

# WHEN A PICTURE IS NOT WORTH A THOUSAND WORDS: WHY EMOJIS SHOULD NOT SATISFY THE STATUTE OF FRAUDS’ WRITING REQUIREMENT

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## INTRODUCTION

In May 2016, Yaniv Dahan posted an online advertisement offering his apartment in Israel for rent.<sup>1</sup> Shortly thereafter, an Israeli couple contacted Dahan to inquire about the apartment.<sup>2</sup> The couple viewed the apartment twice over the course of the next month.<sup>3</sup> On June 5, 2016, the couple sent Dahan a text message reading, “Good morning 😊 We are interested in the home 🏠👨👩👦👧👉👈👉👈👉👈 We just need to settle on the details . . . When does it work for you?”<sup>4</sup> Relying upon an understanding

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<sup>1</sup> File No. 30823-08-16 Small Claims Court (Herzliya), *Dahan v. Shacharoff*, at 2 (Feb. 24, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.), [https://www.nevo.co.il/psika\\_html/shalom/SH-S-16-08-30823-934.htm](https://www.nevo.co.il/psika_html/shalom/SH-S-16-08-30823-934.htm) [<https://perma.cc/6TZ3-GXCU>]. For a summary of the case in English, see Ido Kenan, 🏠👨👩👦👧👉👈👉👈👉👈 *Show Intention to Rent Apartment, Says Judge, ROOM 404* (May 17, 2017), <https://web.archive.org/web/20190105101632/http://room404.net/eng/%E2%80%8D👉👈👉👈-show-intention-to-rent-apartment-says-judge> [<https://perma.cc/W4UY-4K2X>].

<sup>2</sup> *Dahan*, *supra* note 1, at 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (translated from Hebrew by author). It should be noted that the actual emojis do not appear in the online version of the court opinion, but an image of the text message containing the emojis does appear in the judge’s actual decision, *available at* <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2518&context=historical> [<https://perma.cc/NX9L-HTC8>]. See generally Jennifer L. Behrens, “Unknown Symbols”: *Online Legal Research in the Age of Emoji*, 38 LEGAL REFERENCE SERVS. Q. 155, 167 (2019) (discussing that courts and journals “may opt not (or be unable) to embed emoji via keyboard in word-processing documents”); see also Eric Goldman, *What’s New with Emoji Law? An Interview*, TECH. & MARKETING L. BLOG (Feb. 11, 2019),

that the couple intended to rent the apartment, Dahan took the apartment off the market.<sup>5</sup> Thereafter, the couple was unresponsive to Dahan's many attempts at scheduling a meeting to discuss the lease details and sign a contract.<sup>6</sup> Eventually, contract negotiations terminated.<sup>7</sup> On August 12, 2016, Dahan sued the couple in Israel's Herzliya Small Claims Court alleging breach of contract.<sup>8</sup> Dahan argued that despite not having signed a contract, the parties considered themselves to have a binding agreement.<sup>9</sup>

The court found that the parties did not intend to enter into a binding agreement until a contract was signed.<sup>10</sup> Nevertheless, the court determined that the couple was liable for Dahan's losses.<sup>11</sup> In the court's opinion, the string of emojis that the couple sent to Dahan—which the court interpreted to symbolize “a dancing woman, a dancing couple, a ‘V-sign with fingers,’ a shooting star, a squirrel, and a bottle of champagne”—indicated “great optimism.”<sup>12</sup> The court also pointed to repeated use of the “smiling face” emoji in the defendants' communications as further evidence of bad faith.<sup>13</sup> Thus, the court found the defendants liable for the loss that Dahan incurred due to their bad-faith negotiations.<sup>14</sup>

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<https://blog.ericgoldman.org/archives/2019/02/whats-new-with-emoji-law-an-interview.htm> [<https://perma.cc/L6DK-8JAU>] (recommending that judges display emojis in the actual opinion even if they do not appear in legal research services databases). Emojis in this Note may appear different than in the original source.

<sup>5</sup> *Dahan*, *supra* note 1, at 2–3.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 4–5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 5–6 (“Should the relations between the parties be viewed as having matured into contractual relations? After examining the entirety of the evidence presented to me, my opinion is that, at the end of the day, the answer to this is [in the] negative.”) (translated from Hebrew by author).

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.* at 2, 7 (translated from Hebrew by author).

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 6 (translated from Hebrew by author). This case appears to turn on an Israeli law creating a cause of action for bad-faith negotiations. Gabriella Zicarelli & Eric Goldman, *How a Chipmunk Emoji Cost an Israeli Texter \$2,200*, TECH. & MARKETING L. BLOG (May 25, 2017), <https://blog.ericgoldman.org/archives/2017/05/how-a-chipmunk-emoji-cost-an-israeli-texter->

Although the court in *Dahan*<sup>15</sup> ultimately ruled that there was no actual contract between the two parties, this case illustrates an emerging issue that lawyers and lawmakers need to contemplate—the legal implications of emoji use in contracts.<sup>16</sup> With nearly eighty percent of the population regularly using emojis in text messages, social media posts, and emails,<sup>17</sup> and as the language of emojis rapidly evolves,<sup>18</sup> it is becoming increasingly common for emojis to find their way into contracts that are conducted using digital communication.<sup>19</sup> Consider the hypothetical situation in which someone sends a friend a text message offering to sell a car. The friend responds using a “thumbs up” (👍) emoji. Can the use of this emoji, commonly interpreted as indicating agreement or approval,<sup>20</sup> create a binding contract between the two parties for the sale of the car? What if the sender had a different intent when using the “thumbs up” emoji?<sup>21</sup> Or, consider the scenario where defendant Egbert invokes the statute of frauds as a legal defense to plaintiff John’s allegations that Egbert orally promised to sell a fighting cock named Fiste

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2200.htm [https://perma.cc/67GR-KGKM]. In the United States, there is generally no remedy for bad-faith negotiations. *Id.*

<sup>15</sup> *Dahan*, *supra* note 1, at 5–6; see *supra* note 10 and accompanying text.

<sup>16</sup> See Eric Begun, *Your Emoji Use Just Formed a Contract*, KING | FISHER L. FIRM, <https://www.king-fisher.com/your-emoji-use-just-formed-a-contract> [https://perma.cc/KK2D-7RAW] (“For attorneys, contract professionals, and business executives and teams discussing, negotiating, and communicating about technology, business, deals, and transactions, the use of emojis . . . should be a concern.”).

<sup>17</sup> See Meera Senthilingam, *What Your Emojis Say About You*, CNN (Jan. 18, 2017, 4:02 AM), <https://www.cnn.com/2017/01/18/health/emoji-use-personality-traits-study/index.html> [https://perma.cc/3HNN-ZMSU] (“[R]esearch found that almost 80% of people . . . used emojis when texting, while 76% used them on Facebook and . . . 15% used them in email contexts.”).

<sup>18</sup> See *infra* notes 72–73.

<sup>19</sup> See, e.g., Tim Cummins, *Contracting with Emojis*, COMMITMENT MATTERS (Aug. 29, 2017), <https://commitmentmatters.com/2017/08/29/contracting-with-emojis> [https://perma.cc/G7RA-RC89] (“I was in a negotiation with a client and they sent me an email with their counterproposal. My response was an emoji. Specifically, a thumbs up. 👍 After I sent that I realized I had just contracted with the client using an emoji!”).

<sup>20</sup> 👍 *Thumbs Up*, EMOJIPEDIA, <https://emojipedia.org/thumbs-up-sign> [https://perma.cc/H9B4-SABW].

<sup>21</sup> In some cultures, a thumbs up is an obscene gesture. Gayle Cotton, *Gestures to Avoid in Cross-Cultural Business: In Other Words, ‘Keep Your Fingers to Yourself,’* HUFFINGTON POST, [https://www.huffingtonpost.com/gayle-cotton/cross-cultural-gestures\\_b\\_3437653.html](https://www.huffingtonpost.com/gayle-cotton/cross-cultural-gestures_b_3437653.html) [https://perma.cc/6EZR-RQE9] (last updated Aug. 13, 2013). In a similar vein, depending on the country, a thumbs up can signify either the number one or number five. *Id.*

to John.<sup>22</sup> Suppose John produces to the court a chain of text messages between Egbert and himself in which John texted “👊🐓,” Egbert responded “💰💰💰,” and John replied “👍.” Do these text messages constitute written evidence of Egbert’s promise?<sup>23</sup> What if Egbert argues that he thought John was just congratulating him on Fiste’s latest win?

This Note raises some legal issues surrounding emojis and contract law through an analysis of the use of emojis to satisfy the statute of frauds. Part I of this Note provides background information about emojis—what they are, when they first started being used, the history of their evolution and their widespread use, and the benefits and drawbacks that people encounter when using them in electronic communications. Part I also provides background information about the statute of frauds—what it is, when it was first enacted, why it was enacted, the criticisms that it has faced, ancillary functions that it serves, and a history of how courts have applied it to various new forms of communication and technology. Part II considers the arguments for and against the applicability of the statute of frauds to contracts written with emojis. This includes arguments based on the text of the statute, its intent, and precedent. Part III of this Note commences with a discussion of the various approaches that are available to deal with this issue. Part III then continues to propose that the legislature amend the statute to provide that emojis do not constitute a writing for the purpose of the statute of frauds.

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<sup>22</sup> The statute of frauds provides that certain oral agreements are not enforceable. See *infra* text accompanying notes 77–81. According to legend, the statute of frauds was originally enacted in response to a jury relying on perjured testimony to conclude that one Egbert agreed to sell his fighting cock named Fiste to one John. *Thompson Printing Mach. Co. v. B.F. Goodrich Co.*, 714 F.2d 744, 746 (7th Cir. 1983).

<sup>23</sup> The primary function that the statute serves is to provide the court with evidence of the agreement. See *infra* text accompanying notes 87–91. For a discussion of whether text messages can satisfy the statute of frauds, see *infra* Section I.B.2.e.

## I. BACKGROUND

A. *Background and History of Emojis*

In 1999, Japanese computer programmer Shigetaka Kurita developed the emoji.<sup>24</sup> A modern-day take on the bare-bones emoticon,<sup>25</sup> an emoji is a graphic digital image that can be integrated into text and used to convey an idea, thought, or emotion.<sup>26</sup> Emoji use quickly became popular in Japan, and it was not long before all major Japanese telecommunication companies offered emojis on their devices.<sup>27</sup> When Apple released its first iPhone in 2007, it included emoji functionality in order to appeal to the Japanese market.<sup>28</sup> Emojis became a globally accessible phenomenon after the Unicode Consortium (Unicode), an international programming standard, added the first emoji characters to its database of digital symbols in 2009.<sup>29</sup>

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<sup>24</sup> Adam Sternbergh, *Smile, You're Speaking EMOJI: The Rapid Evolution of a Wordless Tongue*, N.Y. MAG.: INTELLIGENCER (Nov. 16, 2014, 9:00 PM), <http://nymag.com/daily/intelligencer/2014/11/emojis-rapid-evolution.html> [<https://perma.cc/T22F-AK3U>]. The word “emoji” is a combination of the Japanese words meaning picture character. CAROLINE TAGGART, NEW WORDS FOR OLD: RECYCLING OUR LANGUAGE FOR THE MODERN WORLD (2015).

<sup>25</sup> Emoticons are combinations of keyboard characters that create non-graphic images—such as ;- ) or :- (—and have been used globally since 1982 to convey emotions in digital messages. See Paul Bignell, *Happy 30th Birthday Emoticon! :- )*, INDEPENDENT (Sept. 9, 2012, 12:00 AM), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/happy-30th-birthday-emoticon-8120158.html> [<https://perma.cc/6QHH-T4VC>]; J.J. O'Donoghue, *Emoji: The Evolution of Emoticons*, JAPAN TIMES (Sept. 17, 2016), <https://www.japantimes.co.jp/life/2016/09/17/digital/emoji-evolution-emoticons/#.W9tet5NKg2w> [<https://perma.cc/9YAX-U3AD>]. The resemblance between the words “emoji” and “emoticon” is pure coincidence. TAGGART, *supra* note 24.

<sup>26</sup> See Sternbergh, *supra* note 24. Some common emojis include the “smiley” (😊), “kissing heart” (💕), and “wink” (😉). See Mona Chalabi, *The 100 Most-Used Emojis*, FIVETHIRTYEIGHT (June 5, 2014, 3:06 PM), <https://fivethirtyeight.com/features/the-100-most-used-emojis> [<https://perma.cc/K8PN-HLUB>].

<sup>27</sup> Sternbergh, *supra* note 24 (“This feature proved so popular that the other Japanese telecoms adopted it.”).

<sup>28</sup> *Id.* Interestingly, Apple initially hid the emoji keyboard outside of Japan hoping that users would not find it. Marc Schenker, *The Surprising History of Emojis*, WEBDESIGNERDEPOT (Oct. 11, 2016), <https://www.webdesignerdepot.com/2016/10/the-surprising-history-of-emojis> [<https://perma.cc/8S7G-6CMQ>].

<sup>29</sup> UNICODE, DRAFT UNICODE TECHNICAL REPORT #51: UNICODE EMOJI (Mark Davis & Peter Edberg eds., 2015), <https://www.unicode.org/L2/L2015/15140-utr51-2d9.pdf> [<https://perma.cc/GPQ6-KS29>]; O'Donoghue, *supra* note 25. The Unicode Consortium is the coding standard that

## 1. The Many Functions of Emojis

Emojis serve a myriad of functions for their users, from inserting tone<sup>30</sup> and emotion<sup>31</sup> to replacing complete words.<sup>32</sup> Emojis allow people of different linguistic and cultural backgrounds to transcend the language barrier to communicate with each other more efficiently.<sup>33</sup> Additionally, emojis help people communicate faster.<sup>34</sup>

In a 2015 survey asking people why they use emojis, 70.4% of responders said emojis help them accurately express their thoughts, 64.7% said emojis help people understand them, 49.7% said emojis help create personal connections to others, 41.1% said emojis are a better fit

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allows phones that use different operating systems to interpret messages sent from one to another. Schenker, *supra* note 28; Arielle Pardes, *The Wired Guide to Emoji*, WIRED (Feb. 1, 2018, 9:23 AM), <https://www.wired.com/story/guide-emoji> [<https://perma.cc/6GLR-T729?type=image>].

