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A *Bland* Interpretation: Why a Facebook “Like” Should Be Protected First Amendment Speech  
Bethany C. Stein \*

I. Introduction

Social media is everywhere. Every day millions of users around the world communicate with each other by logging into Facebook, Twitter, Google+, and many other social networking sites.<sup>1</sup> Users of many ages connect through their computers, tablets, and mobile phones from home and on the go.<sup>2</sup> Social media sites are centers of communication, where users can create an online identity for themselves, providing as much or as little information as they want.<sup>3</sup> Most social networking sites allow users to upload pictures, give a brief autobiography, and associate with many individuals and groups.<sup>4</sup> More importantly, people use social networking sites to express their feelings and opinions on every topic imaginable, ranging from the weather to restaurants to political issues and elections. Many times, users can add their location to their

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<sup>1</sup> As of October 2012, Facebook had one billion monthly active users, 600 million of which used a Facebook mobile product in September 2012, and an average of 552 million daily active users in June 2012. *Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited October 11, 2012). As of March 21, 2012, there were more than 140 million active users on Twitter posting about 340 million tweets per day. *Twitter turns six*, TWITTER BLOG (Mar. 21, 2012), <http://blog.twitter.com/2012/03/twitter-turns-six.html>. As of January 2012, Google+ had over 90 million users. *Google+ has 90 million+ users according to official statistics as of Jan 2012 from Google!*, GOOGLE+ NEWS (Jan. 19, 2012), <http://google-plus.com/4811/google-has-90-million-users-according-to-official-statistics-as-of-jan-2012-from-google/>. Each day, 625,000 users join Google+. 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 (Fall 2012).

<sup>2</sup> See *Logging in from a Mobile Device*, FACEBOOK, <http://www.facebook.com/help/334358763304865/> (last visited January 14, 2013); *Apps, SMS, and Mobile*, TWITTER, <https://support.twitter.com/groups/34-apps-sms-and-mobile> (last visited January 14, 2013); *Availability of mobile features*, GOOGLE, <http://support.google.com/plus/bin/answer.py?hl=en&answer=1301221&topic=1248785&ctx=topic> (last visited January 14, 2013).

<sup>3</sup> See *How to Post & Share*, FACEBOOK, <http://www.facebook.com/help/333140160100643/> (last visited January 14, 2013); *Twitter 101: How should I get started using Twitter?*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/215585-twitter-101-how-should-i-get-started-using-twitter> (last visited January 14, 2013); *About profiles*, GOOGLE, <http://support.google.com/plus/bin/answer.py?hl=en&answer=1355890&from=97703&rd=1> (last visited January 14, 2013).

<sup>4</sup> See *Update Your Basic Info*, FACEBOOK, <http://www.facebook.com/help/334656726616576/> (last visited January 14, 2013); *How to Change Your Profile Photo and Information*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/107-my-profile-account-settings/articles/127871-how-to-change-your-profile-photo-and-information> (last visited January 14, 2013); *About Profiles*, *supra* note 3.

posts, indicating in which city they are located and even in which restaurant they are eating or what attraction they are touring.<sup>5</sup>

The First Amendment to the United States Constitution reads: “Congress shall make no law . . . abridging the freedom of speech.”<sup>6</sup> This provision prevents the government (including government as employer) from suppressing speech except in a limited number of circumstances.<sup>7</sup> The speech protection applies not only to the national government, but to state and local governments as well.<sup>8</sup> The three principal values of the First Amendment are promoting knowledge and truth in communicating ideas, facilitating democracy, and promoting self-expression.<sup>9</sup> Therefore, this Amendment allows the public to engage in the free flow of ideas and beliefs without fear that the government will punish or retaliate as a result of such communication. The First Amendment forbids the government to proscribe speech and expressive conduct based on the fact that the government disapproves of the message.<sup>10</sup> Thus, one need not actually speak or write in order to be protected by the First Amendment; expressive conduct warrants First Amendment protection when it is “sufficiently imbued with elements of communication.”<sup>11</sup>

The scope of First Amendment protection in the context of social media has been a major issue in recent cases. One such case is *Bland v. Roberts*, in which the United States District Court for the Eastern District of Virginia stripped Facebook users of the highly valued and

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<sup>5</sup> See *Location Basics*, FACEBOOK, <http://www.facebook.com/help/337244676357509/> (last visited January 14, 2013); *How to Tweet with Your Location*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/122236-how-to-tweet-with-your-location> (last visited January 14, 2013); *Location Sharing*, GOOGLE, <http://support.google.com/plus/bin/answer.py?hl=en&answer=1306809> (January 14, 2013).

<sup>6</sup> U.S. CONST. amend. I.

<sup>7</sup> KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 760 (17th ed. 2010).

<sup>8</sup> *Id.* at 369.

<sup>9</sup> *Id.* at 763.

<sup>10</sup> *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

<sup>11</sup> *Spence v. Wash.*, 418 U.S. 405, 409 (1974).

essential First Amendment speech protection.<sup>12</sup> In this case, during a sheriff election, employees of the sheriff's department "liked" one of the candidate's Facebook page.<sup>13</sup> That candidate lost the election, and when the new sheriff took office he fired the employees who had "liked" his opponent's Facebook page.<sup>14</sup> The court held that "liking" a Facebook page is not speech that warrants constitutional protection.<sup>15</sup> The former employees filed an appeal in the Fourth Circuit on May 22, 2012.<sup>16</sup>

Courts have deemed certain communications on social media sites as protected speech. For instance, a wall post has been held to be protected under the First Amendment.<sup>17</sup> This Comment will argue that "liking" something on Facebook should also be protected speech. When a user "likes" a Facebook page, the page's title is displayed on the user's Timeline for all of the user's friends to see, as well as on the user's friends' News Feeds.<sup>18</sup> Additionally, the user's name and picture appear on the page under people who "liked" it, and the page name is permanently displayed under the "likes" section of the user's profile.<sup>19</sup> The words appearing are substantive, and it is as if the user actually typed the words herself. Even if a court were to hold that clicking the "like" button is not substantive speech, however, it should still be protected as expressive conduct. By clicking the "like" button, the user is deliberately stating that she agrees with the page's opinion and meaning and other users understand the reason for the user's "like."

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<sup>12</sup> 857 F. Supp. 2d 599 (E.D. Va. 2012).

<sup>13</sup> *Id.* at 601

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 603. *Bland* involves other legal issues, like freedom of association, as well as those specific to public employees, like qualified immunity and eleventh amendment immunity. The plaintiffs may have lost the suit even if the "like" was protected because of the law and facts surrounding those issues. However, this Comment will not focus on those issues. The aim of this Comment is to answer the threshold question of whether "liking" something on Facebook should be protected under the First Amendment.

<sup>16</sup> Brief of Appellants at 1, *Bland v. Roberts*, 857 F. Supp. 2d 599 (E.D. Va. 2012) (No. 12-1671), 2012 WL 3072139, at\*1 (hereinafter Brief of Appellants).

<sup>17</sup> See *Gresham v. City of Atlanta*, 2011 WL 4601020 (N.D. Ga. 2011); *Mattingly v. Milligan*, 2011 WL 5184283 (E.D. Ark. 2011).

<sup>18</sup> *Like*, FACEBOOK, <http://www.facebook.com/help/?page=103918613033301> (last visited October 24, 2012).

<sup>19</sup> *Id.*

“Liking” a Facebook page should be protected speech, and the way the court rules on this issue will have a large impact on the way it will rule on other types of social media speech. Therefore, it is essential for the courts to establish a framework for determining whether speech on social media websites is protected by the First Amendment, and it is imperative that this framework is developed quickly. Social media is rapidly expanding and is a relatively new and extremely popular way that people are communicating and interacting with each other and developing and sharing ideas and opinions. Establishing a new framework for social media speech will make users aware of what speech is protected and will ensure that courts understand when and how ideas are being communicated through social media. This will ensure that speech deserving of First Amendment protection will receive such protection.

