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## COMMENT

# DIGITAL LOVE: WHERE DOES THE MARITAL COMMUNICATIONS PRIVILEGE FIT IN THE WORLD OF SOCIAL MEDIA COMMUNICATIONS

NICOLE SCOTT\*

### INTRODUCTION

Alongside social media, marriage has evolved significantly in the last decade. What the institution of marriage once meant has changed.<sup>1</sup> Communication between spouses through social media has become a normal practice in the lives of many American couples.<sup>2</sup> 74% of adults that use the Internet have reported that the Internet, particularly social media, has positive impacts on their marriages.<sup>3</sup> Additionally, 21% of these users have expressed that they feel closer to their spouses be-

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1. *A Historical Look*, MARRIAGE EQUALITY USA, (last visited Mar. 29, 2014) [http://www.marriageequality.org/a\\_historical\\_look](http://www.marriageequality.org/a_historical_look).

2. Amanda Lenhart & Maeve Duggan, *Couples, the Internet, and Social Media*, PEW RESEARCH INTERNET PROJECT (Feb. 11, 2014), <http://www.pewinternet.org/2014/02/11/couples-the-internet-and-social-media/>.

3. *Id.*

cause of the online communications they exchange.<sup>4</sup>

On March 26, 1998, Brian Steven Carihfield was viciously murdered by Roy Benny Helmick and Gypsy Buck Bohon (“Mr. Bohon”) in his West Virginia trailer home.<sup>5</sup> During the trial of Mr. Bohon, the State intended to introduce a verbal conversation that took place between Mr. Bohon and his wife regarding the murder.<sup>6</sup> The Court ruled that the admission of the conversation between Mr. Bohon and his wife was prohibited because it was a privileged communication and protected under the marital privilege statute.<sup>7</sup>

Now imagine this situation with the current channels of communication. Instead of Mr. Bohon having a verbal conversation with his wife about the murder, he and his wife were communicating via social media private messages (e.g. Facebook, MySpace, Twitter, Instagram, etc.). Is this communication still protected under the marital privilege?

It could be argued that the martial privilege should extend to communications between spouses made through social media. The martial privilege has been around for centuries,<sup>8</sup> and when the privilege was created, the prevalent form of communication was verbal. Therefore, the decision the Court reached in *Bohon* is conceivable. However, social media has only been around since the late 70’s and courts have yet to rule on whether the martial privilege applies to social media communication.<sup>9</sup> Due to the recent spike in social media usage, it is foreseeable that courts will one day apply the marital privilege to social media communications, specifically communications via private messaging.<sup>10</sup>

This comment explores the impact of recent developments in communication on the applicability of the marital communications privilege. Particularly, this article explores the role social media communication plays, focusing on whether a change is necessary for the privilege to adhere to the recent changes in marriage and communication. Part II of this article discusses the history of the marital privilege, the evolution of marriage, and the history of social media. Part III proposes the need to extend the marital privilege to include private communications on social media. I will advocate for this by comparing the Privilege to other communication privileges, analyzing the Privilege’s current status

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4. *Id.*

5. *State v. Bohon*, 565 S.E.2d 399, 401 (W. Va. 2002).

6. *Id.*

7. *See id.* at 405 (discussing conversations made in the presence of a third party).

8. *See Trammel v. United States*, 445 U.S. 40, 43-44 (1980) (tracing the marital privilege back to 1628).

9. *See* Brett Borders, *A Brief History of Social Media*, COPY BRIGHTER MARKETING (June 2, 2009), <http://copybrighter.com/history-of-social-media>.

10. *See generally* Anthony Curtis, *The Brief History of Social Media: Where people interact freely, sharing and discussing information about their lives* (2013) (on file with author).

relating to electronic communications (including text messages and emailing), and evaluating the current state of marriage in relation to the Privilege.

## II. BACKGROUND

### THE HISTORY OF THE MARITAL COMMUNICATIONS PRIVILEGE

The marital privilege is an exception to the general admissibility of evidence and is justified based on its role in “fostering the harmony and sanctity of the marriage relationship.”<sup>11</sup> There are two types of marital privilege: 1) the adverse spousal testimonial privilege and 2) the communications privilege.<sup>12</sup> The adverse spousal testimonial privilege is one with ancient roots, stemming back to 1628.<sup>13</sup> The adverse spousal testimonial privilege applies in criminal cases<sup>14</sup> to *any* adverse testimony that one spouse might provide as a witness against the other.<sup>15</sup>

Deriving from what is known as spousal disqualification, the adverse testimonial privilege can be linked to two canons of medieval jurisprudence: the first canon states that the accused is not required to testify on his own behalf because of his own interest in the proceedings; the second canon states that the husband and wife are one, but since women were not recognized legally, the husband accounted for that one.<sup>16</sup> Spousal disqualification remained intact until 1933, at which time the Court, in *Funk v. United States*, abolished it.<sup>17</sup> Although spousal disqualification was abolished, *Funk* created a privilege rather than a complete disqualification by allowing either spouse to prevent the other from giving adverse testimony.<sup>18</sup>

The marital communications privilege applies to any “information privately disclosed between husband and wife in the confidence of the marital relationship.”<sup>19</sup> Applicable to both criminal and civil cases,<sup>20</sup> the marital communications privilege applies only to communications made during the marriage and does not extend to communications made dur-

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11. *Trammel*, 445 U.S. at 44.

12. *United States v. Brock*, 724 F.3d 817, 820 (7th Cir. 2013); *see Trammel* at 40 (discussing the history of the Privilege and how it became a two part privilege).

13. *Trammel* at 43.

14. *Brock*, 724 F.3d at 822 (emphasis added).

15. Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2082 (1995) (citing *United States v. Brown*, 605 F.2d 389,396 (8th Cir.).

16. *Trammel* at 44 (1980).

17. *Id.* (citing *Funk v. United States*, 290 U.S. 371, 373 (1933).

18. *Trammel* at 44 (1980); *See Funk*, 290 U.S. at 373.

19. *Brock* at 820 (citing *Trammel* at 51; *Blau v. United States*, 340 U.S. 332, 333 (1951).

20. *State v. Serrano*, 210 P.3d 892, 897 (Or. 2009).

ing a legal separation or divorce.<sup>21</sup> The purpose of the Privilege is to foster marital relationships by encouraging confidential communication between spouses.<sup>22</sup> The court in *Wolfe v. United States* famously stated that, “[t]he basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails.”<sup>23</sup>

Consequently, there is a presumption that all marital communications are confidential.<sup>24</sup> However, if a communication between husband and wife is made under circumstances clearly not intended to be confidential, it is not privileged.<sup>25</sup> An example of a non-confidential communication is a communication made in the presence of third parties,<sup>26</sup> which illustrates the Third Party Presence Rule.<sup>27</sup> Furthermore, a typical trend in state statutes that recognize the privilege is disallowing the extension to crimes or civil action(s) by one spouse against the other,<sup>28</sup> crimes against a child(ren) of either or both spouse,<sup>29</sup> or to a third party

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21. *See State v. Christian*, 841 A.2d 1158,1172 (Conn. 2004).

22. *Id.* (citing *Curran v. Pasek*, 886 P.2d 272, 276 (Wyo. 1994)).

23. *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

24. *Blau v. United States*, 340 U.S. 332, 333 (1951) (citing *Wolfe*, 291 U.S. at 14).

25. *Wolfe* at 14.

26. *Id.*; *State v. Rollins*, 675 S.E.2d 334, 336 (N.C. 2009).

27. The Third Party Presence Rule is defined as any otherwise valid privileged “marital confidence” that has subsequently been “knowingly and voluntarily disclose[d]” by one of the participants to a third party. *State v. Wilkinson*, 612 A. 2d 926, 931 (1992).

