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YOU CAN'T TRUST EVERYTHING ON THE INTERNET: A LOOK INTO TEXAS' AND MARYLAND'S APPROACH OF SOCIAL MEDIA AUTHENTICATION.

*Danielle Orr**

Evidence cannot speak for itself. Someone must testify about the evidence to speak to its truthfulness, through a process called authentication.¹ Each jurisdiction has its own rules regarding how authentication works, but the reason for such process is the same throughout. According to the Federal Rules of Evidence, “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”² From this rule comes the most famous phrase about authentication: to prove that the evidence is what it purports to be.³ Authentication is required so that evidence can be accepted as true and then determined to be relevant, which is the ability to prove a fact, disprove a fact, or make a fact more probable.⁴

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¹ FED. R. EVID. 901(a). *But see id.* 902 (stating some evidence does not require “extrinsic evidence of authenticity in order to be admitted” as it is “self-authenticating”).

² *Id.* 901(a).

³ Vincent DiCarlo, *Summary of the Rules of Evidence*, FINDLAW, <https://corporate.findlaw.com/litigation-disputes/summary-of-the-rules-of-evidence.html> (last updated Mar. 29, 2018).

⁴ FED. R. EVID. 401; Jerome Michael & Mortimer J. Adler, *Real Proof*, 5 VAND. L. REV. 344, 362 (1952); *Sublet v. State*, 113 A.3d 695, 709 (Md. 2015); EDMUND M. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 38 (1963); *see generally* ROBERT P. MOSTELLER, MCCORMICK ON EVIDENCE § 185 (J. Dickson Phillips ed., 1952) (explaining relevancy and how it is weighted for admissibility standards).

Typically, a witness with personal knowledge of the evidence in question will be called to the stand to answer questions regarding the evidence's relevance and genuineness.⁵ This process is easy to understand when the evidence is physical—for example, in the case of a contract, a party to the contract may testify to their first-hand knowledge of that contract in which he or she entered. Thus, the contracting party is able to answer questions regarding the terms of the contract, other signatories, and circumstances regarding the contract's creation.⁶ Authentication of evidence on the internet, however, is different. Because the evidence is not already physical, or originally written on paper, the proponent of the evidence must make the proposed evidence physical by printing out a copy of the social media post.⁷ However, the likelihood of an online post being unauthentic is greater as well, adding to the problems posed when authenticating social media evidence.

This article is not about evidence that is easily authenticated, such as a contract; rather, it is a dive into authentication of social media evidence and about the dangers of letting unreliable information into the record due to the limited, or lack of, ability to show that such evidence is what it purports to be. The purpose of this note is to illustrate that all United States jurisdiction must realize the dangers in social media and interpret their evidentiary rules accordingly. By comparing and contrasting Maryland's and Texas' differing approaches to social media authentication, this article will demonstrate that Texas' permits unreliable evidence into the record, violating the defendant's due process rights. While demonstrating the low standard of Texas', this note recommends Texas courts apply the Maryland approach, with some changes, in order to embrace the ever-growing dangers of the internet.

Section I of this article discusses social media and explains the dangers of allowing social media evidence into court. With those social media dangers in mind, section II explains and differentiates the Maryland and Texas approaches in authenticating proffered social media evidence. Section III explains the Fifth and Fourteenth Amendment standard of Due Process and takes the position that, although neither of the discussed approaches is perfect, the Texas approach is particularly troublesome as it violates due process. Finally, section IV discusses the changes needed to the Texas approach in order to comport with due process and still allow for authentic evidence to enter into the record through the infamous Manti Te'o catfishing situation.

⁵ *Evidence*, JRANK ARTICLES, <https://law.jrank.org/pages/6615/Evidence-Authentication-Identification.html> (last visited Nov. 6, 2021).

⁶ See FED. R. EVID. 901(b)(1) ("Testimony that an item is what it is claimed to be.").

⁷ Paul W. Grimm et al., *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433, 444 (2013).

I. THE POPULARITY AND RISK OF SOCIAL MEDIA EVIDENCE

Social media has increased in popularity over the last decade and had numerous applications from blogs to content communities, to virtual worlds.⁸ Social media is defined as any form of electronic communication “which users create online communities to share information, ideas, personal messages, and other content.”⁹

As of July 2020, more than 3.96 billion people use social media, which is over half of the world’s population.¹⁰ With the rise in popularity of social media, a rise in hacking has followed suit.¹¹ Most recently, in July of 2020, politicians and high profile celebrities—such as President Joe Biden, Elon Musk, and Kanye West—and companies—such as Apple and Uber— were part of a bitcoin scam in which hackers were able to get through Twitter’s security and post on the parties’ respective accounts.¹² While it is dangerous that our nation’s leaders and high-profile characters have been hacked, these individuals have the means to compile evidence to prove a hack occurred. But what about those who do not have the means to hire experts to prove the evidence (i.e., the postings on their accounts) is not what it purports to be due to a hack?¹³ As social media authentication depends on the premise that the profile or posting was created by its purported owner, a question should always arise regarding whether such profile or posting is due to a hacker or other unauthorized user of the social media account.¹⁴ How does one prove such unauthorized posting? Will it always be a he-said-she-said situation?

A. Social Media is Sometimes What it Purports to Be

In 1999, before the surge of social media use, courts were already suspicious

⁸ *Id.* at 434.

⁹ *Social Media*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/social%20media> (last visited Nov. 12, 2021).

¹⁰ Simon Kemp, *Digital 2020: July Global Statshot*, DATAREPORTAL (July 21, 2020), <https://datareportal.com/reports/digital-2020-july-global-statshot>.

¹¹ *How Often Are Social Media Accounts Hacked?*, ZEROFOX (Jan. 22, 2021), <https://www.zerofox.com/blog/often-social-media-accounts-hacked/> [hereinafter ZEROFOX].

¹² Aaron Holmes, et al., *Hackers Took Over Dozens of High-profile Twitter Accounts Including Those of Barack Obama, Joe Biden, Elon Musk, Kim Kardashian, and Apple and Used Them to Post Bitcoin Scam Links*, BUS. INSIDER (July 15, 2020), <https://www.businessinsider.com.au/hackers-bitcoin-crypto-cashapp-gates-ripple-coindesk-twitter-scam-links-2020-7?r=US&IR=T>.

¹³ Matthew Menendez, et al., *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CENT. FOR JUST. (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>.

¹⁴ *Sublet v. State*, 113 A.3d 695, 697 (Md. 2015) (consolidating three cases regarding different social media authentication issues).

of information found on the internet, famously stating “[a]nyone can put anything on the Internet. No web-site is monitored for accuracy.”¹⁵ This same quote is the basis of the decision in a 2002 case, *Moroccanoil, Inc. v. Marc Anthony Cosmetics, Inc.*, where the defendant proffered evidence of the plaintiff’s Facebook page, attempting to show that Facebook users interchangeably used the terms “Moroccanoil” and “Moroccan Oil” to refer to both the defendant’s argan oil and plaintiff’s trademarked product.¹⁶ The United States District Court for the Central District of California found that the evidence was not properly authenticated, noting Marc Anthony Cosmetics could not authenticate the posting since authentication focuses on truth, and the truth of commenters statements regarding the interchangeability of the two words could not be ascertained.¹⁷

While in 2020, social media is an everyday or, for some, every hour occurrence, courts remain focused on the importance of proving authenticity and relevancy.¹⁸ In *State v. Sample*, the Maryland Court of Appeals found there was sufficient circumstantial evidence to show the defendant unfriended his alleged accomplice on social media to hide their association.¹⁹ In allowing this social media evidence into the record, the court determined a reasonable juror could find it more likely than not the “SoLo Haze” Facebook profile belonged to the defendant and that the “claude.mayo.5” Facebook profile belonged to his alleged accomplice.²⁰ The Maryland Court of Appeals, however, only determined there was enough circumstantial evidence to create “distinctive characteristics” of ownership. The court came to this decision after considering the two email addresses attached to the SoLo Haze Facebook, the friends list of the profile that matched those on the defendant’s witness list, and the Facebook “about me” section, which mirrored the defendant’s current city, high school, and university.²¹ While the Appeals Court determined ownership, the court did not

¹⁵ *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774–75 (S.D. Tex. 1999).

¹⁶ *Moroccanoil, Inc. v. Marc Anthony Cosmetics, Inc.*, 57 F. Supp. 3d 1203, 1213 (C.D. Cal. 2014); *id.* at 1213 n.5.

¹⁷ *Moroccanoil, Inc.*, 57 F. Supp. 3d at 1213 n.5. The comments were entered pursuant to a hearsay exception because Marc Anthony Cosmetics wanted to submit the Facebook to show how Moroccanoil customers use the term Moroccanoil, rather than use the evidence as truthful statements. As the truth of the statement could not be ascertained, the comments are not considered authenticated, but were still entered into the record. *Id.*; *see* FED. R. EVID. 801(c)(2).

¹⁸ *See* *People v. Price*, 29 N.E.3d 1005, 1011 (N.Y. 2017) (holding the government failed to establish that the website, which included a photo of the defendant holding a firearm and money, belonged to, and was controlled by, defendant).

¹⁹ *State v. Sample*, 228 A.3d 171, 194 (Md. 2020).

²⁰ *Id.*

²¹ *Id.* at 198–99.

make any finding regarding the defendant as the person who actually did the unfriending, as this was a question reserved for the jury.²² This highly anticipated 2020 case highlights the Maryland court's role in determining whether the social media profile belongs to the purported author and the jury's role in determining whether the social media evidence is credible.

B. Catfishing and Hacking: Dangers to Society and Authentication

In 2014, 83.09 million accounts on Facebook were deemed fake.²³ This phenomenon has been coined “catfishing” by one of the practice's most outspoken victims, Nev Shuman – connecting his victimhood to cod caught by fishermen.²⁴ Cod fishermen, attempting to produce better quality fish, put a catfish, cod's natural predator, in the tank during travel with the cod.²⁵ This stimulation causes the codfish to continually swim in the tank, maintaining the fish's taste and texture during travel.²⁶ In the online world, the term “catfish” is used to describe “a person who sets up a false personal profile on a social networking site for fraudulent or deceptive purposes.”²⁷ Basically, a catfish stimulates their victim.²⁸ Catfishing has been proven dangerous — leading some to give money to fake online friends, landing others in jail, and creating a lot of emotional distress for those that believed to have found love online, only to find out their online lover lied about their identity, gender, and more.²⁹

The idea of catfishing is relatively new, taking the world by storm after

²² *Id.* at 199 (finding that the preponderance of the evidence makes it likely that a reasonable juror will find it likely that that the social media evidence is what it purports it to be).

