THE BIZARRE DRAFTING ERRORS IN THE VIRGINIA STATUTE ON PRIVILEGED MARITAL COMMUNICATIONS

James Joseph Duane[*]

I. INTRODUCTION

Henry Ford finished construction of his first automobile in 1893. The Italian electrical engineer Guglielmo Marconi developed his first working radio in 1895. And in between those two historic events, the Virginia legislature drafted a privilege statute that is still on the books today.

The common law recognized a privilege to shield communications that pass in private between a husband and wife. This privilege has roots that are both sacred and sublime. As the United States Supreme Court explained:

> The rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence.[1]

More than a century ago, in 1894, the Virginia Assembly codified that common law privilege in a statute with the title, "An Act to make husband and wife competent witnesses for or against each other in civil cases."[2] The Act began by partially repealing the common law rule that disqualified anyone from testifying in a case where his or her spouse was a party: "Be it enacted by the general assembly of Virginia, That

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[*] Associate Professor of Law, Regent University Law School, Virginia Beach, Virginia; J.D., Harvard Law School, 1984; A.B., Harvard College, 1981. Professor Duane is also on the faculty of the annual Trial Advocacy Institute at the University of Virginia School of Law. I wish to thank the beautiful wife of my youth, Beverly, my constant source of strength and encouragement for over twenty years, "for her worth is far above rubies." *Prov.* 31:10. This article is lovingly dedicated to her, even though (for reasons that shall be presently made plain) I will never let her read it as long as we live in Virginia.

[1] Stein v. Bowman, 38 U.S. 209, 223 (1839). To be precise, the *Stein* Court was actually describing the basis for what was, at that time, a general rule declaring both spouses incompetent to testify for or against one another, which in turn gradually gave rise to the privilege in its modern form.

[2] 1893-94 Va. Acts ch. 619, "An Act to make husband and wife competent witnesses for or against each other in civil cases" (enacted March 5, 1894).

husband and wife shall be competent to testify for or against each other in all civil cases . . . ."[3] The partial repeal of the rule of incompetence was subject, however, to the provision that:

> Neither husband nor wife can, without the consent of the other, be examined in any case as to any communication made by one to the other while married; nor shall either of them be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted . . . .[4]

This particular language has shown extraordinary resilience. Although the statute has been recodified and renumbered many times in the past century, the language quoted above has been preserved virtually verbatim. Even now, on the dawn of a new millennium, the law still begins with a reminder that husbands and wives are generally competent to testify for and against each other, followed immediately by the provision that:

> [N]either husband nor wife shall, without the consent of the other, be examined in any action as to any communication privately made by one to the other while married, nor shall either be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted.[5]

In the span of time that the first radio and automobile gave way to the internet and space travel, the Virginia privilege has remained almost entirely unchanged. A simple comparison reveals that the quoted portion of the statute has been preserved verbatim since it was drafted in 1894, with only four cosmetic changes, most of them almost as ancient as the original statute.[6] For the sake of simplicity, this article refers to this statutory privilege for confidential marital communications, § 8.01-398, as "the Virginia statute."[7]

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[3] *Id.* § 1.

[4] *Id.* § 3.

[5] VA. CODE ANN. § 8.01-398 (Michie 1998).

[6] (1) In 1898, the statute was changed to read "shall" instead of "can." 1898 Va. Acts ch. 703, § 3. (2) In 1919, "either of them" was shortened to "either." 1919 Va. Acts ch. 673 § 3. (3) Also since 1919, the statute requires that the communication must have been "privately" made. *Id.* (4) As part of the 1977 revision giving birth to the current version of the statute, and the splitting off of what is now § 19.2-271.2, the law was changed to cover testimony in any "action" instead of a case. 1977 Va. Acts ch. 617, § 8.01-398. Those four trifling modifications are irrelevant to this article. The only noteworthy difference involves a clause that used to appear at the end of the original privilege, but which has somehow been lost in the shuffle as the statute was reworked over the years. That change is discussed later. *See infra* Part III.D.

[7] Just like federal law, the law of Virginia has long recognized a separate privilege that, in its current form, allows a person to refuse to testify against his or her spouse at certain sorts of criminal trials. VA. CODE ANN. § 19.2-271.2 (Michie 1998). Apart from a brief discussion of that other privilege for "adverse spousal testimony" in Part III.D., this article has almost nothing to say about that other significant form of marital privilege.

Since its inception, this statutory privilege has always been applicable in both civil and criminal cases.[8] It has now been half a century since the highest court of the State declared that this law's "fundamental purpose [is] to protect from public exposure confidences of the marital relation . . . which the continued tranquility, integrity and confidence of their intimate relation demands to be shielded and protected by the inviolate veil of the marital sanctuary."[9]

But how well does the Virginia statute actually serve that purpose? This article demonstrates that this deceptively simple-looking statute actually contains five serious drafting flaws that severely undermine its ability to accomplish its supposed objectives. The article concludes with a proposal for reform of the statute to bring it more in line with the likely intentions of its drafters, the current thrust of evidence scholarship and legislation from other states, and the purposes it is supposed to serve. But first we must take a moment to review some fundamental principles of statutory construction applied these days by the Supreme Court of Virginia. Only in this way can we understand the alarming implications of the statute's imprecise drafting and the genuine threat they pose to the administration of justice in Virginia.

II. PERTINENT PRINCIPLES OF VIRGINIA LAW ON CONSTRUING STATUTORY PRIVILEGES

Particularly in recent years, the Virginia courts have faithfully observed two pivotal principles of statutory construction. Both of them have special significance for the proper interpretation of the Virginia statute on confidential marital communications.

The preeminent principle of modern statutory interpretation under Virginia law is to look first—and perhaps only—at the "plain language" of the statute.[10] If the language of the statute is clear and unambiguous

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Except where otherwise indicated, this article is concerned solely with the privilege for confidential communications between a husband and wife.

[8] The current version of the communications privilege is explicitly codified only in a statute governing civil proceedings, but is incorporated by cross-reference in another statute for criminal cases. *See* Church v. Commonwealth, 335 S.E.2d 823, 826-27 (Va. 1985).

[9] Menefee v. Commonwealth, 55 S.E.2d 9, 15 (Va. 1949).

[10] In this respect, the Supreme Court of Virginia is in complete harmony with the current attitude of the Supreme Court of the United States, which recently declared: "As in any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 119 S. Ct. 755, 760 (1999) (internal citations and quotation marks omitted); *see also* Salinas v. United States, 522 U.S. 52, 118 S. Ct. 469, 474 (1997) ("Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.") (internal punctuation omitted).

on its face, the courts of Virginia will "look no further than the plain meaning of the statute's words,"[11] and will "accord the statutory language its plain meaning."[12] That is, quite literally, the end of the matter. Earlier this year, the Virginia Supreme Court said it "is firmly established that, when a statute is clear and unambiguous, a court must accept its plain meaning and not resort to extrinsic evidence or rules of construction."[13] Indeed, it seems that nothing on earth can override that paramount principle of statutory interpretation. Only last year, the court declared: "When considering a legislative act, a court may look *only* to the words of the statute to determine its meaning, and when the meaning is plain, resort to rules of construction, legislative history, and extrinsic evidence is impermissible."[14] Unless a literal reading of a statute would result in internal contradictions amounting to "manifest absurdity," the statute will be enforced as written "regardless of what courts think of its wisdom or policy."[15]

Even when interpreting a statutory privilege, the Virginia Supreme Court faithfully adheres to the plain language of the text. It does so even when it is visibly unsure about the wisdom of the rule. In one recent case interpreting the statutory privilege for adverse spousal testimony, the Supreme Court followed the literal language of the statute to reverse a murder conviction. After complaining that "the statute mandates that the judgments be reversed,"[16] the Court added "We are not, however, called upon to pass upon the reasons for the rule, or the wisdom of the

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[11] Commonwealth Dep't of Taxation v. Delta Air Lines, Inc., 513 S.E.2d 130, 133 (Va. 1999); Carolina Builders Corp. v. Cenit Equity Co., 512 S.E.2d 550, 552 (Va. 1999).

[12] Advanced Marine Enterprises, Inc. v. PRC Inc., 501 S.E.2d 148, 159 (Va. 1998).

[13] Yates v. Pitman Mfg., Inc., 514 S.E.2d 605 (Va. 1999); *accord* Massie v. Blue Cross & Blue Shield, 500 S.E.2d 509, 511 (Va. 1998) (quoting Wall v. Fairfax County Sch. Bd., 475 S.E.2d 803, 805 (Va. 1996)); Krampen v. Commonwealth, 510 S.E.2d 276, 278 (Va. Ct. App. 1999) ("Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory construction.") (quoting Last v. Virginia State Bd. of Med., 421 S.E.2d 201, 205 (Va. Ct. App. 1992)).

[14] Town of Blackstone v. Southside Elec. Coop., 506 S.E.2d 773, 776 (Va. 1998) (emphasis added). On this point as well, the United States Supreme Court is in agreement: "As with a statute, our inquiry is *complete* if we find the text of the rule to be clear and unambiguous." Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 545 (1991) (emphasis added); *accord* Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 642 (1990) ("As a general rule of statutory construction, where the terms of a statute are unambiguous, judicial inquiry is complete."). For that reason, the Court has often declared that "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 808 n.3 (1989); *accord* Shannon v. United States, 512 U.S. 573, 583 (1994); Reves v. Ernst & Young, 507 U.S. 170, 177-78 (1993); Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

[15] Wiggins v. Fairfax Park Ltd. Partnership, 470 S.E.2d 591, 596 (Va. Ct. App. 1996) (citations and internal quotations omitted).

[16] Jenkins v. Commonwealth, 250 S.E.2d 763, 765 (Va. 1979).

law. A lack of good reason may be ground for the legislature to change the law; but we must construe the law as it is."[17]

A second basic principle of construction is implicated when interpreting any statute that creates a privilege. In applying federal law, the United States Supreme Court has long held that testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for the truth."[18] Because they contravene the right of the public "to every man's evidence,"[19] testimonial privileges "must be strictly construed."[20] Following that lead, the Virginia Supreme Court has likewise decreed that a statutory privilege, because it "operates to limit the introduction of relevant evidence, . . . must be strictly construed against the existence of the privilege."[21] Because such rules "impair the right of the public to have all relevant evidence introduced in the fact-finding process, [they] should be strictly construed."[22]

These two fundamental principles of statutory construction are applied with rigor by the Virginia courts. So far as I am aware, the Virginia Supreme Court has not once departed from either of these standards in decades. So it is no surprise that when the two principles coincide and point to the same result in a given case, the courts follow that course with a vengeance.[23] In the four most recent cases where a literal reading of a statute yielded a result that was more restrictive of the scope of some privilege, the Virginia appellate courts have summarily adopted that interpretation, often with little or no discussion of whether that conclusion was the most sensible one.[24] They have done

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[17] *Id.* (quoting Meade v. Commonwealth, 43 S.E.2d 858, 862 (Va. 1947), *overruled on other grounds*, Hudson v. Commonwealth, 292 S.E.2d 317 (Va. 1982)).

