

## GENDER: MALE OR FEMALE? *IN RE HEILIG* AND THE FUTURE OF CHECK-THE-BOX

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Eight million people, or 2.7% of the population, are born with female genitalia, yet they feel that they should have been born with male genitalia. This condition, called gender dysphoria, is sometimes powerful enough to compel an individual to undergo sex reassignment surgery. In Maryland, if this surgery is completed, an individual can be treated as a member of the opposite sex because state law recognizes that individuals may change gender through sex reassignment surgery; but, if surgery is incomplete then that individual possesses the rights of her or his original sex.<sup>1</sup> Gender carries certain rights with it, such as the right to marry, the right to privacy, and the right to government aid. For one out of 37,000 people in the United States who are transsexual,<sup>2</sup> these are weighty questions.<sup>3</sup>

The Maryland Court of Appeals recently addressed the controversial issues of gender dysphoria and transsexual rights. The *In re Heilig* Court considered whether the petitioner, a pre-operative transsexual, was properly precluded from a declaratory judgment changing both his name and his gender from male to female.<sup>4</sup> Judge Wilner, writing for the Court of Appeals, held that the circuit court had equity jurisdiction over the case,<sup>5</sup> and that in order for the court to change Heilig's status, Heilig had to sufficiently demonstrate that his

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1. *In re Heilig*, 372 Md. 692, 715, 816 A.2d 68, 82 (2003).

2. Transsexual is defined as: "the most severe manifestation of gender identity disorder in adults, being a prolonged, persistent desire to relinquish their primary and secondary sex characteristics and acquire those of the opposite sex; particularly describing those persons who go so far as to live as members of the opposite sex though dress, hormonal treatments, or surgical reassignment." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1867 (29th ed. 2000). In 1994, the Diagnostic and Statistical Manual of Mental Disorders-IV committee replaced the diagnosis of Transsexualism with Gender Identity Disorder. Available at <http://www.hbgda.org/socv6.html>.; Sex reassignment is a combination of taking hormones, removing sexual organs, and reconstructing the genitals to reflect the new gender. *In re Heilig*, 372 Md. at 722, 816 A.2d at 86-87 (2003); Gender dysphoria is another term for transsexualism. Available at <http://www.hbgda.org/socv6.html>.

3. Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 BUFF. L. REV. 835, 841 (1995) (citing Sir Martin Roth, 49 MEDICO-LEGAL J. 5, 12 (1981)).

4. *In re Heilig*, 372 Md. at 712, 816 A.2d at 80 (discussing that the Petitioner was a non-resident and there was no opposition filed in the matter).

5. *Id.*

gender was presently and permanently female.<sup>6</sup> Although the Court reversed and remanded the case in order to allow Heilig to present criteria that defines gender and medical evidence that his gender had been changed, it did not go far enough because the Court failed to give lower courts the option of taking factors, such as self-identification, into consideration when determining whether an individual's gender status should be changed.<sup>7</sup> Rather than perpetuating a rigid definition of two possible genders, the Court should have allowed self-identification, defined gender more clearly, embraced a broader standard that does not require evidence of surgery, and created a possible third sex for transsexual individuals.

### I. THE CASE

The petitioner, Robert Wright Heilig, was born as a male in 1948 in Pennsylvania.<sup>8</sup> Although he had a Pennsylvania birth certificate, the petitioner was a Maryland resident at the time of the trial.<sup>9</sup> In March 2001, Heilig filed a petition in the Circuit Court for Montgomery County requesting an order to change his<sup>10</sup> name to Janet Heilig Wright and his sex from male to female.<sup>11</sup> Within the petition, Heilig included two letters from treating medical sources; one stated that Heilig had completed "hormonal castration" and the other noted that Heilig's true gender identity is that of a female.<sup>12</sup> Alleging that he was "transitioning from male to female," Heilig asked the court for an

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6. *Id.* at 723, 816 A.2d at 87.

7. *Id.*

8. *Id.* at 693, 816 A.2d at 69.

9. *Id.*

10. The petitioner used the male pronoun to describe himself in the court filings.

11. *In re Heilig*, 372 Md. at 693; 816 A.2d at 69.

12. *Id.* The letter from the petitioner's psychotherapist stated that the change in gender comported with the standards of care for Gender Identity Disorder as described by the Harry Benjamin International Gender Dysphoria Association: (1) Acceptance of personal homosexual or bisexual fantasies and behaviors (orientation) as distinct from gender identity and gender role aspirations; (2) Acceptance of the need to maintain a job, provide for the emotional needs of children, honor a spousal commitment, or not to distress a family member as currently having a higher priority than the personal wish for constant cross-gender expression; (3) Integration of male and female gender awareness into daily living; (4) Identification of the triggers for increased cross-gender yearnings and effectively attending to them; for instance, developing better self-protective, self-assertive, and vocational skills to advance at work and resolve interpersonal struggles to strengthen key relationships. Available at <http://www.hbigda.org/socv6.html>.

order that would legally change his sexual identity.<sup>13</sup> The Circuit Court for Montgomery County entered an order that changed Heilig's name.<sup>14</sup> However, the court rejected Heilig's request to change his sexual identity.<sup>15</sup> The circuit court noted that gender had "physical manifestations that were not subject to modification,"<sup>16</sup> and found that it had no authority to enter an order changing Heilig's sexual identity.<sup>17</sup> The hearing at the Circuit Court for Montgomery County dealt solely with the issue of jurisdiction, and Heilig appealed.<sup>18</sup>

