁸² Taking all of this into account, the study found “significant potential for miscommunication, both for individual emoji [designs] and for different emoji [designs] across platforms.”⁸³

3. Emoji interpretation

This potential for miscommunication may be short-lived, thanks to the hashtag.⁸⁴ “A hashtag is a keyword or a phrase used to describe a topic or a theme.”⁸⁵ It is created by putting a pound sign (#) in front of a string of text containing neither spaces nor punctuation, and “automatically become[s] a clickable link” when shared on a social media platform.⁸⁶ The

⁸⁰ Hannah Miller et al., “*Blissfully happy*” or “*ready to fight*”: *Varying Interpretations of Emoji*, ASS’N FOR THE ADVANCEMENT OF ARTIFICIAL INTELLIGENCE (2016), http://www-users.cs.umn.edu/~bhecht/publications/ICWSM2016_emoji.pdf. See also Lauren Foster, *Meaning of a Message: Emojis and Emoji Hashtags Become New Visual Evidence*, 79 Tex. B.J. 14 (2016).

⁸¹ Miller et al., *supra* note 80.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Emojineering Part 1: Machine Learning for Emoji Trends*, INSTAGRAM ENG’G (May 1, 2015) [hereinafter *Emojineering*], <https://engineering.instagram.com/emojineering-part-1-machine-learning-for-emoji-trendsmachine-learning-for-emoji-trends-7f5f9cb979ad#.4vmky67fl>.

⁸⁵ Daniel Nations, *What is a Hashtag on Twitter?*, LIFEWIRE, <https://www.lifewire.com/what-is-a-hashtag-on-twitter-3486592> (last updated Mar. 23, 2017).

⁸⁶ *Id.*

purpose of hashtags is to allow users “to categorize [their social media posts] in a way that makes it easy for other users to find and follow [posts] about a specific topic or theme.”⁸⁷

In 2015, Instagram began allowing users to hashtag the emoji that they include in social media posts.⁸⁸ This feature “allows people to tag and search content with their favorite emoji.”⁸⁹ But that is not all. By allowing emoji to be tagged, Instagram could compile data about their usage and “discover the hidden semantics of emoji.”⁹⁰

In order to discover the meaning of each emoji based on common usage, Instagram used machine learning and natural language processing. This approach allowed Instagram to determine “what English words are semantically similar” to the emoji.⁹¹ The English words that were found to be similar were the “natural, English-language translation for that emoji.”⁹²

Instagram found that many of the most popular emoji had “meanings in-line with early internet slang.”⁹³ For example, 😂, the most commonly used emoji, meant “lol” (an abbreviation for “laughing out loud”) or “lmao” (an abbreviation for “laughing my a— off”).⁹⁴ Further, “[s]ome of the more distinctive emoji had particularly distinctive meanings,” like 🐱🐱, which means “sisters for life” or “best friends forever.”⁹⁵ Still, without a definitive algorithm to

⁸⁷ *Id.*

⁸⁸ *Emojineering*, *supra* note 84.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* See *id.* for a discussion of machine learning and natural language processing.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* See also *LOL*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/LOL> (last visited May 9, 2017) for meaning of lol and *LMAO*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/LMAO> (last visited May 9, 2017) for meaning of lmao.

⁹⁵ *Emojineering*, *supra* note 84.

determine the precise meaning of a specific emoji, interpretations will vary across geographic and cultural boundaries.⁹⁶

II. The Federal Rules of Evidence

The Federal Rules of Evidence (“the Rules”) were promulgated in order “to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”⁹⁷

Although they apply only to federal courts,⁹⁸ the Rules serve as a model on which most state jurisdictions pattern their own evidence rules.⁹⁹ Therefore, the Rules are a good starting point for analyzing how emoji fit into the evidentiary scheme of any particular state.

A. Relevance

The first determination a court must make when deciding on the admissibility of an item of evidence whether that evidence is relevant under Rule 401.¹⁰⁰ This determination requires a two-part analysis.¹⁰¹ First, a court must consider whether the evidence “has any tendency to make a fact more or less probable than it would be without the evidence,” the probative value

⁹⁶ See Foster, *supra* note 80, at 17 (discussing the fact that the eggplant emoji does not actually stand for an eggplant). See also *Emoji Sentiment Ranking v1.0*, http://kt.ijs.si/data/Emoji_sentiment_ranking/ (last visited May 9, 2017); Amanda Hess, *Exhibit A: ;-)*, SLATE (Oct. 26, 2015), http://www.slate.com/articles/technology/users/2015/10/emoticons_and_emojis_as_evidence_in_court.html (“So far, efforts to build a unified emotional context for hundreds of emojis used by millions of people around the world have failed.”).

⁹⁷ Fed. R. Evid. 102.

⁹⁸ Fed. R. Evid. 101(a).

⁹⁹ 6-T WEINSTEIN'S FEDERAL EVIDENCE (2017). (“Forty-four states, Guam, Puerto Rico, the Virgin Islands, and the military have adopted rules of evidence patterned on the Federal Rules of Evidence. The majority of those jurisdictions adopted rules closely following the Federal Rules of Evidence as they were worded after Congress completed its revisions that resulted in their 1975 enactment.”).

¹⁰⁰ Fed. R. Evid. 401.

¹⁰¹ *Id.*

prong.¹⁰² Second, the court must determine whether “the fact is of consequence in determining the action,” the materiality prong.¹⁰³ If both of these prongs are satisfied, the evidence is relevant, and thus admissible.¹⁰⁴ But even relevant evidence may be excluded in certain circumstances.¹⁰⁵ Under Rule 403, a court has discretion to exclude relevant evidence “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”¹⁰⁶

B. Hearsay

The Rules contain an entire Article dedicated to hearsay and its many exceptions.¹⁰⁷ Rule 802—also known as the rule against hearsay—provides: “Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.”¹⁰⁸ Hearsay is defined as “a statement that 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

¹⁰² Fed. R. Evid. 401(a).

