

Unlikely Bedfellows: The Intersection Between The Defense of Marriage Act(s) and Domestic Violence Prosecution

When President Bill Clinton signed the federal Defense of Marriage Act (“DOMA”)¹ into law on September 20, 1996, he released a statement to the media making clear that he opposed discrimination against gay and lesbian citizens, and he further attempted to delineate “what this legislation does and does not do.”² Specifically, he noted that DOMA only confirmed the states’ rights to regulate same-sex marriage and defined the terms “marriage” and “spouse” for the purposes of federal law.³ However, he also expressed an underlying fear of how this legislation might be abused:

I also want to make clear to all that the enactment of *this legislation should not. . . be understood to provide an excuse for discrimination, violence or intimidation against any person on the basis of sexual orientation.*⁴

As President Clinton’s comment foreshadows, this legislation has been used as “an excuse for. . . violence,” although probably not in ways he imagined.

Soon after the passage of the federal DOMA, states quickly began passing “mini-DOMAs,” state-enacted statutes mirroring the federal legislation, as well as state constitutional

¹ Defense of Marriage Act, Pub. L. No. 104-199 (HR 3396) (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). Chapter 1, Section 7 reads:

§ 7. Definition of “marriage” and “spouse”

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

Chapter 28, Section 1738C reads:

§ 1738C. Certain acts, records, and proceedings and the effect thereof

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C.

² President on Signing Same Gender Marriage Ban 09/20/1996, 1996 WL 533626 (Sept. 22, 1996).

³ *Id.*

⁴ *Id.* (emphasis added).

amendments prohibiting same-sex marriages.⁵ Ironically, the federal and state DOMA legislation, along with state constitutional “marriage amendments,” have been used *as a defense* by abusers in domestic violence cases. These domestic violence cases, which ironically are not limited to domestic violence between same-sex partners, show how a seemingly “protective” body of legislation can have unintended, adverse consequences.

This paper analyzes how the language of domestic violence statutes, interpreted through various heterosexual marriage protectionist laws (e.g., DOMA, state mini-DOMAs, and state constitution “marriage amendments”⁶), creates legal loopholes through which abusers attempt to avoid prosecution. This unintentional by-product of the “Defense of Marriage” legislation may end up being a blessing in an ugly disguise, by leading to the revision of ineffective domestic violence statutes. Rather than creating a greater gulf between same-sex marriage proponents and opponents, this particular misapplication of protectionist laws may bridge between the two otherwise adversarial factions for the benefit of domestic abuse prevention statutes.⁷

Part I of this paper traces the origins of heterosexual marriage protectionist laws, like the Defense of Marriage Act and mini-DOMAs, in the social and political context of the past ten years. Part II describes variations in domestic violence statutes and highlights problematic language, which creates loopholes for domestic violence prosecution. Part III discusses conflicting opinions in Ohio as related to the constitutionality of that state’s domestic violence statute after Ohio passed a restrictive marriage amendment. These opinions demonstrate the

⁵ See e.g., Peter Hay, *Recognition of Same-Sex Relationships in the United States*, 54 AM. J. COMP. L. 257, 257-65 (2006) (discussing the current status of same-sex marriage and civil union recognition between states and the federal government).

⁶ Different sources refer to this general body of legislation in a variety of ways, including “anti-same-sex marriage laws,” “gay codes,” and “preservation of marriage laws”; however, this paper will refer to these statutes and amendments collectively as heterosexual marriage protectionist laws. Although a cumbersome term, it is somewhat less value-laden than the analogous terms.

⁷ See, e.g., Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WILLIAM & MARY L. REV. 1841, 1878 (2006) (“Despite their fervent opposition to same-sex couples being allowed to marry, the religious Right’s leaders indicated that same sex couples should be allowed to benefit from a [domestic violence] law that required a spouse-like relationship.”).

exploitation of legal loopholes found at the intersection between that state's domestic violence statute and its "Marriage Amendment." Part IV argues that the misuse of DOMA-like statutes and amendments by abusers forces legislatures to strengthen and improve domestic violence statutes—or risk freeing abusers. Ironically, although these invidious legal loopholes grew out of the same-sex marriage controversy, the revised domestic violence statutes tend to protect all victims, regardless of their sexuality. Finally, Part V concludes by discussing pending and potential legislation regarding domestic violence.

I. The Defense of Marriage Act and its Offspring, 1996-2006

*The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit. The courts in Hawaii have rendered a decision loud and clear. They have told the lower court: You shall recognize same-sex marriages. What more does it take, America? What more does it take, my colleagues, to wake up and see that this is an issue being shouted at us by extremists intent, bent on forcing a tortured view of morality on the rest of the country?*⁸

In 1993, the Justices of the Hawaii Supreme Court shook the nation when they held in *Baehr v. Lewin*⁹ that Hawaii's marriage statute,¹⁰ which at the time obliquely limited marriage to one man and one woman, was presumed unconstitutional on equal protection grounds.¹¹ According to a plurality of the Justices, three homosexual couples who were denied marriage licenses were free to press their equal protection claim,¹² but this court went to great lengths to distance itself from the appearance of endorsing same-sex marriage:

[W]e do not believe that a right to same-sex marriage is so rooted in the traditions

⁸ 142 CONG. REC. 7480, 7482 (1996) (statement of Rep. Robert Barr).

⁹ 852 P.2d 22 (Haw. 1993).

¹⁰ Haw. Rev. Stat. § 572-1 (1985). At the time, the statute read in relevant part:

“Requisites of valid marriage contract. In order to make valid the marriage contract, it shall be necessary that: . . . (7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the *man and woman* to be married . . .” *Id.* (emphasis added).

