

CRIMINAL LAW PROJECT  
Ms. Clyde Williams, Atty

By Phyllis:

I want to introduce to y'all, Ms. Clyde Williams. Clyde Williams is going to present Criminal Law as related to the transgender community.

Clyde Williams. I've known her for a very long time. She was the first President of the Bar Association for Human Rights, and she serves currently as the Chair of the Montrose Activity Center, which is an umbrella organization for the Houston area inclusive lesbian/gay and transgender community. Clyde and I have been friends for a long time. We've marched. We've been in people's faces, and we've been where we weren't wanted, and said things to people that needed to hear things said. She is a past president of the Harris County Criminal Lawyer's Association. She is certified in the State of Texas in criminal law, and she even ran for District Attorney in Harris County. I wish to introduce to you, Clyde Williams.

(NOTE: Ms. Williams outline was so complete that we published it instead of the transcript.)



FIRST INTERNATIONAL CONFERENCE ON  
TRANSGENDER LAW & EMPLOYMENT LAW

CRIMINAL LAW & PRACTICE REPORT

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Houston, Texas

1. Introduction

Throughout this wonderful country, America, where many of the world's people believe that Americans live in freedom, are laws that negate and criminalize behaviors which should be basic freedoms. The transgender community and any person who strays from the strictest and most limited sex categories of male and female can be subjected to criminal prosecution. America the enlightened. I think not. To be enlightened, Americans will begin to see sex, gender, sexuality and sexual preference as many parts of the individual, capable of developing in complex manners and modes and changing as the person transforms emotionally, intellectually and physically.

2. The stated objective of our committee was to survey the current status of criminal law and practice as it impacts on the lives of the transgender community. Our committee was surveyed as to the participants' personal objectives in discussing criminal law. We found that although each member of the committee conducted themselves as good, law abiding citizens each had a serious concern about whether or not they would ever be detained, investigated, arrested or jailed for violation of cross-dressing or rest room laws.

3. The purpose of criminal law in general is, according to this State's Penal Code:

a. To insure the public safety through (1) deterrent influence of penalties, (2) rehabilitation of the offender, and (3) punishment to prevent reoccurrences of the criminal behavior.

b. By definition and grading of offenses to give fair warning of what is prohibited and the consequences of violation.

c. To prescribe penalties that are proportionate to the seriousness of the offense and that permit recognition of differences and rehabilitation possibilities among individual offenders.

d. To safeguard conduct that is without guilt from condemnation as criminal.

e. To guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.

f. To define the scope of state interest in law enforcement against specific offenses to systematize the exercise of state criminal jurisdiction.

4. The bottom line and basic rationale for the existence for criminal law is to protect people and to protect property. And probably if we stopped there we would not have a problem. We would not face some of the problems that impact on the transgender community and basic freedoms. However, some see the purpose of criminal law as protecting our morals or sensibilities from being shocked. Herein lies the big bug-a-boo.

#### 5. Cross-Dressing Laws

It is impossible to tell how many states have laws that prohibit cross-dressing. Each city has its own ordinances. This, in effect, has the potential of criminalizing any pre-operative transgender appearing in public in clothing which does not match up with the in anatomy. There are also laws which criminalize basic

functions without any criminal intent such as using the rest room of the sex that does not match up with a person's anatomy. This criminalizes persons who are intentionally trying to avoid the potential conflict of using the rest room of their anatomical sex in clothing that does not match.

The historical purpose of cross-dressing laws is to discriminate against women. What possible purpose for dressing the sexes differently exists if there is no underlying intention to treat them differently? Appearance discrimination extended to include gays and transgenders.

Religious sources are origins of cross-dressing prohibitions. Some of the early western historical purpose of cross-dressing laws was to prevent criminals from disguising themselves as members of the opposite sex to elude law enforcement officers. Now the technology of disguise offers a multitude of costumes and characters so little purpose is served. The criminal's quick change to opposite his anatomical and psychological sex for escape has itself proven to prompt law enforcement scrutiny and cause the criminal's arrest.

What validity do cross-dressing laws have now? None, except to perpetuate discrimination.

6. How have the courts treated defendants in cross-dressing cases?

The defendant in City of Columbus v. Zanders, 266 N.E.2d 602, 25 Ohio Misc. 144, 54 Ohio Ops.2d 142 (1970), was arrested wearing women's clothing and makeup. The court dismissed finding that "a

person is not responsible for criminal conduct if at the time of such conduct as a result of mental defect he lacks substantial capacity to appreciate the wrongness of his conduct or to conform to his conduct to the requirements of law."

