

# EQUAL MARRIAGE RIGHTS FOR TRANSGENDERED INDIVIDUALS

By Parker Thoeni\*

The prevailing view on marriage is premised on a binary conceptualization of the sexual characteristics of the two adults involved. This approach is typified by the Defense of Marriage Act, passed by the U.S. Congress in 1996, which limits marriage to the legal union of one man and one woman for the purposes of federal law.<sup>1</sup> Considering the medical facts about this topic, however, it becomes apparent that there are a plethora of scenarios where two consenting adults who wish to be married do not fit into the categorically binary definition of marriage between a man and a woman.<sup>2</sup> Just as in the 2004 case *Deane v. Conaway*, where nine same-sex couples and a man whose partner had recently passed away unsuccessfully challenged a Maryland law which denied same-sex couples the right to marry,<sup>3</sup> transsexual or transgendered individuals could take issue with being precluded from marriage on the basis of sex. The scarcity of these challenges most likely stems from the unfortunate consequences of a history of social and official discrimination and isolation severe enough to keep citizens from coming out of the woodwork.<sup>4</sup> This article analyzes the Maryland Family Law's restriction on the marriage rights of transgendered individuals.

## SEX AND GENDER

For the purposes of this article, the term "transgender" means having personal characteristics that transcend traditional gender boundaries and corresponding sexual norms.<sup>5</sup> The traditional binary model of sex and gender, emerging from the Middle Ages, shoehorns individuals into the categorical role of "male" or "female." During those early times, intersex individuals were forced to choose one of the two established gender roles, with the penalties for transgression being as serious as death.<sup>6</sup>

Medical experts today recognize that many factors contribute to the determination of an individual's sex, including the presence of sexual organs, facial and chest hair or breasts, "sexual identity (one's own sense of one's sexual identity), gender identity (the gender society would attribute to an individual), and gender role (the extent to which one chooses to live in one's self-identified sex)."<sup>7</sup> While most individuals do not find any inconsistencies between these factors in their identification as a male or female, there is some ambiguity

between these factors for transgendered individuals and others.<sup>8</sup> The relationship between sex and gender is thus not always a binary concept limited to all male or all female.<sup>9</sup> Neither are the terms "sex" and "gender" always synonymous; "sex" refers to one's anatomy and biological function in reproduction whereas "gender" refers to psychosexual individuality or identity."<sup>10</sup>

## NON-CONGRUENT SEX CHARACTERISTICS

The initial development of a fetus is asexual, followed by the formation of rudimentary sexual organs based on the presence or absence of a Y chromosome.<sup>11</sup> When the sexual development of the fetus is changed or interrupted, people are born with sexual features that are either ambiguous (inconsistent with either "male" or "female" characteristics) or incongruent (inconsistent with their assigned sex).<sup>12</sup> Doctors in the past commonly believed that a person was psychosexually neutral at birth and that the development after birth was dependent on the appearance of the person's genitals.<sup>13</sup> The medical community no longer accepts this view, and many researchers believe that a person's brain differentiates in utero to one gender or the other.<sup>14</sup> This offers a "biological explanation for transsexualism the brain has differentiated to one sex while the body has differentiated to another."<sup>15</sup>

At ages as young as three or four years old, many transsexual individuals may begin to believe they have grown up with the wrong genitalia and proceed to rebel against the social order imposed upon them, refusing to wear "appropriate" clothes or participate in activities associated with their gender.<sup>16</sup> Even so, "the official designation of a person as

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male or female usually occurs at or immediately after birth, and is often based on the appearance of the external genitalia."<sup>17</sup>

Transgendered individuals who wish to bring their sex characteristics into alignment with either the male or female categories have limited options. These include psychotherapy, living as a person of the assigned sex, hormonal treatment, and sex reassignment surgery.<sup>18</sup> "Estimates of the number of intersexed individuals vary considerably, from 1 per 37,000 people to as high as 1 per 2,000 people."<sup>19</sup>

Regardless of the nature of an individual's inconsistent or ambiguous sex characteristics, and regardless of the treatment they may undergo, a transgendered individual may one day wish

to make a lifelong commitment to another consenting adult and enter into the union of marriage with that adult. Although the Maryland Family Law currently burdens, arguably to the point of preclusion, transgendered individuals' marriage rights, legal discrimination based on sex is forbidden by Maryland's state constitution.<sup>20</sup>

### FAMILY LAW AND EQUAL RIGHTS IN MARYLAND

While states have approached marriage issues in a variety of ways, from banning same-sex marriages by constitutional amendment to finding prohibitions on same-sex marriage to violate a number of constitutional provisions, the best analysis of transgender marriage rights in Maryland rests on the application of the state's Equal Rights Amendment (hereinafter "ERA"). By avoiding the issue of fundamental due process rights to marriage and privacy,<sup>21</sup> and by avoiding application of the rational basis standard of review, courts in Maryland leave the decision to usurp the ERA to the people through a constitutional amendment. Such actions have failed to pass through the legislative branch.<sup>22</sup>

