

# An Analysis of Facebook “Likes” and Other Nonverbal Internet Communication Under the Federal Rules of Evidence

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*ABSTRACT: Social media is an important part of our lives. The social media users’ ability to share his or her feelings and thoughts has moved beyond the written word and now includes pictures, music, and multiple other forms of nonverbal content-sharing. As the day-to-day influence of nonverbal content-sharing through social media increases, so too will—by necessity—the attempt to use these forms of communication as evidence in the courtroom. Aside from the Fourth Circuit’s holding in Bland v. Roberts—that a Facebook “like” is protected by the First Amendment—courts have yet to deal with nonverbal social media content including Facebook “likes” or Twitter “favorites.” This Note explains why courts should apply the Federal Rules of Evidence excluding hearsay and allowing adoptive admissions to Facebook “likes” and other nonverbal social media content, including similar forms of communication yet to be invented. This Note argues that “likes” should not be viewed as creating new, independent statements, but should instead be viewed as nonverbal adoptions of preexisting statements similar to unprompted head nods. However, this Note illustrates that even if “likes” are viewed as independent statements, “likes” will often constitute hearsay. Furthermore, this Note advocates that “likes”—if viewed properly as manifestations of agreement with preexisting statements—allow otherwise inadmissible hearsay statements to qualify for the adoptive admissions hearsay exemption. “Likes” can be analyzed under the existing Federal Rules of Evidence and no reform to the Federal Rules is needed as parties increasingly use nonverbal social media content in the courtroom.*

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## I. INTRODUCTION

Information obtained from the Internet has transformed from “voodoo information”<sup>1</sup> into an exceedingly valuable and commonly used tool for gathering information. The increasing willingness of courts to admit Internet content as evidence has led scholars to consider what—if any—unique evidentiary problems Internet content may pose.<sup>2</sup> Scholars in various areas of the legal profession have called for adaptations to current law based on the law’s general silence about the use of technology.<sup>3</sup> The social networking site Facebook<sup>4</sup> has greatly influenced Internet communication and has steadily worked its way into the courtroom.<sup>5</sup>

Facebook is rapidly becoming ubiquitous, with 1.15 billion monthly active users as of June 2013.<sup>6</sup> Facebook was created to facilitate worldwide communication and awareness of world issues and to promote self-expression.<sup>7</sup> Based on Facebook’s user statistics,<sup>8</sup> and because social media is deeply engrained in our society,<sup>9</sup> this form of communication will likely remain a part of our lives in the foreseeable future. Facebook and other forms of electronic media are an increasingly common form of

1. *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999) (holding that “any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules”).

2. *See, e.g., Jeffrey Bellin, Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331 (2012) (arguing that the rules governing hearsay are premised on outdated communication norms and that reform is needed to appropriately address Facebook, Twitter, and other Internet communication); Jessica C. Collier, *Informal Internet Research: Need, Reliability, and Admissibility*, 38 COLO. LAW., Aug. 2009, at 111; Kathrine Minotti, *The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession*, 60 S.C. L. REV. 1057 (2009); Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It*, 41 U. MEM. L. REV. 355 (2010).

3. Bellin, *supra* note 2; Minotti, *supra* note 2, at 1061–66 (advocating a change to the Federal Rules of Civil Procedure to accommodate electronic evidence); Vinson, *supra* note 2 (calling for written guidelines specifically addressing the use of social media in the legal profession); *see also* *United States v. Safavian*, 425 F. Supp. 2d 36 (D.D.C. 2006); *Black v. State*, 358 S.W.3d 823, 831 (Tex. App. 2012) (calling for modernization of the rules of evidence).

4. Facebook is a website where users can create a personal page or a page for their business. It is a means of communicating with other people and businesses by sharing photos, videos, events, and other content that a user posts to his or her page. *See Timeline*, FACEBOOK, <http://www.facebook.com/help/467610326601639/> (last visited Sept. 25, 2013).

5. *See Bland v. Roberts*, 857 F. Supp. 2d 599, 602–04, 606–07 (E.D. Va. 2012) (discussing the First Amendment implications of a Facebook “like”), *aff’d in part, rev’d in part, and remanded by* No. 12–1671, 2013 WL 5228033 (4th Cir. Sept. 18, 2013).

6. *Newsroom: Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Sept. 25, 2013).

7. *Id.*

8. Jeffrey F. Rayport, *What Is Facebook, Really?*, HARV. BUS. REV. (Feb. 2, 2011, 1:38 PM), [http://blogs.hbr.org/cs/2011/02/what\\_is\\_facebook\\_is\\_becoming.html](http://blogs.hbr.org/cs/2011/02/what_is_facebook_is_becoming.html).

9. *Id.*

communication and expression.<sup>10</sup> As this type of communication often provides relevant and valuable evidence at trial, courts must address the admissibility of social media content in trials.

This Note argues that Facebook “likes” are most properly viewed as manifestations of belief in an existing statement rather than independent statements, and therefore “likes” constitute adoptive admissions under the Federal Rules of Evidence (“Rules”). Effectively analyzing “likes” as adoptive admissions does not require any change to the current Rules. Part II explains what a “like” is and gives a basic overview of the Rules governing hearsay and adoptive admissions. Part III argues that a “like” may itself constitute hearsay, or alternatively (and more appropriately), that “likes” allow “liked” content that would otherwise constitute hearsay to qualify for the adoptive admissions hearsay exemption. Part IV summarizes the arguments this Note presents and highlights the growing impact of social media in the courtroom.

## II. BACKGROUND

This Part explains the concept of a Facebook “like” and discusses the Federal Rules of Evidence as they relate to hearsay and adoptive admissions.

### A. WHAT IS A FACEBOOK “LIKE?”

This Subpart describes a Facebook “like” through the use of a hypothetical Facebook user named Jane.<sup>11</sup> Jane “likes” content posted by one of her Facebook friends—or perhaps even a stranger—by clicking the “like” button below the content when the content appears on her Facebook page.<sup>12</sup> When Jane clicks the “like” button, a story appears in her friends’ “News Feed”—an instant stream of Facebook updates from a user’s Facebook friends<sup>13</sup>—with a link back to Jane’s page.<sup>14</sup> After Jane clicks “like,” anyone<sup>15</sup> able to view the original content Jane “liked” or able to view

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10. Twitter is another popular social media website. As of December 18, 2012, Twitter reported that it had more than 200 million monthly active users. Seth Fiegerman, *Twitter Now Has More than 200 Monthly Active Users*, MASHABLE (Dec. 18, 2012), <http://mashable.com/2012/12/18/twitter-200-million-active-users/>.

11. This Note will reference this hypothetical character, “Jane,” throughout in order to help explain how the Federal Rules of Evidence apply to Facebook “likes.”

12. *Like*, FACEBOOK, <https://www.facebook.com/help/www/452446998120360> (last visited Sept. 25, 2013).

13. *What Is News Feed?*, FACEBOOK, <http://www.facebook.com/help/?faq=210346402339221> (last visited Sept. 25, 2013).

14. *Like*, *supra* note 12.

15. Note that users have some control over their privacy settings in order to limit who may view the content on their Facebook page, including things they “like.” See *Basic Privacy Settings & Tools*, FACEBOOK, <http://www.facebook.com/help/325807937506242> (last visited Sept. 25, 2013).

Jane’s Facebook page will see that Jane has “liked” the content.<sup>16</sup> Text proclaiming “Jane likes this” and an icon of the thumbs-up sign will appear below the content with Jane’s name as a hyperlink to her own Facebook page.<sup>17</sup>

There are different reasons Jane may click “like.” Jane may “like” content because she finds it humorous, because she agrees with what the content says, or because she wishes to support what the content represents.<sup>18</sup> While Jane may “like” things for different reasons, each time she “likes” something, she completes an intentional action<sup>19</sup>—clicking her mouse or screen—in order to communicate with another person.

This Note examines how the Federal Rules of Evidence addressing hearsay and the hearsay exemption for adoptive admissions apply to Facebook “likes.”<sup>20</sup>

### B. THE FEDERAL RULES OF EVIDENCE GOVERNING HEARSAY

The Federal Rules of Evidence govern admissibility of evidence in trial.<sup>21</sup> The Rules generally exclude hearsay evidence from admission into evidence in trial.<sup>22</sup> A piece of evidence must contain four components in order to qualify as hearsay: the evidence must be (1) a statement, (2) made

16. *Like, supra* note 12.