<sup>30</sup> Tianran Hu et al., *Spice up Your Chat: The Intentions and Sentiment Effects of Using Emojis*, 11 INT'L ASS'N FOR ADVANCEMENT ARTIFICIAL INTELLIGENCE CONF. ON WEB & SOC. MEDIA 102 (2017). For example, adding the “rolling eyes” (🙄) emoji to the end of a statement displays sarcasm, and adding the “face with stuck-out tongue and winking eye” (😜) emoji to the end of a statement indicates that the sender is joking. See Ashley Fetters, *In Praise of the Eye-Roll Emoji, the Sarcasm Indicator We’ve Always Needed*, GQ (Apr. 4, 2016), <https://www.gq.com/story/three-years-for-the-eye-roll-emoji> [<https://perma.cc/4SHC-VMKG?type=image>]; 😜 *Winking Face with Tongue*, EMOJIPEDIA, <https://emojipedia.org/face-with-stuck-out-tongue-and-winking-eye> [<https://perma.cc/G27B-SPGN>].

<sup>31</sup> See Sternbergh, *supra* note 24.

<sup>32</sup> MARCEL DANESI, *THE SEMIOTICS OF EMOJI* (2016) (“[Emojis] have both pictographic (directly representational of objects) and logographic (word-replacement) functions.”); see Seema Mody, *Emojis: The Death of the Written Language?*, CNBC (June 24, 2015, 1:32 AM), <https://www.cnbc.com/2015/06/24/emojis-the-death-of-the-written-language.html> [<https://perma.cc/A5HG-AZPZ?type=image>] (comparing emojis to hieroglyphs). In fact, a number of complete books have been written solely using emojis, including a translation of the literature classic *Moby-Dick*—titled *Emoji Dick*. Sternbergh, *supra* note 24.

<sup>33</sup> DANESI, *supra* note 32; Gabrielle Reed, *4 Reasons to Use Emoji in Your Next Presentation*, BUS. 2 COMMUNITY (June 6, 2016), <https://www.business2community.com/communications/4-reasons-use-emoji-next-presentation-01563944> [<https://perma.cc/2QZM-HVD8>] (“For the most part, emojis are easily interpreted by people all around the world. The emoji breaks down language barriers.”). But see *infra* notes 58–59 (evidencing that emojis do not always cross the language and culture divide).

<sup>34</sup> See Reed, *supra* note 33 (noting that emojis save time).

for the way they think, 41% said it is a faster method of typing, and 23.6% said it is a more contemporaneous method of communication.<sup>35</sup>

## 2. Growth and Impact of Emojis

Unicode continues to add hundreds of new emojis to its database each year,<sup>36</sup> including images of facial expressions, food, activities, careers, flags, and more.<sup>37</sup> Emojis are now available on the keyboards of all mainstream smartphones.<sup>38</sup> Their use is widespread across all Internet, social media, and texting platforms.<sup>39</sup> People from all countries<sup>40</sup> and of all ages<sup>41</sup> admit to using emojis.

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<sup>35</sup> *Leading Reasons for Using Emojis According to U.S. Internet Users as of August 2015*, STATISTA, <https://www.statista.com/statistics/476354/reasons-usage-emojis-internet-users-us> [<https://perma.cc/RN3J-YTJG>].

<sup>36</sup> See generally Jeremy Burge, *157 New Emojis in the 2018 Emoji List*, EMOJIPEDIA: BLOG (Feb. 7, 2018), <https://blog.emojipedia.org/157-new-emojis-in-the-final-2018-emoji-list> [<https://perma.cc/FEH7-69EK>] (discussing the new additions in 2018). As of March 2019, there are 3,019 Unicode emojis. *Emoji Statistics*, EMOJIPEDIA, <https://emojipedia.org/stats> [<https://perma.cc/B9DC-V27H>]; see *Emoji List, v12.1*, UNICODE, <https://unicode.org/emoji/charts/emoji-list.html> [<https://perma.cc/UBD2-NUFJ>].

<sup>37</sup> See sources cited *supra* note 36.

<sup>38</sup> UNICODE, *supra* note 29.

<sup>39</sup> Senthilingam, *supra* note 17; Alex Williams, (-: *Just Between You and Me* :-), N.Y. TIMES (July 29, 2007), <https://www.nytimes.com/2007/07/29/fashion/29emoticon.html> [<https://perma.cc/3AVS-E679>] (regarding emoticons).

<sup>40</sup> In a 2013 poll asking people if they used emojis in their messaging apps, 74% of Americans, 82% of Chinese, 84% of Indonesians, 69% of South Africans, and 54% of Brazilians responded affirmatively. *Do You Use Stickers or Emoji in Messaging Apps?*, STATISTA, <https://www.statista.com/statistics/301061/mobile-messaging-apps-sticker-emoji-usage> [<https://perma.cc/CS7H-DQKX>]. Thirty-five percent of American respondents admitted to using emojis on a daily basis. *Id.*

<sup>41</sup> See Bob Hutchins, *The Emoji Infographic: Stats to Back Up Your Obsession*, MELTWATER (Oct. 14, 2015), <https://www.meltwater.com/blog/the-emoji-infographic-stats-to-back-up-your-obsession> [<https://perma.cc/8B88-PNHB>] (emoji use by people older than age thirty-five is only slightly below use by people younger than age thirty-five); Jeremy Burge, *77% of 56–64 Year Olds Use Emojis On Messenger*, EMOJIPEDIA: BLOG (Nov. 17, 2017), <https://blog.emojipedia.org/77-of-56-64-year-olds-use-emojis-on-messenger/#fn1> [<https://perma.cc/XUQ8-MVGT>] (“While it might not be surprising to some that the vast majority of teens (13–18) use emojis on [Facebook] Messenger (92%), some may not have expected 77% of those aged 56–64 to use emojis.”).



Due to their widespread use,<sup>42</sup> multifunctionality,<sup>43</sup> and undeniable charm,<sup>44</sup> emojis have made their impression on Western culture,<sup>45</sup>

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<sup>42</sup> See sources cited *supra* note 39; see also *Leading Reasons for Using Emojis According to U.S. Internet Users as of August 2015*, *supra* note 35 (19.3% of those surveyed admitted to using emojis because other people do).

<sup>43</sup> See *supra* notes 30–35 and accompanying text.

<sup>44</sup> See Jonna Adams, *Emojis: Carriers of Culture and Symbols of Identity* 22 (May 22, 2017) (unpublished Master's thesis, Malmö University), [https://muep.mau.se/bitstream/handle/2043/23736/AdamsJonna%E2%80%93Emojis%E2%80%93MasterThesis\\_170605%E2%80%93Final.pdf?sequence=2&isAllowed=y](https://muep.mau.se/bitstream/handle/2043/23736/AdamsJonna%E2%80%93Emojis%E2%80%93MasterThesis_170605%E2%80%93Final.pdf?sequence=2&isAllowed=y) [<https://perma.cc/9P3G-77BJ>] (“[U]sers often find [emojis] ‘enjoyable’ or ‘playful’ to use.”).

<sup>45</sup> See generally *id.*

society,<sup>46</sup> politics,<sup>47</sup> and the corporate world.<sup>48</sup> Over the last few years, emojis have also increasingly appeared in lawsuits.<sup>49</sup> Legal issues

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<sup>46</sup> Following social trends toward diversity and inclusivity, Apple created a range of skin color options for all emojis depicting a human body part, male and female representation of all career emojis, single-parent family emojis, and religiously diverse emojis. Julissa Catalan, *Apple to Diversify Its Emojis Following Nationwide Criticism*, DIVERSITYINC (Mar. 31, 2014), <https://www.diversityinc.com/news/apple-diversify-emojis-following-nationwide-criticism> [https://perma.cc/V777-VECH]; Jeremy Burge, *iOS 8.3 Emoji Changelog*, EMOJIPEDIA: BLOG (Apr. 8, 2015), <https://blog.emojiopedia.org/apple-2015-emoji-changelog-ios-os-x> [https://perma.cc/79RA-RUW9]; see also Dave Taylor, *Emoji Surprisingly Politicized These Days*, NEWSMAX (Nov. 9, 2016, 3:47 PM), <https://www.newsmax.com/davetaylor/emoji-gun-skin-tone-unicode/2016/11/09/id/758047> [https://perma.cc/LA96-UEBD]; Olivia Solon, *Emoji Diversity: How 'Silly Little Faces' Can Make a Big Difference*, GUARDIAN (Nov. 7, 2016, 6:51 PM), <https://www.theguardian.com/technology/2016/nov/07/emoji-diversity-texting-emojicon-san-francisco> [https://perma.cc/U5VB-PV8W] (“Yet there are more serious cultural problems highlighted by the rise of emoji, particularly how to make them more inclusive to people of different races, genders and physical abilities.”).

<sup>47</sup> In 2016, then-presidential candidate Hillary Clinton was criticized after her initiative to promote affordable college backfired. Hillary had asked her Twitter followers to convey their feelings about student debt in three emojis or less. Many responses contained suicidal depictions or sexual innuendos. Madison Malone Kircher, *Hillary Clinton Wants You to Describe Your Student Loan Debt—In Emojis*, BUS. INSIDER (Aug. 12, 2015, 3:58 PM), <https://www.businessinsider.com/hillary-clinton-asked-twitter-users-to-describe-student-debt-in-emoji-2015-8> [https://perma.cc/7ED9-DMVS] (showing some people were critical of or sarcastic about the campaign’s attempt to reach younger voters); see also, e.g., @jftpw, TWITTER (Aug. 12, 2015, 12:01 PM), <https://twitter.com/jftpw/status/631541006509441024> [https://perma.cc/8M53-CP3U] (responding to Hillary’s tweet “🙄💀🔪”); @AaronGoodliffe, TWITTER (Aug. 12, 2015, 12:09 PM), <https://twitter.com/AaronGoodliffe/status/631543102998728704> [https://perma.cc/S65Z-K5GR] (responding to Hillary’s tweet “🔪🔪🔪”). Specific emojis have also been the subject of politicization. See, e.g., Bonnie Malkin, *Water Pistol Emoji Replaces Revolver as Apple Enters Gun Violence Debate*, GUARDIAN (Aug. 1, 2016, 8:32 PM), <https://www.theguardian.com/technology/2016/aug/02/apple-replaces-gun-emoji-water-pistol-revolver-violence-debate> [https://perma.cc/EAW8-ZK5N] (explaining that Apple swapped its gun emoji for a water gun in the wake of continued gun violence and public debate about gun control).

<sup>48</sup> For example, emojis are frequently used in advertising campaigns. See, e.g., *Social Media Case Study: Taco Bell Gets Fans Using the New Taco Emoji on Twitter*, DIGITAL TRAINING ACAD., [http://www.digitaltrainingacademy.com/casestudies/2016/07/social\\_media\\_case\\_study\\_taco\\_bell\\_creates\\_600\\_gifs\\_to\\_celebrate\\_new\\_emoji.php](http://www.digitaltrainingacademy.com/casestudies/2016/07/social_media_case_study_taco_bell_creates_600_gifs_to_celebrate_new_emoji.php) [https://perma.cc/FN4G-HQG9] (showing that after Taco Bell successfully petitioned Unicode to add a taco emoji to its database, Taco Bell celebrated by encouraging people to tweet the taco image, generating more than half of a million tweets in the first five days); Tim Nudd, *Coke Spreads Happiness Online with Emoji Web Addresses*, ADWEEK (Feb. 19, 2015), <https://www.adweek.com/creativity/coca-cola-spreads-happiness-online-first-emoji-web-addresses-163044> [https://perma.cc/K9AR-MTGC] (showing Coca Cola registered URLs for every emoji that conveys happiness). At least one business is named with

associated with emojis include the admissibility of emojis as evidence,<sup>50</sup> criminal threats via emojis,<sup>51</sup> defamatory postings containing emojis,<sup>52</sup> and the use of emojis in contract negotiations.<sup>53</sup>

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emojis. See DISK CACTUS, <http://diskcact.us> [<https://perma.cc/5KU6-G2UQ>] (“To our knowledge, we are the first company with a native emoji name.”).

<sup>49</sup> Mike Cherney, *Lawyers Faced with Emojis and Emoticons Are All “\_( ‘ )\_”*, WALL ST. J. (Jan. 29, 2018, 11:39 AM), <https://www.wsj.com/articles/lawyers-faced-with-emojis-and-emoticons-are-all-1517243950> [<https://perma.cc/YS4M-T2WR>] (“Increasingly, [emojis] are bones of contention in lawsuits ranging from business disputes to harassment to defamation . . . [In 2017], emojis or emoticons were mentioned in at least 33 U.S. federal and state court opinions . . . up from 25 in 2016 and 14 in 2015.”).

<sup>50</sup> See generally Erin Janssen, Comment, *Hearsay in the Smiley Face: Analyzing the Use of Emojis as Evidence*, 49 ST. MARY’S L.J. 699 (2018) (“[C]ourts struggle with how messages, or symbols alone, should be presented as evidence.”); Rebecca A. Berels, Take Me Seriously: Emoji as Evidence 26 (2017) (unpublished seminar paper, Michigan State University College of Law), <https://digitalcommons.law.msu.edu/king/261> [<https://perma.cc/BQ8W-3THG>] (“[J]udges are taking differing approaches to emoji as evidence.”); *Emojis as Evidence: Recent Developments*, BERKELEY TECH. L.J.: BTLJ BLOG (Apr. 15, 2015), <http://btlj.org/2015/04/emojis-as-evidence-recent-developments> [<https://perma.cc/9F39-4TQJ>].

