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A Blessed Union: technology Expanding Private Conversations Exempted by Massachusetts's Spousal Disqualification Rule to Voicemail Messages

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A BLESSED UNION: TECHNOLOGY EXPANDING PRIVATE CONVERSATIONS EXEMPTED BY MASSACHUSETTS'S SPOUSAL DISQUALIFICATION RULE TO VOICEMAIL MESSAGES

I. INTRODUCTION

Marital privilege is at the foundation of western legal jurisprudence.[1] Resting on antiquated values and status of marriage, the marital privilege can conflict with the pursuit of justice.[2] It continues, however, to hold a place within the United States justice system.[3]

The scope of spousal communication has evolved far beyond the bedroom conversations between a husband and wife.[4] New technology allows spouses to communicate via email, cellular phone, Skype, text messages, and many other innovative methods.[5] Courts frequently are confronted with novel methods of communication that do not fall within traditional definitions established by statute or common law.[6]

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[1] *See* Newell v. State, 49 So.3d 66, 70-72 (Miss. 2010) (exploring extension of marital privileges to cellular telephones).

[2] Naomi Harlin Goodno, *Protecting "Any Child": The Use of the Confidential-Marital-Communications Privilege in Child-Molestation Cases*, 59 U. KAN. L. REV. 1, 8 n.54 (2010) ("Evidence scholars have offered four historical bases for the common law view that spouses were not competent witnesses for or against each other: (1) The common law unity of husband and wife. Upon marriage, the wife lost her separate identity, and the husband and wife became a legal unity, represented by the husband. Only he could sue or be sued. If the wife had an action, it had to be brought in the husband's name. Since parties were incompetent as witnesses, the husband could not testify. Therefore neither could his alter ego, his wife. (2) The marital identity of interest. Even apart from the spouses' legal identity, their interest in the outcome of any lawsuit would be the same. Hence, the rationale for the party's incompetency applied equally to the party's spouse. (3) The assumed bias of affection. Because of the spouses' intimate relationship and strong feelings for each other, their testimony was deemed incredible. (4) Public policy. There might be interference with marital harmony if the wife could be called to give unfavorable testimony against her husband. Even if the wife gave favorable testimony on direct examination, on cross-examination she may be required to give damaging testimony." (quoting RONALD CARLSON, ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 168 (4th ed. 1997))).

[3] *See Newell*, 49 So.3d at 70-72 (exploring extension of marital privileges to cellular telephones).

[4] *See* Riley v. California, 134 S. Ct. 2473, 2494-95 (2014) (expanding reasonable expectation of privacy to cellular phones).

[5] *See id.* (expanding reasonable expectation of privacy to cellular phones).

[6] *See id.* at 2494-95 (expanding reasonable expectation of privacy to cellular phones).

In *Riley v. California*,[7] the Supreme Court hinted at a new privacy argument regarding marital conversations made over cellular phones.[8] While mainly dicta, the Court made a compelling argument that the new era of "smart phones" means a wealth of personal information at one's fingertips.[9] This dicta, coupled with a recent case in Mississippi, presents a persuasive argument for extending the confidential communications marital privilege to voicemails on cellular phones.[10]

This piece explores the Massachusetts definition of the confidential marital communication privilege and its applicability to voicemail messages.[11] In Part II, I explore the historical development of confidential marital communications from its medieval roots to the present.[12] Part III focuses the historical development on the rise of Massachusetts' evidentiary guidelines and the Commonwealth's use of marital privileges.[13] Part IV discusses the Massachusetts' spousal disqualification rule regarding private communications and the requisite required elements.[14] Part V discusses the dramatic advances in communication technology, the recent cases concerning the Stored Communications Act, and the impact of *Riley* and *Newell v. State*[15] on privacy argument.[16] Finally, Part VI discusses this new concept is applicable to Massachusetts and how to apply the confidential marital communications privilege to voicemails through existing case law.[17]

II. HISTORY OF MARITAL PRIVILEGE

Martial privilege can be placed into two categories: adverse spousal testimony and confidential marital communications.[18] Adverse spousal testimony privilege permits the witness-spouse to refuse to testify

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[7] 134 S. Ct. 2473 (2014).

[8] *See id.* at 2494-95 (expanding reasonable expectation of privacy to cellular phones).

[9] *See id.* (expanding reasonable expectation of privacy to cellular phones).

[10] *See Newell*, 49 So.3d at 70-72 (exploring extension of marital privileges to cellular telephones).

[11] *See infra* Part VI (applying marital privilege to voicemails).

[12] *See infra* Part II (discussing history of marital privilege).

[13] *See infra* Part III (discussing history of Massachusetts Guide to Evidence).

[14] *See infra* Part IV (discussing the elements of spousal disqualification rules).

[15] 49 So.3d 66 (Miss. 2010).

[16] *See infra* Part IV (discussing privacy cell phones).

[17] *See infra* Part VI (applying marital privilege to voicemails).

[18] *See* United States v. Breton, 740 F.3d 1, 9-10 (1st Cir. 2014) (discussing the two types of marital privilege); Goodno, *supra* note 2, at 3 (discussing comparison between two branches of martial privilege).

adversely against his or her spouse.[19] Confidential marital communication privilege allows either spouse to prevent his or her spouse from testifying to the confidential communications during the marriage.[20] Courts and scholars believe both categories have evolved from the medieval disqualification rule.[21]

A marital privilege was first mentioned in a civil case in the sixteenth century in England.[22] According to medieval jurisprudence, husband and wife were viewed as one person and, therefore, a wife was not allowed to testify for or against her husband.[23] Legally, the wife did not have an identity separate from her husband, which would render her testimony useless, as she would be testifying against herself.[24] This jurisprudence created the spousal disqualification rule.[25] According to

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[19] *See Breton*, 740 F.3d at 9-10 (discussing the two types of marital privilege).

[20] *Id.*

[21] *See* Trammel v. United States, 445 U.S. 40, 43-44 (1980) (explaining common medieval jurisprudence that led to two marital privileges); Goodno, *supra* note 2, at 8 n.54 ("Evidence scholars have offered four historical bases for the common law view that spouses were not competent witnesses for or against each other: (1) *The common law unity of husband and wife*. Upon marriage, the wife lost her separate identity, and the husband and wife became a legal unity, represented by the husband. Only he could sue or be sued. If the wife had an action, it had to be brought in the husband's name. Since parties were incompetent as witnesses, the husband could not testify. Therefore neither could his alter ego, his wife. (2) *The marital identity of interest*. Even apart from the spouses' legal identity, their interest in the outcome of any lawsuit would be the same. Hence, the rationale for the party's incompetency applied equally to the party's spouse. (3) *The assumed bias of affection*. Because of the spouses' intimate relationship and strong feelings for each other, their testimony was deemed incredible. (4) *Public policy*. There might be interference with marital harmony if the wife could be called to give unfavorable testimony against her husband. Even if the wife gave favorable testimony on direct examination, on cross-examination she may be required to give damaging testimony." (quoting RONALD CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 168 (4th ed. 1997))); *see also Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1564 (1985) [hereinafter "*Developments in the Law*"] (linking development of adverse testimonial privilege to disqualification rule).

[22] *See* Bent v. Allot, 21 Eng. Rep. 50, 50 (Ch. 1579-1580) (regarding request to examine defendant's wife after defendant attempted to introduce wife's testimony). The precedent created by this case was that a wife could not be induced to testify against her husband. *Id.*; *see* Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2054 n.44 (1995) (citing cases that recognized husband's right to prevent wife from testifying against him).

[23] *See* Goodno, *supra* note 2, at 8 n.54 (discussing background of marital privileged).