28. Ala. R. Evid. 504(d); Alaska R. Evid. 505(b)(2); A.R.S. § 12-2232 (A)(1) (2010); Ark. R. Evid. 504(d); Colo. Rev. Stat. Ann. § 13-90-107(1)(a)(1)(West 2014); Del. R. Evid. 504(d); D.C. Code Ann. § 14-306; Fla. Stat. Ann. § 90.504 (3) (West 2014); Haw. Rev. Stat. § 626-1 (c)(West); Idaho Code Ann. § 9-203(1) (West); Kan. Stat. Ann. § 60-428 (b)(West 2014); Ky. R. Evid. 504(c); La. Code Evid. Ann. art. 504(c); Me. R. Evid. 504(d); MCLS § 600.2162; Minn. Stat. Ann. § 595.02 (West); Miss. R. Evid. 504(d); Mo. Ann. Stat. § 546.260 (West); Mont. Code Ann. § 26-1-802; Neb. Rev. Stat. § 27-505; Nev. Rev. Stat. Ann. § 49.295 (West); N.J. Stat. Ann. § 2A:84A-22 (West); N.D. R. Evid. 504(d); Ohio Rev. Code Ann. § 2945.42 (West); Okla. Stat. Ann. tit. 12, § 2504 (d)(West); Or. Rev. Stat. Ann. § 40.255 (West)(a)(c); S.C. Code Ann. § 19-11-30; Tenn. Code Ann. § 24-1-201; Tex. Evid. R. 504(a)(4); Utah R. Evid. Rule 502(e); Vt. R. Evid. 504(d); Wash. Rev. Code Ann. § 5.60.060 (West); Wis. Stat. § 905.05(3).

29. Ala. R. Evid. 504(d); Alaska R. Evid. 505(b)(2); Ark. R. Evid. 504(d); Del. R. Evid. 504(d); D.C. Code Ann. § 14-306; Fla. Stat. Ann. § 90.504 (3) (West 2014); Haw. Rev. Stat. § 626-1(c)(West); Idaho Code Ann. § 9-203(1) (West); 735 ILCS 5/8-801(West 2014); Kan. Stat. Ann. § 60-428 (b)(West 2014); Ky. R. Evid. 504(c)-(d); La. Code Evid. Ann. art. 504(c); Me. R. Evid. 504(d); Mass. Gen.Laws Ann. Ch. 233, § 20 (West); MCLS § 600.2162; Minn. Stat. Ann. § 595.02 (West); Miss. R. Evid. 504(d); Mo. Ann. Stat. § 546.260 (West); Mont. Code Ann. § 26-1-802; Neb. Rev. Stat. § 27-505; Nev. Rev. Stat. Ann. § 49.295 (West); N.H. R. Evid. 504; N.D. R. Evid. 504(d); Ohio Rev. Code Ann. § 2945.42 (West); Okla. Stat. Ann. tit. 12, § 2504 (d)(West); Or. Rev. Stat. Ann. § 40.255(a)(West); S.C. Code Ann. § 19-11-30; Tenn. Code Ann. § 24-1-201; Tex. Evid. R. 504(a)(4); Utah R. Evid. Rule 502(e); Vt. R. Evid. 504(d); Wash. Rev. Code Ann. § 5.60.060 (West); Wis. Stat. § 905.05(3).

injured in the commission of a crime against spouse or child.<sup>30</sup> Overall, the Privilege is recognized federally,<sup>31</sup> and is codified in 49 states,<sup>32 33</sup> the District of Columbia,<sup>34</sup> and various U.S. Territories.<sup>35</sup>

#### THE EVOLUTION OF MARRIAGE: ABRIDGED

The institution of marriage has drastically evolved. At one point, women were viewed as their husband's property, and it was not until recently that same-sex marriage was recognized.<sup>36</sup> In the early eighteenth century, marriage was considered a legalized form of prostitution due to the limitations placed on women before it was denounced.<sup>37</sup> William Blackstone, a legal expert, described eighteenth century marriage as the suspension of a woman's legal existence.<sup>38</sup> Blackstone further analyzed a woman's being during marriage as one that was consolidated into that of the husband's, "under whose wing[s], protection or cover

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30. Ala. R. Evid. 504(d); Ark. R. Evid. 504(d); Del. R. Evid. 504(d); Haw. Rev. Stat. § 626-1(c)(West); Kan. Stat. Ann. § 60-428 (b)(West 2014); Ky. R. Evid. 504(c); Me. R. Evid. 504(d); Neb. Rev. Stat. § 27-505; N.D. R. Evid. 504(d); Okla. Stat. Ann. tit. 12, § 2504 (d)(West); Or. Rev. Stat. Ann. § 40.255 (a)(West); Utah R. Evid. Rule 502(e); Vt. R. Evid. 504(d).

31. See Fed. R. Evid. 501; *SEC v. Lavin*, 111 F.3d 921, 933 (D.C. Cir. 1997) (recognizing the existence of both marital privileges).

32. Ala. R. Evid. 504(b); Alaska R. Evid. 505(b); A.R.S. § 12-2232 (2010); Ark. R. Evid. 504(b); Cal. Evid. Code § 917 (West 2014); Colo. Rev. Stat. Ann. § 13-90-107(1)(a)(1)(West 2014); Del. R. Evid. 504; Fla. Stat. Ann. § 90.504 (West 2014); O.C.G.A. § 24-5-501; Haw. Rev. Stat. § 626-1 (West); Idaho Code Ann. § 9-203(1) (West); 735 ILCS 5/8-801(West 2014); Ind. R. Evid. 501; Iowa Code Ann. § 622.9 (West); Kan. Stat. Ann. § 60-428 (West 2014); Ky. R. Evid. 504; La. Code Evid. Ann. art. 504; Me. R. Evid. 504; Md. Code Ann., Cts. & Jud. Proc. § 9-105 (West); Mass. Gen. Laws Ann. Ch. 233, § 20 (West); MCLS § 600.2162; Minn. Stat. Ann. § 595.02 (West); Miss. R. Evid. 504; Mo. Ann. Stat. § 546.260 (West); Mont. Code Ann. § 26-1-802; Neb. Rev. Stat. § 27-505; Nev. Rev. Stat. Ann. § 49.295 (West); N.H. R. Evid. 504; N.J. Stat. Ann. § 2A:84A-22 (West); N.M. Stat. Ann. § 38-6-6 (West); N.Y. C.P.L.R. 4502 (McKinney); N.C. Gen. Stat. Ann. § 8-57 (West); N.D. R. Evid. 504; Ohio Rev. Code Ann. § 2945.42 (West); Okla. Stat. Ann. tit. 12, § 2504 (West); Or. Rev. Stat. Ann. § 40.255 (West); 42 Pa. Cons. Stat. Ann. § 5914 (West); R.I. Gen. Laws § 9-17-13; S.C. Code Ann. § 19-11-30; S.D. Codified Laws § 19-13-13; Tenn. Code Ann. § 24-1-201; Tex. Evid. R. 504; Utah R. Evid. Rule 502; Vt. R. Evid. 504; Va. Code Ann. § 19.2-271.2; Wash. Rev. Code Ann. § 5.60.060 (West); W. Va. Code § 57-3-4; Wis. Stat. § 905.05 (2012); Wyo. Stat. § 1-12-104.

33. Connecticut has not codified the marital communications privilege, but courts recognize the privilege. *State v. Christian*, 841 A.2d 1158, 1173 (Conn. 2004).

34. D.C. Code Ann. § 14-306.

35. 6 G.C.A. § 3102.

36. See *A Historical Look at Marriage*, *supra* note 1.

37. Karen Offen, *A Brief History of Marriage: Marriage Laws and Women's Financial Independence*, *Economica: Women and the Global Economy*, INTERNATIONAL MUSEUM OF WOMEN, <http://exhibitions.globalfundforwomen.org/economica/marriage-and-money/brief-history-marriage> (last visited Apr. 1, 2014).