This Comment will focus on three common social media websites: Facebook, Twitter, and Google+. Facebook and Twitter are more popular than Google+,<sup>20</sup> but Google+ has been called the fastest growing social media network.<sup>21</sup> These sites have many things in common, but most important are the ability of the user to post opinions and statements in their own words and the ability to re-post someone else’s ideas with which the user agrees. These social media capabilities, along with frequency and ease of use, have given rise to many legal disputes, including those involving First Amendment speech protections.<sup>22</sup>

Part II of this Comment will explain the technicalities of Facebook, what people use Facebook for, and what it means to “like” something. Part III will discuss *Bland v. Roberts*. Part IV will provide an overview of the history of First Amendment speech protection and will

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<sup>20</sup> Facebook and Twitter have more active monthly users than Google+. See *Key Facts*, *supra* note 1; *Twitter turns six*, *supra* note 1; *Google+ has 90 million+ users according to official statistics as of Jan 2012 from Google!*, *supra* note 1.

<sup>21</sup> *Google+ has 90 million+ users*, *supra* note 1.

<sup>22</sup> See Gresham, 2011 WL 4601020; Mattingly, 2011 WL 5184283; *Bland v. Roberts*, F. Supp. 2d 599 (E.D. Va. 2012).

discuss current case law on First Amendment protections in the context of social media. Next, Part V will explain why “liking” a Facebook page should be protected under the First Amendment. Part VI will discuss how, if the Fourth Circuit affirms the District Court’s ruling, that decision will negatively affect First Amendment speech protection on other social media websites, specifically Twitter and Google+. It will apply the *Bland* framework to features on each site and show the negative impact the ruling would have. Finally, Part VII will set forth a proposed framework for evaluating whether a user’s speech on social media is protected under the First Amendment.

## II. The Technicalities of Facebook

Facebook is arguably the most popular social networking site. As of October 2012, Facebook had one billion monthly active users.<sup>23</sup> Six hundred million monthly active users accessed Facebook with a mobile product in September 2012.<sup>24</sup> Facebook had an average of 552 million daily active users in June 2012.<sup>25</sup> Because of this abundance of active users, “[o]ver 3 billion Likes and comments are posted every day” on Facebook.<sup>26</sup> Each minute, there are approximately 50,304 links shared; 135,849 photographs uploaded, 66,168 of them tagged; 74,204 event invites sent; 82,557 statuses updated; 98,604 friend requests approved; and 231,605 messages sent.<sup>27</sup> In the United States, Facebook users spend about 12.7% of their online time

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<sup>23</sup> *Key Facts*, *supra* note 1.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Brief for Daniel Ray Carter, Jr.-Facebook, Inc. as Amici Curiae Supporting Appellants at 3, *Bland v. Roberts*, F. Supp. 2d 599 (E.D. Va. 2012) (No. 12-1671), 2012 WL 3191379, at \*3 (hereinafter Facebook Brief).

<sup>27</sup> Craig Duff, *One Minute on Facebook*, TIME, [http://www.time.com/time/video/player/0,32068,711054024001\\_2037229,00.html](http://www.time.com/time/video/player/0,32068,711054024001_2037229,00.html) (last visited September 17, 2012).

using Facebook.<sup>28</sup> Because of Facebook's extreme popularity, it is imperative that user's beliefs and opinions are constitutionally protected.

#### A. Facebook Communication

Facebook was designed specifically to allow users to communicate their interests, ideas, and opinions to others. On its own Facebook profile, Facebook states that its mission is "to give people the power to share and make the world more open and connected."<sup>29</sup> To achieve this mission, Facebook allows users to easily connect with others, "discover what is going on in the world around them, and to share what matters to them and to the people they care about."<sup>30</sup>

When connecting with others, users can share everything ranging from photos to their opinions and ideas while having the power to limit their audience to a few close friends and family members or to the world at large.<sup>31</sup> This ensures that every Facebook user has a voice.<sup>32</sup> By allowing these various channels of communication, "Facebook strives to create an online environment that facilitates communication, social connection, and the sharing of ideas, and in which [u]sers can engage in debate and advocate for the political ideas, parties, and candidates of their choice."<sup>33</sup>

Facebook's design was created to fulfill its mission and enable ease of communication. Every Facebook user has a profile that contains the user's name, photos, a list of that user's Facebook friends, a map of cities and countries around the world that the user has visited or where the user has lived, and a list of pages that the user has "liked."<sup>34</sup> The profile contains as

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<sup>28</sup> Morales, *supra* note 1.

<sup>29</sup> *About*, FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited September 16, 2012).

<sup>30</sup> Facebook Brief, *supra* note 26, at 1.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 4.

much personal information as the user chooses to disclose, such as hometown, religious views, political views, birthdate, sexual orientation, and more.<sup>35</sup> The user's profile is also called the user's timeline, and is described by Facebook as the user's "collection of the photos, stories, and experiences that tell [her] story."<sup>36</sup> Timeline is a newer Facebook feature that essentially allows the user to track her entire life on Facebook and make it available to her friends.<sup>37</sup> Facebook is not limited to individuals, but can also be used by businesses, athletic teams, religious and political organizations, and other groups.<sup>38</sup> These groups have Facebook Pages that allow them to communicate their stories to and connect with Facebook users.<sup>39</sup>

Every Facebook user also has a news feed, which displays minute by minute updates about the user's friends, whether it be photos that they have posted, status updates, or pages that they have "liked."<sup>40</sup> The news feed "is a constantly updating list of stories from people and Pages that [the user] follow[s] on Facebook."<sup>41</sup> Everything a user chooses to share with her friends is displayed in her friends' news feeds.<sup>42</sup>

There are a number of ways for users to communicate with their friends on Facebook and to build their profiles to better identify their beliefs and interests to their friends. Many actions the user takes will appear on her profile and on her friends' news feeds. For example, a user can update her status by writing in the "What's on your mind?" box on her news feed or profile and

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<sup>35</sup> *How Do I Edit My Basic Personal Information (ex: contact info, birthday, relationships, work and education) From My Timeline?*, FACEBOOK, [http://www.facebook.com/help/?faq=276177272409629&in\\_context](http://www.facebook.com/help/?faq=276177272409629&in_context) (last visited October 24, 2012).

<sup>36</sup> *Get Started*, FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited September 16, 2012).

<sup>37</sup> *Introducing Timeline?*, FACEBOOK, <https://www.facebook.com/about/timeline> (last visited October 24, 2012).

<sup>38</sup> *Getting Started*, FACEBOOK, <http://www.facebook.com/help/364458366957655/> (last visited October 24, 2012).

<sup>39</sup> Facebook Brief, *supra* note 26, at 5.

<sup>40</sup> *How News Feed Works*, FACEBOOK, <http://www.facebook.com/help/327131014036297/> (last visited September 16, 2012).

<sup>41</sup> *Id.*

<sup>42</sup> Facebook Brief, *supra* note 26, at 5.

then clicking “post.”<sup>43</sup> Also, a user can write on a friend’s wall, called a wall post, by going to that friend’s profile and writing in the box that says “write something...” and then clicking “post.”<sup>44</sup> Additionally, a user can post a photograph to a friend’s wall, her own wall, or in an online album.<sup>45</sup> Using a mobile device, like a cell phone or a tablet, a user can update her location, either by current city or by exact location, indicating a restaurant or attraction by “checking in” using the Facebook application.<sup>46</sup> Finally, and most importantly for purposes of this Comment, the user can communicate ideas and opinions to her friends by “liking” a Facebook page.<sup>47</sup> Once the user has “liked” a Facebook page, that page’s name will appear on the user’s profile and on her friends’ news feeds.<sup>48</sup> The user’s name and picture will also be displayed on the Facebook page and the page will appear on the “Likes” section of the user’s profile.<sup>49</sup>

## B. Facebook Use in Political Elections

Facebook has played a relatively large role in recent elections. One and a half million Facebook users connected to a political candidate or issues group during the 2006 congressional election.<sup>50</sup> Also, Facebook acted as a political platform for many users in the 2008 Presidential election, becoming a great way to group supporters together and motivating them to act, vote,

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<sup>43</sup> *How Do I Post Something On a Timeline?*, FACEBOOK, <http://www.facebook.com/help/?faq=173433019380025> (last visited October 24, 2012).