17. *Id.*

18. For example, Jane may click “like” in response to her friend Harry’s post stating, “I’m happy to have gotten a job today” to show support for Harry’s success. Different types of content may prompt Jane to “like” the posts. Therefore, Jane’s intention in clicking “like” will make a difference in the hearsay and adoptive admissions analyses. *See infra* Parts II.B.3, III.A.3.

19. The issue of a mistaken or accidental click resulting in a “like” is an authentication issue. While authentication is relevant to hearsay, it is beyond the scope of this Note. This Note only addresses admissibility of previously authenticated “likes” under the adoptive admissions rule. For a more in-depth discussion of authentication standards and issues related to hearsay and Facebook “likes,” see *infra* notes 136, 148–52 and accompanying text.

20. The analysis of this Note is also applicable to “favorites” on Twitter. Jane “favorites” content on Twitter in much the same way she “likes” content on Facebook. Twitter displays a star next to each user’s tweet. When Jane clicks the star, she “favorites” the tweet. Jane’s friends can then click on a tab on Jane’s Twitter page that displays all of her “favorite” tweets. A “favorite” tweet is “most commonly used when users like a Tweet. Favoriting a Tweet can let the original poster know that you liked their Tweet, or you can save the Tweet for later.” *What Is a Favorite?*, TWITTER, <http://support.twitter.com/articles/14214-what-is-a-favorite#> (last visited Sept. 25, 2013). Saving the tweet for later implies that a person may “retweet” the tweet. “A retweet is someone else’s Tweet that you chose to share with all of your followers.” *Retweeting Another Person’s Tweet*, TWITTER, <http://support.twitter.com/articles/20169873-retweeting-another-person-s-tweet#> (last visited Sept. 25, 2013). “Retweets” share the content with a person’s followers while indicating the content’s original source (the person who first wrote the tweet). *Id.*

21. *See generally* FED. R. EVID. (providing instructions for what evidence is inadmissible at trial for various purposes). State court proceedings may be covered by local rules of evidence.

22. *Id.* R. 802.

by a declarant, (3) made outside of the courtroom, and (4) offered for the truth of the matter asserted.<sup>23</sup>

### 1. Statement

The Rules define a statement as “a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.”<sup>24</sup> This Subpart first addresses how courts have generally determined what constitutes an assertion. Next, it addresses how courts analyze the grammatical construction of a statement and how that construction affects whether evidence constitutes a statement.

#### a. Assertions

Though the Rules do not explicitly define “assertion,” the requirement that a statement be an assertion is a crucial element in the hearsay analysis. The closest the Rules come to defining “assertion” is noting that “nothing is an assertion unless intended to be one.”<sup>25</sup> Most analyses determining whether a statement is an assertion center around whether a declarant intends the statement as an assertion.

In *United States v. Zenni*, a federal district court in Kentucky addressed the definition of an assertion.<sup>26</sup> The court differentiated between “assertions” and “implied assertions.”<sup>27</sup> The *Zenni* court held that the Rules establish that implied assertions do not constitute hearsay by “providing that no oral or written expression [is] to be considered as hearsay, unless it [is] an ‘assertion’ concerning the matter sought to be proved and that no nonverbal conduct should be considered as hearsay, unless it [is] intended to be an ‘assertion’ concerning said matter.”<sup>28</sup> Therefore, for a statement to be an assertion, the declarant must intend to communicate something about the matter sought to be proved.<sup>29</sup>

In holding that the Rules fail to exclude implied assertions as hearsay, the *Zenni* court cited a famous example involving a sea captain.<sup>30</sup> The sea captain example asks: “Is it hearsay to offer as proof of the seaworthiness of a vessel that its captain, after thoroughly inspecting it, embarked on an ocean

23. Federal Rules of Evidence 801, 802, 803, 804, and 807 govern the use of hearsay. The Rules define hearsay as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” *Id.* R. 801(c).

24. *Id.* R. 801(a).

25. *Id.* R. 801(a) advisory committee’s note.

26. *United States v. Zenni*, 492 F. Supp. 464, 468 (E.D. Ky. 1980).

27. *Id.* at 466–68.

28. *Id.* at 468.

29. *Id.*

30. *Id.* at 466 (citing *Wright v. Tatham*, (1837) 112 Eng. Rep. 488 (K.B.)).

voyage upon it with his family?”<sup>31</sup> The *Zenni* court held that the Rules exclude this type of conduct from constituting hearsay because the declarant—the sea captain—does not intend to communicate anything to the outside world.<sup>32</sup> Because the sea captain’s conduct is non-assertive, meaning it is not *intended* to communicate his belief in the trustworthiness of the vessel, the conduct escapes exclusion under the rule excluding hearsay.<sup>33</sup>

However, not all nonverbal conduct is immune from the hearsay rule. “Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and [is] to be regarded as a statement.”<sup>34</sup> Therefore, various types of nonverbal conduct qualify as hearsay as long as the declarant intends to communicate. Courts have held that nonverbal conduct in the form of gesturing or pointing also constitutes conduct intended as an assertion.<sup>35</sup>

While courts have not addressed whether a “like” constitutes a statement for purposes of hearsay analysis, one Virginia district court held that “likes” are not statements in the First Amendment context.<sup>36</sup> In *Bland v. Roberts*, several police officers argued that they were fired for “liking” the Facebook page of their supervisor’s opponent in an upcoming Sheriff election.<sup>37</sup> The officers asserted that “liking” the page constituted a statement of support.<sup>38</sup> The court disagreed.<sup>39</sup>

The *Bland* court held that “merely ‘liking’ a Facebook page [was] insufficient speech to merit constitutional protection” because it was not expressive speech.<sup>40</sup> The court found that the First Amendment did not protect “likes” in part because, “[i]n cases where courts have found that

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31. *Id.*

32. *Id.* at 467.

33. *Id.* at 468.

34. *Id.* (citing Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 214, 217 (1948)).

35. For a variety of cases addressing nonverbal conduct as hearsay, see, for example, *United States v. Caro*, 569 F.2d 411, 416 n.9 (5th Cir. 1978) (holding that a person’s pointing out a vehicle in response to police investigation was assertive conduct and therefore inadmissible hearsay); *Colvard v. Commonwealth*, 309 S.W.3d 239, 247–48 (Ky. 2010) (holding that pointing in response to a question is hearsay under the Kentucky hearsay rules); *Clabon v. State*, 111 S.W.3d 805, 808 (Tex. App. 2003) (holding that a woman’s stabbing motions indicating knowledge about a murder were hearsay under the Texas Rules of Evidence).

36. *Bland v. Roberts*, 857 F. Supp. 2d 599 (E.D. Va. 2012), *aff’d in part, rev’d in part, and remanded by* No. 12–1671, 2013 WL 5228033 (4th Cir. Sept. 18, 2013). This case is significant because it is the first time a federal court has discussed whether nonverbal social media conduct is a statement.

37. *Id.* at 601.

38. *Id.*

39. *Id.* at 603.

40. *Id.*

constitutional speech protections extended to Facebook posts, actual statements existed within the record.”<sup>41</sup> The court found that without a verbal statement, a “like” warrants no First Amendment protection.<sup>42</sup>

Many subsequently criticized the *Bland* court for holding that a “like” is not constitutionally protected speech.<sup>43</sup> The ruling implied that a “like” may be sufficient to communicate a message that may lead to a person’s termination, but insufficient to warrant First Amendment protections.<sup>44</sup> In an amicus curiae brief for *Bland*’s appeal, the American Civil Liberties Union (“ACLU”) stated that “[l]iking’ something on Facebook expresses a clear message—one recognized by millions of Facebook users and non-Facebook users—and is both pure speech and symbolic expression.”<sup>45</sup> The ACLU noted that a “[l]ike’ publishes text that literally states that the user likes something” and “distributes the universally understood ‘thumbs up’ symbol.”<sup>46</sup> When a Facebook user “likes” a political candidate, as the officers did in *Bland*, the “like”

is a clear sign of support for that candidate. Similarly, when a user “Likes” a movie, television show, or game, it shows that he or she enjoys that product. Or if a user “Likes” another user’s comment or post, he or she is expressing approval of the information conveyed by that other user.<sup>47</sup>