<sup>51</sup> See generally Elizabeth Kirley & Marilyn McMahon, *How the Law Responds When Emoji Are the Weapon of Choice*, CONVERSATION (Dec. 4, 2017, 2:20 PM), <https://theconversation.com/how-the-law-responds-when-emoji-are-the-weapon-of-choice-88552> [<https://perma.cc/B9DR-YKBZ>] (showing a message from a man to his ex-partner saying, “you’re going to fucking get it 🛩️” was considered a threat because the airplane emoji conveyed that the defendant was “coming to get” his ex-partner; the statement “meet me in the library Tuesday 📖🔪💣” was considered a threat; a Facebook post containing “👤🗣️🗣️🗣️” was not considered a threat although a prosecutor insisted that it should be; and a message comprised of “👉👈🚗” was considered a threat); Henry Samuel, *Frenchman Jailed for Three Months for Sending Ex-Girlfriend Gun Emoji*, TELEGRAPH (Mar. 31, 2016, 4:53 PM), <https://www.telegraph.co.uk/news/2016/03/31/frenchman-jailed-for-three-months-for-sending-ex-girlfriend-gun> [<https://perma.cc/WE45-VNG2>] (reporting that “🔫” was in itself a threat).

<sup>52</sup> See, e.g., *Ghanam v. Does*, 845 N.W.2d 128, 145 (Mich. Ct. App. 2014) (writing that a reasonable reader could not understand an online posting to be a defamatory statement since it ended with “:P” indicating that the author was joking); *McAlpine v. Bercow* [2013] EWHC 1342 (QB) (explaining that an “innocent face” emoji after a question posed on social media deemed the question defamatory since it suggested that the author intended the question disingenuously). See generally Nicole Pelletier, Note, *The Emoji that Cost \$20,000: Triggering Liability for Defamation on Social Media*, 52 WASH. U. J.L. & POL’Y 227 (2016).

<sup>53</sup> See *supra* text accompanying notes 1–14.

### 3. Miscommunication Caused by Emojis

Despite their widespread use<sup>54</sup> and many advantages,<sup>55</sup> emojis have their limitations. One significant drawback is that there is no consensus as to the meaning of each emoji.<sup>56</sup> Interpretations vary by age,<sup>57</sup> culture,<sup>58</sup> and many other factors.<sup>59</sup> For example, despite being named Oxford Dictionary's word of the year in 2015<sup>60</sup> and voted "most popular emoji of all time" by Twitter users in 2017,<sup>61</sup> usage of the "face with tears of joy"

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<sup>54</sup> See Senthilingam, *supra* note 17.

<sup>55</sup> See *supra* text accompanying notes 30–35.

<sup>56</sup> Hannah Miller, *Investigating the Potential for Miscommunication Using Emoji*, GROUPLENS (Apr. 5, 2016), <https://grouplens.org/blog/investigating-the-potential-for-miscommunication-using-emoji> [<https://perma.cc/GNZ4-2RVT>] ("What's more, our work also showed that even when two people look at the exact same emoji rendering (e.g., 😊), they often don't interpret it the same way . . ."). In one study, researchers found that people disagree about the emotion being conveyed twenty-five percent of the time—even disagreeing whether a particular emoji conveys positive or negative emotions. Hilary Brueck, *Nobody Knows What Your Emojis Mean*, FORTUNE (Apr. 14, 2016, 8:34 AM), <http://fortune.com/2016/04/14/emoji-miscommunication-study-umn>; see also Bernadine Racoma, *How Emojis Are Perceived Differently by Different Cultures*, DAY TRANSLATIONS (Feb. 8, 2018), <https://www.daytranslations.com/blog/2018/02/how-emojis-are-perceived-differently-by-different-cultures-10690> [<https://perma.cc/B279-VX72>] ("[I]n the U.S. the most-used emoji is the face showing tears of joy, which has positive and negative interpretations, depending on the person looking at it.").

<sup>57</sup> See, e.g., Racoma, *supra* note 56 (reporting that people ages twenty-five to thirty-four or forty-five to fifty-four will likely interpret "😏" as flirtatious, while other age groups will not).

<sup>58</sup> For example, the "waving hand" emoji (👋), commonly used to say hello or goodbye, is used in China as a sign of breaking off a relationship. *Id.*; see 🙋 Waving Hand, EMOJIPEDIA, <https://emojipedia.org/waving-hand-sign> [<https://perma.cc/7AZD-EXEK>]; see also sources cited *supra* note 21.

<sup>59</sup> For example, the language one speaks may influence his interpretation of an emoji. Racoma, *supra* note 56.

<sup>60</sup> *Word of the Year 2015*, OXFORDLANGUAGES, <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2015> [<https://perma.cc/LTD8-X8TP>].

<sup>61</sup> See *Winners of World Emoji Awards to be Announced on World Emoji Day*, BROADWAY WORLD (July 17, 2017) <https://www.broadwayworld.com/bwwtv/article/Winners-of-World-Emoji-Awards-to-be-Announced-on-World-Emoji-Day-20170717> [<https://perma.cc/E58S-J6GE>]; @EmojiAwards, TWITTER (July 18, 2017, 2:55 PM), <https://twitter.com/EmojiAwards/status/887430714131664896> [<https://perma.cc/8MH4-BJ86>].

emoji (😂) varies greatly.<sup>62</sup> Most people use it to express laughing,<sup>63</sup> some to imply gloating,<sup>64</sup> and others mistakenly use it to convey a sad, crying face.<sup>65</sup> These factors often lead to miscommunication.<sup>66</sup>

Another significant issue that affects emoji interpretation is their digital nature, which makes them easily susceptible to technological changes and glitches.<sup>67</sup> Many emojis appear with slight, but significant, differences on different devices.<sup>68</sup> These differences can completely alter

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<sup>62</sup> Katy Waldman, *This Year's Word of the Year Isn't Even a Word* 😂😂😂, SLATE (Nov. 16, 2015, 5:09 PM), <https://slate.com/human-interest/2015/11/the-face-with-tears-of-joy-emoji-is-the-word-of-the-year-says-oxford-dictionaries.html> [<https://perma.cc/RZY7-K289>] (“What does [😂] mean? Is it good or bad? It depends!”).

<sup>63</sup> 😂 *Face with Tears of Joy*, EMOJIPEDIA, <https://emojipedia.org/face-with-tears-of-joy> [<https://perma.cc/C98D-8UVA>].

<sup>64</sup> Abi Wilkinson, *The ‘Tears of Joy’ Emoji Is the Worst of All—It’s Used to Gloat About Human Suffering*, GUARDIAN (Nov. 24, 2016, 8:52 AM), <https://www.theguardian.com/commentisfree/2016/nov/24/tears-of-joy-emoji-worst-gloat-about-human-suffering> [<https://perma.cc/VCW7-XXBV>].

<sup>65</sup> Andrew Sharp, *Terrible ‘Sad’ Emoji Mistakes that Will Confuse and Outrage Your Friends*, DEL. ONLINE (July 11, 2018, 12:30 PM), <https://www.delawareonline.com/story/entertainment/2018/07/11/terrible-crying-emoji-mistakes/774821002> [<https://perma.cc/B4H4-Z6CM>] (“A lot of emojis that seem to have tears, in fact, will confuse or outrage people if you try to use them to show how sad you are.”).

<sup>66</sup> See Brueck, *supra* note 56 (“[I]t’s pretty impossible to know for sure how someone is going to interpret one of your emoji texts.”).

<sup>67</sup> Selena Larson, *Emoji Can Lead to Huge Misunderstandings, Research Finds*, DAILY DOT (Apr. 11, 2016, 5:19 PM), <https://www.dailydot.com/debug/emoji-miscommunicate> [<https://perma.cc/CJR5-Q44M>] (“[W]hile the Unicode Consortium tries to have some cohesion across platforms, there are still significant variations between emoji on mobile and the web. The tiny cartoon renderings of people, places, and things look different when you’re on an iOS, Android, or Windows device, on an OS like Firefox, or web service like Twitter.”); Bianca Bosker, *How Emoji Get Lost in Translation*, HUFFINGTON POST (June 27, 2014, 7:36 AM), [https://www.huffingtonpost.com/2014/06/27/emoji-meaning\\_n\\_5530638.html](https://www.huffingtonpost.com/2014/06/27/emoji-meaning_n_5530638.html) [<https://perma.cc/95CH-ML5Y>] (“Those clapping hands and squinting smiley faces aren’t the universal language the world trusts them to be. They are tech firms’ personal IP and branding tools, and they can be highly irregular and even confusing as a result.”).

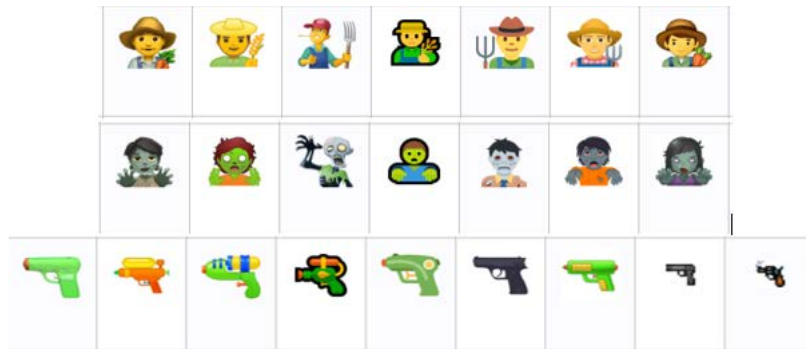
<sup>68</sup> Bosker, *supra* note 67 (showing that Apple’s “dancing girls” emoji appears on Android as an iteration of a Playboy Bunny); Arika Okrent, *9 Emojis that Look Completely Different on Other Phones*, MENTAL FLOSS (Jan. 15, 2016), <http://mentalfloss.com/article/70879/9-emojis-look-completely-different-other-phones> [<https://perma.cc/YEF2-GJE4>]. Professor Eric Goldman, a prolific author in legal issues surrounding emojis, suggests that these differences are the result of intellectual property concerns. See generally Eric Goldman, *Emojis and the Law*, 93 WASH. L. REV. 1227 (2018). When Unicode encodes an emoji, it merely provides a black-and-white pictorial outline of what the emoji should resemble. *Id.* at 1234. Each platform designs its own color and

the sender's intention, causing further miscommunication and misunderstanding.<sup>69</sup> Similarly, an emoji sent to a device with out-of-date software will sometimes appear as a blank box, leaving the recipient with no immediate way of determining what the sender intended, and the sender with the assumption that the recipient received the message.<sup>70</sup>

Adding to the confusion is the rapid evolution of the emoji language.<sup>71</sup> Unicode expands its database annually—often with hundreds

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shape. *Id.* The following graphs depict the farmer, zombie, and pistol emojis as they appear across various platforms:



*Emoji List, v12.1, supra* note 36. A similar communication issue that can creep up when sending an emoji across platforms is that Unicode allows platforms to use an invisible character called a Zero Width Joiner (ZWJ) to combine multiple emojis and create one all-inclusive emoji. Jeremy Burge, *Emoji ZWJ Sequences: Three Letters, Many Possibilities*, EMOJIPEDIA: BLOG (July 12, 2016), <https://blog.emojipedia.org/emoji-zwj-sequences-three-letters-many-possibilities/#fn4> [<https://perma.cc/LW7S-YCRU>]. For example, 🤔❤️🤔 is made up of three separate emojis: 🤔 + ❤️ + 🤔. *Id.* When a user sends such an emoji to a platform that does not support the specific sequence, the individual emojis are displayed. *Id.*

<sup>69</sup> See Okrent, *supra* note 68; see also Jason Fitzpatrick, *Why Don't My Friends See My Emoji Correctly?*, HOW-TO GEEK (Mar. 18, 2017, 6:40 AM), <https://www.howtogeek.com/298649/why-dont-my-friends-see-my-emoji-correctly> [<https://perma.cc/D3U3-3E7M>] (“If you send [🤔] from your LG phone with the sense that you’re saying ‘Oh jeez, that’s awful!’ a recipient on Samsung phone gets treated to that creepy ‘I know where you live!’ face.”). According to a 2016 survey, people interpreted “🤔” as conveying either positive or negative emotions depending on the device they viewed it on. Miller, *supra* note 56.

<sup>70</sup> David Nield, *Why Other People Can't See Your Emojis and How to Fix It*, GIZMODO (Nov. 4, 2017, 9:20 AM), <https://gizmodo.com/why-other-people-cant-see-your-emojis-and-how-to-fix-it-1820037259> [<https://perma.cc/5V8Z-P2E9>].

<sup>71</sup> When Shigetaka Kurita first developed emojis in the late 1990s, he created 176 of them. Sternbergh, *supra* note 24. Twenty years later, there are 3,019 of them. See *supra* note 36.

of new emojis at once.<sup>72</sup> In 2018 alone, 157 new emojis were released by Unicode.<sup>73</sup> This rapid increase makes it even more difficult for people and software programs to stay up-to-date in correctly displaying and interpreting emojis.<sup>74</sup>

### B. Background of the Statute of Frauds

In order to analyze how the statute of frauds would—and should—handle a contract written with emojis, one must have a comprehensive understanding of the statute of frauds, its purposes and accomplishments, and how courts have applied the statute to deal with other advancements in communication.

Practically every state has one or more statutes requiring certain contracts to be in writing<sup>75</sup> and signed<sup>76</sup> in order to be enforceable in court.<sup>77</sup> While statutes differ from state to state, six categories of contracts

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<sup>72</sup> See Chris Mills, *This Is the First Look at New Emoji Coming Next Year*, BGR (Aug. 9, 2018, 10:01 PM), <https://bgr.com/2018/08/09/new-emoji-unicode-12-0-update-ios-android> [<https://perma.cc/DHX5-7EAC>].

<sup>73</sup> *Id.*; Burge, *supra* note 36.

<sup>74</sup> Molly McHugh, *It's Hard Out There for a New Emoji*, WIRED (Feb. 14, 2016, 5:23 AM), <https://www.wired.com/2016/02/new-emoji-popularity-rankings> [<https://perma.cc/YTZ9-RKTQ>] (“You’re taking a big risk using [an emoji] if the recipient just doesn’t understand—or worse yet, hasn’t upgraded to iOS 9.1 or has an Android phone and can’t even see it.”); see Dalvin Brown, *The Internet Is Going Wild over This New Emoji: What Does It Mean?*, USA TODAY (Nov. 1, 2018, 3:54 PM), <https://www.usatoday.com/story/tech/2018/11/01/internet-confused-what-does-new-woozy-face-emoji-mean/1848431002> [<https://perma.cc/XU66-YU2C>] (discussing many suggested interpretations for one particular new emoji).