<sup>44</sup> *How to Post & Share*, *supra* note 3.

<sup>45</sup> *Uploading Photos and Profile Pictures*, FACEBOOK, <http://www.facebook.com/help/118731871603814/> (last visited October 24, 2012).

<sup>46</sup> *Location Basics*, *supra* note 5.

<sup>47</sup> *Like*, *supra* note 18.

<sup>48</sup> *What Does It Mean to Like a Page or Content off Facebook?*, Facebook, <http://www.facebook.com/help/131263873618748/> (last visited January 14, 2013).

<sup>49</sup> *Id.*

<sup>50</sup> Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. REV. 641, 660 (2009).

and communicate with each other.<sup>51</sup> Users even acted independently of the campaign, creating their own Facebook groups and politically motivated events, as well as politically motivated wall posts and status updates.<sup>52</sup>

Political scientists demonstrated that, during the 2010 midterm elections, one Facebook message got around 340,000 voters to the polls merely because the voters' friend had voted.<sup>53</sup> Researchers teamed up with Facebook and isolated two groups of Facebook users: one group was given a message encouraging them to vote, with a link to the user's polling location, an "I voted" button, and pictures of friends who had indicated that they voted; the other group did not get a voting message.<sup>54</sup> The results showed that Facebook users were more likely to vote when they were given the message and saw that their friends, especially close friends, had voted.<sup>55</sup> This study showed how Facebook affects real world decisions and actions.<sup>56</sup>

In the 2012 Presidential election, both Republicans and Democrats created ways to reach out to constituents through social media.<sup>57</sup> The Republican National Committee created the Social Victory Calendar, a Facebook application that users had to download.<sup>58</sup> Once downloaded, the application captured data about the user.<sup>59</sup> Then, whenever a user watched a video or read an article from the application, it showed up on her friends' news feeds, exposing Facebook users to the content even if they had not downloaded the application themselves.<sup>60</sup>

Similarly, President Obama's re-election campaign created Dashboard, an external website that

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<sup>51</sup> *Id.* at 659.

<sup>52</sup> *Id.*

<sup>53</sup> Kevin Charles Redmon, *Facebook Knows How to Trick You Into Voting*, THE ATLANTIC (Sept. 14, 2012, 9:32 AM), <http://www.theatlantic.com/politics/archive/2012/09/facebook-knows-how-to-trick-you-into-voting/262363/>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

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

<sup>57</sup> Sara Burnett, *GOP, Democrats take political scrap online*, DENVERPOST.COM (May 28, 2012, 1:00 AM), [http://www.denverpost.com/politics/ci\\_20724874/gop-democrats-take-political-scrap-online](http://www.denverpost.com/politics/ci_20724874/gop-democrats-take-political-scrap-online).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

could be accessed through Facebook.<sup>61</sup> Users could log in, enter their addresses, and were given a list of neighborhood teams that they could join.<sup>62</sup> Dashboard also listed local events and tracked each user’s activity contributions to the campaign.<sup>63</sup>

Additionally, Facebook has a large number of pages dedicated to specific issues.<sup>64</sup> Social networking sites have created a new avenue for transmitting political information that is more creative and interactive, engaging and activating people who otherwise would be politically apathetic and unable to obtain political information.<sup>65</sup> Facebook and other social networking sites are a convenient way for voters to express their political beliefs and support for candidates.<sup>66</sup> As Facebook has proved to be an important platform for political speech, it is vital that any form of political expression on Facebook is protected under the First Amendment.

### III. *Bland v. Roberts*: “Liking” a Facebook Page is Not Protected Speech Under the First Amendment

*Bland v. Roberts* was brought in the United States District Court for the Eastern District of Virginia and was decided on April 24, 2012.<sup>67</sup> The six plaintiffs, Bobby Bland, Daniel Ray Carter, Jr., David Dixon, Robert McCoy, John Sandhofer, and Debra Woodward, were employees of the Hampton sheriff’s office.<sup>68</sup> The sheriff, B.J. Roberts, was running as the incumbent in the 2009 Sheriff election against Jim Adams, a Lieutenant Colonel in the office.<sup>69</sup> Plaintiffs supported Adams in a number of ways, one being that some of the plaintiffs “liked”

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Burnett, *supra* note 57.

<sup>64</sup> Schacter, *supra* note 50, at 661.

<sup>65</sup> *Id.*

<sup>66</sup> Facebook Brief, *supra* note 26, at 13.

<sup>67</sup> 857 F. Supp. 2d 599 (E.D. Va. 2012).

<sup>68</sup> *Id.* at 601.

<sup>69</sup> *Id.*

Adams' campaign page on Facebook.<sup>70</sup> Upon discovering plaintiffs' support for his opponent, Sheriff Roberts advised the sheriff's office employees "that they should get on the 'long train' with him rather than riding the 'short train' with his opponent."<sup>71</sup> Sheriff Roberts won the election and terminated the plaintiffs.<sup>72</sup> Plaintiffs brought suit alleging that the sheriff violated their First Amendment rights because he fired them for expressing support for Adams.<sup>73</sup>

The court held that "merely 'liking' a Facebook page is insufficient speech to be constitutionally protected."<sup>74</sup> Where courts have found Facebook posts protected by the First Amendment, actual statements had been made.<sup>75</sup> In contrast, no actual statements existed here, and "liking" a page, which involved only a click of a button, was, in the *Bland* Court's view, insufficient to warrant protection because it was not substantive.<sup>76</sup> Though "Facebook posts *can* be considered matters of public concern," the court held that merely "liking" a Facebook page is not speech sufficient to warrant First Amendment protection.<sup>77</sup>

The plaintiffs filed an appeal to the Fourth Circuit on May 22, 2012.<sup>78</sup> Plaintiffs included many issues in appeal,<sup>79</sup> but the only important one for purposes of this Comment is the issue of whether "liking" a Facebook page is protected speech under the First Amendment.

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Bland v. Roberts*, 857 F. Supp. 2d 599, 601-02 (E.D. Va. 2012).

<sup>74</sup> *Id.* at 603.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 604.

<sup>77</sup> *Id.* The Court also analyzed and ruled on freedom of association, qualified immunity, and Eleventh Amendment immunity, but these issues are not relevant for purposes of this Comment. It is important to note that even if the court were to have found that "liking" a Facebook page fell under the freedom of speech protection, the sheriff may still have escaped damages under the doctrine of qualified immunity.

<sup>78</sup> Brief of Appellants, *supra* note 16, at 1.

<sup>79</sup> Specifically, the appeal discusses First Amendment rights of public employees, which is not the focus of this Comment. Brief of Appellants, *supra* note 16.

#### IV. First Amendment Speech Protections

The First Amendment to the United States Constitution declares: “Congress shall make no law . . . abridging the freedom of speech.”<sup>80</sup> This amendment prohibits the government from suppressing speech unless the speech falls within one of the categories of unprotected speech.<sup>81</sup> Not only is the federal government prohibited from suppressing speech, but state and local governments are as well.<sup>82</sup> Even outside of the unprotected categories, the speech protection is not absolute. For example, “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.”<sup>83</sup> Courts have held certain types of social media speech to fall within First Amendment protection. The *Bland* court has held that a Facebook “like” is not protected speech. A Facebook “like” should, however, be protected by the First Amendment, as it is both substantive speech and expressive conduct.

##### A. The First Amendment Generally

The principal values underlying the First Amendment speech protection are “advancing knowledge and ‘truth’ in the ‘marketplace of ideas,’ facilitating representative democracy and self-government, and promoting individual autonomy, self-expression and self-fulfillment.”<sup>84</sup> The political functions of the First Amendment are to encourage broad debate to improve public policy, allow for political change, ensure the government will not abuse its power, and allow for dissent without fear of punishment or retaliation.<sup>85</sup> In other words, the First Amendment encourages the exchange of ideas and fosters the democratic political process, allowing citizens

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<sup>80</sup> U.S. CONST. amend. I.

<sup>81</sup> SULLIVAN & GUNTHER, *supra* note 7, at 760.

<sup>82</sup> *Id* at 369.

<sup>83</sup> Schenck v. United States, 249 U.S. 47, 52 (1919).