Facebook, which also filed an amicus curiae brief supporting constitutional protection for “likes,” agreed that “likes” are inherently

41. *Id.*

42. *Id.* at 604. Therefore, the supervisor’s adverse employment action of firing the employees was not a violation of the employees’ First Amendment rights. *Id.*

43. See, e.g., David L. Hudson, Jr., “Like” Is Unliked: Clicking on a Facebook Item Is Not Free Speech, *Judge Rules*, A.B.A. J. (Sept. 1, 2012, 3:00 AM), [http://www.abajournal.com/magazine/article/like\\_is\\_unliked\\_clicking\\_on\\_a\\_facebook\\_item\\_is\\_not\\_free\\_speech\\_judge\\_rules/](http://www.abajournal.com/magazine/article/like_is_unliked_clicking_on_a_facebook_item_is_not_free_speech_judge_rules/); Chris Matyszczuk, *Could You Get Fired for a Facebook “Like”?*, CNET (May 6, 2012, 9:03 AM), <http://news.cnet.com/8301-17852-3-57428717-71/could-you-get-fired-for-a-facebook-like/> (discussing potential ramifications of “likes” on employment); Joanna Stern, *Is a Facebook “Like” Protected Under the First Amendment?*, ABC NEWS (Aug. 9, 2012, 5:21 PM), <http://abcnews.go.com/blogs/technology/2012/08/is-a-facebook-like-protected-under-the-first-amendment/> (discussing whether “likes” are protected under the First Amendment); G. Edward White et al., *Is It Legal?: Are Facebook “Likes” Protected by the First Amendment?*, U. VA. SCH. L. (Aug. 13, 2012), [http://www.law.virginia.edu/html/news/2012\\_sum/facebook\\_like\\_case.htm](http://www.law.virginia.edu/html/news/2012_sum/facebook_like_case.htm) (discussing why a “like” should be protected speech).

44. Matyszczuk, *supra* note 43.

45. Brief of Amici Curiae American Civil Liberties Union and ACLU of Virginia in Support of Plaintiffs–Appellants’ Appeal Seeking Reversal at 5, *Bland v. Roberts*, 2013 WL 5228033 (4th Cir. Sept. 18, 2013) (No. 12–1671), available at [http://www.aclu.org/files/assets/bland\\_v\\_roberts\\_appeal\\_-\\_amicus\\_brief.pdf](http://www.aclu.org/files/assets/bland_v_roberts_appeal_-_amicus_brief.pdf).

46. *Id.* at 5–6.

47. *Id.* at 6.



communicative.<sup>48</sup> Facebook’s brief implied that “liking” content is like speaking, arguing that “[i]f [the officer] had stood on a street corner and announced, ‘I like Jim Adams for Hampton sheriff,’ there would be no dispute that his statement was constitutionally protected speech.”<sup>49</sup> Facebook and the ACLU therefore agree that a “like” is a tool to communicate one’s beliefs and feelings. However, Facebook and the ACLU are not the only entities that reacted negatively to the *Bland* ruling. Lawyers and law professors throughout the country openly disagreed with the decision.<sup>50</sup> One professor labeled the analysis “dead wrong.”<sup>51</sup>

On appeal, the Fourth Circuit agreed with Facebook and the ACLU.<sup>52</sup> After explaining that “liking” something on Facebook “is an easy way to let someone know that you enjoy it,”<sup>53</sup> the court found that clicking “like” constituted protected speech<sup>54</sup>: “[o]n the most basic level, clicking on the ‘like’ button literally causes to be published the statement that the User ‘likes’ something, which is itself a substantive statement.”<sup>55</sup> The court went on to note that “likes” not only constitute pure speech, but also symbolic expression, as each “like” is accompanied by the distribution of the “universally understood ‘thumbs up’ symbol.”<sup>56</sup> The court concluded by noting that a Facebook “like” is the “Internet equivalent of displaying a political sign in one’s front yard, which the Supreme Court has held is substantive speech.”<sup>57</sup> While the standard for whether a piece of evidence qualifies as a statement for constitutional purposes differs from the requirement that a statement must be an assertion for hearsay purposes,<sup>58</sup> the Fourth Circuit’s decision in *Bland* is informative in the hearsay context.

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48. Facebook’s brief stated that “[l]iking a Facebook Page is entitled to full First Amendment protection,” and that the *Bland* court “reached a contrary conclusion based on an apparent misunderstanding of the way Facebook works.” Brief of Facebook, Inc. as Amicus Curiae in Support of Plaintiff–Appellant Daniel Ray Carter, Jr. and in Support of Vacatur at 9, *Bland*, 2013 WL 5228033 (No. 12–1671), 2012 WL 3191379, at \*9.

49. *Id.* at 3.

50. Hudson, *supra* note 43.

51. *Id.*

54. *Bland*, 2013 WL 5228033, at \*16.

53. *Id.* at \*15 (internal quotation marks omitted).

54. *Id.* at \*16.

55. *Id.* at \*15.

56. *Id.*

57. *Id.* at \*16.

58. The right to free speech is protected by the First Amendment. U.S. CONST. amend. I. “[T]he First Amendment bars the government from dictating what we see or read or speak or hear.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002). However, “it does not embrace certain categories of speech.” *Id.* at 245–46. The First Amendment, therefore, is presumed to apply to all speech unless speech falls into an exception that removes First Amendment protection. However, in the hearsay context, speech is not presumed to be a “statement.”

*b. Grammatical Construction*

Courts have held that the analysis used to determine whether a statement qualifies as an assertion depends on the grammatical structure of the statement. In *United States v. Safavian*, the court cited two cases, *United States v. Oguns*<sup>59</sup> and *United States v. Long*,<sup>60</sup> in support of its conclusion that commands and questions that prompted hearsay objections in *Safavian* failed to constitute hearsay.<sup>61</sup>

In *United States v. Oguns*, Oguns argued that a question—"Have the apples arrived there?"—was excludable hearsay.<sup>62</sup> The Second Circuit disagreed, noting that the lower court admitted the question as "non-hearsay circumstantial evidence of Oguns' knowledge and intent."<sup>63</sup> The Second Circuit held that a question is not hearsay because it is not an assertion, and it therefore cannot be used to prove the truth of the matter asserted.<sup>64</sup> Courts may, therefore, appropriately use questions as circumstantial evidence of the listener's knowledge, as the lower court did in *Oguns*.<sup>65</sup>

In *United States v. Long*, police officers answered a phone call placed to an apartment during a search of the apartment.<sup>66</sup> On the other end of the line, a voice asked if Long "still had any stuff."<sup>67</sup> The officer asked the caller what she meant, and the caller responded, "a fifty."<sup>68</sup> Long objected to this evidence as hearsay because the statements contained an implicit assertion that he dealt drugs.<sup>69</sup> The court noted that the key question when determining whether a statement constitutes hearsay is whether the assertion is intentional or unintentional.<sup>70</sup> While any question arguably contains an implicit message, unintentional messages do not present the same hearsay dangers as intentional messages.<sup>71</sup> The court held that the

59. *United States v. Oguns*, 921 F.2d 442 (2d Cir. 1990).

60. *United States v. Long*, 905 F.2d 1572 (D.C. Cir. 1990).

61. *United States v. Safavian*, 435 F. Supp. 2d 36, 44-45 (D.D.C. 2006) (citing *Oguns*, 921 F.2d at 448-49 and *Long*, 905 F.2d at 1579-80).

62. *Oguns*, 921 F.2d at 448.

63. *Id.*

64. *Id.* at 449.

65. *Id.*

66. *Long*, 905 F.2d at 1579.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1580.