<sup>75</sup> Any writing or series of writings that memorializes the essential terms of the agreement satisfies the writing requirement. RESTATEMENT (SECOND) OF CONTRACTS §§ 131, 132 (AM. LAW INST. 1981). The Uniform Commercial Code is even more lenient, only requiring that the writing “afford a basis for believing that the offered oral evidence rests on a real transaction.” U.C.C. § 2-201 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 2011).

<sup>76</sup> “The signature to a memorandum may be any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer.” RESTATEMENT (SECOND) OF CONTRACTS § 134.

<sup>77</sup> JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 69 (5th ed. 2011); R.J. Robertson, Jr., *Electronic Commerce on the Internet and the Statute of Frauds*, 49 S.C. L. REV. 787, 792–93 (1998). Louisiana does not have a statute of frauds but does have writing requirements. PRIYANKA DESAI ET AL., CARDOZO BLOCKCHAIN PROJECT, “SMART CONTRACTS” & LEGAL ENFORCEABILITY 9 n.27 (2018), [https://cardozo.yu.edu/sites/default/files/Smart%20Contracts%20Report%20%232\\_0.pdf](https://cardozo.yu.edu/sites/default/files/Smart%20Contracts%20Report%20%232_0.pdf) [<https://perma.cc/PYG6-BDLX>]. It should be noted that one of the many differences

are generally covered by such statutes.<sup>78</sup> The Restatement (Second) of Contracts lists five of the categories: contracts by an executor to answer for a duty of a decedent, contracts of suretyship, contracts in consideration of marriage, contracts for the sale of land, and contracts that cannot be performed within one year of the making.<sup>79</sup> The Uniform Commercial Code adds one more category, “a contract for the sale of goods for the price of \$500 or more.”<sup>80</sup> These statutes are collectively referred to as “the statute of frauds.”<sup>81</sup>

### 1. The Original Purpose of the Statute of Frauds

The statute of frauds—or the “Statute for the Prevention of Frauds and Perjuries” as it was then called—was first enacted in England in 1677.<sup>82</sup> At the time, the concept of a jury trial as we know it today was just emerging; juries were still allowed to disregard evidence presented in court in favor of their own personal experiences.<sup>83</sup> Similarly, the laws of evidence were still in their infancy; parties to an action, as well as their spouses, were not considered competent to testify as witnesses.<sup>84</sup> In such a setting, it was not uncommon for parties to commit fraud by purchasing

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between the various states’ statutes is whether the failure to satisfy the statute makes a contract void or voidable. Compare N.Y. GEN. OBLIG. LAW § 5-701(a) (McKinney 2020) (void), with CAL. CIV. CODE § 1624(a) (West 2018) (voidable).

<sup>78</sup> RESTATEMENT (SECOND) OF CONTRACTS § 110(1); U.C.C. § 2-201.

<sup>79</sup> RESTATEMENT (SECOND) OF CONTRACTS § 110(1)(a)–(e). These categories emulate Section 4 of the original English Statute for Prevention of Frauds and Perjuries. See An Act for Prevention of Frauds & Perjuries, 29 Car. 2 c. 3, § 4 (1677).

<sup>80</sup> U.C.C. § 2-201(1). This category is derived from Section 17 of the English Statute for Prevention of Frauds and Perjuries. See 29 Car. 2 c. 3, § 17. This section of the U.C.C. was adopted by forty-nine states. See U.C.C. § 2 editors’ notes (Table of Jurisdictions Wherein UCC Article 2 Has Been Adopted).

<sup>81</sup> Robertson, *supra* note 77.

<sup>82</sup> ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS 371 (One Vol. ed. 1952). While there appears to have been some doubt about the history of the statute, it is now widely accepted that it was first enacted in 1677. Houston Putnam Lowry, *Does Computer Stored Data Constitute a Writing for the Purposes of the Statute of Frauds and the Statute of Wills?*, 9 RUTGERS COMPUTER & TECH. L.J. 93, 96–97 (1982); see also George P. Costigan, Jr., *The Date and Authorship of the Statute of Frauds.*, 26 HARV. L. REV. 329 (1912–1913) (demonstrating evidence that the statute was first enacted in 1677).

<sup>83</sup> Lowry, *supra* note 82, at 98.

<sup>84</sup> *Id.*



perjured testimony.<sup>85</sup> The Statute for the Prevention of Frauds and Perjuries was enacted by the English Parliament in order to combat this problem.<sup>86</sup>

While the original English statute contained twenty-five sections, the modern statute of frauds is based on just two of those sections.<sup>87</sup> Sections four and seventeen required certain agreements to be in writing and signed in order to be enforceable.<sup>88</sup> The specific intention behind these two sections was to prevent fraudulent claims against people who never intended to assume a contractual obligation.<sup>89</sup> Parliament hoped to diminish the likelihood that a jury would be misled by perjured testimony by requiring the parties to provide the court with a written and signed agreement.<sup>90</sup> This purpose of the statute would later be referred to by legal scholars as an “evidentiary function.”<sup>91</sup>

## 2. Alternative Purposes for the Statute of Frauds

Since its enactment, the statute of frauds has been the subject of much criticism.<sup>92</sup> Many scholars believe that the statute perpetuates more injustice than it prevents.<sup>93</sup> These scholars point out that individuals can free themselves of their oral promises by using the statute as a technical

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<sup>85</sup> *Id.* at 99.

<sup>86</sup> CORBIN, *supra* note 82, at 371.

<sup>87</sup> An Act for Prevention of Frauds & Perjuries, 29 Car. 2 c. 3, §§ 4, 17 (1677); *see also* CORBIN, *supra* note 82, at 371. The other sections attempted to deal with frauds in various other transactions, such as deeds, wills, trusts in land, and leaseholds. E. ALLAN FARNSWORTH, *CONTRACTS* 364 (3d ed. 1999).

<sup>88</sup> 29 Car. 2 c. 3, §§ 4, 17; *see also* CORBIN, *supra* note 82, at 371.

<sup>89</sup> CORBIN, *supra* note 82, at 371.

<sup>90</sup> *Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds*, 66 MICH. L. REV. 170 (1967).

<sup>91</sup> Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 68 (1974).

<sup>92</sup> CORBIN, *supra* note 82, at 371; Jennifer Camero, *Zombieland: Seeking Refuge from the Statute of Frauds in Contracts for the Sale of Services or Goods*, 82 UMKC L. REV. 1, 2–3 (2013); *see, e.g.*, Robert E. Ireton, *Should We Abolish the Statute of Frauds?*, 72 U.S. L. REV. 195, 196 (1938) (referring to the statute as “ambiguous, archaic, arbitrary, uneven, unwieldy, unnecessary and unjust”). To be fair, the statute also had its share of staunch supporters over the years. *See, e.g.*, Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 747 (1931).

<sup>93</sup> CORBIN, *supra* note 82, at 371–72, 376; Camero, *supra* note 92, at 11–12.

defense.<sup>94</sup> In fact—especially in light of the changes to jury trials and new laws of evidence—the statute of frauds was completely repealed in England in 1954.<sup>95</sup> Throughout the years, many scholars have called for a repeal of the statute in the United States as well.<sup>96</sup> However, despite its critics, the statute of frauds continues to survive in the United States.<sup>97</sup>

Scholars have suggested numerous justifications for the statute's longevity.<sup>98</sup> Recent attempts to justify the statute of frauds have focused on the functions of contract formalities such as a writing.<sup>99</sup> According to one influential contracts scholar, Professor Joseph Perillo, contract

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<sup>94</sup> CORBIN, *supra* note 82, at 372; *see also* Jeffrey Kagan, *The Indelibility of Invisible Ink: A Critical Survey of the Enforcement of Oral Contracts Without the Statute of Frauds Under the U.C.C.*, 19 WHITTIER L. REV. 423, 442 (1997); Morris G. Shanker, *In Defense of the Sales Statute of Frauds and the Parole Evidence Rule: A Fair Price of Admission to the Courts*, 100 COM. L.J. 259, 268 (1995). “Indeed, numerous cases exist where the court refused to enforce a legitimate oral contract due to the Statute of Frauds.” Camero, *supra* note 92, at 12.

<sup>95</sup> *See* FARNSWORTH, *supra* note 87, at 365.

Among the reasons given by the English Law Reform Committee for repeal were these: . . . [the Statute] “promotes more frauds than it prevents”; and the Statute was the product of a time when “essential kinds of evidence were excluded (e.g., the parties themselves could not give evidence), and objectionable types of evidence were admitted (e.g., juries were still in theory entitled to act on their own knowledge of the facts in dispute)” and has become “an anachronism” now that the parties can freely testify.

*Id.*

<sup>96</sup> CORBIN, *supra* note 82, at 376–77; Camero, *supra* note 92; *see also* Lowry, *supra* note 82, at 99 (insisting that the drafters of the statute themselves never intended the statute to be a long-term solution); CORBIN, *supra* note 82, at 381 (claiming a party which raises the statute as a defense should be required to submit itself to court examination on the merits of the case and deny under oath that it made the promise).

<sup>97</sup> Other than Louisiana, every single state currently has at least one statute requiring certain contracts to be in writing. *See* CARDOZO BLOCKCHAIN PROJECT, *supra* note 77, at 9 n.27.

<sup>98</sup> *See, e.g.*, Robertson, *supra* note 77, at 810 (“Although the prevention of perjured testimony of oral promises justified the original Statute of Frauds, modern commentators have correctly pointed out that the Statute’s formal requirements serve many purposes.”).

<sup>99</sup> FARNSWORTH, *supra* note 87, at 366.

formalities can serve any of nine different functions.<sup>100</sup> The statute of frauds serves some, but not all, of these functions.<sup>101</sup>

a. The Psychological Function

Throughout history, society has associated promises with certain rituals, such as a handshake or raising the right hand.<sup>102</sup> While it is unclear why, it appears that contracting parties feel compelled to fulfill promises when accompanied by such rituals.<sup>103</sup> One theory is that rituals subconsciously impress upon contracting parties that it is the correct thing to fulfill their promises even if subsequently the contract does not seem advantageous for them.<sup>104</sup>

There is something to be said about the psychological effect of putting a transaction in writing even in the modern world.<sup>105</sup> However, a ritual needs to be in tune with contemporaneous cultural beliefs in order to serve such an irrational function.<sup>106</sup> When contracting parties decide to put the agreement in writing, it is unlikely their intentions are to

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<sup>100</sup> Perillo, *supra* note 91, at 43–69. Professor Perillo denominated the nine functions: (1) Magical, Sacramental and Psychological Functions, (2) Earmarking and Classifying Functions, (3) Cautionary Function, (4) Clarifying Function, (5) Managerial Function, (6) Publicity Function, (7) Educational Function, (8) Regulatory and Taxation Functions, and (9) Evidentiary Function. *Id.*

<sup>101</sup> *Id.* “[T]he Statute of Frauds serves the psychological and evidentiary functions of form reasonably well [and] it performs the earmarking, cautionary, and clarifying functions [more] modestly.” *Id.* at 69.

<sup>102</sup> *Id.* at 43 (“Primitive laws of promise are tightly linked to the use of ritual words and acts . . . ‘[I]n England, children shake hands, or slap hands, or join hands and have the grasp broken by a blow from a third party . . . or, fairly commonly, link the little fingers or “pinkies” of their right hands and shake them up and down . . . .”).

<sup>103</sup> *See id.* at 44–45. Some possibilities that Professor Perillo suggests are the fear of a curse being actuated, either by itself (i.e., “magically”) or by a supernatural force (i.e., “sacramentally”), or a nonrational psychological impression that a ritual creates upon the mind. *Id.*

<sup>104</sup> *Id.* at 45.

<sup>105</sup> *Id.* at 47 (“The psychological effect of putting the transaction in writing should not be minimized . . .”).

<sup>106</sup> *Id.* at 46 (“To have this effect, however, the ritual must be in tune with the traditions and current beliefs of the culture in which the individual has been reared.”).

perform a meaningless ritual.<sup>107</sup> Thus, the statute of frauds does little to serve this psychological function.<sup>108</sup>

b. Earmarking and Channeling Functions

Aside from their role as a ritual, contract formalities serve as a bright-line rule for courts to determine that the parties completed their negotiations and entered the realm of contracting.<sup>109</sup> The parties' compliance with required formalities shows that the parties intended to have a binding agreement.<sup>110</sup> Similarly, because courts will rely on formalities to conclude that the parties necessarily intended to contract, a formality also serves as a channel for the parties to display their intent to contract.<sup>111</sup>

Professor Perillo offers two reasons why the statute of frauds does little to serve these functions.<sup>112</sup> First, even during the preliminary

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<sup>107</sup> See *id.* at 47 ("Parties who formalize their contracts in writing do not normally have the psychological function in mind.").

<sup>108</sup> *Id.* at 47–48. This conclusion can be further evidenced by the fact that the statute does not require a party to write down the agreement solely for the sake of satisfying the statute. See RESTATEMENT (SECOND) OF CONTRACTS § 133 (AM. LAW INST. 1981) ("Except in the case of a writing evidencing a contract upon consideration of marriage, the Statute may be satisfied by a signed writing not made as a memorandum of a contract."). Nevertheless, Professor Perillo is quick to point out that the arbitrary categories of contracts to which the statute of frauds applies supports an argument that the statute serves an irrational function. Perillo, *supra* note 91, at 48.

<sup>109</sup> Perillo, *supra* note 91, at 48–49.

<sup>110</sup> *Id.* For example, although consideration is ordinarily a formality required by contract law, Pennsylvania's Written Obligation Act provides that consideration is not required where a party specifically expressed intent to be legally bound. See 33 PA. CONS. STAT. § 6 (2018); *Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 433 (Pa. 2004); *Morgan's Home Equip. Corp. v. Martucci*, 136 A.2d 838, 845 n.12 (Pa. 1957).

<sup>111</sup> Perillo, *supra* note 91, at 49. Professor Perillo refers to the first of these functions as the "earmarking function." *Id.* at 48. Other legal scholars aptly refer to the second of these functions as "the channeling function." *E.g.*, Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941); *Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds*, *supra* note 90. Professor Perillo declines to use this term because the term is more commonly used elsewhere. Perillo, *supra* note 91, at 49 n.62. Professor Perillo also discusses a related function of formalities—to clearly and easily differentiate between two types of contracts—which he refers to as the "classifying function." *Id.* at 50–52. For example, one type of paper can be required for a property lease and another type for a property sale. See *id.* at 51. However, as Perillo observed, "there is nothing in the operation of the Statute [of Frauds] which induces the parties to indicate into which class their contract falls." *Id.* at 52.

