

Trans Parenthood in an Era of Assisted Reproductive Technology: Approaches to Defining Motherhood

Amy B. Frieder*

ABSTRACT

Freddy McConnell is a new father, but in the view of the law, he is also a new mother. A trans man in England who retained his natal reproductive capacity, Freddy was required by English law to register as the child's legal "mother," a permanent designation listed on the child's birth certificate. This Note explores legal approaches to defining "motherhood," barriers to trans parenthood, human rights implications of defining motherhood as the act of giving birth, and the benefits of using gender-inclusive terminology to describe parents on legal documents.

INTRODUCTION

The question of who the law classifies as a "mother" combines family law with questions of gender equality, LGBTQ rights, medical technology and ethics, sociology, and constitutional law.¹ It also may further or impinge on protections enshrined in international human rights law, such as the right to privacy and non-discrimination, the right to family planning, and the right to travel. In the September 2019 case of *The Queen (on the application of TT) v. Registrar General for England and Wales* (henceforth referred to as "the TT case," "TT" being the court's shorthand to anonymously signify the plaintiff),² England's most senior family law judge addressed this question. The plaintiff, a trans man named Freddy McConnell who had given birth, requested that he be listed as either the "father" or the "parent," rather than the "mother," on his child's birth certificate. The court ruled against Freddy McConnell, deciding that anyone who gives birth, regardless of gender identity, is considered a "mother" under English

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1. See John C. Sheldon, *Surrogate Mothers, Gestational Carriers, and a Pragmatic Adaptation of the Uniform Parentage Act of 2000*, 53 ME. L. REV. 523, 526 (2001).

2. *The Queen (on the application of TT) v. Registrar General for England and Wales* [2019] EWHC 2384 (Fam.) (Eng.).

law. The court's reasoning, which emphasized a father's biological role or assigned gender at birth,³ reflected that of a "gestational" or "genetic" approach of viewing motherhood. Under this approach, the person who gives birth is the legal "mother" of the child. The court would have achieved a more just outcome if it had applied a legal analysis that incorporated the "intent approach"—as Freddy intended to be a father figure in his child's life and male for the rest of his life—or the "equal rights" approach—which would have found violations of international human rights law as a compelling factor in deeming Freddy the father of his child.

This Note seeks to delve into what it means to be a "mother" in the view of the law and how that legal definition relates to trans male and nonbinary birth parents.⁴ First, the Note discusses relevant background information such as how traditional presumptions of parenthood have framed the family law framework and how the growth of assisted reproductive technology has resulted in legal challenges to motherhood designations. Then, the Note discusses how trans people have often faced human rights abuses such as discrimination in courts and sterilization requirements. Finally, this Note describes the human rights implications of defining motherhood as the act of giving birth—including the right to privacy and non-discrimination, the right to family planning, and the right to travel—as well as the benefits of furthering trans men's rights through gender-inclusive terminology and the law.

I. BACKGROUND

A. *Traditional Presumptions of Parenthood*

Until recently, the law has only recognized the "mother" as the cisgender woman who had been visibly pregnant and had given birth—the presumption of biology—and the "father" as the cisgender man who was married to the woman who had given birth—the presumption of legiti-

3. *Id.* at ¶ 98.

4. I would like to echo the thoughtful consideration with which Sonia K. Katyal and Ilona M. Turner, who are also queer cisgender women, begin their article: "acutely mindful of the importance, as Paisley Currah, Richard Juang, and Shannon Minter have reminded us, of ensuring gender self-determination as an imperative matter of 'well-being' rather than 'an intellectual curiosity' . . . it is important to acknowledge the inherent limitations of our perspectives as cisgender women." Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593, 1601 (2019). See also JULIA SERANO, WHIPPING GIRL: A TRANSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 209–12 (2007); Jacob Hale, *Suggested Rules for Non-Transsexuals Writing About Transsexuals, Transsexuality, Transsexualism, or Trans* ____, SANDY STONE (Nov. 18, 2009), <http://sandystone.com/hale.rules.html> (discussing the importance of interrogating one's subject position and goals when writing about the trans community).

macy.⁵ Through these presumptions, the law has perpetuated traditional, nuclear family structures to the exclusion of alternate family structures.⁶

The presumptions of biology and legitimacy are not inclusive of parents whose gender identities do not conform with traditional gender-based stereotypes of who constitutes a “mother” and who constitutes a “father.” As such, they have become less meaningful over time. The increased reliability of paternity tests, the growing number of parents who are not married, and the rising number of parents who use assisted reproductive technology,⁷ have altered the landscape of legal parenthood.

