

Secrecy in births, identity rights, care and belonging

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Secrecy in births is rare. Yet ‘baby boxes’ or hatches usually forming part of a hospital wall to deposit babies anonymously into incubators now exist in many EU countries, and all US states have some form of ‘safe haven’ legislation for discreet births. The issue is not much considered legally but, when it is, it tends to be reduced to a balancing of conflicting rights: on the one hand, the birth giver’s right to confidentiality and, on the other, children’s rights, more specifically their rights to identity, with priority given to what is in the child’s best interests.

This article considers secrecy in births in the context of a world where motherhood continues to be constructed as ‘natural’. It is increasingly assumed to be in a child’s best interests to have knowledge of their exact genetic biological origins, favouring full openness and transparency. Secret voluntary relinquishments of babies in this context are therefore seen as ‘unnatural’, morally reprehensible, with corresponding legal restrictions.

It is argued that children’s rights to life and identity are respected by interpreting ‘identity’ as socially formed through living a life, rather than based on knowledge of biological origins. If this interpretation of the right to identity were used, more energy could be infused into creating social circumstances of compassionate care and belonging for all children. This could include providing as much safety as possible, as soon as possible, after birth, better provision for preserving memory books, and a fresh approach to caring for children in the care system following anonymous births. Further, an attitude of care towards the birth giver would assist in enabling her to make more informed choices for herself to live a life in which she feels a sense of belonging.

Introduction

This article considers secrecy in births in the context of a world where motherhood continues to be constructed as natural by reference to female childbearing and birthing capacity. Child rearing and social mothering are perceived as automatically and ‘naturally’ following from that. At the same time, there has been a changing view of what is in a child’s best interests, which risks emphasising the right to identity and reducing it to knowledge of one’s exact genetic biological origins (particularly of one’s birth giver) *and* the right to be brought up by one’s biological family.¹ Secretly relinquishing a child in this context is seen as ‘unnatural’, with corresponding legal restrictions and judgements made against these women.

Part 1 examines the legal treatment of secrecy in births, including some recent case law developments in England and Wales. It then explores how these issues are handled in some different jurisdictions.

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1 See analysis in J Fortin, ‘Children’s right to know their origins – Too far, too fast?’ [2009] CFLQ 336.

The precise meaning of a right to identity is, in my view, problematic. In Part 2, I set out how this right, as a children's right, has been interpreted in international human rights law, and discuss aspects of the United Nations Convention on the Rights of the Child 1989 (CRC) and related Committee reports and comments.² The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention) Article 8's right to respect for one's private life now provides a right to 'identity' through interpretation by the European Court of Human Rights (ECtHR). The court's interpretations vary and can be contrasted with the CRC approach.³

Attitudes towards openness and full disclosure in many areas of life,⁴ including family history, adoption and gamete donation have radically shifted in recent decades.⁵ For example, emotive language used in parliamentary debates in 2004 on legislation removing anonymity in gamete donation, suggested that the resulting children may suffer 'genealogical bewilderment' if donation were anonymous, with the right to identity being described as 'a right not to be deceived about one's true origins'.⁶ I question the idea that being completely open and transparent about things that happened pre-birth are in a child's best interests and consistent with his or her welfare when his or her birth giver does not want this revealed. If attempts to define identity, including newborn children's identity, acknowledged the concept's fluidity – that is as socially formed through living a life – more energy could be infused into creating social circumstances of compassionate care and belonging for *all* children on a more equal basis and also provide more care for the birth giver: the case for this is argued in Part 3.

I use the term 'birth giver' to refer to a girl or woman who has given birth, following earlier analysis by Katherine O'Donovan and myself advocating a conceptual separation between the one who gives birth and the mother.⁷ Adopting this conceptual separation changes the terms in which the debate is conducted in an important way. To paraphrase Jennifer Nedelsky, much of the impetus for feminist politics arises from women claiming the space to choose who and what they are, to refuse to be defined or dictated by notions of what society means by 'woman'⁸ and motherhood. But some areas of life seem difficult to discuss in terms of 'choice'. As we discussed in our earlier work, pregnancy, motherhood and childcare have been approached in

2 United Nations Convention on the Rights of the Child 1989, adopted by General Assembly Resolution 44/25 of 20 November 1989.

3 S Besson, 'Enforcing the Child's Right to Know her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Court of Human Rights' (2007) 21 *International Journal of Law, Policy and the Family* 137.

4 For a consideration of openness and disclosure requirements in other topics such as gender identity see A Sharpe, 'Transgender Marriage and the Legal Obligation to Disclose Gender History' (2012) 75 *Modern Law Review* 33.

5 K O'Donovan, *Sexual Divisions in the Law* (Weidenfeld & Nicolson, 1985); E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford University Press, 2001); *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd 9314 (1984), paras 4.21–4.22, 6.6, 7.7; D Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford University Press, 2nd edn, 2002), at 748; Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 2004/1511). See also Human Fertilisation and Embryology Authority Act 2008, ss 31ZA ff.

6 *Hansard, Lords Debates*, 9 June 2004: <http://hansard.millbanksystems.com/lords/2004/jun/09/human-fertilisation-and-embryology>, last accessed 9 April 2018. Similar language can be seen in *R (Rose) v Secretary of State for Health* [2002] EWHC 1593 (Admin), [2002] 2 FLR 962. As Article 8 incorporates the concept of personal identity, in Scott Baker J's interpretation, this 'plainly included' the right to obtain information about a biological parent. In his view, this information went to 'the very heart of the claimants' identity and to their make up as human beings'. See further J Marshall, *Personal Freedom Through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff, 2009).

7 See K O'Donovan and J Marshall, 'After birth: decisions about becoming a mother' in A Diduck and K O'Donovan (eds), *Feminist Perspectives on Family Law* (Cavendish, 2006). This has been followed in the context of surrogacy by R D'Alton Harrison, 'Mater semper incertus est: who's your mummy?' (2014) 22 *Med Law Rev* 357; see also K Christiansen, 'Who is the mother? Negotiating identity in an Irish surrogacy case in relation to Irish case law' (2015) 18 *Med Health Care Philos* 317.

8 J Nedelsky, 'Reconceiving autonomy: sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7.

various ways in feminist work: first, as natural phenomena to be overcome;⁹ secondly, as natural phenomena to be celebrated but sometimes only when reconstructed, as Adrienne Rich describes it, to release ‘the creation and sustenance of life into the same realm of decision, struggle, surprise, imagination and conscious intelligence as any other difficult but freely chosen work’;¹⁰ and thirdly, an institutional issue of who does what in terms of childcare.¹¹ Yet, in that literature, distinctions are not made between pregnancy and childbirth in the way we sought to do and which I continue in this article.¹²

Any choice is made in a social context and there have certainly been progressive changes in attitudes to parenting, and in some sense ‘mothering’, particularly given reproductive technological developments, apparently prompting more acceptance of a variety of family structures and birthing choices, including surrogacy arrangements. At the same time, there has been increased monitoring of standards of behaviour of pregnant women and birth givers.¹³ As I seek to make clear throughout this article, a pregnant girl or woman’s health needs to be a legal concern, but not through policies of surveillance and further policing of female behaviour.

I turn now to focus on the legal regulation of options for girls and women who seek secrecy during pregnancy and birth.

Part 1: The legal regulation of abandonment, anonymity and voluntary relinquishment

After evaluating certain aspects of the legal position in England and Wales, I contrast this with the growing use of baby boxes and legal responses to anonymity or concealment in France and some other EU jurisdictions that legally permit anonymous births.¹⁴ Parties are treated or classified within the legal systems in different ways. Sometimes, more sympathy is shown towards the birth giver, but the position is generally presented as a conflict between children’s rights to identity – as an important part of their best interests – and women’s rights to confidentiality, sometimes coupled with a child’s and woman’s right to life and healthcare. Children’s rights increasingly trump the latter.

England and Wales: ‘abandonment’, care proceedings and adoption

In England and Wales, it is not possible legally to give birth anonymously.¹⁵ Secret births entail either illegal ‘abandonment’, or legally permissible ‘concealment’ where – aside from the authorities who need to know – the birth giver tells no one or only a limited number of people, and voluntarily relinquishes the newborn into care proceedings and adoption. The child’s birth

9 S De Beauvoir, *The Second Sex* (Jonathan Cape, 1953; Vintage, 1997); S Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (Bantam Books, 1971).