<sup>84</sup> SULLIVAN & GUNTHER, *supra* note 7, at 763.

<sup>85</sup> *Id* at 765.

to engage in an exchange of opinions and advocate for their own values. It was created “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>86</sup>

The First Amendment forbids the government from proscribing speech and expressive conduct based on the fact that the government disapproves of the message.<sup>87</sup> The First Amendment protects expression, which includes both words and symbolic speech.<sup>88</sup> Words are easily construed as speech. A person who actually says or writes something is obviously “speaking” for purposes of the First Amendment. Expressive conduct, however, is a more difficult analysis. Expressive conduct warrants First Amendment protection when it is “sufficiently imbued with elements of communication.”<sup>89</sup> The test is whether there is “an intent to convey a particularized message . . . and [whether] the likelihood [is] great that the message would be understood by those who viewed it.”<sup>90</sup> Many forms of expressive conduct have been protected under the First Amendment. For example, burning a flag in political protest is protected under the First Amendment,<sup>91</sup> as is wearing black armbands to protest a war.<sup>92</sup>

## B. The First Amendment and Political Expression

Political expression is the core of the First Amendment, so when speech involves political expression, the regulation is “subject to exacting scrutiny.”<sup>93</sup> “The interest advanced [by the government] must be paramount [to that of the speaker], one of vital importance, and the burden

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<sup>86</sup> Roth v. United States, 354 U.S. 476, 484 (1957).

<sup>87</sup> R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992).

<sup>88</sup> Texas v. Johnson, 491 U.S. 397, 404 (1989)

<sup>89</sup> Spence v. Wash., 418 U.S. 405, 409 (1974).

<sup>90</sup> *Id.* at 410-11.

<sup>91</sup> Texas v. Johnson, 491 U.S. 397 (1989).

<sup>92</sup> Tinker v. Des Moines Indep. Cmty. Sch. Dist., 39 U.S. 503 (1969).

<sup>93</sup> Meyer v. Grant, 486 U.S. 414, 420 (1988).

is on the government to show existence of such an interest.”<sup>94</sup> Many social media users express their political opinions on social media sites. The protection of political expression should not be lessened simply because it is said on a social network. It is important to give political speech on social media sites the same protection that it is afforded in other domains.

A person engages in protected expression when she places a political sign on her front lawn. “Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community . . . [and] play an important part in political campaigns, during which they are displayed to signal the resident’s support for particular candidates, parties, or causes.”<sup>95</sup> When a person displays a sign from her own residence, she provides information about her identity, which is an important part of an attempt to persuade.<sup>96</sup> It also allows the person to reach out specifically to her neighbors, which is not achieved as well through other means of political advocacy.<sup>97</sup> “Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.”<sup>98</sup> Without this convenient means, citizens may not even participate in public debate.<sup>99</sup> Similarly, a political campaign sign on top of a car is protected political speech,<sup>100</sup> as are buttons and bumper stickers displaying political messages.<sup>101</sup>

The issue of what constitutes speech is more complicated in the context of the Internet and social media. Still, Internet speech receives the same level of constitutional protection as

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<sup>94</sup> *Elrod v. Burns*, 427 U.S. 347, 362 (1976).

<sup>95</sup> *City of Laude v. Gilleo*, 512 U.S. 43, 54-55 (1994).

<sup>96</sup> *Id.* at 57.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

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

<sup>100</sup> *Coady v. Steil*, 187 F.3d 727, 731 (7th Cir. 1999).

<sup>101</sup> *Perry v. L.A. Police Dept.*, 121 F.3d 1365, 1368 (9<sup>th</sup> Cir. 1997).

traditional forms of speech.<sup>102</sup> The Internet “provides relatively unlimited, low-cost capacity for communication of all kinds . . . cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].”<sup>103</sup>

Courts have ruled that speech on the Internet and certain types of speech on Facebook are protected by the First Amendment. Facebook posts are protected under the First Amendment.<sup>104</sup> Posting pictures on Facebook also fall under First Amendment protection.<sup>105</sup> Additionally, uploading a video on YouTube constitutes speech that requires First Amendment protection.<sup>106</sup> As argued below, “liking” a Facebook page produces substantive words and constitutes expressive conduct, therefore it too should be protected under the First Amendment.<sup>107</sup>

## V. Why the *Bland* Court Got it Wrong

To understand why the *Bland* court got it wrong, one must understand how the “like” button works. The “like” button actually says ‘like,’ and once pressed by a user is symbolized by a thumbs-up symbol.<sup>108</sup> According to Facebook’s help center, “[l]ike’ is a way to give positive feedback or to connect with things you care about on Facebook.”<sup>109</sup> Users can “like” status updates, wall posts, photos, and videos as a way to indicate their agreement or enjoyment.<sup>110</sup> Users can also “like” a Facebook page in order to connect with an organization or

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<sup>102</sup> *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

<sup>103</sup> *Id.*

<sup>104</sup> *See Mattingly v. Milligan*, 2011 WL 5184283 (E.D. Ark. 2011); *Gresham v. City of Atlanta*, 2011 WL 4601020 (N.D. Ga. 2011).

<sup>105</sup> *See T.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F.Supp.2d 767 (N.D. Ind. 2011).

<sup>106</sup> *See J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F.Supp.2d 1094 (C.D. Cal. 1010).

<sup>107</sup> *See discussion infra Part V.*

<sup>108</sup> Brief for Daniel Ray Carter, Jr.-American Civil Liberties Union as Amici Curiae Supporting Appellants at 6, *Bland v. Roberts*, 857 F. Supp. 2d 599, (E.D. Va. 2012) (No. 12-1671), 2012 WL 3191379, at \*6.

<sup>109</sup> *What is the Like Feature?*, FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited September 16, 2012).

<sup>110</sup> *Id.*

an external website in order to connect to that website via social plugins.<sup>111</sup> Because “liking” a Facebook page creates words on the user’s profile indicating that the user has connected to the page, and because by intentionally clicking the “like” button the user conveys to her Facebook friends that she agrees with the beliefs or opinions expressed on the page, a Facebook “like” should be constitutionally protected.

#### A. “Liking” a Facebook Page is Substantive Speech

A Facebook “like” is substantive speech and, accordingly, should be afforded First Amendment protection. Substantive speech is written or spoken words and is protected by the First Amendment.<sup>112</sup> When a user “likes” a wall post or status update, the user’s name will appear underneath it, the fact that the user “liked” it will be posted to her timeline, and the user’s friends will receive a notification that the user “liked” the comment.<sup>113</sup> When a user “likes” a Facebook page or external content, the fact that the user “liked” the page will appear on the user’s profile and her friends’ news feeds.<sup>114</sup> For example, if a user named Jane “likes” a page called “John Doe for President,” then the user’s profile and her friends’ news feeds will have a post that says “Jane likes John Doe for President.” This is called a “Like story.”<sup>115</sup> The page’s title and picture then act as a link, and if the user’s friends click on it they will be taken to the “John Doe for President” Facebook page.<sup>116</sup> Because the actual words will be posted to both the user’s timeline and her friends’ news feeds, it is as if the user actually typed the words herself as

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<sup>111</sup> *Id.*

<sup>112</sup> See discussion *supra*, Part IV.A.

<sup>113</sup> *What does it mean to “Like” something?*, FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited September 16, 2012).

<sup>114</sup> *Like*, *supra* note 18.

<sup>115</sup> Facebook Brief, *supra* note 26, at 6.

<sup>116</sup> *Id.*

a wall post or status update. Accordingly, because courts have held Facebook wall posts to be protected under the First Amendment, a Facebook “like” should be protected as well.<sup>117</sup>

Further, the functionality of the link serves as a way of disseminating information and ideas, a key purpose of the First Amendment. The user’s friends can click on the link and navigate to the Facebook page, gaining exposure to the purpose of the page and what it stands for.<sup>118</sup> Once the words and link are posted, the user’s friends can see it and can therefore discuss it in the form of wall posts and comments, opening up a forum for debate and an exchange of ideas. Additionally, once a user “likes” a page, that page’s updates will appear on the user’s news feed.<sup>119</sup> The user is then connected to the Facebook page and the organization.<sup>120</sup> Therefore, the user will receive information from the Facebook page about the organization, political candidate, or group.<sup>121</sup> Because a Facebook “like” encourages the dissemination of information—a key purpose of the First Amendment—such action should receive First Amendment protection.

