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# Public Officials' Facebook "Likes": The Case for Leaving Regulation of Official "Likes" to the Torches and Pitchforks of Constituents

Haleigh Jones\*

## I. INTRODUCTION

As of 2014, there were more than one billion active Facebook users.<sup>1</sup> This means that seventy-one percent of adults with Internet access are on Facebook.<sup>2</sup> These statistics lead to an undeniable conclusion: "social media"<sup>3</sup> has impacted communication and idea sharing. This is, in large part, because social media makes expressing approval or disapproval of a particular statement easier than ever. On Facebook, for example, expressing approval is as easy as clicking the "like" button.<sup>4</sup>

While social media users generally understand "liking" a post to indicate approval, the legal significance of a Facebook "like" remains unclear. This confusion stems largely from the fact that social media use has been no exception to the truism that the law responds slowly to technological

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1. *About Facebook – Milestones*, FACEBOOK, <https://www.facebook.com/facebook/info?tab=milestone> (last visited Nov. 13, 2015).
2. Maeve Duggan, et al., *Demographics of Key Social Networking Platforms*, PEW RESEARCH CENTER (Jan. 9, 2015), <http://www.pewinternet.org/2015/01/09/demographics-of-key-social-networking-platforms-2>.
3. Starting with a definition of "social media" is helpful. The dictionary defines it as "forms of electronic communications (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos)." *Social Media Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20media#> (last visited Nov. 13, 2015); *see also* Lane v. Facebook, Inc., 696 F.3d 811, 816 (9th Cir. 2012) (Facebook is an "online social network where members develop personalized web profiles to interact and share information with other members.").
4. *See* Mattocks v. Black Entm't. Telev. LLC, 43 F. Supp. 3d 1311, 1315 (S.D. Fla. 2014) ("Facebook users can 'like' a Facebook Page . . . or specific postings on a Page, by clicking a 'like' button supplied by Facebook.").

change.<sup>5</sup> The extent to which public officials are subject to special rules governing their conduct on social media begs for clarity. Others have addressed this question generally, focusing on whether officials may maintain any social media presence at all.<sup>6</sup> This article will look at this question more narrowly and will analyze whether it is appropriate for public officials to “like” Facebook content in an official capacity.

This article will first consider the arguments for creating special rules that would explicitly restrict a public official’s ability to “like” Facebook content. Most importantly, recent studies and developments in litigation reflect that a Facebook “like” has both political and commercial significance. On this basis, a “like” can be considered a significant form of self-expression, the type of which has always been regulated in the context of what public employees can and cannot say.

The second half of this article will consider arguments against creating special rules to govern Facebook “likes.” That portion of this article will consider the practical difficulties with capturing a Facebook “like” as part of the public record. This article will also discuss the degree of difficulty associated with distinguishing between public and private Facebook content. Finally, this article will conclude that socio-cultural normative understandings of how Facebook users interact are sufficient to govern official conduct on Facebook.

## II. THE IMPACT OF A FACEBOOK “LIKE” AND THE CASE FOR REGULATION

Before turning to the impact of a “like,” it is important to understand exactly what a “like” is. “The ‘like’ button is represented on Facebook by a thumbs-up icon, and the word ‘like’ appears next to different types of Facebook content.”<sup>7</sup> Users “like” content by clicking the thumbs-up icon.<sup>8</sup> The Southern District Court of Florida in *Mattocks v. Black Entertainment*

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5. See Christina Skinner, *The Unprofessional Sides of Social Media and Social Networking: How Current Standards Fall Short*, 63 S.C. L. REV. 241, 242 (2011) (“[T]he practice of law seems at odds with this information-sharing revolution.”); but see JOHN BROWNING, *THE LAWYER’S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA’S IMPACT ON THE LAW* 154 (2010) (“Law is never going to keep pace with technology. Adopt a specialized rule now addressing a particular medium, and both the medium and the rule will be obsolete before you know it.”).
  6. See generally Jan L. Jacobowitz, *Lawyers Beware: You Are What You Post—The Case for Integrating Cultural Competence, Legal Ethics, and Social Media*, 17 SMU SCI. & TECH. L.R. 541 (2014); see also John Browning, Symposium, *Social Media and the Law: Why Can’t We Be Friends?*, 68 U. MIAMI L. REV. 487, 488 (2014); see also Skinner, *supra* note 5.
  7. *Bland v. Roberts*, 730 F.3d 368, 385 (4th Cir. 2013).
  8. See *id.*

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*Television LLC* defined "liking" something on Facebook as "an easy way to let someone know that you enjoy it."<sup>9</sup> This is consistent with a common cultural understanding of the significance of liking Facebook content.