¹⁰³ Fed. R. Evid. 401(b).

¹⁰⁴ Fed. R. Evid. 401.

¹⁰⁵ See Fed. R. Evid. 403.

¹⁰⁶ Fed. R. Evid. 403. The Advisory Committee defined unfair prejudice as having “undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *Id.* at Committee Notes on Rules—1972 Proposed Rules.

¹⁰⁷ See generally art. VIII. *Hearsay*, Fed. R. Evid. The concept of hearsay began developing as early as the 1500s and did not fully develop as a precise rule of law until the early 1700s. James D. Abrams, *What’s Wrong with Hearsay?*, ABA, https://apps.americanbar.org/litigation/litigationnews/trial_skills/051810-trial-evidence-hearsay-rule.html (last visited May 9, 2017). But from the time of its development to the promulgation of the uniform Federal Rules of Evidence, which codified the hearsay rule, hearsay was “mostly a creature of common law tradition.” *Id.*

¹⁰⁸ Fed. R. Evid. 802. The exceptions and exclusions, which will be discussed further below, are codified in Rules 801, 803, 804, and 807.

matter asserted in the statement.”¹⁰⁹ A statement is “a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion,” and a declarant is “the person who made the statement.”¹¹⁰

Legal scholars have advanced multiple rationales for the rule against hearsay.¹¹¹ Early scholars believed that “hearsay lacked credibility because the original statement was not made under oath.”¹¹² But the more modern view concerns the absence of cross-examination with regard to the hearsay and the declarant.¹¹³ The Advisory Committee observed both of these rationales in its introductory note to the hearsay rules. It also discussed the importance of allowing the trier of fact to observe the demeanor of the witness when making a statement, which cannot occur when the statement is not made while the declarant is testifying as a witness at the current trial.¹¹⁴ Additionally, other scholars have cited “the acceptability of a verdict[, the] control [of] highly adversary procedures and unchecked factfinders[,] or [the] contribut[ion] to justice, protect[ion of] competitive advantage, and limit[ation of] judicial discretion” as purposes for the rule.¹¹⁵

1. Statements that are not hearsay

Though not specifically referred to in the Rules, the definition of hearsay itself does not apply to statements that are not “offer[ed] . . . to prove the truth of the matter asserted in the statement.”¹¹⁶ Statements that are “verbal acts,” also referred to as “legally operative words,” fall

¹⁰⁹ Fed. R. Evid. 801(c).

¹¹⁰ Fed. R. Evid. 801(a), (b).

¹¹¹ *See generally id.*

¹¹² T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 Iowa L. Rev. 499, 533 (1999).

¹¹³ *Id.*

¹¹⁴ Art. VIII. *Hearsay*, Fed. R. Evid.

¹¹⁵ Abrams, *supra* note 107 (internal citations omitted).

¹¹⁶ Fed. R. Evid. 801(c).

within this exclusion.¹¹⁷ A verbal act is an instance where the “utterance of the words is, in itself, an operative fact which gives rise to legal consequences.”¹¹⁸ These types of statements are excluded from the definition of hearsay “because the statement is admitted merely to show that it was actually made, not to prove the truth of what was asserted.”¹¹⁹ Examples of verbal acts include statements made by contracting parties “with respect to the making or the terms of an agreement,” statements that constitute defamation, threats, bribes, and misrepresentation.¹²⁰

Similar to verbal acts, statements are excluded from hearsay if they are offered to prove the “effect on the listener” rather than “the truth of the matter asserted.”¹²¹ This exclusion would apply when the statement is being offered to prove the statement’s impact on someone who heard it, instead of to prove that the statement itself is true.¹²² Examples of the use of this exclusion would be to prove that a person was in fear because of the declarant’s statement,¹²³ or merely that a person understood the statement.¹²⁴

2. Hearsay exclusions

For statements that fall within the definition of hearsay, the rule against hearsay is not a categorical ban.¹²⁵ Instead, it has numerous exclusions and exceptions, most of which existed at common law.¹²⁶ Statements that meet the conditions of either of two exclusions are statements

¹¹⁷ 29 AM. JUR. 2D EVIDENCE § 675.

¹¹⁸ *Id.*

¹¹⁹ 5-801 WEINSTEIN'S FEDERAL EVIDENCE § 801.11.

¹²⁰ *Id.*

¹²¹ *See United States v. Kilpatrick*, 798 F.3d 365, 386 (6th Cir. 2015).

¹²² 29 AM. JUR. 2D EVIDENCE § 676 (“Words offered to prove the effect on the hearer are admissible when they are offered to show their effect on one whose conduct is at issue.”).

¹²³ *Kilpatrick*, 798 F.3d at 386.

¹²⁴ *Boren v. Sable*, 887 F.2d 1032, 1035 (10th Cir. 1989).

¹²⁵ Art. VIII. *Hearsay*, Fed. R. Evid.

¹²⁶ Fed. R. Evid. 801, 803, 804, 807; Gallanis, *supra* note 112, at 533.

that are not considered hearsay.¹²⁷ This first exclusion, for a declarant-witness's prior statement, pertains to instances where "[t]he declarant testifies and is subject to cross examination about a prior statement," where the statement is "inconsistent with the declarant's testimony and was given under the penalty of perjury," is "consistent with the declarant's testimony and . . . offered to rebut an express or implied charge" of recent fabrication or "improper influence or motive" or "to rehabilitate the declarant's credibility," or "identifies a person as someone the declarant perceived earlier."¹²⁸

The second exclusion from the definition of hearsay is for an opposing party's statement, which pertains to situations where the "statement is offered against an opposing party" and where it was made "by the party," was "adopted or believed to be true" by the party, was made "by a person whom the party authorized to make a statement," was made "by the party's agent or employee on a matter within the scope of that relationship and while it existed," or was made "by the party's co-conspirator during and in furtherance of the conspiracy."¹²⁹

3. Hearsay exceptions

In addition to these exclusions, there are a number of exceptions to the rule against hearsay. Accordingly, there are certain statements that fall within the definition of hearsay, but "are not excluded by the rule against hearsay" if they meet certain criteria.¹³⁰ Some of these exceptions apply only to statements made by a declarant that is unavailable as a witness.¹³¹

These exceptions, included in Rule 803, include former testimony, dying declarations, statements

¹²⁷ Fed. R. Evid. 801(d).