Additionally, external websites can use a social plugin, which is a tool that allows Facebook users to share their off-Facebook experiences with their friends on Facebook.<sup>122</sup> An external website is any other website that is not Facebook. Many of the external websites that use social plug-ins include politically motivated websites, company websites, and blogs. When an external website has a social plug-in, it has a “like” button that a user can click, and, once clicked, that fact will appear on the user’s timeline and her friends’ news feeds, just as if the user

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<sup>117</sup> See *Mattingly v. Milligan*, 2011 WL 5184283 (E.D. Ark. 2011); *Gresham v. City of Atlanta*, 2011 WL 4601020 (N.D. Ga. 2011).

<sup>118</sup> Facebook Brief, *supra* note 26, at 6.

<sup>119</sup> *Like*, *supra* note 18.

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

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

<sup>122</sup> *About Social Plugins*, FACEBOOK, <http://www.facebook.com/help/?page=209089222464503> (last visited October 24, 2012).

had “liked” a Facebook page.<sup>123</sup> This is substantive in the same way that “liking” a Facebook page is substantive; it is as if the user actually typed the words herself. If the user posted a status update containing a link to a website along with saying “This is a really informative website and everyone should read it,” that wall post would be protected.<sup>124</sup> Therefore, “liking” the external website should also be protected. Further, it gives the user the ability to share the information with his friends and connections on Facebook, distributing information to a large audience,<sup>125</sup> again fulfilling a key purpose of the First Amendment.

#### B. At the Very Least, “Liking” a Facebook Page is Expressive Conduct

Even if a court were to decide that a Facebook “like” is not substantive speech, it is still expressive conduct that should be protected under the First Amendment. Expressive conduct is protected when there is “an intent to convey a particularized message . . . and the likelihood [is] great that the message would be understood by those who viewed it.”<sup>126</sup> “Liking” a Facebook page satisfies this test.

In *Spence v. Washington*, the Supreme Court held that taping a peace sign to an American flag was protected expressive conduct under the First Amendment.<sup>127</sup> This conduct was protected because “[i]n many of their uses flags are a form of symbolism comprising a ‘primitive but effective way of communicating ideas . . . ,’ and a ‘short cut from mind to mind,’”<sup>128</sup> and “[t]he symbolism included not only the flag but also the superimposed peace symbol.”<sup>129</sup> By taping a peace sign to an American flag, the “speaker” intended to express his opinion that

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<sup>123</sup> *Id.*

<sup>124</sup> See *Mattingly v. Milligan*, 2011 WL 5184283 (E.D. Ark. 2011); *Gresham v. City of Atlanta*, 2011 WL 4601020 (N.D. Ga. 2011).

<sup>125</sup> *About Social Plugins*, *supra* note 122.

<sup>126</sup> *Spence v. Wash.*, 418 U.S. 405, 410-11 (1974).

<sup>127</sup> *Spence v. Wash.*, 418 U.S. 405.

<sup>128</sup> *Id.* at 410.

<sup>129</sup> *Id.*

America stood for peace, and that belief would be understood by those who viewed it.<sup>130</sup>

Therefore, the court acknowledged that both the symbol of the flag and the peace sign had a universal meaning that the speaker intended to convey and that would be understood by viewers. Because of this, it was expressive conduct protected under the First Amendment.

The “like” button is symbolized by a “thumbs-up” symbol which, similar to a flag and a peace sign, conveys a signal understood by all who would view it.<sup>131</sup> The “thumbs-up” sign is universally acknowledged as meaning that the person giving the “thumbs-up” signal agrees with, encourages or approves of what is being said or done.<sup>132</sup> Therefore, when a user chooses to click on the “like” button and display a “thumbs-up” symbol, the user is intentionally conveying the message that the universal symbol always conveys—that the user agrees with the content of the page. That message is easily understood by the user’s friends and the Facebook community, as everyone knows what “thumbs-up” means, and because users know that when another user “likes” a Facebook page it means that the user agrees with the message that the Facebook page conveys.

Additionally, when a user “likes” a Facebook page, the page’s picture appears on the user’s personal profile and her friends’ news feeds.<sup>133</sup> It is as if the user uploaded the photograph herself. Posting pictures on Facebook falls under First Amendment protection because it is intended to convey a message which is likely to be understood by its viewers.<sup>134</sup> Therefore, “liking” a Facebook page should also be protected. The user who “likes” the page knows that the page’s picture will be posted to her wall and her friends’ news feeds. When she clicks the

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<sup>130</sup> *Id.* at 408.

<sup>131</sup> Facebook Brief, *supra* note 26, at 5.

<sup>132</sup> *Thumbs-up*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/thumbs-up> (last visited October 24, 2012).

<sup>133</sup> Facebook Brief, *supra* note 26, at 6.

<sup>134</sup> *See T.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F.Supp.2d 767 (N.D. Ind. 2011).

“like” button with this knowledge, she is intending to convey the message that she enjoys and agrees with the content of the picture and the page. The users who see this will understand the message conveyed that the user agrees with the information found on the page.

Also, when a user “likes” a Facebook page, the user “may be displayed on the Page [she] connected to, in advertisements about that Page, or in social plugins next to the content [she] like[d].”<sup>135</sup> The user chooses to “like” a page knowing that her name and picture may appear in connection with the page, intending to express her approval of and agreement with the ideas expressed on that Facebook page. Just as in the examples above, other users will understand the meaning behind the user’s “like” and will comprehend the message being conveyed—that the user agrees with the overall message of the page.

Further, when a user “likes” a Facebook page, it is permanently noted under the “Likes” section on the user’s timeline.<sup>136</sup> The user knows that this will be a permanent badge on her timeline; therefore, when she clicks the “like” button she intends to express her desire to be connected to that page because she agrees with its assertions and beliefs. When other users look at her timeline and view her “likes,” they will understand that the user approves of the ideas set forth on that Facebook page.<sup>137</sup>

“Liking” a Facebook page is very similar to placing a campaign sign in one’s front yard. In *City of Laude v. Gilleo*, the Supreme Court held that a political campaign sign is a form of speech that deserves First Amendment protection.<sup>138</sup> The *Laude* Court held that a person engages in protected expressive conduct when he puts a sign on his lawn: “[s]igns that react to a local happening or express a view on a controversial issue both reflect and animate change in the

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<sup>135</sup> *What does it mean to like a Page or content off of Facebook?*, *supra* note 48.

<sup>136</sup> *Like*, *supra* note 16.

<sup>137</sup> “Liking” a Facebook page may also be protected under the First Amendment’s freedom of association, however the focus of this Comment is solely on freedom of speech.

<sup>138</sup> 512 U.S. 43 (1994).

life of a community . . . [and] play an important part in political campaigns, during which they are displayed to signal the resident’s support for particular candidates, parties, or causes.”<sup>139</sup> A Facebook “like” meets this test set forth by *Laude*, and therefore deserves to be protected as expressive conduct under the First Amendment.

Many Facebook pages are created in response to political elections and social issues.<sup>140</sup> These pages provide information to Facebook users, and by “liking” a Facebook page the user signals to his friends that he supports the candidate or issue, just as effectively as a political sign on a front yard. By displaying a sign on her property, the owner provides information about her identity, which is important in attempts to persuade.<sup>141</sup> A sign also allows the person to reach out specifically to her neighbors, which is not achieved as well through other means of political advocacy.<sup>142</sup> Similarly, when a user “likes” a Facebook page, this fact appears on her personal profile, adding to the user’s online identity.<sup>143</sup> This permits the user to provide information about her identity and reach out to her Facebook friends, just as a campaign sign provides information and reaches out to neighbors.

Additionally, residential signs are a convenient and cheap way to communicate information and ideas and may be the only way for a person “of modest means or limited mobility” to express his opinions and beliefs.<sup>144</sup> Without this affordable and convenient means, citizens may not even participate in public debate.<sup>145</sup> Facebook is a free service.<sup>146</sup> Every person, regardless of monetary means, can access Facebook and create an account if they have

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<sup>139</sup> *Id.* at 54-55.