In City of Cincinnati v. Adams, 42 Ohio Misc. 48, 71 Ohio Ops.2d 455, 330 N.E.2d 463 (1974), defendant was charged with appearing in a dress or costume not customarily worn by his or her sex, or in a disguise when such dress, apparel, or disguise is worn with the intent of committing any indecent or immoral act. Defendant, a male, was standing in a parking lot wearing a woman's wig, earrings and carrying a purse. The court struck down the ordinance on due process grounds, ruling that the law did not give the defendant fair notice of what was prohibited because of its vagueness and overbreadth. The court implied in its opinion that any ordinance prohibiting transvestism, unaccompanied by criminal activity or solicitation, would be unconstitutional.

The defendant is People v. Simmons, 79 Misc.2d 249, 357 N.Y.S.2d 362 (1974), was dressed in female clothing and after soliciting another male for sex, stole some money from him. One charge against him was violation of a New York State statute prohibiting criminal impersonation, defined as when one "impersonates another and does an act in such assumed character with intent to injure or defraud another". The court concluded that the statute did not apply to this defendant because he was not impersonating another but was simply himself.

City of Chicago v. Wallace Wilson, et al., 75 Ill.2d 525, 27

Ill. Dec. 458, 389 N.E.2d 522 (1978), upheld the constitutionality of the ordinance but overturned the lower court's action, recognizing the need for cross-dressing of the preoperative transsexual undergoing treatment for eventual sex reassignment.

The court in Est. v. McConn, 489 F. Supp. 76 (S.D. Tx, 1980), declared a Houston, Texas, city ordinance unconstitutional as it was applied to preoperative transsexuals who cross-dress in preparation for sex reassignment surgery. The court pointed out that the defendants, past and present city officials charged with the responsibility of enforcing the ordinance had not submitted evidence of a state interest in the enforcement of the ordinance.

In Columbus v. Rogers, 41 Ohio St.2d 161, 70 Ohio Ops.2d 308, 324 N.E.2d 563 (1975), the same city ordinance as that in Zanders, supra, was held unconstitutionally vague on its face. It failed to give fair notice of the conduct forbidden by the ordinance and to provide guideline to law enforcement officials charged with its enforcement. The court stated that once it is recognized that present-day dress may not be capable of being characterized as being intended male or female wear by a person of ordinary intelligence, the constitutional defect in the ordinance becomes apparent. The defect, said the court, is the terms of the ordinance, "dress not belonging to his or her sex", when considered in the light of contemporary dress habits, made it so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

The U.S. Court of Appeals in D.C. and M.S. v. City of St.

Louis, Missouri, 795 F.2d 652 (8th Cir. 1986), ruled that the St. Louis ordinance which prohibited cross-dressing and "lewd and indecent" behavior was unconstitutionally vague, but upheld the constitutionality of the lewd and indecent conduct portion of the ordinance.

Plaintiff's appealed to the Eight Circuit U.S. Court of Appeals which reversed the District Court's failure to find the lewd and indecent conduct portion of the ordinance unconstitutionally vague, and its failure to award both plaintiffs at least nominal damages.

7. The courts' handling of these cross-dressing cases leaves much to be desired. These useless discriminatory laws still exist because few ordinances have been challenged and while the judicial outcomes of some have been most favorable to the transgender defendants, the laws themselves still stand unless they were declared unconstitutionally vague for lack of due process. This means the remaining laws can still be used to at least harass, detain and investigate a member of the transgender community until the law enforcement officer is presented with proof that an individual is a member of the transgender community. Any other law abiding member of society who at the time looks suspect and is dressing in a manner a law enforcement officer perceives is prohibited by local ordinance, can be subjected to the full emotional, financial and liberty impact of detention, investigation, arrest, incarceration, legal fees, etc.

8. Houston Rest Room Ordinance

Here in Houston we had the Summit rest room case wherein Denise Wells was charged with using the rest room of the opposite sex. Ms. Wells, presumably a young heterosexual, was at a well-attended function. The line for the women's rest room was dangerously long, so, to preclude an accident, Ms. Wells used the men's room. A security guard objected and Ms. Wells was charged. However, at trial Ms. Wells prevailed because no disturbance was intended, a necessary element to establish the criminal conduct, hence, a defense for anyone.

Like the cross-dressing ordinances, many of these rest room ordinances are on the books all across this nation. As with cross-dressing laws, many of them are unconstitutional because of vagueness and overbreadth.

#### 9. Sodomy Laws

Sodomy laws also affect transgenders. The gay and lesbian community has made headway in Texas and other states. In Texas our sodomy statute has been held unconstitutional. The State is appealing but has failed to make a reasonable showing of legitimate state interest. The state argued unsuccessfully that the sodomy law protects the public morals. However, so far our courts have failed to buy that since Texas has not been prosecuting citizens under that statute. Our courts recognize the obvious truth that it is unconstitutional to punish homosexuals for the same acts that heterosexuals commit legally.

#### 10. Practical Information Regarding the Laws Discussed

According to the criminal law chapter of Legal Aspects of



Transsexualism, in many locales it is commonplace to find judges, juries, court staff and law enforcement officers unsympathetic to the plight of the preoperative transsexual.