38. *Id.*

she perform[ed] everything.”<sup>39</sup> During that time, women were not allowed to own property and all of their finances were subject to the control of their husbands.<sup>40</sup> By the nineteenth century, women gained independent rights, separate from their husbands, due to the passage of the Married Women’s Property Acts.<sup>41</sup>

Incidentally, women were not the only group of citizens that have been banned or restricted in marriage.<sup>42</sup> For many years, interracial marriage was not permitted.<sup>43</sup> In 1948, California became the first state to challenge racial discrimination in marriage by declaring the ban on interracial marriage unconstitutional.<sup>44</sup> It took almost 20 years for the United States Supreme Court to follow California’s courageous lead on such a controversial issue; in 1967, the Court declared all anti-interracial marriage statutes unconstitutional.<sup>45</sup>

Currently in the 21<sup>st</sup> century, the Supreme Court has considered the institution of marriage in relation to same-sex couples.<sup>46</sup> The Supreme Court ruled on the constitutionality of the Defense Of Marriage Act (“DOMA”),<sup>47</sup> a federal law that allows states to determine whether or not they will recognize same-sex marriages created in other jurisdictions.<sup>48</sup> One of the major issues was with regard to section 3 of DOMA, which defined “marriage” as “a legal union between one man and one woman” and “spouse” as “a person of the opposite sex who is a husband or a wife.”<sup>49</sup> The Supreme Court ruled that section 3 of DOMA was unconstitutional.<sup>50</sup> Most recently, in June 2015, two years after the decision in *United States v. Windsor*, the Supreme Court held that the Constitution guaranteed the right to same-sex marriage.<sup>51</sup> *Obergefell v.*

39. *Id.*

40. *Id.*

41. *Id.*; see generally *Married Women’s Property Acts*, Encyclopaedia Britannica, <http://www.britannica.com/EBchecked/topic/366305/Married-Womens-Property-Acts> (last visited May 1, 2014)(defining the Married Women Property Acts as a series of statutes that expanded the rights of married women. Starting in 1839, these acts gave married women the ability to act as independent agents in legal situations.)

42. See *A Historical Look at Marriage*, *supra* note 1.

43. *Id.*

44. *Id.*; *Perez v. Lippold*, 198 P.2d 17, 29 (Cal. 1948).

45. *A Historical Look at Marriage*, *supra* note 1; see *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

46. *A Historical Look at Marriage*, *supra* note 1.

47. See generally *United States v. Windsor*, 133 S. Ct. 2675 (2013).

48. Christopher Gacek, *Basic Facts About The Defense of Marriage Act*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/onepagars/basic-facts-about-the-defense-of-marriage-act> (last visited Apr. 2, 2014).

49. *Windsor*, 133 S. Ct. at 2683.

50. *Id.* at 2696; *Frequently Asked Questions: Defense of Marriage Act (DOMA)*, GLAAD, <http://www.glaad.org/marriage/doma> (last visited Apr. 2, 2014).

51. Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, <http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex>

*Hodges*<sup>52</sup> is a case in which a same sex couple, after the *United States v. Windsor* ruling, married in the State of Maryland.<sup>53</sup> The couple moved to Ohio and, after learning that Ohio did not recognize their marriage, filed suit against the State alleging that it was discriminating against same-sex couples that were lawfully married.<sup>54</sup> Ultimately, the Supreme Court held in a 5-4 decision that all states are required to grant same-sex marriages and to recognize same-sex marriages previously granted in other states.<sup>55</sup>

#### MARITAL PRIVACY: A FUNDAMENTAL RIGHT

Fundamental rights are rights recognized by the Supreme Court to deserve high levels of protection from government encroachment.<sup>56</sup> Although the right to privacy is not one that is explicit in the Constitution, it is one that courts have recognized as a fundamental right.<sup>57</sup> The Supreme Court has also declared marriage as a fundamental right because of how essential it is to the “orderly pursuit of happiness by free man.”<sup>58</sup>

Essentially, marriage is a central aspect of the right to privacy<sup>59</sup> and many privacy cases revolve specifically around the institution of marriage. Beginning in 1888, in *Maynard v. Hill*, the Supreme Court established how important and fundamental the institution of marriage is.<sup>60</sup> The Court explained that, “[m]arriage [...] create[s] the most important relation in life [and has] more to do with the morals and civilization of a people than any other institution[.]”<sup>61</sup>

Later in 1942, the Court in *Skinner v. State of Okl. ex rel. Williamson* further emphasized the importance of marriage as a fundamental right.<sup>62</sup> *Skinner*, involved an Act that allowed the State to sterilize repeat sex offenders.<sup>63</sup> The Court expressed the fundamental importance of marriage by stating that marriage is “one of the basic civil rights of

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marriage.html?\_r=0 (last visited September 3, 2015).

52. See generally *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

53. *Id.* at 2594.

54. *Id.*

55. *Id.* at 2588.

56. *Fundamental Right*, LEGAL INFORMATION INSTITUTE, [http://www.law.cornell.edu/wex/fundamental\\_right](http://www.law.cornell.edu/wex/fundamental_right).

57. *14 Supreme Court Cases: Marriage is a Fundamental Right*, Marriage News Blog, AMERICAN FOUNDATION FOR EQUAL RIGHTS, (November 28, 2012), <http://afer.org/blog/video-14-supreme-court-rulings-on-marriage/>.

58. *Id.*

59. *Id.*

60. See generally *Maynard v. Hill*, 125 U.S. 190 (1888).

61. *Id.* at 205.

62. See generally *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535 (1942).

63. *Id.* at 539.



man.”<sup>64</sup>

Twenty years later in *Griswold v. Connecticut*, a landmark case, the Court further declared that the right to marry was a fundamental right.<sup>65</sup> The Court stated:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>66</sup>

More recently, the Court reiterated the fundamental right to marriage and marital privacy in relation to same-sex couples.<sup>67</sup> In *Lawrence v. Texas*, a case involving sexual intercourse between two men,<sup>68</sup> the Court stated that, “our laws and traditions afford constitutional protection to personal decisions relating to marriage [...] Persons in a homosexual relationship may seek autonomy for th[is] purpose, just as heterosexual persons do.”<sup>69</sup> Overall, marriage has a high value in our society and is regarded as an important right, belonging to all that want to partake in it.

#### THE BRIEF HISTORY OF SOCIAL MEDIA

Social media has become a place where people communicate and interact freely, sharing the most intimate details of their lives while engaging in personal conversations.<sup>70</sup> Starting in 1978 with the creation of the bulletin board system (BBS),<sup>71</sup> social media has evolved into many different forms including blogs, forums, message boards and social net-

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64. *Id.* at 541.

65. *See generally* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

66. *Id.* at 486.

67. *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003).

68. *Id.*

69. *Id.* at 574.

70. Curtis, *supra* note 10.

71. *See* Margaret Rouse, *Bulletin Board System*, WHATIS.COM, <http://whatis.techtarget.com/definition/bulletin-board-system-BBS> (last updated September 2005) (stating that an electronic Bulletin Board System (“BBS”) “is a computer or an application dedicated to the sharing or exchange of messages or other files on a network. Originally an electronic version of the type of bulletin board found on the wall in many kitchens and work places, the BBS was used to post simple messages between users.”; *see also* *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 980 (C.D. Cal. 2010) (citing *MTV Networks v. Curry*, 867 F.Supp. 202, 204 n. 3 (S.D.N.Y.1994))(mentioning that “[c]omputer bulletin boards generally offer both private electronic mail service and newsgroups. The latter is essentially email directed to the community at large, rather than a private recipient.”)

works.<sup>72</sup> In 1985, the America Online service was founded.<sup>73</sup> “You’ve Got Mail!” is a sound that resonates with countless Americans, as AOL became one of the first to bring social online culture and romance into the home.<sup>74</sup> Thereafter, in the early 90’s, the World Wide Web became publically accessible, granting millions of people the opportunity to unlimited and unfiltered online experiences.<sup>75</sup> The inception of the World Wide Web created an explosion of popular Internet forums where people were able to express themselves openly and freely about current issues.<sup>76</sup>

By the late 90’s, modern social networking came into existence, with SixDegrees being the first social networking website.<sup>77</sup> SixDegrees was an interactive web application which allowed people to make profiles and connect with friends by becoming friends with other users and creating a friends list.<sup>78</sup> As time went on, interactive web applications became very popular and spurred up the creation of Friendster, Myspace, Facebook and Twitter in the early to mid 2000’s.<sup>79</sup> Within the last five years, social media has become an essential element of daily life.<sup>80</sup> As of 2013, Facebook reported a whopping 1.11 billion users;<sup>81</sup> Twitter reported 500 million registered users<sup>82</sup> and MySpace reported a total of 25 million users.<sup>83</sup>

Before determining whether social media communications are afforded protection under the marital privilege, we must first look at whether social media communications are provided protections elsewhere. Contrary to popular belief, social media communications are provided some level of protection.

