

# Evolution of the Birth Certificate: A Tale of Gender, ART, and Society

by  
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## I. Introduction

Two legal cases have highlighted the need for a close examination of what a birth certificate is, what it is not, and what its utility and function are in fact. One is a recent decision in the U.K. Court of Appeals, and the other is a case from Germany that is now before the European Court of Human Rights. Advances in medical science, including in the field of assisted reproduction, have influenced the way the law has evolved in many areas. Changes in social norms having to do with the role of gender in marriage, and in the way the law views gender, marriage, and legal parentage, require an examination about long-held views of the birth certificate.

In the course of such a discussion it is useful, if not necessary, to recognize a distinction between birth registration and the birth certificate itself. In a study of the literature (including many of the sources cited in this article) with regard to these two entities, it is not always clear which one the writers are talking about. Birth registration is considered proof of a person's existence and is done primarily in the interest of the state. It is considered a right,<sup>1</sup> and it is primarily a process.<sup>2</sup> The birth certificate derives from the registration and is a person's proof of identity and generally one's legal parentage. It is a document used for the benefit of the individual, but it is not clear that there

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<sup>1</sup> Convention on the Rights of the Child art. 7, *adopted and opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); International Covenant on Civil and Political Rights art. 24(2), *adopted and opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>2</sup> Although, of course, memorializing documents are produced in the course of that process.

is a right to have a birth certificate.<sup>3</sup> This article is an attempt to elucidate the nature of both, to describe the differences between them, and to propose a scheme for a more universal process of birth registration and issuance of the birth certificate.

## II. The Cases

In 2018, Freddy McConnell gave birth to a child in England. Freddy, a single man and U.K. citizen, conceived the child with insemination by donor sperm. He had transitioned from female to male and had been certified in 2017 as a man under the United Kingdom’s Gender Recognition Act of 2004 (GRA).<sup>4</sup> His request to be identified as “father” on the child’s birth certificate was denied,<sup>5</sup> and the denial has been upheld on appeal.<sup>6</sup> In its 2020 opinion in the case, the Court of Appeal held:

The legislative scheme of the GRA required Mr[.] McConnell to be registered as the mother of YY, rather than the father, parent or gestational parent. That requirement did not violate his or YY’s Article 8 rights. There is no incompatibility between the GRA and the Convention. In the result we dismiss these appeals.<sup>7</sup>

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<sup>3</sup> Paula Gerber, Andy Gargett & Melissa Castan, *Does the Right to Birth Registration Include a Right to a Birth Certificate?*, 29 NETHERLANDS Q. HUM. RTS. 429, 430 (2011), [https://www.researchgate.net/publication/255725410\\_Does\\_the\\_Right\\_to\\_Birth\\_Registration\\_Include\\_a\\_Right\\_to\\_a\\_Birth\\_Certificate](https://www.researchgate.net/publication/255725410_Does_the_Right_to_Birth_Registration_Include_a_Right_to_a_Birth_Certificate).

<sup>4</sup> Gender Recognition Act, 2004, ch. 7, <https://www.legislation.gov.uk/ukpga/2004/7/contents>.

<sup>5</sup> In the matter of TT and YY, [2019] EWHC 2384 (Fam), <https://www.familylawweek.co.uk/site.aspx?i=ED203219#:~:text=AN%20extensive%20case%20regarding%20the,confirming%20his%20gender%20as%20male>

<sup>6</sup> R (Alfred McConnell) v. Registrar Gen. for Eng. & Wales, [2020] EWCA Civ 559, <https://www.judiciary.uk/judgments/r-alfred-mcconnell-v-the-registrar-general-for-england-and-wales-and-others/>. For further details, see Robert Booth, *Transgender Man Loses Appeal Court Battle to Be Registered as Father*, GUARDIAN, Apr. 29, 2020, <https://www.theguardian.com/society/2020/apr/29/transgender-man-loses-appeal-court-battle-registered-father-freddy-mcconnell>. There was a somewhat similar case in Germany from 2017, with a similar result. See Dan Avery, *German Court Rules Transgender Man Can’t Be His Biological Child’s Father*, NEWNOWNEXT (Sept. 27, 2017), <http://www.newnownext.com/transgender-man-birth-certificate-father/09/2017/>.

<sup>7</sup> *McConnell*, EWCA Civ 559, para. 89. Note that Article 8(1) of the Convention on the Rights of the Child provides that: “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and *family relations* as recognized by law without unlawful interfer-

Permission to appeal further has been denied, but the case could possibly reach the European Court of Human Rights.<sup>8</sup> Another case, in Germany, with similar facts is now before that court.<sup>9</sup> These cases do not represent the first time that a female to male trans person had given birth, and they will not be the last.<sup>10</sup>

In its ruling, the U.K. Court of Appeals looked to the Gender Recognition Act of 2004,<sup>11</sup> a statute enacted more than a decade earlier and almost certainly not in contemplation of such a fact situation.<sup>12</sup> The lower court (the High Court of Justice's Family Division and Administrative Court) apparently interpreted section 12 of the GRA (which says "The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.")<sup>13</sup> as meaning that the official recognition of a trans per-

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ence." Convention on the Rights of the Child, *supra* note 1, art. 8(1) (emphasis added). Whether McConnell would be the child's father "as recognized by law" is of course what was at issue in the case, and it had to be determined through application of common law and interpretation of the GRA.

<sup>8</sup> The order denying permission to appeal is available at <https://www.judiciary.uk/wp-content/uploads/2020/04/McConnell-Final-Approved-Order-1.pdf>. An application to the European Court of Human Rights is planned. See Robert Booth, *Trans Man Loses UK Legal Battle to Register as His Child's Father*, GUARDIAN, Nov. 16, 2020, <https://www.theguardian.com/society/2020/nov/16/trans-man-loses-uk-legal-battle-to-register-as-his-childs-father>.

<sup>9</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 6, 2017, XII ZB 660/14. Germany's Federal Constitutional Court declined to hear an appeal. Bundesverfassungsgericht [BVerfG], May 15, 2018, 1 BvR 2831/17, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=79598&pos=0&anz=1>.

<sup>10</sup> Alice Margaria, *Trans Men Giving Birth and Reflections on Fatherhood: What to Expect?*, 34 INT'L J. L., POL'Y & FAM. 225-246 (2020), <https://academic.oup.com/lawfam/article/34/3/225/6040670>; see also Erica Tempesta, 'We're Still Humans and I Want People to Respect Us,' MAIL ONLINE (U.K.), Jan. 4, 2019, <https://www.dailymail.co.uk/femail/article-6558255/Pregnant-trans-gender-man-shares-fears-giving-birth-Texas.html>.

<sup>11</sup> Gender Recognition Act, 2004, ch. 7.

<sup>12</sup> *McConnell*, EWCA Civ 559. Paragraph 46 of the opinion acknowledges that prior to the enactment there had been other cases of transgender men giving birth but provides no indication that such a scenario was considered when the GRA was enacted. *Id.* para. 46.

<sup>13</sup> Gender Recognition Act § 12. The fact situation in *McConnell*, where a trans man gave birth, was almost certainly not what U.K. legislators had in mind at the time of the enactment of the provision. A conclusion that this stat-

son's gender does not affect the acquisition of legal parentage *even after* gender recognition has occurred. In other words, the court felt that section 12's disavowal of effect on parentage is "both retrospective and prospective," applying "even where the relevant birth has taken place after the issuance of a [gender recognition certificate]." <sup>14</sup> That conclusion relied on section 9 of the Act:

(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes *for all purposes* the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).

