

# EMOJI: THE CARICATURED LAWSUIT

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## INTRODUCTION

Many police departments in this country stand behind the motto “To Serve and Protect.”<sup>1</sup> The Memphis Police Department (MPD) strives, in similar fashion, to “create and maintain an overall environment for public safety.”<sup>2</sup> Maintaining this environment requires competent and professional police officers, notably because the MPD is, in its own opinion, “the finest police department in the country.”<sup>3</sup> In July 2016, however, two MPD police officers were

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1. Mike Burg, *To Serve and Protect?*, POLICE MAG. (Dec. 1, 1998), <http://www.policemag.com/channel/patrol/articles/1998/12/to-serve-and-protect.aspx> [<https://perma.cc/KUQ9-NY9W>].

2. *Mission Statement*, MEMPHIS POLICE DEP’T, <http://www.memphispolice.org/mission.asp> (last visited June 14, 2018) [<https://perma.cc/3JGT-G6CX>].

3. *Welcome!*, MEMPHIS POLICE DEP’T, <http://www.memphispolice.org/default.asp> (last visited June 14, 2018) [<https://perma.cc/NG8N-UEP9>].

suspended after posting on Snapchat<sup>4</sup> a photo showing one of the officers holding a real gun pointed at an emoji.<sup>5</sup> The MPD suspended the officers immediately—even though the officer did not point his gun at an actual person and no one was physically hurt—because the photo was “disgusting” and would “not be tolerated.”<sup>6</sup> The director of the MPD presumably found the photo disgusting because the emoji at which the officer pointed the gun was a running black male. Despite the racial implications in the photograph, the officer, arguably, had every *right* to express himself by using an emoji of *any* color—black, white, or yellow—running away, or any other emoji offered in the emoji lexicon, such as a flag, trumpet, or cheeseburger. By using a human emoji, however, the officer invited unwanted interpretation into what he may have believed was in jest (although, realistically, he was well aware of his actions). While the MPD officers were more than likely suspended because the officer pointed a gun at a black male emoji, this story also highlights a growing trend, if not a standard, in digital communication: emoji. This story also illustrates a subtler issue: specifically, how emoji can be interpreted and subsequently used, for example, as evidence of a true threat or as a basis for an employer’s adverse action against an employee. These considerations articulate the reality that emojis are becoming standard communication tools, and this new communication can have broad legal ramifications.

In *Cyberspace and the Law of the Horse*, Judge Frank Easterbrook argued cyberspace does not need its own set of laws to be regulated, but rather should be regulated with existing laws. Judge Easterbrook explained that “[b]eliefs lawyers hold about computers, and predictions they make about new technology, are highly likely to be false. This should make us hesitate to prescribe legal adaptations for cyberspace.”<sup>7</sup> Easterbrook made this argument in 1996, with the understanding that new technology may require its own set of unique rules, though the proper method(s) by which to approach such rule-making seemed unclear. He nevertheless posited that to understand new technology, the courses taught in law school should illuminate

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4. Snapchat is a mobile application that allows users to capture and send videos and pictures that self destruct after after the receiver opens and views the videos and pictures for a few seconds. Larry Magid, *What Is Snapchat and Why Do Kids Love It and Parents Fear It? (Updated)*, FORBES (May 1, 2013, 4:14 PM), <http://www.forbes.com/sites/larrymagid/2013/05/01/what-is-snapchat-and-why-do-kids-love-it-and-parents-fear-it/#701988782551> [https://perma.cc/K9HS-4JDT].

5. Lee Moran, *2 Cops Suspended Over Snapchat Image of Gun Aimed at Emoji of Black Boy*, HUFFINGTON POST (July 11, 2016, 3:55 AM), [http://www.huffingtonpost.com/entry/memphis-police-snapchat-emoji-suspended\\_us\\_57833cfbe4b0c590f7e9ee71](http://www.huffingtonpost.com/entry/memphis-police-snapchat-emoji-suspended_us_57833cfbe4b0c590f7e9ee71) [https://perma.cc/9Z4G-5WCW].

6. Jody Callahan, *MPD IDs Two Officers Suspended Over Snapchat Post*, COM. APPEAL (July 14, 2016), <http://archive.commercialappeal.com/news/crime/mpd-ids-two-officer-suspended-over-snapchat-post-37a02ef4-9536-5806-e053-0100007f112e-386869191.html> [https://perma.cc/VXY7-FMMP].

7. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 UNIV. CHI. LEGAL F. 207 (1996),

the entire law because, he stated, “the best way to learn the law applicable to specialized endeavors is to study general rules.”<sup>8</sup> In other words, lawmakers should not automatically create laws to address technological advances. Rather, legislators, lawyers, and scholars must first study existing laws that regulate the general areas in which new technologies exist, then apply those laws to those technologies. Referring to computers and new technology, Judge Easterbrook proposed that regulating a “sound law of intellectual property” and then applying it to computer networks was the solution to addressing new technologies in the legal field.<sup>9</sup>

Professor Lawrence Lessig challenged Judge Easterbrook’s opinion,<sup>10</sup> arguing that real-space sovereign will lose out as the net continues to grow.<sup>11</sup> Discussing the differences between real and cyberspace regulations, Lessig opined, “real-space regulations depend upon certain features in the ‘design’ of real space.”<sup>12</sup> To illustrate, he considered how pornography “in real space is zoned from kids. Whether because of laws (banning the sale of porn to minors), or norms (telling us to shun those who do sell porn to minors) . . . it is hard in real space for kids to buy porn.”<sup>13</sup> He argued age, however, was not “similarly self-authenticating” in cyberspace, thus making it more difficult to “zone porn.”<sup>14</sup> Lessig ultimately asks whether the law should change in response to these differences, or whether the law should try to “change the features of cyberspace, to make them conform to law.”<sup>15</sup> Answering his own question, Lessig responded, “more than law alone enables legal values, and law alone cannot guarantee them. If our objective is a world constituted by these values, then it is as much these other regulators – code, but also norms and the market – that must be addressed.”<sup>16</sup> Put differently, if we want a society that values the law, we must recognize that law alone cannot determine our legal values; we must address the law, norms, and the market to determine legal changes to cyberspace.

Although Easterbrook and Lessig’s articles were written in 1996 and 1999, respectively, their arguments remain valid, as technology and the internet continue to advance lawmakers adapt to those advancements.

Such advancements have included improvements in the ways individuals and groups can communicate with one another.

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8. *Id.*

9. *Id.* at 209.

10. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999).

11. *Id.* at 502, 546.

12. *Id.* at 504.

13. *Id.* at 503.

14. *Id.* at 504.

15. *Id.* at 505.

16. *Id.* at 546.

Cellphones, smartphones, and the internet have become the normal modes of communication in today's digital age.<sup>17</sup> Notably, text messaging has grown rapidly since smart phones gained popularity. A decade ago, for the first time, Americans sent more text messages than they made cell phone calls,<sup>18</sup> and this social landscape has expanded since that time.

Most importantly, for the purposes of this Note, this expansion includes emoji—"two-dimensional pictographs that were originally designed to convey emotion between participants in text-based conversation."<sup>19</sup> While emoji can be fun and allow people more expression in their nonverbal communications, they are now arising "in a place where their meanings are closely scrutinized: courtrooms."<sup>20</sup> Specifically, as a form of expression, emoji, like words, can comprise either a part or whole of a discernable message. Like other forms of expression, the First Amendment protects emoji.<sup>21</sup> The free speech clause, however, is not unlimited in scope. For example, "true threats" are outside the protections of the First Amendment.<sup>22</sup> Similarly, many employees and employers are not protected by the First Amendment, and they often face discipline at work or litigation because of how they choose to express themselves. For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination based on a person's protected class – e.g., race or sex.<sup>23</sup> If an employer is found to have violated Title VII – because, for example, the employer terminated employees because of their sex, and used sexually based emoji in its communications – the employer faces damages for lost wages, compensatory and punitive damages, and whatever other relief a court may require.