10 A Rich, *Of Woman Born* (Virago, 1976), at p 280.

11 See, for example, N Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (University of California Press, 1978).

12 See also J Marshall, ‘Giving birth but refusing motherhood: inauthentic choice or self-determining identity?’ (2008) 4 *International Journal of Law in Context* 169 and J Marshall, ‘Concealed Births, Adoption and Human Rights Law: Being wary of seeking to open windows into people’s souls’ (2012) 71 *Cambridge Law Journal* 325.

13 See S Day Sclater et al, *Regulating Autonomy: Sex, Reproduction and Family* (Hart Publishing, 2009), especially chapter 5 by E Lee and J Bristow, ‘Rules for Feeding Babies’.

14 This is not meant as a comprehensive comparative law piece; for fuller comparative work on adoption see Council of Europe, Commissioner for Human Rights, *Adoption and Children: A Human Rights Perspective* CommDH/Issue Paper (2011) 2 (28 April 2011); European Commission, Joint Council of Europe and European Commission Conference: *Challenges in Adoption Procedures in Europe: Ensuring the best interests of the child* (30 November – 1 December 2009, Strasbourg).

15 Secret abandonment is a crime: see the Offences against the Person Act 1861, s 27; the Children and Young Persons Act 1933, s 1.

must be registered with the birth giver named as mother.¹⁶ The relevant local authority will seek care placements and subsequent adoption, where ‘the paramount consideration of the court or adoption agency must be the child’s welfare, throughout his life’.¹⁷

Cases are occasionally reported in the press of babies being found in public places. But statistically, these cases now appear to be extremely rare. The Office for National Statistics (ONS) notes that few details are known about abandoned children and they are not included in any birth statistics. However, since 1977, these infants have been included in the Abandoned Children Register. In its 2015 report, the ONS’s entries show four abandoned babies recorded in 2005, three in 2006, none in 2007 or 2008, one in 2009, three in 2010, one in 2011 and none in 2012, 2013, or 2014.¹⁸ However, this register only includes children whose parents are never found.¹⁹

The rate of child abandonment in the UK has been described by a recent empirical European project (the Child Abandonment Project) as very low in comparison to other EU countries. This is attributed to good access to family planning advice, including by young people, the availability of abortion, generally good hospital provision and a comprehensive welfare system. The Child Abandonment Project notes, from a personal communication between it and the British Association for Adoption and Fostering (BAAF) from 2011, that given the different support services available, British parents ‘do not need to abandon their children’.²⁰ It concludes that there are no direct services or organisations working specifically with parents who choose to relinquish children in the UK. This is contrasted to the situation 40 years ago, ‘when social stigma towards infants born out of wedlock, and poor living conditions meant that more infants were placed for adoption’.²¹ These changing conditions are questioned in Part 3.

Voluntary relinquishment more generally has been described as the traditional type of adoption case.²² As Munby P has pointed out: ‘[a] combination of dramatic changes in the 1960s – the ready availability of the contraceptive pill, the legalisation of abortion, the relaxation of the divorce laws and a sea-change in society’s attitude to illegitimacy – led to dramatic reduction in the number of adoptions of the traditional type ...’.²³ Lord Wilson has highlighted that this social change is reflected in the dramatic reduction in adoption orders: ‘In 1968, 25,000 adoption orders were made . . . [In 2013] . . . only 5,000 . . . What has happened? The answer is that the use made of adoption in our society has entirely changed’.²⁴

16 Human Fertilisation and Embryology Act 2008, s 33.

17 Adoption and Children Act 2002, s 1(2).

18 See ‘Birth Statistics Metadata’ July 2015 (ONS 2015), available at: www.ons.gov.uk, last accessed 9 April 2018.

19 See L Sherr, J Mueller and Z Fox, ‘Abandoned babies in the UK – a review utilizing media reports’ (2009) *Child Care Health and Development* 419 – see further Part 3 below.

20 See: ‘Child Abandonment and its Prevention in Europe’ (University of Nottingham, 2012) ‘the Child Abandonment Project’ at: bettercarenetwork.org/sites/default/files/attachments/Child%20Abandonment%20and%20Its%20Prevention%20in%20Europe.pdf, last accessed 6 April 2018, at p 347.

21 Ibid.

22 See Baker J in the jointly heard cases of JL and AO: *Re JL and AO (Babies Relinquished for Adoption)* [2016] EWHC 440 (Fam), [2016] 4 WLR 40 (hereafter *JL and AO*), at [46].

23 The quotation is cited at paras [44]–[45] of Baker J’s judgment in *Re JL and AO* (ibid) from *Re N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112, [2017] AC 167.

24 This quotation is also cited at paras [44]–[45] of Baker J’s judgment in *Re JL and AO*, from Lord Wilson’s speech to the Denning Society on 13 November 2014. Non-consensual adoption is not the focus of this article. See B Sloan, ‘Conflicting rights: the English adoption law and the implementation of the UN Convention on the Rights of the Child’ [2013] CFLQ 40; J Doughty, ‘Myths and Misunderstanding in adoption law and policy’ [2015] CFLQ 331.

It was noted in 2001 that no statistics exist as to how many girls and women conceal their pregnancies and give birth in hospital without their family and or the biological father²⁵ knowing.²⁶ The situation varies depending on whether the concealment has been from everyone, from the father,²⁷ the birth giver's or the father's wider family. On adoption, the new social family legally replaces the biological family. Where the father's identity is unknown, local authorities sometimes apply for court orders to confirm whether they have a duty to make further enquiries regarding the identity of the father and or the newborn child's wider biological family. The reason for seeking such orders seems to be connected to potential placement with blood relatives and notions of kinship. But it is not clear why local authorities seek orders about such enquiries when the birth giver (and often also the father) does not want the wider family to be informed of the child's existence.

There appears to be a growing assumption that fathers, and wider family members, ought to know of the child's existence. But is this what the law says? The English cases are fact-dependent. Some cases point to a father's right to know, based on any right to respect for family life he *may* have under Article 8 of the European Convention. However, the existence of any such right has been disputed when the father does not know of the child's existence and, in any event, this is a qualified right.²⁸ The ECtHR has deemed relevant to establishing 'family life' for the purposes of Article 8(1) the fact that the father tried to establish contact with children he knew existed but was prevented from doing so.²⁹ Even if he has no family life with the children to be protected by Article 8, in these circumstances, the ECtHR has said he will have a right to respect for his identity as an aspect of 'private life' under the same provision, and this needs to be considered in determining whether he has a right to have contact with the children. However, this is when he is *aware* of their existence.³⁰ The English cases show that significant factors favouring disclosure of the child's existence to a father are that his relationship with the birth giver was of some duration, the couple cohabited in an established way,³¹ and they have other children together.³² If the father has parental responsibility, Mostyn J has stated that it is '... hard ... to envisage an adoption process ever legitimately proceeding without the knowledge of, and consent being sought from, [him]'.³³ It is, though, still a possibility.

By contrast, English case law suggests that courts are unlikely to order disclosure where the child is conceived as a result of a one-night sexual encounter, where the couple have never cohabited³⁴ or where the child is conceived as a result of 'violent rape'.³⁵ In a case where an unmarried 17-year-old Bangladeshi girl gave birth and the father, her brother-in-law, was unaware of the child's existence, it was ordered that the father not be informed. Evidence showed that, if the liaison were known to 'the community', as the court described it, the birth giver would face ostracism, the father and family would be put under great strain, and the

25 In my view, the man who contributes sperm to create the child is not a father by this act alone. As I have done with the expression birth giver, I would like a different word to denote the distinction between this and genuine fatherhood. However, for ease of reference, I use the term 'father' in this article.

26 See Holman J in *Z County Council v R* [2001] 1 FLR 365.

27 I am assuming the pregnancy is not a result of reproductive technology; this is unlikely in a case of secret relinquishment.

28 Per Arden LJ in *Re C (A Child) (Adoption: Duty of Local Authority)* [2007] EWCA Civ 1206, [2008] Fam 54.

29 See *Anayo v Germany* (Application No 20578/07) [2011] 1 FLR 1883.

30 *Ibid*, see especially at para [62].

31 *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646. Thorpe LJ in *Re S (A Child) (Adoption Proceedings: Joinder of Father)* [2001] 1 FCR 158, at [20]–[21] refers to the shift in attitudes to the role of unmarried fathers 'where the father has intermittently but transiently sought to play a part in the child's life' and it seems wise to ensure he has notice of proceedings.

32 *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646.

33 Cited by Thorpe LJ in *Re A (Father: Knowledge of Child's Birth)* [2011] EWCA Civ 273, [2011] 2 FLR 123, at [7].

34 *Re C (A Child) (Adoption: Duty of Local Authority)* [2007] EWCA Civ 1206, [2008] Fam 54.

