

WHEN IS AN ATTEMPTED RAPE *NOT* AN ATTEMPTED RAPE? WHEN THE VICTIM IS A TRANSSEXUAL

SCHWENK V. HARTFORD: THE INTERSECTION OF PRISON RAPE, TITLE VII AND SOCIETAL WILLINGNESS TO DEHUMANIZE TRANSSEXUALS

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I. INTRODUCTION: YES, VIRGINIA, THERE IS TRANSGENDER LAW

*“When is a murder not a murder? When the victim is transsexual.”*¹

Sadly, transsexuals² long have had to face this sort of attitude from the legal system.³ This unwillingness to provide transsexuals with basic legal protection comes not just from criminal law.⁴ Transsexuals’ very identities are currently under attack in a number of courts⁵ even though almost half of the jurisdictions in the United

1. Kevin Rothstein, *Travesty of Justice*, BOSTON PHOENIX (May 1997), available at <http://12.11.184.13/archive/1in10/97/05/eMURDER.html> (noting how the killer of pre-operative transsexual Chanele Pickett used a variation of the “homosexual panic defense” to end up with a conviction for assault rather than murder).

2. Numerous articles addressing legal aspects of transsexualism include a litany of definitions pertinent to the subject. Although the genuine ignorance about transgender issues which abounds in the legal profession all but demands that such a list be a part of articles on the subject, the limited focus of this Article makes me inclined to include only two critical ones: ‘transsexual’ and ‘transgender.’

A transsexual is an individual whose internal sense of being male or female is at variance with his or her physical appearance and desires to correct the variance via hormone treatment and/or surgery. ‘Transgender,’ as it is widely used today, is an umbrella term which includes not only transsexuals but also other categories of gender-variant people, though it had originally been used to refer to transsexuals who, though hormonally altered and living as members of the opposite gender, ultimately opted not to have sex reassignment surgery. See PAISLEY CURRAH & SHANNON MINTER, *TRANSGENDER EQUALITY* 3-4 (2000).

3. Though certainly not all perceived mistreatment of transsexuals is animus-laden, the words of Debra Sherman Tedeschi ring true: “Whenever a transsexual goes to court, the legal system is automatically faced with a situation with which it is ill-equipped to deal: ambiguity and indefiniteness.” Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 *TEMPLE POL. & CIV. RTS. L. REV.* 27, 46 (1995).

4. Actually, some of transsexuals’ most notable successes have come in the criminal law arena: challenging laws which criminalize crossdressing. Such challenges historically have resulted in the laws being declared unconstitutional, at least as applied to transsexuals. See Laura Richards Craft & Matthew A. Hodel, *City of Chicago v. Wilson and Constitutional Protection for Personal Appearance: Cross-Dressing as an Element of Sexual Identity*, 30 *HASTINGS L.J.* 1151, 1164-67 (1979) (discussing various laws dealing with personal appearance), construed in Symposium, *Family and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT) Opening Remarks: Queer Recount*, 64 *ALB. L. REV.* 889 (2001); Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDOMA’s Box By Closing the Door on Transsexuals’ Right to Marry*, 9 *J.L. & SEX.* 1, 6 (1999-2000) [hereinafter Rose, *Transsexual and the Damage Done*] (discussing *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999)).

5. See *Littleton v. Prange*, 9 S.W.3d 223, 223-24 (Tex. App. 1999), cert. denied, 531 U.S. 872 (2000) (discussing the question of when a man is a man and a woman is a woman); see also *Goins v. West Group*, 619 N.W.2d 424, 427 (Minn. Ct. App. 2000) (deciding a claim of sexual discrimination where an employee was denied use of women’s restrooms in the workplace based on the fact that her female self-image was not traditionally associated with her biological maleness); *In re Gardiner*, 22 P.3d 1086, 1109 (Kan. App. 2001), rev’d on other grounds, 23 P.2d 902 (Kan. App. 2001) (finding a material fact exists as to whether the transsexual, at the time of the marriage license, was in fact a woman).

Strictly in terms of criminal law, this is of greater importance in jurisdictions where a person’s status as male or female can be an element of a crime. Compare *Regina v. Tan (Moria)*, [1983] Q.B. 1053 (C.A.) (holding that a male-to-female transsexual was male for purposes of a statute which made it illegal for a male to live off of wages earned from prostitution), with *R. v. Cogley*,

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States have specific statutes which allow transsexuals to change their sex designation on their birth certificates,⁶ and every state but one has statutory language that is sufficient to permit a transsexual to do so, if the language is interpreted fairly.⁷

In addition to the specific exclusion of most transgendered people from the Americans With Disabilities Act (ADA),⁸ a line of federal

[1989] VR 799 (Sup. Ct. Victoria) (holding that a male-to-female transsexual was female for purposes of status as a rape victim).

6. See Stephanie Belser, *Don't Make a Federal Case of it: Gender Outlaws and Employment Discrimination*, 2 S. TEX. C.L. J. 17, 33 (1998) (noting that these statutes exist in twenty-one states, the District of Columbia, and Guam). California's Legislature recently approved a bill to provide a mechanism for California's transsexual residents who were not born in California to get gender change documentation. See 1999 Cal. A.B. 1851. However, Governor Gray Davis vetoed the bill. The veto message is regarded by transgender rights supporters as being either callously disingenuous or completely ignorant of what the bill was designed to do. See PlanetOut News Staff, *CA Trans* Certificate Bill Vetoed* (Sept. 21, 2000), available at <http://www.planetout.com/news/article-print.html?2000/09/21/3>; see also Boyce Hinman, *CA: Response to Veto of A.B. 1851*, Lambda Letters Project Press Release, available at <http://gender.org/gain/g00/g092000.htm> ("The objections to the bill, voiced by the Governor in his veto message simply are not valid.").

The fate of A.B. 1851 was not the only strange end for transgender-related legislation in California in 2000. According to San Francisco's *Bay Area Reporter*, an effort which had already been approved by the state Assembly to add transgendered people to that state's employment anti-discrimination law, appears to have died in a Senate committee specifically because of a negative recommendation by a lesbian member of Governor Davis' cabinet. Katie Szymanski, *Lesbian Kills TG Bill; Handful of Gay Bills Pass Legislature*, BAY AREA REP., Sept. 7, 2000, at 6.

7. Compare *Ex parte Torres*, No. CC-97-639, 2000 PR Sup. LEXIS 104, at *75 (approving of a post-operative transsexual's petition to change the sex designation on her birth certificate from male to female), *Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D. Conn. 1975), and 1975 MASS. A.G. OP. 62, 64 (construing general statutory language to permit birth certificate changes for transsexuals), with *In re Ladrach*, 513 N.E.2d 828, 831 (Ohio Prob. Ct. 1987) (ignoring pro-transgender cases and misapplying *K. v. Health Div. of Human Res.*, 560 P.2d 1070, 1072 (Or. 1977), to deny a transsexual's request to change the sex designation on her birth certificate).

Only one state, Tennessee, has ever passed a statute that specifically prohibits such birth certificate changes. See TENN. CODE ANN. § 68-3-203(d) (1999).

8. The law codifies the notion that these conditions are, in the words of Senator Jesse Helms, "moral problems, not mental handicaps" that they are "addictions" with "moral content" whose presence might render an individual unfit for working life." Adrienne L. Hiegel, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1476-77 (1994) (quoting Sen. Helms from the Congressional Record, March 17, 1988) (citations omitted). Language strikingly similar to the federal exclusion now can be found in several state versions of the ADA. See, e.g., IND. CODE ANN. § 22-9-5-6(d)(3) (Michie 2000); IOWA CODE § 15.102, Subd. 5.b(1)(b) & § 225C.46 Subd. 1.a.(2)(b) (1999); 51 LA. REV. STAT. ANN. § 2232(11)(b) (2000); NEB. REV. STAT. ANN. § 48-1102(9) (2000); OHIO REV. CODE ANN. § 4112.01(16)(b)(ii) (2000).

A definitional reference to the federal statute was recently removed from California's ADA. See 2000 Cal. Stat. 1049. This has prompted some transgender advocates to say that transgendered people are now covered under the law rather than excluded from its protection. See Press Release, *Transpeople Removed From California Disability Exclusions* (Oct. 11, 2000) (on file with author). While the changes made by the 2000 enactment are not as clear-cut as those advocates assert, and the ultimate effect yet to be proven, it bears noting that even prior to Ch. 1049, a provision of the California Government Code prohibited both "sexual harassment" and "gender harassment" under the definition of "harassment" because of sex." CAL. GOV'T CODE ANN. § 12940(h)(3)(C) (West 1999).

decisions⁹ have held that Title VII's prohibition of employment discrimination "because of . . . sex"¹⁰ does not encompass discrimination because of *change* of sex.¹¹ *Schwenk v. Hartford*,¹² however, may be the positive turning point that transsexuals have long sought in gaining federal protection from employment discrimination solely because they are transsexual. Somewhat strangely, *Schwenk* was not an employment law case at all, but rather a civil rights action brought by a pre-operative transsexual prisoner under 42 U.S.C. § 1983 and a provision of the now-eviscerated Violence Against Women Act.¹³

Employment issues are important to all but the most financially secure of transsexuals¹⁴ and, although such issues have long been the subject of legal commentary¹⁵ and likely will be for the foreseeable future, they are not the focus of this article. However, this piece addresses the Title VII implications of *Schwenk* as well as other transgender legal concerns,¹⁶ simply to point out to legal

9. See *Dillon v. Frank*, 952 F.2d 403, 405 (6th Cir. 1992) (noting that the plain meaning of Title VII does not provide a remedy for a hostile environment created by taunts aimed at plaintiff's homosexuality); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (stating that the words utilized in Title VII do not prohibit discrimination based upon homosexuality); see also *Ulane v. E. Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984) (holding that Title VII does not protect transsexuals since all words in the statute are given ordinary, common meaning).

10. 42 U.S.C. § 2000e-2(a)(1) (2000).

11. See *infra* Part III.A.

12. 204 F.3d 1187 (9th Cir. 2000).

13. 42 U.S.C. § 13981 (2000); see *United States v. Morrison*, 529 U.S. 598, 681 (2000) (holding Congress exceeded its Commerce Clause and Fourteenth Amendment legislative powers in establishing the Violence Against Women Act's federal cause of action); see also Julie Goldscheid, *The Second Circuit Addresses Genderbased Violence: A Review of Violence Against Women Act Cases*, 66 BROOKLYN L. REV. 457, 457-58 (2000).

14. Professor Dierdre McCloskey acknowledged that her upper middleclass status made her gender transition smoother than it may otherwise have been. See generally DIERDRE MCCLOSKEY, *CROSSING — A MEMOIR* 53 (2000) (discussing the ways in which her financial standing and social status made the transition easier).

15. For one of the better earlier articles, see Stuart A. Wein & Cynthia Lark Remmers, *Employment Protection and Gender Dysphoria: Legal Definitions of Unequal Treatment on the Basis of Sex and Disability*, 30 HASTINGS L.J. 1075, 1098 (1979) (proposing that discrimination against transsexuals may be cognizable under Title VII).

16. I will not address hate crimes legislation to any significant extent other than that to which the Violence Against Women Act can be considered a hate crime law. The subject of hate crime legislation in general is worthy of considerable debate in its own right. See Craig L. Urich, *Hate Crime Legislation: A Public Policy Analysis*, 36 HOUS. L. REV. 1467, 1470-71 (1999) (discussing the criminal theory and public policy arguments affecting both state and federal anti-hate crime legislation). However, it should be noted that a major dispute has arisen between the transgendered community in New York and a gay male state representative as to whether that state's recently-enacted hate crimes law covers transgendered people. See Tom McGeever, *Transgendered Activists Speak Out*, N.Y. BLADE, Sept. 1, 2000, at 11. The law does not specifically mention transgendered people, nor does it contain a definition of sexual orientation that is similar to the trans-inclusive one in Minnesota's Human Rights Act. MINN. STAT. ANN. § 363.01, Subd. 45 (West Supp. 2000). However, the law does address an attacker's

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professionals the difficulties with *any* case involving transsexualism, where simple answers and seemingly black-and-white distinctions almost never work, on any level.

For example, though the federal government and a majority of states have passed so-called ‘Defense of Marriage’ acts,¹⁷ purporting to establish a government right to deny recognition to same-sex marriages, none of these statutes address how a same-sex marriage ban affects marriages involving transsexuals. Likewise, statutes which specifically allow transsexuals to change the sex designation on their birth certificates do not specifically address the issue either, even though dicta from one of the most virulently anti-transsexual judicial decisions, Ohio’s trial-level *In re Ladrach*,¹⁸ surmised that any state which allows transsexual birth certificate changes must allow transsexuals to marry as well.¹⁹

Transsexual gender status is a broad issue that can touch all areas of the law. However, this article leads to a narrow issue — an extremely disturbing aspect of the *Schwenk* litigation which could easily be missed when simply looking at the holding. Specifically, concern lies with precisely what Washington State Attorneys were willing, in their effort to help the state avoid liability for actions alleged to have been perpetrated by state prison guards, to argue — that the guards’ actions did *not* constitute attempted rape. Because of

“belief or perception regarding the . . . gender . . . of a person, regardless of whether the belief or perception is correct.” 2000 N.Y. Laws 107 § 2. While some believe that this language is inclusive of transgendered people, others do not, which caused several representatives of the transgendered community to walk out of a post-enactment meeting with the aforementioned State Rep., Tom Duane. See McGeeveran, *supra*, at 11.