The ERA, passed by the legislature and ratified by voters in 1972, became Article 46 of the Maryland Declaration of Rights and states that "[e]quality of rights under the law shall not be abridged or denied because of sex."<sup>23</sup> The historical denial of equal rights for women preceding the ERA reveals the basic principle of the ERA; sex is not a permissible factor in determining legal rights.<sup>24</sup> The ERA recognized that preserving the status quo could mean stigmatizing a class of people based on mistaken reliance on internalized stereotypes rather than on medical facts.<sup>25</sup> Maryland's ERA may have mistakenly internalized the binary notion that sex is limited to "male" and "female."<sup>26</sup> But without a doubt, the concept of sex incorporates, if not turns on, gender identity.<sup>27</sup>

Under the ERA, sex- and gender-based classifications are considered suspect, subject to strict scrutiny.<sup>28</sup> The Maryland Court of Appeals initially interpreted the language of Article 46 as clear and unambiguous.<sup>29</sup> Since that point, the court has stated, "because of [Article 46], classifications based on gender are suspect and subject to strict scrutiny."<sup>30</sup> While this standard "flatly prohibits gender-based classifications, absent substantial justification,"<sup>31</sup> the court has clarified that the ERA forbids the determination of rights *solely* on the basis of one's sex.<sup>32</sup>

Maryland Family Law § 2-201, however, states that "[o]nly a marriage between a man and a woman is valid in this State."<sup>33</sup> To the extent that § 2-201 is intended to benefit men and women, and in effect primarily benefits only men and women, it imposes some additional burden, inconvenience and expense to transgendered individuals by forcing them to "pass" as a man or a woman in order to reap the benefits of marriage. The ERA,

however, mandates that transgendered individuals be granted the right to marry a consenting individual of their choice because classifications based on sex are considered suspect and thus subject to strict scrutiny, and because § 2-201 is a sex-based classification on its face. Section 2-201 is a sex-based classification on its face because it grants different rights to men and women, and it burdens the marriage rights of transgendered individuals. In addition, laws precluding transgendered individuals from marrying a consenting adult are not narrowly tailored to serve a compelling government interest. Just as a statute that benefits males at the expense of everyone else violates the ERA, a statute that benefits males and females at the expense of everyone else violates the ERA.

The government may make a gender-based classification only when it can show that the classification is narrowly tailored to achieve compelling state goals.<sup>34</sup> Whenever a law refers to an individual's gender on its face, the state must have a compelling reason for doing so; the theory of "equal application" has been rejected in Maryland.<sup>35</sup> Application of the strict scrutiny standard of review inevitably leads to the conclusion that transgendered individuals are eligible to enjoy the same benefits of marriage as all other individuals in Maryland.

### REJECTION OF THE "EQUAL APPLICATION" THEORY

Even though both men and women have the right to marry someone of the opposite sex, § 2-201 is a sex-based classification because Maryland has rejected the "equal application" theory as unpersuasive. Article 24, the due process clause of the Maryland Declaration of Rights,<sup>36</sup> does not contain an express equal protection clause, but Maryland courts have long recognized that the due process clause implicitly guarantees equal protection similar to the equal protection clause of the Fourteenth Amendment of the federal constitution in both manner and extent.<sup>37</sup>

Because it could not realistically be contended that the people, in adding the ERA, intended to repeat what was already contained in Article 24, Maryland courts have interpreted Article 46 of the Maryland Declaration of Rights as developing one of those differences: "segregation based upon sex, absent substantial justification, violates the [ERA], just as segregation based upon race violates the Fourteenth Amendment."<sup>38</sup> The divergence here from the federal notion of equal protection is the treatment of sex as a suspect class, not the manner in which equal protection is applied to a suspect class.<sup>39</sup> Thus, Maryland's strict scrutiny standard likely incorporates federal standards that rejected the "equal application" and "separate but equal" theories with respect to suspect classes.<sup>40</sup> Indeed, the rejection of the "separate but equal" theory, limiting the term "marriage" to a relationship between a man and a woman, would be a sex-based classification.

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Even if Maryland accepted the theories of “equal application” and “separate but equal,” limiting the definition of sex to the binary categories of “all male” and “all female,” the resulting scheme would inherently exclude people from marriage on the basis of sex. As race is more than just black or white, so is sex more than just male or female. The “equal application” argument that all individuals are free to marry someone of the “opposite sex,”<sup>41</sup> is just as faulty and non-sensical as an argument that all individuals are free to marry someone of the “opposite race.” To avoid a discriminatory classification, the word “opposite” must be replaced with the word “any.”