[24] *See Trammel*, 445 U.S. at 44 (citing to spousal disqualification rule). According to *Trammel*, the logic behind the prohibition is based on the legal principle that "an accused was not permitted to testify on his own behalf because of his interest in the proceeding" and the husband was the only one with a legal existence. *Id.* The wife derived her legal existence from the husband, thus utilizing his legal existence to testify. *Id.* If she had to borrow the husband's existence to testify, legally she was considered the husband testifying against himself, which was not legally permissible. *Id.*

[25] *See Developments in the Law*, *supra* note 21, at 1564 (describing evolution of medieval jurisprudence regarding disqualification rule).

another theory adverse testimonial privilege arose independently and was well established in judicial decisions and legal commentary by the sixteen century.[26] *Bent v. Allot*,[27] citing adverse testimonial privilege, was mentioned nearly forty-eight years before the first mention of spousal disqualification.[28]

The Supreme Court did not explicitly recognize the spousal disqualification rule until 1839.[29] In *Stein v. Bowman*,[30] the Court recognized that a wife was unable to testify for or against her husband because she served as a legal extension of him.[31] However, this ruling became outdated when Congress passed legislation in 1878 that empowered a defendant to testify on his own behalf in a criminal case.[32] Enactment of the legislation made it more difficult to prove a wife, as an extension of her husband, was incompetent to testify on her husband's behalf if her husband was able to testify for himself.[33] Thus, in 1933 the spousal disqualification rule was abolished.[34] Without the spousal

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[26] *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §2227, 211 (J. McNaughton rev. ed. 1961) (exploring history of adverse testimonial privilege). Wigmore theorizes that the privilege arose from a "legal and social acceptance" of husbands as the master of the home. *Id.* In the late sixteenth century, a wife or a servant who harmed the "master" could be tried for petit treason. *Id.* If a wife was permitted to testify against her husband, and indirectly be the cause for her husband's death, then she harmed the "master." *Id.* By the mid seventeenth century this privilege was cited in judicial decisions and legal commentary. *Id.*

[27] 21 Eng. Rep. 50 (Ch. 1580).

[28] *See* Regan, *supra* note 22, at 2055 n.46 (discussing Bent v. Allot). *Bent* referenced Edward Coke's statement that, "a wife cannot be produced either against or for her husband, *quia sunt duae animae, in carne una* [because they are two souls in one body], and it might be a cause of implacable discord and dissention between husband & the wife." *Id.* (citing EDWARD COKE, THE COMMENTARY UPON LITTLETON § 6b (5th ed. 1656); *see* Davis v. Dinwoody, 4 Term Rep. 678, 679, 100 Eng. Rep. 1241, 1241 (K.B. 1792) ("[B]eing so nearly connected, [spouses] are supposed to have such a bias upon their minds that they are not to be permitted to give evidence either for or against each other.").

[29] *See* Stein v. Bowman, 38 U.S. 209, 222 (1839) ("[T]he wife and the husband have been viewed, in this respect, as having a right to protection from a disclosure, on the same principle as an attorney is protected from a disclosure of the facts communicated to him by his client.").

[30] 38 U.S. 209 (1839).

[31] *See id.* (explaining holding of the case in the context of marital privilege).

[32] *See* 18 U.S.C. § 3481 (2012) ("In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness.").

[33] *See* Goodno, *supra* note 2, at 7 (reflecting on effects of legislation). The courts did not separate the legal entity of the husband and wife, but women were empowered to serve as witnesses in judicial proceedings. *Id.*

[34] *See* Funk v. United States, 290 U.S. 371, 387 (1933) ("Nor can the exclusion of the wife's testimony, in the face of the broad and liberal extension of the rules in respect of the competency of witnesses generally, be any longer justified, if it ever was justified, on any ground of public policy."). The Court held the witness-spouse could testify on behalf of the defendant-spouse, but

disqualification rule in play, adverse testimonial privilege and confidential communications privilege were able to evolve into the privileges we recognize today.[35]

Following 1933, *Hawkins v. United States*[36] explicitly outlined the adverse testimonial privilege.[37] The Supreme Court held that both spouses held the privilege to bar adverse testimony of the other spouse to "foster family peace."[38] This rule remained in place until the Court's decision in *Trammel v. United States*,[39] which held that the witness-spouse alone held the privilege in criminal proceedings.[40]

On the other hand, the marital communications privilege was not explicitly utilized until the 1850s.[41] With the spousal disqualification rule in place, a wife did not possess a separate legal identity and was forbidden from testifying against her spouse.[42] In all other cases, the adverse testimonial privilege could cover attempts to bring in spousal evidence.[43] The marital communications did not come to the forefront until the spousal disqualification rule was abolished.[44] In 1934, in *Wolfle v. United States*,[45] the Supreme Court recognized the martial communications privilege for the first time.[46] However, it was not clear who held the power to invoke the privilege and, even in the latter case of *Blau v. United States*,[47] the Court

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did not discuss whether one spouse could prevent the other from adversely testifying. *Id.*

[35] *Id.*

[36] 358 U.S. 74 (1958).

[37] *See id.* at 78-79 (establishing parameters of adverse testimonial privilege). In *Hawkins*, the Court reaffirmed *Funk* and answered the question of whether one spouse could prevent the other spouse from adversely testifying. *Id.* In other words, it defined adverse testimonial privilege. *Id.*

[38] *See id.* at 77 (exploring policy rationale behind spousal privilege).

[39] 445 U.S. 40 (1980).

[40] *See id.* at 53 (balancing interests in "marital harmony" with not "unduly burdening legitimate law enforcement means").

[41] *See* WIGMORE, *supra* note 26, at 644 (discussing evolution of spousal privilege).

[42] *See Developments in the Law*, *supra* note 21, at 1565 (discussing usage of spousal disqualification rule). The spousal disqualification rule was the primary rule in place preventing wives from testifying in legal proceedings until its abolishment in 1933. *Id.*

[43] *See Developments in the Law*, *supra* note 21, at 1565. The only time the marital communications privilege was necessary was when the action involved neither spouse as a party to the case, but the communication remained material to the case outcome. *Id.*

[44] *See* WIGMORE, *supra* note 26, at 645 (relating the evolution of marital communications privilege). After the spousal disqualification rule was abolished, state legislatures felt compelled to enact protections for marital communications. *Id.*

[45] 291 U.S. 7 (1934).

[46] *See id.* at 14 ("[R]egarded [marital communications] as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice."); Goodno, *supra* note 2, at 9-10 (discussing impact of *Wolfle*).

[47] 340 U.S. 332 (1951).

avoided the question of invocation.[48]

In conjunction with the common law holdings, state legislatures and other organizations sought to reform the boundaries of the marital privilege landscape.[49] In 1938, the American Bar Association recommended that adverse testimonial privilege be abolished, while maintaining the confidential communications privilege.[50] The American Law Institute's Model Code of Evidence and the National Conference of Commissioners on Uniform State Laws quickly followed suit, also attacking the adverse testimonial privilege.[51] However, in 1971, the Committee on the Federal Rules of Evidence proposed the Rule 505, which abolished the confidential communications privilege in favor of adverse testimonial privilege.[52] In response, Congress rejected proposed Rule 505 and in favor of the more permissive Rule 501.[53] The codification of the

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[48] *See id.* at 333 (reaffirming requirements for the privilege without deciding who may invoke it).

[49] *See* Regan, *supra* note 22, at 2058-59 (arguing there was movement to provide more protection for confidential communications than adverse testimonial privilege).

[50] *See id.* (arguing there was movement to provide more protection for confidential communications than adverse testimonial privilege). Regan describes the extensive protections instituted by states regarding all manner of confidential communications, such as with marital counselors, domestic violence counselors, and social workers. *Id.* at 2057.

[51] *See id.* at 2058-59 (stating American Law Institute rejected argument that "adverse testimony preserved marital harmony"); *see also* UNIF. R. EVID. 23(2) cmt. (1953) (stating National Conference of Commissioners recommended elimination of adverse testimony but retention of communication privilege).

[52] *See* Regan, *supra* note 22, at 2058-59 (stating American Law Institute rejected argument that "adverse testimony preserved marital harmony"). The Committee on the Federal Rules of Evidence originally met and drafted a preliminary draft in 1969. *See* 46 F.R.D. 161, 263-66 (1969) (discussing general rule of marital privilege). The logic behind not including marital communications in the privilege was that the committee felt the traditional justifications for having a marital privilege were not relevant to the discussion of marital communications. *Id.* at 264. The committee found the "prevention of marital dissension" and "repugnancy of requiring a person to condemn or be condemned by his spouse" as the key rationales for developing this privilege. *Id.* A privilege regarding marital communications would not deter these issues since the committee felt parties are likely unaware that this privilege exists. *Id.* at 264-65. Finally, they contrasted marital communication with other communication privileges, such as attorney-client privilege and doctor-patient privilege, where because one professional is privy to the communication he or she can inform the other of the existence of the privilege before it becomes effective. *Id.* at 265. The concern was married couples did not have the requisite knowledge of the privilege before it became effective. *Id.* Then, in 1972, the same committee proposed revisions to the Rule 505. 51 F.R.D. 315, 369-71 (1971).