¹¹ *Baehr*, 852 P.2d at 67 (Haw. 1993).

¹² *Baehr*, 852 P.2d at 57 (Haw. 1993).

and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.¹³

The Hawaiian high court remanded the case to the trial court on the equal protection claim; yet, this ruling created a firestorm of reaction. Headlines across the country sounded alarms of imminent legalization of gay and lesbian marriages, often inaccurately describing the impact of the court's decision.¹⁴ Same-sex marriage quickly became one of the hottest political controversies of the decade, with a U.S. Congressman on the conservative side crying that "[t]he very foundations of our society are in danger of being burned,"¹⁵ and a gay rights activist recognizing that "we're at a real tug of war stage [over gay rights]. . . . This same-sex marriage thing is throwing gasoline into the fire and it's likely to explode."¹⁶

On a national level, the same-sex marriage debate after the Hawaii ruling centered on whether one state must recognize another's same-sex marriages under the U.S. Constitution's Full Faith and Credit Clause.¹⁷ In the country's increasingly conservative political climate came the Defense of Marriage Act, the explicit purpose of which reads:

H.R. 3396, the Defense of Marriage Act, has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.¹⁸

¹³ *Id.*

¹⁴ See, e.g., Joan Biskupic, *Hawaii Court Rules Gays Can Marry*, BUFFALO NEWS, May 7, 1993, at A9; *Hawaiian Court Advances Gay Marriages*, ST. LOUIS POST-DISPATCH, MAY 9, 1993, at 06A.

¹⁵ Barr, *supra* note 8.

¹⁶ Bettina Boxall, *Hawaii Justices Open Door to Legalizing Gay Marriages*, L.A. TIMES, Mar. 26, 1995, at A1 (quoting Los Angeles attorney and gay rights activist Thomas F. Coleman).

¹⁷ U.S. CONST. art. IV, § 1.

¹⁸ H.R. Rep. No. 104-664, at *1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 (hereinafter *Report*).

The House of Representatives Report on the Defense of Marriage Act provides a surprisingly candid look at the context and fears that led to the introduction and passage of this federal legislation.¹⁹ As the authors of this Report lamented, “the gay rights organizations and lawyers driving the Hawaiian lawsuit have made plain that they consider Hawaii to be only the first step in a national effort to win by judicial fiat the right to same sex ‘marriage.’ And the primary mechanism for nationalizing [same-sex marriage] will be the Full Faith and Credit Clause”²⁰ Representative Henry Hyde, in a “Markup Session” for DOMA, commented: [Same-sex marriage] trivializes the legitimate status of marriage and demeans it by putting a stamp of approval . . . on a union that many people . . . think is immoral.”²¹ To combat this seemingly imminent threat of same-sex marriage coming from the state courts, Congress passed the Defense of Marriage Act, which was signed into law on September 21, 1996.²²

On the heels of the federal DOMA, almost every state passed either a mini-DOMA or a similar statute, and many modified their state constitutions to effectively prohibit the legal recognition of same-sex unions.²³ The first wave of this heterosexual marriage protectionist legislation, the mini-DOMAs, immediately followed on the heels of the *Baehr* decision in Hawaii and was concurrent with the federal DOMA. A significant number of the first wave

¹⁹ *Id.* at 2906.

²⁰ *Id.* at 2911. *See generally*, Hay, *supra* note 5.

²¹ *Id.* at 2920 (citing “Markup Session: H.R. 3396, the Defense of Marriage Act,” Committee on the Judiciary, Subcommittee on the Constitution, 104th Cong., 2d Sess. 87 (May 30, 1996)).

²² Pub. L. 104-199, 100 Stat. 2419 (1996) (codified as 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

²³ For a state-by-state comparison of DOMA statutes and “Marriage Amendments,” see The Heritage Foundation’s Assessment of Language Used in State Statutes, <http://www.heritage.org/Research/Family/Marriage50/Dataforall50States.cfm> (last visited Nov. 28, 2006). According to this website, and supported by a review of legal research resources:

Taking a cue from the passage of the federal Defense of Marriage Act (DOMA) in 1996, many states moved to protect marriage in their state codes in the late 1990s. While all of these states adopted language similar to the federal DOMA, there is some variation. . . . Examples of states with strong marriage statutes are Alabama, Georgia, Michigan, and Ohio. States with weaker marriage statutes include Delaware, Illinois, Iowa, Maine, South Dakota, and Vermont. Some states had already defined marriage in their state statutes prior to the passage of the federal DOMA. These states are Maryland, New Hampshire, Utah, Wisconsin, and Wyoming. *Id.*

mini-DOMAs were passed by state legislatures in the late 1990s.²⁴ Some state statutes followed the federal DOMA pattern, while other states, like Ohio, Georgia, and Alabama, attempted to create exceptionally strong and far-reaching DOMA-like statutes.²⁵

In 2003, when the Supreme Judicial Court of Massachusetts decided a controversial same-sex marriage case, *Goodridge v. Department of Public Health*,²⁶ a second wave of more virulent heterosexual marriage protectionist legislation was launched.²⁷ In *Goodridge*, the Supreme Judicial Court held, “. . . that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”²⁸ The fear of impending doom at the hands of the “liberal” judiciary²⁹ led to a rash of state “marriage amendments” which were introduced and, with one exception, passed in the 2004, 2005, and 2006 elections across the country.³⁰

For the purposes of the loopholes created by the federal DOMA and the mini-DOMAs, the relatively innocuous definitions of “marriage” and “spouse”³¹ are considerably more problematic than whether one state must recognize another state’s issues of same-sex unions.³²

The House Report on DOMA notes that “the word ‘marriage’ appears in more than 800 sections of federal statutes and regulations, and the word ‘spouse’ appears more than 3,100 times.”³³

²⁴ *Id.* Arizona, Pennsylvania, Tennessee, and other states passed mini-DOMA statutes in 1996. Others followed soon thereafter.