II. ASSISTED REPRODUCTIVE TECHNOLOGY DEVELOPMENTS AND RESULTING DEVELOPMENTS IN CASE LAW

Technological advances in reproductive health have resulted in an increasing number of options for parents who are unable to have biological children on their own or who opt to use assisted reproductive technology (ART) for other reasons. These relatively recent technological advances in ART have resulted in a growing number of people who have conceived children through methods the law did not anticipate.⁸

Much of the case law challenging the traditional common law presumptions of motherhood and fatherhood was born out of births that involved surrogates and/or egg donors. Much of this case law developed in the United States, since many other countries have decided to ban surrogacy altogether, ban commercial surrogacy, or not legislate in this area. For example, Article Twenty-One of the Oviedo Convention (the European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine), which entered into force in 1999, states: “The human body and its parts shall not, as such, give rise to financial gain.”⁹ It thereby limits financial incentives for people to donate eggs or sperm or to become surrogates in much of Europe. Hopeful parents living in more restrictive jurisdictions sometimes engage in “fertility tour-

5. See Sheldon, *supra* note 1, at 527–32; see also Katyal & Turner, *supra* note 4 at 1602, 1608, 1665.

6. Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 *YALE L.J.* 187, 190 (1986).

7. See Sheldon, *supra* note 1, at 529–32.

8. The growth of ART has resulted in challenges not only to legal motherhood designation but also to other areas of the law, such as tax law. A gay male who used IVF treatments, an egg donor, and a gestational surrogate brought suit against the U.S. federal government because he alleged that Internal Revenue Service’s (IRS) refusal to allow a deduction on his income tax return violated his equal protection rights; the court held that he failed to demonstrate that the IRS discriminated against him on the basis of sexual orientation. See *generally* *Morrissey v. United States*, 871 F.3d 1260 (11th Cir. 2017).

9. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Apr. 4, 1997, ETS No.164.

ism”¹⁰ outside of their home countries—traveling to the few countries in which commercial surrogacy is legal, such as India, the United States, Russia, and Ukraine—and the restrictive home countries sometimes refuse to recognize the parental standing of these intended parents.¹¹ Additionally, some jurisdictions, including Nepal and Mexico, have moved to a more restrictive approach to surrogacy because of the “generally abusive circumstances created by a rapid proliferation in surrogacy over a short period of time and a lack of strong regulation.”¹² Meanwhile, in other jurisdictions, surrogacy lacks a legal framework but is not explicitly illegal.¹³ For example, Thailand—which is among a few countries popular with parents for surrogacy arrangements—does not have clear regulations governing surrogacy.¹⁴

While laws governing surrogacy and egg donation vary widely among U.S. states¹⁵ (and even within states¹⁶), and across countries, the concurrent developments in case law from around the world can be categorized into the following three methodologies: the gestational approach, the intent approach, and the human rights approach. This final approach, in Freddy’s case, would center his rights to privacy and equal treatment.

1. *The Gestational Approach*

Under the gestational approach, the person who gives birth is recognized as the legal mother of the child. The United Kingdom takes the gestational approach, even to the point where a surrogate parent is recognized as the legal mother.¹⁷ The country established this through legislation, not the courts: Under the Surrogacy Arrangements Act of 1985, intended parents must obtain a court order to become the child’s legal parents and to extinguish the parental rights of the surrogate; however, surrogacy arrangements cannot be used to force a surrogate parent to surrender the baby to the intended parents after having second thoughts.¹⁸

In the United States, *In re Baby M*, decided in 1988, was the first case in which a court decided whether to enforce a compensated surrogacy agree-

10. See Sven Bergmann, *Fertility Tourism: Circumventive Routes that Enable Access to Reproductive Technologies and Substances*, 36 SIGNS 280, 280–88 (2011).

11. See generally Cornell Law School International Human Rights Policy Advocacy Clinic and National Law University, Delhi, *Should Compensated Surrogacy Be Permitted or Prohibited?*, CORNELL LAW FACULTY PUBLICATIONS (Sept. 2017), <http://scholarship.law.cornell.edu/facpub/1551>.

12. *Id.* at 2.

13. Helier Cheung, *Surrogate Babies: Where Can You Have Them, and is it Legal?*, BBC NEWS (Aug. 4, 2014), <https://www.bbc.com/news/world-28679020>.