But Facebook "likes" can carry other meaning as well. Facebook's own definition of "liking" is even more consistent with the cultural understandings surrounding the function. Facebook defines "liking" as a way for Facebook users to share information with each other.<sup>10</sup> This definition reflects the idea that "likes" are not merely used to convey happiness or enjoyment; instead, "likes" can also be used to acknowledge ideas or feelings resulting from negative events. For example, it would be perfectly appropriate for me to "like" a statement by my friend on Facebook if she posted, "Today, my puppy dug a hole under my fence in the back yard, ate all of my neighbor's petunias, and then escaped. If any of my neighbors that I am friends with find him, please call me at the number below." In this case, by "liking" my friend's post, I am not expressing enjoyment over the fact that her new puppy has escaped and demolished her neighbor's flower beds. Instead, other Facebook users who noted that I had "liked" the post would understand that I was merely acknowledging my friend's feelings of angst over her missing puppy and expressing empathy.

Obviously, this connotation of a Facebook "like" conflicts some with our literal dictionary understanding of what it means to like something.<sup>11</sup> Because a Facebook "like" does convey expressive connotation that, oftentimes, goes beyond enjoyment of an idea, "likes" have meaning. They are valuable in both political and commercial settings.

### A. Facebook "Likes" as Political Speech

Several courts have now considered the political importance of a Facebook "like." At least one court has found a "like" to constitute political speech that is protected by the First Amendment. In *Bland v. Roberts*, Sheriff B.J. Roberts sought reelection as sheriff.<sup>12</sup> At that time, Roberts had served as sheriff for seventeen years.<sup>13</sup> Jim Adams announced in early 2009 that he would run against Sheriff Roberts.<sup>14</sup> During the campaign, Jim Adams cre-

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9. *Mattocks*, 43 F. Supp. 3d at 1315 (citing *What does it mean to "Like" something?*, FACEBOOK, <https://www.facebook.com/help/452446998120360> (last visited Nov. 13, 2015)).

10. *See What does it mean to "Like" something?*, FACEBOOK, <https://www.facebook.com/help/452446998120360> (last visited Nov. 13, 2015); *see also* *Lane v. Facebook, Inc.*, 696 F.3d 811, 816 (9th Cir. 2012).

11. *Like Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/like> (last visited Nov. 13, 2015) (defining "like" as "to enjoy (something)").

12. *Bland*, 730 F.3d at 372.

13. *Id.*

14. *Id.*

ated an official campaign Facebook page.<sup>15</sup> Daniel Ray Carter, one of Sheriff Roberts's employees, "liked" Jim Adams's campaign page.<sup>16</sup> Roberts ultimately won the election and fired all of his employees who had openly supported Jim Adams—including Carter.<sup>17</sup>

Carter, joined by other employees, filed a Section 1983 claim against Roberts, alleging that "Roberts retaliated against the plaintiffs in violation of their First Amendment rights by choosing not to reappoint them because of their support of his electoral opponent."<sup>18</sup> Roberts relied on Carter's Facebook "like" of Jim Adams's page as evidence that Carter had supported Roberts's opponent in the election.<sup>19</sup> As a result, an issue arose as to whether a Facebook "like" is protectable expression for purposes of the First Amendment.<sup>20</sup>

According to the Fourth Circuit, it is. The court stated:

Once one understands the nature of what Carter did by liking the Campaign Page, it becomes apparent that his conduct qualifies as speech. On the most basic level, clicking on the "like" button literally causes to be published the statement that the User "likes" something, which is itself a substantive statement. In the context of a political campaign's Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual keystrokes is of no constitutional significance.<sup>21</sup>

As a result, the trial court's decision granting Sheriff Roberts's Motion for Summary Judgment was reversed on appeal, and the case was remanded for trial.<sup>22</sup> This case is the most direct judicial recognition of the fact that a Facebook "like" is sufficiently expressive to be protectable political speech.

## B. The Commercial Value of Facebook "Likes"

Facebook "likes" create the potential for people and pages to connect, which makes collecting Facebook "likes" commercially valuable. Inre-

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15. *See id.* at 380.

16. *Id.* at 384.

17. *Id.* at 372–73.

18. *Bland*, 730 F.3d at 372–73.

19. *Id.* at 380.

20. *See generally id.*

21. *Id.* at 386.

22. *Id.* at 394.

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ingly, companies rely on Facebook as a marketing tool.<sup>23</sup> To understand this trend, it is necessary to have at least a preliminary understanding of how Facebook generates search results.

In 2013, the founders of Facebook implemented its current search engine, known as "Graph Search."<sup>24</sup> Graph Search is a semantic search engine designed to find search results using natural language search terms.<sup>25</sup> Search box entries are "autocompleted," which means that as the searcher enters search terms, Facebook recommends connections to other people and pages.<sup>26</sup> As a result, it became more significant for a Facebook user to "like" a page, because Graph Search will generate that "like" as a connection in response to certain types of searches.<sup>27</sup> For example, a law student at SMU could search for "friends who 'like' SMU Law School" and a list of that student's friends who had "liked" the school's Facebook page would appear. Thus, each "like" on Facebook creates a potential for a connection to another person or page.