Professor Lessig might argue emoji should not be regulated in cyberspace based on real space regulations without first understanding the norms and contexts in which they exist. Similarly,

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17. See Adarsh Verma, *Barack Obama: "The Internet Is Not a Luxury, It's a Necessity"*, FOSSBYTES, (July 20, 2015), <https://fossbytes.com/barack-obama-the-internet-is-not-a-luxury-its-a-necessity/> [<https://perma.cc/4WMA-GTTT>]; see also Lee Rainie & Kathryn Zickuhr, *Americans' Views on Mobile Etiquette 2*, PEW RES. CTR., (Aug. 26, 2015), [http://www.pewinternet.org/files/2015/08/2015-08-26\\_mobile-etiquette\\_FINAL.pdf](http://www.pewinternet.org/files/2015/08/2015-08-26_mobile-etiquette_FINAL.pdf) [<https://perma.cc/DXL7-PCTD>].

18. Marissa A. Harrison & Angela L. Gilmore, *U Txt When? College Students' Social Contexts of Text Messaging*, 49 SOC. SCI. J. 513 (2012).

19. Ryan Kelly & Leon Watts, *Characterising the Inventive Appropriation of Emoji as Relationally Meaningful in Mediated Close Personal Relationships*, (last visited June 14, 2018) [https://projects.hci.sbg.ac.at/ecscw2015/wp-content/uploads/sites/31/2015/08/Kelly\\_Watts.pdf](https://projects.hci.sbg.ac.at/ecscw2015/wp-content/uploads/sites/31/2015/08/Kelly_Watts.pdf) [<https://perma.cc/P9YX-PUXL>].

20. *Next Witness: Will The Yellow Smiley Face Take The Stand?*, NPR (Feb. 8, 2015, 10:12 AM), <http://www.npr.org/2015/02/08/384662409/your-honor-id-like-to-call-the-smiley-face-to-the-stand> [<https://perma.cc/A96P-M9CE>].

21. U.S CONST. amend. I.

22. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 287–88 (2001) (emphasis added).

23. *Harassment*, EEOC, <https://www.eeoc.gov/laws/types/harassment.cfm> (last visited June 14, 2018) [<https://perma.cc/FA5Z-HCYS>].

Judge Easterbrook might contend real space regulations generally are steadfast and can be interpreted to adapt to and address the needs of foreign concepts. Here, the real space regulations include the First Amendment and Title VII; the foreign concept is emoji. While technology has advanced drastically since Easterbrook expressed his opinions on “The Law of the Horse,” his premise remains relevant, particularly in the context of emoji. As Judge Easterbrook states, “[m]ost behavior in cyberspace is easy to classify under current [legal] principles.”<sup>24</sup> This opinion can be said of emoji because there are legal principles that already address communication, and emoji can be classified under them.

Emoji, however, comprise more than simple word substitutions. On one hand, similar to traditional art but with a more significant presence in the modern lexicon, emoji can be interpreted differently depending on the audience. As such, it makes sense that many people believe they can better express themselves through visuals like emoji “than through old-fashioned English.”<sup>25</sup> It follows that this “better” expression can have consequences, as reflected in the story of the MPD officers above.

Accordingly, in this paper I aim to address emoji, their popularity, and their use in two contexts: true threats specifically, and adverse employment actions broadly. Part I will provide a brief history of emoji, the contexts in which they are used, and issues with interpreting emoji. In Part II, I address two seemingly unrelated areas of law: (1) true threats under the First Amendment, and (2) adverse employment decisions generally. Part III will then look at emoji through the opinions of Judge Easterbrook and Professor Lessig; and apply the story of the MPD officers to both true threats and adverse employment actions, focusing throughout the discussion on emoji’s role in these legal contexts. Finally, in Part IV conclude this paper, noting the proliferation of emoji and the caution legal decision-makers should exercise as emoji become more popular.

## I. EMOJI

### A. *Brief History*

Emoji are “picture characters” originally associated with cellphone usage in Japan, but now popular worldwide.<sup>26</sup>

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24. Easterbrook, *supra* note 7, at 210.

25. Katy Steinmetz, *Forget Words, a lot of Millennials Say GIFs and Emojis Communication Their Thoughts Better Than English*, TIME (June 27, 2017), <http://time.com/4834112/millennials-gifs-emojis/> [<https://perma.cc/6JGY-473V>].

26. *Emoji and Pictographs*, UNICODE, [http://unicode.org/faq/emoji\\_dingbats.html](http://unicode.org/faq/emoji_dingbats.html) (last visited Feb. 16, 2017) [<https://perma.cc/ST5L-T737>].

Emoji are often pictographs—images of things such as faces, weather, vehicles and buildings, food and drink, animals and plants—or icons that represent emotions, feelings, or activities. In cellular phone usage, many emoji characters are presented in color (sometimes as a multicolor image), and some are presented in animated form, usually as a repeating sequence of two to four images—for example, a pulsing red heart.<sup>27</sup>

Thus, emoji make faceless communication more personal, understandable, and coherent. Emoji, however, are not the first instance of facial expressions in text messaging.

Emoticons, emoji's predecessor, were created in the 1980s when Carnegie Mellon computer scientist Scott Fahlman used online bulletin boards to communicate with his colleagues.<sup>28</sup> Fahlman found his colleagues did not always understand jokes or sarcasm used in the bulletin board.<sup>29</sup> Thus, Fahlman and his colleagues eventually found a way to mark those statements that were meant to not be taken seriously: emoticons.<sup>30</sup> For example, the combination of a colon, dash, and left- or right-facing parenthesis [:-) or :-)] signify happiness and sadness.

Emoji were created later in the 1990s and first gained popularity in Japan.<sup>31</sup> DoCoMo, Japan's largest network provider, first introduced emoji to its "i-mode messaging service."<sup>32</sup> At that time, emoji sent from one service provider were initially incompatible with others.<sup>33</sup> When Apple released iOS 5.0 for the iPhone, however, the new operating system changed the emoji encoding to make it visible to everyone.<sup>34</sup> Thus, Apple's iPhone is "largely credited with allowing their [emoji's] explosive growth in popularity outside of Japan."<sup>35</sup>

There are currently over 1,800 emoji characters supported on current platforms, up to and including Unicode 9.0.<sup>36</sup> The ubiquity of emoji warrants a continuous increase in their volume and categories,<sup>37</sup>

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27. *Id.*

28. Scott E. Fahlman, *Smiley Lore :-)*, <http://www.cs.cmu.edu/~sef/sefSmiley.htm> (last visited June 14, 2017) [<https://perma.cc/CV77-V5WX>].

29. *Id.*

30. Fahlman and his colleagues did not coin the term. *Id.*

31. *Why 140 Characters, When One Will Do? Tracing The Emoji Evolution*, NPR (June 30, 2014, 5:35 PM), <http://www.npr.org/2014/06/30/326937998/why-140-characters-when-one-will-do-tracing-the-emoji-evolution> [<https://perma.cc/BG84-3XTG>].

32. Paul Ferson, *MTE Explains: How Emoji Work*, MAKE TECH EASIER (July 7, 2016), <https://www.maketecheasier.com/how-emoji-work/> [<https://perma.cc/R23P-ATPN>].

33. *Id.*

34. *Id.*

35. *Id.*

36. *Frequently Asked Question*, EMOJIPEDIA <http://emojipedia.org/faq/> (last visited June 14 2017) [<https://perma.cc/98WR-VEFF>].