By assuming that all people are either purely male or purely female, proponents of the equal application theory attempt to force a square peg into a round hole. Just as a law defining marriage as only between two white people would burden some white people (those wishing to marry someone non-white) and all non-white people, a law defining marriage as only between a man and a woman burdens some men and women, and all transgendered individuals who do not fit those categories. Thus, even if the equal application theory were accepted, it does not apply.

#### A SUSPECT CLASS OF TRANSGENDERED INDIVIDUALS

Those who fall outside the male/female dichotomy and are therefore left without marriage rights should be considered a suspect class.<sup>42</sup> Under Maryland equal protection, a “suspect class is a category of people who have experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”<sup>43</sup> The long history of purposeful unequal treatment of transgendered people is unquestionable.<sup>44</sup> Transgendered individuals are thus a suspect class, and the Maryland Family Law should be reviewed under strict scrutiny instead of rational basis review.<sup>45</sup> Because § 2-201 makes a gender-based classification on its face, it must be narrowly tailored to achieve compelling state interests.<sup>46</sup>

There are no compelling government interests furthered by narrowly tailored means when marriage is limited as between a man and a woman. Thus, the best way to define marriage is between two individuals, rather than conditioning marriage rights on any sexual characteristics.

Though the government in *Deane* failed to assert a compelling interest in restricting marriage rights on the basis of sex, the true legislative intent of § 2-201 of prohibiting same-sex marriages can easily be derived from the face of the statute.<sup>47</sup> Any attempt to justify this government interest as compelling should fail, and a marriage statute that defines marriage on the basis of sex is not narrowly tailored to meet any government interest that is valid under the ERA. In *Deane*, the government asserted an interest in promoting traditional family units and

preserving traditional societal values.<sup>48</sup>

Promoting a traditional family unit that encourages procreation is neither compelling nor narrowly tailored because it is based on the presumption that people who do not fit into the traditional binary sex system, even to the extent that only their sexual orientation differs, are not similarly situated to those who do so with respect to raising a

child. However, the ERA does not allow the presumption that a man or a woman is better suited to raise a child of a certain sex, so it likewise bars the presumption that a man or a woman is better suited to raise any child.<sup>49</sup> Therefore, ERA also bars the presumption that a male-female couple is better suited to raise a child than any other couple, without respect to sex.

To the extent that procreation is argued to be natural, such an argument is based on internalized stereotypes that fail to recognize that individuals are born with sex characteristics that do not fit the binary mold.<sup>50</sup> Regardless, §2-201 is not narrowly tailored to meet that goal because it does not claim to invalidate marriages because the couple cannot or has not chosen to procreate.

Any argument that these conclusions are counter to societal values and tradition is misplaced. The traditional notion of marriage is a thorn in the foot of Maryland’s overarching traditions of tolerance and protection of minorities. One instance in which the state may permissibly grant benefits on the basis of sex arises where women seek remedies to past wrongs. Such remedies are similar to those allowed under the Fourteenth Amendment in instances of racial classifications.<sup>51</sup> The long denial of equal rights to women that prompted the ERA has indeed applied to women’s marriage rights, and those inequities

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have since been equalized.<sup>52</sup> For example, there may very well be compelling government interests in providing women with a remedy for past discrimination from male sports.<sup>53</sup> Of course, if the classification included anyone other than women, and lasted longer than necessary to remedy the past wrongs, it would not be narrowly tailored to the class of individuals discriminated. Even if the exclusion of homosexuals from marriage were a compelling interest, marriage, as defined between a man and a woman, is not narrowly tailored because it is under-inclusive

and over-inclusive. Maryland's marriage statute does not pass muster in limiting marriage rights to men and women because the means by which people are identified as men or women are not made clear enough to be considered narrowly tailored. While § 2-201 uses the words "man" and "woman," it fails to offer a definition of either. Section 2-201 does not require any showing of sex. Section 2-402 of the Maryland Family Law requires details such as name, address, prior relationship, social security number, and age, leaving it to the clerk to withhold licenses if he or she feels that there may be legal reasons why applicants for a marriage license should not be married under the Maryland Family Law.<sup>54</sup> By granting marriage rights to "men" and to "women" without offering a sufficient mechanism with which to define a "man" or a "woman," § 2-201 at least burdens, and potentially precludes, transgendered individuals from getting married because of their gender identity differences, and more specifically, *because* of sex.<sup>55</sup>

The Maryland Court of Appeals recently held that individuals must be allowed to change their birth certificates to reflect their sex identity; however, it first required evidence of a "permanent and irreversible change" from male to female.<sup>56</sup> The court in *In re Heilig* required a showing based on medical facts, but carefully avoided concluding that surgery would be the only permissible medical fact.<sup>57</sup> Requiring any showing of sex, sex change or congruency between sex and gender characteristics as a condition to marriage, shows that any mechanism by which an individual's sex is defined for the purposes of marriage, is overbroad.

