ESTOP IN THE NAME OF LOVE: A CASE FOR CONSTRUCTIVE MARRIAGE IN VIRGINIA

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INTRODUCTION

"Without *some* supervision ... disputes are won not by justice but by strength. Although imperfect by any standard, the centuries' accretion of marriage laws are, today, society's painstakingly hammered consensus on how a couple should justly be treated."

—E.J. Graff, *What is Marriage For?* [1]

In 1865, the Civil War ended in Virginia; in 2006, the Civil Union War in Virginia met with a similar fate. On November 7, 2006, the Commonwealth of Virginia amended its constitution with, among other things, the following provision:[2]

> This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.[3]

The amendment is sweeping, to say the least. Not only does it prohibit the legal recognition of same-sex marriage and civil unions, it denies legal status to any couples involved in long-term non-marital cohabitation. Upon its passage, the amendment's supporters declared that the people of Virginia had spoken, and the message was clear: leave marriage alone.[4]

Such a sentiment is understandable. Marriage is the foundational economic, social, and religious unit in American culture. The U.S. Supreme Court has declared that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and

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1. E.J. GRAFF, WHAT IS MARRIAGE FOR? 212 (1999).

2. *See* Chris L. Jenkins, *Ban on Same-Sex Unions Added to Va. Constitution*, WASH. POST, Nov. 8, 2006, at A46.

3. VA. CONST. art. I, § 15-A. This amendment also defines marriage as "only a union between one man and one woman," foreclosing legal recognition of any form of same-sex union. *Id.*

4. Jenkins, *supra* note 2.

survival."[5] Marriage is of such significance that the Court has permitted extensive regulation of the institution under the state's police power.[6] The state's interests in marriage are varied and substantial and include "keeping records, promoting health, and preventing child or incestuous marriages," as well as providing a safe, healthy, and nurturing environment for children and families; facilitating private networks of mutual support and obligation; and supporting public morality.[7] Married people live longer,[8] make more money,[9] have better-adjusted children,[10] and have a higher level of "subjective well-being"[11] than their nonmarried counterparts. In this way marriage is an important and beneficial institution for both couples and for society at large. Virginia's conclusion that it wants to protect the working model for such a successful, socially valuable, time-proven entity is hardly front page news.[12]

From the standpoint of a state that clearly has articulated a public policy in favor of marriage, then, the relevant problem is not that too many people want to enter into marriage; rather, the problem is that Virginia is full of couples who cohabit but are not married.[13] According to the most recent U.S. Census estimate, there were a minimum of 128,363 unmarried-partner households

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5. Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 527, 535 (1942)).

6. *See id.* at 7 (citing Maynard v. Hill, 125 U.S. 190 (1888)). Although *Loving* struck down as unconstitutional a Virginia statue that prohibited interracial marriage, the Court noted that the State could regulate marriage under its police power.

7. David S. Caudill, *Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-law Marriage*, 49 TENN. L. REV. 537, 558 (1982).

8. *See* LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 47 (2000) ("Compared to married people, the nonmarried ... have higher rates of mortality than the married: about 50% higher among women and about 240% higher among men." (citation omitted)).

9. *See id.* at 97 ("Married couples are far more affluent, on average, than singles.").

10. *See id.* at 38 ("Children living with cohabiting couples show poorer emotional development than children from married, two-parent families do." (citation omitted)).

11. *Id.* at 73 ("[T]he married have the highest level of subjective well-being ...." (citation and internal quotation marks omitted)).

12. Apparently the *Washington Post* agrees, as it reported the news of the amendment's passage on page A46. Jenkins, *supra* note 2.

13. From this standpoint, the first part of Virginia's constitutional amendment, which limits accessibility to marriage, does not logically follow from a clear policy preference in favor of state-regulated marriage. *See* VA. CONST. art. I, § 15-A. For further discussion of the implications of this Note for same-sex marriage, see *infra* Part III.E.

in Virginia.[14] This translates to over 256,000 Virginians living in nonmarital cohabitation as of 2006. Statistics show that "[a]bout half of Americans from age thirty-five to thirty-nine have cohabited" at some point.[15] If the aim of the new amendment to the Virginia Constitution is to encourage unmarried cohabiters to marry because they cannot hope to receive legal recognition for their less-than-marriage-but-more-than-just-dating relationships, then the new amendment may have some limited effect. Increased social acceptance of cohabitation and a general aversion to marital commitment among cohabiters,[16] however, will strongly militate against that rather indirect incentive.

This Note will argue that, in furtherance of its legitimate interest in regulating marriage, Virginia should adopt a form of common law marriage by estoppel known as "constructive marriage."[17] Because the extensive data on the benefits of marriage are available almost exclusively for male-female couples, and, more significantly, because same-sex marriage is now affirmatively banned by the Virginia Constitution, this Note will largely focus on heterosexual cohabitation and marriage.[18] Part I will explain why nonmarital cohabitation should be strongly disfavored as a matter of policy. Part II will suggest that adoption of the doctrine of constructive marriage would be a timely, practical, and beneficial public policy for both the people

14. U.S. Census Bureau, http://factfinder.census.gov/ (under "Fast Access to Information," select "Virginia" in drop-down menu; then click "show more" next to "Social Characteristics" on the Virginia page) (last visited Nov. 30, 2007). The estimate is at the low end because the Census Bureau instructed that couples who were common law married could report in the category they thought to be "most appropriate." *See* U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY/PUERTO RICO COMMUNITY SURVEY: 2006 SUBJECT DEFINITIONS 65, *available at* http://www.census.gov/acs/www/Downloads/2006/usedata/Subject_Definitions.pdf (last visited Nov. 30, 2007). Virginia, however, does not recognize common law marriage. *See* Offield v. Davis, 40 S.E. 910 (Va. 1902). As a result, unmarried cohabiters who considered themselves to be common law married, but who were not legally married, could have reported in any category with which they identified.

15. WAITE & GALLAGHER, *supra* note 8, at 37; *see also* Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 32, tbl.1 (showing similar rates of cohabitation for women between the ages of 25-44).

16. *See* Caudill, *supra* note 7, at 566.

17. This Note adopts the term "constructive marriage" from Professor David S. Caudill's article on the subject. *See id.* at 538-40.

18. A powerful argument could be made that constructive marriage would be as beneficial for same-sex couples as it has proven to be for heterosexual couples, but that is largely outside the scope of this Note. *See infra* Part III.E.

and the State of Virginia. Part III will explore how constructive marriage comports with Virginia's constitutional, statutory, and common law, as well as the explicit and implicit public policy aims of the Commonwealth.

I. THE STATUS OF COHABITATION AND MARRIAGE

A. Defining Marriage

Everyone has a frame of reference for marriage; it has been defined, refined, and practiced by American society for hundreds of years. Marriage is "surrounded by legal, social, and cultural beliefs about the broad contours of the relationship" that inform the married and unmarried alike.[19] In Virginia, marriage has a simple statutory definition. By written law, a marriage only requires a man and a woman to obtain a license and participate in a solemnization ceremony.[20] The courts have added to these requirements by declaring that "sexual intercourse is a necessary act to consummate any marriage."[21] Without sex, no marriage exists and the relationship is a legal "nullity."[22]

The law of marriage in Virginia, however, is more complicated than the basic entry requirements would suggest. Both statutory and judge-made law in Virginia focus considerable energy on the importance of the relationship after the entry requirements of contract and coitus. A married couple must live in "matrimonial cohabitation" to be fully engaged in marriage. According to the Virginia Supreme Court, "'matrimonial cohabitation' consists of more than sexual relations. It also imports the continuing condition of living together and carrying out the mutual responsibilities of the marital relationship."[23] The Virginia Code of Domestic Relations makes clear that matrimonial cohabitation is the relationship's

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19. Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 409 (2004).

20. VA. CODE ANN. § 20-13 (2007) ("Every marriage in this Commonwealth shall be under a license and solemnized in the manner herein provided.").

21. Derakhshan v. Derakhshan, 42 Va. Cir. 411, 412 (Cir. Ct. 1997).

22. *Id.*

23. Petachenko v. Petachenko, 350 S.E.2d 600, 602 (Va. 1986); *see also* VA. CODE ANN. § 20-91 (2007) (discussing desertion and failure to cohabit as grounds for divorce).

essence: willful desertion of one's spouse is a crime;[24] and abandonment is grounds for divorce for the "innocent party" who has been deserted.[25] Even in the case of no-fault divorce, the husband and wife must "have lived separate and apart without any cohabitation and without interruption for one year" in order to break the bonds of matrimony.[26] Additionally, matrimonial cohabitation is actually an affirmative defense to some grounds for divorce on the theory of condonation.[27]

The law's emphasis on the unwritten requirement of matrimonial cohabitation means that court inquiries into a marriage will invariably involve questions about the parties' conduct in the marriage, rather than being confined to a mere investigation of whether formal entry requirements were satisfied.[28] To that end, defects in the formal requirements of license or ceremony are not fatal to a marriage;[29] yet a couple's post-wedding conduct—for example, their failure to engage in matrimonial cohabitation—could be the undoing of their special legal status as "married."[30]

Marriage, then, from Virginia's perspective, is more than a mere license, more than a ceremony, and more than just sex. Marriage is an ongoing filial relationship with mutual responsibilities for the parties involved.[31] It is in exchange for this *conduct*, not the mere *agreement* articulated at the wedding ceremony, that the Commonwealth of Virginia truly finds a marriage. In this way, marriage in Virginia is viewed as a status, not a mere contract.[32]

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24. *See* § 20-61.