37. *See Apple*, EMOJIPEDIA, <http://emojipedia.org/apple/> (last visited June 14, 2017) [<https://perma.cc/YZV8-C9KJ>].

which allows more accurate representations of people and things around the world, including characters of different races.<sup>38</sup>

As stated above, emoji comprise more than human cartoons. For example, they include “weather, vehicles and buildings, food and drink, animals and . . . icons that represent emotions, feeling, or activities.”<sup>39</sup> Because of this wide array of choices, a text message that includes emoji does not necessarily require any words for the receiver to understand the message’s content. Apple even introduced a function that allows a user to replace the words he or she types with emoji, allowing an emoji to appear when a person types something that has a corresponding emoji.<sup>40</sup> For example, “‘I’m happy’ will predict ‘I’m [smiley face].’”<sup>41</sup> This update reflects the linguistic function of emoji to a greater extent, because now words can be replaced with corresponding emoji without the user even searching for it.

With over 1,800 emoji characters and counting, emoji can “add context, clarify meaning, or even completely transform a sentence by turning what initially appeared to be a serious statement into a joke” by adding to a statement, for example, “a winking or smiling face to indicate sarcasm or joking.”<sup>42</sup> See *Figure 1*, below.<sup>43</sup>

FIGURE 1



Moreover, emoji are considered a language primarily used by today’s younger generation: “For the youth consumer today, emoji[]

38. Rod Chester, *Apple Embraces Racial and Sexual Diversity with Emoji Facelift*, NEWS CORP. AUSTL. (Feb. 24, 2015, 10:39 AM), <http://www.news.com.au/technology/apple-embraces-racial-and-sexual-diversity-with-emoji-facelift/news-story/39a6c3dfbb3a32e03e7be8e9fe37fa4c> [https://perma.cc/6MMU-Z8DA].

39. *Emoji and Pictographs*, UNICODE, [http://unicode.org/faq/emoji\\_dingbats.html](http://unicode.org/faq/emoji_dingbats.html) (last visited June 14, 2017) [https://perma.cc/4JNL-RC3F].

40. *Id.*

41. *Id.*

42. John G. Browning & Gwendolyn Seale, *More Than Words The Evidentiary Value of Emoji*, 57 NO. 10 DRI FOR DEF. 34 (2015).

43. *List of all Emojis to Cut and Paste*, GET EMOJI, <https://getemoji.com/assets/og/mobile.png> (last visited June 14, 2018) [https://perma.cc/S5RG-HZ3J].

and emoticons are 21st century dialogue.”<sup>44</sup> This dialogue is not limited to “the youth,” yet it seems as if this language is *for* “the youth,” *of* “the youth,” and interpreted *by* “the youth.”<sup>45</sup> For example, when asked whether they are more comfortable expressing emotions through visuals, including emoji, than through phone conversations, “68% of millennials agreed, compared to 37% of those over the age of 65.”<sup>46</sup> Accordingly, while emoji have become a wide-reaching tool used primarily by millennials, their use is not limited only to that group. And as the popularity of emoji continues to expand, adverse outcomes will naturally arise from their use.

### B. *Can Emoji Be Used to Threaten or Harass?*

Because language is used as a means of expression, and emoji are considered a new language, indeed they can be used to threaten and harass. The following examples reflect this reality:

In January 2015, a 17-year-old boy in Brooklyn was arrested on a terror charge after he posted on Facebook “N— — run up on me, he gunna get blown down” followed by emoji of flames, a police officer, and guns pointing at the head of the officer.<sup>47</sup> The defendant’s attorney told a news outlet he did not believe the defendant “actually threatened anyone.”<sup>48</sup> The attorney also stated the defendant “expressed a dislike of the police based on a particular experience, but never threatened to act on that.”<sup>49</sup> Ultimately, the grand jury did not indict the teen on that charge, though the reasoning is unclear.<sup>50</sup>

In April 2015, a 24-year-old man’s text messages, which included emoji of a running man, an explosion, and a firearm, were used as

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44. *Gen Y, Gen Z and the Age of Emojis*, FUSE (Sept. 2015), <http://www.fusemarketing.com/thought-leadership/gen-y-gen-z-and-the-age-of-emojis/> [<https://perma.cc/T4QN-4GEM>].

45. See Mark H.K. Choi, *Like. Flirt. Ghost: A Journey Into the Social Media Lives of Teens*, WIRED (Aug. 25, 2016, 7:00 AM), <https://www.wired.com/2016/08/how-teens-use-social-media/> [<https://perma.cc/7PLU-GCLU>]; Leonid Bershidsky, *Here Comes Generation Z*, BLOOMBERG (June 18, 2014, 8:28 AM), <https://www.bloomberg.com/view/articles/2014-06-18/nailing-generation-z> [<https://perma.cc/5PYV-BHE2>]; Dee Sharp, *New Emoji Bible Translation for Millennial Generation*, INQUISITR (May 25, 2016), <http://www.inquisitr.com/3133936/new-emoji-bible-translation-for-millennial-generation/> [<https://perma.cc/C2FA-6ZHS>]; Team CGK, *Emoji Frenzy: How IGen is Leading the New Wave of Communication*, CTR. FOR GENERATIONAL KINETICS (Oct. 12, 2015), <http://genhq.com/emoji-frenzy-how-igen-is-leading-the-new-wave-of-communication> [<https://perma.cc/WCG4-BD62>].

46. Steinmetz, *supra* note 25.

47. Thomas Tracy, *Grand Jury Tosses Brooklyn Teen’s Emoji Cop Threat Charges*, N.Y. DAILY NEWS (Feb. 3, 2015, 12:52 PM), <http://www.nydailynews.com/new-york/nyc-crime/grand-jury-tosses-brooklyn-teen-emoji-threat-charges-article-1.2101735> [<https://perma.cc/A3LA-XZQE>].

48. *Id.*

49. *Id.*

50. *Id.*

evidence to indicate the defendant knew there would be gun-related violence before he arrived at the scene of a drug deal.<sup>51</sup>

In June 2015, two South Carolina men, both 29, were arrested for sending threatening text messages to a third party that included an emoji of a forefinger pointing at an emoji of an ambulance next to an emoji of a fist.<sup>52</sup> The local news outlet opined that the forefinger resembled a gun.<sup>53</sup>

In February 2016, a 12-year-old girl was charged with threatening her school and computer harassment after police said she posted a message on Instagram which included a gun, bomb, and knife emoji.<sup>54</sup>

In May 2016, a 15-year-old student in Maine was charged after posting a threat on a mobile application, which consisted of a gun emoji and a television clip of a person brandishing a gun.<sup>55</sup> The post also included a caption that referenced the teen's high school for the following day.<sup>56</sup> Classes at the high school were canceled the next day to ensure the safety of the students.<sup>57</sup>

Thus, emoji can be used to threaten and harass based on both the content in a message and the context through which another party receives that same message. As with any form of communication, context with emoji is "critical to understanding a text phrase or an online conversation fully."<sup>58</sup> As such, (1) the newness and proliferation of emoji, (2) their concentrated generational use, and (3) their potential to produce inconsistent and diverging interpretations, considered together, begs the question: should courts be empowered to interpret a "language" they may not even understand?

### C. Interpretation Issues

A language is defined from and through various sources. Ethnologue provides the following insight:

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51. Madasyn Czebiniak, *Beaver Falls Man Charged with Killing Two Teens in Sheraden Last Fall*, PITTSBURGH POST-GAZETTE (Apr. 14, 2015, 11:54 PM), <http://www.post-gazette.com/local/west/2015/04/14/Beaver-Falls-man-charged-with-killing-two-teens-in-Sheraden-last-fall/stories/201504140210> [<https://perma.cc/9B5J-R485>].

