State v. Carswell: The Whipsaws of Backlash

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For Shannon Hitchcock

When, late in April 2006, the Ohio Supreme Court agreed to hear *State v. Carswell*[1]—a case in which the court will decide whether Ohio's recently enacted "Marriage Amendment"[2] abolishes the protections unmarried victims of domestic abuse currently receive under state law[3]—it set the stage to deliver cultural conservatives some bad news. Virtually no matter how the court rules, they will lose, setting back their efforts in Ohio and elsewhere to pass and enforce anti-gay marriage amendments, as well as the larger

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1. *See* State v. Carswell, No. 06-0151 (Ohio argued Dec. 12, 2006).
2. OHIO CONST. art. XV, § 11.
3. To date, the appellate decisions rejecting this claim outrun those accepting it. The trial courts were initially split, practically down the middle, on the issue. For a breakdown of both the appellate and lower court decisions, see Appendix.

reclamation project of which they have been (and are) a part: the push to redistrict the law as a zone of traditional morality.[4]

Though *Carswell* is a case of nationwide significance, it should be of particular interest in the dozen or so other states with equally harsh marriage amendments on their constitutional books.[5] It appears to be

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4. *See* Michelle Goldberg, *"Homosexuals Are Hellbound!"*, SALON.COM, Oct. 18, 2004, http://archive.salon.com/news/feature/2004/10/18/gayohio/index.html (linking the campaign to enact Ohio's Marriage Amendment to broader struggles by cultural conservatives as part of the "ongoing" culture wars).

5. For the time being, the states (Ohio aside) that have some kind of constitutional "marriage amendment" are: (i) those that adopted one before 2004: Alaska, ALASKA CONST. art. I, § 25; Hawaii, HAW. CONST. art. I, § 23; Nebraska, NEB. CONST. art. I, § 29; and Nevada, NEV. CONST. art. I, § 21; (ii) those that adopted one in 2004: Arkansas, ARK. CONST. amend. LXXXIII, § 2; Georgia, GA. CONST. art. I, § 4; Kentucky, KY. CONST. § 233a; Louisiana, LA. CONST. art. XII, § 15; Michigan, MICH. CONST. art. I, § 25; Mississippi, MISS. CONST. art. XIV, § 263A; Missouri, MO. CONST. art. I, § 33; Montana, MONT. CONST. art. XIII, § 7; North Dakota, N.D. CONST. art. XI, § 28; Oklahoma, OKLA. CONST. art. II, § 35; Oregon, OR. CONST. art. XV, § 5a; and Utah, UTAH CONST. art. I, § 29; and (iii) those that have adopted one since 2004: Alabama, ALA. CONST. amend. DCCLXXIV; Colorado, COLO. CONST. art. II, § 31; Idaho, IDAHO CONST. art. III, § 28; Kansas, KAN. CONST. art. XV, § 16(a); South Carolina, S.C. CONST. art. XVII, § 15; South Dakota, S.D. CONST. art. XXI, § 9; Tennessee, TENN. CONST. art. XI, § 18; Texas, TEX. CONST. art. I, § 32; Virginia, VA. CONST. art. I, § 15-A; and Wisconsin, WIS. CONST. art. XIII, § 13. Of these, a number have provisions that look like they could function as the provision at issue in *Carswell* has. See, for example, Arkansas's, ARK. CONST. amend. LXXXIII, § 2 ("Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman."); Kentucky's, KY. CONST. § 233a ("A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."); Louisiana's, LA. CONST. art. XII, § 15 ("No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."); Michigan's, MICH. CONST. art. I, § 25 ("[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."); Nebraska's, NEB. CONST. art. I, § 29 ("The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized . . . ."); North Dakota's, N.D. CONST. art. XI, § 28 ("No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."); Oklahoma's, OKLA. CONST. art. II, § 35 ("Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."); South Carolina's, S.C. CONST. art. XVII, § 15 ("This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated. Nothing in this section shall impair any right or benefit extended by the State or its political subdivisions other than a right or benefit arising from a domestic union that is not valid or recognized in this State. This section shall not prohibit or limit parties, other than the State or its political subdivisions, from entering into contracts or other legal instruments."); South Dakota's, S.D. CONST. art.

the first case in which a local court of final jurisdiction will substantively interpret a state constitutional marriage amendment passed as part of the backlash against the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*,[6] announcing a right to marry under the Commonwealth's constitution that same-sex couples, just like their cross-sex counterparts, are free to enjoy.[7] Without question, it will not be the last.

Ohio's Marriage Amendment, as marriage amendments elsewhere have been, was publicly sold as security against the ominous "threat" of same-sex couples gaily wed. As one official description of the

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XXI, § 9 ("The uniting of two or more persons in civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized . . . ."); Texas's, TEX. CONST art. I, § 32 ("This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."); Utah's, UTAH CONST. art. I, § 29 ("No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."); Virginia's, VA. CONST. art. I, § 15-A ("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."); and Wisconsin's, WIS. CONST. art. XIII, § 13 ("A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."). Whether they will or not is another question.

6. 798 N.E.2d 941 (2003).

7. *Carswell* may also be the first case in which a court of final jurisdiction substantively interprets any constitutionally grounded anti-gay marriage amendment, at least if the Hawaii Supreme Court's last statement in *Baehr v. Miike*, No. 20371, 1994 Haw. LEXIS 391 (Haw. Dec. 9, 1999), is put aside. Some may think that *Baehr*, unlike *Carswell*, involved no real interpretive question at all, because the meaning of the constitutional amendment it turned on was so thoroughly "obvious." *See id.* at *6 ("The marriage amendment validated [the sex-based definition of marriage as the union of one man to one woman] by taking the statute out of the ambit of the equal protection clause . . . ."). I myself would say that the "obviousness" of the resolution of the interpretive dispute it involved did not render it a non-interpretive one. *See* Marc S. Spindelman, *Reorienting* Bowers v. Hardwick, 79 N.C. L. REV. 359, 412 n.161 (2001) (challenging the notion of "plain meaning"); *accord* R. Stephen Painter, Jr., *Reserving the Right: Does a Constitutional Marriage Amendment Necessarily Trump an Earlier and More General Equal Protection or Privacy Provision?*, 36 SETON HALL L. REV. 125, 127 n.14 (2005) ("The Hawaii court's assumption that the marriage amendment removed the marriage prohibition from the ambit of the equal protection clause is striking, given the considerable legislative ambiguity on precisely this point."); *id.* at 130 ("To write, as it did, without any discussion at all, that the Hawaii marriage amendment removed the same-sex marriage prohibition from the ambit of the state['s] equal protection clause, the Hawaii Supreme Court obscured the range of interpretive possibilities [that the amendment presented]."); *id.* at 155 n.111 (discussing the legislative history around Hawaii's marriage amendment).

Marriage Amendment, then known as "Issue 1," described it: Issue 1 "establishes in the Ohio Constitution the historic definition of marriage as exclusively between one man and one woman as husband and wife," hence "excludes from [it] . . . homosexual relationships and relationships of three or more persons." More, to keep things that way, it "prohibits judges in Ohio from anti-democratic efforts to redefine marriage, such as was done by a bare majority of the judges of the Massachusetts Supreme Court [sic] which ordered that same-sex 'marriage' be recognized in that state."[8]

To some, it has thus been surprising that *Carswell* itself is not a case about lesbians and gay men or their relational rights, but rather involves old-school, male-on-female domestic abuse.

In February 2005, Michael Carswell was indicted on one count of domestic violence against Shannon Hitchcock, his live-in girlfriend at the time.[9] According to a bill of particulars, he pushed Hitchcock's head down "by her neck facing [her] to the floor causing injury to her neck, head, and leg."[10] In light of two prior domestic violence convictions,[11] Carswell was charged with a third-degree felony under the law against domestic abuse.[12]

In legal papers that sought to have the proceedings dismissed, Carswell ventured what was at the time a relatively novel legal proposition. The Marriage Amendment, he offered, barred the state from prosecuting him for domestically abusing Hitchcock, with whom he was, according to the domestic violence law's operative

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8. OHIO BALLOT BD., OHIO ISSUES REPORT: STATE ISSUE BALLOT INFORMATION FOR THE NOVEMBER 2, 2004 GENERAL ELECTION 2 (2004); *see also* Brief of the State of Ohio at 15–16, State v. Carswell, No. 06-151 (Ohio July 13, 2006) ("The purpose of the Marriage Amendment is to recognize and define marriage, and to exclude from that recognition and definition any attempt to add gay marriage and civil unions.").

9. Indictment, State v. Carswell, No. 05CR22077 (Ohio Ct. Common Pleas Warren County Feb. 28, 2005); Bill of Particulars, State v. Carswell, No. 05CR22077 (Ohio Ct. Common Pleas Warren County Mar. 25, 2005). According to Judge Neal B. Bronson, the trial court judge in the case, "[i]t is . . . undisputed that the Defendant and the alleged victim were not married but were living together at the time of the alleged offense." State v. Carswell, No. 05CR22077, at 1 (Ohio Ct. Common Pleas Warren County Apr. 12, 2005).

10. Bill of Particulars, *supra* note 9.

11. Indictment, *supra* note 9; Brief of the State of Ohio, *supra* note 8, at 2 n.2 ("The Defendant was previously convicted of domestic violence in October, 2001, and September, 2002.").

12. Indictment, *supra* note 9.

language, "living as a spouse."[13] The trial court credited this position,[14] though it amended the felony domestic violence charge to a lesser-included offense of misdemeanor assault.[15] That decision was subsequently reversed in a unanimous appellate decision.[16] Carswell then turned to the Ohio Supreme Court, which agreed to hear his case.

To appreciate Carswell's basic argument,[17] including its legal force, it is useful to provide some context for both the Marriage Amendment and the state's domestic violence law.

Ohio's Marriage Amendment is a sweeping piece of morals legislation. By design, it is an effort to leverage homophobia, particularly the anti-gay sentiment *Goodridge* roused,[18] in order to brand the state's constitution with the mark of traditional moral values.

The amendment opens with a classic definition of marriage as the exclusive union of one man and one woman as husband and wife: "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions."[19] But it then goes well beyond that to provide that traditional marriage

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13. As the trial court explained, "The issue of dismissal is presented on a constitutional argument because of a recent amendment to the Ohio Constitution." *Carswell*, No. 05CR22077, at 1 (footnote omitted).

14. *Id.* at 3–4.

15. *Id.* at 4 ("The within indictment is amended . . . to reflect the charge of Assault."); *see also* Brief of the State of Ohio, *supra* note 8, at 3.

16. State v. Carswell, No. CA2005-04-047, 2005 Ohio App. LEXIS 5903 (Ohio Ct. App. Dec. 12, 2005).

17. Merit Brief of Appellant Michael Carswell at 1, State v. Carswell, No. 06-151 (Ohio June 16, 2006) ("The Appellant filed to dismiss the indictment due to the unconstitutionality of one specific provision of the domestic violence statute, defining 'family or household member' in terms of 'living as a spouse,' although neither the Appellant nor the alleged victim *were ever spouses*, that is, never entered into a marriage as defined by Ohio law. The Motion was based upon recent amendments to the Ohio Constitution that included a provision prohibiting the extension of legal benefits of spouses to unmarried persons." (citation omitted)); *see also id.* at 3 ("[T]he question before this Court now is only of the plain language of the Ohio Constitution, that simply states that unmarried persons can't be given the benefits afforded to married persons, and couples who have undertaken the legal commitment to each other are to be afforded special protections that unmarried people, regardless of how they are living with each other, are not."); *see also generally id.* at 3–8 (elaborating the argument).

18. *See* 798 N.E.2d 941 (Mass. 2003). For indications of the relation between *Goodridge* and Ohio's Marriage Amendment, see *supra* note 8 and accompanying text.