71. *Id.* ("One of the principal goals of the hearsay rule is to exclude declarations when their veracity cannot be tested through cross-examination. When a declarant does not intend to communicate anything, however, his sincerity is not in question and the need for cross-examination is sharply diminished. Thus, an unintentional message is presumptively more reliable.") Even though the hearsay dangers of "perception, memory, and narration" are untested, "these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds." *Id.* (quoting FED. R. EVID. 801 advisory committee's note) (internal quotation marks omitted).

questions were not hearsay because there was insufficient evidence demonstrating that the caller intended to communicate Long’s involvement in dealing drugs, despite the fact that the caller’s comments contained implied assertions that Long dealt drugs.<sup>72</sup>

Whether evidence is a statement hinges on whether it is assertive. Both verbal statements and nonverbal actions may constitute assertions.<sup>73</sup> This determination depends on both the declarant’s intent to communicate and on the grammatical structure of the statement.<sup>74</sup>

## 2. Declarant and Out-of-Court Statement Components

The second and third components of hearsay—requiring a declarant and an out-of-court statement—are simple in the context of Facebook “likes.” “[T]he person who made the statement” is the declarant.<sup>75</sup> This means that for evidence to constitute hearsay a human being must make the statement.<sup>76</sup> The requirement that the statement be made outside of the courtroom means the statement is not made by a person while testifying in the current proceeding.<sup>77</sup>

## 3. Truth of the Matter Asserted Component

The last requirement for evidence to qualify as hearsay is that a person offers the statement for “the truth of the matter asserted.”<sup>78</sup> “If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted.”<sup>79</sup> However, a statement offered for the substance of its content—rather than the mere fact

72. *Id.*

73. FED. R. EVID. 801.

74. Rhetorical questions may be treated differently from questions that seek a literal answer. Rhetorical questions may even occur in circumstances that show that the question is intended to communicate something. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE MANUAL § 14.02[2] (1987 & Supp. 2013) (citing *United States v. Summers*, 414 F.3d 1287, 1300 (10th Cir. 2005)).

75. FED. R. EVID. 801(b).

76. The declarant requirement dictates that a statement must be made by a human being, as opposed to a statement or image generated by a machine. *Compare* *United States v. Hamilton*, 413 F.3d 1138, 1142 (10th Cir. 2005) (holding a computer-generated header does not meet the definition of declarant), *and* *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) (stating that “a statement is something uttered by ‘a person,’ so nothing ‘said’ by a machine . . . is hearsay” (quoting 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE 65 (2d ed. 1994) (internal quotation marks omitted))), *and* *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007) (holding that “[o]nly a *person* may be a declarant and make a statement”), *with* *Black v. State*, 358 S.W.3d 823, 831 (Tex. App. 2012) (holding that text messages, though electronic, were “produced by human thought and action,” making them hearsay).

77. FED. R. EVID. 801(c)(1).

78. *Id.* R. 801(c)(2).

79. *Id.* R. 801(c) advisory committee’s note.

that the speaker made it—is offered for the truth of the matter asserted.<sup>80</sup> The truth of the matter asserted need not be direct evidence of the proposition to be ultimately shown.<sup>81</sup> Instead, if the matter asserted in the statement, “if true, [provides] circumstantial evidence of the matter to be proved,” the statement constitutes hearsay.<sup>82</sup>

Some statements possess a dual purpose—one that goes to the truth of the matter asserted and one that supports another purpose.<sup>83</sup> In these situations, the circumstances surrounding the stated purpose for the statement are relevant in determining whether the court must exclude the statement on hearsay grounds.

*State v. Richcreek* addressed the issue of dual use.<sup>84</sup> In *Richcreek*, the court found that, “[d]espite a professed nonhearsay use, if the statement’s content could also cut toward proof of guilt, the potential for abuse is great.”<sup>85</sup> Therefore, “when the [out-of-court] statements connect the accused with the crime charged, they should generally be excluded.”<sup>86</sup>

*United States v. Reynolds* also addressed a statement open to multiple interpretations.<sup>87</sup> The court in *Reynolds* held that the statement was not offered to prove its express meaning.<sup>88</sup> However, the party was offering the statement for the truth of its implication that the defendant was guilty.<sup>89</sup> The court stated that “[i]t is well settled that evidence is inadmissible hearsay if its probative value depends on the truth of any assertion of fact it contains.”<sup>90</sup> Therefore, when a statement bears the potential for multiple uses in court, one of which depends on the truth of the matter asserted, courts must consider the statement hearsay.

The Federal Rules of Evidence dictate that all of the above four requirements must be met for evidence to qualify as hearsay.<sup>91</sup> The Rules provide that courts must exclude hearsay from admission into evidence unless otherwise allowed by federal statute, a different portion of the rules,

80. *Id.*

81. *United States v. Reynolds*, 715 F.2d 99, 103 (3d Cir. 1983).

82. *Id.* (quoting 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE 94 n.84 (1980)).

83. For example, a party may offer a statement by a witness that the witness’s friend told him she had been assaulted for the truth that the friend was in fact assaulted *or* to show what the friend did after the assault. *See State v. Richcreek*, 964 N.E.2d 442, 450–51 (Ohio Ct. App. 2011) (discussing dual use).

84. *Richcreek*, 964 N.E.2d at 450.

85. *Id.*

86. *Id.* (alteration in original).

87. *United States v. Reynolds*, 715 F.2d 99, 103 (3d Cir. 1983).

88. *Id.* at 104.

89. *Id.*

90. *Id.* at 101.

91. FED. R. EVID. 801 (c); *see supra* note 23 and accompanying text.

or Supreme Court precedent.<sup>92</sup> The Rules allow for the admission of hearsay that meets a hearsay exception or exemption.<sup>93</sup> Therefore, courts may still admit evidence that meets the qualifications outlined above if the evidence also meets the requirements for a hearsay exemption. The adoptive admissions exemption is one example.

### C. THE HEARSAY EXEMPTION FOR ADOPTIVE ADMISSIONS

The adoptive admissions exemption to hearsay allows courts to admit some otherwise excludable statements into evidence as nonhearsay statements. The hearsay exemption for adoptive admissions states, “[a] statement that meets the following conditions is not hearsay: . . . (2) An Opposing Party’s Statement. The statement is offered against an opposing party and: . . . (B) is one the party manifested that it adopted or believed to be true.”<sup>94</sup>

The “statement” in the adoptive admissions exemption has the same definition as “statement” for purposes of hearsay analysis.<sup>95</sup> In contrast, the term “admission” in this context means something other than what people commonly understand it to mean. Statements admitted into evidence under this exemption need not “admit” anything such as a person’s guilt or

92. FED. R. EVID. 802.

93. An exemption means that a statement is considered “not hearsay.” *Id.* R. 801(d). Exemptions contained in 801(d) include “[s]everal types of statements which would otherwise literally fall within the definition [but] are expressly excluded from it[.]” *Id.* R. 801(d) advisory committee’s note. In contrast, an exception may apply when the statement is considered hearsay but is allowed into evidence based on other reasoning that overcomes the rationale for excluding hearsay evidence. *See id.* R. 803–04, 807. The differences between an exception to hearsay and an exemption from hearsay are not relevant to this Note, as it only examines one exemption to the hearsay rule. However, it is relevant to recognize that accepting evidence under an exemption classifies the evidence as *nonhearsay*. *Id.* 801(d). The results of qualifying for an exemption from hearsay and qualifying for an exception to hearsay are the same: the evidence is admissible. *Id.* R. 801(d), 803–04, 807.

94. *Id.* R. 801(d)(2)(B). There are scenarios where a party may want to enter a “liked” statement into evidence made by a person other than the opposing party. For example, if a witness to a crime “liked” a description of the crime, a party may want to enter the “like” in order to corroborate details of the event. In that case, it is unlikely that a party would offer this against the person who clicked “like.” In the case of offering a “liked” statement not against the person who made it but against a third party, the “like” could only be analyzed using the standard hearsay analysis and the adoptive admissions exemption would not apply, though other exceptions or exemptions may apply. *See infra* Part III.A. For an argument that the Present Sense Impression exception effectively operates as is when applied to “e-hearsay” and requires no adaptation to account for verbal Internet communication, 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 (2012).

95. Both rules rely on the definition of “statement” in Rule 801(a), as both the hearsay rule and the adoptive admissions exemption are part of Rule 801. FED. R. EVID. 801. A statement is “a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.” *Id.* R. 801(a).

involvement in a crime.<sup>96</sup> Rather, if “a statement can be used against the party at trial—for example a false alibi by the defendant that the government wants to use to show the defendant’s consciousness of guilt—it is admissible despite the fact that it is hearsay.”<sup>97</sup> The adoptive admissions exemption is only applicable when a statement is being offered against the party who made the statement.<sup>98</sup>

While courts have yet to consider whether a “like” is an adoptive admission, cases considering nonverbal conduct and forwarded electronic mail (“e-mail”) messages as adoptive admissions provide an analogous background.