[53] *See* Regan, *supra* note 22 at 2058-59 (discussing Congress' preference for Rule 501); *see also* Mika K. Story, *Twenty-First Century Pillow-Talk: Applicability of the Marital Communications to Electronic Mail*, 58 S.C. L. REV. 275, 280 (2006) (noting Congress also rejected proposal to abolish confidential communication privilege).

> [T]he meaning of the Rule (made entirely clear in the Advisory Committee's comments) is that, however intimate, however private, however embarrassing may be

federal rules of evidence was delayed for two years partly because of the strong condemnation against the proposed Rule 505.[54] Thus, Rule 501 was enacted instead, so that marital privileges could be left to the discretion of the states.[55] Today, the confidential communications privilege is codified in forty-nine states and the District of Columbia, reflecting its popularity even after the codification of the Federal Rules of Evidence.[56]

> a disclosure by one spouse to another, or some fact discovered, within the privacies of marriage, by one spouse about another, that disclosure of fact can be wrung from the spouse under penalty of being held in contempt of court, if it is thought barely relevant to the issues in anybody's lawsuit for breach of a contract to sell a carload of apples . . . It seems clear to me that this Rule trenches on the area of marital privacy so staunchly defended by the Supreme Court.

Charles L. Black, Jr., *The Marital and Physician Privileges – A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 47 (1975); *see also* Goodno, *supra* note 2, at 11 (discussing Professor Charles Black's letter to Congressman William L. Hungate's regarding privilege rule).

[54] *See* Goodno, *supra* note 2, at 11 (discussing opposition to eliminating marital privilege). After the Judicial Conference approved the Revised Draft of Propose Rules from the Advisory Committee, the Supreme Court sought the legal community's opinion of this draft. Michael W. Mullane, Trammel v. United States: *Bad History, Bad Policy, and Bad Law*, 47 ME. L. REV. 105, 117-18 (1995). Immediately, the United States Justice Department and "conservative" members of Congress voiced opposition to the wording of the marital privilege. *See id.* ("Organized opposition surfaced, notably from the United States Justice Department. Conservative members of Congress were also upset . . . ." (quoting RONALD L. CARLSON ET AL., EVIDENCE IN THE NINETIES 25 (3rd ed. 1991))). When the Supreme Court sent the revised rules to Congress there were extensive debates. *Id.* at 118. Endless committee hearings and floor debates, coupled with a disparity between the bills of the House and Senate, significantly delayed the enactment of the federal rules. *Id.* It was expected that Congress would "reject the entire set of rules" solely over the marital privilege dispute. *Id.*

[55] *See* FED. R. EVID. 501 (discussing privileges in general); 120 Cong. Rec. 40, 891 (1094) (presenting statement of Rep. Hungate).

[56] *See* Story, *supra* note 53, at 281 (*citing* ALA. R. EVID. 504(b));505(b); ARIZ. REV. STAT. § 12-2232 (2003); ARK. R. EVID. 504(b); CAL. EVID. CODE § 917(a) (West Supp. 2006); COLO. REV. STAT. § 13-90-107(1)(a)(I) (Supp. 2006); DEL. UNIF. R. EVID. 504(b); D.C. CODE § 14-306 (LexisNexis Supp. 2006); FLA. STAT. § 90.504 (West 1999); GA. CODE § 24-5-501(7) (2014); HAW. R. EVID. 505(b); IDAHO CODE § 9-203(1) (2004); 735 ILL. COMP. STAT. 5/8-801 (West 2003); IND. CODE § 34-46-3-1(4) (LexisNexis 1998); IOWA CODE § 622.9 (West 1999); KAN. STAT. § 60-428 (2005); KY. R. EVID. 504(b); LA. CODE EVID. art. 504 (2006); ME. REV. STAT. tit. 15 § 1315 (1999); MD. CODE CTS. & JUD. PROC. § 9-105 (LexisNexis 2002); MASS. GEN. LAWS ch. 233 § 20 (2006); MICH. COMP. LAWS § 600.2162(7) (West Supp. 2006); MINN. STAT. § 595.02(a) (West 2000); MISS. R. EVID. 504(b); MO. STAT. § 546.260 (West 2006); MONT. CODE § 26-1-802 (2005); NEB. REV. STAT. § 27-505 (1995); NEV. REV. STAT. § 49.295(1)(b) (LexisNexis 2002); N.H.R. EVID. 504; N.J. STAT. § 2A:84A-22 (West 1994); N.M. STAT. § 38-6-6(A) (LexisNexis 2004); N.Y. C.P.L.R. 4502(b) (McKinney 1992); N.C. GEN. STAT. § 8-57(c) (2005); N.D.R. EVID. 504(b); OHIO REV. CODE § 2945.42 (LexisNexis 2006); OKLA. STAT. tit. 12, § 2504 (West Supp. 2006); OR. REV. STAT. § 40.255 (2005); 42 PA. CONS. STAT. § 5914 (West 2000); R.I. GEN. LAWS § 9-17-13 (1997); S.C. CODE ANN. § 19-11-30 (Supp. 2004); S.D. CODIFIED LAWS § 19-13-13 (1995); TENN. CODE ANN. § 24-1-201 (2000); TEX. R. EVID. 504(a)(2); UTAH CODE ANN. § 78-24-8(1) (2002); VT. R. EVID. 504(b); VA. CODE. ANN. § 19.2-

III. HISTORY OF MASSACHUSETTS GUIDE TO EVIDENCE

Following the codification of the Federal Rules of Evidence, the Massachusetts Supreme Judicial Court appointed an advisory committee to explore the codification of evidence rules into law.[57] Headed by Honorable John E. Fenton, Jr. and Professor Charles M. Burnim of Suffolk University Law School, the committee drafted proposed rules of evidence to be reviewed by the Massachusetts Bar Association before its final submission to the court.[58] The committee cited the Federal Rules of Evidence and Proposed Federal Rules of Evidence, among other sources, as the language's foundation.[59] In 1980, with the court requesting briefs from a number of organizations, the Massachusetts Lawyers Weekly published the full text of the findings with notes from the committee.[60] In all, there was a relatively positive response to the codification,[61] but on December 30, 1982, the court released an announcement declining to codify the proposed rules.[62] The court was concerned that codification would restrict the

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271.2 (Supp. 2006); WASH. REV. CODE § 5.60.060(1) (West Supp. 2006); W. VA. CODE § 57-3-4 (LexisNexis 2005); WIS. STAT. § 905.05 (West 2000); WYO. STAT. § 1-12-104 (2005)) (discussing purpose of Rule 501).

[57] *See* Jeremiah F. Healy III, *Ten Years After: A Reconsideration of the Codification of Evidence Law in Massachusetts*, 15 W. NEW ENG. L. REV. 1, 3 (1993) (discussing and citing codification of Federal Rules of Evidence as impetus behind movement). The advisory committee was appointed on November 22, 1976. *Id.*

[58] *See id.* at 3-4 (describing the formation of the committee). The original chairman was the Honorable A. David Mazzone of the Massachusetts Superior Court, but he was succeeded by the Honorable John E. Fenton, Jr. when Mazzone was elevated to the federal bench. *Id.* at 3. Professor Charles M. Burnim succeeded a member of the committee who passed away. *Id.* at 4. These gentlemen led the advisory committee and sought commentary from the legal community at the annual meeting of the Massachusetts Bar Association while finalizing their draft rules. *Id.* The draft was submitted to the Supreme Judicial Court in July of 1980. *Id.*

[59] Healy, *supra* note 57, at 4. The Federal Rules of Evidence refers to the rules that were codified, while the Proposed Federal Rules of Evidence were rules were not enacted by Congress. *Id.* The committee sought to utilize the Federal Rules of Evidence "as a starting point" and would deviate when there were "reasons of policy or of well-established Massachusetts practice." *Id.*

[60] *Id.* The Boston Bar Association submitted a 70-page brief that comprehensively discussed the proposed rules. *Id.* at 12.