52. WSPA Staff, *SC Pair Arrested After 'Threatening' Emojis Sent on Facebook, Deputies Say*, CBS N.C. (June 3, 2015, 10:07 PM), <http://wncn.com/2015/06/03/sc-pair-arrested-after-threatening-emojis-sent-on-facebook-deputies-say/> [<https://perma.cc/9DS9-3KVV>].

53. *Id.*

54. 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/XB6S-TRPK>].

55. Allen Bennett, *Maine Teen Faces Felony Charge After Posting Gun Emoji on Social Media App*, BANGOR DAILY NEWS (June 6, 2016, 10:09 AM), <http://bangordailynews.com/2016/06/06/news/maine-teen-faces-felony-charge-after-posting-gun-emoji-on-social-media-app/> [<https://perma.cc/X4LG-8HV5>].

56. *Id.*

57. *Id.*

58. Browning & Seale, *supra* note 42.

How one chooses to define a language depends on the purposes one has in identifying one language as being distinct from another. Some base their definition on purely linguistic grounds, focusing on lexical and grammatical differences. Others may see social, cultural, or political factors as being primary. In addition, speakers themselves often have their own perspectives on what makes a particular language uniquely theirs.<sup>59</sup>

Similarly, when people use language either in face-to-face communication or through online platforms, American courts can interpret a sender's intent, based on the context of a specific message, and make decisions based on those interpretations. While one can understand why the courts are the proper adjudicators of the intent or meaning behind one's words or actions, the same cannot necessarily be said for emoji.

Indeed, because emoji are, essentially, a new language, courts should be able to interpret their meaning. "Emoji[] have evidentiary significance, and lawyers who want a finder of fact to understand an online conversation or a text message fully cannot afford to leave them out or not address them as a vital part of a larger piece of evidence."<sup>60</sup>

Emoji are novel, however, and, at least currently, used mostly by the "Millennial" generation. Understandably, language and expression change all the time, so these changes should not bar courts from playing a role in these new developments. Yet the role of courts in interpreting emoji should not be based solely on the role they have played in interpreting language and expression in the past. Rather, because of the novelty of emoji and their susceptibility to misinterpretation, attorneys and judges should realize their limitations when addressing this language and tread cautiously.

#### *D. The Case of the MPD Police Officers*

The MPD did not state why the police officers involved in posting the Snapchat photo were suspended, though inferring a reason there is not difficult. Accordingly, for illustrative purposes only, I will assume the officers were suspended because the photograph had an implied racist message that is unbecoming of any governmental office. Indeed, a public employer can discipline its employees for inappropriate expression. In those instances, the First Amendment does not shield an employee, and an employer can discipline that

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59. *The Problem of Language Identification*, ETHNOLOGUE, <https://www.ethnologue.com/about/problem-language-identification> (last visited June 14, 2018) [<https://perma.cc/2JY7-PHYN>].

60. Browning & Seale, *supra* note 42.

employee if the employee's speech violates certain restraints placed by the employer.<sup>61</sup>

Adverse action an employer takes against an employee because of that employee's speech can include suspension and, ultimately, termination. Further action, however—including civil or criminal liability—may not follow, or coincide with, the employee's dismissal, unless the employee's expression enters the realm of unprotected speech, such as "fighting words"<sup>62</sup> or "true threats."<sup>63</sup>

In the case of the MPD officers, the Snapchat photo did not constitute "fighting words" because "fighting words" must "inflict injury or tend to incite an immediate breach of the peace,"<sup>64</sup> neither of which seemed to occur. Moreover, if the MPD officers were suspended because of the racist implications in the photograph, the Supreme Court has stated a government cannot prohibit "fighting words of whatever manner that communicate messages of racial...intolerance,"<sup>65</sup> *i.e.*, a government risks prohibiting free speech if the speaker merely communicates intolerance of a protected class. Similarly, the photograph could not necessarily be characterized as a "true threat" because "true threats" require that a speaker "directs a threat to a person,"<sup>66</sup> not an emoji. However, as explained in Part III B, below, the officer's actions could reasonably be perceived as a true threat.

## II. TRUE THREATS AND THE WORKPLACE

Because emoji are a new language and, accordingly, used evidentially as any other language is used, emoji left to a court's interpretation warrant the same First Amendment considerations as any other symbol. When the Supreme Court decided *Texas v. Johnson* in 1989, it made a landmark decision on whether flag burning, an illegal act at the time, was constitutionally protected, ultimately deciding it was indeed protected by the First Amendment.<sup>67</sup> Significantly, Justice Brennan explained, "[t]o conclude that the government may permit designated symbols to be used to communicate only a limited set of messages *would be to enter territory having no discernible or defensible boundaries.*"<sup>68</sup> These discernible and defensible boundaries relate to the potential interpretation and

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61. See *San Diego v. Roe*, 543 U.S. 77, 80 (2004) (stating "a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public").

62. See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

63. *Virginia v. Black*, 538 U.S. 343, 344 (2003).

64. *Gooding v. Wilson*, 405 U.S. 518, 522 (1972).

65. *R.A.V.*, 505 U.S. at 393–94.

66. *Black*, 538 U.S. at 360.

67. *Texas v. Johnson*, 491 U.S. 397 (1989).

68. *Id.* at 417 (emphasis added).

regulation of emoji. With emoji, these boundaries are essential because, unlike the American flag which has existed in some form for over 200 years, emoji have existed for less than twenty.<sup>69</sup>

#### A. *True Threats*

One of the most significant issues with establishing these boundaries with emoji in the “true threats” framework is that the Supreme Court has defined or discussed what constitutes a “true threat” in only a few cases. In 1969, the Court, in *Watts v. United States*, determined a person’s political opposition to the president did not constitute a true threat.<sup>70</sup> The petitioner in that case discussed the Vietnam War draft, stating “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”<sup>71</sup> The Court did not deem the petitioner’s statement a “true threat” and agreed the petitioner’s only offense was “a kind of very crude offensive method of stating a political opposition to the President.”<sup>72</sup> The Court further stated, “[w]hat is a threat must be distinguished from what is constitutionally protected speech.”<sup>73</sup> The Court, however, did not elaborate the definition of a true threat until 1992, explaining that mere threats of violence are outside the purview of the First Amendment.<sup>74</sup> Thus, a true threat must involve more than a threat of violence.

In *Virginia v. Black*, a 2003 case involving cross burning, the Court further explained a speaker must mean “to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals” for his or her speech to constitute a true threat.<sup>75</sup> A speaker does not even need to intend to carry out the act.<sup>76</sup> Instead, “a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur.”<sup>77</sup> Moreover, the Court clarified that intimidation is a type of true threat, “where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”<sup>78</sup> Thus, if the receiver of a message is engendered by fear, whether the sender intended to evoke such fear, it can constitute a true threat.

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69. *History of the American Flag & US Flag History*, DREXEL UNIV., <https://online.drexel.edu/flag-history.aspx>. (last visited June 14, 2017) [<https://perma.cc/XRG4-JBF7>].

70. *Watts v. US*, 394 U.S. 705, 707 (1969).

71. *Id.* at 706.

72. *Id.* at 708.

73. *Id.* at 707.

74. *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992).

75. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

76. *Id.*

77. *Id.*

78. *Id.* at 360.

The United States Circuit Courts of Appeal have, within the framework set by the Court, construed their own definitions of true threats. Notably, “[m]ost circuits have adopted either a reasonable speaker or a reasonable listener test” to determine when speech is protected by the First Amendment and therefore not punishable as a threat.<sup>79</sup> That test focuses on whether a “reasonable recipient” would consider a message threatening, even if the sender did not intend to send a threatening message.<sup>80</sup>

Accordingly, regardless of the “true threat” definition used, if a message contains only words, a legal decision-maker can reasonably determine whether a sender intended to convey a threat. If a message contains only emoji, however, the foregoing reasonable determination can become cumbersome analysis. Notably, court decisions that hinge on emoji-only communications have not arisen. Nevertheless, emoji, or even emoticons, have appeared in a few cases so far.