### 1. Nonverbal Conduct as Adoptive Admissions

In *United States v. Joshi*, the Eleventh Circuit Court of Appeals reviewed the district court’s decision to admit a head nod in response to a statement made by another person as an adoptive admission.<sup>99</sup> In reviewing the ruling, the Eleventh Circuit held that evidence must meet two criteria for courts to admit a statement as an adoptive admission: “First, the statement must be such that an innocent defendant would normally be induced to respond,” and “[s]econd, there must be sufficient foundational facts from which the jury could infer that the defendant ‘heard, understood, and acquiesced in the statement.’”<sup>100</sup> The first of these criteria is particularly relevant in cases of adoption by complete silence, which is when a defendant’s lack of verbal or physical response to a statement that would typically induce an innocent defendant to respond indicates the defendant’s adoption of another person’s statement.<sup>101</sup> The court held that, because Joshi acted by nodding his head rather than remaining silent, this first criterion was not an issue.<sup>102</sup>

In addressing the second criterion, the court held that evidence meets this requirement when “a jury could reasonably find that the defendant comprehended and acquiesced in the statement.”<sup>103</sup> An undercover agent had introduced Joshi as the agent’s “partner in both the Newark and the

96. *Id.* R. 801 reporter’s comment on restyled Rule 801.

97. *Id.* For this reason, the Federal Rules changed the language of the Rule so that it no longer uses the term “admission.” While the Federal Rules currently use the phrase “Opposing Party Statement” rather than the old language of “Admission by a Party Opponent,” this Note uses the phrase “Adoptive Admission” to refer to the exception embodied in Rule 801(d)(2)(b) for purposes of brevity.

98. There are circumstances when statements made by third parties may be offered into evidence utilizing other hearsay exemptions. *See supra* note 93; *see also infra* Part III.B (describing that “making” a statement within adoptive admissions is equivalent to someone adopting the original statement uttered by another party).

99. *United States v. Joshi*, 896 F.2d 1303, 1311 (11th Cir. 1990).

100. *Id.* (quoting *United States v. Jenkins*, 779 F.2d 606, 612 (11th Cir. 1986)).

101. *Id.*

102. *Id.*

103. *Id.* at 1312.

Miami hashish importation plans.”<sup>104</sup> Joshi nodded his head in response to this introduction.<sup>105</sup> The court determined that “the nod itself could support an inference that Joshi understood the statements to which he was responding,” and that there was sufficient evidence for a reasonable jury to conclude Joshi’s nod provided an acknowledgment of the statement.<sup>106</sup> Therefore, the court held that the head nod fulfilled the requirements for an adoptive admission.<sup>107</sup>

*United States v. Price* also addressed whether a head nod satisfied the requirements of the adoptive admissions exemption.<sup>108</sup> In *Price*, the defendant nodded his head repeatedly when another person, Hill, described bank robberies he had committed with the defendant.<sup>109</sup> The defendant’s head nod “suggest[ed] that he had helped Hill commit these crimes.”<sup>110</sup> Though people may have interpreted the defendant’s head-nodding in various ways, including that “he was impressed by Hill’s criminal exploits,” the court held that “because Hill’s statement was made in [the defendant’s] presence and because [the defendant] appeared to adopt it as his own—signifying that he, too, participated in these crimes—the statement was admissible under Rule 801(d)(2)(E).”<sup>111</sup>

## 2. E-Mail Forwarding as Adoptive Admissions

In *United States v. Safavian*, the court applied the adoptive admissions doctrine to forwarded e-mails.<sup>112</sup> However, the court provided little information about the process it used to determine whether a forwarded e-mail message constituted an adoptive admission.<sup>113</sup> The court held simply that “[t]he context and content of certain e-mails demonstrate clearly that Mr. Safavian ‘manifested an adoption or belief’ in the truth of the statements of other people as he forwarded their e-mails,” while certain other e-mails did not have the requisite context.<sup>114</sup> Without explaining what context was sufficient for this showing, the court admitted some e-mails as adoptive admissions and excluded others.<sup>115</sup> *Safavian* illustrates that the simple act of forwarding an e-mail message does not necessarily constitute

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104. *Id.* at 1305.

105. *Id.*

106. *Id.* at 1312.

107. *Id.*

108. *United States v. Price*, 516 F.3d 597, 607 (7th Cir. 2008).

109. *Id.* at 602.

110. *Id.*

111. *Id.* at 607.

112. *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

113. *Id.* at 42–44.

114. *Id.* at 43 (quoting FED. R. EVID. 801(d)(2)(B)).

115. *Id.*

an adoptive admission without context indicating an adoption of the information contained within.

In *Sea-Land Service, Inc. v. Lozen International, LLC*, the Ninth Circuit addressed the admissibility of a forwarded e-mail message as an adoptive admission.<sup>116</sup> In *Sea-Land*, one Sea-Land employee forwarded a memo to another Sea-Land employee, prefacing the forwarded message with “Yikes, Pls note the rail screwed us up.”<sup>117</sup> The court held that this constituted an adoption of the original e-mail rising to the level of “manifest[ing] an adoption or belief in [the] truth’ of the information contained in the original e-mail.”<sup>118</sup>

*Safavian* and *Sea-Land* illustrate that the context surrounding one’s silence or statement is key to determining whether the silence or statement is an adoptive admission in an e-mail forwarding scenario. Likewise, to determine whether a specific “like” constitutes hearsay or an adoptive admission, courts should also take the context of the “like” into account.

### III. ANALYZING A “LIKE” UNDER THE FEDERAL RULES OF EVIDENCE

Courts’ analyses of “likes” under the Federal Rules of Evidence will hinge on whether courts view the “like” either (1) as creating an independent statement separate from the original statement, or (2) as a manifestation of agreement with a preexisting statement. “Likes” are most appropriately viewed as the latter.<sup>119</sup> When viewed as manifestations of agreement with a preexisting statement rather than new statements in and of themselves, “likes” will never be subject to the hearsay analysis because they are not themselves statements. Instead, the original typewritten statement that was “liked” would be subject to the hearsay analysis. Therefore, courts should analyze the underlying typewritten statement the way they would analyze any other verbal statement to determine if the statement is hearsay. If the original typewritten statement constitutes hearsay, courts should then consider the effect of a person “liking” that statement.

However, if viewed as newly created statements in and of themselves, “likes” are subject to the hearsay analysis. While the context surrounding “likes”—namely that “likes” are a direct positive reaction to another person’s statement—illustrates that “likes” are more appropriately categorized as adoptions of a preexisting statement, “likes” viewed as independent statements would constitute hearsay in many cases. Subpart III.A illustrates how the existing hearsay analysis applies to “likes” if they are viewed as creating new, independent statements. Subpart III.B illustrates the adoptive

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116. *Sea-Land Serv., Inc. v. Lozen Int’l, LLC*, 285 F.3d 808 (9th Cir. 2002).

117. *Id.* at 821.

118. *Id.* (alteration in original) (citing FED. R. EVID. 801(d)(2)(B)).

119. *See infra* Part III.B.



admissions analysis, which only applies if the “like” is viewed not as an independent statement, but as a vehicle for the admission of the original statement, when the original statement constitutes hearsay.

A. “LIKES,” IF VIEWED AS CREATING INDEPENDENT STATEMENTS,  
MAY CONSTITUTE HEARSAY

A “like” may be viewed as creating a new statement. In cases where a “like” is viewed as an independent statement, a “like” constitutes hearsay in the same circumstances as any other piece of evidence: when the statement meets the conditions of the Federal Rules of Evidence. Therefore, a “like” must contain four components in order to qualify as hearsay: the evidence must be (1) a statement, (2) made by a declarant, (3) made outside of the courtroom, and (4) offered for the truth of the matter asserted.<sup>120</sup>

1. Statement

A statement is a “person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.”<sup>121</sup> The Rules do not define the term “assertion.” However, “[i]f the conduct is assertive in nature, that is, meant to be a communication—like the nodding or shaking of the head in answer to a question—it is treated as a statement, and the hearsay rule applies.”<sup>122</sup> The key question in determining whether nonverbal conduct constitutes a statement is whether the actor intended to communicate something. When an actor does not intend to communicate something through his or her nonverbal conduct, the conduct is not a statement.<sup>123</sup>

While a person may have various subjective purposes for clicking “like,” all “likes” are a form of communication. “Liking” something signals a positive reaction to the content or a show of support.<sup>124</sup> The intention to

120. FED. R. EVID. 801; *supra* note 23 and accompanying text.

121. FED. R. EVID. 801 (a).

122. *State v. Davis*, 854 A.2d 67, 73 (Conn. App. Ct. 2004).