[18] United States v. Nixon, 418 U.S. 683, 710 (1974).

[19] United States v. Bryan, 339 U.S. 323, 331 (1950).

[20] Trammel v. United States, 445 U.S. 40, 50 (1980).

[21] Bennett v. Commonwealth, 374 S.E.2d 303, 309 (Va. 1988) (interpreting the Virginia statutory privilege for adverse spousal testimony in criminal cases).

[22] Brown v. Commonwealth, 292 S.E.2d 319, 322 (Va. 1982) (following Trammel v. United States, 445 U.S. 40, 50 (1980)); *accord* Livingston v. Commonwealth, 466 S.E.2d 757, 760 (Va. Ct. App. 1996). The *Brown* court added that, even in criminal cases, a statutory privilege invoked by the accused to assist in his own defense "is not a penal statute that must be construed strictly against the Commonwealth." 292 S.E.2d at 322.

[23] It should be remembered that these two principles of statutory interpretation coincide frequently, but not always. There are occasions when the more literal reading of a statute is the one that is more generous to the party asserting a privilege. *E.g.*, Jenkins v. Commonwealth, 250 S.E.2d 763, 765 (Va. 1979). In such cases, the secondary principle of construing statutory privileges narrowly will yield to the "plain meaning" of the statute, even if the court is not persuaded of the wisdom of that result, just as the Court ordered in *Jenkins*.

[24] Klarfeld v. Salsbury, 355 S.E.2d 319, 322-24 (Va. 1987) (concluding that the plain language of statutory privilege for medical staff committees was not broad enough to

so even in criminal cases, and even when the narrower construction of the privilege statute was contrary to the interests of the accused.[25] Let us keep this background in mind when we consider how the plain language of the Virginia statute applies to several common test cases.

III. THE FIVE TEST CASES THAT ILLUSTRATE THE PROBLEMS OF THE VIRGINIA STATUTE

Marital privilege issues crop up most frequently in the following scenario. Imagine that a man is on trial in a criminal case. His estranged wife or former wife is called to testify against him. She was not a victim of (or a witness to) the crime, and has no personal knowledge of his guilt. But she is now willing, if allowed, to disclose incriminating statements he once made to her in the strictest of privacy, during happier times when they were still married and far more intimate. Of course, he would rather prevent her from testifying if he could. The question is: Should the man be allowed to assert a privilege to prevent her from sharing in court what he once told her in confidence?

As it happens, marital privilege issues usually arise in this exact setting.[26] And in this precise situation—what we might call "the standard privilege scenario"—the States and federal law are in almost unanimous agreement that the husband has a valid privilege to prevent the wife from disclosing the communications he shared with her in private.[27] The traditional theory is that any other result would not

include medical malpractice review panels); Wiggins v. Fairfax Park Ltd. Partnership, 470 S.E.2d 591, 596 (Va. Ct. App. 1996) (following "literal construction" to hold that waiver of physician/patient privilege by party bringing worker compensation proceeding was not limited to independent medical examiners); Livingston v. Commonwealth, 466 S.E.2d 757, 760 (Va. Ct. App. 1996) (following "plain meaning" of marital privilege statute governing "criminal cases" to conclude that it did not apply to pretrial criminal investigations); Blevins v. Commonwealth, 399 S.E.2d 173, 174 (Va. Ct. App. 1990) (following plain language to conclude that statutory lawyer-client privilege was waived when accused raised insanity defense, even as to psychological examinations that were not ordered by the court).

[25] *See Livingston*, 466 S.E.2d at 760.

[26] In theory, of course, the marital privilege in every jurisdiction is much broader, and also applies in civil cases, and in cases where the husband is not a party, and to cases where the communicating spouse was the wife. But as a practical matter those other situations rarely generate much litigation. If the husband is not a party, what he told his wife is usually inadmissible hearsay, and often irrelevant, so the privilege issue is moot. If he is a party in a civil case, his statements to his wife are not hearsay if offered against him, *see* FED. R. EVID. 801(d)(2)(A), but he will usually not have a Fifth Amendment privilege to refuse to testify, so there is far less need to question her about what he knows. And in criminal cases, men simply end up on trial far more often than women. It is no coincidence, therefore, that almost every reported appellate case involving the privilege for marital communications involves the testimony of a woman against her husband or former husband in a criminal case. *See, e.g.*, cases cited *infra* note 70.

[27] In most States and federal court, the prevailing view is that both spouses hold the privilege, so either can prevent the other from disclosing confidential marital

accord sufficient sanctity to the intimacy of the marital relationship. And at least in this most common setting, Virginia law is uniform with the conventional approach. The Virginia statute provides that neither spouse may testify to a marital communication "without the consent of the other," so obviously the husband's objection will prevent his wife from testifying in court about what was said between them in private. It is likely that this precise factual situation was on the minds of the Virginia legislators who selected that statutory language. But although the language of the Virginia statute is well suited for this common setting, it is quite poorly chosen to handle a wide variety of other frequent situations. Let us now consider five of those situations, and how the wording of the statute generates bizarre and often unintended results in each of them.

A. The Case of The Purloined Letter

Consider again the case of the man who desires to prevent his wife from disclosing some incriminating statement he made to her in complete privacy. If the confession was made orally, as we have seen, the issue is quite simple. Under the law of every state, including Virginia, she cannot disclose the communication over his objection. But what if the statement he made to her was in *writing*, or some other form of tangible recording, as is often the case? She surely could not testify about the letter over his objection, even in Virginia, because that would be testimony about his written communication to her. The definition of a "communication" is broad enough to include confidential statements made in writing or other forms of recording.[28]

Suppose, however, the wife who received the confidential letter from her husband is not called to testify at his trial, but the incriminating document has somehow found its way into the hands of the government. (This happens in many different ways. She might have turned it over herself, either out of anger toward her former husband or a desire to work out a favorable plea agreement for herself or the sake of the

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communications. Other states provide the privilege may only be asserted by the "communicating spouse" who made the confession; others confer the privilege on whichever spouse is the accused at a criminal trial. CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE 457 (2d ed. 1999); GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 446-47 (3rd ed. 1996); *see also* ROGER C. PARK, DAVID P. LEONARD & STEVEN H. GOLDBERG, EVIDENCE LAW 415 (1998); GLEN WEISSENBERGER, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY 219 (1998); KENNETH S. BROUN ET AL., 1 MCCORMICK ON EVIDENCE 305-07 (4th ed. 1992). Under any one of those three versions, of course, the privilege may be asserted by an accused to prevent his wife from testifying about what he told her.

[28] Under the Virginia statute, the term "communications" includes "all information or knowledge privately imparted and made known by one spouse to the other by virtue of and in consequence of the marital relation through conduct, acts, signs, and spoken or written words." Menefee v. Commonwealth, 55 S.E.2d 9, 15 (Va. 1949).

children. Or she may have lost it through inadvertence or theft. As we shall see, none of these possibilities make any difference under the language of the Virginia statute.) And imagine that the prosecuting attorney, who now desires to offer the letter into evidence against the husband, is ready and able without the help of the wife to establish that the letter was written by the accused.[29] Can the husband still assert a privilege to block the admission of the letter?

Modern scholarly commentators are apparently in complete agreement that the letter should be regarded as privileged, just as much as an oral statement between the spouses would have been, so that the husband would be able to insist upon the exclusion of the letter from evidence.[30] Modern case law, both State and federal, almost invariably reaches the same result.[31] Common sense commends that outcome; there is no intuitive basis for a modern statute that would distinguish between oral and written marital communications.

Moreover, for what it is worth, the precious little Virginia authority on this question points to the same result. The leading textbook on Virginia evidence asserts, without the citation to any authority, that the statutory marital privilege extends with equal force to oral and written statements.[32] Although there has been no reported Virginia case law on this precise question in three decades, the Virginia Supreme Court once stated in passing dictum that the statute would apply to a confidential letter from a man to his wife. Thirty years ago, in *Reil v.*

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[29] I assume for the sake of argument that she could not be called to authenticate the letter or to lay a foundation for its admissibility, not even in Virginia, because she would then be "examined . . . as to any communication privately made." *But cf.* Bennett v. Commonwealth, 374 S.E.2d 303, 309 (Va. 1988) (strictly construing Virginia statute governing spouse's testimony "as a witness against the other" to be inapplicable where wife was examined merely as to her marital status at a hearing to decide applicability of the privilege, because that hearing "had nothing to do with [his] guilt or innocence."). But of course there are many other ways to lay the foundation for the admission of a letter written by a man without the help of his wife, such as the testimony of an expert or anyone familiar with his handwriting, or the distinctive characteristics of the contents or the location of the letter when it was found.

[30] MUELLER & KIRKPATRICK, *supra* note 27, at 457; WEISSENBERGER, *supra* note 27, at 219.

[31] Securities & Exch. Comm'n. v. Lavin, 111 F.3d 921 (D.C. Cir. 1997) (tape recording of confidential marital conversation is within the privilege); United States v. Wood, 924 F.2d 399, 401-402 (1st Cir. 1991) (assuming without deciding that privilege would block admission of confidential letter from husband to wife while he was in jail); United States v. Duran, 884 F. Supp. 537, 541 (D.D.C. 1995) (defendant's marital privilege applies to confidential letter to his wife).

[32] "It should be noted that the privilege is not limited to oral statements. Written statements are equally privileged." 1 CHARLES E. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA 241 (4th ed. 1993).

Commonwealth,[33] the State Supreme Court asserted—without any explanation or analysis—that a letter by the defendant to his wife would have been inadmissible as a privileged communication if he had objected to its admission.[34] But because he made no objection, and because its admission was deemed harmless error, the court saw no need to explain its assumption that the privilege would apply to a letter, and its conclusory assertion to that effect was pure dictum.[35]

Both in and outside of Virginia, the legal authorities are in almost complete agreement that a man has a legal right to prevent the admission of a letter written privately by him to his wife.[36] Most modern statutes achieve this result by allowing the holder of the privilege, typically the author of the letter, to prevent others from "disclosing" the communication at trial.[37] But despite this remarkable display of unanimity, the Virginia statute says nothing of the kind. On the contrary, the law actually declares that:

> Husband and wife shall be competent *witnesses* to *testify* for or against each other in all civil actions; provided that neither husband nor wife shall, without the consent of the other, be *examined* in any action as to any communication privately made by one to the other while married, nor shall either be permitted, without such consent, to *reveal in testimony* after the marriage relation ceases any such communication made while the marriage subsisted.[38]

This plain language has simply no applicability to a letter written by a man and offered into evidence against him, so long as his wife is never questioned about it at trial. The statute says that, without his consent, his wife may not be "examined" as to private communications, and may not "reveal in testimony" such communications. The entire focus of the statute is on testimony by the spouse.[39] If she never takes the stand at

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[33] 171 S.E.2d 162 (Va. 1969). At that time, the court was called the Supreme Court of Appeals.

[34] *Id.* at 164.

