North Dakota Law Review

Volume 93 | Number 2 Article 4

1-1-2018

Adopted Statements in the Digital Age: Hearsay Responses to Social Media "Likes"

Daniel R. Tilly

ADOPTED STATEMENTS IN THE DIGITAL AGE: HEARSAY RESPONSES TO SOCIAL MEDIA "LIKES"

DANIEL R. TILLY*

ABSTRACT

Social media users collectively register billions of "likes" each and every day to the endless flow of content posted on social networking websites. What an individual user actually intends by the quick click of the "like" button may vary widely. Perhaps she is conveying acknowledgement but not agreement. Maybe he is expressing support but not acceptance. Within the social media context, short-form clicks register the same response. Yet they may be intended to convey sorrow, joy, support, agreement, acknowledgement, humor, or a multitude of other emotions. What a user actually intends by social media "likes" depends entirely on the person and the post. In the evidentiary context of hearsay, however, the intent a user may be held to have manifested by "liking" online content has significant legal consequences.

This Article addresses the nuanced question of applying social media "likes" to traditional rules governing the manifestation of adoptive statements in the hearsay context. It focuses on whether a "like" is a tacit adoption of the post itself or a far more casual and less concrete response that fails to manifest adoptive intent without more. Should a statement that would otherwise be excluded as the hearsay statement of a third party nonetheless be admitted as the statement of the individual who merely "liked" the comment? Does a single click manifest a belief in the truth of the online content? Or is a "like" merely an acknowledgement – the online equivalent of a shrug and nod – without more? How does a court discern this question when faced with the offer? This Article endeavors to answer these questions while offering courts and practitioners alike a functional analysis for determining whether social media "likes" may be deemed adoptive statements under traditional hearsay orthodoxy.

---

*† Assistant Professor and Director of Advocacy, Campbell University School of Law. I am thankful to Zachary Bolitho, Lauren Fussell, Robert Galloway, Anthony Ghiotto, and Sarah Ludington for their insight and comments on earlier drafts of this Article. I am indebted to Hannah Wallace and Tyler Willis for their research assistance. I am deeply thankful for my journalist father, John R. Tilly. This Article is for Angela and the Tilly boys.

I. INTRODUCTION 279
II. OVERVIEW 282
III. MODERN SOCIAL NETWORKING 286
A. THE DEVELOPMENT OF SOCIAL NETWORKS 286
B. SOCIAL NETWORKING IN THE INTERNET AGE: INFANCY 289
C. SOCIAL NETWORKING WEBSITES EMERGE 291
D. FACEBOOK, ET AL. 293
E. THE UBIQUITOUS "LIKE" BUTTON 295
IV. HEARSAY AND ADOPTIVE STATEMENTS 300
A. TRADITIONAL HEARSAY ORTHODOXY 300
B. OPPOSING PARTY STATEMENTS EXEMPTED 304
C. ADOPTED STATEMENTS EXEMPTED 307
1. Traditional Interpretation of Adoptive Statements 307
a) Context and surrounding circumstances 308
b) What exactly did you mean by that? 312
c) Adoption in the face of ambiguity or equivocation? 314
2. Adoptive Statements in the Digital Age 317
V. THE MULTIFARIOUS MEANING OF A SOCIAL MEDIA "LIKE" 319
A. EMOTIONAL "LIKES" 324
B. AWKWARD "LIKES" 325
C. MULTIPLE ISSUE "LIKES" 327
D. SINGLE ISSUE "LIKES" 328
E. INCULPATORY "LIKES" 330
VI. "LIKES" AS INDEPENDENT STATEMENTS AND NON-HEARSAY USES 333
A. "LIKES" AS INDEPENDENT STATEMENTS 334
1. A *Bland* Analysis of "Likes" 335
2. Reconciling Bland and Standards Likes 337

B. NON-HEARSAY USES OF "LIKES" 337
1. "Likes" as Independent, Non-Hearsay Evidence 337
2. "Likes" as Circumstantial Evidence of State of Mind 339
VII. FACTORS FOR HARMONIZING HEARSAY AND SOCIAL MEDIA "LIKES" 341
A. AUTHENTICATION & ATTRIBUTION 342
B. HEARSAY V. NON-HEARSAY USE OF "LIKE" 344
C. FACTORS FOR EVALUATING "LIKES" AS MANIFESTING ADOPTIVE INTENT 345
VIII. CONCLUSION 353

I. INTRODUCTION

A 21-year-old young man armed with a semi-automatic assault rifle walks into a synagogue in Houston, Texas and opens fire. One by one he picks off terrified worshipers who are fleeing slower than his bullets fly. The carnage is catastrophic. His intentions are self-evident but his reasons are not. The assailant never says a word throughout the rampage. Emergency calls pour in to 911. SWAT teams deploy at once. After a six-hour standoff, the young man is captured and taken into custody. He refuses to speak with law enforcement and demands legal counsel.

State and federal prosecutors begin piecing together a profile of this disturbed individual; civil litigators contacted by families of the victims commence claim evaluations. Everyone involved is seeking an answer to the question, "Why?" The assailant's intent and motive are critical to the legal claims that will be brought against him. Prosecutors, in particular, are keen on pursuing hate crime charges in addition to murder and attempted murder.

Investigators search the assailant's apartment where they discover a personal computer. Subsequent forensic computer analysis reveals the assailant became deeply entrenched in online social media in the years preceding his attack. He is "friends" with several hundred individuals on Facebook and has joined several groups on the website. His Facebook connections vary widely from public figures and celebrities to sports teams and online gamers. Curiously, investigators note a few are anti-Semitic hate groups while others are progressive organizations. His Instagram, Twitter, and Snapchat accounts are similarly dichotomous, revealing he follows neo-

Nazi individuals alongside civil liberties groups. He appears equally enamored by all forms of protest and dissent.

Notably, investigators discover the assailant rarely posted his own thoughts online. His social media accounts are devoid of individual photos or commentary. However, investigators find the assailant voraciously "liked" or "reacted" to posts, comments, and photos posted on social media by those he followed. Consistent with his online connections, his likes and reactions span an array of topics and genres including music, guns, drugs, politics, and religion. Some within this cache of electronic evidence, however, include "likes" to anti-Semitic posts, including one recent "like" to a comment posted by a self-avowed white supremacist denouncing the Jewish faith.

Prosecutors seek to offer the anti-Semitic comments, photos, and memes posted by other individuals that were "liked" by defendant on his social media accounts. They assert the defendant's online reactions to these posts manifested his adoption of their content such that they are effectively his own statements and may be used against him. Defense counsel vigorously object, maintaining these statements are rank hearsay made and posted by other individuals and not the defendant. They assert a "like" to an online post does not and cannot rise to the level of manifest self-adoption required for attributing a hearsay statement to another given the multitude of potential reasons an individual may "like" a social media post. Moreover, they note prosecutors are selectively cherry-picking from the defendant's social media accounts while ignoring the vast number of "likes" the defendant made to countless other posts, including progressive organizations. Finally, they claim the nature of social media as an organic online forum compels users to click the "like" button for innumerable reasons and therefore are not implicit adoptions of the online content "liked." The senior judge assigned to the case admits that, while he is well versed in traditional hearsay rules, he has little experience applying them in the context of online communication. He instructs the parties to brief the issue.

The rapid emergence of social media over the past decade has largely changed the landscape of interconnectivity and communication between modern, online participants.[1] As the technology to connect through online social platforms has emerged, so too has a distinct culture, community, and

1. Jeffrey Bellin, *Applying Crawford's Confrontation Right in a Digital Age*, 45 TEX. TECH. L. REV. 33, 35-36 (2012).

manner of communicating.[2] In historical context, an individual placing a "I like Ike" sign in their front yard could clearly be said to manifest the intent to nominate General Dwight D. Eisenhower for President. The question of whether an online "like" carries equal meaning is far more opaque. In fact, the intent conveyed by online "likes" is distinctly more nuanced in the online environment than in traditional communication. Several factors contribute to this reality. Social media platforms often offer few options for expressing responses to online posts.[3] Clicking the "like" button is simple and fast for users.[4] The sheer volume of social media content makes individual comment less practical.[5] And user movement toward mobile devices and away from computer keyboards tends to compel simple responses.[6] Thus, whether a "like" is an outright endorsement of the post, a tacit acceptance, an acknowledgment that the post has been seen, or something in between, significantly impacts whether the action itself can be considered manifesting an adoption of the posted content in the hearsay context.

Because social media has become so remarkably ubiquitous in modern culture, participants now reveal significant personal information about their

2. Ronald Brownstein, *How Has Technology Changed the Concept of Community?*, THE ATLANTIC (Oct. 10, 2015), https://www.theatlantic.com/technology/archive/2015/10/community-in-the-digital-age/408961/; Megan Garber, *What Does 'Community' Mean?*, THE ATLANTIC (July 3, 2017), https://www.theatlantic.com/entertainment/archive/2017/07/what-does-community-mean/532518/.

3. *See, e.g.*, TUMBLR, http://www.tumblr.com (limiting user responses to reposts or "likes"), TWITTER, http://twitter.com (offering users the option of reposting, liking, or commenting in 140 characters or less), LINKEDIN, http://www.linkedin.com (offering only binary options of "likes" or comments), and FACEBOOK, http://www facebook.com (permitting users to "like," react, comment or share).

4. *Like and React to Posts*, FACEBOOK HELP CENTER, https://www facebook.com/help/1624177224568554/?helpref=hc_fnav (last visited Nov. 7, 2017).

5. *See, e.g.*, *Facebook Reports Third Quarter 2017 Results*, FACEBOOK INVESTOR RELATIONS (Nov. 1, 2017), https://investor fb.com/investor-news/press-release-details/2017/Facebook-Reports-Third-Quarter-2017-Results/default.aspx (stating as of September 2017, Facebook averaged 1.37 billion daily active users); Twitter Inc., *Twitter turns six*, TWITTER OFFICIAL BLOG (Mar. 12, 2012), https://blog.twitter.com/official/en_us/a/2012/twitter-turns-six html (claiming a total of 140 million active Twitter users a day and 340 million Tweets a day); INSTAGRAM BUSINESS, https://business.instagram.com (last visited Nov. 8, 2017) (stating 500 million Instagram accounts are active every day). With this massive number of people using social media and posts each day, it is easier to respond to a friend's post by "liking" it with just one click than it is taking the time to type out a comment.

6. *See, e.g.*, Amanda Lenhart, *Mobile Access Shifts Social Media Use and Other Online Activities*, PEW RESEARCH CENTER (Apr. 9, 2015), http://www.pewinternet.org/2015/04/09/mobile-access-shifts-social-media-use-and-other-online-activities/#fn-13249-4 ("The survey shows that 91% of teens go online from a mobile device, at least occasionally.").

thoughts, opinions, and interests.[7] This phenomenon has resulted in a treasure trove of data for criminal and civil litigants.[8] However, in order to attribute the statements, comments, photos, and other social media actions of one party to another under hearsay standards, the true intent behind the actions of "liking" the same must first be determined.[9] The simplistic approach to assuming that a "like" manifestly means the adoption of a statement wholly ignores the nature of the medium and the multitude of reasons behind the simple click of a button.[10]

II. OVERVIEW

The advent of online social networking has radically transformed the manner in which humans interact. What began around the turn of this century as a small niche community has evolved into billions of people networking online through social media.[11] Facebook, Instagram, Twitter, LinkedIn, and other social media platforms enable interpersonal communication among

7. Dimitris Gritzalis, Miltiadis Kandias, Vasilis Stavrous, & Lilian Mitrou, *History of Information: The Case of Privacy and Security in Social Media*, at 2-3 (2014), https://www.infosec.aueb.gr/Publications/INFOHIST-2014%20Legal%20Publications.pdf.

8. Megan Uncel, Comment, *"Facebook is Now Friends with the Court": Current Federal Rules and Social Media Evidence*, 52 JURIMETRICS J. 43, 44 (2011) (observing that "[p]ictures or postings on social media may not be the smoking gun that every Perry Mason hopes for, but they can be extremely helpful in litigating both civil and criminal cases."); Sublet v. State, 113 A.3d 695, 711-12 (Md. 2015) (observing that "[s]ocial networking material provides fodder for civil disputes and defenses, as well as proof of violations of criminal laws."); Lawrence Morales II, *Social Media Evidence: "What you post or Tweet can and will be used against you in a court of law"*, 60 THE ADVOC. (TEXAS) 32, 32 (2012).

9. *See* FED. R. EVID. 801(a) ("'Statement' means a person's oral assertion, written assertion, or nonverbal conduct, *if the person intended it as an assertion*." (emphasis added)). Olivia A. League, Note, *Whether You Like it or Not Your "Likes" are Out: An Analysis of Nonverbal Internet Conduct in the Hearsay Context*, 68 S.C. L. REV. 939, 946 (2017) ("[U]nderstanding what a Facebook "like" is, and what it means to "like" a Facebook page or post is important in determining whether this activity, and other types of nonverbal Internet conduct, qualify as hearsay.").

10. *See What does it mean to "Like" something?,* FACEBOOK HELP CENTER, https://www facebook.com/help/110920455663362?helpref=uf_permalink (last visited Nov. 8, 2017) (explaining that a "like" is "an easy way to let people know that you enjoy it without leaving a comment."). This definition of a "like" is vague and a person can "enjoy" a post for various reasons. *See also* Brian Hanley, *12 Reasons Why People Like Your Posts on Social Media*, HUFFINGTON POST (Sept. 22, 2014), https://www.huffingtonpost.com/brian-hanley/12-secret-reasons-why-peo_b_5614316 html.

11. *See generally* Facebook's Form S-1 Registration Statement, at 43 (Feb. 1, 2012) https://www.sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1 htm#toc287954_3a (illustrating the growth of monthly active users on Facebook from its creation in 2004 to 2011 with 845 million monthly active users); Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 3-7 (2012) (tracking the rise of social media in the United States for various sites such as Facebook, Twitter, Tumbler, and LinkedIn).

friends and associates while increasingly offering users individual platforms for self-expression.[12] Social networking websites afford users the opportunity to chronicle their activities, opinions, and emotions for friends to see.[13] Synchronously, users can comment on their followers' thoughts, expressions, and activities.[14] They may share an online friend's post, offer personal commentary on a video clip, or express a "like" or "reaction" to an amusing photo.[15] In this way, social networking participants routinely reveal their personality to the larger world – their thoughts, locations, actions, and opinions are often freely expressed for anyone to see.[16] By doing so, social networking participants offer a previously unavailable view into their daily lives.[17] Within the legal system, the transference of offline behavior to online social networking websites has proven to be a wellspring of personal information to both prosecutors and civil litigants.[18] It also has raised

12. *See* Chip Babcock & Luke Gilman, *Use of Social Media in Voir Dire*, 60 THE ADVOC. (TEXAS) 44, 44 (2012) ("Self-expression is the hallmark of social media, whatever its particular form—ranging from relationship-centered cites such as Facebook, MySpace, or Linkedin to content sharing sites like YouTube, Flickr, or Instagram, or hybrids such as Twitter or Google Plus."); *Your Profile and Settings*, FACEBOOK HELP CENTER, https://www facebook.com/help/239070709801747?helpref=popular_topics (last visited Nov. 8, 2016) ("Your profile tells your story. You can choose what to share, such as interests, photos and personal information like your hometown, and who to share it with.").

13. *See, e.g.*, *Share and Manage Posts on Your Timeline: How do I share my feelings or what I'm doing in a status update?*, FACEBOOK HELP CENTER, https://www facebook.com/help/1640261589632787/?helpref=hc_fnav (last visited Nov. 8, 2017); *Getting started with Twitter*, TWITTER, https://support.twitter.com/articles/215585 (last visited Nov. 8, 2017).

14. *How do I comment on something I see on Facebook?*, FACEBOOK HELP CENTER, https://www facebook.com/help/187302991320347?helpref=search&sr=1&query=comment (last visited Nov. 8, 2017); TWITTER, *supra* note 3 (allowing users to reply to tweets); INSTAGRAM, https://www.instagram.com (last visited Nov. 8, 2017) (allowing users to comment on posts).

15. FACEBOOK, *supra* note 3 (permitting users to share, comment on, "like," and "react" to friends' posts).

16. Uncel, *supra* note 8, at 44 (noting that "it is shocking how some social networking users so casually and unwittingly post personal information about themselves."); *see also* Gritzalis et al., *supra* note 7, at 2.

17. *See, e.g.*, Ana Homayoun, *The Secret Social Media Lives of Teenager*, N.Y. TIMES (June 7, 2017), https://www nytimes.com/2017/06/07/well/family/the-secret-social-media-lives-of-teenagers html (discussing how social media reveals secret lives of students that they would not broadcast to the world. For example, the author mentions how Harvard University revoked admission offers for ten students who posted offensive content to their social media in 2017.).

18. Kathryn Kinnison Van Namen, Comment, *Facebook Facts and Twitter Tips—Prosecutors and Social Media: An Analysis of the Implications Associated with the Use of Social Media in the Prosecution Function*, 81 MISS. L.J. 549 (2012); Agnieszka A. Mcpeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 WAKE FOREST L. REV. 887 (2013); Babcock, *supra* note 12; Sublet v. State, 113 A.3d 695 (Md. 2015).

significant questions concerning the meaning attributable to social networking "likes" and the admissibility of the underlying content.[19]

As with most first-generation technology, early social networking websites were rudimentary.[20] They offered users a basic portal for connecting with existing friends but little more.[21] As social networking websites increased in popularity, their features evolved to meet user demands.[22] Photos, videos, live streaming, and an array of features for self-expression began to define the social networking landscape.[23] Today, social networking platforms are sophisticated, user-friendly media for participants to communicate and exchange a vast array of personal, political, and societal information in a fluid environment.[24] Within this environment, users are empowered – if not directly encouraged – to react to content posted by other friends and followers through quick, short-form responses.[25] Often, this comes in the form of a "like" or a "reaction" to a social media post.[26] Users can register their support, acknowledgement, or interest with a simple computer click or mobile tap. Facebook developed these short-form devices for users to respond easily to the onslaught of user-generated posts continuously flowing into its site.[27] The now ubiquitous "like" button

19. Thaddeus Hoffmeister, *"Liking" the Social Media Revolution*, 17 S.M.U. SCI. & TECH. L. REV. 507 (2004); Molly D. McPartland, Note, *An Analysis of Facebook "Likes" and Other Non-verbal Internet Communication Under the Federal Rules of Evidence*, 99 IOWA L. REV. 445 (2013).

20. *Then and now: a history of social networking sites*, CBS NEWS, https://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites/ (last visited Nov. 8, 2017).

21. *Id.*

22. *Id.*

23. *See, e.g.*, TWITTER, *supra* note 3 (offering users the option of posting videos, photos, and words), FACEBOOK, *supra* note 3 (permitting users to post photos, live stream, and upload videos), INSTAGRAM, *supra* note 14 (provides users with options of posting photos, uploading videos, live streaming, and commenting).

24. Drew Hendricks, *Complete History of Social Media: Then and Now*, SMALL BUSINESS TRENDS (May 8, 2013), https://smallbiztrends.com/2013/05/the-complete-history-of-social-media-infographic html.

25. Sammi Krug, *Reactions Now Available Globally*, FACEBOOK NEWSROOM (Feb. 24, 2016), https://newsroom fb.com/news/2016/02/reactions-now-available-globally/ stating:

> We've been listening to people and know that there should be more ways to easily and quickly express how something you see in News Feed makes you feel. That's why today we are launching Reactions, an extension of the Like button, to give you more ways to share your reaction to a post in a quick and easy way.

See also Drew Moxon, *Introducing Message Reactions and Mentions for Messenger*, FACEBOOK NEWSROOM (Mar. 23, 2017), https://newsroom fb.com/news/2017/03/introducing-message-reactions-and-mentions-for-messenger/.

26. *See Like and React to Posts*, *supra* note 4.

27. *Id.*

officially launched on Facebook's social networking website in 2009.[28] With its advent, Facebook created a digital tool for its network of interconnected users – friends and followers – to offer a shorthand commentary through the simple click of a "like" or "reaction" button.[29] No longer constrained to writing long-form comments to offer a response, Facebook users could simply click a "like" button and then move along to other content.[30] Today, the "like" button is spread across the social media spectra having been adopted by a host of social media platforms as a simple communicative tool for online users.[31]

The simple expression afforded by the "like" button does not, however, transfer easily into traditional rules of hearsay and adoptive statement evidence. Under the *Federal Rules of Evidence*, statements made by third parties are not excluded by traditional hearsay orthodoxy when offered against an opposing party who adopted the statement.[32] For an adopted statement to be attributable to an opposing party, the party must have "manifested that it adopted or believed [the statement] to be true."[33] Whether an opposing party has *manifested* an adoption or belief in the truth of a statement she herself did not make is a tricky question indeed.[34] It becomes even more so in the context of social media "likes."[35] Is an online "like" the same as the traditional expression associated with liking something or someone? What is being manifested by the click of a social media "like?" And does that correspond well with historical modes of evidence rules adopted in an age prior to the modern usage and parlance of social networking communication? Once authenticated, an individual's electronic mail, messages, comments, and stated opinions may be subject to traditional questions of hearsay.[36] But what about in the context of short-form clicks on

28. Jason Kincaid, *Facebook Activates "Like" Button; FriendFeed Tires of Sincere Flattery*, TECHCRUNCH (Feb. 9, 2009), https://techcrunch.com/2009/02/09/facebook-activates-like-button-friendfeed-tires-of-sincere-flattery/.

29. *See Like and React to Posts*, *supra* note 4.

30. *Id.*

31. *See, e.g.*, TWITTER, *supra* note 3 (offering a heart icon as a "like" button), INSTAGRAM, *supra* note 14 (offering a heart icon as a "like" button), TUMBLER, *supra* note 3 (also offering a heart icon as a "like" button); FACEBOOK, *supra* note 3 (offering "like" and "reactions").

32. FED. R. EVID. 801(d)(2)(B).

33. *Id.*

34. *See, e.g.*, Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. LOUISVILLE L. REV. 21 (2008); Bret Ruber, *Adoptive Admissions and the Duty to Speak: A Proposal for an Appropriate Test for the Admissibility of Silence in the Face of an Accusation*, 36 CARDOZO L. REV. 299 (2014).

35. *See* Dylan Charles Edwards, *Admissions Online: Statements of Party Opponent in the Internet Age*, 65 OKLA. L. REV. 553 (2013); League, *supra* note 9, at 946.