<sup>140</sup> Schacter, *supra* note 50, at 661.

<sup>141</sup> *City of Laude*, 512 U.S. at 57.

<sup>142</sup> *Id.*

<sup>143</sup> *Like*, *supra* note 18.

<sup>144</sup> *City of Laude*, 512 U.S. at 57.

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

<sup>146</sup> *Create an Account*, FACEBOOK, <http://www.facebook.com/help/345121355559712/> (last visited October 24, 2012).

access to a computer, even if it is at a place like a public library. Facebook can be accessed by computer, mobile phone, or tablet from anywhere in the world that has a wireless connection or cellular phone reception. “Liking” a page is quick and easy and gets the point across.<sup>147</sup> It allows anyone and everyone to get involved in political elections and social issues debates.<sup>148</sup> Because “liking” a Facebook page contains the same characteristics the *Laude* court found so crucial to a campaign sign on a front yard, such conduct should be protected by the First Amendment as well.

## VI. Why This Matters: the Potential Impact On All Social Media

The number of social media sites and the amount of people who use them is growing every day. Social media is a free and easy way for people around the world to communicate with each other and share information. If, however, the activity of and communication between social media users is not protected by the First Amendment, there could be many adverse effects. One such effect may be to chill online speech and impede the dissemination of information, which goes directly against First Amendment principles.<sup>149</sup> If courts fail to protect social media speech and expressive conduct, users may stop using social networking sites to express their opinions or beliefs, and may even stop using the sites altogether, for fear of being punished for something that they wrote on their social media profile. “The resulting hesitation to participate in social media platforms could chill discussion in a forum many see as an extension of their private lives.”<sup>150</sup> Chilling social media speech would result in a decrease in the socially and

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<sup>147</sup> See *City of Laude*, 512 U.S. at 57

<sup>148</sup> See *Id.*

<sup>149</sup> See discussion *supra*, Part IV.A.

<sup>150</sup> Matthew Lafferman, *Do Facebook and Twitter Make You a Public Figure?: How to Apply the Gertz Public Figure Doctrine to Social Media*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 199, 241 (2013) (Though Lafferman focuses on the Public Figure Doctrine, his analysis of the effects of chilling social media speech apply to the Facebook “like” analysis discussed in this Comment.).

politically beneficial speech that occurs on social media sites.<sup>151</sup> Another effect could be to cause political unrest.<sup>152</sup> For example, a social media revolution was sparked in Egypt when citizens protested the government's actions.<sup>153</sup> When the government shut down the Internet and blocked social media sites, users found other ways to access the social media networks and successfully caused Egyptian President Hosni Mubarak to step down.<sup>154</sup> Further, affirming the *Bland* ruling will affect the free dissemination of information and ideas on other rapidly growing social networking sites; specifically, Twitter and Google+.

#### A. Twitter

If the *Bland* ruling is affirmed and the Facebook “like” remains unprotected, then information dissemination functions on Twitter—the “retweet” and the “follow”—will likely go unprotected as well. “Twitter is an information network made up of 140-character messages called Tweets. It is an easy way to discover the latest news related to subjects [users] care about.”<sup>155</sup> Users can “tweet,” meaning they post a message on Twitter.<sup>156</sup> Twitter users can also “follow” other people, like friends, family, celebrities, political candidates, and organizations.<sup>157</sup> All the user needs to do to follow a person or organization is to click on the “follow” button by the person's or organization's name.<sup>158</sup> When a user “follows” a person or organization, its tweets will show up on the user's home tab, so that the home tab is constantly updating with new

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<sup>151</sup> *Id.*

<sup>152</sup> Emily Banks, *Egyptian president steps down amidst groundbreaking digital revolution*, CNN (February 11, 2011, 2:35 PM), <http://www.cnn.com/2011/TECH/social.media/02/11/egyptian.president.digital.mashable/>.

<sup>153</sup> *Id.*

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

<sup>155</sup> *Twitter 101: How should I get started using Twitter?*, *supra* note 3.

<sup>156</sup> *The Twitter Glossary*, TWITTER, <https://support.twitter.com/articles/166337-the-twitter-glossary#t> (last visited September 17, 2012).

<sup>157</sup> *Twitter 101*, *supra* note 3.

<sup>158</sup> *How to Follow Others*, TWITTER, <https://support.twitter.com/articles/162981-how-to-follow-others> (last visited October 24, 2012).

stories.<sup>159</sup> Because the user is picking who and what she is following, “[i]t’s like [she is] being delivered a newspaper whose headlines [she’ll] always find interesting—[she] can discover news as it’s happening, learn more about topics that are important to [her], and get the inside scoop in real time.”<sup>160</sup> On the user’s profile page, there is a tab that says “following” where other users can see all the people and organizations she is following.<sup>161</sup> When a user follows a person or organization that has tweeted something, that user can “retweet” that message, which is essentially forwarding the exact message to her followers.<sup>162</sup> To “retweet,” all the user needs to do is hover the mouse over another user’s “tweet,” then click the “retweet” button twice.<sup>163</sup>

If *Bland* is affirmed, “retweeting” may not be protected under the First Amendment. “Retweeting” is very similar to “liking” a Facebook page. To “retweet” an organization’s “tweet,” the user must hover over the “tweet,” click the “retweet” link, and confirm the action by clicking on the “retweet” link again.<sup>164</sup> Upon this action, the user “tweets” the exact wording of the original “tweet” to her followers.<sup>165</sup> Just as a newspaper re-printing an Associated Press article would be protected by the First Amendment, so should “retweeting” another organization’s words. “Retweeting,” however, is not much more than just a simple click of the mouse. The user must click on “retweet” once, read the message, and click “retweet” again if she approves of the message.<sup>166</sup> This creates an actual “tweet,” or post, on the user’s profile and on her followers’ home tabs.<sup>167</sup> Therefore, similar to “liking” a Facebook page, where the page’s

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<sup>159</sup> *FAQs About Following*, Twitter, <https://support.twitter.com/articles/14019-what-is-following> (last visited September 17, 2012).

<sup>160</sup> *Twitter 101*, *supra* note 3.

<sup>161</sup> *FAQs About Following*, *supra* note 159.

<sup>162</sup> *The Twitter Glossary*, *supra* note 156.

<sup>163</sup> *How to Retweet a Tweet*, Twitter, <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/20169873-how-to-retweet-a-tweet> (last visited October 24, 2012).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

title appears as words on the user’s Facebook profile, “retweeting” someone else’s “tweet” creates words on the user’s Twitter profile, as if the user typed the words herself, so it is substantive speech that should be protected by the First Amendment. Because the user is not actually typing the words, however, and simply clicking two buttons, the court could look at the “retweet” under the *Bland* framework, find that it is not substantive, and hold it to be unprotected.

Even if a court would not find “retweeting” protected as substantive speech, it should be protected as expressive conduct. By clicking “retweet,” the user intends to convey the message that she agrees with the “tweet,” and it will be understood that way by viewers.<sup>168</sup> Therefore, if a court were to find that a “retweet” is not substantive speech, it should still be considered expressive conduct and deserving of First Amendment protection. Under the *Bland* framework, however, the “retweet” may be seen the same way the *Bland* court saw the Facebook “like,” and it may very well be unprotected.

Additionally, if *Bland* is affirmed, “following” a Twitter page could be unprotected. In *Bland* the court held that “liking” a Facebook page was not protected because no actual statements existed and the court refused to “infer the actual content of . . . posts . . . from one click of a button.”<sup>169</sup> Following someone is done the same way “liking” a Facebook page is—by the click of the mouse on the link. Therefore, under the *Bland* framework, courts would likely have to conclude that following an organization or person on Twitter is unprotected. In fact, following something or someone on Twitter is less substantive than “liking” a page, because where “liking” a page produces actual words on the user’s profile and friends’ news feeds,<sup>170</sup> the only place on Twitter that indicates the user is following the organization is in the user’s

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<sup>168</sup> See discussion of expressive conduct *supra*, Part IV.A.