While a "like" may seem like a small thing, the potential for connection created by a Facebook "like" is commercially valuable, and, as a result, analysts are starting to measure the value of a single Facebook "like."<sup>28</sup> Of course, the researchers note that "[t]he numbers [vary] wildly . . . depending on the variables [used] to calculate the value."<sup>29</sup> According to Blackbaud, NTEN, and Common Knowledge, in their 2012 Nonprofit Social Networking Benchmark Report, "the average value of a like for non-profits seeking to attract donations, calculated based off total revenue received from a supporter over the twelve months following acquisition [is] \$214.81."<sup>30</sup> Analysts from Syncapse, an enterprise social media marketing management company, concluded that with regard to for-profit companies, "a Facebook fan is worth [on average] \$136.38 more than a customer who is a nonfan."<sup>31</sup> And according to Vitruve, another social media marketing management firm, a fan base

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23. See Jim Edwards, *What is a Facebook "Like" Actually Worth in Dollars?*, BUSINESS INSIDER (Mar. 27, 2013, 10:06 AM), <http://www.businessinsider.com/what-is-a-facebook-like-actually-worth-in-dollars-2013-3>.

24. Francis Bea, *Hands on: Facebook Graph Search Digs Deep, Even if it Doesn't Always Strike Gold*, DIGITAL TRENDS (Jan. 25, 2013), <http://www.digital-trends.com/social-media/hands-on-with-facebook-graph-search>.

25. *Id.*

26. *Id.*

27. *Id.*

28. See Edwards, *supra* note 23.

29. *Id.*

30. *Id.*

31. *Id.* (explaining that Syncapse "quantified fans' and nonfans' product spending, loyalty to a company, propensity to recommend a company, brand affinity, media value, and acquisition cost" to determine this figure).

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of one million Facebook supporters “translates into at least \$3.6 million in equivalent media over a year.”<sup>32</sup>

This data leads to two conclusions regarding the commercial value of a “like.” First, the number of Facebook “likes” that a company has can indicate commercial success. Second, not only do “likes” indicate commercial success, but they can also result in revenue by attracting customers, investors, and higher quality employees and by allowing people to make connections based on their support of a company. These concepts are related.

At least one case exists in which parties litigated the rights to Facebook “likes.”<sup>33</sup> From 2006 to 2009, the CW Network broadcasted a television drama entitled “The Game,” “a dramatic comedy about the lives of professional football players and their wives and girlfriends.”<sup>34</sup> When Black Entertainment Television (BET) discovered a popular fan page for the show on Facebook, created by Stacey Mattocks, BET hired Mattocks to manage an official Facebook fan page on a part-time basis.<sup>35</sup> Eventually, Mattocks and BET began discussing the possibility of employing Mattocks full-time.<sup>36</sup> During the course of these discussions, Mattocks informed BET that she would “restrict BET’s administrative access” to the Facebook Page “[u]ntil such time as [they could] reach an amicable and mutually beneficial resolution” regarding her employment.<sup>37</sup>

Mattocks limited BET’s administrative access to the page the same day.<sup>38</sup> In response, BET asked Facebook to “migrate” the “likes” on Mattocks’s page over to a new Facebook page controlled by BET.<sup>39</sup> After review of Mattocks’s page, Facebook granted BET’s request and moved the “likes” associated with the Facebook page to the BET-sponsored page.<sup>40</sup> Mattocks claimed that doing so converted a business interest (the “likes” the page had accumulated while she ran it) she had in the Facebook page.<sup>41</sup> Mattocks asserted that the “substantial interest in the [Facebook page] and the significant number of ‘[l]ikes’ generated by Mattocks provided her with business opportunities[,]” because companies pay her for redirecting visitors to their sites.<sup>42</sup>

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32. *Id.*

33. *See generally* Mattocks v. Black Entm’t. Telev. LLC, 43 F. Supp. 3d 1311, 1315 (S.D. Fla. 2014).

34. *Id.* at 1314.

35. *Id.* at 1315–16.

36. *Id.* at 1316.

37. *Id.*

38. *Id.*

39. *Mattocks*, 43 F. Supp. 3d at 1316.

40. *Id.* at 1317.

41. *Id.* at 1321.

42. *Id.* at 1320.