17. See generally ANDREW SULLIVAN, SAME SEX MARRIAGE: PRO AND CON 223 (1996) (discussing the federal and various state Defense of Marriage Acts).

18. 513 N.E.2d 828, 831 (Ohio Prob. Ct. 1987) (holding that a postoperative male to female transsexual could not obtain a marriage license to marry a male).

19. This perhaps is why an attorney challenging the gender status of a Kansas transsexual widow stated matter-of-factly, “To the best of my knowledge, no state’s legislation says that for purposes of marriage a person can change sex and become a woman or vice versa.” John T. Dauner, *Wealth and a Sex Change Are Highlights of Kansas Estate Litigation*, KAN. CITY STAR, June 24, 2000, at A1; see also Katrina C. Rose, Littleton v. Prange: *The Next Generation?*, TEX. TRIANGLE, July 7, 2000, at 8 [hereinafter Rose, Littleton v. Prange]. That position, of course, also ignores the holding in *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. App. Div. 1976), *cert. denied*, 364 A.2d 1076 (N.J. 1976), the seminal case on transsexual marriages in America, which held that a transsexual who underwent successful sex reassignment surgery to become both physically and physiologically a woman was legally married to her husband. Fortunately, the appellate court which reviewed the case did not ignore the New Jersey decision even though it did ignore the *Ladrach* logic declaration, that a state which allows birth certificate changes for a transsexual would have to allow that transsexual to marry in her post-transition gender. See *In re Gardiner*, 22 P.3d 1086, 1104-05 (Kan. App. 2001). The British Columbia Supreme Court, however, recently ruled that compliance with that province’s birth certificate statute necessitated according a post-operative transsexual the full status of the post-transition gender. See *Vancouver Rape Relief Soc’y v. British Columbia Human Rights Comm’n*, 2000 BCTC 1809 (B.C. Sup. Ct. 2000).

one possible²⁰ implication of the theory put forth by the defense in *Schwenk*, I hope that readers will recognize that the legal system's historic willingness to avoid the plain fact that transsexualism is "an evident reality that demands a legal solution,"²¹ not to mention the general judicial deference to penological discretion that allows "place[ment of] transgendered prisoners either in a virtual torture chamber of incessant sexual humiliation or in a more benign environment,"²² has never had any real winners. But, had the defense prevailed in *Schwenk*, the legal system could have made losers out of society at large.

II. *SCHWENK V. HARTFORD*: THE FACT PATTERN

A. *A Prefatory Note on Transgender Prison Litigation*

Precisely how many transsexuals are incarcerated is unknown — as is the number of transsexuals overall.²³ Two decades ago, a San Francisco official estimated that "at least ten percent of the city's prisoners are either homosexual or transsexual."²⁴ During that same era, a doctor at Rikers Island jail in New York City estimated that of every sixty inmate patients he had seen, "three or four" were transsexual.²⁵

As indicated above, a person's legal sex classification for purposes of marriage is important — although it is an issue with which most non-transgendered people never have to deal.²⁶ Likewise,

20. Though I do freely admit not likely. See *infra*, Part V.B.

21. *Ex parte Torres*, 2000 PR Sup. LEXIS 104, at *19 (approving of a post-operative transsexual's petition to change the sex designation on her birth certificate from male to female); quoted passage translated in, Ivan Roman, *Court Gives Gay-Rights Activists Hope*, ORLANDO SENTINEL, July 17, 2000, at A6.

22. Darren Rosenblum, "Trapped" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 517 (2000).

23. Taking into account all known medical conditions which result in variance from the concrete, yet incorrect, assumption that 'XX chromosomes = female' and 'XY chromosomes = male,' the percentage of humans who are transgendered in some form is estimated to be between one tenth of one percent and four percent. See Julie A. Greenberg, *Defining Male and Female: Intersexuality and Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 267-68 (1999); Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are not Enough*, SCI., Mar.-Apr. 1993, at 20-21; ALICE D. DREGER, *HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX* 43 (1998). Perhaps most significantly, in terms of opposition to the "chromosomes = sex" standard, one in every 45,000 males has the so-called "normal" female XX pattern. See Wayne Scott Cole, *Transsexuals in Search of Legal Acceptance: The Constitutionality of the Chromosome Test*, 15 SAN DIEGO L. REV. 331, 335 n.17 (1978).

24. Ralph Gardner, Jr., *For Transsexuals, Prison is 'Ten Times as Rough'*, CORRECTIONS MAG., Feb. 1981, at 32.

25. *Id.*

26. Nevertheless, the logical implication of *Littleton* is that they might. See Rose, *Littleton v. Prange*, *supra* note 19, at 8.

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incarceration is something that most people never encounter.²⁷ In addition, the vast majority of people who do end up behind bars do not present jailers with the problem of deciding to house them in the male, or the female part of the jail facility. Since almost all jails and prisons are sex-segregated, the question of where to house²⁸ male-to-female transsexuals has resulted in disputes that often lead to litigation.²⁹

If Crystal Schwenk has ever challenged her assignment to a male prison facility, it appears not to have been an issue in the litigation that led to the Ninth Circuit's decision on February 29, 2000. I point this out because most litigation involving transsexual inmates seems to involve those who have *not* undergone sex reassignment surgery.³⁰ The Second Circuit, in a case involving a *post-operative* transsexual inmate whose transition was revealed to other inmates by prison officials, stated that it would be difficult to conceive of instances "in which the disclosure of an inmate's transsexualism — a condition which (obviously) is not contagious — serves legitimate penological interests, especially given that, in the sexually charged atmosphere of most prison settings, such disclosure might lead to inmate-on-inmate violence."³¹ For those who are overly anxious to see a 'slippery slope,' rest assured that neither my support for more humane treatment of both pre- and post-operative transsexual inmates nor my approval of the holding in the aforementioned case, *Powell v. Schriver*,³² should be read as a suggestion that Eighth Amendment jurisprudence needs to

27. See, e.g., Rosenblum, *supra* note 22.

28. The simple matter of pronouns can be used as a means of humiliating the incarcerated transsexual. Referring to a transsexual as "it" is not unknown. See Cole, *supra* note 23, at 342 n.54; see also James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1306 n.71 (2000).

29. See, e.g., *infra* notes 31-32.

30. Occasionally, the issue of gender status for a transsexual with respect to the prison system involves not the prisoner but the prisoner's spouse — an issue for prisons that allow conjugal visits from opposite-sex spouses but not same-sex partners. See ASSOC. PRESS, Mar. 16, 1978 ("Her operation was a success and we'll accept it," Dr. William Welch of the California Medical Facility staff said.)

Interestingly, the couple was married at the prison. *Id.* And, a lengthy feature on the wedding appeared in at least one major California newspaper at the time, only a short time prior to the California Senate's final consideration — and ultimate passage — of a bill to allow transsexuals' birth certificates to be changed to reflect gender reassignment. WEST'S ANN. CAL. HEALTH & SAFETY CODE § 103425 (West 2001); Walter Blum, *Kate's Wedding Day . . . And Night*, S.F. EXAMINER & CHRON., Aug. 7, 1977, at 12. The significant aspect of this story is that it runs against any notion that there was no intent on the part of the Legislature not to allow transsexuals to marry post-transition.

31. *Powell v. Schriver*, 175 F.3d 107, 113 (2d Cir. 1999).

32. See *id.* at 115 (holding that a prison guard and supervisor were deliberately indifferent to the safety of a transsexual inmate, in violation of her Eighth Amendment right, by disclosing her transsexual status).

be expanded to allow a transsexual inmate, even a post-operative one, to sue *solely* for being referred to with a no-longer-appropriate pronoun, as once happened in Germany.³³

Powell involved the ‘outing’ of an inmate and the potential jeopardizing of her safety. *Schwenk* also involved the potential jeopardizing of a transsexual inmate’s safety — though under decidedly different circumstances.

B. *Crystal Schwenk’s Allegations Against Robert Mitchell*

1. *Caveat*

Due to the serious nature of Schwenk’s allegations, it is important to keep in mind that *Schwenk v. Hartford* was an interlocutory appeal from a denial of a summary judgment motion. A “reviewing court must assume the nonmoving party’s version of the facts to be correct.”³⁴ This article addresses the light in which the State asked the court to view the allegations against prison guard Robert Mitchell, assuming that those allegations were true. I take absolutely no position regarding whether they are, in fact, true. For the record, I adopted a similar posture in my criticism of *Littleton v. Prange*,³⁵ a wrongful death medical malpractice action in which a transsexual widow was, inaccurately in my view, declared to be male.³⁶

2. *The Allegations Themselves*

Crystal Marie Schwenk is a pre-operative male-to-female transsexual who plans someday to obtain sex reassignment surgery (SRS).³⁷ Judge Reinhardt’s opinion states that Schwenk “asserts” this pre-operative transsexual status. This might initially seem to be disrespectful; however, it is not, as Schwenk’s background indicates that she had never been formally diagnosed with gender dysphoria³⁸ prior to her incarceration. As part of her case, she submitted the declaration of a

33. See Whitman, *supra* note 28, at 1306 n.71 (arguing that German civility laws and hate-speech regulations give rise to a more respectful society than the United States).

34. *Schwenk*, 204 F.3d at 1187 n.3 (citing *Liston v. County of Riverside*, 120 F.3d 965, 977 (9th Cir. 1997)).

35. 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) (holding that a transsexual spouse did not have standing to bring a medical malpractice action under the wrongful death survival statute, in her capacity as the surviving spouse of a male patient), *cert. denied*, 531 U.S. 872 (2000).

36. See Rose, *Transsexual and the Damage Done*, *supra* note 4, at 55 n.300.

37. See *Schwenk*, 204 F.3d at 1193.

38. See generally AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 532-38 (4th ed. 1994) (providing the lengthy diagnostic criteria for gender identity disorder).

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University of Washington adjunct Professor of Psychiatry and Behavioral Sciences that, based on an interview with Schwenk and a review of her records, Schwenk is indeed transsexual.³⁹ Moreover, Judge Reinhardt refers to her as “she” and by her adopted name of “Crystal Marie Schwenk” rather than “he” and “Douglas W. Schwenk,” the name listed in court documents.⁴⁰

In June of 1993, Schwenk was incarcerated in the all-male Washington State Penitentiary in Walla Walla. In September of the following year, she was transferred to the prison’s medium security Baker Unit, where Robert Mitchell, one of three named defendants, was employed as a guard. According to Mitchell, shortly after Schwenk arrived at Baker, other inmates told him Schwenk was homosexual. He admitted that, soon afterward, Schwenk told him that she intended to have a “sex change operation” after her release, repeating this assertion to him “from time to time.”⁴¹ According to Schwenk, Mitchell referred to her as Crystal rather than her legal name, Douglas.⁴²

The basis of Schwenk’s suit are allegations that shortly after she arrived at Baker, Mitchell subjected her to a series of unwelcome sexual advances and harassment and, ultimately, a sexual assault.

Th[e] harassment began with “winking, performing explicit actions imitating oral sex, making obscene and threatening comments, watching Plaintiff in the shower while ‘grinding’ his hand on his crotch area, and repeatedly demanding that Plaintiff engage in sexual acts with him.” Then, in late 1994, Mitchell asked Schwenk to have sex with him in the staff bathroom, offering to bring her make-up and “girl stuff” in exchange for sex [Upon being rebuffed by Schwenk,] Mitchell grabbed . . . and groped her.⁴³

She pushed him away and ran back to her cell crying, but later that same day, Mitchell again approached Schwenk and told her that he had had oral sex with a former inmate.⁴⁴ Also, Mitchell stated that he planned to have sex with his neighbor’s young son, whom he claimed to be “‘grooming’ for the experience.”⁴⁵ Schwenk testified, “Once

39. *See Schwenk*, 204 F.3d at 1193 n.4.

40. *Id.* at 1193.

41. Crystal Marie Schwenk testified that she had made other prison officials aware of her being transsexual. *Id.*

42. *See id.* at 1192-93 (according to Schwenk, she considers herself female and has been known as “Crystal Marie” since early adolescence).

43. *Id.* at 1193 (documenting sexual misconduct that Mitchell directed towards Schwenk).

44. *See Schwenk*, 204 F.3d at 1193 (detailing the sexually explicit conversations between Mitchell and Schwenk).