35 *Re S (A Child) (Adoption Proceedings: Joinder of Father)* [2001] 1 FCR 158, at [20].

‘overall effect would be catastrophic, with a real danger of very serious violence’.³⁶ In a later case, *Re S*, Thorpe LJ stated ‘[t]here will undoubtedly be cases in which the court will exercise that discretion against joining a natural father. An extreme and obvious instance would be the mother whose conception was as a consequence of violent rape’.³⁷ This jurisprudence indicates that the father has no right to know of the child’s existence or, if there is a right, it can be lawfully interfered with.

Arden LJ in the Court of Appeal in *Re C* applied this approach beyond the case of a violent father. She stated as ‘self-evident’ that ‘it would be inappropriate to reveal the existence of a child . . . to relatives who suffered from illnesses which would make it impossible for them to look after the child’.³⁸ Enquiries will not be in the child’s interests simply because they will provide more information about the child’s background. They must genuinely further the prospect of finding a long-term carer for the child without delay. The emphasis lies on the need speedily to find the child a permanent home.³⁹ There was said to be no policy or legislative preference for the ‘natural’ family in these factual circumstances.⁴⁰ Whilst mentioning that there is an interest in the child retaining his or her identity, and that this is likely to be important in adulthood, the court considered this as ‘only one factor in the balance that has to be struck’.⁴¹ The court was not convinced by arguments that there is now an expectation of disclosure and a societal shift in support of greater involvement of the father. The purpose of informing is for the child to be cared for, not for any entitlement to know about the child’s existence or the child’s right to know exactly who his or her parents are.⁴²

In an earlier case, Holman J held that no notice ought to be given to the family against the birth giver’s wishes, and warned that: ‘[t]here is . . . a strong social need, if it is lawful, to continue to enable some mothers . . . to make discreet, dignified and humane arrangements for the birth and subsequent adoption of their babies, without their families knowing anything about it . . .’.⁴³ This judgment was applauded by Munby J (as he then was) as demonstrating ‘much humanity and wisdom’.⁴⁴ He described judges forcing birth givers to reveal the identity of the father and the nature and extent of her relationship with him, by, for example, cross-examination as ‘deeply unattractive and unsettling’; ‘in relation to matters as personal and intimate as this we should be wary of seeking to open windows into people’s souls’.⁴⁵ Munby J’s reference to the word ‘soul’ alludes to matters of an ‘intimate nature’, usually sexual intercourse or delving into a person’s conscience, often sought to be kept secret and private.⁴⁶ These relinquishment cases involve disclosing with whom one has had sex, and that one is pregnant and has given birth, all matters of an intimate nature. Yet, when a girl or woman is pregnant, it often seems that society considers her body is now an object for public concern and surveillance, issues explored further in Part 3.

36 In *Re X (Care: Notice of Proceedings)* [1996] 1 FLR 186.

37 *Re S (A Child) (Adoption Proceedings: Joinder of Father)* [2001] 1 FCR 158, at [20].

38 *Re C (A Child) (Adoption: Duty of Local Authority)* [2007] EWCA Civ 1206, [2008] Fam 54, at [25].

39 *Ibid*, at [1] and [3].

40 *Ibid*, at [43].

41 *Ibid*, at [15], referring to the ACA 2002, s 1.

42 See further analysis of these issues in J Marshall, ‘Concealed births, adoption and human rights law: Being wary of seeking to open windows into people’s souls’ (2012) 71 *Cambridge Law Journal* 325 and in Part 2 below.

43 *Z County Council v R* [2001] 1 FLR 365.

44 *Re L (Adoption: Contacting Natural Father)* [2007] EWHC 1771 (Fam), [2008] 1 FLR 1079.

45 *Ibid*, at [38].

46 *X v M*. Also known as *Re MM*; *Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at [100]. See also remarks by Munby LJ in *R (Jobns) v Derby City Council (Equality and Human Rights Commission Intervening)* [2011] EWHC 375 (Admin), [2011] 1 FLR 2094.

In *Re LG (A Child)*,⁴⁷ Baker J sought to answer the question whether the approaches in *Re B* at the Supreme Court⁴⁸ and *Re B-S* at the Court of Appeal⁴⁹ – which set out the fundamental policy position that adoption is the ‘last resort’ and only permissible if ‘nothing else will do’ – apply where parents have relinquished a baby for adoption. He concluded that: ‘... in all adoption cases – non-consensual and consensual – the local authority is under an obligation to carry out a thorough analysis of the realistic options for the child, as highlighted in *Re B-S*’.⁵⁰ Further, he had to ‘keep at the forefront of [his] mind [that] the child’s interests include being brought up by the parents and wider family unless the overriding requirements of the child’s welfare make that not possible’.⁵¹

Both parents in *LG*, and also in two joined cases of *JL and AO*, knew of the child’s existence and wished to relinquish the child. In *LG*, they initially did not want their wider family to know or to be given the opportunity to look after the child. The father then changed his mind and his view of his father’s character (the child’s grandfather). Baker J cautioned local authorities against being distracted by parents who might conceal the truth,⁵² and ordered that the child be placed in that grandfather’s care. In *JL and AO*, Baker J stated that it was ‘notable that both cases involve mothers from other countries’. One of the issues was whether the children should be released for adoption abroad. He noted that there were other such cases, although it was not possible to know how many because these types of adoptions are usually uncontested so there is no recent reported judicial consideration of the legal principles or procedure to be applied.⁵³

The parents in these cases were all adamant that the grandparents not be told of the children’s existence, although in one of them the aunt knew. Baker J highlighted the difference between *Re B*, concerning non-consensual adoption, and *JL and AO*. The parents’ wishes are, he said, important and the degree of interference with family life is less where the adoption is consensual. Therefore, the local authority does not have to reach a conclusion that ‘nothing else will do’. The parents’ wishes and feelings regarding the child are an important consideration, but are only one of the factors in the welfare checklist in section 1(4) of the Adoption and Children Act 2002 that need to be evaluated in any adoption decision. Baker J cautioned against assuming that giving up a baby for adoption was ‘a dereliction of responsibility’, stating that ‘usually [such] a decision [is] taken only after a great deal of thought and anguish, by parents who realise that they cannot look after the baby and wish to give the baby the best opportunity to grow up in a loving home’.⁵⁴

The Court of Appeal in *Re W (A Child)* recently made clear that local authorities are incorrect to state there is a ‘right’ for a child to be brought up by his or her natural family.⁵⁵ This case is one of initial concealment from the father’s family. The birth giver gave birth to A in 2014. A was placed at seven months old with prospective adopters, couple X. At the time of the Court of Appeal hearing, the child had been living with this couple for 17 months. They had filed for adoption in April 2015. In 2015 and 2016 respectively, two further children had been born to A’s biological parents and the social services’ enquiries this time identified the paternal grandparents, who became aware of the existence of A for the first time in June 2015. The two

47 *Re LG (A Child)* [2015] EWFC 52, [2016] 1 FLR 607.

48 *Re B (Care Proceedings: Appeal)* [2013] UKSC 33, [2013] 1 WLR 1911.

49 *Re B-S (Permission to Oppose Adoption Order)* [2013] EWCA Civ 813, [2013] Fam Law 1243.

50 *Re LG (A Child)* [2015] EWFC 52, [2016] 1 FLR 607, at [54].

51 *Ibid*, at [31].

52 *Ibid*, at [35]–[37].

53 *Re JL and AO (Babies Relinquished for Adoption)* [2016] EWHC 440 (Fam), [2016] 4 WLR 40, at [46].

54 *Ibid*, at [47].

55 *Re W (A Child)* [2016] EWCA Civ 793, [2017] 1 WLR 889.

other children looked likely to find a permanent home in the paternal family.⁵⁶ Yet couple X successfully appealed against the judge's dismissal of their adoption application and his order in favour of the paternal grandparents, and later they obtained the adoption order sought. The Court of Appeal said that 'the assumption that there is a presumption to [be brought up by the biological family], needs to be firmly and clearly laid to rest. No such "right" or presumption exists'.⁵⁷

Before moving on to investigate interpretations of children's rights to identity, I briefly review how voluntary relinquishment is dealt with in some other jurisdictions. In certain European countries, most notably France, it is possible to give birth anonymously.