#### PRIVACY POLICIES ON SOCIAL MEDIA SITES

When signing up to participate in a social media network, you consent to a set of terms and conditions. The terms and conditions include a data use or privacy policy that explains how the website receives information about you, how the information is categorized and used, and

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72. Curtis, *supra* note 10.

73. *Id.*

74. See Borders, *supra* note 9 (discussing the appearance of AOL through the movie, “You’ve Got Mail!”).

75. Curtis, *supra* note 10; see Borders, *supra* note 9 (discussing the creation of the World Wide Web in the 1960’s).

76. Borders, *supra* note 9

77. *Id.*

78. Curtis, *supra* note 10; Borders, *supra* note 9

79. Curtis, *supra* note 10.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

essentially what information is not private.<sup>84</sup> For example, the privacy policies of Facebook, MySpace and Twitter all state that the information they collect from the user, which includes registration information and the information shared on the network (e.g. pictures, tweets, or status updates), is to better improve the services provided to you over time.<sup>85</sup> Moreover, the policies all state that the sites may use users' information in response to legal requests if they have a reasonable belief that compliance with the law is required.<sup>86</sup>

The social media sites also provide descriptions of what public information means in their policies.<sup>87</sup> Facebook, for example, states that your name, profile picture, cover photos, networks, gender, username and ID are always publically available and treated as information you decide to make public.<sup>88</sup> Additionally, if a user decides to delete their social media account, the process is not simple. On Facebook, aside from the fact that the link to delete your account is hidden within the pages of the privacy policy, the actual deletion of an account takes approximately one month.<sup>89</sup> Even after deletion, "some information may remain in backup copies and logs for up to 90 days."<sup>90</sup>

Interestingly enough, all of the privacy policies analyzed and compared in this article barely mention private messaging.<sup>91</sup> The policies only mention private messaging in the recognition of its existence.<sup>92</sup> It

84. *Data Use Policy*, FACEBOOK, <https://www.facebook.com/about/privacy/your-info> (last revised November 15, 2013); *Twitter Privacy Policy*, TWITTER, INC., <https://twitter.com/privacy> (last revised October 21, 2013); *Privacy Policy*, MYSPACE, <https://myspace.com/pages/privacy> (last revised May 14, 2014).

85. *Data Use Policy*, FACEBOOK; *Twitter Privacy Policy*; *Privacy Policy*, MYSPACE.

86. *Data Use Policy*, FACEBOOK; *Twitter Privacy Policy*; *Privacy Policy*, MYSPACE.

87. *Data Use Policy*, FACEBOOK, <https://www.facebook.com/about/privacy/your-info> (last revised November 15, 2013); see *Twitter Privacy Policy*, TWITTER, INC. (stating that "non private information" includes: public user profile information, public Tweets, the people you follow or that follow you, or the number of users who clicked on a particular link); see *Privacy Policy*, MYSPACE (stating that public information includes: full name, username, profile URL, About Me, Profile photo, profile cover, stated location, gender, age and MySpace ID).

88. *Data Use Policy*, FACEBOOK.

89. *Id.*

90. *Id.*

91. See *id.* (only stating that it receives data about the user when he or she sends and receives a message; it states nothing further about private messages); see *Twitter Privacy Policy*, TWITTER (not mentioning private messages/direct messages in the privacy policy; not listing private/direct messages in the information that the site considers public); see *Privacy Policy*, MYSPACE (barely mentioning private messaging in the privacy policy; does not mention private messages in the list of what is public information). The MySpace policy does state that private messages cannot be deleted and only moved to the archives.

*MySpace Messages*, MYSPACE, <https://www.askmyspace.com/t5/Articles/Myspace-Messages/ba-p/38821> (last revised May 14, 2014).

92. See *Data Use Policy*, FACEBOOK; *Twitter Privacy Policy*, TWITTER; *Privacy Poli-*

is important to note that the privacy policies do not categorize private messages as “public information,” which implies that there is some level of privacy protection afforded to private messages.

#### THE STORED COMMUNICATIONS ACT

Another level of protection for social media private messaging is the Stored Communications Act (“SCA”).<sup>93</sup> The SCA was passed under the Electronic Communications Privacy Act in 1986.<sup>94</sup> The SCA prevents communication service providers from disclosing private communications to particular entities and individuals.<sup>95</sup> Many believe that Congress enacted this statute because of the lack of protection provided by the Fourth Amendment.<sup>96</sup> The Act gives greater privacy protections than the Fourth Amendment while merely requiring a subpoena to obtain information shared on social media sites.<sup>97</sup>

Within the statute, Congress distinguishes between two types of communications: Electronic Communication Services (“ECS”) and Remote Communication Services (“RCS”).<sup>98</sup> Each type of communication receives different regulations.

An ECS provider is defined as “any service, which provides to users [...] the ability to send or receive [...] electronic communications.”<sup>99</sup> Additionally, an ECS provider is prohibited from disclosing only “the contents of a communication while in electronic storage by that service.”<sup>100</sup> The Act defines electronic storage as: “(A) any temporary, intermediate storage of a[n] [...] electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication[.]”<sup>101</sup> The statute defines a RCS as “the provision to the public of computer storage or processing services by means of an electronic communications system[.]”<sup>102</sup> A RCS provider:

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cy, MYSPACE.

93. 18 U.S.C. §§ 2701- 2712

94. See *Crispin*, 717 F. Supp. at 971 (C.D. Cal. 2010); Mikah K. Story, *Twenty-First Century Pillow-Talk: Applicability of the Marital Communications Privilege to Electronic Mail*, 58 S.C. L. REV. 275, 286 (2006).

95. *Crispin* at 971 (citing Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1213 (2004).

96. *Crispin* at 972; Mikah, *supra* note 94 at 287.

97. *Crispin* at 972.

98. 18 U.S.C. § 2510(15) (2012); 18 U.S.C. § 271(2) (2012); *Crispin* at 972; Mikah, *supra* note 94 at 286- 287.

99. 18 U.S.C. § 2510 (15).

100. *Crispin* at 972 (citing 18 U.S.C. § 2702).

101. 18 U.S.C. § 2510(17).

102. 18 U.S.C. § 2711.

may not divulge the content of any communication received by electronic transmission that is carried or maintained on its service for a customer or subscriber ‘solely for the purpose of providing storage or computer processing services to [the] subscriber or customer, if the provider is not authorized to access the contents of [the] communications for purposes of providing . . . services other than storage or computer processing.’<sup>103</sup>

Overall, the level of protection social media sites provide to users depends on whether the sites would be considered an ECS or a RCS. Although there are few cases that answer this question, one court has determined that social media sites can be considered both ECS and RCS.<sup>104</sup> In *Crispin*, the California District Court made this ruling by comparing social media sites containing both private and public components to emails and electronic bulletin board systems (“BBS”).<sup>105</sup> Through this comparison, the Court determined that unopened, private messages on social media sites operate under an ECS provider because the messages are in electronic storage and fall within the temporary, intermediate storage category.<sup>106</sup> Under the SCA, this means that the government may access a communication for 180 days or less pursuant to a warrant.<sup>107</sup> As for the messages that have been opened, social media sites operate as RCS providers by providing a storage system.<sup>108</sup> This allows the government to access it for longer than 180 days.<sup>109</sup>

In sum, private messages made through social media networking sites are afforded some protection under the SCA. However, because the barriers of that protection are unclear, the marital privilege may be the only way to secure private communications made through social media.

## ANALYSIS

### A COMPARISON OF THE MARITAL PRIVILEGE TO OTHER EVIDENTIARY PRIVILEGES

In order to fully grasp the necessity and functionality behind the use of the marital privilege, it is beneficial to compare the privilege to other evidentiary privileges. Other evidentiary privileges include the attorney-client privilege, the patient-physician privilege, and the psy-

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103. *Crispin* at 973.

