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Anything You Say (or Like, Repost, and Quote) Can Be Used Against You

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Cover Page Footnote

J.D. Candidate, May 2024, The Catholic University of America, Columbus School of Law; B.A. 2021, The University of Maryland. A special thank you to Professor John Sharifi for his guidance throughout the writing process.

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ANYTHING YOU SAY (OR LIKE, REPOST, AND QUOTE POST) CAN BE USED AGAINST YOU

Alexandra Heyl[+]

Social media allows users to exchange thoughts and ideas without saying a single word. Whether a user "likes", "reposts", or "quotes" third-party content, a user publicly interacts with content authored by someone else with the click of a button. Is this online activity more akin to a user making a statement, adopting a third-party's statement, or not making a statement at all? Does it matter? Only certain statements can be used against you at trial. Federal Rule of Evidence ("Federal Rule") 802(a) provides that "hearsay" is an out-of-court statement offered for the truth of the matter asserted. According to Federal Rule 802, hearsay is generally not admissible at trial unless an exception applies. Despite the existence of hearsay exceptions, Federal Rule 801 also carves out hearsay exemptions which are unaffected by the rule against hearsay. One of these exemptions is Federal Rule 801(d)(2)(A) which deems statements of a party-opponent offered against it at trial admissible. Another exemption exists for "tacit admissions" under Federal Rule 801(d)(2)(B) for statements made by a third-party offered against a party-opponent if the party-opponent manifested it adopted the third-party statement or believes it to be true. Thus, if online activity is considered a statement or a tacit admission it can be used against you at trial.

This Comment analyzes how the Federal Rules apply to online activity– "likes," "reposts," and "quotes"–and explores whether this activity constitutes a statement or tacit admission. Although "quotes" may satisfy the requirements of Federal Rule 801(d)(2)(B) in certain contexts, "likes" and "reposts" alone are not sufficient to warrant treatment as tacit admissions. Further, courts should treat "likes" and "reposts" as non-statements *per se* because the context surrounding either action is unavailable and the meaning of a "like" or "repost" is ambiguous. This treatment of "likes" and "reposts" as non-statements will avoid inconsistent evidentiary rulings and streamline the trial process.

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Whether it be from TikTok, television, or a real-life experience, most American citizens recognize the phrase "anything you say can and will be used against you in a court of law."[1] This phrase—commonly known as a *Miranda* warning—is part of a prophylactic scheme designed to remind an arrestee of his constitutional rights. Effectively, issuing a *Miranda* warning impresses upon the listener that nothing he says going forward will remain confidential. But an arrest followed by a subsequent interrogation is not the exclusive context where an individual must be cognizant of what he says. People now speak through a screen using social media. As of 2023, there are more than 302 million social media users in the United States alone.[2] People use social media accounts for a plethora of reasons—everything from announcing the birth of a child to engaging in political debates with others. It is undisputed that the moment you post something online, that post can not only be used against you in the court of public opinion, [3] but also in a court of law.[4] However, posting something on a social media account is not the exclusive means through which a user engages with the virtual world. Users now frequently employ alternative means to engage with others online, such as using Facebook's "like" function or X's (formerly known as "Twitter") "repost" and "quote post" functions (formerly known as "retweet" and "quote tweet" functions, respectively). What remains unsettled—and what this Comment seeks to explore—is whether "likes," "reposts," and "quote posts" are statements that can be used against you.

The Federal Rules of Evidence ("Rules" or "Rule") govern the admissibility of evidence in federal courts.[5] When drafting the Rules, the Advisory Committee desired to produce a body of evidence law that was "easily accessible" and efficient to apply.[6] Of the categories of evidence governed by the Rules, one of the most well-known is "hearsay" evidence.[7] Hearsay is an out-of-court statement being offered to prove the truth of the matter asserted in

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1. This phrase derives from *Miranda v. Arizona*, where the Court ruled individuals must understand and voluntarily waive their Fifth Amendment rights for any statements made in response to police interrogation to be used in court. 384 U.S. 436, 444–45 (1966).

2. *See* Daniel Ruby, *Social Media Users—How Many People Use Social Media In 2023*, DEMAND SAGE (July 6, 2023), https://www.demandsage.com/social-media-users/.

3. Evan Nierman, *Why Social Media, Cancel Culture, and Crisis Management Have Become Intertwined*, FAST COMPANY (Aug. 31, 2022), https://www.fastcompany.com/90781299/why-social-media-cancel-culture-and-crisis-management-have-become-intertwined.

4. These online statements are admissible as party admissions. *See* FED. R. EVID. 801(d)(2)(A).

5. Many state courts model their rules of evidence off the Rules. Thus, an understanding of the Rules is important for both federal and state courts. *See What Are the Federal Rules of Evidence?*, FINDLAW, (April 03, 2019), https://www.findlaw.com/criminal/criminal-procedure/what-are-the-federal-rules-of-evidence-.html.

6. *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 115 (1962).

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

the statement.[8] Despite complexities often cited by law students, the doctrine is relatively straightforward to apply. For example, imagine the police interview a witness to a bank robbery and the witness says, "the getaway car was blue." The prosecutor wants to use this statement at trial to show the defendant's blue car was the getaway car. If the prosecutor calls the police officer to the stand and asks the officer what the witness said, the defense will object on hearsay grounds. The witness's statement was made outside the current trial (an out-of-court statement) and is being offered to prove the truth of the matter asserted in the statement—that the getaway car was blue.

Throughout the 1970s and 1980s, the malleability of the Rules was tested by a new type of evidence that was not even remotely in the contemplation of the Advisory Committee when originally drafting the Rules: electronic evidence.[9] As society experienced an influx of technological advancement, new "flavors" of electronic evidence—e.g., e-mails, websites, and online posts—emerged in litigation.[10] Some courts were initially reluctant to admit electronic evidence at trial, fearing it was unreliable and untrustworthy, to the point that one district court commented, "any evidence procured off the Internet is adequate for almost nothing . . . ."[11] Naturally, then, some scholars advocated for amendments to the Rules to remedy this concern.[12] Others felt, however, that amending the Rules would be counterproductive given its adaptive framework.[13] Ultimately, the

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8. Blair v. Henry Filters, Inc., 505 F.3d 517, 524 (6th Cir. 2007) (citing FED. R. EVID. 801(c)).

9. Kimberly D. Richard, *Electronic Evidence: To Produce or Not to Produce, That Is the Question*, 21 WHITTIER L. REV. 463, 470–77 (1999).

10. Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 538 (D. Md. 2007) ("'flavors', including e-mail, website ESI, internet postings, digital photographs, and computer-generated documents and data files.").

11. St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773, 774–75 (S.D. Tex. 1999); *but see* United States v. Cameron, 762 F. Supp. 2d 152, 160–61 (D. Me. 2011) (criticizing the court in *St. Clair*).

12. For example, Professor Jeffrey Bellin proposed several amendments to the Rules, including an "eHearsay" exception to prevent "the exclusion of many important and reliable electronic communications." Daniel J. Capra, *Memorandum: Hearsay Exception for Electronic Communications of Recent Perception*, 83 FORDHAM L. REV. 1337, 1337 (2014) (referencing Jeffrey Bellin, *Ehearsay*, 98 MINN. L. REV. 7, 27 (2013)).

13. *See* Gregory P. Joseph, *Internet and E-mail Evidence (Part 1)*, 58 PRAC. LAW. 19, 19 (2012); *see also* Steven Goode, *The Admissibility of Electronic Evidence*, 29 REV. LITIG. 42 (2009) (discussing that "the legal standards that have for many years governed the admissibility of evidence are more than adequate to the task" of adapting to the use of electronic evidence). For example, in *Lorraine v. Markel Am. Ins. Co.*, the court fashioned an analytical model designed to address the reliability concerns of electronically stored information under the frameworks of the Federal Rules. *See* 241 F.R.D. at 538. Specifically, the court explained its evidentiary framework analyzing ESI as follows:

> Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered: (1) is the ESI relevant as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be); (2) if relevant under 401, is

adequacy of the Advisory Committee's "easily accessible" and efficient framework applying the Rules in a novel context persevered.[14] Indeed, the Rules continue to control the admissibility of electronic evidence.

However, nearly five decades since the enactment of the Rules, advances in electronic evidence continue to catalyze. Communication is not only faster, but also no longer limited to the traditional means of electronic evidence. Rather than just sending an e-mail or posting on websites, users can engage with online content in new ways due to social media.[15] For example, users can now "repost"[16] or "quote post"[17] the content of other users on X or "like"[18] the posts authored by others on Facebook. Despite the application of the hearsay framework successfully translating to traditional electronic evidence, there remains a jurisprudential void with respect to the new way users can communicate in the social media context. Consequently, the adequacy of the current hearsay framework is potentially subject to challenge once again.

This potential evidentiary quagmire warrants resorting to the logic employed by past advocates when deciding whether to amend the Rules due to the proliferation of electronic evidence. Just as before, applying the Rules to social media is "a bit like pouring old wine into new bottles. Some will fit neatly, while

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> it authentic as required by Rule 901(a) (can the proponent show that the ESI is what it purports to be); (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807); (4) is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule, or if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001–1008); and (5) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance.

Id. For electronic evidence, the principles governing admissibility under the Rules do not pose analytical problems in terms of the legal analysis but rather pose practical problems. *See* Goode, *supra* note 13. In other words, they are more "difficult to apply because of the new context." Dylan C. Edwards, *Admissions Online: Statements of a Party Opponent in the Internet Age,* 65 OKLA. L. REV. 533, 536 n.21 (2013) (quoting PAUL R. RICE, ELECTRONIC EVIDENCE: LAW AND PRACTICE 403 (2d ed. 2008)).

14. *See* Edward J. Imwinkelried, *The Golden Anniversary of the "Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts": Mission Accomplished?*, 57 WAYNE L. REV. 1367, 1370–82 (2011).