Anonymous births in other parts of Europe

Anonymous births exist in only a minority of countries in Europe. Whilst described as 'not exceptional'⁵⁸ (it can happen in Italy, Luxembourg and France), it has been said that it is 'very rare' to omit the mother's name from the birth registry.⁵⁹

In France, anonymous birthing is legally permitted under the *accouchement sous X* system where a woman can attend hospital to give birth keeping her identity a secret.⁶⁰ This is based on an ancient tradition in France that enables newborn babies to be abandoned in accordance with a set procedure. Kertzer traces this practice back to 1198 when the first reported foundling home was established in Rome built with a wheel in the wall, and in France in 1638.⁶¹ The child would be placed in the crib and the birth giver ring a bell. On that signal, someone on the other side of the wall would cause the crib to pivot and collect the infant. The aim was to prevent infanticide, abortion and babies being exposed.⁶² These are antecedents to the modern baby hatch or boxes discussed below.

The French system enables the newborn to be taken into care, with the birth giver having a right to change her mind within two months of the birth. The child is placed in the care of an institution during this period. A change in the law in 2002 permitted access by adopted persons and people in State care to information about their origins. This did not change women's rights to give birth anonymously. However, birth givers are advised of the option to leave identifying information of some kind to enable the child to know something of his or her biological origins and any other information the birth giver wishes to share. The National Council for Access to Personal Origins supports adult children born of anonymous births. This Council can provide access to non-identifying information, and – with the consent of the birth giver and the child, and under certain conditions – remove the anonymity.⁶³

Other national laws drafted during the past decade also provide for births in discreet conditions: in Austria, Luxembourg, Russia, Slovakia. In the case of discreet birth leading to full adoption, the child will often lose all contact with his or her birth family; the new parent-child relationship erases any previous ties. This is the case in Austria, France, Monaco,

56 Ibid, at [11]. See further, in the context of vulnerability and recurrent care proceedings, Part 3 below.

57 Ibid, at [71], following *Re H (A Child) (Appeal)* [2015] EWCA Civ 1284, [2016] 2 FLR 1173, at [89]–[94].

58 *Godelli v Italy* (Application No 33783/09) 25 September 2012, at [28]–[32].

59 Ibid.

60 See Law no 93–22 of 8 January 1993, Article L.222–6 of the Social Action and Families Code, as amended by Law no 2002–93 of 22 January 2002 on 'access by adopted persons and people in State care to information about their origins', at paras 15–18.

61 D Kertzer, *Sacrificed for Honor* (Beacon Press, 1994).

62 *Odièvre v France* (Application No 42326/98) (2003) 38 EHRR 871, at [15].

63 See Law no 2002–93 of 22 January 2002 on 'access by adopted persons and people in State care to information about their origins', and *Odièvre v France* *ibid*, at [17]. See further C Villeneuve-Gokalp, 'Women Who Give Birth "Secretly" in France, 2007–2009' (2011) 66 *Population* 131, available at: www.cairn-int.info/focus-E_POPU_1101_0135-women-who-give-birth-secretly-in-france.htm, last accessed 6 April 2018.

Bulgaria, Russia and Macedonia.⁶⁴ In Italy, the birth giver has the right not to be named on the birth certificate when she expresses this wish to the hospital at the birth.⁶⁵ The system in the Czech Republic has been likened to that in France.⁶⁶

Access to the birth certificate is sometimes possible from a minimum age. This is the position in Germany, Croatia, Hungary, Latvia and Portugal. The child may be authorised to gain access to a wider range of information – in Bulgaria, Estonia, Lithuania, Switzerland, Spain – although that may require legal proceedings in which the competing interests may be examined.⁶⁷ The ECtHR has dealt with anonymous birth cases in a small number of cases, discussed in Part 2 below.

Safe havens and baby boxes

Modern baby boxes are the direct descendant of the foundling wheel mentioned above. In today's practice, babies are placed into heated hatches, warm incubators, opened from the outside wall of a hospital in a discreet location. A bell or alarm rings inside the hospital or building shortly after the baby is placed in the hatch, allowing the baby to be retrieved and taken into safekeeping by a carer inside without the person placing the baby being seen or identified. It has been said that:

‘there is an undeniable increase in the number of “*windows*” or “*baby hatches*” reminiscent of foundling wheels in the Middle Ages. It is practically and materially impossible for the child to gain access to information about his or her birth family; the register of births will give a “fictitious” name to the child that bears no connection to that of its birth parents.’⁶⁸

The first ‘safe haven’ provision in the USA came into existence in Texas in 1999, and such provision now exists in every US state. They are described as an incentive to ‘mothers in crisis’ to relinquish their babies safely. The laws, which vary from state to state, generally permit anonymity and protection against prosecution, permitting babies to be left in a variety of locations including hospitals and fire stations.⁶⁹ Other parts of the world, for example, South Korea and Japan, and Vancouver, Canada, have some form of baby hatches provision.

The installation of baby hatches in Europe is said to be on the rise, although exact up-to-date figures are difficult to obtain.⁷⁰ In 2012, it was reported that 11 EU member countries had baby boxes in operation: Austria, Belgium, Czech Republic, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Portugal and Slovakia, with over 200 baby boxes having been installed in the past decade.⁷¹ Since 2000, 400 children have been abandoned in these boxes.⁷² Switzerland opened an eighth box in 2016, with a reported 16 babies left since the first box opened there in

64 *Godelli v Italy* (Application No 33783/09) 25 September 2012.

65 Decreto del Presidente della Repubblica (3 November 2000), n 396. See V Colcelli, ‘Anonymous Birth, Birth Registration and the Child’s Right to Know Their Origins in the Italian Legal System: a Short Comment’ (2012) *J Civil Legal Sci* 1, doi:10.4172/2169-0170.1000101.

66 *Godelli v Italy* (Application No 33783/09) 25 September 2012, at [29].

67 *Ibid*, at [31].

68 *Ibid*, at [30].

69 For a comprehensive summary of these laws see Child Welfare Information Gateway, ‘Infant Safe Haven Laws’ available at: www.childwelfare.gov/topics/systemwide/laws-policies/statutes/safehaven/, last accessed 9 April 2018.

70 *Godelli v Italy* (Application No 33783/09) 25 September 2012, at [30]; R Ramesh, Spread of “baby boxes” in Europe alarms United Nations’ *The Guardian*, 10 June 2012. Available at: www.theguardian.com/world/2012/jun/10/unitednations-europe-news, last accessed 9 April 2018.

71 The reference is quoted from a report on the Czech Republic by Ramesh, *ibid*. See also information at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20015&LangID=E, last accessed 9 April 2018.

72 See a summary available at: bettercarenetwork.org/library/particular-threats-to-childrens-care-and-protection/child-abuse-and-neglect/child-abandonment-and-its-prevention-in-europe (the Child Abandonment Project), last accessed 9 April 2018.

2001.⁷³ The Child Abandonment Project stated that an average of seven infants are left in baby boxes each year.⁷⁴ These boxes do not exist in the UK, and calls for their installation here are very rare.⁷⁵

Part 2: Children's rights to identity: origins or existence?

United Nations Convention on the Rights of the Child

In the international human rights context, the preamble to the CRC states that for the 'full and harmonious development of his or her personality the child should grow up in a family environment, in an atmosphere of happiness, love and understanding'. The Universal Declaration of Human Rights describes the family as '... the natural and fundamental group unit of society . . . entitled to protection by society and the State'.⁷⁶ Article 24 of the CRC provides that children have a right to the protection and care necessary for their well-being. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with his or her parents, unless this is contrary to his or her interests.⁷⁷ Similar provisions are contained in a variety of regional human rights protections.⁷⁸ The primary consideration is the best interests of the child,⁷⁹ and it is understood to be in such interests for the child to be brought up in a family environment, because some form of 'family life' – a human bond in a loving, caring, committed and stable unit – is needed to fulfil basic human needs for connection, stability and predictability to enable us to grow our own personalities or identity. There is no explicit reference in these provisions, however, to the *biological* family and, although the family in which the child is raised will commonly be the genetic/biological family, this will not always be so, including in secret birth situations.

Children have a right to identity as enshrined in the CRC. However, it is not clear exactly what such a right entails. Article 7 of the CRC states that a child 'shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents'. Article 8 states that parties to the Convention 'undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference'.

Some commentators consider that Article 7 creates a right to know one's genetic origins.⁸⁰ This has been variously described as a right to know one's 'true' identity, including a right to know one's ancestral background, medical and genetic information about oneself and one's biological parentage, the circumstances of one's conception, time and place of birth, and records of events

73 www.telegraph.co.uk/news/worldnews/europe/switzerland/12136902/Switzerland-gets-new-baby-hatch-a-hole-in-the-wall-where-mothers-give-away-their-newborn-babies.html, last accessed 9 April 2018.