104. *Id.* at 985-91.

105. *Id.* at 980-81.

106. *Id.* at 987.

107. Mikah, *supra* note 94 at 287.

108. *Crispin* at 987.

109. Mikah, *supra* note 94 at 287 (citing 18 U.S.C. § 2703(a)).

chotherapist-patient.<sup>110</sup>

The attorney-client privilege serves the purpose of promoting open and full communications between the attorney and client.<sup>111</sup> This privilege ensures that statements made by any person who seeks legal advice or aid from a lawyer in confidence will be completely protected.<sup>112</sup> The patient-physician privilege protects the confidential communications made by a patient to their physician regarding care and medical treatment.<sup>113</sup> The privilege is necessary for the free flow of information between the patient and physician to promote the administration of proper care.<sup>114</sup> Lastly, the psychotherapist-patient privilege protects confidential communications between the patient and psychologist, social worker, or licensed counselor from disclosure, when such communications assist the professional in making a complete diagnosis.<sup>115</sup> The purpose of this privilege is to assure a patient that the most intimate and embarrassing details of their lives are held in confidence.<sup>116</sup> Such assurance is vital to ensure that the patient fully discloses facts that aid in diagnosis and treatment.<sup>117</sup>

The commonalities between these privileges are evident. First, in order for a court to recognize any evidentiary privilege, four circumstances must be present: “1) The communications must originate in a confidence that they will not be disclosed; 2) [The] element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; 3) The relation must be one which in the opinion of the community ought to be sedulously fostered; [and] 4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.”<sup>118</sup> Secondly, scholars believe that the purposes of evidentiary privileges is to help individuals “effectively exercise autonomy by facilitating intelligent, independent life preference choices.”<sup>119</sup> Such autonomy is promoted by allowing individuals to freely consult

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110. *Id.* at 294.

111. *Id.*

112. *What the Attorney-Client Privilege Really Means*, Smith, Gambrell and Russell LLP, [http://www.sgrlaw.com/resources/trust\\_the\\_leaders/leaders\\_issues/ttl5/916/](http://www.sgrlaw.com/resources/trust_the_leaders/leaders_issues/ttl5/916/), (last visited Apr. 30, 2014).

113. *Confidentiality, Patient/Physician*, AMERICAN ACADEMY OF FAMILY PHYSICIANS, <http://www.aafp.org/about/policies/all/patient-confidentiality.html> (last visited Apr. 30, 2014).

114. *Id.*

115. Mikah, *supra* note 94 at 298 (citing Cal. Evid. Code § 1012 (West 2006); Iowa Code Ann. § 622.10 (West 1999); Me. Rev. Stat. Ann. Tit. 32 §§ 7005; Minn. Stat. Ann. § 595.02(g) (West 2000); Wash. Rev. Code Ann. § 18.83.110 (West 2006)).

116. Mikah, *supra* note 94 at 298.

117. *Id.*

118. *Id.* at 305 (citing 8 Wigmore, Evidence § 2285, at 57).

119. Mikah, *supra* note 94 at 310.

confidants, thus prompting free flowing communications.<sup>120</sup>

Each privilege serves to protect communications between individuals in relationships valued by society. Case law is lacking on the application of the other privileges to electronic communications (i.e. text messages and social media communications). However, each privilege centers on the free flow of confidential communications and is “rooted in the imperative need for confidence and trust.”<sup>121</sup> That being said, it is clear that the marital communications privilege is of utmost importance. Being one of the oldest institutions of civilization, the marital relationship depends on open and honest communications. Without an open and free flowing environment, the marital relationship cannot survive.

#### APPLICABILITY OF THE MARITAL PRIVILEGE TO ELECTRONIC COMMUNICATIONS

Case law analyzing the marital privilege’s application to social media communications is virtually non-existent. Therefore, it is important to look at how the marital privilege applies to electronic communications generally. This article looks at two types of electronic communications: emails and text-messages. Once analyzed, this article determines the protections that social media communications are afforded under the Privilege.

#### EMAIL

When determining the protections social media communications are afforded, the closest form of communication to private messages sent on social media is email because each involves sending and receiving messages. Accordingly, courts have started to analogize the two when considering the protections given to social media communications. Although case law is lacking, there is little doubt that emails between spouses fall under the marital privilege.<sup>122</sup> There are isolated instances where, if not for one factor, the privilege would have attached.<sup>123</sup> However, courts recognize that the right is fundamentally present, only when the proper circumstances are present.<sup>124</sup>

For example, in *Reaves v. State*,<sup>125</sup> the defendant wife, Charlott Reaves, was charged with malicious murder of her minor stepdaugh-

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120. *Id.*

121. *Trammel* at 51.

122. *See generally Reaves*; *See generally Hamilton*; *See generally Etkin*.

123. *See generally Reaves*; *See generally Hamilton*; *See generally Etkin*.

124. *See generally Reaves*; *See generally Hamilton*; *See generally Etkin*.

125. *Reaves* at 208.

ter.<sup>126</sup> The defendant wrote emails to her husband regarding the murder.<sup>127</sup> When the State attempted to enter the email communications into evidence, the defendant asserted that they were inadmissible under the marital privilege.<sup>128</sup> The marital privilege statute in this jurisdiction provided that the Privilege does not apply to communications regarding crimes against minor children.<sup>129</sup> Although the privilege did not apply in *Reaves*, the Court still acknowledged that spousal communications are typically inadmissible.<sup>130</sup>

Courts have ruled similarly when dealing with the application of the marital privilege to emails sent on work computers.<sup>131</sup> This category of emails brings a different aspect to the analysis because the Third Party Presence Exception<sup>132</sup> to the Privilege must be considered in these circumstances. For example, in *United States v. Hamilton*,<sup>133</sup> defendant husband and state legislature, Hamilton, was charged with bribery and extortion.<sup>134</sup> The Court allowed the admission of emails sent between Defendant and his wife from his work computer.<sup>135</sup> Defendant raised the marital privilege to bar the emails.<sup>136</sup> The Court ruled that Defendant did not take the steps needed to preserve the privilege.<sup>137</sup> Additionally, the Court found that Defendant was aware that his employer, a third party, had access to the contents of the computer.<sup>138</sup> In doing so, it further reasoned that defendant had knowledge of the policy adopted by his employer which stated that there was “no expectation of privacy in [his] use of the Computer System” and that “[a]ll information created, sent[,] received, accessed, or stored in the . . . Computer System is subject to inspection and monitoring at any time.”<sup>139</sup> Although the privilege did not attach in *Hamilton* because of Defendant’s knowledge of the

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126. *Id.*

127. *Id.* at 210.

128. *Id.*

129. *Id.* (citing Ga. Code Ann. § 24-9-21 (West)).

130. *Id.* (stating that “communications between spouses are privileged and are generally inadmissible.”).

131. *See Hamilton* at 652.

132. *See Wolfe* at 14 (holding that the communication privilege was not applicable because there was a third party involved, a stenographer); *see State v. Rollins*, 675 S.E.2d 334 (N.C. 2009) (holding that the marital communication privilege was not applicable because the conversation was in a public area where it could be overheard by third parties).

133. *Hamilton* at 651.

134. *Id.* at 652.

135. *Id.* at 655.

136. *Id.* at 654.

137. *Id.* at 655.