The Court of Special Appeals<sup>19</sup> affirmed the circuit court.<sup>20</sup> The Court of Special Appeals' decision was based on three grounds: first, there was no jurisdiction to enter declaratory relief because there was no justiciable claim; second, there was no statutory or common law basis for the relief that Heilig sought because he was not born in Maryland, and the court declined to extend equity jurisdiction in this case; and third, Heilig failed to show a permanent change in his sexual identity.<sup>21</sup> Again Heilig appealed, and the Court of Appeals addressed the three issues that formed the basis for the Court of Special Appeals' decision, namely jurisdiction, basis for relief, and sufficiency of the evidence.

## II. LEGAL BACKGROUND

There is little case law pertaining to the rights of individuals with gender dysphoria, and past cases on gender identity have largely been decided based on chromosomal and anatomical construction.<sup>22</sup> *Heilig* is unique because the Court considered the current medical factors that form an individual's gender and decided the case based on sex reassignment surgery. The *Heilig* Court made a significant contribution to the body of law regarding individuals with gender dysphoria, both in its discussion of relevant medical scholarship and

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13. *Id.* at 693, 816 A.2d at 69.

14. *Id.* at 693-94, 816 A.2d at 69.

15. *Id.* at 694, 816 A.2d at 69.

16. *Id.*

17. *Id.*

18. *Id.* at 696, 816 A.2d at 71.

19. The Court of Special Appeals is Maryland's intermediary court. The Court of Appeals is the highest court in Maryland.

20. *In re Heilig*, 372 Md. at 694, 816 A.2d at 69.

21. *Id.* at 694-95, 816 A.2d at 69-70.

22. *See infra* Section II.A.

its acknowledgment of additional factors for courts to consider when faced with these issues.

### A. *Sex as an Immutable Characteristic*

The judiciary has been wedded to the idea that one cannot change his or her sex.<sup>23</sup> Sex is defined as male or female at birth.<sup>24</sup> The courts have based their decisions on a variety of factors, including immutable characteristics like chromosomes and reproductive organs. Regardless of the fact that some people have undergone sex reassignment surgery, courts have refused to make changes of gender in official documents until recently.<sup>25</sup> The first case in this area of law arose in Great Britain in 1960;<sup>26</sup> however, United States courts were soon confronted with the situation in two contexts.

The first case known to deal with the legal rights of transsexual<sup>27</sup> individuals was heard by England's Probate, Divorce and Admiralty Division.<sup>28</sup> In 1960, April Ashley Corbett, a biologically born male, had sex reassignment surgery and from then on lived as a female.<sup>29</sup> In 1963, she married a man who later that year petitioned for the marriage to be nullified.<sup>30</sup> The Court held that Corbett was biologically a male based on her chromosomal sex, gonadal sex, and genital sex, all of which are immutable characteristics.<sup>31</sup> The Court

23. *Littleton v. Prang*, 9 S.W.3d 223, 230 (Tex. App. 1999). *Corbett v. Corbett*, 2 Eng. Rep. 83 (P. 1970).

24. *Id.*

25. *See infra*. Section II.A.

26. *Corbett v. Corbett*, 2 Eng. Rep. 83 (P. 1970).

27. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1867 (29th ed. 2000) Defining transsexualism as:

the most severe manifestation of gender identity disorder in adults, being a prolonged, persistent desire to relinquish their primary and secondary sex characteristics and acquire those of the opposite sex; particularly describing those persons who go so far as to live as members of the opposite sex through dress, hormonal treatments, or surgical reassignment.

*Id.*

28. *Corbett v. Corbett*, 2 Eng. Rep. 83 (P. 1970).

29. *Id.*

30. *Id.*

31. *Id.* *See also* Greenberg, *supra* note 32 (stating that chromosomal sex is based on one's genetic make-up e.g. XX or XY, gonadal sex is based on the reproductive sex glands that are manifested e.g. testes or ovaries, and genital sex consists of the sexual organs that a person possesses e.g. penis or clitoris).

defined marriage as a relationship between a man and a woman, and thus found the Corbetts' marriage void.<sup>32</sup>

The Supreme Court of New York County came to a similar conclusion in *Hartin v. Director of the Bureau of Records and Statistics*.<sup>33</sup> In *Hartin*, the plaintiff filed for a new and corrected birth certificate that stated he was a female after sex reassignment surgery.<sup>34</sup> The court took under consideration the New York City Health Code Section 207.05(a)(5) that stated, "'A new birth certificate shall be filed when: . . . The name of the person has been changed pursuant to court order and proof satisfactory to the Department has been submitted that such person has undergone convertive surgery.'"<sup>35</sup> The basis of the code was a report by the Committee on Public Health of New York Academy of Medicine.<sup>36</sup> The Committee concluded that even though the surgery was complete, male to female transsexuals are still males on the basis of chromosomal sex; therefore, male to female transsexuals' birth certificates could be amended to show the present (female) and former (male) sexes of an individual.<sup>37</sup> However, because of the possibility for defrauding creditors by assuming a new gender and new name, the Committee found that transsexual individuals' birth certificates should not solely reflect the new sex.<sup>38</sup> While the Committee concluded that birth certificates could be subject to amendment, the court was more concerned with the potential for fraud.<sup>39</sup> As a result, *Hartin's* request was denied.<sup>40</sup>