19. OHIO CONST. art. XV, § 11.

is to be the only intimate relationship created by, or recognized within, the state; no other is to be countenanced as such at law. In terms: "This state 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 effect of marriage."[20]

Almost luckily (for Carswell, anyway), laws that address domestic violence, including Ohio's, trace a similar conceptual trajectory: from marriage to other intimate relationships. These laws target what used to be called simply "wife beating," a practice that once, not so long ago, was officially sanctioned under law as part of the right (and duty) of husbands to chastise their wives.[21] Although wife beating was the classic image of domestic violence and remains its paradigmatic case, it proved, on empirical investigation, to be but one part of a much broader pattern of abuse that women suffered at the hands of men to whom they were intimately related.[22] Written specifically to address these socially ignored (hence accepted) forms of sex-based violence, domestic violence laws were typically not limited to wife beating, but encompassed kindred forms of intimate-partner abuse. (In Ohio, for instance, a late 1970s report by the Attorney General's Task Force on Domestic Violence, which recommended law reform efforts on behalf of victims of domestic abuse, did not limit itself to wife beating or spousal abuse, but cast its net even more widely to pick up what it itself called "mate" abuse, a term that, as the report explained, "involves those spouses and those males and females living as spouses or who formerly resided in the

20. *Id.*

21. In practice, it often, if no longer "officially," still is. For some of the history, see, for example, Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996); *cf.* ANDREA DWORKIN, RIGHT-WING WOMEN 57–58 (1983) (quoting Victoria Woodhull on "marital rape and compulsory intercourse as the purpose, meaning, and method of marriage").

22. Sources are legion. For some discussion of what I am calling the "marriage model" of domestic violence, see generally Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1851–57 (2006). For a recent assessment of the incidence and prevalence of the domestic abuse women suffer at the hands of the men to whom they are intimately related, see PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, NCJ 193781, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183781.pdf.

same household as spouses, but are now divorced or separated."[23]) Eventually, a number of jurisdictions, Ohio among them, extended protections against domestic violence to women and men in same-sex relationships, again, based on a wife-beating, hence, implicitly, a marriage model.[24]

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23. TASK FORCE ON DOMESTIC VIOLENCE, NAT'L COUNCIL ON CRIME & DELINQUENCY, REPORT FROM THE ATTORNEY GENERAL'S TASK FORCE ON DOMESTIC VIOLENCE, at v (1977). All the same, much of the empirical evidence the Task Force drew on as the predicate for its proposals involved "battered wives" and the phenomenon of "wife beating." *See id.* at 58–59 (citing sources).

24. The operative cases in Ohio are *State v. Hadinger*, 573 N.E.2d 1191, 1193 (Ohio Ct. App. 1991) (reasoning, in light of legislative intent, that the domestic violence law, "does not in and of itself exclude two persons of the same sex."), and *State v. Yaden*, 692 N.E.2d 1097, 1101 (Ohio Ct. App. 1997) (noting amendments to the domestic violence regime passed after *Hadinger* was decided, then venturing that "the legislature implicitly endorsed *Hadinger* when it declined to alter the definition of 'cohabit' to exclude same-sex couples"). *See also* State v. Linner, 77 Ohio Misc. 2d 22, 25 (Hamilton County Mun. Ct. 1996) (explaining that "[t]he better-reasoned analysis of the law reflects that Ohio's domestic violence laws apply equally to all persons regardless of their gender. Any person of either sex who can prove that he or she 'otherwise is cohabiting' with another person of either sex as a 'family or household member' is a person who is entitled to the protection of Ohio's domestic violence laws."). This rule has recently been reaffirmed. *See, e.g.*, State v. Nixon, 165 Ohio App. 3d 178, 2006-Ohio-72, 845 N.E.2d 544, 549 (Ohio Ct. App. 2006) (citing *Hadinger* and *Yaden*); State v. Burk, 843 N.E.2d 1254, 1257 (Ohio Ct. App. 2005) (citing *Hadinger*); State v. Jenson, No. 2005-L-193, 2006 Ohio App. LEXIS 5135, at *13 (Ohio Ct. App. Sept. 29, 2006) (citing *Yaden* and quoting *Hadinger*, in that order); State v. Rodriguez, No. H-05-020, 2006 Ohio App. LEXIS 3289, at *20 (Ohio Ct. App. June 30, 2006) (citing both *Hadinger* and *Yaden*); State v. Goshorn, No. 05CA2879, 2006 Ohio app. LEXIS 2593, at *3 (Ohio Ct. App. May 23, 2006) (citing *Burk* and *Hadinger*).

Not all jurisdictions have domestic violence laws that are as (a-hem) progressive as Ohio's is on this front. A recent opinion by the Attorney General of Virginia, Robert McDonnell, before Virginia's Marriage Amendment was adopted, seems to suggest that Virginia law prohibits (or, more exactly, may prohibit) same-sex domestic violence, a prohibition that will not be altered by Virginia's new Marriage Amendment:

> . . . [W]hile the institution of marriage provides an illustrative and objective standard by which "cohabitation" may be identified by a trier of fact, the use of marriage as a comparative standard does not confer upon the cohabiting relationship any of the "rights, benefits, obligations, qualities, or effects of marriage," nor is it a recognition of a relationship "that intends to approximate the design, qualities, significance, or effects of marriage." Were such a construction plausible, a prosecution pursuant to § 18.2-57.2 could not be maintained against an individual involved in an unmarried heterosexual relationship. Such [a] construction would implicitly recognize a common-law marriage, which, like same-sex marriage, is not permitted in Virginia. In addition, in defining "family or household member," the General Assembly specifically listed "spouse" in a distinct and separate subsection of § 16.1-228 and placed individuals who cohabit in another subsection. This distinct placement clearly indicates that the General Assembly wished to establish a new and distinct class of potential domestic

> violence victims among unmarried, cohabitating persons other than spouses. Finally, customary legal usage also distinguishes between "cohabitation" and "matrimonial cohabitation." Thus, Virginia's existing law does not confer a legal right unique to marriage on another class of persons that might be invalidated by the marriage amendment, but rather creates five distinct classes of potential victims (other than spouses) of domestic violence.
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> It is my opinion that "cohabitation" is determined by a variety of factors, and that the institution of marriage may be used as an illustrative and objective standard to determine whether unmarried parties are cohabitating. Applying this standard pursuant to § 18.2-57.2 does not confer upon the cohabiting relationship any of the "rights, benefits, obligations, qualities, or effects of marriage," nor is it a recognition of a relationship "that intends to approximate the design, qualities, significance, or effects of marriage." Passage of the amendment, therefore, would not prevent prosecution of an individual cohabitating in a same-sex or other unmarried relationship for assault and battery of the other individual pursuant to § 18.2-57.2.

ROBERT F. MCDONNELL, ATT'Y GEN. OF VA., OFFICIAL ADVISORY OPINION # 06-003, at 11–12 (2006), http://www.oag.state.va.us/OPINIONS/2006opns/06-003Newmanetal.pdf (footnotes omitted). The validity of Attorney General McDonnell's opinion is rendered uncertain by, among other things, an opinion by one of McDonnell's predecessors, Virginia Attorney General James S. Gilmore, III, squarely holding that same-sex domestic violence is not encompassed by the Commonwealth's anti-domestic violence rules. Particularly noteworthy is Gilmore's reasoning why: in light of the Commonwealth's ban on same-sex marriage, same-sex couples cannot be assimilated into the domestic violence law's marriage model. As his opinion explains:

> [W]hen the General Assembly used the term "cohabits" in defining who would be considered a "family or household member" [for purposes of the domestic violence law], it presumably was aware that the courts have interpreted that term to connote persons living together as husband and wife without being legally married. It also is presumed to have known of [the statutory prohibition of] marriages between persons of the same sex. In my opinion, therefore, the use of "cohabits" indicates a legislative intent that the definitions of "family or household member" in §§ 16.1-228 and 18.2-57.2 encompass unrelated persons in the same household only if they are of opposite sexes and are living as husband and wife. If the General Assembly had intended those statutory definitions to encompass unrelated persons of the same sex, either in a homosexual relationship or merely as lodgers sharing a common dwelling, in my opinion, it would have used a broader term, such as "resides" instead of the limiting term "cohabits" in the applicable definitions in §§ 16.1-228 and 18.2-57.2.

1994 Op. Va. Att'y Gen. 60, 62 (on file with author). On this point, McDonnell's opinion announces that Gilmore's "has been superseded by [*Cowell v. Commonwealth*, No. 3198-02-1, 2005 Va. App. LEXIS 42, *8–*9 (2005)] and the customary legal usage of the term 'cohabitation.'" MCDONNELL, *supra*, at 11 n.55. Though I do like the notion that Gilmore's opinion has been reversed, and think it should be, I cannot see how it has been, based on *Cowell* or "the customary legal usage of the term 'cohabitation.'" *Id.*

On a related note, Judith Smith has recently offered a snapshot of treatment of same-sex domestic violence under state laws. Her research indicates that five states deny domestic violence protections to same-sex couples: Delaware, Louisiana, Montana, North Carolina, and South Carolina. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 104 n.68, 106 n.82 (2005).

Drawing these two strands together, Carswell's position can be summarized this way: The Marriage Amendment, which seeks to preserve the status of marriage as unique in law, bars the state from treating unmarried individuals like married individuals. The state's domestic violence law does just that by extending unmarried individuals legal protections against intimate-partner violence as if they were married.[25] Therefore, the Marriage Amendment invalidates the domestic violence law as applied to unmarried couples. As Carswell explained it to the Ohio Supreme Court:

> [T]he Ohio domestic violence statute, in attempting to protect unmarried persons the same as married persons, is incompatible with [Ohio's Marriage Amendment] in that it provides recognition and therefore a legal status . . . to a person who is *not* married to the offender but is only 'living as a spouse.' That portion of the domestic violence statute is unconstitutional and this Appellant cannot be prosecuted under it.[26]

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25. *See, e.g.*, Merit Brief of Appellant Michael Carswell, *supra* note 17, at 7 ("In this context, it is clear that the domestic violence statute was intended to protect persons who were unmarried, as though they were in fact married.").

26. *See id.* at 8. Neither here nor elsewhere in the briefs submitted in *Carswell* was any direct challenge to the Marriage Amendment's definition of marriage as the union of one man to one woman mounted. Nobody—not even Lambda Legal Defense and Education Fund, Inc. (see generally Memorandum of Amicus Curiae Lambda Legal Defense and Education Fund, Inc, in Support of Appellee State of Ohio, State v. Carswell, No. 06-151 (Ohio July 17, 2006))—argued that that definition of marriage was unconstitutional under the federal constitution, or, notwithstanding the Marriage Amendment, under state law. The closest any brief comes to such an argument, and truthfully, it is not really all that close, is the Brief of Amici Curiae Action Ohio Coalition of Battered Women, Ohio Domestic Violence Network, and Ohio NOW Education and Legal Fund in Support of Appellee State of Ohio at 30 n.33, State v. Carswell, No. 06-151 (Ohio July 17, 2006) ("Although not directly on point, the federal court's ruling that a state constitutional prohibition on same-sex civil unions or domestic partnerships violates the Equal Protection Clause certainly suggests that the even more radical Ohio Constitutional amendment if applied to exclude . . . same-sex couples or other unmarried couples from the legal protections of Ohio'[s] domestic violence statutes . . . is an even more egregious violation of equal protection."). For some thoughts in the counterintuitive direction of suggesting that a constitutional Marriage Amendment may itself be unconstitutional (even a state constitutional marriage amendment under state constitutional law), see Painter, *supra* note 7, at 129 (arguing that "the statutory canon of construction—that a later and more specific provision governs over an earlier and more general provision—is an uneasy fit in the constitutional context," and that, in any event, such an amendment does not "automatically" settle the question whether there is a constitutional right to marriage—even under state law—

Realities of non-enforcement aside,[27] cultural conservatives who backed the Marriage Amendment at one point assured doubters they need not worry about prospects like these. Phil Burress, president of the Ohio group Citizens for Community Values (an affiliate of Focus on the Family), who ran the Ohio Campaign to Protect Marriage,[28] which spearheaded the drive for the amendment, ridiculed concerns that it would nullify portions of the domestic violence law. Even after the amendment passed, he insisted that the idea that it would be dangerous for unmarried victims of domestic abuse was "on its face absolutely absurd" and "a lot of hypotheticals."[29] This posture struck

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that encompasses a right to same-sex marriage). Arguments on the potential for constitutional amendments themselves to be held unconstitutional are found in, for example, Charles A. Kelbley, *Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Bases of Equality*, 72 FORDHAM L. REV. 1487 (2004); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980); Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1991), all cited in Painter, *supra* note 11, at 128–29 n.10; *see also* JOHN RAWLS, POLITICAL LIBERALISM 238–40 (1993) (suggesting that not all constitutional amendments may themselves be constitutional); *id.* at 239 ("The successful practice of [the Constitution's] ideas and principles over two centuries place restrictions on what can now count as an amendment, whatever was true at the beginning.").