The court in *In re Heilig* found that a change in sex denoted on an individual's birth certificate was permissible, but it left open the question of what would need to be shown to establish such a change and whether this change on the birth certificate would mean a change in sex for the purposes of marriage. The methods used to determine someone's sex for the purposes of marriage are presently unclear, but presumably either the sex on a person's birth certificate at birth, or as amended, or in a driver's license, would be determinative.

Therefore, the first question regarding the determination of an individual's sex for the purposes of marriage is whether individuals are defined as a man or a woman based on the sex denoted on their original birth certificates, or whether individuals may change their sex for the purpose of marriage. The second question then is what criteria should be used if an individual's sex may be changed for the purposes of marriage. If the determination of sex does not hinge on sex as recorded at birth, the method of determination of sex cannot simply lead to the categories of male and female.

Marriage defined as between a man and a woman does not

pass muster under the ERA because the relevant characteristic gender identity may be male, female, or neither, without respect to the physical characteristics of an individual. Reliance on the original birth certificate, or the genitals an individual has at birth, is not narrowly tailored because it focuses on mutable characteristics.<sup>58</sup> Requiring a medical showing of sex change is not narrowly tailored because it burdens transgendered individuals more than others on the basis of sex by requiring a showing based on genitals at birth; an individual's gender does not change with medical procedures.<sup>59</sup>

If the government does not recognize a change in sex, then it relies on the sex assigned at birth, which is most commonly based solely on the appearance of the external genitalia. By failing to recognize a change in gender, the government implicitly allows an individual who, for example, was born with male sex characteristics that have since been changed to female sex characteristics, to marry a woman. However, it does not allow an individual who was born with female sex characteristics, which have since been changed to male sex characteristics, to marry a woman. Therefore, physical sex characteristics are not relevant to marriage between a man and a woman to the extent that the genitals with which an individual is born define sex.

If the government does recognize a change in sex, then it allows a person born with male sex characteristics that have since been changed to female sex characteristics to marry a woman upon a showing that such a change has in fact occurred. However, that change must occur prior to the marriage. A person born with male sex characteristics could marry a woman, and after the marriage, transition to female sex characteristics. Because the individual's sex is not changed except upon a showing to a court, the marriage remains valid. If a showing is not required after marriage, it cannot be required prior to marriage. Therefore, whether a change in sex is allowed or not, two individuals with the same sex characteristics may end up together in marriage if the government considers sex characteristics to be mutable and not locked at birth.

For the purposes of limiting marriage as between a man and a woman, an individual's sex must be defined by gender identity. However, the government does not require a showing that two individuals getting married have one partner who identifies as a male and one who identifies as a female.<sup>60</sup>

Requiring congruency between a person's sex and gender characteristics lacks narrow tailoring as well. The presence or absence of surgery or hormonal treatment cannot be the basis upon which the decision is made, because not only is gender an immutable characteristic, but furthermore the cost-prohibitive nature of surgery conditions marriage rights on the ability to pay

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for a medical procedure. Indeed, requiring congruency is not a narrowly tailored test because it is easily evaded by delaying any medical procedures.<sup>61</sup> If consistency is to be required, then everyone must bear the same burden of proof, and the government must require from everyone a showing that their gender identity is consistent with their physical sex characteristics. This places the focus on the irreversible gender identity rather than the changeable physical sex characteristics. Requiring a showing of sex prior to marriage based on genitals at birth is not narrowly tailored.

The government lacks a narrowly tailored definition of marriage by defining it as between a man and a woman, even as defined by gender identity alone, because it is inherently either under-inclusive or over-inclusive. Because defining a person's sex focuses on gender identity, and because individuals can have ambiguous gender identities,<sup>62</sup> the scope of marriage rights must be expanded to include those people. However, when marriage is recognized as between a man and a woman, it becomes clear that accommodation of those individuals provides them with a pool of suitable spouses that grants them a choice of whether to marry a man or a woman. Because this choice may not be limited to those individuals on the basis of sex, it must also be granted to individuals who identify themselves as men and women. Thus, marriage rights must be blind as to a person's sex characteristics at birth as well as an individual's gender identity, and should be defined as between two individuals, not between a man and a woman, in order to comply with the equal protection mandates of the ERA.