(2) Subsection (1) does not affect things done, or events occurring, before the [gender] certificate is issued; but *it does operate* for the interpretation of enactments passed, and instruments and other documents made, before the [gender recognition] certificate is issued (as well as those passed or *made afterwards*).

(3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation. <sup>15</sup>

Note the distinction between "things done, or events occurring" and "interpretation of enactments passed, and instruments and other documents made." <sup>16</sup> Sections 9 and 12 do not make explicit mention of "things done" or "events occurring" *after* the gender certificate is issued.

At worst – as far as Mr. McConnell is concerned – section 9 could be viewed as inapplicable, and at best it could (and probably should) be read as entitling McConnell to be listed as a male parent (*i.e.*, as "father") on the birth certificate. In other words, his official recognition as a male operates for the interpretation of "enactments passed, and instruments and other documents made" either before or after the issuance of the gender recognition certificate. This wording therefore should authorize *ab ovo* issuance of a birth certificate listing a trans man who gave birth as the "father" in a case where legal gender recognition occurred

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ute is dispositive of whether Mr. McConnell is his child's mother or his father presupposes itself.

<sup>14</sup> *McConnell*, EWCA Civ 559, para. 14(iv).

<sup>15</sup> Gender Recognition Act § 9 (emphasis added). The reference to "instruments and other documents" made before issuance of the gender recognition certificate, in section 9(2) of the GRA, presumably would include a birth certificate.

<sup>16</sup> *Id.*

before the child's birth. And it should authorize amending the child's birth certificate, to reflect the official recognition of the trans parent's gender, if the gender recognition came into effect after the birth of the child.

So the British courts got this wrong, but what's the fuss? Why can't Mr. McConnell just accept that he will be designated as the child's mother and just forget about it? Well, it is a matter of identity, not only with regard to himself and his son, but as a part of society. The structured information required in the birth certificate form notwithstanding, does it really matter if anyone, including the state, sees Freddie McConnell, who identifies as a man and who is socially and legally considered a man, to be the father and not the mother of a child? Should the answer to that question be decided by the constraints of a statutory form when no other valid reason exists to deny his request? What is important, as far as a birth certificate is concerned, is that he is the legal parent of his child. The child's "right to know [his] origins"<sup>17</sup> is fully preserved and protected in the relevant medical information contained in the record of birth registration, to which he would have access.<sup>18</sup>

In addition to the fact that being listed as his child's mother is an affront to his identity, a more practical problem for Mr. McConnell is that, despite identifying as a man, and being legally and socially recognized as a man, every time he is required to produce his son's birth certificate<sup>19</sup> in person he will likely be met with quizzical looks and asked for some explanation. This may happen over and over again, in dealings with people for whom the details really don't matter, and might make him an unwilling object of curiosity.<sup>20</sup> Moreover, the ripple effects of

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<sup>17</sup> *McConnell*, EWCA Civ 559, para. 75. On this point, the court referenced the German case, *see supra* note 9, noting that the German decision "laid emphasis on the right of a child of a trans person to know its origins." *Id.*

<sup>18</sup> The common practice of using anonymous gamete or embryo donors can be problematic in that it may deny the child the "right to know its origins" by preventing the child from knowing the identity of a biological parent. That in itself is a larger issue and is beyond the scope of this article.

<sup>19</sup> *But see infra* notes 23-26 and accompanying text, where there is a discussion of the U.K. long form and short form birth certificates.

<sup>20</sup> In the case pending before the European Court of Human Rights, organizations advocating for the interests of trans parents and their children have emphasized the potential harm resulting from forced disclosure of information

such a scenario may lead unnecessarily to adverse discriminatory consequences for both parent and child.<sup>21</sup> Birth certificates have a wide range of uses and “[t]he interplay between public and private information is politically sensitive.”<sup>22</sup> It might also be argued of course, that if the trans parent were listed as the child’s father, he could be questioned about why no mother is listed, but that is not unlike the more common situation where no father is listed.

Part of the problem in the *McConnell* case lies in the British system of birth registration,<sup>23</sup> which is in effect the “long form” birth certificate.<sup>24</sup> The “short form” certificate records “only the name, sex, date and place of birth, without disclosing any parental details.”<sup>25</sup> However, it is said that while the short form has been useful in the past for enabling persons to keep the circumstances of their family private (and indeed was probably created for just that reason), the long form is being “increasingly requested for identification purposes.”<sup>26</sup> So, in effect, what was originally conceived as a tightly restricted source of information, including a lot of medical information that should be private, has become a semi-public document in the way that only the short form certificate was meant to be.

Mr. McConnell participated in the making of a documentary film, entitled “Seahorse,” about his experience as a trans man

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when presenting a child’s birth certificate, including stigmatization, discrimination, and bullying. See Third Party Intervention at 3, 9-11, *O.H. & G.H. v. Germany*, Application No. 53568/18 and 54741/18 (Eur. Ct. H.R. June 25, 2019) (submitted by ILGA-Europe and TGEU), [https://ilga-europe.org/sites/default/files/AH%20v.%20Germany%20draft%20TPI%20\\_FINAL.pdf](https://ilga-europe.org/sites/default/files/AH%20v.%20Germany%20draft%20TPI%20_FINAL.pdf).

<sup>21</sup> *Id.* at 9.

<sup>22</sup> Julie McCandless, *Reforming Birth Registration Law in England and Wales?*, REPROD. BIOMEDICINE & SOC’Y ONLINE, June 2017, at 52, 53, <https://reader.elsevier.com/reader/sd/pii/S2405661817300187>.

<sup>23</sup> HM Passport Office, *Birth Certificates and the Full Birth Certificate Policy*, GOV.UK (updated Oct. 30, 2019), <https://www.gov.uk/government/publications/birth-certificates-and-the-full-birth-certificate-policy/birth-certificates-and-the-full-birth-certificate-policy>.

<sup>24</sup> The certificate is apparently the only record of birth registration.

<sup>25</sup> McCandless, *supra* note 22, at 55.

<sup>26</sup> *Id.* Proof of legal parentage may often be the main reason why the birth certificate is required for individuals to avail themselves of rights and privileges of citizenship, or to prove citizenship itself.

who gave birth.<sup>27</sup> That decision should not amount to a waiver of privacy rights in all such future encounters on his part, and of course should not affect the privacy rights of others in a similar situation.

The British Court of Appeal's decision in the *McConnell* case refers to the common law<sup>28</sup> being used to define "mother," but it is common law that was developed centuries before the *McConnell* fact situation was ever contemplated, and of course before assisted reproduction technology could bring about situations where neither the person giving birth nor the egg provider was ever intended to be the child's legal mother. And that common law was used to support the contention that one's status as father or mother is not affected by the acquisition of gender under the GRA, even when the relevant birth took place after the issue of a gender recognition certificate (*i.e.*, where no parent-child relationship existed at the time the gender recognition certificate was issued). Such a conclusion requires the common law to presuppose itself.<sup>29</sup> The judgment of the Court of Appeal eschewed the idea of "judicial legislation,"<sup>30</sup> in effect suggesting that in fact the statute did not apply in any event.