15. "Social media" refers to "web-based platforms that allow users to engage with one another." *What Is Social Media? – Everything You Need To Know*, NFI, https://www.nfi.edu/what-is-social-media/ (last visited Feb. 22, 2023). Pertinent to this Comment, these platforms include Facebook, Instagram, and X. *Id.*

16. *See infra* note 160; *About Different Types of Posts*, X HELP CENTER, https://help.twitter.com/en/using-x/types-of-posts (last visited Feb. 12, 2023).

17. *See infra* p. 23–24 and notes 177–79; *see also About Different Types of Posts*, *supra* note 16.

18. *See infra* p. 17–18 and notes 119–37; *see also Like and React to Posts: What Does it Mean to "Like" Something on Facebook?*, FACEBOOK HELP CENTER, https://www.facebook.com/help/1624177224568554 (last visited Feb. 12, 2023) [hereinafter *Like and React to Posts*].

others will require a degree of dexterity and ingenuity, and there will be an occasional miss and mess."[19] In other words, the new means of social media communication requires one to ask whether the application of the existing hearsay framework fits neatly, requires ingenuity, or is otherwise a total mess warranting a *de novo* reconsideration of the framework altogether.

This Comment explores the potential complications of applying the hearsay doctrine in the social media context, specifically whether mere engagement on social media through the use of "likes," "reposts," and "quote posts" constitutes a "statement," and is consequently admissible as a party admission. Part I discusses the hearsay doctrine, generally. Part II explains how the hearsay doctrine and its exemptions are currently applied to electronic evidence. Part III explores how current standards for Rule 801(a), Rule 801(d)(2)(A), and Rule 801(d)(2)(B) may extrapolate to "likes," "reposts," and "quote posts." Part IV argues that "likes" and "reposts" are too ambiguous to possess the intent necessary to qualify as "statements" subject to the hearsay rule, and that standing alone, they are not sufficient manifestations of adoption or belief to be tacit admissions. Finally, this Comment proposes that "likes" and "reposts" should not qualify as hearsay *per se*.

I. THE TRUTH OF THE MATTER: THE HEARSAY DOCTRINE AND ITS EXEMPTIONS

A. Breaking Down Hearsay

Federal Rule 102 states the purpose of the Rules is to "ascertain[] the truth and secure[] . . . just determination[s]" in every proceeding.[20] To this end, the Rules implement a general bar on the admissibility of hearsay. Hearsay is generally defined as an out-of-court statement offered to prove the truth of the matter asserted.[21] This hearsay bar—"The Rule Against Hearsay"[22]—stems from the dismal weight courts place on statements not subject to the procedural safeguards of in-court testimony.[23] However, while hearsay is generally

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19. PAUL R. RICE, ELECTRONIC EVIDENCE: LAW AND PRACTICE 492 (2d ed. 2008).

20. FED. R. EVID. 102.

21. The Rules specifically define hearsay as follows: "'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers into evidence to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c).

22. *See* FED. R. EVID. 802.

23. When it comes to the hearsay bar, the Advisory Committee explained that "[t]estimony given by a witness in the course of court proceedings is excluded since there is compliance with all the ideal conditions for testifying." FED. R. EVID. 801(c) Notes of Advisory Committee on Proposed Rules. The adversarial process provides these "ideal conditions," as in-court testimony is under oath, subject to cross-examination, and observed by the trier of fact. *See also* California v. Green, 399 U.S. 149, 158 (1970) (explaining the importance of procedural safeguards inherent in the adversarial process to ensuring compliance with the Confrontation Clause of the Sixth Amendment). These safeguards combat the risks inherent to all testimony, including "the declarant's capacity to perceive accurately, inadequate memory, ambiguity, and fabrication."

unreliable,[24] certain out-of-court statements are admissible provided they satisfy a hearsay exception, are explicitly exempted as non-hearsay, or are permitted by legislative or constitutional rules.[25]

To trigger the application of the hearsay doctrine, the Rules first contemplate there being a "statement" at issue. Under Rule 801(a), a "statement" is "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion."[26] While the Rules do not explicitly define "assertion," the Advisory Committee has provided some interpretive guidance.[27] The Committee explained, "[t]he key to the definition is that nothing is an assertion unless intended to be one."[28] With this guidance, the Committee effectively rejects the common law view that statements include both express and implied assertions.[29] In its view, implied assertions are more trustworthy

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Edwards *supra* note 13, at 536; *see also* 6 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801:1 (7th ed. 2012); *see*, *e.g.*, United States v. Tin Yat Chin, 371 F.3d 31, 38 (2d Cir. 2004) (explaining how evidence not affected by "defects in memory, perception, narration, or sincerity," like receipts, are admissible "non-hearsay"). Elimination of the risk of false, inaccurate, or misleading information generally requires the exclusion of out-of-court statements, which are not subject to any of these safeguards. *See* Edwards, *supra* note 13, at 537; *see also* Jonathan L. Moore*, Time for an Upgrade: Amending the Federal Rules of Evidence to Address the Challenges of Electronically Stored Information in Civil Litigation,* 50 JURIMETRICS J. 147*,* 166–67 (2010).

24. *See* United States v. Lozado, 776 F.3d 1119, 1121 (10th Cir. 2015).

25. FED. R. EVID. 802. According to the Rules, "[h]earsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court." *Id.*; *see* FED. R. EVID. 803 (listing exceptions to the rule against hearsay); *see also* Edwards, *supra* note 13, at 537.

26. FED. R. EVID. 801(a). The definition seeks to "exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion." FED. R. EVID. 801(a) Notes of Advisory Committee on Proposed Rules.

27. Because the Rules are silent as to the definition of an assertion, some federal circuit courts have construed Rule 801(c) to include implied assertions. *See, e.g.*, United States v. Torres, 794 F.3d 1053, 1061 (9th Cir. 2015) (holding that where a declarant intends a question to communicate an implied assertion, and the proponent offers the question for the truth of the intended message, the question meets the definition of hearsay); United States v. Reynolds, 715 F.2d 99, 103 (3d Cir. 1983) (holding express assertions themselves may contain implied assertions, qualifying as hearsay); *but see* United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990) (holding implied assertions do not fall within the definition of hearsay).

28. FED. R. EVID. 801(a) Notes of Advisory Committee on Proposed Rules; *see also Lewis*, 902 F.2d at 1179 (finding an assertion "has the connotation of a positive declaration.").

29. Under the common law, implied assertions offered to show the declarant's belief in a fact were well recognized as "statements" for hearsay purposes. This rationale is explained in *Wright v. Doe d. Tatham*, a case which involved the question of whether a testator was competent at the time of the execution of his will. 7Ad. & E 313, 112 Eng. Rep. 488 (Ex. Ch. 1837), 5 Clark & Finelly 670 (1838). At trial, proponents of the will's legitimacy offered several letters addressed to the testator concerning business matters. *Id.* at 492, 498. The letters were not introduced for the truth of the business matters contained within—which would fall within the definition of hearsay—but rather to show the competency of the testator. *Id.* at 514−15. Thus, the court had to determine whether the implied assertion of the declarants, their belief the testator had the capacity to engage in intelligent discourse, was a statement for hearsay purposes. *Id.* at 515. Ultimately, the court held that the implied assertions were statements, as their relevance depended on the belief of the

and free from the dangers of mendacity,[30] so the Rules do not treat them as statements.[31]

Assertions are either verbal or nonverbal.[32] *Verbal* assertions of the declarant—both oral and written words—are scarcely doubted as intended assertions.[33] Thus, if oral or written words are offered to prove the truth of the contents of the words themselves, they are hearsay, and no further inquiry is necessary.[34] However, *nonverbal* conduct requires further consideration before qualifying as a statement. This inquiry hinges on whether the declarant had assertive intent to communicate a message.[35] Many courts recognize that "[s]ome nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, [is] assertive in nature, and [is] to be regarded as a statement."[36] Such nonverbal conduct includes gesturing, pointing, and nodding.[37] On the other hand, some nonverbal conduct is by its

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declarant. *Id.* at 516–17. If not considered hearsay, the declarants—who addressed the letters—and their belief as to the testator's competency would not be subject to cross-examination. The Committee rejects this common law view on the basis that although no evidence is completely free from the risk of fabrication, dangers involving perception, memory, and narration of the actor "are minimal in the absence of an intent to assert and do not justify the loss of evidence on hearsay grounds." FED. R. EVID. 801(a) Notes of Advisory Committee on Proposed Rules.

30. FED. R. EVID. 801(a) Notes of Advisory Committee on Proposed Rules. Cross-examination to determine the veracity of the declarant's implied assertion would not be probative. *See* KENNETH S. BROUN, ET AL., MCCORMICK ON EVIDENCE § 250, 738–39 (Edward W. Cleary ed., 3d ed. 1984):

> Even though the risks arising from purposeful deception may be slight or nonexistent in the absence of intent to communicate, the objection remains that the actor's perception and memory are untested by cross-examination for the possibility of honest mistake. However, in contrast to the risks from purposeful deception those arising from the chance of honest mistake seem more sensibly to be factors useful in evaluating weight and credibility rather than grounds for exclusion.

31. Not all states have adopted the Advisory Committee's view of what constitutes a statement and continue to subject implied assertions to the hearsay doctrine. *See e.g.*, State v. Dullard, 668 N.W.2d 585, 593–95 (Iowa 2003) (holding implied assertions from speech intended as communication comes within the definition of an assertion); *see also* Paul R. Rice, *Should Unintended Implications of Speech be Considered Nonhearsay? The Assertive/Nonassertive Distinction Under Rule 801(a) of the Federal Rules of Evidence*, 65 TEMP. L. REV. 529, 538 (1992).

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

33. FED. R. EVID. 801(a) Notes of Advisory Committee on Proposed Rules.

34. *See id.* ("Hence verbal assertions readily fall into the category of 'statement'.").