In *Ghanam v. Does*,<sup>81</sup> a defamation suit, the plaintiff sought to depose a third party to discover the identities of persons who “allegedly made defamatory statements about him on an Internet message board.”<sup>82</sup> The plaintiff argued the defendants’ statements constituted “actionable statements of fact that accuse[d]” him of a crime.<sup>83</sup> Discussing a comment made by one of the unidentified parties, the court noted “the use of the ‘:P’ emoticon ma[de] it patently clear that the commenter was making a joke.” The court interpreted “:P” as “a tongue sticking out to denote a joke or sarcasm.”<sup>84</sup> Evaluating the emoticon in context with other facts in the case, the Michigan appeals court concluded the plaintiff could not establish defamation,<sup>85</sup> which requires a plaintiff to show a false statement purporting to be fact.<sup>86</sup> It was therefore improper to allow discovery of the third party for identifying the anonymous commenters.<sup>87</sup> While that case did not involve a “true threat,” it reflects a court’s benign attempt to interpret emoticon, and that interpretation was one of the factors considered in the court’s ruling against the plaintiff.

In *People v. Cramer*, the defendant was charged with willfully making criminal threats after he sent the victim a text message that “included several ‘emoji’ images of bombs, guns, knives, needles, and [a] fork and knife.”<sup>88</sup> In affirming the lower court’s decision to impose

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79. Rothman, *supra* note 22, at 288.

80. *See id.*

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

82. *Id.* at 132.

83. *Id.* at 146.

84. *Id.* at 145.

85. *Id.* at 146.

86. Restatement (Second) of Torts §559 (1977).

87. *Ghanam*, 845 N.W.2d at 146.

88. *People v. Cramer*, No. C080611, 2016 Cal. App. Unpub. LEXIS 5667, \*2 (Aug. 1, 2016).

the “upper term on [defendant’s] corporal injury offense,” the California appellate court explained, “the circumstances of aggravation outweighed the circumstances of mitigation.”<sup>89</sup> Aggravating circumstances included that the crime at issue involved “great violence, threat of bodily harm, and other acts disclosing a high degree of cruelty, viciousness or callousness.”<sup>90</sup> Thus, the defendant’s words, coupled with his use of emoji weaponry, supported an aggravated criminal threats charge.

Similarly, in *People v. L.F.*, a juvenile court determined statements made online by a minor, which included emoji, constituted threats under California law.<sup>91</sup> The minor, L.F., posted a series of “tweets” on Twitter about purchasing a gun and shooting classmates and teachers,<sup>92</sup> and some of the tweets included “laughing emoji” at the end.<sup>93</sup> After the father of two students became concerned for the safety of his children, he alerted the police.<sup>94</sup> L.F. stated her tweets were jokes, and her best friend testified “the use of laughing emoji[] in the tweets indicated that [L.F.] was joking.”<sup>95</sup> The court was not convinced, and it determined L.F. intended to convey threats to her classmates and staff at her high school.<sup>96</sup> The court supported its decision, explaining L.F.’s statements “were made over a period of hours, they included threats to shoot people” in specific areas of her school, “including one named staff member,” and L.F. stated, “she was going to get a gun.”<sup>97</sup> On those facts, the appellate court determined it was “reasonable for the juvenile court to conclude [L.F.] intended her statements to be taken as a threat.”<sup>98</sup> Thus, unlike *Cramer*, the use of emoji in *People v. L.F.* was not a defense, because the messages in which they were included defeated any reasonable inference that emoji made the messages comical. Additionally, people actually felt threatened and concerned for their safety because of the messages.

Finally, in *Elonis v. United States*, one of the only Supreme Court cases involving an emoticon and true threats, the Supreme Court certified the following question for review:

whether a federal law which makes it a crime to transmit in interstate commerce “any communication containing a threat...to injure the person of another” . . . also requires that the defendant

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89. *Id.* at \*8.

90. *People v. L.F.* (In re L.F.), No. A142296, 2015 Cal. App. Unpub. LEXIS 3916, at \*2 (June 3, 2015).

91. *Id.* at \*1.

92. *Id.* at \*2–3.

93. *Id.* at \*3.

94. *Id.* at \*4.

95. *Id.* at \*5–6.

96. *Id.* at \*10.

97. *Id.* at \*11.

98. *Id.* at \*13.

be aware of the threatening nature of the communication, and — if not—whether the First Amendment requires such a showing.<sup>99</sup>

In that case, *Elonis*, a “self-styled” rapper, posted graphic and violent rants about his wife and others on social media.<sup>100</sup> At *Elonis*’s trial his lawyers argued “the tongue-out emoticon (:p) signaled that he was joking or engaging in hyperbole just meant to shock.”<sup>101</sup> *Elonis*’s lawyers also requested, unsuccessfully, for a jury instruction that “required intent to be considered as part of a ‘true threat.’”<sup>102</sup> On review, the Court never addressed *Elonis*’s First Amendment issue regarding the emoticon, or his intent when he sent his messages. Instead, the Court, mirroring the analysis used by other circuit courts, focused on whether a reasonable person would have understood *Elonis*’s messages as threats.<sup>103</sup> Importantly, the Court did not decide whether *Elonis*’s intent *also* mattered, despite the Court’s assertion in *Virginia v. Black* that a speaker must mean “to communicate a serious expression of an intent” for his or her speech to be a true threat.<sup>104</sup>

The cases above reflect the newness of emoji and emoticon in court opinions. While it would be helpful if the highest court weighed its opinion on emoji interpretation, it is best that it has not yet been tasked with this assignment. Indeed, courts that have interpreted emoji were not presented difficult tasks because the words with which the emoji were associated sufficed to show clearly the senders’ intent. Yet, as indicated above, it is unclear how a court would interpret a series of emoji-laden messages if they included fewer words to provide context, or no words at all.

### B. Employment

Even if courts are not yet weighing in on the meaning of emoji, attorneys are addressing emoji as they relate to both threats and harassment in one major area of the economy: the workplace. Lawyers and human resources professionals have already begun thinking about the proliferation of emoji in the workplace, and, for example, whether they should draft proactive policies regarding the use of emoji in workplace communications.<sup>105</sup>

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99. *Elonis v. US*, 135 S. Ct. 2001, 2004 (2015).

100. *Id.* at 2004–05.

101. Leigh Raper, *Can Emojis Be Used as Evidence in Court?*, AVVO (Dec. 23, 2015), <http://stories.avvo.com/crime/can-emojis-be-used-as-evidence-in-court.html> [https://perma.cc/9FFL-PN95].

102. *Id.*

103. *Elonis*, 135 S. Ct. at 2004, 2011.

104. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

105. See George Khoury, *Do You Need an Employee Emoji Policy?*, FINDLAW (Oct. 17, 2017), [http://blogs.findlaw.com/in\\_house/2017/10/do-you-need-an-employee-emoji-policy.html](http://blogs.findlaw.com/in_house/2017/10/do-you-need-an-employee-emoji-policy.html) [https://perma.cc/HFE8-NN9A]; Christina Hynes Mesco, *Can Using an Emoji Land*

As more businesses enhance their modes of communication to become digital workplaces,<sup>106</sup> small talk at work is no longer confined to conference rooms or the proverbial water coolers of the past.<sup>107</sup> Accordingly, employers must address the ways employees communicate with one another to avoid liability for an unintended or unexpected outcome. This concern with emoji in the workplace is appropriate, especially in light of the attention the media has brought – and rightfully so – to workplace harassment.