27. *See, e.g.*, Town of Castle Rock, Colo. v. Gonzalez, 545 U.S. 748 (2005); Brief of Amici Curiae The National Network to End Domestic Violence et al., Urging Affirmance at 35–36, State v. Carswell, No. 06-151 (Ohio July 17, 2006) ("Despite the massive legal reforms that have occurred in the last century, and especially the past several decades, to transform the use of violence in the family into a crime, victims of abuse have continued to struggle with apathetic and sometimes even hostile courts. . . . The State's role in perpetuating domestic violence through its ambivalent responses has been repeatedly acknowledged by important governmental bodies." (footnotes omitted)).

28. Brief Amicus Curiae of Citizens for Community Values, Urging Reversal at 1, State v. Carswell, No. 06-151 (Ohio June 19, 2006) (noting the formal affiliation). Citizens' for Community Values' President, Phil Burress, "organized and chaired the Ohio Campaign to Protect Marriage, the political action committee [that] successfully campaigned in favor of the passage of the [marriage] amendment." *Id.*

29. Jim Nichols, *Claim: Unwed Abuse Victims Left Unprotected Under Issue 1*, PLAIN DEALER (Cleveland, Ohio), Jan. 15, 2005, at A1 ("Phil Burress, a leader in the drive to pass Issue 1, said the claim that it would undermine parts of the domestic-violence law 'on its face is absolutely absurd.' He dismissed the prospect of that as an unintended consequence as 'a lot of hypotheticals.'"); *see also* Brian Albrecht, *Issue 1 Conflicts with Domestic Abuse Law, Judge Says*, PLAIN DEALER (Cleveland, Ohio), Mar. 24, 2005, at A1 ("Phil Burress of Cincinnati, a leader in the drive to pass Issue 1, said the domestic violence law needs to be amended 'to bring about equal treatment,' and noted that legislation to that effect has been introduced . . . . 'There's nothing wrong with the constitutional amendment,' he added. 'If there's any law contrary to the constitutional amendment, we will fix it.'"); Bruce Cadwallader, *It's Still Domestic Violence*, COLUMBUS DISPATCH (Columbus, Ohio), Mar. 26, 2005, at A1 ("'These (domestic-violence) crimes should have the same penalty whether you're married or not' said

an intuitive chord. After all, what kind of "community values" initiative would help perpetrators, not victims, of domestic abuse?

An unmistakable answer came in an amicus brief that Burress's associate David Langdon, one of the original authors of the Marriage Amendment,[30] submitted for Citizens for Community Values in *State v. McIntosh*.[31] Like *Carswell*, *McIntosh* involved a constitutional

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Phil Burress.'"); M.R. Kropko, *Gay Wedding Ban Tested*, CINCINNATI POST, Feb. 4, 2005, at A1 ("Phil Burress . . . said the amendment . . . was never intended to change the state's domestic violence law. . . . 'We would fix the law and make sure the penalty for domestic violence is the same against everyone. It's a crime. Physical abuse is illegal, period. I don't see how you can beat up someone living with you and get away with it,' Burress said.").

30. *See* Carrie Spencer, *Marriage Measure Raising Concerns*, CINCINNATI POST, Oct. 4, 2004, at A8 (describing Langdon as "the Cincinnati attorney who wrote the 55 words [of the Marriage Amendment] perplexing legal and political experts").

31. Brief Amicus Curiae of Citizens for Community Values, Urging Reversal, State v. McIntosh, No. CA 21093 (Ohio Ct. App. Aug. 23, 2005).

Another answer, in a related context, came in Phyllis Schlafly, *Time to Address Domestic Violence Abuses*, CONSERVATIVE VOICE, May 18, 2006, http://www.theconservativevoice.com/article/14693.html, which savages the Violence Against Women Act ("VAWA"), mainly on the grounds that domestic violence abuses to which it is related, are abuses of and by the legal system, driven (of course) by feminist puppet masters, not the violence perpetrators actually commit. As she writes:

> VAWA advocates assert that domestic violence is a crime, yet family courts often adjudicate domestic violence as a civil (not a criminal) matter. This enables courts to deny the accused all Bill of Rights and due process protections which are granted to the most heinous of criminals.
>
> Specifically, the accused is not innocent until proven guilty but is presumed guilty, and he doesn't have to be convicted "beyond a reasonable doubt." Due process rights, such as trial by jury and the right of free counsel to poor defendants, are regularly denied, and false accusations are not covered by perjury law. VAWA provides funding for legal representation for accusers but not for defendants.
>
> Those who are concerned about judicial activism, i.e., judges legislating from the bench, could observe judges doing this every day in domestic violence cases. Every time a judge issues a restraining order, the judge creates new crimes for which an individual can be arrested and jailed without trial for doing what no statute prohibits and what anyone else may lawfully do.
>
> This criminalizing of ordinary [ordinary?] private behavior and incarceration without due process follows classic police-state practices. Evidence is irrelevant, hearsay is admissible, defendants have no right to confront their accusers, and forced confessions are a common feature. [And we all know we are against that.]
>
> Some of these injustices result from overzealous law enforcement officials (sometimes running for office), and some from timid judges who grant restraining orders and deny due process to defendants for fear of being blamed for subsequent violence. Most of this, however, is the result of feminist activism and the taxpayers' money given them by Congress.

challenge to the state's domestic violence law in the wake of the Marriage Amendment. To the benefit of David McIntosh, the perpetrator in the case,[32] Langdon's brief maintains that the Marriage Amendment invalidates the domestic violence law because, in giving unmarried partners the same legal protections that spouses receive, it fails to recognize the unique legal status of marriage.[33] Summarizing the point, the brief contends: "The problem with the domestic violence statute is that it creates a category of relationship for unmarried couples living as spouses,"[34] a category that cannot be squared with the Marriage Amendment, which "intends that marriage remain unique in being the only state-recognized relationship of its type."[35] The same argument appears verbatim in the amicus brief

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. . . .

> VAWA money is used by anti-male feminists to train judges, prosecutors and the police in the feminist myths that domestic violence is a contagious epidemic, and that men are naturally batterers and women are naturally victims.

Id. Schlafly obviously is not thinking about same-sex domestic violence here at all. Still, her commentary is reminiscent of the often forgotten traditionalist opposition to domestic violence legislation, on which a small refresher can be found in Colker, *supra* note 22, at 1852–53.

32. Not "alleged" in light of his "no contest" plea. Entry of Waiver and Plea(s) on Indictment; Entry and Order, State v. McIntosh, No 2004 CA 04712 (Ohio Ct. Common Pleas Montgomery County Apr. 28, 2005).

33. Unremarkably, both Langdon's brief for Citizens for Community Values in *McIntosh*, Brief Amicus Curiae of Citizens for Community Values, Urging Reversal, *supra* note 31, at 1–2, and his brief for it in *Carswell*, Brief Amicus Curiae of Citizens for Community Values, Urging Reversal, *supra* note 28, at 1–2, contain language of disavowal. As it appears in the Citizens for Community values' brief filed with the Ohio Supreme Court in *Carswell*, which almost perfectly tracks the language from the *McIntosh* brief:

> Because CCV's purpose in this filing lies exclusively in advocating that the text of the Marriage Amendment be respected, and to resist the diminishing suggestions found in the lower courts['] written decisions, it takes no position on the allegations lodged against Defendant in this case. CCV deplores and condemns as abhorrent the acts of assault which occur between those who share what should be a sanctuary: the home. CCV believes the law should contain stiff penalties for those who perpetrate assaults on individuals with whom they reside, and CCV looks forward to the state legislature's remedial efforts extending the application of the domestic violence law to all those now covered under its terms, as well as other similarly situated vulnerable persons, and all in a manner which conforms to the Ohio Constitution.

Brief Amicus Curiae of Citizens for Community Values, Urging Reversal, *supra* note 28, at 1–2. Precipitating the need for all this, of course, is the substantive position of the briefs to the benefit of the defendants in the cases.

34. *Id.* at 9.

35. *Id.* at 10.

Langdon wrote for Citizens for Community Values and gave to the Ohio Supreme Court in *Carswell*.[36]

Needless to say, those "absolutely absurd" hypotheticals do not look either absurd or hypothetical any more. To some of us, they never did.[37]

More significantly, by staking out this ground, conservative supporters of the Marriage Amendment have fenced themselves in. Should the Ohio Supreme Court reject the view that they have embraced in *Carswell*, it will set a powerful (and, from their perspective, troubling) precedent: The Marriage Amendment's terms can, and in some instances, should, be changed, to protect battered women, along with other victims of domestic abuse, at the very least.

This bodes ill, for instance, for efforts by cultural conservatives to eliminate the domestic partnership benefits that state universities (some, only very recently) have decided to provide to some unmarried employees, given for years as a matter of course (of course) to married full-time faculty and staff.[38] If the *Carswell* court gives the Marriage Amendment a narrow (or narrowing) interpretation out of a recognition, tacit or not, that state protection against intimate-partner abuse is basic to human well-being, what principled grounds could there be for not doing the same thing where domestic-partnership benefits are concerned? Is their central aim—providing health insurance to those in relationships who need it—not

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36. *Id.*

37. *See, e.g.*, Carrie Spencer, *Experts: Issue One Impact to Be Felt More in Homes than Workplaces*, ASSOCIATED PRESS NEWSWIRE, Nov. 3, 2004 ("Attorneys for unmarried clients charged with domestic violence 'will trot out Issue 1 in service of their defense,' [Spindelman] said.").

38. *Brinkman v. Miami University*, 139 Ohio Misc. 2d 114 (Ohio Ct. Common Pleas Butler County 2006), was the first such case they brought. Though *Brinkman* was decided without reaching the merits of the case, *id.* at 27–28, its underlying question, which the trial court does address in dicta suggesting that providing domestic partnership benefits to unmarried couples, specifically same-sex couples, does not conform to Ohio's Marriage Amendment, *id.* at 1 ("Arguably, Brinkman is correct" that "Miami's policy violates the Ohio Constitution."); *id*. at 23 ("Arguably, the state of Ohio, through its instrumentality or arm, Miami University, has done that which is constitutionally proscribed."), seems likely to resurface if the standing problems which led to the dismissal in *Brinkman* can be overcome. *See also* Nat'l Pride at Work, Inc. v. Granholm, No. 05-000368-CZ, 2005 WL 3048040 (Mich. Cir. Ct. Sept. 27, 2005), *rev'd*, 732 N.W.2d 139 (Mich. Ct. App. 2007), *appeal docketed*, No. 133554 (Mich. May 23, 2007).

likewise basic to human well-being?[39] What sense, moreover, would it make to hold that the Marriage Amendment permits the state to expend resources on punishing and incarcerating perpetrators of domestic violence who are not married to their victims, but that it may not help offset those same unmarried victims' health care costs as part of a domestic partnership program? It is hard to see how any legal system based on the rule of reason could support such a distinction.

As bad as it would be for cultural conservatives were the Ohio Supreme Court to reject the claim that the Marriage Amendment invalidates the domestic violence law as applied to unmarried couples, it would be worse for them in a way if it did not. Accepting that claim, along with its conclusion, impels the declaration in *Carswell* itself or some future case, that the Marriage Amendment, or, minimally, that bit of it directly at issue in *Carswell*, is itself unconstitutional.[40]

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39. Though I happen to have in mind Martha Nussbaum's "capabilities" approach, *see* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000); *see also* Amartya Sen, *Rights as Goals*, *in* EQUALITY AND DISCRIMINATION: ESSAYS IN FREEDOM & JUSTICE 14, 15–16 (Stephen Guest & Alan Milne eds., 1985), I do not mean to weigh in here on whether, or if so, why, it may or may not be preferable to the approaches others have taken when elaborating the relation between social justice and health care.