35. FED. R. EVID. 801(a) Notes of Advisory Committee on Proposed Rules.

36. *Id.*

37. *See, e.g.*, State v. Dessinger, 958 N.W.2d 590, 599 (Iowa 2021) (holding after being asked about an alleged altercation, the declarant's illustrative demonstration of a choking incident was an assertion); Pierre-Charles v. State, 67 So. 3d 301, 305 (Fla. Dist. Ct. App. 2011) (holding a head nod is an affirmative response intended to communicate a message, and is therefore hearsay); United States v. Ross, 321 F.2d 61, 69 (2d Cir. 1963) (holding pointing to a salesman's number in response to a question is hearsay); Miller v. Dillard's, Inc., 166 F. Supp. 2d 1326, 1333 (D. Kan. 2001) (holding a security guard's act of showing his badge is assertive in nature).

nature nonassertive, such as visceral reactions,[38] and thus is not considered a statement.

Even if words or conduct are assertive, they will only be subject to the rule against hearsay if produced by the declarant outside of the courtroom.[39] A declarant is defined as "the *person* who made the statement."[40] Statements generated by a computer, unaffected by human thought and action, are not subject to the hearsay rule.[41] Moreover, the rule against hearsay only applies if the proponent offers the statement of the declarant "to prove the truth of the matter asserted in the statement."[42] Whether or not a statement is admissible "will most often hinge on the purpose for which it is offered."[43] Accordingly, "[i]f the significance of an offered statement lies solely in the fact it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay."[44] Extrajudicial statements offered to show the effect on the listener,[45] notice,[46] or an individual's knowledge[47] fall within this category. However, a statement offered for the truth of the matter asserted meets such criteria when it is "offered for the substance of its content."[48]

38. BROUN, *supra* note 30; *see, e.g.*, United States v. Kiel, 658 F. App'x 701, 709–10 (5th Cir. 2016) (holding an individual's reaction to surveillance footage of a bank robbery where she "'fell back into her chair and put her hand over her mouth and started crying'" was not an intended assertion); United States v. Kool, 552 F. App'x 832, 834 (10th Cir. 2014) (holding the defendant did not intend to assert anything when placing his hands under his armpits in a police interview).

39. *See* FED. R. EVID. 801(c)(1).

40. FED. R. EVID. 801(b) (emphasis added).

41. *See* Lyngaas v. Curaden AG, 992 F.3d 412, 431 (6th Cir. 2021) (holding computer-generated summary-report logs are not hearsay because they were not made by a person); Black v. State, 358 S.W.3d 823, 831 (Tex. App. 2012) (holding text messages "produced by human thought and action" are hearsay); State v. Armstead, 432 So. 2d 837, 839–40 (La. 1983) (holding print-outs of computer-stored data placed in the computer by an out-of-court declarant are hearsay, but computer-generated data free from human assistance is not); United States v. Lizarraga-Tirado, 789 F.3d 1107, 1109–10 (9th Cir. 2015) (holding a tack placed by the Google Earth program was not an assertion, rationalizing that "[t]hough a person types in the GPS coordinates, he has no role in figuring out where the tack will be placed."). Even where there are concerns a human tampered with a computer-generated statement, it still does not qualify as hearsay. *See Lizarraga-Tirado*, 789 F.3d at 1110.

42. FED. R. EVID. 801(c)(2).

43. United States v. Linwood, 142 F.3d 418, 425 (7th Cir. 1998).

44. FED. R. EVID. 801 Notes of the Advisory Committee on Proposed Rules.

45. *See, e.g.*, United States v. Levy, 904 F.2d 1026, 1030 (6th Cir. 1990) (holding a tip given to officers to "look [] for a new, four-door yellow Cadillac on Ogden Street" was not offered for the truth (the description of the car) but rather to show why the officers went to a particular area).

46. *See, e.g.*, United States v. Moseley, 980 F.3d 9, 27 (2d Cir. 2020) (holding evidence of customer complaints may be introduced to show the defendant was "'put on notice' of illegal acts").

47. *See, e.g.*, United States v. Norwood, 798 F.2d 1094, 1097 (7th Cir. 1986) (holding statements made by one friend to another that the latter was authorized to use a credit card are not hearsay because they were offered to prove the friend's state of mind—he was not aware the credit card was stolen).

48. Molly D. McPartland, *An Analysis of Facebook "Likes" and Other Nonverbal Internet Communication Under the Federal Rules of Evidence*, 99 IOWA L. REV. 445, 455 (2013).

B. Understanding Party Admissions and Tacit Admissions

Under Rule 802, when evidence falls within the definition of hearsay, it is inadmissible, unless otherwise deemed admissible by the Rules, legislative enactment, or "other rules prescribed by the Supreme Court."[49] The Rules provide hearsay *exceptions* and *exemptions*, making evidence that would otherwise fall within the definition of hearsay admissible upon meeting certain preliminary requirements.[50] The *exceptions*—which derive from common law—are statements that "possess circumstantial guarantees of trustworthiness."[51] Conversely, the *exemptions* are expressly characterized as non-hearsay under the Rules.[52] Specifically, admissions by a party-opponent are excluded from the hearsay definition under Rule 801(d)(2).[53] Admissions by a party-opponent are not considered hearsay, as they are a "result of the adversary system rather than satisfaction of the conditions of the hearsay rule."[54] Because the party is present at trial, he has the opportunity to take the stand and explain, deny, or rebut the statement offered against him.[55] Consequently, admissions by a party-opponent enjoy "generous treatment" with no requirements of any "guarantee of trustworthiness" to be admissible.[56]

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49. FED. R. EVID. 802.

50. *See* FED. R. EVID. 803; FED. R. EVID. 804.

51. The hearsay exceptions recognize circumstances that are more reliable and not adversely affected by the traditional dangers of perception, memory, ambiguity, and fabrication. FED. R. EVID. 803 Notes of Advisory Committee on Proposed Rules. For example, Rule 803(2), the excited utterance exception, is premised on the idea that utterances are "free of conscious fabrication" when produced under conditions of excitement. *Id.*

52. What the Rules consider exemptions, some states may consider exceptions. *See, e.g.*, MD. RULE 5-803 (listing statements by a party opponent as a hearsay exception).

53. Per Rule 801(d)(2), a statement is not hearsay when:

> The statement is offered against an opposing party and:
> (A) was made by the party in an individual or representative capacity;
> (B) is one the party manifested that it adopted or believed to be true;
> (C) was made by a person whom the party authorized to make a statement on the subject;
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
> (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

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

54. FED. R. EVID. 801 Notes of Advisory Committee on Proposed Rules; *see also* John S. Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 493–94 (1937).

55. *See* Jones v. Nat'l Am. Univ., 608 F.3d 1039, 1045 (8th Cir. 2010) ("'A party who denies making a statement cannot keep it out by objecting on this ground if the proponent presents sufficient proof to support a jury finding that the objecting party made the statement.'") (quoting 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:44 (3d ed. 2007)); Jewell v. CSX Transp., 135 F.3d 361, 365 (6th Cir. 1998) ("The admissibility of statements of a party-opponent is grounded not in the presumed trustworthiness of the statements, but on 'a kind of estoppel or waiver theory, that a party should be entitled to rely on his opponent's statements.'") (quoting United States v. DiDomenico, 78 F.3d 294, 303 (7th Cir. 1996)).

56. FED. R. EVID. 801(d)(2) Notes of Advisory Committee on Proposed Rules.

To qualify as an admission by a party-opponent under Rule 801(d)(2), a statement must be made by a party in the litigation and offered against that party.[57] These statements are not limited to the assertions of the opposing party in her individual capacity—a statement may be attributed to the opposing party as if she made the statement.[58] Despite this variety, a party's own statement—a "party admission"—is the most obvious example.[59] The only requirement is that the declarant be the party against whom the statement is offered.[60] There is no requirement that the statement be an original thought of the party.[61]

The exemption for admissions by a party-opponent also includes tacit admissions, which are statements offered against an opposing party when "the party manifested that it adopted or believed [the statement] to be true."[62] Unlike party admissions, the proponent does not need to show the opposing party actually made the statement. Rather, in this context, the party adopts the statement of another, "becom[ing] the declarant."[63] Thus, tacit admissions involve the admission of two statements: (1) the statement of another person and (2) the party's manifestation of adoption.[64] The proponent of the statement has the burden of proving a party manifested adoption by a preponderance of the evidence.[65] Whether this burden is met is a preliminary question, which lies within the trial judge's discretion.[66]

As a matter of law, "a purported [tacit] admission should be admitted into evidence only if a jury could reasonably find that there was unambiguous assent

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57. *See* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 567 (D. Md. 2007) (recognizing a party cannot offer its own out-of-court statements as admissions).

58. Even if the opposing party did not utter the statement herself, it may still be admissible against that party if certain prerequisites are met, including if the statement was made "by a person whom the party authorized," "by the party's agent or employee on a matter within the scope of that relationship and while it existed" or "by the party's coconspirator during and in furtherance of the conspiracy." *See* FED. R. EVID. 801(d)(2).

59. *See* FED. R. EVID. 801(d)(2)(A).

60. *Id.*; *see also* Order Granting Plaintiffs' First Motion *In Limine*, Graves ex rel. W.A.G. v. Toyota Motor Corp., 2012 U.S. Dist. LEXIS 3122 at *9-10 (S.D. Miss. Jan. 10, 2012) (granted to exclude statements in a medical report because Toyota did not offer evidence to establish the declarant of the statement, precluding admissibility under Rule 801(d)(2)).

61. *See* Jewell v. CSX Transp., 135 F.3d 361, 365–66 (6th Cir. 1998) (holding statements made in an individual capacity are party admissions, regardless of whether the declarant has independent recollection of the matter asserted).

62. *See* FED. R. EVID. 801(d)(2)(B).

63. State v. Carlson, 808 P.2d 1002, 1005 (Or. 1991).

64. *See id.* at 1005–06.

65. *See* Bourjaily v. United States, 483 U.S. 171, 175–76 (1987) (holding the standard for preliminary questions under Federal Rule 104(a) is a preponderance of the evidence); *see also* Cook v. Michael, 330 P.2d 1026, 1032 (1958) ("[P]roof by a 'preponderance of the evidence' means that the [factfinder] must believe that the facts asserted are more probably true than false . . . .").

