

## The First Amendment, Speech, and Modern Culture: Bland v. Roberts, 2013: Facebook “likes”, protected speech

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*“...the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race.”*— On Liberty, John Stuart Mill

Since passing by Congress in September 25, 1789 and ratification on December 15, 1791, the forty-five words of the First Amendment of the Bill of Rights, which speaks on US citizens’ rights of freedom, petitions, and assembly, have never changed and states: “Congress shall make no law ... abridging the freedom of speech.”<sup>1</sup> The people, culture, and society this law seeks to protect, however, have.

The Courts have historically been challenged to alter their interpretations of certain laws for the regulations to be relevant to the needs and issues of the public. We live in a society where technology is constantly on the verge of development and evolution; The Next Big Thing<sup>TM2</sup> is here for but a short period until the next new gadget emerges; our technology is rapidly changing but its driver, the culture, is in a constant state of change. In researching this article, I found some important issues or questions on this topic.

- Considering the advances in technology and electronics, where do these issues leave the law?
- Are and should our Twitter and Facebook postings protected speech?
- Is clicking the “like” button on someone’s Facebook page under the speech clause of the First Amendment?
- How does the law address and govern the rapidly evolving society, specifically on the issue of their freedom of speech and expression?

This article seeks to explore these issues specifically as I analyze the recent Fourth Circuit Court of Appeals ruling of Bland v. Roberts in September 2013. The 2013 Court’s ruling defined Facebook “likes” as pure and substantive political speech; this form of speech warrants the highest degree of protection under the US Constitution.

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<sup>1</sup> 1st Amendment fully reads: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<sup>2</sup> Samsung, Galaxy S, Samsung Galaxy, Super AMOLED, SAFE, Samsung KNOX, S Beam, Air Gesture, Air View, Group Play and Samsung Smart Switch are all trademarks of Samsung Electronics Co., Ltd. G.

**Bland v. Roberts – Case history and information**

In November of 2009, the sheriff of Hampton, Virginia, B.J. Roberts, ran for re-election having served in that capacity for 17 years. Select members of Roberts' office, however, including Bobby Bland, were not supportive of the ordeal in having Roberts prolong his role as Hampton sheriff. Resorting to social media among other efforts to express their opposition to Roberts' re-election, they "liked" the Facebook campaign page of opponent Jim Adams. The plaintiffs showed public support for Jim Adams in different ways and subterfuge tactics by the less daring. Roberts confronted the plaintiffs about their lack of support for him during the election process. Despite their efforts, Roberts was re-elected and subsequently fired Bobby Bland and a few others stating that they "hindered the harmony and efficiency of the office" by not supporting him.

On March 4, 2011, the plaintiffs filed suit in their Virginia District Court against the Sheriff in his individual and official capacities alleging that he violated their First Amendment rights to freedom of speech and freedom of association when he fired them in retaliation against their affirmative support of his electoral opponent. The defendant moved for a summary judgment<sup>3</sup> which was granted by the District Judge Raymond A. Jackson who stated that "simply liking a Facebook page is insufficient. It is not the kind of substantive statement that has previously warranted constitutional protection" and dismissed the case.

The plaintiffs appealed the case rulings together with the support of the American Civil Liberties Union, American Civil Liberties Union of Virginia Foundation, Facebook Inc. and National Association of Police Organizations. Chief Judge William Traxler of the Fourth Circuit Court of Appeals reversed Jackson's rulings noting:

Once one understands the nature of what [the plaintiff] 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. .

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<sup>3</sup> "[S]ummary judgments should be granted in those cases where it is perfectly clear that no issue of fact is involved and inquiry into the fact is not necessary to clarify the application of the law." Once a motion for summary judgment is properly made and supported, the opposing party "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita*, 475 U.S. at 586–87, 106 S.Ct. 1348 (1986) (quoted in *Bland v. Roberts*).

As noted within this case, the Supreme Court has upheld that online speech is worthy of the same level of protection as other speech.<sup>4</sup>

The Court explained that the meaning and message that the plaintiffs were trying to convey – their approval of Adams for sheriff and their disapproval of Roberts – by liking Adams’ page, were “unmistakable”. Judge Traxler made clear that whether the plaintiffs, in an effort to get their message across, had used a keyboard to type that they support Adams or clicked a button to show their support is of no constitutional significance.