36. Steven Goode, *The Admissibility of Electronic Evidence*, 29 REV. LITIG. 1 (2009).

the opinions, comments, photos, and status of another? Are "likes" tantamount to adoptions of the litany of content users spread throughout social media and on social networking websites? Or is a "like" a casual response that affords little affirmative intent to adopt the very thing being "liked?" With scant case law addressing this issue, an opportunity exists to shape this question on the front end rather than the back.

This Article explores the minefield of treating an individual's social media "likes" as manifestly adopting the truth of the litany of comments, opinions, and content placed within the online social environment for hearsay exemption purposes. It concludes by offering the Bench and Bar an analytical framework for conducting this discreet analysis. Part III offers a historical overview of social networking before exploring the rise of Internet social media, the "like" button, and the prevailing use of "likes" within online social networks today. Part IV addresses adoptive statements under the *Federal Rules of Evidence* and traditional norms for parties manifesting an adoption or belief in the veracity of third-party statements. Part V explores the "like" button and its awkward application to varying social media posts when analyzing the intent a user may or may not manifest in "liking" social media content. Part VI considers "likes" as creating independent statements exempt from hearsay and other contexts wherein "likes" bear evidentiary force excusive of hearsay strictures. Finally, Part VII harmonizes hearsay orthodoxy and online "likes" by offering specific factors for courts and practitioners to apply when offering hearsay statements as adoptive admissions of a party opponent who has merely "liked" social media content.

III. MODERN SOCIAL NETWORKING

A. THE DEVELOPMENT OF SOCIAL NETWORKS

The Internet age has enabled an array of communication platforms previously unimagined while forming the architecture for modern social media.[37] Social groups of every persuasion can be found by simply wandering across the Internet with a few keystrokes and an imagination. Social networking through interconnected groups is not, however, unique to contemporary human interaction.[38] People have engaged in religious, political, and social discourse for centuries by passing information thorough

37. JOSÉ VAN DIJCK, THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA 13 (2013).

38. TOM STANDAGE, WRITING ON THE WALL: SOCIAL MEDIA – THE FIRST 2,000 YEARS 3 (2013).

friends, confidants, and inner-circles.[39] In fact, the social media we know today traces its roots to systems employed by the Romans some 2000 years ago.[40] During that era, information passed through an elaborate interpersonal distribution network.[41] Copying, commenting, and sharing information by papyrus rolls circulated among friends and social circles kept information flowing throughout the Roman Empire and into the wider world.[42] At that time, Cicero was well known for distributing letters and speeches for subsequent consumption and comment by his friends and associates.[43] In the centuries to follow, social networks would, *inter alia,* circulate the apostle Paul's letters within the early Christian church,[44] disseminate Martin Luther's reformist teachings,[45] and spread the progressive, common-sense political writings of Thomas Paine throughout the American colonies.[46] Naturally, while traditional social networks served to spread information throughout the centuries, they were limited in effectiveness by both geography and communication media.

The advent of electronic connectivity radically altered information transfer and, over time, social networking. Samuel Morse's invention of the telegraph system in the early 1800s ushered in a profound new electronic medium for long distance communication and interconnectivity.[47] It also introduced the first modern forms of social networking. By the early 1850s, more than twelve thousand miles of networked wire had been installed throughout populated areas of the United States.[48] The first transatlantic cable linked the New and Old Worlds soon thereafter in 1858. Telegraph lines expanded their global reach into India and Australia by 1871.[49]

39. *Id*. (noting, *inter alia*, letters and documents circulated within the early Christian church, printed tracts at the beginning of the Reformation, gossip-laced poetry bandied in the Tudor and Stuart dynasties, and political pamphlets exchanged in the English Civil War and, later, the American Revolution).

40. *Id*.

41. *Id*. at 1, 21-26.

42. *Id.* at 1-2.

43. *Id*.

44. STANDAGE, *supra* note 38, at 42-47 (remarking that "the early church might be more accurately described as a community of letter-sharers" and that "Paul's letters were written to be copied and shared, and they were.").

45. *Id*. at 48-63.

46. *Id.* at 139-146.

47. *See* Monica Riese, *The Definitive History of Social Media*, THE DAILY DOT (Sept. 12, 2016, 12:00 AM), https://www.dailydot.com/debug/history-of-social-media.

48. STANDAGE, *supra* note 38, at 182.

49. WILLIAM J. BERNSTEIN, MASTERS OF THE WORD: HOW MEDIA SHAPED HISTORY FROM THE ALPHABET TO THE INTERNET 204 (2013).

Through these interwoven, transcontinental lines, information could be transmitted within minutes or hours rather than the weeks and months demanded by then-conventional means.[50] But the telegraph did more than just alter the speed in which information could be transmitted from once place to another. Along with revolutionizing communication from traditional paper and post, the telegraph system enabled the first form of electronic social networking.[51] Telegraph operators soon formed their own social groups over the lines despite being separated by hundreds and thousands of miles.[52] Operators played remote games, exchanged gossip, and chatted with one another over the interconnected web of telegraph wires linking them.[53] Much like the Internet a century and a half later, telegraphic communication spawned friendships and romantic relationships between users remotely connected by electronic means.[54]

Over the next century, the inventions of radio and television would transform our national culture. These media offered previously unseen mechanisms for rapidly communicating information, much like the telegraph before them.[55] Unlike the telegraph, though, radio and television created direct lines of communication into users' homes without the need for an office or operator to transmit messages.[56] Radio exploded in popularity once it emerged. In 1924, three million radios populated American homes.[57] That number would increase ten-fold to thirty million by 1936.[58] And a mere four years later that number had swelled to an astonishing fifty million sets.[59] During this period, Americans adopted electronic communication as the preferred method of receiving information.[60] By the mid-1930s, the average American shifted to spending more time listening to the radio than reading

50. *Id.*

51. STANDAGE, *supra* note 38 at 183 (noting that "[t]elegraphers were members of the world's first online community, in instant contact with distant colleagues."); *See* Liesa L. Richter, *Don't Just Do Something!: E-hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process*, 61 AM. U. L. REV. 1657, 1672 (2012) (hereinafter Richter, *Don't Just Do Something!)*.

52. STANDAGE, *supra* note 38, at 183.

53. *Id.*

54. *Id.*

55. *Id*. at 3-4.

56. *Id.*

57. BERNSTEIN, *supra* note 49, at 235.

58. *Id.*

59. *Id.*

60. *Id.*

newspapers.[61] The direct access to music and entertainment offered by radio penetrating directly into living rooms was unheard of previously. As one author noted, "[i]n our current information-soaked age, it is difficult to imagine the thrill of bringing Jack Benny, Fred Allen, and Bob Hope into the living room for the first time, let alone a onetime event like the Joe Louis – Max Schmeling boxing match."[62] Yet, while radio and television radically altered the spread of information and entertainment into American households, neither enabled vast networks for social engagement between users.[63] The influence of radio and television on national politics, war, and entertainment cannot be understated. But at their core they are one-way communications media that require no input on the part of the receiver.[64] In this sense, TV has been vilified for creating a culture of socially reclusive "couch potatoes" who passively consume ever-larger hours of content.[65] Thus, while these electronic formats offered a means for distributing content to mass audiences, the masses themselves did not have a mechanism for electronic interconnectivity. This radically changed with the Internet's ability to connect billions of people worldwide.

B. SOCIAL NETWORKING IN THE INTERNET AGE: INFANCY

While social networking is deeply rooted in history and the human desire to connect, a single platform capable of linking billions of individuals together simultaneously simply did not exist until recent modern history. That changed at the close of the second millennium with the advent of the Internet. In 1969, researchers working with the Advanced Research Projects Agency (ARPA) used packet switch technology to link computer mainframes at UCLA and Stanford.[66] ARPANET sprang to life with two simple keystrokes. A mere five years later, this precursor to the Internet networked research mainframes from coast to coast and across the Atlantic. Once started, building the web of networked computers proceeded in earnest. By the early 1980s, packet switching technology had been replaced by an internetwork protocol system that more easily linked networks through what

61. *Id.* (observing, in fact, that "[b]y the 1930s, the average American spent more hours listening to the radio than reading newspapers or attending movie theaters, concerts, and plays combined; social workers reported that families did without beds and iceboxes to purchase a radio set.").

62. *Id.*

63. *See, e.g.*, *id*. at 220 (describing both radio, and later, television as "one-way media").

64. *Id.*

65. *Id.*

66. STANDAGE, *supra* note 38, at 214-215.

was known as "internetting."[67] At this point, the Internet was well underway. But during this early stage its use was severely limited to the few privileged academic users who had access.[68] Two critical roadblocks to widespread public use stood in the way. While the number of networked computers continued to expand, a standardized language for exchanging information between different computers was unknown and web browsers had not yet been developed.

In 1990, British scientist Tim Berners-Lee conceived WorldWideWeb, a program originally designed to connect scientists and researchers across a variety of computer systems.[69] WorldWideWeb revolutionized computer networking by utilizing hypertext, a standardized computer language for formatting (HTML) and delivering (HTTP) documents across an array of networks. This underlying technology would quickly expand far beyond the academic realm and into mainstream society. The HTML and HTTP protocols continue to underpin the Internet.[70] In doing so, Berners-Lee is credited with developing the first web browser.[71] His invention was quickly adapted to mainstream computers. In 1993, Marc Anderson and Eric Bina developed the Mosaic web browser for PC and Apple computers utilizing Berners-Lee's hypertext language.[72] Anderson then cofounded Netscape Communications and released "Netscape Navigator," which quickly became the web browser of the world as the online population exploded from approximately five million users in 1991[73] to two hundred and fifty million by the start of the new millennium.[74] Access to the Internet has grown exponentially since the development of WorldWideWeb in 1990. The number of Internet users crossed the one billion threshold in 2005.[75] Today, there are more than three and a half billion Internet users worldwide.[76] Consistent with historical norms of human behavior, Internet users immediately began social interactions online. Electronic mail, weblogs, and

67. *Id.* at 217-219.

68. *Id*. at 221.

69. *Id*. at 222.

70. GRAHAM MEIKLE & SHERMAN YOUNG, MEDIA CONVERGENCE: NETWORKED DIGITAL MEDIA IN EVERYDAY LIFE 19 (2012).

71. STANDAGE, *supra* note 38 at 223.

72. *Id.*

73. *Id.* at 224 (noting that, overall, most of these individual users were academics).

74. *Id.*

75. Jakob Nielsen, *One Billion Internet Users*, NNG (Dec. 19, 2005), https://www nngroup.com/articles/one-billion-internet-users/.

76. *Internet Users*, INTERNET LIVE STATS, http://www.internetlivestats.com/internet-users/ (last visited Mar. 23, 2018).

list-servers were the first new communication platforms of enabled communication ushered into mass use by the Internet.[77] Soon thereafter, the first websites solely devoted to social networking emerged – bringing short-form methods of communicating emotion along with them and a host of previously unheard of evidentiary issues.

C. SOCIAL NETWORKING WEBSITES EMERGE

As the Internet rapidly expanded in the 1990s, the first social networking websites emerged to connect its growing number of users. The first of these was SixDegrees.com.[78] Launched in 1997, the site allowed users to create personal profiles, link with existing friends, create groups, and view other user profiles.[79] Its "friend" concept encouraged users to network with individuals multiple degrees removed from their existing friends, family and acquaintances.[80] SixDegrees crested at three and a half million users before being sold in 1999[81] and eventually abandoned by users for other platforms.[82] The "friend" concept, however, survived in various iterations in many subsequent social networking sites.[83]

In 2002, Friendster initially carried the friend model forward with its "circle of friends" concept, networking individuals who shared common bonds.[84] The site attracted three million users in its first year of operation.[85] Online networking quickly gained popularity as users flocked to socialize. The only question became the preferred platform users chose to connect,

---

77. DIJCK, *supra* note 37, at 5.

78. DANA BOYD & NICOLE ELLISON, SOCIAL NETWORK SITES: DEFINITION, HISTORY AND SCHOLARSHIP 214 J. OF COMPUTER-MEDIATED COMM. (2008).

79. *Id.*; *see also* Saqib Shah, *The History of Social Networking*, DIGITAL TRENDS (May 14, 2016, 6:00 AM), https://www.digitaltrends.com/features/the-history-of-social-networking/.

80. *Id.*

81. Ash Read, *A Brief History of Social Media (The Stuff You Probably Didn't Already Know) and 4 Predictions on its Future*, BUFFER SOCIAL (Nov. 10, 2015, last updated Jan. 27, 2016), https://blog.bufferapp.com/history-of-social-media.

82. BOYD & ELLISON, *supra* note 78 (noting the collapse of SixDegrees has been attributed to a multitude of possibilities including an unsustainable business model, users whose friends were largely not yet online, little to do on the site once a user registered, and its founder simply believing it to have been "ahead of its time.").

83. STANDAGE, *supra* note 38, at 22; *see, e.g.*, FACEBOOK, *supra* note 3; *see also* SNAPCHAT, www.snapchat.com. Notably, the first use of the "friend" concept for social networking set the standard for the far broader meaning of a friend in the social media context. A friend could be an individual as traditionally defined as a confidant or someone several degrees removed from the user's confidants. As later discussed, whether a "friend" is truly a friend is entirely contextual as is the question of whether a "like" bears the traditional meaning of a "like."

84. Shah, *supra* note 79.

85. *Id*.

share, and exchange information. Ultimately, Friendster was not it. Although it boasted an astonishing one hundred million users at its peak,[86] Friendster ultimately alienated users by limiting friend connections, restricting user activities, and experiencing repeated site failures due to its burgeoning use.[87] But Friendster demonstrated that by the early 2000s, hundreds of millions of users were clamoring to network socially online.[88] It also revealed that the "friends" model could link them together if managed correctly.

Demographically targeted social networking sites emerged during the time between the fall of Friendster and the rise of Facebook.[89] Many sites focused on narrow, interest-based constituencies.[90] For example, LinkedIn (professionals), YouTube (video sharers), MyChurch (Christians), Flikr (photo sharers), and Last.FM (music aficionados) all began by targeting specific demographics rather than widespread general audiences.[91] Then, in 2004, MySpace exploded onto the scene capturing a massive audience of online users – many of whom had become disenchanted with Friendster.[92] MySpace's unique platform enabled user-generated content, unlike most of its predecessors that offered little for users to do once on their sites. MySpace users could personalize pages with photos, music, text, and other content.[93] These pages could then be kept private or made public for anyone to view.[94] The site's design largely embodied the Internet's shift from passive user interaction to user generated content and social networking (a.k.a., Web

86. Read, *supra* note 81.

87. BOYD & ELLISON, *supra* note 78, at 215-216 (commenting on Friendster's regular site failures, technical difficulties, and user frustrations with the site's operators).

88. Read, *supra* note 81 (noting that for many users Friendster was their first introduction to social networking online. When the site experienced technical failures and failed to integrate into user's daily lives, they moved on to newer, better networking sites); *see also* Riese, *supra* note 47 (noting that Friendster was "the Facebook that might have been" but that its technical difficulties were so extensive even its founder later acknowledged, "People could barely log into the website for two years.").

89. BOYD & ELLISON, *supra* note 78, at 216. At the rate in which online social networking was occurring, the period between Friendster's fall and Facebook's rise was decidedly short. Friendster launched in 2002 and crested in 2004, the same year Facebook started on the Harvard campus before opening to anyone over age 13 in 2006.

90. *Id*.

91. *Id*.

92. *Id*. at 216-217; *see also* Stuart Dredge, *MySpace – what went wrong: 'The site was a massive spaghetti-ball mess'*, THE GUARDIAN (Mar. 6, 2015), https://www.theguardian.com/technology/2015/mar/06/myspace-what-went-wrong-sean-percival-spotify (detailing MySpace's strategy of targeting users rejected by Friendster to promote its network).

93. DIJCK, *supra* note 37, at 35; *see also* BOYD & ELLISON, *supra* note 78, at 217.

94. STANDAGE, *supra* note 38, at 230.

2.0).[95] During a span of three years between 2005 and 2008, MySpace commanded the social networking universe as the largest in the world.[96] To appreciate MySpace's popularity at the time, consider this: In June of 2006, MySpace eclipsed Google as the most visited website in the U.S.[97] By this time social networking was not an Internet sideshow. It had become the Internet's front door. This shift had a profound impact on evidence law as users began generating a massive amount of content, much of which would be viable evidence once authenticated. And its impact on courtroom evidence – hearsay in particular – was only just beginning.

MySpace's reign as the chosen social networking site among Internet users proved short-lived.[98] The site suffered a series of self-inflicted wounds in a flurried effort to monetize its platform after being purchased by News Corp. in 2005.[99] In three short years, MySpace went from earning $900 million in revenue to little more than one-tenth that amount three years later.[100] By 2014, MySpace was losing fourteen percent of its audience every single month.[101] The primary benefactor of, and contributor to, MySpace's demise was an emerging social site with a simple, user-friendly platform that would become the dominant force in all of social networking: Facebook.[102]

D. FACEBOOK, ET AL.

A variety of social networking platforms appealing to an array of interests and genres exist in today's online world. Snapchat allows its users to communicate through photos and video clips,[103] Reddit engages its

95. *See* Matthew Garrahan, *The rise and fall of MySpace*, FINANCIAL TIMES (Dec. 4, 2009), https://www ft.com/content/fd9ffd9c-dee5-11de-adff-00144feab49a?mhq5j=e22; *see also* MEIKLE, *supra* note 70, at 65 (explaining that "[t]he Web 2.0 concept is most often applied to online participatory culture, and the rise of blogging, photo and video sharing, music file sharing, collaborative writing and editing, and social network media in the first decade of the twenty-first century." The evolution of the Internet to more user-friendly platforms that encouraged online collaboration and enabled user generated content is summarized simply as "Web 2.0.").

96. Read, *supra* note 81.

97. *Id*.

98. Garrahan, *supra* note 95.

99. *Id*.

100. Michael Arrington, *Exclusive: The Bleak Financial Numbers From MySpace Sale Pitch Book*, TECHCRUNCH (Apr. 12, 2011), https://techcrunch.com/2011/04/12/exclusive-the-bleak-financial-numbers-from-the-myspace-sale-pitch-book/.

101. *Id*.

102. Garrahan, *supra* note 95; *see also* DIJCK, *supra* note 37, at 57.

103. Max Chafkin & Sarah Frier, *How Snapchat Built a Business by Confusing Olds* BLOOMBERG (Mar. 3, 2016), https://www.bloomberg.com/features/2016-how-snapchat-built-a-business/.

community in unedited news and commentary,[104] and Pinterest appeals to individuals who want to catalog their personal interests.[105] But three of the largest social networking sites of general interest, and those which share similar short-form communication tools germane to this Article, are Facebook, Instagram, and Twitter.

Facebook is the dominant social networking website of the current age with two billion monthly users worldwide.[106] In the United States, Facebook is the nation's most popular social media website by a landslide.[107] In 2016, the Pew Research Center reported that nearly eighty percent of all online Americans use Facebook.[108] Remarkably, Facebook's meteoric rise to the top of the social networking food chain took a mere four years.[109] When Mark Zuckerberg launched TheFacebook on the Harvard campus in 2004, his focus was to unite Harvard students on a single, connected social platform.[110] The site was practically an instant success. Half of Harvard's undergrads signed up within the first month.[111] Over the next two years, TheFacebook evolved into simply "Facebook" while rapidly spreading across college campuses before opening to all Internet users over age twelve in 2006.[112]

Facebook's success is largely a result of its user-friendly platform, demand for authenticity, and willingness to adapt to user preferences.[113] From the outset, Facebook's simple, streamlined platform stood in stark contrast to MySpace's cacophony of mottled, user-generated pages.[114]

---

104. Rebecca J. Rosen, *What is Reddit?*, THE ATLANTIC (Sept. 11, 2013), https://www.theatlantic.com/technology/archive/2013/09/what-is-reddit/279579/.

105. Alexis C. Madrigal, *What is Pinterest? A Database of Intentions*, THE ATLANTIC (July 31, 2014), https://www.theatlantic.com/technology/archive/2014/07/what-is-pinterest-a-database-of-intentions/375365/.

106. *See* Mike Nowak & Guillermo Spiller, *Two Billion People Coming Together on Facebook*, FACEBOOK COMPANY NEWS (June 27, 2017), https://newsroom fb.com/news/2017/06/two-billion-people-coming-together-on-facebook/.

107. Shannon Greenwood, Andrew Perrin & Maeve Duggan, *Social Media Update 2016*, PEW RESEARCH CENTER (Nov. 11, 2016), http://www.pewinternet.org/2016/11/11/social-media-update-2016/.

108. *Id*.

109. Amy Lee, *MySpace Collapse: How The Social Network Fell Apart*, HUFFPOST (last updated Aug. 30, 2011), http://www.huffingtonpost.com/2011/06/30/how-myspace-fell-apart_n_887853 html; *see also* STANDAGE, *supra* note 38, at 230-231.

110. Riese, *supra* note 47.

111. STANDAGE, *supra* note 38, at 230.

112. *Id.*; *see also* Sarah Phillips, *A Brief History of Facebook*, THE GUARDIAN (Jul. 25, 2007), https://www.theguardian.com/technology/2007/jul/25/media newmedia.

113. STANDAGE, *supra* note 38 at 231.

114. *Id.* at 230-31.

Facebook capitalized on clean, uniform pages that encouraged individuality and connectivity.[115] During its heyday, MySpace was the epicenter of customization for imaginative users to create individualized pages.[116] Customization came at a price, however: it diminished interest in the site overall and tended to frustrate users.[117] Facebook, on the other hand, provided a balance of customization within carefully controlled layouts that offered consistency throughout the site.[118]

Perhaps most importantly, though, Facebook emphasized authenticity from the beginning by encouraging users to be themselves.[119] Then and today, Facebook enables users to create individual profiles with a personal "wall" for posting status updates, photos, activities, videos, and a host of other individualized content.[120] But its lasting and most prominent feature is "News Feed" which is prominently displayed when users access the site online or by mobile device.[121] Introduced in 2006 when Facebook opened to the general public, News Feed offers users a constantly updating list of their friends' posts and activities.[122] This endless stream created a never-ending opportunity for responsive comments from other users. The "like" button soon evolved to fill the gap needed for users to respond quickly to the deluge of never-ending posts while simultaneously driving the very content News Feed displayed.