45. *Id.*

Mitchell told me that I — I freaked.”⁴⁶

Shortly thereafter, she asserts that Mitchell entered her cell and, upon noticing that they were alone, demanded that she perform oral sex on him. She refused and told him to get out. However, he then unzipped his pants, pulled out his penis, and reiterated the demand for oral sex.⁴⁷ This encounter, by far the most serious of Schwenk’s allegations, eventually included closing the cell door, grabbing her, turning her around forcibly, pushing her against the bars, and grinding his exposed penis into her buttocks. Schwenk’s testimony indicated that she told him to “leave me alone” but that “he didn’t listen to me.”⁴⁸ However, the attack did stop, apparently when Mitchell sensed that he might be detected.⁴⁹ Later that week, Mitchell again demanded sexual favors, and Schwenk again refused. This time, however, Mitchell threatened retaliation in the form of arranging to get her “infracted” and sent to a more dangerous area of the prison, which, in fact, did happen early in 1995.⁵⁰

Schwenk subsequently filed an administrative grievance,⁵¹ and later, a *pro se* complaint in federal court against Mitchell and various institutional defendants in which she alleged that the sexual assault violated her Eighth Amendment rights.⁵² Counsel was appointed for her, and an amended complaint adding a claim under the Gender-Motivated Violence Act (“GMVA”),⁵³ a portion of the Violence

46. *Id.* at 1194 (asserting from Schwenk’s testimony that Mitchell was dangerous).

47. *Id.*

48. *Schwenk*, 204 F.3d at 1194.

49. *Id.*

50. *Id.*

51. *See id.* (following this filing, the prison denied the grievance on the grounds that it was untimely). The complaint was filed ten days after the incident and regulations require that any complaints be filed within five days of any alleged incidents. *Id.*

52. Although worthy of full analysis in its own right, particularly in light of the fact that one of the leading Eighth Amendment cases, *Farmer v. Brennan*, 511 U.S. 825 (1994), is, to date, the only opinion of the U.S. Supreme Court to address transsexual existence to any significant degree, this Article will not focus on the ultimate viability of Schwenk’s claims. Rather, the critical point of this article is the *attitude* of the defense — a defense put on by the State — which yielded a disturbing claim regarding what constitutes attempted rape.

For articles which look at *Farmer* in more depth, see Stacy Lancaster Cozad, *Cruel But Not So Unusual: Farmer v. Brennan and the Devolving Standards of Decency*, 23 PEPP. L. REV. 175, 176 (1995); John Boston et al., *Farmer v. Brennan: Defining Deliberate Indifference Under the Eighth Amendment*, 14 ST. LOUIS U. PUB. L. REV. 83, 84 (1994); Lisa DiBartolomeo, *Subjective Awareness Governs the Deliberate Indifference Standard in Cruel and Unusual Punishment Claim*, 29 SUFFOLK U. L. REV. 294, 295 (1995); Jason D. Sanabria, *Farmer v. Brennan: Do Prisoners Have Any Rights Left Under the Eighth Amendment?*, 16 WHITTIER L. REV. 1113, 1114 (1995).

53. Violent Crime Control and Law Enforcement (Gender-Motivated Violence) Act of 1994 § 40302(c), 42 U.S.C. § 13981 (1994 & Supp.) (rev’d) (permitting a perpetrator who has committed a violent crime because of the victim’s gender to be sued in federal or state court).

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Against Women Act,⁵⁴ was filed. After dismissing the institutional defendants, the district court “converted Mitchell’s motion to dismiss into a motion for summary judgment and allowed discovery to proceed.”⁵⁵ Ultimately, the district court denied Mitchell’s motion, which had been based on qualified immunity.⁵⁶ The Ninth Circuit upheld the denial as to Schwenk’s civil rights action but reversed on the GMVA claim.⁵⁷

III. HOW TITLE VII CREPT INTO A CASE INVOLVING THIS SET OF FACTS

In light of the U.S. Supreme Court’s decision in *United States v. Morrison*,⁵⁸ overturning the portion of the Violence Against Women Act⁵⁹ under which Schwenk had brought suit, a victory on this portion of her action would have been short-lived.⁶⁰ Timing is everything, however, and, in this instance, the then-extant viability of the GMVA, when the Ninth Circuit issued its decision, may benefit transsexuals more than Ms. Schwenk could have imagined when she filed suit.

A. *Transsexuals and Title VII, Pre-Schwenk*

Title VII of the Civil Rights Act of 1964 provides that “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex” is unlawful.⁶¹ Though a number of decisions held against transsexuals throughout the 1970s and 1980s,⁶² the Seventh Circuit’s 1984 decision in *Ulane v. Eastern Airlines*⁶³ is

54. Violent Crime Control and Law Enforcement (Violence Against Women) Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of the U.S. Code).

55. *Schwenk*, 204 F.3d at 1194.

56. See *Jeffers v. Gomez*, 240 F.3d 845, 853 (9th Cir. 2001) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (noting that law enforcement officers, including prison guards, enjoy qualified immunity from civil damages unless the conduct violated “clearly established statutory or constitutional rights of which a reasonable person would have known”).

57. See *Schwenk*, 204 F.3d at 1192-93, 1205 (finding that although the GMVA covers the defendant’s alleged conduct, “the law regarding the scope and applicability of that statute was not clearly established at the time of the assault . . .”).

58. 529 U.S. 598, 627 (2000).

59. 44 U.S.C. § 13981 (2000).

60. The Ninth Circuit’s decision in *Schwenk* was issued on February 29, 2000; less than three months later, on May 15, 2000, the Supreme Court decided *Morrison*.

61. 42 U.S.C. § 2000e-2(a)(1) (2000).

62. See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (finding that a transsexual’s decision to have a sex change does not bring that person, or a class of transsexuals, under the purview of Title VII); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (holding that “sex” under Title VII does not include transsexualism).

63. 742 F.2d 1081 (7th Cir. 1984), *cert denied*, 471 U.S. 1017 (1985).

generally regarded as being to transgender employment law in America what *Corbett v. Corbett*⁶⁴ is to legal recognition of gender transition in England.

The case primarily involved two Title VII discrimination claims⁶⁵ by Karen Ulane, who had been a pilot with Eastern Airlines from 1968 to 1981 — initially as Kenneth but later as Karen.⁶⁶ She claimed her firing amounted to discrimination because she was transsexual and because she was female.⁶⁷ The district court found that Eastern had indeed discharged Ulane because she was transsexual.⁶⁸ Significantly, it also found that Title VII prohibited such discrimination.⁶⁹ The Seventh Circuit disagreed with the district court interpretation of Title VII to be, as Judge Wood summarized the lower court interpretation for a unanimous panel, “a remedial statute to be liberally construed . . . to hold that the statutory word ‘sex’ literally and scientifically applies to transsexuals”⁷⁰

After citing the somewhat familiar history of how the word sex

64. [1970] P. 83; 2 All ER 33. Judge Ormrod’s heavily-criticized opinion created the ‘chromosomes = sex’ standard which precludes transsexuals from achieving full legal recognition of gender transition. To say that this is a minority view among jurisdictions which have fully, or at least adequately, addressed the issue is an understatement. See Belsler, *supra* note 6, at 33; see generally *Ex parte* Torres, No. CC-97-639, 2000 PR Sup. LEXIS 104 (P.R. June 30, 2000). Still, whenever the question of transgender legal status arises in a jurisdiction that has no statute specific enough for a reviewing court’s liking, the judicial addiction to *Corbett* surfaces. See *Littleton*, 9 S.W.3d at 226 (Tex. App. 1999). Although the European Courts have intervened to the benefit of transsexuals in other countries in Europe, they have never seen fit to overrule *Corbett*’s applicability to England. Compare *Rees v. United Kingdom*, 81 Eur. Ct. H.R. (ser.A) at 56 (1986), with *B. v. France* [1992] 2 FLR 249. However, even the intransigence of England is on the verge of giving way. Parliament has recently begun serious study of the problems created by the *Corbett* standard and legislation is expected soon which will overrule *Corbett*. See Christine Burns, *101 Unequal Ways to Treat You Equally* (Mar. 2, 2001), available at <http://www.pfc.org.uk/news/2000/101ways.htm> (last modified Nov. 18, 2000) (providing an update on the legislative attempts to provide protection from discrimination to “trans people”). Whether such legislation will occur during the lifetime of April Ashley, the transsexual party in *Corbett*, is another matter. See also Jane Warren, *The Express, Forty Years After My Sex Change I’m Still Treated as a Joke, Though I Don’t Get My Face Slapped Any More* (July 28, 2000), available at <http://www.pfc.org.uk/news/2000/acrex.htm>.

65. There were other claims as well, but those are not what the case is known for. See *Ulane*, 742 F.2d at 1082 n.1.

66. In Judge Wood’s words, “Eastern was not aware of Ulane’s transsexuality, the hormone treatments, or her psychiatric counseling until she attempted to return to work after her sex reassignment surgery. Eastern knew Ulane only as one of its male pilots.” *Id.* at 1083.

67. *Id.* at 1082.

68. See *Ulane v. E. Airlines*, 581 F. Supp. 821, 828 (N.D. Ill. 1983) (holding that Ulane’s discharge was particularly suspect because the issue of her dismissal did not arise until after her surgery).

69. See *id.* at 837 (finding that Title VII was violated because Ulane was treated disparately as a result of her transsexual status and that Eastern Airlines’ treatment of her was not substantially related to the operation of its business).

70. *Ulane*, 742 F.2d at 1084.

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became part of Title VII,⁷¹ Judge Wood abruptly declared that

[t]he total lack of legislative history supporting the sex amendment [to the bill that ultimately was enacted as the Civil Rights Act of 1964] coupled with the circumstances of the amendment's adoption *clearly* indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex.⁷²

Clearly, reduced to a mathematical equation, Wood's logic is $0 = -1$. The dearth of legislative history could have just as easily led to a $0 = 1$, and protection for those who have transitioned or intend to do so.

Adding to this logic gap in the ultimate holding, Wood also brought up attempts by Congress to expand Title VII to cover homosexuals and bisexuals.⁷³ However, even after properly acknowledging that those bills did *not* address transsexuals, he went on to imply that the failure of such attempts — occurring subsequent to the first of the anti-transsexual Title VII decisions — were nevertheless indicative of a Congressional intent *not to cover transsexuals*.⁷⁴ The definitions of who and what were covered by those bills varied from:

having or manifesting an emotional or physical attachment to another consenting person or persons of either gender, or having or manifesting a preference for such attachment⁷⁵

which was contained in a bill introduced by Rep. Bella Abzug, to:

male or female homosexuality, heterosexuality, and bisexuality by orientation or practice, by and between consenting adults.⁷⁶

Beyond the muddying of the waters, though, the depth of the anti-transsexual attitude of the *Ulane* court can be discerned simply from Judge Wood's description of male-to-female transsexual Karen Ulane as something that has been "created from what remains of a man."⁷⁷

71. *See id.* at 1085 (tracing the legislative history of Title VII that "sex" as a class was added to kill the Civil Rights Act); *see also* Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 879-84 (1967).

72. *Ulane*, 742 F.2d at 1085 (emphasis added).

73. *See id.* at 1085 n.11 (citing the failed attempts to include sexual orientation within the purview of Title VII).

74. *See id.* at 1086.

75. Civil Rights Amendments of 1975, H.R. 166, 94th Cong. § 11 (1975) (defining "affectional or sexual preference").

76. Civil Rights Amendments of 1975, H.R. 3371, 97th Cong. § 8 (1981) (defining "affectional or sexual orientation"). A Senate bill introduced in the same session by Sen. Paul Tsongas used the same language as a definition of "sexual orientation." S. 1708, 97th Cong. (1981).

77. *Ulane*, 742 F.2d at 1087 (stating that the district court's finding that Ulane also had been discriminated against as a woman was not sufficiently supported by factual findings); *see also id.* (arguing that Judge Wood concluded his opinion with positive language for transsexuals

Wood could not have tipped his hand any further had he quoted directly from Janice Raymond's tract, *The Transsexual Empire*, and simply referred to Ulane as a "male into constructed female."⁷⁸

Imagine the outcry, though, had Wood referred to a convert to Judaism as something created from "what remains" of a Christian (or vice versa). The position that "because of such individual's . . . sex"⁷⁹ does not cover discrimination because of change of sex is all but devoid of logic in light of Title VII also prohibiting discrimination because of religion. It is simply inconceivable that a court would not find that a person who had been discriminated against solely because the person had changed from one religion to another could state a claim under Title VII for religion-based discrimination. Yet, if the same person changed his or her sex and was discriminated against *specifically on that basis*, the same court likely, at least prior to *Schwenk*, would hold that the person was unprotected by Title VII.⁸⁰

B. GMVA

Judge Reinhardt's ruling against Schwenk on her GMVA claim was not based on any ultimate inapplicability of the Act to transsexuals. In fact, he said it *is* applicable to transsexuals, but that *her* claim should fail because, "the law regarding the scope and applicability of that statute was not clearly established at the time of the assault on Schwenk, at least with respect to questions of gender motivation and animus."⁸¹ Most significantly, however, in reaching his conclusion that transsexuals were afforded protection under the GMVA, Judge Reinhardt analogized transsexuals' protection under the GMVA to their protection under Title VII.

Mitchell made an argument similar to those used successfully

seeking redress under Title VII by holding that "[i]f Eastern had considered Ulane to be female and had discriminated against her because she was female (i.e., Eastern treated females less favorably than males), then the argument might be made that Title VII applied" (citing *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977)).