[35] Moreover, it is entirely unclear from the opinion in *Reil* whether the Court was assuming that the privilege would block the admission of a letter even if it could somehow be authenticated and admitted without the testimony of the wife. The opinion contains not one word to indicate whether the prosecutor in that case used the testimony of the wife to lay the foundation for the admission of the letter by the accused, as was likely the case.

[36] *See* sources cited *supra* notes 30-32.

[37] *E.g.*, CAL. EVID. CODE § 980 (West 1995); FLA. STAT. ANN. § 90.504 (West 1999); KAN. STAT. ANN. § 60-428(a) (1994); LA. CODE EVID. ANN. art. 504(B) (West 1995); N.J. STAT. ANN. § 2A:84A-22, (West 1994); N.M. R. EVID. 11-505 (Michie 1994); N.Y. C.P.L.R. § 4502(b) (Consol. 1978); OR. REV. STAT. § 40.255 (1997); TEX. R. CIV. EVID. 504(a)(4)(C) (West 1993). *See also* TENN. CODE ANN. § 24-1-201(b) (1998) (declaring simply that marital communications are "inadmissible").

[38] VA. CODE ANN. § 8.01-398 (Michie 1992) (emphasis added).

[39] "We have invariably held that the object of [this statute] was to give to both spouses the right to object to the other testifying in violation of the section." Daniels v. Morris, 98 S.E.2d 694, 699 (Va. 1957).

trial, not one clause of the statute would exclude evidence of a letter or recording from the husband to his wife.

It must be remembered that in this context, the literal reading of the statute also happens to coincide with the interpretation that is most restrictive of the scope of the privilege. Because statutory privileges "must be strictly construed against the existence of the privilege,"[40] it is all the more likely that this literal reading will be adopted by the Virginia courts the next time this point is brought to their attention.

There are compelling reasons to suppose that the Virginia courts would refuse to construe this privilege statute as applying to all evidence of marital communications, including letters and exhibits. Earlier this year, the Virginia Supreme Court rejected an invitation to interpret a statute beyond the reach of its plain language to include other terms not specifically provided there, because the state legislature had already demonstrated its ability to discriminate between such terms in other legislation. The court refused to construe the phrase "in the Commonwealth" as meaning "in or over the Commonwealth," largely because other statutes passed by the General Assembly had contained that more expansive language.[41]

Judged by that standard, it is all the more likely that the courts would refuse to interpret the marital statute's ban on "testimony" as also giving a spouse the right to insist upon the exclusion of confidential letters and writings. If the legislature had intended to draft a privilege statute that broad, it certainly knew how to do so. Almost immediately following the marital privilege statute, the General Assembly has codified a similar privilege for "Communications between ministers of religion and persons they counsel or advise," which spells out when a minister may be allowed or compelled "to give testimony as a witness or to relinquish notes, records or any written documentation made by such person, or disclose the contents of any such notes, records or written documentation, in discovery proceedings in any civil action."[42] Surely the legislature could have used the same language if it had intended the marital privilege to have the same scope.[43] In the absence of such a

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[40] Bennett v. Commonwealth, 374 S.E.2d 303, 309 (Va. 1988).

[41] Commonwealth Dep't of Taxation v. Delta Air Lines, Inc., 513 S.E.2d 130 (Va. 1999). *See also* Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 545 (1991) ("Had the Advisory Committee intended to limit the application of the [rule] to parties proceeding *pro se*, it would surely have said so. Elsewhere in the text, the Committee demonstrated its ability to distinguish between represented and unrepresented parties.").

[42] VA. CODE ANN. § 8.01-400 (Michie 1999).

[43] *See* Advanced Marine Enters., Inc. v. PRC Inc., 501 S.E.2d 148, 159 (Va. 1998) ("If the General Assembly had intended for an award of treble damages to be subject to this limitation, it would have included an express reference to such damages in the statutory language.").

reference, the Virginia Supreme Court "will not construe the plain language in a manner that amounts to holding that the legislature meant other than what it actually stated."[44]

This narrow and literal reading of the statute is admittedly difficult to reconcile with the modern understanding of privilege law, including the way many observers have assumed Virginia law operates. But that is the way the statute is plainly written, and that is supposed to be the end of the matter. Moreover, even if the wording of the statute seems foolish to modern sensibilities, it is not "so farfetched" as to prove that the rule "cannot mean what it says."[45] In the first half of this century, near the time the Virginia statute was first drafted in its current form, courts and leading evidence scholars generally agreed that confidential letters and other documents sent to one's wife lost their privileged character when they fell into the hands of a third party, at least if they were obtained surreptitiously or otherwise without her consent.[46] Even as recently as the early 1960s, in interpreting a statute (like the Virginia law) that permits a spouse "to refuse to disclose and to prevent the other from disclosing," a leading evidence text concluded that the law "therefore does not permit the suppression of evidence of the communication in the hands of third persons, no matter how such persons obtained it."[47] Only five years ago, the New Jersey Supreme Court interpreted its similarly restrictive marital privilege as having no applicability to a confidential letter written by a man to his wife and then found by her father without her consent.[48] Surely it would yield no patent absurdity to construe the current Virginia statute, in accordance with its plain language, as reflecting the same limitation on the scope of the marital privilege.

It is true that the Virginia Supreme Court, in *Reil v. Commonwealth*, once expressed an assumption that the privilege would cover confidential marital letters, in at least some cases. But that was said merely in dictum, thirty years ago, in a case where the Supreme

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[44] *Id.*

[45] Crosby v. United States, 506 U.S. 255, 261 (1993). *Accord* Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 127 (1989) (a statute should be enforced as written unless it produces results "so unthinkable as to compel the conclusion that the Rule does not mean what it most naturally seems to say.").

[46] 8 WIGMORE, EVIDENCE § 2339, at 668 & n.3 (McNaughton rev. 1961) (collecting dozens of cases prior to 1950 admitting letters sent by prisoners to their wives).

[47] *Id.* at 667 n.1 (construing UNIF. R. EVID. 28(1)).

[48] State v. Szemple, 640 A.2d 817, 822 (N.J. 1994) ("[T]he marital-communications privilege does not apply to a written communication obtained by a third person without the other spouse's aid and consent"). The Court acknowledged that "the danger of a written communication falling into the hands of a third party would appear to be more foreseeable than the danger of an oral conversation being overheard," *id.* at 824, but nevertheless held that a man who writes to his wife has no privilege if he neglects to take adequate measures to insure that his letter never falls into the hands of anyone else. *Id.*

Court indicated no awareness that its assumption had no basis in the text of the statute. Moreover, the *Reil* opinion did not explicitly consider or decide whether the privilege would apply to a letter that could be authenticated without testimony by either spouse. Since that time, especially in the past few years, the Supreme Court has emphasized the uncompromising imperative of construing all statutes in accordance with their plain language, and interpreting privileges strictly against the party seeking to exclude relevant evidence. In light of those far more recent pronouncements, it is unlikely that the Virginia Supreme Court will deem itself bound to follow the mistaken and ambiguous dictum from *Reil* the next time some litigant squarely raises the issue.

B. The Case of the Eavesdropping Witness

A second problem with the drafting of the Virginia statute is much like the first. Imagine a criminal suspect who confides in his beloved wife about a matter of the gravest personal significance. He takes every reasonable precaution to insure that they are alone in their bedroom and that nobody else will hear a word he is saying.[49] But unfortunately, for reasons the husband could not have reasonably foreseen, his words are overheard by an unlikely eavesdropper who was hiding in the room. Should he still be allowed to assert a privilege to prevent this third party from testifying about the private conversation?

Almost all modern scholars and judges agree that the husband ought to possess a privilege to prevent the intruder from testifying. "Under the modern view, a privilege is not lost because a privileged communication was overheard by an eavesdropper, a privileged document was stolen, or a communication otherwise intercepted, provided that reasonable precautions were taken to prevent such disclosure."[50] This is the rule that was proposed by the drafters of the Federal Rules of Evidence.[51] Most modern privilege statutes explicitly reflect this understanding by providing that a married person may prevent *anyone* from disclosing a confidential marital communication, and not merely the other spouse.[52] This development is in line with "the emerging notion that a zone of marital privacy ought to be protected"

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[49] If the husband takes no such precautions, the statement to his wife would not be privileged, simply because it was not "privately made." VA. CODE ANN. § 8.01-398 (Michie 1998).

[50] MUELLER & KIRKPATRICK, *supra* note 27, at 328; *see also id.* at 373.

[51] *Id.* at 328.

[52] *E.g.*, ALA. R. EVID. 504 (West 1999); CAL. EVID. CODE § 980 (West 1995); FLA. STAT. ANN. § 90.504 (West 1999); IDAHO R. EVID. 504(b) (Lexis 1999); N.M. R. EVID. 11-505 (Michie 1994); N.Y. C.P.L.R. § 4502(b) (Consol. 1978); TENN. CODE ANN. § 24-1-201(b) (1998); TEX. R. CIV. EVID. 504(a)(4)(C) (West 1993); *see also* UNIF. R. EVID. 504.

against unforeseen intruders, particularly in light of recent advances in eavesdropping technology.[53]

Here again, however, there is a major discrepancy between the thrust of modern evidence law and the plain language of the Virginia law. The statute states merely that, if a husband objects, his *wife* cannot "be examined" about or "reveal in testimony" what he disclosed to her.[54] But not one word of the statute suggests that he can prevent *others* from testifying to things he told his wife in private. If the statute is construed literally and strictly in derogation of the scope of the privilege, as the Virginia Supreme Court has repeatedly directed, the result is obvious: there is no privilege that permits a man to object to the testimony of strangers in the night.[55]

Although this literal and narrow reading of the statute flies in the face of modern privilege theory in the vast majority of American jurisdictions, it cannot be said that the literal reading is so absurd as to be an indefensible construction of legislative intent. At the common law, at the time the Virginia statute was first drafted, the prevailing understanding was that "[a] third person overhearing a confidential [marital] communication" was not barred by the privilege from repeating what he had heard.[56] At that time, "many state courts [had ruled] that a communication between husband and wife, however confidential, may be proved by the testimony of a third person who has acquired knowledge of it, even though without the assent of the spouse making the communication."[57] Even as recently as 1934, federal law on this very point was still unsettled, and the United States government took the position "that confidential communications between husband and wife are privileged only when the testimony offered is that of one of the spouses, and that the privilege does not exclude proof of communications between them, however confidential, by a witness who is neither the

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53 LILLY, *supra* note 27, at 446.

54 VA. CODE ANN. § 8.01-398 (Michie 1998).

55 The result would be different if the eavesdropper was not present in the room, but had intercepted the communication through a wiretap or similar electronic technology. VA. CODE ANN. § 19.2-67(D) (Michie 1998) ("No wire, electronic or oral communication which is a privileged communication between the parties to the conversation which is intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character, nor shall it be disclosed or used in any way."). But that statute would not apply to an uninvited intruder who managed to overhear a private conversation through the old-fashioned technique of hiding in the room.

56 8 WIGMORE, EVIDENCE § 2339, at 667 (McNaughton rev. 1961).