¹²⁸ Fed. R. Evid. 801(d)(1).

¹²⁹ Fed. R. Evid. 801(d)(2).

¹³⁰ Fed. R. Evid. 803, 804(b).

¹³¹ Fed. R. Evid. 804(b). There are particular requirements for a witness to be considered unavailable. *See* Fed. R. Evid. 804(a).

against interest, statements of personal or family history, and statements offered against a party who wrongfully caused the declarant's unavailability.¹³² Other exceptions, found in Rule 804, apply regardless of the declarant's availability,¹³³ such as present sense impressions, excited utterances, statements made for medical diagnosis or treatment, and recorded recollections.¹³⁴

Of particular note, Rule 803(3) contains an exception for a statement that concerns "the declarants then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)."¹³⁵ This exception does not apply, however, when the statement is "of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will."¹³⁶

C. Expert testimony

The Federal Rules of Evidence also include rules pertaining to expert testimony.¹³⁷ Prior to their promulgation, opinion testimony by one determined to be an "expert" in a scientific field was admitted in federal court only if the scientific technique on which the expert based his or her opinion was "generally accepted as a reliable technique" in the scientific community.¹³⁸ But in

¹³² Fed. R. Evid. 804(b).

¹³³ Fed. R. Evid. 804.

¹³⁴ Fed. R. Evid. 803. Other exceptions that apply regardless of the declarants availability include records of a regularly conducted activity, absence of a record of a regularly conducted activity, public records, public records of vital statistics, absence of a public record, records of religious organizations concerning personal or family history, certificates of marriage, baptism, and similar ceremonies, family records, records of documents that affect an interest in property, statements in ancient documents, market reports and similar commercial publications, statements in learned treatises, periodicals, or pamphlets, reputation concerning personal or family history, reputation concerning boundaries or general history, reputation concerning character, judgment of a previous conviction, and judgments involving personal, family, or general history, or a boundary. Fed. R. Evid. 803.

¹³⁵ Fed. R. Evid. 803(3).

¹³⁶ *Id.*

¹³⁷ *See* Fed. R. Evid. 702.

¹³⁸ *Frye v. United States*, 293 F. 1013, 1129-30 (D.C. Cir. 1923).

1993, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court of the United States recognized that Rule 702 of the Federal Rules of Evidence displaced the “general acceptance test” as the exclusive test for admitting scientific expert testimony.¹³⁹ And in 1999, the Supreme Court extended *Daubert*’s holding to include “not only . . . [expert] testimony based on ‘scientific’ knowledge, but also . . . [expert] testimony based on ‘technical’ and ‘other specialized’ knowledge.”¹⁴⁰

As amended to comply with the rule announced by the Supreme Court in *Daubert* and its extension in *Kumho Tire Co. v. Carmichael*, Rule 702 now provides that “[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion” so long as “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue,” the expert’s “testimony is based on sufficient facts or data,” the expert’s “testimony is the product of reliable principles and methods,” and “the expert has reliably applied the principles and methods to the facts of the case.”¹⁴¹

This rule recognizes that the judge is the gatekeeper, responsible for “exclude[ing] unreliable testimony.”¹⁴² The Advisory Committee also observed that, in order to determine the reliability of expert testimony, the court should, in its discretion, consider certain factors, including factors enumerated in *Daubert*, though “no single factor is necessarily dispositive.”¹⁴³ These factors include:

- (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether

¹³⁹ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588-89 (1993).

¹⁴⁰ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

¹⁴¹ Fed. R. Evid. 702.

¹⁴² *Id.* at Committee Notes on Rules—2000 Amendment.

¹⁴³ *Id.*

it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.¹⁴⁴

Experts are often used “when the facts and issues of the case are not easily comprehensible, when the facts . . . require the trier of fact to reach an opinion or conclusion that is not easily attainable, . . . [or] when the . . . issues are sophisticated and the . . . [trier of fact] is not well-versed in the relevant concepts.”¹⁴⁵ In order to make things clear for the trier of fact, an expert can “give his or her informed opinion about disputed or unclear questions of fact, [or] on subjects outside the life experience of ordinary judges or jurors.”¹⁴⁶

III. The state of the law pertaining to emoji

Since the advent of social media, courts have struggled with how to handle social media evidence in litigation, with a recent trend towards admissibility of social media posts.¹⁴⁷ Though emoji use in social media continues to increase year after year, courts are just beginning to grapple with how to handle these symbols as evidence.¹⁴⁸

¹⁴⁴ *Id.* (discussing other factors in addition to those listed).

¹⁴⁵ Greg Eastman, Vandy M. Howell, & Maria Salgado, *A Primer on When to Use Expert Witnesses and How to Find Them*, BLOOMBERG BNA (Jan. 7, 2013), <https://www.bna.com/a-primer-on-when-to-use-expert-witnesses-and-how-to-find-them/>.

¹⁴⁶ *Expert Witnesses Help Judges and Juries Find the Truth*, OHIO STATE BAR ASS’N (Oct. 10, 2009), <https://www.ohioabar.org/ForPublic/Resources/LawYouCanUse/Pages/LawYouCanUse-150.aspx>.

