

Emojis As Evidence in Trial: A Grounded Theory Study on Judges' Perspectives on Emojis

Gabriela Zeidler¹ and Taylor Lee¹

¹Advanced Technologies Academy, Las Vegas, NV, USA

ABSTRACT

As the sophistication and use of technology increases, communication through technology becomes more common, leading to the increasing use of emojis. In turn, this has led to an increase of emojis being used as evidence in court, with little guidance of how they can be interpreted within the law. This study examines the ways judges perceive emojis in court, especially when they are used as evidence. Through a grounded theory qualitative study, semi-structured interviews of judges throughout the Southwest region of the United States were conducted and analyzed according to Charmaz grounded theory guidelines (Charmaz, 2006) to determine judges' perceptions of the use of emojis in court as evidence. This seeks to determine how emojis are used within the court system as they can carry and convey many different meanings to different people. This study found that many judges find it necessary to have context with emojis for the purposes of interpretation by the jury, but it is not necessary for special instructions to be made in regard to emojis. Additionally, this study found other aspects of trial including jury selection and the appellate court are being affected by the increasing usage of emojis as evidence due to their highly subjective nature. Further research is needed to assess the broader implications of advancements in technology on the legal system.

Introduction

As the use of technology increases in society, communication through technology also increases (Hakam, 2017). Emojis are a small digital image or icon used to express an idea, emotion, expression, and more (Unicode, 2019). Emojis are also called emoticons or pictographs (Unicode, 2019); the word emoji comes from the Japanese root -moji, meaning letter or character (Unicode, 2019). Emojis are becoming more common in text messages, emails, instant messages, direct messages, etc. (Goldman, 2018). Examples of emojis can be found in Figure 1.



Figure 1. Examples of Emojis.

With the increase of emojis in communication, the court system has seen an increase of emojis being presented as evidence (Goldman, 2018). While some emojis are generally thought to be sweet (Kirley, 2017), some are not as sweet. Emojis range from hearts and smiley faces to knives and guns (Unicode, 2019). Many studies have been done on how emojis are used in communication, but these will not be reviewed in detail and will only be referred to as appropriate. The Unicode Consortium is a database containing the master copy of all emojis and their official

definitions (Unicode, 2019), and, while useful, does not provide all definitions of emojis as emojis can be interpreted differently in various situations (Miller, 2017).

Purpose Statement

The objective of this grounded theory qualitative study is to explore the perspective of Judges on the topic of emojis as a product of advancements in technology as evidence in trials in the Southwestern region of the United States. Emojis are defined as “small digital image or icon used to express an idea, emotion, expression, or thought,” (Unicode, 2019) and are commonly used in digital forms of communication including text messages, emails, direct and private messages, video or picture messages, social media posts, and in digital media (Goldman, 2018). Emojis differ from typical messages because they are small graphics used with other means of communication such as words or pictures or can be used by themselves (or with other emojis) to convey meaning (Miller, 2017). Emojis can convey meaning that is otherwise left out in digital communication. The causation of this study is the lack of understanding of how judges view emojis in trial and a lack of legal precedent. Creating a better understanding of how emojis are used and the effects they are having on the trial law system from the perspective of judges can provide insight.

Research Question

After examination of current information on the topic of emojis as evidence in trial and how judges are reacting and responding, this study has been created with the overarching question: *How do Judges view the use of emojis in trial as evidence in relation to emoji definition, effects, and use?*

Literature Review

Communication is defined as “the transmission of information, which may be by verbal (oral or written) or nonverbal means (body language or other),” by the American Psychological Association (2019), and they claim that “humans communicate to relate and exchange ideas, knowledge, feelings, and experiences and for many other interpersonal and social purposes,” (American Psychological Association, 2019). For example, person 1 may tell person 2 about their day to express their feelings or to relay personal experiences for the purpose of social advancement. Communication can be used for many different purposes meaning that these communications can show up in court if a communication is in question or is evidence. Emojis are becoming more common in text messages, emails, instant messages, direct messages, etc. (Goldman, 2018) as part of communications to express ideas (Unicode, 2019).