E. THE UBIQUITOUS "LIKE" BUTTON

The "like" button has attained an unquestioned level of ubiquity within social media since its inception. Facebook users alone register an astonishing six billion "likes" each and every day.[123] And while Facebook does not disclose the aggregate data, the collective number of "likes" its users have

115. *Id.* at 230.

116. Andre McNeil, *How Facebook Beat MySpace*, INVESTOPEDIA (Feb. 9, 2012), https://www.investopedia.com/financial-edge/0212/how-facebook-beat-myspace.aspx.

117. *Id.*

118. *Id.* (noting that "Facebook seems to have mastered the customization feature, as it allows users to customize their profiles/timelines and pages, while maintaining the Facebook layout.").

119. STANDAGE, *supra* note 38, at 231.

120. *Id.*

121. *Id.*

122. *Id.*

123. Sarah Frier, *Inside Facebook's Decision to Blow Up the Like Button*, BLOOMBERG (Jan. 27, 2016), https://www.bloomberg.com/features/2016-facebook-reactions-chris-cox/.

registered since the "like" button launched figures to be in the *trillions*.[124] Today, Facebook's "like" button reaches far beyond the site itself.[125] It is imbedded into an array of websites strung across the Internet.[126] Consequently, the number of Internet users who daily see the Facebook "like" symbol is thought to be a staggering twenty-two billion individuals.[127] And it is not just Facebook. Most social media platforms have adopted a "like" button, or some variation thereof, for users to respond to content quickly.[128]

The "like" button is remarkably simple in form and use as a response device. Generically, it is a clickable icon or "button" that social media participants can use as a quick, easy tool for reacting to online content.[129] Facebook's now infamous "like" button employs a small, thumb up icon immediately below photos, articles, comments, status updates, and video clips posted to its site.[130] It is strategically placed left to right as the first option users confront before "comment" and "share."[131] Facebook encourages "likes" first and foremost above comments or sharing by placement alone. A user need only click on the thumb button to register a "like" to the post they are viewing.[132] They can then move on to other content without the need for more.

Facebook is no longer alone in emphasizing a "like" button. Today, most social media sites utilize "like" devices for their user communities. Twitter,[133] Instagram,[134] LinkedIn,[135] Tumblr,[136] YouTube,[137] and a

124. Victor Luckerson, *The Rise of the Like Economy*, THE RINGER (Feb. 15, 2017), https://www.theringer.com/2017/2/15/16038024/how-the-like-button-took-over-the-internet-ebe778be2459 (hereinafter Luckerson*, The Rise of the Like Economy*).

125. Farhad Manjoo, *Facebook's Plan To Take Over the Web*, SLATE (Apr. 22, 2010, 5:43PM), http://www.slate.com/articles/technology/technology/2010/04/facebooks_plan_to_take_over_the_web html.

126. *Id*.

127. Devin, *Why the "Like" Button Design of Facebook Took Half a Year*, MOCKPLUS (May 10, 2017), https://www mockplus.com/blog/post/button-design.

128. Julian Morgans, *The Inventor of the 'Like' Button Wants You to Stop Worrying About Likes*, VICE (July 6, 2017, 1:26AM), https://www.vice.com/en_uk/article/mbag3a/the-inventor-of-the-like-button-wants-you-to-stop-worrying-about-likes.

129. *See* WIKIPEDIA, *Like Button*, https://en.wikipedia.org/wiki/Like_button.

130. *See* FACEBOOK, *supra* note 3.

131. *Id.*

132. *See What does it mean to "Like" something?*, *supra* note 10.

133. *See* TWITTER, *supra* note 3.

134. *See* INSTAGRAM, *supra* note 14.

135. *See* LINKEDIN, *supra* note 3.

136. *See* TUMBLR, *supra* note 3.

137. *See* YOUTUBE, http://www.youtube.com (last visited Feb. 1, 2018).

multitude of other social sites[138] now employ a "like" button in one form or another.[139] LinkedIn's "like" button is practically identical to Facebook's, with the exception of an inverse thumbs up.[140] LinkedIn also places the button ahead of options for users to comment or share content posted to its site.[141] Meanwhile, Twitter, Instagram, and Tumblr utilize a heart symbol placed immediately below posted content. When a user clicks the heart, it registers as a "like" rather than a "love," "affection," "happy," or even "yay." The Instagram heart is also placed before the comment bubble button. This design layout tends to encourage users to simply "like" posts rather than offer lengthier comments. Tumblr affords only two primary options: either reposting the content on one's own page or simply "liking" it. All of these social sites offer essentially the same single-click opportunity for users to quickly respond to posts and comments without the need for long form commentary.

In the fast-paced, time-constrained age we live, it is no wonder billions of "likes" register every day and are incorporated into websites all over the Internet. With a single click, users can register their acknowledgment and then move on to other content. But to appreciate the impact of a "like," and its context within courtroom evidence, we need to explore deeper than its mere function. We must contemplate what a "like" may mean and the true implication of "liking" online content. Let's begin with its popularity. How did a single button attain such widespread adoption? Not without controversy or what Facebook developers considered a "cursed project."[142]

The "like" button first debuted on social media with little fanfare in October 2007. That month, FriendFeed introduced the simple button for its users to respond more easily to content posted on its site. FriendFeed may have been the first, but it was not alone in recognizing that a cleaner, simpler alternative to comments would be useful.[143] A few months before FriendFeed launched its "like" button,[144] project engineers at Facebook were

138. *See, e.g.*, TRIPADVISOR, http://www.tripadvisor.com; FANDANGO, http://www.fandango.com; GOOGLE+, http://www.plus.google.com. TripAdvisor adopts the standard "like," while Fandango opts for a heart, and Google+ uses a +1 symbol for users to express interest in posted content.

139. Morgans, *supra* note 128.

140. *See* LINKEDIN, *supra* note 3.

141. *Id*.

142. Luckerson, *The Rise of the Like Economy*, *supra* note 124.

143. *Id.*

144. Devin, *supra* note 127 (noting that Facebook designers claim their "like" concept was already being floated in August of 2007, two months before FriendFeed's launch, and that nobody at Facebook noticed FriendFeed's introduction of the "like" button).

already embroiled in an internal debate over how to distill similar user comments that people continuously posted – such as "cool," "yay," "awesome," "congrats" – into a simple, short-form click.[145] The project of converging redundant comments into a single, clickable button was controversial from the outset.[146] Facebook developers initially proposed an "awesome" button for users to click when they found a post particularly noteworthy.[147] Other ideas included "bomb," "love," or "like."[148] The project languished for two years until Facebook CEO Mark Zuckerberg finally pronounced, "It's going to be like with a thumbs up, just build and ship it, we're done with this."[149]

Facebook's "like" feature formally launched with a blog post announcement from project manager Leah Pearlman in February 2009.[150] Zuckerberg predicted one billion "likes" on the first day alone.[151] He had good reason. Facebook had already engaged major media partners, including CNN, ESPN, and IMDb to embed the "like" button within their own sites on articles and news features. "Likes" on these sites would funnel directly into Facebook. The effect was remarkable. Internet users across the media spectrum could click a simple button and have it routed into their own Facebook pages. At the same time, Facebook could use the number of "likes" on external and internal content to value and rank the content displayed within its own News Feed. Today, "likes" are a key driver of News Feed content across Facebook's social spectrum. What started as a simple tool for users has evolved into a monetizing tool for Facebook and its advertisers. By aggregating "likes" from billions of users, Facebook can prioritize and personalize information such that the most popular content is top and center.

Facebook users immediately adopted the "like" button.[152] Where a post might receive fifty comments before, the simple, quick nature of the button

145. Morgans, *supra* note 128.

146. Barbara Speed, *"A cursed project": a short history of the Facebook "like" button*, NEW STATESMAN (Oct. 9, 2015), http://www newstatesman.com/science-tech/social-media/2015/10/cursed-project-short-history-facebook-button.

147. Morgans, *supra* note 128. The very first idea floated was a 'bomb' button, but it received little traction among team members. The awesome button gained more attention and set the development team into motion. *Id.*

148. *Id.*

149. *Id.*

150. Speed, *supra* note 146.

151. MG Siegler, *Facebook: We'll Serve 1 Billion Likes On The Web In Just 24 Hours*, TECHCRUNCH (Apr. 21, 2010), https://techcrunch.com/2010/04/21/facebook-like-button/.

152. Morgans, *supra* note 128.

resulted in a hundred and fifty "likes."[153] "Likes" became self-perpetuating content drivers. The number of "likes" a poster received begat additional status updates from the poster whose content was "liked."[154] This symbiotic relationship redefined Facebook itself. Practically overnight, the "like" button radically altered the Facebook user experience.[155] As its popularity has spread across social media, it has now become a natural part of the user experience. It is the go-to method for users to react to online content. As one commentator recently noted, "the Like button has become the low-hanging digital fruit for human connection, not only on Facebook but across the social web."[156]

The "like" button is remarkable in its simplicity of use if not complex in its meaning. The reasons a user may "like" content varies widely. The problem with the "like" button's simplicity, ease of use, and overwhelming popularity is that it masks the individual meaning accorded to the user's click. Its meaning is not easily discernable. A user's purpose in "liking" online content is both highly individualized and multifaceted. With a simple click, users register a "like." But what does that mean to *that* user? Even as its designer admits, the purpose of creating the "like" was to condense redundant comments.[157] And yet even she suggests that a "like" may mean something far less than "I endorse what you're saying."[158] This is the problem confronted by attributing a "like" to manifesting adoption of the content "liked." From a courtroom evidentiary perspective, and hearsay in particular, traditional notions of manifesting intent are not so easily applied to the social media realm. To appreciate this conundrum, and before addressing the multifarious nature of the meaning of a "like," this Article will examine traditional interpretations of hearsay and adoptive statements. As we will see, adoptive statements, and the manifest intent required to establish them, often bear little resemblance to today's online connections.

153. *Id.*
154. *Id.*
155. *Id.*
156. Luckerson, *The Rise of the Like Economy*, *supra* note 124.
157. Morgans, *supra* note 128.
158. *Id.*

IV. HEARSAY AND ADOPTIVE STATEMENTS

A. TRADITIONAL HEARSAY ORTHODOXY

Hearsay has long occupied a hallowed, controversial place within courtroom jurisprudence.[159] For several centuries, courts have expressed grave concerns over admitting statements made by persons not present in court and subject to cross-examination.[160] Anglo-American common law and modern evidence rules equally disavow "out-of-court" statements when offered for their truthful assertions as untenable evidence that can neither be tested nor trusted.[161] In fact, lawyers and laypersons alike have long recognized these second-hand "hearsay" statements for bearing dubious reliability.[162]

The theory supporting hearsay exclusion rests on solid footing, despite its noted complexity.[163] The rules governing hearsay evidence are designed to filter reliable, competent witness testimony from unreliable, untested out-of-court statements.[164] They favor live testimony from witnesses under oath, subject to cross-examination, seated within the critical guise of the trier of fact.[165] And, generally, disfavor statements made by individuals outside the courtroom under circumstances divorced from its formalism and many strictures.[166] Over the years, rules governing hearsay have been lauded for

159. 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE, § 244 (7th ed. 2013); *see also* Crawford v. Washington, 541 U.S. 36 (2004) (chronicling the history of confrontation rights and concomitant hearsay reliability concerns).

160. STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, EVIDENCE LAW AND PRACTICE, § 10.03 (5th ed.).

161. United States v. Boyce, 742 F.3d 792, 800 (2014) (Posner, J., concurring) (noting the two prime reasons why hearsay is normally inadmissible: it is "often no better than rumor or gossip" and it "can't be tested by cross-examination of its author.").

162. FRIEDLAND, BERGMAN & ANDREW, *supra* note 160.

163. Jeffrey Bellin, *eHearsay*, 98 Minn. L. Rev. 7, 27 (2013) (hereinafter Bellin, *eHearsay*); 2 BROUN ET AL., *supra* note 159.

164. *Boyce*, 742 F.3d at 802 (Posner, J., concurring) ("The 'hearsay' rule is too complex, as well as being archaic. Trials would be better with a simpler rule . . . .").

165. 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 801.11[1] (Mark S. Brodin & Joseph M. McLaughlin eds., Matthew Bender 2d ed. 2017); California v. Green, 399 U.S. 149, 154 (1970).

166. FED. R. EVID. 801-807. The courtroom strictures most commonly applicable to statement reliability are witness presence, witness oath, cross-examination, and the opportunity for the trier-of-fact to gauge the witness's demeanor. 5 WEINSTEIN & BERGER, *supra* note 165, at § 801.11[1]; *Green*, 399 U.S. at 154.

their contribution to the legal system[167] and derided for their dysfunction.[168] Yet, while universally renowned for their complexity, hearsay rules have survived common law iterations to their current statutory form.[169]

Today, the historical skepticism afforded to statements made outside the courtroom perpetuates in evidence rules prohibiting hearsay at both the state and federal level.[170] Under federal law, traditional hearsay orthodoxy is codified in Article VIII of the Federal Rules of Evidence.[171] Hearsay is defined in Rule 801 as an out-of-court "statement" made by a "declarant" not while "testifying" under oath at the "current trial or hearing" that the proponent "offers in evidence" to factually "prove the truth of the matter asserted" within the statement.[172] The complexity of the definition[173] alone sheds light on why hearsay strikes fear in law students' hearts[174] and has been categorized as "one of the law's most celebrated nightmares."[175]

Essentially, a witness who *hears* and then *says* in-court a statement overheard outside-of-court is testifying to *hearsay* when the factual truth of the statement's contents is offered.[176] The repeated statement is hearsay by definition and must be excluded absent an exemption or exception.[177] For example, a witness who testifies, "I overheard Zac say, 'Tony left the house unarmed'" is testifying to hearsay when the statement is offered to prove Tony was unarmed when he left the house.[178] In fact, although controversial,

---

167. 5 WIGMORE, EVIDENCE § 1364, at 28 (Chadbourn rev. 1974); 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1365, 1695 (Little Brown, 1904).

168. Hon. Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465 (2016); *Boyce*, 742 F.3d at 802 (Posner, J., concurring); David Alan Sklansy, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 1.

169. Bellin, *eHearsay*, *supra* note 163, at 28-35.

170. FRIEDLAND, BERGMAN & TASLITZ, *supra* note 160, at § 10.03; Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1868-69 (2015).

171. FED. R. EVID. 801-807.

172. FED. R. EVID. 801(c).

173. 2 BROUN ET AL., *supra* note 159, at § 246 (explaining the nuances of the hearsay definition and its many parts).

174. David DePianto, *The Costs and Benefits of a Categorical Approach to Hearsay*, 67 FLA. L. REV. F. 258, 258.

175. Sklansy, *supra* note 168, at 10 (quoting Peter Murphy, *Evidence and Advocacy* 14 (Oxford 5th ed. 2002)).

176. FED. R. EVID. 801; Posner, *supra* note 168, at 1467.

177. FED. R. EVID. 801(c) & 802. More than 30 exemptions and exceptions may be found within the rules of evidence, furthering the rule's complexity. *See* FED. R. EVID. 801(d) & 803-807.

178. FED. R. EVID. 801(c). Although this statement may be exempted or excepted from exclusion by other hearsay rules depending on who made the statement and the circumstances under which it was made, the statement itself is hearsay by definition. *See* FED. R. EVID. 801(d) & 803-807.

any statement made by the witness herself while not testifying at the current trial falls equally within the strict hearsay definition.[179] Thus, a witness who testifies, "I told my friend that Tony left the house unarmed" is no less offering inadmissible hearsay testimony.[180] Applying the hearsay rule as strictly defined, the witness would be limited to simply testifying, "I saw Tony leave the house unarmed."[181]

While the theory supporting the exclusion of hearsay evidence is well-settled by centuries of jurisprudence, its application to emerging digital technologies remains the subject of ongoing concern. Prior to the development of the Internet, social media, hand-held devices, tablets, and other modern electronic technologies, hearsay rules focused on more traditional communication norms.[182] Oral statements, non-verbal assertions, and writings tended to command hearsay jurisprudence.[183] As the telegraph and telephone enabled new forms of communication, jurists and practitioners slowly adjusted to applying traditional rules to these and other emerging technologies.[184] Today, the Internet has radically transformed communication norms while enabling vast amounts of hearsay to be stored electronically in perpetuity.[185] Once again, courts, practitioners, and scholars have debated how traditional evidentiary rules should – or, realistically, can

179. FED. R. EVID. 801(c). However, many declarant-witness statements qualify as exemptions when offered to impeach or rehabilitate the witness. *See* FED. R. EVID. 801(d)(1). They may also be excepted from hearsay exclusion when made under circumstances ostensibly affording them greater reliability. *See* FED. R. EVID. 803-807; *see also, e.g.*, Bellin, *eHearsay*, *supra* note 163, at 28-29 (2013).

180. *See* FED. R. EVID. 801(c) (a statement offered to prove the truth of what it asserts is inadmissible hearsay). However, a prior consistent statement offered to prove the truth asserted in the statement may be admissible if offered to rebut an express or implied charge that the statement's author recently fabricated it, acted from a recent improper influence or motive, or was attacked on other grounds. FED. R. EVID. 801(d)(1)(B).

181. *See* FED. R. EVID. 801(c).

182. *See* Goode, *supra* note 36, at 2-5; *see also* Richter, *Don't Just Do Something!*, *supra* note 51, at 1670-73.

183. *See* Goode, *supra* note 36, at 2-5; *see also* Richter, *Don't Just Do Something!*, *supra* note 51, at 1670-73.

184. *See* Richter, *Don't Just Do Something!*, *supra* note 51, at 1672-73 (pointing out that "throughout the history of the hearsay doctrine, technology has constantly pushed human communication into new formats, requiring consideration by the courts.").

185. *See* Bellin, *eHearsay*, *supra* note 163, at 19 (noting that, unlike oral assertions, electronic statements do not fade with memory but "often last[] forever") (quoting MATT IVESTER, LOL . . . OMG: WHAT EVERY STUDENT NEEDS TO KNOW ABOUT REPUTATION MANAGEMENT, DIGITAL CITIZENSHIP AND CYBERBULLYING 25 (Serra Knight 2011)).

– apply to the onslaught of emails, blogs, Tweets, comments, posts, and other electronic transmissions coursing across the web.[186]

In an early case confronting Internet postings, the Seventh Circuit addressed authentication and hearsay issues by employing traditional evidentiary rules and analysis.[187] In a straightforward opinion, the court in *United States v. Jackson* opined simply, "The web postings were not statements made by declarants testifying at trial, and they were being offered to prove the matter asserted. That means they were hearsay."[188] As *Jackson* demonstrates, and other courts have noted, at least for now, hearsay rules apply with equal force to traditional communication norms and digital technology.[189] This is no surprise. No matter the day or age, hearsay rules have focused on the *circumstances* in which statements are made rather than the *medium* utilized.[190] Hearsay prohibits oral and written statements, as well as assertive conduct, when made outside of live testimony.[191] How those statements are conveyed – whether by telegraph, telephone, or Twitter – makes no difference. Comments made within social media or other electronic means are subject to the same concerns and skepticism as other traditional forms of hearsay.[192] Consequently, all forms of social media, whether email, texts, online posts, or other form of electronically transmitted statements, fall within the hearsay spectrum.[193]

Returning to our prior example, then, instead of a witness testifying, "I overheard Zac say, 'Tony left the house unarmed,'" the witness says, "I read Zac's Facebook post saying Tony left the house unarmed." In either scenario, the witness is relying on say-so information rather than information personally perceived. Hearsay equally excludes both statements. But what

186. *Compare* Bellin, *eHearsay*, *supra* note 163 (calling for a percipient witness amendment to the present sense impression exception given the prevalence of "eHearsay"), *with* Goode, *supra* note 36, at 2 (contending that the current rules of evidence are adequate for filtering electronic evidence), *and* Richter, *Don't Just Do Something!*, *supra* note 51 (cautioning against unnecessary reform to hearsay rules which are adequate as adopted to regulate electronically communicated hearsay).

187. *See* United States v. Jackson, 208 F.3d 633, 637-38 (7th Cir. 2000).

188. *Id.* at 637 (citing FED. R. EVID. 801).

189. *See id*; *see also* United States v. Browne, 834 F.3d 403, 410-14 (3d Cir. 2016).

190. *See generally* Richter, *Don't Just Do Something!*, *supra* note 51 (chronicling hearsay application through multiple technological advancements and arguing that the rules as crafted suffice to meet new technological forms).

191. FED. R. EVID. 801(a) & (c).

192. *See* Goode, *supra* note 36, at 6 ("[E]lectronic evidence does not present any particularly difficult analytical problems in terms of the law of evidence . . . .").

193. *See* Bellin, *eHearsay*, *supra* note 163, at 27; *see also* United States v. Brinson, 772 F.3d 1314, 1320-21 (10th Cir. 2014) *and* United States v. Tank, 200 F.3d 627, 630 (9th Cir. 2000).

if Zac is a party at trial and his Facebook post is offered against him? Should hearsay logically exclude the statement of a party at trial who is capable of defending or explaining statements allegedly attributable to her or him? Hearsay is not so dogmatic. In fact, among the most noted exceptions to hearsay exclusion are statements offered against a party who made the statement.[194] In the digital world, parties increasingly make statements that are preserved for later use against them – social media comments included.[195] When an opposing party makes these statements in the form of social networking posts, blogs, tweets, text messages, etc., authentication and attribution have been the primary concern.[196] Adding a layer to this complexity are the types of short-form "likes," "reactions," emoticons, and other digital expressions opposing parties make and whether these fit easily within traditional hearsay exemptions applicable to opposing party statements.

B. OPPOSING PARTY STATEMENTS EXEMPTED

Statements made by or attributable to an opposing party are *exempted* from hearsay when offered against that party.[197] In fact, pursuant to Rule 801(d)(2), statements made by and offered against an opposing party are categorically declared "*not hearsay.*"[198] This proclamation stands at odds with the definition of hearsay itself – further lending to the confusion encountered by law students and practitioners alike. Drafting incongruities aside, the result is simply this: absent a claim of privilege,[199] parties are bound by their own statements.[200] As the Seventh Circuit succinctly observed, there are only two conditions for admissibility under the opposing party hearsay exemption: "a statement was made by a party, and the statement

194. *See* 2 BROUN ET AL., *supra* note 159, at § 254 (explaining the theory supporting exempting opposing party statements).

195. Morales II, *supra* note 8, at 32; *see also* Sublet v. State, 113 A.3d 695, 711-12 (Md. 2015) (chronicling cases where social networking posts offered evidence of criminality and observing that "[s]ocial networking material provides the fodder for civil disputes and defenses, as well as proof of violations of criminal laws.").