Physical sex characteristics are not immutable, but gender identity is. A focus on physical sex characteristics is therefore more easily evaded than a focus on gender identity and cannot be considered narrowly tailored. Once the focus has shifted to the relevant characteristic, it becomes apparent that individuals

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whose identity does not fit within the binary sex categories do not have marriage rights at all, and individuals who were born with inconsistent sex characteristics are more burdened than those who were not, solely because they are a minority sex class. Requiring any showing of sex produces nonsensical results, and reliance on physical sex characteristics is not narrowly tailored either. Because the asserted interests inherently cannot be furthered by narrowly tailored means, they are revealed as

falling short of being compelling. If a showing has not been required of course, Maryland has not concerned itself with two people of the same gender marrying one another. The benefits of marriage may not fall solely on men and women, no matter how they are defined, because sex is more complex than simply "male" and "female."

#### PHYSICAL DIFFERENCE AS A LEGITIMATE BASIS ON WHICH TO MAKE SEX CLASSIFICATIONS

Maryland has recognized physical differences as legitimate bases on which to make sex classifications.<sup>63</sup> During isolated personal interactions, physical sex characteristics are most

noticeable in the context of one-time contacts. Since marriage involves every day contact with a person, not just a one-time run in with the body of a person, and because the marriage contact is consensual, gender identification not physical sex characteristics are relevant. Physical sex char-

acteristics may be relevant to the extent that those characteristics are usually not revealed to the public (e.g., e.g. external genitals revealed to or forced upon an unconsenting individual). Thus, for the purpose of sexual assault or bathroom designations, physical sex characteristics may be the most appropriate criteria on which to base different treatment.<sup>64</sup>

The court in *In re Heilig* noted that many courts find, for purposes of marriage, that an individual's biological sexual constitution is fixed at birth and cannot be changed unless a mistake has been made at birth and later revealed by medical investigation.<sup>65</sup> As the facts make clear, and because the law in this field should depend upon medical facts,<sup>66</sup> when an individual is born, that individual's gender identity has been decided.<sup>67</sup> Thus, while basing a classification system on an individual's genitals at birth may often lead to the appropriate classification, sometimes it will lead to a mistake, mis-identifying an individual as a male or female based on that individual's genitalia.<sup>68</sup>

Because they are "universally recognized as inherent, rather than chosen," attempts to change a person's gender identity to conform to physical sex characteristics have consistently failed.<sup>69</sup> In addition, although they are noticeable, physical sex characteristics are reversible because they can be altered by way of hormone treatment or sex reassignment surgery, but are likely to be altered only to conform to gender identity, which is immutable.<sup>70</sup> Indeed, sexual reassignment surgery "merely harmonizes a person's physical characteristics with that identity."<sup>71</sup> Therefore, a person whose sex characteristics fit the binary categories and who feels that physical sex characteristics are immutable is correct with respect to himself or herself because it would counter the dictates of his or her gender

identity to alter their already congruent sex characteristics. However, this is not the case for transgendered individuals.

If the government is interested in defining sex for the purpose of marriage on a basis other than gender identity, it should do so by stating precisely what sex characteristics it feels are relevant to marriage. It would not be unreasonable to expect the legislature to do this. Indeed, Maryland reconstructed its rape statute to define the crime based on the physical sex characteristics it found, to be most naturally vulnerable.<sup>72</sup> However, if sex can be said to be relevant to marriage, then the relevant characteristic is gender identity, not physical sex characteristics. To the extent that a person's sex is defined by physical sex characteristics, for the purposes of marriage, the definition does not

fit under a "unique characteristics" exception.

## CONCLUSION

Marriage may not be limited as between a man and a woman, and there is no narrowly tailored definition of man and woman that does not exclude a class of people based on sex. Because requiring any showing of sex prior to marriage, or limiting marriage based on genitals at birth, is not narrowly tailored to further a compelling government interest, defining marriage as between a man and a woman violates the ERA. To comply with the ERA, marriage should be defined as between two individuals, rather than as between a man and a woman.

## ENDNOTES

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<sup>1</sup> 1 U.S.C. §7 (1996).

<sup>2</sup> See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 278, 328 (1999) (describing sixteen different "intersex conditions").

<sup>3</sup> Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006), *rev'd*, Conaway v. Deane, No. 44, Sept. Term 2006, September 18, 2007, <http://mdcourts.gov/cgi-bin/indexlist.pl?court=coa&year=2007&order=bydate&submit=Submit> (last visited October 15, 2007).

<sup>4</sup> Greenberg, *supra* note 2, at 275 n.47 (describing death as the penalty in the middle ages); *In re Heilig*, 372 Md. 692, 705 (2003) (pointing out that gender identity differences were "once regarded as a form of sexual or psychological deviance and, in some [places, are] still considered so today").

<sup>5</sup> Merriam-Webster Online Dictionary, *Definition of Transgender*, available at <http://merriam-webster.com/dictionary/transgender> (last visited Oct. 7, 2007); *cf. In re Heilig*, 372 Md. at 697 n.3 (using the term "transsexual" to describe individuals with sexual characteristics of one sex, and psychosocial configuration of another sex or someone who has achieved "consistent gender" only after a medical procedure, and distinguishing the term from "transvestism" and "homosexuality"); see also Greenberg, *supra* note 2, at 278 (describing intersexed people as those having non-congruent sexual attributes).