40. Aware of this, Lambda's brief in *Carswell* nevertheless urges the court to avoid this ruling, hence the declaration that the Marriage Amendment—or part of it—is unconstitutional: "Interpreting [the Marriage Amendment] so broadly as to preclude the ability of individuals to obtain protection under Ohio's domestic violence statute based on their status would raise grave constitutional concerns and should be avoided." Memorandum of Amicus Curiae Lambda Legal Defense and Education Fund, Inc., in Support of Appellee State of Ohio, *supra* note 26, at 5 n.1. The relevant federal court citation offered is *Romer v. Evans*, 517 U.S. 620 (1996), though no explanation why is provided. *Accord* Merit Brief of Amici Curaie [sic] American Civil Liberties Union of Ohio Foundation, Inc. and American Civil Liberties Union in Support of Appellee, State of Ohio at 6 n.1, State v. Carswell, No. 06-151 (Ohio July 17, 2006) ("*Amici curiae* ACLU of Ohio and ACLU do not take occasion here to address the constitutionality of the Marriage Amendment, as doing so is wholly unnecessary for addressing the issue at bar, and this court 'should avoid addressing constitutional issues which need not necessarily be considered in reaching a decision on the case before it.'") (quotation marks omitted) (citing Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 157 Ohio St. 182, 196 (1958))); *but see* Brief of the State of Ohio, *supra* note 8, at 32–33 (elaborating the equal protection problems if the Ohio Supreme Court should decide to read the Marriage Amendment to nullify existing domestic violence protections for unmarried individuals); Brief of Amici Curiae Action Ohio Coalition of Battered Women, Ohio Domestic Violence Network, and Ohio NOW Education and Legal Fund in Support of Appellee State of Ohio, *supra* note 26, at 22–29 (same). I have already sketched how I would run a cite to *Romer v. Evans*, 517 U.S. 620 (1996) in Marc Spindelman, Associate Professor, The Ohio State Univ. Moritz College of Law, Some Issues

For more than thirty years—at least since the United States Supreme Court's decision in *Eisenstadt v. Baird*,[41] freshly reaffirmed and extended by *Lawrence v. Texas*[42]—it has been settled federal constitutional law that a state cannot legitimately draw distinctions

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with Issue 1, Presentation at Moritz College of Law Forum: The "Defense of Marriage" Amendment: What Is the Amendment Defending Now? (Apr. 19, 2006).

Nearly as troubling and unexplained as Lambda's abandonment of any equal protection argument against the Marriage Amendment is its evident decision to forego any serious discussion of the realities of same-sex domestic violence, including its empirical dimensions, beyond some oblique, passing references to the phenomenon. *See* Memorandum of Amicus Curiae Lambda Legal Defense and Education Fund, Inc., in Support of Appellee State of Ohio, *supra* note 26, at 5 ("Nothing in the Ohio Constitution permits batterers to avoid appropriate punishment, or leaves unmarried partner victims, including gay and lesbian victims, without a remedy they long have had."); *id.* at 14–15 n.4 (citing PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, NCJ181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 39 (2000)). This decision, it should be said, nearly left its survivors' interests all but completely unrepresented as such, and would have, but for the efforts of another brief, which attempted to cobble together a constitutional argument against the Marriage Amendment specifically in their name. Brief of Amici Curiae Action Ohio Coalition of Battered Women, Ohio Domestic Violence Network, and Ohio NOW Education and Legal Fund in Support of Appellee State of Ohio, *supra* note 26, at 29–34. Had Lambda wished to cite and discuss some of the relevant empirical evidence, it was at hand in TJADEN & THOENNES, *supra*, at 29–31. Though Lambda's brief does not say, the elision of any engagement with the realities of same-sex domestic violence might have had something to do with the findings Tjaden and Thoennes reached: that, for instance,

> same-sex cohabitants reported significantly more intimate partner violence than did opposite-sex cohabitants. Among women, 39.2 percent of the same-sex cohabitants and 21.7 percent of the opposite-sex cohabitants reported being raped, physically assaulted, and/or stalked by a marital/cohabiting partner at some time in their lifetime. Among men, the comparable figures are 23.1 percent and 7.4 percent.

Id. at 30. Hardly good news, viewed from a classically pro-gay political perspective, at least if one puts aside the methodological limitations and certain other wrinkles related to these findings, which Tjaden and Thoennes note, as well as how at odds they are with other studies, correctly described as "studies of small, unrepresentative samples of gay and lesbian couples" that "suggest that same-sex couples are about as violent as heterosexual couples." *Id.* at 29; *see also id.* at 31 n.1 (collecting sources). But then, the Lambda brief does not bother to cite any of the leading Ohio cases on same-sex domestic violence, such as *State v. Hadinger*, 573 N.E.2d 1191 (1991), *State v. Yaden*, 691 N.E.2d 1097, 1101 (1997); or *State v. Linner*, 77 Ohio Misc. 2d 22 (Hamilton County Mun. Ct. 1996) either, though, to be fair, it does cite cases that do cite one or more of them, if not apparently for that reason. *See, e.g.*, Memorandum of Amicus Curiae Lambda Legal Defense and Education Fund, Inc., in Support of Appellee State of Ohio, *supra* note 26, at 10, 21 n.8 (citing State v. Nixon, 845 N.E.2d 544, 549 (Ohio Ct. App. 2006)); *id.* at 1, 10, 21 n.8. This issue is reported on in Eric Resnick, *Experts Disagree on How to Combat Ohio's Ban Amendment*, GAY PEOPLES' CHRONICLE (Cleveland, Ohio), Dec. 22, 2006, at 4.

41. 405 U.S. 438 (1972).

42. 539 U.S. 558 (2003).

between married and unmarried couples, or married and unmarried individuals, for purposes of the criminal law—certainly not on traditional morality grounds.[43] But there is no conceivable

43. References to the moral underpinnings of the Massachusetts statute at issue in *Eisenstadt* are laced throughout the opinion. *See Eisenstadt*, 405 U.S. at 442–43 ("In a subsequent decision . . . the [Massachusetts Supreme Judicial Court], however, found 'a second and more compelling ground for upholding the statute'—namely, to protect morals through 'regulating the private sexual lives of single persons.' The Court of Appeals . . . did not consider the promotion of health or the protection of morals through the deterrence of fornication to be the legislative aim." (footnote omitted)); *id.* at 443 ("We agree that the goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims of [the provisions at issue in the case]."); *id.* at 448 ("[T]he Massachusetts Supreme Judicial Court [has] explained that the law's 'plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women.' Although the State clearly abandoned that purpose . . ., at least insofar as the illicit sexual activities of married persons are concerned, the court reiterated . . . that the object of legislation is to discourage premarital sexual intercourse. Conceding that the State could, consistent[] with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as '[e]vils . . . of different dimensions and proportions, requiring different remedies,' we cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of the Massachusetts law. It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor under Massachusetts [law]. Aside from the scheme of values that assumption would attribute to the State, it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proferred objective." (citations and footnotes omitted)). But most significant for present purposes is this dimension of the *Eisenstadt* Court's reasoning:

> If the Massachusetts statue cannot be upheld as a deterrent to fornication or as a health measure, may it, nevertheless, be sustained simply as a prohibition on contraception? The Court of Appeals[']' analysis "led inevitably to the conclusion that, so far as morals are concerned, it is contraceptives per se that are considered immoral—to the extent that *Griswold* will permit such a declaration." The Court of Appeals went on to hold:
>
> > "To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state."
>
> We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.
>
> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital

> relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.
>
> . . . .
>
> . . . We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, Massachusetts [anti-contraception laws] violate the Equal Protection Clause.

Id. at 452–55. Whatever one might wish to say about *Eisenstadt*'s apparent sympathy for the appellate court's view that morality as such, independent of some non-traditional morality-based notion of "harm," is a constitutionally inadequate justification for state action, the Court avows that traditional morality alone cannot and does not provide an adequate constitutional basis for distinguishing between married and unmarried individuals who are otherwise similarly situated, as they are at least where criminal regulations of the sort at issue in *Eisenstadt* are concerned. *Accord* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1423 (2d ed. 1988) (describing *Eisenstadt* as having "declared that just such a distinction between married and single persons was unconstitutional"). For some indication of how *Lawrence* affirms and extends this reasoning, see, for example, Lawrence v. Texas, 539 U.S. 558, 565 (2003) (reaffirming *Eisenstadt* and its rule that traditional morality alone does not provide an adequate basis for distinguishing the constitutional rights of married and unmarried individuals); *id.* at 566 (same); *id.* at 580 (O'Connor, J., concurring) (noting that the *Eisenstadt* court "refused to sanction a law that discriminated between married and unmarried persons"); *id.* at 582 (suggesting that *Lawrence* raises the question whether "moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy," and declaring flatly that "[i]t is not"); *id.* ("Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."). For his part, Justice Scalia, in dissent, recognized the deep challenge that Justice O'Connor's reasoning, hence, by implication, *Eisenstadt*'s, may pose to marriage, if it is understood strictly in traditional moral terms:

> This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O'Connor seeks to preserve them by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. But "preserving the traditional institution of marriage" is just a kinder way of describing the State's *moral disapproval* of same-sex couples.

Id. at 601 (Scalia, J., dissenting). An answer to this, of course, assuming it is right, is that the problem is not one that is simply of Justice O'Connor's making, but is one that should be placed at *Eisenstadt*'s door—even if Justice O'Connor does not invoke *Eisenstadt* at precisely that moment in her *Lawrence* opinion when she embraces a fairly robust version of its principle. *Cf.* John Noonan, Jr., *The Family and the Supreme Court*, 23 CATH. U. L. REV. 255, 273 (describing *Eisenstadt*, among other cases, as "wrong," in part, because it "subvert[s] the privileged status of marriage, contrary to the teaching of *Loving v. Virginia* . . . [and] contrary to the place of marriage in American experience. To say that legal immunities and legal benefits may not depend on marriage is to deny the vital right. To say that Equal Protection requires the equal treatment of the married and the unmarried in all respects is to deny the hierarchy of values of our society."). For other thoughts on the relation between *Eisenstadt* and *Lawrence*,

justification aside from traditional morality for the state not to recognize the existence of non-marital intimate relationships as such, including their violent realities, through the domestic violence law.[44] If the Marriage Amendment requires the state to differentiate between married and unmarried perpetrators (and victims) of domestic abuse, and if the only possible justification for this is traditional morality, standing alone, then the Marriage Amendment violates federal constitutional law.[45] It is worth noting that the state's lawyers have for some time recognized this; indeed, in *Carswell*, they openly conceded the point.[46]

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and of both to traditional morality, see, for example, Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615 (2004) (reading *Lawrence* to have affirmed the sexual rights of heterosexuals, married and not, and the sexual rights of lesbians and gay men, by extension); *see also* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233 (2004).

44. So far as I have been able to discern, nobody has advanced one. The brief filed for the State of Ohio has, in fact, conceded none exists:

> In order to avoid constitutional difficulties, the State must have a rational basis to differentiate between those persons who are living together, share familial and financial responsibilities and consortium *and are married*, and those persons who are living together, share familial and financial responsibilities, and consortium *and are not married*. No such rational basis exists. While the state has a legitimate and uncontested interest in preserving and encouraging marriage, none of those interests are served through domestic violence laws, because their purpose is to provide enhanced penalties for violence in familial relationships.

Brief of the State of Ohio, *supra* note 8, at 33. The same basic point was made by the state in *State v. Burk*, No. CR 462510, 2005 WL 786212 (Ohio Ct. Common Pleas Cuyahoga County Mar. 23, 2005), one of the first decisions crediting a Marriage Amendment challenge to Ohio's domestic violence law. *Id*. at *7 (quoting the state's argument that the Marriage Amendment, if interpreted to eliminate domestic violence protections for unmarried victims, "would arbitrarily discriminate against a class of persons based on marital status and immediately deny them the protections afforded by Ohio's domestic violence law. There can be no rational relationship to a legitimate government interest if [the Marriage Amendment] is construed to strip the protections of the domestic violence law from unmarried persons. Such an arbitrary and discriminatory outcome would therefore violate the Equal Protection Clause of the Federal Constitution.").

45. This argument is made in Brief of Amici Curiae Action Ohio Coalition of Battered Women, Ohio Domestic Violence Network, and Ohio NOW Education and Legal Fund in Support of Appellee State of Ohio, *supra* note 26, at 22–29. *Cf.* State v. Linner, 77 Ohio Misc. 2d 22, 25 (Hamilton County Mun. Ct. 1996) ("[T]he court is reminded that 'it . . . is not an ecclesiastical tribunal [empowered] to enforce moral standards uncodified by statute.'" (alteration in original) (citing Taylor v. Taylor, 465 N.E.2d 476, 477 (Ohio Ct. App. 1983))).

46. *See supra* note 44.

Still, remarkably, of the dozens of trial and appellate court judges in Ohio who have heard and decided cases involving a Marriage Amendment attack on the domestic violence law,[47] only Judge James Celebrezze seems to have fully understood and accepted this line of reasoning.[48] As he concluded in *Phelps v. Johnson*,[49] it is irrational and unreasonable, hence unconstitutional, for the state to distinguish between or among cases of domestic violence based on the marital status of the perpetrator and the victim. As he wrote:

> [T]he differentiation between the protections provide[d] married victims of domestic violence, vis-à-vis unmarried victims, bears no rational relationship to a legitimate state interest, and the classifications drawn [along those lines in the Marriage Amendment] are not reasonable in light of its purpose.[50]

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47. *See* Appendix.