196. *See* Goode, *supra* note 36, at 11-12; *see also* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 541-62 (D. Md. 2007).

197. 5 WEINSTEIN & BERGER, *supra* note 165, at § 801.30[1].

198. FED. R. EVID. 801(d)(2) (emphasis added).

199. *See* United States v. Evans, 572 F.2d 455, 488 (5th Cir. 1978).

200. FED. R. EVID. 801(d)(2)). In fact, the now infamous *Miranda* warning that includes, in part, an admonition to the accused that "anything you say can and will be used against you in a court of law" is nothing less than short course on hearsay and the admissibility of opposing party statements when offered by the prosecution against the accused. *See generally* 2 BROUN ET. AL., *supra* note 159, at § 254.

was offered against that party."[201] Nothing more. Nothing less. Thus, when a litigant offers an opposing party's words, writings, or assertive conduct into evidence against her, hearsay is no bar.[202] The theory of exemption is straightforward. Should the law permit a party to stand and object, claiming her own statement is unreliable?[203] That it was not made while under oath and therefore may have been a lie?[204] Or that she has no opportunity to fairly meet the statement in open court?[205] Evidence law answers each question with a resounding "no."[206] A party may not claim that her statement is unreliable because it was not made while under oath, subject to cross-examination, and within the guise of the trier of fact.[207] Exempting opposing party statements from hearsay logically rests on an estoppel theory, and the nature of the adversarial system, rather than reliability.[208] A party is precluded from disclaiming the reliability or trustworthiness of her own statement.[209] Nor may she sit in the courtroom as a party and suggest that she cannot fairly respond to her own statements. She may freely take the witness stand to deny or explain any statement offered against her.[210] Notably, the reason for exempting opposing party statements from hearsay exclusion is not because they are objectively more reliable.[211] After all, a party's opposition status affords scant affirmation of either accuracy or trustworthiness.[212] The rule simply declares that a party must own statements made by or attributable to him.[213] They need not even satisfy any expectation

201. Jordan v. Binns, 712 F.3d 1123, 1128-29 (7th Cir. 2013) (citations omitted).

202. FED. R. EVID. 801(d)(2).

203. 5 WEINSTEIN & BERGER, *supra* note 165, at § 801.30[1].

204. *Id.*

205. *Id.*

206. FED. R. EVID. 801(d)(2).

207. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.27 (Wolters Kluwer 5th ed. 2012).

208. 5 WEINSTEIN & BERGER, *supra* note 165, at § 801.30[1].

209. *Id.*

210. Harris v. United States, 834 A.2d 106, 116 (D.C. Cir. 2003) (citing Chaabi v. United States, 544 A.2d 1247, 1248 (D.C. Cir. 1988)). Obviously, as the criminally accused, she may well prefer to observe her constitutional right not to offer testimony in her own defense. *See* U.S. CONST. amend. V. That, however, does not mean she is prevented from testifying and explaining her own statements that have been offered against her. Additionally, while the adversarial system supports exempting opposing party statements, it is not a mandate. *See* Savarese v. Agriss, 883 F.2d 1194, 1200-01 (3d Cir. 1989). Thus, opposing party statements are exempt from hearsay even when the opposing party is deceased at the time of trial. *Id.* at 1201.

211. 2 BROUN ET AL., *supra* note 159, at § 254.

212. *See Harris*, 834 A.2d at 116 (citing FED. R. EVID. 801 advisory committee's note); *Savarese*, 883 F.2d at 1200-01.

213. *See* FED. R. EVID. 801(d)(2).

of personal knowledge.[214] And the rule is blind to whether the statement is self-serving or self-indicting.[215]

Importantly, statements made by parties – no matter the form or medium – are exempt from hearsay exclusion when offered against them.[216] The rule does not attempt to confine the myriad of ways in which a statement may be made. Over the years, courts have admitted a litany of opposing party statements made orally, in writing, by conduct, and even silence.[217] Those made in an individual capacity may be readily offered against the party making the statement – whether under oath or offhand, in a deposition or depot, or to a court or confidant.[218] And they apply equally in the digital context. The advent of electronic technology enables parties to have their voices heard across multiple digital platforms. In today's world, an individual may send an email, Tweet an opinion, compose a blog post, text a friend, and write a status update on Facebook – all on a single Sunday morning. When the author is an opposing party, all of these statements are exempt from hearsay exclusion when offered against the author.[219] To date, federal courts applying 801(d)(2) to digital statements have readily exempted emails[220], text messages,[221] and Facebook posts[222] when authored by and offered against an opposing party.

The hearsay exemption for statements made and offered against an opposing party is not limited to her own. They also include *imputed* statements. Hearsay exempts statements made by an opposing party's agents,

---

214. *Id.*; 2 BROUN ET AL., *supra* note 159, at § 254.

215. *Id.*

216. FED. R. EVID. 801(d)(2).

217. *See* 5 WEINSTEIN & BERGER, *supra* note 165, at § 801.30[2].

218. At least, such statements are not barred by the prohibition against hearsay evidence. A claim of privilege may exclude the statement, for example. *See, e.g.*, FED. R. EVID. 501, 502. Moreover, as with other forms of evidence, the statements must satisfy the basic requirements of relevance, not be excludable by unfair prejudice or jury confusion, improper character concerns, and other evidentiary rules, statutes, and the Constitution. *See* 5 WEINSTEIN & BERGER, *supra* note 165, at § 801.30[4].

219. FED. R. EVID. 801(d)(2).

220. *See, e.g.*, United States v. Siddiqui, 235 F.3d 1318, 1323 (11th Cir. 2000); Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 398 (D. Conn. 2008), *aff'd*, 587 F.3d 132 (2d Cir. 2009); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 974 (C.D. Cal. 2006); In re Homestore.com, Inc. Sec. Litig., 347 F. Supp. 2d 769, 781 (C.D. Cal. 2004); Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1155 (C.D. Cal. 2002); Vt. Elec. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co., 72 F. Supp. 2d 441, 448-49 (D. Vt. 1999).

221. United States v. Hunter, 266 Fed. App'x 619, 621-22 (9th Cir. 2008).

222. *See, e.g.*, United States v. Browne, 834 F.3d 403, 415 (3d Cir. 2016); United States v. Lemons, 792 F.3d 941, 946 (8th Cir. 2015); United States v. Brinson, 772 F.3d 1314, 1317 (10th Cir. 2014).

representatives, authorized individuals, employees, and co-conspirators.[223] The logic is self-evident. Each has some binding relationship with the party herself. The relationship may be contractual or even criminal, but the statement attributable to the opposing party is a direct consequence of the relationship with the opposing party. There is one more exemption, however. And it has nothing to do with any particular relationship, but with the actions of the opposing party. Traditional hearsay rules include one additional type of statement that may be imputed to an opposing party where no direct or binding relationship need exist: statements the opposing party "adopts."[224]

C. ADOPTED STATEMENTS EXEMPTED

When a party opponent adopts another person's statement, the statement becomes her own and may be offered against her.[225] The circumstances supporting adoption vary widely depending on the individual, context, and circumstances in which the statement is made.[226] By rule, hearsay exempts statements offered against an opposing party where the statement is one "the party manifested that it adopted or believed to be true."[227] The problem, of course, is knowing when a party has sufficiently acted by words or conduct in such a way that in fairness she may be said to have adopted a statement that was neither her own, nor necessarily that of any party with whom she has any special relationship. Whether an opposing party has *manifested* an adoption or *belief* in the truth of a statement that she herself did not make is a prickly question indeed. It becomes particularly thorny in the context of social media communications – especially "like" button clicks.

1. Traditional Interpretation of Adoptive Statements

A primary test for interpreting when a party has manifested that it adopted or believed a statement to be true has eluded courts confronting the issue. In the almost fifty years since the enactment of the Federal Rules of Evidence, courts have failed to coalesce around any single test for adoptive statements offered against opposing parties.[228] The reason is at least twofold.

---

223. *See* FED. R. EVID. 801(d)(2)(C)-(E). Each requires specific predicate and proof before being attributable to the party against whom it is offered.

224. FED. R. EVID. 801(d)(2)(B).

225. *Id.*

226. *See* discussion *infra* Parts II.C.1.a-f.

227. FED. R. EVID. 801(d)(2)(B).

228. *See generally* 2 BROUN ET AL., *supra* note 159, § 261 (discussing a variety of ways in which adoption has been upheld and rejected).

Individually, a person may manifest adoption or belief in a myriad of different, unique ways.[229] And, the Advisory Committee on the Federal Rules of Evidence tacitly encourages a case-by-case approach rather than specifying any particular test when explaining the hearsay exemption for adoptive statements.[230] The Committee suggests "[a]doption or acquiescence may be manifested in any appropriate manner" without explaining what types of words or conduct constitutes manifestation or what would be an appropriate versus inappropriate manner for adopting another person's statement as a party's own.[231] Over the years, courts have considered a number of different factors when deciding whether an individual party adopted another person's statement.[232] Although the cases vary widely based on the circumstances, a few discernable factors are notable – particularly for social media application. These include the context in which the statement was made, individual conduct of the party under the circumstances, and equivocal or unambiguous nature of the party's actions.

a) Context and surrounding circumstances

The context and circumstances surrounding an out-of-court statement must be carefully evaluated when deciding whether a party has manifested the requisite intent for imputing the statement by adoption.[233] When a party affirmatively expresses agreement with another's statement, or his actions clearly indicate acceptance, the adoption analysis is a relatively simple task.[234] A classic example is *United States v. Jinadu*, wherein the defendant acted and responded affirmatively to interrogation accusations made by the investigating officer.[235] The Sixth Circuit held the defendant had clearly adopted the investigator's statement by conduct and words after considering

229. The advisory committee's notes acknowledge the innumerable ways in which adoption may be accomplished by suggesting that adoption "may be manifested in any appropriate manner." FED. R. EVID. 801(d)(2)(B) advisory committee's note.

230. *See* 2 BROUN ET AL., *supra* note 159, at § 261; 5 WEINSTEIN & BERGER, *supra* note 165, at § 801.31.

231. FED. R. EVID. 801(d)(2) advisory committee's note.

232. *See* 2 BROUN ET AL., *supra* note 159, at § 261; 5 WEINSTEIN & BERGER, *supra* note 165, at § 801.31.

233. Harris v. United States, 834 A.2d 106, 116-17 (D.C. Cir. 2003)

234. *See, e.g.*, United States v. Young, 814 F.2d 392, 395-96 (7th Cir. 1987) (admitting the statement of a co-defendant as an adoptive statement of the defendant who acknowledged and agreed that found fingerprints were his own); United States v. Champion, 813 F.2d 1154, 1172 (11th Cir. 1987) (finding statement properly admitted as an adoptive admission where the adopting party nudged the speaker in the ribs and told speaker he did not want him to continue discussing the cause of an airplane crash any longer).

235. 98 F.3d 239, 244 (6th Cir. 1996).

the entire investigation, interrogation context, investigating officer's statements, and the defendant's actions and verbal responses.[236] When the investigator directly asserted that the defendant knew a package contained heroin, the defendant both nodded his head and replied, "yes."[237] In a similarly straightforward case, the Seventh Circuit readily determined a defendant adopted the statement of his co-defendant by affirmatively responding, "Yeah, I guess it must be mine," when his co-defendant remarked that fingerprints had been found which were not his own.[238]

In many cases, however, the circumstances surrounding the question of an adoptive statement are not as readily determinable. When adoptive intent becomes more opaque, courts must be particularly resolute in demanding specific proof supporting adoption to prevent statements from improperly being imputed to a party opponent.[239] In these cases, courts have considered an array of factors to evaluate the full context in which a statement was made to scrutinize whether a party manifested intent to adopt a statement or believed the statement to be true. In each, courts have viewed the totality of the circumstances when deciding manifest intent or belief in adopting the statement of another.

A prime example is *Harris v. United States*.[240] In *Harris*, the Court of Appeals for the District of Columbia engaged in a lengthy analysis when evaluating whether the government adopted an investigator's conclusions in a probable cause affidavit.[241] Michael Harris was indicted for first-degree murder in James Monroe's death.[242] Harris claimed self-defense.[243] He maintained the victim was, in fact, the aggressor who was acting under orders

236. *Id.* at 244-47.

237. *Id.*

238. United States v. Young, 814 F.2d 392, 395-96 (7th Cir. 1987).

239. *See generally* GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY, § 801.19 (7th ed. 2011) (commenting that foundational requirements for adoptive statements should be "strictly applied" to prevent misapplication and distortion of the rule).

240. 834 A.2d 106 (D.C. Cir. 2003).

241. *Id*. The *Harris* decision is particularly noteworthy given that courts have been loath to apply the party opponent exemption to statements made by government officials, much less statements by adoption. *See* 5 WEINSTEIN & BERGER, *supra* note 165, at § 801.33[3] (observing that the Second, Third, Fifth, and Seventh Circuits have maintained observance of the strict common-law rule against exempting hearsay statements by government officials when offered by the defendant as an opposing party statement). The *Harris* court accurately noted, however, that "[t]he language of the party admission rule provides no basis for creating a prosecutorial exception or an exception where the government is the party opponent." *Harris*, 834 A.2d at 120.

242. *Harris*, 834 A.2d at 111.

243. *Id.*

from Donald Monroe to have Harris killed.[244] In support of this theory, Harris offered an affidavit sworn to by a police investigator when seeking a warrant to search Donald Monroe's home in a prior case.[245] At the time the search warrant was sought, police were investigating Donald Monroe for conspiracy to have Harris murdered.[246] The police affidavit directly supported Harris' theory: that he had responded in self-defense to an attempted murder on his own life by the Monroes.[247] At trial, government prosecutors objected to the affidavit as inadmissible hearsay.[248] Harris responded that the affidavit was exempt from hearsay as an adopted statement of the government, his opposing party.[249] Harris claimed the government had adopted the affidavit when Clifford T. Keenan, an Assistant United States Attorney, approved its use in supporting the search warrant application.[250] The trial court rejected Harris' reasoning and excluded the affidavit as inadmissible hearsay.[251]

The *Harris* court began its analysis of whether the hearsay exemption for adoptive statements applied by examining "whether the *context* and *circumstances* surrounding AUSA Keenan's approval" of the affidavit demonstrated that "Keenan manifested an intent to adopt the affidavit."[252] The court first recognized the fundamental constitutional rights implicated when government officials seek a search warrant.[253] It noted that affidavits supporting warrant applications must be confirmed by oaths or affirmations designed to impress upon the affiants the gravity of their statements.[254] Moreover, the court observed the significance prosecutors must afford to the warrant application. The court explained that "by approving the warrant application the prosecutor certainly endorses" an "officer's conclusion that probable cause exists" and thereby signifies that constitutional standards for issuing the warrant have been met.[255] The court then examined the affidavit's contents, the prosecutor's actions in signing every page, and the prosecutor's

244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Harris,* 834 A.2d at 111.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at 120 (emphasis added).
253. *Id.*
254. *Harris,* 834 A.2d at 120.
255. *Id.* at 121.

knowledge that it would be submitted in support of the constitutional requirements for the issuance of a warrant.[256] After collectively evaluating all of these circumstances and the full context in which the affidavit was made, the appellate court held that the United States Attorney "unambiguously manifested his adoption on behalf of the government" of the officer's conclusions that probable cause existed to believe Monroe conspired to kill Harris.[257]

Where the circumstances and context of adoptive intent have involved parties affirmatively using documents, or acting in conformity with the contents of a document, courts have concluded that sufficient foundational facts support a finding that the party manifested an adoption of third-party statements.[258] In doing so, these courts have applied a "possession plus" standard to adoption of statements within physical documents when the circumstances tie the possessor to the documents in a meaningful way.[259] For example, in *United States v. Jefferson*, the Tenth Circuit found insufficient evidence of adoptive intent where the circumstances demonstrated that a receipt offered against the defendant bore the defendant's name, but nothing more tied the defendant to the receipt itself.[260] A decade later, the same court, in *United States v. Pulido-Jacobo*, considered circumstances in which the defendant kept a receipt in his possession and the property shown in the receipt matched property in the defendant's vehicle sufficiently tied the receipt and defendant together in a meaningful way.[261] Under these circumstances, the Tenth Circuit concluded the defendant manifested an adoption of the receipt's contents.[262]

As the *Harris*, *Jefferson*, and *Pulido-Jacobo* decisions illustrate, scrutinizing the circumstance and context in which a statement may have been made is essential to determining adoptive intent. Applying these principles, courts have focused on whether the statement alleged to have been

256. *Id.*

257. *Id.*

258. *See, e.g.*, Transbay Auto Serv., Inc. v. Chevron USA Inc., 807 F.3d 1113, 1118-21 (9th Cir. 2015).

259. United States v. Pulido-Jacobo, 377 F.3d 1124, 1132 (10th Cir. 2004); United States v. Paulino, 13 F.3d 20, 24 (1st Cir. 1994); United States v. Jefferson, 925 F.2d 1242 (10th Cir. 1991); United States v. Ospina, 739 F.2d 448, 451 (9th Cir. 1984).

260. *See generally Jefferson*, 925 F.2d 1242.

261. *Pulido-Jacobo*, 377 F.3d at 1132 (describing these types of circumstances as supporting the "possession plus" standard).

262. *Id.*

adopted was signed,[263] used,[264] subsequently acted upon,[265] forwarded to others with comments,[266] or merely passed along or repeated for other purposes.[267] All of these cases demonstrate that the context and circumstances are fundamental to whether a party may be held to have manifested intent to adopt a statement.

b) What exactly did you mean by that?

Whether a party may have manifested an adoption or belief in the veracity of a third-party statement is more than just a contextual evaluation. It is also a highly *individualized* assessment. The rule exempting adoptive statements from hearsay focuses on the party and her individual words, conduct, or actions that may or may not manifest intent to adopt a third-party statement.[268] Appropriately, some courts have initiated the adoptive statement analysis by recognizing that "[a]doption is evaluated by examining the behavior of the party [the statement] is to be offered against."[269] Careful analysis of the individual party's behavior is consistent with the rule itself.[270]

263. McQueeney v. Wilmington Trust Co., 779 F.2d 916, 930 (3d Cir. 1985) (holding that plaintiff's signature on service records prepared by multiple individuals adopted the records as his own); Pillsbury Co. v. Cleaver-Brooks Div. of Aqua-Chem, Inc., 646 F.2d 1216, 1218 (8th Cir. 1981) (finding that signing each page of a report manifested adoption of the report's contents as the party's own).

264. White Indus., Inc. v. The Cessna Aircraft Co., 611 F. Supp. 1049, 1062-63 (W.D. Mo. 1985) (discussing mere possession versus affirmative use consistent with truthful adoption and observing that before "'use' of information from another can be qualified as an adoptive admission, it must be shown that the party acted (or failed to act) in some *significant, identifiable way, in direct reliance upon the specific information in question,* so as to demonstrate clearly the party's belief in and intentional adoption of that information) (emphasis added).

265. United States v. Ospina, 739 F.2d 448, 451 (9th Cir. 1984) (concluding the defendant adopted statements in business cards by acting upon when he traveled to the address indicated within); In re: Gen. Motors LLC, No. 14–MD–2543 (JMF), 2015 WL 8578945, at *2-3 (S.D.N.Y. Dec. 9, 2015) (finding that an investigative report into a product failure had been adopted by use when the party accepted its contents, vouched for its reliability, and took action based thereon).

266. Sea-Land Serv., Inc. v. Lozen Int'l, LLC., 285 F.3d 808, 821 (9th Cir. 2002) (finding a party adopted a third-party email by copying and pasting it into her own along with an introductory remark saying "Yikes, Pls note the rail screwed us up . . . .").

267. *See, e.g.* United States v. Safavian, 435 F. Supp. 2d 36, 43-44 (D.D.C. 2006) (noting the party opponent forwarded some emails but did "not clearly demonstrate his adoption of the contents" when doing so); Powers v. Coccia, 861 A.2d 466, 470 (R.I. 2004) (concluding a defendant who filed an affidavit with some references to external reports did not sufficiently tie himself tie to the reports to have adopted them when applying Rhode Island's corresponding hearsay exemption for adoptive statements by party opponents).

268. FED. R. EVID. 801(d)(2)(B).

269. Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd., 262 F. Supp. 2d 251, 258 (S.D.N.Y. 2003).

270. FED. R. EVID. 801(d)(2)(B). The rule specifically provides that the statement be one the "*party* manifested that it adopted or believed to be true" (emphasis added).

Analyzing a party's individual manifestations is also a necessary, fundamental predicate to admitting untested hearsay statements and subsequently imputing them to that party – particularly when the party did not utter them personally. It is axiomatic then that a party's individual behavior, conduct, language, and even silence must be carefully evaluated when scrutinizing adoptive intent.[271] Even within the same case, a party's individual actions may suggest adoptive intent in some instances but not others.[272] When the party's own actions are not reflective of individual manifestation of adoption or belief in the veracity of another's statement, the statement should not be imputed to the party as her own.[273] The distinct behavior of each unique party must be evaluated in light of the surrounding circumstances, regardless of whether the statement was part of a document, discussion, correspondence or otherwise.[274]

Recognizing the individual nature of the adoption analysis, the district court in *White Industries, Inc. v. Cessna Aircraft Co.*, considered whether a party who uses information from a third party adopts the information used.[275] At the outset, the trial court observed that a party who uses information may or may not thereby manifest adoption of the information.[276] Mere use standing alone is not conclusively adoption.[277] The answer depends on the individual party and the nature of the use.[278] The court acknowledged that everyone uses information gathered from other sources, "yet it would seem highly unrealistic to suggest that each of these innumerable occasions should be viewed as representing an 'adoptive' admission of the truth of the information."[279] The question then turns on the individual party and how that party acted.[280] Before the use of third party statements can qualify as adoptive admissions, "it must be shown that the party acted (or failed to act) in some *significant, identifiable way, in direct reliance upon the specific*

271. *Id.*

272. United States v. Safavian, 435 F. Supp. 2d 36, 43-44 (D.D.C. 2006) (finding the defendant adopted the contents of some emails forwarded but not others).

273. *Id*. (finding that "a party who forwarded emails from another person did not clearly demonstrate *his* adoption of the contents and therefore could not be offered against him as an opposing party statement") (emphasis added).

274. *See* discussion *supra* Part IV.C.1.a.

275. 611 F. Supp. 1049, 1062-64 (W.D. Mo. 1985).