57 Wolfle v. United States, 291 U.S. 7, 14 n.1 (1934) (collecting cases). The Court added that this was the prevailing result "at least where the spouse to whom the communication was made is not responsible for the disclosure." *Id.*

husband nor the wife."[58] That is exactly the position that is dictated by a literal reading of the current Virginia statute, in language that dates back to 1894. Surely it cannot be assumed that the General Assembly could not have done so deliberately at the time, even though the result is plainly out of line with current thinking on privilege law.

C. The Case of the Secretive Spouse on the Stand

Up until this point, we have focused entirely on the more common situation where the spouse who desires to invoke the marital privilege is *not* on the witness stand, and is typically the defendant in a criminal case or some other party at a trial. But privilege law is not so narrow, of course. Now let us consider the reverse situation, where the spouse desiring to assert the privilege also happens to be the one who, at the moment, is being questioned over his objection on the witness stand. This could happen in a variety of ways. He might be a criminal defendant who has waived his Fifth Amendment right not to testify, and is now being cross-examined. Or he might be a civil defendant who had no such right and was called to the stand by the plaintiff as an adverse witness. He might even be a nonparty witness. As we shall see, none of this makes any difference under the language of the statute. To take the most problematic case, let us imagine he is the accused in a criminal trial, facing charges of sexually abusing a young woman, and has chosen to testify in his own defense. He admits he had inappropriate contact with the alleged victim, but denies that they had sexual relations.

Now imagine that while this man is being cross-examined by the prosecutor, he gets quite a surprise. It suddenly turns out that the prosecutor has somehow learned the details of a confidential confession that the defendant made to his wife. This could happen in countless ways, and often does, although it would not matter how it happened under the language of the Virginia statute.[59] We will assume the accused

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[58] *Id.* at 13-14 (declining to resolve the issue, and noting that it "remains open in the federal courts."). It must be noted that a small number of recent cases from other states have adopted the same view. *See* State v. Szemple, 640 A.2d 817, 822 (N.J. 1994) ("New Jersey law has long held that the marital-communications privilege does not prohibit disclosure by third parties who overhear spousal conversations.").

[59] The conversation could have been overheard by another, or the communication might have been a confidential letter by the accused to his wife that was intercepted, lost, stolen, or even voluntarily turned over by her to the prosecutor. Or maybe she simply chose to tell the prosecutor about her husband's statement. A different marital privilege pertains to testimony against an accused in a criminal trial by his current spouse, but that would not prevent the wife from turning over letters or information to the prosecution. Under both federal and Virginia law, that separate privilege for spousal testimony belongs to the spouse who is not on trial, Trammel v. United States, 445 U.S. 40 (1980); VA. CODE ANN. § 19.2-271.2 (Michie 1998), and does not have any bearing on whether the witness spouse chooses to assist the police and prosecutor in any way she pleases during their pretrial investigation. *Trammel*, 445 U.S. at 52-53 n.12; Wood v. Hodnett, 377 F. Supp. 740, 742

never waived any privilege by discussing the communication, or even mentioning his wife, during his direct examination. Nevertheless, the cross-examiner desires to get into the matter of the confession and asks the accused: "Isn't it true, Bill, that you told your wife Hillary in strict confidence that you would never forgive yourself for having sex with that young woman?" The accused and his attorney promptly object and insist that the answer is privileged.

Ironically, this hypothetical fact pattern lies as close as one could imagine to the very core of the modern theory behind the marital privilege. Indeed, under the law of every state but Virginia, the husband would have every right to refuse to answer the question. Outside of Virginia, State and federal authorities have adopted four different answers to the central issue of who holds the privilege for confidential marital communications.[60] Depending on where the trial takes place, some statutes have provided that the privilege belongs to and may be asserted by: (1) either spouse,[61] or (2) only the spouse who made the communication,[62] or (3) only the spouse who is the accused on trial,[63] or (4) only the spouse who is on the witness stand.[64] Under any of those four standards, the privilege could be asserted by an accused who refuses to testify on the stand about a confession he made to his wife. No other case would generate the same result under all four versions of the privilege.

But what would be the answer under Virginia law? There is no case law directly on point. No reported Virginia decision has ever considered whether an objection based on the marital privilege might be available to someone on the witness stand. A leading reference work on Virginia

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(W.D. Va. 1974) (applying Virginia law); Livingston v. Commonwealth, 466 S.E.2d 757 (Va. Ct. App. 1996).

[60] *See* sources cited *supra* note 27.

[61] This is the position taken by the overwhelming majority of the States that have enacted statutory codifications of the privilege. *E.g.*, ALA. R. EVID. 504 (West 1999); CAL. EVID. CODE § 980 (West 1995); FLA. STAT. ANN. § 90.504 (West 1999); IDAHO R. EVID. 504(b) (Lexis 1999); LA. CODE EVID. ANN. art. 504(2) (West 1995); MISS. R. EVID. 504 (West 1999); N.M. R. EVID. 11-505 (Michie 1994); N.Y. C.P.L.R. § 4502(b) (Consol. 1978); OR. REV. STAT. §40.255(2) (1997); TENN. CODE ANN. § 24-1-201(b) (1998); *see* MUELLER & KIRKPATRICK, *supra* note 27, at 457; WEISSENBERGER, *supra* note 27, at 219.

[62] *See* KAN. STAT. ANN. § 60-428(a) (1994); TEXAS R. CIV. EVID. 504(a)(2) (West 1993); UNIF. R. EVID. 504(a).

[63] *See* ARK. CODE. ANN. § 16-41-101 (Michie 1994); OKLA. STAT. ANN. tit. 12 § 2504(B) (West 1993); S.D. CODIFIED LAWS § 19-13-13 (Michie 1995).

[64] Actually, it is not clear that any State currently follows the fourth variation of vesting the privilege solely in the testifying spouse. The only examples typically cited for that rule are New Mexico, *e.g.*, LILLY, *supra* note 27, at 447 n.22, and Tennessee, *e.g.*, RONALD J. ALLEN ET AL., EVIDENCE: TEXT, CASES, AND PROBLEMS 1056 (2d ed. 1997). But both of those States have since joined the large number of States that allow either spouse to assert the privilege. N.M. R. EVID. 11-505(B) (Michie 1994); *see* State v. Teel, 712 P.2d 792, 793 (N.M. Ct. App. 1985); TENN. CODE ANN. § 24-1-201(b) (1998).

evidence law states, with no supporting authority other than the statute, that the privilege in this State—as in most States—is "claimable by *either* spouse."[65] Federal law likewise allows the privilege to be claimed by either spouse.[66] If that were true in Virginia, of course, there would be no doubt that Bill would be able to refuse to answer any questions about what he told Hillary in strict privacy.

But that is, unfortunately, not what the statute says. If we might return our attention to the text of this most peculiar privilege, the General Assembly has in fact provided that:

> neither husband nor wife shall, *without the consent of the other*, be examined in any action as to any communication privately made by one to the other while married, nor shall either be permitted, *without such consent*, to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted.[67]

Giving that statutory language its most natural and literal reading, we see that the "holder" of this privilege is, in fact, "the Other." That is, the privilege may be either asserted or waived at the sole discretion of whichever party to the marital communication just happens, at the moment, to be *not* sitting on the witness stand.[68] In this respect, the statute is unique. No other court or legislature in the nation currently delegates the privilege solely to the spouse who is *not* testifying.[69]

This unnatural wording leads to bizarre results. Recall our hypothetical case where the accused, Bill, tried to assert his privilege to refuse to answer any questions about what he told his wife in confidence. To rule upon that objection, a Virginia judge applying the plain meaning

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[65] BOYD-GRAVES CONFERENCE, VIRGINIA BAR ASS'N, A GUIDE TO EVIDENCE IN VIRGINIA 38 (1998-99 ed.) (emphasis added).

[66] *See* Blau v. United States, 340 U.S. 332 (1951) (privilege permits husband to refuse to disclose what his spouse told him); Wolfle v. United States, 291 U.S. 7 (1934) (assuming that privilege is generally available to husband who objects to evidence of what he told his spouse).

[67] VA. CODE ANN. § 8.01-398 (Michie 1998) (emphasis added).

[68] The California Law Revision Commission once reached the same conclusion in its construction of an almost identical statute. Years ago, that State's laws said, in words almost identical to the Virginia statute, that neither party to a marriage could be, "without the consent of the other, examined as to any communication made by one to the other during the marriage." CAL. CIV. PROC. CODE § 1881(1) (1872), *repealed by* CAL. EVID. CODE § 980 (West 1995) (operative Jan. 1, 1967). The Commission later concluded, correctly, that this language evidently meant that "the privilege may belong only to the nontestifying spouse." CAL. EVID. CODE § 980 law revision commission's cmt. (West 1995). The matter was mooted in 1965 when the privilege was amended to provide that "both spouses are the holders of the privilege and either spouse may claim it." *Id.*

[69] Nebraska's version of the privilege is quite similar to the Virginia statute, except it adds the explicit proviso that "This privilege may be waived only with the consent of *both* spouses," NEB. REV. STAT. § 27-505(1) (1995) (emphasis added), so it poses no danger that a woman could unilaterally force her husband to testify over his objection, as the Virginia statute does.

of the rule would have only one assignment: to find out what "the other" spouse thought about Bill's objection. Suppose, as is quite common, the prosecutor can report that the defendant's wife or former wife, Hillary, is present in the courthouse. Moreover, she has absolutely no objection if Bill is convicted, much less forced to answer questions about the incriminating things he told her in private.[70] Hillary then stuns the courtroom by standing up in the back of the room and announcing: "That's right, Your Honor. I am here and enjoying every moment of this. I have no objection to this line of questioning at all, and you have my consent to make him answer these questions."