123. *See, e.g., United States v. Jeffries*, 457 Fed. App’x 471, 483 (6th Cir. 2012), *cert. denied*, 132 S. Ct. 2418 (2012) (holding that a person’s mere possession of cocaine was not intended as an assertion and therefore was not hearsay); *United States v. Butler*, 763 F.2d 11, 14 (1st Cir. 1985) (holding that the defendant’s girlfriend’s action of leaving his house in her car—as an informant had predicted she would—was not assertive conduct because there was no evidence that her conduct was intended as an assertion as opposed to ordinary conduct); *State v. Burney*, 954 A.2d 793, 802–04 (Conn. 2008) (outlining holdings in Connecticut and other jurisdictions that a person’s demeanor is not hearsay).

124. *Like, supra* note 12 (explaining that “like” is a way to “[g]ive positive feedback” and that a “like” is a way to “let someone know that you enjoy [something] without leaving a comment”). There are circumstances in which a “like” may not signal that a user actually likes something, but functions instead as an acknowledgement of an event or a show of support. For example, a user who “likes” a friend’s Facebook post stating, “My brother lost his job, please send prayers his way” likely does not actually enjoy the fact that his friend’s brother lost his job. Instead, this type of “like” signals an acknowledgment of the event and a positive show of

communicate that a person actually likes something lies embedded in the purpose of the “like.”

Facebook advertises a “like” as “an easy way to let someone know that you enjoy [something], without leaving a [verbal] comment.”<sup>125</sup> The Fourth Circuit recently agreed with Facebook’s view that “likes” are communicative in *Bland v. Roberts*.<sup>126</sup> Moreover, Facebook users commonly understand “likes” as a tool for communication.<sup>127</sup> Together, these characterizations support the notion that “likes” generally constitute statements for purposes of hearsay analysis.<sup>128</sup>

Legal scholars and writers have supported Facebook’s position on the communicative nature of a “like,” providing examples of analogous speech that would constitute a statement.<sup>129</sup> “[I]t’s hard to imagine the slogan ‘I Like Ike’ would not [have] take[n] on a strong dose of Facebook meaning with supporters liking him online” if Dwight Eisenhower ran for office in 2012.<sup>130</sup> One law professor noted that “[p]ressing like on Facebook is the cyberequivalent of making a gesture at someone. We know that giving someone the finger or clapping for someone are forms of protected expression.”<sup>131</sup> Though these examples were discussed in the context of the *Bland* district court holding that “likes” do not constitute speech for purposes of First Amendment protection, the analogies are applicable in determining whether conduct is assertive for hearsay purposes. In fact, the Fourth Circuit in *Bland* interpreted “likes” as “substantive statements” ascribing the verbal phrase “I like this” to someone else’s content.<sup>132</sup>

Though a court may initially determine a “like” to be hearsay, the party arguing that a “like” escapes qualification as hearsay may offer evidence that the “like” in a specific case was not communicative because the use of “like” was an accident or not meant to communicate anything.<sup>133</sup> However, absent evidence showing that a statement created by the “like” in a particular case

support. While *what* a person intends to communicate will require a case-by-case analysis, all “likes” communicate *something*. Deciphering what a “like” was intended to communicate is relevant to determining if the “like” is offered for the truth of the matter asserted. *See supra* Part II.B.3.

125. *Like, supra* note 12.

126. *Bland v. Roberts*, No. 12–1671, 2013 WL 5228033, at \*16 (4th Cir. Sept. 18, 2013).

127. The ACLU cites the common understanding of the purpose of a Facebook “like” in its amicus curiae brief for the appeal of *Bland v. Roberts*. *See supra* notes 45–47 and accompanying text.

128. For a discussion of the standard of proof for each component of the hearsay rule, see *infra* note 136.

129. Hudson, *supra* note 43.

130. *Id.* (quoting Clay Calvert, director of the Marion B. Brechner First Amendment Project at the University of Florida) (internal quotation marks omitted).

131. *Id.* (quoting Paul Secunda, Professor of Law, Marquette University Law School) (internal quotation marks omitted).

132. *Bland v. Roberts*, No. 12–1671, 2013 WL 5228033, at \*16 (4th Cir. Sept. 18, 2013).

133. *See supra* note 19.

was not intended as a communication, “liked” content must be considered a statement for purposes of hearsay analysis because both the common characteristics of “liked” content and the common understanding of “likes” support the finding that “likes” are intended as tools for communication.<sup>134</sup>

## 2. Declarant and Made-Out-of-Court Components

The declarant requirement focuses on whether a human being generates the statement.<sup>135</sup> While a “like” may be clicked by mistake, a person—not a machine—still clicks the “like” button or types the statement. Furthermore, whether a person clicks “like” by mistake raises an authentication issue rather than issues of whether the statements qualify as hearsay.<sup>136</sup>

“Likes” represent an action that occurs on the Internet through the use of Facebook. Witnesses typically cannot access the Internet while they are

134. See *infra* Part IV.

135. See *supra* Part II.B.2.

136. The Federal Rules of Evidence address different possible modes of authentication under Rule 901. FED. R. EVID. 901. The standard of proof for authenticating evidence is listed in both Rule 901 and Rule 104. *Id.* R. 104, 901. The question of whether a piece of evidence has been authenticated involves a preliminary question under Rule 104. *Id.* R. 104. A preliminary question is a question that must be answered in order to determine the purpose for which the evidence is being offered. For example, “if a letter purporting to be from Y is relied upon to establish admission by him, it has no probative value unless Y wrote or authorized it.” *Id.* R. 104(b) advisory committee’s note. The question of whether the “like” button was clicked by the hypothetical Facebook user Jane is a question of fact that must be answered in order to make the “like” relevant, similar to the offering of a letter against Y. Therefore, the court would consider this issue under Rule 104(b). Rule 104(b) states that “[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.” *Id.*

In order for a “like” to be authenticated, therefore, the judge need not find that the “like” button was clicked by the person against whom the “like” is being offered beyond a reasonable doubt or even by a preponderance of the evidence. The judge must only find that there is evidence “sufficient to support a finding” by a jury that Jane clicked “like.” Jane is also allowed to present evidence rebutting the allegation that she clicked “like.”

Some commentators have stressed that social media evidence presents unique difficulties. See, e.g., Bellin, *supra* note 2 (arguing that the current hearsay exception for present sense impressions does not adequately apply to Internet communication); Scott R. Grubman & Robert H. Snyder, *Web 2.0 Crashes Through the Courthouse Door: Legal and Ethical Issues Related to the Discoverability and Admissibility of Social Networking Evidence*, 37 RUTGERS COMPUTER & TECH. L.J. 156, 211 (2011) (stating that web evidence presents “unique issues”); Vinson, *supra* note 2 (calling for written guidelines that specifically address the use of social media in the legal profession). However, in the case of Facebook “likes,” courts should hold that, since Jane’s “like” is clicked by someone who has accessed Jane’s private Facebook account—which appears with Jane’s name on a page displaying Jane’s photo, contact information, and other personally identifying features—the “sufficient to support a finding” standard is preliminarily met; “likes” are generally admissible, subject to rebuttal evidence on authentication if Jane can cast doubt on the authenticity of the “like.”

testifying. Therefore, this Note assumes that clicking “like” takes place outside of the courtroom.<sup>137</sup>

### 3. Truth of the Matter Asserted

The requirement that the “like” be offered for the truth of the matter asserted depends on the purported use of the evidence provided by the proponent of the “like.” If a “like” is viewed as creating a new statement, it is most reasonably viewed as creating a duplicate of the original statement rather than a new statement prefaced with “I like” and followed by the original statement. For example, if Jane “likes” a friend’s post that says, “Why should the Boston bomber get a lawyer at all?” and the “like” is viewed as creating a new statement, it is most reasonably viewed as Jane’s repeating the question in the friend’s post rather than Jane’s saying “I like the post ‘why should the Boston Bomber get a lawyer at all.’” If a “like” is viewed as creating a new statement beginning with “I like,” then the phrasing of the “like” will always be a declarative utterance and therefore never exempt from hearsay.<sup>138</sup> However, if a “like” is viewed as creating a duplicate of the original statement, the grammatical form of the statement will dictate whether the “like” constitutes hearsay.