48. The Court of Appeals for the Second Appellate District in Green County, Ohio, in its decision in *State v. Ward*, 849 N.E.2d 1076 (Ohio Ct. App. 2006), striking down domestic violence protections for unmarried victims on Marriage Amendment grounds, did seem to signal, as one judge on that court has pointed out to me, that it was aware of the federal constitutional issues (potentially) implicated by the Marriage Amendment's challenge to the state's domestic violence law. As the *Ward* court explained:

> Some of the[] amicus briefs raise issues that have not been raised by the parties, either in the trial court or this court—e.g., that the Defense of Marriage amendment violates the Supremacy and Equal Protection [C]lauses of the United States Constitution. Because these issues were not raised in the trial court, we deem them waived, and do not reach them.

Id. at 1078. This might have been a nice recognition of the point I am making, as well as an appropriate reservation of it for some future case, except the *Ward* court took it upon itself selectively to consider arguments from briefs not actually before it in that case. *Id*. Having taken that unusual step, I fail to see why the court did not and could not have considered the equal protection arguments it deemed "waived," especially since, if those arguments are correct as a matter of law, as the State of Ohio has recognized, see *supra* note 44, the *Ward* court's interpretation of the Marriage Amendment—that it nullifies existing domestic violence protections for unmarried victims of abuse—puts it out of constitutional bounds, hence makes *Ward* itself an unconstitutional decision. My sense, accordingly, is that the court believed that the equal protection arguments were actually without merit. I have a different reaction to *Burk*, 2005 WL 786212, at *7, however, though it suffers a similar flaw.

49. Phelps v. Johnson, No. DV05 305642, 2005 WL 4651081 (Ohio Ct. Common Pleas Cuyahoga County Nov. 28, 2005).

50. *Id.* at *2; *accord* Brief of Amici Curiae Action Ohio Coalition of Battered Women, Ohio Domestic Violence Network, and Ohio NOW Education and Legal Fund in Support of Appellee State of Ohio, *supra* note 26, at 7 & n.9.

To be sure, Judge Celebrezze did not cite either *Eisenstadt* or *Lawrence* as authority for his reasoning or its upshot: that the Marriage Amendment violates the United States Constitution.[51] But he internalized and recapitulated their shared constitutional point.

At least in this respect, Judge Celebrezze got it right in *Phelps*, and the Ohio Supreme Court should follow his lead when it rules in *Carswell*. Whether it does or not, though, it is sure to teach cultural conservatives a lesson the anti-domestic-violence movement has been insisting on, for years: There is a price to pay for the moral hubris it takes to treat victims and survivors of abuse as pawns in your own game.

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51. The cases Judge Celebrezze did cite, are: *Berman v. Parker*, 348 U.S. 25, 32 (1954), and *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964). *Phelps*, 2005 WL 4651081, at *2. Some light on what he may have had in mind when doing so can be found in Brief of Amici Curiae Action Ohio Coalition of Battered Women, Ohio Domestic Violence Network, and Ohio NOW Education and Legal Fund in Support of Appellee State of Ohio, *supra* note 26, at 40.

APPENDIX[†]

Trial Court Cases Upholding Domestic Violence Statute *Written Opinion Available*						
App. Dist.	**Case Name**	**Case No./ Citation**	**Date**	**Court**	**Page/ Paragraph #**	**Holding/Authority for Holding**
1	Hufford v. Clark	DV0500 206	Apr. 12, 2005	Ct. Common Pleas Hamilton County	p. 5	"[T]his Court holds that Clark has not met the burden of proof incumbent upon him to demonstrate that the amendment to Article XV, Section 11 as the Ohio Constitution rendered O.R.C. 3113.31 facially unconstitutional or, as in the matter at bar, unconstitutional as applied."
1	State v. Jenkins	B-0502 848	July 12, 2005	Ct. Common Pleas Hamilton County	pp. 7-8	"R.C. §2919.25 does not represent a recognition or creation of a legal status for unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage. . . . This court demonstrated a reasonable interpretation of the Domestic Violence Statute that allows both the statute and Article XV Section 11 to coexist. Therefore, Defendant's motion is denied."
2	State v. Nixon	CV 2004 11 6587	Apr. 4, 2005	Ct. Common Pleas Summit County	p. 4	"R.C. 2919.25 and Oh. Const. Art. XV, §11 are able to coexist without Constitutional violation. To hold otherwise would result in eliminating a majority of the domestic protections afforded by the General Assembly and leave thousands of Ohio citizens subject to violence within their households without any significant criminal legal recourse."
2	State v. McIntosh	2004 CR 4712	Apr. 18, 2005	Ct. Common Pleas Montgomery County	p. 11	"Art. XV, §11 of the Ohio Constitution was not enacted to strip intimate cohabitants from the protection of Ohio's domestic violence laws. Therefore, the domestic violence statute is not unconstitutional under Art. XV, §11 of the Ohio Constitution." *See also* Supplemental Order, State v. McIntosh, 2004 CR 4712, at 1-2 (Ohio Ct. Common Pleas Montgomery County May 2, 2005).

† This Appendix does not conform to THE BLUEBOOK: A UNIFORM MANUAL OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

Trial Court Cases
Upholding Domestic Violence Statute
Written Opinion Available (cont.)

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
2	State v. Danley	05CRB 00356	May 5, 2005	Fairborn Municipal Ct.	p. 2	"Defendant's motion to dismiss based upon the unconstitutionality of the [domestic violence] statute in light of the recently enacted marriage validity amendment to the Ohio Constitution is, therefore, DENIED."
2	State v. Maddox	2005 CR 761	May 17, 2005	Ct. Common Pleas Montgomery County	p. 11	"Art. XV, §11 of the Ohio Constitution was not enacted to strip intimate cohabitants from the protection of Ohio's domestic violence laws. Therefore, the domestic violence statute is not unconstitutional under Art. XV, §11 of the Ohio Constitution."
2	State v. Phillips	2005 CR 446	May 17, 2005	Ct. Common Pleas Montgomery County	p. 10	"Art. XV, §11 of the Ohio Constitution was not enacted to strip intimate cohabitants from the protection of Ohio's domestic violence laws. Therefore, the domestic violence statute is not unconstitutional under Art. XV, §11 of the Ohio Constitution."
2	State v. Wagoner	2005 CR 883	May 17, 2005	Ct. Common Pleas Montgomery County	p. 11	"Art. XV, §11 of the Ohio Constitution was not enacted to strip intimate cohabitants from the protection of Ohio's domestic violence laws. Therefore, the domestic violence statute is not unconstitutional under Art. XV, §11 of the Ohio Constitution."
2	State v. Pike	05CRB 00325	May 23, 2005	Fairborn Municipal Ct.	p. 2	"Defendant's motion to dismiss based upon unconstitutionality of the statute in light of the recently enacted marriage validity amendment to the Ohio Constitution is, therefore, DENIED."
2	State v. Bledsoe	05CRB 06691	June 3, 2005	Ct. Common Pleas Montgomery County	p. 1	"Motion to dismiss pursuant to State Issue One argument denied by the Court."
2	State v. Newman	2005-CR-01116	July 11, 2005	Ct. Common Pleas Montgomery County	pp. 2-3	"[T]his Court adopts the rationale in State of Ohio v. David McIntosh (April 18, 2005) Montgomery County Common Pleas Court, Case No. 2004-CR-4712, *in toto*, in finding that Sections 2919.25, 2919.27 and 3113.31, are not unconstitutional under Article XV, Section 11 of the Ohio Constitution." (emphasis removed)

Trial Court Cases
Upholding Domestic Violence Statute
Written Opinion Available (cont.)

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
3	Bloomfield v. Stearns	2005-DV-12	Mar. 24, 2005	Ct. Common Pleas Hancock County	p. 11	"The statute at issue is designed to protection [sic] against violence that arises from the intimacy of a shared household and/or consortium. That violence and that protection are not dependent upon marital status. The Magistrate therefore *RECOMMENDS* that the respondent's motion to dismiss be denied . . . ." (emphasis removed).
3	State v. McKinley	CR 04 12 0236	Apr. 21, 2005	Ct. Common Pleas Logan County	p. 3	"[T]his Court believes that the amendment only effects laws adopted on or after December 1, 2004, and not those already in existence. For the above reasons, the Court finds the motion to dismiss the indictment is NOT WELL TAKEN. It is ORDERED that the motion to dismiss the indictment be, and hereby is[,] DENIED." (emphasis removed).
3	State v. Shaffer	05-CR-0105	Sept. 29, 2005	Ct. Common Pleas Union County	p. 1	"Defendant's Motion to Dismiss is OVERRULED. . . .The Court, being fully aware of *State v. Humbarger*, 2002-Ohio-4160, a 3rd district case out of Van Wert County, opinion by Judge Hadley, is of the belief that with the state of the law since the rendering of that opinion having changed, the opinion (and consequently the stance of the Third Appellate District) would today affirm the trial court."
8	City of Cleveland v. Knipp	2004 CRB 039103	Mar. 10, 2005	Cleveland Municipal Ct.	p. 9	"After thorough review, the court finds no evidence that there was any intent on the part of the Legislature, in creating the definitions, 'living as a spouse,' 'cohabited' and 'otherwise cohabiting,' to bestow upon unmarried individuals, or to recognize in them, a legal status that approximates the design, qualities, significance or effect of marriage. . . . [T]he court finds that the Defendant's Motion to Dismiss is not well-taken. It is, therefore, DENIED."
8	Phelps v. Johnson	DV 05 305642	Nov. 28, 2005	Ct. Common Pleas Cuyahoga County	p. 2	"This Court finds that the purpose behind Article XV, Section 11 of the Ohio constitution [sic] does not pass the 'rational basis test'. [sic] Therefore, the second sentence of Article XV, Section 11 of the Ohio Constitution (Issue 1) is

Trial Court Cases
Upholding Domestic Violence Statute
Written Opinion Available (cont.)

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
						in violation of the Fourteenth Amendment to the U.S. Constitution (Equal Protections Clause) as it pertains to the Domestic Violence Act in Ohio law." *See also* text accompanying notes 47-51, *supra*.
10	State v. Rodgers	05CR-269	Mar. 29, 2005	Ct. Common Pleas Franklin County	p. 9	"[T]he Marriage Amendment did not override R.C. 2919.25 by implication, as when the Marriage Amendment and the statute are both given a reasonable construction they can both coexist. The Defendant's Motion to Dismiss is DENIED." (emphasis removed).
11	State v. Burdock	05-CRB-00908	Sept. 9, 2005	Willoughby Municipal Ct.	p. 4	"The Defense of Marriage Amendment does not nor should it be applicable to criminal statutes in general or the Domestic Violence Statute in particular."
11	State v. Demark	05-CRB-00986	Sept. 9, 2005	Willoughby Municipal Ct.	p. 4	"The Defense of Marriage Amendment does not nor should it be applicable to criminal statutes in general or the Domestic Violence Statute in particular."
11	State v. Green	05-CRB-03028	Sept. 9, 2005	Willoughby Municipal Ct.	p. 4	"The Defense of Marriage Amendment does not nor should it be applicable to criminal statutes in general or the Domestic Violence Statute in particular."
11	State v. Jenson	05-CRB-01845	Sept. 9, 2005	Willoughby Municipal Ct.	p. 4	"The Defense of Marriage Amendment does not nor should it be applicable to criminal statutes in general or the Domestic Violence Statute in particular."

Trial Court Cases
Upholding Domestic Violence Statute
Written Opinion Not Available

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
1	State v. Ramirez*	05CRB-43586	Dec. 2, 2005	Ct. Common Pleas Hamilton County	¶ 9	Appellate Decision, 2006 Ohio 5600: "In his second assignment of error, Ramirez states that his conviction was unconstitutional."

Trial Court Cases
Upholding Domestic Violence Statute
Written Opinion Not Available (cont.)