²⁵ *Id.* See, e.g., Ohio Rev. Code Ann. § 3101.01(C)(3), which states: “The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state”

²⁶ 798 N.E.2d 941 (Mass. 2003).

²⁷ For example, Georgia, Kentucky, Louisiana, Michigan, Missouri, and Ohio passed constitutional amendments in 2004.

²⁸ *Id.* at 969.

²⁹ See, e.g., Brothers in Arms: Gay Marriage in Texas, THE ECONOMIST, Oct. 29, 2005, at ___ (“Even with a constitutional amendment, Texan manhood might not be safely protected from the liberal judiciary’s impositions.”).

³⁰ Of eight amendments on the ballots, only Arizona’s marriage amendment did not pass in the 2006 election. All other state marriage amendments which have been introduced in their respective states have passed.

³¹ See 1 U.S.C. § 7 and *supra* note 1.

³² 28 U.S.C. § 1738C. The constitutionality of the state-to-state recognition of same-sex marriages is quite controversial, but that topic is beyond the scope of this discussion. Despite its apparent legal simplicity, the mere definitions can be more problematic. See e.g., United States v. Costigan, 2000 WL 898455 (D. Me. 2000) (noting in an unreported opinion that the definition of “cohabit as a spouse” as applicable to a criminal statute, 18 U.S.C. § 922(g)(9), creates considerable problems after DOMA).

³³ Report, *supra* note 18, at 2914.

Generally, neither of these common words is defined in federal law, which was troubling to the House Committee that prepared this Report.³⁴ The Committee focused on the lack of these definitions “if Hawaii does ultimately permit homosexuals to ‘marry,’”³⁵ but failed to be wary of unintended consequences on other statutes when it created these overly-narrow definitions.

II. Domestic Violence Statutes: Variations in Language

The implications of state marriage amendments and mini-DOMA definitions on domestic violence statutes vary between jurisdictions. Broadly defined, domestic violence is “a pattern of interaction that includes the use of physical violence, coercion, intimidation, isolation, and/or emotional, economic, or sexual abuse by one intimate partner to maintain power and control over the other intimate partner.”³⁶ However, the definition of exactly who qualifies as a “victim” differs by state. Similarly, the wording of the heterosexual marriage protectionist laws varies. Thus, the legal loopholes created by the intersection of these bodies of legislation are like moving targets against which legislatures are fumbling to protect their intentions.³⁷

Domestic violence statutes typically cover specified victims, ranging from people residing in the same home to spouses or ex-spouses. For example, victims under Tennessee’s domestic violence statute, Tenn. Code Ann. § 36-3-601 *et seq.*, include current or former spouses, people who live together or have lived together, who date or have dated, who have or had a sexual relationship, who are related by blood or adoption, who are related by marriage or formerly related by marriage, or who are the children of someone who fits any of the above descriptions.³⁸ It explicitly includes all persons who reside in the same house. Unlike some

³⁴ *Id.* at 2914.

³⁵ *Id.*

³⁶ Jo Ann Merica, *The Lawyer’s Basic Guide to Domestic Violence*, 62 TEX. B.J. 915, 915 (1999).

³⁷ *See e.g.*, Ohio 126th General Assembly, H.B. No. 161 (proposing to delete all references to “person living as a spouse” from Ohio’s domestic violence statutes, and revising to include “any person who is living with the offender”).

³⁸ Tenn. Code Ann. § 36-3-601(11)(A)-(F).

states, Tennessee does not limit domestic violence by the emotional or financial relationship between the parties, and specifically encompasses sexual or dating relationships as well as residence cohabitants.³⁹ Tennessee also includes people related by marriage or, notably, people who are formerly related by marriage, an unusual but potentially important distinction.⁴⁰ Compared to the victims listed in other states,⁴¹ Tennessee's victim definitions are broadly encompassing.

Compared to Tennessee, some states narrowly define victims for domestic violence statutes. For example, South Carolina unambiguously limited their designation of a "household member" to preclude protection of same-sex partners when that state revised its domestic violence statute in 1994.⁴² Furthermore, South Carolina's statute requires an intimate relationship, and effectively excludes parties with dating rather than cohabiting relationships.⁴³ Similarly, Colorado's statute explicitly defines domestic violence to require an action "against a person with whom the actor is or has been involved in an intimate relationship."⁴⁴ A third variation among many is Virginia's wordy, but ultimately somewhat narrow, definition.⁴⁵ Here, "family or household member" includes every variation of in-laws or step-families, but excludes

³⁹ *But see* § 36-3-601(11)(C), disallowing "fraternization between two (2) individuals in a business or social context."

⁴⁰ *See* Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. POL'Y REV. 93, 94 (discussing *Orellana v. Escalante*, 653 N.Y.S.2d 992 (App. Div. 1997) (holding that court did not have jurisdiction to grant an order of protection to former step-daughter)).

⁴¹ Discussed *infra*.

⁴² S.C. Code Ann. § 20-4-20(b) states: "(b) 'Household member' means: (i) a spouse; (ii) a former spouse; (iii) persons who have a child in common; (iv) a male and female who are cohabiting or formerly cohabited."

⁴³ *Id.*

⁴⁴ Colo. Rev. Stat. § 18-6-800.3(2).