<sup>6</sup> See Greenberg, *supra* note 2, at 275 n.47 (citing Richard A. Epstein, *Gender is for Nouns*, 41 DEPAUL L. REV. 981, 983 (1992)).

<sup>7</sup> Greenberg, *supra* note 2, at 278 n.74.

<sup>8</sup> See Greenberg, *supra* note 2, at 278

<sup>9</sup> See *In re Heilig*, 372 Md. at 698 (citing Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 BUFF. L. REV. 835, 842-43 (1995); Greenberg, *supra* note 2, at 275-76.

<sup>10</sup> See *In re Heilig*, 372 Md. at 698 n.4 (2003) (citing Jerold Taitz, *Judicial Determination of the Sexual Identity of Post-Operative Transsexuals: A New Form of Sex Discrimination*, 13 AM. J.L. & MED. 53, 53-54 (1987)); Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & the Law*, 11 ANN. HEALTH L. 195, 200-01 (2002); Pearlman, *supra* note 9, at 835; Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 12-14 (1995).

<sup>11</sup> See *In re Heilig*, 372 Md. at 700 (citing Susan Tucker Blackburn, MATERNAL, FETAL, & NEONATAL PHYSIOLOGY: A CLINICAL PERSPECTIVE 19-24 (2d ed. 2002)).

<sup>12</sup> *Id.* (citing Alice Do Murat Dreger, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 35-40 (1998); Blackburn, *supra* note 11, at 24-28; Greenberg, *supra* note 2, at 279-90; Claude J. Migeon & Amy B. Wisniewski, *Sexual Differentiation: From Genes to Gender*, 50 HORMONE RESEARCH 245, 249 (1998); Selma Feldman Witchel & Peter A. Lee, *Ambiguous Genitalia*, in PEDIATRIC ENDOCRINOLOGY 111 (Mark A. Sperling ed., 2d ed. 2002); Alan J. Schafer & Peter N. Goodfellow, *Sex Determination in Humans*, 18 BIOESSAYS 955 (1996); John Money & Anke A. Ehrhardt, MAN & WOMAN, BOY & GIRL: GENDER IDENTITY FROM CONCEPTION TO MATURITY 1-21 (1996)).

<sup>13</sup> See *In re Heilig*, 372 Md. at 703-704 (noting that doctors used to remove ambiguous external organs from infants, suggesting the child be raised as a girl).

<sup>14</sup> See *Id.* at 704

<sup>15</sup> *Id.* (citing Frank P.M. Kruijver et al., *Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus*, 85 J. CLIN. ENDOCRINOLOGY AND METABOLISM 2034 (2000)).

<sup>16</sup> See *Id.* at 707.

<sup>17</sup> *Id.* at 702-703 (noting that sometimes, an individual's sexual ambiguity may be the result of a mistaken "sex assignment" at birth, if genitalia were abnormal -mistaking an enlarged clitoris for a small penis or vice versa).

<sup>18</sup> See *Id.* at 707-709

<sup>19</sup> *In re Heilig*, 372 Md. at 709.

<sup>20</sup> Md. Const. Decl. of Rights, Art. 46.

<sup>21</sup> See *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 640-41 (1983).

<sup>22</sup> See Md. Leg. Wrap Up, No. 04-14 (bill proposing a constitutional amendment to define marriage as being between a man and a woman failed (SB 673/HB 16), as well as a bill which proposed that a same-sex marriage validly entered into in another state or country, is valid in Maryland, and declaring that same-sex marriages are against the public policy of Maryland (SB 746/HB 728)); *c.f.* Deane, 2006 WL 148145 at \*2 (noting that only six months following the Attorney General's declaration that Maryland common law limited marriage to male-female relationships, Maryland passed its ERA, and the following year, the legislature attempted to preserve the common law with a marriage statute); see also Dan Friedman, *Marriage Equity: The Counter-majoritarian Nature of the Maryland Constitution*, The Daily Record, Mar. 3, 2006, available at <http://www.equalitymaryland.org/dailyrecord.htm> (describing gubernatorial disapproval of attempts to remove the judge's finding that Maryland allows same-sex marriage, and the preference of a constitutional amendment when minority rights are at stake) (last visited Oct. 7, 2007).

<sup>23</sup> Md. Const. Decl. of Rights, Art. 46.

<sup>24</sup> See *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 63-64 (1985) [hereinafter *Bainum*].

<sup>25</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (recalling rhetoric from 100 years prior, that women are naturally timid and delicate, put women "not on a pedestal, but in a cage").