74 See the Child Abandonment Project, note 20 above.

75 Alley Lofthouse, who is the founder of a campaign group called 'A Foundling', and who is described as a 'foundling' herself, is reported to have called for these: see BBC Scotland, 'Call for "baby boxes" for abandoned newborns' 12 April 2013, available at: www.bbc.co.uk/news/uk-scotland-22123366 (last accessed 9 April 2018).

76 General Assembly, *Universal Declaration of Human Rights* (10 December 1948), 217 A(III), at Article 16(3).

77 United Nations Convention on the Rights of the Child (hereafter, CRC), adopted by General Assembly Resolution 44/25 of 20 November 1989, Article 9.

78 See, for example, the African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) in which protection extends to the family's physical health and morals, and Article 24 of the EU Charter of Fundamental Rights, 18 December 2000, 2000/C 364/01.

79 See CRC, Article 3.

80 See analysis in K O'Donovan, '“Real” mothers for abandoned children' (2002) 36 *Law and Society Review* 347; M Freeman, 'The New Birth Right?' (1996) 1 *International Journal of Children's Rights* 1; J Masson and C Harrison, 'Identity: Mapping the Frontiers' in N Lowe and G Douglas (eds), *Families across Frontiers* (Kluwer, 1996).

meaningful to the individual.⁸¹ The website of the Child Abandonment Project states without explanation that ‘abandoning a child violates Article 7 of the CRC’,⁸² an absolute statement that appears to overlook the express limitation in the Article that the rights to know and be cared for by one’s parents are to be protected ‘as far as possible’.

The Committee of the CRC has expressed concern at what it describes as the ‘alarming spread’ of the use of baby boxes in certain parts of Europe.⁸³ In the Committee’s analysis, the programme is a violation of certain Articles of the CRC. It has criticised the Czech Republic, and urged that it end the programme ‘as soon as possible and expeditiously strengthen and promote alternatives’, addressing the root causes of abandoned babies, including family planning provision, adequate counselling, social support for unplanned pregnancies and the prevention of what it calls ‘risk pregnancies’. In its observations in the report on the Holy See in February 2014, the Committee expressed its concern with the practice of anonymous abandonment organised by Catholic organisations in several countries. It urged the Holy See to cooperate in studies into the root causes of the practice and to promote alternatives to take ‘full account of the rights of children to know their parents and siblings enshrined in Article 7...’.⁸⁴

The Committee considers that Articles 7 and 8 of the CRC are violated by anonymous ‘abandonment’.⁸⁵ However, in the Holy See report, the Committee did acknowledge ‘the possibility of confidential births at hospitals as a measure of last resort to prevent abandonment and/or death of a child’.⁸⁶ The history of Articles 7 and 8 suggests that they were developed to deal with the problems of children caught up in political struggles and armed conflicts, particularly in response to ‘disappearances’ in Argentina between 1975 and 1983 where an estimated 30 percent of those who disappeared were women, some with children;⁸⁷ as Geraldine Van Bueren points out, three percent of these women were pregnant.⁸⁸ These provisions were therefore drafted to deal with situations of forced removals, quite unlike voluntary secret births and so to which different considerations should apply.

European Convention on Human Rights

As noted above in discussing English law, case law of the ECtHR has interpreted the right to respect for one’s private life in Article 8 of the European Convention to entail a right to personal identity. This includes a child’s right to identity. I have previously argued that this case law demonstrates two interpretations of identity: as self-determination and self-realisation/self-fulfilment.⁸⁹ The former allows fluidity and freedom in one’s own determination of identity in lived existence by creating and becoming who we want to be: similar to free will. The latter seeks to reduce identity to a pre-existing inner core essence, increasingly equated to genes or biology, that has to be fulfilled to be true to oneself: similar to destiny. The ECtHR includes

81 G Stewart, ‘Interpreting the Child’s Right to Identity in the UN Convention on the Rights of the Child’ 26 *Family Law Quarterly* 221; M Freeman and A Margaria, ‘Who and What is a Mother? Maternity, Responsibility and Liberty’ (2012) 13 *Theoretical Inquiries in Law* 153; A Bainham, ‘What is the point of birth registration?’ [2008] CFLQ 449.

82 See the EU Child Abandonment Project, note 20 above.

83 The reference is quoted from a Report on the Czech Republic by Ramesh in *The Guardian*, see n 70 above.

84 Concluding observations on the second periodic report of the Holy See CRC/C/V AT/CO/2 25 FEB 2014, at [35]–[36].

85 See a position in agreement with that expressed by the CRC Committee in C Fenton-Glynn, ‘Anonymous Relinquishment and Baby-Boxes: Life-Saving Mechanisms or a Violation of Human Rights?’ in K Boele-Woekli et al (eds), *Family Law and Culture in Europe* (Intersentia, 2014). Fenton-Glynn does not refer to the arguments in K O’Donovan and J Marshall, ‘After Birth: decisions about becoming a mother’ in A Diduck and K O’Donovan (eds), *Feminist Perspectives on Family Law* (Cavendish, 2006), or to my subsequent articles on this topic.

86 See above note 84.

87 See K O’Donovan, ‘“Real” mothers for abandoned children’ (2002) 36 *Law and Society Review* 347.

88 G Van Bueren, *The International Law on the Rights of the Child* (Nijhoff, 1995), chapter 4.

89 See J Marshall, *Personal Freedom Through Human Rights Law?: Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff, 2009), especially chapters 6 and 8 and ‘A Right to Personal Autonomy at the European Court of Human Rights’ (2008) 3 *European Human Rights Law Review* 336.

within its right to identity: the right to access information relating to one's childhood existence and development,⁹⁰ sexual orientation and sexual practices, and gender identity.⁹¹ In my view, the majority of the judgments reflect the more fluid idea of identity focusing on self-determination through lived experience.

There are mixed interpretations of Article 8's right to respect for private life in cases involving anonymous or discreet births. The legality of the French system was tested at the ECtHR in *Odièvre v France*.⁹² The grown-up applicant claimed that her right to identity under Article 8 was violated because it was not possible for her to access information about her birth giver and any siblings, in particular exact knowledge of her birth giver's identity.⁹³ A divided ECtHR decided by ten judges to seven that the French law could be upheld. The reasoning of the majority was largely based on a balancing exercise of the mother's rights to confidentiality and the child's rights to life and identity. The dissenting opinion highlighted the child's identity right but, as I have previously argued, mistakenly interpreted identity in a reductive manner.⁹⁴ They use the terms 'self-fulfilment';⁹⁵ explain the issue of access to information about one's origins as concerning 'the essence of a person's identity', and acquiring 'the ability to retrace one's personal history [which] is a question of liberty, and therefore, human dignity', going to 'the heart of the rights guaranteed by the Convention'. As in the majority judgment, the birth giver's right to personal autonomy, and so the need to balance rights, is acknowledged. However, the dissent found that the different interests involved had *not* been balanced; instead the dissent considered that 'the mother . . . has a discretionary right [under French law] to bring a suffering child into the world and to condemn it to lifelong ignorance'.⁹⁶

The dissent in *Odièvre* seemed to find favour in *Jaggi v Switzerland*,⁹⁷ where the court decided that 'persons seeking to establish the identity of ascendants have a vital interest, protected by the Convention, in receiving information necessary to uncover the truth about an important aspect of their personal identity'.⁹⁸ The court decided in favour of the 67-year-old applicant whose right to identity was said to have been violated by not being allowed to exhume the body of his dead putative biological father, to confirm through DNA testing that the man was his biological father. Without presenting any psychological evidence in support of its position, the court took the view that an individual's interest in discovering his parentage does not disappear with age, 'quite the reverse' happens.⁹⁹ Because the applicant had sought to establish this paternity throughout his life, the court considered this as evidence of his 'mental and psychological suffering, even if this has not been medically attested'.¹⁰⁰

In *Godelli v Italy*, the ECtHR held that Italian law – permitting a birth giver the right not to be named on the birth certificate when she expressed this wish to the hospital at the birth – violated Article 8 because the adult applicant could not discover information about her

90 As in *Gaskin v United Kingdom* (Application No 10454/83) (1989) 12 EHRR 36; *MG v United Kingdom* (Application No 39393/98) (2002) 36 EHRR 22; see also *Mikulic v Croatia* (Application No 53176/99) (2002) 11 BHRC 689.

91 *Dudgeon v United Kingdom* (Application No 7525/26) (1981) 4 EHRR 149; *Norris v Ireland* (Application No 10581/83) (1988) 13 EHRR 186; *Goodwin and I v United Kingdom* (Application No 28957/95) [2002] 2 FLR 487.

92 (Application No 42326/98) (2003) 38 EHRR 871.