14. *Id.*

15. See Shannon Price Minter, *Transgender Family Law*, 56 FAM. CT. REV. 410, 415 (2018).

16. See generally, Kyle Lee Holt, *Hoosier Mother?: Indiana’s Inconsistent Surrogacy Law*, 48 VAL. U.L. REV. 1133 (2014).

17. See Cheung, *supra* note 13.

18. Stephen R. Latham, *The United Kingdom Revisits Its Surrogacy Law*, 50 HASTINGS CENTER REPORT 6, 6–7 (2020).

ment.¹⁹ After giving birth, the surrogate had felt a strong bond with the baby and did not want to part with her, so the intended parents brought suit seeking enforcement of the surrogacy contract.²⁰ The New Jersey Supreme Court in this case held that the surrogacy contract conflicted with public policy and that the surrogate was the mother.²¹ While the plaintiffs claimed a constitutional right of privacy—including the right of consenting adults to deal with reproduction as they see fit—and that awarding custody to them would be in the best interest of the child,²² the court was more concerned with the inducement of money, coercion of contract, and timing of the arrangement, asserting that decisions about adoption and the best interest of the child should be made after the child's birth.²³

2. *The Intent Approach*

Under the intent approach, the intended parents of the child are the legal parents of the child. In India, a popular destination for surrogacy arrangements, the intended parents are the legal parents.²⁴

In the United States, in *Johnson v. Calvert*, decided in 1993, relations between the intended parents and the gestational carrier deteriorated, and the gestational carrier threatened to refuse to give up the child once the child was born.²⁵ After acknowledging that both women in this case demonstrated a mother-child relationship as contemplated by the Uniform Parentage Act (the female spouse through genetics and the gestational carrier through giving birth), the court concluded that when “[when] genetic consanguinity and giving birth . . . do not coincide in one woman, she who intended to procreate the child . . . is the natural mother under California law.”²⁶ Therefore, the parties’ intentions, as expressed in the surrogacy contract, determined maternity, and prioritized the intentions of the intended parents over the surrogates.²⁷

3. *The Human Rights Approach*

In re Roberto D.B. was a significant case, in 2007, in that the highest court of Maryland determined—using an equal rights rationale—that a gestational carrier is not required to be listed on a birth certificate. Roberto initiated an in-vitro fertilization (IVF) procedure in which his sperm, an egg donor’s ova, and a gestational carrier were involved in the birth of

19. See Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 500 (1996).

20. *Id.*

21. *Id.*

22. In re Baby M, 537 A.2d 1227, 1239 (N.J. 1988).

23. *Id.* at 1240.

24. See Cheung, *supra* note 13.

25. Coleman, *supra* note 19, at 505–06.

26. *Johnson v. Calvert*, 851 P.2d 776, 782 (1993).

27. *Id.*

Roberto's child, with neither the egg donor nor the gestational carrier intending to gain custody.²⁸ Roberto and the gestational carrier petitioned the Circuit Court for Montgomery County to remove the gestational carrier's name from Roberto's child's birth certificate and subsequently appealed to the Court of Special Appeals of Maryland. That court held that paternity statutes must be "construed to apply equally to both males and females" to comply with Maryland's Equal Rights Amendment and address issues arising from advancing reproductive technologies,²⁹ and that Maryland law "accommodates, if not contemplates, a birth certificate on which the mother is not identified."³⁰

Similarly, the law in Italy has determined legal motherhood designations using a human rights approach, particularly with respect to the right to privacy. As mentioned in the *TT* case, "the law in Italy allows a mother, who has given up her child for adoption, to opt for full anonymity."³¹ Thus, as per *Godelli v. Italy*, where the adopted child applies for information in order to identify their maternal line, the Italian law adopts a blanket policy of refusal in a manner which will always uphold the anonymity of the mother.³² The *Godelli* court determined that the mother's right to privacy is paramount.

III. FUTURE CHALLENGES AND TRANS PARENTHOOD

A. Barriers to Trans Parenthood

Trans people have faced tremendous barriers³³ to parenthood—including sterilization requirements that have precluded them from giving birth and discrimination based on gender identity that has resulted in child custody loss—arguably in violation of the right to create a family established in Article Sixteen of the Universal Declaration of Human Rights, proclaimed in 1948.³⁴ In the United States, child-custody cases have exhibited discriminatory rulings against trans parents.³⁵ Trans parents have lost custody of

28. Patricia Calomeris, *Recent Developments: In re Roberto D.B.: A Gestational Carrier is Not Required to be Listed on a Birth Certificate Because the Maryland Equal Rights Amendment Demands That Maryland Paternity Statutes, Which Allow Men to Challenge Paternity, Extend to Women*, 38 U. BALT. L.F. 75 (2007).