¹⁴⁷ See Hon. Paul W. Grimm et al., *Authentication of Social Media Evidence*, 36 Am. J. Trial Advoc. 433 (2013); Elizabeth A. Flanagan, *#Guilty? Sublet V. State and the Authentication of Social Media Evidence in Criminal Proceedings*, 61 Vill. L. Rev. 287 (2016). Note that many of these discussions relate to the *authentication* of social media evidence, which will not be discussed in this paper.

¹⁴⁸ Karen Henry & Jason Harrow, *Exhibit A - Winky Face: Emoticon Evidence Enters Courts*, LAW360 (Nov. 17, 2015), <https://www.law360.com/articles/727700/courts-begin-considering-emoticon-and-emoji-evidence>.

A. Cases dealing with emoticons

Although emoji are a relatively recent phenomenon, courts have only recently dealt with the evidentiary value and meaning of their older cousins—emoticons.¹⁴⁹ In *Enjaian v. Schlissel*, a 2015 case from the U.S. District Court for the Eastern District of Michigan, Jesse Enjaian was accused of stalking one of his college classmates.¹⁵⁰ The classmate reported to the university police various emails and Facebook messages that Enjaian sent her.¹⁵¹ After the victim reported him, Enjaian sent text messages to a mutual friend about his and the victim’s relationship, saying that he deserved an apology from the victim.¹⁵² The mutual friend warned Enjaian not to do anything, to which Enjaian responded he would not do anything “that serious. Just enough to make her feel crappy -D [sic].”¹⁵³ After the mutual friend subsequently showed these messages to the victim, and the victim reported Enjaian to the university police,¹⁵⁴ a detective with the university police obtained and executed a search warrant of Enjaian’s electronic equipment.¹⁵⁵ In so doing, however, the detective omitted the “-D” from the affidavit for the search warrant.¹⁵⁶

¹⁴⁹ See *United States v. Cochran*, 534 F.3d 631 (7th Cir. 2008) (admitting emoticons as evidence of enticing minors to engage in sexual activity for which any person can be charged with a criminal offense when he sent messages and used a webcam online to a Detective posing as a minor); *State v. Nero*, 1 A.3d 184 (Conn. App. 2010) (admitting emoticons as evidence of attempt to commit sexual assault, attempt to commit risk of injury to a child, and attempt to entice a minor by computer to engage in sexual activity when he sent messages online to a Detective posing as a minor in chat rooms).

¹⁵⁰ *Enjaian v. Schlissel*, No. 14-CV-13297, 2015 WL 3408805, at *1 (E.D. Mich. May 27, 2015).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at *1-2.

¹⁵⁵ *Id.* at *2, *6.

¹⁵⁶ *Enjaian v. Schlissel*, No. 14-CV-13297, 2015 WL 3408805, at *2, *6 (E.D. Mich. May 27, 2015) (internal quotation marks omitted).

Enjaian responded by filing a civil action against the detective.¹⁵⁷ Among other things, Enjaian alleged that omission of the “-D” emoticon from the affidavit caused the affidavit to be maliciously, intentionally, or recklessly false, because the inclusion “would have led the reader to understand that he was merely deeply unhappy . . . rather than sadistically bloodthirsty for revenge.”¹⁵⁸ The court found that the text messages exchanged between Enjaian and his mutual friend, with or without the “-D” emoticon—which the court described as a “wide open-mouth smile” emoticon—“show[ed] that Enjaian may have had an intent to harass [the victim] and can explain why [the victim] would be upset and frightened by otherwise innocuous looking transmissions.”¹⁵⁹ Therefore, the court found that the inclusion of the “-D” in the warrant affidavit would not have helped Enjaian establish a cause of action for a maliciously, intentionally, or recklessly false affidavit in support of a search warrant because the emoticon did “not materially alter the meaning of the text message,” from an intent to harass to just showing Enjaian’s unhappiness.¹⁶⁰

Similarly, in *Lenz v. Universal Music Corporation*, a 2010 case from the U.S. District Court for the Northern District of California arising from a First Amendment claim, the defendant asserted that the plaintiff “did not believe she was substantially and irreparably harmed” because of an email exchange between the plaintiff and a friend.¹⁶¹ In this exchange, the plaintiff “respond[ed] to her friend’s comment that the friend ‘love[s] how [the plaintiff has] been injured ‘substantially and irreparably’;-)’ by writing ‘I have;-).’”¹⁶² The court found that

¹⁵⁷ *Id.* at *6.

¹⁵⁸ *Id.* at *6 (internal quotation marks omitted).

¹⁵⁹ *Id.* at *7.

¹⁶⁰ *Id.* at *6 , *7 n.10.

¹⁶¹ *Lenz v. Universal Music Corp.*, No. C 07-3783 JF, 2010 WL 702466, at *5 (N.D. Cal. Feb. 25, 2010)

¹⁶² *Id.* at *4.

the defendants “proffered evidence,” including the fact that both email messages included a “winky” emoticon which the plaintiff admitted meant “just kidding,” was “insufficient to prove [the plaintiff] acted in bad faith.”¹⁶³

A different approach was taken in *Ghanam v. Does*, a 2014 case rendered by the Michigan Court of Appeals.¹⁶⁴ The plaintiff, who served as the superintendent of a city’s department of public works, alleged that various defendants had defamed him by “post[ing] false and malicious statements about [the] plaintiff on an Internet message board.”¹⁶⁵ However, the plaintiff “fail[ed] to cite the actual complained-of statements in the complaint,” making his complaint “patently deficient.”¹⁶⁶ Still, the court analyzed the statements to determine whether the plaintiff could state a cause of action for defamation if he was allowed to amend the complaint to include the statements.¹⁶⁷

One of the statements that the plaintiff alleged was defamatory was “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.’”¹⁶⁸ In analyzing this statement, the court explained that “[e]moticons are used to suggest an attitude or emotion in computerized communications,” and that the :P emoticon particularly “represents a face with a tongue sticking out, indicating a joke, sarcasm, or disgust.”¹⁶⁹ The court held that the allegedly defamatory statement “on its face c[ould] not be taken seriously” because “[t]he use of the ‘:P’ emoticon makes it *patently clear* that the

¹⁶³ *Id.* at *5.