### Speech, Technology, and Time

One term and/or theory commonly mentioned in deciding whether or not the forum is a traditional public forum and thus the level of protection warranted under the First Amendment is whether it is among the fora<sup>5</sup> which, since time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. But how long is “time out of mind”? Also referred to as ‘times immemorial’, time out of mind means that such is and has been the tradition or custom for so long that we have no recollection of how long or when the practice started. This is an issue faced by the courts in today’s rapidly changing society, culture, and technology:

We often hear that technology is advancing so fast that society cannot keep up. But in reality, social change is intimately linked to technology changes, and that expectations of what technology can bring changes in intensity.<sup>6</sup>

As the society, culture, and values of America continues to change and evolve, so does technology as a means of keeping up with and giving society what it wants and needs. As a result, so must the laws and interpretations thereof. In the lower court 2012 verdict, Judge Raymond Jackson of the Eastern District of Virginia failed to take these facts into consideration in his opinion and, as a result, threw out the suit, finding that the simple stroke on a keyboard

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<sup>4</sup> From *Bland v. Roberts* (2013): “The Supreme Court has rejected the notion that online speech is somehow not worthy of the same level of protection as other speech. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997); see also *Ashcroft v. ACLU*, 542 U.S. 656 (2004).”

<sup>5</sup> Plural form of forum.

<sup>6</sup> This quote comes from the historian of ideas, Martin Hultman, who in a widely publicized research project together with his colleague Christer Nordlund, from Umeå Studies in Science, Technology and Environment (USSTE), is studying these parcels in intensity regarding environmental technology (2013, March 14). Is technology really too fast for society?. Umeå University. Retrieved January 14, 2014, from <http://www.humfak.umu.se/english/about/news/newsdetailpage/is-technology-really-too-fast-for-society.cid211625> ORIGINAL PUB: Martin Hultman & Christer Nordlund (2013) Energizing technology: expectations of fuel cells and the hydrogen economy, 1990–2005, *History and Technology: An International Journal*, 29:1, 33-53, DOI: 10.1080/07341512.2013.778145

clicking the “like” button did not represent an actual “substantive statement” protected by the First Amendment<sup>7</sup>.

Though the Courts have not made a definite declaration of the internet as a traditional public forum, it has referred to the internet as a place for free exchange of ideas and commenting.

### Conclusion – Digital Speech

Within our modern society and digital age comes a new language and form of communication. The carefully selected combination of letters, punctuation, and grammar symbols such as colons, semicolons, and brackets can be used to express emotions and ideas. Examples include :-), :-|<sup>8</sup>, LOL, IDK, and GR8 TY<sup>9</sup>. Studies have shown that the average American spends 23 hours per week sending, texting and using social media and other forms of online communication.<sup>10</sup> Whether or not the courts specifically grants the title of public for a to the internet, blogging, Twitter tweets, and Facebook posts, our cultural changes, interests, and means of expression says it is. In John Locke’s essay, ‘Concerning Human Understanding III - Of Words or Language in General’, he writes in reference to the value, importance, and purpose of language and words and describes them as:

“...the signs of men's ideas, and by that means the instruments whereby men communicate their conceptions, and express to one another those thoughts and imaginations they have within their own breasts... Words are sensible signs, necessary for communication of ideas.”<sup>11</sup>

Clicking is the new writing. It is how we communicate ideas and make agreements in today’s world. To make a purchase, we click. To share information among ourselves, we click. To speak, we click. Though just a decade ago clicking the Facebook “thumbs up” icon was a new phenomenon, popular culture has accepted and widely understood the meaning and message

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<sup>7</sup> Bland v. Roberts, 2012 US Dist. Lexis 57530, 4:11cv45 (E.D. Va.; Apr. 24, 2012).

<sup>8</sup> Common smiley combinations, where :- ) = ☺, :-| = ☹

<sup>9</sup> (Tecca), Jessica. "92 Teen Text Terms Decoded for Confused Parents." TIME.com. <http://techland.time.com/2012/05/03/92-teen-text-terms-decoded-for-confused-parents/#ixzz2qQ9PR73j> (accessed January 3, 2014). **Note:** LOL, IDK, and GR8, TY translates “Laugh out Loud”, “I Do not Know”, and “Great, Thank you”, respectively.

<sup>10</sup> Mielach, David. "Americans Spend 23 Hours Per Week Online, Texting." Yahoo! News. <http://news.yahoo.com/americans-spend-23-hours-per-week-online-texting-092010569.html> (accessed January 2, 2014).

<sup>11</sup> BOOK III: John Locke's ESSAY CONCERNING HUMAN UNDERSTANDING: Of Words or Language in General from <http://oregonstate.edu/instruct/phl302/texts/locke/locke1/Book3a.html#ChapterI>.

of liking one's page. And now, with the backing of Judge William Traxler, Jr., a simple click is protected *speech*.