The Texas Court of Appeals addressed the issue of gender identity in the context of a wrongful death suit in which the plaintiff was living as a female, with female genitals, but, of course, still retained his original male chromosomes.<sup>41</sup> In *Littleton v. Prang*, the court held that an individual's sex is permanently determined at birth by biological factors.<sup>42</sup> In this wrongful death suit, the decedent's surviving spouse claimed to be the decedent's next of kin rather than

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32. *Corbett*, 2 Eng. Rep. at 83.

33. 347 N.Y.S.2d 515 (N.Y. Sup. Ct. 1973).

34. *Id.* at 516.

35. *Id.* at 517.

36. *Id.*

37. *Id.*

38. *Id.* at 517-18.

39. *Id.*

40. *Id.* at 518.

41. *Littleton v. Prang*, 9 S.W.3d 223, 230 (Tex. App. 1999).

42. *Id.*

the decedent's estranged, surviving child.<sup>43</sup> The plaintiff, wife of the decedent, changed his name in 1977, underwent sex reassignment surgeries from 1979-1980,<sup>44</sup> and was married to the decedent for seven years until he died.<sup>45</sup> The court held that the plaintiff was a man, regardless of his female genitals, because he maintained his male chromosomal makeup.<sup>46</sup> Because the court determined the plaintiff was always male, he was not eligible to be legally married to the decedent under Texas law and, by extension, the plaintiff was not the surviving spouse.<sup>47</sup>

In addition, the plaintiff in *Littleton* had filed a petition to amend his birth certificate.<sup>48</sup> The trial court granted the petition because the original birth certificate was inaccurate post-operation.<sup>49</sup> However, the Court of Appeals of Texas found that the plaintiff's sex on his birth certificate should reflect his anatomical and genetic sex at the time of birth not at the time of the petition.<sup>50</sup> Furthermore, the plaintiff's birth certificate was accurate according to the Court's interpretation of the law.<sup>51</sup> The Court interpreted the legislative intent behind the word "inaccurate" in Section 191.028 of the Texas Code to mean based on fraud or error, which was not present in the case at bar.<sup>52</sup>

### *B. Sex as a Mutable Characteristic*

Two recent court decisions, *Goodwin v. United Kingdom* and *M.T. v. J.T.*, demonstrate the shift to recognize gender as a mutable characteristic, and can be changed by a combination of taking hormones, removing sexual organs, and reconstructing the genitals to reflect the new gender.<sup>53</sup> Additionally, the European Court of Human Rights handed down an opinion that based legal recognition of

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43. *Id.* at 225.

44. *Id.* at 224.

45. *Id.* at 225.

46. *Id.* at 230.

47. *Id.* at 231.

48. *Id.* at 226.

49. *Id.* at 231.

50. *Id.*

51. *Id.*

52. *Id.*, TEX. HEALTH & SAFETY CODE ANN. § 191.028 (Vernon 1992) (stating that a person may seek an amended birth certificate if the original record was "incomplete or proved by satisfactory evidence to be inaccurate").

53. *In re Heilig*, 372 Md. 692, 722, 816 A.2d 68, 86-87 (2003).

transsexual identities on human rights such as privacy, dignity and freedom.<sup>54</sup>

The legal identity of transsexual individuals has been considered from a human rights perspective in international courts. In *Goodwin v. United Kingdom*, a biologically born male underwent gender reassignment surgery and became a female.<sup>55</sup> Notwithstanding the fact that the petitioner was living as a female, he was still legally considered a male for the purposes of national insurance.<sup>56</sup> Men in the United Kingdom are required to pay national insurance until they are sixty-five, whereas women are required to pay national insurance until they are sixty.<sup>57</sup> The petitioner, at the age of sixty-five, filed the action because he identified himself as female but was forced to continue paying insurance.<sup>58</sup>

Christine Goodwin brought an action against the United Kingdom Government for four violations of the European Convention on Human Rights. The European Convention on Human Rights, Article 8, espouses privacy, human dignity, and human freedom.<sup>59</sup> Additionally, Article 12 grants the right of a man to marry a woman.<sup>60</sup> The Court found that the Government breached both articles, and Goodwin's rights had been violated.<sup>61</sup> The Court held in *Goodwin v. United Kingdom* that the right to marry should not be based on one's chromosomes.<sup>62</sup>

In 1971, the highest court in New Jersey found that sex was mutable in *M.T. v. J.T.*<sup>63</sup> The plaintiff in this case was a biologically born male, who surgically changed her genitals from male to female.<sup>64</sup> The plaintiff changed her birth certificate and married the defendant.<sup>65</sup> After living together as a married couple for two years, the defendant deserted the plaintiff.<sup>66</sup> Initially, the plaintiff filed for support and

54. *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 447, 480–81 (2002).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, E.T.S. 44 [hereinafter European Convention on Human Rights].

60. Eur. Conv. on H.R., Nov. 4, 1950, art. 12, E.T.S. No. 44.

61. *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 447, 481 (2002).