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The court held that Mattocks could not establish that she owned a property interest in the "likes" on the Facebook page.<sup>43</sup> The court explained that "'liking' a [Facebook page] simply means that the user is expressing his or her enjoyment or approval of the content. At any time . . . the user is free to revoke the 'like' by clicking an 'unlike' button."<sup>44</sup> The court concluded that "if anyone can be deemed to own the 'likes' on a [p]age, it is the individual users responsible for them."<sup>45</sup>

This case illustrates the commercial value of a "like." The conclusion from the holdings of *Bland* and *Mattingly* is clear: Facebook "likes" are a form of expression with legal and commercial significance. As a result, public officials might consider themselves restricted in their ability to freely "like" pages on Facebook in an official capacity. Therefore, Facebook "likes" should not be considered an exception to those rules that limit public officials in what they can and cannot say online.

### C. Traditional Restrictions on Government Officials' Ability to Speak Publicly

The government can regulate the speech of civilians in narrowly defined circumstances only.<sup>46</sup> Generally, regulation of civilian speech is permissible when exceptions or exclusions to the First Amendment apply.<sup>47</sup> In contrast, the government has much greater latitude to restrict the speech of its employees.<sup>48</sup> Even so, the First Amendment prohibits regulation of a public employee's speech when the speech addresses a matter of public concern.<sup>49</sup>

The U.S. Supreme Court has held that analysis of whether the restriction of a public employee's ability to speak on a matter of public concern violates the First Amendment requires "a balance between the interests of the [em-

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43. *Id.*

44. *Id.* at 1320–21.

45. *Mattocks*, 43 F. Supp. 3d at 1321.

46. *See* U.S. CONST. amend. I.

47. Certain categories of speech lack the full extent of constitutional protection. Traditional examples include defamation, fighting words, obscenity, and true threats. *See* *R. A. V. v. St. Paul*, 505 U.S. 377, 383–84 (1992).

48. *See* *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) (recognizing that "the government as employer . . . has far broader powers than does the government as sovereign."); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (holding that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general").

49. *Waters*, 511 U.S. at 668 ("To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.") (internal quotations omitted).



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ployee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>50</sup> When the speaker seeks results that “contravene governmental policies or impair the proper performance of governmental functions,” efficient and effective government operation may be impeded.<sup>51</sup> For the government to restrict an employee’s speech, the speech must be made in a public forum in which viewers, readers, or listeners have some capacity to perceive the speech.<sup>52</sup> As a result, this doctrine was traditionally applied in the context of print media.<sup>53</sup> The same considerations that warrant regulating official speech in print media—limiting interference with official government function—may also justify regulation of speech in social media.

Facebook is now considered a public forum.<sup>54</sup> This means that, under the analysis from *Connick* and *Pickering*, the Facebook content of public officials can be regulated when it does not speak to a matter of public concern. To avoid application of the difficult *Connick* balancing test, some localities now entirely prohibit public officials from maintaining a social media presence.<sup>55</sup> In discussing the zeal of some local governments in prohibiting online activity, Bill Sherman, Commissioner on the City of Seattle Ethics and Elections Commission, wrote that, “some [jurisdictions] have gone so far as to bar public officials from social networks for fear of violating campaign finance, open meeting, freedom of information, and government ethics laws.”<sup>56</sup> Perhaps the clearest example of professional regulation of what public employees may and may not say regarding their public duties appears in

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50. *Connick v. Myers*, 461 U.S. 138, 142 (1983) (alteration in original) (internal citations omitted).
  51. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).
  52. *Connick*, 461 U.S. at 152.
  53. See, e.g., *id.* at 138 (addressing a questionnaire that a public employee distributed to staff members in retaliation for being fired); see also *Pickering*, 391 U.S. at 563 (involving a letter sent to a newspaper by a former school employee that was critical of the way in which the board had handled past proposals to raise new revenue for the schools).
  54. See *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 511–12 (Minn. 2012) (“A university does not violate the [First Amendment] rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards.”); see also *Hatch v. Superior Court*, 94 Cal. App. 4th 170, 201 (2000) (noting that the internet is a public forum); see also *Johnson v. Ryan*, 346 P.3d 789, 794 (2015) (same).
  55. See Bill Sherman, *Social Networking and the Law: Your Mayor, Your “Friend”: Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95, 103 (Winter 2011).
  56. *Id.* at 95.

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the American Bar Association's Model Code of Judicial Code of Conduct.<sup>57</sup> There, judges are specifically prohibited from discussing or commenting on their pending cases *in any way, and in any forum*.<sup>58</sup>

In one case, a judge was removed from the bench because of his use of social media.<sup>59</sup> The report of uncontested sanction arose before the Supreme Court of Arkansas in fall 2014 from a complaint filed concerning comments made on the Louisiana State University (LSU) fan message board, "www.tigerdroppings.com."<sup>60</sup> The comments were made by an author using the screen name "geauxjudge."<sup>61</sup> Arkansas Judge Maggio admitted on March 3, 2014, that he authored these posts.<sup>62</sup> His comments were classified as "racist, sexist, homophobic or inappropriate."<sup>63</sup> Even more concerning, a January 17, 2012, post by "geauxjudge" referenced "possible confidential proceedings involving actress Charlize Theron's adoption of her son, explaining a 'judge friend' of his handled the case."<sup>64</sup> It was unclear at the time whether it was actually Judge Maggio who handled the case.<sup>65</sup> Judge Maggio was then forced to end his campaign for a seat on the Arkansas Court of Appeals on May 5, 2014.<sup>66</sup>