<sup>112</sup> Perillo, *supra* note 91, at 50.

negotiation stage, the parties might unwittingly put the agreement into a signed writing sufficient to satisfy the statute of frauds.<sup>113</sup> Second, while compliance with the statute of frauds is a necessary component of an enforceable contract, it is not the only component of an enforceable contract.<sup>114</sup>

However, other scholars are of the opinion that the statute of frauds does serve this function by providing a dependable means of determining whether the parties intended to enter into a legally binding agreement.<sup>115</sup> Indeed, as Professor Perillo himself notes, “an occasional judicial decision has been influenced by the idea that one objective of the [s]tatute is to lay down a clear and positive rule to determine when a contract has been made.”<sup>116</sup>

### c. The Cautionary Function

The cautionary function presents in two distinct manners. First, certain contract formalities ensure that the promisor is adequately advised about any legal implications of the promise<sup>117</sup> and, relatedly, that the promise is legally binding.<sup>118</sup> Second, certain formalities provide the promisor with an opportunity to reflect on the implications of a promise made in haste without the appropriate level of prudence.<sup>119</sup>

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<sup>113</sup> *Id.* This is a likely scenario where parties are negotiating an agreement through mail or email.

<sup>114</sup> *Id.* Perillo appears to be arguing that in light of other formal requirements for a contract to be enforceable, such as consideration, putting an agreement into writing does not in itself demonstrate intent. *See id.*

<sup>115</sup> *See, e.g., Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds*, *supra* note 90, at 170–71; *see also, e.g., FARNSWORTH*, *supra* note 87, at 366 (discussing how this function is specifically pertinent to the land-contract provision of the statute).

<sup>116</sup> Perillo, *supra* note 91, at 50; *see, e.g., Rondeau v. Wyatt*, 126 Eng. Rep. 430; 2 H. Bl. 63 (finding that executory contracts are within the scope of the statute); *Clay v. Hanson*, 536 A.2d 1097, 1101–02 (D.C. 1988) (discussing specifically the sales of land).

<sup>117</sup> Perillo, *supra* note 91, at 53 (“[One] required formality seems designed to force the parties to receive advance warning of the nature and consequences of [their] agreement . . .”). Examples of formalities that serve this function are statutes that require a contracting party to consult with counsel or the requirement in some legal systems for a notary to draft certain legal documents. *Id.*

<sup>118</sup> *Id.* (“[O]ne function . . . is to caution the promisor that he is entering into a binding relationship.”).

<sup>119</sup> Camero, *supra* note 92, at 13 (arguing that this function is an inappropriate paternalism because “the law should [not] interfere with the agreement and save the person from her poor decision”); *see also* Perillo, *supra* note 91, at 54 (“[T]here is greater opportunity for reflection and deliberation . . . [a risk that] at first appeared unthinkable can be better understood upon

While the statute of frauds serves this function at times, that is not always the case.<sup>120</sup> Where the parties to an agreement transcribe their agreement specifically in order to satisfy the statute of frauds, they are indeed afforded an extra opportunity to reflect on the legal implications of their agreement.<sup>121</sup> However, where a party satisfies the statute of frauds by a memorandum written after the fact, or where a party fails to read the contract before signing it, the statute of frauds arguably does not satisfy the cautionary function.<sup>122</sup>

#### d. The Clarifying Function

When parties are required to write down the terms of their agreement, they will likely contemplate details that they would not have otherwise considered.<sup>123</sup> In a way then, writing down the agreement “influences the content of the contract,” resolves disputes before they arise, and gives the parties an opportunity to clarify the details of the agreement.<sup>124</sup>

Professor Perillo observes that the statute of frauds does not require a comprehensive writing sufficient to serve this function.<sup>125</sup> Nevertheless, in the course of actually writing their agreement, contracting parties will

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reflection . . .”). Professor Perillo points out the specific need for formalities that serve this purpose in promises of suretyship or in consideration of marriage where parties are inclined to make promises without considering its implications. *Id.*

<sup>120</sup> *Id.* at 56.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*; Camero, *supra* note 92, at 14–16; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 133 cmt. a (AM. LAW INST. 1981) (reflecting that mere evidentiary writings do not satisfy the cautionary function of the statute’s marriage provision). Professor Perillo also questions how this function fits with the particular categories of contracts covered by the statute of frauds. Perillo, *supra* note 91, at 56.

<sup>123</sup> Perillo, *supra* note 91, at 56–57; *see also* Sam Mollaei, *Advantages and Disadvantages of a Written Contract* (2020), MOLLAEI L.: BUS. LAW. FOR ENTREPRENEURS BLOG, <https://mollaeilaw.com/blog/advantages-of-written-contract> [https://perma.cc/J8TY-FK4T] (“Putting a contract in writing helps prevent later misunderstandings by forcing the parties to articulate their intentions and desires . . . . The drafting process identifies misunderstandings or unclear points that might otherwise surface only in the event of a later dispute . . .”).

<sup>124</sup> Perillo, *supra* note 91, at 56–57. Professor Perillo notes that this benefit comes with a cost, namely, the inconvenience of spelling out the smallest details in writing. *Id.* at 57.

<sup>125</sup> *Id.*; *see also supra* note 75.

inevitably encounter terms on which they disagree and have an opportunity to discuss and settle them.<sup>126</sup>

e. The Referential Function

One final function of the statute of frauds, which Professor Perillo does not discuss, is the ability to prevent disputes and litigation “that arise by reason of treacherous memory and the absence of witnesses.”<sup>127</sup> In other words, in addition to the evidentiary value that the writing provides to a court adjudicating a dispute, the parties themselves are also able to refer to the writing and refresh their memories about the terms of an agreement. This prevents disputes from escalating to the point of litigation.<sup>128</sup>

3. Applying the Statute of Frauds to Technological Advancements

In the last 350 years—since the enactment of the English Statute for the Prevention of Frauds and Perjuries—courts, legislators, scholars, and contracting parties have struggled to apply the statute of frauds to various new methods of communication.<sup>129</sup>

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<sup>126</sup> Perillo, *supra* note 91, at 57–58. In other words, the clarifying function is served where the parties are afforded an opportunity to clarify points of dispute before they arise, even if the formality does not force them to do so.

<sup>127</sup> CORBIN, *supra* note 82, at 381; *accord* Valdez Fisheries Dev. Ass’n v. Alyeska Pipeline Serv. Co., 45 P.3d 657, 669 (Alaska 2002) (“[The statute of frauds] recognizes the natural tendency of peoples’ memories to contour the words they recall to fit their understanding of the agreement.”).

<sup>128</sup> CORBIN, *supra* note 82, at 381.

<sup>129</sup> For example, in *Clason v. Bailey*, 14 Johns. 484, 491 (N.Y. 1817), a contracting party argued that a contract written with pencil—then a novel method of writing—did not satisfy the statute of frauds’ “writing” requirement. The court held pencil did constitute “writing” for the purpose of the statute of frauds. *Id.* The court reasoned that the issue was more about the instrument used to create the writing than the writing itself, and the statute of frauds “did not require any formal and solemn instrument.” *Id.* at 491–92; *see also, e.g.*, *Am. Union Tr. Co. v. Never Break Range Co.*, 190 S.W. 1045, 1047 (Mo. Ct. App. 1916) (clarifying that a rubber stamp was considered a writing).

a. Telegraphic Communications<sup>130</sup>

On May 24, 1844, Samuel Morse sent America's first telegram,<sup>131</sup> revolutionizing the way people communicated.<sup>132</sup> By assigning a series of dots and dashes to each letter and number,<sup>133</sup> one could send electronic impulses from one telegraph machine to another and the operator of the recipient machine could interpret the code and transcribe it.<sup>134</sup> In the early days of telegrams, to send a message one needed to hand-deliver a written message to the telegraph operator.<sup>135</sup> With the invention of telephones, however, one was able to telephone the telegraph operator to convey the message.<sup>136</sup> Eventually, it became commonplace for individuals to own and operate private telegraph machines from the comfort of their own homes.<sup>137</sup> These home machines—popular from the 1930s through the 1980s—ran on a network called telex.<sup>138</sup>

In what may be the earliest case on record to consider how the statute of frauds affects contracts created using telegraphic communications, the Supreme Court of Vermont decided *Durkee v. Vermont Central Railroad Co.*<sup>139</sup> in 1856. In *Durkee*, the plaintiff alleged that the defendants authorized him by telegram to negotiate a loan on their behalf and he was therefore entitled to a commission.<sup>140</sup> The Supreme Court of Vermont viewed the issue as to what constituted

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<sup>130</sup> This Note uses the term “telegraphic communications” or “telegraphic messages” to refer to both telegrams and telex.

<sup>131</sup> *Inventor Samuel Morse Sends the First U.S. Telegram*, TELEGRAPH (June 1, 2017, 3:15 PM), <https://www.telegraph.co.uk/technology/connecting-britain/samuel-morse-sends-first-us-telegram> [https://perma.cc/83QK-QBEE].

<sup>132</sup> *Morse Code & the Telegraph*, HIST. (Nov. 9, 2009), <https://www.history.com/topics/inventions/telegraph> [https://perma.cc/FJC7-88LF].

<sup>133</sup> *Id.* This code of dots and dashes later became known as Morse Code. *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Robertson, *supra* note 77, at 798.

<sup>136</sup> *Id.*; see *Pike Indus. v. Middlebury Assocs.*, 398 A.2d 280, 282 (Vt. 1979).

<sup>137</sup> Lowry, *supra* note 82, at 101; see also *Joseph Denunzio Fruit Co. v. Crane*, 79 F. Supp. 117, 128 (S.D. Cal. 1948).

<sup>138</sup> *Telex*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/technology/telex> [https://perma.cc/879M-V9H8]; Deborah L. Wilkerson, Comment, *Electronic Commerce Under the U.C.C. Section 2-201 Statute of Frauds: Are Electronic Messages Enforceable?*, 41 U. KAN. L. REV. 403, 410 n.56 (1992).

<sup>139</sup> *Durkee v. Vt. Cent. R.R. Co.*, 29 Vt. 127 (1856).

<sup>140</sup> *Id.* at 128.



appropriate proof of communications sent via telegram.<sup>141</sup> The court held that contracts created by telegram “must be proved in the same manner [as] other writings.”<sup>142</sup>

Another early case to discuss the implications of the statute of frauds on telegraphic writing is *Howley v. Whipple*.<sup>143</sup> The Superior Court of Judicature of New Hampshire, in deciding whether a telegraphic message was admissible in evidence, concluded that telegraphic messages “are governed by the same general rules which are applied to other writings.”<sup>144</sup> The court pointed out that the only difference between a telegram and a letter is that a telegram is written twice, once by the sender and once by the recipient, creating a question about which should be admitted into evidence.<sup>145</sup> The court stated that the original writing, if available, should constitute evidence of the contract, but if not available, the recipient’s copy would suffice.<sup>146</sup>

While courts would eventually come to accept that a telegraphic message is sufficient to satisfy the statute of frauds’ writing requirement,<sup>147</sup> courts continued to grapple with the issue of whether telegraphic messages were considered to be signed by the sender<sup>148</sup> as required by the statute of frauds.<sup>149</sup> Early cases, such as *Howley*, held that a telegram was considered signed.<sup>150</sup> However, the precedential value of

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<sup>141</sup> *Id.* at 140 (“In regard to the proof offered to establish telegraphic communications . . .”).

<sup>142</sup> *Id.* (reasoning that telegrams, like other writings, are ordinarily in written form in the hands of both the sender and the recipient).

<sup>143</sup> *Howley v. Whipple*, 48 N.H. 487 (1869).

<sup>144</sup> *Id.* at 488. Unlike the reasoning in *Durkee*, the court in *Howley* used the concept of agency to allow the telegraph operator to send a message on the sender’s behalf. *Id.* (explaining a telegraph is a contract “because each party authorizes his agents, the company or the company’s operator, to write for him”). The court reasoned that it made no difference that the agent used a telegram instead of a traditional pen. *Id.* (equating a telegram to writing with a pen that is “a thousand miles long,” and the use of the electronic impulses to the use of ink).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* The court reasoned that the original message would contain the handwriting of the sender while the copy received by the recipient could not provide proof of the sender without tracing the message “from the lips of the one party until it was received in the ear of the other party.” *Id.* at 489.

<sup>147</sup> See, e.g., *Brewer v. Horst-Lachmund Co.*, 60 P. 418, 419 (Cal. 1900); *Leesley Bros. v. A. Rebori Fruit Co.*, 144 S.W. 138, 140 (Mo. Ct. App. 1912); *Selma Sav. Bank v. Webster Cty. Bank*, 206 S.W. 870, 872 (Ky. 1918) (citing *Howley*, 48 N.H. 487).

<sup>148</sup> Robertson, *supra* note 77, at 798.

<sup>149</sup> See sources cited *supra* note 77.

<sup>150</sup> See *Howley*, 48 N.H. 487.

such cases was limited.<sup>151</sup> Nevertheless, courts eventually came to consider the sender's name affixed to the end of a telegraphic message as a valid signature.<sup>152</sup>

b. Fax Machines<sup>153</sup>

A fax machine essentially operates in a similar manner as a telegraph or telex: one fax machine transmits an electronic version of a message to a second fax machine, which interprets and transcribes it.<sup>154</sup> Like with telegraphs,<sup>155</sup> in the early stages of fax machines, a hard copy of the message was required in order to send a message; as technology developed, one could send a message to someone else's fax machine via computer, without the use of a hard copy.<sup>156</sup>

In the early days of fax, people concerned about the statute of frauds would often follow up their faxes by mailing the original document.<sup>157</sup> As

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<sup>151</sup> Robertson, *supra* note 77, at 798. The early cases were decided in the pre-telephone era, when a hardcopy containing the sender's signature existed. *Id.*; see *supra* text accompanying note 135. However, once it became common for messages to be dictated to the telegraph operator by phone, at least one court held that the signature requirement of the statute of frauds was not satisfied. See *supra* note 136 and accompanying text; Pike Indus. v. Middlebury Assocs., 398 A.2d 280, 282 (Vt. 1979) (analogizing it to handing an unsigned message to the telegraph operator). But cf. Blackburn v. Paducah, 441 S.W.2d 395, 397 (Ky. 1969) (holding a "phoned-in telegram" to be signed). This limitation was particularly important with the advent of telexes, since telexes also do not require the sender to sign the message before sending it. See Joseph Denunzio Fruit Co. v. Crane, 79 F. Supp. 117, 128–29 (S.D. Cal. 1948) (noting that telexes are not "literally signed" and the issue is one of first impression, but nevertheless finding a signature because "each party was readily identifiable and known to the other by the symbols or code letters used").