62. *Id.*

63. 355 A.2d 204, 211 (N.J. Super. Ct. App. Div., 1976).

64. *Id.*

65. *Id.*

66. *Id.*

maintenance.<sup>67</sup> In response, the defendant filed a defense stating that the marriage was void.<sup>68</sup> The court found that the plaintiff was a female at the time she married the defendant, and the defendant was deemed to be the plaintiff's lawful husband.<sup>69</sup> As a result of their divorce, the defendant was ordered to pay spousal support.<sup>70</sup>

The *M.T.* court held that marriage is between a man and a woman.<sup>71</sup> However, the court found that the biology of sex is not permanently determined at birth.<sup>72</sup> Moreover, surgery is required for sex reassignment.<sup>73</sup> The court considered the anatomical test for sex reassignment that consists of the genitalia, the psychological gender, and the sexual capacity. The court found that a person's sex reassignment was complete if he or she passed the anatomical test, meaning his or her genitalia, psychological gender, and sexual capacity were all aligned with the newly assigned sex.<sup>74</sup> It is important to note that the court considered the issue of sex on an individual's birth certificate and decided that when there is harmony between a person's psychological and anatomical sex, the psychological sex will be the person's sex.<sup>75</sup> However, the court stated that when there is disharmony, the anatomical sex will determine the person's sex.<sup>76</sup> Furthermore, the court dispelled the notion that transsexuals are attempting to defraud creditors when they assume new genders and names.<sup>77</sup>

### *C. Name Change in Maryland*

Maryland has a name change statute based on the policy concern regarding people who change their names in attempts to avoid creditors and commit fraud.<sup>78</sup> Some individuals believe that transsexuals change their gender identity solely to commit fraud. The

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67. *Id.* at 205.

68. *Id.*

69. *Id.* at 211.

70. *Id.*

71. *Id.* at 207.

72. *Id.* at 209.

73. *Id.*

74. *Id.*

75. *Id.* at 211.

76. *Id.*

77. *Id.* at 210–11.

78. *Stuart v. Board of Supervisors of Elections*, 266 Md. 440, 443, 295 A.2d 223, 226 (1972).

federal government adopted the Model Statistics Act to modernize the vital statistics procedures and provide a uniform system for all the states. Maryland followed accordingly in 1995. For example, the Maryland legislature adopted its Vital Statistics Act<sup>79</sup> in 1995<sup>80</sup> to address the possibility of fraud when changing gender.<sup>81</sup>

The Maryland judiciary had never approached changing one's gender identity before *Heilig*; however, it had addressed changing one's name in past cases. In *Stuart v. Board of Supervisors of Elections*,<sup>82</sup> the Maryland Court of Appeals stated that under state law, a married woman may choose not to adopt her husband's name.<sup>83</sup> The legislature passed a statute with similar language, which states that a party may change the name taken at marriage to the birth-given name or any other name she formerly used so long as the purpose is not illegal, fraudulent, or immoral.<sup>84</sup> The *Heilig* Court found that the petitioner's name change did not involve any illegal, fraudulent, or immoral purposes; therefore, it affirmed the lower court's decision to grant the name change order.<sup>85</sup>

It is important to note that a petition for name change must be initiated in the county where the petitioner resides and that the process is commenced by taking an oath.<sup>86</sup> The name change process is not rigorous; however, it requires that the clerk of the court issue a one-time notice and the petitioner file a certificate of publication.<sup>87</sup> If there are no objections, the court may issue an order.<sup>88</sup> In addition, Maryland continues to allow the common-law method of name change, which requires that a person use his or her new name exclusively, consistently, and non-fraudulently.<sup>89</sup> Name change orders are an important parallel to gender identity orders because both orders are legal representations of a person's identity.

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79. See *infra* Section III.B.

80. *Id.*

81. *Id.*

82. 266 Md. 440, 295 A.2d 223 (1972).

83. *Id.*

84. MD. CODE ANN., FAM. LAW § 7-105 (1984).

85. *In re Heilig*, 372 Md. at 694, 816 A.2d at 70.

86. MD. CODE ANN., RULES § 15-901 (1997).

87. *Id.*

88. *Id.*

89. *Stuart v. Board of Supervisors of Elections*, 266 Md. 440, 449, 295 A.2d 223, 227 (1972).

## III. THE COURT'S REASONING

The Maryland Court of Appeals held that there was equity jurisdiction for two reasons: one, for the circuit court to hear the petitioner's case; and two, to declare that a person has changed his or her gender.<sup>90</sup> The idea of equity jurisdiction is that it provides remedies that were not recognized but, as a matter of justice, should be recognized.<sup>91</sup> The Court of Appeals addressed three points from the Court of Special Appeals' decision:<sup>92</sup> first, whether there was jurisdiction to enter declaratory relief where there was no justiciable claim;<sup>93</sup> second, whether there was a statutory or common law basis for the relief requested where the petitioner was not born in Maryland;<sup>94</sup> and third, whether Heilig as a pre-operative male demonstrated a permanent change in his sexual identity based on the two letters contained in the petition.<sup>95</sup>

A. *Jurisdiction*

First, the Court held that a declaratory judgment, filed under the Declaratory Judgment Act,<sup>96</sup> is only appropriate for matters that are contested. In other words, there must be two adverse parties who seek a declaratory judgment from the court. In this case, Heilig filed for a declaratory judgment, but the case was not contested by another party. Therefore, declaratory judgment was inappropriate in the case at bar.<sup>97</sup> However, equity jurisdiction to rule on the petition was appropriate.<sup>98</sup> Circuit courts in Maryland have original equity

90. *In re Heilig*, 372 Md. at 695, 816 A.2d at 70 (2003).