<sup>26</sup> See Greenberg, *supra* note 2, at 275 (explaining that binary views of sex and gender implicit in some legislation ignore millions of people who are transgendered).

<sup>27</sup> See generally *In re Heilig*, 372 Md. at 710.

<sup>28</sup> *Murphy v. Edmunds*, 325 Md. 342, 357 n.7 (1992).

<sup>29</sup> E.g., *Rand v. Rand*, 280 Md. 508, 511-512 (1977).

<sup>30</sup> *Murphy*, 325 Md. at 357 n.7.

<sup>31</sup> *Giffin v. Crane*, 351 Md. 133, 149 (1998).

<sup>32</sup> *Tyler v. State*, 330 Md. 261, 265-66 (1993) (emphasis added).

<sup>33</sup> MD. CODE ANN., FAM. LAW § 2-201 (1984).

<sup>34</sup> See *State v. Burning Tree Club*, 315 Md. 254, 295-96 (1989) [hereinafter *Burning Tree Club*].

<sup>35</sup> See *Bainum*, 305 Md. at 86; *Burning Tree Club*, 315 Md. at 293-295; *Giffin*, 351 Md. at 149 (noting that treatment by the law may not be based on sex, and that the law may not burden or benefit one sex but not the other).

<sup>36</sup> Md. Const. Decl. of Rights, Art. 24

<sup>37</sup> See, e.g., *Kirsch v. Prince George's County*, 331 Md. 89, 97 (1993); *Manikhi v. Mass Transit Admin.*, 127 Md.App. 497, 524 (Md. Ct. Spec. App. 1999) (observing that "with respect to the development of equal protection jurisprudence, the Court of Appeals has virtually adopted Supreme Court

## ENDNOTES CONTINUED

precedent as controlling authority in the interpretation of corresponding State constitutional law”).

<sup>38</sup> *Tyler v. State*, 330 Md. 261, 265 (1993) (citing *Burning Tree Club*, 315 Md. at 269).

<sup>39</sup> *See also* *Detroit Automotive Purchasing Services, Inc. v. Lee*, 463 F. Supp. 954, 970 (1978) (finding that with respect to Maryland, “relevant federal and state provisions regarding equal protection are afforded the same judicial construction”).

<sup>40</sup> *See Bainum*, 305 Md. at 72 n.14 (noting that a statute couched in gender-neutral terms may have an unconstitutionally discriminatory purpose and effect and rejecting the “equal application” theory, citing *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967); *id.* at 79 (suggesting that “separate but equal” theory rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954) would be rejected under Article 46); *but see* *Singer v. Hara*, 11 Wash. Ct. App. 247 (1974) (accepting an effectively separate but equal argument that marriage is descriptive of a relationship between a man and a woman so the label should be limited as such).

<sup>41</sup> *See, e.g.*, Paul Benjamin Linton, *Same-Sex “Marriage” Under State Equal Rights Amendments*, 46 ST. LOUIS U. L.J. 909, 928 (2002).

<sup>42</sup> *Cf. Bainum*, 305 Md. at 72.

<sup>43</sup> *Hornbeck*, 295 Md. at 640-41.

<sup>44</sup> *See* Greenberg, *supra* note 2, at 275 n.47; *see also, e.g.*, *Hartin v. Bureau of Records*, 347 N.Y.S.2d 515, 518 (N.Y. Sup. Ct. 1973) (where the New York Board of Health described sex reassignment surgery as “an experimental form of psychotherapy by which mutilating surgery is conducted on a person with the intent of setting his mind at ease, and that nonetheless, does not change the body cells governing sexuality.”); *Corbett v. Corbett*, 2 All E.R. 33, 2 W.L.R. 1306 (Probate, Divorce, and Admiralty Div. 1970) (finding litigant’s transsexualism to be a “psychological sexual abnormality”); *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) (in describing a transsexual wishing to undergo sex reassignment surgery, court observed that “[s]omeone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder”); *see generally* Marybeth Herald, *Transgender Theory: Reprogramming Our Automated Settings*, 28 T. JEFFERSON L. REV. 167 (Fall, 2005); *see also* MD. CODE ANN., CRIM. PROC. §10-301 (2005) (recognizing gender-related identity as a target characteristic for hate crimes).

<sup>45</sup> *See* *Massage Parlors, Inc. v. Mayor & City Council of Baltimore*, 284 Md. 490, 496-497 (1979) (noting that rational basis analysis applies only when there is no suspect class or fundamental right restricted); *Kirsch*, 331 Md. at 108-109 (Chasanow, dissenting, explaining that “a statutory classification reviewed under the rational basis standard enjoys a strong presumption of constitutionality and will be invalidated only if the classification is clearly arbitrary”); *but cf.* *Massachusetts v. Goodridge*, 440 Mass. 309, 334 (2003) (applying rational basis standard under a variety of state constitutional provisions, stating only it in dicta that strict scrutiny is the appropriate standard).