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”<sup>108</sup> Title VII’s prohibition includes harassment if it is “so severe or pervasive as to alter the conditions of [the victim’s] employment and create an abusive working environment.”<sup>109</sup> Furthermore, the employer will be held liable if the employee committing the harassment is empowered to “take tangible employment actions against the victim, i.e., to effect a significant change in employment status, such as hiring, firing . . . or a decision causing a significant change in benefits.”<sup>110</sup>

In 2017, several women accused Harvey Weinstein, a famous American film producer, of sexual harassment going back four decades.<sup>111</sup> After Weinstein’s actions were revealed, several other celebrities and powerful figures were similarly accused of sexual harassment.<sup>112</sup> The Weinstein Company (“TWC”), Weinstein’s employer and the movie and television studio Weinstein helped to

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*You in Court?*, THE PRINZ LAW FIRM (Oct. 17, 2017), <http://www.prinz-lawfirm.com/blog/2017/october/can-using-an-emoji-land-you-in-court/> [https://perma.cc/9M54-JU8A]; Marissa Lang, *Emoji Could Cause Confusion, Trouble in the Workplace*, THE STAR (Aug. 4, 2017), [https://www.thestar.com/business/tech\\_news/2017/08/04/emoji-could-cause-confusion-trouble-in-the-workplace.html](https://www.thestar.com/business/tech_news/2017/08/04/emoji-could-cause-confusion-trouble-in-the-workplace.html) [https://perma.cc/G686-NES2]; Jon Hyman, *No You do not Need a Workplace Emoji Policy*, WORKFORCE (Oct. 18, 2017), <https://www.workforce.com/2017/10/18/no-not-need-workplace-emoji-policy/> [https://perma.cc/62QZ-59F3].

106. See *Trends in Business Communications for 2017*, RINGCENTRAL, [https://netstorage.ringcentral.com/uk/documents/8\\_trends.pdf](https://netstorage.ringcentral.com/uk/documents/8_trends.pdf) (last visited June 14, 2018) [https://perma.cc/43DV-8SD9].

107. Marissa Lang, *Don’t text ;-) To Your Co-worker; It Could Be Harassment*, S.F. CHRONICLE (July 21, 2017, 6:00 AM), <http://www.sfchronicle.com/business/article/Don-t-text-to-your-co-worker-it-could-be-11719201.php> [https://perma.cc/E78R-6VJ3].

108. *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993).

109. *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001).

110. *McCafferty v. Preiss Enters.*, 534 F. App’x 726, 730 (10th Cir. 2013) (citation omitted).

111. Ellen Gabler, Megan Twohey & Jodi Kantor, *New Accusers Expand Harvey Weinstein Sexual Assault Claims Back to ‘70s*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/us/harvey-weinstein-sexual-assault-allegations.html> [https://perma.cc/NPS2-DLCW].

112. Doug Criss, *The (Incomplete) List of Powerful Men Accused of Sexual Harassment after Harvey Weinstein*, CNN (Nov. 1, 2017), <http://www.cnn.com/2017/10/25/us/list-of-accused-after-weinstein-scandal-trnd/index.html> [https://perma.cc/EP3B-GDMJ].

found, promptly fired him after the allegations became known.<sup>113</sup> Importantly, Weinstein could not be punished individually under Title VII for his acts against employees or prospective employees.<sup>114</sup> TWC, however, could be found liable for Weinstein's egregious acts because, as founder and co-chairman of his namesake company, Weinstein more than likely had the power to take tangible employment actions against TWC's employees.<sup>115</sup>

With all these sexual harassment allegations surfacing, as well as other communication issues generally, employers are appropriately becoming more vigilant concerning workplace communications.<sup>116</sup> No person wants to be accused of something he or she did not do, particularly when that accusation can lead to the loss of one's career and taint of reputation. Likewise, companies do not want to open themselves up to liability because of unlawful acts performed by employees, especially those empowered to take tangible employment actions against other employees.

Thus, because the manner in which employees communicate with one another can lead to workplace issues, even if those communications are made in jest, attorneys are looking at how emoji play a role in those communications. One employment attorney, Alden Parker, stated he has seen emoji used as evidence in cases that allege harassment and workplace discrimination.<sup>117</sup> Parker explains, "[p]eople sometimes misgender someone or don't use the correct (skin) pigmentation or they use a symbol that has another meaning that is offensive and inappropriate . . . [m]aybe they didn't mean it, maybe they did. But that's typically where we see problems arise."<sup>118</sup> Parker's statements reflect that courts may not hear certain discrimination and harassment cases (that hinge on the meaning of emoji); yet, people are filing lawsuits regarding the same.

While the lack of tried cases might leave one skeptical of whether emoji in the workplace is an actual issue, it is important to note that

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113. Brook Barnes, *Harvey Weinstein, Fired on Oct. 8, Resigns From Company's Board*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/business/media/harvey-weinstein-sexual-harassment.html> [<https://perma.cc/MHX5-QVUX>].

114. *Haynes v. Williams*, 88 F.3d 898, 901 (10th Cir. 1996) (holding that personal capacity suits against individual supervisors are inappropriate under Title VII).

115. This statement assumes procedural barriers—e.g., statutes of limitation or exhausting administrative remedies—are not at issue.

116. Andrew Brodsky, *The Dos and Don'ts of Work Email, from Emojis to Typos*, HARV. BUS. REV. (Apr. 23, 2015), <https://hbr.org/2015/04/the-dos-and-donts-of-work-email-from-emojis-to-typos> [<https://perma.cc/NY93-HZ74>]; Sammi Caramela, *Put a Smiley on It: Should You Use Emojis in Business Communication?* (Feb. 5, 2018), <https://www.business.com/articles/put-an-emoji-on-it-should-you-use-emojis-in-business-communication/> [<https://perma.cc/YLK8-S7ZV>]; Amanda Ciccatelli, *Emoji-Awareness in Law* (Sept. 7, 2017), <https://www.law.com/insidecounsel/almID/59b1b73d140ba0a64a8e3dfe/?slreturn=20180209172119> [<https://perma.cc/2S74-27ZC>].

117. Lang, *supra* note 107.

118. *Id.*

most cases are settled before they go to trial.<sup>119</sup> Notwithstanding this reality, the U.S. Equal Employment Opportunity Commission (EEOC) received 91,503 charges of workplace discrimination in 2016, which was the second year in a row the number of charges filed with the EEOC increased.<sup>120</sup> In 2016, the EEOC also responded to over 585,000 calls to its toll-free number and more than 160,000 inquiries in field offices.<sup>121</sup> These numbers reflect “the public demand for EEOC’s services.”<sup>122</sup> Likewise, these numbers also show people are suing their employers for various reasons.

Significantly, workplace issues do not only arise in the physical space of the jobsite, but also include a larger digital space. This digital space, including emails and text messages, is becoming more susceptible to legal discovery during litigation.<sup>123</sup> Discovery of an employee’s text messages could surely backfire, even if the employee did not intend a message. As an example, attorney Michelle Lee Flores asked, hypothetically, “[w]hat if I did a thumbs-up emoji and accidentally hit a black one, but as a supervisor, I’m a white guy sending it to someone of color? The employee could be saying, ‘What are you saying to me? Are you trying to be funny?’”<sup>124</sup> That hypothetical is plausible considering how common it is to send text messages inadvertently.<sup>125</sup> A misunderstanding can have terrible consequences, and “we should expect to encounter it more frequently with emoji[] due to the dynamism of the emoji ecosystem.”<sup>126</sup> Therefore, we must understand how to address, or at least begin to think about, these inevitable encounters.