138. *Id.*

139. Jeff Kosseff, *Fourth Circuit Limits Marital Communications Privilege for Email*, InsidePrivacy (December 18, 2012), <http://www.insideprivacy.com/united-states/fourth-circuit-limits-marital-communications-privilege-for-email/>.



presence of a third party, the Court still acknowledged that marital communications via email are presumptively confidential.<sup>140</sup>

The Court in *United States v. Etkin* had a similar ruling.<sup>141</sup> In *Etkin*, a deputy sheriff in Sullivan County was indicted for extortion.<sup>142</sup> During the seizure of his work vehicle, a “printed email exchange between Defendant and his wife” was discovered.<sup>143</sup> The government sought to use the email exchange at trial but the defendant objected on the grounds that the emails were protected by the marital privilege.<sup>144</sup> The Court ruled that the emails were not subject to the privilege because they were not confidential.<sup>145</sup> The Court recognized that email communications between spouses were subject to a presumption of confidentiality.<sup>146</sup> However, the Court employed the Third Party Presence Rule and found that because Defendant was notified each time he logged into the computer that a third party would “monitor, intercept, record, read, copy, access and capture information for use or disclosure without additional prior notice,” the privilege did not attach.<sup>147</sup> Moreover, the court stated that Defendant had notice of the work policy because in order to complete the log in process, he had to click “ok” or press “enter” every time he logged into his work computer.<sup>148</sup>

Although every previously mentioned case involved third parties, the courts recognized that email communications are not considered privileged communications but were still protected under the marital privilege.<sup>149</sup> Those cases demonstrate that, in most circumstances, the Privilege is interpreted narrowly.<sup>150</sup> However, the courts’ use of the Third Party Presence Exception evidences the view that the Privilege’s application should not be narrowly construed when involving electronic communications. Typically, the application of the Third Party Presence Exception is not flexible.<sup>151</sup> However, courts have recognized the need for a third party in transporting messages to email users.<sup>152</sup> Thus, when applying the Third Party Presence Rule in relation to emails, the courts have carved out, what can be called, an exception to the exception.<sup>153</sup>

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140. *Hamilton* at 654.

141. *Etkin*, 2008 WL 482281.

142. *Id.* at \*1.

143. *Id.*

144. *Id.*

145. *Id.* at \*5.

146. *Id.* at \*3.

147. *Etkin*, 2008 WL 482281 at \*3.

148. *Id.* at \*4.

149. *Reaves* at 208; *Hamilton* at 652; *Etkin* at \*5.

150. *See generally Reaves*; *see generally Hamilton*; *see generally Etkin*.

151. Mikah, *supra* note 94 at 279-80.

152. *See Hamilton* at 655.

153. *Id.*

Courts have been known to consider the user's "reasonably designed" efforts to protect and preserve the privilege and the user's reasonable belief in the privacy of the emails sent to determine if the privilege is preserved.<sup>154</sup> Overall, the case law regarding the applicability of the privilege to emails indicates that the privilege would also apply to private messages sent on social media sites.

#### TEXT-MESSAGING

Text messages and private messages sent through social media are also comparable. Both forms of communication provide users with an instantaneous connection to others by sending brief electronic messages. Additionally, messages sent through social media sites can be accessed through text messages. Looking at how courts handle text messages relating to the marital privilege is a direct reflection of how the courts could protect private messages on social media. Fortunately, cases have recognized the fundamental application of the marital privilege to text messaging, but similarly to email communications, the privilege is interpreted quite narrowly.<sup>155</sup>

For example, in *State v. Franklin*,<sup>156</sup> defendant Shawnttis Franklin was charged and convicted of attempted murder and aggravated burglary.<sup>157</sup> Text messages sent by Defendant to a person in the house at the time of the stabbing and robbery were admitted into evidence.<sup>158</sup> Some of the text messages sent by the defendant stated the following: "I whupped that b[\*]tch and served her to let her know I ain't the one[.] I told you what I did and didn't do [, and] you know me I tell you everything so stay down for her then you know."<sup>159</sup> Defendant claimed that the text messages were protected from disclosure by the marital privilege.<sup>160</sup> The Court ruled that the privilege did not attach in this case because, contrary to Defendant's assertion, he never established a common law marriage.<sup>161</sup> Nevertheless, the Court acknowledged that the privilege would attach to communications between spouses through text messages.<sup>162</sup>

Similarly, another court affirmed the protection provided to text

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154. *Id.*

155. *See State v. Franklin*, 121 P.3d 447, 449 (Kan 2005); *see generally Commonwealth v. Hunter*, 60 A.3d 156 (Pa. Super. Ct. 2013).

156. *See generally Franklin*, 121 P.3d 447.

157. *Id.* at 449.

158. *Id.* at 451.

159. *Id.* at 450.

160. *Id.* at 451.

161. *Id.*

162. *See Franklin*, 121 P.3d 447, 451 (Kan. 2005) (suggesting that the marital privilege did not apply in this case because the issue was not preserved on appeal).

message communications under the Privilege.<sup>163</sup> In *Commonwealth v. Hunter*,<sup>164</sup> defendant wife Hunter was charged with assault, aggravated assault and endangering the welfare of a child.<sup>165</sup> Hunter's four-year-old stepson suffered a severe brain injury while in her care.<sup>166</sup> Defendant sent her husband text messages regarding the injuries and condition of the child, which were admitted into evidence.<sup>167</sup> Defendant sought to exclude the admissions of the text messages by claiming that they were protected under marital privilege.<sup>168</sup> While recognizing the general rule that communications between spouses (including text messages) are presumed confidential, the Court ruled that the privilege could not be applied in this case because the texts were regarding an offense against a child.<sup>169</sup>

In sum, it appears that an exception to the marital privilege would be applicable to private messages sent through social media websites based on the application of the Privilege to text messages. Both means of communication are conceptually comparable in function. Therefore, it is logical for various courts to apply the fundamental protections the Privilege affords text message communications to that of private communications made through social media sites.

#### CHANGE IS SOON TO COME: LEGISLATIVE AND JUDICIAL PROGRESSION

Legislatures have begun to recognize the widespread presence of electronic communications in the daily lives of Americans.<sup>170</sup> Some legislation has been passed to accommodate its popularity. So far, there have been at least two statutes addressing the protections afforded to electronic communications.<sup>171</sup>

First, a New York statute states that, “[n]o communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.”<sup>172</sup> The second piece of legislation involves California's confidential communication statute that states:

If a privilege is claimed on the ground that the matter sought to be

163. See generally *Hunter*, 60 A.3d 156.

164. *Id.*

165. *Id.* at 158.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Commonwealth v. Hunter*, 60 A.3d 156, 159 (Pa. Super. Ct. 2013).

170. See N.Y. C.P.L.R. 4548 (McKinney); Cal. Evid. Code § 917(a)(b)(West 2014).

171. See N.Y. C.P.L.R. 4548; Cal. Evid. Code § 917(a)(b).

172. N.Y. C.P.L.R. 4548.

disclosed is a communication made in confidence in the course of the [...] husband-wife [...] relationship, the communication is presumed to have been made in confidence[.] A communication between [spouses] does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communications may have access to the content of the communication.<sup>173</sup>

The case law suggests that the legislature intends to include social media communications within the meaning of the statute.<sup>174</sup> In California, for example, the United States District Court for the Central District of California was one of the first courts to consider and establish that private messages sent through social media are protected from e-discovery requests.<sup>175</sup>

Overall, the statutes and emerging case law provide an insightful view at the future of the marital communications privilege in relation to electronic and private social media communications. As the means of communication are evolving and the majority of communications are made through online mediums, the marital communications privilege needs to be extended in order to serve its intended purpose.

#### THE PROPOSAL TO EXTEND THE MARITAL PRIVILEGE

Due to the expansion of the marital relationship in recent years, the marital privilege is more important now than ever before. As previously stated, the purpose of the marital privilege is to foster marital relationships by encouraging confidential communications between spouses.<sup>176</sup> The Privilege protects marital confidences because they are regarded as so essential to the preservation of the marriage relationship and outweighs the disadvantages to the administration of justice.<sup>177</sup>

Clearly, the underlying reason for the privilege is to preserve the marital relationship.<sup>178</sup> To explore the essence in which the marital relationship derives is vital in determining the fate of the Privilege. For many years, family law scholars have grappled with two categories of the marital relationships: contractual relationship and status relationship. Although the complexity of the marital relationship cannot be summarized fully within these two concepts, this section explores each category and applies the appropriate approaches in order to determine whether the Privilege should be expanded.

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173. Cal. Evid. Code § 917(a)(b).

174. See *Crispin* at 987.

175. See generally *id.*

176. *Trammel* at 44.