91. *Id.* at 712–13, 816 A.2d at 80–81.

92. *Id.* at 694, 816 A.2d at 69–70.

93. *Id.*

94. *Id.*

95. *Id.* at 695, 816 A.2d at 70.

96. MD. CODE ANN., CTS. & JUD. PROC. § 3–403 (a) & 3–409 (1973) (giving the circuit court authority to grant a declaratory judgment on civil actions other than divorce or annulment if it will terminate the controversy at hand and if one of the following three situations exists: “an actual controversy exists between contending parties, antagonistic claims between the parties indicate imminent and inevitable litigation, or a party asserts a legal relation, status, right, or privilege that is challenged or denied by an adversary party who also has or asserts a concrete interest in it”).

97. *In re Heilig*, 372 Md. at 711, 816 A.2d at 79–80.

98. *Id.* at 712. MD. CODE ANN., CTS. & JUD. PROC. § 1–501 (a) (1973):

The circuit courts are the highest common-law and equity courts of record exercising original jurisdiction within the State. Each has full common-law and equity powers and jurisdiction in all civil and criminal cases

jurisdiction over such things as divorce, annulment, appointment of guardians, paternity, adoption, and name change.<sup>99</sup> It is important to note that Heilig's request for a name change was granted by the circuit court.<sup>100</sup> The circuit court's decision affected Heilig's legal rights and it is part of the equity jurisdiction of the circuit court.<sup>101</sup>

The circuit court has jurisdiction, through equity and by statute, to issue court orders that alter an individual's vital statistics.<sup>102</sup> There is no language in Maryland's Vital Statistics and Records Act, Title 4.2, stating that this is a new grant of power to the circuit court; therefore, it is simply recognition that the circuit court continues to maintain equity jurisdiction.<sup>103</sup> Although Section 4-214(b)(5) only addresses changing an individual's birth certificate, the Court found that other statutes grant the circuit court the jurisdiction to issue new birth certificates or register certificates for persons who are adopted, so long as the individuals are properly before the court.<sup>104</sup> In sum, Maryland's lower courts have jurisdiction in their domain as equity courts to rule on an individual's legal status.

### B. Basis for Relief

Second, according to both the Equal Protection and the Privileges and Immunity clauses of the Fourteenth Amendment of the United States Constitution, the petitioner may be granted a declaration of gender.<sup>105</sup> Maryland's Vital Statistics Act, Amendment to Certificate, Section 4-214(b)(5), states that the Secretary of Health and Mental Hygiene may amend a person's Maryland birth certificate upon the receipt of a court order indicating that the sex of an individual, who

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within its county, and all the additional powers and jurisdiction conferred by the Constitution and by law, except where by law jurisdiction has been limited or conferred exclusively upon another tribunal.

*Id.*

99. MD. CODE ANN., CTS. & JUD. PROC. § 1-501 (a) (1973).

100. *In re Heilig*, 372 Md. at 694, 816 A.2d at 69.

101. *Id.* at 714, 816 A.2d at 81-82.

102. *Id.* at 718, 816 A.2d at 84.

103. *Id.*

104. *Id.* MD. CODE ANN., HEALTH-GEN. I § 4-211 (a), (b), (i) (1995).

105. *In re Helig*, 372 Md. at 718, 816 A.2d at 84. *See also* U.S. CONST. amend. XIV, § 1 (stating that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

was born in Maryland, has been surgically altered.<sup>106</sup> Section 4-214(b)(5) is not directly applicable in this case because Heilig was not born in Maryland; therefore, he did not have a Maryland birth certificate that could be changed.<sup>107</sup> However, according to the principles of the Equal Protection Clause, the petitioner should be afforded the same protections as every other resident of Maryland, regardless of the state where he or she was born.<sup>108</sup> Notwithstanding Heilig's birthplace of Pennsylvania, the Court concluded that general equity jurisdiction extends to this case for an order on gender identity.<sup>109</sup>

Maryland adopted Section 4-214(b)(5) in 1995.<sup>110</sup> Section 4-214(b)(5) was based on the Model States Vital Statistics Act ("the Act") as promulgated by the Department of Health and Human Services.<sup>111</sup> There is very little legislative history on Section 4-214(b)(5), except that it was adopted to reflect the legal recommendations of the Act.<sup>112</sup> The Act's purpose was, "'to incorporate current social customs and practices and current technology into the policies and procedures of the vital statistics system in various states,' to promote uniformity of those policies and procedures so that vital records will be acceptable everywhere as prima facie evidence of the facts recorded, and to enhance the level of comparability of vital statistics data among the States."<sup>113</sup> Furthermore, Section 21(d) of the Act states, "upon receipt of a certified copy of an order of (a court of competent jurisdiction) indicating the sex of an individual born in this State has been changed by surgical procedure and whether such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed by regulation."<sup>114</sup> Therefore, Maryland adopted Section

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106. MD. CODE ANN., HEALTH-GEN. I § 4-214 (1995) (stating that a birth or death certificate in Maryland should be amended, "upon receipt of a certified copy of an order of a court of competent jurisdiction indicating the sex of an individual born in this State has been changed by surgical procedure and whether such individuals name has been changed, the Secretary shall amend the certificate of birth of the individual as prescribed by regulation").