²³ Lauren Reichart et al., *Follow Me, What's the Harm? Considerations of Catfishing and Utilizing Fake Online Persona on Social Media*, 27 J. LEGAL ASPECTS OF SPORT 32, 33 (2017).

²⁴ Anna Meerts, *How Did Catfishing Come into Our Society?*, DIGGIT MAG. (May 12, 2018), <https://www.diggitmagazine.com/articles/catfishing>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Catfish*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/catfish> (last visited Nov. 6, 2021).

²⁸ Meerts, *supra* note 24.

²⁹ Alex J. Coyne, *How to Identify a Catfish (and Protect Your Money)*, THE DOLLAR STRETCHER, <https://www.thedollarstretcher.com/money-problems/how-to-identify-a-catfish/> (last updated Aug. 2021); Andrew Paparella, et al., *How NBA Star, Aspiring Model Became Victims of a Massive Catfishing Scheme Out of Canada*, ABC NEWS (Apr. 13, 2017), <https://abcnews.go.com/Technology/nba-star-aspiring-model-victims-massive-catfishing-scheme/story?id=46755887>; Reichart Smith et al., *supra* note 23, at 37; see Erica Gonzales, *Catfished! Girls Scam ISIS on Social Media for Travel Money*, YAHOO (July 29, 2015), <https://www.yahoo.com/lifestyle/catfished-girls-scam-isis-on-social-media-for-125374397897.html?guccounter=1> (explaining how three Chechen women catfished ISIS out of money on the proposition they would travel to the Islamic state and join ISIS, but instead, kept the money for leisure).

college football player, Manti Te'o, was catfished in 2012.³⁰ During the 2012 football season, Notre Dame football fans mourned with Te'o as his online girlfriend, Lennay Kekua, died of leukemia.³¹ In reality, however, Kekua was not real; it was a hoax, orchestrated by Ronaiah Tuiasosopo, a 22-year-old male struggling with mental illnesses.³² Although the fictitious Kekua (Tuiasosopo) and Te'o never physically met, they spoke on the phone, with the help of a female friend of Tuiasosopo, or Tuiasosopo himself, using a specific voice tone to pretend to be Kekua.³³ Unfortunately, Te'o is not alone. Shulman's "Catfish: the TV Show" has run for eight seasons and follows Nev and his co-hosts, who help seemingly normal individuals determine whether their online relationships are authentic or fictitious.³⁴

The relatively simple form of fraudulent behavior in catfishing means people do not need to know the complexities of the internet in order to become a security risk—they just need to know how to create a social media account and know enough personal facts about another person to create a rapport.³⁵ Maryland courts have acknowledged such "relative ease" and have created authentication standards to combat the practice.³⁶ However, given the number of fake social media accounts and the dangers and traumas associated with catfishing, catfishing is probably more prevalent than the court anticipated.³⁷

In addition to fraud, hacking has become more prevalent on the modern internet as well.³⁸ Security analysts report that a person can hack a Facebook account just by knowing the Facebook user's phone number.³⁹ Although some

³⁰ Colleen Curry et al., *Notre Dame: Football Star Manti Te'o Was 'Catfished' in Girlfriend Hoax*, ABC NEWS (Jan. 16, 2013), <https://abcnews.go.com/US/notre-dame-football-star-manti-teo-dead-girlfriend/story?id=18232374>.

³¹ John Moriello, *What Happened to the NFL's Manti Te'o, Victim of a Famous Catfishing Hoax?*, SPORTSCASTING (Sept. 6, 2020), <https://www.sportscasting.com/what-happened-to-the-nfls-manti-teo-victim-of-a-famous-catfishing-hoax/>.

³² Paul Myerburg, *Tuiasosopo Tells Dr. Phil Why He 'Killed' Te'o's Fake Girlfriend*, USA TODAY (Jan. 31, 2013), <https://www.usatoday.com/story/sports/ncaaf/2013/01/31/roniah-tuiasosopo-manti-teo-dr-phil-interview/1879643/>.

³³ *Id.*

³⁴ *Catfish: The TV Show*, MTV, <https://www.mtv.com/shows/55vxjl/catfish-the-tv-show> (last visited Nov. 10, 2021).

³⁵ *Understanding Threats in Social Media*, DELOITTE (Sept. 2019), <https://www2.deloitte.com/content/dam/Deloitte/sg/Documents/risk/sea-risk-cyber-101-part9.pdf>.

³⁶ *Griffin v. State*, 19 A.3d 415, 422 (Md. 2011) ("[A]nyone can create fictional personas or gain unauthorized access to another user's profile . . .").

³⁷ *See supra* note 29 and the accompanying text.

³⁸ *It Is Easy to Hack Any Social Media Account by Sending SMS*, VARDINDIA (Jan. 9, 2020), <https://varindia.com/news/it-is-easy-to-hack-any-social-media-account-by-sending-sms>.

³⁹ *Id.*

knowledge of the internet is needed to accomplish this, all the hacker needs to do is “infect[] the mobile phone by sending a simple SMS, to influence the interest, after surveying [the victim’s] profile [o]n social media.”⁴⁰ Once the victim clicks on the offer, the hacker can enter the victim’s social media.⁴¹

In a recent study, twenty-two percent of adults claimed their social media had been hacked.⁴² Hacking should not only be thought of as a man hiding in a basement, hunched over multiple screens using highly technical knowledge, but rather someone, such as a scorned partner or friend, logging into someone else’s social media profile without consent.⁴³ To access another person’s social media page and post something that could be used against them in a court of law, all that is needed is a known password or known facts that could get a person through the security questions, such as a “date of birth, address, hometown, or names of family members and pets.”⁴⁴ This information can be easily found on the Facebook “about” profile, or through posts or quizzes on social media sites that ask questions about someone’s first vehicle, birthdate or school.⁴⁵ These are all commonly asked security questions that could be a gateway to social media hacking.⁴⁶

C. Social Media Evidence Being Deleted

In order to enter evidence, the proponent of the evidence must show that it is relevant and real, specifically that the alleged author is the true author.⁴⁷ An attorney has an ethical duty “to preserve evidence aris[ing from] when the party has notice that the evidence is relevant to litigation or when a party should have

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *What to Do When Your Social Media Account Gets Hacked*, MCAFEE (July 22, 2020), <https://www.mcafee.com/blogs/consumer/consumer-threat-notices/social-media-account-hacked/> [hereinafter MCAFEE].

⁴³ *See* *Campbell v. State*, 382 S.W.3d 545, 548 (Tex. App. 2012) (recognizing that the appeal turned on the authentication of Facebook messages alleged to have been sent to the victim, from a scorned partner, after a domestic violence incident); *see also* Matt Burgess, *How to Know if You’ve Been Hacked, and What to Do About It*, WIRED (July 19, 2020), <https://www.wired.com/story/how-to-know-if-youve-been-hacked-and-what-to-do-about-it/>.

⁴⁴ MCAFEE, *supra* note 42.

⁴⁵ Carson Burns, *Beware of Facebook Posts that Ask You to Share Personal Information Like Your First Car or Hometown*, WBIR (Apr. 15, 2020), <https://www.wbir.com/article/news/crime/beware-of-facebook-posts-that-ask-you-to-share-personal-information-like-your-first-car-or-hometown/51-e3b9319f-0dc8-42a7-af0d-250323720194>.

⁴⁶ *Id.*

⁴⁷ *Griffin v. State*, 19 A.3d 415, 423–24 n.12 (Md. 2011) (discussing the authorship of the MySpace profile); Christine Lozier & Michael Zogby, *Authenticating Social Media Evidence at Trial*, JDSUPRA (Aug. 19, 2019), <https://www.jdsupra.com/legalnews/authenticating-social-media-evidence-at-33843/>.

known that the evidence may be relevant to future litigation.”⁴⁸ Yet, according to ethics guidelines of the New York State Bar, deleting social media postings “does not violate the substantive law regarding the destruction or spoliation of evidence, [since] there is no ethical bar to ‘taking down’ such material from social media publications, or prohibiting a client’s lawyer from advising the client to do so.”⁴⁹ This is because the courts assume that the post is preserved on the person’s computer or on the social networking site’s records.⁵⁰ Although the destruction of evidence is a relevant danger in all trials, this adds another layer to the troubles in the authentication of social media since there is an added step to even finding such evidence.

D. Other Ethical Considerations

The discovery of social media evidence may put the attorney in ethical problems as well. Although such a problem is not relevant to authentication, it is important for the attorney to keep in mind the ethical considerations in discovery when finding social media posts or profiles to enter into evidence. Model Rule of Profession Conduct 4.2 states

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.⁵¹

Thus, attorneys are prohibited from having communications with a person represented by another attorney, even if such connection is on social media.⁵² The Model Rules of Professional Conduct has warned that in some jurisdictions, the use of LinkedIn, a business oriented social networking platform,⁵³ may unknowingly violate Model Rules of Professional Conduct rule 4.2 as the platform sends an automatic notification to the user that their profile was viewed and indicates who viewed the profile.⁵⁴ New York, a jurisdiction which views automatic notification as communication under ABA Professional Conduct rule

⁴⁸ *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)).

⁴⁹ SOCIAL MEDIA ETHICS GUIDELINES OF THE COM. AND FED. LITIG. SECTION No. 5A cmt. (N.Y. State Bar Ass’n 2019).

⁵⁰ *Id.*

⁵¹ MODEL RULES OF PROF’L CONDUCT r. 4.2 (AM. BAR ASS’N 1983).