Judge Maggio's case involved actual statements made on social media. Such statements are certainly distinct from a Facebook "like." But, importantly, judges have also faced criticism for their Facebook "likes." In 2012, Kansas Judge Jan Satterfield became the subject of a complaint filed with the Kansas Commission of Judicial Qualifications after she "liked" a Facebook campaign post of Sheriff Kelly Herzet.<sup>67</sup> The campaign post said, "Soooooo.

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57. See MODEL CODE OF JUDICIAL CONDUCT R. 2.10 (2011), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/model\\_code\\_of\\_judicial\\_conduct\\_canon\\_2/rule2\\_10\\_judicialstatementsonpendingandimpendingcases.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_10_judicialstatementsonpendingandimpendingcases.html).

58. *Id.*

59. See *Judicial Discipline & Disability Comm'n v. Maggio*, 440 S.W.3d 333, 334 (Ark. 2014).

60. *Id.*

61. *Id.*

62. *Id.*

63. Emily Lane, *Arkansas Judge Outed as "geauxjudge" on LSU Fan Message Board, Ends Bid for Office*, THE TIMES-PICAYUNE (Mar. 07, 2014, 12:49 PM), [http://www.nola.com/news/baton-rouge/index.ssf/2014/03/arkansas\\_judge\\_outed\\_as\\_geauxj.html](http://www.nola.com/news/baton-rouge/index.ssf/2014/03/arkansas_judge_outed_as_geauxj.html).

64. *Id.*

65. See *id.*

66. See *id.*

67. See Associated Press, *Kansas Judge Causes Stir with Facebook 'like'*, REAL CLEAR POLITICS (July 29, 2012), [http://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas\\_judge\\_causes\\_stir\\_with\\_facebook\\_like\\_.html](http://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas_judge_causes_stir_with_facebook_like_.html).

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I was thinking that we could get to 200 likes by 6/18. That's only 88 more. Wouldn't that be cool?"<sup>68</sup> Critics of Judge Satterfield argued that her "like" of the post "violated the judicial canons of ethics that prohibit a judge from 'publicly endorsing or opposing another candidate for any public office.'"<sup>69</sup>

Obviously, this case did not *specifically* delineate what public officials can and cannot do on social media. It is, however, a good illustration of the social significance of a "like." A "like" does carry value in the sense that it has the power to quantify the level of approval for a particular statement, idea, opinion, or product. With this value in mind, it is easy to understand the concerns of those who argue that officials should be prohibited from "liking" social media content: a "like" means something. Because a "like" has such significance, the argument goes, public officials should not be able to release "likes" at the click of a button with no potential for consequence. But the justifications for allowing public officials to "like" content are more persuasive.

### III. THE CASE FOR ALLOWING PUBLIC OFFICIALS TO "LIKE" FACEBOOK CONTENT

There are a myriad of reasons not to regulate a public employee's right to "like" Facebook content. As a preliminary matter, regulating Facebook "likes" of public employees is impractical. More importantly, the cultural perspectives surrounding the use of Facebook make such regulation unnecessary.

#### A. Practical Considerations: the Difficulty of Archiving Facebook "Likes"

Everything a government employee says that relates to official business is treated as part of the public record.<sup>70</sup> And public records must be made available to a particular agency's constituents.<sup>71</sup> As a result, public records

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68. *Id.*

69. *Id.*

70. See Sherman, *supra* note 55, at 108–09 (public records are defined as "any writing or other record containing information relating to the conduct of government prepared, owned, used, or retained by any part of the government."); see also Michael Schmidt & Amy Chozick, *Using Private Email, Hillary Clinton Thwarted Records Request*, N.Y. TIMES, March 4, 2015, at A1, [http://www.nytimes.com/2015/03/04/us/politics/using-private-email-hillary-clinton-thwarted-record-requests.html?\\_r=0](http://www.nytimes.com/2015/03/04/us/politics/using-private-email-hillary-clinton-thwarted-record-requests.html?_r=0) (criticizing Hillary Clinton for using her private email, rather than her official email as Secretary of State, to avoid producing her emails that are public records.).