93 *Ibid* and *Godelli v Italy* (Application No 33783/09) 25 September 2012.

94 See J Marshall, 'Giving Birth but refusing motherhood: inauthentic choice or self-determining identity?' (2008) 4 *International Journal of Law in Context* 169.

95 *Odièvre v France* (Application No 42326/98) (2003) 38 EHRR 871, Joint Dissenting Opinion of Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpaa, at [3].

96 For all of the quotations, see *ibid* at [7].

97 (Application No 58757/00) (2006) 47 EHRR 702.

98 *Ibid*, at [38].

99 *Ibid*.

100 *Ibid*, at [40].

heritage.¹⁰¹ The applicant's birth certificate recorded the date and time of birth to 'a woman, who did not consent to being named'.¹⁰² Because Italian law did not allow access to non-identifying information concerning the child's origins or the disclosure of the birth giver's identity, unlike the French law after the 2002 changes under scrutiny in *Odièvre*, the court considered that the Italian authorities failed to strike a proportionate balance between the interests at stake.¹⁰³

To reiterate, the idea of identity presented by the dissent in *Odièvre*, the court in *Jaggi*, and in some interpretations of children's identity rights (all of which highlight genetics and biology), depends on an idea of identity based on an unchanging foundational core of the human person. This idea equates a right to identity with knowledge of genetic or biological origins. This can be used to justify the state making people feel that they have to bring to fruition and liberate some inner core, to 'find out' who they 'truly' are. Identity rights pursuant to the CRC and the European Convention can, however, be interpreted differently. Rather than focusing on the past, on needing to know everything about other people's lives, including those of one's father and birth giver in a unfairly gendered world, and reducing our identity to blood or genes, it is possible to explore different ways in which we can gain a strong sense of our identity through lived existence and belonging from birth.

Part 3: Care and belonging: for the birth giver and child

Care and belonging

Invoking care and compassion when making and interpreting the law can help to prevent detachment, coldness and lack of understanding as to human frailty. As Jonathan Herring explains '[c]are seems the most basic moral value . . . Without care . . . there would be no persons to respect and no families to improve'.¹⁰⁴ As such, care is the manifestation of love; it involves meeting the needs of others and accepting our vulnerability, which is 'an aspect of many of the things people value most in their lives. Relationships; intimacy; care; all of these things in their nature render us vulnerable'.¹⁰⁵ I suggest that any human right to identity must be related to care and encourage an environment of belonging and inclusion for any newborn and birth giver. This has potential to be a more empowering, positive and kinder way to proceed in this context of secrecy in pregnancy and birth and to help lead to a more gender-equal world.

Herring and Foster argue that '[t]hose who trumpet the importance of the right to know genetic origins often come close to saying that genetic parenthood is more important than social parenthood'.¹⁰⁶ Jane Fortin argues that the right to know one's genetic origins is going 'too far, too fast'.¹⁰⁷ Fortin sees a shift in judicial attitudes that risks being exploited and manipulated, for example, by biological fathers claiming that they should have a relationship with the child despite the opposition of the mother. John Eekelaar's analysis of family law and personal life shows that English judges have increasingly taken the view that the best interests of the child are achieved by resolving disputes about the child's 'true' genetic origins through scientific

101 *Godelli v Italy* (Application No 33783/09) 25 September 2012.

102 *Ibid.*, at [6].

103 *Ibid.*, at [57].

104 J Herring, *Caring and the Law* (Hart Publishing, 2013), at 56. See more generally, V Held, *The Ethics of Care: Personal, Political, and Global* (Oxford University Press, 2007), at 71–72.

105 Herring, *ibid.*, 56, citing DW Harris, 'Dignity and Vulnerability' (2000) 61 *Philosophy and Phenomenological Research* 239.

106 J Herring and C Foster, '“Please Don't Tell Me” The Right Not to Know' (2012) 21 *Cambridge Quarterly of Healthcare Ethics* 20, at 26.

107 J Fortin, 'Children's right to know their origins – Too far, too fast?' [2009] CFLQ 336.

means. He cites as evidence case law dealing with paternity blood tests where judges have stated that a mother's duty is to bring up her children to believe that *honesty* is the best policy and so 'she should not sabotage that . . . by living a lie'.¹⁰⁸ Eekelaar argues that keeping secrets about paternity and parenthood gives the older generation power over 'the innocent and vulnerable child'.¹⁰⁹ However, Carol Smart has questioned how significant genetic parentage has become and asks us to consider 'how real people live with truths and untruths'.¹¹⁰ Smart and Petra Nordqvist in their empirical research on donor conception highlight how families try to create a sense of belonging, connectedness and bonding, 'in the face of an increasingly unsympathetic popular culture that emphasises the predominance of genetic links'.¹¹¹ This research reveals that the concept of the gene, the modern day version of 'blood' ties,¹¹² is now routinely invoked when talking about family relationships, reproduction and children. Yet, they also discovered that 'what genes do is not terribly clear in people's thinking . . . genes both matter a great deal and yet do not really matter at all'.¹¹³ Indeed, as Nikolas Rose observed in 2007, '[t]he brute reductionism of much of the genomics of the closing decades of the 20th century already seems old-fashioned ...'.¹¹⁴

In my context of secret births, the father may be unaware of the child's existence, and the child is unlikely to have full knowledge of his or her parentage. Perpetuating genetic and biological views of what constitutes a child's identity right pits the child against a woman who wishes not to reveal her own identity and/or the identity of the father. It also risks making the adopted child, who might otherwise have been content, feel he or she is living an inauthentic life, and that his or her right to identity is being contravened and damaged in some way. It could also be used, not only to argue for revelation of this information, but to make the woman feel her decision to relinquish a child is inauthentic and impermissible. The law could, and should, instead enable everyone to be safe, well, and enabled to have a private life through the provision of care and support. This could encourage a sense of belonging for both birth giver and children born secretly.

Care and belonging for the birth giver

The ideology of motherhood constructs maternity and motherhood in terms of connection, physically and emotionally, to the child and in ways that can constrain women's choices.¹¹⁵ This affects interpretations of permissible identities as these are created in part by the attitudes of society, our communities and the laws under which we live. Biology and love are assumed as naturally connected; blood and genes interlinked in the construction of maternal behaviour.¹¹⁶ Many therefore find it hard to understand that there are girls and women who become

108 *Re H (Paternity: Blood Tests)* [1996] 4 All ER 28, at 44. See J Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2007), at 63–64; C Smart, 'Family Secrets: Law and Understandings of Openness in Everyday Relationships' (2009) 38 *Jnl Soc Pol* 551.

109 J Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2007), at 63–64; see analysis by Smart, *ibid*, at 554.

110 C Smart, 'Law and the Regulation of Family Secrets' (2010) 24 *International Journal of Law, Policy and the Family* 397; C Smart, 'Family Secrets: Law and Understandings of Openness in Everyday Relationships' (2009) 38 *Jnl Soc Pol* 551.

111 P Nordqvist and C Smart, *Relative Strangers: Family life, genes and donor conception* (Palgrave Macmillan, 2014), at p 28.

112 See N Murphy and C Knight (eds), *Human Identity at the Intersection of Science, Technology and Religion* (Ashgate, 2010).

113 P Nordqvist and C Smart, *Relative Strangers: Family life, genes and donor conception* (Palgrave Macmillan, 2014), at 145.

114 See further N Rose, *Governing the Soul: Shaping of the Private Self* (Free Association Books, 1990) and N Rose, *The Politics of Life Itself* (Princeton University Press, 2007), at 14.

115 S Ruddick, *Maternal Thinking* (Ballantine Books, 1989). See also A Rich, *Of Woman Born* (Virago, 1976); M O'Brien, *The Politics of Reproduction* (Routledge, 1981); A Dally, *Inventing Motherhood: the consequences of an ideal* (Burnett Books Ltd, 1982). See recent socio-legal analysis in S Boyd et al, *Autonomous Motherhood? A Socio-legal study of choice and constraint* (University of Toronto Press, 2015).