How should the judge rule? In any state or federal court outside of Virginia, the answer would be simple. As long as Bill is asserting his privilege, as I have said, his objection will be sustained, and any consent or objection by the wife would be irrelevant. That result makes perfect sense, because in every jurisdiction (including Virginia) the former wife would not be allowed to testify over Bill's objection about his private statements to her, even if she wanted to do so.[71] There is no reason her "consent" should change anything merely because at the moment Bill is on the stand instead of her. But under the unambiguous language of the statute, that is not the law in Virginia. A spouse on the witness stand may refuse to be "examined" about his private statements to his wife

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[70] The state and federal cases are legion where a woman is perfectly willing to testify against her husband or former husband at his criminal trial, either because of a favorable plea agreement she worked out for herself or simply because of the natural animosity she feels toward a man after concluding that he had committed a horrible crime. For a list of examples within the State of Virginia alone, consider: Livingston v. Commonwealth, 466 S.E.2d 757 (Va. Ct. App. 1996) (man convicted of marijuana possession after his estranged wife told police about marijuana and cocaine she saw in his home); Edwards v. Commonwealth, 457 S.E.2d 797 (Va. Ct. App. 1995) (man convicted of murder after his former wife testified about things he said and did while they were alone together); Creech v. Commonwealth, 410 S.E.2d 650 (Va. 1991) (man convicted of arson after his estranged wife testified that he had threatened to torch her property); Bennett v. Commonwealth, 374 S.E.2d 303, 309 (Va. 1988) (man convicted of capital murder after his wife by invalid bigamous marriage testified against him); Church v. Commonwealth, 335 S.E.2d 823 (Va. 1985) (man convicted of raping seven-year-old girl after his former wife testified to his private confessions of sexual arousal by the victim); Brown v. Commonwealth, 292 S.E.2d 319, 322-23 (Va. 1982) (man convicted of murder after his estranged wife testified as a witness to the crime); Hudson v. Commonwealth, 292 S.E.2d 317 (Va. 1982) (man convicted of forgery and theft from his estranged wife after she testified against him); Stewart v. Commonwealth, 252 S.E.2d 329 (Va. 1979) (man convicted of grand larceny after his former wife testified against him); Osborne v. Commonwealth, 204 S.E.2d 289 (Va. 1974) (man convicted of statutory rape after his wife testified to his private confessions to her); Menefee v. Commonwealth, 55 S.E.2d 9 (Va. 1949) (man convicted of robbery after his former wife testified to his communicative conduct the night of the crime); Wilson v. Commonwealth, 162 S.E. 15 (Va. 1932) (man convicted of malicious wounding after his wife announced at his trial that she was ready to testify against him, thereby forcing him to assert his privilege in the presence of the jury).

[71] *Church*, 335 S.E.2d at 827; *Menefee*, 55 S.E.2d 9.

only if the questioning is conducted "without the consent of the *other*" spouse.[72] Because Hillary is now in the courtroom and willing to waive her privilege, even though she would not be allowed to answer those questions herself, the law plainly states that she can by her consent force Bill to answer the question.

And this is not the only strange result of this statute's wording. What if Bill is ordered to answer the question but denies that he made the statement, or insists he did not say it the way Hillary related it to the police? (He might very well do so even if she is telling the truth, if he has no scruples about the sanctity of the oath and if he has closely read either the Virginia statute or this article.) Surely Hillary cannot be called as a rebuttal witness to impeach his testimony about their private discussions, because then the bizarre "shifting Virginia privilege" would belong to him again. Once she took the stand as a rebuttal witness, Bill would again become the holder of this boomerang privilege—he would again become "the Other"—and he could assert it to prevent her from saying a word.[73] And even more odd, the statute clearly gives him immunity from any meaningful threat of prosecution for perjury. Assuming that Hillary is the only witness who knows that his sworn denials were false, no prosecutor could prove the perjury without calling her to contradict him on what he told her—at which time Bill surely would invoke the privilege to block her from saying a word.[74]

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[72] VA. CODE ANN. § 8.01-398 (Michie 1998) (emphasis added).

[73] This particular result is a bit odd but by no means unprecedented. The law of evidence has long recognized that certain kinds of questions are sufficiently tangential to the main issues at a trial that the judge should allow the question to be asked, but exclude any rebuttal or extrinsic evidence on the matter if the witness denies it. *E.g.*, FED. R. EVID. 608(b) (codifying common law rule that specific instances of dishonest conduct used to impeach character of a witness may be asked about on cross-examination but not proved if he denies them). But surely the framers of the Virginia privilege did not see themselves as deliberately creating such a system in this context, or as expressing any general judgment that confessions and other statements made by the accused are too collateral to be deserving of extended court time merely because they were made in private to his wife.

[74] One other odd twist deserves passing mention. If Bill's trial for sexual abuse was a *civil* case, the shifting privilege would allow Hillary to force Bill to answer the questions about what he told her, and would also allow him to prevent her from contradicting him. But could the plaintiff's attorney still call Hillary to the stand as a rebuttal witness and ask her about what Bill told her anyway, thus forcing Bill to assert the privilege in the presence of the jury to stop her? And would the plaintiff be permitted to argue in closing that the jury ought to be allowed to draw an adverse inference against Bill because of his assertion of the privilege? *See* Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) ("prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"); United States v. Premises Known As 281 Syosset Woodbury Road, 862 F. Supp. 847, 859-60 (E.D.N.Y. 1994) (allowing adverse inference to be drawn in civil case from assertion of marital communications privilege), *aff'd*, 71 F.3d 1067 (2d Cir. 1995); L.A. Gear, Inc. v. Thom McAn Shoe Co., 988 F.2d 1117, 1126 (Fed. Cir. 1993) (in patent infringement action, adverse inference may be drawn from assertion of attorney-client

This literal reading of the statute not only produces absurd results in the courtroom. It also makes the statute impossible to reconcile with its supposed justification. Construing this very statute half a century ago, the highest court of the State declared that the law's "fundamental purpose [is] to protect from public exposure confidences of the marital relation . . . which the continued tranquility, integrity and confidence of their intimate relation demands to be shielded and protected by the inviolate veil of the marital sanctuary."[75] No law can serve that purpose if it affords a shifting privilege that only applies sometimes, depending on which spouse ends up on the witness stand at any given moment.

D. The Case of the Craven Crook Who Commits Crimes Against His Clan

Thus far we have considered three surprising ways in which the wording of the Virginia statute is actually narrower than was likely intended and than it has generally been assumed to reach. But in at least two equally strange respects, the wording of the statute is overinclusive as well and actually extends the privilege to situations where it does not make sense at all. The next two sections of this article will consider both of them.

Most litigated marital privilege cases involve a man who made a private confession to his spouse about a matter that does not directly involve her. As we have seen, the law of most states (including Virginia) allows him an absolute right to forever prevent her from repeating those statements in court, even if they amount to an admission to a terrible crime.[76] The theory behind this harsh rule is that it is "far better that occasional hardships be suffered and that crime sometimes go unpunished," if that is the necessary price for shielding "the continued tranquility, integrity and confidence" underlying "the inviolate veil of the marital sanctuary."[77]

But what if the man's incriminating statements to his wife involve a crime that he commits against *her*? Or against their minor children who reside with them? For over a century, almost every jurisdiction has regarded that as a very different situation, on the theory that a man who

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privilege); MUELLER & KIRKPATRICK, *supra* note 27, at 330-31 ("A few states specifically allow an adverse inference to be drawn from the assertion of the privilege against self-incrimination in a civil proceeding.").

[75] *Menefee*, 55 S.E.2d at 15.

[76] *E.g.*, *Church*, 335 S.E.2d at 826-27 (marital privilege entitled alleged rapist of seven-year-old victim to prevent his former wife from testifying to his earlier statements that the child aroused him sexually).

[77] *Menefee*, 55 S.E.2d at 15; *see also* Wolfle v. United States, 291 U.S. 7, 14 (1934) ("The 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.").

victimizes his own wife "has committed an offense against both her and the marital relation."[78] Where a woman learns that her husband has committed a terrible offense such as child abuse within their family, even if she learns it from him in confidence, "[i]t would be unconscionable to permit a privilege grounded on promoting communications of trust and love between marriage partners to prevent a properly outraged spouse with knowledge from testifying against the perpetrator of such a crime."[79] The privilege is denied to any husband who would use it as a shield for domestic abuse of his wife and their children,[80] and perhaps even other minor relatives visiting in the defendant's home.[81]

It would be a gross understatement to call this exception to the privilege "well-settled." Indeed, the exception is literally older than the rule itself! More than one and a half centuries ago, at common law, husbands and wives did not enjoy a privilege to refuse to testify against each other; they had no choice in the matter, because they were incompetent to testify in any case where the other was a party.[82] Yet even in those days, the extremely harsh doctrine of spousal incompetence was mitigated by an exception for cases where one spouse was charged with a crime against the other.[83] Even to this day, virtually every modern statute governing marital privileges contains an explicit

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[78] Wyatt v. United States, 362 U.S. 525, 529 (1960) (declining to recognize marital privilege at trial of man accused of using his wife in prostitution, even where she asserts an objection to testifying against him). *See also* United States v. Castillo, 140 F.3d 874, 884-85 (10th Cir. 1998) (recognizing an exception to marital privilege where man was charged with sexually abusing two of his daughters); United States v. Martinez, 44 F. Supp. 2d 835 (W.D. Tex. 1999) (no spousal communications privilege where ex-husband testifies against woman accused of abusing her two minor children).

[79] United States v. Bahe, 128 F.3d 1440, 1446 (10th Cir. 1997).

[80] *See* United States v. White, 974 F.2d 1135, 1137-38 (9th Cir. 1992) (where accused was charged with killing his stepdaughter, wife was allowed to testify that he privately threatened to do so earlier).

[81] *Bahe*, 128 F.3d at 1446.

[82] "The common-law rule, accepted at an early date as controlling in this country, was that husband and wife were incompetent as witnesses for or against each other." Hawkins v. United States, 358 U.S. 74, 75 (1958). The basic difference, of course, is that a privilege, like any right, may be waived by its holder. A witness deemed incompetent is disqualified from testifying, whether he wants to or not. *Id.*

[83] Stein v. Bowman, 38 U.S. 209, 222 (1839) ("It is, however, admitted in all the cases, that the wife is not competent, *except in cases of violence upon her person*, directly to criminate her husband; or to disclose that which she has learned from him in their confidential intercourse.") (emphasis added); Meade v. Commonwealth, 43 S.E.2d 858, 860 (Va. 1947) ("At common law, neither husband nor wife was a competent witness in a criminal action against the other, except where the crime was committed against the one testifying"), *overruled on other grounds*, Hudson v. Commonwealth, 292 S.E.2d 317 (Va. 1982).

exception for crimes committed against family members.[84] There are few other facets of the marital privilege on which the states and evidence scholars have demonstrated such unanimity.[85]

Once upon a time, the law was the same in Virginia. When the Virginia General Assembly first drafted the privilege for confidential marital communications in 1894, the section ended with an important exception to deal with this very situation. Immediately after declaring that neither spouse could testify about their communications without the consent of the other, the statute provided:

> [T]his exclusion shall *not* apply to a criminal proceeding for a criminal offence committed by one against the other, but as to such proceeding the existing rules of evidence shall remain unchanged.[86]

For a quarter of a century, this provision guaranteed that no Virginian would be able to exploit the privilege as a shield, committing terrible crimes against his family members and then preventing his victims from testifying to the incriminating statements he made to them in private. Interpreting this language only a few years later, Virginia's highest court said:

> It is plain that it was the intention of the legislature that the statutory restrictions upon . . . the revealing in testimony by [husband or wife] against the other of communications by the one to the other during the marriage, or after the marriage relation ceases, shall *not* apply to proceedings for a criminal offense committed by one against the other . . .[87]

Surely it came as no surprise that this exception was preserved verbatim when the privilege was amended and re-enacted in 1898,[88] and again in 1902.[89]

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[84] In almost every State, the exception explicitly provides that the privilege is inapplicable in any criminal proceeding where a spouse is charged with any crime against the other or against a child of either one. *E.g.*, ALA. R. EVID. 504(d)(3); ARK. CODE. ANN. § 16-41-101 (Michie 1991); CAL. EVID. CODE § 985; FLA. STAT. ANN. § 90.504(3)(b) (West 1999); IDAHO R. EVID. 504(d)(2); KAN. STAT. ANN. § 60-428(b)(3) (1994); MISS. R. EVID. 504(d); N.J. STAT. ANN. § 2A:84A-22 (West 1994); OKLA. STAT. ANN. tit. 12 § 2504(D); OR. REV. STAT. § 40.255(4)(a) (1997); NEB. REV. STAT. § 27-505(3)(a) (1995); N.M. R. EVID. 11-505(D)(1); TENN. CODE ANN. § 24-1-201(b) (1980); TEX. R. EVID. 504(a)(4)(C); WIS. STAT. ANN. § 905.05(3)(b) (1996); *see also* UNIF. R. EVID. 504(c). Sometimes the exception is limited to prosecutions for crimes of violence against the spouse or physical injury to the child, IDAHO CODE § 9-203(1) (1955), or to cases of sexual assault and related offenses. N.H. REV. STAT. ANN. § 632-A:5 (1998).