Interpretation

There are numerous studies that have been conducted on the interpretation of emojis and they have found that emojis need context to be interpreted (Gesselman, 2019; Goldman, 2018; Miller, 2017). Context can be additional parts of the conversation, additional words attached to the emoji, or any other means of communication that could provide additional information. Emojis are similar to pictures in the way that they can convey meaning differently than words can (Gesselman, 2019). Sometimes they convey an emotion that words may struggle to convey. There is a growing concern with how emojis are perceived across different platforms because of the differences between emojis across platforms (Goldman, 2018). For example, a crying face on a Samsung device looks different than a crying face on an Apple device or another Android device. The same goes for the majority of emojis. An example of the same emoji from two different platforms can be found in Figure 2. This is part of why emojis are controversial within the court system because the jury may not interpret it the same as the person sending or receiving the message (Goldman, 2018).



Figure 2. Differences between emojis of different platforms

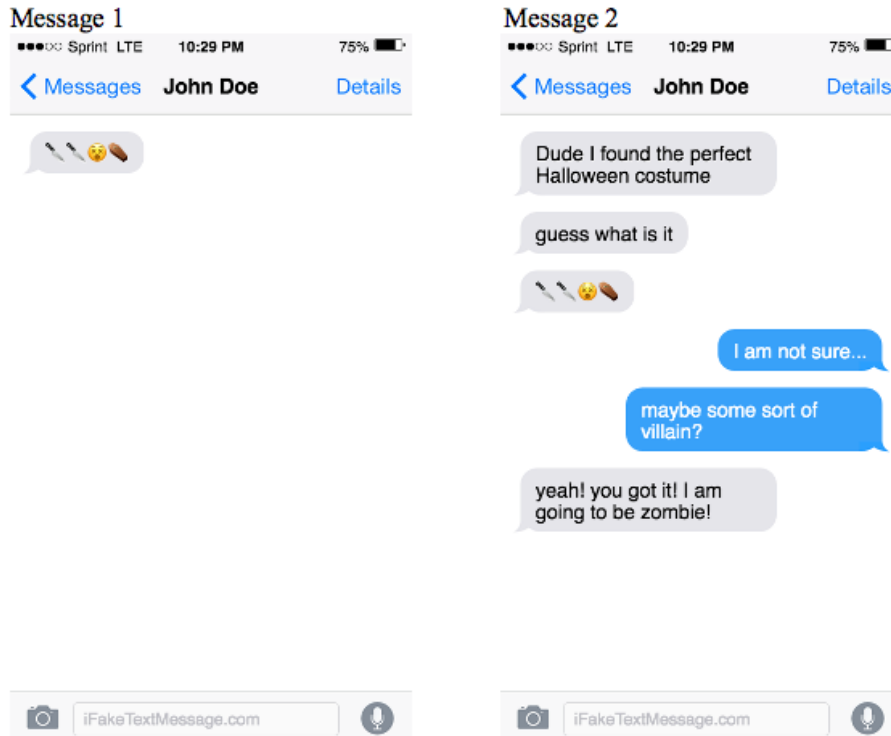


Figure 3. Examples of Emojis with context and without context

As communication with emojis increases, the occurrence of emojis in legal cases has increased. Emojis can be used as codes or as secret messages that must be decoded or can only be understood by the intended receiver (Dorn, 2019). There is no set way to use emojis in communication. They are popularly used in advertising campaigns, commercials, and books. They can be used in text messages, emails, social media, etc. (Goldman, 2018). Without context, it can be difficult to understand the intended meaning of emojis and their messages (Miller, 2017). This creates an issue within the legal field because emojis can be vital evidence in court cases. With no set interpretation, it is hard for someone to determine how it was actually meant in some cases. There is no set way of dealing with emojis in the legal system (Janssen, 2018). Each time an emoji is used as evidence, the presiding judge may use their judgment as to how the emoji is entered and presented (Janssen, 2018). This leaves every emoji in the hands of the presiding judge meaning that if the case were to go to the appellate court, the information about the emoji would not be the same.