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
2	State v. Puckett*	2004 CR 0780	Mar. 7, 2005	Ct. Common Pleas Greene County	¶ 8	Appellate Decision, 2006 Ohio 1127: "Defendant did not challenge the constitutionality of R.C. 2919.25(A) by way of a Crim.R. 12(C)(1) motion filed in the trial court or in any other way prior to this appeal."
3	State v. Logsdon	05 CR 0034	July 25, 2005	Ct. Common Pleas Seneca County	¶ 6	Appellate Decision, 2006 Ohio 2938: "[T]he trial court denied Logsdon's motion to dismiss the charge of domestic violence on the unconstitutionality of the R.C. 2919.25(A), based upon the Franklin County Court of Common Pleas decision in *State v. Rodgers*, 131 Ohio Misc. 2d 1 . . . ."
5	State v. Adams	2004 CR 02160	Feb. 22, 2005	Ct. Common Pleas Stark County	¶ 5	Appellate Decision, 2005 Ohio 6333: "Prior to trial, appellant filed a motion to dismiss arguing that Issue 1 rendered the domestic violence statute, R.C. 2919.25, unconstitutional. This matter proceeded to a bench trial on February 22, 2005. Prior to the commencement of trial, the court denied appellant's motion to dismiss."
5	City of Ulrichsville v. Losey*	2004 CRB 786	Mar. 1, 2005	Ct. Common Pleas Tuscarawas County	¶ 29	Appellate Decision, 2005 Ohio 6564: "In his Third Assignment of Error, appellant maintains trial court erred in convicting him of domestic violence against Tonya, to whom he has never been married, following the Defense of Marriage Amendment to the Ohio Constitution."
5	State v. Hare	05CR-I-01 -0047	Mar. 31, 2005	Ct. Common Pleas Delaware County	¶ 63	Appellate Decision, 2006 Ohio 3926: "Appellant, in his first assignment of error, argues that the trial court erred in overruling his Crim.R. 29 motion of acquittal with respect to the domestic violence charge because R.C. 2919.25, the domestic-violence statute, violates the Defense of Marriage Amendment of the Ohio Constitution, and is therefore unconstitutional."
5	State v. Edwards*	2005 CRB 02252	May 4, 2005	Ct. Common Pleas Stark County	¶ 9	Appellate Decision, 2005 Ohio 7064: "Appellant, in his sole assignment of error, contends that the trial court erred in finding Appellant guilty of domestic violence in violation of R.C. §2919.25 arguing that the recent amendment to the

Trial Court Cases
Upholding Domestic Violence Statute
Written Opinion Not Available (cont.)

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
						Ohio Constitution by this State's voters prohibits the spousal protection of unmarried couples."
5	State v. Newell*	2004CR 0820	Aug. 9, 2004	Ct. Common Pleas Stark County	¶ 26	Appellate Decision, 2005 Ohio 2848: "Appellant, in his second assignment of error, contends that the trial court committed plain error in allowing appellant to be tried and convicted of domestic violence in violation of R.C. 2919.25 when 'recent changes to the Ohio Constitution by this State's voters prohibit the spousal protection of unmarried couples.'"
8	State v. Brown*	CR-05-467287-A	Oct. 19, 2005	Ct. Common Pleas Cuyahoga County	¶ 44	Appellate Decision, 2006 Ohio 6267: "In her fourth assignment of error, appellant challenges the sufficiency of the evidence as it relates to the domestic violence charge. In particular, appellant argues that the domestic violence statute, contained in R.C. 2919.25, violates the State's Constitution because it grants a legal status to unmarried persons living as spouses." *See also* ¶ 3 (noting motion for acquittal on "all three counts" was denied).

Trial Court Cases
Striking Down Domestic Violence Statute
Written Opinion Available

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
2	State v. Peterson	2004 CR 873	Apr. 18, 2005	Ct. Common Pleas Greene County	p. 4	"[T]he Court further agrees with the reasoning and views of Judge Friedman of the Cuyahoga County Common Pleas Court and finds those reasons most persuasive and based upon the plain language of Section 2919.25 of the Ohio Revised Code and the plain language of Article XV, Section 11, the Marriage Validity amendment, the Court finds beyond a reasonable doubt that the portion of Section 2929.25 as relates to a family or household member being defined as a person living as a spouse, is unconstitutional . . . ."

Trial Court Cases
Striking Down Domestic Violence Statute
Written Opinion Available (cont.)

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
2	State v. Dixon	2005 CR 0091	Apr. 26, 2005	Ct. Common Pleas Greene County	p. 7	"[T]he Ohio Domestic Violence Statute is incompatible and in conflict with the Ohio Constitution insofar as it recognizes a person living as a spouse as a family or household member, when they are unmarried individuals."
2	State v. Steineman	2005 CR 0068	Apr. 26, 2005	Ct. Common Pleas Greene County	p. 7	"[T]he Ohio Domestic Violence Statute is incompatible and in conflict with the Ohio Constitution insofar as it recognizes a person living as a spouse as a family or household member, when they are unmarried individuals."
2	State v. Davis	2005 CR 122	June 7, 2005	Ct. Common Pleas Greene County	p. 1	"[B]ased upon the Court's previous holding [in *State v. Peterson*, *supra*] that the statute is unconstitutional as relates to these facts, the indictment herein is dismissed."
2	State v. Woullard	2005 CR 256	June 8, 2005	Ct. Common Pleas Greene County	p. 1	"[B]ased upon the Court's previous holding that the statute is unconstitutional as [it] relates to unmarried persons living as a spouse, the indictment herein is dismissed."
2	State v. Robinson	2005 CR 151	June 9, 2005	Ct. Common Pleas Greene County	p. 1	"Upon motion of counsel, and for good cause shown, the within matter is hereby dismissed."
2	State v. K. Ward	2005 CR 0269	July 5, 2005	Ct. Common Pleas Greene County	p. 1	"Based upon this Court's decisions in *State vs. Jason Dixon* Case No: 2005 CR 91, Greene County Common Pleas Court, and *State vs. Steinman* Case No: 2005 CR 68, Greene County Common Pleas Court, this Court finds the Defendant's Motion well taken and is GRANTED."
2	State v. James	2005 CR 0255	July 15, 2005	Ct. Common Pleas Greene County	p. 1	"Based upon this Court's decisions in *State vs. Jason Dixon* Case No: 2005 CR 91, Greene County Common Pleas Court, and *State vs. Steinman* Case No: 2005 CR 68, Greene County Common Pleas Court, this Court finds the Defendant's Motion well taken and is GRANTED."
2	State v. D. Ward	05-CR-415	Aug. 17, 2005	Ct. Common Pleas Greene County	p. 1	"[S]ince the Defendant and the victim are not married, both the domestic violence charge and the Civil Protection

Trial Court Cases
Striking Down Domestic Violence Statute
Written Opinion Available (cont.)

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
						Order against the Defendant are hereby DISMISSED."
4	State v. Renner	CRB 05 00288	Apr. 29, 2005	Chillicothe Municipal Ct.	pp. 2-3	"It seems clear to this court that the domestic violence statute was crafted to protect unmarried individuals in a relationship that approximates the design, qualities, significance or effect of marriage. The new amendment now prohibits the court from recognizing such a relationship. Consequently, since the state has stipulated that the evidence in this case will be that the defendant and the victim were living together in a nonmarital relationship, the state is unable to prove domestic violence and the charge against Tiffany Renner is dismissed."
4	State v. Goshorn	CRB 05 02680 A	Nov. 15, 2005	Chillicothe Municipal Ct.	pp. 2-3	"It seems clear to this court that the domestic violence statute was crafted to protect unmarried individuals in a relationship that approximates the design, qualities, significance or effect of marriage. The amendment now prohibits the court from recognizing such a relationship. Consequently, since the state has stipulated that the evidence in this case will be that the defendant and the victim were living together in a nonmarital relationship, the state is unable to prove domestic violence and the charge against Richard Goshorn is dismissed."
7	Gough v. Triner	2005 DR 00041	Mar. 29, 2005	Ct. Common Pleas Columbiana County	p. 2	"O.R.C. 3113.31(A)(4) is unconstitutional under Article XV, Section 11 of the Ohio Constitution as applied to unmarried individuals who are cohabiting with no children in common."
7	State v. Rexroad	05-CR-79	July 5, 2005	Ct. Common Pleas Columbiana County	p. 5	"This Court finds that R.C. §2919.25 (A) is unconstitutional as it applies to an unmarried man and woman living together as spouses."
7	State v. McCaslin	05 CR 71	July 13, 2005	Ct. Common Pleas Columbiana County	p. 1	"For the reasons set forth in this Court's decision in *State v. Rexroad*, 2005 CR 79, a copy of which is attached to this judgment entry and incorporated in this entry[,] the motion to dismiss is granted."

Trial Court Cases
Striking Down Domestic Violence Statute
Written Opinion Available (cont.)

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
7	State v. Pasco	05 CR 127	Feb. 14, 2006	Ct. Common Pleas Columbiana County	p. 3	"If as alleged by the State the parties were living together as husband and wife then the statue is unconstitutional as it applies to this defendant[.] . . . If as alleged by the defendant the parties were not romantically involved then under *State v. Williams* the State cannot prosecute the defendant because only those persons cohabitating can bring domestic violence charges. Therefore the indictment is subject to dismissal on either of these grounds."
8	City of Cleveland v. Voies	2005 CRB 002653	Mar. 23, 2005	Cleveland Municipal Ct.	p. 14	"[T]he adoption of the Amendment makes charging unmarried cohabitants with domestic violence a legal impossibility. It is no incumbent upon the General Assembly to correct the infirmities of the domestic violence statute or to toughen the Assault statute so victims are afforded more protection."
8	State v. Burk	CR 462 510	Mar. 23, 2005	Ct. Common Pleas Cuyahoga County	p. 11	"[T]he Court finds, beyond a reasonable doubt, that Ohio R.C. §2919.25 is incompatible with Art. XV, §11, of the Ohio Constitution, insofar as it recognizes as a 'family or household member' a person who is not married to the offender but is 'living as a spouse.'"
8	State v. Douglas	CR-05-463822-A	June 10, 2005	Ct. Common Pleas Cuyahoga County	p. 1	"Defendant's motion to dismiss is granted in part. Indictments amended to assault, R.C. 2903.13, on authority of this Court's opinion in State v. Burk, Case No. 462510 [finding the domestic violence statute unconstitutional]."
8	State v. Wain	05-467055 -A	Aug. 26, 2005	Ct. Common Pleas Cuyahoga County	p. 1	"Per court's decision in State v. Bu[r]k (CR 462510), court dismisses original charge of domestic violence and finds that L.I.O is appropriate per criminal rule 7(D). Case to proceed on amended charge of assault, R.C. 2903.13."
12	State v. Carswell	05CR22 077	Apr. 12, 2005	Ct. Common Pleas Warren County	p. 3	"This Court must, too, reach the conclusion that an unintended effect of the recent amendment is to make R.C. 2919.25 unconstitutional as it pertains to allegations where the offender and the victim are living as a spouse, but are not married."

Trial Court Cases
Striking Down Domestic Violence Statute
Written Opinion Available (cont.)

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
12	State v. Campbell	2005 CRB 00501	May 19, 2005	Warren County Ct.	p. 2	"[T]he Court finds R.C. §2919.25 is unconstitutional when applied to a defendant whose only relationship to the victim is as a 'person living as a spouse.'"

Trial Court Cases
Striking Down Domestic Violence Statute
Written Opinion Not Available

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
8	State v. Kvasne	CR-05-463205-A	June 29, 2005	Ct. Common Pleas Cuyahoga County	¶ 1	Appellate Decision, 862 N.E.2d 171: "The court found that in light of the Ohio Constitution's new Article XV, Section 11 (known as 'Issue 1'), the state could not pursue a conviction against Kvasne for the offense of domestic violence."

Trial Court Cases
Constitutionality of Domestic Violence Statute Not Raised
Written Opinion Not Available

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
5	State v. Hampton	2005CR 1045	Oct. 17, 2005	Ct. Common Pleas Stark County	¶ 8	Appellate Decision, 2006 Ohio 5995: "Appellant claims his trial counsel was ineffective for failing to challenge the constitutionality of R.C. 2919.25…."
6	State v. Rodriguez	CRB-050 1150	Aug. 23, 2005	Ct. Common Pleas Huron County	¶ 7	Appellate Decision, 2006 Ohio 3378: "Appellant neither filed a motion to dismiss supported by these arguments, nor did he raise these arguments below during any proceedings."
8	State v. Williams	CR-469 695	Dec. 6, 2005	Ct. Common Pleas Cuyahoga County	¶ 13	Appellate Decision, 2006 Ohio 6281: "In his second assignment of error, Williams argues that he was denied his constitutional right to the effective assistance of counsel because his counsel failed to move for a dismissal of the indictment based on the unconstitutionality of the domestic violence statute." (Defendant pled guilty.)