66. *See* FED. R. EVID. 104(a). Ultimately, the trial judge wields substantial discretion in cases involving whether nonverbal conduct constitutes a manifestation of adoption. This is particularly concerning as social media evidence has become more common in litigation, calling judges to consider a new form of ambiguous, nonverbal conduct—"liking" and "reposting."

to the statement of another."[67] Under the Rules, this can be done in two ways—through adoption or belief. In terms of adoption, "[a] party adopts the . . . statement of another person when that party's words or conduct 'indicate that [he or she] intended to adopt the statement.'"[68] In terms of belief, "[a] party manifests a belief in the truth of another's statement when the party intends to embrace the truth of the statement."[69] This requires the trial judge to analyze "the surrounding circumstances, including circumstances and nature of the underlying statement itself . . . to determine whether an intent to adopt the statement is fairly reflected by the act or failure to act which is in question."[70]

It is easiest to identify when a party verbally adopts a statement—he "agree[s] with or concur[s] in an oral statement . . . ."[71] A statement may also be adopted through conduct.[72] In these instances, courts assess whether the statement is "such that an innocent defendant would normally be induced to respond" and whether "the defendant 'heard, understood, and acquiesced in the statement.'"[73] Notably, in many instances the meaning of a party's conduct is ambiguous.[74] In *State v. Carlson,* the defendant was convicted of the unlawful possession of methamphetamine and endangering the welfare of a minor.[75] When asked by a police officer about needle marks on his arm, the defendant explained the marks were injuries he sustained from working on a car.[76] At this point, the defendant's wife interjected, "yelling: 'You liar, you got them from shooting up in the

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67. Blackson v. United States, 979 A.2d 1, 7 (D.C. 2009).

68. *Carlson*, 808 P.2d at 1006 (quoting State v. Severson, 298 Or. 652, 660 (1985)). To adopt a statement the party "must have comprehended the statement" and "expressly acknowledge[d] the truth of the statement," not just merely act in reference to it. 1 WEISSENBERGER'S FEDERAL EVIDENCE § 801.19 (Matthew Bender, 8th ed. 2023).

69. *Carlson*, 808 P.2d at 1006 (quoting *Severson*, 298 Or. at 660). To manifest belief, a party must act "in some *significant, identifiable way, in direct reliance upon the specific information* . . . ." White Indus. v. Cessna Aircraft Co., 611 F. Supp. 1049, 1063 (W.D. Mo. 1985).

70. *White Indus.*, 611 F. Supp. at 1062. A party may manifest adoption of a statement through language (written or oral), conduct, or silence. *Id.* at 1062–63.

71. 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 801.31(3)(b) (Mark S. Brodin, ed., Matthew Bender 2d ed. 2023); *see*, *e.g.*, United States v. Jinadu, 98 F.3d 239, 244 (6th Cir. 1996) (holding defendant adopted the contents of the agent's question by replying "yes").

72. Although not relevant to this Comment, a party may also manifest adoption of a statement through silence. *See* United States v. Watson, 552 F. App'x 480, 486 (6th Cir. 2014).

73. United States v. Joshi, 896 F.2d 1303, 1311 (11th Cir. 1990). In *Joshi*, the Eleventh Circuit held that a defendant adopted a statement made by his co-conspirator by nodding his head in "knowing acknowledgment" of the statement. *Id.*

74. *See* United States v. Tocco, 135 F.3d 116, 129 (2d Cir. 1998) (holding the district court's determination that a head nod constituted an adoptive admission was not an abuse of discretion despite the "so-called ambiguity surrounding [its] meaning" since the "evidentiary determination was preliminary to a decision as to what inference should be drawn from it, which was ultimately a question for the jury to assess . . . .").

75. *Carlson*, 808 P.2d at 1003.

76. *Id.* at 1003–04.

bedroom with all your stupid friends.'"[77] The "[d]efendant 'hung his head and shook [it] back and forth.'"[78] After concluding the defendant's nonverbal reaction constituted a tacit admission, the trial court admitted testimony about the wife's accusatory statement over the defendant's hearsay objection.[79] On appeal, the Oregon Supreme Court considered whether or not the defendant's conduct was sufficient to manifest adoption or belief of his wife's statements.[80] Ultimately, the court held the conduct was inherently ambiguous and did not rise to the level of a manifestation of adoption or belief in the truth of the statement.[81] The act of hanging one's head and shaking it back and forth was "so ambiguous that it [could not] reasonably be deemed sufficient to establish that any particular interpretation . . . is more probably correct."[82]

A written statement is adopted when a party has read and signed the statement of another.[83] A party also adopts a written statement if he uses the statement or acts in compliance with it, such that "the surrounding circumstances tie the possessor and the document together in some meaningful way."[84] For example, by implementing recommendations in a report, a party adopts the report's findings as true.[85] However, a party does not need to have personal knowledge of the truth of the matter asserted in the statement to manifest adoption.[86]

II. A Virtual Revolution: Applying Hearsay to Electronic Evidence

Before the advent of social media, courts most often dealt with electronic evidence in the form of e-mails and website posts. When applying the Rules to determine the admissibility of electronic evidence, online statements are only subject to the hearsay rule when they "could be affected by the human problems of perception, memory, sincerity, and ambiguity."[87]

Assuming they are relevant and properly authenticated, e-mail correspondence between parties in a civil litigation constitute party

77. *Id.* at 1004.

78. *Id.*

79. *Id.* at 1004.

80. *Id.* at 1005–06.

81. *Id.* at 1010.

82. *Id.* The court also listed the possible interpretations of his conduct, including confusion, uncertainty, reluctance to engage in a dispute with his wife, intimidation to speak in the presence of police officers, dismay, or disagreement with the wife's statement. *Id.*

83. A signature is a clear example of a written adoptive admission. *See, e.g.*, Pillsbury Co. v. Cleaver-Brooks Div. of Aqua-Chem, Inc., 646 F.2d 1216, 1218 n.2 (8th Cir. 1981) (holding a supervisor manifested adoption of a report prepared by the defendant when he signed each page).

84. United States v. Paulino, 13 F.3d 20, 24 (1st Cir. 1994).

85. *See, e.g.*, Pilgrim v. Trs. of Tufts Coll., 118 F.3d 864, 870 (1st Cir. 1997).

86. In *Pillsbury Co.*, the Eighth Circuit held an employer manifested adoption of the truth of the matter asserted in incorrect service reports when he signed them. 646 F.2d at 1218. The court held this despite it being his "personal policy to sign reports . . . whenever a report is reviewed with him and he understands its contents." *Id.* at 1218 n.2.

87. Rice, *supra* note 19.

admissions.[88] In *United States v. Safavian*, the court addressed the admissibility of several e-mails sent by the former Chief of Staff ("COS") for the Administrator of the General Services Administration ("GSA"),[89] which were offered against him at trial for obstruction of justice.[90] The court held that the statements in the e-mails directly authored by the COS were admissible as a party admission.[91] The court then analyzed the admissibility of the forwarded e-mails as tacit admissions.[92] Based on the context and content of certain e-mails, the court stated that the COS "'manifested an adoption or belief' in the truth of the statements" of third parties by forwarding the e-mails.[93] However, other e-mails he forwarded "[did] not clearly demonstrate his adoption of the contents."[94] Although the court did not address the specific content that made certain e-mails admissible as tacit admissions, this case demonstrates that the mere act of forwarding an e-mail is not alone sufficient to satisfy a clear manifestation of adoption.

This principle is further demonstrated in *Sea-Land Service, Inc. v. Lozen International, LLC*.[95] Instead of acting as a mere messenger by forwarding an internal e-mail, an employee prefaced it with the statement, "Yikes, Pls [sic] note the rail screwed us up . . . ."[96] The court held that by including this prefatory statement, the employee "incorporated and adopted the contents of [the] original message, because her remark 'manifested an adoption or belief in [the] truth' of the information contained in the original e-mail."[97] The written statement in *Sea-Land* demonstrates a clear manifestation of the belief that the information within the original message was true.[98]

88. The only preliminary requirement is that the declarant is the party against whom the statement is offered. *See* United States v. Shah, 125 F. Supp. 3d 570, 577 (E.D.N.C. 2015) (recognizing electronic communications demand a higher standard for authentication under Rule 901(b), and a mere e-mail address or username is not sufficient to establish the identity of the declarant); *cf.* Sysmex Co. v. Beckman Coulter, Inc., No. 19-1642-JFB-CJB, 2022 U.S. Dist. LEXIS 105752, at *8 (D. Del. June 14, 2022) (holding letters authored by third parties and attached to e-mails sent by the defendant are not party admissions).

89. United States v. Safavian, 233 F.R.D. 12, 13 (D.D.C. 2005).

90. *Id.* The e-mails in this case are in reference to whether the defendant could travel on a private jet to attend a golf trip in Scotland with lobbyist Jack Abramoff. When the defendant asked an ethics officer about the matter, he specifically reported Abramoff had no business before GSA, which was challenged as false. *Id.*

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

92. *Id.*

93. *Id.*

94. *Id.* at 44.

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

96. *Id.* at 821.

97. *Id.*

98. *See generally id.* However, communication on social media is not always so clear, especially with the emerging use of emojis, which hold flexible meanings. If, instead of a prefatory statement, the employee had included a single emoji, would this still constitute a clear manifestation of belief in the truth of the original statement?

Unlike e-mails, which are composed of written assertions, website postings "do not always function as proxies for direct communication."[99] Although it is still necessary to establish as a preliminary matter that the declarant is the party against whom the statement is offered,[100] the post must first qualify as a statement for either hearsay exemption to apply. Thus, the initial inquiry is whether the act of posting on a website constitutes an intentional assertion.

The specific content of a website qualifies as a statement when it is offered for the truth of the matter asserted.[101] As previously stated, any statement authored by the opposing party is subject to the party admission exemption. This means that any statement authored by a party and posted on the party's own website constitutes a party admission.[102] However, a slight alteration to the facts—that the party did not author the statement—shifts the analysis to the tacit admission context, even though the same party posted the statement on their own website.