When a “like” is viewed as creating a new, duplicate statement, the hearsay analysis will differ based on the grammatical form of the “liked” content. Suppose Jane “likes” a friend’s post saying, “Why should the Boston bomber get a lawyer at all?” or a post saying, “The Boston bomber shouldn’t have a right to a lawyer.”<sup>139</sup> The former phrasing is a question, while the latter is a declarative utterance. Though Jane’s “liking” both statements may convey the same message—that Jane thinks the Boston bomber shouldn’t get a lawyer—the question creates an implied assertion that Jane thinks the

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137. If the unusual case ever arises where the “like” button is clicked while a witness is on the witness stand and then offered during that same trial against the party who clicked “like” while on the stand, the analysis in this Note will not apply because the “like” would not constitute hearsay under Rule 801. For an interesting commentary on the potential use and dangers of access to social networking relating to the courtroom in areas other than the admission of evidence, see Marcy Zora, *The Real Social Network: How Jurors’ Use of Social Media and Smart Phones Affects a Defendant’s Sixth Amendment Rights*, 2012 U. ILL. L. REV. 557.

138. A declarative statement is the only grammatical form that qualifies as an assertion. See *supra* Part II.B.1.b.

139. “Boston bomber” references the individuals who were accused of detonating bombs during the Boston Marathon on April 15, 2013. See CNN Staff, *What We Know About the Boston Bombing and Its Aftermath*, CNN (Apr. 18, 2013, 5:54 AM), <http://www.cnn.com/2013/04/18/us/boston-marathon-things-we-know/index.html>. This example is adapted from real Facebook posts the author saw shortly after the bombings.

bomber shouldn't get a lawyer,<sup>140</sup> while the same assertion stemming from the declarative utterance is direct, not implied.<sup>141</sup>

Whether a party offers a statement for the truth of the matter asserted also hinges on the purpose for which the proponent of the evidence is offering the statement. For example, suppose authorities accuse Jane of participating in the robbery of a gas station. One piece of evidence authorities offer in Jane's trial is that Jane “liked” her co-defendant's Facebook post, written an hour before the robbery, saying, “About to come into some extra cash. Drinks on me tonight!” If authorities offer Jane's “like” to show that Jane too was shortly going to have some extra money, then the statement is being offered for the truth of the matter asserted because it directly supports the proposition to be proved—that Jane took money from the gas station. However, if the proponent offers the statement to show that Jane had knowledge that the robbery was going to occur, or that Jane believed her friend would buy her a drink that night, the statement is not being offered for the truth of the matter asserted, and therefore it is not hearsay.<sup>142</sup>

In short, there is no simple answer to whether a “like,” when interpreted as creating an independent statement, is being offered for the truth of the matter asserted. How a court interprets the way a “like” creates a new statement will dictate how courts conduct the hearsay analysis and therefore whether the evidence will constitute hearsay. The “like” may create a duplicate statement of a question, in which case the underlying statement would not constitute hearsay. Alternatively, “liking” a question may create a new declarative statement asserting the speaker's support of the question, and it would therefore not be excluded from the hearsay analysis because of the grammatical phrasing of the newly created statement. Parties may also offer “likes” as circumstantial evidence of knowledge, meaning they are not offered for the truth of the matter asserted and are therefore not excludable under the hearsay rule.<sup>143</sup>

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140. *United States v. Long*, 905 F.2d 1572, 1580 (D.C. Cir. 1990); *see also supra* Part II.B.1.a. (discussing the assertion requirement for statements).

141. Since both “likes” may be interpreted as conveying the same message, it may seem arbitrary to draw the line based on grammatical structure. However, courts have commonly relied on grammatical structure to determine if a statement is being offered for the truth of the matter asserted, holding that certain types of grammatical structures inherently have no truth matter to be asserted. *See supra* Part II.B.1.b.

142. *See United States v. Oguns*, 921 F.2d 442, 448–49 (2d Cir. 1990) (holding that statements offered as circumstantial evidence of knowledge are not offered for the truth of the matter asserted); *see also supra* Part II.B.3. In the case that the evidence is being offered for Jane's knowledge of the robbery, it would be offered as “circumstantial evidence of . . . knowledge,” similar to the question in *Oguns*, 921 F.2d at 448.

143. Of course, “likes” that are not excludable as hearsay may or may not be excluded from evidence on other grounds such as character evidence or relevance. This Note only addresses the application of the hearsay rule to “likes” and does not contend that “likes” do or do not qualify for exclusion from evidence under any other evidentiary rule.

However, “likes” that create statements that are phrased as a declarative utterance and offered by the sponsoring party for the assertion that is contained within *are* offered for the truth of the matter asserted and courts must treat these “likes” as hearsay.<sup>144</sup> Courts interpreting “likes” as creating new statements should acknowledge that the outcome of a hearsay analysis of the “like” turns upon how the court interprets the phrasing of the statement created by the “like.” Furthermore, courts should hold that statements with a dual use, one of which would constitute use for the truth of the matter asserted and one that would not, are hearsay.<sup>145</sup>

*B. “LIKES” QUALIFY AS ADOPTIVE ADMISSIONS*

Whether a “like” constitutes an adoptive admission is only relevant if courts view “likes” as tools used to ascribe an existing statement to a new declarant. Therefore, this analysis does not apply when courts interpret “likes” as creating new statements, as discussed in Part III.A. However, “likes” should not be viewed as creating independent statements. When properly viewing “likes” as a show of support for another person’s statement—i.e., an adoptive admission—courts should first look to the underlying typewritten statement to determine whether the verbal statement constitutes hearsay. Then, courts should treat “likes” as analogous to head nods and e-mail forwarding: nonverbal manifestations of agreement with a pre-existing statement most appropriately analyzed as adoptive admissions.<sup>146</sup>

A “like” fails to fit the analysis for adoptive admission by silence because “likes” represent a distinct action. In order to qualify for the adoptive admission exemption, the context proving that a person manifested a belief

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144. Note that in cases where “likes” are viewed not as creating independent statements but only as a tool by which the court can attribute the original statement to a new declarant—the “liker”—courts are applying the hearsay analysis not to the “like” but to the underlying statement. Therefore, in cases where a “like” is viewed only as a means by which to attribute a statement to a new declarant, the hearsay analysis is exactly the same as it would be in any analysis of a verbal statement because the evidence that is being analyzed to determine whether the evidence is hearsay is not the “like,” but the underlying typewritten statement. When “likes” are viewed not as creating independent statements but as adoptions of an existing statement, the “like” does not come into play until the court has determined that the underlying statement constitutes hearsay.

145. See *State v. Richcreek*, 964 N.E.2d 442, 450 (Ohio Ct. App. 2011) (discussing the proper use of a statement that has a dual use); see also *supra* notes 84–86 and accompanying text (same).

146. Head nodding in agreement is different from head nodding in response to a question. Nodding in response to a question would constitute an independent statement, namely, “yes” or “no,” while unprompted head nodding in agreement constitutes a manifestation of belief in what someone else is saying. See *supra* Part II.C.1.

in the content she “liked” must indicate that he or she “heard, understood, and acquiesced” in the content.<sup>147</sup>

When analyzing Facebook “likes” under the adoptive admissions exemption, the evidence at stake is not the “like” itself, but the underlying statement that was “liked.” Courts are required to determine the authenticity of the “like” by establishing that the “like” actually came from the person who is alleged to have clicked “like” in order to determine whether the evidence is relevant.<sup>148</sup> In contrast, a court’s determination that evidence qualifies for the adoptive admissions exemption is unrelated to the relevance of the evidence. Therefore, Rule 104(a) governs a court’s determination of whether a “like” is an adoptive admission.<sup>149</sup> Under Rule 104(a), a court must find by a preponderance of the evidence that the evidence in question meets the conditions necessary to qualify the evidence for the adoptive admissions exemption.<sup>150</sup> The court is allowed to consider otherwise inadmissible evidence in making this determination.<sup>151</sup> Therefore, the court may consider the “like” itself and the circumstances surrounding the “like” in determining whether the “like” constitutes an adoptive admission. The court may do so despite the fact that the “like” has not been admitted into evidence and the circumstances surrounding the “like” may otherwise be inadmissible.<sup>152</sup> In the vast majority of cases—if not all cases—Facebook “likes” will easily meet this preponderance of the evidence standard and therefore qualify as adoptive admissions.