Paragraph 14 of the Court's opinion looks to the common law for the legal definition of "mother,"<sup>31</sup> but apparently does not consider the idea that it may be time for centuries-old com-

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<sup>27</sup> SEAHORSE (BBC 2019).

<sup>28</sup> R (Alfred McConnell) v. Registrar Gen. for Eng. & Wales, [2020] EWCA Civ 559, para. 28. Note that in the German case, the designation of "mother" was based upon statute. *Id.* para. 73 (quoting the German Civil Code's statement that "[t]he mother of a child is the woman who gave birth to it"). Likewise, a U.K. statute indicates that the "woman who is carrying or has carried a child . . . and no other woman, is to be treated as the mother of the child," unless modified by adoption. Human Fertilisation and Embryology Act, 2008, ch. 22, <https://www.legislation.gov.uk/ukpga/2008/22/section/33>. Once again the statute was almost certainly enacted without considering the situation of a legally recognized male giving birth.

<sup>29</sup> Such a conclusion also seems to contradict section 9(1) of the GRA, which provides that the acquired gender will be effective "for all purposes," and section 9(2), which provides that the acquired gender will apply to the "interpretation of enactments passed, and instruments and other documents made," either before or after the gender recognition certificate is issued. Gender Recognition Act, 2004, ch. 7, § 9(1), (2).

<sup>30</sup> *McConnell*, EWCA Civ 559, para. 35.

<sup>31</sup> *Id.* para. 14(i).

mon law to change. The common law is not static, as Lord Hodge of the U.K. Supreme Court has so well stated elsewhere: “Judge-made law is an independent source of law in common law systems.”<sup>32</sup> Accordingly, the dynamic nature of the common law seems well-suited to a situation where advances in medical science and evolution in social customs and norms clash with labored interpretations of statutory law such as the GRA. We should not be trying to shoehorn a novel fact situation into a statute and thereby produce an anomaly such as officially designating a male parent as being his child’s mother. There is a place for judge-made law under certain circumstances, such as when statutory law was not created in contemplation of the facts of the case at bar and does not lend itself to easy application. In such instances a court ruling that fairly settles the issue in dispute may provide a stimulus for the legislature to codify the ruling, either by affirmation or by correction. As Lord Hodge also noted, “Parliament has also used statute to codify rules which judges have made in order to make them more accessible.”<sup>33</sup>

Section 12 of the GRA, providing that a person’s acquired gender does not affect the person’s status as a parent, does not support a different result. McConnell had been legally recognized as being a male before his child’s insemination and birth occurred. Section 9(1) states that the acquired gender applies *for all purposes*. Section 9(2) adds that this includes the interpretation of “enactments passed and instruments and other documents made” either before or after the gender certificate is issued. So at the very least, McConnell should be recognized as being a “male parent,” and the issue then, I suppose, is whether a “male parent” can be a “mother,” which flies in the face of the common meaning of the term “mother.” A “male parent” is the common meaning of the term “father.” As to the need to know one’s biological origins,<sup>34</sup> I shall try to show that the birth certifi-

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<sup>32</sup> Lord Patrick Hodge, *The Scope of Judicial Law-Making in the Common Law Tradition*, Lecture at the Max Planck Institute of Comparative and International Private Law 1 (Oct. 28, 2019), <https://www.supremecourt.uk/docs/speech-191028.pdf>. For an example of resorting to “judge-made” law when the statutory law does not explicitly address or does not properly fit a given fact situation, see the *Buzzanca* case discussed below. *See infra* note 44.

<sup>33</sup> Hodge, *supra* note 32 at 1.

<sup>34</sup> *McConnell*, EWCA Civ 559, para. 75. Paragraph 75 of the opinion seems to rely on the German Court’s language, saying “The [German] Court



cate, at least in the vast majority of states in the United States, is primarily a document to prove legal parentage, can be unreliable as a source of one's biological origins,<sup>35</sup> and has been unreliable for centuries. Moreover, its unreliability is potentially magnitudes greater when viewed today against the backdrop of assisted reproduction and modern concepts of legal gender.<sup>36</sup> Of course, a rule that treats the person giving birth as the legal mother, at least temporarily, is a bright line, but one that can produce much confusion and misunderstanding and can, in turn, lead to unnecessary litigation. U.S. courts have figured this out to varying degrees, in permitting pre-birth orders<sup>37</sup> for designation of legal parents on the birth certificate.

Interestingly, in a 2017 Pennsylvania case, a transgender man (female at birth) was listed on the birth certificate as the father of a child born to his female spouse during the marriage, a fact uncontroversially acknowledged by the court.<sup>38</sup> An Arizona case included facts reflecting that a transgender man had given birth to three children in Oregon between 2003 and 2005, and was named as the father, and his female spouse was named as the mother, on the birth certificate in each instance.<sup>39</sup> Similar fact situations resulted in verdicts (and subsequent legislation) in

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laid emphasis on the right of a child of a trans person to know its origins (*Abstammungsrecht*)." *Id.*

<sup>35</sup> Most commonly, a birth certificate may not accurately identify the male parent.

<sup>36</sup> Marilyn A. Crawshaw, Eric D. Blyth, & Julia Feast, *Can the UK's Birth Registration System Better Serve the Interests of Those Born Following Collaborative Assisted Reproduction?*, REPROD. BIOMEDICINE & SOC'Y ONLINE, June 2017, at 1, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5952822/>.

<sup>37</sup> For instance, in the case of surrogacy, see *Intended Parents: Surrogacy Laws by State*, SURROGATE.COM, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state/> (last visited Dec. 29, 2020).

<sup>38</sup> *In re A.M.*, 223 A.3d 691 (Pa. Super. Ct. 2019). The legal spouse of the birth mother referred to himself as a male, as did the Pennsylvania Superior Court in its opinion. The case itself was about the marital presumption of paternity and did not directly have anything to do with the issue of designating a transgender man as the father on the birth certificate. Curiously, however, both the female spouse and the court referred to the marriage as "same-sex." *Id.* at 693-94, 697.

<sup>39</sup> *Beatie v. Beatie*, 333 P.3d 754 (Ariz. Ct. App. 2014). The dispute in the case was not about how the parents were listed on the birth certificate.

Sweden based on rationales that drew on international law, with courts finding that “the official recognition of gender identity should apply for all legal purposes, as well as [the] ‘best interests of the child’ principle derived from the Convention on the Rights of the Child.”<sup>40</sup> Courts in Italy and Israel have reached similar conclusions.<sup>41</sup> In California, parents are, by statute, permitted to self-designate as “mother,” “father,” or “parent,” regardless of gender.”<sup>42</sup>

The *McConnell* case is not just about how a person is designated as a legal parent. It highlights the disconnect between how the birth certificate has been traditionally viewed and its actual significance and function in today’s world. It also suggests a need to distinguish between birth registration and the birth certificate.

There are three major factors that influence how the birth certificate has evolved or arguably should evolve. The first is advances in the technology of assisted reproduction. The multitude of techniques used in assisted reproduction<sup>43</sup> has greatly increased the number of scenarios where individuals secure parental rights through actions, other than sexual intercourse, that lead to the birth of the child. In other words, the dispositive factor or factors may be certain acts that may have nothing to do with a biological connection.<sup>44</sup> The second factor is the trend toward

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<sup>40</sup> *Third Party Intervention*, *supra* note 20, para. 9.

<sup>41</sup> *Id.* para 10.