25. § 20-91.

26. *Id.*

27. § 20-94; *see also* Moran v. Moran, 12 Va. Cir. 340, 346-47 (Cir. Ct. 1988) (denying the wife's petition for divorce on the grounds of adultery and holding that the wife had condoned her husband's adultery by continuing to live in a state of "matrimonial cohabitation" with him after his transgressions).

28. *See, e.g.*, *Moran*, 12 Va. Cir. at 346-47.

29. *See* § 20-31 (stating that when a marriage is solemnized by an unauthorized party who has professed to the couple that she is authorized to conduct a marriage ceremony, or if there is some defect in the marriage license, the marriage "shall [not] be deemed or adjudged to be void ... if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage").

30. *See* § 20-91.

31. *See* Schweider v. Schweider, 415 S.E.2d 135, 137 (Va. 1992).

32. For an excellent discussion on the competing interpretations of marriage as a status and, alternatively, a contract, see Ellen Kandoian, *Cohabitation, Common Law Marriage, and*

As a status, marriage is an institution necessarily subject to close public regulation. The married couple must conform their behavior to the status's norms; the individuals involved do not control the terms of the relationship.[33] This conforming effect causes the marital relationship to be actually constructive of the participants' identities.[34] By contrast, if marriage were viewed as a mere contract between two parties, then the parties could define every aspect of the relationship without regard to the state's interests.[35] Marriage, as a contract, would be constructive only to the extent that the parties would be subject to the terms that they privately negotiated, which they could modify at any time. As a private contract, marriage qua a social institution would lose much of its meaning, as infinite variations on the parameters of that relationship would emerge.

Under the marriage-as-status model, conforming conduct is the relationship's most important aspect. Consider the case of a man and a woman who privately adopt every aspect of a marriage but who do not obtain a license or participate in a ceremony. They cohabit, have children, pool their assets, and divide domestic responsibilities. They take care of each other at home and present themselves as a solid family unit to their friends and relatives.[36] Without regard to procedural formalities, objectively they have entered into the status of marriage. What sense would it make for a state that views marriage as a status to exclude this man and woman, who have conformed their conduct to the status, from legal recognition? Why deny the couple the title, benefits, and legal sanction of marriage that it affords identically situated couples who have gone through a solemnization ritual? In the words of one scholar, "[t]he state simply has little interest in the external formalities or rituals of a ... marriage-like relationship. Its concern is with family stability, care of children, support obligations, and morality, and each of these values potentially is involved in an

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the Possibility of a Shared Moral Life, 75 GEO. L.J. 1829, 1833 (1987).

33. *Id.*

34. *Id.*

35. *Id.* (stating that the marriage-as-contract model "would seem to elevate the parties' roles and obviate the state's role" in regulating marriage).

36. *See infra* notes 168-71 and accompanying text.

informal marriage-like relationship ...."[37] Denying what could be called a "substantive marriage" for a lack of procedural fitness does not further any of the state's interests in regulating and encouraging the marriage relationship.[38]

The status view of marriage does not require that unmarried cohabiting couples be denied entry into the institution of marriage; this is merely the way that Virginia has chosen to regulate the marital relationship. The state could just as easily recognize and regulate unlicensed substantive marriages as a status in the same way and under the same scheme as it regulates fully licensed marriages.[39] In doing so, the state would be rewarding status-conforming behavior and discouraging privately negotiated substitutes for marriage. An analogous relationship that is already treated this way in Virginia is the business partnership.[40] When parties enter into a joint business venture, failing to file the required paperwork does not prevent their relationship from being recognized and regulated as a partnership, even if the parties did not have an express oral or written agreement,[41] and even if the parties deny that a partnership exists.[42]

B. If It Looks Like a Duck and Walks Like a Duck

If the state were to grant some or all of the privileges of marriage to a cohabiting but unmarried couple, a threshold question that must be answered is: What is "nonmarital cohabitation," and at what point is it sufficiently identical to marriage to be considered as conforming to the status? In Virginia, longstanding principles of marriage law have already answered that question: nonmarital cohabitation exists when a man and a woman "live together in the same house as married persons ... or in the manner of husband and wife."[43] Virginia courts refer to this status as "cohabitation, analogous to marriage," and they have "consistently interpreted

37. Caudill, *supra* note 7, at 569.

38. *See supra* notes 7-11 and accompanying text.

39. *See* Cooper v. Spencer, 238 S.E.2d 805, 806-07 (Va. 1977); Kandoian, *supra* note 32, at 1868.

40. Kandoian, *supra* note 32, at 1871.

41. *Cooper*, 238 S.E.2d at 806-07.

42. Kandoian, *supra* note 32, at 1871.

43. Johnson v. Commonwealth, 146 S.E. 289, 291 (Va. 1929).

[nonmarital cohabitation] ... as encompassing both a permanency or continuity element and an assumption of marital duties."[44] Although the courts have not given couples whose relationships meet this definition the full title and benefits of legal marriage, by identifying nonmarital cohabitation they have recognized that these relationships exist and are often substantively the same as legal marriages.[45]

In practice, identifying cohabitation analogous to marriage can be difficult. One hallmark of the nonmarital cohabitation relationship is the lack of regulation by society.[46] Because of this, "not only do scholars have difficulty pinning down the meaning of cohabitation, but (often) so do cohabitors [sic] themselves."[47] Unmarried cohabiters often make the point to the general public that their relationship is distinctly *not* marriage. Rather than taking on the "protective coloration of marriage," unmarried cohabiters in modern-day American society sometimes emphasize their unmarried status.[48]

The existence of proud proclamations of unmarried cohabitational bliss, however, should not result in per se exclusion of a couple's relationship from regulation in a society that seeks to encourage and facilitate marriage. These attitudes are exactly those that the state should be discouraging through regulation.[49] Such is the regulatory approach in partnership law: a disavowal of one's joint venture does not undo the existence of the venture itself; it merely serves to distract from and obfuscate the relationship's essence.[50]

For the prescriptive aims of this Note, no reason exists to deviate from the already-adopted and functional definition of nonmarital cohabitation—or "cohabitation analogous to marriage"—as recognized by the Virginia courts.[51] Nonmarital cohabitation therefore conforms to the status requirements of marriage when: (1) a man

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44. Frey v. Frey, 416 S.E.2d 40, 43 (Va. Ct. App. 1992).

45. *See id.*

46. Brinig & Nock, *supra* note 19, at 409.

47. *Id.*

48. WAITE & GALLAGHER, *supra* note 8, at 37.

49. *See* Margaret F. Brinig, *Domestic Partnership: Missing the Target?*, 4 J.L. & FAM. STUD. 19, 22-23 (2002).

50. *See* Cooper v. Spencer, 238 S.E.2d 805, 806 (Va. 1977) (holding that an implied partnership can be found when specific "indicia of the existence of a partnership" exist).

51. *See, e.g.*, Rickman v. Commonwealth, 535 S.E.2d 187, 190 (Va. Ct. App. 2000).

and a woman live together with (2) permanency or continuity and (3) they assume some marital duties.[52] A couple's declarations about their nonconformity to procedural formalities would be relevant to the overall inquiry, of course, but would not be dispositive evidence of a lack of nonmarital cohabitation.[53]

C. "Let's Just Live Together"

Cohabitations analogous to marriage are unions that approximate the institution of marriage without the ceremonial formalities or the social or legal sanction of marriage. Although they are structurally similar to marriage and conform to the basic requirements of attaining marital status, nonmarital cohabitations, in practice, fail to glean the many benefits of marriage for a variety of reasons. In fact, nonmarital cohabitations come with a host of problems that exact a toll on both society and the couples involved therein. From Virginia's policy perspective, the issue is not merely that marriage should be favored by the state; nonmarital cohabitation as a separate, unregulated institution should be actively discouraged. In other words, marriage is not just good, but cohabitation is actually bad in quantifiable ways.

Couples who cohabit but do not marry tend to be attracted to the halfway approach of "just living together," because nonmarital cohabitation is seen as a lesser commitment than marriage, and one that can be terminated without the hassle and expense of divorce.[54] Unsurprisingly, then, one of the primary features of nonmarital cohabitation is that it is unstable; research has shown that unmarried cohabiters are less committed to each other and that their relationships are plagued by instability.[55]

This lack of commitment presents problems for the unmarried cohabiter. Those who try to maintain economic independence run into problems because they do not experience the economic benefits that married couples do by fully pooling their resources.[56] One result

52. *See id.* (quoting Frey v. Frey, 416 S.E.2d 40, 43 (Va. Ct. App. 1992)).

53. *See* Caudill, *supra* note 7, at 568.

54. *See* WAITE & GALLAGHER, *supra* note 8, at 38.

55. Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1438 (2001).