276. *Id.* at 1062.

277. *Id.*

278. *Id.*

279. *Id.* at 1063.

280. *Id.*

information, so as to demonstrate clearly the party's belief in and intentional adoption of the information."[281]

In a myriad of different contextual settings in which third-party statements are made and may or may not have been adopted, courts have carefully construed the actions of the individual parties under the specific case circumstances.[282] In fact, even in the context of adoption by silence, courts have carefully gauged the individual party's conduct and actions against the natural, expected reactions of a reasonable person confronted with an untrue statement.[283]

The unique behavior, actions, words, and conduct of each individual party is critical to the traditional adoption analysis. It is equally vital when examining social media "likes" to discern adoptive intent. Unfortunately, a party's behavior when clicking "like" is not apparent without looking beyond the "like" to additional factors. Other individuals rarely may be present to observe the party "liking" online content or hear her verbalize what she intends to convey when clicking the "like" button. A party's own comments may seldom accompany their "like" to assist courts in making an individualized determination of what the party may have intended when clicking "like." As discussed in Part V, given a party must individually manifest adoptive intent, assigning a singular intent to all social media "likes" is improper and belies the actual expression being conveyed by the party clicking the "like" button from one type of post to the other.

c) Adoption in the face of ambiguity or equivocation?

Where ambiguity exists, courts must be particularly resolute in demanding specific proof supporting adoption to prevent hearsay statements from being imputed to a party improperly.[284] A number of cases refer to statements being "unequivocally"[285] adopted or find that a party "unambiguously" manifested adoption.[286] Some have demanded proof

281. *White Inds.*, 611 F. Supp. at 1063 (emphasis in original).

282. *See, e.g.*, Harris v. United States, 834 A.2d 106 (D.C. 2003) discussion *supra* n. 240.

283. 2 BROUN ET AL., *supra* note 159, at § 262.

284. *See generally* WEISSENBERGER & DUANE, *supra* note 239, at § 801.20 (noting that foundational requirements should be "strictly applied" to prevent improper imputation of statements by adoption).

285. *See, e.g.*, Wagstaff v. Protective Apparel Corp. of Am. Inc., 760 F.2d 1074, 1078 (10th Cir. 1985) ("[D]efendants unequivocally manifested their adoption of the inflated statements made in the newspaper articles.").

286. *Harris*, 834 A.2d at 121; United States v. Beckham, 968 F.2d 47, 51-52 (D.C. 1992); Brown v. United States, 464 A.2d 120, 123-24 (D.C. 1983); United States v. Coppola, 526 F.2d

sufficient to "clearly demonstrate" adoption.[287] Whether unambiguous intent to adopt a statement is merely a factual result of the case being decided, or a foundational predicate for the hearsay exemption, is debatable. It is one thing to say that a party unambiguously manifested adoption of a statement such that it should be imputed to him. It is quite another, however, to say that such proof must be established before a party will be deemed to have adopted a statement.

To illustrate, in *Wagstaff v. Protective Apparel Corp. of America, Inc.*, the Tenth Circuit considered the actions of a defendant alleged to have committed fraud in representing the viability of a security equipment distributorship.[288] The plaintiff offered evidence of reprinted newspaper articles appearing to inflate the defendant's financial condition.[289] The defendant reprinted these portions of the articles and then distributed them directly to its business associates, including plaintiff.[290] The plaintiff argued that by doing so the defendant adopted the statements in the article. The court of appeals agreed. The court held the "defendants *unequivocally manifested their adoption* of the inflated statements" by reprinting and distributing the articles.[291] Consequently, the court found the trial court had abused its discretion when it excluded the statements as inadmissible hearsay.[292]

Applying cases like *Wagstaff*, perhaps any equivocation or ambiguity vitiates adoption. If so, the employment of a "like" would always fail to manifest adoptive intent given its amorphous meaning in the social media environment. It would, however, be disingenuous to extract from *Wagstaff* a rule mandating proof establishing that a party unequivocally manifested intent to adopt a statement in every case. The standard is not quite that high. That said, courts have certainly found adoption lacking in the face of ambiguity. The Eighth Circuit expressed doubt that a "smile" in response to a statement was enough to support adoption.[293] And, in *United States v. Safavian* discussed in depth below, a district court refused to find the

764, 769 n.2 (10th Cir. 1975), Harrison v. United States, 281 A.2d 222, 224 (D.C. 1971); Naples v. United States, 344 F.2d 508, 511-12 (D.C. 1964).

287. United States v. Safavian, 435 F. Supp. 2d 36, 43-44 (D.D.C. 2006).

288. 760 F.2d 1074, 1078 (10th Cir. 1985).

289. *Id.* at 1078.

290. *Id.*

291. *Id.*

292. *Id.*

293. United States v. Disbrow, 768 F.2d 976, 980-81 (8th Cir. 1985).

defendant adopted the contents of emails he forwarded where his actions did not *clearly* demonstrate adoptive intent.[294]

While some courts may factually declare that a party unambiguously adopted another's statement, the Court of Appeals for the District of Columbia has repeatedly suggested that such proof is mandated by rule.[295] Applying common law hearsay principles prior to the enactment of the Federal Rules of Evidence, the court in *Naples v. United States* declared that statements by adoption would be accepted against a defendant where "it clearly appears that the accused understood and unambiguously assented to those statements."[296] In the decades since *Naples,* the court has repeatedly reaffirmed that proof of adoption demands both understanding and unambiguous assent[297] – even though such understanding and assent may be established by words or conduct.[298] Although the court's rule refers to adoptive statements of a criminal defendant, none of the court's opinions suggests that proof of unambiguous adoption is limited to the criminally accused. And, in fact, the *Harris* court applied the same standard to adopted statements offered against the government.[299]

Discerning whether a party manifested adoption of another person's statement demands careful scrutiny of the circumstances, context, individual party, and any existing ambiguity. It requires careful attention and thorough examination. As some commentators have noted, "[f]oundational requirements should be strictly applied to assure the existence of conditions that establish that the statement of another person is unequivocally attributable to a party."[300] This is particularly true when considering adoptive statements made through electronic media wherein sufficient conditions supporting adoption simply may not be present.

---

294. 435 F. Supp. 2d 36, 43-44 (D.D.C. 2006) (emphasis added).

295. *See* Harris v. United States, 834 A.2d 106, 120-21 (D.C. 2003); United States v. Beckham, 968 F.2d 47, 51-52 (D.C. 1992); Brown v. United States, 464 A.2d 120, 123-24 (D.C. 1983); Harrison v. United States, 281 A.2d 222, 224 (D.C. 1971); Naples v. United States, 344 F.2d 508, 511-12 (D.C. 1964).

296. *Naples*, 344 F.2d at 511-12.

297. *Harris*, 834 A.2d at 120-21; *Beckham*, 968 F.2d at 51-52; *Brown*, 464 A.2d at 123-24; *Coppola*, 526 F.2d at 769 n.2; *Harrison*, 281 A.2d at 224.

298. *Beckham*, 968 F.2d at 51-52.

299. *Harris*, 834 A.2d at 120-21.

300. WEISSENBERGER & DUANE, *supra* note 239, at § 801.19; MCCORMICK ON EVIDENCE, § 262 (7th ed. 2013) (explaining that adoption by silence may be found where "a statement is made in the presence of a party containing asserts of facts which, if untrue, the *party* would under *all the circumstances* naturally be expected to deny . . . ."(emphasis added)).

2. *Adoptive Statements in the Digital Age*

Courts have proceeded with caution when evaluating whether or not a party adopted a statement made through electronic media. Adhering to the traditional hearsay analysis discussed above, the context, circumstances, and individual actions of the party alleged to have adopted a digital statement continue to be the focal points. The scrutiny applied, however, is particularly notable. To date, there are no reported cases involving a court analyzing social media "likes" under the hearsay exemption for adopted statements.[301] However, the measured approach courts have taken when evaluating other forms of digital communications offers some insight into to the eventual "likes" analysis.

United States v. Safavian is illustrative.[302] In that case, the trial court considered the admissibility of emails sent by the Defendant, David Safavian.[303] Some he authored; others he received and forwarded.[304] The primary hearsay question concerned those Safavian received from third parties and then forwarded to others.[305] The contents of these emails were inadmissible hearsay unless Safavian adopted them.[306] After careful analysis, the court imputed some to Safavian as adopted statements where the "context and content" clearly demonstrated that Safavian manifested an adoption or belief in the emails forwarded.[307] The forwarded emails wherein Safavian did not "*clearly* demonstrate his adoption of the contents" were excluded as

---

301. *See, e.g.*, Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013) (focusing on a Facebook "like" as an independent statement qualifying as speech in the First Amendment context without conducting a hearsay analysis); Grutzmacher v. Howard Cty., 851 F.3d 332, 349 n.3 (4th Cir. 2017) (reviewing plaintiff's various Facebook posts, comment replies, and "likes" collectively as Plaintiff's 'Facebook activity' or 'speech' but not analyzing "likes" under the hearsay doctrine); B.T.E. v. State, 82 N.E.3d 267, 271 (Ind. Ct. App. 2017) (observing only that a "like" served to propel an investigation into the defendant's conduct); State v. Webster, 865 N.W.2d 223, 239-41 (Iowa 2015) (reviewing a juror's "like" in the context of an improper communication, irrespective of any hearsay concerns); Champion Printing & Copying LLC v. Nichols, No. 03-15-00704-CV, 2017 WL 3585213, at 5 (Tex. App. – Austin Aug. 18, 2017) (considering "likes" only in the context of whether a defamatory comment had been read and its potential impact on plaintiff's mental anguish claim).

302. 435 F. Supp. 2d 36, 43-44 (D.D.C. 2006).

303. *Id.* at 43-44 (explaining the numerous emails reviewed by the court comprised those authored by the defendant, including those originally composed and replies, as well as emails he received and forwarded).

304. *Id*.

305. *Id.*

306. *Id.* (explaining the emails personally authored by Safavian were exempted under Rule 801(d)(2)(A) as statements made by an opposing party in an individual capacity).

307. *Id.*

inadmissible hearsay.[308] In deciding the adoption question, the trial court employed a traditional analysis focused on the context, content, and individual intent manifested by Safavian to adopt the emails.[309] The *Safavian* case approach is in like company. Courts have rendered similar holdings in other cases involving electronic correspondence implicating adoptive intent. These include where a party "expresses approval"[310] of third-party statements or includes introductory "remarks"[311] signaling adoption of forwarded emails. At least one court, however, has refused to impute statements by adoption where the context failed to support "intent" and "unequivocal adoptive admission."[312] Collectively, these cases reveal the highly contextualized analysis courts employ by focusing on the individual intent and actions of the party charged with adopting a third-party statement. A similar approach to "likes" is equally mandated given its use and meaning within social media. As discussed in this Part, the text of Rule 801(d)(2)(B) exempts from hearsay statements offered against an opposing party that "the party manifested that it adopted or believed to be true."[313] The advisory committee notes tell us "[a]doption or acquiescence may be manifested in any appropriate manner."[314] Undoubtedly, a social media "like" is a *manner* of communicating. But is it a manner that manifests adoption or acquiescence? Whether a "like" manifests an adoption of the statement "liked" is a contextualized analysis which, as with other forms of traditional and digital adoptions, requires evaluating the context, contents, individual intent, and equivocal nature of the act. This is where we now turn. Next, this Article examines the meaning of "like" in the social media lexicon for courts and practitioners to appreciate its use as a phatic term of art that may or may not manifest adoptive intent given when and how it is employed.

---

308. *Safavian*, 435 F. Supp. 2d at 43-44 (emphasis added).

309. *Id.*

310. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 973-74 (C.D. Cal. 2006) (finding that where "other content" was included by the party in emails forwarded, and the party expressed "approval" of the forwarded emails, the contents of the forwarded emails were adopted statements).

311. Sea-Land Serv., Inc. v. Lozen Intern., LLC., 285 F.3d 808, 821 (9th Cir. 2002) (finding a party adopted a third-party email by copying and pasting it into her own along with an introductory remark saying "Yikes, Pls note the rail screwed us up . . . .").

312. Sleepy's, LLC v. Select Comfort Wholesale Corp., No. 07 CV 4018 (TCP (ARL), 2012 U.S. Dist. LEXIS 16466, at *4 (E.D.N.Y. Feb. 9, 2012) (holding that a party had not established adoption given the "questions of intent" and whether the party's emails "sufficed to create an unequivocal adoptive admission").

313. FED. R. EVID. 801(d)(2)(B).

314. FED. R. EVID. 801(d)(2)(B) advisory committee's note.

V. THE MULTIFARIOUS MEANING OF A SOCIAL MEDIA "LIKE"

"My father passed away. May he rest in peace."
"*Like*"
"Civil war is ravaging Syria. Can't we do something?"
"*Like*"
"The NFL catch rule is an unmitigated disaster."
"*Like*"

In the lexicon of online social media, the word "like" conveys no universal meaning. It embodies an array of emotions and potential interpretations – many of which are often utterly incongruent. In the social networking realm "like" is a term of art that may convey approval, support, or empathy[315] in some contexts while demonstrating sorrow,[316] dismay, or even dislike[317] in others. Take, for example, an online user who "likes" a story about the ravages of an ongoing civil war.[318] By "liking" the story does he mean to say he approves of internal war being waged and its concomitant devastation?[319] Or does he dislike civil war but "likes" the story in hopes of making his online followers aware of the atrocities being committed in a distant country by drawing attention to the issue?[320] When a user "likes" a post about the death of a relative, is she expressing support for the surviving loved one or an abhorrent disregard for the loss of a human life and grief associated?[321] With only a single word for a single click, "like" has devolved into an imperfect but functional method of expression for online users. Paradoxical as it may seem, it is not necessary to actually like something to "like" it.[322] That's not to say that a user who "likes" online content doesn't like it in the traditional sense of the word. She may. Or she may not. Given

315. *Liking Isn't Helping*, D&AD (2014), https://www.dandad.org/awards/professional/2014/outdoor-advertising/23123/liking-isnt-helping-war/.

316. Joshua Andrew, *How We Grieve on Social Media*, THE ATLANTIC (Apr. 25, 2014), https://www.theatlantic.com/health/archive/2014/04/grieving-in-public-tragedy-on-social-media/360788/.

317. Torie Bosch, *On Facebook, "Like" Can Mean "Dislike." Get Over It.*, SLATE (Apr. 3, 2013), http://www.slate.com/blogs/future_tense/2013/04/03/dislike_button_why_facebook_doesn_t_need_one html

318. Jason Abbruzzese, *In search of meaning for the Facebook Like*, MASHABLE (June 6, 2017), https://mashable.com/2017/06/06/what-does-a-facebook-like-mean/#E9rr_RwWTSqP.

319. *Id.*

320. *Id.*

321. Andrew, *supra* note 316.

322. Bosch, *supra* note 317.

the myriad reasons individuals click the "like" button, neither presumption is fitting.

It would be remarkably naïve to assume that every click of the "like" button conveys the same intent, meaning, or emotion across the endless spectrum of online content and commentary. Billions of individual social networking users register billions of "likes" every day. What each user intends to emote by clicking a single button – which is quantifiable – is not universally definable. And therein lies the problem when applied to the hearsay exemption for adoptive statements. Concluding that a person has manifested adoptive intent or expressed belief in the veracity of online content by clicking "like" woefully misconstrues the nature of the expression, the nature of social media interaction, and the individualized nature of "liking" online content. If it were so easy, the inquiry would end as soon as it began. If a "like" is tantamount to "I agree with what you are saying" in every context and with all content, the hearsay issue is translucent. You liked it; you adopted it. Inquiry over. This *ipse dixit* approach to online "likes" would be simple and consistent for courts to apply. It would also be phenomenally disingenuous and laughably disconnected from any understanding of how social media operates among the masses who use it.[323]

Social media networking sites themselves have acknowledged the multifarious meanings accorded to the "like" button. Twitter originally used a star symbol for users to indicate their "favorite" content.[324] In 2015, the company dropped the star and instead switched to a heart symbol for "liking" content.[325] In making the change, Twitter acknowledged that content "liked" falls somewhere on the emotive scale below a "favorite" but inhabits a more expansive meaning than "like" in the traditional sense.[326] Twitter suggested its new "like" feature is a way for users to express the equivalent of "yes!," "congrats," "LOL," "adorbs," "stay strong," "hugs," "wow," "aww," and "high five" all in one click of its heart-shaped "like" button.[327]

---

323. Abbruzzese, *supra* note 318 (noting that a literal interpretation of a 'like' in no way "jives with the experiences of anybody who's ever actually spent time on Facebook" and that "[p]arsing intent from someone hitting a button on the Internet is, at best, a faulty calculus of context").

324. Kevan Lee, *Twitter Hearts: What the Change from Favorites to Likes Could Mean for Your Engagement,* BUFFER SOCIAL (Nov. 4, 2015), https://blog.bufferapp.com/twitter-hearts; Aki Kumar (@AkiK), *Hearts on Twitter,* TWITTER, (Nov. 3, 2015) https://blog.twitter.com/official/en_us/a/2015/hearts-on-twitter html.

325. Kumar, *supra* note 324.

326. *Id*.

327. *Id*.

Meanwhile, Facebook's Help Center eschews a literal interpretation of "like" or any definition of what its "like" button means.[328] Facebook simply suggests the "like" button is "an easy way to let people know that you enjoy" their post.[329] In fact, Facebook encourages users to utilize a "reaction" for a less ambiguous response because, according to the company, a "like" simply "tells your friends you enjoyed their post or comment" whereas a reaction conveys a more specific response.[330]

Some social networking sites have dropped the "like" altogether given its opacity. Pinterest previously offered users two buttons: one for "like" and another for "save."[331] In 2017, when dropping its "like" feature, Pinterest acknowledged "[t]here are *lots of reasons* why people like Pins on Pinterest."[332] Included among them was nothing more than user desire to save the content for later reference. For Pinterest users, "like" and "save" had become indistinguishable.[333] As a result, Pinterest abandoned the "like" button entirely after concluding the difference between "liking" content and "saving" content on its website was unclear.[334]

The meaning of an online "like" has been assigned innumerable interpretations by social networking writers, commentators, bloggers, web developers, and other observers weighing in on the question. These include suggestions that an online "like" conveys:

"I hear you"[335]
"Uh-huh"[336]
"I acknowledge this"[337]
"Yup"[338]
"I thought about this and read it for a second"[339]

---

328. *What does it mean to "Like" something?*, *supra* note 10.
329. *Id*.
330. *How do I react to a post or comment?*, FACEBOOK HELP CENTER, https://www facebook.com/help/933093216805622?helpref=related.
331. Kim O'Rourke, *Goodbye, Like button* (Apr. 20, 2017), https://blog.pinterest.com/en/goodbye-button.
332. *Id*. (emphasis in original).
333. *Id*.
334. *Id*.; Kurt Wagner, *Pinterest is killing off its 'Like' button and wants you to know it's different from Facebook and Instagram*, RECODE (Apr. 21, 2017), https://www.recode net/2017/4/21/15383980/pinterest-like-button-removed-facebook-instagram.
335. Bosch, *supra* note 317.
336. *Id*.
337. *Id*.
338. *Id*.
339. *Id*.

"I enjoyed reading that"[340]
"Thanks for spreading the news"[341]
"I approve"[342]
"A nod of approval"[343]
"Sense of empathy"[344]
"Show of support"[345]
"Lightweight expression of support"[346]
"Kudos"[347]
"A digital pat on the back"[348]
"An ambiguous upvote"[349]
"That's funny"[350]
"I agree with you"[351]
"I appreciate what you're saying"[352]
"I'm a fan"[353]
"Congratulations"[354]
"I understand"[355]

340. Victor Luckerson, *Here's How Facebook's News Feed Actually Works*, TIME.COM (July 9, 2015), http://time.com/collection-post/3950525/facebook-news-feed-algorithm/ (hereinafter Luckerson*, Here's How*); Abbruzzese, *supra* note 318.

341. Abbruzzese, *supra* note 318.

342. *Id*.

343. D&AD, *supra* note 315.

344. *Id*.; State v. Webster, 865 N.W.2d 223, 239 (Iowa 2015) (concluding that a juror who "liked" a Facebook comment posted during trial by the victim's stepmother was simply showing "empathy for a grieving stepmother who lost her son.").

345. *Id* at 247.

346. Luckerson, *The Rise of the Like Economy*, *supra* note 124.

347. *Id*.

348. *Id*.

349. *Id*.

350. Dominick Soar, *What Does it Really Mean to Like Something on Facebook?*, BRANDWATCH (Oct. 24, 2011), https://www.brandwatch.com/blog/what-does-it-really-mean-to-like-something-on-facebook/.

351. *Id*.

352. *Id*.; Rose Eveleth, *The Facebook Experience Without a Like Button*, THE ATLANTIC (Aug. 22, 2014) https://www.theatlantic.com/technology/archive/2014/08/what-happens-when-you-neutralize-the-like-button/378951/ (noting that without a Like button, "showing passive appreciation" is harder).

353. *Id*.

354. Kim Z Dale, *20 Things Facebook Likes May Really Mean*, CHICAGONOW (Aug. 10, 2015), http://www.chicagonow.com/listing-beyond-forty/2015/08/20-things-facebook-likes-may-really-mean/.

355. *Id*.

"I accidentally clicked this"[356]
"You tagged me in this; I'm acknowledging I saw it"[357]
"Information received"[358]
"I saw this"[359]
"I'm a good person"[360]
"My condolences to you"[361]
"I'm obligated to respond, but I'm not really interested"[362]
"I'm pretending I'm okay with this, but I'm really not"[363]
"Dislike"[364]

The "like" button operates as a useful tool to quantify popularity for the purpose of social networking algorithms.[365] But when a panoply of emotions collapse into a single word, divining intent is no simple task. As one observer succinctly noted:

> Parsing intent from someone hitting a button on the Internet is, at best, a faulty calculus of context. Trying to figure out what a Like means is a question that requires knowing everything about the time, place, content, and people involved in said Like. In a world where Facebook networks often include friends, family, colleagues, frenemies, old friends, and whoever else is around, that's an incredibly *messy proposition*.[366]

356. *Id*.; *Flattening the Like Button: Why Facebook's Omnipresent Thumb Sticks in the Eye*, A HUNDRED MONKEYS, https://www.ahundredmonkeys.com/facebook-like-button/; s*ee also How do I like a photo or video?*, INSTAGRAM HELP CENTER, https://help.instagram.com/459307087443937(specifically acknowledging that accidental likes occur and offering users guidance on how to unlike Instagram content).