⁴⁵ Va. Code Ann. §16-1-228:

"Family or household member" means (i) the person's spouse, whether or not he or she resides in the same home with the person, (ii) the person's former spouse, whether or not he or she resides in the same home with the person, (iii) the person's parents, stepparents, children, stepchildren, brothers, sisters, half-brothers, half-sisters, grandparents and grandchildren, regardless of whether such persons reside in the same home with the person, (iv) the person's mother-in-law, father-in-law, sons-in-law, daughters-in-law, brothers-in-law and sisters-in-law who reside in the same home with the person, (v) any individual who has a child in common with the person, whether or not the person and that individual have been married or have resided together at any time, or (vi) any individual who cohabits or who, within the previous 12 months, cohabited with the person, and any children of either of them then residing in the same home with the person.

dating relationships.⁴⁶ Subsection (vi) of Virginia’s statute includes “an individual who cohabits or who, within the previous 12 months, cohabited with the person, and any children of either of them then residing in the same home with the person,” yet the statute fails to specify whether the term “cohabit” includes non-intimate parties like housemates.⁴⁷

For the purposes of the current discussion, a noteworthy variation among the definitions for the victims of domestic violence can be found in the Ohio Revised Code.⁴⁸ Like Virginia, dating relationships without cohabitation are excluded as victims. Ohio apparently intended to limit its domestic violence coverage to intimates and to parents and children of intimates, but on its face, the statute is quite broadly inclusive. Specifically, Ohio defines a “family or household member” as:

- (a) Any of the following who is residing or has resided with the offender:
 - (i) A spouse, a person living as a spouse, or a former spouse of the offender;
 - (ii) A parent or child of the offender, or another person related by consanguinity or affinity to the offender;
 - (iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.
- (b) The natural parent of any child of whom the offender is the other natural or is the putative other natural parent.⁴⁹

In subsection (2), a “person living as a spouse” is further defined as meaning “a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.”⁵⁰ This “person living as a spouse” provision of Ohio’s domestic violence statute, after the passage of that state’s Defense

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Ohio Rev. Code Ann. § 2919.25.

⁴⁹ Ohio Rev. Code Ann. § 2919.25(F)(1).

⁵⁰ Ohio Rev. Code Ann. § 2919.25(F)(2).

of Marriage Amendment,⁵¹ created a loophole through which a number of abusers have avoided prosecution, a controversy which ultimately will be decided in that state's Supreme Court.⁵²

III. Conflicting Opinions in the Courts of Ohio

*Only a union between one man and one woman may be a marriage valid in or recognized by [Ohio] and its political subdivisions. 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.*⁵³

In 2004, after the Supreme Judicial Court of Massachusetts rattled the country with its decision in *Goodridge*,⁵⁴ Ohio voters circulated initiative petitions to ward off this ostensible “attack” on heterosexual marriage.⁵⁵ One passionate supporter argued that Ohio needed to “stop the judicial activism that is going to force homosexual marriage on the unsuspecting public” and later noted that he even supported and endorsed the “criminalization of homosexuality.”⁵⁶ Despite warnings of the potential problems with Ohio's constitutional amendment “including loss of domestic-partner benefits enacted by [Ohio universities] . . . and problems with existing domestic-violence laws and probate procedures,”⁵⁷ Ohio's Defense of Marriage Amendment was passed with sixty-two percent (62%) of the voters in favor of the amendment.

In February 2005, a month after the passage of Ohio's Defense of Marriage Amendment, a tumultuous legal battle over the amendment's impact on existing laws began in the Cuyahoga County Common Pleas Court.⁵⁸ In this case, an unmarried man faced charges of felony domestic violence against his live-in girlfriend, stemming from an incident that occurred before the

⁵¹ Ohio Const. art. XV, § 11.

⁵² See *infra* Part III.

⁵³ Ohio Const. art. XV, § 11.

⁵⁴ See *supra* note 26.

⁵⁵ See generally *State v. Ward*, 849 N.E.2d 1076, 1080 (Ohio App. 2006).

⁵⁶ Alan Johnson, *Homosexuality Should Be a Crime, Proponent of State Issue 1 Says*, COLUMBUS DISPATCH, Oct. 9, 2004, at 5B.

⁵⁷ *Id.*

⁵⁸ See Jim Nichols, *Judge Pushes Changes to Domestic Violence Law Concern Follows Ruling Tied to Issue 1*, CLEVELAND PLAIN DEALER, Feb. 12, 2005, at B1.

amendment's December 2, 2004 effective date.⁵⁹ Attorneys from the Cuyahoga County Public Defenders Office moved the trial court to dismiss the charges on the basis that Ohio's domestic violence statute, Ohio Rev. Code § 2919.25, was unconstitutional in light of the state's new Marriage Amendment. Although Common Pleas Court Judge Stuart Friedman ultimately denied the motion to dismiss, he did so only on a procedural flaw of retroactive application.⁶⁰ Judge Friedman "admitted disappointment in having to duck the larger questions. 'At some point, either this judge or some other judge . . . is going to have to make a decision [about the issue]. . . . [I]n one sense, I'm a little upset that I'm not the one doing it, now.'"⁶¹

A little over a month later, Judge Friedman was given a second chance to rule on whether Ohio's new Marriage Amendment rendered the domestic violence statute unconstitutional.⁶² In that case, Frederick Burk was indicted on a single count of domestic violence against his live-in girlfriend, Barbara Sanders.⁶³ His attorney from the Cuyahoga County Public Defenders' Office successfully (in relevant part) moved the trial court to dismiss the charges on the basis that Ohio's domestic violence statute⁶⁴ was unconstitutional in light of the newly enacted Marriage Amendment.⁶⁵ Specifically, his counsel argued that the "living together as a spouse" provision of the statute became unconstitutional after the passage of the Defense of Marriage Amendment.⁶⁶ The trial court judge dismissed the domestic violence charge, amending the

⁵⁹ *Id.* The names of the parties and/or caption of this earliest case do not appear in the Nichols article.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Ohio v. Burk*, Court of Common Pleas, Greene County, T.C. Case No. 05-CR-0269. *See Ohio v. Burk*, 843 N.E.2d 1254, 1255 (Ohio App. 2005) (hereinafter *Burk*) (overruling the trial court's holding that the domestic violence statute was unconstitutional). *See generally* Brian Albretch, *Issue 1 Conflicts with Domestic Abuse Law, Judge Says Marriage Amendment Makes Portion of Law Unconstitutional, He Rules*, CLEVELAND PLAIN DEALER, at A1.