⁵² Christina M. Jordan, *Discovery of Social Media Evidence in Legal Proceedings*, ABA (Jan. 30, 2020), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2020/january-2020/discovery-social-media-evidence-legal-proceedings/.

⁵³ *LinkedIn*, TECHTERMS, <https://techterms.com/definition/linkedin> (last updated Mar. 3, 2010).

⁵⁴ Jordan, *supra* note 52.

4.2, states it is the attorney's job to research individual social media sites processes in order to "avoid inadvertent communications."⁵⁵ However, the same court allows for lawyers to access public social media pages of other litigants "as long as the lawyer does not 'friend' the other party or direct a third person to do so."⁵⁶

Relatedly, Rule 8.4 prohibits an attorney from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."⁵⁷ This further protects third parties, as it would be a violation of the Model Rules of Professional Conduct for attorneys to essentially catfish, or otherwise deceitfully act in a way so that, other litigants would divulge meaningful information, or private information on social media. However, the term "private" is an important phrase for this scenario because, as seen below, attorneys are able to get almost all posts and messages directly from social media platforms through certified records.⁵⁸ Thus, the question of how an attorney receives information turns to what is considered private; however, this is a question beyond the scope of this article.

II. DIFFERENT APPROACHES TO SOCIAL MEDIA AUTHENTICATION

States generally fall into two camps regarding the requirements for authenticating social media: the Texas Approach and the Maryland Approach.⁵⁹ Texas is considered to be more trusting of social media as it requires a lower burden of proof than Maryland and accepts "distinctive characteristics as a prima facie showing of authenticity."⁶⁰ Meanwhile, Maryland has an inherent distrust of social media, "finding the odds too great" that the author is not who he or she purports to be.⁶¹

It is important to understand how different jurisdictions treat social media authentication because if catfishing or hacking occurs, and the fruits of that malicious behavior is then proposed as evidence in litigation, it is dangerous to the defendant if the evidence is admitted. This is the reason social media

⁵⁵ N.Y. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012) (referring to jury research but is relevant to communications to those represented by an attorney, which in this context, should be understood broadly, and includes not only sending a specific message, but also any notification to the person being researched that they have been the subject of an attorney's research efforts).

⁵⁶ N.Y. Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010).

⁵⁷ MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2020).

⁵⁸ FED. R. EVID. 902(11).

⁵⁹ Wendy Angus-Anderson, *Authenticity and Admissibility of Social Media Website Printouts*, 14 DUKE L. & TECH. REV. 33, 37 (2015).

⁶⁰ Michael Roundy, *On the Fundamentals of Authentication*, ABA (Feb. 24, 2020), <https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/articles/2020/winter2020-on-the-fundamentals-of-authentication/>.

⁶¹ Angus-Anderson, *supra* note 59, at 37.

evidence, or evidence in general, must be authenticated before being used in court.

A. The Texas Approach to Social Media Authentication

According to the Texas Rules of Evidence, “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”⁶² Typically, the court emphasizes Texas Evidence Rule 901(b)(4) regarding distinctive characteristics, in which “[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances” satisfies the requirement of authentication.⁶³ The Texas courts have construed this rule to mean that the proponent must introduce sufficient evidence of authenticity, so that a reasonable jury can conclude the evidence is authentic.⁶⁴ This rule leaves the question of relevancy and verification to the jury, rather than the judge, following both the Texas Rule of Evidence 401 and Federal Rule of Evidence 401 regarding relevant evidence as a question of fact.⁶⁵

This approach to authentication has survived social media and technological growth, despite the rise in hacking and catfishing.⁶⁶ New Jersey, which follows the Texas approach, does not differentiate between tweets and other social media postings, and physical writings.⁶⁷ In fact, the court equates the two.⁶⁸ This lack of modification for social media evidence stems from the idea that under the Federal Rule of Evidence 901, the proponent must produce evidence, regardless

⁶² TEX. R. EVID. 901(a).

⁶³ *Id.* 901(b)(4); *see* *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007) (considering distinctive characteristics to determine authorship); *Tienda v. State*, No. 05-09-00553-CR, 2010 Tex. App. LEXIS 10031, at *12–13 (Tex. App. Dec. 17, 2010) (holding a reasonable jury could find that evidence authentic through distinctive characteristics).

⁶⁴ *Druery*, 225 S.W.3d at 502.

⁶⁵ *Parker v. State*, 85 A.3d 682, 687 (Del. 2014); FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”); TEX. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”)

⁶⁶ *ZEROFOX*, *supra* note 11; *State v. Hannah*, 151 A.3d 99, 105–06 (N.J. Super. Ct. App. Div. 2016).

⁶⁷ *See Hannah*, 151 A.3d at 106 (“The simple fact that a tweet is created on the Internet does not set it apart from other writings.”).

⁶⁸ *See id.* (explaining that the authentication standards are not change whether the proffer evidence is electronic or physical).

of its physical or electronic status, that is what it proports to be.⁶⁹

In *Tienda v. State*, a Texas murder trial, the Appeals Court found that a Myspace profile was properly authenticated under Texas Rule of Evidence 901(a) because the account holder was identified with relevant factors, “taken as a whole with all of the individual, particular details considered in combination,” that show authenticity.⁷⁰ Using distinctive characteristics, the court held a reasonable juror could find that the evidence had been authenticated considering the photos could be associated to the defendant by his unique tattoos, his distinctive eyeglasses and earring, and posts that referenced the victim’s death, funeral, and defendant’s arrest.⁷¹ States that adopt Texas’s approach use similar factors to connect the social media evidence to defendants.

B. The Maryland Approach to Social Media Authentication

States that follow the Maryland approach demonstrate an inherent mistrust of the internet and social media, resulting in a heightened burden of proof for authenticating evidence.⁷² The Maryland Rule of Evidence 5-901 states that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”⁷³ Maryland courts have held that, in order to authenticate social media evidence, “the admitting party should either: (1) ask the purported creator if [he or she] created the profile or the post, (2) search the internet history and hard drive of the purported creator’s computer ‘to determine whether that computer was used to originate the social networking profile and posting in question,’ or (3) ‘obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it.’”⁷⁴

⁶⁹ See *id.* (citing KENNETH BROUN ET AL., MCCORMICK ON EVIDENCE 108 (7d ed. 2013) (“Despite the seeming novelty of social network-generated documents, courts have applied the existing concepts of authentication under Federal Rule 901 to them, including the reply letter doctrine and content known only to the participants.”)); FED. R. EVID. 901(a).

⁷⁰ *Tienda v. State*, No. 05-09-00553-CR, 2010 Tex. App. LEXIS 10031, at *11–12 (Dec. 17, 2010) *aff’d*, 358 S.W.3d 633, 645, 647 (Tex. Crim. App. 2012) (“Because there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be—MySpace pages the contents of which the appellant was responsible for—we affirm the trial judge and the court of appeals which had both concluded the same.”).

⁷¹ *Tienda*, 358 S.W.3d at 647 (noting that in Texas Court of Criminal Appeals, the court looks at Maryland’s *Griffin* case discussed later and disagreed with the Maryland court’s aversion to circumstantial evidence).

⁷² Roundy, *supra* note 60.

⁷³ MD. R. EVID. 5-901.

⁷⁴ *Griffin v. State*, 19 A.3d 415, 428–29 (Md. 2011); see *Sublet v. State*, 113 A.3d 695, 713 (Md. 2015). *But see* *Parker v. State*, 85 A.3d 682, 686–87 (Del. 2014) (rejecting the

Similar to the Texas Rules of Evidence and Federal Rules of Evidence, the Maryland Rules of Evidence allows for “circumstantial evidence” such as “appearance, contents, substance, internal patterns, location, [and] other distinctive characteristics.”⁷⁵ Keeping with Maryland’s system, however, such circumstantial evidence must still comply with the heightened standard regarding who is able to authenticate such evidence.⁷⁶

In the three consolidated cases in *Sublet v. State*, the court identified certain facts to authenticate evidence derived from social networking websites pursuant to the Maryland Rules of Evidence.⁷⁷ In the first consolidated case, *Sublet v. State*, the Maryland Court of Appeals held that the Facebook posts were not properly admitted into evidence due to lack of sufficient authentication, as the Facebook page owner denied making the comments, and the social media pages, in general, were “devoid of unique characteristics.”⁷⁸ The Court found the proposed owner’s denial credible, as witness denial of personal knowledge regarding the proffered item “necessarily undercuts the notion of authenticity.”⁷⁹ Next, in *Harris v. State*, the second consolidated case, the Court held the Twitter direct messages and tweets were properly authenticated considering the circumstantial evidence, such as the alleged author’s Twitter name and photographs, and messages on the purported social media profile included the personal knowledge of the shooting at core in the case.⁸⁰ In the last consolidated case, *Monge-Martinez v. State*, the Appeals Court determined the Facebook messages in question had enough distinctive characteristics considering the “limited number of people knowledgeable of the incident as well as the use of Spanish in each message.”⁸¹ Although this may seem similar to the distinctive characteristic showing in Texas, Maryland established a preponderance of the evidence standard in *Sublet*, which leaves less decision up to a jury as the

Maryland approach and adopting the Texas standard as the Texas standard does not require three ways to authenticate social media evidence).

⁷⁵ MD. R. EVID. 5-901(b)(4); FED. R. EVID. 901(b)(4); TEX. R. EVID. 901(b)(4); *Sublet*, 113 A.3d at 711 (“[A]uthentication of a writing also could be obtained were the contents or subject matter of the writing to ‘contain circumstantial evidence indicating the identity of its author.’”).

⁷⁶ See *Griffin*, 19 A.3d at 424 (“[t]he picture of [the girlfriend], coupled with her birth date and location, were not sufficient ‘distinctive characteristics’ on a MySpace profile to authenticate its printout . . .”).

⁷⁷ *Sublet*, 113 A.3d at 711.

⁷⁸ *Id.* at 719.

⁷⁹ *Id.* at 718–19.

⁸⁰ *Id.* at 719–21.

⁸¹ *Id.* at 722. See FED. R. EVID. 901(b)(4) (“The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.”).