357. Dale, *supra* note 354.

358. Kari Paul, *Does the 'Like' Mean Anything Anymore?*, SELECT/ALL (May 5, 2016), http://nymag.com/selectall/2016/05/does-the-like-mean-anything-anymore html.

359. *Id*.: Robinson Meyer, *Twitter Unfaves Itself*, THE ATLANTIC (Nov. 3, 2015), https://www.theatlantic.com/technology/archive/2015/11/twitter-unfaves-itself-hearts/413917/.

360. David B. Feldman, Ph.D., *Why the "Like" Button May be Killing Activism*, PSYCHOLOGY TODAY (Feb. 17, 2017), https://www.psychologytoday.com/blog/supersurvivors/201702/why-the-button-may-be-killing-activism.

361. Andrew, *supra* note 316.

362. Luckerson, *Here's How*, *supra* note 340.

363. Dale, *supra* note 354.

364. Bosch, *supra* note 317; Meyer, *supra* note 359 (noting that journalists may bookmark comments as a way of cataloging information without actually liking the content).

365. *See* Luckerson, *Here's How*, *supra* note 340.

366. Abbruzzese, *supra* note 318 (emphasis added).

Undeniably true. And yet, this analysis is one courts must make before attributing online content to a user who has "liked" it.

If the rules of evidence require "manifestation" of intent to adopt the "truthfulness" of a statement, then the mere click of a "like" fails in many if not most instances. After all, the "like" button is not an "accurate" or "truth" button. At the same time, liking content does manifest something more than nothing. The question is what is being manifested by a "like?" What, if anything, is being adopted or believed about the statement being "liked"? The answer varies widely from user to user and post to post. It means individual "likes" must be critically analyzed. The answer is not as simple as assuming "like" means adoption. It may. It may not. Just like statements made in traditional forms, the context and circumstances are determinative of whether a social media "like" legally constitutes an adopted statement attributable to the opposing party "liking" the content. To better appreciate the challenges of analyzing online "likes" within the constructs of the adoptive statement analysis, consider a few examples to illustrate the issue.

A. EMOTIONAL "LIKES"

On September 11, 2017, comedian Jim Gaffigan posted a picture of the following quote to his Instagram account, along with the hashtag #NeverForget:

> Hey Jules, this is Brian. Ah, listen . . . I'm on a plane that has been hijacked . . . if things don't go well, and they're not looking good, I want you to know that I absolutely love you. I want you to do good, have good times, same with my parents. I'll see you when you get here. I want you to know that I totally love you. Bye, babe, hope I will call you." - Brian Sweeny, passenger, United Flight 175, phone message to his wife Julie.

As of March 21, 2018, Gaffigan's post had garnered 23,605 "likes."[367] Consider a similar post by Historyphotographed of Anne Frank and her sister, Margot, smiling on a beach in Zandvoort, Netherlands in 1940.[368] Since being posted, 86,277 users have "liked" the photo.[369] Do we expect these

367. Jim Gaffigan (@jimgaffigan), INSTAGRAM (Sept. 11, 2017), https://www.instagram.com/p/BY6jMbxF3qg/?taken-by=jimgaffigan (last visited Mar. 21, 2018).

368. @historyphotographed, INSTAGRAM (Nov. 2, 2016), https://www.instagram.com/p/BMUkGflD4eY/?hl=en&taken-by=historyphotographed (last visited Mar. 21, 2018).

369. *Id.*

users to like the fact that a man is calling his wife for the last time before his death? Or that two young girls are pictured enjoying a carefree day in the sun not knowing their cruel fate at the hands of the Nazi regime? If courts conclude that an online "like" invariably means the party clicking the "like" button manifested an adoption of the statement or a belief in its veracity because a "like" carries the same meaning online as traditionally understood, then more than a hundred thousand users collectively "liking" these posts are callous indeed.

From the context of Brian Sweeny's message, and Gaffigan's "NeverForget" hashtag, it seems, though, that users are primarily conveying remembrance, vigilance, sorrow, anguish, sympathy, and a host of related emotions by "liking" his post. The accompanying comments confirm as much, with users expressing sadness, heartbreak, remembrance, love, humility, and, simply, an appreciation for the quote.[370] The same is true for the photo of Anne and Margo Frank. The image is a powerful portrait revealing innocence before evil; life before death; joy before suffering. When a user "likes" this photo, do they *like* seeing joy before suffering? The comments to the photo suggest, abhorrently, yes in a few very rare instances.[371] The overwhelming comments, however, appear to convey sadness, heartbreak, shock, beauty, appreciation, thanks, love, remembrance, and happiness.[372] As one user aptly commented, "It feels strange to like this photo . . . ."[373] In the context of these and similar types of posts, "likes" appear less as an endorsement in the traditional sense and more as a means of conveying an emotional sentiment.

B. AWKWARD "LIKES"

An online "like" is often equally unfitting in some social media contexts given its awkward application if applied literally. How does one express disappointment, regret, or similar emotion with a single click? The most obvious answer is, one does not. A user would best be served by writing a personal note rather than clicking a button – much less one with a thumbs up

370. *See generally*, comments to Jim Gaffigan (@jimgaffigan), INSTAGRAM (Sept. 11, 2017), https://www.instagram.com/p/BY6jMbxF3qg/?taken-by=jimgaffigan (last visited Mar. 21, 2018).

371. *See generally*, comments to @historyphotographed, INSTAGRAM (Nov. 2, 2016), https://www.instagram.com/p/BMUkGflD4eY/?hl=en&taken-by=historyphotographed (last visited Mar. 21, 2018).

372. *Id*.

373. @jodie.corey, Comment to @historyphotographed, INSTAGRAM (Nov. 2, 2016), https://www.instagram.com/p/BMUkGflD4eY/?hl=en&taken-by=historyphotographed (last visited Feb. 10, 2018).

icon. Yet, often, people either don't know what to say or how to properly convey emotion when confronted with another's misfortune.[374] If a "like" can communicate sorrow, appreciation, concern, comfort, recognition or other emotions, however, then its use fits even where it may otherwise seem particularly awkward, if not outright inappropriate. Take, for example, social media users who post the following:

> "My great-grandmother, Mabel Reed, died this morning at age 88. Her funeral service will be at 10:00 a.m. on Friday at the DeLeon funeral home."
>
> *"Like"*
>
> "Depression has me in a hole. I just want out."
>
> *"Like"*
>
> "Got a pink slip at the office today. Guess I'm back on the job market."
>
> *"Like"*

When a post conveys vulnerability, death, sickness, or personal misfortune, a "like" is repugnantly insensitive by literal interpretation or even Facebook standards.[375] Imagine someone verbally responding, "I like that your grandmother died" or "I'm glad to hear you're jobless." If every social media "like" were interpreted as an independent statement beginning with "I like that . . . " then we would ascribe some particularly coarse, bizarre sensibilities to users clicking "like." As we have seen, though, "like" in the social networking context has evolved into a term of art for an array of emotions – all of which are dependent on the post and the person. A "like" can manifest itself as a genuine recognition of loss, hurt, or regret, thereby serving as an accepted response to misfortunate information.[376] Even in awkward instances, a "like" conveys to the user that the liking party has seen, heard, and appreciates what is happening in their life – even if they are disappointed to hear the news.[377]

374. *See* Andrew, *supra* note 316.

375. *What does it mean to "Like" something*, *supra* note 10.

376. Nancy Guthrie, *How to Comfort the Grieving: Click the "Like" Button*, CROSSWAY (Sept. 8, 2016), https://www.crossway.org/articles/how-to-comfort-the-grieving-click-the-like-button/.

377. Andrew, *supra* note 316.

C. MULTIPLE ISSUE "LIKES"

Deciding whether online content "liked" by an opposing party is adopted as her own becomes further complicated when the content "liked" conveys multiple statements or several sentiments. In an age where social media is used as personal platforms, not all online content fits neatly into single sentence packages for the purpose of the adoption question. Where online content conveys multiple sentiments or has dual purposes, discerning whether a "like" manifested adoption of all, part, or none of the content "liked" is an additional challenge. For instance, consider a college student who posts the following:

> "My girlfriend went and cheated on me. She's a California dime, but it's time for me to quit her."[378]
>
> *"Like"*

The comment itself is a glib, metaphorical way of conveying news of a recent breakup. So, then what does a "like" to this post convey? Does the user like the fact that the poster was cheated on? That's certainly a possibility depending on the relationship between the user "liking" and the poster posting the comment. Does the user accept as true that it is time for the poster to move on in his relationship without agreeing with his infidelity claim or the objectification of his girlfriend as a "dime?"[379] That's also a distinct possibility. It may also be the user simply thinks quoting a song lyric as a means of conveying a breakup is amusing. And that very well may be the dual purpose intended by the student posting the comment. The user may also merely be a fan of Hot Chelle Rae and "likes" the lyric.

Parsing out what an individual may have manifested by a single "like" is challenging in isolation. It becomes particularly difficult where a post conveys more than one sentiment. Consider further a seriously construed social media post by a user who opines:

---

378. HOT CHELLE RAE, *Tonight Tonight*, *on* Whatever (RCA Records 2011).

379. In the lyric/hypothetical post, "dime" is being used as a noun to connote an attractive individual. *See* "Dime" URBAN DICTIONARY, https://www.urbandictionary.com/define.php?term=dime (Feb. 1, 2018) (defining "dime" as "a very attractive person" or "a perfect ten").

> "Immigration laws should be relaxed. Marijuana laws must be enforced. Roe v. Wade should be upheld. The tax rate should be flat. Gun laws should be overturned."[380]
>
> *"Like"*

The opinions expressed in this post address several, divergent political concerns. What then would the "like" to this post manifest? Does "like" suggest the user agrees with all, most, some, or none of the opinions stated? If we evaluate the post and "like" in isolation, we simply cannot say with any degree of certainty. If, however, we broaden our evidentiary horizon by considering who made the post, who "liked" the post, the relationship between the two, and other relevant evidence, we may arrive at sound conclusion. If the party liking the post is a close friend or family member, the "like" may simply be a signal of recognition or one made out of a sense of obligation.[381] "Like" in this context may be the verbal equivalent of "I hear you" rather than an agreement.[382] If the party liking the post is online "friends" with a host of gun-rights advocates, follows the NRA Facebook Page, and repeatedly "likes" comments suggesting gun laws should be overturned, however, the "like" appears to adopt the poster's latter sentence. It would not, though, evidence adoption of the former opinions.

As these examples demonstrate, in the context of multifaceted comments, particularly where they appear incongruent, divergent, or subject to multiple interpretations, a "like" becomes particularly difficult to attribute as a statement of adoption unless additional contextual evidence is brought to bear on the post and the "like."

D. SINGLE ISSUE "LIKES"

When a social media post addresses a single, specific issue, the adoption calculus remains contextual but enables a more definitive result. We need only examine the single statement and the context surrounding the parties making and "liking" the statement without parsing our multiple sentences or sentiments within the comment itself. That said, "likes" to single-issue posts still demand careful scrutiny before they may be deemed a manifestation of

380. This post is purely hypothetical in nature. Its sole purpose is to demonstrate the complexity of attributing "likes" in the context multifaceted online comments, particularly where they appear incongruent, divergent, or subject to multiple interpretation. It is not a reflection of the Author's own personal or political views. If anything, it represents an amalgamation of comments the Author has blocked over the years.

381. *See* Luckerson, *Here's How*, *supra* note 340.

382. *Id.*

intent to adopt the comment. For example, where the single-issue post is generic, a "like" may convey little more than bland acknowledgement. Consider a user who posts a comment saying:

"Texas is beautiful in late spring."
"Like"

The post itself is single-issue specific, albeit generic. Texas is a large place and many areas within it may be considered beautiful. A "like" to this post leaves us only to consider what was manifested by the "like" – but not what the comment itself means or whether we have to parse it into several parts. Moreover, the comment is innocuous. Many may consider Texas a beautiful place in the spring – and "liking" this specific comment carries no negative political, social, or personal implications. But what if the post is both specific and does imply animus, hate, despite, or societal implications? For example, imagine a hypothetical single-issue, specific post by a Twitter page associated with the Islamic State of Iraq and Syria (ISIS) saying:

"Terror is nothing less than justice deserved."[383]
"Like"

The tweet leaves little room for alternative meanings. Who would "like" such a vile comment without actually endorsing the sentiment? Given the negative political, social, and moral underpinnings associated with the comment, "like" in this context tends to sway toward endorsement rather than alternative possibilities. The statement is toxic on its face. "Liking" a single-issue comment of this type commands an analysis of whether an individual may simply be saying "information received" versus "I agree." That said, taking the "like" and the post in isolation would still lead to an erroneous finding that the party "liking" the post has adopted the statement as his own if the full context of the post and liking party are left unevaluated.[384] A prime example involves journalists who write about extremist groups. A journalist who "likes" anti-Semitic comments or follows white-supremacists groups to

383. *See generally* Zoie O'Brien, *Manchester terror WAS planned: ISIS cheerleaders tweeted on arena attack hours BEFORE bomb*, EXPRESS (May 24, 2017), https://www.express.co.uk/news/uk/808077/Manchester-terror-bombing-explosion-attack-Ariana-Grande-manchester-arena-ISIS-twitter.

384. In fact, the comment and "like" itself arguably may not be considered in isolation under the rules governing adoptive admissions.

follow their movements and track their statements is not doing so because she has adopted their hate speech as her own. She has done so purely for professional purposes. When viewed in the context of her other "likes," posts, and professional duties, the "likes" reveal themselves as a method of bookmarking rather than endorsement.[385] Thus, while a "like" to a single-issue comment affords simpler consideration of the content, it does not alone answer the adoption by "like" question.

E. INCULPATORY "LIKES"

When a social media user "likes" a post that directly accuses him of conduct he would normally be expected to deny if untrue, he may be deemed to have adopted the facts within the post under a narrow legal doctrine applicable to adoptive statements. A party who fails to deny an accusatory statement is subject to having the accusation imputed to him as if he had made it himself under the adoption by silence doctrine.[386] The implication is severe, particularly in the post-*Miranda* age, and evidence of adoption by silence demands strict proof based on specific findings.[387] Traditionally, when a statement made in a party's presence includes facts that, if untrue, would be natural to deny under the circumstances, failing to respond has been deemed adoption by silence.[388] While a "like" may be amorphous in many contexts, it is unquestionably something more than silence. Where adoption by silence would impute a statement to a party, a "like" would appear to do the same.

Digital media and evidence of silence by adoption make poor bedfellows. There are a host of infirmities inherent in digital communications that add to the already suspect application of adoption by silence. First,

385. Meyer, *supra* note 359 (observing that journalists may dislike comments yet bookmark them for professional purposes).

386. *See, e.g.*, United States v. Miller, 478 F.3d 48, 51 (1st Cir. 2007) ("The law of evidence long has recognized 'adoptive admissions.'. . . This doctrine provides that, in certain circumstances, a party's agreement with a fact stated by another may be inferred from (or 'adopted' by) silence); 5 WEINSTEIN & BERGER, *supra* note 165.

387. *See* Marty Skrapka, *Comment, Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre-Miranda Silence as Evidence of Guilt*, 59 OKLA. L. REV. 357, 358-359 (2006) (observing that people tend to be aware of their right to remain silent and therefore may naturally exercise that right even prior to an official warning); *see* Ruber, *supra* note 34 (detailing the numerous criticism of the adoption by silence doctrine).

388. *See, e.g.*, United States v. Williams, 445 F.3d 724, 735 (4th Cir. 2006); 2 BROUN ET AL., *supra* note 159, at § 262. Silence as an adoptive statement dates back to the early nineteenth century and remains viable. *See* Ruber, *supra* note 34, at 305-310 (2014) (tracing the history of adoption by silence beginning with the 1815 case, Carrel v. Early, 4 Bibb 270 (Ky. 1815), to modern tests employed by federal circuit courts).

adoption by silence necessarily demands proof that the adopting party heard or read the statement.[389] Second, it must have been unnatural to have not spoken in response to the accusatory nature of the statement.[390] Both of these requirements create substantial proof issues when applied to digital evidence. For instance, assume Joe sends an email to Jack. His email says the following:

> "*I can't believe you robbed a convenience store last night. You're lucky you didn't get caught. You better share the loot!"*

If this statement had been made in Jack's physical presence and hearing, rather than by electronic mail, the accusation would be imputed to him by adoption if he did not respond. After all, it would be unnatural for anyone to permit a clearly false robbery accusation to go undenied when made in his physical presence. Yet, in the digital world, a party is not physically present. Electronic correspondence may end up in a junk folder, get lost among other emails, never be seen, opened, or read. Even if the offering party had forensic evidence that the email was received and opened, we would need evidence that the party opponent himself opened, read, understood, and then failed to respond. Now, let us assume a similar scenario in the social media context. Imagine Joe writes a post on Joe's own Facebook page saying:

> "*I can't believe @Jack robbed a convenience store last night. @Jack, you're lucky you didn't get caught. Share the loot!"*

In this hypothetical situation, Joe has mentioned Jack on Facebook. But will Jack ever see or read Joe's post? The post was not made on Jack's Facebook page. Even though it mentions Jack, it may or may not show up displaying in Jack's Facebook News Feed. And if it did, there is no assurance of where it would be placed or how long it would take until it became buried

---

389. *See, e.g.*, United States v. Ward, 377 F.3d 671, 675 (7th Cir. 2004) (nothing *inter alia* that "a statement may be adopted as long as . . . the defendant understood the statement" but that evidence of understanding may be proven by proximity or cognizance through conduct or comment); United States v. Monks, 774 F.2d 945, 950 (9th Cir. 1985) (finding that evidence was sufficient for a jury to conclude the defendant heard and understood the inculpatory statement attributed to him by silence).

390. *See, e.g.*, *Williams*, 445 F.3d at 735 (concluding that a statement which is not directly accusatory – but merely questions whether an act occurred – fails to satisfy the adoption by silence mandate of a direct accusation that would be unnatural for a party to deny. Defendant was asked whether he had killed someone as opposed to a direct accusation that he had killed someone or why he had killed someone. Because the statement was not directly accusatory, defendant's failure to respond did not become an adoption by silence).

in the morass of subsequently posted content. If Jack has his Facebook notifications configured to alert him whenever he is mentioned in a post, did Jack receive this notification? Did he open the notification or ignore it? Even if the proponent established that Jack had logged into his Facebook account, could the proponent establish that Jack affirmatively read the post but remained silent? Now, let's take our hypothetical one step further. Now imagine Joe writing a post on Jack's Facebook page saying,

> "*I can't believe you robbed a convenience store last night. You're lucky you didn't get caught. Share the loot!"*

Assume Jack fails to write any comment denying the post. It simply stays on his Facebook page. Is this an adoptive admission? Once again, we are faced with a host of issues created by the adoption by silence doctrine in the context of digital media. Does Jack check Facebook often? Are there other posts that have buried Joe's post? Can we prove that Jack logged in to his Facebook account? Even so, do we know it was Jack who logged in and not someone else? How does the proponent establish that Jack received, read, understood, and then failed to respond to an online accusation? All of these questions should leave us doubtful of the usefulness of silence in the online context. But not in every situation. Taking our hypothetical further still, now assume Joe writes a post on Jack's Facebook page saying:

> "*I can't believe you robbed a convenience store last night. You're lucky you didn't get caught. Enjoy the loot!"*
> *"Like" – @Jack*

Where before we questioned whether Jack had received, read, and understood the accusatory post, now there is a response from Jack ostensibly supporting each. No matter how much a "like" constitutes a phatic term of art, it is unquestionably an indication that the post has been viewed and answered. It is neither silence nor a denial. Certainly, a "like" in the face of an online accusation could be intended as a laugh, the digital equivalent of an eye roll, or a response expressing "yea right" where the context supports a finding that the accusation was a joke or not meaningfully intended, for example. If so, then the "like" would otherwise fail to adopt the accusation. Absent these or related facts, however, harmonizing the adoption by silence doctrine with the affirmative click of the "like" button compels the conclusion that "liking" an online accusation, which would be natural to deny

if untrue, imputes the accusatory post to the "liking" party as an adopted statement.

The foregoing examples provide a small glimpse into the analysis inherent in considering "likes" as manifesting intent to adopt content posted in the social networking environment. In today's online community, "like" has become a synonymic term of art conveying a wide range of emotion – much of which falls short of the type of endorsement or tacit agreement necessary to impute third party statements. In some cases, however, the adoption analysis may not apply because the type of "like" utilized functions to create an independent statement or the "like" has evidentiary value in the mere fact that it was made.

VI. "LIKES" AS INDEPENDENT STATEMENTS AND NON-HEARSAY USES

Adding to the complexity of the "likes" analysis is the fact that, in the social networking realm, "likes" are neither created equally nor operate the same.[391] In most instances, clicking a "like" button registers a "like" to the associated content and nothing more.[392] However, within some social media platforms, clicking a "like" button does more than register a "like" – it serves to republish and save content in a way that more directly ties the user to the content "liked."[393] This most frequently arises when a user "likes" a social networking page, rather than a single post or comment.[394] In the context of a page like, a "like" more closely resembles an independent statement by the user than an adoption of a third party's comment. In other cases, a "like" may have evidentiary force apart from whether it makes or adopts a statement. The mere fact that a user registered a "like" – no matter the reason or meaning conveyed – serves a relevant, non-hearsay purpose.

---

391. TWITTER, *supra* note 3; INSTAGRAM, *supra* note 14; TUMBLER, *supra* note 3 (all three of which utilize a heart icon for their "like" button). FACEBOOK, *supra* note 3 *and* LINKEDIN, *supra* note 3 (using thumbs up buttons for registering "likes").

392. *Id.* As discussed *supra*, we are only left to ponder what may have been intended by the single click of the button. Determining whether a "like" operates as an adoption of the content posted is the critical determination with these types of likes.

393. Bland v. Roberts, 730 F.3d 368, 385 (4th Cir. 2013) (recognizing that liking content differs from liking a Facebook page, the latter of which causes the page liked to appear in a user's timeline and allows the owner of the page to post content into the user's News Feed); *see also Like and Interact with Pages*, FACEBOOK HELP CENTER, https://www facebook.com/help/1771297453117418/?helpref=hc_fnav.

394. *See, e.g.*, Bland v. Roberts, 730 F.3d 368, 385 (4th Cir. 2013); People v. Johnson, 28 N.Y.S.3d 783, 787-88 (N.Y. Co. Ct. 2015).