107. *In re Heilig*, 372 Md. at 715, 816 A.2d at 82.

108. U.S. CONST. amend. XIV, § 1.

109. *In re Heilig*, 372 Md. at 715-16, 816 A.2d at 82.

110. MD. CODE ANN., HEALTH-GEN. I § 4-214 (1995).

111. *In re Heilig*, 372 Md. at 715, 816 A.2d at 82.

112. *Id.* at 716, 816 A.2d at 83.

113. *Id.* (quoting the Model Act of 1977).

114. U.S. DEP'T OF HEALTH AND HUMAN SRVS., PUB. NO. 94-1115, Model State Vital Statistics Act and Regulations 10 (1992).

21(d) of the Act almost exactly.<sup>115</sup> Twenty-two other states and the District of Columbia have acted similarly, allowing a person who has successfully changed his or her gender to amend his or her birth certificate.<sup>116</sup>

### C. Sufficiency of the Evidence

Third, the case was remanded because Heilig failed to demonstrate a permanent change in his sexual identity. Heilig's petition contained no evidence that he had undergone sex reassignment surgery.<sup>117</sup> However, on remand, Heilig was granted the opportunity to provide sufficient medical evidence that he had transitioned from a male to a female.<sup>118</sup> The Court found that sex reassignment surgery is essential evidence because it shows that an individual's sex has been completely changed in order to align the external genitalia with the other determinants of gender, not to perpetrate fraud.<sup>119</sup> Moreover, it is permanent and irreversible.<sup>120</sup> The Court noted that, "hormonal therapy alone, which usually can be terminated or perhaps even reversed, has not, to our knowledge, been recognized as effecting either a sufficient change or a permanent one."<sup>121</sup> Sex reassignment surgery is prohibitively expensive for most individuals, yet the court requires it.

The Court found that there is support for a variety of factors for determining gender.<sup>122</sup> The medical field's methods for determining gender may be ambiguous or incongruent, such as taking into account genitalia that are inconsistent with the chromosome pattern.<sup>123</sup> Moreover, gender is mutable because some of the determinants of gender, such as genitals, may be altered. As a result, the determinant that previously pointed towards one gender may move towards the other gender and become inconsistent with the individual's gender on his or her birth certificate.<sup>124</sup> Furthermore, psychology and self-identification are increasingly important factors for gender

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115. *Id.* See MD. CODE ANN., HEALTH-GEN. I § 4-214 (1995).

116. *In re Heilig*, 372 Md. at 717, 816 A.2d at 83.

117. *Id.* at 695, 816 A.2d at 70.

118. *Id.* at 723, 816 A.2d at 87.

119. *Id.* at 722, 816 A.2d at 86-87.

120. *Id.*

121. *Id.*

122. *Id.* at 710, 816 A.2d at 79.

123. *Id.*

124. *Id.*

identification. Notably, the *Heilig* Court concluded that regardless of whether a person's psychological gender is based on his or her physiology, it is one of the determinants of gender.<sup>125</sup>

#### IV. ANALYSIS

By remanding the case to allow *Heilig* to present evidence that his gender had been changed by surgical procedure, the *Heilig* Court upheld the notion that gender is not permanently fixed at birth.<sup>126</sup> Because the legislation depends on surgery as the sole indicator of one's sexual identity, the case was remanded for a further showing of medical evidence that the petitioner's sex reassignment was permanent and irreversible.<sup>127</sup> Much of the Court's analysis is based on equity principles. Transsexual rights are a new area for the court to address based on the exigency of human dignity. The Court's decision should be based on self-identification, a lucid definition of gender, a standard that does not require surgery, and an "other" category.

##### *A. Modernization*

The Court decided that sex reassignment surgery is a bright line for gender reassignment.<sup>128</sup> There is a great concern for fraud, yet there is disregard for inaccurate categorization of gender. The male and female categories are not always appropriate descriptions of individuals, and the Court discusses the naturally occurring scenarios that give rise to this dilemma and the scientific developments that add to the quandary.<sup>129</sup>

The Court is overly fearful that individuals will attempt to defraud their creditors by arguing that they suffer from gender dysphoria. Claiming to be a transsexual in order to defraud one's creditors is unlikely because hormone treatment, psychotherapy, sex reassignment surgery, and reconstructive surgery are drastic

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125. *Id.*

126. *Id.* at 723, 816 A.2d at 87.

127. *Id.* at 722–23, 816 A.2d at 86–87.

128. *Id.* at 722, 816 A.2d at 86–87.