In *Janus Capital Group, Inc. v. First Derivative Traders*, shareholders argued that Janus Capital Management LLC ("JCM") violated Securities and Exchange Commission Rule 10b-5 when it posted prospectuses from a Janus Investment Fund on its website.[103] Ultimately, the Supreme Court found this statement was not attributable to JCM, noting that "[m]erely hosting a document on a Web site does not indicate that the hosting entity adopts the document as its own statement or exercises control over its content."[104] Because nothing "on the face of the prospectuses indicate[ed] that any statements therein came from JCM rather than Janus Investment Fund," JCM did not make the statements.[105]

This principle was subsequently applied by the Sixth Circuit in *Parker v. Winwood*, where American songwriters brought an action for copyright infringement against two English brothers, who allegedly lifted the baseline from their original (American) song, and found chart-topping success in

99. Edwards, *supra* note 13, at 549.

100. Just like e-mails, web postings offered against a party, of which that same party is the author of the post, are admissible under Rule 801(d)(2)(A). FED. R. EVID. 801(d)(2)(A).

101. When printouts—including the images and text—of a website are introduced only to show what the website looks like on a specific day, they are not statements. Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1155 (C.D. Cal. 2002).

102. In *Van Westrienen v. Americontinental Collection Corp.*, the defendants made misrepresentations on their website in violation of the Fair Debt Collection Practices Act. 94 F. Supp. 2d 1087, 1107–08 (D. Or. 2000). When offered by the plaintiffs, the court held the representations were admissible under Rule 801(d)(2)(A) because they were made by the defendants, who created the website. *Id.* at 1109.

103. Janus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 137 (2011). Securities and Exchange Commission Rule 10b-5 prohibits "mak[ing] any untrue statement of material fact" in connection with the purchase or sale of securities. 17 C.F.R. § 240.10b-5 (2010). JCM was the investment advisor and administrator of the Janus Investment Fund, a business trust which issued mutual fund prospectuses containing allegedly false statements which "materially misled the investing public." *See Id.* at 138–41.

104. *Id.* at 148 n.12.

105. *Id.* at 147.

England.[106] One of the brothers had republished an interview with *Billboard Magazine* on his website, which contained statements by the record company admitting the base riff was lifted.[107] The American songwriters argued the brother manifested adoption of the record company's statements or manifested his belief that the record company's statements were true by reproducing the interview on his website.[108] Relying on the Supreme Court's reasoning in *Janus*, the Sixth Circuit held that "[a]lthough posting a statement on a webpage might *imply* one's general agreement with it, Rule 801(d)(2)(B) requires an actual 'manifesta[tion]' of one's adoption of a statement or belief in it."[109] Because there was no clear manifestation of adoption or belief in the truth of the statement from the interview, it was excluded as hearsay.[110]

III. A RECENT ENGAGEMENT: UNDERSTANDING HEARSAY IN THE SOCIAL MEDIA CONTEXT

A. An Online Language—Communication on Social Media

The *Janus* decision was a step in the right direction for Internet evidence. It embraced the idea that posting on a website does not directly reflect the website creator's belief or intention. An individual may share content on an Internet platform for a variety of reasons.[111] But while the judicial system's initial concerns of vetting out reliable Internet evidence from fabricated Internet evidence have been cured with new methods and standards for authenticating Internet evidence, issues rooted in ambiguity have yet to be addressed and remedied.[112] This is particularly relevant for tacit admissions, as a manifestation of adoption or belief must be unambiguous.[113]

The proliferation of social media has created new channels for communication, and, unlike e-mails and instant messaging, social media platforms are designed to distribute information from a single user to a global, public audience.[114] Among these platforms, Facebook and X are some of the

106. Parker v. Winwood, 938 F.3d 833, 835 (6th Cir. 2019).

107. *Id.* at 837.

108. *Id.*

109. *Id.* at 838; *see also* Janus, 564 U.S. 135, at 148 n.12.

110. *Parker*, 938 F.3d at 838.

111. For an explanation and examples of the different meanings of "likes," such as emotional "likes" and awkward "likes," *see* Daniel R. Tilly, *Adopted Statements in the Digital Age: Hearsay Responses to Social Media "Likes*," 93 N.D. L. REV. 277, 319–33 (2018).

112. *See* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 560 (D. Md. 2007).

113. Blackson v. United States, 979 A.2d 1, 7 (D.C. 2009).

114. *See* Indep. Newspapers, Inc. v. Brodie, 996 A.2d 432, 437–38 (Md. 2009) (recognizing how instant messaging sites, like chatrooms, allow users to post information "to the world at large without specification"); *see also* Evan DeFilippis et al., *The Impact of Covid-19 on Digital Communication Patterns*, HUMANS. & SOC. SCIS. COMMC'NS 9 (2022), https://doi.org/10.1057/s41599-022-01190-9 (finding that since the Covid-19 pandemic there has been, *inter alia*, an increase in the number of virtual work meetings).

most widely utilized.[115] Users can do more than just post on their personal accounts. For example, the Facebook "like" button allows a user to show he "enjoys" a post with the simple click of a button.[116] Even more emotion-specific responses are available through Facebook's reaction function; an individual may "react" to a post or comments with icons, including various facial expressions (in the form of emojis) and hearts.[117] On X, users can '"like" posts, "repost" someone else's post onto their profile, or use the "quote post" feature to post another person's post with their own additional commentary.[118] With a plethora of communicative functions available, how the Federal Rules govern the admissibility of social media statements—and what social media activity may be considered a statement—is ripe for consideration. It once again squarely presents the question of whether the present evidentiary rules have "kept current with the diverse and omnipresent social media platforms,"[119] or if they should be amended to categorically address social media evidence.

B. An Infamous Misnomer—What Is in a "Like"?

The key function of social media is to allow a user to post and share from his account to a far-reaching audience.[120] As with every hearsay analysis, it is essential to first determine what activity constitutes a statement. A Facebook or X "like" may be interpreted as an assertion, falling within the Rules' definition of a statement.[121] Facebook advertises a "like" as "a way to let people know you enjoy [a post or comment] without leaving a comment."[122] While an individual may not necessarily be showing he "enjoys" a post by liking it, it communicates a message nonetheless to both the user who posted and all users who encounter the post.[123] It follows that, by making a definitive choice to press the "like"

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115. Caroline Forsey, *What Is Twitter and How Does It Work?*, HUBSPOT (July 26, 2021), https://blog.hubspot.com/marketing/what-is-twitter; Brian Dean, *Facebook Demographic Statistics: How Many People Use Facebook in 2023?*, BACKLINKO (Mar. 27, 2023), https://backlinko.com/facebook-users.

116. *Like and React to Posts*, *supra* note 18.

117. *Id.*

118. *About Different Types of Posts*, *supra* note 16.

119. People v. Randall, 2022 IL App (1st) 191616-U, at ¶ 98 (2022) (Hyman, J., concurring specially).

120. *See Facebook Mission and Vision Statement Analysis,* MISSION-STATEMENT.COM, https://mission-statement.com/facebook/ (last visited Feb. 12, 2023); *Posting: What is X?*, X HELP CENTER, https://help.twitter.com/en/resources/new-user-faq (last visited Feb. 12, 2023).

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

122. *Like and React to Posts*, *supra* note 18.

123. There are many instances where through the act of clicking "like" a user is not expressing they enjoy a post but is communicating a different message. For example, when a user posts about a pet dying, a subsequent user who "likes" the post is likely not communicating they enjoy that fact the pet died. *See* McPartland, *supra* note 48, at 461 n.124. In this context, a "like" conveys support or acknowledgment. *Id.*

button, the user is intentionally asserting something. The question remains as to what that "something" is.[124]

Some courts embrace the view that a social media "like" constitutes a statement. In *Bland v. Roberts*, the Fourth Circuit determined social media "likes" are constitutionally protected speech.[125] By "liking" a Facebook Page, the user "causes to be published the statement that the user 'likes' something."[126] The Fourth Circuit considered that "something" an individual, substantive statement.[127] In this context, when the user "liked" a Facebook Campaign page, his profile appeared on the page's "People [Who] Like This" list, which the court considered an announcement that he approved the candidacy.[128] The court deemed the "like" both "pure speech" and "symbolic expression."[129]

Bland teaches two things in the evidentiary context. First a "like" may be a statement in its own capacity, stating "I like [insert content]."[130] Second, a "like" may be nonverbal assertive conduct showing approval, like a head nod or gesture.[131] Both interpretations of a Facebook "like" were discussed in *United States v. Barela*, where the government argued a "like" by a party-opponent was admissible as either a party admission or tacit admission.[132] Specifically, the government asserted that the "'like' of a particular Facebook Sports Page is a party statement, and 'as a whole, is undoubtedly intended as an assertion that the individual favors the page.'"[133] Nevertheless, the court was not immediately persuaded. It first emphasized that the context of the "like" was critical.[134] Delving a bit deeper, the court identified that although the Facebook user "'authored' the 'like,'" he did not author the page itself.[135] As such, the court implored the government to offer additional context and ultimately did not

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124. Olivia A. League, *Whether You Like It or Not Your "Likes" Are Out: An Analysis of Nonverbal Internet Conduct in the Hearsay Context*, 68 S.C. L. REV. 939, 958–59 (2017).

125. Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013).

126. *Id.*

127. *See id.*

128. *Id.* at 385–86.

129. *Id.* at 386 (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)). The Fourth Circuit found the "like" to be symbolic speech because the universally understood "thumbs up" symbol conveyed support of the candidacy and "the likelihood was great that the message would be understood by those who viewed it." *Id.*

130. McPartland, *supra* note 48, at 464.

131. *See supra* note 37 and accompanying text.

132. United States v. Barela, No. 1:20-cr-01228-KWR, 2021 U.S. Dist. LEXIS 226118, at *4 (D.N.M. Nov. 22, 2021). The government also argued the "like" was admissible under Rule 803(3), a hearsay exception for a "then-existing state of mind . . . or emotional, sensory, or physical condition." *See* FED. R. EVID. 803(3).

133. *Barela*, 2021 U.S. Dist. LEXIS 226118, at *7.