56. *See* WAITE & GALLAGHER, *supra* note 8, at 39-41.

of this is that "[n]ot only do married couples have higher household incomes than cohabiting couples, but they are less likely to experience various forms of economic hardship, such as having trouble paying bills."[57] Furthermore, cohabiting partners who maintain economic independence run into difficulties when one partner makes substantially more money than the other.[58] Although income disparities are linked to stability in marriages, the same income disparities in nonmarital cohabitations have a destabilizing effect.[59]

Lack of commitment exerts more than an economic toll on nonmarital cohabitation. Studies show that although married couples and unmarried cohabiters have nearly identical expectations of sexual exclusivity,[60] unmarried cohabiters are much more likely to be unfaithful to their partners.[61] Unmarried, cohabiting men cheat on their partners four times as often as husbands cheat on their wives;[62] unmarried, cohabiting women cheat on their partners four to five times as often as wives cheat on their husbands.[63]

Couples who cohabit but do not marry are less likely than married couples to have children.[64] Increasing numbers of American children, however, are being raised by unmarried cohabiters, as the overall rate of nonmarital cohabitation has risen over the past several decades.[65] Children born to cohabiting couples are much more likely to experience family disruption than children born to married parents,[66] and the presence of children does not correlate with an improved relationship quality for unmarried cohabiters.[67]

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57. *Id.* at 41.

58. *Id.* at 39.

59. *Id.*

60. *Id.* at 91 (stating that "[i]n the National Sex Survey, 94.6 percent of cohabitors [sic] and 98.7 percent of married people expected their partner to be sexually faithful to them").

61. *See id.*

62. *See id.* (stating that "just 4 percent of married men compared to 16 percent of cohabiting men said they had been unfaithful over the past year").

63. *See id.* at 93 (stating that 4 percent of married women had had a secondary sex partner, compared to 20 percent of cohabiting women).

64. Douglas W. Kmiec, *Marriage and Family*, *in* NEVER A MATTER OF INDIFFERENCE: SUSTAINING VIRTUE IN A FREE REPUBLIC 114, 148 (Peter Berkowitz ed., 2003) (citing WAITE & GALLAGHER, *supra* note 8, at 201).

65. *See* Bumpass & Lu, *supra* note 15, at 34-35, 34 tbl.4.

66. *See id.* at 38.

67. *See* Susan L. Brown & Alan Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 58 J. MARRIAGE & FAM. 668, 674 (1996).

In one study of relationship quality among unmarried cohabiters and married partners, when the sample of nonmarital cohabitations was limited to only those that produced a biological child, the data showed that the presence of a child had no impact on the nexus between nonmarital cohabitation and lower overall relationship quality.[68] Children raised by unmarried cohabiters also "show poorer emotional development than children from married, two-parent families."[69] One unfortunate result of children being raised by parents who are unmarried cohabiters is that they are more likely to enter into nonmarital cohabitation arrangements when they grow up.[70] Also, due to the likelihood that their parents' relationship was of lower quality than a marriage, children of unmarried cohabiters may be themselves more likely to have poor quality adult relationships, whether in the form of nonmarital cohabitation or actual marriage.[71]

Couples who live together but do not marry fail to reap some of the quality of life advantages associated with marriage. The health benefits of marriage, which include both increased life expectancy[72] and lower rates of alcoholism in men,[73] are not realized by people who cohabit but never marry.[74] Additionally, studies show that married men actually make more money than single men, but men who cohabit only realize about half the "earnings premium" that married men do.[75]

In summary, marriage is an arrangement that reaps many benefits for its participants and is associated with positive social

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68. *Id.*

69. WAITE & GALLAGHER, *supra* note 8, at 38.

70. William G. Axinn & Arland Thornton, *The Relationship Between Cohabitation and Divorce: Selectivity or Causal Influence?*, 29 DEMOGRAPHY 357, 360 (1992).

71. *See* THOMAS B. HOLMAN, PREMARITAL PREDICTION OF MARITAL QUALITY OR BREAKUP: RESEARCH, THEORY, AND PRACTICE 99 (2001) (stating that "the quality of family-of-origin experience assessed premaritally does indeed influence the marital quality of the children who grew up in those families").

72. WAITE & GALLAGHER, *supra* note 8, at 50 ("Almost nine out of ten married men alive at age forty-eight would still be alive at age sixty-five. By contrast, just six out of every ten never-married men alive at forty-eight would make it to retirement age ....").

73. *Id.* at 53 (stating that one out of four unmarried men between the ages of nineteen and twenty-six reported that alcohol caused them problems at work or with aggression, compared to one out of seven married men in the same age range).

74. *Id.* at 63.

75. *Id.* at 99-101, 103. Married women also, on average, make more money than single women. *Id.* at 105.

externalities. Nonmarital cohabitation, however, in spite of the fact that it conforms to the basic structural elements of marriage, fails to confer many of the quality of life benefits upon its participants, is far less stable than marriage, and is harmful to children.

D. Which Came First, the Chicken or the Bad Eggs?

All the evidence tending to show the lower quality of nonmarital cohabitation as compared to marriage begs the question of causality. Are unmarried cohabiters simply a self-selecting group of those less likely to get married and more inclined to lead independent, non-committal lives, or is there something intrinsic in the nature of non-marital cohabitation itself that leads to instability? Undoubtedly, the underlying assumptions and proclivities of those who choose to enter into nonmarital cohabitation are factors in the success of their relationships; however, this is far from the complete explanation for the problems with nonmarital cohabitation. Though the extent to which unmarried cohabiters are a self-selecting group of people who are bad at relationships may be unclear,[76] a strong case can be made that the structure of nonmarital cohabitation is inimical to stability and long-term success. In other words, doomed couples do not merely choose nonmarital cohabitation; nonmarital cohabitation can doom couples.

Nonmarital cohabitation begins to form partners' perceptions from the moment they move in together. Scholars in the field have noted that "the early experiences of cohabitation may establish relationship trajectories that conflict with the expectations of legal marriage."[77] The reason for this is that nonmarital cohabitation is typically an "exchange relationship" right from the start.[78] Exchange relationships are contractual in nature.[79] Couples in an exchange relationship do not have an expectation of permanence, so they cannot reasonably rely on each other for the mid- and long-term future. The partners in the relationship, therefore, make decisions designed to maximize immediate return.[80] The result of this

76. Regan, *supra* note 55, at 1439-42.
77. Brinig & Nock, *supra* note 19, at 424-25.
78. *Id.* at 427; *see also* Brinig, *supra* note 49, at 22-23.
79. Brinig, *supra* note 49, at 22-23.
80. *Id.*

perpetual short-term focus is indefinitely forestalled intimacy.[81] True intimacy can only develop from trust and reliance; with no external requirement of permanence, participants in an exchange relationship must forsake uncertain long-term benefits for more likely short-term satisfaction.[82] In marriage, this type of exchange relationship is closely linked with relationship instability.[83] Nonmarital cohabitation, an arrangement that has no requirement of permanence, necessitates no commitment, and has no social sanction to encourage stability, is the exact type of relationship that lends itself to becoming entrenched in the exchange model.

A second reason the structure of nonmarital cohabitation may be toxic to its participants is that it exists on a plane outside of public expectation.[84] Laws and social norms govern the institution of marriage and thus the behavior, and even identity, of those who are married. One scholar has stated that, "[f]or intimate commitment to be constitutive of identity ... requires that it be seen as something that derives its value from a source outside the self's choice to engage in it. It requires, in other words, social validation."[85] The formal mechanisms of social validation, however, do not exist for nonmarital cohabitation.[86] Unmarried cohabiters are not only forced to construct the terms of their relationships on their own, but, because no social consensus exists as to how nonmarital cohabitation should be conducted, unmarried cohabiters must also fend for themselves throughout the course of their relationship. One researcher has suggested that this social isolation is the primary cause for the overall lower quality of nonmarital cohabitation as compared to marriage.[87] Only the strongest of self-constructed and self-defining unions could survive such isolation, and, indeed, very few survive at all: 90 percent of nonmarital cohabitations end within five years.[88]

If nonmarital cohabitation is a bad institution because it fosters exchange relationships and because it exists apart from social

81. *See id.*
82. *Id.* at 22.
83. *See* Brinig & Nock, *supra* note 19, at 427.
84. *See* Brown & Booth, *supra* note 67, at 670.
85. Regan, *supra* note 55, at 1445.
86. *See id.*
87. *See* Brown & Booth, *supra* note 67, at 670.
88. *See id.* at 669.

norms and expectations, then one can see how it could be rehabilitated by implementing policies that discourage couples from focusing on short-term gains and by establishing a set of universal social norms for nonmarital cohabitation. Such public regulation of nonmarital cohabitation would promote intimacy in relationships by giving the partners a set of relationship guidelines; no longer would they have to indefinitely postpone the decision about whether to make a mutual commitment because it would become expected at some point.[89] In other words, if nonmarital cohabitation were to be publicly regulated in the same way that marriage is, then the relationships of those involved would actually become better.