Notable Uses of Emojis in Court

Emojis have been used in different contexts in different court cases. Some notable uses of emojis in the legal system include gang cases to dark web cases. Emojis have been used by gangs as codes so the police have a harder time interpreting message (Dorn, 2019). Dark web traffickers have used emojis to prevent their messages from being interpreted by the police (Weiser, 2018). In the case of UNITED STATES OF AMERICA v. ROSS WILLIAM ULBRICHT, there were several instances of “emoticons” and “nonverbal” communications that had “no indication” that they were communicated out loud (UNITED STATES OF AMERICA v. ROSS WILLIAM ULBRICHT, 2015). These messages were vital, but it was not guaranteed that it would be used in court even if it is otherwise admissible due to it being an emoji and not having a guaranteed interpretation (Weiser, 2018). In this case, the judge ruled that the communications were “meant to be read,” therefore the jury would read the communications and interpret them on their own -- without a lawyer or witness reading it or interpreting it for them (UNITED STATES OF AMERICA v. ROSS WILLIAM ULBRICHT, 2015).

In 2016, emojis were used as evidence in a defamation case in which the emoji evidence was the difference between the defendant being found liable or not (Pelletier, 2016). There is currently no copyright on the majority of emojis, meaning that there are currently no issues with emojis being used incorrectly in relation to copyright laws (Scall, 2016). In each of these cases, the presiding judge was the deciding factor in whether or not the emoji evidence was admitted and how it was handled when it was admitted. This is a small sample of the number of cases where emojis are used. Emojis are becoming more common in court cases, with a significant increase since 2015 (Goldman, 2018). This can act as a deterring factor for some judges because they may be unaware of the importance of emojis in trial or may not want them to be included because they are new.

As seen in the previous cases, emojis can be used in many cases from criminal cases to civil cases. This does not play a significant role in determining how the emojis are admitted and used (Goldman, 2018). Before emojis can be considered for being admitted into evidence, it must be proper evidence, or otherwise admissible (Ho, 2015). Proper evidence is evidence that meets criteria to be admitted such as relevance, facts in issue, chain of custody proof, etc. (Ho, 2015). Evidence can be admitted in documents, pictures, videos, statements, etc. (Ho, 2015).

Gap in Knowledge

Current literature provides insight as to how emojis are used in communication and how there is currently a discrepancy in how emojis are used in court. There is not enough research done on the judge’s perspective and how that can impact the use of emojis in court. The judge’s perspective is an area that needs to be further studied in addition to the trends of emojis in court since the Judges’ perspectives are the deciding factor of the admittance of emojis as evidence. The judge’s perspective is used by attorneys to determine how to approach the use of emojis in court. This research will also provide the legal community with insight as to how much judges know about emojis and how they are used. Further research will provide the legal community with insight on what Judges consider when they see emoji evidence and how they may choose to deal with it. This research will allow the legal community to have a better understanding of how emojis can be used as evidence and whether or not there can be a standard for admitting emojis. There is room for additional research in other areas as well, including the interpretation of emojis across platforms.

Methods

Qualitative Grounded theory will be used for this study because there is relatively little known on the topic, participants’ perceptions and experiences are of primary interest, and the aim is to develop new theories on the topic to fill in missing data gaps in the current research (Payne, 2007). Grounded theory strategies will especially be used to analyze the data collected from the interviews. Charmaz (2006) guidelines will be followed throughout the course of

the interviews and analysis of the interviews. Grounded theory will allow the data to be analyzed categorically and be placed in a larger context (Charmaz, 2006).