116 K O'Donovan, '“Real” mothers for abandoned children' (2002) 36 *Law and Society Review* 347.

pregnant, remain pregnant, give birth and wish to relinquish the baby, often in almost complete secrecy, and want to prevent that from happening.¹¹⁷ For example, the Child Abandonment Project states that ‘abandoning a child violates Article 7 of the CRC’ and that their ‘... findings give some indication as to reasons why babies and infants may be given up for adoption in the UK. However, a lot more research is needed to explore this area in more detail, to allow us to learn more about why babies are placed for adoption and, therefore, to be able to work towards preventing this from happening’.¹¹⁸

The use of the word ‘abandonment’ to describe some of these cases indicates a lack of sympathy for birth givers – it assumes that the child’s welfare will be damaged by relinquishment.¹¹⁹ Media reporting of criminal abandonment shows a mixture of attitudes. For example, in 2016, a woman was convicted in London for abandonment after being discovered six years after the event through DNA evidence on another case: the ‘genetic truth’ catches out the criminal woman. The headline in the English tabloid press was disparaging: ‘How Could She? Mum who abandoned newborn baby on freezing doorstep in Tesco carrier bag is caught six years on by DNA evidence from fraud case’.¹²⁰ By contrast, reports of other abandonments show sympathy towards the birth giver’s situation, as happened recently in September 2017 in East London. A baby, named Harry by medical staff, was found wrapped in a white blanket in a bush with coverage urging the birth giver to come forward for help and reconciliation.¹²¹

Indeed, when a girl or woman who voluntarily relinquishes her child frames her decision in terms of the child’s welfare, this can be perceived as acceptable. In such circumstances, the acts of the ‘sacrificial mother’ are permitted, seen as good for the child, allowing the child to have a better life.¹²² This birth giver is an object of sympathy. Alternatively, however, the act may be seen to be one of self-betrayal and personal disintegration: this is reflected in phrases like ‘you will regret that later’ or ‘it is not natural’, which send a message that her actions are against her true self and that they are inauthentic. So the act is acceptable if perceived to be in the child’s best interests, but selfish and irresponsible if explained as a woman’s ‘choice’.

Girls and women voluntarily relinquish for complex and manifold reasons. Many, like Arden LJ in *Re C*, understandably often assume that if a girl or woman does not want a child and becomes pregnant, she will now have a termination.¹²³ However, empirical research shows that: some girls and women do not seek an abortion for personal, including religious, reasons; some cannot obtain an abortion because of legal prohibitions; some may be unaware they are pregnant, or only realise at a stage when an abortion is not legally possible; others enter into a state of denial or, aware of their pregnancy, cannot cope with the steps necessary to terminate.¹²⁴ The next two sections explore the reasons underpinning relinquishment, suggesting a potential mixture of vulnerability but also an element of control on the part of the birth giver.

117 See, for example, the Child Abandonment Project, note 20 above.

118 Ibid, at p 336.

119 O’Donovan, ‘“Real” mothers for abandoned children’ (2002) 36 *Law and Society Review* 347.

120 P Harper, ‘How could she?’ *The Sun*, 14 November 2016, available at: www.thesun.co.uk/news/2181072/newborn-baby-girl-found-suffering-from-hypothermia-after-being-dumped-on-freezing-doorstep-in-tesco-carrier-bag-by-her-mother/, last accessed 9 April 2018.

121 See, for example, footage and report available at: www.bbc.co.uk/news/uk-england-london-41310137, last accessed 12 April 2018. For further discussion of abandonment of this kind, see K O’Donovan, ‘*Enfants Trouvés*, Anonymous Mothers and Children’s Identity Rights’ in K O’Donovan and G Rubin (eds), *Human Rights and Legal History* (Oxford University Press, 2000).

122 K O’Donovan, ‘“Real” Mothers for abandoned children’ (2002) 36 *Law and Society Review* 347.

123 *Re C (A Child) (Adoption: Duty of Local Authority)* [2007] EWCA Civ 1206, [2008] Fam 54, at [37].

124 I Brockington, *Motherhood and Mental Health* (Oxford University Press, 1996).

Care through acknowledging vulnerability and hardship

Judge Greve in her concurring opinion in *Odièvre* alludes to vulnerability in finding no violation of the applicant's Article 8 right. She highlights the need for safe and humane medical provision for women in childbirth and the primacy of their right to life.¹²⁵ Permitting secrecy can thus offer safety and support to those in difficult situations. The French literature highlights hardships of various kinds and the potential for relinquishment to alleviate distress.¹²⁶ Evidence was presented by the French government of three main categories of women giving birth anonymously: young women who were not yet independent; young women still living with parents in Muslim families originally from North African or Sub-Saharan African societies in which pregnancy outside marriage was a great dishonour; and isolated women with financial difficulties, some the victims of domestic violence. Reasons for seeking confidentiality sometimes included rape or incest.¹²⁷

Cases such as these reflect the feminist insight that, whilst bringing joy and happiness to many, the family unit can be a structure of oppression and great harm.¹²⁸

The issue of 'honour' is also raised in Julie Selwyn's research in the UK, which concluded that the concept of family honour – 'izzat' – played a significant part in decisions by Asian birth givers to relinquish their babies; it was noted that the mothers often expressed fear for their lives.¹²⁹ Selwyn and her co-authors analyse 'honour' in certain 'communities' in a way comparable to case histories from the 1960s: a young single mother with a child born out of wedlock brings shame on the family.¹³⁰

The vulnerability of young mothers is also evident in a recent study identifying the prevalence of recurrent care proceedings.¹³¹ *Re W (A Child)*, discussed in Part 1, is one such case, with all three of the birth giver's children being consecutively removed from her.¹³² Ellie Lee's research on abortion decisions indicates that young women from areas of social deprivation are more likely to become pregnant and are less likely to have an abortion. In contrast, young women from more affluent backgrounds are less likely to become pregnant, but, once they do, are more likely to terminate the pregnancy.¹³³ In the context of birth registration proposals to require fathers to be named on birth registration – never fully implemented, but set out in the Welfare Reform Act 2009 – Sally Sheldon and Julie Wallbank, in separate work, pointed to the vulnerability of many unmarried mothers, including in terms of their educational disadvantage,

125 Concurring Opinion of Judge Greve in *Odièvre v France*, note 95, above at 35, 38.

126 *Odièvre*, note 95 above, at 37; C Bonnet, *Gesture of Love* (Editions Odile Jacob, 1991); N Lefaucheur 'The French "tradition" of anonymous birthing: the lines of argument' (2004) 18 *International Journal of Law, Policy and the Family* 319.

127 *Odièvre*, *ibid*, at 36.

128 See, for example, C Pateman, *The Sexual Contract* (Stanford University Press, 1988); F Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497; A Diduck, *Law's Families* (Butterworths, 2003).

129 J Selwyn, P Harris et al, 'Pathways to Permanence for Black, Asian and Mixed Ethnicity Children: Dilemmas, Decision-making and Outcomes' (Department for Children, Schools and Families, October 2008) DCSF-RBX-13-08 *Research Brief. Re X (Care: Notice of Proceedings)* [1996] 1 FLR 186, discussed in Part 1 above, seems to have involved similar circumstances.

130 The children in this study came from three local authorities, all of which had large minority ethnic populations, in London, the Midlands and the North of England; it is unclear exactly how 'Asian' was defined.

131 K Broadhurst and C Mason, 'Birth Parents and the Collateral Consequences of Court-ordered Child Removal: Towards a Comprehensive Framework' (2017) 31 *International Journal of Law, Policy and the Family* 41; K Broadhurst et al, 'Vulnerable Birth Mothers and repeat losses of infants to public care: is targeted reproductive health care ethically defensible?' (2015) 37 *Journal of Social Welfare and Family Law* 84. See further list of publications and related work available at: wp.lancs.ac.uk/recurrent-care/publications/, last accessed 9 April 2018.

132 *Re W (A Child)* [2016] EWCA Civ 793, [2017] 1 WLR 889.

133 E Lee et al, *A Matter of Choice?* (Joseph Rowntree Foundation, 2004).

their young age and social class.¹³⁴ The facts of some of the English cases and the French literature suggest that girls and women who seek secrecy in births are amongst those who find themselves in such vulnerable positions.

Analysing historical data about family secrets over biological parentage – for example, pretending a certain man is the biological father – Carol Smart argues that the personal and social conditions under which women were living made it very hard for them to tell the possible truth about the child's paternity.¹³⁵ Smart's analysis is based on reflections on past eras and it is widely perceived that the parameters of culturally and socially 'acceptable' behaviour have changed over time (see, for example, the references by Munby P and Lord Wilson cited above to the advent of the contraceptive pill, abortion etc). Yet the research findings referred to in this section indicate that that change is not universally received and that caution must be exercised in assuming and judging in these circumstances, when care and support are needed instead.

Care through allowing personal control

Smart's work draws on Lynn Turney's interviews with women who had experience of 'paternity uncertainty'.¹³⁶ Turney discovered a mixture of reasons for women keeping secrets in sexual liaisons and paternity uncertainty, including fear of their existing partner leaving them and fear of violence.¹³⁷ It is suggested that there is an element of control *in and through* the keeping of secrets. Smart explains:

'in families, secrets may be felt to be necessary for the preservation of relationships, and the "truth" may be taken to be less important than stabilising fictions ...