A. "LIKES" AS INDEPENDENT STATEMENTS

A social networking "like" may constitute an independent statement in some unique situations. In most contexts, a party who "likes" content posted by other social media participants raises the question of whether, by doing so, that party clearly manifested an adoption of the online content or belief in its veracity.[395] As we have seen, arriving at the answer demands a highly contextualized analysis.[396] However, in other situations, a "like" appears less akin to an ambiguous term of art and more analogous to someone making an independent statement. Distinguishing the two requires understanding how different "likes" function.

Facebook "likes" are uniquely different in operation than their social networking counterparts in two critical ways. The vast majority of social media "like" buttons merely register a "like" after a user clicks it.[397] Others, however, operate to republish and attach the "liked" content to the user more concretely.[398] We will distinguish the two here by categorizing Facebook "likes" as either "Standard Likes" or "Page Likes." A Facebook user employs a Standard Like by clicking the "like" button appearing next to the litany of comments, photos, opinions, and other content posted by his or her Facebook "friends."[399] A Standard Like does not republish or repost the content "liked" into a user's own News Feed nor does it show up in a user's profile as a "like."

Facebook Pages Likes differ significantly from Standard Likes in both operation and effect. Facebook developed Pages as a mechanism for companies, politicians, musicians, celebrities, and others to connect with their customers and fan bases.[400] They operate much like an individual website within Facebook, allowing Page owners to include product content,

---

395. *See* discussion *supra* Part V.; *see also* McPartland, *supra* note 19 (commenting that, "courts should not view "likes" as creating independent statements. "Likes" should be considered manifestations of belief in preexisting statements").

396. *See* discussion *supra* Part V.A-E.

397. *See What does it mean to "Like" something?*, *supra* note 10 (explaining that a "like" is "an easy way to let people know that you enjoy it without leaving a comment.").

398. *See Like and Interact with Pages*, *supra* note 393 (describing Page Likes and the effect of "liking" a Page on Facebook).

399. *See Pages*, FACEBOOK HELP CENTER, https://www facebook.com/help/282489752085908/?helpref=hc_fnav (last visited Feb. 1, 2018). Facebook nests its "like" button alongside every form of content posted to its website. *See also* FACEBOOK, *supra* note 3. This includes photos, text, status updates, comments, and other content. *Id.*

400. *Pages*, *supra* note 399. According to Facebook's own data, there are approximately 60 million active business Pages. *Facebook Pages*, FACEBOOK BUSINESS, https://www facebook.com/business/products/pages.

advertisements, offers, information, etc.[401] A Facebook user registers a Page Like by clicking the "like" button associated with one of these Pages. When she does, the result is more significant. Unlike a Standard Like, a Page Like means a user is connecting with that Page.[402] The Page Like appears in the user's timeline, the user's name appears on the Page as someone who has "liked" the Page, and the Page owner can post information into the user's News Feed.[403] More importantly, however, when a user registers a Page Like, that "like" is announced to the user's Facebook friends.[404] Critically, Page Likes are listed in the "About" section of a user's profile under "Likes" where it is displayed with its title and icon.[405] Thus, when a Facebook user clicks a Page Like, the Page Like is accounted, republished, and imbedded into the "Likes" section of the user's own profile, causing continual updates from that Page to appear in the user's News Feed. When this type of "like" is expressed, the Page Like appears far more substantive and less opaque than Standard Likes. Consequently, it changes the analysis for courts considering the implication of the Page "like."

1. A Bland Analysis of "Likes"

The Fourth Circuit addressed the First Amendment implications of a Page Like in *Bland v. Roberts* when considering whether a public employee's conduct in "liking" a Facebook campaign page constituted protected speech.[406] In 2009, Daniel Carter was a sheriff's deputy working in the Hampton, Virginia Sheriff's Office under Sheriff B.J. Roberts. That year, Sheriff Roberts was opposed in his reelection bid by Jim Adams, a veteran within the Sheriff's department who resigned to run against Roberts. During the course of the campaign, Carter "liked" Adams' campaign Facebook page.[407] Doing so registered a Page Like. Adams' Campaign page name,

401. *Create and Manage a Page*, FACEBOOK HELP CENTER, https://www facebook.com/help/135275340210354/?helpref=hc_fnav.

402. *Like and Interact with Pages*, *supra* note 393.

403. *Id*. In fact, a Page Like is a key way for Facebook users to receive updates in their News Feed from the Page. *Id.*

404. *Id.*

405. Bland v. Roberts, 730 F.3d 368, 385 (4th Cir. 2013); B.T.E. v. State, 82 N.E.3d 267, (Ind. Ct. App. 2017) (observing that officers began their investigation of the defendant after discovering within his Facebook "likes" profile a page titled Columbine High School Massacre); People v. Johnson, 28 N.Y.S.3d 783, 787-88 (N.Y. Co. Ct. 2015) ("Generally, a person using a Facebook account can "like" a third party page by clicking a 'Thumbs up' icon located next to content posted by the third party. This then has the page appear on the receiver's Facebook page . . . .").

406. 730 F.3d 368, 385-86 (4th Cir. 2013).

407. *Id.* at 380.

icon, and a photo of Adams were added to Carter's Facebook user profile.[408] The Page Like also created an announcement on Carter's friends' News Feeds that he had "liked" Adams' Campaign Page.[409] And, Carter's name and profile photo were added to the Campaign Page's list of "People [Who] Like This."[410] In addition to the Page Like, Carter posted a message on Adams' Campaign Page encouraging him in his efforts to unseat Roberts.[411] These social media actions became well known within the Sherriff's office and to Sheriff Roberts. After the election, Sheriff Roberts retained his position; he did not retain Carter. Carter filed suit claiming his Facebook actions were constitutionally protected speech and demanded reinstatement.

The court in *Bland* focused its analysis on whether Carter's Facebook actions qualified as speech or symbolic expression.[412] After conducting a detailed analysis of Page Likes and their operation, the *Bland* court observed, "Once one understands the nature of what Carter did by liking the Campaign *Page*, it becomes apparent that his conduct qualifies as speech."[413] The court noted that a "like" is a "substantive statement" in this situation.[414] In the context of a Page Like – particularly a political campaign page – "the meaning that the user approves of the candidacy whose *page* is being liked is unmistakable."[415] Admittedly, the *Bland* court focused on the speech aspect of Carter's Page Like rather than its impact on the hearsay doctrine. Its analysis, however, offers some guidance for appreciating the nature of a Page Like and how it may be distinguished from a Standard Like in the hearsay adoption query.

Certainly, one approach to social networking "likes" would be for courts simply to conclude a "like" is always an independent statement. After all, *Bland* suggested that a "like" is a "substantive statement" (albeit this conclusion was made in the context of a Page Like). Under this approach, any click or tap on the "like" button would be tantamount to writing, "I like what you posted." Such a conclusion would expand *Bland* well beyond its intended boundaries while ignoring the type of "like" the court considered in that case. It would also fail to account for the billions of "likes" coursing

408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.*
412. *Bland*, 730 F.3d at 385-86.
413. *Id.* at 386 (emphasis added).
414. *Id.*
415. *Id.*

across social media on a daily basis which do not repost, publish, or associate content but are merely intended to convey one of a multitude of emotions.

2. *Reconciling Bland and Standards Likes*

As this Article reveals, assigning a single inference to a "like" utterly belies its use as a term of art in social media and brings us right back around to a pure, literal interpretation of the word as used in the traditional sense.[416] To echo the average social media user, "I didn't *say* I liked it, all I did was *click* the 'like' button." Moreover, "like" is not a complete sentence. It is a single word. It asserts no fact whatsoever in the absence of the content "liked." A "like" standing alone is utterly meaningless. In one distinct context, however, clicking the "like" button does more than just register an amorphous "like;" it also causes the content "liked" to be published, reposted, and saved on a user's own profile.[417] This was precisely the type of "like" scrutinized in *Bland.* In Page Like context, the "like" more closely resembles an independent statement exempt from hearsay when offered against the party making the statement, rather than an adopted statement.[418] As discussed in Part VII below, however, even Page Likes demand careful scrutiny to avoid misapplying their use as an adoption.

B. NON-HEARSAY USES OF "LIKES"

In many contexts, a "like" may have evidentiary force separate and apart from the question of whether the "like" adopts a statement or makes an independent statement. Hearsay is not implicated when a "like" is offered as substantive evidence to establish a relevant fact that is not dependent on the truth of the content "liked."[419] In these situations, the "like" – whatever it may convey – may be offered to demonstrate its substantive impact in having been made.

1. *"Likes" as Independent, Non-Hearsay Evidence*

A recent juror misconduct case illustrates how a social media "like" may be offered as non-hearsay evidence. In *State v. Webster,* a juror was

416. Abbruzzese, *supra* note 318 (commenting that any literal interpretation of a "like" would "in no way jive with the experiences of anybody who's ever actually spent time on Facebook").

417. *Like and Interact with Pages*, *supra* note 393.

418. FED. R. EVID. 801(d)(2)(A).

419. FED. R. EVID. 801(c) advisory committee note ("If the significance of an offered statement lies solely in the fact that it was made, then no issue is raised as to the truth of anything asserted, and the statement is not hearsay.").

discovered to have "liked" a statement posted by the victim's stepmother on Facebook.[420] The stepmother posted a comment saying, "Give me strength" during the evidentiary phase of the trial.[421] The juror "liked" the comment.[422] According to the juror, "merely clicking the 'like' on Facebook was not a 'communication' in her estimation."[423] The *Webster* court found this assumption clearly erroneous.[424] The court held the juror's "like" to be clear evidence of an improper juror communication – regardless of intent.[425] In fact, the court surmised the "like" conveyed "a degree of empathy" under the circumstances yet, despite its intention, cast serious doubt on the perception of the justice system.[426] Most notably for this discussion, hearsay played no part in the analysis. The juror's "like" was offered merely to demonstrate an improper communication occurred and not for any truth it may have asserted.

Non-truth evidence of "likes" accompanies any number of potential situations. For example, a domestic partner or stalker under a "do not contact" restraining order who continues to "like" content posted by the person protected would be engaging in improper contact. In other domestic cases, "likes" may be offered to demonstrate a lack of parental oversight[427] or as evidence of cohabitation to support termination of alimony.[428] In some cases, the *effect* of the "like" would constitute a proper non-truth purpose.[429]

---

420. 865 N.W.2d 223, 230 (Iowa 2015). In fact, the juror denied communicating with the victim's stepmother during the trial despite "liking" the stepmother's Facebook comment. According to the juror, she "simply 'clicked a button that said, 'like.'"" *Id.*

421. *Id*. at 239 (Iowa 2015).

422. *Id*.

423. *Id*.

424. *Id*.

425. *Id*. ("A juror who directly violates the admonitions of the court and then communicates with the mother of a crime victim about a case certainly raises questions about her ability to be an impartial juror.").

426. *Webster*, 865 N.W.2d at 239.

427. Kelly v. Kelly, No. M201501779COAR3CV, 2016 WL 6124116, at *3 (Tenn. Ct. App. Oct. 19, 2016) (In support of suit to modify custody and visitation, Father offered evidence of daughter's social media "likes" to demonstrate Mother was failing to properly supervise child).

428. *See generally*, Robitzski v. Robitzski, No. A-2818-14T3, 2016 WL 2350466, at *1 (N.J. Super. Ct. App. Div. May 5, 2016).

429. The effect on the listener is a well-established purpose for offering evidence, where relevant, that does not implicate the dictates of hearsay. *See, e.g.*, United States v. Shaw, 824, F.3d 624, 630 (7th Cir. 2016) (noting that the "course of the investigation" rationale is an extension of the well-settled "effect only the listener" principle); United States v. Kilpatrick, 798 F.3d 365, 386 (6th Cir. 2015) ("If an out-of-court statement is offered purely to show the statement's effect on the hearer, then this usage is not hearsay."); U.S. v. Rivera, 780 F.3d 1084, 1092 (11th Cir. 2015) ("Generally, an out-of-court statement admitted to show its effect on the hearer is not hearsay"); United States v. Certified Envtl. Servs., Inc., 753 F.3d 72, (2d Cir. 2014) (noting that out-of-court statements offered for some other purpose than the truth of the matter asserted is proper *inter alia* to "demonstrate the statement's effect on the listener").

The negative impact of a "like" is demonstrably illustrated in *Grutzmacher v. Howard County*, where an employee's "like" of a racist cartoon negatively impacted workplace morale and resulted in the employee's termination.[430] The meaning, intent, or assertion conveyed by the "like" was inconsequential to the *fact* that it was made.[431] In the defamation context, a "like" to a fallacious post would serve as evidence that the post was published to others and its deleterious impact, regardless of what the "like" was intended to convey.[432] In cases where establishing a party had been placed on notice or received information is relevant, a "like" would demonstrate the posted information had been read and received by the "liking" party.[433] Moreover, a "like" would potentially impeach a witness who "liked" online content and later denied having been placed on notice of the information included in the "liked" content.[434] And, in a basic sense, a "like" indicates the individual "liking" and the person posting are connected in some way, however far removed.[435]

2. "Likes" as Circumstantial Evidence of State of Mind

Statements are commonly used for non-hearsay purposes to circumstantially prove the speaker's state of mind, intent, or motive.[436] A "like" would not, however, qualify as circumstantial evidence of the "liking" party's state of mind without first proving the "like" constituted an adoptive statement. At first blush, this sounds circular. Why would a party need to prove a "like" adopted a statement before offering it for a non-hearsay, circumstantial evidence purpose? The answer is hidden in the fact that there

430. 851 F.3d 332, 345-346 (4th Cir. 2017).

431. *Id.*

432. *See generally*, Champion Printing & Copying LLC v. Nichols, No. 03-15-00704-CV, 2017 WL 3585213 (Tex. App. Aug. 18, 2017) (wherein "likes" to online posts claimed to be defamatory revealed the post had been received, reviewed, and, according to plaintiff, impacted her mental anguish claim).

433. A party "liking" a warning, newspaper article, or other informative source could be charged with knowledge or notice based on "liking" the content.

434. For example, "liking" information concerning a product recall could have the impact of demonstrating notice to a plaintiff claiming harm as a result of the product's subsequent failure.

435. *See, e.g.*, United States v. Siddiqui, 235 F.3d 1318, 1323 (11th Cir. 2000) (finding emails between two individuals were non-hearsay given they were only admitted to prove their "relationship and custom of communication by email" rather than for-truth purposes). Unquestionably, many individuals have online friends they do not know nor will ever know – such as a celebrity – making the connection less probative. Sluss v. Com., 381 S.W.3d 215, 222 (Ky. 2012) (observing that "friendship" on Facebook and other social networks do not carry the same weight as true friendships in the community and can be as varied as passing acquaintances and close relatives). However, the strength of the relationship between users would only affect the weight of the connection indicated by the "like" and not the fact that a connection exists.

436. 5 WEINSTEIN & BERGER, *supra* note 165, at § 801.11[5].

are two declarants: the third party making the post and the party clicking the "like." We cannot know that the "liking" party shared the same state of mind as the statement's declarant given the amorphous nature of social media "likes." Therefore, until a finding has been made that the "like" manifested an adoption of the statement or belief in its veracity, the original statement only evinces the posting party's state of mind.

To illustrate, consider a hypothetical tort claim alleging a driver knowingly struck a cyclist on the road. The driver's social media account demonstrates Driver posted a tweet on Twitter a week before the collision saying:

"Cyclists are morons in tight shorts."

In this situation, Driver's tweet would demonstrate, circumstantially, Driver's negative feelings toward cyclists. The statement would not be offered to prove – truthfully – that cyclists are morons who wear tight attire. The statement would be offered to circumstantially demonstrate Driver dislikes cyclists (which makes it somewhat more likely Driver struck the cyclist intentionally).[437] The statement circumstantially reveals the *declarant's* intent and motive.

Importantly, though, when considering a "like," there are two declarants: the declarant who composed the post and the declarant who clicked the "like" button. A post may reveal the author's state of mind; a "like" may not reveal the "liking" party's state of mind. Consider the prior example, except this time, rather than composing the tweet, the driver merely "likes" a statement posted by one of his friends on Facebook. Driver's friend, Danny, writes a post on Facebook saying:

"Cyclists are idiots who take up the road."
"Like" – @Driver

In this illustration, Driver has "liked" a third-party social media comment posted by his Facebook friend, Danny. Driver did not post the comment himself. The post clearly offers a window into Danny's state of mind vis-à-vis cyclists. But does it also reveal Driver's state of mind toward cyclists? Perhaps so; perhaps no. It depends on what Driver manifested by

437. If the speaker said, "I hate cyclists" this statement would have to satisfy hearsay strictures because the statement is direct evidence of the declarant's state of mind – it would need to be true to reveal the speaker's feelings.

the click of the "like" button to Danny's post. Danny may have been supporting his friend, thought the post was funny, or agreed entirely with the sentiment.

As discussed throughout this Article, the meaning attributable to a social media "like" is often ambiguous. The "liking" party may think the post funny, cute, sarcastic, or an array of other emotions, or the "liking" party may fundamentally agree.[438] Absent other evidence offering additional context, we are left with the question of what the "like" means. Before attributing a particular state of mind demonstrated by a "liked" post, courts must first determine whether the party who "liked" the statement did so because he conformed to the same belief. The social media post would only then reveal the "liking" party's state of mind. Unless and until a court determines the "like" constitutes an adoption such that it becomes his own, the statement is not one of his own state of mind but that of the individual who posted it – and that person's state of mind is irrelevant. When a "like" is offered as evidence of the "liking" party's state of mind, we are left returning to the critical analysis – is a "like" an adoption of the content "liked" such that it may be offered against the party who "liked" the content. In search of an appropriate methodology for answering this question, and the host of related questions concerning "likes" as adoptive statements, we now turn to consider the court's role in determining preliminary questions of admissibility and factors courts and practitioners may consider in conducting the hearsay analysis when confronted with social media "likes."

VII. FACTORS FOR HARMONIZING HEARSAY AND SOCIAL MEDIA "LIKES"

Harmonizing traditional hearsay norms with modern digital evidence involves a complex, contextual analysis. When a party offers social media content "liked" by an opposing party, courts must decipher whether the "like" manifested an adoption of the content "liked," created an independent statement, or is otherwise offered for a permissible, non-hearsay purpose. In making this determination, courts are hailed upon to utilize their authority to make preliminary findings before placing evidence in front of the jury. Given the multiple meanings a "like" may embrace, and the purposes it may be offered to prove, the admissibility calculus is one that is inherently contextual and case dependent. This Part offers a roadmap for the Bench and Bar when confronted with digital evidence in the form of social media "likes" and similar short-form clicks.

438. *See generally discussion supra,* Part V.

A. AUTHENTICATION & ATTRIBUTION

The first step in any court's analysis toward admitting digital evidence begins with authentication.[439] While this Article is focused on the hearsay aspect of social media "likes," it is important to recognize that authenticating digital evidence is a condition precedent to admissibility.[440] Judicial confirmation that a "like" is what it purports to be – a digital expression attributable to and actually made by the party against whom it is offered – is fundamental.[441]

Initially, digital evidence was met with judicial skepticism if not outright disdain.[442] Courts became overly preoccupied with the ease in which digital evidence – particularly social media sites – could be fabricated or modified.[443] Today, most of the initial recalcitrance has been replaced with an acceptance that digital evidence, like other forms of evidence, may be logically considered under existing rules governing authentication.[444] In fact, while authenticating social networking websites continues to be matter of first impression for courts just now confronting electronically stored

439. *See* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 537-63 (D. Md. 2007) (offering a comprehensive analysis for approaching electronically stored evidence from relevance to authentication to hearsay and other admissibility issues).

440. *Id*. at 541-42 (quoting FED. R. EVID. 901(a) prior to its restyling in 2011); Smith v. State, 136 So.3d 424, 432 (Miss. 2014); Griffin v. State, 19 A.3d 415, 423 (Md. 2011) (quoting *Lorraine*, 241 F.R.D. at 541-42).

441. FED. R. EVID. 104(b). Authentication is a question of conditional relevance ultimately left for the jury after an initial determination by the court that evidence sufficient to support a finding that the evidence is what it purports to be has been established. *See Lorraine*, 241 F.R.D. at 539-41 (explaining the interplay between judicial findings and jury findings in Rule 104).

442. *See, e.g.*, St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773, 774-75 (S.D. Tex. 1999) ("[H]ackers can adulterate the content on *any* web-site from *any* location at *any* time. For these reasons, any evidence procured off the Internet is adequate for almost nothing . . . .").

443. *Smith*, 136 So.3d at 432; *Griffin*, 19 A.3d at 421-22.

444. Goode, *supra* note 36, at 4-8 (chronicling judicial skepticism while demonstrating that the current rules of evidence are adequate for filtering electronic evidence); s*ee also* Hon. Paul W. Grimm et al., *Authenticating Digital Evidence*, 69 BAYLOR L. REV. 1, 3 (2017) (hereinafter Grimm et al., *Digital Evidence*) (noting that authentication is not automatic and that "[d]igital evidence can present the challenge of convincing the court that it has not been altered or hacked and that it comes from a certain source"); Bellin, *eHearsay*, *supra* note 163, at 27 n.77 ("[A]uthentication is likely to fade as a unique difficulty for admitting electronic communication as judges and litigants become more familiar with the technology involved.").

evidence,[445] a body of decisions and scholarship exists to guide courts and practitioners in their analyses.[446]

As noted scholars have emphasized, "the standard for establishing authenticity of digital evidence is the same mild standard as for traditional forms of evidence."[447] Thus, while communication media have evolved, the rules governing authentication as currently adopted amply suffice.[448] And, thankfully, jurists and scholars have recently developed a practical series of factors useful to authenticating varying types of digital evidence.[449]

Authentication requires the proponent to establish both that the evidence is what it purports to be and is attributable to the party against whom it is is offered.[450] For digital "likes," this would involve the proponent both establishing that the social media account associated with the "like" belongs to the opposing party and the opposing party was the person who clicked the "like" button, rather than someone else.[451] Authentication does not require the proponent to "prove a negative" – that nobody but the party against whom the "like" is offered could have created the social media account or clicked

445. *See,* e.g., United States v. Browne, 834 F.3d 403, 432 (3d Cir. 2016) ("The proper authentication of social media records is an issue of first impression in this Court"); People v. Johnson, 28 N.Y.S.3d 783, 786 (N.Y. Co. Ct. 2015) ("The issue of the admissibility of Facebook and other electronically stored information evidence (ESI) is novel in U.S. Courts and has little statutory or judicial precedent guidance.").