129. *Id.* at 701, 816 A.2d at 74.

measures.<sup>130</sup> Treatment is also expensive, which makes it less likely that a person would attempt to defraud his or her creditors by transitioning between sexes. Additionally, some jurisdictions currently issue marriage licenses on the basis of self-identified sex.<sup>131</sup> While opponents fear that people would claim to be transsexuals in order to be able to marry another person of the same sex, the result may already occur because of self-identification.<sup>132</sup> Gender is a huge part of a person's identity, both in his or her own mind and in the minds of other people.

As science continues to evolve, a test with expanded factors is more appropriate. Laws should reflect the medical field's ability to probe how chromosomes, genitals and hormones, along with psychological factors, form gender identity. The *M.T.* court took psychological and anatomical factors into consideration when it found that a male had successfully transitioned into a woman.<sup>133</sup> Section 4-214(b)(4) recognizes the advancement of medicine to a point that doctors have the ability to change a person's gender.<sup>134</sup> However, it leaves open the question of what factor or factors define gender and what classification a court should give when there are factors going in both directions.<sup>135</sup> The *Heilig* Court was distracted by the sufficiency or permanency of the surgery, and failed to focus on the accuracy of its categories or qualities for gender.<sup>136</sup>

The Court's overall conclusions on the polarity of sex are in tension with current scholarship and moreover with reality. Patricia A. Cain, Professor of Law at the University of Iowa, notes that according

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130. Shana Brown, *Sex Changes and "Opposite-Sex" Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons' Amended Legal Sex for Marital Purposes*, 38 SAN DIEGO L. REV. 1113, 1144 (2001).

131. See Greenberg, *supra* note 32.

132. *Id.*

133. *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. Ct. App. Div., 1976).

134. MD. CODE ANN., HEALTH-GEN. I § 4-214 (1995).

135. *Id.*

136. *In re Heilig*, 372 Md. 692, 710, 816 A.2d 68, 79 (2003) (concluding that external genitalia are not the sole medically recognized determinant of gender, medically recognized determinants of gender may sometimes be either ambiguous or incongruent, some people's sex is mislabeled at birth due to assumptions by physicians and those incorrect assumptions lead to medically incorrect gender statuses, some of the medically recognized determinants of gender are subject to being altered in such a way as to make them inconsistent with the individual's officially declared gender and consistent with the opposite gender, and whether a person's psychological gender identity is physiologically based it is received recognition as one of the determinants of gender and plays a powerful role in the person's psyche).

to scientific knowledge, there are at least five sexes.<sup>137</sup> Julie A. Greenberg, Professor of Law at the Thomas Jefferson School of Law, states that “Doctors have discovered people with a variety of combinations [of chromosomes].”<sup>138</sup> She illustrates six chromosomal combinations, two examples of which are Klinefelter Syndrome and Hermaphroditism.<sup>139</sup> Klinefelter Syndrome involves a male who is born with one Y chromosome and two or more X chromosomes.<sup>140</sup> Most people with Klinefelter syndrome self-identify as males; however, they take testosterone in order to further their secondary male sex characteristics, such as facial hair.<sup>141</sup> While Klinefelter Syndrome is exhibited by XXY chromosomes and male genitalia, Hermaphrodites predominantly have XX chromosomes and have a combination of both sexes’ gonads.<sup>142</sup> Both of these situations are very rare; however, the law should develop as accurately as possible.<sup>143</sup> Therefore, the courts should propound its own set of guidelines that are accurate reflections of sex and are more flexible than the current standard.

### *B. Feminism Perspective*

The self-identification proposal largely arises from feminist scholarship. Rather than telling women what they can do, feminism espouses the notion of choice. There is a strong argument for creating a third gender class rather than conforming to bi-polar gender classification that is based on societal stereotyping.<sup>144</sup>

The law should be based on an approach to gender that has been espoused by feminist scholars. Professor Cain begins her construction of a feminist legal theory with the act of listening.<sup>145</sup> Women have often been silenced, and according to the feminist method it is important for women to share their experiences and gain

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137. Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U.L. REV. 1321, 1355 (1998) (arguing that there are males, females, and three types of intersexed people plus there may be more sexes due to people who are surgically transitioning from one sex to another).

138. See Greenberg, *supra* note 32.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. See Pearlman, *supra* note 3, at 848.

145. See Cain, *supra* note 138, at 1325.

insight from each other.<sup>146</sup> The act of believing or understanding women's stories has shaped the legal theories that address sexual harassment and rape.<sup>147</sup> By discrediting a person's own identification of sex, or not creating a forum for accurate reporting, the law continues to silence women of every type. The feminist method can be applied to the law by retelling women's stories and creating a change in the traditional notions of gender discrimination.<sup>148</sup>

Gender discrimination is based upon our definitions of the male and the female. In order to give everyone the right to be free from discrimination, gender must expand to include a spectrum of people that base sex on various factors. Professor Greenberg challenges the legal system's exclusive standards for sex that are based more on socialization than on biological traits.<sup>149</sup> One scholar argues that requiring castration in order to change one's sex is oppression, both on the individual and on all people who do not want sex roles to be limited.<sup>150</sup> Not giving transsexual people legal status maintains the heterosexual status quo that society utilizes to reduce confusion and anxiety; however, it reinforces stereotypes of masculinity and femininity.<sup>151</sup> Feminism espouses choice and it can be argued that transsexual persons embody this choice by self-identifying their gender rather than having biology or society assign it to them.<sup>152</sup>

Transsexual individuals are classified as non-operative, pre-operative or post-operative. Post-operative transsexuals defy one sex by changing to the other, but from an a-feminist standpoint, conformity with societal categories is better than non-conformity.<sup>153</sup> It is possible that the judicial system only recognizes the post-operative transsexual in order to reinforce the two sexes.<sup>154</sup> If the laws changed and gave non-operative or pre-operative transsexuals legal status, societal stereotypes would be deconstructed.<sup>155</sup> Just as "black" and "white" used to be the only choices provided for race until we created

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146. *Id.*

147. *Id.* (noting that the standard in family violence is what a person standing in the victim's shoes would have thought based on her own life experiences).