Maryland courts require authentication prior to admitting evidence to a jury.⁸² Consequentially, in Maryland, the judge acts as a gatekeeper in determining whether the preponderance of the evidence indicates “sufficient proof . . . so that a reasonable juror could find in favor of authenticity or identification” before the question is turned over to the jury to find whether the evidence is what it purports to be.⁸³ The Maryland courts have held that the determination of evidence purporting what it claims to be is a question of fact, thus must be left up to the jury.⁸⁴

C. Comparing and Contrasting the Two Approaches

The textual difference between the Maryland and Texas evidence rules are almost nonexistent.⁸⁵ Yet, the two jurisdictions construe the similar language very differently—specifically in terms of what is considered admissible distinctive characteristics in each jurisdiction, and who can testify to such characteristics in the postings and profiles.⁸⁶ Both states agree on a “reasonable juror” test: it is up to a reasonable juror to decide whether the evidence is sufficient and authentic as to allow such evidence to be used in the criminal proceedings.⁸⁷ Yet, the Maryland approach has a heightened burden—preponderance of the evidence. Maryland’s preponderance of the evidence standard coupled with the three authentication methods, are both missing from the Texas approach. This difference shows that comparatively, the Texas

⁸² *Sublet*, 113 A.3d at 715, 722. See Denise A. Blake, *Recent Development Sublet v. State: Authentication of Evidence from Social Networking Websites Requires a Trial Judge to Find Sufficient Proof from which a Reasonable Juror Could Conclude that the Evidence Is What the Proponent Claims it to Be*, 46 U. BALT. L. F. 80, 82 (2015).

⁸³ *Sublet*, 113 A.3d at 715 (quoting *United States v. Vayner*, 769 F.3d 125, 129–130 (2d Cir. 2014)).

⁸⁴ *Id.* at 715.

⁸⁵ Compare MD. R. EVID. 5-901(a) (“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”), with TEX. R. EVID. 901(a) (“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”). For the sake of short examination of the extensive Evidence rules, the comparing of the Texas and Maryland’s general provision should be enough to ascertain the similarities.

⁸⁶ Compare MD. R. EVID. 5-901(a) (“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”), with TEX. R. EVID. 901(a) (“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”).

⁸⁷ *State v. Sample*, 228 A.3d 171, 174 (Md. 2020); *United States v. Vayner*, 769 F.3d 125, 129–30 (2d Cir. 2014) (quoting *United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1999)). See MD. R. EVID. 5-901; TEX. R. EVID. 901.

standard is too low.⁸⁸ As discussed below, however, even if the Maryland approach did not have such heightened burden, the Texas approach would still violate due process.

In *Griffin v. State*, the Maryland Court of Appeals determined that the proffered Myspace profile of the defendant's girlfriend did not have distinctive characteristics that could lead to authentication.⁸⁹ Although printed pages of the "profile in the name of 'Sistasouljah,' described a 23 year-old female from Port Deposit, listing her birthday as '10/02/1983' and containing a photograph of [the] embracing couple," the Myspace page was not admissible.⁹⁰ The Maryland Court of Appeals prohibited the profile from being entered as evidence because the government used a police officer to authenticate the screenshot of the Myspace page.⁹¹ As the police officer was not the purported creator, the internet history/hard drive of the purported author's computer, nor information directly from the social networking site, the police officer is not able to testify to the authenticity of the social media postings according to the Maryland standard.⁹² The case was thus, remanded to comply with Maryland's authentication standard, requiring the evidence be authenticated by either (1) the girlfriend (the purported author); (2) self-authenticating computer history or hard drive records that show the computer of the girlfriend "was used to originate the social networking profile"; or (3) by a representative of MySpace, or self-authenticating business documents from MySpace, that could "link[] the establishment of the profile to the person."⁹³ This three-option approach creates a heightened burden of sufficient proof that protects the defendant from unfair legal action. Furthermore, the preponderance of the evidence standard requires more than a few distinctive characteristics so that the jury can hold the evidence is more likely than not authentic.⁹⁴

Differently, in *Garcia v. State*, the Texas Court of Appeals held there was enough evidence to convict the defendant of murder based on a fake Facebook profile used to lure the victim to a mobile home park where he was attacked and killed.⁹⁵ The mutual ex-girlfriend of both the victim and

⁸⁸ *E.g.* Blake, *supra* note 82, at 82 (demonstrating that the Maryland approach has a higher standard than the Texas approach).

⁸⁹ *Griffin v. State*, 19 A.3d 415, 418 (Md. 2011).

⁹⁰ *Id.*

⁹¹ *Id.* at 423.

⁹² *Id.*

⁹³ *Id.* at 427–28.

⁹⁴ See Kevin M. Clermont, *Trial by Traditional Probability, Relative Plausibility, Or Belief Function?*, 66 CASE W. RES. L. REV. 353, 371 (2015) ("The standard of preponderance of the evidence translates into a more-likely-than-not standard. It is the usual standard in civil litigation, but it appears throughout law.").

⁹⁵ *Garcia v. State*, No. 06-15-00187-CR, 2016 Tex. App. LEXIS 12117, at *1, *24

defendant testified that “Monica,” the victim’s girlfriend who he met on Facebook, was not a real person and the defendant created the profile to foster a relationship with and trick the victim solely through the internet.⁹⁶ The defendant’s sister also testified that the defendant created the fake profile, however, on cross examination, the sister testified that the defendant never admitted he created the “Monica” account.⁹⁷ Additionally, the police detective testified that the defendant knew the “Monica” Facebook name and password.⁹⁸

The defendant testified and denied killing the victim and creating the “Monica” Facebook page.⁹⁹ Rather, he claimed his ex-girlfriend was the one that created and pursued a relationship with the victim online.¹⁰⁰ The court held that a reasonable juror could find that the defendant, regardless of the Facebook evidence, caused the victim’s death, and consequently, admitted the evidence.¹⁰¹

Though the outcome in these cases contrast each other, they are similar in that a police officer, and others, testified to the authentication of the social media page in both the Maryland and Texas cases. In Maryland, this process was considered an error, but it was allowed in Texas, illustrating that the standard in Maryland is significantly higher.¹⁰² While the Texas Appeals Court in *Garcia v. State* had evidence — other than the Facebook page — that proved beyond a reasonable doubt that the defendant murdered the victim, such finding does not excuse the fact the Facebook page should not have been entered into evidence, especially considering the court’s statement: “either [the defendant] or [the ex-girlfriend] created the false Monica Facebook page.”¹⁰³ This would not pass muster in Maryland, considering it does not fulfill the more-likely-than-not requirement rooted in the preponderance of the evidence standard.¹⁰⁴ Additionally, Maryland has held that when a proffered author denies authorship of a posting or profile, it “necessarily undercuts the notion of authenticity.”¹⁰⁵ There is evidence admitted by the Texas Appeals Court, that the purported author of the fraudulent Myspace profile could be a different person; yet the “Monica” profile was still admitted into evidence.¹⁰⁶

(Nov. 10, 2016).

⁹⁶ *Id.* at *7–9.

⁹⁷ *Id.* at *11, *13.

⁹⁸ *Id.* at *16.

⁹⁹ *Id.* at *19.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at *26.

¹⁰² Compare *id.* at *16, with *Griffin v. State*, 19 A.3d 415, 418 (Md. 2011).

¹⁰³ *Garcia*, No. 06-15-00187-CR, 2016 Tex. App. LEXIS 12117, at *24.

¹⁰⁴ Clermont, *supra* note 94, at 372 (explaining the burden of proofs needed for different case types).

¹⁰⁵ *Sublet v. State*, 113 A.3d 695, 718–19 (Md. 2015) (citing *Makowski v. Mayor & Balt.*, 94 A.3d 91, 108 (Md. 2014)).

¹⁰⁶ *Garcia*, No. 06-15-00187-CR, 2016 Tex. App. LEXIS 12117, at *24.

This difference between Maryland's and Texas' standard is illustrated in *Tienda v. State*, where the Texas Court of Criminal Appeals court analyzed Maryland's *Griffin v. State* case.¹⁰⁷ In *Griffin v. State*, the Maryland Court of Appeals focused on the ease of creating a fictitious account.¹⁰⁸ Yet, the Texas Court of Criminal Appeals found that there was enough circumstantial evidence corroborating the Myspace page in *Tienda* to justify the admittance.¹⁰⁹ In arriving at this conclusion, the Texas Criminal Appeals Court used the Maryland Appeals Court's own words:

The potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user leads to our conclusion that a printout of an image from such a site requires a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site in order to reflect that [the defendant's girlfriend] was its creator and the author of [the threatening language posted thereon].¹¹⁰

In comparing the two cases, Texas looks at the evidence of Maryland's *Griffin* to show only a birthday, location, and a photograph as sufficient distinctive characteristics.¹¹¹ However, Texas, in *Tienda*, found a picture of the defendant and posts referencing the victim's death and the defendant's arrest to be more convincing of authentication.¹¹² Viewed in totality, the evidence in the two cases do not seem so different, yet the evidence in the *Tienda* case was considered enough to be presented to the jury.¹¹³ This dichotomy between Texas and Maryland is based on the burden each jurisdiction has in determining whether the proffered evidence is sufficiently supported before it is ultimately a question for the jury.¹¹⁴

¹⁰⁷ *Tienda v. State*, 358 S.W.3d 633, 646 (Tex. Crim. App. 2012) (citing *Griffin v. State*, 19 A.3d 415, 427 (Md. 2011)).

¹⁰⁸ *Id.* at 646 (citing *Griffin v. State*, 19 A.3d 415, 427 (Md. 2011)).

¹⁰⁹ *Id.* at 647.

¹¹⁰ *Id.* at 646 (quoting *Griffin v. State*, 19 A.3d 415, 424 (Md. 2011)).

¹¹¹ *Id.* (citing *Griffin v. State*, 19 A.3d 415, 424 (Md. 2011)).

¹¹² *Tienda v. State*, No. 05-09-00553-CR, 2010 Tex. App. LEXIS 10031, at *11–12 (Dec. 17, 2010).

¹¹³ *See Tienda v. State*, 358 S.W.3d 633, 647 (Tex. Crim. App. 2012) (“[T]here are far more circumstantial indicia of authenticity in this case than in *Griffin*.”).