78. See JANICE RAYMOND, *THE TRANSSEXUAL EMPIRE* (13th ed. 1994); see also Janice Raymond, *Paper Prepared for the National Center for Health Care Technology on the Social and Ethical Aspects of Transsexual Surgery* (1980), available at <http://home.att.net/~jackie40/text/ts1.txt> (last visited July 14, 2001) (elaborating on *The Transsexual Empire*, first published in 1979). But see Sandy Stone, *The Empire Strikes Back* (1994), available at <http://eserver.org/gender/the-empire-strikes-back.txt> (last visited Nov. 19, 2000) (articulating a viewpoint that is contrary and much less paranoid than Janice Raymond's); Rose, *supra* note 4, at 50-52.

79. See *Ulane*, 742 F.2d at 1087.

80. See Reginald E. Jones, *Address to the Sixth International Conference on Transgender Law and Employment Policy*, available at <http://www.abmall.com/ictlep/jonesspeech.html> (last visited July 11, 2001) (commenting on the late transsexual attorney JoAnna McNamera's hypothetical and the dichotomy that Title VII's current form presents). Although Jones, then an EEOC Commissioner, saw the validity of the analogy, its logic has yet to be adopted by courts.

81. *Schwenk*, 204 F.3d at 1205.

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against transsexuals who seek protection from employment discrimination under Title VII. “According to Mitchell,” Judge Reinhardt stated, “Schwenk has alleged only that the attack occurred because of Schwenk’s transsexuality, which, Mitchell contends, is not an element of gender, but rather constitutes gender dysphoria, a psychiatric illness.”⁸² Much of Title VII case law specifically dealing with transsexuals, including the Ninth Circuit’s *Holloway*,⁸³ would have backed this defense. As Judge Reinhardt accurately summarized these cases:

Male-to-female transsexuals, as anatomical males whose outward behavior and inward identity did not meet social definitions of masculinity, were denied the protection of Title VII by these courts because they were the victims of gender, rather than sex, discrimination.⁸⁴

However, he then made a bold statement that immediately brought the opinion to the attention of all supporters of transgender rights:

The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse [v. Hopkins]*.⁸⁵ In *Price Waterhouse*, which was decided after *Holloway* and *Ulane*, the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed “to act like a woman” — that is, to conform to socially-constructed gender expectations.⁸⁶

In short, in Judge Reinhardt’s view, *Price Waterhouse* had overruled the long string of anti-transsexual Title VII decisions.⁸⁷

82. *Id.* at 1200.

83. *Holloway*, 566 F.2d at 661 n.3 (articulating the viewpoint that many “judgments about male to female transsexuals have varied from the opinion that a request for a sex change is a sign of severe psychopathology to the opinions that these persons are psychologically normal”).

84. *Schwenk*, 204 F.3d at 1201.

85. 490 U.S. 228 (1989).

86. *Schwenk*, 204 F.3d at 1201-02 (citations in original omitted) (focusing on the flawed analysis of cases such as *Holloway*).

87. Somewhat oddly, the criticism of Judge Reinhardt’s *Schwenk* opinion by the right-wing Family Research Council was not directed at the Title VII dicta, which will likely be transsexuals’ biggest gain from *Schwenk* on the anti-discrimination front, but rather at the holding that transsexuals are covered under the GMVA — which had already been overturned by the U.S. Supreme Court in *Morrison*. See *FRC Announces Winners of 2000 Court Jester Awards; Judges ‘Roasted’ For ‘Ridiculous Rulings,’* PR NEWSWIRE, June 30, 2000. The FRC declared *Schwenk* to be one of four Ninth Circuit decisions that “appear to have been made in the dark.” *Id.* Moreover, considering that, as Reinhardt pointed out, the GMVA applied “without qualification to ‘all persons within the United States. . .,’” rather than the Ninth Circuit it seems that the FRC is in dire need of a light bulb. *Schwenk*, 204 F.3d at 1200 (quoting 42 U.S.C. § 13981(b) (1999)).

C. *Stepping Back*

Judge Reinhardt's dicta is extremely significant for transgendered people due to the fact that current language of the proposed federal Employment Non-Discrimination Act ("ENDA"),⁸⁸ a bill intended to prohibit employment discrimination based on sexual orientation, is purposely written so as not to include transgendered people among those specifically mentioned as included classes. Unlike the enacted version of the ADA,⁸⁹ ENDA does not currently contain language which specifically excludes transgendered people. In the bill, "sexual orientation" means homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived.⁹⁰ Of course, the words "real or perceived" *should* be an umbrella that covers transgendered people.⁹¹ Yet, Title VII's umbrella capability has rarely been used to the benefit of non-heterosexuals.⁹² As British law professor, and female-to-male transsexual, Stephen Whittle has noted, federal courts have "gone out of their way to find that existing federal non-discrimination laws do not apply to transgendered individuals."⁹³

Likewise, many gay proponents of ENDA sadly have also gone out of their way to ensure that ENDA will not benefit transgendered people. ENDA's chief sponsor, Rep. Barney Frank,⁹⁴ as well as the most visible gay and lesbian lobbying group, the Human Rights

88. Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999) (providing remedies for employment discrimination based on sex).

89. American With Disabilities Act, 42 U.S.C. § 12101 (1990).

90. H.R. 2355, 106th Cong. (1999).

91. *Id.*

92. See Stephen Whittle, *Gemeinschaftsfremden — or How to Be Shafted by Your Friends: Sterilization Requirements and Legal Status Recognition for the Transsexual*, in LEGAL QUERIES 42, 47 (Leslie Moran et al. eds. 1998) (finding that transgendered people have not been included in Title VII's sexual orientation penumbra).

93. *Id.* (quoting from PROCEEDINGS FROM THE SECOND CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY (1993)).

94. The openly gay Massachusetts Representative, in his backing of this non-inclusivity, has exhibited a staggering degree of disingenuousness, justifying his non-inclusion of transgendered people with his vote for the ADA. At the 1999 reintroduction of ENDA

Frank forthrightly raised the fact that 'this bill does not protect everybody,' specifically transgender people. He explained that no bill has ever done that, yet he eagerly voted for legislation ending gender discrimination, the Americans with Disabilities Act, and others that did not include protection for him. 'There is no magic button we can push that will protect everybody all at once.'

Bob Roehr, *Enda Back*, OUTLINES (June 30, 1999), available at <http://www.outlineschicago.com>. This assumes that homosexuals *truly* would be willing to accept a federal government declaration that homosexuality is an "impairment" if it meant employment anti-discrimination protection - which is doubtful. See 42 U.S.C. § 12211(a) (2000) ("For purposes of the definition of "disability" in [42 USC] § 12102(2), homosexuality and bisexuality are not impairments and as such are not disabilities under this [Act].").

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Campaign (“HRC”),⁹⁵ are adamantly opposed to including transgendered people in ENDA. Though transgendered people are lobbying to change the current non-inclusive wording, many believe that “HRC has been undermining [such] efforts.”⁹⁶ Frank justifies excluding *all* transgendered people from the bill because of nebulous “political and substantive complications.”⁹⁷ However, the “complications” are situations in which pre-operative transsexuals might be in employment settings that require use of “communal showers.”⁹⁸ The exclusion fails to protect all post-operative transsexuals as well as those pre-operative ones whose work environments do not involve communal showers (law firms immediately come to mind as one example — the *Ally McBeal*-style unisex bathroom notwithstanding).⁹⁹

Schwenk could alleviate the need for the aforementioned discussion to continue.¹⁰⁰ However, this will only be so if Judge Reinhardt’s take on *Price Waterhouse v. Hopkins*¹⁰¹ carries the day.¹⁰² Although an argument can be made that five Justices in *Price Waterhouse* did approve of gender stereotyping being impermissible under Title VII, the oft-quoted portion of the Court’s decision was a plurality opinion,

95. HRC was formerly the Human Rights Campaign Fund (HRCF).

96. Kirk D. Richards, *Power Tour Urges Gays to Vote*, COLUMBUS DISPATCH, Aug. 10, 1999, at 3D (quoting Cathryn Platine, President of the Midwest Transsexual Alliance); see also *Symposium: Queer Law 1999: Current Issues in Lesbian, Gay, Bisexual and Transgendered Law*, 27 FORDHAM URB. L.J. 279, 366-67 (1999).

The report of a lesbian being responsible for scuttling an effort to add transgendered people to California’s anti-discrimination law has, of course, done nothing to ease tensions between transgendered people and those homosexuals — HRC members or otherwise — who are perceived as being anti-transgender. See Szymanski, *supra* note 6, at 6.

97. Barney Frank, *Letter to the Editor: Special Protection*, S.F. CHRON., July 11, 2000, at A26.

98. What Rep. Barney Frank Thinks About TG Inclusion in ENDA, *The Subversion of the American Transgender Movement: A Report From HRC Watch*, available at www.gendernet.org/hrcwatch/subvert.htm (last visited Mar. 2, 2001).

99. In fact, at least within the confines of the *Ally McBeal* universe, the transphobia of several of the firm’s partners, insofar as a pre-operative male-to-female transsexual having a penis, recently was shown to transcend the bathroom issue and go directly to the person’s very existence. See *Ally McBeal: Without a Net* (FOX television broadcast, Nov. 13, 2000) (on file with author).

100. Professor Chai Feldblum has described the animosity between the transgender community and HRC (then HRCF) at the time of the initial trans-exclusionary ENDA in 1994 as a “mini-war.” Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE - SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 182-83 (John D’Emilio et al. eds., 2000).

101. 490 U.S. 228 (1989).

102. It was persuasive in the Connecticut Commission on Human Rights and Opportunities’ recent interpretation of ‘sex’ to include ‘gender’ in the state’s employment anti-discrimination statute. See Connecticut Commission on Human Rights and Opportunities, *Declaratory Ruling on Behalf of John/Jane Doe*, available at <http://www.state.ct.us/chro/metapages/HearingOffice/HODDecisions/declaratoryrulings/DRDoe.htm> (last visited Mar. 3, 2001) [hereinafter *Declaratory Ruling*].

to which only one signatory, Justice Stevens, is still on the Court.¹⁰³ The possibility that ‘sex = gender’ may be repudiated when next the Supreme Court looks at the issue, together with the conflation of sexual orientation and gender identity in *Ulane* poses the very real possibility that ENDA, enacted with no explicit transgender inclusion in the definition of sexual orientation, would be viewed as intent by Congress not to protect transgendered people in any form.¹⁰⁴

Currently, however, ENDA is still only a proposal and it is still far too soon to tell whether *Schwenk* will have the effect on employment law for which transsexuals are hoping.¹⁰⁵ Judge Reinhardt’s opinion does not appear to have any transgender-related Title VII progeny yet,¹⁰⁶ although a Second Circuit decision involving a homosexual male, even while finding against the plaintiff, did favorably cite *Price Waterhouse’s* and *Schwenk’s* take on “sexual stereotypes” as being “cognizable as discrimination based on sex.”¹⁰⁷ However, Judge Walker cautioned, “This theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are

103. Justice White’s concurrence addressed only the burden-shifting issue. See *Price Waterhouse*, 490 U.S. at 258. Justice O’Connor, however, not only addressed burden-shifting but also seemingly approved of the concept of gender stereotyping being violative of Title VII. See *id.* at 278 (O’Connor, J., concurring). More significantly, though, she used both ‘sex’ and ‘gender’ interchangeably. See *id.* at 272-74. Even taking this into account, an assertion that ‘sex = gender’ was the majority holding of the Court in *Price Waterhouse* is one which, though possibly correct, rests on a foundation shaky enough that homosexuals cannot legitimately expect transgendered people to rely upon it alone to alleviate anti-transgender employment discrimination on a national level.

104. See Feldblum, *supra* note 100, at 183 (defending HRC’s mid-1990s stance with the self-congratulatory, “[a]lthough HRCF refused to agree that ENDA would include protection based on gender identity when it was reintroduced, HRCF did agree not to oppose any amendment that added such protection were such an amendment to be offered.”). What this does not address is whether the current HRC (or even the then HRCF) would, in any meaningful way, oppose introduction of an explicit *exclusion* of gender identity similar to that which was attached to the Americans With Disabilities Act. See Rose, *Littleton v. Prange*, *supra* note 19, at 8. Essentially, this type of exclusion, albeit far less than that in the ADA, is what occurred in the hate crime bill enacted by the State of Texas in 2001. 2001 Tex. Sess. Laws Serv. 85, § 1.02 (West 2001) (amending Article 42.014 of the Texas Code of Criminal Procedure). Though originally containing “perceived as” language, the final so-called compromise bill contained the following, “In this article, ‘sexual preference’ has the following meaning *only*: a preference for heterosexuality, homosexuality, or bisexuality.” *Id.* (emphasis added).

105. See *Daskalea v. District of Columbia*, 227 F.3d 433, 441 (D.C. Cir. 2000) (referring to *Schwenk* case as support for finding constitutional violation when prison guards forced a female prisoner to perform a striptease).