<sup>42</sup> CAL. HEALTH & SAFETY CODE § 102425.1. California law refers to a “confidential portion” and a “public portion” of the certificate of live birth, with the confidential portion labeled “Confidential Information for Public Health Use Only.” *Id.* § 102425.

<sup>43</sup> The term “assisted reproduction” is not to be confused with “assisted reproductive technology” (ART), which is best described as a sub-category of assisted reproduction. ART includes all fertility treatments in which both eggs and embryos are handled outside the body. ART does not include non-coital insemination or the use of drugs only to stimulate ovulation, even though those measures would be considered assisted reproduction. See Ctrs. for Disease Control & Prevention, *What Is Assisted Reproductive Technology?* (reviewed Oct. 8, 2019), <https://www.cdc.gov/art/whatis.html>.

<sup>44</sup> This concept was established in the United States in the case of *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 1410 (Cal. Ct. App. 1998) (also sometimes cited as *Buzzanca v. Buzzanca*), where a child was born from an embryo created by a sperm donor and an egg donor, implanted into a gestational surrogate, and so none of the individuals biologically-related to the child intended to be a legal parent. The couple who, intending to be the child’s parents, set in

gender neutrality and the increasing number of jurisdictions (world-wide) that recognize legal same-sex marriage. And the third factor is the increasing acceptance (both social and legal) of the idea that gender identity and the legal recognition of gender are not necessarily concordant with the chromosomal make-up of the individual or gender designated at birth. Gender identity is a complex phenomenon that is not entirely either/or, in other words, is not dichotomous (especially when genitalia are ambiguous) as to indicating one gender or another. There is increasing societal and legal recognition of this idea of non-binary gender or non-cisgender.<sup>45</sup> These issues primarily concern the individual, and are (or at least should be) of rapidly decreasing interest of the state, almost to the point of having zero state interest in some jurisdictions.

I have chosen to discuss the *McConnell* case in some detail because it raises fundamental questions about an already brewing question of what a birth certificate actually is and what it is not, with the overriding goal being to protect the rights of individuals that may be affected by its use. What if Mr. McConnell had been a gestational surrogate or gestational (non-genetic) parent of a child derived from a donor embryo, donor sperm or a donor egg? If he were listed as the child's "mother,"<sup>46</sup> *i.e.*, the person who had given birth, would it not trivialize or mask the

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motion the events that led to the child's birth, had divorced by the time the child was born, and were found in a trial court to not be the child's parents. In other words, the trial court said, the child had no legal parents. On appeal, the court said that both of the formerly-married couple were the child's legal parents. *See also supra* note 32.

<sup>45</sup> *See, e.g.*, Marissa Mallon, Comment, *Ambiguous Genitals & Societal Disdain: A Case for a Prohibition of Medically Unnecessary, Cosmetic Genital Normalization Surgeries on Infants and Children*, 33 J. AM. ACAD. MATRIM. LAW. 465, 478 (2020) ("Society has evolved beyond clear definitions of male and female, and society recognizes non-binary individuals."). The term "cisgender" refers to the common situation where a person's gender identity aligns with the gender assigned to them at birth, however that may have been determined. A "non-cisgender" person simply refers to a person whose gender identity does not conform to one's gender at birth. The term "non-binary" means that the person does not acknowledge having either a "male" or "female" gender. *See* Hum. Rts. Campaign, Glossary of Terms, <https://www.hrc.org/resources/glossary-of-terms> (last visited Dec. 29, 2020).

<sup>46</sup> And he would be, as of the time of birth. *See supra* note 28.

child's right to know the identity of anonymous donors?<sup>47</sup> If he had gestated an embryo derived from donor sperm and an egg from a female intended parent (whether or not, hypothetically here, she were his spouse), how would she be characterized on the birth certificate?

In reaching its decision, the U.K. Court of Appeal drew support for its opinion from a ruling in the Federal High Court of Germany, noting the German court's "emphasis on the right of a child of a trans person to know its origins (*Abstammungsrecht*),"<sup>48</sup> and "the child's right to personal knowledge of his/her parentage, which is also protected by Article 8(1) of the [European] Convention [on Human Rights]."<sup>49</sup> That information can and should be entered in the process of birth registration, which can be accessed by the child, without unnecessary access by others. I suggest that such a right of a child to know their<sup>50</sup> biological origins would not be in any way infringed by designating Mr. McConnell as the child's father on the birth certificate, any more than such a right would be infringed if the child were born as a result of an anonymous sperm, egg, or embryo donor,<sup>51</sup> especially if one considers the only real issue from a legal standpoint and purposes of producing a birth certificate is whether he is the

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<sup>47</sup> As to sperm or egg donation, the answer is "yes," at least if the donors are registered with the Human Fertilisation & Embryology Authority, as is required of clinics in the United Kingdom. See *Sperm Donor Anonymity Ends*, BBC NEWS (Mar. 31, 2005), <http://news.bbc.co.uk/2/hi/health/4397249.stm>. Under the Human Fertilisation and Embryology Act, see *supra* note 28, once a child reaches the age of 18 they will have a right to know the identity of egg or sperm donors, *i.e.*, their genetic parents. See also *Legal Rights for Egg and Sperm Donors*, Gov.UK, <https://www.gov.uk/legal-rights-for-egg-and-sperm-donors> (last visited Dec. 29, 2020).

<sup>48</sup> *R (Alfred McConnell) v. Registrar Gen. for Eng. & Wales*, [2020] EWCA Civ 559, para. 75.

<sup>49</sup> *Id.* para. 76.

<sup>50</sup> Throughout this article, and recognizing that the choice is controversial, I have chosen to use the word "their" rather than the phrase "his or her" (likewise "they/them" rather than "he/she" or "him/her"), slightly sacrificing formality, so as to preserve gender neutrality in the least awkward way. This is in keeping with common usage of the word "they" as a gender-neutral singular pronoun for more than six hundred years. See Merriam-Webster's Words of the Year 2019, <https://www.merriam-webster.com/words-at-play/word-of-the-year-2019-they> (last visited Dec. 29, 2020).

<sup>51</sup> There is an increasing tendency to recognize a right of a child to learn the identity of such donors, say, when they reach the age of eighteen.

legal parent of his child.<sup>52</sup> The emergence of this unusual fact situation should give cause to consider the idea that the birth certificate is in fact a legal document and as such one of its primary functions is to identify legal parentage: the designation of “mother” or “father” really amounts to no more than a cognomen of little or no legal significance, and one that simply facilitates or confirms one’s position in society so as not to disrupt long-established social norms. The designation of Mr. Connell, or of one similarly situated, as “father” would seem to be included (if not required) in “[f]ull legal recognition in all areas of life.”<sup>53</sup> Not surprisingly, the existing statutory forms do not contemplate the situation where the gestational parent is legally a male.<sup>54</sup>

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<sup>52</sup> The fact that the child may grow up not knowing the birth-gender of their parent seems no more difficult to manage than the eventual disclosure that one’s legal and social parent(s) is not their genetic parent. Although, of course, law in some jurisdictions may treat the child differently based upon the birth-gender of their parent(s), such law would likely be viewed as anomalous and rare.