An important consideration in giving legal sanction to nonmarital cohabitation is that in cases where unmarried cohabiters do eventually marry, studies show that the couple's likelihood of divorcing is much higher than if they had never cohabited.[90] In light of this, one criticism of giving social and legal sanction to nonmarital cohabitation could be that it would ultimately encourage divorce. This would be an ill-founded criticism. Although marriages that are preceded by cohabitation are less stable than marriages that are not preceded by cohabitation, all marriages, regardless of origin, are more likely to succeed over the long-term than nonmarital cohabitations alone.[91] If couples engaged in nonmarital cohabitation were given the legal sanction, norms, and regulations of marriage, they would statistically be more likely to stay together than if they never married.[92] Additionally, the existence of legal duties and responsibilities for unmarried cohabiters would have a deterrent effect on uncommitted couples considering nonmarital cohabitation.

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89. *See* Brinig, *supra* note 49, at 28-29.

90. Brown & Booth, *supra* note 67, at 669 (stating that "marriages in which at least one spouse is an ex-cohabitor [sic] are 50% more likely to end in divorce than are marriages in which neither spouse experienced premarital cohabitation").

91. *Compare id. with* text accompanying note 88.

92. *See supra* Part I.C; *see also* Axinn & Thornton, *supra* note 70, at 372 ("[O]ur work suggests that cohabitation and divorce may be linked because cohabitation not only is selective of the divorce-prone but also itself increases susceptibility to divorce.").

E. When It's Over

Even if regulating nonmarital cohabitation were to have no positive impact whatsoever on the quality of cohabitation relationships or the individuals involved therein, a separate reason exists to actively disfavor cohabitation as a matter of public policy: justice. "The public institution of marriage, in western democracies, is for applying a just consensus to private disputes, a consensus to treat each individual bond with respect and equality."[93] The legal wrangling of divorce can be viewed as an institution of dispute resolution. When problems arise and couples decide to part ways, the state has developed a mechanism, in the form of divorce law, to regulate parties' separations.

The legal remedies that are available to divorcing couples are unavailable to unmarried cohabiters who separate.[94] In Virginia, divorcing couples have access to the courts, which classify property, distribute marital property, and determine spousal support payments.[95] But an unmarried cohabiting couple—even if involved in a long-term cohabitation relationship analogous to marriage with children and jointly held property—would be entitled to no legal remedies upon the dissolution of their union.[96]

The lack of remedies available for separating unmarried cohabiters has a disparate impact on the people most in need of aid.[97] Less educated, lower income segments of the population are most likely to be involved in nonmarital cohabitation relationships.[98] Not only are these parties the most in need of support and assistance, but they are the same populations most likely to erroneously believe that the state will recognize their nonmarital union as a common law marriage, placing reliance on a judicial remedy that is not available to them if they do not live in a common

93. GRAFF, *supra* note 1, at 214-15.

94. *See* Cynthia Grant Bowman, *A Feminist Proposal To Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 758-61 (1996).

95. *See* Reynolds v. Reynolds, 62 Va. Cir. 114, 122 (Cir. Ct. 2003).

96. *Id.* Child support actions are separate from divorce proceedings in Virginia, and the marital status of parents is not a factor in determining child support and visitation rights. *See* VA. CODE ANN. §§ 20-108.1, -124.2 (2007) (pertaining, respectively, to the determination of child support and to court-ordered custody and visitation arrangements).

97. *See* Bowman, *supra* note 94, at 767-70.

98. *See* Bumpass & Lu, *supra* note 15, at 32.

law marriage state.[99] In Virginia, the Commonwealth imposes fines and criminal penalties on "[a]ny spouse who without cause deserts or willfully neglects or refuses or fails to provide for the support and maintenance of his or her spouse ...."[100] But no sanction is imposed on an unmarried cohabiter who abandons his or her partner in equally necessitous circumstances.[101]

The situation is as bad when a nonmarital cohabitation ends in the death of one of the partners. In states like Virginia that do not recognize common law marriage, "[w]hen a cohabitation ends with the death of one of the partners, the survivor as such has no rights in the decedent's estate."[102] An unmarried cohabitant survivor has no standing to be a plaintiff in a wrongful death suit,[103] nor can she seek Social Security benefits provided for widows and widowers.[104]

Dissolutions of nonmarital cohabitation are as emotionally taxing as divorce[105] (and far more common) and are most likely to occur among the least-educated and poorest citizens,[106] yet currently Virginia leaves the parties ending a nonmarital relationship to fend entirely for themselves.

II. REMEDIES

In recognizing the need to provide both legal and social structure to nonmarital cohabitation, different jurisdictions have come up with a variety of solutions, both in the United States and abroad. Many U.S. states, like Virginia, offer few, if any, legal rights of marriage for unmarried cohabiters.[107] Other U.S. states and many western European countries recognize domestic partnerships as a

99. Bowman, *supra* note 94, at 766. Professor Bowman also points out that nonrecognition of common law marriage has a disparate impact on minorities and women. *Id.* at 767-70.

100. *See* § 20-61.

101. *Id.* When minor children are involved, a cohabiter who is abandoned by his or her partner is able to seek both child support and the remedies available under § 20-61. *See id.*

102. MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 282 (1989). Glendon notes, however, that nothing prevents cohabiters from contracting for inheritance through wills. *Id.*

103. *Id.*

104. *See* Bowman, *supra* note 94, at 746.

105. WAITE & GALLAGHER, *supra* note 8, at 74.

106. *See supra* notes 97-99 and accompanying text.

107. *See* VA. CONST. art. I, § 15-A (proscribing civil unions in Virginia); Offield v. Davis, 40 S.E. 910, 914 (Va. 1902) (holding that common law marriage is not recognized in Virginia).

status separate from marriage, and some grant an equitable right to unmarried cohabiters to seek property distribution.[108] Finally, a minority of U.S. states fully convert nonmarital cohabitation into actual marriage under the doctrine of common law marriage.[109]

A. Marvin *Remedies*

In the famous case of *Marvin v. Marvin*, the California Supreme Court held that separating unmarried cohabiters could theoretically recover property on a theory of quantum meruit.[110] Since the *Marvin* ruling in 1976, other states, including Kansas, Mississippi, Washington, and West Virginia, have followed California's lead in holding that unmarried cohabiters can seek property distribution rights upon the dissolution of their relationship.[111]

Although this decision promises some equitable relief, the *Marvin* solution to the myriad problems of nonmarital cohabitation is insufficient. The *Marvin* remedy is limited to property distribution rights among unmarried cohabiters who are separating; it does little to stabilize nonmarital cohabitation.[112] The *Marvin* approach allows for marriage and nonmarital cohabitation to exist simultaneously.[113] This situation fails to convey the benefits of marriage to unmarried cohabiters, because it institutionalizes nonmarital cohabitation as a kind of second-class marriage that can be privately negotiated. *Marvin* and its progeny "fail[] to recognize ... that traditional marriage—an exclusive status exerting social control—is an

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108. *See* GLENDON, *supra* note 102, at 278-81 (discussing the California case of *Marvin v. Marvin* and its progeny, which recognized that cohabiters could theoretically recover on a theory of quantum meruit) (citations omitted); *see also infra* notes 110-21 and accompanying text.

109. *See* Sonya C. Garza, *Common Law Marriage: A Proposal for the Revival of a Dying Doctrine*, 40 NEW ENG. L. REV. 541, 541 (2006) (noting that "[t]oday, only eleven states and the District of Columbia recognize common law marriage").

110. Marvin v. Marvin, 557 P.2d 106, 122-23 (Cal. 1976); *see also* GLENDON, *supra* note 102, at 278-81.

111. *See* GLENDON, *supra* note 102, at 281 ("In Kansas, Mississippi, and Washington, the courts are proceeding, as they do in divorce cases, to distribute the property of cohabitants in the way that seems to the judge 'just and equitable.'" (quoting Marriage of Lindsey, 678 P.2d 328 (Wash. 1984))); Bowman, *supra* note 94, at 773 (citing West Virginia as a state that has followed California's *Marvin* example).

112. *See* Bowman, *supra* note 94, at 774.

113. Kandoian, *supra* note 32, at 1856.

arrangement that cannot coexist with limitless options."[114] *Marvin* does not import any of the beneficial social and regulatory features of marriage into cohabitation.[115] Simultaneously, from the perspective of justice, *Marvin* is limited because it only grants a quantum meruit right to property distribution, without providing any of the other remedies available to widowed or divorcing spouses.[116]

B. Domestic Partnerships

A more thorough approach to legalizing nonmarital cohabitation is in the domestic partnership form. The American Law Institute (ALI) takes an approach similar to *Marvin* but allows for more expansive rights for property distribution when a domestic partnership dissolves.[117] Under the ALI approach, separating domestic partners would be able to seek both property distribution and spousal support in the form of "compensatory payments."[118]

Like *Marvin*, however, the ALI approach falls short because it is limited to dissolution and does nothing to confer benefits upon unmarried cohabiters during the relationship's course.[119] Marital obligations of mutual support and fidelity are not imposed upon domestic partners under the ALI.[120] The ALI fails to extend many of the legal protections of marriage to domestic partnership, such as tort immunity, spousal confidentiality, and inheritance benefits.[121] As in *Marvin*, therefore, the ALI approach creates a dual system of marriage and less-than-marriage, allowing couples to opt out of the commitment and stability of marriage with a partial solution.