134. *Id.*

135. *Id.*

decide whether the "like" created an independent statement or whether it manifested adoption.[136]

Although *Bland* dealt with whether "likes" qualified as speech warranting constitutional protection, the court's reasoning can be applied in the hearsay context. A "like" may be used to assert something, whether it be verbal or through conduct.[137] However, an important distinction between a statement for hearsay purposes and speech is the user's intent.[138] The symbolic speech analysis in *Bland* is illustrative, as the court assumed the user "inten[ded] to convey a particularized message" by liking the Facebook page.[139] While it may be true that a user likes content to assert a message, this does not hold true in every instance. For example, a user may come across a recipe on Facebook she wants to try and "like" the post so it remains archived on her account for later access. The user is not intending to assert *anything* by "liking" the recipe; she may view the "like" as a means to an end—*e.g.*, a bookmark—and not a communicative message.

Traditionally, both oral and written words have easily satisfied the requirements of Rule 801(a) to constitute a statement.[140] Yet, despite the court's treatment of a "like" in *Bland*, there remains substantial doubt as to whether a "like" actually requires assertive intent. It is equally unclear if a "like," when translated to a written statement, would read "user likes content" or "user bookmarks content." This suggests that a "like" is not capable of being accurately transcribed into a written statement and is more akin to nonverbal assertive conduct.[141] For instance, compare a "like" to forwarding an e-mail. The forwarder is not the declarant of the e-mail's content because he did not author the content himself; instead, the forwarder is a mere messenger, even though his name is visible to the recipient.[142] Similarly, "liking" a post is not like repeating a statement on social media and effectively assuming the role of author. It is better understood as an independent action. As a result, if a "like" is a statement, it is a form of nonverbal assertive conduct.

An intent to assert hinges on whether there is intent to communicate. For instance, if a user intends to communicate by clicking the "like" button, the "like" itself would constitute an independent statement, and the original post would be admissible under the Rules to provide context.[143] However, it remains

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136. *Id.*, at *7–8.

137. *See* FED. R. EVID. 801(a).

138. FED. R. EVID. 801(a) Notes of Advisory Committee on Proposed Rules (stating "nothing is an assertion unless *intended* to be one") (emphasis added).

139. Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013).

140. FED. R. EVID. 801(a) Notes of Advisory Committee on Proposed Rules.

141. *See* League, *supra* note 124, at 942–43.

142. *See* United States v. Safavian, 435 F. Supp. 2d. 36, 44 (D.D.C. 2006).

143. The original post, while still an out-of-court statement, is not offered in this context for the truth of the matter asserted. Rather, the original post is used to provide context for the "like" and is not hearsay. *See* United States v. Tolliver, 454 F.3d 660, 666 (7th Cir. 2006).

unclear whether the user actually intended to assert something by clicking the "like" button. Some scholars view pressing the "like" button on Facebook as equivalent to making a gesture at someone—*e.g.*, "giving someone the finger or clapping for someone."[144] But the purported analogy fails to consider a relevant contextual difference—those gestures occur in face-to-face interactions, whereas social media "likes" are almost exclusively made in isolation. Consequently, "liking" a post on social media does not provide context of assertive intent beyond the fact the "like" button was pushed.[145] Moreover, in *Bland* the court focused on the fact that the "like" was visible to the public, so by "liking" the post, the user was communicating support.[146] However, not only can a user "like" content for their own private use, but now users on platforms like X can also make their "likes" private from public view, emphasizing the intent *not* to communicate.[147] Although by clicking "like," a user seemingly appears to be expressing agreement or support of the "liked" content, the inquiry does not focus on how the action is perceived by other users, but rather the intent of the purported declarant. As a result, "likes" viewed as nonverbal conduct are ambiguous in terms of whether there is an intent to assert by the user.

"Likes" may also be viewed as tacit admissions in the sense that a "like" would constitute a manifestation of adoption or belief in the original post by the user.[148] Under this interpretation, the user "liking" the post would step into the shoes of the declarant of the original post.[149] Similar to e-mails, merely forwarding a message is not enough to constitute adoption—more must be present.[150] And, although by virtue of being labeled a "like," "liked" content appears to automatically imply a prefatory statement of agreement, in actuality there are a myriad of messages a "like" could convey. According to Facebook, a "like" is used to express enjoyment, but according to X a "like" is used to show appreciation.[151] Therefore, this implied prefatory statement can never be

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144. *See* 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), http://www.abajournal.com/magazine/article/like_is_unliked_clicking_on_a_facebook_item_is_not_free_speech_judge_rules/ (quoting Paul Secunda, Professor of Law, Marquette University Law School).

145. *See* League, *supra* note 124, at 958–59. While some may view this lack of context as an issue in deciphering *what* the user intended to assert, *see id.*, it also leaves unclear whether the user intended to assert anything in the first place. For example, the user may have accidentally clicked the "like" button. *See* Tilly, *supra* note 111, at 323.

146. Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013).

147. Janet Jacobs, *How to Hide Likes on Twitter (Step–By–Step)*, THE COLD WIRE (Aug. 15, 2021), https://www.thecoldwire.com/how-to-hide-likes-on-twitter/.

148. *See* FED. R. EVID. 801(d)(2)(B). Whether a "like" is enough to constitute an adoptive admission lies in the discretion of the trial judge under Rule 104(a). *See* Bourjaily v. United States, 483 U.S. 171, 175–76 (1987).

149. State v. Carlson, 808 P.2d 1002, 1005 (Ore. 1991).

150. *See* Sea-Land Serv., Inc. v. Lozen Int'l, LLC., 285 F.3d 808, 821 (9th Cir. 2002).

151. *Like and React to Posts*, *supra* note 18; *see How to Like a Post*, X HELP CENTER, https://help.twitter.com/en/using-x/liking-posts-and-moments (last visited Dec. 7, 2023).

considered a clear manifestation of adoption or belief.[152] By "liking" a post, without any words from the party to indicate a manifestation of adoption or belief, the "like" is inherently ambiguous. Similar to the nonverbal conduct contemplated in *Carlson*, clicking "like" is "so ambiguous that it cannot reasonably be deemed sufficient to establish that any particular interpretation . . . is probably correct."[153] A fact-intensive inquiry examining the context of the "like," other "likes," and the facts of the case would be required for a trial judge to determine whether there was a sufficient manifestation. This, in turn, would result in a mini-trial over the admissibility of the social media "like."[154] Moreover, based on the *Parker* decision, an expression of agreement is not the same as adoption or belief in the truth of the statement.[155] Therefore, a "like" alone is ambiguous and not enough to constitute a manifestation of adoption or belief in the truth of the statement as a tacit admission.

C. X in Context—No Authorship, No Admission

X allows users to communicate online by posting, "reposting" other user's posts, and participating in exchanges using the "quote post" function.[156] A post is a message that may contain "photos, videos, links, and text," which is displayed on the user's profile.[157] This is visible to a user's followers on their feed and searchable on X.[158] If a user authors a post, the post qualifies as a party admission.[159] However, what can be discerned from a "repost"?[160]

X defines a "repost" as a post "that you forward to your followers."[161] Accordingly, a "repost" is necessarily republishing the words of another, which courts have consistently considered under the tacit admission analysis—not as an independent statement. In *United States v. Recio*, the Fourth Circuit had to

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152. For example, a user could "like" a post because they think it is funny, informative, or to reciprocate support with other users. *See* Tilly, *supra* note 111, at 321–24.

153. *See Carlson*, 808 P.2d at 1010.

154. Rule 104(a) states, "[t]he 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." *See also* Bourjaily v. United States, 483 U.S. 171, 175–76 (1987).

155. *See* Parker v. Winwood, 938 F.3d 833, 838 (6th Cir. 2019).

156. *About Different Types of Posts*, *supra* note 16.

157. *Posting: What is X?*, *supra* note 120.

158. *Id.*

159. A post authored by a party is a statement that is admissible when offered against that same party. *See* FED. R. EVID. 801(d)(2)(A).

160. "What does it say about you when you retweet someone else's tweet? These are not just questions for Millennials or Zoomers." Flynn v. CNN, Inc., 621 F. Supp. 3d 432, 434 (S.D.N.Y. 2022).

161. *Posting: What is X*?, *supra* note 120. Contrasting "reposts" with the "like" function, the "like" function adds a blurb that a user "liked" a post. *See* Bland v. Roberts, 730 F.3d 368, 385–86 (4th Cir. 2013). A "repost" (formerly "retweet") publishes the same content as the initial post, but with a "'Retweet' icon and the phrase '[Username] Retweeted' at the top of the post to indicate that the post is a 'Retweet.'" Bell v. Crawford Indep. Sch. Dist., No. 6:19-CV-268-ADA, 2020 U.S. Dist. LEXIS 165345, at *2 n.1 (W.D. Tex. Feb. 13, 2020).

determine whether the trial court erred in admitting rap lyrics posted on the defendant's Facebook page as a party admission.[162] The court held that because the defendant "did not use quotation marks, attribute the lyrics to the artist, or provide other signals to indicate to his Facebook audience that someone else authored the words in his post" and only "slightly editorialized the song lyric," the defendant adopted the lyrics as his own words.[163] Unlike a Facebook post, a user is not able to feign authorship—as the defendant did in *Recio*—of a "post" through the "repost" function.[164] Therefore, a "repost" does not qualify as an independent statement of the party.

As a result, whether a "repost" is hearsay turns on whether the nonverbal act of "reposting" constitutes a statement. The holding in *Safavian* indicates it is not.[165] Although e-mails authored by the defendant were admissible party admissions, the court analyzed the e-mails he forwarded exclusively as tacit admissions.[166] In the same way "reposts" add only the user's tag, the act of forwarding an e-mail without adding to the substantive message is not an independent statement of a party in their individual capacity.

Moreover, courts have been reluctant to impose individual liability on a user for simply "reposting" a post.[167] In *Banaian v. Bascom*, the court interpreted whether a person "reposting" a post qualified as a "user," immune from liability for defamation under the Communications Decency Act.[168] The court found that because the defendants could not be considered "publisher[s]" under the act, nor did they "actually [write], creat[e], or develop[] the allegedly defamatory content,"[169] they were immune from liability.[170] Although this involved a matter of statutory interpretation, the court acknowledged the basic principle that a "repost" is not akin to an independent statement for which an individual could be held liable for defamation.[171] Thus, there is a reluctance to impose individual

162. *See* United States v. Recio, 884 F.3d 230, 234–35 (4th Cir. 2018).