[T]here is another way to interpret the relationships between culturally elevated truths, secrets and forms of knowing. The need for a certain kind of secrecy at different times and in different circumstances can be interpreted as a response to social vulnerability. In this way, secrets might serve as a form of protection against economic hardship, social rejection or personal denunciation.'¹³⁸

The response of secrecy forming protection can therefore provide the birth giver some form of control over her own decisions. Anonymity in the French system is recognised as a *choice* for birth givers exercised as a right, a fundamental freedom, linked to privacy. It is a breach of an aspect of respect for private life to publish without the birth giver's consent information that she is pregnant, even though her condition is publicly visible. This provides a limited level of personal control and so the starting point to freedom (and thus choice) for the birth giver: her views are being listened to, and her experience being taken seriously, in a non-judgmental, caring way. The focus is then on supporting her health and well-being. Aims of preventing harm to the birth giver and newborn, and ensuring a safe environment for them both, also underpin the provision of safe havens in the USA.¹³⁹ Respecting the birth giver's decisions, not forcing

134 S Sheldon, 'From "absent objects of blame" to "fathers who want to take responsibility": reforming birth registration law' (2009) 31 *Journal of Social Welfare and Family Law* 373; J Wallbank, ' "Bodies in the Shadows": joint birth registration, parental responsibility and social class' [2009] CFLQ 267.

135 C Smart, 'Family Secrets: Law and Understandings of Openness in Everyday Relationships' (2009) 38 *Jnl Soc Pol* 551.

136 L Turney, 'Paternity Secrets: why women don't tell' (2005) 11 *Journal of Family Studies* 227.

137 C Smart, 'Family Secrets: Law and Understandings of Openness in Everyday Relationships' (2009) 38 *Jnl Soc Pol* 551, at 561–562.

138 *Ibid*, at 563–564.

139 See, for example, analysis by S Ayres, 'Kairos and Safe Havens: The Timing and Calamity of Unwanted Birth' (2009) 15 *William & Mary Journal of Women and the Law* 227 and analysis by L Chambers, 'Newborn Adoption: Birth Mothers, Genetic Fathers, and Reproductive Autonomy' (2010) 26 *Can J Fam L* 339. For criticisms of safe haven laws see C Sanger, 'Infant Safe Haven Laws: Legislating in the Culture of Life' (2006) 106 *Columbia Law Review* 753. Further analysis is beyond the scope of this article.

her through threats of legal penalties for impermissible ‘abandonment’, itself constitutes support as she decides whether or not to relinquish the child.

Care and belonging for the children born secretly

In times of armed conflicts and forced detention (such as in the former Yugoslavia and Rwanda in the 1990s), pregnancies have occurred and babies have been born as a result of rapes in conflict. It is common for the birth giver to reject the child.¹⁴⁰ Quite apart from conflict situations, rapes also occur regularly across the globe. Many think that, in such situations, the child is better knowing nothing about the circumstances of his or her birth, and encouraged to forge his or her own identity in and through lived experience. These issues are complex and beyond the scope of this article. But surely it is worth reflecting as to why these attitudes towards anonymity are so sparse in times of peace and beyond the case of rape.

Family love and connection from birth are ongoing activities and experiences throughout our lives, forming part of the creation of our identity as a project within relationships. The family love involved does not have to originate in biology. Some research has shown that birth givers may give up their children to protect them, as, in Bonnet’s words, ‘a gesture of love’.¹⁴¹ Safe relinquishment can therefore safeguard children from infanticide and abuse, abortion, and abandonment on the street.¹⁴² Love, care and belonging from birth can be further assisted through recording as much information as possible about a relinquished child and enabling him or her to be secure in a loving environment.

Mueller and Sherr’s research studying baby abandonment in the UK explains that few studies have systematically examined the emotions or experiences of the now grown-up children who are adult survivors of abandonment.¹⁴³ They note that there is no evidence of the conditions or effects of abandonment on birth giver or baby and the available literature indicates an absence of clear provision as to how to support these individuals, and an absence of research that could inform policy. Pending any such evidence, they suggest certain procedures could be implemented at the time of finding an abandoned baby to minimise identity and belonging problems that appear to face those abandoned at birth. I suggest these ‘procedures’ can be extended to all children born in concealed circumstances and can include, for example, any letters, information or tokens left by the birth giver,¹⁴⁴ or photographs, whether left by the birth giver or taken immediately when the baby is found, and life books with photographs made by social care, healthcare staff or police. These can help strengthen the child’s sense of rootedness. Sherr and Mueller advocate recording a specific date as a birth date, even if an estimate, on the child’s birth certificate. Such measures provide children in the care system following any form of secret birth with a foundation on which to build an outlook that could assist the formation of their own strong and positive sense of identity.

Details can also be left for the birth giver to collect in baby boxes. These aim to provide care and belonging for the birth giver, and by extension the child, through showing the support available from the hospital. The woman is encouraged to leave information about herself and her background, as this letter from Germany illustrates:

‘Dear Mother of a foundling,

140 I currently have a work in progress on this issue. On the topic of children born of war in general, R Charli Carpenter (ed), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press, 2007).

141 C Bonnet, *Gesture of Love* (Editions Odile Jacob, 1991).

142 All reasons provided by the French government for their policy in *Odièvre*.

143 J Mueller and L Sherr, ‘Abandoned Babies and Absent Policies’ (2009) 93 *Health Policy* 157; see also L Sherr, J Mueller and Z Fox, ‘Abandoned babies in the UK – a review utilizing media reports’ (2009) *Child Care Health and Development* 419.

144 As can be visited in The Foundling Museum in London: foundlingmuseum.org.uk, last accessed 9 April 2018.

We realise that taking the step of giving away your child wasn't easy for you. Please be assured that we will take loving care of your baby to the best of our ability and as such will give him/her a good start in life. Also, the baby should be given a chance to live! Should you change your mind and want your baby back, you can come back to us with full trust. We will gladly help you and are pleased when mother and child are able to be together. Even if you don't, we will still help you with advice. Rest assured that you don't need to worry about the police looking for you. Call us. We are there for you.

Remember, one day your child will want to know at the very least the name of his/her mother. If you wish to leave this vital piece of information, we'll be glad to help.¹⁴⁵

A sense of identity can be developed based on the encouragement and support provided to a newborn child, infant and young person through love, care and nurturance and building a sense of their own identity throughout life, through the development of self-esteem and self-confidence.¹⁴⁶ This support can be enabled through the legal and political system creating and sustaining policies of inclusion, provision of resources and safety from birth.

Conclusion

In 1976, Adrienne Rich observed that the free exercise by all women of sexual and procreative choice would bring about enormous social changes, together with other claims denied to women and certain men for centuries.¹⁴⁷ Over forty years later, such freedom still seems somewhat distant. Whilst the availability of free and confidential family planning, contraceptives, abortion and supportive social attitudes towards all forms of family life are to be encouraged, these services and attitudes do not always exist and are not uniformly used if they do. Meanwhile, rights to identity are conflated with rights to know biological origins, which inform a particular understanding of the child's best interests and of what will improve his or her welfare. Girls and women are told that pregnancy, childbirth and childrearing as currently experienced in a gendered world are 'natural', and that giving birth but refusing motherhood is unnatural and unacceptable with sanctions for behaving in such a way. All this perpetuates unfreedom.

There are, therefore, many girls and women whose lives, as Smart says, 'are still incongruous with the new stringent requirement for truth',¹⁴⁸ openness and acceptance. Showing care and respect by listening to, and acting upon, a girl's or woman's choice to relinquish and to keep her pregnancy and birth secret can coincide with a child's best interests and identity rights by assisting the child to live in security and to be cared for by those who love, want, support, and are capable of looking after the child. Providing social conditions to improve care and belonging for both the child born secretly and the secret birth giver can be part of a process to bring about such freedom.

145 See 'Letter stored in the Babywiese' translated from German and reported in 'The Baby Box returns to Europe' by S Evans, 26 June 2012, available at: www.bbc.co.uk/news/magazine-18585020, last accessed 9 April 2018.

146 See further A Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Polity Press, 1992); and analysis by J Marshall, *Human Rights Law and Personal Identity* (Routledge, 2014).

147 A Rich, *Of Woman Born* (Virago, 1976), at 174.

148 C Smart, 'Family Secrets: Law and Understandings of Openness in Everyday Relationships' (2009) 38 *Jnl Soc Pol* 551, at 561–562.