⁶³ *Burk*, 843 N.E.2d 1254, 1255.

⁶⁴ Ohio Rev. Code § 2919.25.

⁶⁵ *Burk*, 843 N.E.2d 1254, 1255.

⁶⁶ *Id.*

indictment to a lesser included charge of assault.⁶⁷ After the trial for *Ohio v. Burk*, Common Pleas Court Judge Stuart Friedman expressed his concern about adverse consequences resulting from his decision, but he “emphasized that anyone who assumed the ruling was based on any kind of personal, legal, or social agenda would be wrong. And following the law . . . can sometimes mean taking a path to some unfamiliar or even frightening places.”⁶⁸

In response to the controversial trial court decision in *Burk*, the executive director of the Domestic Violence Center in Cleveland pointed out that the problems with Ohio’s domestic violence statute needed to be resolved, but “the troubling part, until the state figures out how to address these unintended consequences [of the amendment], is that a victim can’t avail themselves [sic] of the full protection of the domestic violence law.”⁶⁹ Lewis Katz, a law professor at Case Western Reserve University, predicted that more defense lawyers would raise this constitutional question in domestic violence cases, and remarked that he expected to see “judges bending over backwards to save the domestic violence statute from such attacks.”⁷⁰ Katz’s predictions and expectations were quickly proven true.⁷¹

The first sentence of Ohio’s Defense of Marriage Amendment clearly states a prohibition of same-sex marriages in the State.⁷² The second sentence, however, is broader and less directly focused on same-sex relationships.⁷³ Governor Bob Taft, as well as other Ohio lawmakers,

⁶⁷ *Id.*

⁶⁸ Albretch, *supra* note 62, at A1.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *See, e.g.*, *State v. Ward*, 849 N.E.2d 1076 (Ohio App. 2006) (holding the domestic violence statute was rendered unconstitutional by the Marriage Amendment) *accepted for review*, 852 N.E.2d 187 (Ohio 2006); *State v. Carswell*, 2005-Ohio-6547 (Ohio App. 2005) (holding that the appellee did not overcome the presumption of domestic violence statute’s constitutionality) *accepted for review*, 846 N.E.2d 533 (Ohio 2006); *State v. Goshorn*, 2006 WL 1495256 (Ohio App. 4 Dist. May 23, 2006) (holding the domestic violence statute is constitutional as written); *City of Cleveland v. Voies*, 2005 WL 1940135 (Ohio Mun. March 23, 2005) (holding the unconstitutional provision in the statute is severable from the rest of the statute).

⁷² Ohio Const. art. XV, § 11 (“Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions.”).

⁷³ *Id.* (“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.”).

warned voters against this overly broad constitutional amendment which could lead to legal loopholes in existing statutes.⁷⁴ In an official statement, the Governor cautioned that the second sentence “is an ambiguous invitation to litigation that will result in unintended consequences There will be as many interpretations of the words, ‘[i]ntends to approximate the design, qualities, significance or effect of marriage,’ as there are judges in the state of Ohio.”⁷⁵ The interpretations of the domestic violence statute’s “person living as a spouse” provision, and whether this provision “intends to approximate the design, qualities, significance or effect of marriage” resulted in *nearly* as many interpretations as there are judges in the state of Ohio, to intentionally exaggerate and paraphrase the Governor’s warning.⁷⁶

After two years of conflicting opinions—and expensive litigation—over whether Ohio’s Defense of Marriage Amendment rendered its domestic violence statute unconstitutional or not, the Ohio Supreme Court consolidated two conflicting cases for review, *State v. Ward*⁷⁷ and *State v. Carswell*.⁷⁸ In *Carswell*, the Court of Appeals of Ohio (12th District) held that the “person living as a spouse” provision of the domestic violence statute 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.”⁷⁹ In *Ward*, however, the Court of Appeals (2nd District) held that the relevant phrase in the domestic violence statute does violate the constitutional amendment, and explains that in their view, “a ‘person living as a spouse’ for the purposes of the domestic-violence statute is the sort of quasi-marital relationship that the

⁷⁴ See generally *Voies*, 2005 WL 1940135, at *5.

⁷⁵ *Id.* (citing Governor Bob Taft News Release of October 13, 2004).

⁷⁶ See *supra* note 71. As of Dec. 1, 2006, more than 20 domestic violence cases have been decided on the constitutionality or unconstitutionality of the statute after the Defense of Marriage Amendment. Some were dismissed against the abuser as a result of the decision in *State v. Ward*, 849 N.E.2d 1076 (Ohio App. 2006), discussed *infra*. Others followed *State v. Carswell*, 2005-Ohio-6547 (Ohio App. 2005), which held that the domestic violence statute’s language does not “approximate” a marriage. On Dec. 12, 2006, the Ohio Supreme Court heard oral arguments in a consolidated appeal of *Carswell* and *Ward*.