163. *Id.*

164. A user who "reposts" is incapable of feigning authorship due to the appearance of the "repost" itself. Accordingly, "[r]eposts look like normal posts with the author's name and username next to it but are distinguished by the Repost icon and the name of the person who Reposted the post." *RePost FAQS: What Is a Repost?*, X HELP CENTER, https://help.twitter.com/en/using-x/repost-faqs (last visited Feb. 12, 2021).

165. *See* United States v. Safavian, 435 F. Supp. 2d 36, 43 (D.D.C. 2006).

166. *Id.* at 43–44.

167. *See*, *e.g.*, Holmok v. Burke, No. 110900, 2022 Ohio App. LEXIS 2015, at **7, **9 (Ohio Ct. App. June 23, 2022) (holding that under the CDA, a user is immune from liability for retweeting unless they substantively alter or add speech to the original tweet).

168. Banaian v. Bascom, 281 A.3d 975, 976 (N.H. 2022).

169. *Id.* at 979 (quoting Directory Assistants, Inc. v. Supremedia, LLC, 884 F. Supp. 2d 446, 452 (E.D. Va. 2012)).

170. *Id.* at 979–80.

171. *Id.* at 980. Another example of judicial reluctance to view "reposts" as independent statements is *Bell v. Crawford Independent School District*, which also considered whether a "retweet" is enough to establish liability for copyright infringement. Plaintiff argued her "retweet" was commentary on the original post. No. 6:19-CV-268-ADA, 2020 U.S. Dist. LEXIS 165345, at

liability on a user for "reposting" a post. For the same reasons as "likes," whether a user intends to assert something by "reposting" is inherently ambiguous.

Despite a "repost" not qualifying as a statement under Rule 801(a)—and thus failing as a party admission—a "repost" may still arguably be a tacit admission. If by clicking the "repost" button, a party manifests adoption or belief in the truth of the original post, then the original post and the party's act of "reposting" are admissible under the rule.[172] However, because a "repost" is similar to forwarding a message, *Sea-Land* instructs that the act of "reposting" is not a manifestation of adoption or belief without an additional statement.[173] Nonetheless, the X context is distinguishable from e-mails in the sense that the user is not forwarding information to a specific individual but is forwarding a message for the entire world to see. In this manner, the user is forwarding a post for other users to view on their personal accounts. Thus, applying *Bland*, the "repost" may constitute an adoption of the original post, analogous to an announcement on the user's page.[174] Before Twitter became X, the court in *Flynn v. Cable News Network* was faced with the assertion that "as a matter of law[,] . . . by retweeting another's tweet, the retweeter is adopting every word in the tweet as their own."[175] But the court refused to adopt this proposition as a matter of law, finding that "there are many reasons that someone might retweet a statement; a retweet is not necessarily an endorsement of the original tweet, much less an endorsement of the unexpressed belief system of the original tweeter . . . ."[176] Moreover, the Supreme Court in *Janus* established that simply posting the work of another on a website is not a manifestation of adoption or a belief in the truth of the original statement.[177] The only difference between *Janus* and the issue here is that an independent statement is being shared on an individual's social media account and not a website.

Online activity that communicates through the simple click of a button, such as a "like" or "repost," is too ambiguous standing alone to qualify as an independent statement. And although there may be meaning behind the act, it is not a manifestation of adoption or belief in the truth of the original statement. However, "quote posts" involve more than the click of a button—they involve authorship on the part of the user.[178] X explains that the "quote post" feature

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*8 (W.D. Tex. Feb. 13, 2020). Although the court declined to decide whether a "retweet" is *per se* commentary, it asserted that imposing a duty on social media users to "ascertain the source of [an] image before posting it" was deserving of skepticism. *Id.* at *11 n.2.

172. *See* State v. Carlson, 808 P.2d 1002, 1005–06 (Ore. 1991).

173. Sea-Land Serv., Inc. v. Lozen Int'l, LLC., 285 F.3d 808, 821 (9th Cir. 2002).

174. Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013).

175. Flynn v. CNN, Inc., 621 F. Supp. 3d 432, 435 (S.D.N.Y. 2022). As defendant CNN put it, a "retweet" is not simply forwarding a fact into existence. *Id.*

176. *Id.* at 439.

177. Janus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 148 n.12 (2011).

178. *About Different Types of Posts*, *supra* note 16.

"allows you to post another person's post with your own comment added."[179] Unlike "likes" and "reposts," there is no ambiguity as to whether the user has the intent to assert. The user must add their own independent statement—which is an admissible party admission, and the original post is admissible for the non-hearsay purpose of adding context.[180]

IV. AN AMBIGUOUS 'CLICK'—ENGAGEMENT ON SOCIAL MEDIA IS NOT HEARSAY

A. Party Admissions: "Like" It or Not, Analysis Is a Waste of Time

The hearsay doctrine should not bar "likes" on social media, as they do not meet the definitional requirements of a statement.[181] Each determination as to whether a "like" is assertive nonverbal conduct requires a determination by the trial judge.[182] Considering the inherent ambiguity surrounding the intentionality of a "like" behind closed doors, a judge should rule that the "like" is admissible, as it is not an assertive statement barred by hearsay.[183] However, assuming *arguendo* the judge determines that a user, who is a party in the case, did intend to assert something by "liking" it on social media, then this "like" would constitute a statement and be admissible as a party admission.[184] Thus, when dealing with the "like" of a party-opponent, it would impractical to analyze whether the "like" is assertive nonverbal conduct in the first place. In either instance—whether deemed non-hearsay (not a statement) or a party admission—the "like" will be admissible for any purpose.[185] Ultimately, a "like" should not be considered hearsay *per se*, and the meaning of the "like," if any at all, should go to weight and credibility.[186]

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179. *Id.*

180. *See* FED. R. EVID. 801(d)(2)(A); United States v. Tolliver, 454 F.3d 660, 666 (7th Cir. 2006).

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

182. FED. R. EVID. 104(a).

183. Of course, there are exceptional circumstances where a judge may rule otherwise. For example, if a third person observed the party "like" the content and state the reasons for doing so.

184. If a trial judge determines by a preponderance of the evidence that the proponent of the "like" has established the user intended to assert something by "liking" the content, the "like" has met the necessary criteria to qualify as a statement under Rule 801(a). FED. R. EVID. 801(a). Upon this ruling, the "like" is a statement offered against an opposing party, made by the party in an individual capacity, and is thus admissible under Rule 801(d)(2)(A). FED. R. EVID. 801(d)(2)(A).

185. The usual evidentiary hurdles, such as relevance and authentication, should be the only considerations. *See* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 538 (Md. 2007); FED. R. EVID. 401; FED. R. EVID. 901(a).

186. When considering the party admission exemption, it is not material what a "like" means. If the "like" is assertive, it is then admissible when offered against an opposing party declarant for any purpose. Thus, the differing classifications of a "like"—one as a statement and party admission, and one as not a statement and non-hearsay—both have the same outcome.

To illustrate, consider both alternatives—(1) a "like" as a statement and (2) a "like" as a non-statement—in the following hypothetical. Assume that a user, *A*, runs over *B*'s dog with her car. In grief, *B* posts on Facebook about his dog dying. When *A* sees this, she "likes" the Facebook post by *B*. *B* later sues *A* for intentionally hitting the dog with her car and wants to offer *A*'s "liked" Facebook post as evidence to show motive—*A* disliked the dog and was happy the dog died. Under the first alternative—where a "like" may qualify as a statement—the judge determines that the "like" is nonverbal assertive conduct by *A*, therefore constituting an out-of-court statement subject to the hearsay rule. This "like" is exempt from the rule against hearsay as a party admission.[187] For a "like" to be admissible, a court need not address what *A* specifically meant by "liking" the post.[188] At this point, it is up to the jury to interpret the meaning of the "like" as it sees fit. And the trier-of-fact is in the best position to answer this question.

Now, consider the second alternative—that a "like" is not a statement for hearsay purposes. In the same example as above, the judge does not need to decide whether the "like" is assertive conduct by *A*. So long as the "like" is authenticated and relevant, either party can introduce it at trial. Free from the hearsay doctrine, what the "like" means is once again up to the jury to decide. As a result, the "like" in both situations is admissible against an opposing party for any purpose, but in the non-hearsay illustration, there is no required interim ruling by the judge.

Importantly, consider a slight alteration to the hypothetical under the first alternative, where a "like" may be a statement. Assume that *B* is unsure who ran over his dog, but suspects it was *A* who stopped by earlier that day. *A* did not "like" *B*'s Facebook post, but *D* did. *D* is *B*'s neighbor who has always complained about the dog barking. *A* calls *D* as a witness, offering the "like" as evidence of *D*'s motive to run over the dog. Because *D* is not a party in the case, the party admission exemption does not apply. The hearsay doctrine will bar this "like" only if offered for the truth of the matter asserted.[189] What is the truth of the matter asserted for this nonverbal conduct? The trial judge, not the trier of fact, answers this preliminary question pertaining to the admissibility of the statement.[190] If the judge determines the statement is offered for the truth of the matter asserted and excludes it, the jury is now unable to hear the evidence, instead of assessing what it could mean. However, in this same altered hypothetical, under the second alternative—if a "like" is not a statement—then the "like" is admissible by *A*, as it is no longer necessary to answer what the

187. *See* FED. R. EVID. 801(d)(2)(A).

188. Maybe *A* was sympathetic to *B* or wanted to appear to other users as sympathetic to *B*, or maybe *A* was happy the dog died.

189. Under Rule 801(c), "hearsay" is a statement "(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." FED. R. EVID. 801(c).

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

truth of the matter asserted is. Once again, any meaning of the "like" is for the jury to decide.