[61] *See id.* at 12-13 (discussing reviews of the rules). The author examined the briefs and responses of interested organizations and found the responses stated that the "codification of Massachusetts evidence law was sensible, especially if it was modeled on the federal rules . . . ." *Id.* The author felt that the singular issue for these organizations was the "wording of certain individual rules" not opposition to its enactment. *Id.*

[62] *See id.* at 13 (discussing Massachusetts Supreme Judicial Court's decision regarding codification); Jeffrey S. Siegal, *Timing Isn't Everything: Massachusetts' Expansion of the Excited Utterance Exception in Severe Criminal Cases*, 79 B.U. L. REV. 1241, 1244 (1999) (discussing codification of Massachusetts' rules of evidence). Many were shocked when the rules were not codified because there was such a positive response from the legal community. Healy, *supra* note 57, at 13.

evolution of the common law evidence already better adapted to Massachusetts's law and cited the lack of uniformity even in federal courts.[63] It would not adopt them "at this time."[64] However, the courts, including the Supreme Judicial Court, continue to cite to these proposed "rules."[65]

Finally in 2006, at the request of the Massachusetts Bar Association, Boston Bar Association, and the Massachusetts Academy of Trial Attorneys, the Supreme Judicial Court once again selected an advisory committee to prepare what is now known as the *Guide to Evidence*, first published in 2008.[66] While not codified, these "rules" are considered a reliable compilation of existing evidence standards to be utilized by the courts and the public.[67] The marital privilege standards are statutorily enforced and dictated in the Guide to Evidence,[68] but the case law illuminates the necessary elements of the "rule" regarding the confidential communications privilege, which is better known as the spousal disqualification rule in Massachusetts.[69]

IV. ELEMENTS OF MARITAL PRIVILEGE

In Massachusetts, the marital privilege is included in Massachusetts General Laws chapter 233, section 20 and section 504 of the Guide to Evidence.[70] Section 504(b)(1) states, "In any proceeding, civil or

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[63] *See* Healy, *supra* note 57, at 14 (explaining rules were "less adapted to the needs of modern trial practice than current Massachusetts law.").

[64] *Id.* at 14. The Justices saw the "substantial value" of the proposed rules and suggested there was a place for them in the "continued and historical role of the courts." *Id.*

[65] *See* Siegal, *supra* note 62, at 1244 (discussing the "proposed rules"). The proposed rules are considered an "authoritative source in evidentiary rulings." *Id.*

[66] *Massachusetts Guide To Evidence*, SUP. JUD. CT. ADVISORY COMM. ON MASS. EVIDENCE L., iii (2016), http://www.mass.gov/courts/docs/sjc/guide-to-evidence/massguidetoevidence.pdf (describing all proposed rules of evidence and corresponding case law).

[67] *See* Siegal, *supra* note 62, at 1244 (discussing the "proposed rules" as an "authoritative source" by the trial and appellate courts).

[68] *See Massachusetts Guide to Evidence*, *supra* note 66, at iii (describing all proposed rules of evidence and corresponding case law).

[69] *See infra* Part IV (discussing marital privileges in Massachusetts General Laws and Guide to Evidence).

[70] MASS. GEN. LAWS ch. 233, § 20 (2016).

> First, Except in a proceeding arising out of or involving a contract made by a married woman with her husband . . . neither husband nor wife shall testify as to private conversations with the other . . . [nor] shall be compelled to testify in trial . . . against the other.

criminal, a witness shall not testify as to private conversations with a spouse occurring during their marriage."[71] From this statement we can derive the basic elements of the rule: any proceeding civil or criminal, disqualification versus a privilege, private conversation between the spouses, and during the marriage.[72]

A. "In any proceeding, civil or criminal"

This language, which is present in the Guide as well as the statutory wording, suggests that the privilege is applicable in both civil and criminal proceedings.[73] Since the language "any proceeding" precedes the clause "civil or criminal," the term "civil or criminal" serves merely to clarify the broader meaning of proceeding.[74] The legislature intended a broad application of this privilege across both types of proceedings because it limited its application through a series of exceptions.[75]

B. Disqualification Versus Privilege

Unlike the adverse testimonial privilege, the spousal disqualification prevents either spouse from testifying about private conversations; thus, no one person holds a right to prevent or disclose the information.[76] Even if both parties are agreeable to revealing the elements of the private conversation, the rule does not permit it.[77] It is important to

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Id.

[71] *See Massachusetts Guide to Evidence*, *supra* note 66, at 70 (describing spousal privilege general rule and who can claim privilege).

[72] *See id.* (describing spousal privilege general rule and who can claim privilege).

[73] *See* Commonwealth v. Burnham, 887 N.E.2d 222, 225-27 (Mass. 2008) (treating civil and criminal proceedings together under spousal privilege rule). The court held that since the wording states "any person may testify in any proceeding" the rule meant to treat both civil and criminal proceedings alike. *Id.* The defendant attempted to argue that since there were exceptions to the rule citing specific civil or criminal proceedings, the whole statute must be read as distinguishing the treatment between civil or criminal proceedings. *Id.* The court pointed to laws involving statutory construction to demonstrate that since the word "proceeding" is used without limitation, it refers to either proceeding. *Id.*

[74] *See id.* at 226-27 (applying canons of statutory construction to "proceeding").

[75] *See id.* (applying canons of statutory construction to "proceeding").

[76] *See* Gallagher v. Goldstein, 524 N.E.2d 53, 54 (Mass. 1988) (holding rule applies equally to both spouses and both can raise it).

[77] *See id.* (discussing evidence of a private conversation). In one case, the husband attempting to prove the effects of a head injury, called his own wife as a witness to testify that he declared he was going to drown himself. *See also* Commonwealth v. Cronin, 69 N.E. 1065, 1066 (Mass. 1904) (discussing spouse's testimony). This was the only evidence he attempted to commit suicide before the assault of the plaintiff. *Id.* However, the court excluded this evidence

note that the disqualification applies to the content of the conversation, not the fact that the conversation occurred.[78] So, if the existence of the conversation is material to the case, it can be introduced as evidence.[79] As long as neither party objected to the fact of the private conversation occurred, then it can be "given its full probative value."[80]

C. Privacy

Privacy is an essential limitation on the conversations permitted and, therefore, is a preliminary fact for the trial judge to determine.[81] In federal courts the limitation is restricted to those that are confidential, but the Massachusetts courts take the limitation a step further.[82] Privacy is defined as solely in the presence of the husband and wife, and thus there has been case law considering whether the presence of the spouse's children eliminates the element of privacy since they could count as a "third party."[83] In those cases, the court has considered the age, proximity, and understanding of the children, though the courts are not necessarily

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as a private conversation between a husband and his wife. *Id.* While the husband and wife were willing to share this private conversation, and the testimony would be beneficial to defendant's case, it had to be excluded because of the absolute bar of the rule. *Id.*

[78] *See Goldstein*, 524 N.E.2d at 54 ("[T]he statute does not bar evidence as to the fact that a conversation took place.").

[79] *See* Sampson v. Sampson, 112 N.E. 84, 87 (Mass. 1916) ("It does not exclude from the realm of evidence proofs of acts designedly induced by those conversations and legitimate inferences as to the cause of such acts.").

[80] *See* Commonwealth v. Stokes, 374 N.E.2d 87, 95-96 (Mass. 1978) (noting defendant making proper objection is entitled to ruling from trial judge). The privilege is a defense that can be raised, but is considered waived if there is no objection raised. *See* MacDonald's Case, 178 N.E. 647, 649 (Mass. 1931) (discussing application of privilege).

[81] *See* Freeman v. Freeman, 130 N.E. 220, 222-23 (Mass. 1921) (demonstrating judge determines whether conversation is private in presence of spouses' daughters). In this case, the judge properly admitted a marital conversation that occurred in the presence of their nine-year-old child since the judge determined that the child had "sufficient intelligence at the time to pay attention, and to understand." *Id.* at 222. The court decided it was for the judge to determine whether the element of privacy was met before proceeding with the evidence. *Id.*

[82] *See* Wolfle v. United States, 291 U.S. 7, 14 (1934) ("[B]etween husband and wife may sometimes be made in confidence even though in the presence of a third person"); Blau v. United States, 340 U.S. 332, 333 (1951) (recognizing rule that marital communications are presumptively confidential); Haddad v. Lockheed Cal. Corp., 720 F.2d 1454, 1456 (9th Cir. 1983) (finding party that introduces communication bears burden of overcoming the presumption of applying privilege); United States v. Weinberg, 439 F.2d 743, 750 (9th Cir. 1971) (affirming the holding of *Haddad*).