<sup>169</sup> *Bland v. Roberts*, 857 F. Supp. 2d 599, 605 (E.D. Va. 2012).

<sup>170</sup> *Like*, *supra* note 18.

“following” tab and the organization’s “followers” tab; no actual words are displayed on a personal profile.<sup>171</sup> Following someone on Twitter is important, however, as it is one of the easiest ways to access important information that is constantly changing.<sup>172</sup> Therefore, it serves one of the key purposes of the First Amendment—free exchange of information. Twitter users generally follow organizations whose purpose they believe in. A user may, however, follow an organization or person whose opinions the user does not necessarily agree with because she is interested in what the other side has to say. In either case, when a user chooses to follow someone on Twitter, she intentionally conveys the message that she is interested in what the organization or person has to say or shares similar beliefs or opinions, and that message is likely to be understood by others who see that the user is following that organization. Because of the intentional message that “following” an organization conveys, it should be protected as expressive conduct. If, however, the *Bland* framework were applied to “following,” it would not be constitutionally protected speech because it is not substantive and occurs with only a click of the mouse.

## B. Google+

Google+ might be characterized as a combination of Facebook and Twitter. It allows users to create a profile with personal information<sup>173</sup> and also allows users to add people to their “circles,” which are groups of people with whom the user wishes to share information.<sup>174</sup> The user can “share” on Google+, which adds content to the user’s home page, as well as to the home

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<sup>171</sup> *FAQs About Following*, *supra* note 159.

<sup>172</sup> *Twitter 101*, *supra* note 3.

<sup>173</sup> *About your profile*, GOOGLE+,

<http://support.google.com/plus/bin/answer.py?hl=en&answer=97706&topic=1698291&ctx=topic> (last visited October 24, 2012).

<sup>174</sup> *About circles*, GOOGLE+,

<http://support.google.com/plus/bin/answer.py?hl=en&answer=1047805&topic=1698291&ctx=topic> (last visited October 24, 2012).

page of the people that have the user in their circles, so long as the user chooses to share with them.<sup>175</sup> Users can share photos, videos, and links.<sup>176</sup> The user can also use a “+1” button, which when pressed means that the user publicly recommends something across the Internet.<sup>177</sup> Much like the Facebook “like” button, the +1 button is found on Google and also on outside websites.<sup>178</sup> When the user clicks the +1 button on a webpage, that page is added to the +1 tab in the user’s profile so the user can share it with her circles.<sup>179</sup> Others looking at the content that the user approved using the +1 function can see the page, even if the user chooses not to make her +1’s public or to share them with her circles.<sup>180</sup> Therefore, the page that the user connected to with the +1 function may be visible as one of an anonymous aggregated number of people who also connected to the page using the +1 button, or the user’s “name could appear next to the +1 button on a website . . . [because] +1’ing is a public action. Anyone could potentially see items [the user] +1’d when they visit the same places on the Web.”<sup>181</sup> Using the +1 button is an easy way for a user to express that she likes and agrees with an organization or article.<sup>182</sup>

Under current case law, sharing is likely to be protected under the First Amendment because it is very similar to a Facebook wall post. Using the +1 button, however, would not likely be protected under the *Bland* framework. Pressing the +1 button is akin to “liking” a Facebook page. With one click of the button, the user can announce to her circles and to the

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<sup>175</sup> *Share on Google+*, GOOGLE+, <http://support.google.com/plus/bin/answer.py?hl=en&answer=1053549&topic=1698291&ctx=topic> (last visited September 17, 2012).

<sup>176</sup> *Id.*

<sup>177</sup> *About the +1 button*, GOOGLE+, <http://support.google.com/plus/bin/answer.py?hl=en&answer=1047397&topic=1207011&ctx=topic> (last visited September 17, 2012).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *The +1 button in Google+*, GOOGLE+, <http://support.google.com/plus/bin/answer.py?hl=en&answer=1295930&topic=1207011&ctx=topic> (last visited September 17, 2012).

world (because using the +1 button is a public action) that she approves of the message. This should at least be expressive conduct, because when the user clicks the +1 button on a website, she does so with the intent to express to the world that she approves of the message on the website or article, and others who see that the user connected to the page with the +1 function would understand that message.<sup>183</sup> Under the *Bland* framework, however, because the +1 is effectuated though the simple click of a mouse, such an action would not be deemed substantive; therefore, it would not be protected.

## VII. Moving Forward: A More Protective Framework

Twitter and Google+ are just two examples of social media networks that will be adversely affected if the *Bland* ruling is affirmed. New social media sites are being created and becoming popular every day. These sites seem to have a feature for almost everything, and it is likely that social media networks are thinking up new features right this second, all of which will continue to make it easier to access and share information. As social media expands and changes, what constitutes speech will become more complex. Because of the increasing ease of access, immediate dissemination of information, and its growing role in political elections and social change, courts need to be open to understanding the importance of social media in communication today and how each feature works and what it communicates before deciding on the First Amendment issue. The *Bland* ruling threatens to chill speech on social media and have other negative effects unless the courts realize that they need to look at social media speech a bit differently and apply a slightly different framework when considering whether it is protected by the First Amendment.<sup>184</sup> This Comment proposes that, when analyzing whether speech on social

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<sup>183</sup> See discussion of expressive conduct *supra*, Part IV.A.

<sup>184</sup> See discussion of negative effects *supra*, Part VI.

media networks is protected under the First Amendment, a court must first analyze the feature and understand its purpose and how it is used, it should then analyze the feature under a substantive speech analysis, and if the feature is not protected as substantive speech, the court should then conduct an expressive conduct analysis.

#### A. Step One: Analyze the Feature

When deciding whether speech on social media should be protected under the First Amendment, the first step the court should take to determine the status of the speech at issue is to analyze the feature that the speaker used to communicate her ideas or opinions. By learning about the feature and how it is used, the court will be able to determine whether something is being communicated and how.

To properly analyze the feature, the court must know its purpose. To do this, the court should first find the reason the social media network created the feature and how the network intended it to be used. Also essential to this inquiry is how users on the social media network actually use that feature, even if that use is different than what the creators intended. Most importantly, the court should look at how the speaker at issue used the feature to create the speech that she is fighting to have protected under the First Amendment. If the creators, the users, or the speaker intended the feature to be used to convey any kind of idea, opinion, belief, or information, no matter how insignificant or inconsequential that communication or feature may initially appear, the court should continue with its analysis to find whether that speech should be protected. Throughout this analysis, the court should keep in mind that the feature is most likely meant to communicate some sort of information, as the major purpose of social media networks is to communicate with people throughout the world.

After determining the purpose of the feature, the court must then look to how the feature is technically used. Specifically, the court must understand how the user actually engages the feature. To use a feature, the user may have to type words or simply click a button, or it may involve something in between. Additionally, the court must understand what happens once the feature is used, including how the information that the user conveys through the feature is displayed on the user's social media profile and how it is received by other users on the social media site.

If the user must type actual words in order to use the feature, like a Facebook wall post or status update, this weighs heavily in favor of the feature being protected under the First Amendment as substantive speech. Similarly, if the user does not necessarily type the words, but using the feature produces actual words on the user's social media profile or homepage, like a Facebook "like," this too should weigh in favor of it being protected speech under the First Amendment. Additionally, the more places the message is shown on the social media site and the more prominently it is displayed, the more the communication should weigh in favor of protection, as it is more likely to be seen by other social media users.

As social media continues to expand, however, most speech on social media is likely to be conveyed by simply clicking on certain buttons and links, as that is the fastest and easiest way to disseminate information on the Internet. The ease with which the information is communicated, however, does not make the speech less significant than other forms of speech. Rather, courts must remain sensitive to the fact that much speech online is made quickly and easily, often with the click of the mouse, but that it may nonetheless be speech that should be protected by the First Amendment.

Additionally, through this analysis, the court should take into consideration whether the speech provides hyperlinks to other social media pages or websites. Much of the speech conducted on social media sites includes these links, and when users click on the links they are taken to other pages where they are provided with additional information, opinions, and ideas. This promotes the dissemination of information, and as this is a key purpose of the First Amendment, this should weigh in favor of the speech being protected under the First Amendment.