¹¹⁴ *Id.* (“The ultimate question of authenticity [is submitted] to the jury.”); *Sublet v. State*, 113 A.3d 695, 715 (Md. 2015) (citing *United States v. Vayner*, 769 F.3d 125, 130 (2d Cir. 2014)) (“[T]he jury ultimately is left to make the ‘determination as to whether the evidence is, in fact, what its proponent claims.’”).

III. DUE PROCESS IS VIOLATED

If unauthentic evidence forms basis of a defendant's conviction, the defendant's due process rights have been violated. The Fifth and Fourteenth Amendments of the United States Constitution provide that no one shall be "deprived of life, liberty, or property without due process of law."¹¹⁵ In a criminal proceeding, a defendant can have his or her life and liberty taken away through jail time—that is why the procedure is so important. When a defendant's liberty is at risk, the defendant must be completely heard by the court in order to avoid oppression from the government.¹¹⁶ In order to allow a defendant to be completely heard by the court, the "government must follow fair procedures."¹¹⁷ If the government denies due process, the government's actions are unconstitutional—even if the action is proscribed by law.¹¹⁸

A. Eyewitness Testimony

Eyewitness testimony is a classic example of evidence that includes a lawfully proscribed process, but famously denies many defendants due process.¹¹⁹ In *Stovall v. Denno*, the defendant, a Black man, was identified by the White female victim as the individual who stabbed her in her home.¹²⁰ This identification occurred after the defendant was brought into the victim's hospital room, handcuffed by police officers.¹²¹ The Supreme Court held that the process of identification "was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."¹²² This holding created a connection between unreliable evidence and due process violations by stating "unnecessarily suggestive" evidence is so unfair to a defendant that it denies the defendant their rights to life, liberty, and property.¹²³

¹¹⁵ U.S. CONST. amend. V (referring to the federal court system); *id.* amend. XIV, §1 (referring to the state court system).

¹¹⁶ Matthew R. Schreck, *Preventing "You've Got Mail" From Meaning "You've Been Served": How Service of Process by Email Does Not Meet Constitutional Due Process Requirements*, 38 J. MARSHALL L. REV. 1121, 1121 (2005); *see* *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

¹¹⁷ Peter Strauss, *Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/due_process (last visited Nov. 11, 2020).

¹¹⁸ *Id.*

¹¹⁹ Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 732 (2013).

¹²⁰ *See Stovall v. Denno*, 388 U.S. 293, 295 (1967).

¹²¹ *Id.*

¹²² *Id.* at 302.

¹²³ *Foster v. California*, 394 U.S. 440, 442 (1969) (finding the defendants due process rights were violated as the identification processes made such identification "all but inevitable").

Similarly, in Maryland, the Appeals Court in *Sublet v. State* stated that it is easy for a juror to imply parts of the case just by looking at a particular object.¹²⁴ The court explained “‘It is easy for a jury, when witnesses speak of a horse being stolen from Doe by Roe, to understand, [that] when Doe is proved to have lost the horse, that it still remains to be proved that Roe took it,’” but, by having a witness to the theft bring the horse into the courtroom, it would persuade the jury as “‘it were, a part of the witness’ testimony, [tending] to verify the [missing] remainder” that Roe took the horse.¹²⁵ Reminiscent of the Supreme Court’s discussion of “unnecessarily suggestive” evidence in *Stovall*, the Maryland Court in *Sublet* emphasized the inability of most juries to separate the implied facts from the genuine facts of evidence.¹²⁶

The Supreme Court later determined that unreliable evidence is not bound by the due process clause of the Fourteenth Amendment, but rather through evidentiary rules of the courts.¹²⁷ By backtracking on the due process procedures “[t]he Court made explicit the constitutional insignificance of evidential reliability” and ignored the connection between unreliable evidence and due process violations.¹²⁸ Later in 2012, however, the Supreme Court overruled their previous evidentiary rules determination by holding, in *Perry v. New Hampshire*, that “[t]he Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.”¹²⁹ This rule is consistent with both the current Maryland and Texas approaches, which tasks the juries with “determining the reliability of the evidence presented at trial.”¹³⁰

B. Eyewitness Testimony Standard Applied

Pursuant to the *Perry v. New Hampshire* decision, it is the federal and state governments’ job to protect the defendant from unreliable evidence resulting in the deprivation of liberty.¹³¹ Therefore, it is the job of the states, including those

¹²⁴ *Sublet v. State*, 113 A.3d 695, 709 (Md. 2015) (quoting 7 Wigmore, Evidence § 2129 (Chadborun Rev. 1978)).

¹²⁵ *Id.*

¹²⁶ *Id.* at 709–10.

¹²⁷ *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

¹²⁸ Findley, *supra* note 119, at 732.

¹²⁹ *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012).

¹³⁰ *Id.*

¹³¹ *Id.* (“[S]tate and federal statutes and rules ordinarily govern the admissibility of evidence . . .”).

following Texas's approach to social media authentication, to protect its citizens from due process violations. At first glance, the Texas approach appears to fit within the Supreme Court's holding in *Perry*. However, the ease of catfishing and hacking and the difficulty in determining a whether the profile or post is fictitious has led to the need for a higher standard of authentication. Maryland's gatekeeping approach, which forces judges to determine the preponderance of the evidence before the jury finds true authenticity, creates procedural limits that prevent questionable evidence from entering,¹³² while still "affording the [opponent] means to persuade the jury."¹³³ Theoretically, the evidence is already determined by the judge to be at least 51% authentic, making it less likely that the evidence is not authentic, thus, the opponent is afforded the right to persuade the jury of that 49% possible authenticity is unreliable.¹³⁴

The Maryland approach, however, is not free from criticism. In *State v. Sample*, the Court of Appeals did not determine if it was another person was fraudulently acting on the defendant's Facebook when the accomplice was removed from the defendant's friends list.¹³⁵ The Court held that the requirement "to somehow conclusively disprove that someone other than" the defendant unfriended the victim was too high a standard for authentication purposes.¹³⁶ In desiring to keep the social media authentication high, so as not to allow for fictitious accounts in evidence, the Appeals Court upheld the reasonable juror test.¹³⁷ In this case, it allowed the jury to determine whether it was more likely than not that the defendant unfriended the accomplice.¹³⁸ The Appeals Court in *State v. Sample* determined it was too high of a standard to make the defendant prove fraudulent actions existed on his social media, allowing such social media evidence in the record, however the jury was still able to conclude that the Facebook belonged to the defendant and the circumstances led to the unfriending by the defendant.¹³⁹

¹³² *Sublet v. State*, 113 A.3d 695, 708 (Md. 2015).

¹³³ *Perry*, 565 U.S. at 237.

¹³⁴ *Evidentiary Standards and Burdens of Proof*, JUSTIA (May 2019), <https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/evidentiary-standards-and-burdens-of-proof> [hereinafter JUSTIA] ("Some scholars define the preponderance of the evidence standard as requiring a finding that at least 51 percent of the evidence favors the [proponent's] outcome.").

¹³⁵ *State v. Sample*, 228 A.3d 171, 199 (Md. 2020).

¹³⁶ *Id.*

¹³⁷ *Id.* See *Griffin v. State*, 19 A.3d 415, 421 (Md. 2011) ("The concern arises because anyone can create fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password . . .").

¹³⁸ *Sample*, 228 A.3d at 199.

¹³⁹ *Id.*

C. The Texas Standard is Too Low

The Texas standard for reliability is so low it could easily offend a defendant's due process rights. Maryland's law puts the burden on the proponent to show that the evidence is sufficient to conclude that the social media evidence is authentic, while the Texas law puts the burden on the proponent to show the social media posting *could* be real, then shifts the burden to the opponent to show that the social media postings are falsified—a higher burden than the one on the proponent.¹⁴⁰ Texas does not have the preponderance of the evidence standard, which requires the proponent to prove the authenticity at a theoretical 51% minimum, as seen in Maryland.¹⁴¹ While the Maryland approach also switches the burden to show the social media postings are unauthentic,¹⁴² the proponent of the evidence has a high standard to begin with, which is in place to catch such falsified social media posting and profiles.¹⁴³

The lack of safeguards under Texas law to protect defendants from irrelevant and unauthentic social media creates a backwards view of the United States judicial system. The United States judicial system can be summed up in the presumption in the American justice system that someone is innocent until proven guilty. This standard, first established by *Coffin v. United States* in 1895, forces the government to prove “each essential element of the crime charged” beyond a reasonable doubt.¹⁴⁴ In this rebuttable presumption of innocence, “proof resulting from the evidence” leads to guilt, but only if the evidence proves such guilt.¹⁴⁵

Following that standard, the proponent should have to prove that the evidence was created by the proffered author. Although the evidence rules are nearly identical in Maryland and Texas, the case law in the respective states have made the burdens different in regards to authentication.¹⁴⁶ Maryland does this by the preponderance of the evidence standard, which forces the proponent to bring in evidence that proves that the defendant authored a social media post in order to

¹⁴⁰ *Tienda v. State*, 358 S.W.3d 633, 646–47 (Tex. Crim. App. 2012).

¹⁴¹ *Id.* at 638; see JUSTIA, *supra* note 134.

¹⁴² *Sample*, 228 A.3d at 199 (“[N]ot required to eliminate all possibilities that were inconsistent with authenticity . . .”).

¹⁴³ See *Griffin v. State*, 19 A.3d 415, 422 (Md. 2011).

¹⁴⁴ *Coffin v. United States*, 156 U.S. 432, 453 (1895); *Presumption of Innocence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/presumption_of_innocence (last visited Nov. 9, 2021).

¹⁴⁵ *Coffin*, 156 U.S. at 460 (“For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy.”).

¹⁴⁶ Compare *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012), with *Griffin*, 19 A.3d 415.

pass the gatekeeper—the judge.¹⁴⁷ Meanwhile, Texas forces the opponent to prove he did not author the proposed evidence. This allows unauthentic evidence into court, and act as the basis for the defendant's conviction, which will directly violate the defendant's right to life and liberty.¹⁴⁸ Thus, Texas needs to change and add a higher burden of proof to act as a safeguard against such due process violations.