<sup>152</sup> Yaggy v. B.V.D. Co., 173 S.E.2d 496, 501 (N.C. Ct. App. 1970) (finding "a telegram to which the vendor's name has been so affixed may be considered as having been signed by the vendor within the meaning of [North Carolina's] statute of frauds"); accord Hillstrom v. Gosnay, 614 P.2d 466, 469 (Mont. 1980) ("[T]he typewritten 'signature' on a telegram is a proper subscription within the meaning of the statute." (citing Yaggy, 173 S.E.2d at 502)); Hansen v. Hill, 340 N.W.2d 8, 12–13 (Neb. 1983) (citing Hillstrom, 614 P.2d 466); La Mar Hosiery Mills, Inc. v. Credit & Commodity Corp., 216 N.Y.S.2d 186, 190 (N.Y. City Ct. 1961); Heffernan v. Keith, 127 So. 2d 903, 904 (Fla. Dist. Ct. App. 1961); Apex Oil Co. v. Vanguard Oil & Serv. Co., 760 F.2d 417, 423 (2d Cir. 1985) (discussing telex); Interocean Shipping Co. v. Nat'l Shipping & Trading Corp., 523 F.2d 527, 537–38 (2d Cir. 1975) (discussing telex).

<sup>153</sup> Also referred to as facsimile or telecopiers. See Wilkerson, *supra* note 138, at 410 n.57.

<sup>154</sup> *Id.* at 413.

<sup>155</sup> See *supra* notes 135–136 and accompanying text.

<sup>156</sup> Wilkerson, *supra* note 138, at 413.

<sup>157</sup> *Id.*

the issue came before courts, it was consistently held that faxes constitute a “writing” for the purpose of the statute of frauds.<sup>158</sup> However, in an oft-cited opinion, the New York Court of Appeals held that an automated printing of the sender’s name by the recipient’s fax machine did not constitute a signature.<sup>159</sup>

### c. Voice Recordings

Voice recordings created the first real differences between how jurisdictions dealt with the statute of frauds in light of new technology. In *Ellis Canning Co. v. Bernstein*,<sup>160</sup> contracting parties agreed to tape-record their telephone conversation.<sup>161</sup> The court, recognizing that it was an issue of first impression, held that a tape-recorded conversation satisfied Colorado’s statute of frauds.<sup>162</sup> The court reasoned that a tape-recording satisfied the purpose of the statute—to prevent frauds and perjuries.<sup>163</sup> The court acknowledged that this reasoning alone would not suffice given the requirement of a “writing.”<sup>164</sup> The court found additional authority in the Uniform Commercial Code’s “unusual definition of the word ‘written’” which includes “[any] intentional reduction to tangible form.”<sup>165</sup> Finally, the court concluded that the statute’s reason for

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<sup>158</sup> See, e.g., *Bazak Int’l Corp. v. Mast Indus., Inc.*, 535 N.E.2d 633, 635 (N.Y. 1989) (finding the statute of frauds satisfied by a faxed document without discussing the issue); see also, e.g., *Parma Tile Mosaic & Marble Co. v. Estate of Short*, 663 N.E.2d 633, 635 (N.Y. 1996) (finding that a fax did not satisfy the statute of frauds, but only because there was no signature). But see *Dep’t of Transp. v. Norris*, 474 S.E.2d 216, 218 (Ga. Ct. App. 1996) (holding a fax was not a “writing” for the purpose of a different statute’s writing requirement).

<sup>159</sup> *Parma Tile*, 663 N.E.2d at 635. The court in *Parma Tile* reasoned that an automated signature did not have the adequate intent required for a signature under the statute of frauds. *Id.* The court also rejected the plaintiff’s argument that by programming their fax machine to print their name on every page transmitted, the sender was intending to satisfy the signature requirement of the statute of frauds. *Id.*

<sup>160</sup> *Ellis Canning Co. v. Bernstein*, 348 F. Supp. 1212 (Dist. Colo. 1972).

<sup>161</sup> *Id.* at 1216–18.

<sup>162</sup> See *id.* at 1228.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* (“Probably the opposite result would be required under historical statutes of frauds . . .”).

<sup>165</sup> *Id.*; U.C.C. § 1-201(43) (AM. LAW INST. & UNIF. LAW COMM’N 2011).

requiring a signature is to identify the contracting parties, which can be satisfied where the parties are identifiable from the recording.<sup>166</sup>

While most jurisdictions follow *Ellis Canning*,<sup>167</sup> others hold that a tape-recorded conversation is not a “writing” and therefore does not satisfy the statute of frauds.<sup>168</sup>

#### d. Emails

As emails gained popularity, debate renewed about the statute of frauds. As one legal scholar noted, there is an inherent conflict between the objectives of the statute of frauds and email—email is intended to eliminate conventional writings, while the statute of frauds is intended to create them.<sup>169</sup> Some scholars believed that the statute of frauds should not apply to contracts created via email.<sup>170</sup> Other scholars used the issue to renew the perpetual calls for a complete repeal of the statute.<sup>171</sup> Courts,

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<sup>166</sup> *Ellis Canning*, 348 F. Supp. at 1228 (“[T]he clear purpose of [the signature requirement] is to require identification of the contracting party, and where, as here, the identity of the oral contractors is established, and, in fact, admitted, the tape itself is enough.”).

<sup>167</sup> *Id.*; e.g., *Londono v. City of Gainesville*, 768 F.2d 1223, 1227 n.4 (11th Cir. 1985).

<sup>168</sup> E.g., *Sonders v. Roosevelt*, 476 N.Y.S.2d 331 (App. Div. 1984), *aff’d*, 476 N.E.2d 996 (N.Y. 1985) (“[A] recorded telephone conversation . . . is not a note or memorandum in writing subscribed by the defendant in compliance with [New York’s statute of frauds].”); *Roos v. Aloï*, 487 N.Y.S.2d 637, 642–43 (Sup. Ct. 1985) (citing *Sonders*, 476 N.Y.S.2d 331); see also, e.g., *Swink & Co. v. Carroll McEntee & McGinley, Inc.*, 584 S.W.2d 393, 399 (Ark. 1979) (holding a tape recording is not signed, while expressly leaving open the question of whether it constitutes a writing). *But cf.* Wilkerson, *supra* note 138, at 418 (noting that the facts in *Swink* were different because the contracting party did not know that the conversation was being recorded and therefore could not have intent to authenticate it). For an in-depth discussion about whether tape-recordings should satisfy the statute of frauds, see Robert L. Misner, *Tape Recordings, Business Transactions via Telephone, and the Statute of Frauds*, 61 IOWA L. REV. 941 (1976).

<sup>169</sup> Wilkerson, *supra* note 138, at 407–08 (“One of the primary goals of electronic messaging is the elimination of paper, which ultimately means the elimination of conventional writings. Maintaining a ‘paper trail’ to guard against problems with the statute of frauds diminishes the objectives of computer contracting.”).

<sup>170</sup> E.g., Marc E. Szafran, *A Neo-Institutional Paradigm for Contracts Formed in Cyberspace: Judgment Day for the Statute of Frauds*, 14 CARDOZO ARTS & ENT. L.J. 491, 497 (1996) (“[C]ertain commercial transactions—particularly transactions conducted via electronic networks—should not be governed by the Statute.”); see also, e.g., Robertson, *supra* note 77, at 796–97 (advocating for “some accommodation between electronic commerce and the Statute of Frauds” because “the Statute of Frauds presents a fundamental legal barrier to the expansion of electronic commerce”).

<sup>171</sup> Robertson, *supra* note 77, at 797; see sources cited *supra* note 96.

in applying the statute of frauds to email contracts, had differing views on whether emails were considered “writing.”<sup>172</sup>

In light of the confusion and apprehension over the effects of the statute of frauds on email commerce, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Electronic Transactions Act (UETA) to provide that electronic signatures and electronic contracts cannot be denied legal effect or enforceability solely because they are in electronic form.<sup>173</sup> So far, forty-seven states have enacted UETA.<sup>174</sup> In addition, Congress passed a similar federal law, the Electronic Signatures in Global and National Commerce Act (E-SIGN), which applies to transactions in interstate or foreign commerce.<sup>175</sup>

Since their enactment, many courts have relied on UETA and E-SIGN to find that email contracts satisfy the statute of frauds.<sup>176</sup> Even courts in New York, one of the few states that did not adopt UETA,<sup>177</sup>

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<sup>172</sup> See *Singer v. Adamson*, 11 LCR 338, 341–42 (Mass. Land Ct. 2003), *aff’d*, 837 N.E.2d 313 (Mass. App. Ct. 2005) (holding that emails do not satisfy the statute because they lack the cautionary and memorializing functions of the statute of frauds); *Gleneagle Civic Ass’n v. Hardin*, 205 P.3d 462, 467 (Colo. App. 2008) (noting that it is an unsettled question of law); *Shattuck v. Klotzbach*, 2001 Mass. Super. LEXIS 642, at \*6–7 (Mass. Super. Ct. Dec. 11, 2001) (noting email satisfies statute of frauds); *Slover v. Carpenter*, 24 LCR 1, 5 (Mass. Land Ct. 2016) (noting email satisfies statute of frauds); *McClare v. Rocha*, 86 A.3d 22, 27 (Me. 2014) (noting email satisfies statute of frauds).

<sup>173</sup> UNIFORM ELECTRONIC TRANSACTIONS ACT § 7 (UNIF. LAW COMM’N 1999).

<sup>174</sup> CARDOZO BLOCKCHAIN PROJECT, *supra* note 77, at 17; see *Electronic Transactions Act*, UNIFORM L. COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034> [https://perma.cc/E27Q-GNT5]. New York and Illinois enacted legislation that closely mirrors UETA, leaving Washington as the sole outlier. Stephanie Curry, Comment, *Washington’s Electronic Signature Act: An Anachronism in the New Millennium*, 88 WASH. L. REV. 559, 561 (2013); see also CARDOZO BLOCKCHAIN PROJECT, *supra* note 77, at 19–20.

<sup>175</sup> ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT (E-SIGN), 15 U.S.C. § 7001 (2018).

<sup>176</sup> E.g., *Kluver v. PPL Mont., LLC*, 293 P.3d 817, 821–22 (Mont. 2012); *Feldberg v. Coxall*, 2012 Mass. Super. LEXIS 214, at \*16–17 (Mass. Super. Ct. May 22, 2012); *McClare v. Rocha*, 86 A.3d 22, 27 (Me. 2014). It is important to note that unlike E-SIGN, UETA only applies where the parties agreed to conduct their transaction by electronic means. UNIFORM ELECTRONIC TRANSACTIONS ACT § 5(b); see *Kluver*, 293 P.3d at 821–22 (finding the parties intended to conduct their transaction by electronic means); *Feldberg*, 2012 Mass. Super. LEXIS 214, at \*16–17 (finding that there was a triable issue of fact whether the parties intended to conduct their transaction by electronic means). This makes for an interesting argument that post-UETA, faxes, which are included in UETA but were widely considered a writing before UETA, see *supra* note 158, should only be considered a writing if the parties intended to conduct their transaction by electronic means.

<sup>177</sup> See *supra* note 174.

have been influenced by UETA and E-SIGN to hold that emails satisfy the statute of frauds.<sup>178</sup>

As far as satisfying the signature requirement, courts have taken different approaches. Citing precedent from telegraphic communications, and especially in light of UETA, courts have little issue finding a signature where the sender intentionally types his name at the end of an email.<sup>179</sup> However, courts have come to different conclusions with respect to automated signature blocks and where the sender's name is in the "from" line of the email.<sup>180</sup>

#### e. Text Messages

Few cases have yet to discuss the effects of the statute of frauds' writing and signature requirements on text messages.<sup>181</sup> In a recent, widely discussed case, a court in Massachusetts held that, where the sender typed his name at the bottom of a text message, it satisfied the

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<sup>178</sup> See *Naldi v. Grunberg*, 908 N.Y.S.2d 639, 642 (App. Div. 2010). The court explained that while at an earlier point of time there was a good argument to the contrary, since the enactment of UETA and E-SIGN the New York legislature had enacted its own Electronic Signatures and Records Act (ESRA), which was intended to incorporate E-SIGN into New York law. *Id.* at 643–47; see N.Y. STATE TECH. LAW §§ 301–309 (McKinney 2020).

<sup>179</sup> See, e.g., *Stevens v. Publicis, S.A.*, 854 N.Y.S.2d 690, 692 (App. Div. 2008); *Newmark & Co. Real Estate v. 2615 E. 17 St. Realty LLC*, 914 N.Y.S.2d 162, 164 (App. Div. 2011); see also *J.B.B. Inv. Partners, Ltd. v. Fair*, 182 Cal. Rptr. 3d 154, 164–65 (Ct. App. 2014) ("Courts in other jurisdictions that have adopted a version of UETA have concluded that names typed at the end of e-mails *can* be electronic signatures.").

<sup>180</sup> See *Khoury v. Tomlinson*, 518 S.W.3d 568 (Tex. App. 2017) (discussing that a name in "from" line constitutes a signature); *Bayerische Landesbank v. 45 John St. LLC*, 960 N.Y.S.2d 64, 66 (App. Div. 2013) (noting that an automated printing of name is not a signature); *Rosenfeld v. Zerneck*, 776 N.Y.S.2d 458 (Sup. Ct. 2004) (distinguishing *Parma Tile* because it was automated); *Feldberg*, 2012 Mass. Super. LEXIS 214, at \*16–17 ("The parties' email 'signature block' may [satisfy the statute of frauds]. So may the 'from' portion of the email."); see also *Kluver*, 293 P.3d at 822–23 (finding the "[f]rom" field combined with other affirmation to constitute a signature). In *Kluver*, the dissent argued that the "[f]rom" field could not constitute a signature because it could be easily manipulated. *Id.* at 833 n.2. By that logic, a typed name on an email or telegraphic message should also not constitute a signature.