<sup>53</sup> COUNCIL OF EUROPE, PROTECTING HUMAN RIGHTS OF TRANSGENDERED PERSONS: A SHORT GUIDE TO LEGAL GENDER RECOGNITION 21-22 (2015), <https://rm.coe.int/1680492119>. That document states:

Member states should ensure that the change of name and gender on official documents effectively guarantees full legal recognition in all areas of life. CM/Rec(2010)5 [Council of Ministers Recommendations] states that the content and scope of procedures relating to the legal recognition of a person’s gender identity need to be sufficient for “making possible the change of name and gender in official documents” and “*corresponding recognition and changes by non-state actors with respect to key documents*”. Thus, member states need also to ensure that documents provided by non-state actors, such as educational and employment certificates can also be changed to match a person’s legally recognised gender. *Legal gender recognition procedures should also ensure protection of a transgender person’s private life by making sure that third parties cannot obtain information on gender reassignment.*

*Id.* at 21 (emphasis added).

<sup>54</sup> It appears that only one of a same-sex couple can be listed as “mother” or “father,” and the other is to be listed simply as “parent.” Individuals simply declare their parental status by declaration under oath and it is implicit that the “mother” will be female. *Register a Birth*, Gov.UK, <https://www.gov.uk/register-birth> (last visited Dec. 29, 2020).

The dilemma faced by Mr. McConnell justifies some in-depth consideration of just exactly what a birth certificate is (and is not) in today's world, what it is used for, and what kind of information it should contain, given that it will be seen by various clerks and functionaries – often presented by a parent – on many occasions over the person's lifetime, and thus in effect is a quasi-public document.<sup>55</sup> It also raises the question of what kind of information is more appropriately relegated exclusively to the birth registration, to which access is more easily and appropriately restricted.

### III. History of Birth Registration and the Birth Certificate

The history of birth registration is a tale of many origins and *raisons d'être* that goes back centuries.<sup>56</sup> Initially its primary purposes were taxation and estimates of military manpower.<sup>57</sup> In the American colonies, it was used to ensure individual rights, primarily rights to property.<sup>58</sup> Birth registration in England and Wales has been compulsory since 1837.<sup>59</sup> In response to the horrors of “baby farming” in England in the late nineteenth century, the Infant Life Protection Act of 1872 required the registration of all births and deaths and placed a legal duty on certain individuals to notify the authorities of births and deaths.<sup>60</sup>

Generally, the reasons for both birth registration and the issuance of birth certificates are legal, and not medical. The rationales for including medical information about the parents relate

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<sup>55</sup> See *supra* notes 23-26 and accompanying text.

<sup>56</sup> See, e.g., Peter Turvey, *The History Behind Your Birth Certificate*, <https://www.angliaresearch.co.uk/articles/the-history-behind-your-birth-certificate/> (last visited Dec. 29, 2020).

<sup>57</sup> Heather L. Brumberg, et al., *History of the Birth Certificate: From Inception to the Future of Electronic Data*, 32 J. PERINATOLOGY 407, 407 (2012), <https://www.nature.com/articles/jp20123>.

<sup>58</sup> *Id.*

<sup>59</sup> McCandless, *supra* note 22, at 54-55.

<sup>60</sup> Dorothy L. Haller, *Bastardy and Baby Farming in Victorian England* (2009), <http://people.loyno.edu/~history/journal/1989-0/haller.htm>. Baby farming was a practice that preyed upon unwed mothers, by which their children were “farmed out” to so-called baby farmers who, for a fee, would take over the care of the children, but notoriously neglected them, often to the point of negligent infanticide or worse.

to establishing the legal rights of the individual, some of which has relevance in determining legal parentage, as well as providing demographic data for purposes of administering public health and the development of public policy, but also to provide a repository of medical and genetic information regarding the biological parent(s) that may be of interest to the child. The birth registration is primarily in the interest of the state,<sup>61</sup> and the birth certificate is primarily to protect the interest of the individual and to enable and facilitate the exercise of their rights.

Various U.S. states began to require registration of births and birth certificates in the nineteenth century. The Bureau of the Census, which was later established as a permanent agency in 1902 by an Act of Congress, developed the first standard certificate for the registration of live births in the United States in 1900.<sup>62</sup> In 1946, responsibility for the collection of vital statistics was transferred to the U.S. Public Health Service's National Office of Vital Statistics, "later reorganized in 1963 as the Division of Vital Statistics of the National Center for Health Statistics."<sup>63</sup> The U.S. Standard Certificate of Live Birth was last updated in 2003.<sup>64</sup> States are encouraged to use this form, but are not required to do so.<sup>65</sup> Notably this form simply requests information on the "father" and the "mother" (presumably the legal parents), apparently assuming that they are the sperm provider and the birth mother/egg provider, respectively.<sup>66</sup> There are questions about whether assisted reproduction was employed, but they seem to go no further.<sup>67</sup> Presumably this will be updated periodically and require more and more data, but already it requires lots of information regarding the obstetric and maternal history, as well as medical information about the (presumably biological) fa-

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<sup>61</sup> Although much of the information recorded is medical and should receive the confidentiality protections available under law, that same information is presumably derived from a medical record, often through a medical professional, as the original source.

<sup>62</sup> Brumberg, *supra* note 57, at 408.

<sup>63</sup> *Id.*

<sup>64</sup> Ctrs. for Disease Control & Prevention, *U.S. Standard Certificate of Live Birth* (revised Nov. 2003), <https://www.cdc.gov/NCHS/data/dvs/birth11-03final-ACC.pdf>.

<sup>65</sup> *Id.* at 3.

<sup>66</sup> *Id.* at 1.

<sup>67</sup> *Id.* at 2.

ther, tobacco use, “race,” marital status, and even source of payment for delivery, all ostensibly for public health surveillance and development of health policy.<sup>68</sup>

The rapid evolution of the electronic health record in the United States and in other developed countries and the likelihood of its becoming near-universal in the next few years, coupled with its likely eventual seamless integration with public health databases, including governmental archives of vital statistics,<sup>69</sup> enables the relegation of medical information identifying the child’s biological progenitors<sup>70</sup> and its gestational mother to a medical record, part of which may be duplicated in the birth registration, subject to the legal protections of privacy and confidentiality, and of course available to the courts in the event of challenges to the child’s legal parentage.

It is probably axiomatic that the longer the checklist of questions and the more data that is requested, the greater the potential for inaccuracy in reporting.<sup>71</sup> And a significant problem with recording and storing inaccurate data in electronic form is that it so easily propagates among multiple databases. That is a problem that is not unique to birth registration, and the advent of the electronic health record has only exacerbated it because the appetite for data requested or required has increased in proportion to the increase in the availability and use of electronic methods for acquisition and storage, as well as the increasing capacity of such systems to acquire and store such information without enough thought given to the necessity and purposes of requiring such data. The solution to this problem probably lies in user-designed artificial intelligence systems that aid in the design of such systems and that detect and prevent errors and inconsistencies in reporting.

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<sup>68</sup> *Id.* at 1-2.

<sup>69</sup> With, of course, appropriate limitations on the kind of information that is linked.

<sup>70</sup> Here, “biological progenitor” refers to an individual who has contributed genetic material to the creation of the child and would include providers of DNA, both nuclear and cytoplasmic (nDNA and cDNA, respectively), or egg cytoplasm. See Bruce Lord Wilder, *Assisted Reproduction*, in *PENNSYLVANIA FAMILY LAW PRACTICE AND PROCEDURE WITH FORMS* 481, 486 (2019) (volume 17 of the *West’s Pennsylvania Practice* series).