Trial Court Cases
Constitutionality of Domestic Violence Statute Not Raised
Written Opinion Not Available (cont.)

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
12	State v. Bryant	CR04-08 -1280	Dec. 6, 2004	Ct. Common Pleas Butler County	¶ 10	Appellate Decision, 2005 Ohio 6855: "Appellant also argues that his counsel should have informed him that Section 11, Article XV of the Ohio Constitution, Ohio's 'Defense of Marriage' amendment, might render the domestic violence statute unconstitutional as applied to him." (Defendant pled guilty).

Trial Court Cases
Constitutionality of Domestic Violence Statute Raised But Not Addressed
Written Opinion Available

App. Dist.	Case Name	Case No./ Citation	Date	Court	Page/ Paragraph #	Holding/Authority for Holding
2	State v. Brown	04-CR-4436	Mar. 11, 2005	Ct. Common Pleas Montgomery County	pp. 2-3	"The State concludes that deciding the Defendant's constitutionality challenge is unnecessary, because the 'parental relationship' statutory alternative is not in conflict with Article XV, section 11 of the Ohio Constitution. . . . This Court therefore need not address the Defendant's constitutional challenge[.]"
8	State v. Forte	CR 460137	Feb. 11, 2005	Ct. Common Pleas Cuyahoga County	p. 5	"Thus, Art. XV, §11 did not take effect until December 2, 2004, thirty days after being approved by the voters at the general election….The text of Issue 1 did not clearly provide for retrospective application; therefore, it took effect on December 2, 2004, and any charge of domestic violence that arose prior to that date must be governed by the legal relationship of the defendant and the alleged victim existing as of the date of the alleged offense."

Appellate Cases Upholding Domestic Violence Statute						
App. Dist.	**Case Name**	**Case No./ Citation**	**Date**	**Court**	**Page/ Paragraph #**	**Holding/Authority for Holding**
1	State v. Ramirez	2006 Ohio 5600	Oct. 27, 2006	Ohio App. 1 Dist.	¶ 13	"We agree with those cases that have held that the domestic-violence statute does not create a legal status that approximates the design, qualities, significance, or effect of marriage. Therefore, we join those districts that have held that R.C. 2919.25 does not violate the Defense of Marriage Amendment."
4	State v. Goshorn	2006 Ohio 2755	May 23, 2006	Ohio App. 4 Dist.	¶ 7	"We agree with the rationales expressed in *Burk*, *Newell*, *Carswell*, *Rexroad*, and *Nixon* that R.C. 2919.25 does not create or recognize a legal status approximating marriage. Instead, it defines a criminal offense and defines the class of persons entitled to protection. Because R.C. 2919.25 is predicated upon the factual determination of cohabitation, not the legal determination of marriage, both the statute and Article XV[,] Section II of the Ohio Constitution may coexist."
5	State v. Newell	2005 Ohio 2848	May 31, 2005	Ohio App. 5 Dist.	¶¶ 45-46	"'[H]ad the proponents intended to alter Ohio's domestic-violence law, they would have drafted the Marriage Amendment accordingly. It was readily apparent by 2004 that Ohio's domestic-violence law referred to, but did[] not create, a legal status that approximates marriage.' Based on the foregoing, we find that appellant's conviction for domestic violence was not unconstitutional." (citation omitted).
5	State v. Adams	2005 Ohio 6333	Nov. 28, 2005	Ohio App. 5 Dist.	¶¶ 26-27	"'Therefore, had the proponents intended to alter Ohio's domestic-violence law, they would have drafted the Marriage Amendment accordingly.' Therefore, for the foregoing reasons, we find appellant's conviction, for domestic violence, was not unconstitutional." (citation omitted).
5	City of Uhrichsville v. Losey	2005 Ohio 6564	Dec. 7, 2005	Ohio App. 5 Dist.	¶ 32	"This Court rejected an argument analogous to appellant's present contention in *State v. Newell*, Stark App.No. 2004CA00264, 2005 Ohio 2848, ¶ 43-¶ 46. Appellant herein fails to persuade us [to] alter our holding in *Newell.* Accordingly, appellant's Third Assignment of Error is overruled."

Appellate Cases Upholding Domestic Violence Statute (cont.)						
App. Dist.	**Case Name**	**Case No./ Citation**	**Date**	**Court**	**Page/ Paragraph #**	**Holding/Authority for Holding**
5	State v. Edwards	2005 Ohio 7064	Dec. 19, 2005	Ohio App. 5 Dist.	¶¶ 28-29	"'Therefore, had the proponents intended to alter Ohio's domestic-violence law, they would have drafted the Marriage Amendment accordingly. It was readily apparent by 2004 that Ohio's domestic-violence law referred to, but did [] not create, a legal status that approximates marriage.' Based on the foregoing, we find that appellant's conviction for domestic violence was not unconstitutional." (citation omitted)
5	State v. Brown	2006 Ohio 1181	Mar. 13, 2006	Ohio App. 5 Dist.	¶ 21	"'We agree with appellee that the Defense of Marriage Amendment has no application to criminal statutes in general or the domestic violence statute in particular.'" (citation omitted).
5	State v. Hare	2006 Ohio 3926	July 27, 2006	Ohio App. 5 Dist.	¶¶ 79-80	"We agree with appellee that the Defense of Marriage Amendment has no application to criminal statutes in general or the domestic violence statute in particular.' Based on the foregoing, we find that the trial court did not err in overruling appellant's Crim. R. 29 motion for judgment of acquittal with respect to the domestic violence charge." (citations omitted)
5	State v. Hampton	2006 Ohio 5995	Nov. 13, 2006	Ohio App. 5 Dist.	¶¶ 14-15	"We have rejected a challenge to R.C. 2919.25 via the DOMA in *State v. Newell*, Stark App.2004CA00264, 2005 Ohio 2848 . . . .: 'We concur with appellee that the intent of the Defense of Marriage Amendment was to prohibit same sex marriage.* * *We agree with appellee that the Defense of Marriage Amendment has no application to criminal statutes in general or the domestic violence statute in particular. As noted by appellee, "[c]riminal statutes do not create rights; they prohibited (sic) certain conduct, it [2919.25] does not define marriage."'" (alteration in original).
6	State v. Rodriguez	2006 Ohio 3378	June 30, 2006	Ohio App. 6 Dist.	¶ 34	"The domestic violence statute's imposition of legal rights and liabilities neither intends to 'approximate marriage' nor does that legal status approximate marriage in fact."
7	State v. Rexroad	2005 Ohio 6790	Dec. 31, 2005	Ohio App. 7 Dist.	¶ 35	"In these appeals, Rexroad and Pasco argue that they cannot be convicted under R.C. 2919.25(A) because that statute is

Appellate Cases Upholding Domestic Violence Statute (cont.)						
App. Dist.	**Case Name**	**Case No./ Citation**	**Date**	**Court**	**Page/ Paragraph #**	**Holding/Authority for Holding**
						unconstitutional as it applies to them. However, there is no evidence demonstrating the particular facts of either case in the record at this stage of the proceedings, so we cannot determine whether the statute is unconstitutional as it applies to a particular set of facts. Accordingly, Appellees can only make a facial constitutional challenge to the statute. R.C. 2919.25(A) survives a facial challenge since there are many factual situations to which this statute could be constitutionally applied. Thus, the trial court's judgments dismissing the indictments are reversed and these cases are remanded for further proceedings. Appellees are free to raise the constitutionality of the statute as applied to them at a later stage in their respective proceedings."
7	State v. Pasco	2005 CR 151	Dec. 31, 2005	Ohio App. 7 Dist.	¶ 35	"In these appeals, Rexroad and Pasco argue that they cannot be convicted under R.C. 2919.25(A) because that statute is unconstitutional as it applies to them. However, there is no evidence demonstrating the particular facts of either case in the record at this stage of the proceedings, so we cannot determine whether the statute is unconstitutional as it applies to a particular set of facts. Accordingly, Appellees can only make a facial constitutional challenge to the statute. R.C. 2919.25(A) survives a facial challenge since there are many factual situations to which this statute could be constitutionally applied. Thus, the trial court's judgments dismissing the indictments are reversed and these cases are remanded for further proceedings. Appellees are free to raise the constitutionality of the statute as applied to them at a later stage in their respective proceedings."
7	State McCaslin	2006 Ohio 891	Feb. 21, 2006	Ohio App. 7 Dist.	¶ 21	"In the instant case, as in *Rexroad*, there are no facts to evaluate, and therefore, no basis for the trial court to determine whether the statute was unconstitutional as applied. The record only contains allegations and assumptions. Thus, this Court's recent holding in *Rexroad* applies equally to the instant case: 'Before we can

Appellate Cases Upholding Domestic Violence Statute (cont.)						
App. Dist.	**Case Name**	**Case No./ Citation**	**Date**	**Court**	**Page/ Paragraph #**	**Holding/Authority for Holding**
						affirm a decision dismissing their indictment because the statute is being unconstitutionally applied, the record must contain evidence of the particular facts which cause the unconstitutional application of that statute. Thus, the trial court erred when it dismissed Appellees' indictments for this reason.'"
7	Gough v. Triner	2006 Ohio 3522	June 28, 2006	Ohio App. 7 Dist.	¶ 26	"In the eyes of the law, marriage is a special status which confers many rights and benefits upon the parties to a marriage. R.C. 3113.31 gives unmarried couples the ability to receive a DVCPO. This legal status falls far short of the legal status accorded to marriage. Thus, R.C. 3113.31 does not violate the plain language of Article XV, Section 11 because the legal status it creates does not approximate the design, qualities, significance, or effect of marriage."
8	State v. Burk	843 N.E.2d 1254	Dec. 20, 2005	Ohio App. 8 Dist.	¶ 32	"We hold that Ohio's domestic violence statute, insofar as it defines 'family or household member' to include unmarried individuals who live as spouses, is constitutional and coexists in harmony with Issue 1."
8	Cleveland v. Voies	2006 Ohio 815	Feb. 23, 2006	Ohio App. 8 Dist.	¶ 1	"For the reasons explained in this court's opinion in State v. Burk, Cuyahoga App. No. 86162, 2005-Ohio-6727, we hold that Ohio's domestic violence statute is constitutional and coexists in harmony with Article XV, Section 11 of the Ohio Constitution."
8	State v. C. Douglas	2006 Ohio 2343	May 11, 2006	Ohio App. 8 Dist.	¶ 6	"Thus, for the reasons explained in this court's opinion in *Burk*, we hold that Ohio's domestic violence statute is constitutional and coexists in harmony with Section 11, Article XV, of the Ohio Constitution."
8	State v. Wain	2006 Ohio 4124	Aug. 10, 2006	Ohio App. 8 Dist.	¶¶ 9-10	"The record in the case at bar reflects that the trial court found the domestic violence statute unconstitutional and amended the indictment to assault based on a finding that Wain was neither married nor had a child with the victim. Based on our holding in *Burk*, this case is reversed and remanded to the trial court. The trial court's decision granting Wain's motion to dismiss is reversed, Wain's original

Appellate Cases Upholding Domestic Violence Statute (cont.)						
App. Dist.	**Case Name**	**Case No./ Citation**	**Date**	**Court**	**Page/ Paragraph #**	**Holding/Authority for Holding**
						indictment for domestic violence is reinstated, and this case is remanded."
8	State v. Kvasne	862 N.E.2d 171	Oct. 5, 2006	Ohio App. 8 Dist.	¶ 5	"This court previously has held that R.C. 2919.25 is neither incompatible with Issue 1 nor unconstitutional in light of it. Consequently, that portion of the trial court's order is reversed, and [the cause] is remanded for further proceedings . . . ." (citations omitted). *See also* ¶¶ 24-25.
8	State v. Brown	2006 Ohio 6267	Nov. 30, 2006	Ohio App. 8 Dist.	¶ 47	"In *State v. Burk*, 164 Ohio App.3d 740, 2005 Ohio 6727, 843 N.E.2d 1254, this court found that Ohio's domestic violence statute is neither incompatible with, nor unconstitutional in light of, Issue 1 . . . The issue is presently pending in the Supreme Court of Ohio, and unless and until this court is reversed by the Supreme Court, we follow our precedent." (citations omitted).
9	State v. Nixon	845 N.E.2d 544	Jan. 11, 2006	Ohio App. 9 Dist.	¶ 16	"[W]e find that Nixon failed to meet his burden of establishing unconstitutionality."
10	State v. Rodgers	850 N.E.2d 90	Mar. 30, 2006	Ohio App. 10 Dist.	¶ 18	"The Ohio domestic-violence statute does not conflict with Section 11, Article XV, Ohio Constitution."
11	State v. Jenson	2006 Ohio 5169	Sept. 29, 2006	Ohio App. 11 Dist.	¶ 33	"In our view, 'living as a spouse' under R.C. 2919.25, while nominally involving a relationship which might be factually comparable to marriage, was not enacted with an intent to approximate a de jure marriage nor does the legal status it affords approximate marriage in fact."
12	State v. Carswell	2005 Ohio 6547	Dec. 12, 2005	Ohio App. 12 Dist.	¶ 21	"We conclude that appellee cannot overcome the presumption of constitutionality accorded R.C. 2919.25. R.C. 2919.25 and Section 11, Article XV are reconcilable. Under a fair interpretation, R.C. 2919.25 does not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effect of marriage.'"