[83] *See Freeman*, 130 N.E. at 222 (regarding presence of nine-year-old child enough to destroy privacy); Pereira v. United States, 347 U.S. 1, 6-7 (1954) (ruling federally privilege may be waived if information is conveyed to third party).

lenient.[84] Therefore, if a third party overhears such a conversation, there is no bar on him or her from testifying to the substance.[85]

D. Conversations with a Spouse

In Massachusetts, the communication is limited verbal conversations, not written communications.[86] However, courts do not allow "words constituting or accompanying abuse, threats, or assaults" against the other spouse to be disqualified as confidential conversations since it is against public policy and would limit the prosecution of domestic violence cases.[87] Further complaints or exclamations regarding pain or suffering to one's spouse are also not barred.[88] There are several proceedings listed in section 504(b)(2) where the disqualification does not apply because the conversation is regarded as material for public policy reasons.[89]

E. During their Marriage

The disqualification only applies during the marriage because this rule is derived from an interest in preserving marital harmony.[90] Therefore, any private conversations before or after the spouses were married are not disqualified.[91] However, if the spouse has passed away, the disqualification survives.[92] There is an exception if the declaration of a

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[84] *See* Lyon v. Prouty, 28 N.E. 908, 909 (Mass. 1891) (finding conversation was subject matter child would be interested in and she had sufficient proximity).

[85] *See* Commonwealth v. O'Brien, 388 N.E.2d 658, 661 (Mass. 1979) (holding third parties in presence of marital conversation are not forbidden from testifying about conversation).

[86] *See* Commonwealth v. Szczuka, 464 N.E.2d 38, 46 n.14 (Mass. 1984) (finding letters from defendant to wife were properly introduced into evidence).

[87] *See* Commonwealth v. Gillis, 263 N.E.2d 437, 440 (Mass. 1970) (finding disqualification not meant to cover words of abuse, threats, or assaults).

[88] *See* Commonwealth v. Jardine, 10 N.E. 250, 250-51 (Mass. 1887) (holding wife's presence while defendant complained of pain and suffering did not exclude testimony).

[89] *Massachusetts Guide to Evidence*, *supra* note 66, at 70; *see, e.g.*, Commonwealth v. Burnham, 887 N.E.2d 222, 222-24 (Mass. 2008) (regarding not applying privilege to child abuse proceedings); Villalta v. Commonwealth, 702 N.E.2d 1148, 1152 (Mass. 1998) (stating child abuse exception not limited to child of either spouse).

[90] *See* Gallagher v. Goldstein, 524 N.E.2d 54, 54-55 (Mass. 1988) (citing historical precedence and policy reasons for the rule).

[91] *See* Commonwealth v. Azar, 588 N.E.2d 1352, 1361 (Mass. App. Ct. 1992) ("[The marital disqualification rule] depends upon the existence of the marital relationship at the time of the conversation.").

[92] *See* Dexter v. Booth, 84 Mass. 559, 559-60 (1861) (holding disqualification still applies after death of spouse). Plaintiff was a merchant who brought an action against the executor of an

deceased is admitted as hearsay, was made in good faith, and upon "personal knowledge."[93]

V. PRIVACY OF CELLULAR PHONES

More than any other element, the privacy element has been attacked the most because of the proliferation and popularity of cellular phones in our society.[94] Courts regularly face the uncharted, expanding territory of technology that does not always analogize well with previous jurisprudence. Some courts attempted to rationalize how the law should evolve to accept the challenges posed by our technologically savvy society, while others refused to delve into the complexities of connectivity and the "cloud."[95] Consequently, it came as no surprise that the Supreme Court granted certiorari to consider cellular phones in the context of Fourth Amendment protections during a search and seizure.[96]

A. Privacy and the "Third Party Presence"

One of the first, publicized debates regarding privacy and cell phones was in the context of the National Security Administration's surveillance of cellular phone metadata.[97] The American Civil Liberties

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estate for goods purchased. *Id.* Plaintiff attempted to have the widow testify to private conversations with her husband. *Id.* The court held the "exclusion remains unaffected by his death" even though the nature of the conversation was not confidential. *Id.*

[93] *See Massachusetts Guide to Evidence*, *supra* note 66, at 70 ("This disqualification shall not apply to: . . . a declaration of a deceased spouse if the court finds that it was made in good faith and upon the personal knowledge of the declarant."); *see also* MASS. GEN. LAWS ch. 233, § 65 (2016) ("In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant.").

[94] *See* Klayman v. Obama, 957 F. Supp. 2d 1, 30-33 (D.D.C. 2013) (discussing marital privilege in the context of cell phones).

[95] *See* American Civil Liberties Union v. Clapper, 959 F. Supp. 2d 724, 757 (S.D.N.Y. 2013) (finding no standing to raise Fourth Amendment challenge); *Klayman*, 957 F. Supp. 2d at 30-33 (affirming had standing to raise Fourth Amendment challenge). While reaching differing opinions, as noted below, both courts were confronted with arguments by the plaintiff citing to the radical differences between cellular phones and other items discoverable during a search. *See Clapper*, 959 F. Supp. 2d at 757 (finding no standing to raise Fourth Amendment challenge); *Klayman*, 957 F. Supp. 2d at 32-33 (affirming standing to raise Fourth Amendment challenge).

[96] *See* Riley v. California, 134 S. Ct. 2473, 2480-85 (2014) (holding search of cellular phone's metadata requires search warrant).

[97] *See* Glenn Greenwald, *NSA Collecting Phone Records of Verizon Customer Daily*, THE GUARDIAN, June 6, 2013, http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order (revealing mass-collection of telephone records in United States from records

Union, among others, were concerned that there was little to no oversight of government organizations that acted in the name of national security.[98] However, other than a general knowledge that such surveillance was in place, very little concrete evidence was available to the public.[99] Therefore, the initial hurdle for bringing suit in federal court was the issue of standing.[100] Previously, cases brought before the district courts could only proceed on the assumption that their calls were being reviewed due to the existence of the surveillance program.[101] This all changed when Edward Snowden, a former NSA contract employee, released documentation that revealed that the NSA was collecting daily phone records of Verizon customers and the Government confirmed the authenticity of the documents.[102] This assumption was no longer too attenuated for the justice system to ignore the very real question of privacy, which led to two highly differing opinions.[103]

First, in *Klayman v. Obama*[104] the court held that due to "nature and quantity of the information contained in people's telephony metadata" the public had a "*greater* expectation of privacy" than before and therefore the public has the right to be protected from "invasive acts" by the government.[105] Distinguishing from the landmark opinion *Smith v. Maryland*,[106] the court found this decision inapplicable due to the

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released by Edward Snowden).

[98] *See Clapper*, 133 S. Ct. at 1146-47 (finding no standing existed even though plaintiff claimed communications intercepted).

[99] See *id.* at 1144-45 (discussing limited knowledge of extent of collection).

[100] *See id.* at 1147 ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is *certainly* impending." (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 565 n.2 (1992))).

[101] *See id.* at 1148-49 (discussing government's targeting practice); Kate Vinton, *Edward Snowden Calls Ruling on NSA Mass Surveillance "Extraordinarily Encouraging"*, FORBES, May 8, 2015, http://www.forbes.com/sites/katevinton/2015/05/08/edward-snowden-calls-nsa-mass-surveillance-ruling-extraordinarily-encouraging/ (explaining Amnesty case thrown out because it could not prove it was being spied on).

[102] *See* Greenwald, *supra* note 97 (recognizing foreign intelligence surveillance court giving permission to collect telephone metadata from Verizon).

[103] *See Clapper*, 959 F. Supp. 2d at 757 (discussing NSA collection provided standing); Klayman v. Obama, 957 F. Supp. 2d 1, 1 (D.D.C. 2013) (holding had standing due to proof of NSA collection); Greenwald, *supra* note 97 (recognizing foreign intelligence surveillance court giving permission to collect telephone metadata from Verizon).

[104] 957 F. Supp. 2d 1 (D.D.C. 2013), *vacated and remanded*, 800 F.3d 559 (D.C. Cir. 2015).

[105] *See id.* at 34-36, 41 (summarizing how metadata constitutes a search).

