

The Honeymoon's Over

Cultural conservatives stumble legally in campaign to ban same-sex marriage.

BY MARC SPINDELMAN

They may not realize it yet, but cultural conservatives got some bad news in Ohio. Late in April the state Supreme Court agreed to hear *Ohio v. Carswell*, a case that asks whether the state's recent Marriage Amendment nullifies the legal protections currently afforded unmarried victims of domestic abuse.

Virtually no matter the court's answer, cultural conservatives will lose, setting back efforts in Ohio and elsewhere to pass and enforce anti-gay-marriage amendments, as well as the broader national project of which they're a part—the push to make the law an annex of traditional morality.

Virginia residents should find the case particularly interesting. Ohio's constitutional amendment, passed in November 2004, is considered one of the harshest because, in addition to banning same-sex marriage, it also bars state recognition of any legal status between unmarried individuals that smells like marriage. Virginia's proposed amendment, on the ballot this fall, sweeps just as broadly.

SHE'S NOT MY WIFE

Although the Marriage Amendment was sold publicly as a defense against the fearsome hypothetical "threat" of same-sex couples gaily married, *Carswell* actually involves old-school male-on-female domestic abuse. Michael Carswell was indicted in February 2005 on one count of domestic violence against Shannon Hitchcock, his live-in girlfriend. 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." In light of his two prior convictions for domestic abuse, Carswell was charged with a third-degree felony.

In court papers seeking to have the proceedings dismissed, Carswell staked out what was then a relatively novel legal proposition: The Marriage Amendment, he maintained, enjoined the state from prosecuting him for domestically abusing Hitchcock, with whom he was, according to the domestic-violence law's provi-

sions, "living as a spouse." The trial court credited his position, amending the charge to one of assault, but was reversed by a unanimous appellate panel. Carswell turned to the state Supreme Court.

To understand Carswell's basic argument, it's useful to put both the state's Marriage Amendment and its domestic-violence law in some context.

The Ohio Marriage Amendment is a sweeping piece of morals legislation. By design, it's an effort to leverage homophobia—in the form of the anti-gay sentiment roused by the Massachusetts Supreme Judicial Court's decision to recognize a constitutional right to same-sex marriage—in order to brand the Ohio Constitution with the broad imprint of traditional moral values.

The amendment begins with a traditional definition of marriage as the exclusive union of one man and one woman. But it then goes far, far beyond that to declare that no intimate relationship other than a traditional marriage shall be created or recognized as a relationship under law: "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." (Substitute "commonwealth" for "state," and Virginia's proposed amendment contains the same language.)

Interestingly, domestic-violence laws, including Ohio's, follow a similar conceptual trajectory from marriage to other relationships. These laws attack what used to be called simply wife beating, a practice that was once, not so very long ago, sanctioned under law as part of the right (and duty) of husbands to chastise their wives. Although wife beating was and is the classic image of domestic violence, it proved to be but one part of a much broader pattern of abuse that women suffered at the hands of men in intimate relationships. 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. Eventually, in a number of jurisdictions, Ohio among them, protections against domestic violence were extended to women and men in same-sex relationships—again, based on a wife-beating, hence marriage, model.

Bringing these two strands together, Carswell's position can be stated this way: The Marriage Amendment, which seeks to preserve the unique legal status of marriage, 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 on a marriage model. Therefore, the Marriage Amendment invalidates the domestic-violence law as applied to unmarried couples.

ABSOLUTELY ABSURD?

If this argument seems fanciful, many thanks are due to the cultural conservatives who backed the Marriage Amendment. They said, Don't worry.

Phil Burress, president of the Ohio group Citizens for Community Values, ran the Ohio Campaign to Protect Marriage, which spearheaded the drive for an amendment. He pooh-poohed concerns that it would eliminate parts of the domestic-violence law. Even after the amendment passed, he continued to insist 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."

The defensive posture struck an intuitive chord with listeners: What kind of "community values" initiative would help perpetrators, not victims, of domestic abuse?

An unmistakable answer came in legal papers that Burress' associate David Langdon, credited as the author of the Marriage Amendment, filed for Citizens for Community Values in *Ohio v. McIntosh*. Like *Carswell*, *McIntosh* involved a constitutional 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, Langdon's amicus brief maintains that the Marriage Amendment invalidates the domestic-violence law because, in giving unmarried partners the same legal protections that spouses as spouses get, it fails to recognize the unique status of the marital relationship.

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," 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."

Funny, those "absolutely absurd" hypotheticals don't look so absurd or so hypothetical anymore. (To some of us, they never did.)

By taking this position, conservative supporters of the Marriage Amendment have boxed themselves in. If the Ohio Supreme Court ultimately rejects the claim they've supported, it will set a powerful (and, from their perspective, troubling) precedent: that the Marriage Amendment's terms can, and in some instances should, be watered down.

This bodes ill, for example, for efforts cultural conservatives have instigated in *Brinkman v. Miami University*, a case seeking to overturn that Ohio university's decision to offer some unmarried couples the same domestic-partnership benefits provided for years to full-time faculty and staff who are married. If the *Carswell* court reads the Marriage Amendment narrowly 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? Isn't their central aim—providing health insurance to those who need it—also basic to human well-being?

More specifically, what sense would it make to say that the Marriage Amendment allows the state to expend resources on punishing and incarcerating perpetrators of domestic violence who aren't married to their victims, but that it can't help offset those same unmarried victims' health care costs as part of a domestic-partnership program? Beyond none. No legal system based on the rule of reason could properly support it.

JUST PLAIN UNCONSTITUTIONAL

As bad as it would be for cultural conservatives if the Ohio Supreme Court rejected the claim that the Marriage Amendment invalidated the domestic-violence law as applied to unmarried couples, it would be worse for them if it did not. Accepting that claim, along with its conclusion, compels the declaration—in *Carswell* or some future case—that the Marriage Amendment itself is unconstitutional.

For more than 30 years—at least since the U.S. Supreme Court's decision in *Eisenstadt v. Baird* (1972), freshly reaffirmed by *Lawrence v. Texas* (2003)—it's been settled federal constitutional law that the state cannot legitimately draw distinctions between married and unmarried couples for criminal law purposes—certainly not on traditional morality grounds. But there's no conceivable justification aside from traditional morality for Ohio not to recognize the existence of nonmarital intimate relationships as such, including their violent realities, through the domestic-violence law. Traditional morality alone is a constitutionally inadequate basis for differentiating between married and unmarried perpetrators—and victims—of domestic abuse.

Remarkably, of the dozens of state court judges in Ohio who have already heard and decided cases involving a Marriage Amendment attack on the domestic-violence law, only Judge James Celebrezze seems to have fully understood and accepted this point. As he concluded last year in *Phelps v. Johnson*, it's both irrational and unreasonable, hence unconstitutional, to distinguish among cases of domestic abuse based upon the marital status of the perpetrator and the victim. As his Phelps opinion puts it: "[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." Judge Celebrezze didn't cite either *Eisenstadt* or *Lawrence* as authority for this reasoning or its upshot—that the Marriage Amendment violates the U.S. Constitution—but he internalized and recapitulated their shared constitutional vision.

Judge Celebrezze got it exactly right in *Phelps*, and the Ohio Supreme Court should follow his lead. But whichever way the *Carswell* court comes out, it is poised to teach cultural conservatives a lesson the anti-domestic-violence movement has been teaching abusers for years: There's a price to pay for the moral hubris it takes to treat people as pawns in your own game.

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