[85] *See* MUELLER & KIRKPATRICK, *supra* note 27, at 461; BROUN ET AL., *supra* note 27, at 307; WEISSENBERGER, *supra* note 27, at 220.

[86] 1893-1894 Va. Acts ch. 619, § 3 (emphasis added).

[87] Davis v. Commonwealth, 38 S.E. 191, 192 (Va. 1901) (in light of "marital crimes" exception to adverse spousal testimony privilege, trial court properly allowed wife to testify against husband who poisoned well from which she drank).

[88] 1897-98 Va. Acts ch. 703, § 3 (enacted March, 1898).

[89] 1901-02 Va. Acts ch. 673, § 3 (enacted April, 1902).

But then something completely unexpected happened. In 1919, when the privilege for marital communications was re-enacted, the exception for crimes against one's spouse was deleted from the statute.[90] Although there is no surviving legislative history for this abrupt change, the General Assembly must have thought it was only moving the domestic crimes exception from one marital privilege statute to the other. In that very same legislation, at the same time it amended the marital communications privilege to delete the former exception for "a criminal offense committed by one against the other,"[91] the separate privilege governing adverse spousal testimony in criminal cases was expanded to include, for the first time, a new sentence specifically addressed to the admissibility of marital communications in the case of "a criminal offense committed by one against the other."[92]

But somehow in the moving process, this ancient "exception" to the privilege was inadvertently damaged beyond recognition. In its new home, the exception had been reworded to declare that:

> In the prosecution for a criminal offense committed by one against the other, each shall be a competent witness *except* as to privileged communications.[93]

This rule has now been in the Virginia statute for eighty years, and has since been expanded to also include crimes against young children of either spouse.[94] Because there is no surviving legislative history of the reason for the change, it is quite likely the General Assembly did not realize what it was doing when it made this radical change in the law. Even the highest court of the state was not immediately aware of the significance of this change in the statute, which it once described in an early case as "only a slight and immaterial change in its verbiage and punctuation."[95]

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[90] VA. CODE ANN. § 6212 (Michie 1919).

[91] The quoted language, which was removed from the statute in its 1919 amendment, is taken from the version in effect immediately before that. 1901-02 Va. Acts ch. 673, § 3.

[92] VA. CODE ANN. § 6211 (Michie 1919).

[93] VA. CODE ANN. § 6211 (Michie 1919) (emphasis added).

[94] Today's version states: "[I]n the case of a prosecution for an offense committed by one against the other or against a minor child of either, . . . each [spouse] shall be a competent witness *except as to privileged communications.*" VA. CODE ANN. § 19.2-271.2 (Michie 1998) (emphasis added). Indeed, in addition to crimes against one's spouse and children, the rule making a spouse incompetent to disclose confidential communications has even been expanded to include "any proceeding relating to a violation of the laws pertaining to criminal sexual assault, crimes against nature involving a minor as a victim and provided the defendant and the victim are not married to each other, incest, or abuse of children." *Id.* (internal cross-references to other statutes omitted).

[95] Meade v. Commonwealth, 43 S.E.2d 858, 861 (Va. 1947), *overruled on other grounds*, Hudson v. Commonwealth, 292 S.E.2d 317 (Va. 1982).

The language of the current statute is, unfortunately, clear and unambiguous. It is also a complete reversal of the common law approach to admissibility of testimony by a crime victim who is married to the accused. The "except" clause here plainly means that a woman is *not* free to testify to private communications to her by her husband, even in a criminal case where she is testifying as the victim or the mother of the victim. Rarely has such valuable cargo been so severely damaged in shipping and handling as when this venerable exception to the marital privilege was transported to the special privilege statute for criminal cases. Thus the legislature overturned a critical legal exception to the privilege that has been well settled in almost every jurisdiction for over a century.

The 1919 revisers probably meant to say, as Virginia law had said for decades, something more like this: "At a criminal trial of a married person, each spouse shall be a competent witness *except* as to privileged communications, *unless* it is a prosecution for an offense committed by one against the other or against a minor child of either." But they got the order of the exceptions mixed up, thus completely reversing the meaning of the sentence. It is almost as if the unskilled laborers hired to transport this vital exception to the Criminal Procedure Code missed the sign warning "This End Up."

This bizarre feature of the Virginia marital privilege has never been explicitly acknowledged in print anywhere before today. It has never been mentioned in the occasional law review articles discussing the privilege, nor in any reported state or federal court opinion. But it is the law, and there is no question that the Virginia courts have silently noticed this embarrassing glitch. In two recent cases, two Virginia men were convicted of sexually abusing their daughters following trials where their wives testified to confidential and incriminating statements made to them by the accused. Dale Clinton Osborne was convicted of raping his fifteen-year old stepdaughter following a trial where his wife testified: "He had threatened to take her in sex before."[96] Latovia Joel Whitehead was convicted of sodomizing his five-year old daughter following a trial where his wife testified that he told her that the girl "asked for it, and she wanted some."[97] In both cases, the defendant sought reversal on the grounds that his wife had been allowed to disclose his confidential communications. Because the victim in each case was a minor relative of the accused, the privilege objection could have been summarily overruled on that basis under the common law or the current law of almost every other State. Yet in neither case did the appellate

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[96] Osborne v. Commonwealth, 204 S.E.2d 289, 290 (Va. 1974).

[97] Whitehead v. Commonwealth, No. 0576-95-3, 1996 WL 265248, at *1 (Va. Ct. App. May 21, 1996) (unpublished opinion).

courts suggest that disposition, electing instead to affirm on the alternative grounds that the error had been unpreserved or harmless.[98] The reason is plain: the courts in both cases obviously noticed this unfortunate defect in the statute, and are understandably reluctant to acknowledge it in public, perhaps for fear of tipping off the defense bar.

But as bad as the law may be, it is almost certainly not what the General Assembly meant to say when they wrote the 1919 statute and its subsequent revisions, most recently in 1996.[99] In fact, it is nearly certain that they intended to say the exact opposite. It is inconceivable that the legislature would have intentionally done what this statute plainly does, in light of five simple facts. (1) The ancient rule withholding the marital communications privilege from domestic abusers had been settled in Virginia, and enforced by the State Supreme Court without question, for nearly a quarter century before it was abolished.[100] (2) This common law exception has now been accepted without question in virtually every other state for well over a century, and has not been criticized or rejected by any modern evidence scholar.[101] (3) Since the time it abrogated the "domestic abuse" exception to the privilege in criminal cases, the Virginia General Assembly has expressly reinstated similar exceptions denying the privilege in civil cases between spouses,[102] as well as civil child abuse and neglect proceedings,[103] and proceedings under the Uniform Interstate Family Support Act.[104] (4) Even in criminal cases, the legislature has also preserved the rule that even the spouse on the witness stand cannot assert her traditional privilege not to give any testimony against her current husband if she or

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[98] *Osborne*, 204 S.E.2d at 290 (holding that error was invited and waived because it was arguably responsive to a question by defense counsel); *Whitehead*, 1996 WL 265248, at *2 (holding that the error was harmless). In *Whitehead*, the court's refusal to rely on the defendant's relationship to the victim was especially conspicuous, because the court properly relied on that same ground to overrule the defendant's alternative claim under the privilege for adverse spousal testimony. *Id.* at *1.

[99] The current version of § 19.2-271.2 was revised as recently as 1996. 1996 Va. Acts ch. 423.

[100] There is a sort of presumption that the General Assembly would not intend to abrogate a long-standing rule of privilege law without a clear enactment to that effect. Church v. Commonwealth, 335 S.E.2d 823, 827 (Va. 1985).

[101] *See* sources cited *supra* notes 76-85.

[102] VA. CODE ANN. § 8.01-398(B) (Michie 1998) (stating that communications privilege shall not apply in civil actions "where the law of this Commonwealth confers upon a spouse a right of action against the other spouse.") This clause is codified under the section of the State Code entitled "Civil Remedies and Procedure," and has been part of the statute since its 1977 revision. 1977 Va. Acts ch. 617, at 1119.

[103] VA. CODE ANN. § 63.1-248.11 (Michie 1998).

[104] VA. CODE ANN. § 20-88.59(H) (Michie 1998).

her child is the victim of the crime.[105] (5) Last and surely not least, it is common knowledge that there has never been greater need for legal protection of vulnerable women and children from physical and sexual abuse committed by adult relatives.[106] Yet despite all these facts, since 1919 Virginia law has preserved the confidential marital communications privilege for criminal cases where a man is charged with a crime against his wife or their children, no matter how serious the crime may be.

Recent years have seen many child abuse prosecutions where crucial evidence of guilt is supplied by a wife's voluntary testimony about incriminating admissions by her husband to some terrible crime against their children.[107] For decades such testimony was made admissible, even over the objection of the husband, by the rule making the privilege inapplicable in cases of crimes committed in the home. With brutal domestic abuse more serious than ever before, surely the General Assembly could not have intended to withdraw that legal protection now of all times.

This terrifying accident is intolerable and must be rectified. Some might be tempted to dismiss these concerns by placing their faith in the Virginia Supreme Court. Perhaps when the court is eventually confronted with this terrible legislative error by a convicted child abuser who has preserved the point for appeal, some might hope, the court will disregard the plain language of the law on the grounds that it could not have been what the legislature really intended. That would be an unacceptable and reckless risk to take. In construing this very statute not long ago, the Virginia Supreme Court warned that it was not at liberty "to pass upon the reasons for the rule, or the wisdom of the law."[108] Although the Supreme Court will not presume that the General

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[105] VA. CODE ANN. § 19.2-271.2 (Michie 1998). This is probably the most subtle inconsistency of the bunch, but also the most profound. That statute states in its first line that a woman whose children have been assaulted by her husband can be forced to testify against him, even if she does *not* want to do so, because the law deems it necessary for her own good and protection, and because the husband has forfeited the privilege by abusing his own family members. And yet, two sentences later, the same statute now provides that, even if she *wants* to testify against him, she cannot relate that he privately confessed to her about the same horrible crime that he committed against the children! It is almost inconceivable that the legislature intended to simultaneously adopt those two rules for criminal trials. But that is exactly what they did.