[106] *See* Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (holding fourth amendment rights not violated by installing pen register without warrant). The Supreme Court found a person could not have a reasonable expectation of privacy for "numbers dialed into a telephone system." *Id.* at 738. The numbers dialed are sent to the telephone system, a third party, through the switchboards that convey the call to the recipient. *Id.* at 742. The court found the reasonable expectation of

advancement in technology, the breadth of information, and how the current relationship between law enforcement and these private companies amounts to a "joint intelligence-gathering operation."[107] Most of the argument regarding whether it constituted a search pointed to the ubiquity of cellular phones as well as their numerous functions, revealing a wealth of information far beyond its telephone capabilities.[108] The court acknowledged that a phone "reflects a wealth of detail about . . . familial, political, professional, religious, and sexual associations."[109] With such a device, the court could comprehend why "society views that expectation as reasonable."[110]

In contrast, in *American Civil Liberties Union v. Clapper*,[111] the court found no "reasonable expectation of privacy" because an individual cannot hold an expectation of privacy when it voluntarily releases the information to third parties: the telecommunication providers.[112] When an individual uses his or her phone, the service provider stores where the call went to, how long the call lasted, and other information regarding usage.[113] These companies are allowed to collect this data because all customers agree to such conditions when they buy a device.[114] Furthermore, a customer cannot allege a breach of his or her privacy when he or she knowingly submitted to such terms.[115] In the court's analysis, it examined *Katz v. United States*[116] to determine, "first that a person have exhibited an actual (subjective) expectation of privacy" to ascertain if a search occurred.[117] The court determined a person could not have an expectation if he or she already knows that the information is stored and used for the

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privacy stopped at the content of the phone call. *Id.* at 739, 743.

[107] *See Klayman*, 957 F. Supp. 2d at 32-34 (distinguishing present case from Smith v. Maryland).

[108] *See id.* at 33 (distinguishing present case from Smith v. Maryland).

[109] *Id.* at 36 (quoting U.S. v. Jones, 132 S. Ct. 945, 956 (2012)).

[110] *Id.*

[111] 959 F.Supp.2d 724 (S.D.N.Y 2013).

[112] *See* ACLU v. Clapper, 959 F. Supp. 2d 724, 749, 752 (S.D.N.Y 2013) (enforcing *Smith v. Maryland*).

[113] *See id.* at 730 (discussing metadata).

[114] *See id.* at 753 (discussing how the concept of metadata has not changed).

[115] *See id.* at 749-50 (reasoning no expectation of privacy when dialing telephone numbers because company keeps records of numbers).

[116] *See* 389 U.S. 347, 353 (1967) (holding that fourth amendment violations are not limited to physical intrusions and trespass doctrine).

[117] *See id.* at 361 (Harlan, J., concurring) ("[T]he rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

company's business records.[118] Once that privacy expectation is lost, the court finds the breadth and type of information from a phone not important to the analysis of whether or not there was a search.[119] However, the Supreme Court acknowledged the notion that a petitioner can have the expectation to keep the content of the conversation private even if that does not extend to the actual number dialed.[120]

These two cases while exploring the implication of a "reasonable expectation of privacy," touched upon relevant privacy arguments for marital privilege.[121] Both acknowledged that the "touchstone" was the "reasonable expectation" of the public.[122] The public's perception of phones has dramatically changed over the decades, thus requiring a reevaluation of the court's consideration of "reasonableness."[123] There appeared to be a consensus that the content of the data would implicate legitimate privacy concerns.[124]

B. Reasonable Expectation of Privacy

In 2014, arguments surrounding a "reasonable expectation of privacy" came to the forefront when the Supreme Court considered the case of *Riley v. California*.[125] That case consisted of two separate incidents regarding a cell phone seized off the defendants' person during a search.[126] In the first incident, a cell phone was seized off of petitioner David Riley during an arrest for possession of concealed and loaded firearms in his vehicle.[127] In the second incident, two cellular phones were seized off of

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[118] *See Clapper*, 959 F. Supp. 2d at 750 (finding no privacy expectations for customers).

[119] *See id.* at 752 (asserting unprotected information does not turn make it Constitutional right).

[120] *See* Smith v. Maryland, 442 U.S. 735, 743 (1979) (rejecting notion that numbers called are private). Also, in *Clapper*, the discussion does not broach the concept of content versus identification because the query initially only starts with the telephone number itself. *Clapper*, 959 F. Supp. 2d at 740-41.

[121] *See Clapper*, 959 F. Supp. 2d at 756-57 (emphasizing importance of reasonableness with Fourth Amendment); *Klayman*, 957 F. Supp. 2d 1, 30-31 (D.D.C. 2013) (recognizing plaintiff had reasonable expectation of privacy).

[122] *See Clapper*, 959 F. Supp. 2d at 756-57 (emphasizing importance of reasonableness with Fourth Amendment); *Klayman*, 957 F. Supp. 2d at 30-31 (recognizing plaintiff had reasonable expectation of privacy).

[123] *See Klayman*, 957 F. Supp. 2d at 29-42 (analyzing plaintiffs' reasonable expectations of privacy to cellular telephone metadata).

[124] *See Clapper*, 959 F. Supp. 2d at 724; *Klayman*, 957 F. Supp. 2d at 1.

[125] *See* Riley v. California, 134 S. Ct. 2473, 2482-84 (2014) (discussing reasonable expectation of privacy in cellphones).

[126] *See id.* at 2480-81 (discussing factual and procedural background).

[127] *Id.* at 2480. Riley's cellular phone was a "smart phone," which has "advanced computing

petitioner Brima Wurie after she made an apparent drug sale from a car.[128]

The Court's analysis expanded upon the language of the Fourth Amendment and the search and seizure exception in order to consider the issue in the context of cellular phones.[129] In both cases the phone evidence was entered as relating to a "search incident to the arrest" to "seize fruits or evidence of crime."[130] However, a search could be exempt from the warrant requirement if it meets the test that balances "the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interest."[131] In this case, the court held that the individual's privacy interests outweighed the government's interest and therefore the search did not fall within this

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capability, large storage capacity, and Internet connectivity." *Id.* The officer, concerned that Riley was associated with the "Bloods" gang, searched the phone. *Id.* Riley attempted to suppress all information obtained from the phone as a violation of the Fourth Amendment without success. *Id.* at 2481. The information obtained from Riley's phone was key to establishing Riley's association with the gang. *See id.* ("Although there was 'a lot of stuff' on the phone, particular files that 'caught [the detective's] eye' included videos of young men sparring while someone yelled encouragement using the moniker 'Blood.' . . . . The police also found photographs of Riley standing in front of a car they suspected had been involved in a shooting a few weeks earlier . . . . At Riley's trial, police officers testified about the photographs and videos found on the phone, and some of the photographs were admitted into evidence. Riley was convicted on all three counts and received an enhanced sentence of 15 years to life in prison.").

[128] *Id.* at 2481. This phone, unlike the first case, was a simpler "flip phone" that lacks the advanced connectivity and capability. *Id.* The officers used a number off the phone to locate Wurie's "home" and with a search warrant found "215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm and ammunition, and cash." *Id.*

[129] *See id.* 2482-84 (discussing reasonable expectation of privacy in cellphones). The Fourth Amendment has always been considered within the context of "reasonableness," and, thus, an exception was created so law enforcement could have access to legitimate evidence of "criminal wrongdoing." *Id.* at 2482. However, the scope of "reasonableness" is not always a clear answer. *Id.* The Court outlined the "search incident to arrest trilogy" to flesh out the known boundaries of the argument. *Id.* at 2483-84. The first case of the trilogy, Chimel v. California, 395 U.S. 752 (1969), was the foundation for the doctrine and first articulated the justification for the exception. *Id.* at 2483. A search could be justified "to protect officer safety or to preserve evidence." *Id.* However, the Court cited to relevant limiting language to a search of "the arrestee's person and the area 'within his immediate control.'" *Id.* The second case, United States v. Robinson, 414 U.S. 218 (1973), delved further into the scope of a "search of arrestee's person." *Id.* The Court stated the authority to search does not depend on "the probability in a particular arrest situation that weapons or evidence would in front be found." *Id.* (internal quotes omitted). Instead the Court held a "custodial arrest of a suspect based on probable cause is a reasonable intrusion . . . [consequently] a search incident to the arrest requires no additional justification." *Id.* (internal quotes omitted). Finally, in Arizona v. Gant, 556 U.S. 332 (2009), a specific exception was established for "circumstances unique to a vehicle context." *Id.* at 2484. The Court held police can search a car only "when an arrestee is unsecured and within reaching distance of the passenger compartment at time of the search." *Id.*

[130] *See* Riley, 134 S. Ct. at 2481-82 (addressing phone seizure in content of search incident to lawful arrest).