106. See *Declaratory Ruling*, *supra* note 102 (limiting the declaratory ruling to determine whether “discrimination against transsexual persons” is a form of sexual discrimination rather than a “physical and/or mental disability”). *Schwenk* was also cited favorably in a non-employment case involving a transgendered student in Massachusetts; see also *Doe ex rel. Doe v. Yunits*, No. 00-1060A, 2001 WL 664947, at *6 (Mass. Super. Feb. 26, 2001) (granting plaintiff’s motion to return to junior high school wearing clothes consistent with her gender identity).

107. *Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000) (noting as a substantial argument that the abuse suffered was discrimination based on sexual stereotypes may be cognizable as discrimination based on sex).

stereotypically feminine, and not all heterosexual men are stereotypically masculine. But, under this theory, relief would be available for discrimination based upon sexual stereotypes.”¹⁰⁸

IV. NO DEFENSE FOR THE STATE’S DEFENSE

A. *First Glance*

In this section, I focus on what appears to be the most serious of the incidents alleged by Ms. Schwenk to have occurred — the claim that Mitchell unzipped his pants, pulled out his penis, demanded oral sex, grabbed her, turned her around forcibly, pushing her against the bars and grinding his exposed penis into her buttocks.¹⁰⁹ The defense asserted that “Schwenk’s allegations constitute at worst ‘same-sex sexual harassment’ and not sexual assault.”¹¹⁰

Upon first reading it, I thought that I might have misread that sentence — at least insofar as the ultimate intent of the assertion. I could easily accept as being conceivably legitimate any number of defenses to Ms. Schwenk’s claims. The most obvious, of course, would be innocence. No one, transgender rights advocate or otherwise, could have a legitimate complaint over the state defending Mitchell if he put forth a legitimate defense to the effect that he did not commit the acts in question.¹¹¹ Nor could there be a serious complaint even if there were another non-substantive defense such as the running of the statute of limitations.¹¹² It just did not seem

108. *Id.* at 38. Additionally, in an Equal Credit Opportunity Act case that did not cite *Schwenk*, the First Circuit recently used the reasoning of *Price Waterhouse* to rule in favor of a crossdresser who had been denied credit based on gender norms. See *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 216 (1st Cir. 2000).

109. *Schwenk*, 204 F.3d at 1194.

110. *Id.* at 1198 (finding the defense’s argument unsupported by case law because of the physical sexual conduct). Washington criminal law utilizes the word “rape” rather than the phrase “sexual assault.” WASH. REV. CODE ANN. § 9A.44.040 (West 2000).

111. “An interlocutory appeal . . . does not lie from a denial of qualified immunity when the claim is one of factual insufficiency.” *Sterling v. Borough of Minersville*, 232 F.3d 190, 197 (3d Cir. 2000) (quoting *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996)). “Stated another way — an ‘I didn’t do it’ argument is not recognizable in this context.” *Id.* (quoting *Reyes v. Sazan*, 168 F.3d 158, 161 (5th Cir. 1999)). Nevertheless, the claim itself would be one on which the state should be obligated to support him. See also *Doe v. Bowles*, 254 F.3d 617, 622 (6th Cir. 2001) (stating that material questions of fact can preclude determination of whether prison employee sued by transsexual inmate is entitled to qualified immunity).

112. In fact, much to the consternation of some transsexual legal advocates, I feel that a time-line issue may have been legitimately fatal to Christie Lee Littleton’s wrongful death claim which was disallowed in *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999), even if she had prevailed, either at the Texas Court of Appeals or at the U.S. Supreme Court, on the question of her *current* gender status. Ms. Littleton did not amend her birth certificate to reflect her gender transition prior to her marriage. See *Littleton*, 9 S.W.3d at 231. Consequently, it would be conceivable that a court could have ruled her to be legally female currently but to have been

possible, though, that attorneys for the state, even in the context of defending a prison guard, would argue that the acts described by Ms. Schwenk, if true, would not constitute sexual assault. However, an e-mail correspondence with Ms. Schwenk's attorney, Jeffrey Finer of Finer & Pugsley, P.S., indicated that I was not in any way imagining the ludicrous posture of the defense. At the appellate level, "the State tried very hard to argue that the alleged conduct did not amount to an assault."¹¹³ He added, "Some of the trial level briefs were even funnier, if that's the right word."¹¹⁴

B. *Not So Funny*

In the state's attempt to argue that the allegations would not constitute a "crime of violence," as that term is used in the GMVA,¹¹⁵ the argument was made that Mitchell's alleged "actions, even if true, have not been determined to be actions which would constitute a crime of violence, or actions which presented a serious risk of physical injury."¹¹⁶ According to Judge Reinhardt, "The district court performed the correct analysis and properly concluded that Schwenk's allegations, if proved, would fall within the definition of attempted rape, which is a felony in the state of Washington."¹¹⁷

1. *Was Judge Reinhardt Correct?*

The Washington rape statutes define more than one level of rape. First degree rape involves "sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory" to the offense "uses or threatens to use a deadly weapon or what appears to be a deadly weapon."¹¹⁸ Second degree rape is engaging in "sexual intercourse with another person: (a) by forcible compulsion; (b) when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;"¹¹⁹ and under circumstances which

legally male at the time of her marriage. See Rose, *Transsexual and the Damage Done*, *supra* note 4, at 8.

113. E-mail from Jeffrey Finer, attorney of Finer & Pugsley, P.S. to Katrina C. Rose (Mar. 20, 2000, 20:44:25 CST) (on file with author).

114. *Id.*

115. 42 U.S.C. § 13981(d)(2) (1999).

116. *Schwenk*, 204 F.3d at 1199.

117. *Id.*

118. WASH. REV. CODE ANN. § 9A.44.040(1)(a) (West Supp. 2000). The words "including but not limited to physical injury which renders the victim unconscious" were added to subsection (c) subsequent to the time of the facts in Ms. Schwenk's allegations. 1998 Wash. Laws ch. 242 § 1.

119. WASH. REV. CODE ANN. § 9A.44.050(1) (West Supp. 2000).

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do not constitute first degree rape. Third degree rape is engaging in sexual intercourse with a person “not married to the perpetrator (a) where the victim did not consent to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim’s words or conduct,”¹²⁰ or “(b) where there is threat of substantial unlawful harm to property rights of the victim . . .”¹²¹ and under circumstances that constitute neither first nor second degree rape.

The phrase “sexual intercourse,”¹²² in addition to having its ordinarily understood meaning, also “means *any* act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.”¹²³ “Sexual contact” is defined as “*any* touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.”¹²⁴ The Washington Supreme Court recently noted that “although the word ‘any’ is not defined by the statute, ‘Washington courts have repeatedly construed the word ‘any’ to mean ‘every’ and ‘all.’”¹²⁵ “‘Forcible compulsion’ means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.”¹²⁶ Moreover, “[a] person is guilty of an attempt to commit crime if, with

120. “‘Consent’ means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.” WASH. REV. CODE ANN. § 9A.44.010 (7) (West Supp. 2000).

121. WASH. REV. CODE ANN. § 9A.44.060 (West 2000).

122. WASH. REV. CODE ANN. § 9A.44.010(1)(a) (West 2000).

123. WASH. REV. CODE ANN. § 9A.44.010(1)(c) (West 2000) (emphasis added).

124. WASH. REV. CODE ANN. § 9A.44.010(2) (West 2000) (emphasis added).

125. *State v. Tili*, 985 P.2d 365, 370 (Wash. 1999) (quoting *State v. Smith*, 814 P.2d 652, 656 (Wash. 1991) (quoting *State v. Harris*, 693 P.2d 750, 751 (Wash. Ct. App. 1985)) (finding the defendant guilty of first degree rape).

In an unpublished opinion, the Court of Appeals discussed in *State v. Waddle*, though in the context of a child rape case, the issue of “sexual contact” if the alleged act takes place through clothing. 1998 WL 306591, at *1 (Wash. Ct. App. 1998). “Proof of contact with a child’s intimate parts by an unrelated adult with no caretaking function supports an inference the contact was for the purpose of sexual gratification. Additional proof of sexual gratification may be required if the touching is on top of the child’s clothing.” *Id.* at 3 (citing *State v. Powell*, 816 P.2d 86, 88 (Wash. Ct. App. 1991), *review denied*, 824 P.2d 491 (1992)). That distinction could be significant to a differentiation between attempted rape and rape as Judge Reinhardt’s opinion, while noting that Mitchell’s penis was exposed when he “began grinding [it] into her buttocks,” did not specify whether Ms. Schwenk’s buttocks were covered or were exposed resulting in skin-to-skin contact of even a slight duration. *Schwenk*, 204 F.3d at 1194. However, because the determination at issue before the Ninth Circuit involved “attempted rape,” I will not address that distinction.

126. WASH. REV. CODE ANN. § 9A.44.010 (6) (West 2000).

intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime,”¹²⁷ and “a ‘substantial step’ is conduct strongly corroborative of the actor’s criminal purpose.”¹²⁸

In *State v. Aumick*, the Washington Supreme Court noted that neither force nor actual physical contact is necessary to find that the “substantial step” threshold of first degree rape has been crossed.¹²⁹ That decision upheld a decision of the Court of Appeals which included the following passage: “The unlawful touching *or the placing of the victim in apprehension of harm* is a necessary element of attempted first degree rape by forcible compulsion.”¹³⁰

2. *Statutory Correctness — From Washington to Florida*

Given the above statutory framework and judicial interpretations, I see no rational conclusion other than that the actions alleged by Ms. Schwenk to have been committed by Robert Mitchell, if true, would indeed constitute some level of attempted rape under Washington law.¹³¹ In fact, in all likelihood, the actions alleged by Ms. Schwenk to have occurred in her cell constitute a substantial step toward first degree rape, with there seeming to be little, if any, possibility of a spin being put on the facts as alleged by her which would show her not to have been “in apprehension of harm.” Mitchell may or may not have had some implement on his person which would generally be thought of as a deadly weapon, but Gianna Israel, a gender specialist who has consulted in litigation involving transgendered inmates, notes that

a guard with or without a weapon is a deadly weapon. At any time he has the power to impose infractions, get the individual transferred to more dangerous housing, set the inmate up in a bad situation, or work in tandem with other guards to have someone injured or killed.¹³²

As the facts of *Schwenk*, at least as accepted by Judge Reinhardt, show, some of those scenarios were in play in the events that

127. WASH. REV. CODE ANN. § 9A.28.020(1) (West 2000).

128. See *State v. Aumick*, 894 P.2d 1325, 1329 (Wash. 1995).

129. See *id.* (determining that a “substantial step” meets the threshold to find a perpetrator guilty of criminal intent).

130. *State v. Aumick*, 869 P.2d 421, 424 (Wash. Ct. App. 1994) (emphasis added).

131. “A person is guilty of an attempt to commit crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.” WASH. REV. CODE ANN. § 9A.28.020(1) (West 2000).

132. E-mail from Gianna Israel, Community Counselor and Author, Counselsuite (July 30, 2001, 02:47:14 CDT) (on file with author).

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transpired between Crystal Schwenk and Robert Mitchell.¹³³

Crystal Schwenk, of course, is not the only pre-operative transsexual to have been sexually assaulted by a prison guard while in confinement. As a corollary, it must be noted that not all inmates who are sexually assaulted by prison guards are pre-operative transsexuals. Recently, an editorial in the Fort Lauderdale Sun-Sentinel concluded with the following thought: "Whatever their legal status, *immigrant* detainees have certain rights as human beings. At the very least, they have the right not to be raped or physically abused by their jailers."¹³⁴ While I certainly agree with that sentiment, it is a bit unsettling that its author did not say the same for transsexuals because, despite allegations of numerous sexual assaults at the Krome INS detention center, the primary incident which spurred the editorial was the charging of Krome guard Lemar Andre Smith with the rape of an immigrant detainee who happened to be transsexual, Christina Madrazo.¹³⁵

Madrazo had been taken to the center after being apprehended as an illegal alien in May.¹³⁶ She asserts that she was raped twice, the

133. See *Schwenk*, 204 F.3d at 1194 (describing Schwenk's refusal of a guard's sexual advances, objection to assault, threats by the guard to send her to a maximum security unit of the prison, and a subsequent transfer which caused Schwenk constant fear of rape or other assault).

134. *Detainees Still Have Rights; At Least 10 Guards Under Investigation at Center*, FT. LAUDERDALE SUN-SENTINEL, Sept. 4, 2000, at 18A (emphasis added).

135. See *id.*

136. See *Guard Accused of Raping Inmate*, ASSOC. PRESS, Sept. 7, 2000 [hereinafter *Guard Accused*] (discussing the alleged repeat rape of Mexican transsexual Christina Madrazo at the Krome Detention Center).