Participants

Participants were active and/or retired judges from the Southwest region of the United States in order to keep the scope of the study more focused. For this study, a total of six judges will be interviewed. All of the participants will have worked or are currently working in trial law and have experience with hearing evidence being admitted in trial. Judges will have experience in civil, criminal, family law, or a combination. Additionally, they will all have experience hearing trials with juries. All participants will have experience in practicing law as an attorney in addition to practicing as a judge.

Ethical Considerations

All data was made to be anonymous and all identifiable information was removed in order to protect the confidentiality of the participants and their experiences. All participants were made aware of this before agreeing to participate. All judges are still bound by confidentiality and were not expected to share or were prompted to share any confidential information throughout the course of this study. Judges were only asked to share information that is available to the public if specific details are needed. All participants were asked to sign a consent form as mandated by the College Bound and can be found in Appendix B.

Procedure

Semi-Structured interviews were conducted and were audio recorded. The interviews were held in private areas so all information was able to be shared freely and lasted between 40 and 60 minutes in total. Participants were asked a series of guiding questions. Participants were prompted to elaborate on their responses to gain a full and deep understanding of the topics discussed by using follow up questions (Charmaz, 2006). Interviewing techniques from the Grounded theory perspective from Charmaz (2006) were used for this study. A copy of the base semi-structured interview questions used can be found as Appendix A.

Analysis

All interviews were transcribed from the audio recordings. The interviews were analyzed to find common themes and categorized patterns from the interviews (Charmaz, 2006). They were then put into descriptive categories to organize all of the thoughts presented (Charmaz, 2006). Literature searches and further research were done as necessary to add any needed contextualization to the data gathered for a full understanding of the information. Relationships between categories were analyzed to gain a deeper understanding of the data gathered (Charmaz, 2006). From this data, conclusions have been drawn about the overall topic and the consensus of judges' opinions.