[131] *See id.* at 2478 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)) (describing balancing test).

exception.[132] The most interesting party of this decision is the Court's reliance on a heightened protection for "smart phones" because of the breadth of personal information available at your fingertips.[133] The Court goes into great length to discuss the "immense storage capacity," "element of pervasiveness," and how the "cloud" has created limitless access to devices far beyond the cell phone on the individual's person.[134] A phone was analogized to being the equivalent of "lug[ging] around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read."[135] Additionally, there were citations to studies that have measured cell phone ownership in the United States, the proximity levels between the owners and their phone, and the average number of "apps" installed on average.[136] Essentially, this decision is peppered with references to studies, articles, and amicus briefs filed by organizations, such as the Electronic Privacy Information Center (EPIC), that demonstrate that there are significant privacy concerns when considering cell phones.[137]

VI. Voicemails and Marital Privileges

There is a strong argument to include voicemails within "private

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[132] *See id.* at 2485 (dictating holding of the case). The Court found United States v. Robinson inapplicable in the context of the "digital content of cell phones." *Id.* The data will not harm an officer once it is removed from the person and it will not "effectuate the arrestee's escape." *Id.* Further, the officer does not need to search into a phone to know "exactly what they would find therein: data." *Id.* The Court also stated even with concerns with evidence destruction there is no justification for accessing the cell phone until a warrant is secured. *Id.* at 2486. The Court held that when inspecting a cell phone there is a "substantial intrusion" on the privacy of an individual. *Id.* at 2489. A search of a cell phone would be more exhaustive than any other search particularly with the usage of "cloud computing." *Id.* at 2491. With "cloud computing," information can be stored and accessed remotely and there is no way to determine whether something is being accessed from the phone or the "cloud." *Id.* It was conceded by the government that a search should not include files accessed remotely, but it could provide no solution to this problem. *Id.*

[133] *See id.* at 2489 ("[I]nspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself [and] may make sense as applied to physical items, but any extension of that reasoning to digital data had to rest on its own bottom.").

[134] *See id.* at 2489-91 (analyzing breadth of information accessible through cellular phones).

[135] *See* Riley, 134 S. Ct. at 2489 (analyzing breadth of information accessible through cellular phones).

[136] *See id.* at 2490 (analyzing breadth of information accessible through cellular phones). The Court discusses applications for "managing detailed information about all aspects of a person's life." *Id.* It points to "apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms," and so forth to reveal that cell phones have no limitations when it comes to personal information. *Id.*

[137] *See id.* at 2489-91 (citing to studies in EPIC's amicus brief when analyzing effect and breadth of cellular technology).

conversations" when courts have acknowledged the heightened privacy concerns for cell phones coupled with the language of marital privileges.[138] As previously stated, the Supreme Court opines that a phone is no longer solely a means of communication, but rather a single source for all information regarding an individual's likes, dislikes, bank information, reading habits, and other elements.[139] While not widespread, many courts are already handling matters involving technology in the context of marital privilege.[140]

A. Prior Cases Regarding Voicemails

An earlier example can best be seen in *Wong-Wing v. State*,[141] where a marital privilege was invoked regarding a message on an answering machine, similar to a voicemail.[142] In this case, the defendant was convicted of sexually abusing his ex-wife's daughter and the voice message left on the machine was evidence of his state of mind.[143] However, the defendant did not invoke the marital communication privilege until the case reached the appellate division.[144] The defendant argued that since the message was "intended solely for his wife" this communication was protected the trial court erred in admitting it.[145] While the defendant failed to assert the privilege at the appropriate time, the court still discussed the implications of the privilege applying to a message on an answering machine.[146] The court held that since the message was left in a

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[138] *See Riley*, 134 S. Ct. at 2494 (2014) (discussing voicemail); *see also Massachusetts Guide to Evidence*, *supra* note 66, at 70 (discussing spousal disqualification).

[139] *See id.* at 2490-91 ("[A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house[.]").

[140] *See* Wong-Wing v. State, 847 A.2d 1206, 1208-10 (Md. Ct. Spec. App. 2004) (discussing answering machine messages with marital privilege); Newell v. State, 49 So.3d 66, 67-71 (Miss. 2010) (discussing voicemail messages with marital privilege).

[141] 847 A.2d 1206 (Md. Ct. Spec. App. 2004).

[142] *See id.* at 1208-09 (summarizing facts of case).

[143] *Id.* at 1209. The State introduced both the tape and the transcript into evidence. *Id.* The defendant had previously admitted to the mother that he had attempted to commit suicide. *Id.* When the mother heard this message, she immediately contacted the police and the detective, who proceeded to defendant's home with a warrant. *Id.*

[144] *See id.* at 1210 (noting defense counsel did not invoke marital privilege at trial).

[145] *Id.* "One spouse is not competent to disclose any confidential communication between the spouses occurring during their marriage." MD. CODE CTS. & JUD. PROC. § 9-105 (West 2016). The element of confidentiality is further defined: "Communications between husband and wife occurring during the marriage are deemed confidential if expressly made so, or if the subject is such that the communicating spouse would probably desire that the matter be kept secret, either because its disclosure would be embarrassing or for some other reason." Coleman v. State, 380 A.2d 49, 52 (Md. 1977) (citation omitted).

[146] *See Wong-Wing*, 847 A.2d at 1212-13 (discussing defendants' unreasonable expectation

home shared by the mother, daughter, and the mother-in-law, the defendant failed to meet the element of confidentiality.[147] There was no expectation that this communication would remain confidential since there was a possibility of someone other than his wife would receive the message from a machine available to multiple family members.[148] Further, the communication was not confidential in its nature because the defendant did not offer evidence that stated otherwise at the trial court level.[149] The court suggested the defendant could have met either element of confidentiality if evidence had been presented regarding, ". . . the location of the answering machine; who had access to it; or whether the answering machine was the kind that broadcast aloud any message that it recorded."[150]

In a Mississippi court, the court was presented with voicemail messages the defendant sought to exclude by the spousal privilege.[151] In this case, the defendant convinced his wife was unfaithful, called her and left two voicemail messages on her cell phone.[152] In the first message he threatened to kill her and her alleged lover, and then in the second message he retracted his threat.[153] Unfortunately, the defendant later went to confirm his wife's infidelity and shot an individual during a struggle.[154] In an effort to prove his side of the story, the defendant demanded the police seize his wife's phone to prove she was cheating.[155] At this point, the cell phone still contained the voicemail messages he had previously left.[156] The wife willingly gave her cellular phone and her passcode to the police after the police requested access to the messages.[157]

On the defendant's notice of appeal, he argued that the voicemail messages should not have been admitted because they were subject to the spousal privilege and the wife failed to meet the spousal competency

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of privacy regarding answering machine message). At the trial court, defense counsel objected to the tape not being "timely disclosed," which was overruled, and then requested that the transcript be submitted instead of the recording. *Id.* at 1210.

[147] *See id.* at 1212-13 (discussing defendants' unreasonable expectation of privacy regarding answering machine message).

[148] *See id.* at 1213 (explaining defendant lacked reasonable expectation).

[149] *See id.* (noting lack of other evidence proving expectation of privacy).

[150] *Wong-Wing*, 847 A.2d. at 1213.

[151] *See* Newell v. State, 49 So.3d 66, 70 (Miss. 2010) (explaining basis for appeals filed by Newell).

[152] *See id.* at 68 (providing context).

[153] *See id.* (describing both messages).

[154] *See id.* at 69 (providing content for shooting).

[155] *See id.*

[156] *See Newell*, 49 So.3d at 70 (explaining basis for appealed filed by Newell).

[157] *Id.* at 71.

standard.[158] Once again, the defendant had to demonstrate the communications were confidential in order for the privilege to apply.[159] The court disagreed with this argument because the husband threatened to kill his wife in the voicemails.[160] However, excluding that exception, confidentiality would not have been met because the threat would have likely been communicated to the wife's lover or the police once the wife heard the message.[161] More importantly, the spouses both waived the privilege when the defendant instructed the police to check his wife's phone for evidence and when the wife voluntarily gave her phone to the police.[162] Therefore, while it clearly fell within an exception, the court still analyzed the lack of confidentiality in the communications.[163]

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[158] *See id.* (detailing defendant's argument). According to the spousal privilege, "[i]n any proceeding, civil or criminal, a person has a privilege to prevent that person's spouse, or former spouse, from testifying as to any confidential communication between that person and that person's spouse." MISS. R. EVID. 504(b). This privilege can be claimed by either spouse. MISS. R. EVID. 504(c). According to the spousal competency rule, "[e]very person is competent to be a witness except as restricted by the following: (a) In all instances where one spouse is a party litigant the other spouse shall not be competent as a witness without the consent of both . . . ." MISS. R. EVID. 601.