Many western European countries have also recognized varying forms of domestic partnership.[122] Sweden is perhaps the most

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114. *Id.* at 1857.

115. *See supra* Part I.C.

116. *See* Bowman, *supra* note 94, at 774.

117. *See* AM. LAW INST. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.02(1) (2002).

118. *Id.* § 6.02 cmt. a; § 6.05 ("Allocation of Domestic-Partnership Property"); § 6.06 ("Compensatory Payments").

119. *See* Brinig, *supra* note 49, at 29-31.

120. *Id.* at 31.

121. *Id.* at 30-31.

122. *See* Katharina Boele-Woelki, *Private International Law Aspects of Registered Partnerships and Other Forms of Non-marital Cohabitation in Europe*, 60 LA. L. REV. 1053, 1055 (2000).

progressive of the European countries in that it has removed virtually all distinctions between statutory marriage and domestic partnership.[123] Sweden now provides the same tax treatment, insurance schemes, and wrongful death causes of action to both married and non-married cohabiting couples.[124] In the event of the relationship's termination, all couples are offered voluntary mediation and some property distribution rights, regardless of marital status.[125]

As the most comprehensive institutionalization of nonmarital cohabitation, Sweden's approach may provide a model for Virginia; but, in many ways, it is not a perfect fit. Sweden's solution is uniquely European because its high tax rate and extensive welfare system make marital property a much less significant issue for Swedes than for Americans.[126] Additionally, when it comes to inheritance law and property rights for couples with "significant assets," Sweden still has a two-class system for married couples and cohabiters.[127]

The best model for Virginia to emulate in addressing the problem of unregulated nonmarital cohabitation does not come from *Marvin* or the ALI or Europe; rather, it comes in the form of the longstanding American doctrine of common law marriage. As comprehensive as Sweden's approach may be, "not even Sweden converts cohabitation completely into legal marriage as do the [U.S.] common law marriage states."[128] Common law marriage offers at once the most comprehensive and the most American solution for regulating the relationships of unmarried cohabiters.

C. Common Law Marriage

Common law marriage, as applied in the United States, is coterminous with marriage.[129] It is not a substitution for marriage, it is not a parallel institution to marriage, and it is not a euphemism

123. Bowman, *supra* note 94, at 777.
124. GLENDON, *supra* note 102, at 275.
125. *Id.*
126. *Id.* at 276.
127. *Id.*
128. *Id.* at 284.
129. *Id.*

for marriage that implies only some of the same legal rights as marriage. Common law marriage, as a status and an institution, is one and the same with statutory marriage. The only distinction between the two is the way in which the marriage begins.[130]

Statutory marriage requires both a marriage license and solemnization ceremony.[131] By contrast, common law marriage is formed when a couple assumes marital duties by (1) consummating their agreement to marry; (2) cohabiting without any formal license or ceremony;[132] and (3) holding themselves out to the community as a married couple.[133] In common law marriage states, couples are free to enter into the marital status via either private agreement (a common law marriage) or public agreement (a license and ceremony).[134]

Common law marriage was extensively recognized in the United States in the nineteenth century.[135] The rationale behind the widespread acceptance of common law marriage was founded on a variety of public policy grounds, ranging from broad concerns about morality to very practical concerns about social dependency:

> By validating informal, common law unions, by refusing to void marriages formed in violation of statutory requirements, ... mid- and late-nineteenth-century courts advanced a vision of the marriage relation as an intrinsically desirable end of public policy. By consistently presuming and preserving the validity of disputed unions ... American courts in effect legitimized and provided for children, saved women from unchastity and men from licentiousness, and guarded the state against the burden of financial dependents.[136]

The nineteenth century courts that supported common law unions tended to view marriage as a status and not a mere contract.[137] Because the marriage status had such significance to the function-

130. Caudill, *supra* note 7, at 562-63.

131. *See supra* notes 19-21 and accompanying text.

132. Caudill, *supra* note 7, at 560.

133. Bowman, *supra* note 94, at 713.

134. *See* Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 LAW & SOC. INQUIRY 541, 547 (1998).

135. Bowman, *supra* note 94, at 715.

136. Lindsay, *supra* note 134.

137. *See id.* at 546.

ing of ordered society, and because it was so integrally linked with rights of property, inheritance, and issues of public morality, the courts frequently interpreted nonmarital cohabitations as marriages in an effort to "legitimize" couples and bring them into the fold of public regulation.[138] So strong was the preference for imputing to couples the status of marriage that some courts, when disputes arose, placed the burden of proof on the party denying the existence of a common law marriage.[139]

As the turn of the twentieth century approached, American jurisdictions began to renounce common law marriage in favor of strictly controlled statutory marriage.[140] Scholars have suggested a variety of reasons for the widespread abandonment of common law marriage, ranging from racism and eugenics to concerns about poverty and fear of fraudulent claims that might burden the emerging welfare state.[141]

The desire to prevent interracial marriage is one factor that is documented as playing a significant role in the decline of common law marriage.[142] After the eradication of slavery, states were concerned that miscegenation might become rampant if common law marriage were permitted, as non-licensed marriages could be a means of circumventing statutory prohibitions on performing interracial marriages.[143] In response to this concern, many U.S. states both explicitly prohibited miscegenation and banned common law marriage at the end of the nineteenth century and the early part of the twentieth century.[144] In Virginia, common law marriage was officially declared to be against the public policy by the Virginia Supreme Court in 1902;[145] and the Commonwealth reified its

138. *See id.* at 546-47 (citing a Mississippi court's discussion of the importance of marriage).

139. *Id.* at 550.

140. *See id.* at 553-63.

141. *See* Bowman, *supra* note 94, at 731-49; Lindsay, *supra* note 134, at 553-77; *see also* Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1903-05 (1998).

142. Bowman, *supra* note 94, at 737-39.

143. *See id.*

144. *See id.* (stating that by 1916, twenty-eight states and territories had passed laws prohibiting miscegenation).

145. *See* Offield v. Davis, 40 S.E. 910, 913-14 (Va. 1902).

longstanding anti-miscegenation policy by strengthening the wording of the statute in 1924.[146]

The eugenics movement, which was closely related to the wave of anti-miscegenation statutes both temporally and ideologically, was concerned with "national hereditary fitness";[147] that is, it sought to use the state as a mechanism to create and perpetuate an ideal race of people.[148] As marriage was the key way for the state to control reproduction, the goals of the eugenics movement could be furthered by carefully restricting and controlling who could marry.[149] Because common law marriage allowed citizens to marry—and therefore reproduce—without state involvement, proponents of the eugenics movement found common law marriage to be inimical to their goals of biological fitness.[150] Supporters of eugenics also tended to view the emerging poverty associated with industrialization as a behavioral problem and not an economic crisis.[151] Thus, they thought the evils of poverty could be controlled by carefully regulating marriage and preventing the "biologically unsound"[152] from marrying and, presumably, procreating.[153]

A third major nationwide concern about common law marriage was the fear of false claims on inheritance and government benefits.[154] After widows' benefits became more substantial in the wake of World War I, one official in the Veterans' Bureau became "violently opposed to common law marriage" because he feared it might create "an immense administrative burden, as government

146. *See* Walter Wadlington, *The* Loving *Case: Virginia's Anti-miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1200-01 (1966) (citing Va. Acts of Assembly 1924, ch. 371).

147. *See* Lindsay, *supra* note 134, at 565, 571.

148. *Id.* at 563-72.

149. *See id.* at 564-66, 570-71.

150. *See id.* at 570-71.

151. *Id.* at 554.

152. *Id.* at 571.

153. *Id.* at 555 (speculating that "by locating the causes of society's crisis of pauperism in families themselves, rather than in the nature of industrial wage relations, reformers and policymakers who were invested in the idea of the nation's continued economic growth could maintain that the remedy for dependency lay not in state regulation of the economy but rather in the moral and behavioral reconstruction of one of the most conspicuous and disturbing symbols of social disintegration—the faltering family").

154. Bowman, *supra* note 94, at 741-43, 746-48.

agencies [would be] required to sort through numerous claims" of common law marriage in order to award benefits.[155]

In the modern day, the criticisms that led to the demise of common law marriage in many U.S. states, including Virginia, are considered to be unconstitutional, morally unsound, or generally unfounded.[156] The Supreme Court declared anti-miscegenation statutes to be unconstitutional in the landmark case of *Loving v. Virginia*,[157] and the eugenics movement is no longer a relevant social force.[158] Any attempt to implement a public policy based on race-based considerations or genetic engineering would be morally repugnant and run afoul of the Equal Protection Clause of the Fourteenth Amendment.[159]

Although concerns about burdening the courts and administrative bureaucracies with false claims are still a legitimate consideration, the data indicate that these concerns are far from prohibitively burdensome. In the common law marriage state of Georgia, a study revealed that from 1955 to 1983, the state's appellate courts dealt with resolving common law marriage disputes an average of only four times per year.[160] The Supreme Court of Nebraska, while asserting that it was widely known that common law marriage frequently resulted in false claims and fraud, was unable to cite a single case of fraud or injustice in that state stemming from a common law marriage case.[161] Although the threat of fraud and false claims does inhere in a common law regime, such negatives must be balanced against the many benefits of giving social and legal recognition to unmarried cohabiters.[162]

Today, only eleven states and the nation's capital use the doctrine of common law marriage to confer the rights and responsibilities of marriage onto couples who have not been formally married.[163] In spite of the fact that nonmarital cohabitation is an inherently

155. *Id.* at 746-47.