The circumstances surrounding a statement provide critical information in determining whether a person “manifested” that he or she “adopted or believed” the statement to be true.<sup>153</sup> There may be facts that do not support qualifying the evidence as an adoptive admission. Even if all other facts point against the “like” being an adoptive admission, the facts common to all “likes” provide enough evidence to find, by a preponderance

147. *United States v. Joshi*, 896 F.2d 1303, 1311 (11th Cir. 1990) (quoting *United States v. Jenkins*, 779 F.2d 606, 612 (11th Cir. 1986)) (internal quotation marks omitted); *see supra* Part II.C.1 (explaining how nonverbal conduct may constitute a statement).

148. Because the relevance of the evidence hinges on its authentication, Rule 104(b) governs the authenticity of the source of the “like.” *See supra* note 136.

149. *See* FED. R. EVID. 104(a).

150. *See id.* 804 advisory committee’s note (“The usual Rule 104(a) preponderance of the evidence standard has been adopted . . .”).

151. “The court must decide any preliminary question about whether . . . evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.” *Id.* R. 104(a).

152. “An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest.” *Id.* R. 104(a) advisory committee’s note. Similarly, the content of the statement “liked,” though not in evidence, must be considered in determining whether the “liked” statement constitutes an adoptive admission.

153. *Id.* R. 801(d)(2)(b); *see supra* Part II.C (explaining the requirements for the adoptive admissions exemption).

of the evidence, that a particular “like” is an adoptive admission. The facts common to all of Jane’s “likes”—and all of the likes by any other Facebook user—are as follows: (1) a person who is logged into Jane’s Facebook account clicks “like;”<sup>154</sup> (2) Jane’s Facebook page possesses a number of identifying characteristics including, but not limited to, her name, a photo of her, her place of employment and the schools Jane has attended, Jane’s interests, a list of Jane’s friends, and indications of places Jane has visited on a map; and (3) after Jane clicks “like,” anyone<sup>155</sup> allowed under Jane’s privacy settings will see that Jane has “liked” the content.

Clicking “like” is not anonymous. Rather, text proclaiming “Jane likes this” and an icon of the thumbs-up sign will appear below the content with Jane’s name as a hyperlink to her own Facebook page.<sup>156</sup> Further, “likes” are a way for Facebook users to express agreement or support with the “liked” content,<sup>157</sup> and Facebook advertises them as such.<sup>158</sup>

The above circumstances exist every time a person clicks “like.”<sup>159</sup> Based on these facts common to every “like,” every Facebook “like” will achieve the standard required to determine by a preponderance of the evidence that the “like” constitutes an adoptive admission. Of course, this standard allows for the person objecting to the admission of the evidence as an adoptive admission to offer counter-evidence in support of his or her contention that the “like” does not qualify for an adoptive admission.<sup>160</sup> However, courts should generally admit “likes” under the preponderance of the evidence standard by virtue of the characteristics shared by every “like” because the circumstances of every like show by a preponderance that a person knowingly clicks “like” to publicly demonstrate his or her support for the “liked” content.

In short, courts should not view “likes” as creating independent statements. “Likes” should be considered manifestations of belief in preexisting statements. Under the Federal Rules of Evidence, many, though not all, “likes” will meet the requirements of the adoptive admissions exemption based on the circumstances common to all “likes.”

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154. Whether that person was actually Jane is a different question addressed under Federal Rule of Evidence 104(b). See *supra* note 136.

155. Note that users have some control over their privacy settings in order to limit who may view the content on their Facebook page, including things they “like.” *Privacy*, FACEBOOK, <http://www.facebook.com/help/445588775451827> (last visited Sept. 25, 2013).

156. *Like*, *supra* note 12.

157. *Id.*

158. *Id.*

159. Some users may have limited others’ access to their photos displayed on Facebook or have disabled certain Facebook features. In cases where a Facebook user limits the personal information available to others on her Facebook page, outside evidence may be necessary to meet the preponderance of the evidence standard.

160. For further discussion of the “sufficient to support a finding” standard in the context of authentication, see *supra* note 136.



## IV. CONCLUSION

Social media has become deeply engrained in our day-to-day lives. Facebook logos and advertisements appear on many websites other than Facebook, and Facebook encourages users to connect with other websites through Facebook.<sup>161</sup> Facebook is not the only important social media website in regular public use. Websites like Twitter and LinkedIn also provide important communication forums, and other social media websites will likely be created in the future. Many social media websites have nonverbal content-sharing similar to a Facebook “like,”<sup>162</sup> and courts must prepare to address attempts to introduce this nonverbal Internet content into evidence at trial.

Courts have previously considered some kinds of Internet content under the Federal Rules of Evidence.<sup>163</sup> The likelihood of this type of evidence having an impact in the courtroom is growing. Today, social media evidence is legally relevant in a variety of cases.<sup>164</sup> While nonverbal social media content-sharing is relatively new and currently limited to things such as “likes,” “favorites,” “retweets,” and e-mail forwarding, options for nonverbal Internet communication are certain to expand. The analysis in this Note is relevant to all current types of nonverbal content-sharing and could be applied to types of nonverbal Internet communications that have yet to be invented.<sup>165</sup> While courts may initially balk at parties’ use of nonverbal Internet evidence, such nonverbal communications must inevitably be analyzed under the Rules’ framework. Courts must embrace, or “friend,”<sup>166</sup>

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161. For example, CNN and Fox News each allow readers to “like” stories on their websites. This means a reader can access the news website through Facebook, and when the user clicks “like” on the CNN or Fox News website, that content appears on the reader’s Facebook page. *See, e.g.*, Barnini Chakraborty, *Top IRS Official to Invoke Fifth Amendment, Decline to Testify at House Hearing*, FOX NEWS (May 22, 2013), <http://www.foxnews.com/politics/2013/05/22/top-irs-official-to-invoke-fifth-amendment-wednesday-in-house-hearing/>; CNN Staff, *supra* note 139. Readers can use the same process to “tweet” a news story on Twitter.

162. For example, the analysis used in this Note would also be applicable to “retweets” on Twitter.

163. *See supra* Part II.C.2 for a discussion of court precedent dealing with forwarded emails.

164. *See, e.g.*, Tara Bannow, *Dear Facebook, Here’s My Confession*, IOWA CITY PRESS CITIZEN (Mar. 25, 2013, 11:49 PM), <http://www.press-citizen.com/article/20130326/NEWS01/303260019>.

165. For example, if Facebook created a “dislike” button, the analysis outlined in this Note would apply to the use of a “dislike” as evidence. While Facebook has no official “dislike” button, some Facebook users have attempted to create this option. *See How to Actually Get a Dislike Button*, FACEBOOK, <https://www.facebook.com/pages/How-to-actually-get-a-dislike-button/195827261387> (last visited Sept. 25, 2013).

166. The term “friending” refers to the action of accepting or requesting another Facebook user as a Facebook friend. For example, Jane may say, “I friended Harry yesterday.” Or, in other circumstances, “I de-friended Harry yesterday,” meaning that Jane has removed Harry from her list of Facebook friends. *See Finding Friends*, FACEBOOK, <http://www.facebook.com/help/336320879782850> (last visited Sept. 25, 2013). “Friend” is now defined as a verb in

the ever-increasing use of Internet evidence—verbal and nonverbal—and apply the Federal Rules of Evidence to Internet content the same way in which they would to any other verbal or nonverbal content.

With the rapid growth and change of the Internet and social media tools, it is difficult to predict what new technologies may be around the bend. However, nonverbal Internet communications are clearly covered by the current Federal Rules of Evidence for hearsay. Given the well-established principles of the Rules, adapting them to deal explicitly with each advance in communication is unnecessary and will result in a continually unstable set of rules. Thus, courts should rely on the existing tools contained in the Rules to deal with Internet evidence before adopting new measures<sup>167</sup> and stand firm on the solid foundation of the current Federal Rules of Evidence in analyzing nonverbal Internet communication.

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some dictionaries, further demonstrating the magnitude of the Internet's impact on our culture. See *Friend*, DICTIONARY.COM, <http://dictionary.reference.com/browse/friend?s=t> (last visited Sept. 25, 2013).

167. See Richter, *supra* note 94, at 1660.