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Privacy as Privilege: The Stored Communications Act and Internet Evidence

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A homicide defendant in California was blocked from arguing self-defense because he was denied access to the records of harassing online messages and death threats that had kept him "in constant fear for his life. A murder defendant in the District of Columbia was denied access to impeachment material from a key prosecution witness's social media accounts, despite the trial judge's finding that the evidence was relevant, material, and necessary to vindicate his "fundamental constitutional rights. A death row inmate in Texas was denied access to the source code for a forensic software program used to analyze the evidence against him, despite a judge's finding that the code was "material and necessary for the administration of justice. An Iraqi refugee, accused of terrorism and facing extradition, torture, and "almost certain death, was denied access to Facebook and Twitter posts that might have helped exonerate him.

The Supreme Court has repeatedly declared: "In our judicial system, the public has a right to every [person's] evidence, technology companies, including Facebook, GitHub, Google, Instagram, Microsoft, and Twitter, have argued that the Stored Communications Act— a key data privacy law for the internet — gives the companies special entitlements to not comply with judicially ordered compulsory process, and that those entitlements are more important than the life and liberty of the criminally accused. Indeed, Facebook and Twitter recently argued to the Supreme Court that it is wrong to "prioritize[] a criminal defendant's desire to obtain" relevant, exculpatory evidence over "trust in the privacy of electronic communications," because doing so "threatens to discourage the use and development of innovative technologies. To date, the courts have agreed.

For over a decade, federal and state courts across the country have construed the SCA to bar criminal defendants from subpoenaing technology companies for the contents of another's electronic communications. Section 2702(a) of the SCA mandates that electronic communication service providers "shall not knowingly divulge to any person or entity the contents of a communication." Section 2702(b) then lists nine express exceptions for permissible disclosures of communications contents, including disclosures to an intended recipient of the communication, disclosures necessary to the rendition of the service, and disclosures to governmental entities pursuant to certain forms of legal process. The text is silent on criminal defense subpoenas, as is the legislative record. Nonetheless, courts and commentators alike have concluded that the SCA bars disclosures pursuant to such subpoenas without qualification. When communications are unavailable from other sources, such as when subpoenaing an account holder directly would be dangerous or impossible or would risk destruction of evidence, the current SCA case law can completely suppress relevant, exculpatory evidence.

This Article argues that all of these decisions are wrong — as a matter of binding Supreme Court doctrine and just policy. It makes two novel doctrinal claims and then evaluates the policy implications of those claims. *First*, courts have construed the SCA as creating an evidentiary privilege. *Second*, this construction violates a binding rule of privilege law: courts must not construe ambiguous silence in statutory text as impliedly creating a privilege because privileges are "in derogation of the search for truth. While existing legal authorities are admittedly vague in defining what constitutes a privilege, this Article shows that the central function of a privilege is to exempt an ex ante category of information from compulsory process. Construing the SCA as a bar on criminal defense subpoenas does just that. This Article is the first to examine the SCA through the lens of evidentiary privilege law. The cases comprising the current consensus view of the SCA never considered and do not address the arguments presented here.