71. For example, in Texas, information is open to the public when it falls within TEX. GOV'T. CODE § 552.002. That section requires access to "public information . . . that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1)

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statutes obligate agencies to archive their employees' public statements.<sup>72</sup> This Big Brother Orwellian feat is difficult enough to accomplish when actual statements are issued.<sup>73</sup> This is because social media has become so pervasive in society, and so easy to use, that public officials can release statements with unprecedented ease at an unprecedented frequency.<sup>74</sup> Indeed, Facebook users generate almost 2.5 billion content shares every single day.<sup>75</sup> The sheer volume of these communications makes them hard to track and archive. If Facebook "likes" of public employees were to be regulated, it would likely be on the basis of their relevance as political or commercial expression. And if "likes" are to be regulated on that basis it follows that they, too, are important enough to be archived as part of the public record.

Presumably, the archival of "likes" would entail a system in which the date and time that a particular public official "liked" a particular statement would be recorded. Considering the number of "likes" generated daily,<sup>76</sup> as well as how easy it is to click the "like" button,<sup>77</sup> government agencies would face insurmountable cost and spend significant time recording their employees' "likes."<sup>78</sup> Also, consider the chaos that would ensue if public officials

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by a governmental body; (2) for a governmental body and the governmental body . . . ; or (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body."

72. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1161 (2002) ("Today, all fifty states have open records statutes, a majority of which are modeled after the [Federal Freedom of Information Act].").
73. See, e.g., Schmidt & Chozick, *supra* note 70 (discussing Hillary Clinton's failure to comply with U.S. State Department policies requiring public employees to use their official emails when sending correspondence in an official capacity). While Clinton's failure was arguably intentional, it still provides an example of the complexities associated with ensuring that all of a public employee's statements can be satisfactorily preserved and archived as public records.
74. See *Bland v. Roberts*, 730 F.3d 368, 385 (4th Cir. 2013).
75. Casey Chan, *What Facebook Deals with Everyday*, GIZMODO (Aug. 22, 2012, 10:30 PM), <http://gizmodo.com/5937143/what-facebook-deals-with-everyday-27-billion-likes-300-million-photos-uploaded-and-500-terabytes-of-data>.
76. As of 2012, there were 2.7 billion likes generated daily. *Id.*
77. See *Bland*, 730 F.3d at 385.
78. Companies are already capitalizing on and privatizing the expense of archiving social media statements. See *Social Media Archiving Built for Government: Automatic Recapture and Fast Retrieval for Public Records Law Compliance*, ARCHIVESOCIAL, <http://archivesocial.com/social-media-archiving-for-government> (last visited Nov. 13, 2015).

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began “unliking” posts.<sup>79</sup> If they did so before the original “like” was archived, perhaps there would be no issue. But currently Facebook gives users the option to “unlike” a post indefinitely.<sup>80</sup> It is easy to imagine that someone reprimanded for a Facebook “like,” such as Judge Satterfield in Kansas,<sup>81</sup> would take matters into her own hands—despite the public record—and “unlike” a controversial statement as an act to appease her social media naysayers. Both the “like” and the subsequent “unlike” would need to be noted based on the political and expressive significance of each action. It is important to note that the government would have little control over its employees’ ability to “unlike” content, because Facebook is privately owned and controlled.<sup>82</sup>

In light of these practical concerns, regulators could also choose to uniformly prohibit all public employees from “liking” Facebook content. *Voilà*, the public records problem is solved. But regulating “likes” across the board would be inconsistent with the First Amendment.<sup>83</sup> The justification for a prohibition on “likes” in the first place would likely be their significance as expressive statements and their capacity to convey more than mere enjoyment of a particular post. However, the conclusion that Facebook “likes” have expressive value should not result in their complete prohibition. Due to the First Amendment implications inherent in regulating a public employee’s Facebook “likes,” government regulators would be left with two choices: (1) distinguish Facebook “likes” that relate to a matter of public concern from those that are purely private in nature, and allow private “likes” while prohibiting public “likes”; or (2) require public employees to maintain separate public and personal Facebook pages, and allow them to “like” content from their personal page only.<sup>84</sup>

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79. Once the “like” icon has been clicked, that icon will be replaced with the “unlike” icon, allowing users to retract their Facebook “likes”. See *Desktop Help, Connecting, Like*, FACEBOOK, <https://www.facebook.com/help/452446998120360/> (last visited Nov. 13, 2015).

80. See *id.*

81. See *Kansas Judge Causes Stirjudge causes stir with Facebook ‘like’*, *supra* note 67.

82. See Sherman, *supra* note 55, at 103–04 (“Because social networks are, for the most part, third party applications, their features, format, and rules are not directly controlled by the public officials or government agencies that use them. Consequently, any restrictions on use of social media by public officials can only be enforced by monitoring and enforcement, under threat of some penalty, rather than through design modifications or access limitations.”).

83. See *Connick v. Myers*, 461 U.S. 138, 161 (1983) (Brennan, J., dissenting) (“Unconstrained discussion concerning the manner in which the government performs its duties is an essential element of the public discourse necessary to informed self-government.”).