Madrazo apparently came to the United States to escape the persecution that she was suffering in Mexico because she is transsexual, and had even sought political asylum. See Jody A. Benjamin, *Grand Jury Indicts Guard on Rape Charges; Allegations Against Others Investigated*, FT. LAUDERDALE SUN-SENTINEL, Sept. 1, 2000, at 1B [hereinafter *Grand Jury Indicts*]. "A month before coming to the United States, four men in her home state of Veracruz, Mexico, viciously beat her up. She spent 20 days in the hospital." *Guard Accused*, *supra* note 136. The Ninth Circuit recently recognized such persecution as grounds for asylum. See also *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000) (entitling Plaintiff to asylum and withholding deportation as there was an un rebutted presumption that Plaintiff had a well-founded fear of persecution if Plaintiff returned to Mexico because of Plaintiff's sexuality and gender expression).

Hernandez-Montiel attempted to distinguish between the persecution of men who are identified as having feminine traits, as it viewed the immigrant in that case, with persecution of transsexuals by asserting that the Court was not addressing that issue. However, any court which follows *Hernandez-Montiel* and finds that persecution of transsexuals does not fall under the same rubric would be guilty of gross intellectual dishonesty. Whether the issue will arise in Madrazo's case is unclear as, according to one report, after the second rape "INS officials gave her the choice of going to a mental institution or the Dade County Jail, so she signed an order agreeing to be returned to Mexico." *Guard Accused*, *supra* note 136. However, another report indicates that she will not be returned, at least not immediately. See Jody A. Benjamin, *Detainee Charges Guard Raped Her; Mexico Native Makes Appeal for Asylum*, FT. LAUDERDALE SUN-SENTINEL, Aug. 1, 2000, at 1B [hereinafter *Detainee Charges*].

second time coming after having reported the first, though it is unclear whether it was direct retaliation.¹³⁷ According to Madrazo, “I tried to defend myself, but he’s a big man and I’m a small woman.”¹³⁸ The Krome Center had apparently been the subject of allegations throughout its twenty-year history but, according to Cheryl Little, Executive Director of the Florida Immigrant Advocacy Center, “This is the first time I know about where an officer has actually been indicted.”¹³⁹

“She is just really happy that the government is taking the situation at Krome seriously,” said Madrazo’s attorney, Robert Sheldon.¹⁴⁰ “She had almost given up.”¹⁴¹ Federal officials have taken Madrazo’s allegations seriously enough to undertake an investigation which has yielded criminal sexual assault and sexual abuse indictments against the guard. Regarding the previous lack of investigation into the activities at Krome, Little has also stated, “[b]ecause guards have been doing this for years and have gotten away with it, they have no reason to believe anything will ever happen to them.”¹⁴²

Those who defended Mitchell in Washington against *civil* claims tried to characterize his actions against Crystal Schwenk — even under the assumption that they are true — only as sexual harassment. How can that not be construed as a message that such activity is not worthy of punishment under criminal law?

V. THE ROBERT MITCHELL DEFENSE: WHY IT SHOULD MATTER TO EVERYONE?

A. *A Conflict of . . . Convenience?*

I am He
As You are He
As You are Me
And we are all together.¹⁴³

Even those in agreement with the Ninth Circuit, as well as my

137. *Guard Accused*, *supra* note 136.

138. *Id.*

139. *Grand Jury Indicts*, *supra* note 136, at 1B. A cynical view might be that a rape of a transsexual is what it took to spur investigative action. I do not believe that such a view would be proper, particularly in light of how transsexuals are generally treated by the system when they are victims of crime.

140. *Id.*

141. *Id.*

142. *Detainee Charges*, *supra* note 135.

143. The Beatles, *I am the Walrus*, on MAGICAL MYSTERY TOUR (Capitol 1967).

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critique, might still have a question. Namely, why should this issue be of any concern to anyone other than transsexual prisoners and those who advocate for them?

Simply put — the obvious: The defender is also often a prosecutor.

States vary as to the role which the Office of the State Attorney General does, or even can, play in criminal prosecutions.¹⁴⁴ Irrespective of the organ of government which actually does the work attendant to them, criminal prosecutions are brought in the name of the state. The state is also responsible for bringing, as well as defending against, numerous types of civil actions. The advent of the administrative state has resulted in situations where a state attorney general's office has represented *both* sides in conflicts between dueling agencies.¹⁴⁵

It should not, therefore, be terribly surprising that intra-state conflicts between criminal law enforcement and civil legal logistics can arise. As a preface to examination of the particular problem which could have manifested itself as a result of Washington's defense of Robert Mitchell, I feel it instructive to look at an intra-state conflict which has arisen in Texas.

Refer back to the 1999 Texas Court of Appeals' decision in *Littleton v. Prange*.¹⁴⁶ The 2-1 majority invalidated the marriage of Christie Lee Littleton and Jonathan Littleton because Christie Lee is a male-to-female transsexual.¹⁴⁷ As I detailed in my article about the decision,¹⁴⁸ Ms. Littleton's counsel handled her case abominably,¹⁴⁹ and numerous theories which might have caused the outcome to be more

144. Although typically thought of as being involved in criminal prosecutions at the appeal stage, states run the gamut in terms of the power of attorney generals to participate in criminal prosecutions: from exclusive prosecutorial authority to none. See Committee on the Office of the Attorney General, National Association of Attorneys General, *The Attorney General's Role in Prosecution*, Table 2, at 6-10 (1977); see also NAT'L ASS'N OF ATTORNEYS GEN., *STATE ATTORNEYS GENERAL, POWERS AND RESPONSIBILITIES* 281-83 (Lynne M. Ross, ed., BNA Books 1990).

145. See Robert M. McGreevey, *The Illinois Attorney General's Representation of Opposing State Agencies - Conflicts of Interest, Policy and Practice*, ILL. B.J., Feb. 1978, at 308 (discussing the role of Illinois Attorney General in representing opposing agencies in a dispute, which would create a conflict of interest in private practice).

146. 9 S.W.3d 223, 231 (Tex. App. 1999) (holding that Christie Littleton is a male, and could not be married to another male and therefore, could not bring a cause of action as a surviving spouse).

147. See generally *id.*

148. See Rose, *Transsexual and the Damage Done*, *supra* note 4, at 8. I became privy to additional information on this issue after the article went to press. See generally *Petition for Writ of Certiorari, Littleton v. Prange*, 531 U.S. 872 (2000).

149. This reference is to her counsel of record at Texas' Fourth Court of Appeals rather than to Phyllis Frye and Alyson Meiselman, who resurrected the case after Littleton's original counsel failed to timely petition for a rehearing following the Texas Supreme Court's denial of review of the Court of Appeals decision.

favorable to her¹⁵⁰ were not set forth on her behalf.¹⁵¹ One of these was the fact that the Texas Attorney General's Office *did* regard her as female and did recognize her marriage when it came to the issue of collection of her husband's child support obligation to his children from a previous marriage.¹⁵² Texas, of course, is a community property state.¹⁵³

Now, arguably, the Texas Attorney General's garnishment of Ms. Littleton's wages was a ministerial act and in no way on par with a formal or informal attorney general opinion. Nevertheless, it did occur¹⁵⁴ throughout the early to mid 1990s. Almost twenty years prior to *Littleton v. Prange*, in an entirely different type of court case, the State of Texas all but declared that gender transition was recognized under Texas law. The reason for doing so was somewhat nefarious, but it *did* occur — and it is a footnote (literally) to a controversy that, as of this writing, is still alive and kicking in a Texas appellate court, albeit not as part of the same case.¹⁵⁵

The earlier of the cases was *Baker v. Wade*,¹⁵⁶ one of numerous challenges to the constitutionality of Section 21.06 of the Texas Penal Code, popularly known as Texas' sodomy law even though, in actuality, it only criminalizes conduct between members of the same sex.¹⁵⁷ In *Baker*, the mere possibility of undergoing a "surgical sex change" was proffered by the state as a reason to deny standing to the homosexual male who was challenging Section 21.06.¹⁵⁸ Citing *Babbit*

150. See Rose, *Transsexual and the Damage Done*, *supra* note 4, at 120 (noting that Littleton's counsel could have presented various theories that may have changed the outcome of her case, at least with respect to her *current* gender).

151. *Id.*

152. See Petition for Writ of Certiorari at 10, *Littleton v. Prange*, 531 U.S. 872 (2000) (No. 00-25).

153. See TEX. FAM. CODE ANN. §§ 3.001-3.003 (Vernon 1998).

154. A different issue entirely could arise now that the U.S. Supreme Court has denied review to Ms. Littleton's petition for writ of certiorari: Will the Texas Attorney General's Office return the money that was garnished from her? It seems as though Ms. Littleton will have an opportunity to collaterally challenge the Texas Appeals Court declaration that she is male in an action to seek the refund of that money that was garnished. However, insofar as her gender is concerned, it actually would be to her advantage to lose on the issue of seeking the return of the money.

155. See *Lawrence v. State*, Nos. 14-99-00109-CR and 14-99-00111-CR, 2000 Tex. App. LEXIS 3760 (Tex. Ct. App. June 8, 2000), *rev'd on reh'g*, 41 S.W.3d 349 (Tex. Ct. App. 2001).

156. 553 F. Supp. 1121, 1124 (N.D. Tex. 1982), *appeal dismissed*, 743 F.2d 236 (5th Cir. 1984), *rev'd on reh'g*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

157. See TEX. PEN. CODE ANN. § 21.06(a) (Vernon 1999) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."); see also TEX. PEN. CODE ANN. § 21.01(b) (Vernon 1999) ("[D]eviate sexual intercourse" includes "the penetration of the genitals or the anus of another person with an object.").

158. See *Baker*, 553 F. Supp. at 1147 n.62. This, of course, illuminates the inaccuracy of statements such as "[d]espite recent efforts to link them, the gay and transgender movements

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*v. United Farm Workers*¹⁵⁹ and *Steffel v. Thompson*,¹⁶⁰ District Judge Buchmeyer held that it was “not necessary for the plaintiff to expose himself to actual arrest and prosecution in order to challenge § 21.06.”¹⁶¹ He went on to note:

Although there may be practical problems in obtaining convictions under § 21.06, the threat of prosecution is “credible” and “real.” For example, participants can be prosecuted if a third person observes their acts of homosexual sodomy. Moreover, § 21.06 can be—and has been—used by the state if there is some doubt as to whether the conduct occurred in a public place. The state has certainly not “disavowed any intention” of invoking the statute in either of these instances.¹⁶²

However, it was in a footnote that Buchmeyer referred to the State’s “baseless, but imaginative” argument to deny standing that included the existence of transsexualism as one prong.¹⁶³ The State claimed that Section 21.06, “may not ever be enforced against the plaintiff because of a myriad of circumstances under his control, e.g., a change in preference for sexual partners, *a surgical sex change*, or a physical inability to locate a suitable male sexual partner.”¹⁶⁴

The *Baker* suit was ultimately unsuccessful, as was another challenge to the statute.¹⁶⁵ Although, a Houston appeals court, in June of 2000, ruled in *Lawrence v. State* that Section 21.06 was violative of the Equal Rights Amendment to the Texas Constitution, a full court, on rehearing overruled the June decision and found the statute did not violate federal or state equal protection guarantees.¹⁶⁶

have little in common,” made by those homosexuals who oppose transgender inclusivity. Paul Varnell, *Same Sex Marriage, Sort of*, CHI. FREE PRESS, Sept. 6, 2000.

159. 442 U.S. 289, 299 (1979) (holding that challenges to provisions regulating election procedures, consumer publicity, and criminal sanctions presented “case or controversy”).

160. 415 U.S. 452, 459 (1974) (holding that petitioner who had been threatened by police with arrest for violating Georgia criminal trespass law if he did not stop handing out anti-Vietnam handbills on the sidewalk presented an actual controversy and did not preclude federal declaratory relief).

161. *Baker*, 553 F. Supp. at 1146.

162. *Id.* at 1146-47 (parentheticals omitted).

163. *Id.* at 1147 n.62.

164. *Id.* (emphasis in original).

165. See generally *State v. Morales*, 826 S.W.2d 201, 205 (Tex. Ct. App. 1992) (finding the statute unconstitutional), *rev’d on other grounds*, 869 S.W.2d 941 (Tex. 1994).

166. See *Lawrence*, 41 S.W.3d at 357; see also Tim Fleck, HOUS. PRESS, *Court on a Hot Tin Roof*, (July 20, 2000), available at <http://www.houstonpress.com/issues/2000-07-20/insider.html> (reporting that prior to the scheduling of the re-hearing, the two Justices who ruled that the statute was unconstitutional were pressured by the Harris County Republican Party to change their decision); Brenda Sapino Jeffreys, *Criminal Investigation Sought Because of Alleged Pressure Tactics: Sodomy Ruling Sparks Outcry From Republican Party*, TEX. LAW., July 17, 2000, at 6 (noting that a district judge requested the Attorney General to investigate allegations of political pressure for an *en banc* hearing on the two appellate justices who declared § 21.06

This decision, handed down several months after *Littleton v. Prange*, gave no indication that the state was desirous of making the same “surgical sex change” argument in *Lawrence* that it had made in *Baker*.¹⁶⁷ Arguably, *Littleton* would not have foreclosed such an argument because it and *Lawrence* occurred in different Texas appellate districts and, similar to the operation of authoritativeness of federal circuit decisions, a decision from one Texas appellate district is not binding authority in the others.