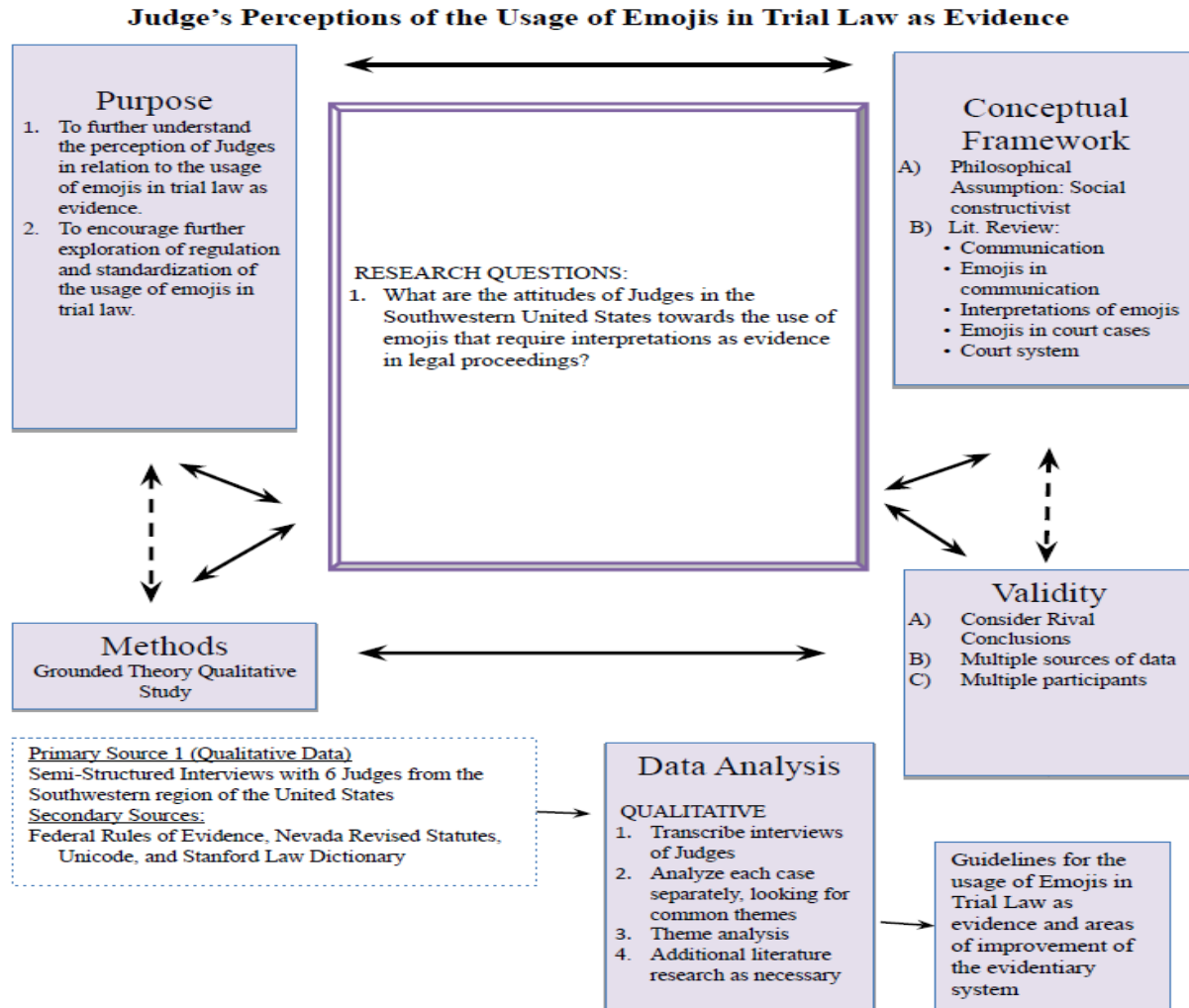


Figure 4. Visual representation of procedures and methods

Results

For the semi-structured interviews, the participants were asked a series of questions relating to evidentiary rules, emojis as evidence, emojis as evidence in relation to juries, and emoji trends (Appendix A). A total of six judges were interviewed, with all interviews lasting between 45 minutes to 60 minutes. Each participant signed a consent form as mandated by the College Board (Appendix B).

Participant A

Participant A has been a judge for less than one year and had overseen approximately 20 cases at the time of the interview and has experience overseeing civil trials in federal court. Participant A has had limited exposure to emojis being used as evidence in trials. Participant A believes that the Federal Rules of Evidence will need to be amended eventually because the expansion of technology has “surpassed the limits of the FRE’s.” Participant A recognizes that this is a fairly progressive approach to the FRE’s but does not see any way that rules written decades ago can continue to govern the courts. Additionally, Participant A believes cases with large amounts of advanced technology will affect

jury selection in a negative way as many members of the community do not keep up with the latest technological advancements.

Participant B

Participant B has been a judge for over 15 years and has overseen criminal and civil law and at the time of the interview was overseeing mostly criminal trials involving murders at the District Court level. Participant B has had “ample experience with emojis in court” and the amount of emojis are “increasing exponentially.” Participant B sees emojis as only conveying meaning when it is a part of a larger communication. Participant B believes that the current Federal Rules of Evidence and state specific court rules will not need to be amended in the foreseeable future as they are designed to account for advancements including emojis. Participant B does not believe that this will affect jury selection at all and made the claim that “all judges should have the liberty to make their own determinations” with the reasoning that it is within their power.

Participant C

Participant C has been a judge for approximately 13 years and is a family court lawyer. This Judge sees many people who represent themselves and a lot of communication records such as text messages, emails, instant messages, direct messages, etc. The messages are from a variety of different platforms such as apps designed for guardians sharing custody, Snapchat, Instagram, Facebook, texting apps, email platforms, and more. Participant C said that they see “hundreds of emojis in communications per week, sometimes per day.” Participant C stated the “Federal Rules of Evidence are all encompassing” and will not need to be revised assuming the court system stays the same. Additionally, Participant C does not think that jury selection will be negatively affected as technology has always been advancing. Participant C sees more of an issue with the appellate court system of only having transcripts than with actual emojis.