[106] April Taylor, *Child Abuse Reports Rise 8% in U.S. Since 1993*, THE DETROIT NEWS, Mar. 31, 1999 at A13 (reported cases of child abuse and neglect have surpassed three million cases annually, including one million confirmed cases; over half of all children age five and under killed in the last twenty years were killed by a parent).

[107] *See, e.g.*, sources cited *supra* notes 79, 80, 96, 97.

[108] Jenkins v. Commonwealth, 250 S.E.2d 763, 765 (Va. 1979) (quoting Meade v. Commonwealth, 43 S.E.2d 858, 862 (1947), *overruled on other grounds*, Hudson v. Commonwealth, 292 S.E.2d 317 (Va. 1982)).

Assembly intended to overturn a long-standing aspect of privilege law "[i]n the absence of an express enactment to that effect,"[109] that is exactly what we have in the case of the current statutes. Whether intentionally or not, § 19.2-271.2 states expressly and plainly that victims in criminal prosecutions brought against their spouses are competent to testify "*except* as to privileged communications." Evidence law rarely gets any more plain than that, or more dangerous.

E. The Case of the Missing Spouse

Thus far, we have been discussing a variety of scenarios where a husband and wife are both present in court, and at least one of them desires to assert the privilege as to some communication between them. But what about the situation where one spouse desires to make the disclosure, and the other spouse is not available to either object *or* consent?

Suppose a man on trial for his life desires to take the stand in his own defense. He wishes to testify to certain exculpatory things that were said in private between him and his wife. But she is missing for some reason at the time of trial, and the prosecutor objects that his testimony is therefore inadmissible and privileged. For example, he has been charged with the murder of his wife, who died under suspicious circumstances. He wishes to tell the jury that the night he last saw her alive, she told him just before leaving the house, "Bill, please don't ever tell anyone I said this, but I've been thinking about killing myself and making it look like an accident. I am only doing this because I love you and want you to get the insurance money for an accidental death." The defendant concedes that his wife never wanted that information repeated publicly, but argues that she never could have foreseen that *he* would be charged with her death, or that public disclosure of her statement would be necessary to exculpate her innocent husband. Should the prosecutor be allowed to assert a privilege to prevent the husband from offering this testimony?[110]

In almost any jurisdiction but Virginia, the answer is clear. The overwhelming modern consensus of scholars and courts is that the privilege does not prevent an accused from testifying to even confidential

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[109] Church v. Commonwealth, 335 S.E.2d 823, 827 (Va. 1985).

[110] I am focusing here solely on a privilege objection. Anyone who knows little about the law might well conclude that the husband's testimony should be excluded because it is self-serving and untrustworthy. But it would not be excluded on that basis, because our modern legal tradition resolves such doubts by placing its faith in the oath and the ability of cross-examination to expose any falsehood in his testimony. *See* ADVISORY COMMITTEE NOTE TO FEDERAL RULE OF EVIDENCE 601 (noting the refusal of federal law to create any general impediment to testimony by a witness about alleged transactions or conversations with deceased persons).

communications with his spouse in order to help prove his innocence and to avoid a possible injustice.[111] This exception usually applies even in the unusual case where the other spouse is present and objecting, and surely applies with far greater force if the other spouse is deceased or otherwise unable to assert any objection to the testimony.[112]

The privilege law of most jurisdictions dictates this result quite simply by vesting the privilege in either spouse, so that either one may insist upon exclusion of the testimony—but only if he or she is present and raises the objection.[113] Typical privilege statutes accomplish this, for example, by providing that confidential communications are admissible unless "*either* spouse objects."[114] Several states have even gone so far as to explicitly provide that the privilege belongs only to the surviving spouse after one has died.[115] Under all of these standards, of course, the

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[111] MUELLER & KIRKPATRICK, *supra* note 27, at 457 & nn. 16-17; PARK ET AL., *supra* note 27, at 417; WEISSENBERGER, *supra* note 27, at 220 ("Another commonly recognized exception arises where one spouse is charged with a crime and wishes to introduce into evidence confidential statements made to the other to help in the defense."). *Cf.* Swidler & Berlin v. United States, 118 S. Ct. 2081, 2089 (1998) (O'Connor, J., dissenting on other grounds) ("Where the exoneration of an innocent criminal defendant . . . is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs" the case for preserving confidences entrusted to a lawyer by a now deceased client).

[112] At least in criminal cases, this result is made explicit in several states by statutes abrogating the privilege when the accused offers evidence of confidential communications in his own defense, regardless of whether the spouse objects. *E.g.*, CAL. EVID. CODE § 987 ("There is no privilege under this article in a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made."); FLA. STAT. ANN. § 90.504(3)(c) (West 1999) (same); KAN. STAT. ANN. § 60-428(b)(4) (1994) (neither spouse may claim the privilege "in a criminal action in which the accused offers evidence of a communication between him or her and his or her spouse . . . ."); N.J. STAT. ANN. § 2A:84A-22 (West 1994) (no privilege "in a criminal action or proceeding in which either spouse consents to the disclosure . . . ."); WIS. STAT. ANN. § 905.05(3)(b) (West 1982). Other states achieve the same result indirectly, by making the accused the holder of the privilege in criminal cases. *See* ARK. CODE. ANN. § 16-41-101, (Michie 1991); OKLA. STAT. ANN. tit. 12 § 2504(B) (West 1993); S.D. CODIFIED LAWS § 19-13-13 (Michie 1995). Many other states would, if necessary, likely reach the same result based on the constitutional right of an accused to present exculpatory evidence in his own defense, which has led to the creation of exceptions to many statutory privileges. MUELLER & KIRKPATRICK, *supra* note 27, § 5.5; *cf. Swidler*, 118 S. Ct. at 2087 n.3 (noting without deciding the possibility that an exception to attorney-client privilege might be justified by "exceptional circumstances implicating a criminal defendant's constitutional rights.").

[113] *See, e.g.*, sources cited *supra* note 61.

[114] TENN. CODE ANN. § 24-1-201(b) (1980) (emphasis added). Many other states attain the same result by stating that either spouse has the "privilege to refuse to testify or to *prevent* his or her spouse or former spouse from testifying." UNIF. R. EVID. 504(a) (emphasis added).

[115] *E.g.*, NEB. REV. STAT. § 27-505(1) (1995) ("This privilege may be waived only with the consent of both spouses. After the death of one, it may be waived by the survivor."); N.Y. C.P.L.R. § 4502(b) (Consol. 1978) ("A husband or wife shall not be required, or, without the consent of the other if living, allowed, to disclose a confidential communication

privilege is not self-enforcing, and comes into play only if one spouse asserts it. This makes sense. If one spouse is deceased or in a coma, there is no reason why the surviving spouse should not be free to make disclosure in court of relevant communications between them. This is true especially, but not only, where disclosure is necessary to save the survivor from an unjust conviction, or where it would otherwise be consistent with the deceased spouse's likely wishes.

But not here in Virginia. The controlling statutory language, remember, provides that a man cannot "be examined" or "permitted . . . to reveal" anything said in confidence between him and his former spouse during their marriage "without the *consent* of the other."[116] Unlike most privilege rules, which provide that disclosure is permissible unless either spouse *objects*, this one declares that neither spouse may talk unless the other affirmatively *consents*. In that sense, the statute more closely resembles a sort of "conditional competency" statute, which absolutely precludes a spouse from testifying to certain facts without the consent of the other.

Unlike the other bizarre features of this statute described in this article, the problem I am outlining here is not just something I read in the statute. Shortly after the turn of the century, this very point was raised and settled by the highest court of Virginia, in *Wilkes' Administrator v. Wilkes*.[117] In that civil will contest, the distribution of a dead man's considerable estate turned on whether he or his wife had made an alteration to his will when four words were somehow crossed out with a "single line with pencil indistinctly and irregularly drawn through them."[118] When a challenge was made to the will, the man's widow gave uncontradicted testimony that the alteration to the will had been made by her, and not by her deceased husband, and she related the details of a conversation the two had surrounding the matter.[119] The jury evidently found her testimony trustworthy and chose to credit it.[120]

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made by one to the other during marriage"); *see* CAL. EVID. CODE § 980 (Law Revision Commission Comment, 1995) ("[W]hen one spouse is dead, no one can claim the privilege for him; the privilege, if it is to be claimed at all, can be claimed only by or on behalf of the surviving spouse.").

[116] VA. CODE ANN. § 8.01-398 (Michie 1998) (emphasis added).

[117] 80 S.E. 745 (Va. 1914).

[118] *Id.* at 745.

[119] *Id.* at 746. I say that her critical testimony was uncontradicted because the Court later stated that, apart from her testimony, there was "no evidence whatever to show how, when, or by whom the mark . . . was made," or with what intent. *Id.* at 749.

[120] This fact can be safely inferred from the opinion of the Supreme Court of Appeals. The Court stated that there was no evidence apart from that of Mrs. Wilkes as to who had altered the will, but the jury concluded that the alteration had not been part of her husband's will. *Id.*

Nevertheless, based on these facts, the Virginia Supreme Court concluded that the lower court erred in allowing the widow to testify to her communications with her husband. Citing the statute's plain provision that neither spouse may testify to such matters "without the consent of the other," even after his death, the court concluded that the statute rendered her *incompetent* to testify, simply because she obviously could not obtain the consent of her dead husband.[121] Of course, Mrs. Wilkes, the sole survivor of the marriage, was anxious to waive any "privilege" she might have had and to testify about such matters. And her testimony, if true (as the jury found), meant that her husband would have surely consented to her testimony if he had been able to give it. Yet the Court dismissed those facts as utterly immaterial, reasoning that the statute categorically rendered Mrs. Wilkes incompetent to testify to any conversations with her husband after his death. Even though the testimony was being offered by the only surviving spouse without objection from either, the Court explained:

> The language of the statute is as broad and comprehensive as could have been used to express the intent of the framers thereof. . . . [I]ts language being that neither husband nor wife shall, without the consent of the other, be examined in any case as to any communication made by the one to the other, . . . it would therefore seem too clear to admit of argument that *it is a matter of no consequence by whom the husband or wife may be called as a witness or for what purpose,* whether for or against each other.[122]

According to the unambiguous holding in *Wilkes*, therefore, a spouse may not testify to any private communication with his or her spouse unless that other spouse affirmatively consents to the disclosure—even if the other spouse is now deceased and even if the survivor wishes to do so! The case has never been distinguished or overruled,[123] and there can be no room for arguing that it has been modified by the legislature. In all relevant respects, the crucial language relied upon by the court in *Wilkes* is exactly the same in the current version of the statute.[124] This means,

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[121] "At common law, Mrs. Wilkes would have been plainly incompetent as a witness in this case, as husband and wife were absolutely incompetent to testify for or against each other, and it is only by statute that this incompetency has been *partially* removed." *Id.* at 747 (emphasis added). The Court concluded that "Mrs. Wilkes was an *incompetent* witness, no matter by whom called." *Id.* at 749 (emphasis added).