B. *Not Slippery, But a Slope Nevertheless*

Schwenk v. Hartford involved a suit by a state prison inmate against state prison guards — state employees acting in their official capacities¹⁶⁸ — arising from allegations of rape, one of the most egregious physical violations of a person’s body imaginable. The Texas cases cited above touch on one of the most important aspects of a transsexual’s life: the person’s very identity. This, of course, is a question of legal status. Physical safety is of concern to transsexuals as well — as it is to all people.

The state employees in *Schwenk* were defended by a Washington State Assistant Attorney General.¹⁶⁹ The position of that defense was that the actions alleged *do not constitute attempted rape*.¹⁷⁰ If that position of the State of Washington regarding what is and is not “sexual assault” is good enough for a state prison guard “goose” in a civil rights action, then why should it not be good enough for an average, civilian “gander” in a criminal prosecution for rape or attempted rape?

Merely taking a position repugnant to a certain segment of the

unconstitutional in the June, 2000 panel).

167. See *Lawrence*, 41 S.W.3d at 357-58.

168. See *Schwenk*, 204 F.3d at 1205 (finding state prison guard accused of raping a transsexual prisoner not entitled to qualified immunity under prisoner’s § 1983 claim but reversing district court’s denial of immunity under prisoner’s Gender Motivated Violence Act claim); see also WASH. CONST. art. III, § 21 (stating that “the attorney general shall be the legal adviser of the state officers”). The attorney general shall:

(3) Defend all actions and proceedings against any state officer or employee acting in his official capacity, in any of the courts of this state or the United States;

(4) Consult with and advise the several prosecuting attorneys in matters relating to the duties of their office, and when the interests of the state require, he shall attend the trial of any person accused of a crime, and assist in the prosecution.

WASH. REV. CODE ANN. § 43.10.030 (West 1998); see also WASH. REV. CODE ANN. § 43.10.250 (West 1998).

169. *Schwenk*, 204 F.3d at 1192.

170. See *id.* at 1198 (noting that the guard’s position was that prisoner’s allegations were merely “same-sex sexual harassment” but not sexual assault).

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population does not contravene the Attorney General's duties.¹⁷¹ However, the reality of the State's position in *Schwenk* is disturbing. Much scholarship has been generated over the years as to the authoritativeness of attorney general opinions as well as to their proper role in the legal system.¹⁷² Though I have been unable to find any discussion that equates the position taken by an attorney general in a court filing to a formal (or informal) attorney general opinion, I see little reason why it should not be viewed in such a light — at least to some degree.

Speaking specifically of the powers and duties, Wisconsin's Attorney General stated, "[b]ecause the Attorney General represents the state and its agencies in virtually all litigation, he may often have a decisive voice in establishing state policy simply by declining to represent the agency or officer asking him to initiate or defend litigation."¹⁷³ Dee Akers commented, "His opinions being non-judicial, an attorney general is not as restricted by the implications of the doctrine of *stare decisis* as are the courts; nevertheless, the principles of the doctrine are not to be denied their value in any phase of legal activity."¹⁷⁴

Whether regarded as being on par with what is generally thought of in the legal profession as an attorney general's opinion or not, the position taken in *Schwenk* was certainly *an opinion* of the Office of the Attorney General as to what constituted a viable legal theory for Robert Mitchell's defense. Judge Reinhardt's stern rejection of the State's argument certainly minimizes the likelihood that use of the State's reasoning as a defense for an accused rapist would succeed. However, that does not negate the fact that the defense *was* used by the *State* in its defense of Mitchell. Consequently, one point bears repeating: however unlikely that any weight might be given to the

171. See *Young Ams. for Freedom v. Gorton*, 588 P.2d 195, 196 (Wash. 1978) (upholding a summary judgment against a group who had challenged the Attorney General's submission of an amicus curiae brief in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), because it disagreed with the Attorney General's position).

172. See generally Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1 (1993); Lacy H. Thornburg, *Changes in the State's Law Firm: The Powers, Duties and Operations of the Office of the Attorney General*, 12 CAMPBELL L. REV. 343 (1990); Thomas R. Morris, *State Attorneys General as Interpreters of State Constitutions*, 17 PUBLIUS 133 (1987); Henry S. Cohn, *The Office of the Attorney General of the State of Connecticut and Its Evolution and Duties*, 59 CONN. B.J. 261 (1985); William N. Thompson et al., *Conflicts of Interest and the State Attorneys General*, 15 WASHBURN L.J. 15 (1976); Arlen C. Christenson, *The State Attorney General*, 1970 WIS. L. REV. 298 (1970); Henry J. Abraham & Robert R. Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795 (1969); William A. Saxbe, *Functions of the Office of Attorney General of Ohio*, 6 CLEV.-MARSHALL L. REV. 331 (1957); Dee Ashley Akers, *The Advisory Opinion Function of the Attorney General*, 38 KY. L.J. 561 (1950).

173. Christenson, *supra* note 172, at 312.

174. Akers, *supra* note 172, at 578-79.

defense position in *Schwenk* in any future litigation, the position is disturbing in its own right.

C. *Which People Are Worthy of Being Defended?*

While the Attorney General has the duty to defend actions against state officers and employees,¹⁷⁵ the position of the Washington Supreme Court, and a quite logical one, is that it is the Attorney General's "paramount duty to protect the interests of the people of the state."¹⁷⁶ Even those who are of the opinion that transsexuals are freaks or merely "aberrant"¹⁷⁷ should, in addition to consulting medical data, which strongly suggests that the idea of an inborn gender identity that can be at variance with genital appearance is no myth, but rather, is a medical reality,¹⁷⁸ begin to question the lengths to which governments are willing to go to demonize and to dehumanize transsexuals, especially those who happen to end up behind bars.¹⁷⁹

The State of California recently agreed to a settlement in litigation

175. And, I again emphasize that this article is not a wholesale criticism of the mere fact that the State defended Mitchell on some ground, even qualified immunity. My criticism is the extent to which the State was willing to rationalize away the possible commission of a sexual assault.

176. *Reiter v. Wallgren*, 184 P.2d 571, 575 (Wash. 1947); *see also State ex rel. Dunbar v. State Bd.*, 249 P. 996, 999 (Wash. 1926).

177. Mark's ultimate opinion of the pre-operative transsexual Cindy. *See Ally McBeal*, *supra* note 99.

178. Irrespective of its ultimate validity, a recent study indicating a biological basis for transsexualism via a correlation with the incidence of left-handedness among transsexuals makes for good sound bite fodder. *See* Nigel Hawkes, *Homosexuals More Likely to be Left-Handed*, THE TIMES (LONDON), July 7, 2000, at 10 (noting separate studies coming to the same conclusion about homosexuals and transsexuals). However, evidence has long suggested that fetal exposure to hormones plays a strong role. *See* Rose, *Transsexual and the Damage Done*, *supra* note 4, at 10-12 (citing gender specialists Gianna Israel and Randi Ettner); Julie A. Geenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 280 (1999). *See generally* Milton Diamond, *A Critical Evaluation of the Ontogeny of Human Sexual Behavior*, 40 Q. REV. BIOLOGY. 147, 161 (1965); William Reiner, *To Be Male or Female — That is the Question*, 151 ARCH. PEDIATRICS ADOLESCENT MED. 224 (1997) (noting, in speaking of intersexed children, "anatomical (genital) relatedness and appearance may be less dynamic than the prenatal hormonally differentiated brain"). Not insignificantly, Judge Gernon concluded his *Gardiner* opinion with a quote from Reiner's article. *See In re Estate of Gardiner*, 22 P.3d 1086, 1110 (Kan. App. 2001) ("In the end it is only the children themselves who can and must identify who and what they are.").

179. Because the Ninth Circuit's opinion addressed allegations as assumed to be true, the issues I address in this article would not be affected even if Ms. Schewnk ultimately loses or even is shown to have made up all aspects of her story. Additionally, I have deliberately refrained from addressing what Ms. Schwenk was incarcerated for and whether there may have been any anti-transsexual bias involved either in her arrest or her conviction. That is not a part of this article's analysis even though there have been instances of those with "alternative lifestyles" being targeted for elaborately orchestrated police action, and the subject is worthy of commentary. *See United States v. Poehlman*, 217 F.3d 692, 697 (9th Cir. 2000) (holding that a crossdresser, charged with soliciting sex from a minor had been entrapped into such situation).

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brought against it by Torey Tuesday South.¹⁸⁰ Although the ultimate point on which she prevailed actually was one upon which many transsexual prisoners are *unsuccessful*, the seeking of medical treatment for transsexualism while in prison,¹⁸¹ she also claimed to have been “brutally raped by a correctional officer” in San Quentin Prison.¹⁸² One can only conjecture as to whether the rape claim may have played a role in the outcome on the hormone issue. Ultimately though, in addition to whatever the State’s own costs in defending the suit may have been, the cost to the State was over \$90,000.¹⁸³

Doubtlessly, the reaction of some to that will be to question the sanity of the legal system.¹⁸⁴ However, the question that should be

180. See *Ex-prisoner Awarded \$80,000*, SAN DIEGO UNION-TRIB., Sept. 1, 2000, at A-3. See generally *State Settles Claim by Transsexual*, ASSOC. PRESS, Aug. 31, 2000.

181. *South v. Gomez*, 211 F.3d 1275, No. 99-15976, 2000 U.S. App. LEXIS 3200, at *5 (9th Cir. Dec. 7, 1999). According to the Ninth Circuit’s memorandum opinion, the issue in South’s case was “far narrower” than in other cases that had gone against transsexuals seeking hormone therapy.

The critical element here is that plaintiff was already receiving female hormones when she was transferred from [one prison to a second prison] Upon her transfer [to the second prison], the hormones were abruptly cut off, but not because of any considered medical judgment. Thus, the question becomes whether Eighth Amendment standards [can be] violated when a course of hormone treatment is abruptly terminated. All of the doctors and experts in this case are of one opinion that once hormone therapy is begun it should only be terminated by gradually tapering it, and not by halting it preemptorily.

Id. at *5-6 (quoting the district court’s opinion of the situation in South’s case). The Ninth Circuit also carefully analyzed another transsexual prisoner’s claim in *Allard v. Gomez*, No. 00-16947, 2001 U.S. App. LEXIS 13321, at *4 (9th Cir. June 8, 2001) (finding “triable issues as to whether hormone therapy was denied Allard on the basis of an individualized medical evaluation or as a result of a blanket rule, the application of which constituted deliberate indifference to Allard’s medical needs”).

Many, though by no means all, courts have been hostile to prisoners seeking hormone treatment. See generally *Cuoco v. Moritsugu*, 222 F.3d 99, 104 (2d Cir. 2000); *Claybrooks v. Tenn. Dep’t of Corrs.*, No. 98-6271, 1999 U.S. App. LEXIS 15174, at *3 (6th Cir. July 6, 1999); *Farmer v. Moritsugu*, 163 F.3d 610, 612-13 (D.C. Cir. 1998); *Murray v. United States Bureau of Prisons*, No. 95-5204, 1997 U.S. App. LEXIS 1716, at *11-12 (6th Cir. Jan. 28, 1997) (*per curiam*); *Long v. Nix*, 86 F.3d 761, 766 (8th Cir. 1996).

The Federal Bureau of Prisons has, at least in the recent past, had a policy favorable to maintaining transsexual prisoners’ pre-incarceration hormone treatments. *Farmer*, 163 F.3d at 611-12 (citing FEDERAL BUREAU OF PRISONS, U.S. Dep’t. of Justice, Pub. L. No. 6000.04, Program Statement Ch. 1, § 1 (Dec. 15, 1994)).

182. Denny Walsh, *State Settles Claim by Transsexual Former Inmate*, SACRAMENTO BEE, Aug. 31, 2000, at A5. “I still live with (the rape) every day and night,” South wrote in a 1996 letter to U.S. Magistrate Judge John F. Moulds. “The nightmares and the memories are aggravated by the constant abuse, humiliation and sexual harassment that I live with from staff and inmates alike.” *Id.*

183. In addition to the \$80,000 settlement to South, plus \$12,161 in costs related to defending against the state’s appeal. *Id.*

184. Refer back to the reaction of the Family Research Council to Judge Reinhardt’s opinion in *Schwenk*. See *FRC Announces Winners of 2000 Court Jester Awards; Judges ‘Roasted’ For ‘Ridiculous Rulings,’ supra* note 87. How can one *not* interpret FRC’s chiding of Judge Reinhardt as a *de facto* defense of a guard’s ‘right’ to sexually assault transsexual inmates?

asked is whether taxpayers feel that they are getting their money's worth with the *true* cost of prisons hiring sexually predatory prison guards¹⁸⁵ and medical personnel who feel as though they can totally disregard standard medical practices for inmates, whether those inmates are transsexual or not.¹⁸⁶

VI. CONCLUSION

A. *A Review of the Reality of the Robert Mitchell Defense*

The great comedian Richard Pryor once gave thanks to God on stage for the existence of penitentiaries.¹⁸⁷ Though agnostic, I agree with the gist of his sentiment. Prisons exist for a reason. Likewise, prisons have guards for a reason. Their existence is a legitimate need of the state and of the people. Still, how are "the interests of the people of the state" served by attempting to rationalize away the *sexual* assault of *any* prisoner by *any* guard?