⁷⁷ 849 N.E.2d 1076.

⁷⁸ 2005-Ohio-6547.

⁷⁹ *Id.* at *3, ¶ 21.

Defense of Marriage Amendment was concerned with.”⁸⁰ Interestingly, the facts of these two cases differ in some potentially persuasive and important ways.

State v. Carswell is the prototypical domestic violence case with a repeat offending male abuser and a female victim.⁸¹ Not atypically, the abuser and victim were cohabitating rather than married.⁸² In February 2005, Michael Carswell was accused of pushing his live-in girlfriend Shannon Hitchcock to the floor by her neck and injuring her head, neck, and leg.⁸³ In March, on the heels of the *Burk* decision, Carswell moved to dismiss the charges against him by arguing that “the domestic violence statute was unconstitutional because it applied to unmarried, cohabiting individuals as if they were married individuals, thereby granting unmarried individuals a marriage-like status.”⁸⁴ The trial court granted his motion in part, amended the indictment for a lesser included offense, assault.⁸⁵ The State appealed the case.⁸⁶

The Court of Appeals in *Carswell* overruled the trial court, holding that the statute does not violate the Marriage Amendment. Specifically, the Court of Appeals explained:

The statute’s scope is very narrow; it defines the conduct that constitutes the crime of domestic violence, and sets forth categories of individuals considered potential victims under the statute. The statute classifies a cohabitant as one of many potential victims. We do not find that such classification creates a “legal status” for relationships between unmarried, cohabiting individuals. . . . Even if we construed [the statute] to create or recognize a “legal status for relationships of unmarried individuals,” the statute would still be constitutional because it does not “intend[] to approximate the design, qualities, significance, or effect of marriage.” . . . It does not give an unmarried individual the right to inherit from an intestate cohabitant, the right to make medical decisions on a cohabitant’s behalf, the right to file a joint tax return with a cohabitant, or any other of the host of rights associated with marriage. . . . The intent of the domestic violence statute is clear on its face: to protect all members of a household from

⁸⁰ *Ward*, 849 N.E.2d at 1082.

⁸¹ 2005-Ohio-6547 at *1, ¶ 2.

⁸² *Id.*

⁸³ Lawrence Budd, *Debate Continues on Domestic Violence, Defense of Marriage*, DAYTON DAILY NEWS, Apr. 15, 2005, at B4.

⁸⁴ *Carswell*, 2005-Ohio-6547 at *1, ¶ 3.

⁸⁵ *Id.* at *1, ¶ 4.

⁸⁶ *Id.* at *1, ¶ 5.

domestic violence by punishing those who commit domestic violence.⁸⁷

Therefore, the appellate court reversed the amended indictment and remanded the case to the Court of Common Pleas for further proceedings.⁸⁸

In contrast to *Carswell*, the perpetrator, victim, and decisions in *State v. Ward* are quite different.⁸⁹ In this case, the alleged abuser is a woman who was arrested and charged with one count of felony domestic violence.⁹⁰ The victim was Ward's live-in boyfriend, Fred Almonds, Jr.⁹¹ Like the alleged male abuser in *Carswell*, Ward moved to dismiss the charges against her claiming that the "person living as a spouse" language in Ohio's domestic violence statute violated the state's new Defense of Marriage Amendment.⁹² However, unlike *Carswell*, the charges against Karen Ward were dropped.⁹³ The State appealed the case.⁹⁴

Upholding the trial court's dismissal of *State v. Ward*, the Court of Appeals focuses on the weight given to an amendment of Ohio's constitution as compared to the weight given to a statute.⁹⁵ Here, the Court advises in dicta that "an amendment to the Ohio Constitution, once adopted, supersedes any preexisting provisions of the Constitution. In stating this obvious fact, we made no observations concerning the wisdom of the electorate in having adopted the amendment."⁹⁶ The court goes on to interpret whether a statute must "give all of the effects of marriage to a quasi-marital relationship before running afoul of the [Defense of Marriage]

⁸⁷ *Id.* at *3, ¶¶ 18-20.

⁸⁸ *Id.* at *3, ¶ 21.

⁸⁹ *Ward*, 849 N.E.2d 1076.

⁹⁰ *Id.* at 1077, ¶ 2.

⁹¹ *Id.* The rates of female on male domestic violence are beyond the scope of this paper. See generally Linda Kelly, *Disabusing the Definition of Domestic Abuse: How Women Batter Men and the Role of the Feminist State*, 30 FL. ST. U. L. REV. 791.

⁹² 849 N.E.2d at 1077, ¶ 3.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 1080, ¶ 18.

⁹⁶ *Id.* This subtle reminder may be a warning of the power which was wielded with the hasty constitutional amendment.

amendment,” the underlying argument in *Carswell*.⁹⁷ In *Ward*, however, the Court of Appeals concludes the “person living as a spouse” language of Ohio’s domestic violence statute “is the sort of quasi-marital relationship that the Defense of Marriage Amendment was concerned with.”⁹⁸

Finally, in *State v. Ward*, the Court of Appeals suggests about how Ohio’s domestic violence statute might be amended to “avoid running afoul of the Defense of Marriage Amendment.”⁹⁹ Specifically, the court suggests:

If the protections afforded by the statute were extended to all persons sharing residential quarters, that would present no constitutional problem, because an alleged victim who happens to be a quasi-spouse would be accorded the protection of the Domestic Violence statute, not by reason of being a quasi-spouse, but by reason of sharing the residence.¹⁰⁰

Interestingly, Judge Donovan’s dissenting opinion in *Ward* returns to the original purpose of the Defense of Marriage Amendment: “to prevent persons of the same sex from entering into a lawful marriage. It is the duty of the court, and its only proper purpose in the construction of constitutional provisions, to ascertain and give effect to the intent of the people.”¹⁰¹ Donovan would reinstate the indictment against Karen Ward. He suggests, like *Carswell*, that the domestic violence statute “is constitutional and may coexist in harmony with [Marriage Amendment].”¹⁰²

On December 12, 2006, the Supreme Court of Ohio heard oral arguments in the consolidated cases of *Ward* and *Carswell*, to resolve the debate over the legal loopholes inadvertently created at the intersection between Ohio’s Defense of Marriage Amendment and its

⁹⁷ *Id.* at 1080-81, ¶¶ 24-26. Compare to *Carswell*, 2005-Ohio-6547, at *P18-*P19.