<sup>71</sup> See Brumberg, *supra* note 57, at 409-11 (noting concerns about the accuracy of data on birth certificates).



The common thread is that the purpose of the birth certificate seems to have been primarily to be a document that derives from birth registration and memorializes a person's identity and legal status in a given jurisdiction.<sup>72</sup> It functions as a prerequisite for accessing the range of rights and privileges for the individual,<sup>73</sup> such as establishing citizenship, obtaining a passport, identification for issuance of a driver license, enrollment in Social Security, and enrollment in school. A declaration of legal parentage in the form of a birth certificate is critical to that goal. Initially, the collection of information surrounding the child's biological parents was the major determinant of legal parentage. It was almost inevitable that other information about the parents would also be collected incident to the child's birth.

A birth certificate is a document issued by a government that records the birth of a child for vital statistics, tax, military, and census purposes. . . . In the United States, birth certificates serve as proof of an individual's age, citizenship status, and identity. They are necessary to obtain a social security number, apply for a passport, enroll in schools, get a driver's license, gain employment, or apply for other benefits. Humanitarian Desmond Tutu described the birth certificate as "a small paper, but it actually establishes who you are and gives access to the rights and privileges, and the obligations of citizenship."<sup>74</sup>

Other important uses for the birth certificate are identification to establish inheritance rights, registration to vote, and obtaining a marriage license.

In the days before assisted reproduction, identifying the child's mother (synonymously birth mother, genetic mother, and legal mother) was almost always simple, except for the occasional inadvertent or even intentional switching of babies in a hospital nursery. When there was a need for absolute certainty (as in the birth of royalty) special measures were undertaken.<sup>75</sup> If the wo-

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<sup>72</sup> *Id.*; Christine Ro, *A Birth Certificate Is a Person's First Possession*, ATLANTIC MONTHLY, Dec. 10, 2017, <https://www.theatlantic.com/technology/archive/2017/12/a-birth-certificate-is-a-persons-first-possession/547970/>.

<sup>73</sup> Gerber, Gargett & Castan, *supra* note 3, at 436.

<sup>74</sup> Am. Bar Ass'n, *Birth Certificates* (Nov. 20, 2018), [https://www.americanbar.org/groups/public\\_education/publications/teaching-legal-docs/birth-certificates/](https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/birth-certificates/).

<sup>75</sup> Sarah Bradford, *Royal Births: From Protracted, Painful and Public to 21st-Century Labor*, GUARDIAN, July 23, 2013, <https://www.theguardian.com/uk-news/2013/jul/23/royal-births-protracted-painful-public>.

man were married, her husband was deemed in the law to be the child's legal father. However, a child could not always be absolutely certain of that fact, nor could the "father." The child's mother might or might not know. The legal presumption of paternity provided a kind of certainty as far as the law was concerned, but injected the possibility of uncertainty with regard to what a child knows about their biological origin if the birth certificate is seen as the official testament of genetic paternity.

Until the availability of genetic markers, such as ABO blood groups, human leukocyte antigen, and more recently (and more accurately) DNA testing, it was often impossible to establish with certainty who the biological father was. So the presumption of paternity served multiple purposes: to preserve the integrity and respectability of the family, to remove the stigma of bastardy, and to provide a bright line for the establishment of legal paternity, and as much as possible settling (albeit sometimes inaccurately) any lingering doubts on the part of others about a child's biological origin.

With the advent of technology to identify genetic markers, the presumption can now be more easily challenged. For the most part, though, legal parentage of the child still implies their biological heritage, but in fact the birth certificate may not always reliably tell the child anything about their paternal "biological origins."

When assisted reproduction, initially artificial insemination by donor, came along, the law dealing with the issue of who was to be listed as the father on the birth certificate became complicated. In some states it was handled like the situation where a child was born out of wedlock. Particularly in the case of an anonymous donor, this denied the child some possibly important information about their "biological origins" or even misled the child into assuming their legal father was their biological father. That did not change things very much, because by that time childbirth out of wedlock had lost much of its stigma. If the artificial insemination was done with the husband's consent, there was no problem. It was not as easy in the case of an unmarried wo-

man or of a woman married to a man who did not consent, especially if the donor were known.<sup>76</sup>

When surrogacy, including gestational surrogacy,<sup>77</sup> came along, things got more complicated, not least because there were, and still are, wide variations in how legal parentage is determined in such situations. The determination of maternity might involve a dispute between the intended mother/egg provider and the gestational surrogate. If the egg provider were a donor, the intended mother would have no biological connection (not genetic and not gestational) to the child but still could be listed as the mother on the birth certificate, again, depending upon the jurisdiction. Case law developed in many jurisdictions was not, and still is not, congruous. The trend in the United States, though not without a lot of bumps along the way, has been to regard the intended parents as the legal parents and to list them as parents on the birth certificate, assuming certain conditions have been met.<sup>78</sup>

The Uniform Parentage Act, and other legislation or case law in some states, provides some certainty and uniformity by establishing contract-based parentage and provides that the intended father and mother be named on the birth certificate, even though neither might have any biological relationship to the child. But to date the Uniform Act has been adopted in less than half of the states, and not always in its most recent version.<sup>79</sup>

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<sup>76</sup> See, e.g., *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007). In a 3-2 decision, the Pennsylvania Supreme Court reversed a lower court ruling that a donor had support obligations. In that case, a known donor per an oral contract with a married woman would not have parental obligations where there was no spousal consent, and the mother participated in a fraudulent misrepresentation of spousal consent by an imposter.

<sup>77</sup> Gestational surrogacy occurs where the surrogate mother bears a child from an embryo genetically foreign to her, created by IVF from gametes from donors, one or both of which could be anonymous.

<sup>78</sup> See UNIF. PARENTAGE ACT § 815(b)(3) (2017).

<sup>79</sup> The Uniform Parentage Act completed in 2017 has been adopted in its entirety by only four states. See Unif. Law Comm'n, *Parentage Act*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> (last visited Dec. 29, 2020). Earlier versions have been adopted by some other states. Unif. Law Comm'n, *Parentage Act (2002)*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=5d5c48d6-623f-4d01-9994-6933ca8af315> (last visited Dec. 29, 2020); Unif. Law Comm'n, *Parentage Act (1973)*, <https://www.uniformlaws.org/committees/>

The concept of “intended parent” is not straightforward, either. For instance, an individual may “intend” to be the child’s parent at the time of conception, but may have a change of heart before the child is born. A California court’s decision in *In re Marriage of Buzzanca*<sup>80</sup> gave rise to the idea that intent and corroborating behavior at the time of embryo transfer would be the benchmarks of legally enforceable intent (assuming, of course, that there was consent – not always easy to prove). To have a more unified approach to the matter of “intent,” it might be simpler to view what a presumptive parent actually did (regardless of non-written evidence of intent) to bring about the birth of the child,<sup>81</sup> including entering into a contract that includes an explicit statement of intent to be legally bound as the parent(s) of the child.

Another factor, that can be thought of as a by-product of assisted reproduction and the wide variability of legal frameworks in various countries, is what has come to be known as cross-border reproduction, sometimes referred to as “reproductive tourism.”<sup>82</sup> That phenomenon has emerged because people who wish to build their families with assisted reproduction are often stymied by the laws of their own country or state, and resort to travelling to achieve what they might not be able to legally do in their own state or country. However, that solution in turn can lead to other unanticipated legal problems involving birth registration and issuance of a birth certificate.