84. *Id.* at 461 (“A public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.”).

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However, even these solutions present practical problems. First, the only real means of distinguishing "likes" relating to a public issue from those that are purely private would be to analyze the substance of the Facebook content "liked." But the line between public and private is often unclear. For instance, assume a prosecutor, Travis, works regularly with the same private investigator, Mike. Travis and Mike spend significant quantities of time together at work and become friends. Subsequently, they also become Facebook "friends." One day, Mike posts on Facebook, "I am so lucky to get to work so closely with my good friend, Travis. He is such an outstanding person, and I feel safer on the streets knowing that he is representing the good guys. He could not have done a better job in court today, and the world is now a safer place." Travis then "likes" this post.

The problem in this example is that some of the post is personal in nature, relating to the relationship between Travis and Mike, while other parts of the post relate to Travis's work as a prosecutor. Is it appropriate for Travis to "like" this post if there is a prohibition on "likes" relating to matters of Travis's public employment? This example is a close call. Arguably, Travis has not commented on any pending cases, or on the defendant's guilt in the particular case referenced, so the ABA Model Rules of Professional Responsibility would not hold Travis accountable for "liking" this statement.<sup>85</sup> On the other hand, if there is a prohibition on "likes" relating to all matters of public employment in order to avoid public records problems, it would be hard, in this example, to determine if Travis violated that prohibition.

This problem would not be solved by allowing public officials to maintain personal Facebook pages only. Distinguishing between private and public pages assumes that creating a personal Facebook page can insulate an official's Facebook activity from being considered as occurring within an official course of conduct. Even if a public official were acting on a personal Facebook page, a "like" of Facebook content relating to a matter of public concern might still be considered acting within the official course of business. It is difficult to separate a person from his work on the basis of the privacy settings of his Facebook page alone.

For example, the Ohio School Board President, Debe Terhar, drew criticism when she re-published on her personal Facebook page a friend's picture that "seemed to equate gun control efforts with the views of Adolf Hitler."<sup>86</sup> Terhar posted the photo on her private account visible to her Facebook "friends" only.<sup>87</sup> Unfortunately for her, a "friend" captured an image of the

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85. MODEL RULES OF PROF'L CONDUCT R. 3.8. (2013).

86. Andrew Tobias, *Social Media Post Getting Public Officials in Trouble*, DAYTON DAILY NEWS (Jan. 27, 2013, 12:00 AM), <http://www.daytondailynews.com/news/news/local-govt-politics/social-media-post-getting-public-officials-in-trou/nT672/>.

87. *Id.*

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post and leaked it publicly.<sup>88</sup> Critics responded by calling for her resignation.<sup>89</sup> This example illustrates how a public official's social media audience is unable to separate the public Facebook user from the private Facebook user.

These practical problems would inevitably result from attempting to regulate public officials' Facebook "likes." The practical concerns, however, are not the only considerations supporting government employees' rights to "like" Facebook content. Most importantly, regulation of public officials' "likes" is unnecessary based on how Facebook users perceive a "like."

### **B. Socio-Cultural Considerations: Facebook as an Open, Transparent Political Forum**

Facebook users do not operate in a vacuum. By definition, Facebook is an online community.<sup>90</sup> Like any community, Facebook is governed by socio-cultural normative rules that dictate appropriate conduct in the community.<sup>91</sup> Public officials who use Facebook must play by those rules.

The desire to regulate public officials' Facebook conduct is driven by a misunderstanding of these Facebook norms. Critics of Facebook incorrectly think there will be a lack of transparency in public officials' actions on Facebook if their ability to post and "like" is left unchecked. This fear of a lack of transparency is the same fear that initially produced public records laws.<sup>92</sup>

But those paralyzed by fear at the prospect of wild, uncontrolled social media use by public officials fail to recognize that the social and cultural norms of Facebook have created more transparent political dialogue than has ever existed. First, the ability of officials to post on Facebook with ease and frequency puts new pressure on public officials for a more consistent release of information. On April 29, 2015, of the ten subjects "trending on

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88. *Id.*

89. *Id.*

90. Edward Mercer, *The Importance of Facebook*, HOUSTON CHRONICLE, <http://smallbusiness.chron.com/importance-facebook-56887.html> (last visited Nov. 13, 2015) ("The sociologist Benedict Anderson defines a community as a group where even if the members do not know each other personally, they recognize each other's existence as parts of the whole and share a set of common practices and experiences. With its one billion users—a number comparable to the population of Europe and the United States combined—Facebook is one such community.").

91. *Id.*

92. *Schill v. Wis. Rapids Sch. Dist.*, 786 N.W.2d 177, 186 (Wis. 2010) ("[T]his review [of official emails] is important; without it, the people will be deprived of the transparency the legislature mandated in the public records law.").