<sup>181</sup> There have been a couple of recent decisions in which courts found that text messages did not satisfy the statute of frauds for other reasons. See *Fiore v. Lindsey*, 25 LCR 768 (Mass. Land. Ct. 2017) (holding it would satisfy the statute but it did not contain sufficient terms to constitute a contract); *Coston v. Greene*, 2018 N.Y. Misc. LEXIS 4128, at \*11 (N.Y. Sup. Ct. Aug. 28, 2018) (holding that a text message failed to adequately describe the property being sold).

statute of frauds.<sup>182</sup> On the other hand, where a text message was unsigned, another Massachusetts court found that the text message did not satisfy the statute of frauds.<sup>183</sup>

In California, the legislature amended the statute of frauds to provide that, at least regarding conveyances of real property,<sup>184</sup> text messages do not satisfy the statute of frauds.<sup>185</sup>

## II. ANALYSIS

Whether a written contract containing emojis can satisfy the statute of frauds is a question that has yet to be considered by U.S. courts. A party attempting to persuade a court to take one position or another on the issue has a few different avenues from which to approach the question.

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<sup>182</sup> *St. John's Holdings, LLC v. Two Elecs., LLC*, 2016 Mass. LCR LEXIS 49, at \*14–24 (Mass. Land Ct. Apr. 14, 2016), *aff'd*, 92 Mass. App. Ct. 1114 (App. Ct. 2017).

<sup>183</sup> *Donius v. Milligan*, 24 LCR 440 (Mass. Land Ct. 2015). It is interesting to note that no argument was made that the phone number should constitute a signature. This is consistent with the approach that courts took with telegraphic messages. *See supra* note 152. *But cf.* *Joseph Denunzio Fruit Co. v. Crane*, 79 F. Supp. 117, 128–29 (S.D. Cal. 1948) (finding a signature because “each party was readily identifiable and known to the other by the symbols or code letters used”).

<sup>184</sup> The statute is clear that it applies only to real estate conveyances. *See* CAL. CIV. CODE § 1624(d) (West 2018). The reason for this is because the law was sponsored by the California Association of Realtors for the sake of real estate brokers who would otherwise have been required to retain every text message relating to any matter in which their broker’s license was required. Robert C. Barnes, *Can Texts Be ‘Writings’ Under the Statute of Frauds?*, L.A. DAILY J., Oct. 9, 2015, <http://www.nortonrosefulbright.com/knowledge/publications/133332/can-texts-be-writings-under-the-statute-of-frauds> [<https://perma.cc/5SR5-Z6BC>]; #YOUJUSTBOUGHTMYHOUSE?, GIBBS GIDEN LOCHER TURNER SENET & WITTBRODT LLP (Jan. 6, 2015), <https://www.gibbsgiden.com/blog/youjustboughtmyhouse> [<https://perma.cc/MY37-39QR>]. It remains to be seen how California courts will treat text messages with regard to other provisions of the statute of frauds. Barnes, *supra* (“Does this imply that [text messages] may be OK for other contract purposes under the statute? It’s doubtful, but the legislation isn’t clear and no court has ruled on the question.”).

<sup>185</sup> CAL. CIV. CODE § 1624(d). The code provides that any “electronic message of an ephemeral nature that is not designed to be retained or to create a permanent record, including, but not limited to, a text message” is insufficient to satisfy the statute of frauds. *Id.* Based on this language, an argument can be made that where the parties intended to create a binding contract through a text message, the parties intended it to be retained and it does satisfy the statute. If accepted, this argument would make the law in California align with the law in Massachusetts. *See St. John's Holdings, LLC*, 2016 Mass. LCR LEXIS 49, at \*24 (explaining that the fact that the sender signed his name indicated an intent to create a binding contract).

### A. *The Textual Argument*

The first type of argument that one might make is based on the application of the literal text of the statute. A party might argue that the word “writing” in the statute, by its definition, does or does not include emoji characters.<sup>186</sup>

While the English Statute for the Prevention of Frauds and Perjuries did not offer any definition for the word “writing,”<sup>187</sup> the Uniform Commercial Code says that “[w]riting” includes printing, typewriting, or any other intentional reduction to tangible form.”<sup>188</sup> This language is also quoted in the comments to the Restatement.<sup>189</sup> Nevertheless, while states which have adopted the Uniform Commercial Code<sup>190</sup> use that definition with respect to contracts for the sale of goods over \$500,<sup>191</sup> many statutes dealing with other categories of contracts still do not define “writing” at all.<sup>192</sup>

Where a statute does not provide a definition, its terms may, as an initial matter, be viewed in light of their ordinary use, as reflected in a dictionary.<sup>193</sup> Black’s Law Dictionary defines “writing” as

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<sup>186</sup> In *Ellis Canning*, the court stated that if not for the Uniform Commercial Code’s “unusual definition” for the word “writing” the court would have found that a tape-recording is not a “writing.” *Ellis Canning Co. v. Bernstein*, 348 F. Supp. 1212, 1228 (Dist. Colo. 1972). Although they do not say so explicitly, the courts that held that a tape-recording does not satisfy the statute of frauds presumably relied on this argument. See *supra* note 168.

<sup>187</sup> See AN ACT FOR PREVENTION OF FRAUDS & PERJURIES, 29 Car. 2 c. 3, §§ 4, 17 (1677); Lowry, *supra* note 82, at 99.

<sup>188</sup> U.C.C. § 1-201(43) (AM. LAW INST. & UNIF. LAW COMM’N 2011).

<sup>189</sup> RESTATEMENT (SECOND) OF CONTRACTS § 131 cmt. d, § 95 cmt. B (AM. LAW INST. 1981).

<sup>190</sup> See *supra* note 80.

<sup>191</sup> See *supra* text accompanying note 80; see, e.g., MASS. GEN. LAWS ch. 106, § 1-201 (2019).

<sup>192</sup> See, e.g., N.Y. GEN. OBLIG. § 5-703 (McKinney 2020); N.J. STAT. ANN. § 25 (West 2018); MASS. GEN. LAWS ch. 259; ARK. CODE ANN. § 4-59-101 (2018); MONT. CODE ANN. § 28-2-903 (2017); MICH. COMP. LAWS § 566.132 (2020). However, some other statutes do provide guidance as to the meaning of “writing.” See N.Y. GEN. OBLIG. § 5-701(b)(4) (“[T]he tangible written text produced by telex, telefacsimile, computer retrieval or other process by which electronic signals are transmitted by telephone or otherwise shall constitute a writing . . . .”); DEL. CODE ANN. tit. 6, § 2714(c) (2019) (“[W]riting” includes microphotography, photography and photostating, and a microphotographic, photographic or photostatic copy of any agreement covered by this section.”); TENN. CODE ANN. § 29-2-101(c) (2018) (“[A] writing . . . includes a record.”).

<sup>193</sup> See Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994) (“[C]ourts have long used dictionaries to aid their interpretive endeavors; the [United States]



[a]ny intentional recording of *words* in a visual form, whether in handwriting, printing, typewriting, or any other tangible form that may be viewed or heard . . . [including] hard-copy documents, electronic documents on computer media, audio and videotapes, e-mails, and any other media on which words can be recorded.<sup>194</sup>

Even if a court should conclude that emojis are a “tangible form,”<sup>195</sup> one can argue that emoji characters are not “words.”<sup>196</sup> Other interpretations of “writing” would likewise allow an argument that emojis are not writings.<sup>197</sup>

Where the relevant statute of frauds includes language similar to the Uniform Commercial Code’s definition,<sup>198</sup> or where a court turned to the Uniform Commercial Code for interpretation of “writing,”<sup>199</sup> it is likely

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Supreme Court has referred to dictionaries in more than six hundred cases over a period of two centuries.”).

<sup>194</sup> BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis added).

<sup>195</sup> See *infra* note 200.

<sup>196</sup> “Words” can be defined as “a written or printed *character* or combination of characters *representing a spoken word*.” *Word*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/word> [<https://perma.cc/W2SY-3MXX>] (emphasis added). While emojis certainly can represent words, see *supra* note 32, there is no consensus on which spoken word each emoji represents. See *supra* notes 56–66. Another definition for “words,” “[a] single distinct meaningful element of speech or writing, used with others (or sometimes alone) to form a sentence and typically shown with a space on either side when written or printed,” is more open to including emojis but still leaves open the question whether an emoji is “meaningful” since there is no consensus on the meaning of each one. *Word*, LEXICO, <https://en.oxforddictionaries.com/definition/word> [<https://perma.cc/F8XU-VAFK>]; see *supra* notes 56–66. On the other hand, despite the possibility of there being no consensus on the meaning of an emoji, there certainly *can* be consensus in instances. Additionally, proponents of emojis being considered words can point to the fact that one emoji was nominated as “word of the year” by Oxford Dictionary. See *supra* note 60. For further discussion about whether emojis are “words,” see Lauren C. Williams & Laurel Raymond, *Are Emojis Words? Science and Language Experts Explain*, THINK PROGRESS (Nov. 20, 2015, 8:30 AM), <https://thinkprogress.org/are-emojis-words-science-and-language-experts-explain-2d0ab3cda108> [<https://perma.cc/76XV-PMT9>].

<sup>197</sup> For example, in *Clason v. Bailey*, the court in dicta stated that writing refers to “[an expression] of ideas *by letters* visible to the eye.” *Clason v. Bailey*, 14 Johns. 484, 491 (N.Y. 1817) (emphasis added). This definition leaves open the question whether emoji characters are “letters.”

<sup>198</sup> See *supra* note 188 and accompanying text.

<sup>199</sup> Even where the statute does not offer a definition of “writing,” thus requiring the court to look to extrinsic sources for a definition, the court might turn to the Uniform Commercial Code’s interpretation.

that a court will find that emojis are a “tangible form.”<sup>200</sup> However, an argument can still be made that the Uniform Commercial Code is not defining “writing,” but rather is providing that certain devices are allowable mediums by which to create the writing.<sup>201</sup> That is to say, a contract that is created in tangible form is not necessarily a “writing” for the purpose of the statute—the content of the writing and the characters that are used to record the contract might be a separate discussion that the Uniform Commercial Code is not addressing in its explanation of the term “writing.” If a court accepted this argument, the court would again be required to turn to extrinsic sources for a definition of “writing.”<sup>202</sup>

### B. *The Argument Based on Legislative Intent*

As a second approach, one could argue that contracts containing emoji characters do or do not fulfill the intended and ancillary purposes of the statute of frauds. This requires an analysis of each of the objectives of the statute.

The original function of the statute—the evidentiary function—is to provide the court with evidence that an agreement in fact existed between the parties.<sup>203</sup> A court looking for evidence that a contract exists should be able to rely on a contract written with emoji characters to the same extent as a contract written with alphabetic letters. While the lack of consensus as to the meaning of each emoji,<sup>204</sup> and lack of uniformity between digital platforms,<sup>205</sup> provide more opportunity for parties to disagree about the context of the agreement than with conventional

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<sup>200</sup> “[T]angible form” refers to the medium used to create the writing, as is evident from the language of the statute analogizing it to printing and typewriting. See U.C.C. § 1-201(43) (AM. LAW INST. & UNIF. LAW COMM’N 2011) (explaining “*printing, typewriting, or any other intentional reduction to tangible form*” (emphasis added)). This Note assumes that the emojis were written using a permissible medium such as email.

<sup>201</sup> The language in the Uniform Commercial Code—“[w]riting’ *includes*”—seems to support an argument that it is not offering a definition for “writing” but rather telling us not to disqualify a writing solely because it was created with certain devices. U.C.C. § 1-201(43) (emphasis added).

<sup>202</sup> See *supra* notes 193–197.

<sup>203</sup> See *supra* notes 89–90 and accompanying text.

<sup>204</sup> See *supra* notes 56–65 and accompanying text.

<sup>205</sup> See *supra* notes 67–74 and accompanying text.

contracts,<sup>206</sup> courts are adept at interpreting the meaning of contractual terms.<sup>207</sup> Indeed, the evidentiary function never purported to diminish disputes regarding the terms of an agreement.<sup>208</sup> Thus, it would appear that emojis satisfy the evidentiary function of the statute.

However, satisfying the original function of the statute does not necessarily suffice. Many scholars believe that the statute owes its longevity to the ancillary purposes that it serves.<sup>209</sup> Thus, for a contract to satisfy the statute of frauds, it must satisfy the ancillary purposes as well.<sup>210</sup>

The psychological function,<sup>211</sup> to the extent that it is served by the statute,<sup>212</sup> is just as well served where the contract contains emojis. If the ritual of writing down the agreement solely for the sake of the formality

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<sup>206</sup> A party wishing to avoid a contractual obligation might take advantage of this and falsely claim to have a different meaning of the agreement. This would then be a limitation on the evidentiary value of contracts containing emojis.

<sup>207</sup> See, e.g., *Garden State Plaza Corp. v. S.S. Kresge Co.*, 189 A.2d 448 (N.J. Super. Ct. App. Div. 1963) (interpreting the meaning of “floor space” in a contract); see also RESTATEMENT (SECOND) OF CONTRACT § 202 (AM. LAW INST. 1981) (listing rules that courts use to interpret contracts). One might counter that courts have little experience interpreting emojis and therefore the evidentiary value of a contract containing emojis is nevertheless limited. See Eric Goldman, *Two Examples of How Courts Interpret Emojis*, TECH. & MARKETING L. BLOG (Mar. 17, 2019), <https://blog.ericgoldman.org/archives/2019/03/two-examples-of-how-courts-interpret-emojis.htm> [<https://perma.cc/WR49-6ETH>] (“[W]e haven’t gotten a U.S. court opinion thoroughly interpreting emojis . . . I’m sure we’ll get a good U.S. battle royale over emoji interpretation eventually.”); see also Goldman, *supra* note 4 (“[E]mojis do have some unique attributes that require extra consideration when interpreted.”). However, there’s a strong argument that emojis are just a new form of nonverbal and non-textual communications, which courts have been interpreting for centuries. *Id.* (“Courts have been interpreting nonverbal/non-textual communications for centuries.”). It should be noted that if a court finds that there was a reasonable misunderstanding at the time of contract and the parties in fact attributed materially different meanings to an emoji, the court may hold that the contract is void. See RESTATEMENT (SECOND) OF CONTRACTS § 20; see also *Raffles v. Wichelhaus (The Peerless Case)* (1864) 159 Eng. Rep. 375, 2 Hurl. & C. 906 (voiding contract where both parties reasonably attached materially different meanings to a word in the agreement).