D. Maryland Must Fix Their Standard As Well

Maryland's third authentication method, which requires records to be obtained by the social media site in order to link the social media user and defendant, is essentially the court calling for metadata—information about data that is invisible to users of the website but gives the website owner information about the user of the website.¹⁴⁹ With metadata, websites have access to information such as where a photo was uploaded, who has shared it, or who even looked at it.¹⁵⁰ Essentially, the metadata is a social media user's digital footprint.¹⁵¹

If anything, Maryland may be too strict and unrealistic, excluding legitimate evidence that does not comply with the state's testimonial requirements. Many large social media companies such as Facebook rarely, if ever, send their employees testify regarding this information.¹⁵² In fact, the author has been unable to find a Maryland criminal case in which a Facebook employee testified to the authentication of a Facebook post. However, in *State v. Sample*, the defendant's attorney attempted to call a Facebook employee as a witness, to which the Maryland Appeals Court denied such request for not being related to Facebook authentication since Facebook's business records were already being used and were considered self-authenticated.¹⁵³ According to the Court in *Griffin*, the third method of authentication, which the court explained as

¹⁴⁷ See *Sublet v. State*, 113 A.3d 695, 709 (Md. 2015).

¹⁴⁸ U.S. CONST. amend. V; *id.* amend. XIV, §1.

¹⁴⁹ *Social Media Metadata: Facebook Open Graph and Twitter Cards*, WEBSITE SITE DESIGN INC., <https://www.websightdesign.com/services/internet-marketing/search-engine-optimization/social-media-metadata> (last visited Nov. 9, 2021).

¹⁵⁰ Zak Doffman, *Facebook Embeds 'Hidden Codes' to Track Who Sees and Shares Your Photos*, FORBES (June 14, 2019), <https://www.forbes.com/sites/zakdoeffman/2019/07/14/facebook-is-embedding-hidden-codes-to-track-all-your-uploaded-photos-report/?sh=67b3b4a41592>.

¹⁵¹ *Chapter 3 – Metadata, Tracking, and the User's Experience*, GRANITE STATE COLLEGE, <https://granite.pressbooks.pub/comm601/chapter/metadata-tracking-and-the-users-experience/> (last visited Nov. 9, 2021).

¹⁵² *Information for Law Enforcement Authorities*, FACEBOOK, https://www.facebook.com/safety/groups/law/guidelines/?_rdr (last visited Nov. 9, 2021) [hereinafter FACEBOOK].

¹⁵³ *State v. Sample*, 228 A.3d 171, 176–77 (Md. 2020) (denying the request for being untimely).

“obtain[ing] information directly from the social networking website,” is rooted in the outcome of *People v. Clevestine*.¹⁵⁴ Yet, in the New York Appellate Court, a legal compliance officer from Myspace testified in *People v. Clevestine* to messages between a defendant and victim located on the defendant’s home computer, which was contradictory to the defendant’s theory of hacking.¹⁵⁵

According to Facebook, “records are self-authenticating pursuant to law and should not require the testimony of a records custodian.”¹⁵⁶ This is in line with Federal Rules of Evidence 902(11) as records compiled as a regularly conducted activity, which is similar to business records compiled as a part of regular business activity.¹⁵⁷ While business records and certified domestic records do not require testimony to show admissibility,¹⁵⁸ both Facebook and the Maryland court look past the reason social media authentication should still be required—metadata. Metadata would give the court a full picture, and not a repeat of easily ascertainable information found on the social media profile.¹⁵⁹ The Facebook business records for the SoLaze profile, in *State v. Sample*, admitted to the Maryland Trial Court as exhibit A reads:

Target 100009404335910

Generated 2015-12-17 19:40:24 UTC

Date Range 2015-12-01 00:00:00 UTC to 2015-12-17 23:59:59 UTC

* * *

Name First SoLo

Middle

Last Haze

Registered 100009404335910@facebook.com

E[-]mail mrsample2015@gmail.com

Addresses

Vanity Name

¹⁵⁴ Griffin v. State, 19 A.3d 415, 428 (Md. 2011).

¹⁵⁵ People v. Clevestine, 891 N.Y.S.2d 511, 514 (N.Y. App. Div. 2009).

¹⁵⁶ FACEBOOK, *supra* note 152. See FED. R. EVID. 902(11) (“The original or a copy of a domestic record . . . as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court.”).

¹⁵⁷ See FED. R. EVID. 902(11) (“The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court.”).

¹⁵⁸ MD. R. EVID. 5-902(b)(1) (“Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity”); FED. R. EVID. 902(11).

¹⁵⁹ *What is Metadata Tagging?* MERLINONE, <https://merlinone.com/what-is-metadata-tagging/> (last visited Nov. 9, 2021).

* * *

Current City Baltimore, Maryland (112438218775062)

Connections Zodiac Signs (1616634441885213)

Edmondson-Westsid High School (230382833645773)

Towson University (33627530544)

Removed User Claude Mayo (100009340905913)

Friends

Time 2015-12-09 02:36:22 UTC

Removed By 100009404335910¹⁶⁰

This information is telling, as it explains time of the unfriending and the connection between the two profiles; however, it is no better than printing out a Facebook profile or the “about me” section. For this reason, the true downfall in the use of Maryland’s social media rule is the third method of authenticity, which allows for the evidence to be authenticated if it is “obtain[ed] information directly from the social networking website.”¹⁶¹ Thus, Maryland courts construe evidence taken directly from the social networking site, such as Facebook records, as self-authenticating and not requiring testimony.¹⁶² In reality, if Maryland truly wanted to protect defendants from possible due process violations and follow the *Clevenstine* decision, the social media records should not be self-authenticated, or at the very least, should allow the defendant to agree to the self-authentication and waive the ability to bring a record’s custodian in to authenticate the evidence.

IV. CHANGES NEEDED

Due process is the reason the justice system has evidence reliability standards, whether it is for eyewitness testimony, social media authentication, or physical evidence—the evidence must be what it purports to be.¹⁶³ When it comes to technology, pretending to be the defendant is easy—one can hack into another’s social media just by guessing a password or security question, one can hack into a server, or one can catfish and pretend to be someone else. However, it is not as easy to rebut.¹⁶⁴

According to the Federal Rules of Evidence, evidence is considered relevant

¹⁶⁰ State v. Sample, 228 A.3d 171, 177–78 (Md. 2020).

¹⁶¹ Griffin v. State, 19 A.3d 415, 428 (Md. 2011).

¹⁶² FACEBOOK, *supra* note 152; MD. R. EVID. 5-902 (“A copy of an official record or report or entry therein, . . . , including data compilations, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with this Rule or complying with any applicable statute or these rules.”).

¹⁶³ See FED. R. EVID. 901(b)(1) (“Testimony that an item is what it is claimed to be.”).

¹⁶⁴ Burgess, *supra* note 43 (“Discovering if you have been hacked can be a rather complicated task.”).

if it has “any tendency to make a fact more or less probable than it would be without the evidence.”¹⁶⁵ This is thought to be the first step of authentication—something that is needed before even determining whether the proffered evidence is real and authentic.¹⁶⁶ This notion of making “a fact more or less probable” is what turns this question of genuine social media evidence into a potential due process violation. If the proffered social media evidence is what makes the defendant’s charge more probable, and such proffered evidence is not authentic, yet admitted, the defendant’s Fifth and Fourteenth Amendment rights have been violated.¹⁶⁷ Thus, the process that is needed in the authentication of social media in the court system must filter out unreliable and false postings and profiles, while still allowing truly authentic evidence to be admitted.

The Federal Rules of Evidence state that “[t]he court must decide any preliminary question about whether . . . evidence is admissible.”¹⁶⁸ In determining whether the evidence is admissible, evidence can be introduced to support a finding that the relevant facts exist.¹⁶⁹ It is up to the jury to weigh that evidence and determine its credibility.¹⁷⁰ Thus, if any of the sediments of unauthentic social media are not filtered by Maryland’s preponderance of the evidence standard, it is up to the jury to determine if the social media post or profile is credible and to determine what weight to give it in the consideration of conviction.¹⁷¹

A. Texas Should Adopt the Maryland Approach

In Maryland, the preponderance of the evidence standard acts as a filter that is supposed to remove any unreliable and false social media postings and profiles. Before the case goes to the decider of whether the defendants’ right to life and liberty are taken away through jailtime, the jury, the judge must determine there is sufficient proof for a rational jury to conclude that the social media post or profile is what it purported to be.¹⁷² The judge essentially acts as a gatekeeper against unreliable evidence. This gatekeeper phenomenon used in Maryland most likely stems from the perception of juries having the tendency to

¹⁶⁵ FED. R. EVID. 401(a).

¹⁶⁶ See Angus-Anderson, *supra* note 59, at 35.

¹⁶⁷ See U.S. CONST. amend. V; *id.* amend. XIV, §1.

¹⁶⁸ FED. R. EVID. 104(a).

¹⁶⁹ *Id.* 104(b).

¹⁷⁰ *Id.* 104(e).

¹⁷¹ See FED. R. EVID. 104(b).

¹⁷² *Washington v. State*, 961 A.2d 1110, 1116 (Md. 2008) (quoting 3 Wigmore on Evidence § 790 at 219-220 (Chadbourn rev., Little, Brown & Co. 1970)) (explaining that evidence needs “adequate foundation” for authentication purposes).

assume facts about the case.¹⁷³ If a piece of evidence has sufficient proof to be authentic, the next filter is weight and credibility as determined by the jury.¹⁷⁴

In Maryland, if any unreliable evidence is missed by the judge during trial, a reasonable jury is able to pick out unauthentic evidence by affording it less weight.¹⁷⁵ In Texas, there is no initial filter— “the ultimate question of authenticity [is submitted] to the jury.”¹⁷⁶ The entire determination of authenticity falls on a reasonable jury to conclude whether the evidence is sufficient and genuine, which may, in turn, cloud the jury’s perception of its credibility.¹⁷⁷ The jury, as ultimate determiner of authenticity may also violate Texas and Federal Rule of Evidence 104(b) considering that the court is tasked with the question of admissibility and admissibility rests of relevancy and authentication.¹⁷⁸ Thus, if the jury is to determine authentication of proffered social media evidence, then the Texas court is literally entering every piece of proffered evidence through Rule 104(b), allowing evidence to be admitted “on the condition that the proof be introduced later.”¹⁷⁹ With such authenticity standard relying on Rule 104(b), Texas requires almost no standard for authentication, but a high standard to prove unauthenticity.