446. *See, e.g.*, *Browne*, 834 F.3d at 415; United States v. Brinson, 772 F.3d 1314, 1320-22 (10th Cir. 2014); United States v. Jackson, 208 F.3d 633, 638 (7th Cir. 2000); United States v. Tank, 200 F.3d 627, 630-32 (9th Cir. 2000); *Lorraine*, 241 F.R.D. at 537-63; Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1153-56 (C.D. Cal. 2002); Grimm et al., *Digital Evidence*, *supra* note 444; Hon. Paul W. Grimm et al., *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433 (2013) (hereinafter Grimm et al., *Social Media Evidence*); Goode, *supra* note 36.

447. Grimm et al., *Digital Evidence*, *supra* note 444.

448. *See, e.g.*, *Smith*, 136 So.3d at 432 ("Electronic evidence may be authenticated by the traditional means, and is adequately covered by the current rules of evidence."). Naturally, as with other forms of evidence, establishing authenticity does not alone equate to admissibility. *See, e.g.*, United States v. Southard, 700 F.2d 1, 23 (1st Cir. 1983) (noting that parties should not equate authentication with admissibility given that "[t]hey are two separate matters.").

449. Grimm et al., *Digital Evidence*, *supra* note 444; Grimm et al., *Social Media Evidence*, *supra* note 446; Goode, *supra* note 36.

450. *See, e.g.*, *Southard*, 700 F.2d at 23 (noting a lack of testimony linking a codefendant with otherwise authenticated documents).

451. *See generally* Grimm et al., *Digital Evidence*, *supra* note 446 (offering an extensive examination of authenticating different forms of digital evidence, including social media communications); *see also Jackson*, 208 F.3d at 638 (finding insufficient evidence to establish that internet postings purported to have been made by an alleged white supremacist group were in fact made by the group given the opportunity to obfuscate authorship on the Internet).

the "like" button.[452] Whether or not someone else *could* have done so only impacts the weight of the evidence but not the fact of authentication, just like any other form of evidence.[453] The standard of proof is merely whether a reasonable jury could find that the "like" was made by the party claimed to have made it. Once this standard has been satisfied, the court may turn to the next question: whether the "like" is inadmissible hearsay or offered for a proper, non-hearsay purpose.

B. HEARSAY V. NON-HEARSAY USE OF "LIKE"

After conducting the authentication analysis, a court must next determine whether introducing a proffered "like" raises hearsay concerns or if the value of the "like" derives evidentiary value from the mere fact that it was made. As previously discussed, a "like" may have significant evidentiary value separate and apart from hearsay concerns.[454] A "like," *inter alia,* could constitute an improper communication, offer evidence of information received, establish a connection between two users, or be used for impeachment purposes without implicating hearsay concerns.[455]

Offering a "like" as circumstantial evidence of the "liking" party's state of mind is the primary, non-hearsay purpose that would not apply without additional evidence, however. As previously illustrated, out-of-court statements often are offered to prove the declarant's thoughts or feelings rather than any truth associated with the facts asserted in the statement. A social media post may evince the state of mind of the person writing the post. That does not mean it evinces the state of mind of the party "liking" the post. The "like" may merely convey amusement or acknowledgement. Unless and until the "like" is found to constitute adoption or agreement with the post itself, it is not state of mind evidence commensurate with the post "liked." Thus, counsel saying, "Your honor, we're not offering the statement 'liked' for its truth" does little more than obfuscate the issue. The key determination is whether the "like" adopted the post – such that it reveals a shared state of mind – or whether the "like" merely conveyed one of a litany of other

452. Grimm et al., *Digital Evidence*, *supra* note 446 (noting that simply because authorship *could* have been attributable to someone else affects the weight of the evidence and not authentication itself so long as authentication is established by "evidence sufficient to convince a reasonable juror that, more likely than not," the evidence is what it purports to be); *see also* United States v. Safavian, 435 F. Supp. 2d 36, 41 (D.D.C. 2006) (recognizing that the mere possibility that digital evidence can be altered affects the weight the evidence should be given but is not conclusive to authentication).

453. *Id.*

454. *See supra,* Part VI.B.

455. *Id.*

emotions that fall short of adoption or endorsement. In order to answer this question, the court must consider factors establishing that the "liking" party in fact adopted the social media post. This is where we turn next in the analysis.

C. FACTORS FOR EVALUATING "LIKES" AS MANIFESTING ADOPTIVE INTENT

When hearsay is implicated by a party offering an online "like," courts must engage in an intentional analysis that accounts for the context and circumstances in which the particular "like" was made.[456] A "like" may manifest a party's intent to adopt the statement "liked" or represent a belief in its veracity.[457] Or it may not.[458] Deciding whether it does or does not is a predicate question affecting admission or exclusion under hearsay.[459] If the court concludes the "like" effectively adopted the statement, then the statement is imputed to the "liking" party and is exempt from hearsay exclusion when offered against that party.[460] If, however, the court finds the evidence fails to support a finding that the "like" served to manifest an adoption or belief in the veracity of the online statement, then the statement is inadmissible hearsay.[461] This critical predicate question is one the court is empowered to make prior to submitting the evidence to the jury.[462] Unlike the authentication question, however, the standard of proof is somewhat higher. The hearsay decision concerning adoption must be supported by a

---

456. *See discussion supra* Part IV.C.; *see also, e.g.*, *Jackson*, 208 F.3d at 637 (recognizing that web postings are not statements made by declarants testifying at trial. When offered to prove the truth of the matter asserted, they are hearsay); People v. Johnson, 28 N.Y.S.3d 783, 795 (N.Y. Co. Ct. 2015) ("Internet postings are out of court declarations and present a hearsay issue"); Goode, *supra* note 36, at 47 (noting that context is an important consideration in the adoption calculus when considering whether or not digital statements have been adopted).

457. *See supra,* Part V.

458. *Id.*

459. FED. R. EVID. 104(a) ("The court must decide any preliminary questions about whether . . . evidence is admissible"); United States v. Safavian, 435 F. Supp. 2d 36, 43-44, n.5 (D.D.C. 2006) (determining questions of hearsay and adoptive statements under 104(a) in the context of digital evidence).

460. FED. R. EVID. 801(d)(2)(B); *see, e.g.*, *Safavian*, 435 F. Supp. 2d at 43-44, (D.D.C. 2006) (concluding the facts and circumstances warranted concluding some forwarded emails adopted the contents forwarded while others failed to satisfy the predicate for an adopted statement).

461. *Id.*; FED. R. EVID. 801(c).

462. Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 567-68 (D. Md. 2007) ("[T]here are specific foundational facts that must be established before the statement or admission can be accepted into evidence. These determinations are made by the trial judge under Rule 104(a). . ."); FED. R. EVID. 104(a) ("The court must decide any preliminary questions about whether . . . evidence is admissible.").

preponderance of the evidence.[463] Thus, unless and until a court is satisfied that the greater weight of the evidence supports a party's social media "like" having manifested that party's adoption of an online post, or a belief in the post's veracity, it must be excluded as inadmissible hearsay.

Notably, and particularly critical to employing the factors below, the court is not bound by the rules of evidence in making predicate determinations on admissibility, except for those on privilege.[464] As a consequence, the court may review the party's other "likes," comments, emoticons, reactions, or any other information indicating whether the "like" manifested an adoption of the statement "liked." To guide courts and practitioners in this proof process, a list of relevant factors is offered below for consideration. The factors included here are not intended to be exclusive or comprehensive. They are offered as a framework for conducting a contextual analysis. The weight afforded to each is, obviously, case dependent. With that, factors courts and practitioners should consider in pursuing the adoption by "likes" analysis include:

Is the "like" corroborated with individual comments posted by the "liking" party?

A "like" in isolation offers scant evidence of its intended meaning. Given the array of emotions that may be conveyed by the single click of a button, a "like" standing alone confers little indication to what may have been manifest by its use. However, where a party "likes" a social media post and offers comments to the post, or to comments embedded within the post, the

463. Bourjaily v. United States, 483 U.S. 171, 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration"); United States v. Brinson, 772 F.3d 1314, 1320 (10th Cir. 2014) ("Proponents of the evidence need only show by a preponderance of the evidence that the opposing party had made the statement"); United States v. Beckham, 968 F.2d 47, 52 (D.C. Cir. 1992) (noting in the adoption context, "where the facts bearing on admissibility conflict, the court need only find that it is more probable than not that the facts favoring admissibility exist in order to allow the evidence in.").

464. Fed. R. Evid. 104(a) ("The court must decide any preliminary questions about whether . . . evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privileges"); *Lorraine*, 241 F.R.D. at 567-68 ("[T]here are specific foundational facts that must be established before the statement or admission can be accepted into evidence. These determinations are made by the trial judge under Rule 104(a), and therefore the rules of evidence, except for privilege, are inapplicable.").

"like" is viewable in a fuller context.[465] For example, a user who "likes" a post and then comments "That's right!" would collectively indicate the "like" conveys endorsement and adoption of the original post. However, where a party "liked" a post and then offered an ambiguous or contradictory comment, the "like" would appear to be little more than an acknowledgement it had been read. For example, an individual who "liked" a post saying, "These DREAMers need to dream on" but then commented, "Really? You're joking right?" would collectively suggest the "like" did not convey adoption at all. Taken together, the "like" affords little more than an acknowledgement the post was read.

Evaluating "likes" in the context of comments to the post "liked" assures accuracy in determining whether the "like" adopted the post or merely suggested another, lesser intent. To the extent the party "liking" a post has offered other online comments related to the same subject matter, even those made separate from the post "liked," may also offer evidence of the intent manifested by the "like" being offered. Thus, in the prior hypothetical, if the party had posted other comments in support of broadening legal rights to immigrants, the "like" fails to manifest adoptive intent; whereas a comment made supporting toughening immigration laws would suggest the "like" conveyed agreement and assent.

Is the "like" anecdotal or aggregate?

In most instances, a single "like" to a single post affords little assurance of the intent manifest by the one "like." On its face, and without more, the "like" is amorphous and anecdotal. However, if "likes" are aggregated, a clearer view of the intent being manifested by the party employing the "like" is revealed.[466] A party who "likes" multiple posts related to the same topic or genre evinces agreement in a manner that a person casting a single "like" does not. For example, an individual who repeatedly "likes" online posts suggesting marijuana laws should be repealed is more likely to be manifesting agreement with this sentiment. Viewing her "likes" in aggregate

465. *See generally* United States v. Weaver, 565 F.2d 129 (8th Cir. 1977) (finding an adoptive admission where the statement was made in the defendant's presence and the defendant had previously made similar comments thereby making it more likely he had adopted the third-party statement – both by failing to deny and having made similar statements himself).

466. *See generally* Grutzmacher v. Howard Cty., 851 F.3d 332, 344 (4th Cir. 2017) (recognizing, but leaving unanswered, "[w]hether a series of related posts and "likes" over a several week period to a dynamic social networking platform . . . constitutes 'a single expression of speech' is an open question").

affords wider context for evaluating the "like" being offered against her. Whereas a single "like" may convey little more than, "I hear you."

The use of social media "likes" as a synonymic term of art by social media participants necessitates a broader view of "likes" to approximate the meaning and intent conveyed. As a consequence, practitioners should be prepared to offer evidence of multiple "likes" in support of a claim that a party has adopted an online post via "like." And, courts should utilize their authority to consider any and all available information – including all other related "likes" the party has employed – when making the hearsay adoption finding.

Is the post "liked" issue specific or generic?

A social media user who "likes" online content that is single issue specific, as opposed to generic or involves multiple issues, leaves less room for confusion about what the "like" intends. As previously discussed in Part V, the more specific the post, the more the "like" tends toward adoption. For example, a single-issue online comment posted by a Facebook user saying, "Immigration laws must be fixed" is single-issue specific. Evaluating a "like" to this statement does not require parsing between multiple sentences or opinions. That said, the post is generic and subject to multiple meanings. What does the author mean by "fix?" Does she mean immigration laws should be loosened or tightened? When a "liked" statement is generic or subject to multiple meanings, the appurtenant "like" is no less ambiguous. The party "liking" this type of comment may be intending any number of sentiments short of adoption. Where a statement is both single-issue and specific, however, the "like" tends closer to endorsement or adoption. For example, if the online statement "liked" stated, "The DREAM Act should be passed by Congress. The time to act is NOW," the "like" takes on a different appearance. The post is single-issue specific and non-generic. Fewer subtleties exist for interpretation and the post itself stakes out a specific stance. That is not to say, that single-issue specific "likes" manifest adoptive intent per se. Additional extrinsic evidence, including other "likes," comments, posts, etc., could sway the calculus.

Does the post "liked" convey sentimentalities a reasonable individual would disavow unless otherwise endorsed?

In 1919, Justice Oliver Wendell Holmes penned one of the law's most revered metaphors in his dissenting opinion in *Abrams v. United States*.[467] Conceptualizing free speech as a "marketplace of ideas," Holmes propelled an enlightened view of words freely expressed and their power within a vibrant collage of ideas to be accepted or rejected.[468] Holmes recognized that some ideas were abundantly good and would be embraced whereas others were patently bad and would operate on the fringes of society, forsaken within the marketplace.[469] Today, speech takes on many forms, including social media clicks of the "like" button.[470] When a user "likes" speech that is particularly pernicious, vile, or repugnant to societal norms, it tends to suggest the "liking" party has manifested an agreement or adoption of the vile comments "liked." Where an objectively reasonable individual would disavow a statement or not join in its chorus, a "like" factors in favor of endorsement.

Some comments placed within the marketplace of ideas convey violence, hate, bigotry, and other forms of animus, particularly in a digital environment where anonymity is easily achieved.[471] For example, in 2010, a social networking user operating under an alias began espousing violence against Muslims in connection with a proposed Islamic cultural center near the former World Trade Center site in New York City.[472] At that time, he posted an online comment calling for "Bombing of all mosques in the Western world."[473] The statement clearly reveals the author's animus. If "liked," how would a "like" factor in the hearsay by adoption analysis? Given that an objective, reasonable individual would disavow or disassociate with such a comment, registering a "like" tends to imply agreement with the

467. Adams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Joseph Blocher, *Institutions in the Marketplace of Idea*, 57 Duke L. J. 821, 823-24 (2008).

468. *Adams*, 250 U.S. at 630 (Holmes, J., dissenting).

469. Blocher, *supra* note 467, at 824 ("Free speech, in Holmes's framework, is worth of constitutional protection precisely because – like the free flow of goods and services – it creates a competitive environment in which good ideas flourish and bad ideas fail.").

470. *See, e.g.*, Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013) (finding that "liking" a campaign page on Facebook qualified as speech; "[t]hat a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance"); *Grutzmacher*, 851 F.3d at 349 n.3 (categorizing "[p]laintiff's various Facebook posts, comment replies, and "likes" collectively as Plaintiff's 'Facebook activity' or 'speech'").

471. Sachin Seth, *Protected by Online Anonymity, Hate Speech Becomes an Online Mainstay*, CNN.COM (Aug. 16, 2010), http://www.cnn.com/2010/LIVING/08/16/online.anonymity/index.html (detailing Internet hate speech and how it is fostered in an online environment where anonymity is easily achieved).

472. *Id.*

473. *Id.*

racial, religious hatred and violence it espouses. Simply put: Who would "like" such an evil comment if they didn't mean it?

An additional factor for courts and practitioners to consider is whether the statement "liked" is one a reasonable individual would otherwise reject or refuse to join given the violent, hateful, bigoted nature of the objectively reprehensible comment. If so, the "like" weighs in favor of manifesting adoption or belief in the veracity of the statement "liked." That is not to say politically incorrect comments or unpopular sentiments weigh in favor of adoption. It is to say only at some point "liking" violent, hate-filled statements, that are especially vitriolic, is less likely to be for reasons other than endorsement. As with all others, however, this is but a single factor and not *per se* determinative. A lawyer representing the American Civil Liberties Union, an Anti-Defamation League official, or journalist may "like" a hateful social media post for professional purposes to keep tabs on the individuals posting the comments. Therefore, as with every analysis of a "like," the entire context must be scrutinized in correlation with each factor considered.

Is the post "liked" directly accusatory?

A party who "likes" a post that directly accuses the "liking" party of committing an act or causing an event compels an affirmative adoption finding where it would be unnatural not to otherwise deny the accusation. As set forth in Part V, the interplay between the adoption by silence doctrine and online "likes" suggests that when a party "likes" content, rather than denying it, the party is agreeing with the accusation. In order for this factor to weigh in favor of adoption, the statement must be narrowly tailored to directly accuse the "liking" party. Moreover, the statement must be one that includes facts that, if untrue, would be unnatural to deny under the circumstances, much less "like." For example, a party who "likes" a post written on their Facebook page saying, "I can't believe you hit that cyclist and kept driving" should be deemed to have adopted the statement where it would have been unnatural to have "liked" the post if it was not true.

How closely connected is the person posting the statement to the party "liking" the statement?

A common use of the "like" button involves expressing encouragement, acknowledging another's feelings, or offering a show of support.[474] Thus,

474. *See supra,* Part V.

the relationship between the party "liking" content and the party posting content plays an important role in discovering the intent conveyed by the "like." Where a party "likes" content posted by a family member or close friend, the nature of the "like" may factor more in favor of expressing emotional support than adoption. In fact, within close relationships, a sense of obligation to "like" content often compels "like" button clicks.[475] Moreover, these types of relationships can create a sense of reciprocity wherein social media users give "likes" in exchange for "likes" without either side endorsing the other.[476] Naturally, the less attenuated the relationship between the posting party and the "liking" party outside the social networking realm, the less likely a party may be "liking" content out of obligation. With a remote "friend" or someone the party does not actually know, there would be less need to convey support or offer an encouragement if the "liking" party disagrees with the post "liked." Although perhaps a lesser factor than others, it is important for courts and practitioners to appreciate that "likes" may quickly take on a lesser, phatic meaning within the context of the relationships between the party "liking" content and the party "posting" content.

Is the "post" emotional, humorous, informational, or personal in nature?

Social media posts that convey emotion, humor, intimate, or personal details, or which merely convey information factor less in favor of adoption when "liked." A "like" to an emotionally charged post more commonly suggests the intent is to convey sorrow, anguish, sympathy or remembrance than endorsement. Similarly, where a post is humor in nature, the "like" becomes casual in nature – the short-form equivalent of "Ha!," "Funny," or "Silly." Other statements that purely convey information suggest a "like" simply means, "I read this and have received the information." Thus, as with other factors, the nature of the statement must be carefully evaluated in the context of what is conveyed by the statement when determining the more likely than not intent manifested by the party "liking" the comment.

Is the "like" a Page Like or a Standard Like?

475. *See* Luckerson, *Here's How*, *supra* note 340.
476. *See* Paul, *supra* note 358.

Social media "likes" operate differently across the various social media platforms. Importantly, not all "likes" are the same – even within the same website. Most notably, and as discussed in detail in Part V, Facebook "likes" differ significantly between Page Likes and Standard Likes. When a Facebook user "likes" a Facebook Page, the "like" is accounted, republished, and imbedded into the "Likes" section of the user's own profile, causing continual updates from that Page to appear in the user's News Feed. However, standard "likes" employed on comments, photos, videos, and other content on Facebook and other social media sites merely register "like" to the content without more. When a user's "like" republishes, imbeds, and displays on a user's profile, the "like" factors more in favor of adoption. After all, the "like" more closely resembles self-publication of the content "liked" which suggests affirmative endorsement commensurate with adoption.

Is the party frugal or prolific with "likes"?

Whether the party against whom a statement "liked" is offered is one who rarely "likes" online content or doles out "likes" injudiciously is another factor for consideration. An individual who appears to "like" anything and everything suggests the individual is using "like" as a term of art for innumerable emotions rather than as traditionally defined. However, an individual who is discriminate with her "likes" is more indicative of a user who only wants to associate "likes" in a limited, purposeful manner.

Is the post widely popular?

One final factor concerns the popularity of the post "liked." Posts that are widely popular tend to collect even more "likes" – simply because they are popular.[477] A "like" to a popular post is likely to suggest conformity or a desire to be part of the "in" crowd than any actual personal adoption or agreement with the post itself.[478] Thus, prior to attributing a post made by a celebrity or which has otherwise garnered significant popularity, the go-along-with-the-crowd attitude must be considered as a factor weighing against adoption and more in favor of a "like" for popularity purposes only.

477. Lauren E. Sherman, Ashley A. Payton, Leanna M. Hernandez, Patricia M. Greenfield, and Mirella Dapretto, *The Power of the Like in Adolescence: Effects of Peer Influence on Neural and Behavioral Responses to Social Media*, PSYCHOLOGY SCIENCE Vol. 27(7), 1027-35 (2016).

478. *Id.*; *See also,* Roni Caryn Rabin, *For Teenagers, the Pleasure of 'Likes'*, New York Times (June 14, 2016), https://well.blogs nytimes.com/2016/06/14/for-teenagers-the-pleasure-of-likes/.

The factors described above are case dependent and each must be considered in the context of the party clicking the "like" button. When researchers, academics, journalists, reporters, and other individuals "like" online content they may do so for a variety of reasons. So too may the average social media participant. As a consequence, evaluating a multitude of factors supporting or undermining a party's online "like" as a manifesting adoptive intent is fundamental to accurate hearsay rulings.

VIII. CONCLUSION

Applying traditional hearsay orthodoxy to short-form clicks of the digital "like" button is an inherently thorny task. Hearsay is a complex legal concept that demands piercing contextual analysis. Why a statement is offered, the fact it seeks to prove, the individual who made the statement, and a host of circumstances in which the statement is made must be critically evaluated to arrive at a correct resolution before admitting or excluding out-of-court statements. In modern culture, the social networking "like" is a synonymic term of art that does not conform well to traditional communicative norms or interpretation. Yet the complexity inherent in harmonizing modern short-form digital communications with centuries old legal hearsay doctrine does not tie a Gordian knot. Thoughtful analysis conducted without presumption favoring admissibility or exclusion is critical. In modern social networking, "like" is often a phatic expression conveying a wide range of emotions. Prior to declaring that "like" accords adoption, courts must scrutinize the entire context appurtenant to the "like" – including the people involved, the nature of the post, and the circumstances underpinning the "like." In so doing, inadmissible hearsay composed by out-of-court third parties will be rightfully excluded from juries or will be appropriately imputed to the party clicking the "like" button.