What does today’s birth certificate look like? What we know as our birth certificate is generally a one- or two-page document that lists the date, time, and place of birth; gender; “race or color”; birth weight; person certifying the birth; and similar information about the father and mother.<sup>83</sup>

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community-home?CommunityKey=10720858-ebe1-4e85-a275-40210e3f3f87 (last visited Dec. 29, 2020). As noted, statutory and case law varies considerably among the states.

<sup>80</sup> *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 1410 (Cal. Ct. App. 1998); see *supra* note 44.

<sup>81</sup> Sexual intercourse is of course the most common and time-honored example. Parentage by estoppel may not require explicit intent.

<sup>82</sup> Deborah Spar, *Reproductive Tourism and the Regulatory Map*, 352 NEW ENG. J. MED. 531 (2005).

<sup>83</sup> For a list of key changes to the data captured by the national standard birth certificate, see Brumberg, *supra* note 57, at 408.

The function of the birth certificate in practice is that of a legal document that identifies the child's place, date, and time of birth, their gender, and the individual or individuals deemed to be the child's legal parents at the time of birth. Law in various jurisdictions varies, but virtually all jurisdictions provide for amendment and reissuance of the birth certificate at a later time for valid reasons, almost always legal, even after attaining majority.<sup>84</sup> If the birth certificate is amended, say, in the case of adoption, or where a judicial determination of sexual assault has subsequently been made, an amended birth certificate may be issued to conform to the child's legal status vis-à-vis their legal parents and the original placed under seal, depending of course on the particular jurisdiction. Access by even the child may be restricted, depending upon state law.

We can and should consider, therefore, that the collection of medical information incident to a child's birth is important for many reasons other than those having to do with the child's legal parentage, but could be done in a way that protects one's privacy to the same extent that personal health information (including electronically stored personal health information) is protected. The collection and recording of such medical information on the birth certificate may have at one time been important as it relates to the legal status of a child, but with today's technology, the focus should shift to where it belongs, in other words, accurately recording the child's legal parentage at the time of birth (in addition, of course, to the time and place of birth) or under certain circumstances when the legal relationship changes or if a correction or amendment is needed.

Of course a child, and possibly others with a legitimate need to know, should have access to medical information that relates to their biological provenance, as well as other information about how they came to exist, but what is recorded on the birth certificate as the source of that information can be misleading, and possibly harmful if treated as medically accurate and relied upon as medical fact. Moreover, while it may be said that laws restricting access to one's birth certificate provide privacy protection, the fact remains that individuals or their parents have to produce the

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<sup>84</sup> See, e.g., *Amending a Birth Certificate After Adoption*, JUSTIA (updated Aug. 2018), <https://www.justia.com/family/adoptions/adoption-procedures/amending-birth-certificate/>.

birth certificate to various clerks or other officials (both governmental and non-governmental) as an identifier for any number of reasons throughout the child's life, and are thus effectively forced to disclose information about themselves that is not relevant and may lead to adverse consequences. For instance, the inclusion of the Social Security numbers and birth dates may facilitate identity theft.<sup>85</sup>

The history of the law shows how technological advances or changes in society can bring about disputes involving rarely or never imagined factual situations that must be resolved with law that never contemplated such scenarios. A rigid adherence to such law may be a recipe for rulings that are manifestly cruel or just bizarre when measured with the yardstick of fairness and common sense. Perhaps not enough attention is given to judge-made law in these situations.<sup>86</sup> There are times when judge-made law is appropriate and can avert tragic consequences, such as when strict application of existing case law or statutory law might result in declaring a child (potentially) stateless<sup>87</sup> or parentless.<sup>88</sup>

Regarding legal parent-child relationships designated on the birth certificate, we can make a number of observations, of

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<sup>85</sup> See Third Party Intervention, *supra* note 20; see also notes 20-21 and accompanying text.

<sup>86</sup> Hodge, *supra* note 32; see also notes 32-33 and accompanying text.

<sup>87</sup> For example, U.S. State Department policy initially denied citizenship to twins born to a U.S. citizen in Israel, where she could not prove citizenship of an egg donor, but this was reversed to permit citizenship based upon the fact that she was the gestational mother. Michele Chabin, *Policy Shift Eases Citizenship for Foreign-Born Kids of American Moms*, USA TODAY, Feb. 27, 2014, <https://www.usatoday.com/story/news/world/2014/02/27/american-moms-giving-birth-in-israel/5819205/>. The reversal of policy was based on "reinterpretation" of the Immigration and Nationality Act, 8 U.S.C. §§ 301, 309. An appeal by the State Department of a federal district court decision, *Kiviti v. Pompeo*, 467 F. Supp. 3d 293 (D. Md. 2020), to grant citizenship to a child born outside the United States, based upon the U.S. citizenship of a non-biologically related spouse in a same-sex marriage, has been abandoned by the State Department. Michael K. Lavers, *State Department No Longer Challenging Gay Couples' Children's U.S. Citizenship*, WASH. BLADE, Oct. 27, 2020, <https://www.washingtonblade.com/2020/10/27/state-department-no-longer-challenging-gay-couples-childrens-u-s-citizenship/>.

<sup>88</sup> Judy Peres, *Surrogacy Case Breeds New Legal Dilemma*, CHI. TRIB., Sept. 11, 1987, at 1; see also *supra* note 44.

course bearing in mind that the validity of such observations is highly jurisdiction-dependent. First, the person who carried the pregnancy to term (commonly referred to as the birth mother), may or may not (as in the case of surrogacy) be a legal parent. Whether, and under what circumstances, that person may be designated as a “father” is, of course, the crux of the *McConnell* case. Second, the person who provides the female gamete (commonly termed the genetic mother) may or may not be a legal parent, and might (if not a donor) be listed on the birth certificate as either “mother,” “father,” or “parent,” depending on the jurisdiction. Third, the person who provides the male gamete (commonly termed the genetic father) may or may not be designated as “mother,” “father,” or “parent” on the birth certificate.

Thus, it is not at all far-fetched or disruptive to regard the terms “mother” and “father” as mere cognomina descriptive of an important legal status – that of legal parent, with certain restrictions (such as requiring the designation to have some rational underpinning).<sup>89</sup> And just as the long-accepted presumption of paternity may be misleading as to one’s biological origins, the idea that a legally and socially recognized male (who may or may not have provided the female gamete) cannot be designated as the child’s father, because the child has a right to know their biological origins, doesn’t hold water, at least so long as no other person claims that status exclusively.<sup>90</sup> Stated in a different way: The person designated as the legal mother on the birth certificate may be neither the gestational carrier<sup>91</sup> nor

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<sup>89</sup> For example, in the *McConnell* case, the father relied on a previous statutory designation of gender. Such a provision would, arguably, permit a legal parent with a later-acquired legal gender change to request a modified birth certificate, but the answer to such a question is not clear, as it might depend on the question of who owns the birth certificate.

<sup>90</sup> Although it has been relatively rare for a same-sex couple to be legally-recognized as being two fathers or two mothers, it is common nowadays for the children of same-sex couples – even where both may not be legal parents – to view themselves and portray themselves to others as having “two moms,” or “two dads.”