¹⁶⁴ *Ghanam v. Does*, 845 N.W.2d 128 (Mich. Ct. App. 2014).

¹⁶⁵ *Id.* at 146.

¹⁶⁶ *Id.* at 142.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 133.

¹⁶⁹ *Ghanam v. Does*, 845 N.W.2d 128, 133 n.4 (Mich. Ct. App. 2014).

commenter was making a joke.”¹⁷⁰ Thus, the court did not allow the plaintiff to amend his complaint to include the defamatory statements because “a reasonable reader could not view the statement as defamatory.”¹⁷¹

These cases represent two differing interpretations of the meaning and value of an emoticon as it relates to the statement it accompanies. Two courts determined that the inclusion of an emoticon did not alter the meaning of the message it supplemented.¹⁷² In contrast, another court determined that an emoticon transformed the meaning of the message that it accompanied from a serious, potentially defamatory statement to a joke.¹⁷³ Though neither of these cases pertained to the emoticons as hearsay because the cases were still at the pleadings stage, they still provide evidence that *judges* are making determinations as to what emoticons mean and whether they alter the declarant’s message when read hand-in-hand with a message.¹⁷⁴

B. Cases dealing with emoji

Because emoji did not become popular in the United States until 2011, few appellate cases provide any guidance as to how a court should handle a statement accompanied by an

¹⁷⁰ *Id.* at 145 (emphasis added) (determining also that all of the other statements at issue were meant as jokes or sarcasm).

¹⁷¹ *Id.*

¹⁷² *Enjaian*, 2015 WL 3408805 at *6-*7.

¹⁷³ *Ghanam*, 845 N.W.2d at 145.

¹⁷⁴ The United States Supreme Court had an opportunity in 2015 to provide guidance to lower courts on treating emoticon evidence in *Elonis v. United States*. 135 S. Ct. 2001 (2015). The Court was confronted with posts from the defendant’s Facebook page that included emoticons, which led to his conviction for making a threatening communication. *Id.* See also Henry & Harrow, *supra* note 148. The defendant “argued that his conviction for posting threatening communications on Facebook should be reversed in part because the presence of emoticons in some of the posts made them ‘subject to misunderstandings’ and not as threatening as they would otherwise have been.” *Elonis*, 135 S. Ct. at 2012-13. But instead of determining the meaning of the emoticon or providing guidance as to how lower courts should interpret emoticon or emoji evidence, the Supreme Court resolved the case based on constitutional law and statutory interpretation. *Id.*

emoji.¹⁷⁵ But the cases that do address emoji show that courts have taken a variety of approaches when determining the evidentiary value and meaning of an emoji.

In *In re L.F.*, a 2015 case, the California Court of Appeal was called on to review a juvenile court's determination that whether the defendant, a juvenile, made a criminal threat.¹⁷⁶ The defendant had tweeted, "over the course of approximately three hours," various statements about shooting people at her school.¹⁷⁷ But these "tweets include[ed] laughing emoji[, various other emoji,] and statements like 'just kidding.'"¹⁷⁸ Overall, in the tweets cited by the court, the defendant included almost 40 emoji, most of them being what the court referred to as the "laughing emoji."¹⁷⁹

The defendant argued that these emoji, as well as the terms "jk" or "lmao," showed that "her statements were meant as a joke," and not specifically intended to be a threat.¹⁸⁰ But the court found that it was "reasonable for the juvenile court to conclude [that the defendant] intended her statements to be taken as a threat," regardless of the inclusion of the emoji and other language tending to evidence a joking tone.¹⁸¹

And in *Kinsey v. State*, a 2014 case involving an alleged sexual assault, the Court of Appeals of Texas addressed whether the victim consented to the sexual encounter with the

¹⁷⁵ See *supra* note 57.

¹⁷⁶ *In re L.F.*, No. A142296, 2015 WL 3500616, at *1 (Cal. Ct. App. June 3, 2015), *review denied* (Aug. 26, 2015).

¹⁷⁷ *Id.* at *1-2.

¹⁷⁸ *Id.* The court did not include the actual emoji, just descriptions of how they looked in brackets. *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at *4. The court noted that jk means "just kidding," and lmao means "laughing my ass off." *Id.* at *2 n.6. Additionally, two witnesses testified that they thought the tweets were jokes because of the emojis and use of the terms jk. *Id.* at *2.

¹⁸¹ *In re L.F.*, 2015 WL 3500616, at *4.

defendant.¹⁸² The defendant contended that a “winkie face” from the victim established consent for one sexual encounter.¹⁸³ But, apparently un-swayed by the defendant’s consent argument, the jury found him guilty of sexual assault, which the appellate court affirmed.¹⁸⁴

Just as in instances involving emoticons as evidence, it is evident from these cases that judges are taking differing approaches to emoji as evidence. It is unclear whether a judge will dismiss an emoji as having little, if any, evidentiary value,¹⁸⁵ or whether the judge will allow evidence of the emoji to be presented to the trier of fact.¹⁸⁶ Suffice it to say, there are many inconsistent approaches to emoji as evidence across the American court system.¹⁸⁷

C. The problem of inconsistency and lack of guidance

These inconsistent approaches to emoji and emoticons as evidence will only become increasingly defined as more and more cases involve emoji as evidence—an inevitable consequence of emoji use in online communications. If the steadily rising usage statistics are any indication, social media is here to stay.¹⁸⁸ Social media sites are continually evolving and updating their user interface in order to satisfy the wants and needs of their users, such as Facebook’s inclusion of the “Safety Update” feature.¹⁸⁹ And social media sites are also attempting to eliminate their disadvantages while emphasizing their benefits.¹⁹⁰ Due to this

¹⁸² Kinsey v. State, No. 11-12-00102-CR, 2014 WL 2459690, at *4 (Tex. App. May 22, 2014).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at *1.