<sup>208</sup> See *supra* text accompanying notes 89–90.

<sup>209</sup> See *supra* text accompanying notes 98–101. The ancillary purposes are the psychological, earmarking and classifying, cautionary, clarifying, and referential functions. See discussion *supra* Section I.B.2.

<sup>210</sup> See *Clay v. Hanson*, 536 A.2d 1097, 1101–02 (D.C. 1988) (finding that the evidentiary function was satisfied but inquiring whether the channeling function was also satisfied).

<sup>211</sup> See discussion *supra* Section I.B.2.a.

<sup>212</sup> See *supra* note 108 and accompanying text.

causes parties to subconsciously feel bound to the agreement,<sup>213</sup> it should do so regardless of the sort of characters which the parties chose to use.<sup>214</sup>

Likewise, contracts containing emojis satisfy the earmarking and channeling functions<sup>215</sup> just as well as any other writing. If the fact that the parties memorialized their agreement in writing is a sufficient reason for a court to conclude that the parties intended to enter into a binding agreement, then it should conclude so whether or not the writing contains emojis.<sup>216</sup>

The statute of frauds serves the cautionary function by requiring the parties to take the additional step of writing down their agreement, thereby providing them with an additional opportunity to reflect on the legal implications of their actions.<sup>217</sup> This additional opportunity is presented irrespective of whether alphabetic or emoji characters were used. Thus, emojis satisfy the cautionary function as well.

However, a strong argument can be made that emojis do not satisfy the final two functions of the statute, the clarifying and referential functions.<sup>218</sup> While parties memorializing their agreement in writing are ordinarily forced to contemplate and clarify every detail of their agreement,<sup>219</sup> because emojis are more ambiguous than traditional

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<sup>213</sup> See *supra* text accompanying note 104.

<sup>214</sup> One might counter that emojis are primarily used casually—not for the sake of satisfying some ritual. See *supra* text accompanying note 104; *Bardales v. Lamothe*, No. 3:18-cv-00600, 2019 U.S. Dist. LEXIS 186273, at \*27 n.9 (M.D. Tenn. Oct. 25, 2019) (“In the Court’s view, emojis and text messages are widely perceived to be, and in fact are, generally very casual communications, strikingly devoid of formality.”). However, the same can be said about all text messages, and perhaps emails as well. See *supra* text accompanying notes 169–183; *Bardales*, 2019 U.S. Dist. LEXIS 186273, at \*27 n.9. Furthermore, the statute never purported to require the parties to write down the agreement solely for the sake of satisfying the statute. See RESTATEMENT (SECOND) OF CONTRACTS § 133 (AM. LAW INST. 1981). Indeed, this is an argument against the relevance of the psychological function to the statute of frauds altogether. See *supra* note 108.

<sup>215</sup> See discussion *supra* Section I.B.2.b.

<sup>216</sup> To the extent that one can argue that emojis are a very informal means of writing and parties wishing to channel their intent to contract would not do so in an informal manner, it is not a requirement of the statute of frauds that the writing be done with formal language. See *Bardales*, 2019 U.S. Dist. LEXIS 186273, at \*27 n.9; RESTATEMENT (SECOND) OF CONTRACTS § 131 cmt. d (“The statutory memorandum may be a written contract, but under the traditional statutory language any writing, formal or informal, may be sufficient . . .”).

<sup>217</sup> See discussion *supra* Section I.B.2.c.

<sup>218</sup> See discussion *supra* Sections I.B.2.d–e.

<sup>219</sup> See *supra* notes 123–124 and accompanying text.

words,<sup>220</sup> the parties might not contemplate every minute detail. Likewise, when referring back to the writing years later to resolve a dispute, the parties themselves may not recall the meaning which they associated to a particular emoji.<sup>221</sup> Therefore, the clarifying and referential functions of the statute of frauds are not completely satisfied when emojis are used.

### C. *Following Precedent*

Courts have yet to decide any cases involving emojis and the statute of frauds. Nevertheless, in order to predict how a court would conclude when facing the question of whether emojis satisfy the statute of frauds, it may be helpful to see how courts in the past have applied the statute of frauds to other advancements in communications. However, it is important to note that this approach is limited; while past courts have applied the statute to novel devices and methods with which to create a writing,<sup>222</sup> no previous court has dealt with an innovation in the type of characters used in the writing.

One recurring line of reasoning, which courts in the past applied to determine that various advancements were sufficient methods by which to satisfy the statute of frauds, is the widespread use of each of those advancements.<sup>223</sup> Courts reasoned that when a method of writing becomes widely used, it would be detrimental to the advancement of business to hold that such method is precluded from satisfying the

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<sup>220</sup> See *supra* notes 54–65.

<sup>221</sup> See *supra* notes 127–128 and accompanying text.

<sup>222</sup> See *supra* note 129 and Section I.B.3.

<sup>223</sup> See, e.g., *Naldi v. Grunberg*, 908 N.Y.S.2d 639, 647 (App. Div. 2010) (“[G]iven the vast growth in the last decade and a half in the number of people and entities regularly using e-mail, we would conclude that the terms ‘writing’ and ‘subscribed’ in [New York’s statute of frauds] should now be construed to include, respectively, records of electronic communications and electronic signatures . . . .”); *Joseph Denunzio Fruit Co. v. Crane*, 79 F. Supp. 117, 128–29 (S.D. Cal. 1948) (“The court must take a realistic view of modern business practices, and can probably take judicial notice of the extensive use to which the teletype machine is being used today among business firms . . . . The point appears to be a *res nova*, but this court will hold that the teletype messages in this case satisfied the Statute of Frauds in California.”); *La Mar Hosiery Mills, Inc. v. Credit & Commodity Corp.*, 216 N.Y.S.2d 186, 190 (N.Y. City Ct. 1961) (“In view of the way in which business is done nowadays, any other view would be unrealistic and would produce pernicious consequences, impeding the conduct of business transactions.” (citing *Howley* and *Selma Savings Bank*)).

statute.<sup>224</sup> Courts were therefore willing to construe the statute to include the use of widespread advancements.<sup>225</sup>

In following with this line of reasoning, the statute of frauds should be construed to accommodate emojis as well. The use of emojis is now widespread,<sup>226</sup> even amongst people communicating for the purpose of conducting business.<sup>227</sup> Although emojis do not necessarily offer the same benefit that past communicative innovations did, namely, the ability to speed up business transactions by allowing for rapid communication without the burden and expense of paper, emojis contribute to electronic communications in other ways.<sup>228</sup> The benefits that emojis offer are as valuable in business communications as they are in any other communications.<sup>229</sup> It would therefore be detrimental to the advancement of business to eliminate emojis from communications in order to satisfy the statute of frauds. A court might therefore construe the statute of frauds to allow emojis.

### III. PROPOSAL

Legislatures need to revisit the statute of frauds in this modern world where emojis are increasingly making their way into contracts. Were legislatures to leave it to courts to decide whether emojis satisfy the statute

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<sup>224</sup> See, e.g., *La Mar Hosiery Mills, Inc.*, 216 N.Y.S.2d at 190 (“In view of the way in which business is done nowadays, any other view would be unrealistic and *would produce pernicious consequences, impeding the conduct of business transactions.*” (emphasis added) (citing *Howley and Selma Savings Bank*)).

<sup>225</sup> *Id.*

<sup>226</sup> See sources cited *supra* note 39.

<sup>227</sup> See generally Elana Lyn Gross, *How Emojis Have Made Their Way into Business :-)*, FORBES (Dec. 15, 2017, 12:06 PM), <https://www.forbes.com/sites/delltechnologies/2017/12/15/how-emojis-have-made-their-way-into-business/#111935d322bd> [<https://perma.cc/4KTG-Q53W>]; see also Brian Solis, *Domino’s Pizza Serves Up Innovations in Customer Experience (CX) to Drive Business Growth*, FORBES (Aug. 15, 2018, 11:52 AM), <https://www.forbes.com/sites/briansolis/2018/08/15/dominos-pizza-serves-up-innovations-in-customer-experience-cx-to-drive-business-growth/#748ba8408bdb> [<https://perma.cc/R5U7-BSEC>] (showing that Domino’s Pizza allows customers to order pizza by sending a pizza emoji).

<sup>228</sup> For example, emojis help people communicate more efficiently and relate to younger demographics. See *supra* text accompanying note 17.

<sup>229</sup> For example, see *supra* notes 33 and 48.

of frauds, legitimate contracts may be rendered legally unenforceable<sup>230</sup> and the uncertainty that would result until courts come to a consensus might hinder the use of emojis in business negotiations and the benefits that come with it.<sup>231</sup> As occurred with emails,<sup>232</sup> it might take a while for courts to accept emojis as writing due to courts' unwillingness to adapt to technological advancements. Furthermore, different courts might take different approaches, and as with emails,<sup>233</sup> even the same court might reverse its holding as emojis continue to grow in popularity and quantity. Thus, it would be beneficial for legislatures to provide clarity on this inevitable question.

Those scholars who have argued in the past for a complete repeal of the statute<sup>234</sup> might use this new challenge to the statute of frauds to rejuvenate their efforts. However, despite their push to repeal the statute practically each time the statute faced a challenge,<sup>235</sup> the statute of frauds remains very much alive in the United States.<sup>236</sup> It is apparent that legislators in the United States believe that the value which the statute brings<sup>237</sup> outweighs whatever challenges come along with it. Thus, it is unlikely that this modern challenge is going to cause legislatures to finally repeal the statute.

State legislatures could amend their respective statutes to explicitly provide that emojis constitute writings. Doing so would obviously allay any concern that a court would come to the opposite conclusion. This approach can be justified by showing how the statute's intended function and many of the statute's ancillary functions are satisfied where a contract contains emojis.<sup>238</sup> This approach can be further justified by showing how

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<sup>230</sup> See generally Szafran, *supra* note 170, at 494 n.14.

<sup>231</sup> For example, see *supra* note 48.

<sup>232</sup> Email became a popular method of communication in the 1990s. See *A Brief History of Email*, PHRASEE (Mar. 10, 2016), <https://phrasee.co/a-brief-history-of-email> [<https://perma.cc/47N3-FTEZ>]. However, as late as 2008, courts were still grappling with the issue. See *Gleneagle Civic Ass'n v. Hardin*, 205 P.3d 462, 467 (Colo. App. 2008) (noting that it is an unsettled question of law).

<sup>233</sup> See *supra* note 178.

<sup>234</sup> See *supra* note 96 and accompanying text.

<sup>235</sup> See, e.g., Szafran, *supra* note 170.

<sup>236</sup> See *supra* note 97 and accompanying text.

<sup>237</sup> See *supra* text accompanying notes 98–128.

<sup>238</sup> See *supra* text accompanying notes 203–217.

the statute was construed throughout history to allow for various advancements in technology.<sup>239</sup>

However, contracts containing emojis do not serve an underlying reason for the statute of frauds—the prevention of disputes. Each of the functions of the statute are in reality just a means of preventing disputes. The psychological function decreases the likelihood of dispute by discouraging a contracting party from abandoning a promise simply because it is no longer beneficial.<sup>240</sup> Likewise, the earmarking and classifying functions prevent disputes from arising by way of one party denying that it intended to be bound by a contract.<sup>241</sup> The cautionary function ensures that each party understands the ramifications of the agreement which it is entering and will not come to dispute it later on.<sup>242</sup> The clarifying function's stated purpose is to do just this: to prevent disputes before they arise by ensuring that both parties are on the same page about the agreement.<sup>243</sup> Finally, the referential function helps parties resolve disputes on their own without the need to go to court.<sup>244</sup>

Contracts containing emojis are likely to escalate disputes. Due to their many meanings,<sup>245</sup> the different uses by people of different cultures<sup>246</sup> and ages,<sup>247</sup> and the lack of uniformity in their appearance across digital platforms,<sup>248</sup> emojis make it almost certain that parties will misunderstand—or claim to misunderstand—each other and the agreement that they are entering into.<sup>249</sup>

In light of the confusion that will inevitably occur if legislatures take no action, and in light of the multitude of disputes that will arise if emojis are allowed to constitute a writing, state legislatures should amend their statutes to provide that a contract written with emojis does not satisfy the statute of frauds. Such legislation is certain to clear up any questions that

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<sup>239</sup> See *supra* text accompanying notes 130–185 and 223–225.

<sup>240</sup> See discussion *supra* Section I.B.2.a.

<sup>241</sup> See discussion *supra* Section I.B.2.b.

<sup>242</sup> See discussion *supra* Section I.B.2.c.

<sup>243</sup> See discussion *supra* Section I.B.2.d.

<sup>244</sup> See discussion *supra* Section I.B.2.e.

<sup>245</sup> See *supra* notes 56–66 and accompanying text.

<sup>246</sup> See *supra* note 58.

<sup>247</sup> See *supra* note 57.

<sup>248</sup> See *supra* note 67–70 and accompanying text.

<sup>249</sup> In this regard, it may be said that the problem with emojis is that a picture is worth a thousand words.



people have when creating future contracts and puts people on notice that their communications with their business associates should not include emojis.

#### CONCLUSION

Due to the polysemic nature of emojis and their lack of uniformity across platforms, a contract written with emojis undermines the purpose of requiring a writing. The underlying purpose of the statute is to prevent disputes, and contracts containing emojis are likely to generate disputes. Therefore, the legislature of each state should amend its statute of frauds to provide that emojis do not constitute “writing.”