After analyzing the social media feature, understanding its intended use and how the feature technically works, the court must then determine whether the social media speech is protected under the First Amendment as substantive speech.

#### B. Step Two: Substantive Speech Analysis

The next step in this proposed framework is for the court reviewing the speech to find whether it should be protected under the First Amendment as substantive speech. To do this, the court should apply the substantive speech framework to the social media speech and feature at issue.<sup>185</sup>

If the user physically types the words that appear on the social media site, this is obvious substantive speech that is protected by the First Amendment. There are other forms of substantive speech however, that will not be physically typed by the user but are still substantive speech deserving of First Amendment protection. Many forms of speech on social media, as discussed above, involve a user re-posting actual words that other users have already typed. Because actual words will appear when a social media user re-posts another user's words, a court should find that this is substantive speech protected under the First Amendment. If the social

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<sup>185</sup> See discussion *supra* Part IV.A.

media communication is substantive speech that is deserving of First Amendment protection, the court should find it as such and need not go any further.

There will come social media posts, however, that consist of very few words or will not include a user typing any words at all, and it will become unclear whether this is substantive speech for purposes of First Amendment protection. There will even come forms of social media communication that do not consist of any words being posted to a user's social media page, but that still convey an idea, opinion, or information, but is not protected as substantive speech. It is here that courts should turn to step three.

### C. Step Three: Expressive Conduct Analysis

The final step in this proposed framework is that, when the court is unsure whether something is substantive speech, or when the court finds that the communication is in no way substantive speech, the court must determine whether the speech is expressive conduct that is protected under the First Amendment. This requires that the court apply the expressive conduct analysis to the social media speech and feature at issue.

Because the court will have properly analyzed the feature in the first step of this proposed framework, it will be obvious whether the speaker intended to convey a message. The analysis in step one will also assist the court in determining how great the likelihood is that the message will be understood by other social media users who view the speech. It is highly likely that if a message is being conveyed by the social media speech, it is also going to be understood by those who view it, as other users on the social media site will understand the feature, how it works, and how it is used to communicate ideas, opinions, and information.

It is likely that as social media expands, most social media speech will be communicated by expressive conduct, as that is the quickest and easiest way to spread information online. If

courts follow the first step of this framework and truly understand the feature, it will be properly analyzed and actual expressive conduct that warrants First Amendment protection will receive it. This will prevent plain errors like the one made by the *Bland* court.

Through this entire analysis, it is essential that courts remain sensitive to the fact that social media is an integral form of communication because it allows nearly every single person worldwide to participate in the flow of information, as it is free and accessible from nearly everywhere. Therefore, courts should err on the side of protection.

#### D. An Example: Applying This Proposed Framework to the Washington Post Social Reader

##### Application

To get a firm understanding of how this proposed framework would actually apply to social media speech if adopted, it is helpful to use an example of a current social media feature and apply it to this framework. One feature that is useful to apply to understand this framework is a social reader application, like the Washington Post Social Reader.<sup>186</sup> For purposes of this example, assume that this case is similar to *Bland* and a sheriff is running for reelection. One of his employees has added the Washington Post Social Reader application to her Facebook page, and she has been reading only articles supporting the sheriff's opponent. When she reads the articles, they get posted on her Facebook page and on her friends' news feeds. When the sheriff wins reelection, he fires this employee. She is now bringing suit claiming that the posts were protected First Amendment speech.

Under the first step of the proposed framework, the court will analyze the Washington Post Social Reader application. By simply going to the Washington Post website, the court will

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<sup>186</sup> *The Washington Post Social Reader*, THE WASHINGTON POST, [http://www.washingtonpost.com/2010/07/08/gIQA2eKpnK\\_page.html](http://www.washingtonpost.com/2010/07/08/gIQA2eKpnK_page.html) (last visited October 25, 2012).

discover information about the social reader application and will find that its purpose is to provide users with stories that will interest them and allow them to share those stories with friends to “get their thoughts on the issues [the user is] most passionate about,”<sup>187</sup> and to create a “socially powered newswire of intriguing articles.”<sup>188</sup> The website explains exactly what happens when a Facebook user installs the social reader application, including the fact that every social reader story the user reads will appear on her Facebook page and on her friends’ news feeds. If a user does not want the article to appear on her Facebook page or her friends’ news feeds, she can delete the post from her profile or simply read it from the Washington Post website (which will not post the story to the user’s Facebook page) rather than through the social reader application. Therefore, it is safe to assume that when a user reads an article via the Washington Post Social Reader, rather than through the regular Washington Post website, she wants that article to appear on her profile and on her friends’ news feeds so that they too can click on the link to the article and read it. It is important for the court to note that a link to the article will appear in addition to the title of the article, which allows other users to read the article, further encouraging the dissemination of information. This will weigh in favor of First Amendment protection.

The next step will be for the court to look at what was posted and determine whether it constitutes substantive speech for purposes of First Amendment protection. The court will see that the titles of the articles and pictures to go along with them were posted on the employee’s profile and on her friends’ news feeds. The user did not type the words herself, but they are actual words nonetheless, which weighs in favor of the posts being protected by the First Amendment. Just because words were posted, however, they may not be enough to constitute

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

substantive speech. Assume that the opponent's name was Bob Smith. Assume also that the employee read two articles: one is titled "Bob Smith is the Best Man for Sheriff" and the other is simply titled "Bob Smith." Under this framework the court will find that the former is substantive speech deserving of protection under the First Amendment. The words "Bob Smith is the Best Man for Sheriff" convey the idea that the person who wrote the article and the person who read the article, knowing it was going to be posted to her profile and on her friends' news feeds, support Bob Smith in the election. The latter title, however, does not substantively communicate anything; it is only a name. It is, at most, uncertain whether it is substantive speech; it does not, however, likely qualify for protection under the First Amendment as substantive speech. Therefore the court will find the former title protected as substantive speech under the First Amendment and will not further analyze that post; the court will then continue to analyze the latter post, moving to the third prong and applying an expressive conduct analysis to the post.

Under the third prong of this proposed framework, the court will find that when the user clicked on the link to read the article through the Washington Post Social Reader, knowing that the article would appear on her profile and on her friends' news feeds, she intended to convey the message to her friends that she supported Bob Smith in the election and presented the article to her friends so that they too could read it and learn why they should support Bob Smith as well. The court will also find that users would understand that the user intended to convey her support for Bob Smith because she read it via the social reader where it would be publicly displayed, rather than through the Washington Post website where it would remain private, and other users would also understand that by clicking on the link they could read the article and decide whether or not they themselves would support Bob Smith for sheriff. The court will find, therefore, that

when the user clicked on the link to read the article via the Washington Post Social Reader, knowing it would be posted to her Facebook page and on her friends' news feeds, that she was engaging in expressive conduct that is deserving of First Amendment protection.

By following the proposed framework set forth in this Comment for determining whether a social media feature, like a social reader application, should be speech that is protected under the First Amendment, the court will understand when and how information is being communicated. This understanding will assist the court in analyzing the feature under both a substantive speech and expressive conduct analysis, and social media speech will receive First Amendment protection when necessary and deserving.

## VIII. Conclusion

Communication on social media moves rapidly. Users want to be the first of their “friends” or “followers” to find the new hot button issue and advocate for or against it. Users want quick and easy access to information, to the point of minute-to-minute updates, and they want a quick and easy way to share that information with the world. As social media continues to expand, many types of communication will be completed by a simple click of the mouse. Social media provides a forum for people around the world to share with each other their ideas, beliefs, opinions, and information. As such, it is playing an increasingly large role in political and social change.

Thus, it is essential to ensure that communication conducted on social media receives the full protection that it deserves. In order to fully protect deserving speech, courts must use a slightly different framework when analyzing social media speech under the First Amendment. If courts take the time to understand the social media feature that is being used to communicate information, and if they understand that important ideas and opinions can be conveyed by a

feature that involves only a click of the mouse, then when the courts apply a substantive speech and expressive conduct analysis, social media speech will receive the First Amendment protection that it deserves. In following this proposed framework, plain errors like the one made by the *Bland* court will be avoided.