Participant D

Participant D has been a local judge for about 10 years and currently oversees a mix of civil and criminal trials. This Participant has some experience with emojis and has seen it increase along with other types of technology during their time as an attorney and a judge. Participant D believes that the increase in emojis will impact jury selection and the appellate courts because “emojis are changing the game,” but is not sure if the impact will be positive or negative. Participant D believes that the Federal Rules of Evidence currently are broad enough to encompass most situations, but one day may need to be amended to cover more situations. Additionally, Participant believes that the best way to get judges to have more consistency when dealing with emojis as evidence is to have more guidance from a higher-level court such as the supreme court or other upper level federal court.

Participant E

Participant E has been a judge for over 20 years and has overseen both civil and criminal during their tenure. Participant E explained that their court has seen an almost overwhelming increase in technology from technology as evidence and the court going paperless. Participant E has seen an increase in emojis used as part of communications and as evidence during their time as part of the legal system. Additionally, Participant E believes that the Federal Rules of Evidence will never need to be changed because they are so broad, they will “cover every situation under the sun that may come up.” Additionally, Participant E does not think that emojis as evidence will affect jury selection in any way

because “jurors can catch up if they are behind.” Participant E does not think the advancement of technology will cause change to the way cases are taken to the appellate court.

Participant F

Participant F has been a judge for about 2 years and has overseen only civil trials. Participant F has noticed a relatively steady use of technology in their court, but while an attorney noticed a large increase in technology towards the end of his/her career as an attorney. Participant F has seen emojis used in court as evidence during their time as a judge. Participant F sees many reasons that the Federal Rules of Evidence will need to change including left out evidence because of the “archaic rules.” Participant F thinks that the increase in emojis as evidence will negatively affect jury selection as “it may promote using a jury of a limited background and age group.” On the other hand, Participant F thinks that the increase in technology in evidence will force the appellate court system to change in a positive way to fully “convey the messages in the evidence.” Participant F strongly feels that special instructions should not be used with regards to evidence, but rather a “higher court should set precedent” to ensure that “all evidence is treated equally.”

Discussion and Analysis

In the majority of the interviews conducted, common themes emerged. These common themes are Communication, Interpretation, Special Instructions, Jury Selection, Appellate Court, and Advancements in Technology. These results fill the lack of knowledge in the field of trial law because they provide the perspective of judges’ on emojis as evidence in trial and emoji’s impact on the general legal field.

Communication

All of the participants expressed that emojis are a type of communication, regardless of if they are with other words or pictures. Through the participants’ responses, it was made clear that emojis do carry meaning and therefore can be used as evidence to show the jury the meaning communicated from person to person.

Interpretation

Five out of six participants indicated that emojis can convey meaning without something else attached to the communication, but all six participants agreed that emojis need context to allow the jury to have the most information to allow for correct interpretation. For example, Participant C explained that a person who sends a sad face with no context could mean a variety of different things, but a person who sends a sad face as a reaction to a statement such as “The electric bill is very expensive this month” would allow a jury to interpret that the sender of the emoji is sad that the bill is more expensive this month. Participant F shared the example of sending a knife to a person and sending a knife with a picture of a watermelon on a counter. The first without the watermelon could be interpreted as a threat whereas the second could be a person needing a watermelon cut up. Through the participants’ answers, it was clear that emojis need context for the judge to feel comfortable with it being shown to the jury, otherwise it may cause “undue confusion for the jury” as said by Participant B.

Special Instructions

As indicated by all six participants, special instructions pertaining to emojis as evidence are not necessary in most trials because emojis are a type of communication and communication does not require special instructions. Participant

C did explain that if special instructions are given, it should be to “have emojis read aloud and explained for the record” since emojis cannot be typed into the record. Participant C also explained that to achieve this, special instructions do not have to be made in trial and can be achieved through different methods such as the judge adding the descriptions or asking the attorneys to do so before the trial begins. It was made clear that special instructions are not required for emojis to be admitted as evidence and shown to the jury.