With that in mind, review the following theories which the State of Washington argued against Crystal Schwenk:

- At the time of the alleged incidents, the law was clearly established that a prison guard may be liable for allowing someone else to sexually assault an inmate *but not for an assault that the guard himself commits*;¹⁸⁸
- Ms. Schwenk's allegations constitute at worst "same-sex sexual harassment";¹⁸⁹
- The acts alleged do not constitute a "crime of violence";¹⁹⁰
- Despite the GMVA specifically stating it is immaterial "whether or not [the] acts have actually resulted in criminal charges,"¹⁹¹ the fact that Ms. Schwenk had not filed criminal charges against Mitchell should act to discredit her claim;¹⁹²

185. In another recent decision, though not one involving a transsexual inmate, it was noted that one of two guards accused of rape by a female prisoner "pleaded guilty to criminal charges in connection with the assault." *Stockman v. Lowndes County*, No. 1:99CV182-D-D, 2000 U.S. Dist. LEXIS 16677, at 4 (N.D. Miss. Aug. 21, 2000).

186. Federal prison policy has just recently changed to permit prisoners to receive kidney transplants, even those who are in end-stage kidney failure. See Susan Okie, *Inmates Await Transplant Reviews; Despite Federal Policy Change, Prisoners Say They're Ignored*, WASH. POST, Nov. 17, 2000, at A3.

187. See *LIVE ON THE SUNSET STRIP* (Columbia Tri Star 1982).

188. Reinhardt referred to that aspect of the defense as being "both legally and as a matter of common sense . . . absurd." *Schwenk*, 204 F.3d at 1198.

189. *Id.*

190. *Id.* at 1199.

191. 42 U.S.C. § 13981(b) (2000).

192. *Schwenk*, 204 F.3d at 1199.

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- Despite the GMVA's declaration, "*All persons* within the United States shall have the right to be free from crimes of violence motivated by gender,"¹⁹³ the GMVA covers neither men nor transsexuals;¹⁹⁴ and
- An assault that occurs because of a victim's transsexuality is not an assault because of that victim's gender.¹⁹⁵

Those who might disagree with the U.S. Supreme Court's admonition that "[b]eing violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society"¹⁹⁶ should still be left queasy by the cavalier legal reasoning behind such arguments. Moreover, there should be universal concern over the potential ramification of the State's position as to Mitchell's specific actions.

The State's argument constituted a *de facto* statement that unzipping one's pants, pulling out one's penis, demanding oral sex, grabbing one's intended victim, turning that victim around forcibly, pushing him or her against a wall and grinding one's exposed penis into his or her buttocks is only sexual harassment rather than attempted rape. A successful use of that argument in a criminal trial by a rightfully accused attempted rapist would allow that sexual predator to escape justice — and to continue to roam the streets. How would that possibly serve "the interests of the people of the State"? The only acceptable answer to that question is that it would not — and that it cannot. Nevertheless, the argument was put forth.

B. A Review of the Reality of Transsexual Existence

"Arguably, there are few groups in our society today who are as disadvantaged and disenfranchised as transgenderists and transsexuals. Fear and hatred of transgenderists and transsexuals combined with hostility toward their very existence are fundamental human rights issues."¹⁹⁷

The above passage appears in one of the more enlightened statements on the subject of prohibition of anti-transgender

193. 42 U.S.C. § 13981(d)(2)(A) (2000) (emphasis added).

194. See *Schwenk*, 204 F.3d at 1199-1200 (citing legislative history clearly indicating that the law was designed to create a federal remedy "by a victim of gender-based violent crime against *his* or her attacker") (emphasis in original).

195. *Id.* at 1200.

196. *Farmer*, 511 U.S. at 834.

197. Ontario Human Rights Commission, *Policy on Discrimination and Harassment Because of Gender Identity*, available at <http://www.ohrc.on.ca> (last visited on July 7, 2000) (setting forth policies to recognize the worth and dignity for all persons, providing equal rights without discrimination).

discrimination ever to come from any governmental entity. Sadly, for transgendered people in the United States, this enlightened statement was from a *Canadian* provincial human rights commission.

Employment discrimination due solely to one's being transsexual has no definitive recognized remedy under federal law and has remedies in only two states' laws¹⁹⁸ and a few city ordinances.¹⁹⁹ Transgendered people who find themselves shut out of legitimate employment possibilities are known to turn to prostitution just to survive — often with tragic results.²⁰⁰ One study suggests that, after gender transition, a male-to-female transsexual has a greater chance of being murdered than of ever getting married.²⁰¹ It is fair to surmise that transsexuals might have a higher likelihood of being

198. See MINN STAT. ANN. §§ 363.01, Subd. 45 & 363.03, Subd. 1(2) (West 2000); see also *Doe ex rel.*, 2000 WL 33162199, at *7 (Oct. 11, 2000) (stating that Massachusetts maintains a remedy for transsexual discrimination under its Declaration of Rights laws).

199. See generally CURRAH & MINTER, *supra* note 2, at 45-50. Madison, Wisconsin recently added gender identity to its anti-discrimination ordinance. See *Council Bans Gender Identity Discrimination*, CAPITOL TIMES (MADISON), Sept. 20, 2000, at 3A. Portland, Oregon is considering adding similar language to its ordinance. See generally *Portland Mayor Wants to Put Gender Identity in Law*, ASSOC. PRESS, Nov. 17, 2000.

200. See Rose, *Littleton v. Prange*, *supra* note 19, at 8; see also *infra* note 208.

201. See generally Nick Napolitano, *We Are Considered Disposable People*, WASH. BLADE, Dec. 10, 1999. We are also *inconvenient* people for some in the gay community. See David France, *An Inconvenient Woman*, N.Y. TIMES, May 28, 2000, at 24. France notes that some gays who sought to make media hay out of the murder of Pfc. Barry Winchell decided to erase from the picture the fact that his lover, Calpernia Addams, was not a male, but a transsexual female.

[T]he more that Winchell, like Matthew Shepard before him, has been held up as a martyr for gay equality, the less room there has been for explaining such sloppy complications. "A lot of people just don't get that this woman — tall, lovely, beautiful — has male parts," explains Kathi Westcott, a staff attorney for Servicemembers' Legal Defense Network (S.L.D.N.), the gay soldiers' group based in Washington. "It was a difficult connection to make for people, even in the gay community."

Westcott swept into Tennessee days after the killing determined to investigate Winchell's murder and expose the antigay sentiment that persists in the military. She and Rhonda White, co-director of the Nashville-based Lesbian and Gay Coalition for Justice, paid Addams a visit and made a proposal. "For the sake of clarity," White recalls Westcott saying to Addams, they should tell reporters she is a he. "Barry was dating an anatomical male," White says. "How can you say he was gay-bashed if he was dating a woman, you know?"

Addams, a nightclub performer, agreed — "I was really worried I would lend some sort of Jerry Springer element to this awful crime," she says — even though she found it "devastating" to be called a man, after her long journey away from manhood. In news accounts, she was Winchell's "boyfriend" or his "cross-dressing friend," always he and him. Each qualification carried the story away from its truth. By superimposing a rigid grid of sexual identity over the lives of Calpernia Addams and Barry Winchell, the activists effectively severed the soldier from the love for which he died.

France, at 24. A recent article by Winchell's parents not only was devoid of any reference to Addams' transgender status but seemingly went further in erasing her significance to Winchell, failing to mention her at all. See Patricia Kutteles & Wally Kutteles, Texas Triangle, *Why America Must Honor ALL Her Veterans* (Nov. 17, 2000), available at <http://www.txtriangle.com/archive/906/vp1.html>.

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sexually assaulted than non-transsexuals.²⁰² In the Ninth Circuit's *Schwenk v. Hartford* opinion, transgender employment law and transgender personal safety issues crossed paths.

The attempt to classify the alleged actions of Robert Mitchell against Crystal Schwenk as being not a crime of violence and not gender-motivated is chillingly similar to the District of Columbia's assertion that paramedics who stopped treatment on an injured woman when it was discovered that she was a pre-operative transsexual had a free speech-based constitutional right to laugh at her as she lay bleeding to death.²⁰³ The transsexual, Tyra Hunter, died following a traffic accident.²⁰⁴ However, after the accident but prior to her death, paramedics who arrived on the scene not only stopped treatment when they discovered that she had male genitalia but also began verbally berating her.²⁰⁵ The District of Columbia initially claimed that that the verbal abuse by the paramedics was protected free speech but ultimately dropped the theory.²⁰⁶ The speech that the District of Columbia attempted to protect included the paramedics saying, "This bitch ain't no girl. It's a nigger, he's got a dick," followed by laughing along with his colleague.²⁰⁷ On a purely moral level — the attempt to defend such government employee action is a hate crime in its own right.²⁰⁸

202. As Pat Califia noted in her *Advocate* advice column, and as should be evident from the prevalence of the use of transgendered people on television shows such as Jerry Springer's, there are people who are turned on by transvestites and transsexuals. PAT CALIFIA, *ADVOCATE ADVISER* 151 (1991).

203. See Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community*, in *CREATING CHANGE — SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 451, 453 (John D'Emilio et al. eds., 2000).

204. The accident itself was apparently just that — an accident. The anti-transgender atrocity occurred only after treatment of Hunter's injuries began.

205. See Frye, *supra* note 203, at 453.

206. See Julie Makinen Bowles, *D.C. Won't Seek Exemption From Bias Law in Rescue Case*, *WASH. POST*, Jan. 29, 1998, at D2.

Although the City had considered challenging a trial court decision favorable to the Hunter family, a settlement in the case was reached in August 2000 and the matter was closed in November. While not a pyrrhic victory, Rick Rosendall of Gay and Lesbians Activists Alliance (GLAA) notes, "the emergency room doctor who the jury found to have caused Tyra's death still practices medicine at D.C. General, and the firefighter who withdrew medical support from Tyra at the accident scene was promoted late last year to sergeant." Rick Rosendall, *Tyra Hunter Settlement Received*, Gay and Lesbian Activists Alliance, at <http://www.glaa.org/archive/2000/hunterpayment1117.shtml> (Nov. 17, 2000).

207. Desiree Allen Graves, *Mom Sues After Son Died Without His Dignity*, *THE ETHNIC NEWSWATCH*, Feb. 7, 1998, at A1.

208. I have no doubt that this will be viewed by some as hyperbole. However, I stand by the characterization. Transgendered people who survive barbaric treatment by those who are supposed to protect and serve them as they would protect and serve non-transgendered people have been known to commit suicide. See Lynne Smith, *Remembering Michelle*, on *Remembering Our Dead*, available at www.gender.org/remember (last visited Nov. 18, 2000). Smith describes the

I do not assert that the logical extension of the state's defense of Mitchell will ever play out in the courts of Washington or any other state. I believe that any competent judge would come to the same conclusion that Judge Stephen Reinhardt did: the actions described by Crystal Schwenk, if true, constitute attempted rape. However, the mere possibility that an accused rapist might be able to use the 'Robert Mitchell Defense' because of the lengths to which state attorneys were willing to go to defend the actions of a prison guard against a transsexual should cause all in the legal profession to reconsider the inhumane manner in which most areas of the law treat transsexuals. Might it actually take a successful use of this 'Robert Mitchell Defense' in a criminal trial on attempted rape charges to open some eyes?

As I stated at the beginning of this article, it was Judge Reinhardt's Title VII dicta that first drew my attention to *Schwenk v. Hartford*. Irrespective of whether that employment law seed ever bears fruit, the State of Washington's defense of Robert Mitchell should stand forever as the epitome of the willingness of society to deny that transsexuals are human at all,²⁰⁹ essentially no more than "gender trash."²¹⁰ Whether anybody will pay attention is a different matter entirely.

suicide of Michelle Lynn O'Hara following an apparently random rape and beating after which "[s]he was taken to the hospital and was treated with indifference by the hospital staff because of her transgendered status." *Id.* According to Smith, the police were also, at best, indifferent to O'Hara.

209. Professor Whittle has summarized societal attitude toward transsexuals, "The words 'man' and 'woman' are used to represent the whole of humanity. And since transgenderists fit neither keyword, they cannot be part of humanity." Stephen Whittle, *Choice and the Human Experience*, in PROCEEDINGS OF THE FOURTH INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY 23, 25 (1995).

210. The murder of pre-operative transsexual Amanda Milan, a New York sex worker, exemplified the peripheral circumstances which add to the horror of many transgender murders. "While a few bystanders tried to help, several of the yellow cab drivers parked along the street cheered and applauded as Amanda bled to death." GAIN News, *NY Cabbies Applaud Murder of "Gender Trash,"* available at <http://gender.org/gain/g00/g062300.html> (last visited July 6, 2000). One witness said that

the detectives and prosecutors have been treating them with relative respect, but that she gets the impression they are trying to rush this case through and keep it quiet. An unidentified newspaper reporter was interested in the story of the brutal slaying of a woman, but not when he learned she was "just a transvestite."

Id.