177. *Wolfe* at 14.

178. See *supra* note 23 and accompanying text.

## CONTRACTUAL APPROACH

A contract typically means a writing containing terms agreed by both parties, in addition to promises that the law will enforce.<sup>179</sup> Legally, a contract is defined as “a promise or a set of promises for the breach of which the law gives a remedy.”<sup>180</sup> In order to create a fully functioning contract, there needs to be an offer, acceptance and consideration.<sup>181</sup> The consideration is the most essential part of a contract’s formation. It embodies the actual exchange of the promises, which entails commitments by parties to act in the future.<sup>182</sup> Furthermore, contracts incorporate particular relations between people, which incur responsibilities from the individual participants.<sup>183</sup>

The law of contracts is relevant to the marital relationship in many different ways. It is principally believed that individuals who enter into a marital unity are entering into an agreement in which they decide as individuals on the type of system they want to incorporate into their relationship.<sup>184</sup> Although there are written aspects to the marital relationship, which include prenuptial agreements and marital licenses,<sup>185</sup> the concept of the contractual approach is centered on the marital relationship’s private will.<sup>186</sup> It embodies the concepts of contract law in the expressed and implied will of the parties, what they intend and expect from the marital relationship.<sup>187</sup> In the article, *Spousal Privilege and the Meaning of Marriage*, a concept referred to as the “External Stance” is useful in further understanding the implications of the marital relationship to contract law.<sup>188</sup>

As Milton Regan<sup>189</sup> implies, the External Stance is the standpoint that expresses a person’s independent stance on the moral demands made by the relationship in which they are involved.<sup>190</sup> Regan further states that the contract approach implicates the abstraction of individ-

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179. Gaytri Kachroo, *Mapping Alimony: From Status to Contract and Beyond*, 5 PIERCE L. REV. 163, 212 (2007).

180. E. Allan Farnsworth, 1 Farnsworth On Contracts 4 n.1 (1990).

181. Scott J. Burnham, *Contract Law for Dummies*, FOR DUMMIES, <http://www.dummies.com/how-to/content/contract-law-for-dummies-cheat-sheet.html> (last visited Apr. 30, 2014).

182. Kachroo, *supra* note 179 at 213.

183. *Id.* at 187.

184. *Id.* at 214.

185. *Id.* at 213.

186. *See Id.* at 172 (focusing on the choices of the parties; what they choose and do not choose in the relationship).

187. *Id.*

188. Regan, *supra* note 15 at 2067-79.

189. *Id.* at 2067.

190. *Id.*

uals from social constructs and focuses more on self-interest.<sup>191</sup> Through the external stance approach to marriage, each person in the relationship appreciates and views one another as individuals. Overall, the contract approach lends itself to the question of whether the benefits and burdens of family life could be justified by consent of each individual, highlighting the importance of personal choice in marriage.<sup>192</sup>

#### STATUS APPROACH

Status is defined as “the position or rank of someone or something when compared to others in a society, organization or group; the official position of a person [...] according to the law.”<sup>193</sup> Marriage, for example, is a relationship traditionally treated as a distinct and exclusive legal status.<sup>194</sup> Entering into a marriage automatically secures individuals with a distinct set of legal rights, obligations, and social recognition.<sup>195</sup>

The status approach to marriage centers itself around the importance of community membership. Within the status approach, the belief is that “good life involves membership in social communities”; such memberships are of primary importance to human happiness.<sup>196</sup> The status approach is contingent on public recognition from their families, the neighborhood, and/or the state.<sup>197</sup>

The status approach suggests that, in order for a marriage to flourish, there must be some relinquishment of one’s “[self-]perception of empathetic identification and unselfish concern” by the individuals in order to fulfill the meaning of the “interpersonal relationship and the growth of love.”<sup>198</sup> Within this approach is the concept of group identity.<sup>199</sup> In order for a group to formulate such an identity, there needs to be an open flow of communication.<sup>200</sup> For example, group discussions provide a means to build solidarity amongst members, which in turn increases the willingness to forgo individual advantage for the sake of the group.<sup>201</sup> Overall, the status approach includes a central foundation of

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191. *Id.* at 2069.

192. Regan, *supra* note 15 at 2073.

193. *Status*, MERRIAM-WEBSTER ONLINE DICTIONARY (2015), <http://www.merriam-webster.com/dictionary/status>.

194. Jana B. Singer, *Legal Regulation of Marriage: From Status to Contract and Back Again?*, [http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1762&context=fac\\_pubs](http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1762&context=fac_pubs). (last visited Apr. 30, 2014).

195. *Id.* (citing *Maynard*)

196. Kachroo, *supra* note 179 at 197.

197. *Id.*

198. Regan, *supra* note 15 at 2082.

199. *Id.* at 2084.

200. *Id.*

201. *Id.*

loyalty and trust in a status relationship (i.e. the marital relationship).

Loyalty and trust are important concepts in a marriage. One who enters into a marriage takes on the commitment of being self-vulnerable and, in turn, accepts such risk for the sake of the relationship.<sup>202</sup> Accepting such risk assumes that the other spouse will be loyal and trustworthy.<sup>203</sup> Loyalty and trust are concepts that are developed through a shared history.<sup>204</sup> The couple acknowledges that individuals intertwine their fates within one another, for the sake of the relationship in which they both contribute.<sup>205</sup>

#### THE APPROACHES AND WHAT IT MEANS FOR THE PRIVILEGE

Marriage is a joint endeavor and is incapable of being reduced to individual costs and benefits.<sup>206</sup> The private aspect of marriage has been recognized for years as being a fundamental right, and although that private right in nature is one highlighted under the contract approach, the essential right to be in such a private relationship is what the status approach highlights.<sup>207</sup>

Many scholars argue in favor of dividing marriage into these two approaches. Some believe that marriage must either be a status relationship or a contractual relationship, but never both.<sup>208</sup> Based on the above discussion, the nexus between the two is so evident that dividing the two approaches is meaningless. The marital relationship consists of both contract and status elements, which substantiates its importance.<sup>209</sup>

The contract approach focuses on the private will of the parties, while the status approach focuses on public recognition. The marital relationship is dependent on both spouses to survive. For example, the contract approach consists of relations between people who enter into an agreement, and who ultimately decide on the type of system that they want to carry out.<sup>210</sup> As suggested under the status approach, one must relinquish one's self in order to fulfill the true meaning of the agreement. Additionally, individual choice to enter into a marriage is

202. *Id.* at 2106.

203. *Id.*

204. Regan, *supra* note 15 at 2106.

205. *Id.* at 2107.

206. *Id.* at 2050.

207. *See generally Maynard*; *See generally Skinner*; *See generally Griswold*; *See generally Lawrence*.

208. *See Kachroo, supra* note 179 at 172-173 (describing Ellman's view that the marital relationship remains a status relationship).

209. *See Regan, supra* note 15 at 2050 (establishing that the marriage relationship is seen as both the external stance (contractual relationship) and internal stance (status relationship)).

210. *See Kachroo, supra* note 179 at 187.

supported by implications of the contract approach. Moreover, one must relinquish themselves while acknowledging that such relinquishment is beneficial and is accomplished through trust and loyalty.

Further, the evolution of marriage, namely same-sex marriage, is a prime example of the nexus between both approaches. The movement behind same-sex marriage involves both status and contractual approaches. There are status implications in the sense that same sex couples want public recognition and respect of their unity.<sup>211</sup> The contractual implications include the “private will” to enter into relationships and to express their self-interests, without interference.

One might wonder how all of this relates to the marital privilege. The answer to that question is simple. Having been around for centuries,<sup>212</sup> it is impossible to imagine the elimination of the marital privilege.<sup>213</sup> Conversely, it is conceivable to imagine its expansion in order to signify its true essence. The marital communications privilege contributes to holding marriages together as it gives widespread recognition and security. Some may argue that many couples are unaware of the Privilege’s existence and most likely do not make communication decisions contingent on the Privilege’s protection.<sup>214</sup> Although communication is generally a voluntary act, its frequency can be affected by the legal assurance of confidentiality.<sup>215</sup> The legal system has contributed to the notion that existence has a meaningful order.<sup>216</sup> This legal function is no different with regard to the marital communications privilege.