However, in *State v. Sample*, the Maryland court did not conclude the defendant was the one that actually did the unfriending, as it is the jury’s decision to determine whether the defendant actually unfriended their alleged accomplice.¹⁸⁰ Applying Maryland Evidence Rule 104(b), Maryland courts have determined that the ultimate question for authenticity is whether a jury could find the conditional fact by a preponderance of the evidence.¹⁸¹ Here, the Maryland Appeals Court determined that by the preponderance of the evidence, there was “sufficient evidence for a reasonable juror to find that it is more likely than not that the social media evidence is what the proponent of the evidence

¹⁷³ *Sublet v. State*, 113 A.3d 695, 709 (Md. 2015).

¹⁷⁴ FED. R. EVID. 104(e) (“This rule does not limit a party’s right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.”).

¹⁷⁵ *See* MD. R. EVID. 5-104 (“This rule does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.”).

¹⁷⁶ *Tienda v. State*, 358 S.W.3d 633, 647 (Tex. Crim. App. 2012).

¹⁷⁷ *Id.* at 634 (“[T]he trial court itself need not be persuaded that the proffered evidence is authentic.”).

¹⁷⁸ FED. R. EVID. 104(b); TEX. R. EVID. 104(b) (“When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.”).

¹⁷⁹ TEX. R. EVID. 104(b).

¹⁸⁰ *State v. Sample*, 228 A.3d 171, 198 (Md. 2020).

¹⁸¹ *Id.* at 194; MD. R. EVID. 5-104(b) (“When the relevance of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding by the trier of fact that the condition has been fulfilled.”).

purports it to be,” ultimately finding the evidence authentic.¹⁸² Thus, it was not up for the Maryland jury to determine the authenticity, but rather the credibility of the evidence.¹⁸³

Although a judge in Texas, such as in Maryland, does have to find evidence is able to go onto the jury, the standard for Texas judge’s determination is lower than Maryland’s standard. In Texas the “gatekeeping function” as determined by the seminal case *Tienda v. State* is “whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic.”¹⁸⁴ Thus, a proponent just needs to show that the proffered evidence could be factual. Texas does not even require that the evidence is likely to be true before going to the jury, as the entire basis for evidence admittance is based in “support . . . that the fact does exist.”¹⁸⁵ Texas is setting a low standard.

Maryland’s preponderance of the evidence standard, which is considered necessary in connection with the reasonable juror test, is not present in the Texas line of cases.¹⁸⁶ This lower standard means authentic evidence can easily be considered unreliable despite the dangers and anonymity of social media.¹⁸⁷

This unreliable standard is evident due to the lack of concern Texas has with regard to social media. In a 2019 Texas appellate case, *Frelix v. State*, the Seventh District Texas Court of Appeals found social media evidence has different challenges as it “is susceptible to fabrication, hacking, and manipulation.”¹⁸⁸ Yet, this stated concern is only remedied through testimony of a personal witness, circumstantial evidence, or distinctive characteristics.¹⁸⁹ An authentication process is supposed to protect against the possible “fabrication, hacking, and manipulation”¹⁹⁰ in social media, considering that many times, catfishers and hackers will try to make the post or profile realistic so to be believable.¹⁹¹ Yet, the Texas courts find such plausibility of a believable

¹⁸² *Sample*, 228 A.3d at 195.

¹⁸³ *Id.* at 184; *see* MD. R. EVID. 5-104.

¹⁸⁴ *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012).

¹⁸⁵ TEX. R. EVID. 104(b).

¹⁸⁶ *See generally Tienda*, 358 S.W.3d 633; *Dering v. State*, 465 S.W.3d 668 (Tex. App. 2015); *Garcia v. State*, No. 06-15-00187-CR, 2016 Tex. App. LEXIS 12117 (Nov. 10, 2016).

¹⁸⁷ *United States v. Vayner*, 769 F.3d 125, 130 (2d Cir. 2014).

¹⁸⁸ *Frelix v. State*, No. 07-18-00290-CR, 2019 Tex. App. LEXIS 8322, at *8 (Sep. 13, 2019).

¹⁸⁹ *Id.*; *see Tienda*, 358 S.W.3d at 638; TEX. R. EVID. 901(b).

¹⁹⁰ *Frelix*, No. 07-18-00290-CR, 2019 Tex. App. LEXIS 8322, at *8.

¹⁹¹ Dan Brennan, *Signs of Catfishing*, WEBMD (Dec. 3, 2020), <https://www.webmd.com/sex-relationships/signs-catfishing> (explaining that a catfish usually develops social media accounts to make their persona seem more believable) *See* MCAFEE, *supra* note 42 (stating the ease of hacking a social media profile).

hacking or catfishing occurrence to be “some elaborate and ongoing conspiracy.”¹⁹² This statement not only misclassifies how hackers and catfishers work, but is insulting to the intelligence of the almost 18,000 United States citizens that find themselves victims of catfishers each year.¹⁹³

To fix this problem, Texas should adopt the Maryland standard, inclusive of the changes recommended below. This would include adopting the three-authentication methods Maryland sets out specifically. More importantly, however, Texas needs to transform its current view of social media as it understand the legitimate dangers of social media.

B. Maryland Needs to Allow Less Self-Authenticated Evidence

It is likely obvious that the Maryland system is flawed. Although those flaws are not as dangerous as violating a defendant’s constitutional rights, changes are needed to create a more perfect system. In all jurisdictions, Facebook records received directly from the company as business records are self-authenticating and no testimony to their authenticity is needed.¹⁹⁴ This has been interpreted to fit into the third authentication method in Maryland, where information obtained directly from the social media site is properly authenticated.¹⁹⁵ However, as discussed previously, the information in these Facebook records is virtually no different than a simple screenshot, leaving the opponent of the evidence unable to explain the entire picture before its admission.¹⁹⁶ With the evidence already admitted, the jury’s weight and creditably determination becomes the only protection against a due process violation.¹⁹⁷

By leaving the possibly unauthentic evidence of a social media screen shot up to a jury determination, Maryland has created a problem they were trying to avoid—the jury making a prejudiced determination of the evidence.¹⁹⁸ This is the same unnecessarily suggestive problem seen in eye witness testimony that the Supreme Court deemed unconstitutional.¹⁹⁹ To remedy this problem, a simple change is needed: treating the Facebook business record the same as a screenshot.²⁰⁰ In using Facebook records as screenshots, the records would fall

¹⁹² *Tienda*, 358 S.W.3d at 645.

¹⁹³ *Cyber Actors Use Online Dating Sites to Conduct Confidence/Romance Fraud and Recruit Money Mules*, FED. BUREAU OF INVESTIGATION (Aug. 5, 2019), <https://www.ic3.gov/Media/Y2019/PSA190805/>.

¹⁹⁴ FACEBOOK, *supra* note 152.

¹⁹⁵ *Griffin v. State*, 19 A.3d 415, 428 (Md. 2011).

¹⁹⁶ *See* FACEBOOK, *supra* note 152.

¹⁹⁷ *See* MD. R. EVID. 5-104(b) (“This rule does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.”).

¹⁹⁸ *Sublet v. State*, 113 A.3d 695, 709 (Md. 2015).

¹⁹⁹ *See Stovall v. Denno*, 388 U.S. 293, 302 (1967).

²⁰⁰ *But see* MD. R. EVID. 5-902(b)(1) (“Testimony of authenticity as a condition

into an illustrations identification category. To authenticate illustrations such as screenshots, Maryland Rules of Evidence require “[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be.”²⁰¹ This would mean that the witness with knowledge of the information obtained by the social media network would be a person employed by the social media network or the purported author. This is in line with *Griffin*’s holding, “in which a printout of an image from such a site requires a greater degree of authentication than merely identifying” distinctive characteristics or just entering the records into evidence.²⁰² This is directly relevant to the purpose of authentication of social media, which is to protect from “potential [] abuse and manipulation of a social networking site by someone other than its purported creator and/or user.”²⁰³ This would not require Maryland to change the third authentication method, but rather would require it to revert back to the original *Griffin* interpretation.²⁰⁴

As mentioned above, the third method of authentication is rooted in the New York’s *Clevenstine* opinion.²⁰⁵ If the Maryland courts were truly trying to follow the *Clevenstine* precedent, courts would not allow evidence obtained directly from the social media network, such as Facebook records, to be self-authenticating. The whole purpose of the Court’s holding in *Clevenstine* is for the employee of the social media network to be able to give “ample authentication for admission of [] evidence.”²⁰⁶ Thus, in order for a jury to hear the defendant’s whole story regarding the proffered social media evidence, testimony must be heard regarding the authenticity of the evidence.²⁰⁷ Self-authenticating social media evidence is beyond the scope of the *Clevenstine* holding and is likely not considered a correct interpretation of *Griffin*’s third method of authentication.²⁰⁸ The correct interpretation should be the foregoing interpretation: a records custodian to testify at the behest of the opponent.

C. Hypothetical: Tuiasosopo v. Texas and Maryland

Taking this process out of the court and reality, and into to a theoretical case study, a reasonable jury could find many catfish situations are not hoaxes, and

precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity”).

²⁰¹ *Id.* 5-901(b)(1).

²⁰² *Griffin v. State*, 19 A.3d 415, 424 (Md. 2011).

²⁰³ *Id.*

²⁰⁴ *See id.* at 428.

²⁰⁵ *Id.* (“This method was apparently successfully employed to authenticate a MySpace site in *People v. Clevenstine*.”).

²⁰⁶ *People v. Clevenstine*, 891 N.Y.S.2d 511, 514 (N.Y. App. Div. 2009).