Appellate Cases Striking Down Domestic Violence Statute						
App. Dist.	**Case Name**	**Case No./ Citation**	**Date**	**Court**	**Page/ Paragraph #**	**Holding/Authority for Holding**
2	State v. K. Ward	849 N.E.2d 1076	Mar. 24, 2006	Ohio App. 2 Dist.	¶ 36	"We conclude that the 'person living as a spouse' provision of the domestic-violence statute, R.C. 2919.25(F)(1)(a)(i), does violate the Defense of Marriage Amendment."
2	State v. Dixon	2006 Ohio 1584	Mar. 31, 2006	Ohio App. 2 Dist.	¶¶ 2-3	"We recently held that R.C. 2919.25 is unconstitutional as it relates to cohabiting partners pursuant to the Marriage Amendment, Article XV, Sec. 11 of the Ohio Constitution. The appellant's assignment of error is Overruled." (citation omitted).
2	State v. Phillips	2006 Ohio 1607	Mar. 31, 2006	Ohio App. 2 Dist.	¶ 2	"We have recently agreed with Phillips' contention in *State v. Karen Ward*, Greene App. No. 05-CA-75. The appellant's assignment of error is sustained. Nothing precludes the State from charging Phillips with assault pursuant to R.C. 2903.13(A)."
2	State v. Peterson	2006 Ohio 1816	Apr. 7, 2006	Ohio App. 2 Dist.	¶ 3	"The State's assignment of error is overruled upon the authority of *State v. Ward* . . . . Based upon our reasoning in that opinion, we agree with the trial court's conclusion that the extension, in R.C. 2919.25(F)(1)(a)(i), of the protections of the Domestic Violence statute, to 'a person living as a spouse' violates the Defense of Marriage amendment to the Ohio Constitution, Article XV, Section 11." (citation omitted).
2	State v. Maddox	2006 Ohio 2127	Apr. 18, 2006	Ohio App. 2 Dist.	¶ 5	"For the reasons set forth in *State v. Ward* (March 24, 2006), Greene App. No. 2005-CA-75 . . . , we agree with Maddox that the extension of the provisions of the Domestic Violence statute to 'a person living as a spouse' does violate the Defense of Marriage amendment. The State does not dispute Maddox's contention that he is being prosecuted for Domestic Violence upon the theory that his alleged victim, Rose Kelly, to whom he is not married, is a person living as a spouse. Accordingly, we conclude that the trial court erred when it denied Maddox's motion to dismiss."

Appellate Cases Striking Down Domestic Violence Statute (cont.)						
App. Dist.	**Case Name**	**Case No./ Citation**	**Date**	**Court**	**Page/ Paragraph #**	**Holding/Authority for Holding**
2	State v. McIntosh	2006 Ohio 1815	Apr. 27, 2006	Ohio App. 2 Dist.	¶ 2	"We recently held that R.C. 2919.25(A) violates the Marriage Amendment, Article XV, Section 11, to the extent the statute provides that a 'person living as a spouse' includes one 'who is otherwise cohabiting with the offender.' Accordingly, the assignment of error is sustained. Since McIntosh's charge of violating a civil protection order was by committing the crime of domestic violence, that conviction must be set aside as well. Nothing precludes the State from filing assault charges against McIntosh and a charge of violating the civil protection order by committing the crime of assault upon the victim." (citation omitted)
2	State v. Steineman	2006 Ohio 1818	Apr. 27, 2006	Ohio App. 2 Dist.	¶ 4	"For the reasons set forth in *State v. Ward*, ... we agree with the trial court that the extension of the protections of the Domestic Violence statute, R.C. 2919.25(F)(1)(a)(i), to 'a person living as a spouse' violates the Defense of Marriage amendment to the Ohio Constitution, Article XV, Section 11." (citation omitted).
2	State v. Woullard	2006 Ohio 1804	Apr. 27, 2006	Ohio App. 2 Dist.	¶ 3	"The State's assignment of error is overruled upon the authority of *State v. Ward* . . . . Based upon our reasoning in that opinion, we agree with the trial court's conclusion that the extension, in R.C. 2919.25(F)(1)(a)(i), of the protections of the Domestic Violence statute, to 'a person living as a spouse' violates the Defense of Marriage amendment to the Ohio Constitution, Article XV, Section 11." (citation omitted).
2	State v. Bledsoe	2006 Ohio 2327	May 5, 2006	Ohio App. 2 Dist.	¶ 1	"Defendant-Appellant, Benny W. Bledsoe's conviction and sentence for the offense of domestic violence, R.C. 2919.25, is reversed and vacated on the authority of this court's judgment in *State v. Ward* . . . ." (citation omitted).
2	State v. Davis	2006 Ohio 2633	May 19, 2006	Ohio App. 2 Dist.	¶ 6	"This court has recently determined that, to the extent that R.C. 2919.25 extended its protection to 'a person living as a spouse,' it was rendered unconstitutional by the Defense of Marriage amendment, which became effective on December 2, 2004. For the reasons set forth in *Ward*,

Appellate Cases Striking Down Domestic Violence Statute (cont.)						
App. Dist.	**Case Name**	**Case No./ Citation**	**Date**	**Court**	**Page/ Paragraph #**	**Holding/Authority for Holding**
						the state's argument is without merit." (citation omitted).
2	State v. Robinson	2006 Ohio 2650	May 19, 2006	Ohio App. 2 Dist.	¶ 6	"This court has recently determined that, to the extent that R.C. 2919.25 extended its protection to 'a person living as a spouse,' it was rendered unconstitutional by the Defense of Marriage amendment, which became effective on December 2, 2004. For the reasons set forth in *Ward*, the state's argument is without merit." (citation omitted).
2	State v. James	2006 Ohio 3650	July 14, 2006	Ohio App. 2 Dist.	¶ 6	"The parties are making the same arguments that were made in *State v. Ward* . . . . We follow our decision in that case, overrule the State's sole assignment of error, and affirm." (citation omitted).
2	State v. Wagoner	2006 Ohio 3760	July 21, 2006	Ohio App. 2 Dist.	¶ 2	"In a single assignment, Wagoner contends the statute as applied to him in this case is unconstitutional. We agree."
2	State v. D. Ward	2006 Ohio 3761	July 21, 2006	Ohio App. 2 Dist.	¶ 6	"This court has recently determined that, to the extent that R.C. 2919.25 extended its protection to 'a person living as a spouse,' it was rendered unconstitutional by the Defense of Marriage amendment, which became effective on December 2, 2004. For the reasons set forth in *Ward*, the State's argument is without merit." (citation omitted).
2	State v. Newman	2006 Ohio 4160	Aug. 11, 2006	Ohio App. 2 Dist.	¶ 6	"This court has recently determined that, to the extent that R.C. 2919.25 extended its protection to 'a person living as a spouse,' it was rendered unconstitutional by the Defense of Marriage amendment, which became effective on December 2, 2004. For the reasons set forth in *Ward*, Newman's argument is meritorious." (citation omitted).
3	State v. McKinley	2006 Ohio 2507	May 22, 2006	Ohio App. 3 Dist.	¶ 24	"Because the General Assembly has recognized the legal status of cohabitants through R.C. 2919.25, the statute is unconstitutional as applied to heterosexual couples who cohabit and have not parented any children together."
3	State v. Shaffer	2006 Ohio 2662	May 30, 2006	Ohio App. 3 Dist.	¶¶ 10, 12	"We have recently addressed this argument in *State v. McKinley*, Logan App. No. 8-05-14, 2006-Ohio-2507, and found that the Domestic Violence Statute is unconstitutional when applied to

Appellate Cases Striking Down Domestic Violence Statute (cont.)						
App. Dist.	**Case Name**	**Case No./ Citation**	**Date**	**Court**	**Page/ Paragraph #**	**Holding/Authority for Holding**
						individuals in Shaffer's position. . . . Therefore, in accordance with our ruling in *McKinley*, Shaffer's first assignment of error is sustained."
3	State v. Logsdon	2006 Ohio 2938	June 12, 2006	Ohio App. 3 Dist.	¶ 27	"We conclude that the 'person living as a spouse' provision of R.C. 2919.25 does violate the Defense of Marriage Amendment."

Appellate Cases Constitutionality of Domestic Violence Statute Raised But Not Addressed						
App. Dist.	**Case Name**	**Case No./ Citation**	**Date**	**Court**	**Page/ Paragraph #**	**Holding/Authority for Holding**
8	State v. Williams	2006 Ohio 6281	Nov. 30, 2006	Ohio App. 8 Dist.	¶ 1	"Although Williams and the victim were unmarried and cohabited, we found that the victim also qualified as a 'family or household member' because she and Williams had a child together. Consequently, it is not necessary to address the constitutional issue presented by Williams."

Appellate Cases Constitutionality of Domestic Violence Statute Procedurally Barred						
App. Dist.	**Case Name**	**Case No./ Citation**	**Date**	**Court**	**Page/ Paragraph #**	**Holding/Authority for Holding**
2	State v. Puckett	2006 Ohio 1127	Mar. 10, 2006	Ohio App. 2 Dist.	¶¶ 12-13	"Defendant points out in his Reply Brief that, shortly after he entered his guilty pleas on March 7, 2005, the same trial court judge held R.C. 2919.25 unconstitutional for the reasons on which Defendant relies. Perhaps the court would have held likewise had Defendant Puckett raised the issue. However, that the trial court so found in *Steineman* does not make the alleged error "obvious" for purposes of *Barnes*. To be obvious, the nature and effect of the error must be manifestly apparent and undeniable, not merely a basis for contention. That is not the case here. Defendant Puckett entered pleas of guilty to all the charges against

Appellate Cases **Constitutionality of Domestic Violence Statute Procedurally Barred (cont.)**						
App. Dist.	**Case Name**	**Case No./ Citation**	**Date**	**Court**	**Page/ Paragraph #**	**Holding/Authority for Holding**
						him, and a guilty plea is a complete admission of the defendant's guilt. For that reason, and because the alleged plain error is not one which was obvious, we believe the sound and orderly administration of justice supports an exercise of our discretion to decline to review the error assigned." (citations omitted).
2	State v. Pelfrey	2006 Ohio 1605	Mar. 31, 2006	Ohio App. 2 Dist.	¶ 3	"The State argues the Marriage Amendment does not render R.C. 2919.25(A) unconstitutional and in any event it has no application to Pelfrey since his conduct and conviction preceded the effective date of the Marriage Amendment. . . . We agree[.]"
2	State v. Hill	2006 Ohio 1811	Apr. 7, 2006	Ohio App. 2 Dist.	¶ 6	"[Hill] has waived this argument [a constitutional challenge to the domestic violence law, based on the Marriage Amendment] on appeal."
12	State v. Bryant	2005 Ohio 6855	Dec. 27, 2005	Ohio App. 12 Dist.	¶¶ 9-10	"Appellant also argues that his counsel should have informed him that Section 11, Article XV of the Ohio Constitution, Ohio's 'Defense of Marriage' amendment, might render the domestic violence statute unconstitutional as applied to him. However, this court recently ruled that Section 11, Article XV does not render the domestic violence statute unconstitutional as applied to individuals such as appellant, who was unmarried but cohabiting with the victim at the time of the crime. Therefore, we reject appellant's argument that his trial counsel was ineffective for failing to inform him of a potential defense. Because the defense appellant refers to is not a valid defense, there was no prejudice." (citation omitted).

* The absence of a written opinion in these cases, along with a certain opacity in the relevant appellate decision, leaves it unclear exactly how the trial court disposed of the constitutional issue before it. But because the defendant was convicted under the domestic violence statute, the statute (I am assuming) could not have been struck down as unconstitutional.