156. *See generally* Bowman, *supra* note 94; Lindsay, *supra* note 134.

157. 388 U.S. 1 (1967).

158. *See* Lindsay, *supra* note 134, at 563-77 (discussing the eugenics movement as a phenomenon of the late nineteenth and early twentieth centuries).

159. *See Loving*, 388 U.S. at 11-12.

160. Bowman, *supra* note 94, at 752.

161. *Id.* at 741 (citation omitted).

162. *See supra* Part I.C.

163. *See supra* note 109. As previously mentioned, Virginia is not one of them.

unstable arrangement, the number of nonmarital cohabitations is on the rise. As more children are born each year to unmarried cohabiters, Virginia has instituted the clear policy of constitutionally prohibiting any legal recognition—and therefore regulation—of cohabitations analogous to marriage.[164]

The reality of the current social and political situation in Virginia makes common law marriage the ideal public policy solution to the problem of nonmarital cohabitation. Common law marriage is a recognized, historic American legal doctrine; it avoids the problem of having to come up with alternative schemes for marriage, such as civil unions and domestic partnerships; and, best of all, it is simple. If adopted, couples in Virginia would be on notice that, if they enter into a cohabitation analogous to marriage, the state will dispense with the analogies and simply treat them as married.

The only difficulty in implementing common law marriage, as it has traditionally existed in America, is that very few contemporary cohabitating couples would meet all the elements necessary to successfully achieve a common law marriage. Although modern day couples who cohabit but do not marry can easily meet the requirements of consent and assumption of marital duties by cohabiting and consummating their relationships,[165] not many cohabiting couples hold themselves out to their communities to be married couples. Since the mass abandonment of common law marriage a century ago, social expectations and presumptions have changed. Because society no longer expects cohabiting men and women to be married, most modern unmarried cohabiters do not hold themselves out to be married or make an express declaration to each other that they are married.[166]

The state's interests in regulating nonmarital cohabitation exist regardless of whether the couple has made an express declaration of marriage.[167] If the substance of the relationship is that of marriage, then the relationship should be governed and regulated by marriage laws and norms. Yet, if the "holding out" requirement

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164. *See supra* notes 2-4 and accompanying text.

165. *See supra* text accompanying note 132.

166. WAITE & GALLAGHER, *supra* note 8, at 36 (noting that "as the moral prohibition against premarital sex weakened and more unmarried men and women began to conduct active sex lives openly, the stigma of living together also weakened").

167. *See* Caudill, *supra* note 7, at 565.

of common law marriage were to be adopted, then the doctrine would be unavailable to many of the cohabiters whose relationships the state has an interest in regulating.

Professor David S. Caudill has proposed a sensible modification to the "holding out" requirement of common law marriage that would preserve the intent and function of common law marriage while adapting it to the reality of modern nonmarital cohabitation.[168] Instead of the bright-line rule requiring a clear "holding out" that the couple is married, a test would be used to establish whether the couple's relationship has objectively adopted the key characteristics of marriage.[169] In practice, this test would be used instead of the third element of traditional common law marriage—the "holding out" requirement. In order to "ascertain the essence of [the] social structure"[170] of marriage, the test would inquire whether the couple:

> (1) attained economic interdependence and divided domestic functions; and
>
> (2) made representations to the community that they were a committed pair; such representations could include declarations of exclusivity and commitment, having children, purchasing a home or other property, or claiming that they are in fact married.[171]

Professor Caudill has also suggested that the modern incarnation of common law marriage should take legal effect only after all three elements of common law marriage have been met continuously for some period of time, such as two years.[172] This time requirement is a practical compromise that recognizes the simple truth that sometimes people make mistakes in their relationship decisions, and it allows unmarried cohabiters up to twenty-four months to evaluate their decision to live together, and, if necessary, to dissolve the relationship without having to deal with the encumbrances of divorce. At the same time, it would prevent couples from entering into nonmarital cohabitation for longer than two years.[173]

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168. *See id.* at 567-68.

169. *Id.*

170. *Id.* at 568.

171. *See id.*

172. *Id.* Such a presumption should only be rebuttable by an express contract, indicating an intent not to be married. *Id.*

173. *See id.*

Using this modified form of common law marriage, the state would convert nonmarital cohabitation into traditional marriage when these elements are met continuously for two years: (1) consent; (2) cohabitation; and (3) satisfaction of the two-part objective test of marriage characteristics.[174] Couples engaged in nonmarital cohabitations lasting two years or longer would be prevented from denying that they were married, unless they had an express written contract to the contrary. This variation on common law marriage uses the well-established legal concept of estoppel[175] to confer recognition and rights to committed cohabiters. This is constructive marriage.

III. CONSTRUCTIVE MARRIAGE IN VIRGINIA

Theoretically, constructive marriage is an excellent solution to the problem of nonmarital cohabitation in Virginia. It would give status, rights, and recognition to couples who are in relationships analogous to marriage; it would foster stability and long-range planning for couples who consider cohabitation; it would provide a just means for dispute resolution when these relationships end; and it would give structure and guidance to couples and families who are unwilling to impose it upon themselves. In practice, however, such a policy would need to be consistent with Virginia's theories of law and articulated public policy to be successfully implemented. An examination of key Virginia court cases and statutes reveals that in spite of the statutory proscription on common law marriage, much of Virginia law does in fact comport with the approach of constructive marriage. Furthermore, in light of the recent changes to the Virginia Constitution, now is the perfect time for the Commonwealth to adopt constructive marriage.

174. *See id.* at 564.

175. Tennessee is the only U.S. state to have "marriage by estoppel," but its application has been limited to a very narrow set of circumstances. Bowman, *supra* note 94, at 771-72.

A. The Legacy of Offield v. Davis

In *Offield v. Davis*,[176] the Supreme Court of Virginia declared that common law marriage was unlawful in the Commonwealth.[177] The court stated:

> We are ... of opinion that the enactment of [an 1849] statute wholly abrogated the common law in force in this state on the subject of marriages, and that no marriage or attempted marriage, if it took place in this state, can be held valid here unless it has been shown to have been under a license, and solemnized according to our statutes.[178]

Since the holding in *Offield*, courts have consistently held that common law marriage is not recognized in Virginia.[179] In keeping with the holding of *Offield* and its progeny, a license is now statutorily required for any marriage in the Commonwealth to be valid.[180]

The public policy disfavoring common law marriage that was articulated in *Offield*, however, no longer makes sense in Virginia. *Offield* cites no specific Virginia policy against common law marriage aside from a general disdain for unions that are formed

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176. 40 S.E. 910 (Va. 1902).

177. *Id.* at 914. The court relayed the history of statutes imposing punishment on persons who officiate wedding ceremonies without the proper licensing, tracing the history of common law marriage back to seventeenth century British law. The court then noted a comment on the 1849 revision of the Virginia Code, saying:

> It appears quite significant, we think, that [the provision punishing unlicensed wedding officiators] was ingrafted upon the statute at the suggestion of the revisers of the Code of 1849. In a note to their report (Report of Revisers, 1849, p. 558), they recommended that whatever might be the regulations prescribed as to the mode of solemnizing marriages, or the penalty affixed for the offense of solemnizing a marriage without lawful authority, a license should be required in all cases. Manifestly it was their view that with this provision in the statute there could be no valid marriage in Virginia entered into without the license required by law.

Id. at 910-11.

178. *Id.* at 914.

179. *See* Kasey v. Richardson, 331 F. Supp 580 (W.D. Va. 1971); Newsom v. Fleming, 181 S.E. 393 (Va. 1935); Vanderpool v. Ryan, 119 S.E. 65, 66 (Va. 1923); Reynolds v. Adams, 99 S.E. 695 (Va. 1919); Reynolds v. Reynolds, 62 Va. Cir. 114, 118 (Cir. Ct. 2003).

180. *See* VA. CODE ANN. § 20-13 (2007).

outside the control of the state.[181] Although the intended effect of discouraging nonmarital cohabitation may have resulted at the time of *Offield*, contemporary society no longer charges that such unions are "revolting to the sense of enlightened society."[182] Denying unmarried cohabiters a legal status no longer dissuades them from living together, but it does allow them to operate outside the laws and norms that effectively regulate the institution of marriage.[183] Thus, the only legitimate policy goal mentioned in *Offield v. Davis*—that of discouraging nonmarital cohabitation—is no longer served by a ban on common law marriage.

Although a change in statute would be necessary to allow for constructive marriage, that statutory revision would not dramatically alter the current public policy of Virginia; it would simply update the regulatory scheme to address the realities of contemporary Virginia relationships.