²⁰⁷ *See Griffin*, 19 A.3d at 428; *Clevenstine*, 891 N.Y.S.2d at 514.

²⁰⁸ *See Griffin*, 19 A.3d at 428; *Clevenstine*, 891 N.Y.S.2d at 514.

the situation of an online friend or partner is authentic.²⁰⁹ Taking Manti Te'o as an example—most of America was shocked to find out that Te'o's dead girlfriend did not exist.²¹⁰ But, even those closest to Te'o found it reasonable to believe “Kekua” was real.²¹¹

Eventually Ronaiah Tuiasosopo admitted he tricked Te'o, but only after the scandal broke and someone admitted to helping Tuiasosopo by pretending to be a female voice.²¹² After Tuiasosopo's name became public, people started connecting the dots in a similar way to the court's use of distinctive characteristics.²¹³ But even before his name was public, people suspected Tuiasosopo of being behind the Kekua profile, shown by a man tweeting: “my fam & I have an idea who the guy is behind the [Kekua] profile & [he's] up there leading a worship band at his dad's church! SMFH.”²¹⁴ First, the pictures on the Kekua Facebook page came from a woman who was Tuiasosopo's high school classmate.²¹⁵ Next, “Kekua” told Te'o she was in a car accident and within the same timeline as Tuiasosopo's car accident.²¹⁶ Lastly, Tuiasosopo went to a Notre Dame football game after “Kekua's death,” at a time in which Manti Te'o and Norte Dame fans were mourning the death of “Kekua.”²¹⁷

Removing Tuiasosopo's admission of the hoax from consideration, if

²⁰⁹ Arguably a juror could be anyone as jurors are citizens. *Jury Of One's Peers*, LEGAL INFO. INST. (July 2020), https://www.law.cornell.edu/wex/jury_of_one%27s_peers.

²¹⁰ *Notre Dame Presents Believable Explanation for Manti Te'o Girlfriend Hoax*, YAHOO! (Jan. 16, 2013), <https://sports.yahoo.com/news/ncaaf—manti-teo-girlfriend-hoax-notre-dame-jack-swarbrick-sincere-045713273.html>.

²¹¹ Alexander Abad-Santos, *Why the Manti Te'o Defense Still Doesn't Add Up*, ATLANTIC (Jan. 17, 2013), <https://www.theatlantic.com/national/archive/2013/01/why-manti-teo-defense-still-doesnt-add/319345/> (“There was never any indication there was anything fishy about what they said.”).

²¹² Alexander Abad-Santos, *Ronaiah Tuiasosopo: The Mastermind of the Manti Te'o Hoax – and Much More*, ATLANTIC (Jan. 18, 2013), <https://www.theatlantic.com/national/archive/2013/01/ronaiah-tuiasosopo-manti-teo-hoax/319304/>.

²¹³ *See id.*

²¹⁴ *Id.* One reason it is possible that people recognized Tuiasosopo as the catfisher before he came forward may be due to his blurred lines between the fake profile and Tuiasosopo's reality. This is beyond the scope of this article, but may be relevant in understanding the mind of a catfisher or hacker. Melissa Hogenboom, *The Devious Art of Lying by Telling the Truth*, BBC (Nov. 15, 2017), <https://www.bbc.com/future/article/20171114-the-disturbing-art-of-lying-by-telling-the-truth>. (“Misleading by ‘telling the truth’ is so pervasive in daily life that a new term has recently been employed by psychologists to describe it: paltering.”).

²¹⁵ Abad-Santos, *supra* note 211.

²¹⁶ *Id.* This lie by Ronaiah Tuiasosopo has some element of truth, which made it so those that new Tuiasosopo could connect him to the catfish profile of Kekua. *See* Hogenboom, *supra* note 214 (“Lying can and does clearly serve a devious social purpose. It can help someone paint a better picture than the truth.”).

²¹⁷ *Manti Te'o Girlfriend Hoax All Scams Lead to Ronaiah Tuiasosopo*, TMZ (Jan. 17, 2013), <https://www.tMZ.com/2013/01/17/manti-teo-ronaiah-tuiasosopo-scandal-hoax-notre-dame-photo-girlfriend/>.

Tuiasosopo were on trial for criminal allegations, it is more than likely that the Kekua profile would be admissible in Texas, but not in Maryland. For example, in *Garcia v. State*, the Texas Court of Appeals allowed evidence of a fake Facebook profile to be admitted into evidence when a police officer and others testified as to the authentication of the social media page.²¹⁸ Yet, in *Griffin v. State*, the Maryland Court of Appeals held the proposed Myspace profile did not have sufficient distinctive characteristics that could lead to authentication, even though there was a connection between the proffered owner and the profile's birthday and photograph/likeness.²¹⁹ Additionally, a police officer authenticated the profile, but such authentication was deemed an error as a police officer is not one of the admitting parties that Maryland allows for social media authentication.²²⁰

In a Texas court, the man who tweeted his knowledge of Tuiasosopo as the catfisher could authenticate the evidence against Tuiasosopo by testifying about the distinctive characteristics: the use of Tuiasosopo's high school classmate as the Kekua profile photo and both Tuiasosopo and Kekua being in a car accident around similar times.²²¹ In Maryland, however, this evidence would not be sufficient to support a finding that the profile in question is what it purports to be, considering that the author of the tweet would not be able to testify to the authenticity of the catfish profile as the tweet's author does not fit into any of Maryland's authentication methods. Additionally, considering the birthday and photograph in *Griffin* were not sufficient to constitute distinctive characteristics, the distinctive characteristics of the Kekua profile would most likely not be considered sufficient as well.²²²

The entrance of sufficient distinctive characteristics is parallel to Rule 104(b); in both Texas and Maryland, relevance depends on facts, and the sufficient characteristics are the facts that create the relevance and genuineness.²²³ If the threshold of sufficient characteristics, and how those characteristics are testified

²¹⁸ *Garcia v. State*, No. 06-15-00187-CR, 2016 Tex. App. LEXIS 12117, at *16 (Tex. App. Nov. 10, 2016).

²¹⁹ *Griffin v. State*, 19 A.3d 415, 424 (Md. 2011); *but see* *Tienda v. State*, 358 S.W.3d 633, 647 (Tex. Crim. App. 2012) (“[T]here are far more circumstantial indicia of authenticity in this case than in *Griffin*.”).

²²⁰ *Griffin*, 19 A.3d at 427–28 (listing the three authentication opportunities as the purported creator, the purported creator's computer history, or information obtained directly from the social media site).

²²¹ This entire theoretical case study of Tuiasosopo is ignoring evidence entering into the record, or not entering into the record, on hearsay reasons. The readings of this section should focus solely on entering evidence on the basis of authenticity, not on the basis of hearsay. *See Garcia* No. 06-15-00187-CR, 2016 Tex. App. LEXIS 12117, at *13.

²²² *Griffin*, 19 A.3d at 418.

²²³ FED. R. EVID. 104(b); TEX. R. EVID. 104(b); MD. R. EVID. 5-104(b).

thereto, are low, then the entire procedure is tainted.

In Texas, the court claims that the sediments of unauthentic evidence, that enter into the record due to the low sufficient standard for distinctive characteristics, is filtered by opposing counsel to prove that the fact is untrue, then by a reasonable jury.²²⁴ Yet, in Maryland, the court begins sifting unreliable evidence procedurally, through the three-authentication methods, then the court looks at the circumstantial evidence/distinctive characteristics to determine whether the preponderance of the evidence establishes whether a reasonable jury could determine the evidence to be authentic.²²⁵ At this point, the judge turns the determination of authenticity to the jury.²²⁶

Fortunately for Tuiasosopo, he did not receive criminal charges for deceiving Te'o, especially considering he admitted to being the man behind the profile.²²⁷ Regardless of the actual criminal nature of the catfishing situation, this analogy shows the difference between the evidence that could be considered authentic in each jurisdiction.

V. CONCLUSION

No one should feel comfortable about the ease of hacking, catfishing, and the general unknowns of social media. Yet, Texas seems to be. Texas is too trusting of social media, as it allows for anybody to testify to the authenticity of social media with a low burden of proof regarding the relevancy of the post or profile.²²⁸ Meanwhile, Maryland is outspoken on the dangers of social media and requires a heightened standard for both witnesses and proof of authenticity.²²⁹

Neither system is perfect—while Maryland may dismiss many pieces of real social media profiles and postings due to their heightened standard, Texas may allow in too many unauthentic social media posts and profiles. However, being too strict and burdensome in the process of criminal procedures may be required to protect defendants from a potentially oppressive criminal justice system.²³⁰

Maryland attempts to protect their citizens from due process violations through their heightened burdens.²³¹ Texas, however, is playing a dangerous game with their citizens' constitutional rights to freedom of life and liberty by

²²⁴ *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012).

²²⁵ *Griffin*, 19 A.3d at 418.

²²⁶ *Id.* at 430.

²²⁷ *Abad-Santos*, *supra* note 211.

²²⁸ *See generally* Roundy, *supra* note 60.

²²⁹ *Angus-Anderson*, *supra* note 59, at 37.

²³⁰ *Id.* at 43.

²³¹ *Griffin*, 19 A.3d at 424; *Parker v. State*, 85 A.3d 682, 686 (Del. 2014); *see also* *Sublet v. State*, 113 A.3d 695 (Md. 2015).

failing to create processes that are fair or that allow for defendants to be completely heard by the court.²³² If unauthentic evidence is admitted and makes the defendant's charge more probable, the defendant's Fifth and Fourteenth Amendment rights to life and liberty have been violated.²³³ Thus, the process that is needed to authenticate social media in the court system must not allow for unreliable or false social media postings and profiles to be admitted, while admitting truly authentic evidence. The world, and specifically its courts, has a lot to learn about the dangers of social media, but Texas can start changing now by shifting their evidence processes and giving their defendants what is 'due'—protection of their freedoms.²³⁴

²³² Schreck, *supra* note 116, at 1124.

²³³ See U.S. CONST. amend. V; *id.* amend. XIV, §1.

²³⁴ *Id.* amend. V; *id.* amend. XIV, §1; see generally Strauss, *supra* note 117.