¹⁸⁵ In re L.F., 2015 WL 3500616, at *4.

¹⁸⁶ Kinsey, 2014 WL 2459690 at *1.

¹⁸⁷ It is important to note that the struggle with emojis as evidence is not a uniquely American problem. Henry & Harrow, *supra* note 148, at n.1.

¹⁸⁸ See *supra* Section I(B).

¹⁸⁹ See *supra* Section I(A); *supra* note 42.

¹⁹⁰ See *supra* Section I(B); For example, Facebook has recently engaged in efforts to eliminate what is known as “fake news.” See Ivana Kottasová, *Facebook Targets 30,000 Fake Accounts in*

constant evolution and concern with user satisfaction, and unlike “fads” that are only popular for a limited time, social media will continue to be a staple in American life for the foreseeable future.

And with an increase of social media usage comes an increase in the use of emoji.¹⁹¹ Courts have already begun to regularly evaluate social media posts as evidence, with a trend toward admissibility.¹⁹² It was only a matter of time before the posts introduced as evidence regularly included emoji as a form of communication. Just like the steadily increasing use of social media, the steady increase of emoji since 2011 shows that emoji are here to stay.¹⁹³ Developers are consistently releasing different emoji in order to meet users’ needs.¹⁹⁴ Since communication via written word is often unable to accurately convey the speaker’s emotion and tone, users are turning to emoji to accurately express their thoughts, a need that likely will continue so long as social media remains popular.¹⁹⁵ Therefore, as time goes on and emoji become more and more prevalent, courts will increasingly be faced with emoji as evidence. But since emoji are a relatively recent phenomenon, few courts have had to evaluate the evidentiary value of an emoji, and those that have, have taken inconsistent approaches.¹⁹⁶

France, CNN (Apr. 21, 2017), <http://money.cnn.com/2017/04/14/media/facebook-fake-news-france-election/>.

¹⁹¹ See *supra* Section I(C)(1).

¹⁹² See *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) (“On the most basic level, clicking on the “like” button literally causes to be published the statement that the User “likes” something, which is itself a substantive statement.”). Hon. J. Michelle Childs, *Social Media and the Federal Rules of Evidence*, ABA (Aug. 22, 2013), <http://apps.americanbar.org/litigation/committees/trialevidence/articles/summer2013-0813-social-media-federal-rules-evidence.html>.

¹⁹³ *Supra* Section I(C)(1).

¹⁹⁴ Scall, *supra* note 54, at 382-83 (discussing the fact that, at first, there were only 176 emojis); *Emoji Statistics*, *supra* note 58 (noting that there are now over 2,600 emojis).

¹⁹⁵ See *supra* Section I(C)(1).

¹⁹⁶ *Supra* Sections III(A), (B), (C).

IV. The proper application of evidence rules to emoji as evidence

A solution to this problem of inconsistency does not require an overhaul of the Federal Rules of Evidence. Courts need only apply the existing rules in a consistent way, the same way they have for decades, to communications involving emoji.¹⁹⁷

A. The nine-step process to admit an emoji

In order to evaluate the evidentiary value of emoji, courts should follow a nine-step process, similar to the process that courts follow with other pieces of evidence. Because emoji are really just a “new and modern” way to communicate, there is no reason to treat them any differently than other verbal assertions or nonverbal conduct intended as assertions.

1. Step 1: determine whether any accompanying statement is admissible

First, if the emoji does not accompany any statement and is a standalone message, the court should skip this step and move on to step two. But if the emoji accompanies a statement, before the court analyzes the evidentiary value of the emoji, the court must determine whether the statement that the emoji accompanies is admissible. In order to do this, the court should engage in a typical hearsay analysis under the Rules.¹⁹⁸ If the statement is admissible, the court should move on to step two and begin its analysis of the emoji. However, if the statement is inadmissible as hearsay, the court should exclude both the statement and the emoji under Rule 802.¹⁹⁹

¹⁹⁷ Josh Camson, *History of the Federal Rules of Evidence*, ABA (2010), https://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html (The Federal Rules of Evidence were originally enacted in 1975.)

¹⁹⁸ Fed. R. Evid. 801-807.

¹⁹⁹ Fed. R. Evid. 802. (“Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.”).

2. Step 2: determine the emoji's relevance

Second, the court must determine whether the emoji is relevant under Rule 401. If the emoji is a standalone message, the court should engage in a typical relevance analysis, determining the probative value of the emoji as it relates to the fact that the offering party is trying to prove.²⁰⁰ In determining whether evidence of an emoji that supplements a statement is relevant, a court should look to whether the emoji changes the meaning of the statement that it accompanies.²⁰¹ If the court determines that the emoji is relevant, it should move on to step three. Otherwise, it should exclude the emoji.

3. Step 3: determine whether the emoji is a statement

Third, the court must determine if the emoji is itself a statement under the definition of statement in Rule 801.²⁰² To determine whether the emoji is a statement, the court should consider whether the declarant intended that the emoji be taken as a statement.²⁰³ For example, depending on the context, 😍 could be the statement, “I love you.”²⁰⁴ On the other hand, it could indicate the way another statement should be read, *i.e.* in a loving way. If the court determines that the emoji is a statement, it should move on to step four. If it determines the emoji is not a statement, it should move on to step six.

²⁰⁰ *Id.*

²⁰¹ 2-401 WEINSTEIN'S FEDERAL EVIDENCE § 401.04 (“The question to be asked in determining the relevance of evidence is whether a reasonable person might believe the probability of the truth of the consequential fact to be different if that person knew of the proffered evidence.”).