Thus, whether a "like" is a statement or simply non-hearsay has no bearing on "likes" offered against an opposing party. The real problem lies with "likes" offered against non-parties and who should determine what a "like" means. When it comes to the use of a "like" at trial, it is best to consider the statement as non-hearsay and leave the assertive intent of the "liker" and the meaning of the "like" as matters of weight and credibility for the jury to decide. Leaving the admissibility of a "like" solely in the hands of the trial judge to determine the truth of the matter asserted of a "like"—which is inherently ambiguous—will only lead to a loss of relevant evidence. Rather, due to the ambiguity of a "like," the purpose for which it is offered—whether to show a party actually liked something or simply just viewed it—should not impact its admissibility. Moreover, considering the incredible amount of content people "like" on social media, refusing to subject a "like" to a hearsay analysis will speed up the trial. As a result, in determining the admissibility of "likes," a "like" should *per se* not be considered a statement in the hearsay context.

Moreover, foregoing the assessment of "likes" as statements does not defeat the purpose of the hearsay doctrine. Excluding out-of-court statements is intended to eliminate the risk of false, inaccurate, or misleading information, yet exclusion is not the sole avenue to accomplish this purpose.[191] There are measures in place to combat these problems in the context of electronic evidence, including social media evidence. First, "likes" online must be authenticated.[192] The authentication process of electronic evidence has heightened foundational requirements developed to eliminate the risk of admitting evidence from a false identity.[193] Second, the Rules governing character evidence will prevent certain "likes" on social media from being admitted to protect the defendant.[194] Third, Rule 403 will exclude a "like" when its probative value is substantially outweighed by the danger of unfair prejudice.[195]

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191. *See* Moore, *supra* note 23, at 166–67; Edwards, *supra* note 13, at 537.

192. In *United States v. Safavian*, the court analyzed the admissibility of an e-mail and determined "the question for the court under Rule 901 [was] whether the proponent of the evidence has 'offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is." 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

193. *See* cases cited *supra* note 88; Loraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 543 (D. Md. 2007) (discussing the trend of courts requiring the proponents of electronic evidence to focus more on foundational requirements to authenticate evidence than is customary).

194. *See* FED. R. EVID. 404(a)(1).

195. *See* FED. R. EVID. 403; *see* Old Chief v. United States, 519 U.S. 172, 191–92 (1997) (holding otherwise relevant evidence of a prior conviction related to the unlawful possession of a firearm is not admissible in light of a stipulation pertaining to the defendant's legal status, on Rule 403 grounds).

B. Tacit Admissions: A "Like" Behind Closed Doors Is Ambiguous

Although a "like" itself is not hearsay, the content receiving the "like" is hearsay when offered for the truth of the matter asserted. Under the tacit admission exemption, the "liked" content may be admissible against an opposing party if the party's "like" constitutes a manifestation of adoption or belief in the posted content.[196] Nevertheless, because the intent of the user producing the "like" is ambiguous, it should not be considered a sufficient manifestation.

As previously discussed, a "like" does not have one definitive interpretation or meaning. Absent a clear statement of adoption, a "like" alone is not sufficient to manifest adoption.[197] But a "like" is distinguishable from forwarding an e-mail—the user is not simply reiterating words. A "like" has additional flair, almost like commentary, which encompasses more than simple agreement.[198] Yet, to manifest adoption, the party must have comprehended the statement and acknowledged its truth.[199] Due to the lack of context to explain why content is "liked," both of these requirements are difficult to establish. Importantly, a party fails to acknowledge a statement's truth by simply clicking the "like" button. Like a broken clock is right twice a day, this may at times be the case but does not hold true in every instance. Much like shaking a head back and forth, no single interpretation trumps the other.[200] Absent a clear statement of adoption, context is essential to determine whether a user acknowledges the truth of the statement through a "like." And when this conduct occurs through a screen, this context is rarely—if ever—available.[201] As a result, the act of "liking" something on social media is not itself enough to constitute a manifestation of adoption.

Moreover, to manifest belief in the truth of the statement, the party must rely upon the information directly and in a "significant, identifiable way."[202] A person often "likes" content without relying on the information in any way. As such, the user must provide an additional action. For example, "liking" a workout posted on X does not equate to actually doing the workout. If the user

196. "The party becomes the declarant," and the otherwise inadmissible hearsay is now capable of admission. State v. Carlson, 808 P.2d 1002, 1005 (Ore. 1991).

197. *Id.* at 1005–06.

198. *See* Sea-Land Serv., Inc. v. Lozen Int'l, LLC., 285 F.3d 808, 821 (9th Cir. 2002); *see also* Flynn v. CNN, Inc., 621 F. Supp. 3d 432, 435–36 (S.D.N.Y. 2022).

199. GLEN WEISSENBERGER, WEISSENBERGER'S FEDERAL EVIDENCE § 801.19 (Matthew Bender, 8th ed. 2023).

200. *Carlson*, 808 P.2d at 1010.

201. League argues in her article that a "like" is a "distinct action" that clearly demonstrates an intent to communicate "something," "[o]therwise, the user could have refrained from 'liking' the post altogether." League, *supra* note 124, at 958–59. However, the argument fails to acknowledge that a user can like a post to save information on their phone—like a recipe or a workout—with no communicative intent to an audience. Similar to the court in *Bland*, this argument assumes there is an intent to communicate. Bland v. Roberts, 730 F.3d 368 (2013).

202. White Indus., Inc. v. Cessna Aircraft Co., 611 F. Supp. 1049, 1063 (W.D. Mo. 1985).

does the workout listed in the post, then this may be enough to manifest belief. But the "like" itself shows nothing more than mere acknowledgment. Thus, a "like" itself is never enough to constitute a tacit admission, and the original post remains inadmissible hearsay absent the applicability of some other exemption or exception. More is required, like an additional statement or direct action in reliance.[203]

C. "Reposts"—Why A Repost Icon Tells You Nothing

Just as a "like" is not sufficient to qualify as a manifestation of adoption or belief, the same is true for "reposts." While a "like" arguably indicates why a user interacted with a post, a "repost" is even more ambiguous. A "repost" is a direct repetition of the original post. With no additional statement or action taken by the user, a "repost" meets the same fate as "likes" discussed above.[204] Distinct from "likes," which are often private, a user intends to broadcast a "repost" into the online world. But in light of the Supreme Court's determination in *Janus*[205] and court decisions like *Flynn*,[206] posting unoriginal content on a user's own social media account may imply agreement with the content, without rising to the level of a manifestation to be a tacit admission. A "repost" neither endorses a post nor a belief system; *potential* agreement implied from the circumstances is not a *manifestation* of agreement or belief.

Arguably, a "repost" may provide more information about the intent of the user than a "like." Specifically, while "likes" may be visible to certain users or hidden through personal settings,[207] the purpose of a "repost" is to have others view the "repost." Despite this fact, a "repost" is not an assertive restatement of the original post. It is unclear whether the user intended to assert a specific message through a "repost" or whether he is simply spreading information. Similar to "likes," "reposts" should not be considered independent statements, and whether the user intended to assert a message should go to weight and credibility.

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203. Because a "like" is inherently ambiguous, it is never enough to show a user's acknowledgment of truth. Without prior statements or actions of a party expressing the same belief as the "liked" content, or subsequent statements or actions of a party in direct reliance on the "liked" content, a "like" does not qualify under Rule 801(d)(2)(B).

204. Even assuming *arguendo* "reposts" are intended to assert the content of the original post, a "reposter" is not the declarant of the statement. *See* Sea-Land Serv., Inc. v. Lozen Int'l, LLC., 285 F.3d 808, 821 (9th Cir. 2002). The original author of the post remains the declarant. The hearsay doctrine bars the post, an out-of-court statement, when offered for the truth of the matter asserted. While a statement does not need to be an original thought, a repeater is not a declarant when they attribute the statement to the author. Thus, "reposts" will not qualify as party admissions because a "repost" is by its nature authored by a separate declarant, and the "reposter" cannot feign authorship. *See* United States v. Recio, 884 F.2d 230, 235 (4th Cir. 2018).

205. Janus Cap. Grp., Inc., v. First Derivative Traders, 564 U.S. 135, 148 n. 12 (2011).

206. Flynn v. CNN, Inc., 621 F. Supp. 3d 432, 439 (S.D.N.Y. 2022).

207. Jacobs, *supra* note 147.

D. "Quote Posts"—Different Analysis, Same Result

Contrary to "likes" and "reposts," "quote posts" require an additional statement or commentary by a user.[208] As a result, the authored portion of the "quote post" in response to the original post is a party admission. The unauthored portion of the "quote post" will either be admissible under the Rule of Completeness or as a tacit admission.[209] The channel used will depend on whether the authored portion of the "quote post" indicates a manifestation of adoption or belief in the truth of the statement.

CONCLUSION

While "likes" and "reposts" could arguably be nonverbal assertive conduct and thus constitute a statement under the hearsay doctrine, the intended meaning of a "like" and a "repost" by a user is inherently ambiguous. Whether they are statements would require a case-by-case analysis. Given the little-to-no context available to determine the intent of a user in performing either action, whether a user intends to assert something is best left to the weight and credibility—rather than admissibility—of the evidence. This structure allows the jury to hear evidence otherwise at risk of exclusion by a trial judge.

Moreover, while "likes" and "reposts" themselves may impliedly show agreement, they are not actual manifestations of agreement or belief. In the context of tacit admissions, if the only evidence of manifestation is the "like" or "repost" itself, this is not a sufficient manifestation. The tacit admission exemption requires more than a "like" or "repost" to be admissible. Conversely, "quote posts" may qualify as tacit admissions, depending on the additional commentary provided by the user. A *per se* rule that "likes" and "reposts" are neither statements for the purpose of hearsay nor sufficient manifestations of adoption or belief when standing alone would speed up the trial process, support the use of reliable evidence at trial, and allow the jury to make just determinations. This is the result evidence law commands.[210]

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208. *About Different Types of Posts*, *supra* note 16.
209. *See* FED. R. EVID. 106.
210. *See* FED. R. EVID. 102 (explaining the purposes of the Rules).