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119. *How Courts Work*, AM. BAR ASS’N, [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/cases\\_settling.html](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/cases_settling.html) (last visited Apr. 22, 2018) [<https://perma.cc/4RDR-DZX9>].

120. Press Release, U.S. Equal Employment Opportunity Commission, EEOC Releases Fiscal Year 2016 Enforcement and Litigation Data (Jan. 18 2018), <https://www.eeoc.gov/eeoc/newsroom/release/1-18-17a.cfm> [<https://perma.cc/U5UY-6N24>].

121. *Id.*

122. *Id.*

123. Shailendra (Shay) Kulkarni, *How to be Smarter than Your Phone: Discovery of Emails and Text Messages in the Mobile Phone Era*, AM. BAR ASS’N, [https://www.americanbar.org/publications/under\\_construction/2016/winter2016/how\\_to\\_be\\_smarter\\_than\\_your\\_phone.html](https://www.americanbar.org/publications/under_construction/2016/winter2016/how_to_be_smarter_than_your_phone.html) (last visited June 14, 2018) [<https://perma.cc/L4U9-HSV4>].

124. Aimee Picchi, *Why Emoji in the Workplace Get a Frowny Face*, CBS MONEYWATCH (July 19, 2017, 6:00 AM), <https://www.cbsnews.com/news/why-emoji-in-the-workplace-get-a-frowny-face/> [<https://perma.cc/4Y56-XYRJ>].

125. See Janelle Richards, *Send an Accidental Text? There’s an App for That*, NBC NEWS (Jan. 3, 2017, 5:13 AM), <https://www.nbcnews.com/news/nbcblk/send-accidental-text-there-s-app-n693831> [<https://perma.cc/AU9M-G4RM>].

126. Picchi, *supra* note 124 (quoting Eric Goldman, Santa Clara University Law School professor).

### III. WHAT DOES THIS MEAN FOR THE LEGAL LANDSCAPE?

With 97% of smartphone owners using text messaging services<sup>127</sup> and six billion messages sent each day in the U.S. alone,<sup>128</sup> courts may handle cases involving emoji-filled communication soon. However, are the courts ready? As with any new issue that arises before a court, no binding authority exists regarding communication using only emoji, or the classification of emoji as true threats, whether in the workplace or not.<sup>129</sup> Nevertheless, courts have leeway to “seek guidance from other jurisdictions, or by making analogies to related or similar issues.”<sup>130</sup> It is in these analogies where a court, depending on its hierarchical position, acts as a progenitor, carefully crafting an answer to a new question that can have a lasting impact on the way a similar issue is resolved in the future. For example, in *Obergefell v. Hodges*,<sup>131</sup> the landmark opinion guaranteeing marriage equality, the Court did not only look to other opinions discussing marriage equality. The Court analyzed the history of marriage generally, as well as cases and laws addressing interracial marriage, the right for a couple to use contraception, and a prisoner’s right to marry, among others.<sup>132</sup>

Similarly, when emoji arise in future cases, a court will need to analyze emoji based on other laws or cases that have addressed communication generally. At this time, however, a court tasked with analyzing emoji alone will not have precedent established by other cases that also discuss emoji (as the Court had when discussing marriage). Rather, a court might discuss the history of emoji, the technological and communicative advancements since its inception, and how emoji, as a language, should be interpreted using the laws currently in place to regulate speech.

This approach is akin to Judge Easterbrook’s argument that “the best way to learn the law applicable to specialized endeavors is to study general rules.”<sup>133</sup> But, importantly, general rules cannot be viewed in isolation. Specifically, applying Professor Lessig’s opinion, regulations surrounding emoji require more than a study of rules, but

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127. Aaron Smith, *U.S. Smart Phone Use in 2015*, PEW RES. CTR. (Apr. 1, 2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/> [<https://perma.cc/9BVE-P27Z>].

128. Michael O’Grady, *SMS Usage Remains Strong In The US: 6 Billion SMS Messages Are Sent Each Day*, FORRESTER (June 19, 2012), [http://blogs.forrester.com/michael\\_ogrady/12-06-19-sms\\_usage\\_remains\\_strong\\_in\\_the\\_us\\_6\\_billion\\_sms\\_messages\\_are\\_sent\\_each\\_day](http://blogs.forrester.com/michael_ogrady/12-06-19-sms_usage_remains_strong_in_the_us_6_billion_sms_messages_are_sent_each_day) [<https://perma.cc/V993-7MRR>].

129. See *First Impression*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/first\\_impression](https://www.law.cornell.edu/wex/first_impression) (defining “First Impression”) (last visited June 14, 2017) [<https://perma.cc/7BAG-J2YS>].

130. *Id.* (emphasis added).

131. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

132. *Id.* at 2599–2600.

133. Easterbrook, *supra* note 7, at 207.

also need to include a study of the norms of modern culture and the market in which emoji exist.

Lessig states, “[i]f there is a problem zoning speech in cyberspace, it is a problem traceable (at least in part) to a difference in the architecture of that place.”<sup>134</sup> As this statement applies to emoji, although they exist in cyberspace, emoji also transcend cyberspace. In other words, interpreting emoji does not necessarily implicate the cyberspace in which they are used as much as it involves determining the *meaning* behind the characters, which happen to exist in cyberspace. It is in this reasoning, understanding the space in which emoji exist, that judges and lawyers can therefore determine how to understand how emoji are perceived generally.

Conversely, however, considering the context in which emoji are used specifically – particularly in (a) the true threats framework, and (b) the workplace – Judge Easterbrook’s opinion also holds weight: “[m]ost behavior in cyberspace is easy to classify under current property principles.”<sup>135</sup> Easterbrook’s principal conclusion was to “[d]evelop a sound law of intellectual property, then apply it to computer networks.”<sup>136</sup> Without losing their value and meaning, one can repurpose Easterbrook’s statements to apply to emoji: Because most speech<sup>137</sup> in cyberspace is easy to classify under current principles of expression, lawmakers must develop a sound law of expression as it relates to true threats (and harassment), then apply it to emoji.<sup>138</sup>

The First Amendment and related laws have already established a general framework for analyzing speech and determining whether a true threat exists. Therefore, the challenge here, as addressed throughout this note, is: (a) proper interpretation of emoji generally; and (b) determining whether that interpretation, viewed in the context of a specific conversation and the parties involved, warrants classification as – and the collateral punishment that comes with – a bona fide true threat. Importantly, collateral punishment here does not only take the form of criminal liability, but also adverse employment actions. Although this solution appears straightforward, the story of the Memphis Police Department presented in the introduction illuminates issues that can arise. Accordingly, below I will first address the MPD under the true threats framework, then discuss the same in the context of issues in employment.

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134. Lessig, *supra* note 10, at 510.

135. Easterbrook, *supra* note 7, at 210.

136. *Id.* at 209.

137. While code is a language, in this context the primary focus is on communication as an expressive form with other parties.

138. It is implied that understanding the meaning of emoji will occur *before* general laws are applied to expression, specifically potential threats and harassment, using them.

### A. *Emoji and True Threats*

While the running black male emoji was used as the target of the officer's gun, the emoji is not a real person. Thus, presumably no bona fide true threat existed because a true threat encompasses "those statements where the speaker means to communicate a serious expression of an *intent* to commit an act of unlawful violence to a *particular individual or group of individuals*."<sup>139</sup> At the same time, courts also look at the reasonable receiver and whether he or she would perceive a message as threatening.

Objectively, an officer pointed his gun at a cartoon. Subjectively, however, a white officer pointed a gun at a black male cartoon. A reasonable receiver of the photo could easily read more into the Snapchat photo than the officer intended, inferring the racism behind the photo.<sup>140</sup> Moreover, although the cartoon is not real, a reasonable receiver could construe a bona fide true threat from it, particularly the "intent to commit an act of unlawful violence to...group of individuals,"<sup>141</sup> as explained below.