148. *Id.* at 1330.

149. See Greenberg, *supra* note 32 (discussing eight criteria that the medical profession uses to determine sex including a variety of chromosomal patterns rather than just XX or XY).

150. See Pearlman, *supra* note 3, at 840.

151. *Id.* at 845.

152. *Id.* at 848.

153. *Id.* at 846.

154. *Id.* at 847.

155. *Id.* at 848.

the blank space for “other,” gender self-identification or at least an updated definition of the sexes should follow.<sup>156</sup>

### C. Looking Ahead

The Model State Vital Statistics Act, on which the *Heilig* Court relied, will prove instructive in the coming years. In Maryland, post-operative transsexuals will likely be able to change their legal gender by court order. Furthermore, the Act was proposed in order to revise vital statistics according to the “current social customs and practices” and was adopted by the Maryland legislature.<sup>157</sup> As Pearlman states, transsexuals dispel the notion that a biological female correlates to a female gender identity.<sup>158</sup> If the notion of gender identity becomes one of choice of gender rather than assignment by biology, the Court could use that as a factor in its statutory interpretation. With medical and sociological studies of the differences between sex and gender, plus acceptance of a spectrum by the public, the Court is likely to allow personal identification or hormone therapy to sufficiently demarcate sex reassignment at some point in the future.

The pattern of decisions is likely to vary dramatically. If a state has statutes comparable to Maryland’s, then it is likely to continue requiring some proof that surgery has been completed. However, if there is a statute similar to Virginia §32.1-269, which requires that one’s sex is changed by a “medical procedure,” the court may move towards accepting hormone therapy.<sup>159</sup> Thus, if state statutes do not specifically mention sex reassignment in the context of amendments to birth certificates, the door is open for the standard to be self-identification. The message will resound throughout the country if even a few states push for deconstruction of the two sex system and abolition of the requirement of surgery.

In *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts held that same sex couples could be legally married.<sup>160</sup> For transsexual persons in Massachusetts who desire to be legally married, the Court’s ruling in *Goodridge* alleviates a person’s need to change his/her birth certificate. Before the Court

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156. See Greenberg, *supra* note 32.

157. *In re Heilig*, 372 Md. 692, 716–17, 816 A.2d 68, 83 (2003).

158. See Pearlman, *supra* note 3, at 840.

159. VA. CODE ANN. § 32.1–269 (2002).

160. 798 N.E.2d 941 (Mass. 2003).

handed down *Goodridge*, transsexuals' marriages were deemed void because their gender was determined by their biology at birth and their gender was permanently fixed as stated on their birth certificates. On the other hand, the Court's decision in *Goodridge* has very little effect on transsexual persons who want to change their legal gender for other reasons such as health insurance, pension, or government taxation.

People have also become more creative and they have expanded their reliance on the full faith and credit clause. One option for transsexual individuals is to apply a decision in one state to their legal status in other states.<sup>161</sup> Under Utah and Iowa's codes, there are no requirements of surgery to change one's legal gender.<sup>162</sup> As a result, a transsexual person can get a court order from either of these two states and the next state they enter must uphold the order.<sup>163</sup> If the person moves to Massachusetts, he or she could then choose a marriage partner of either sex.<sup>164</sup> This result comports with the Fourteenth Amendment and gives transsexual people equal protection under the law.<sup>165</sup> Therefore, if the judicial system responds to the desires of the people and moves away from the rigid definitions that are ingrained in the law, the opportunity for legal recognition of transsexual individuals in a variety of areas may arise.

## V. CONCLUSION

The *Heilig* Court held that equity jurisdiction extends to orders for gender identity, and it upheld Maryland's Vital Statistics Act, Amendment to Certificate, Section 4-214(b)(5). The Court based its decision on the statutes that are in place that pertain to people who are born in Maryland. However, the case was remanded so that the petitioner could produce evidence that defined gender and supported his request to be identified as a female. While the Court found that gender is mutable, the Court held that there must be concrete medical evidence in order to change an individual's legal identity. The Court should have relied heavily on self-identity as a significant element in determining one's sex. Rather than highlighting any prospect of a

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161. U.S. CONST. art. IV, § 1.

162. UTAH CODE ANN. § 26-2-11 (2002); IOWA CODE § 144.23 (2002).

163. U.S. CONST. art. IV, § 1.

164. *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

165. *See Brown*, *supra* note 131, at 1152-53.

flexible third option, the Court reinforced traditional notions of sex. The Court embraced an exclusive bi-categorization of gender and the result is that transsexual individuals remain largely without any choice regarding their legal status in Maryland.