<sup>91</sup> The gestational carrier is sometimes referred to as the “gestator,” which is in fact a term from the Latin, meaning “carrier,” and more recently a commonly-used neologism derived from the words “gestation” or “gestate.”

the source of the female gamete.<sup>92</sup> And, of course as noted above, and has been true for centuries, the person designated as the “father” may have no biological relationship to the child whatsoever.

Now that we have, I hope, established that the birth certificate is *de facto* a legal document that may not necessarily accurately indicate biological origins, we should recognize the tremendous variability in how jurisdictions decide who is to be listed on the certificate as a legal parent. Generally the choice of who is listed as a parent is determined by the law in the place of birth, but problems may arise if there is conflict<sup>93</sup> with the law of the jurisdiction of one or both parents’ citizenship. Some uniformity among states and among nations is desirable, but is it achievable? The Hague Conference has made a start in the area of surrogacy,<sup>94</sup> and perhaps could build on that idea with regard to the birth certificate.

Accordingly, I offer the following guides toward that end. Birth registration is a universal human right and requires, as a minimum, that data is gathered and recorded regarding a child’s birth that establishes their identity, as required by law in the place of birth, including biological origins; date, time, and place of birth; legal parentage; gender;<sup>95</sup> and other pertinent information about the child’s biological provenance and identities of the individuals legally responsible for their existence. The information should be available only to those who have a legitimate need to know, including the state or states of the nationality of the

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<sup>92</sup> Leaving aside, for a moment, the unusual fact situation in *McConnell* that was undoubtedly not contemplated in the drafting of such statutes, that determination depends upon the state.

<sup>93</sup> Maria Hook, *Common Law Recognition of Foreign Declarations of Parentage*, CONFLICT OF LAWS.NET (Feb. 10, 2020), <https://conflictoflaws.net/2020/common-law-recognition-of-foreign-declarations-of-parentage/>.

<sup>94</sup> Hague Conference on Private Int’l Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Agreements* (Mar. 2014), <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf>. This project demonstrates a recognition of the changing landscape of the law on parentage, but for reasons that are perhaps obvious, it has not considered the role that gender-implicit designations, such as “father” and “mother,” have vis-à-vis the gender-neutral term “parentage.”

<sup>95</sup> Bearing in mind, of course, that the child’s gender may be indeterminate, and designated as such. For example, see Mallon, *supra* note 45.



child and their putative legal parents, and the information should be subject to modification to comply with law in that state or states.

The certificate of birth is also arguably a right of every individual. Issued by the child's state or states of citizenship, it should contain the child's name; date, time, and place of birth; gender; and legal parentage of the child, and as determined by law in the jurisdiction in which it is used, establishes a panoply of legal rights, among them citizenship, enrollment in school, entitlement to government-issued benefits, and of course identification for any other number of rights and privileges. It should be subject to amendment when necessary to preserve the rights and privileges due the child under the law.

Given that a child's legal parents are more and more often (but still relatively rarely) likely to be discordant with their biological progenitors, and are not uncommonly of the same gender, the designation of "mother" or "father" is of decreasing significance, to the point where such designations amount to mere cognomina<sup>96</sup> attached to the status of legal parentage, and serve more a purpose of social recognition, rather than legal recognition.

#### **IV. Conclusion**

The registration of live births and the issuance of birth certificates are best viewed as distinct entities, the former being a process created in the interest of the state, and the latter being a document that provides the individual with proof of a unique identity that is required to access a panoply of rights and privileges. The utility and primary function of the birth certificate, as an official document that declares a child's legal status, including their parentage, ought to be preserved. As such it ought to memorialize the date, time, and place of birth, and the individuals recognized as the child's legal parents at the time of birth. The

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<sup>96</sup> The designation of "mother" or "father" may be subject to certain requirements, such as that a legally male parent is a "father" and a legally female parent is a "mother." In that way, a child may have two legal fathers or two legal mothers. In the latter instance it makes no sense to require that only one be designated the legal mother and the other simply as "parent," especially in the case of a female same-gender couple where one provided the egg and the other was the birth mother.

birth certificate has long been imperfect, but nonetheless has often been viewed as an official record of a child's biological origins because it provided easy (although sometimes inaccurate) assumptions based upon the limited possibilities available for biological parentage in the past.

The acquisition of data about the individual and their biological provenance in the process of birth registration was historically done to help verify or confirm a child's legal status and to satisfy the state's need to maintain vital statistics. For centuries, identification of the child's birth mother virtually always confirmed both biological and legal relationship to the child, thus providing some certainty for the birth certificate's function as a document to verify the child's legal parent, and vice versa. The concordance of legal and biological parentage in the "father" has been less ascertainable, and the law concentrated on providing certainty as to legal parentage, as opposed to the determination of biological paternity, something that up until recently has always been difficult to achieve with equal certainty.

With the relatively recent advent of assisted reproduction techniques, the role of the birth certificate as a testament of both legal and biological parentage has become untenable, even though in only a minority of cases, and has forced us to decide whether it is to be one or the other. Given the overwhelming degree to which, as a matter of practice, it is used almost entirely to establish a child's legal status and access to rights and privileges that are due, we should view the birth certificate as a legal instrument. And given its decreasing reliability as a marker of biological parentage, insofar as some jurisdictions have redefined the determination of legal parentage, it is less and less a reliable document of biological origins.

A designation of the child's gender may also be of importance, depending upon the law in the jurisdiction of the child's birth, or later on, citizenship. Inasmuch as it may differ from certain biological markers, details need not be included on the birth certificate, but may have a legitimate place in the record of birth registration.

What information is recorded on the birth certificate ought to evolve in concert with changes in societal norms, scientific advances in the means by which procreation occurs, and the evolution of gender-neutrality in the law. Above all, its utility and

primary function as an official document for legal purposes ought to be preserved.

The details of biological (or non-biological) relationships between the child and others who contributed to their birth are a legitimate interest of the state, and may have significance for medical, research, and public health interests, as well as to the child, but ought to be available to only those who have a legitimate need, and tailored to fit that legitimate need. Those details are best preserved through the process of birth registration and need not, and for the most part should not, be available to people who may require the birth certificate to validate citizenship, issue other official documents, enroll the child in school, and so forth.

Conflicts that arise because of (sometimes unconscious) differing views as to whether the birth certificate is supposed to be a medical document as well as a legal document, or when it might be disruptive to social norms, can often have adverse consequences for the child or their parents. With the globalization of assisted reproduction, conflicts can arise between determination of parentage and citizenship in the place of birth and in the country or countries of the child's parents. There is a pressing need for agreements, such as Uniform Laws in the United States, and international instruments, such as a Hague Convention,<sup>97</sup> that will provide some uniformity in how legal parents are identified and designated at the time of birth, what information about the biological and legal parents is collected and protected in the registration process, and what is contained in the birth certificate, which is at least a semi-public document.<sup>98</sup> Where uniformity cannot be achieved, such agreements should set out processes to resolve disputes about parentage and citizenship when interjurisdictional conflicts exist. With these steps, progress can be made toward a better understanding of the proper role of birth registration and birth certificates, for the many new issues that have arisen in recent years and surely will continue to arise in the future as reproductive technology develops and social norms evolve.

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<sup>97</sup> See *supra* note 94.

<sup>98</sup> I have designated the birth certificate as a semi-public document because individuals can be required to produce it on multiple occasions during their lives to various entities to show proof of identity

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