²⁰² Fed. R. Evid. 801(a) (defining statement as “an oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion”).

²⁰³ *Id.*

²⁰⁴ *Full Emoji List, supra* note 73.

4. Step 4: if it is a statement, determine whether the emoji falls within the definition of hearsay

Fourth, if the emoji is a statement, the court must determine whether it falls within the definition of hearsay under Rule 801(c).²⁰⁵ If the emoji can be classified as a verbal act, such as a communication of a threat or a manifestation of consent, the emoji would not fall within definition of hearsay.²⁰⁶ Further, if the emoji is only offered for the effect on the listener, such as a tweet directed at law enforcement that included “🔫🔥🔥🔥👮🔫🔫” as evidence of why the police targeted an individual for arrest and prosecution, the emoji would not be a statement at all, and would be excluded from hearsay.²⁰⁷ If the emoji does not fall within the definition of hearsay, the court should move on to step six. Otherwise, if the emoji falls within the definition of hearsay, the court should move on to step five.

5. Step 5: if it is hearsay, determine whether the emoji falls within a hearsay exclusion or exception

Fifth, if the emoji is a statement, the court must determine whether it falls within a hearsay exclusion. If the emoji is being offered against the party who sent it, the court should classify the emoji as a statement by a party opponent under Rule 801, meaning the emoji would fall within a hearsay exclusion.²⁰⁸

If none of the hearsay exclusions apply, then the court should determine whether the emoji falls within a hearsay exception. The most applicable exception when dealing with emoji

²⁰⁵ Fed. R. Evid. 801(c) (defining hearsay as “a statement that: 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”).

²⁰⁶ See *supra* Section II(A)(1).

²⁰⁷ Joseph Stepansky, *Brooklyn Teen Busted for Making Emoji-Laden Threats Against Cops on Facebook*, N.Y. DAILY NEWS (Jan. 23, 2015), <http://www.nydailynews.com/brooklyn-teen-busted-threatening-cops-facebook-article-1.2089216>; *supra* Section II(A)(1).

²⁰⁸ Fed. R. Evid. 801(d)(2). See also *supra* Section II(A)(2).

would likely be the exception for then-existing mental, emotional, or physical condition, Rule 803(3).²⁰⁹ For example, 😊, if considered to be an assertion, likely states, “I am happy,” while 😭 means “I am sad,” or “I am crying.” All of these statements would fall within the exception for then-existing mental, emotional, or physical conditions, because they advise the recipient of the declarants “emotional, sensory, or physical condition.”²¹⁰

After performing this analysis, if the court determines that the emoji falls within an exclusion or exception to hearsay, it should move on to step six. Otherwise, the court should exclude the emoji.

6. Step 6: determine whether the probative value of the emoji is substantially outweighed by its prejudicial effect

Sixth, if the court determines that the emoji is relevant and not excluded by the rule against hearsay, it should balance the emoji’s probative value with its any danger it may have under Rule 403.²¹¹ If the danger of “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, [and/]or needlessly presenting cumulative evidence” substantially outweighs its probative value, the court should exclude the emoji. Otherwise, the court should move on to step seven.

²⁰⁹ Fed. R. Evid. 803(3) (“A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.”); *see also supra* Section II(A)(3).

²¹⁰ Fed. R. Evid. 803(3).

²¹¹ Fed. R. Evid. 403.

7. Step 7: admit the emoji on its original platform

Seventh, after satisfying the above steps, the court must admit the emoji and allow the trier of fact to consider the emoji on its original platform.²¹² As discussed above, emoji look different depending on the platform on which the emoji is viewed.²¹³ Therefore, in order to accurately assess the value and meaning of the emoji, the trier of fact must view the emoji in the design created by the platform on which it was sent when the intent of the sender is at issue. But if the effect on the receiver is at issue, the emoji should be viewed in the design created by the platform on which it was received. And in some instances, both the intent of the sender and the effect on the receiver are at issue, so the trier of fact must see the emoji in the design of both platforms. After admitting the emoji and allowing the trier of fact to view it on its original platform, the court should consider step eight.

8. Step 8: determine the need for expert testimony

Eighth, if requested, the court must determine whether expert testimony is appropriate to help the trier of fact determine the meaning of the emoji. The court must determine whether an expert of this sort is qualified, meaning the expert has the requisite “knowledge, skill, experience, training, or education.”²¹⁴ The testimony could be based in part on the data collected by Instagram and its emoji hashtags, so long as the court is satisfied that this data and the expert’s analysis satisfy the requirements of Rule 702.²¹⁵ The use of an emoji expert may be a thing of the future, as Instagram only began collecting the data on emoji in 2015, and the analysis of that data may not yet reach the standards of *Daubert* and Rule 702; however, because

²¹² See *supra* Section I(B)(2).

²¹³ *Id.*

²¹⁴ Fed. R. Evid. 104(a), 702

²¹⁵ See *supra* Sections I(B)(3), II(B); Fed. R. Evid. 702.

of the current differences in interpretation of emoji across cultures, the use of experts in cases involving emoji is something to consider as a way to standardize the meaning of emoji.²¹⁶

9. Step 9: leave it to the trier of fact

Finally, after performing the above analysis, if the court determines that the emoji must be admitted, it must leave the interpretation of the emoji up to the trier of fact. Courts regularly allow the trier of fact to consider emphasis and vocal inflection as evidence, as well as allowing the trier of fact to determine the meaning, value, and effect of statements.²¹⁷ Because emoji are really just a new, albeit fun, way to communicate, there is no reason to treat them any differently than other pieces of evidence that have long been left up to the trier of fact to determine the value and meaning.