An important facet of marriage is choice. Today, as social media communications are becoming the norm in society,<sup>217</sup> married couples are choosing to incorporate that movement in their relationships by using social media as a form of constant communications.<sup>218</sup> The law should reflect the social media movement in order for the Privilege to continue carry out its primary function.

#### THE SOCIAL MEDIA COMMUNICATION EXCEPTION AS A PROPOSAL FOR THE EXTENSION

The extension of the marital privilege can come in many forms. It

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211. See Shadee Ashtari, *Eight Same-Sex Couples in Florida Sue State For Recognition of Their Out-Of-State Marriages*, THE HUFFINGTON POST, [http://www.huffingtonpost.com/2014/03/13/florida-same-sex-marriage-lawsuit\\_n\\_4957015.html](http://www.huffingtonpost.com/2014/03/13/florida-same-sex-marriage-lawsuit_n_4957015.html) (March 13, 2014 12:59 pm).

212. See *Trammel* at 43.

213. Regan, *supra* note 15 at 2063.

214. Mikah, *supra* note 94 at 280; Regan, *supra* note 15 at 2062.

215. Regan, *supra* note 15 at 2061.

216. *Id.* at 2064.

217. See generally Lenhart & Duggan, *supra* note 2.

218. *Id.*



can mirror statutes such as the ones in California<sup>219</sup> or the New York.<sup>220</sup> However, I am proposing that the marital communications privilege should include a social media exception.

The social media exception to the marital communications privilege can be added to all marital privilege statutes and would function as a way to negate the Third Party Presence Rule. Instead of asking the court to create a social media privilege, the exception would be coupled with the marital communications privilege and operate as a double-edged sword of protection. The reason it would be called an exception is because of how the Third Party Presence Rule operates.

The Third Party Presence Rule bars the privilege from attaching if a party knowingly and voluntarily discloses the communication to a third party.<sup>221</sup> Because social media outlets serve as a medium to send and deliver messages and may be considered third parties, problems may arise with applying the privilege. However, with the social media exception in place, the privilege would attach despite the third party argument.

The idea, in essence, was partially influenced by Mallory Allen and Aaron Orhiem's co-article entitled *Get Outta My Face [Book]: The Discoverability of Social Networking Data and Passwords Needed to Access Them*.<sup>222</sup> Allen and Orhiem focus on the discoverability of social media communications and highlight some of the reasons why opponents of broad social networking discovery believe that social media information should be protected from the discovery process.<sup>223</sup>

In the Article, one of their conclusions is that social networking information should be protected by an evidentiary privilege,<sup>224</sup> similar to that of the attorney/client or marital privileges.<sup>225</sup> The authors entertain the idea of creating a new evidentiary privilege that would be called the "social media communication privilege" but quickly negate the idea.<sup>226</sup> The conclusion that the social media communication privilege would fail on its own is sensible because the courts do not like creating new privileges.<sup>227</sup> However, there appears to be no reason for

219. See Cal. Evid. Code § 917(a)(b) (West 2014).

220. See N.Y. C.P.L.R. 4548 (McKinney 1962).

221. See *supra* note 27 and accompanying text.

222. Mallory Allen & Aaron Orheim, *Get Outta My Face [Book]: The Discoverability of Social Networking Data and The Passwords Needed to Access Them*, 9 WASH J.L. TECH. & ARTS 137, 140 (2012).

223. *Id.* at 138.

224. The article also states that other reasons asserted include that such request for discovery are not relevant under Federal Rules of Civil Procedure 34 and 45 and therefore are not discoverable and that litigants sometimes argue that the Fourth Amendment affords some protection from unreasonable intrusions into their privacy. *Id.* at 138-39.

225. *Id.* at 138.

226. *Id.* at 140-42.

227. *Id.* at 142.

courts not to adopt a social media communication “privilege” as an exception to the marital privilege.

There is a test that a litigant must meet in order to establish an evidentiary privilege.<sup>228</sup> That four-part test could be used in determining whether the social media exception should apply when there is question of the applicability of the marital communications privilege.

Allen and Orheim suggest that litigants proposing a social media communication privilege would have problems establishing the test. Specifically, they suggest that the problems would arise in the following three areas: 1) that the communication was presumed confidential, 2) that the relationship between the communicating parties was of some importance, and 3) that social media relationships are deserving of protection.<sup>229</sup>

The authors express that the privilege would fail due to the difficulty in establishing that the communication was presumed confidential.<sup>230</sup> As an exception to the marital privilege, this would not be a concern as communications between marital couples are presumed to be confidential.<sup>231</sup> As to the concern of establishing that the relationship between the parties is one of importance, this will not be a problem with the marital relationship.<sup>232</sup> The marital relationship is one of the most important relationships to individuals and society alike.

The last concern of the authors was the proof that social media relationships are deserving of protection. If the social media communication “privilege” is added as an exception to the marital privilege, this will not be an issue. As this article highlights, social media communications, more specifically private messages sent via social media are currently afforded some protections.<sup>233</sup> Accordingly, due to the growth of its use in the marital relationship, social media communications are most deserving of protection in order to preserve the significance of the marital relationship.

An example of a scenario where the social media exception can be used in is the situation previously explained in the beginning of this article with Mr. Bohon and his wife.<sup>234</sup> If they decided to communicate about the murder via Facebook private messages, courts may rule that the transcripts of their conversations on Facebook are admissible, despite Mr. Bohon’s attempt to invoke the marital communications privilege. At that point, Mr. Bohon could focus court’s attention the social media communications exception.

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228. See *supra* note 161 and accompanying text

229. Allen & Orheim, *supra* note 222 at 141.

230. *Id.*

231. See *supra* note 24 and accompanying text.

232. Allen & Orheim, *supra* note 222 at 141.

233. See *supra* notes 77-101 and accompanying text.

234. See *supra* 5-7 and accompanying text.

Analyzing the four factors, the courts would find that the factors are satisfied in the Bohon matter and that the exception should apply.<sup>235</sup> For the first factor, the court will see that the communication originated in a confidence that it would not be disclosed, as the Bohons would have been communicating through private Facebook messaging and not public wall posts. For the second factor, the court would find that preserving the confidentiality of the Facebook private communication is essential to the full and satisfactory maintenance of their marital relationship, as being a married couple, the Bohons have an inherent expectation of privacy. The courts would find that the third factor is satisfied because marriage is a relationship that is upheld in the community to be sedulously fostered. Finally, the court would find that the fourth factor is met because the lack of protection for private Facebook communication would injure the marital relationship because such relationships are based on communication; if married couples cannot trust that private communications will be kept private, the foundation of a marriage will crumble.

All in all, adding a social media communication exception to the marital privilege seems to be the most effective and efficient way to get the law to progress with society.

#### CONCLUSION

Marital confidences and communications between husband and wife are typically not solely exchanged across the pillow anymore.<sup>236</sup> Instead, married couples are taking advantage of social media to communicate due to its convenience. With this present reality, a change in the marital communications privilege is needed. By gaining further insight into the importance of the privilege, an understanding as to why the marital relationship depends on the existence and expansion of the privilege is explained throughout this article.

With my proposal for a social media communications exception, I am not negating the fact that the Third Party Presence Rule is needed or denoting its importance to the application of the marital communications privilege. What I intend, however, is to pave a way for the law to catch up to the trends of society without losing its underlying meaning.

The marital relationship is one deeply rooted in society and the free flow of communication is central to the existence of that relationship. The marital communications privilege aids the marital relationship by codifying the importance of its privacy and recognizing publically that

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235. See *supra* note 161 and accompanying text.

236. Peter Lawlor, *NH Rule of Evidence No. 504 The Marital Privilege in the Age of Email, Texting and Social Media*, 52 N.H.B.J. 12 (2012).

the relationship deserves such privacy. Overall, my hope through the analysis of this issue is to bring awareness to the problematic areas in the law in order to meet the proper execution of the privilege.