[122] *Id.* at 747 (emphasis added).

[123] On the contrary, *Wilkes* was followed on almost identical facts to reach the same result in a later Virginia case. Edmundson's Executor v. Edmundson's Widow, 11 Virg. Law Register, N.S., 30 (Corp. Ct. of Radford, 1925) (in contest of her late husband's will, widow may not testify to any private communications with him). The court reasoned: "This law is mandatory; absolute: the voice of sovereignty. 'Shall not be examined' is as emphatic as holy script and makes it plain." *Id.* at 31.

[124] The *Wilkes* court made some mention of the fact that the statute at that time was not restricted to confidential communications, *Wilkes*, 80 S.E. at 747, whereas it is now

returning to our hypothetical case of the man charged with murdering his wife, that he is simply incompetent to testify in his own defense about exculpatory statements made between him and his wife on the night of her death, as long as those statements had been intended to stay confidential and she is now unavailable to consent to his testimony about them.

But even though *Wilkes* is still the law in Virginia, it should not be. In the past fifty years, courts and legal scholars have reached almost complete agreement that confidential communications ought to be freely admissible if one of the parties to the marital conversation desires to disclose them and the other is not available to either object *or* consent.[125] Nothing sensible can be said in favor of preserving the rule of *Wilkes* in the modern era, although it is still the law as long as the statute remains in the same form as it has stood since that case was decided.

Perhaps some might disagree, and defend the wording of the current statute, by arguing that an absolute privilege is necessary to insure that what I tell my spouse will never be disclosed without my consent, even after my death, or else I will never be willing to confide extremely sensitive matters to my spouse. But that would be absurd. Even under the rigorous interpretation of Virginia law laid down in *Wilkes*, remember, the statute is only a rule of evidence (whether of privilege or competence), and so it has no bearing on whether my wife can relate my most intimate secrets to her friends, or in the newspapers, or even in a best-selling book, either before or after my death.[126]

Even if *Wilkes* is not overturned by statute, no sane spouse in this State will have any true and lasting security that what he tells his wife

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limited to communications "privately made." VA. CODE ANN. § 8.01-398 (Michie 1998). But that is surely no basis for arguing that *Wilkes* has been overturned; the logic of that case (such as it is) applies with far greater force to the special case of confidential communications that were not, at the time made, expected by the communicating party to later be made public. Nor can one suggest that *Wilkes* was affected by the fact that the privilege statute now begins with the general provision declaring husbands and wives generally competent to testify for or against each other, subject to the provision for private communications between them, VA. CODE ANN. § 8.01-398(A) (Michie 1998); that identical language was in the statute at the time *Wilkes* was decided, and has been since 1894. 1893-94 Va. Acts ch. 619, § 1 ("Be it enacted by the general assembly of Virginia, That husband and wife shall be competent to testify for or against each other in all civil cases: provided, however . . .").

[125] *See* sources cited *supra* notes 61, 114, 115.

[126] *See* PARK ET AL., supra note 27, at 414. Many other privileges, by contrast, protect the secrecy of communications with professionals such as lawyers or priests or therapists who operate under a separate professional ethical duty of confidentiality. That gives me some measure of confidence (if I want it) that what I tell them will forever remain secret. *See* Swidler & Berlin v. United States, 524 U.S. 399, 118 S. Ct. 2081 (1998) (attorneys acting for no obvious immediate personal gain went all the way to the Supreme Court to defend their right to refuse to disclose client confidences). Spouses do not labor under any similar code of "professional responsibility."

will remain forever secret—apart from the trust he reposes in her good faith and judgment. That same trust is all the comfort any rational man would need in a state where his secrets can be repeated by her in a courtroom after his death only when *she* decides it would be what they both would have wanted. The United States Supreme Court recently reasoned that the rigor of the attorney-client privilege is not undermined by the traditional rule allowing disclosure in disputes among the client's heirs, because it has always been assumed that such disclosure "furthers the client's intent."[127] No man who enjoys a good relationship with his lawyer—or his wife—will hesitate to share confidences with her merely because the law allows her, in her good judgment, to divulge those secrets after his death when she believes that is what he would have wanted. It is high time for Virginia to join the large number of states where that is already the law.

IV. CONCLUSION

Imagine that you are an attorney practicing in Virginia. You represent a client who has been charged with a horrible crime. He may or may not be guilty, but he has admitted to you some facts that would be very prejudicial to his defense if they came out at his upcoming criminal and civil trials. He has thus far admitted these facts to nobody but you. He says he wants to tell his wife what he has done, and is pretty sure he can trust her, but asks your legal advice on whether he can tell her without fear. Now that you've read this article, you understand that a conscientious Virginia lawyer must advise the client this way:

> "Well, if you want to make sure that you have a valid privilege, don't tell her anything in a letter or other form of recording or writing. If that letter fell into the Government's hands, it is not clear that your privilege would prevent the admission of that letter at all. The highest court of the state said thirty years ago that it would, but the law quite plainly does not say anything about letters at all unless your wife is questioned about them, and that same high court has more recently taken to saying that laws, especially privilege statutes, must be strictly and narrowly interpreted just as they are written. To be on the safe side, therefore, put nothing in writing to her.
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> "Second, even if you only communicate with your wife orally, make sure you are talking in a place where there is absolutely no chance you might be overheard by anyone else. Even if you take every reasonable precaution against the risk that someone else is present, but somehow fail, the statute on its face gives you no power to prevent anyone but

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[127] *Swidler*, 118 S. Ct. at 2085. Both during and after the life of the client, a lawyer has no duty to keep silent about client confidences where disclosure would be in keeping with the likely wishes of the client. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999) (lawyer is always authorized to make "disclosures that are impliedly authorized to carry out the representation").

> your wife from disclosing things you mistakenly thought you shared with her in complete privacy. So you'd best talk to her only in a rowboat in the middle of a very large lake, or some other location equally impervious to eavesdroppers.
>
> "Finally, to be totally safe that what you say will forever remain inadmissible at trial, you'd best say nothing to your wife at all. Plenty of men in this State have been convicted of serious crimes after their former spouses proved to be willing to turn against them, and although your marriage is strong now you have no way to know what the future holds. And if your spouse ever decides to tell the government what you told her in strict confidence, although you could surely prevent *her* from repeating it in court, the law plainly states that she alone will decide whether *you* can be forced to answer leading and damning questions on cross-examination about what you told her if you ever decide to take the witness stand, or if you are forced to take the stand as the defendant at your civil trial.
>
> "But here's the good news: None of those loopholes infect the inviolate shield surrounding all confidential communications with your lawyer. So if you're smart, I'll be your only complete and close confidante for the next few years."

An instruction like this is not likely to instill much confidence in a troubled soul struggling with a burning desire to seek the solace of "the inviolate veil of the marital sanctuary."[128] Any privilege filled with such gaps cannot adequately protect "the sanctities of husband and wife," long ago dubbed "the best solace of human existence."[129]

And that is not the worst feature of current law, which is also surely *broader* in two respects than the legislature would intend if they reconsidered the matter today. As the Virginia courts have implicitly acknowledged, the statute prevents a wife from voluntarily testifying to a confidential criminal confession or threat made to her by a man who was then her husband, even if she or her child was the victim of the crime. And as the highest court of the State has already held, the statute prevents a man or woman from testifying to a confidential communication with any spouse who is now deceased or unavailable, even if there is every reason to think the other spouse would have now wanted the communication disclosed. In both of those respects, the Virginia privilege stands in stark contrast with the law in virtually every other American jurisdiction.

There is no reason for this state of affairs to persist. The Virginia General Assembly has not made any substantial alteration in the language of the marital privilege for eighty years. With a new millennium coming up in a few weeks, now would be a fine time. The

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[128] Menefee v. Commonwealth, 55 S.E.2d 9, 15 (1949).

[129] Stein v. Bowman, 38 U.S. 209, 223 (1839).

current version of the privilege, § 8.01-398, should be repealed and replaced with something like the following:

> A person has a privilege in any civil or criminal proceeding to refuse to disclose, and to prevent any other person from disclosing, any confidential communication between that person and his or her spouse, regardless of whether they are still married at the time the objection is made. This privilege may not be claimed in any proceeding in which either spouse is charged with a crime or tort against the other or against the child of either spouse.[130]

This might not be a perfect statute, but it would be a vast improvement over the one that is now on the books in Virginia.[131] It would eliminate all five of the terrible ambiguities identified in this article. It would extend the privilege to written communications, and to all third parties who overhear a communication. It would clarify that the privilege belongs to both spouses and may be asserted by either one, including the one on the witness stand. It would not bar a spouse from disclosing a communication where the other spouse was absent or unavailable. Perhaps most important of all, it would restore the ancient and sensible rule withdrawing the benefits of the privilege from anyone who would abuse it as a shield for crimes against his wife and children.[132]

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[130] The language of this proposal borrows heavily from the wording of proposed Federal Rule of Evidence 506(b) and Uniform Rule of Evidence 504(a). Another version deserving of careful consideration is the Tennessee statute, which provides with admirable clarity and simplicity: "In either a civil or criminal proceeding, confidential communications between married persons are privileged and inadmissible if either spouse objects." TENN. CODE ANN. § 24-1-201(b) (1980). The Tennessee statute then goes on to provide several exceptions, including an exception for crimes committed by one spouse against the other or their children. *Id.*

[131] Among other notable omissions, I have not proposed an exception for situations where the confidential communication was between spouses allegedly working jointly in the commission or planning of a crime. A very large number of States have included such an exception in their statutory versions of the privilege, although Virginia has never been one of them. This exception is typically "justified on the theory that when both spouses are criminal participants the need for effective law enforcement prevails over the interest in protecting marital privacy." MUELLER & KIRKPATRICK, *supra* note 27, at 461. Frankly, that supposed logic is an utterly arbitrary basis for watering down the privilege. In states that observe such an exception, a man may prevent his wife from disclosing his confession to a mass murder as long as she was not involved, but he has no privilege if he made incriminating statements to his wife in the course of planning a $20 theft with her help. Surely the pressing interests of law enforcement are far greater in the former case. It is absurd to suggest that the need for overriding the privilege is categorically greater in cases where the listening spouse was also involved in the planning of some crime. I suspect that this logic has been extremely popular with the courts and legislatures of many states merely because of the growing distaste for privilege claims generally. But this is a consideration the Virginia General Assembly can take up, among others, if it decides to revisit the language of the privilege.

[132] By enacting remedial legislation to further protect the victims of domestic abuse, particularly women and children, Virginia can continue to demonstrate "its time honored

By making those changes, the statute proposed here would bring Virginia privilege law squarely within the mainstream of modern evidence theory, and more in line with the likely intention of the State legislature. It would conform the statute much more accurately to what the Virginia Supreme Court believes that it says. And it would also make the statute more readable. That would be an impressive collection of benefits from a reform so simple, short, and uncontroversial.

commitment to the family." Lynne Marie Kohm, *Domestic Relations*, 32 U. RICH. L. REV. 1165, 1198 (1998).