⁹⁸ *Id.* at 1082, ¶ 33.

⁹⁹ *Id.* at 1082, ¶ 35.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1083-84, ¶ 40 (Donovan, J., dissenting).

¹⁰² *Id.* at 1084-85, ¶¶ 45-46 (Donovan, J., dissenting).

domestic violence statute.¹⁰³ To do so, the Justices will wade through no less than sixty-two (62) amicus curiae briefs filed in support of the parties.¹⁰⁴ Ohio's Defense of Marriage Amendment quagmire and its "ambiguous invitation to litigation"¹⁰⁵ might have served as a warning to other states considering constitutional amendments, but instead, the 2006 election saw seven more states pass constitutional amendments against same-sex marriages.¹⁰⁶

IV. Legal Loopholes: Blessings in an Ugly Disguise

The misuse of DOMA-like statutes and state constitutional "marriage" amendments by abusers for their own legal defenses may force legislatures to strengthen and improve domestic violence statutes—or risk freeing abusers. This unintentional by-product of the heterosexual marriage protectionist legislation may end up being a blessing in an ugly disguise. Rather than creating a greater gulf between the opposing sides in the same-sex marriage controversy, the misapplication of these overly broad laws and amendments may create a much-needed bridge between two generally adversarial factions in the form of updated and expanded domestic violence legislation.¹⁰⁷ Despite the explicit purpose of narrowing the realm of "legitimate" intimate relationships,¹⁰⁸ the marriage protection initiatives may cast a bright light on other areas of law which are in desperate need of revision in these changing times.¹⁰⁹

During the 2006 election with voters in eight states facing constitutional amendments to limit marriage to "one man and one woman," some opposition groups pointed to the litigation

¹⁰³ See Supreme Court of Ohio Case Information, *State of Ohio v. Michael Carswell*, http://www.sconet.state.oh.us/clerk_of_court/ecms/resultsbycasenumber.asp?type=3&year=2006&number=0151&myPage=search&bypartyname.asp (last visited March. 26, 2007.)

¹⁰⁴ *Id.*

¹⁰⁵ See Taft, *supra* note 75.

¹⁰⁶ Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin each passed its own version of a marriage amendment in the 2006 election. Only Arizona defeated a proposed marriage amendment in this election.

¹⁰⁷ See Colker, *supra* note 7.

¹⁰⁸ See, e.g., Ward, 849 N.E.2d at 1083-84, ¶¶ 39-40 (Donovan, J. dissenting) (discussing intentions behind Ohio's amendment).

¹⁰⁹ Discussed *infra*. See also Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93 (2005) (discussing the need for nationwide reform of domestic violence statutes).

chaos in Ohio in an attempt to dissuade voters from supporting the amendments.¹¹⁰ Despite somewhat stronger than expected opposition to the amendments, only the voters in Arizona rejected the proposed constitutional modifications.¹¹¹

Reminiscent of the early warnings expressed by Ohio's Governor Taft against that state's marriage amendment, other states now face problems with their own recently adopted heterosexual marriage protectionist amendments, which have created "ambiguous invitation[s] to litigation that will result in unintended consequences."¹¹² In some states, these amendments might affect the state's current domestic violence statutes; however, the Ohio domestic violence statute is unique in its "living as a spouse" language. A more compelling question is: "What unintended consequences will arise out of this body of 'defense of marriage' legislation?"¹¹³ Guessing the unintended consequences of DOMA-like legislation is a matter of "predicting the unpredictable."

New heterosexual protectionist legislation may adversely affect a wide range of statutes and legal agreements. For example, will Virginia's new marriage amendment affect its statutory end to alimony in a case where a recipient is "cohabiting in a relationship analogous to marriage for one year or more"?¹¹⁴ If Florida passes its "Marriage Protection Amendment" in 2008, will its prohibition of any "other union that is treated as marriage or the substantial equivalent thereof" affect the current employee and health benefits provided for domestic partners

¹¹⁰ See, e.g., Amy Worden, *Same-sex Partners Fear Losing Rights Ripples from PA Vote on Gay Marriage*, PHILA. INQUIRER, June 13, 2006, at A01 (warning Pennsylvania voters of the risks of a marriage amendment); Patrick McIlheran, *Experts and other States Say Benefits Aren't at Risk*, MILWAUKEE J. SENTINEL, Oct. 1, 2006, at J4 (arguing for a marriage amendment in Minnesota by holding up the Ohio example and saying essentially, "that will not happen here").

¹¹¹ See, e.g., Monica Davey, *Liberals Find Rays of Hope on Ballot Measures*, N.Y. TIMES, Nov. 9, 2006, at P16.

¹¹² See *supra* note 75.

¹¹³ For unintended consequences of same-sex marriage bans, especially in Ohio, see C. Susie Lorden, *The Law of Unintended Consequences: The Far-Reaching Effects of Same-Sex Marriage Ban Amendments*, 25 QUINNIPIAC L. REV. 211 (2006).