To cross-dress without running afoul of the law involves avoiding compromising situations, securing proper identification and authorization and learning to dress appropriately. A letter from the attending physician attesting to the fact that the individual is being treated transsexualism and that cross-dressing is a required part of therapy should be carried at all times while cross-dressing. While such a letter has proven useful in helping some individuals to avoid embarrassing situations, it is not a guarantee of immunity from arrest.

11. Strategy for Cross-dressing, Rest Room, and Sodomy Laws

Should any citizen be arrested under a local cross-dressing law, the committee would urge them to hire competent and sensitive criminal counsel to represent them and challenge the constitutionality in the trial court and carry up that challenge to appellate courts if necessary.

11-A. Tests Regarding Constitutionality and State Interest

Usually, the state cannot demonstrate sufficient state interest to maintain the cross-dressing and rest room laws. In fact, no state supporting evidence has been presented in most of the challenges. According to an article by Laura Croft and Matthew Hadel in Vol. 30 (beginning pg. 1115) of Hastings Law Review, the courts have used various tests such as:

I. Tests for Liberty Interests:

a. Make plaintiff show no conceivable rational relationship between ordinance and a permissible state objective. (too restrictive.)

b. Same as above (a.) but make state articulate acceptable legislative purpose.

c. Make state prove rational relationship and permissible state objective.

d. Judicial weighing of interests, individual interest v. state's need to compel uniformity. The Criticism here is that it relies on judge's personal values.

## II. Tests for Fundamental Rights:

Different tests are employed with fundamental rights. With those rights the state just demonstrate compelling interest and overriding need for restriction. At least the one circuit court, the Seventh Circuit, has termed appearance rights of school children as fundamental right in Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970). However, that same circuit has also termed appearance rights liberty interests not of first magnitude and treated those interests accordingly in other subsequent cases.

11-B. There is a strong likelihood of success challenging the ordinances based on the cases available because most of the ordinances are likely drafted in a manner which will not pass the Fourteenth Amendment to United State Constitution due process procedural scrutiny, and will be found void for vagueness or susceptible to the First and Ninth Amendments United States Constitutional attacks and Fourteenth Amendment United States Constitutional liberty interests. In Kelly v. Johnson, 425 U.S. 238 (1976), the U.S. Supreme Court assumed some sort of liberty

interest within the Fourteenth Amendment and in matters of personal appearance without actually deciding so. Also, the Supreme Court has recognized a constitutionally derived right of privacy or better stated, a right to personal autonomy, the right to control one's own body; in Roe. v. Wade, 410 U.S. 113 (1973, right to abortion; and Griswold v. Connecticut, 381 U.S. 479 (1965), which permitted married couples to use contraceptives in Connecticut and others to counsel them accordingly. However, there is no specific right to privacy spelled out in the United States Constitution, nor is there any specific choice of appearance right in the constitution.

## 12. Decriminalization

Other strategies to rid citizens of these oppressive, counter-productive laws are:

a. Collecting, assessing and sharing information about which localities have cross-dressing and rest room ordinances, their enforcement and challenges.

b. Identify medical, psychological, legal and other professionals who support the full range of sexual orientation and gender identification (SOGI) and are knowledgeable or are willing to learn how these laws harm society and lend their expertise to rid us of them.

c. Network, and use political clout to accomplish the abolition of these laws with the transgender community, local government, local politicians, mental health and other professionals, clergy and judiciary.

e. Network and use legislation and political means to require jail and prison officials to treat all persons of any SOGI in a non-discriminatory manner and provide for basic medical and necessary appearance needs to maintain the individuals own appropriate gender identity.

## 13. Legacy

Living within the rigid confinement of traditional male and

female roles drawn by historical religious values and antiquated ordinances and laws is unhealthy for large segments of the population of the United States. No committee member proposed that persons who want to abide by these traditional roles be prevented from doing so or in any manner criminalized for their limitations for lack of development. However, not one logical argument was proposed to maintain the cross-dressing, rest room or sodomy laws. One illogical argument was proposed, "It just ain't natural, it just ain't right". No one counter argued the obvious "Bull Shit, you have false teeth". No longer should threat of "sin" and those with a pipeline to their "god" be allowed to dominate and control how others who are law abiding live their lives.

Any riddance of these laws bequeaths for our children and our world a legacy of opportunity to explore the full range of sexual and gender identification without much of the fear, pain and shame we have experienced. It also provides an inheritance that by not categorizing, people are to be treated equally. You do not need to know my anatomical sex, gender identity, or sexual preference to treat me fairly and with dignity. However, should you also choose to know me, this knowledge and full acceptance of what ever my anatomical sex, gender identity or sexual preference is, brings about friendship and harmony, two highly esteemed societal values.

This concludes the Criminal Law Committee Report.