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Facebook" five of them were political in nature.<sup>93</sup> This is the result of the fact that Facebook has become a community used to share political news, messages, and ideas.

In fact, not only does Facebook *allow* the release of political information, but it often gives constituents a tool to *demand* such information. It is harder for public officials to hide their dirty laundry when constituents have the ability to demand a response to political issues on social media. For example, in response to the April 28, 2015, Baltimore riots, Baltimore Mayor, Stephanie Rawlings-Blake, posted:

Thanks again to all our law enforcement and fire officials, emergency management personnel, and National Guard for working around the clock. To all those who shared my anger and heart-break, thank you for your work in our communities and for showing the world Baltimore's resilience. And to those actively demonstrating, I call for peace. Tonight we must be #OneBaltimore. Thank you for holding the line.<sup>94</sup>

A plausible explanation for her very public and sincere take on the riots is that silence on social media is now considered avoidance of undesirable political issues or an unwillingness to take a stance. This type of unwillingness to comment is relevant—and troublesome—to constituents, and is of value to constituents when they weigh candidates. Facebook has therefore given constituents unprecedented leverage by requiring their officials to keep them honestly informed.

Additionally, Facebook observers are starting to recognize that Facebook is indeed governed by social understandings unique to the Facebook community. These understandings have produced more lax perspectives on whether government officials should be allowed to use social media. For instance, authorities are beginning to conclude that judges may maintain Facebook pages and "friend" attorneys.<sup>95</sup> These types of interac-

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93. Subjects trending included "Baltimore unrest," "Texas State Guard," "King of Saudi Arabia," "Joseph Kent," and "Nepal Earthquake." FACEBOOK, <https://www.facebook.com/WhatsTrending/videos/990714007635222/> (last visited Nov. 13, 2015) (user login required).

94. Stephanie Rawlings-Blake, FACEBOOK, <https://www.facebook.com/stephanie.rawlingsblake/photos/a.168803463208519.46210.165763450179187/804808996274626/?type=3&fref=nf> (Apr. 28, 2015) (user login required).

95. See, e.g., Browning, *supra* note 6, at 532 ("Most states, and ABA Judicial Ethics Opinion 462, acknowledge that the use of social networking sites can benefit judges in both their personal and professional lives, including not just helping a judge stay in touch with the rest of the community, but also providing vital tools for raising both funds and voter awareness in states where judges are elected officials. In addition, most states view the mere existence of a Facebook 'friendship,' without more, as signifying very little due to the realities of 'friendship' in the digital age.").



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tions on Facebook are permissible, because, as one court put it, “it’s no secret that the ‘friend’ label means less in cyberspace than it does in the neighborhood, or in the workplace, or on the schoolyard, or anywhere else that humans interact as real people.”<sup>96</sup> In other words, Facebook “friending” means something different in the context of the Facebook community.<sup>97</sup> Sending a friend request is similar to “liking” a post. Both actions seek to establish a connection that can be viewed and perceived by others. Accordingly, these connections are no longer considered abnormal or *per se* inappropriate.

Of course, the social norms surrounding Facebook use have not yet created a perfect cyber-world in which users are cognizant of what they post and sensitive to the potential ramifications of their Facebook speech. Indeed, this article is rife with examples of official misconduct on social media. However, as Facebook use continues to increase—and it likely will—the attitudes and social norms surrounding Facebook use will continue to develop. Increased demands for self-awareness on Facebook will govern what public officials post and “like” on Facebook. And as Facebook’s use as a political tool continues to increase, there will be a correlative increase in the constituent’s ability to demand honest information.

#### IV. CONCLUSION

Facebook allows an unprecedented exchange of political ideas. A transparent political dialogue should not become reprehensible conduct at the click of the “like” button. Instead, regulation of public officials’ conduct should be left to the social norms that surround Facebook for several reasons. First, as Professor Browning has explained, the “[l]aw is never going to keep pace with technology. Adopt a specialized rule now addressing a particular medium, and both the medium and the rule will be obsolete before you know it.”<sup>98</sup> Additionally, Facebook “likes” have political and commercial value. To regulate them on that basis because they cannot be controlled or archived encroaches on the First Amendment. While the government has the authority to regulate what its public employees say, those employees still maintain the right to post private content. However, because the law cannot practically distinguish between private and public Facebook content, it should take a less restrictive approach to public officials’ conduct on Facebook. Instead, regulation of official conduct should be left to the Facebook community itself. The result is likely to be a more sensitive, self-aware collection of public Facebook users who are wary of the possible criticism of the people who matter to them most: their constituents.

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96. *Williams v. Scribd, Inc.*, 2010 U.S. Dist. LEXIS 90496, at \*16 (S.D. Cal. June 23, 2010).

97. *Id.*

98. BROWNING, *supra* note 5, at 154.