Jury Selection

Five out of six of the participants acknowledged that the jury selection process may be affected by advancements in technology like emojis and has the potential to have a negative effect. Participant A explained that an increase in emojis being admitted into evidence is leading to attorneys “leaning towards juries that are not only younger in age but closer demographically” because it “ensures that the jury will understand” the emojis and other evidence being admitted. This will lead to juries that are more homogenous and not a truly representative sample of the population. On the contrary, Participant B shared that jury selection is designed to take into account parts of the population that are not as in touch with the latest technologies and “this is no different.” It was made clear by a strong majority of participants, that emojis are not only affecting jury selection, but are having effects that some may consider negative such as only using a limited type of people for juries.

Appellate Courts

Currently in the states the participants practice in, the appellate courts use trial transcripts to determine if a case was tried correctly or has grounds to be retried or overturned. All participants acknowledged that emojis complicate only having the case transcripts because emojis cannot be entered into the trial transcript and copies of exhibits are not always provided in the appellate system. All six participants think that the continued advancements in technology will create a more pressing need to relook at the appellate court system. Participant C explained that their court has begun to describe emojis into the record to try to alleviate this problem but says it “can be hard to read every emoji into the record, especially when [Participant C has] as many as 200-300 emojis in some cases” which can because the communications in questions can be long. It was made clear by all participants that in the future, because of advancements like technology, the appellate court system will need to change.

Advancements in Technology

When asked if the current Federal Rules of Evidence (the rules that govern evidence) may never need to be changed due to advancements in technology, the participants split evenly. Participants A, D, and F believe that continued advancements in technology will result in amendments needing to be made to the federal rules of evidence. On the other hand, Participants B, C, and E do not think that the Federal Rules of Evidence will ever need to be changed. In fact, Participant C called the Federal Rules of Evidence “all encompassing” and Participant B called them “timeless.” At this time and stage of research, it is unclear as to if the Federal Rules of Evidence will need to be changed when looking at them from a judge’s perspective.

Pilot Study

To establish credibility for the methods of this research study, a pilot study was conducted with a total of two participants (different than the participants used in this study). After conducting a pilot study and analyzing the results, flaws were addressed to ensure successful methods for this study. For example, even though the sample size was limited, it was enough to find that the questions being asked in the semi-structured interviews needed to be altered to get more

specific answers with more examples. A pilot study allowed for the alteration of the methods of this study in order to ensure that the results would be reliable and replicable. The revised methods used in this study provided more in-depth and reliable results.

Limitations

The intended goal of this study was to obtain an overview of the perception of judges in relation to emojis as evidence to understand the current way emojis are being used and how they are affecting the court system in addition to how they may affect the court system in the future. While this study provided the reader an understanding of the judges' perception, it is limited in the sense that the participants are all from one geographic region and does not account for regional variation in beliefs and system differences. Additionally, the results of this study cannot be applied to every judge due to variations in belief systems and court rules.

Conclusion & Future Implications

Future applications of this research include being able to start conversations within the legal field as to the advancements in technology and how they are affecting the current systems. This research is best used to explain the usage and implications of emojis in the current trial court legal system from a judge's perspective.

Advancements in technology are not topics that are frequently discussed in the legal system, leaving it vulnerable to falling behind the current times. This study gives hope that current members of the legal system are open to looking at beginning the process of changing and amending outdated processes by reviewing and revising. Emojis are one advancement in technology that is affecting the way evidence is admitted in court and is affecting other legal processes such as jury selection and may one day affect larger legal processes such as the appellate court system. Future studies on similar topics or a rendition of this study should focus on the broader topic of advancements in technology and the way other advancements are changing the legal system from all perspectives. Not only will this study and studies like this open conversations about the lack of updates to the legal system, but they will hopefully get those who make our laws look at other advancements in technology and see how they are slipping through the cracks.