B. Application of the eight steps to a hypothetical case

In order to illustrate this process, consider a variation of the facts of *Elonis v. United States*.²¹⁸ Imagine that a defendant is charged with making a threatening statement via text message to a friend by sending this message on his iPhone: “Ur in big trouble! 🗡️😂.” The friend has a Samsung phone, and, because of the differing designs based on Unicode, the message, when received, says: “Ur in big trouble! 🗡️😂.”²¹⁹ The court should follow the step-by-step process outlined above in order to determine the admissibility of the two emoji.²²⁰

²¹⁶ See *supra* Sections I(B)(2), (3), II(B).

²¹⁷ *United States v. Cano-Flores*, 796 F.3d 83, 89 (D.C. Cir. 2015).

²¹⁸ *Supra* note 174.

²¹⁹ See *supra* Section I(B)(2); *Full Emoji List*, *supra* note 73.

²²⁰ See *supra* Section IV(A)(1)-(9), *supra*.

First, the court must determine if the accompanying statement, “Ur in big trouble!” is admissible.²²¹ Here, the prosecution would offer this statement as an admission by a party opponent or as a verbal act, and the court would determine that the statement is excluded from hearsay or outside of the definition of hearsay, and thus admissible.²²²

Second, the court must determine whether the accompanying emoji, 🗡️ and 😂, are relevant.²²³ In this case, the court would determine that the evidence is relevant. In particular, the emoji have a tendency to make it more or less probable that it would be without the evidence that the defendant made a threat.²²⁴ And whether the defendant made a threat is of consequence to the determination of the action because it is the very issue for determination in this prosecution.²²⁵

As the third and fourth step, the court must determine whether the emoji are statements, and if so, whether they fall the definition of hearsay.²²⁶ If the court determines that the emoji are not statements, they would be admissible as context to the statement.²²⁷ And if the court determines they are statements, they would not fall within the definition of hearsay, as they are not offered to prove the truth of the matter asserted, but rather to prove a verbal act—a threat.²²⁸

Even if the court determines that the emoji are statements and fall within the definition of hearsay, it then must move on to the fifth step and determine whether the emoji fall within an

²²¹ *Supra* Section IV(A)(1).

²²² Fed. R. Evid. 801(d)(2)(A).

²²³ *See supra* Section IV(A)(2).

²²⁴ Fed. R. Evid. 401. The gun emoji would arguably make it more probable that this was a threat, while the “laughing face” emoji would arguable make it seem more like a joke or sarcastic comment.

²²⁵ Fed. R. Evid. 401.

²²⁶ *Supra* Sections IV(A)(3), (4).

²²⁷ *Supra* Sections IV(A)(3). Again, the gun emoji could be read as giving a threatening tone to the statement, while the “laughing face” emoji could be read as a joking tone.

²²⁸ *Supra* Section IV(A)(4).

exclusion or exception to hearsay.²²⁹ In this case, since the prosecution is offering the emoji against the defendant, the emoji would fall within the party opponent exception.²³⁰

Sixth, the court must determine whether the probative value of the emoji is substantially outweighed by a danger of unfair prejudice, confusion of the issues, or wasting time.²³¹ Here, the emoji are extremely probative, as they either give context to the accompanying statement or make a threat themselves. This probative value is not *substantially* outweighed by any possible danger the emoji may present.

Seventh, the court must admit the emoji and present it to the trier of fact, in this case the jury, on its original platform.²³² In the case of a threat, both the speaker's intent and the emoji's effect on the listener are at issue.²³³ Therefore, the jury would need to see both versions of the message, 🗳️😂 and 🗳️😂, to determine the defendant's intent as well as the effect on the recipient and whether the statement actually reached the level of a threat.²³⁴

Eighth, and if requested by either of the parties, the court could consider whether expert testimony about the meaning of each of the emoji would be helpful to the jury in determining whether the emoji alter the message or state something when considered alone.²³⁵ At this point, the court's role as gatekeeper of evidence has concluded, as it must leave it up to the jury to

²²⁹ *Supra* Section IV(A)(5).

²³⁰ *Supra* Section IV(A)(5); Fed. R. Evid. 801(d)(2)(A). Even if the emoji were not sent by a party opponent, the "laughing face" emoji would fall within the then-existing mental, emotional, or physical state, as stating, "I am laughing."

²³¹ *Supra* Section IV (A)(6)

²³² *Supra* Section IV(A)(7).

²³³ *Elonis*, 135 S. Ct. at 2012-13.

²³⁴ *See supra* Section IV(A)(7). In a case like this, the difference could be important due to the less threatening nature of the squirt gun as compared to the more realistic depiction of a gun.

²³⁵ *See supra* Section IV(A)(8).

determine whether the emoji altered the meaning of the message—by making a threatening statement either more or less threatening—or whether the emoji conveyed a threat themselves.²³⁶

Conclusion

The Federal Rules of Evidence were promulgated in order to promote uniformity in the administration of justice in federal courts, and states have followed suit.²³⁷ Unfortunately, courts have failed to promote this goal of uniformity when confronted with emoji as evidence, with some courts rejecting emoji altogether, and others allowing the trier of fact to view the emoji in its original form. And as emoji use continues to increase, and social media continues to become a dominant form of communication, courts will increasingly be confronted with those little symbols, and will be required to determine whether they may be offered as evidence. As of now, courts have no guidance on how to approach these topics.

But, since emoji are simply a modern form of communication, there is no need to rewrite the Federal Rules of Evidence to include special provisions for this form of communication. In fact, there is no reason to treat them any differently than other pieces of evidence. When faced with an emoji, courts should engage in the same step-by-step process as they do when evaluating other verbal and nonverbal assertions. They should determine whether the emoji is relevant, whether it is a statement, and if so, whether it is excluded by the rule against hearsay or Rule 403.²³⁸ But after determining whether the statement is admissible under the Rules, a courts' role is complete—the trier of fact is left to determine the meaning and value of the emoji.



²³⁶ See *supra* Section IV(A)(9).

²³⁷ Camson, *supra* note 197.

²³⁸ Fed. R. Evid. 802.