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Police are arresting people for making threats with emojis — 😄 or 😞?

BY [RACHEL ROSEN](#) / ON APRIL 16, 2016

Emojis, or emoticons, have become increasingly common fixtures in our everyday lives. Described by one court as the “little cartoon face that can be added to the text of an instant message . . . used to illustrate how the speaker is feeling or the intended message of what he or she has written,”¹ emojis by their nature can clarify meaning, convey emotions—like love, frustration, anger, and sarcasm—and may even suggest tone. By virtue of this, emojis are increasingly seen as having evidentiary significance. This presents a new issue for courts to grapple with: should these symbols be understood as literal depictions of a sender’s feelings and intentions for purposes of criminal conviction? As social media becomes an increasingly important source of evidence for law enforcement,² so do emojis. Several recent arrests and prosecutions have involved, at least in some form, the emoji.

In a trial that began in January 2015, entrepreneur Ross Ulbricht was charged with running Silk Road, the online black market store where one could purchase drugs and other illegal items.³ Emails and chat logs were read aloud by prosecutors who argued the emojis used in these conversations provided necessary context that should be made available to the jury (they would otherwise say “emoticon” where one was present). Ulbricht’s defense attorney objected, arguing that these internet communications were intended to be read, rather than spoken or heard, and should be relayed to a jury in this manner.⁴ The U.S. District Judge agreed with the defense, holding that jurors should read the indications of these virtual communications in addition to hearing them read aloud in court. “They are meant to be read,” wrote the Judge. “The jury should note the punctuation and emoticons.”⁵

As Ulbricht’s Silk Road trial was transpiring, a Brooklyn teen named Osiris Aristy posted a message on his Facebook that said, “Ni**a run up on me, he gunna get blown down,” followed with an emoji of a police officer and three gun emojis pointing at it.⁶ He posted a similar message an hour later. He was arrested and charged with making a terrorist threat on the basis of those emojis. The extremely broad New York penal statute at issue here—passed after September 11th—provides “that any statement intending to intimidate civilians or the government by threatening to commit a specific offense qualifies as a terroristic threat,” and also holds that a defendant’s inability to actually carry out such a threat is irrelevant.⁷ The statute does require the declarer to have actually *intended* to make a threat, rather than a joke; perhaps for this reason, the grand jury dropped the charges against the minor in February of 2015.⁸

Other criminal cases receiving media attention include the story of a twelve-year-old Virginia middle schooler recently charged with making threats against her school using emojis. Police maintain she created an Instagram post in December that read, in part: “Killing [gun emoji] meet me in the library Tuesday [gun emoji] [knife emoji] [bomb emoji].”⁹ The girl’s mother denounced the criminal charges filed against her daughter, stating that the emojis were simply a reaction to being bullied.¹⁰ While the status of the case is unknown, juvenile proceedings are closed to the press, one can only imagine the quandary presented to authorities who will have to decide exactly what the emojis in question mean—considering they are pictures without a dictionary-mandated definition.

For investigators, attorneys, and jurors trying to determine the intent of a phrase containing an emoji, context is everything. Consider a simple 😊. Sure, it may convey happiness, but it could also be used to show sarcasm, irony, or perhaps a mischievous grin.¹¹ Similar to the spoken word, emojis are open to both the recipient and the sender’s interpretations. It is a complicated relationship, and for that reason lawyers cannot ignore the evidentiary value and interpretative ambiguities of these pictures. In order to help clarify intent, attorneys should be asking witnesses or defendants to explain the meaning of the emojis they have chosen to use.

Emojis have become an integral part of our lives. There is an emoji-only social network, Emojli, where all conversations must be conducted solely in emojis.¹² *Moby Dick* has been translated into “*Emoji Dick*,” where every sentence is written in emojis.¹³ In the legal context, a court recently recognized that a Facebook “like,” depicted by a “thumbs up” icon, is considered a protected statement under the First Amendment.¹⁴ It seems to be the case that emojis are here to stay—and you have the right to remain 😡.

¹ State of Connecticut v. Nero, 122 Conn. App. 763, 1 A. 3d 184 (July 27, 2010).

² The Court considered whether Facebook postings by a Pennsylvania man threatening his ex-wife were protected free speech or “true threats” meriting no First Amendment protection. *Elonis v. United States*, 135 S.Ct 2001 (2015).

³ *United States v. Ulbricht*, 14 Cr. 68 (KBF).

⁴ Letter from Joshua Dratel, Defense Lawyer, to Hon. Katherine B. Forrest in *United States v. Ulbricht*, 14 Cr. 68 (KBF) (Jan. 9, 2015).

⁵ Debra Casseas Weiss, *Emoticons Matter, Judge Rules in Silk Road Trial*, ABA J., Jan. 30, 2015, http://www.abajournal.com/news/article/emoticons_matter_judge_rules_in_silk_road_trial.

⁶ Julia Greenberg, *That 😊 You Type Can and Will Be Used Against You in a Court of Law*, Wired, Feb. 12, 2015, <http://www.wired.com/2015/02/emoji-in-court-cases/>.

⁷ John G. Browning & Gwendolyn Seale, *More Than Words: The Evidentiary Value of Emoji*, 57 No.10 DRI For Def. 34 (2015).

⁸ *Id.*

⁹ Lorelei Laird, *Virginia Middle Schooler is Criminally Charged for Making Threats with Emoji*, ABA J., Feb. 29, 2016, http://www.abajournal.com/news/article/virginia_middle_schooler_is_criminally_charged_for_making_threats_with_emoji.

¹⁰ *Id.*

¹¹ Greenberg, *supra* note 4.

¹² Browning & Seale, *supra* note 7.

¹³ *Id.*

[14](#) *Bland v. Roberts*, 2013 WL 5228033 (4th Cir. Sept. 18, 2013).