Acknowledgments

I would like to thank Mr. Taylor Lee for helping me with this project.

References

American Psychological Association Dictionary of Psychology. (2019). Retrieved March 03, 2020, from <https://dictionary.apa.org/communication/>.

Carlson, S. (2016). When is a Tweet Not Admissible? Closing the Gap in the Federal Rules of Evidence. (2016). University of Pennsylvania Law Review, 164(1033), 1033–1065. Retrieved from <https://pdfs.semanticscholar.org/4ce1/ed5871494e7840ffe6ea1531d1d1ff180318.pdf>.

Dorn, S. (2019, August 4). New York gangs are using emojis as a secret language to plan crimes. Retrieved from <https://nypost.com/2019/08/03/new-york-gangs-are-using-emojis-as-a-secret-language-to-plan-crimes/>.

Geha, G. (2016). Think Twice Before Posting Online: Criminalizing Threats Under 18 U.S.C. § 875(c) After *Elonis*, 50 *J. Marshall L. Rev.* 167 (2016). *The John Marshall Law Review*, 50(1), 167–189. Retrieved from <http://repository.jmls.edu/lawreview/vol50/iss1/6>.

Gesselman AN, Ta VP, Garcia JR (2019) Worth a thousand interpersonal words: Emoji as affective signals for relationship-oriented digital communication. *PLoS ONE* 14(8): e0221297. Retrieved from <https://doi.org/10.1371/journal.pone.0221297>.

Goldman, E. (2018). Emojis and the Law. *Washington Law Review*, 93(3), 1227–1291. Retrieved from <http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=132927950&site=ehost-live>.

Ho, H. L. (2015, November 13). The Legal Concept of Evidence. Retrieved from <https://plato.stanford.edu/entries/evidence-legal/#ConForRecEviWhaCouEviLaw>.

Hakami, S. A. A. (2017, January 1). [PDF] The Importance of Understanding Emoji: An Investigative Study - Semantic Scholar. Retrieved October 1, 2019, from <https://www.semanticscholar.org/paper/The-Importance-of-Understanding-Emoji--An-Study-Hakami/5eb24dfd7addb5dcfcc90f40d583e7475ce06a5b>.

Janssen, E. (2018). Hearsay in the Smiley Face: Analyzing the Use of Emojis as Evidence. *St. Mary's Law Journal*, 49(3), 699–725. Retrieved from <http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=130519445&site=ehost-live>.

Kirley, A. E., McMahon, & Marilyn. (2017, December 14). The Emoji Factor: Humanizing the Emerging Law of Digital Speech. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068058.

Lidsky, L. B., & Norbut, L. R. (2018). #I💎U: Considering the Context of Online Threats. Retrieved October 1, 2019, from <https://scholarship.law.berkeley.edu/californialawreview/vol106/iss6/3/>.

Miller, H. (2017, May 3). Understanding Emoji Ambiguity in Context: The Role of Text in Emoji-Related Miscommunication. Retrieved October 1, 2019, from <https://aaai.org/ocs/index.php/ICWSM/ICWSM17/paper/view/15703>.

Pelletier, N. (2016). The Emoji that Cost \$20,000: Triggering Liability for Defamation on Social Media. *Washington University Journal of Law & Policy*, 52, 228–254. Retrieved from https://openscholarship.wustl.edu/law_journal_law_policy/vol52/iss1/15.

Scall, R. (2016). Emoji as Language and Their Place outside American Copyright Law. *Journal of Intellectual Property & Entertainment Law*, 5(2), 381–405. Retrieved from <http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=119884902&site=ehost-live>.

Unicode Consortium. (2019, September 18). Unicode Consortium. Retrieved from <https://home.unicode.org/>.

Weiser, B. (2015, January 28). At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji. Retrieved from <https://www.nytimes.com/2015/01/29/nyregion/trial-silk-road-online-black-market-debating-emojis.html>.