B. Virginia's Take on Cohabitation

In spite of the holding in *Offield*, Virginia has in fact carved out exceptions for nonmarital cohabitation and granted it some special legal status. The movement of the courts and the legislature toward identifying and regulating nonmarital cohabitation is a step in the direction of constructive marriage, not away from it. Cohabitation is not a legal non-entity in Virginia; it is a recognized union[184] with uncertain legal status. For example, in *McClaugherty v. McClaugherty*, the Supreme Court of Virginia held that the children of unrecognized common law marriages are legitimate.[185] In *Rickman v. Commonwealth*, the Court of Appeals of Virginia held that unmarried cohabiters had a unique enough relationship to fall under the scope of domestic violence statutes, which impose higher penalties than ordinary assaults.[186] In *Frey v. Frey*, the Court of Appeals of Virginia described nonmarital cohabitation as "analogous

181. *See Offield*, 40 S.E. at 913.

182. *Id.* (quoting *In re* Estate of McLaughlin, 30 P. 651 (Wash. 1892) (internal quotation marks omitted)); *see* WAITE & GALLAGHER, *supra* note 8, at 36-37.

183. *See* Caudill, *supra* note 7, at 539-40.

184. *See supra* notes 51-53 and accompanying text.

185. *See* 21 S.E.2d 761, 766-67 (Va. 1942).

186. *See* 535 S.E.2d 187, 187-92 (Va. Ct. App. 2000).

to a marriage."[187] In *Schweider v. Schweider*, the Virginia Supreme Court also found that, within the context of a private alimony contract, the defendant had "remarried" even though she only cohabitated with her new companion.[188]

Following the holding in *Schweider*, a Virginia statutory amendment was passed in 1997 providing that, upon an alimony payee's cohabitation with another person, the payor's obligation of spousal support is terminated.[189] Within this context, the courts have explicitly stated that cohabitation is the equivalent of marriage. Under the 1997 statute, "[f]or spousal support to survive cohabitation, there must be an express provision to that effect, not one presumed by inference."[190] The underlying assumption—that nonmarital cohabitation is essentially the same as marriage—is the same policy rationale that supports the constructive marriage doctrine.

The elements of nonmarital cohabitation as defined by the Supreme Court of Virginia also coincide with the objective test for determining a constructive marriage.[191] The Court of Appeals of Virginia has declared that cohabitation is analogous to marriage when the unmarried couple assumes "marital duties."[192] The Virginia courts have not articulated specifically which marital duties and responsibilities make a cohabitation analogous to marriage. The objective test of constructive marriage simply takes the next step by looking to the two key factors in a marital relationship—interdependence and representations of commitment—as the quintessential marital duties. As such, adoption of constructive marriage in Virginia would not even require a change in the way the courts analyze the relationships; it would merely provide statutory guidelines to make it easier for the courts to determine whether a cohabitation is analogous to marriage and, therefore, a constructive marriage.

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187. 416 S.E.2d 40, 43 (Va. Ct. App. 1992).

188. 415 S.E.2d 135, 138 (Va. 1992).

189. VA. CODE ANN. § 20-109 (2007).

190. Biddle v. Biddle, 46 Va. Cir. 433, 434 (Cir. Ct. 1998).

191. *See supra* notes 52, 168-72 and accompanying text.

192. *See* Rickman v. Commonwealth, 535 S.E.2d 187, 190 (Va. Ct. App. 2000) (quoting *Frey v. Frey*, 416 S.E.2d at 43).

Adoption of constructive marriage would not only be consistent with the 2006 marriage amendment to the Virginia Constitution, but it would also prevent Virginia citizens from losing existing common law and statutory rights that are not consistent with the amendment. The Virginia amendment seeks to prevent a dual system that recognizes both marriage and other institutions that approximate, but are distinctly not, marriage.[193] By adopting constructive marriage, which converts nonmarital cohabitation into full-fledged marriage, Virginia could expand accessibility to marriage while preventing cohabitation arrangements from competing with the institution of marriage. Without constructive marriage, the 2006 constitutional prohibition on recognizing any unions that approximate marriage could undermine the special status that Virginia courts and statutes have conferred upon nonmarital cohabitation. As it stands now, unmarried cohabiters may lose their rights to press charges under domestic violence statutes, their children may become illegitimate, and payors of alimony might have to continue spousal support even if their former spouses enter into long-term nonmarital cohabitation with a new partner.[194] Adopting constructive marriage not only would ensure that the current limited rights and privileges afforded to unmarried cohabiters are maintained, but it would also greatly expand their rights by converting their cohabitations into marriages.

C. Current Virginia Recognition of Common Law Marriage

Despite the articulated hostility toward common law marriage, Virginia actually does recognize some common law unions. Unlicensed marriages of couples who move to Virginia from common law states, as well as common law marriages of Virginia couples who simply travel to a state that recognizes common law marriage, are recognized in Virginia.[195] In the case of *Chapman v. Graninger*, the court held that a seventeen-year-old bride and twenty-two-year-old groom had been married at common law in Washington,

193. *See supra* notes 3-4 and accompanying text.

194. *See supra* notes 185-88 and accompanying text.

195. *See* Reynolds v. Reynolds, 62 Va. Cir. 114, 118 (Cir. Ct. 2003) ("Virginia does recognize as valid a common law marriage formed in accordance with the law of another state which recognizes common law marriage as valid.").

D.C.[196] when they "exchang[ed] vows in front of the Washington Monument" and then spent one night together in the District of Columbia, followed by a two-week cohabitation *in Virginia*.[197] This ruling came in spite of Virginia's requirement of parental consent to marriage for persons between the ages of sixteen and eighteen.[198]

Recognition of some, but not all, common law marriages brings into question the frequent assertion that common law marriage is contrary to the public policy of Virginia.[199] This uneven policy clearly favors couples who have the means or foresight to travel; unmarried cohabiters who vacation in Washington, D.C., or Dallas, for instance, would be given the full legal recognition and status of marriage, but their counterparts who do not have the time, means, or inclination to travel would be left without legal recourse in the event that they separate.[200]

D. Creating the Ties that Bind

Another way in which Virginia law is in line with the approach of constructive marriage is in the area of imposing legal duties on parties based on their behavior. Although Virginia has never officially adopted promissory estoppel into its common law of contracts,[201] it does recognize and apply equitable estoppel.[202] As a state that has adopted the Uniform Partnership Act,[203] Virginia will also recognize a business partnership if the substance of a partner-

196. 6 Va. Cir. 234, 234 (Cir. Ct. 1985).

197. *Id.* at 234-35.

198. *See* VA. CODE ANN. §§ 20-48 to -49 (2007) (setting the minimum age at sixteen and the maximum age at eighteen). Interestingly, in weighing the public policy interests at stake in this case, the Virginia court chose to recognize common law marriage—a union that is supposedly against Virginia's public policy—over the public policy that is clearly articulated in the Virginia Code.

199. *See supra* notes 176-78 and accompanying text.

200. *See Reynolds*, 62 Va. Cir. at 118.

201. *See, e.g.*, Guzy v. Hoban, 43 Va. Cir. 33, 36 (Cir. Ct. 1997) ("The doctrine of promissory estoppel has not been applied in Virginia, and the Supreme Court of Virginia has never officially adopted the doctrine of promissory estoppel as part of Virginia's common law." (citation omitted)).

202. *See, e.g.*, NPA v. WBA, 380 S.E.2d 178, 182 (Va. Ct. App. 1989) (applying equitable estoppel to the child support context).

203. *See* Virginia Uniform Partnership Act, VA. CODE ANN. §§ 50-73.79 to .150 (2007).

ship is proven, even if no express contract exists.[204] Both doctrines—equitable estoppel and implied partnership—are analogous to constructive marriage in both theory and application.

1. Equitable Estoppel

The elements of equitable estoppel, as applied in Virginia, are: (1) the making of a representation, (2) a party's reliance upon that representation, (3) the changing of a party's position, (4) to her detriment.[205] The theory of constructive marriage is built upon similar theoretical underpinnings. When a couple cohabits, commingles their assets, and divides domestic responsibilities, reliance and change of position are not only inevitable; they are necessary to the successful functioning of the relationship.[206] Constructive marriage and equitable estoppel both look to verbal assertions and actions as evidence of reliance and change of position.[207] Although equitable estoppel requires a showing of detriment, constructive marriage has no direct requirement of detriment. Cohabitation and commingling, however, are actions of compromise; every time a couple compromises, each party sacrifices for the success of the pair. Certainly in the divorce context, either or both parties would be able to show some sacrifice as "detriment."[208]

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204. *See* Cooper v. Spencer, 238 S.E.2d 805, 806-07 (Va. 1977) (finding a partnership existed even though an express contract was not signed).

205. *See NPA*, 380 S.E.2d at 182.

206. See the discussion on exchange-based relationships and corresponding relationship instability, *supra* notes 77-83 and accompanying text. Although cohabitations tend to take on characteristics of less dependent exchange relationships, some degree of economic and domestic interdependence is often inevitable. *See* Kandoian, *supra* note 32, at 1867-68. One of the express goals of constructive marriage, in fact, is to encourage cohabiting couples to engage in the more stable and beneficial union of marriage, as opposed to the halfway solution of cohabitation. "[M]inimal evidence of ... interdependence" would be required to satisfy the first part of the objective relationship test for constructive marriage. *See* Caudill, *supra* note 7, at 567. If a cohabitation, however, were to take on *no* characteristics of domestic or economic interdependence, then the relationship would not be either a constructive marriage or a "cohabitation analogous to marriage" under current Virginia law. *See supra* notes 51-52 and accompanying text.