¹¹⁴ See Va. Code Ann. § 20-109.

regardless of gender or sexual preference?¹¹⁵ From the perspective of people who oppose heterosexual marriage protectionist legislation, the unintended consequences of this body of legislation could be far-reaching and destructive.

In the short-term, Ohio's legal loophole, created by the state's Defense of Marriage Amendment and which now hampers its domestic violence statutes, adversely affects the State's ability to prosecute abusers. However, the end result of this glitch is likely to be beneficial for domestic violence laws across the nation for a number of reasons. First, the contentiousness of the controversy over same-sex marriage puts the *national* spotlight on the problematic language of this particular domestic violence statute.¹¹⁶ This controversy over the loopholes created by the marriage amendment has inadvertently brought long-overdue attention to the domestic violence statutes of other states which are contemplating or have passed similar amendments.¹¹⁷ Greater awareness of the effectiveness (or ineffectiveness) of domestic violence statutes is the first step toward the constructive revision of those statutes.

Second, an increased awareness of the serious implications of excessively limiting language when defining "victims" under various domestic violence statutes may lead to a more inclusive redefinition of victims. Problematic definitions which need to be reconsidered include: the exclusion of same-sex partners from protection under domestic violence statutes,¹¹⁸ the exclusion of couples who are dating or in a sexual relationship but not residing together,¹¹⁹ the exclusion of unmarried cohabitants,¹²⁰ and the exclusion of household members in non-intimate

¹¹⁵ See generally, Florida Coalition to Protect Marriage, <http://www.florida4marriage.org/> (last visited Dec. 3, 2006) (sponsoring organization of the Florida amendment).

¹¹⁶ Ohio Rev. Code Ann. § 2919.25, and notably, the use of the term "a person living as a spouse."

¹¹⁷ See generally Smith, *supra* note 109; and McIlheran, *supra* note 110.

¹¹⁸ S.C. Code Ann. § 20-4-20(b) states: "(b) 'Household member' means: (i) a spouse; (ii) a former spouse; (iii) persons who have a child in common; (iv) a male and female who are cohabiting or formerly cohabited." South Carolina's statutory limitation on household members, discussed *supra* note 117, is unusual in its explicit limitation to "a male and female who are cohabiting."

¹¹⁹ *Id.*

¹²⁰ Ohio Rev. Code Ann. § 2919.25, as interpreted by *Ward*, 849 N.E.2d 1076.

relationships (*e.g.*, housemates).¹²¹ As suggested by the court in *State v. Ward*, “[i]f the protections afforded by the statute were extended to all persons sharing residential quarters, that would present no constitutional problem” in the state of Ohio—and likewise, would not be a constitutional problem in any other state which has a marriage amendment.¹²²

Third, providing domestic violence protection to all people sharing a household would expand the reach of domestic violence statutes in some states, yet would more appropriately address the changing family structures of this generation. Many of the domestic violence statutes were originally passed in a time when the traditional family unit was the norm, and the primary goal was to keep these traditional families intact.¹²³ More recently, “the domestic violence movement has attempted to refocus the goal from family cohesion to violence termination.”¹²⁴ With that shift, states must begin to recognize the prevalence of new victims, as well as new relationships between perpetrators, to reduce the lethality of the home and family, whoever that family may include and however they may conduct their personal affairs.

V. Pending Changes and Suggestions for Domestic Violence Legislation

On March 31, 2005, just three months after Ohio’s Defense of Marriage Amendment won the approval of voters, five representatives to the 126th General Assembly in Ohio proposed an amendment revising the domestic violence statute definitions of family and household members.¹²⁵ Namely, these legislators proposed replacing the “living as a spouse” language with “any person who is residing with the offender” in Ohio statutes which used the controversial language.¹²⁶ Will the suggested “residing with the offender” language open the floodgates to

¹²¹ Colo. Rev. Stat. § 18-6-800.3(2).

¹²² 849 N.E.2d at 1082, ¶ 35.

¹²³ *See, e.g.*, Smith, *supra* note 109, at 97.

¹²⁴ *Id.*

¹²⁵ H.B. 161, 126th Gen. Assem., Reg. Sess. (Ohio 2005). That bill is still under review in the General Assembly.

¹²⁶ *Id.* Notably, the amended version would still exclude dating partners from protection under domestic violence laws.

litigation and overburden the courts? Compared to the actual flood of litigation that has flourished in the wake of the *Ward* and *Carswell* cases,¹²⁷ this slight modification is more likely to return that state's litigation level to its pre-DOMA status.

In the wake of the Ohio DOMA/domestic violence debacle, suggestions to improve domestic violence statutes and protect against constitutionality problems with DOMA-like legislation include: 1) define victims and perpetrators based on their mutual living arrangements, erring on the side of over-inclusiveness rather than strict delimitation of victim types¹²⁸ or define by a measure of intimacy,¹²⁹ 2) include dating and sexual relationships without any cohabitation requirement, and 3) reconsider family relationships in light of current (and future) living patterns rather than the myth of the "traditional family" (*e.g.*, consider relationships like grandparents raising grandchildren). Although the intentions of state legislatures vary, politicians identified as "against same-sex marriage" are more palatable in today's cultural climate than legislators identified as "soft on domestic violence." Domestic violence statutes must be modified to become more inclusive to reflect the current diversity in living arrangements and to protect victims, at least until the "defense of marriage" trend subsides.

¹²⁷ Discussed *infra* at Part III.

¹²⁸ Compare to Va. Code Ann. § 16.1-228, *supra* note 45.

¹²⁹ S.C. Code Ann. § 20-4-20(b), *supra* note 43.