First, the black emoji is one of several different emoji, including a neutral yellow emoji, that the officer could have selected as the target of his weapon.<sup>142</sup> Notably, in 2015 Apple introduced racially diverse emoji which allowed users to "cycle through various shades of white and brown to customize their emoji's skin colors."<sup>143</sup> By choosing the black male emoji, however, a dangerous and racially motivated act could be implied from the officer's post. Second, public opinion has shown people believe racial bias is often involved when police shoot black men.<sup>144</sup> Common sense reveals the rationality behind this belief, particularly because of the history of this country<sup>145</sup> and laws passed at its inception.<sup>146</sup> Third, the officer is not an ordinary citizen, but a

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139. See *Virginia v. Black*, 538 U.S. 343, 359 (2003) (emphasis added).

140. Never minding that the officer who posted, but did not take, the photo is a black man. Jody Callahan, *MPD IDs Two Officers Suspended Over Snapchat Post*, THE COMMERCIAL APPEAL (July 14, 2016), <http://archive.commercialappeal.com/news/crime/mpd-ids-two-officer-suspended-over-snapchat-post-37a02ef4-9536-5806-e053-0100007f112e-386869191.html> [https://perma.cc/RE2B-UHRE].

141. See *Black*, 538 U.S. at 359.

142. See Paige Tutt, *Apple's New Diverse Emoji Are Even More Problematic Than Before*, WASH. POST (Apr. 10, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/04/10/how-apples-new-multicultural-emojis-are-more-racist-than-before/?utm\\_term=.b485dddf395](https://www.washingtonpost.com/posteverything/wp/2015/04/10/how-apples-new-multicultural-emojis-are-more-racist-than-before/?utm_term=.b485dddf395) [https://perma.cc/7MYG-2HLN].

143. *Id.*

144. See Sharon E. Moore et al., *Hands up—Don't Shoot: Police Shooting of Young Black Males: Implications for Social Work and Human Services*, 26 J. HUM. BEHAV. SOC. ENV'T 254 (2016), <http://www.tandfonline.com/doi/pdf/10.1080/10911359.2015.1125202?needAccess=true> [https://perma.cc/2WHL-BEF7].

145. See Jim Crow Museum of Racist Memorabilia, FERRIS STATE UNIV., <http://www.ferris.edu/htmls/news/jimcrow/timeline.htm> (last visited Feb. 16, 2017) [https://perma.cc/4AFZ-AP83].

146. See *id.*

government employee with qualified immunity,<sup>147</sup> tasked with protecting equally people of all races. Because officers are non-ordinary citizens who hold shields of immunity that protect them from “undue interference with their duties,”<sup>148</sup> a court, or reasonable receiver, could determine the Memphis officer’s actions transcended humor and entered the realm of threatening behavior toward a group of individuals, namely black men. Thus, notwithstanding any specific racial tensions that may or may not exist in the Memphis metropolitan area, it is clear that an isolated view of the context of the officer’s post would be inappropriate, as his actions could be viewed as threatening black men collectively.

### B. *Emoji and Employment*

Moreover, regardless of whether the officer’s photo was deemed threatening, the photo led to the officer’s suspension from work.<sup>149</sup> As government employees, police officers are subjected to certain restraints on speech that private employees are not.<sup>150</sup> When a court analyzes the validity of such a restraint, it must “arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>151</sup> The officer here was not commenting on a matter of public concern. He expressed himself through a photo that arguably placed his integrity, and the reputation of the MPD, in jeopardy. Even more, the officer was not just *any* public employee; he was an employee empowered to punish lawbreakers immediately with physical force (in the proper circumstances). Accordingly, the officer’s suspension was justified because his actions implicated the interests of the MPD in promoting the efficiency of the services it performs for the public through its employees. Ultimately, although other factors were in play in the officer’s suspension, including his poor decisionmaking, the suspension began with three things: (1) a weapon; (2) a mobile application; and (3) an emoji.

Workplace issues regarding emoji are on the rise. Notwithstanding whether (a) an employee directs an ill-conceived message at a coworker or member of the public, or (b) the message

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147. Richard G. Schott, *Qualified Immunity: How It Protects Law Enforcement Officers*, FBI (Sept. 2012), <https://leb.fbi.gov/2012/september/qualified-immunity-how-it-protects-law-enforcement-officers> [<https://perma.cc/D3AK-S53T>].

148. *Id.*

149. Because this situation did not involve a supervisor’s harassing acts toward an employee, a discussion of Title VII is inappropriate here and thus will not be addressed.

150. See *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 465 (1995) (“Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.”).

151. *Id.* at 465–66 (changes in original) (citation omitted).

comprises a true threat, harassment, or any other unlawful expression, employers should address these issues proactively, especially if they feel a problem is imminent. As a beginning step, attorney Michelle Flores advises that just because emoji are available does not mean everyone should use them.<sup>152</sup> She rationalizes that “[t]here’s so much opportunity for confusion and room to insult or offend other people, and that’s where a lot of problems in the workplace start...Use your words. Try that instead.”<sup>153</sup> Put differently, while courts have not addressed emoji specifically in their opinions, when that day comes, opportunities for confusion (for both courts and attorneys) will be reduced significantly if people use words to convey their messages. Moreover, to avoid this confusion, understanding the various laws governing expression, the norms surrounding the use of emoji (*e.g.*, usage by millennials vs. other generations), and the markets through which emoji are exchanged and defined, will lead to a more concrete determination of their meaning in light of the contexts at issue.

## CONCLUSION

Emoji are an unstoppable trend that, for many, are the new normal.<sup>154</sup> Attorneys and other lawmakers, especially those who do not use emoji, should not assume summarily they understand fully whether that language, when used alone, expresses threats or harassment—particularly when this language can confuse even those who use it on a regular basis.<sup>155</sup>

Likewise, because no court opinions have addressed emoji, introducing a hard-and-fast solution to this prospective concern is premature. Nevertheless, recognizing the likely pitfalls of emoji is both sensible and incumbent upon attorneys and judges who will address these issues.

If language is intended to threaten or harass, it may be proscribed. However, if language is not so intended, but legal or employment decision-makers say otherwise, restricting such language can, among other outcomes, result in (1) suppression of free speech, and (2) adverse employment action. The Court has explained the need for a valid restriction on speech “does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state (or Congress) constitutionally

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152. Lang, *supra* note 107.

153. *Id.*

154. See Justin Bariso, *Emojis: The Rising, Unstoppable Trend*, INC. (Oct. 16, 2015), <http://www.inc.com/justin-bariso/emojis-the-rising-unstoppable-trend.html> [<https://perma.cc/GZB3-NSEV>].

155. Emily Shackleton, *8 Commonly Confused Emoji and What They Really Mean*, METRO (Apr. 15, 2016, 3:02 PM), <http://metro.co.uk/2016/04/15/8-commonly-confused-emoji-and-what-they-really-mean-5814591/> [<https://perma.cc/48V8-R47E>].

may seek to prevent.”<sup>156</sup> As this quote relates to emoji, unless it is unmistakable that a specific interpretation of emoji is intended to produce a “clear and imminent danger of some substantive evil,” lawmakers cannot validly restrict such speech. In the context of this note, the government can seek to prevent threatening behavior as well as harassment based on a person’s protected class. Moreover, it is important to note that there are issues that take time to understand completely, and that is an acceptable reality, because a rushed understanding of an issue can lead to ambiguous rules addressing that issue. For now, emoji may be a fun tool to use, but their development and continued use should be watched closely.

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156. *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 395 (1950).