207. *Compare* Tanson v. Radulescu, 34 Va. Cir. 181, 185 (Cir. Ct. 1994) (holding that the wife's "statements, conduct, [and] actions" estopped her from asserting non-paternity), *with* the objective relationship test for constructive marriage, *supra* notes 169-72 and accompanying text.

208. *See* VA. CODE ANN. § 20-109 (2007) (listing statutory grounds for a claim of spousal support in a divorce action).

Virginia courts have applied the doctrine of estoppel to intimate familial relationships. In the case of *Tanson v. Radulescu*, the court first noted that, "the doctrine of estoppel should be applied cautiously and only when equity clearly requires it to be done."[209] Yet the court went on to find just such an equitable requirement in a family relationship. In this case, a mother was estopped from pleading non-paternity in a custody conflict with her ex-husband, who was not the child's biological or adoptive father: "[Defendant] encouraged the relationship between [complainant] and [her son]. Her statements, conduct, actions, and behavior fostered a father-son relationship between the two. [Complainant] relied upon her position and representations and became a father to this child. [Defendant] must be estopped from now changing her position."[210] In the case of *NPA v. WBA*, the Virginia court also speculated that justifying child support of a non-biological child on a theory of estoppel was possible.[211] Finally, in *T v. T*,[212] a case in which a husband wanted to invoke the statute of frauds to invalidate an implied agreement he had made with his wife, the court made this telling declaration: "We believe that the husband's promises to the wife, in reliance upon which she changed her position, acted to her detriment, and substantially performed her obligations until her husband made further performance impossible, have estopped him from pleading the statute of frauds."[213]

2. Doctrine of Implied Partnership

The doctrine of implied partnership is another close analog to constructive marriage. In Virginia, an implied partnership will be found when one party can show enough evidence to convince the court that a partnership did exist, even in the absence of a contract.[214] In a suit to establish an implied business partnership, the court will look to see if the relationship had enough "indicia" of

209. 34 Va. Cir. 181, 184 (Cir. Ct. 1994) (citation and internal quotation marks omitted).
210. *Id.* at 185.
211. 380 S.E.2d 178, 182 (Va. Ct. App. 1989).
212. 224 S.E.2d 148 (Va. 1976).
213. *Id.* at 152.
214. *See* Cooper v. Spencer, 238 S.E.2d 805, 806 (Va. 1977).

a partnership to be classified as a partnership.[215] If an implied partnership is found, then the court will impute to the relationship all the legal duties and obligations of partnership law.[216] The doctrine of implied partnership is even more similar to constructive marriage than equitable estoppel because, with implied partnership, the court can impute a whole host of duties, obligations, and rights when the status of partnership is declared, as opposed to a single duty or obligation that is found (or prohibited) in the case of estoppel.

Much like in an implied partnership, when the objective test for constructive marriage finds sufficient "indicia" of a marriage in the form of representations of commitment and economic and domestic interdependence, a marriage would be found.[217] The court would impute to the relationship all the obligations and duties of marriage, just as it would under current Virginia partnership law.

So similar are the doctrines of partnership and marriage that in the instance of a divorcing couple also dissolving a jointly held partnership, Virginia courts currently will allow all the partnership and marital assets to be consolidated and distributed in a single action.[218]

The theme that emerges from Virginia's use and acceptance of both equitable estoppel and the doctrine of implied partnership is that Virginia will impute legal duties, rights, and obligations to individuals based upon their actions and assertions that indicate they have impliedly consented to those rights, duties, and obligations. This is an important response to the inevitable outcry that constructive marriage would be excessively intrusive on American conceptions of liberty and autonomy.[219] Although constructive marriage in a very real sense would restrict the liberty of couples to do whatever they like in intimate relationships, countless laws

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215. *Id.* at 806-07.

216. *See id.* at 806.

217. *See supra* notes 169-72 and accompanying text.

218. *See* Epperson v. Epperson, 15 Va. Cir. 39, 53-54 (Cir. Ct. 1988). Note that if the Eppersons had not been married but had merely cohabited, the consolidation of their assets would not have been possible, as there would have been no "marital property."

219. For a critique of constructive marriage's imposition on personal liberty and autonomy, see Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 834-38 (2005) (classifying constructive marriage as "conscriptive").

already exist that restrict the ways in which relationships can be conducted.[220] Constructive marriage simply requires that couples who engage in cohabitations analogous to marriage adhere to the same duties and obligations—and receive the same rights—as their married counterparts. To the extent that the state's adoption of constructive marriage limits personal autonomy, it does so in the same way that the state's lawful regulation of marriage limits personal autonomy: in the name of justice and for the mutual benefit of society, the state, and the couples themselves.

E. Implications for Same-sex Relationships

Adopting a policy of constructive marriage in Virginia would also serve to highlight the inconsistency in the two clauses of the 2006 marriage amendment to the Virginia Constitution. The first clause prohibits same-sex marriage, whereas the second clause expresses a public policy that favors marriage over the less stable and far less beneficial alternative of nonmarital cohabitation.[221] Opponents of the amendment encouraged voters to read the entire text of the amendment before voting;[222] yet an informed voter who valued the stability of marriage and the justice inherent in the state's regulation of marriage, as compared to the relatively unstable and completely unregulated arrangement of cohabitation, might easily have voted in favor of the amendment, in spite of its illogical exclusion of homosexuals from the myriad benefits of marriage.

The clause in the 2006 Virginia constitutional amendment that excluded same-sex couples from marriage was an ideological non sequitur. Same-sex couples would presumably reap the same benefits of stability, social approval, and justice from marriage as heterosexual couples do.[223] Unfortunately, because of the constitutional ban on same-sex unions, and because of a prevailing social norm that "marriage" is exclusively the union of a man and a

220. *See, e.g.*, VA. CODE ANN. § 18.2-57.2 (2007) (forbidding domestic violence); § 18.2-61 (forbidding marital rape); § 18.2-362 (forbidding bigamy); § 18.2-365 (forbidding adultery).

221. *See* VA. CONST. art. I, § 15-A.

222. *See* Jenkins, *supra* note 2 ("Opponents of the measure ... focused their campaign on the second and third lines of the ballot question, which read in part that Virginia would not create a legal status for unmarried couples that sought to 'approximate ... the effects of marriage.'").

223. WAITE & GALLAGHER, *supra* note 8, at 200-01.

woman, more hurdles must be overcome before Virginia is as prepared to adopt same-sex marriage as it is to accommodate constructive marriage. Adopting constructive marriage would serve to focus Virginia policy on marriage as a status and not a mere contract. This renewed focus on status would further the goal of broadening access to the institution of marriage, not limiting it. In this context, an extension of marriage to same-sex couples would be a logical next step.

CONCLUSION

Renowned couples therapist Christopher Clulow once wrote that "[i]t is precisely because private arrangements have social implications ... and because social systems have implications for the arrangement of private life that marriage would have to be invented if it did not already exist."[224] As an institution, marriage both informs the society in which it exists and is shaped and guided by the social norms and attitudes that surround it. Marriage is not simply what we make of it; it defines us as well.

In American society, marriage is an institution of profound economic, social, legal, and moral significance. Cohabitation, by most accounts, is a private arrangement that poorly approximates marriage; it yields few of marriage's benefits but entails a host of complications and negative externalities that pose a threat not only to marriage but to the couples who choose cohabitation. Constructive marriage, if adopted in Virginia, would be an effective hedge to the rising trend of cohabitation; it would encourage stability and commitment in couples while furthering the goals of justice and fair dealing in relationships.

The current public policy, statutes, and common law of Virginia are well-suited to accommodate constructive marriage. Although the statute requiring a license and solemnization for all marriages would need to be revised in order to implement constructive marriage,[225] very little substantive law would need to be changed. The Virginia courts have already established a working definition

224. Christopher Clulow, *"Good-Enough" Marriage*, *in* RETHINKING MARRIAGE: PUBLIC AND PRIVATE PERSPECTIVES 123, 124 (Christopher Clulow ed., 1993).

225. *See* VA. CODE ANN. § 20-13 (2007) (requiring that "[e]very marriage in [the] Commonwealth [of Virginia] shall be under a license and solemnized").

for nonmarital cohabitation and have applied that definition to construe cohabitations in a variety of contexts.[226] Constructive marriage also is consistent with the policy aim of the 2006 marriage amendment to the Virginia Constitution: it would not only help to ensure that cohabiters do not lose rights under the amendment, but it would also ensure that they gain all the rights and protections of marriage. Although constructive marriage places some restrictions on individual autonomy, these restrictions must be balanced with all the benefits of adopting a constructive marriage regime and viewed in the context of Virginia's willingness to impose legal duties on parties who have impliedly consented to those duties through actions and assertions. Constructive marriage is at once creative and simple, progressive yet traditional, and innovative but consistent with current trends and policies in Virginia law.

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226. *See supra* notes 50-52 and accompanying text; Part III.B.

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