<sup>46</sup> *Cf. Burning Tree Club*, 315 Md. at 295-96 (1989); *Condore v. Prince George’s Co.*, 289 Md. 516, 530 (1981); *Turner*, 299 Md. at 574 (1984).

<sup>47</sup> *See Deane*, 2006 WL 148145 at \*1 (describing the legislative history in a way that reveals its intent to preserve the common law marriage rule of banning same sex marriages in response to the ERA).

<sup>48</sup> *See id.* at \*8-9.

<sup>49</sup> *See Giffin*, 351 Md. at 133.

<sup>50</sup> *See In re Heilig*, 372 Md. at 698.

<sup>51</sup> *Cf. Kirsch*, 331 Md. at 89-108.

<sup>52</sup> *See, e.g.*, *Coleman v. State*, 37 Md. App. 322 (1977); *McClellan v. McClellan*, 52 Md. App. 525 (1982); *Bell v. Bell*, 38 Md. App. 10 (1977), cert. denied 282 Md. 729 (holding that presumption that husband is the dominant figure in the marriage cannot stand under the ERA).

<sup>53</sup> *See Bainum*, 305 Md. at 79 (1985) (citing *Darrin v. Gould*, 540 P.2d 882 (1975) and *Petrie v. Illinois High Sch. Ass’n*, 75 Ill. App. 3d 980 (1979)).

<sup>54</sup> MD. CODE ANN., FAM. LAW § 2-402; MD. CODE ANN., FAM. LAW § 2-405.

<sup>55</sup> *See In re Heilig*, 372 Md. at 701 (naming three categories of people whose sex clearly does not fit in the binary sex classifications).

<sup>56</sup> *Id.* at 692 (referring to “MD. CODE ANN., § 4-214(b)(5) of the Health-General Article, which directs the Secretary of Health and Mental Hygiene, upon receipt of a court order indicating that the sex of an individual born in Maryland has been changed by surgical procedure”).

<sup>57</sup> *Id.* at 721-22 (noting that many other contexts require surgery for a gender change, but that medical facts form the basis of a reasoned legal conclusion respecting an asserted change in one’s gender).

<sup>58</sup> *See id.* at 702.

<sup>59</sup> *See id.* at 721-22.

<sup>60</sup> *See* Mark F. Scurti, *Same Sex Marriage: Is Maryland Ready?*, 35 U. BALT. L.F. 128, 134 (Spring 2005) (stating that “[i]f one person transitions to an opposite gender through various medical processes and has not divorced their spouse... Maryland has not... not void[ed] such marriages simply because the gender of one party has changed. Many such couples exist in Maryland....”).

<sup>61</sup> *See In re Heilig*, 372 Md. at 702.

<sup>62</sup> *See* Greenberg, *supra* note 2, at 378; *see also* William Reiner, *To be male or female - that is the question*, 151 ARCHIVES PED. & ADOLESCENT MED. 224 (1997) (noting that in the end, individuals must define who and what they are).

<sup>63</sup> *See, e.g., In re Heilig*, 372 Md. at 710, 719-720 n.9, 721 n.11 (finding that gender identity plays a powerful role as a determinate of gender, and recognizing that the effect and requirements for gender changes differ with context); *cf. Brooks v. State*, 24 Md. App. 334, 337-338 (1975), cert. denied 275 Md. 746 (for the purpose of rape, because the vagina and the possibility of unwanted pregnancy were found to be particularly vulnerable characteristics, the class of individuals with male external genitalia were categorized as men, and treated differently from those who did not have these characteristics).

<sup>64</sup> *See, e.g., Brooks*, 24 Md. App. at 337-338, cert. denied 275 Md. 746 (determining male or female based on external genitalia for the purpose of rape).

<sup>65</sup> *See In re Heilig*, 372 Md. at 710.

<sup>66</sup> *See id.* at 722.

<sup>67</sup> *Id.* at 708 (stating that “transsexualism is universally recognized as inherent, rather than chosen”).

<sup>68</sup> *See id.* at 710 (finding that “external genitalia are not the sole medically recognized determinant of gender”).

<sup>69</sup> *See id.* at 708.

<sup>70</sup> *See id.* at 707-09.

<sup>71</sup> *In re Heilig*, 372 Md. at 698 (citing *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976)).

<sup>72</sup> *See* MD. CODE ANN., CRIM. PROC. § 3-301; *Brooks*, 24 Md. App. at 337-338 (noting that the old rape statute defined rape as by a “person,” but that courts considered physical sex characteristics because a primary concern was to avoid female rape victims being left with unwanted pregnancies).