[159] *See Newell*, 49 So.3d at 71 (analyzing admissibility of defendant's voicemail messages under "husband-wife privilege").

[160] *See id.* Similar to the Massachusetts spousal privilege, there are certain exceptions to the privilege in cases such as when a spouse makes a verbal threat. MISS. R. EVID. 504(d). According to the rule:

> There is no privilege under this rule in civil actions between the spouses or in a proceeding in which one spouse is charged with a crime against (1) the person of any minor child or (2) the person or property of (i) the other spouse, (ii) a person residing in the household of either spouse, or (iii) a third person committed in the course of committing a crime against any of the persons described in (d)(1), or (2) of this rule.

Id. These exceptions are in response to cases of domestic violence where there might be limited evidence of abuse beyond what is offered by the battered spouse. *Id.*

[161] *See Newell*, 49 So.3d at 71 (discussing how threats would have made wife share communication with another for her safety). The court explained regardless of the exception that disqualifies threats to a spouse, the wife would likely have felt compelled to share this communication with the police of her "lover" out of concern for her safety, which would mean the communication was no longer confidential. *Id.*

[162] *See id.* (explaining both spouses waived the privacy element under Rules 504 and 601).

[163] *See id.* (reasoning 504 and 601 did not apply when defendant and wife surrendered phone to police). The court did avoid holding whether the marital communications privilege applied, but still explored, in dicta, the possibility of a confidentiality argument if there was no waiver and these were not threats. *Id.*

B. Voicemails and Massachusetts Spousal Disqualification Rule

While other jurisdictions have not uniformly decided where voicemails fall within spousal communications, the current language of these decisions demonstrates a need to extend the spousal disqualification rule to voicemails.[164] Looking at the spousal disqualification rule through the elements required for a private conversation, a sufficiently strong argument could be presented to protect a client's confidences.[165]

As apparent from case law, meeting the element of a private conversation can be the most taxing hurdle for defendants because courts are concerned whether the conversation is confidential in its nature and if there is an intention for it to be confidential.[166] The Massachusetts courts go beyond the federal courts by limiting conversations to those solely in the presence of the other spouse, although case law does allow children to be present if they are not sufficiently old enough or mature enough to comprehend the conversation.[167] Therefore, similar to the analysis suggested by the *Wong-Wing* court, cases will consider who had access to the phone, whether the voicemails were heard in the presence of others, and the security features within the phone itself.[168]

However, current privacy arguments regarding cellular phones and information regarding the mechanics of cellular phones demonstrate that the nature of these conversations is meant to be private.[169] As stated in *Riley v. California*, these phones, and therefore by default their voicemail inboxes, cannot be compared to the traditional notions of a phone and an answering machine.[170] The court compared cell phones to minicomputers

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[164] *See* Newell v. State, 49 So.3d 66, 71 (Miss. 2010) (finding threatening voicemails not protected under spousal privilege); Wong-Wing v. State, 847 A.2d 1206, 1212 (Md. Ct. Spec. App. 2004) (holding messages lacked confidentiality for spousal communication to apply).

[165] *See Massachusetts Guide to Evidence*, *supra* note 66 (stating rule and elements of marital privilege).

[166] *See* Commonwealth v. Burnham, 887 N.E.2d 222, 226-27 (Mass. 2008) (treating civil and criminal proceedings together under spousal privilege rule); Gallagher v. Goldstein, 542 N.E.2d 53, 54 (Mass. 1988) (holding rule applies equally to both spouses); Commonwealth v. Cronin, 69 N.E.2d 1065, 1066 (Mass. 1904) (explaining while spouses willing to share conversation, not allowed because bar by the rule); Schultz v. Gotlund, 542 N.E.2d 53, 53 (Mass. 1989) (describing Massachusetts marital communications privilege).

[167] *See supra* Part IV.C (discussing element of privacy when in presence of children).

[168] *See Wong-Wing*, 846 A.2d at 1213 (discussing factors in message privacy).

[169] *See* Riley v. California, 134 S. Ct. 2473, 2490-991 (2014) ("[A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house[][.]"); *Newell*, 49 So.3d at 71 (finding threatening voicemails not protected under spousal privilege); Wong-Wing, 847 A.2d at 1206 (holding messages lacked confidentiality for spousal communication to apply).

[170] *See Riley*, 134 S. Ct. at 2485 (finding search of information on cell phone different from

and cited data that "nearly three-quarters of smart phone users report being within five feet of their phones most of the time."[171] Therefore, the public has a greater need for and demand for privacy protection when it comes to their cellular phones.[172] Further, cellular phones have passcodes to access the main features of a phone and separate passcodes for the voicemail inboxes themselves.[173] While the *Wong-Wing* court was concerned that universal access to answering machines, the same concerns cannot be automatically assumed with a cellular phone because to have access would require removing a phone from an individual's person and then entering a private code.[174] It is unlikely that the a person, who statistically always has a phone on his or her person, would leave the cellular phone unattended to be picked up by an individual who also knew the code to access it.[175] For a phone to be accessed by another individual means they previously had permission to do so or are doing so with other intentions.[176]

Along with its private nature, it is also the intention of the sender to leave a message solely for the owner of the cellular phone.[177] The call and message left was specifically to the spouse who owns phone.[178] The phone is essentially an extension of one's physical self, and thus, society can make the reasonable assumption that calling the device correlates to an attempt to reach the owner of the phone.[179] A person no longer has to dictate in a message the intended recipient because it is clear from the number they chose to dial.[180] Therefore, it is clear whom the message is intended for and, with the ubiquity of cellular phones, the person leaving the message is also aware that the security features will protect this

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physical search).

[171] *Id.* at 2489.

[172] *See id.* at 2490 (discussing vast uses of cell phones).

[173] *See Newell*, 49 So.3d at 74 (describing advance features of a cellphone).

[174] *Compare Wong-Wing*, 847 A.2d at 1213 (discussing expectation of privacy of answering machines), *with Newell*, 49 So. 3d at 72 (explaining obtaining individual's cellphone for evidential use).

[175] *See Riley*, 134 S. Ct. at 2490 ("According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower. . . . Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.").

[176] *Id.*

[177] *See Wong-Wing*, 847 A.2d at 1212 (discussing relevancy of sender's intent when determining confidentiality).

[178] *See Newell*, 49 So.3d at 70 (discussing caller's intent).

[179] *See Riley*, 134 S. Ct. at 2490-91 ("[A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house[][.]").

[180] *Id.* at 2489.

information from reaching only the owner.[181] The owner set up the passcode and other security features of the phone to protect calls and messages from the public eye.[182] When the owner and sender of the voicemail message intended the inbox to be accessed solely by the intended recipient likely there is an intention for confidentiality.[183]

VII. CONCLUSION

While marital privilege can appear to be an antiquated concept rooted in outdated principles of marriage and status, both the state and federal jurisprudence continue to support its usage. Particularly for private marital communications, courts and legal organizations continue to rationalize its purpose to protect the confidentiality between spouses at the same level as other evidentiary privileges such as attorney-client privilege or psychotherapist-patient privilege. With no end in sight, it is necessary to adapt it to the evolving world. A cellular phone, with its infinite possibilities, is more than a method of contact. Therefore, it is not hard to contemplate a society that reasonably assumes an expectation of privacy to protect the data stored within a cellular phone. It can be surprising or almost taboo for an individual to not have access to a cellular phone. As an extension of one's self, the cellular phone is central to people's relationships with clients, friends, relatives, and spouses. Even spouses who share a home, a family, and a life each have a phone and private conversations are not going to be limited solely to those face to face interactions. As the judicial system has acknowledged, our current jurisprudence must adapt to a changing landscape. Having phone conversations, such as voicemails, not embraced by the privilege is denying the evolution of communication. The courts in other instances embraced the changing landscape of "traditional" marriage, "traditional" procreation, and now must extend beyond "traditional" marital privilege.

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[181] *See id.* at 2486-88 (discussing cellular telephone encryption).

[182] *See Newell*, 49 So.3d at 71 (discussing privacy in messages).

[183] *See id.* (discussing privacy in messages).