29. See *In re Roberto D.B.*, 923 A.2d 115, 124 (2007).

30. *Id.* at 121.

31. *The Queen (on the application of TT) v. Registrar General for England and Wales* [2019] EWHC 2384 (Fam), [197] (Eng.).

32. *Godelli v. Italy*, App. No. 33783/09, Eur. Ct. H.R. (2012).

33. Trans people also face reproductive health disparities and barriers in access—likely including expensive assisted reproductive technology—that much of the LGBTQ movement "has failed to incorporate into its advocacy." Laura Nixon, *The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People*, 20 WM. & MARY J. WOMEN & L. 73, 77 (2013).

34. ART. 16, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

35. Carla A. Pfeffer, *Trans Pregnancy: An International Exploration of Transmasculine Practices of Reproduction—Law and Policy Review, United States*, UNIVERSITY OF LEEDS TRANS PREGNANCY PROJECT (Apr

their children due to courts declaring their marriages invalid as same-sex marriages,³⁶ as judges viewed coming out as trans as grounds for the trans person's spouse to obtain a fault-based divorce.³⁷

Trans parents have also lost custody of their children because of courts' concerns that having a trans parent would be harmful to children.³⁸ In interpreting family law's commonplace "best interest of the child" standard in this way, courts have effectively decided that having a trans parent is more harmful than terminating a parental relationship, and that terminating a parental relationship is preferable to counseling that would allow a parental relationship to persist.³⁹ Courts in the United Kingdom have made similar determinations.⁴⁰

Although trans parents are still subject to discrimination at the hands of family court judges,⁴¹ recent advances in the United States that have affirmed trans parents' ability to be good parents are assuring.⁴² Indeed, according to Shannon Price Minter, legal director of the National Center for Lesbian Rights, most judges "now recognize that being transgender has no bearing on a person's ability to be a good parent and that transgender parents should be evaluated based on the same factors applied to other parents in custody disputes."⁴³

B. *Increases in Trans Men Giving Birth*

In the past, most trans parents had their children before coming out as trans.⁴⁴ Giving birth after transitioning has not been an option, and is still not an option, for trans men living in countries with sterilization requirements as conditions for legal gender transitioning. For instance, a unanimous panel of Japan's Supreme Court decided in 2019 to uphold a law requiring people wishing to register a gender change to have their original reproductive organs removed, thereby precluding legally recognized trans men from retaining their natal reproductive capacity.⁴⁵ The court reasoned

2018), <https://transpregnancy.leeds.ac.uk/wp-content/uploads/sites/70/2018/05/Trans-Pregnancy-policy-review-USA.pdf>.

36. See, e.g., *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005).

37. See Minter, *supra* note 15, at 411.

38. See, e.g., *Daly v. Daly*, 715 P.2d 56, 71 (Nev. 1986); *J.L.S. v. D.K.S.*, 943 S.W.2d 766, 772–73 (Mo. Ct. App. 1997); *B. (Anon.) v. B. (Anon.)*, 585 N.Y.S.2d 65, 66 (N.Y. App. Div. 1992); *Cisek v. Cisek*, 1982 WL 6161, at *2 (Ohio Ct. App. 1982).

39. See *Katyal & Turner*, *supra* note 4, at 1624.

40. See *J v. B*, [2017] EWFCEWHC 4 [41] (Eng.).

41. See *Katyal & Turner*, *supra* note 4, at 1665.

42. Although most advances are recent, "[a]s long ago as 1973, the Colorado Court of Appeals held that being transgender should not be viewed as an adverse factor in a custody determination, finding no evidence that a custodial mother's transition from female to male had harmed the children in any way." Minter, *supra* note 15, at 416.

43. Minter, *supra* note 15, at 411.

44. *Id.*

45. See Mari Yamaguchi, *Japan court upholds sterilization to register gender change*, THE ASSOCIATED PRESS (Jan. 25, 2019), <https://apnews.com/article/9ef16f52e9b94b9a838b17a63c6c1e8d>.

that the 2004 law was intended to reduce confusion in families and society.⁴⁶

In other countries, however, these requirements have been rolled back due to the advancement of trans rights and concerns about bodily integrity. In a landmark 2017 opinion in *AP, Garçon, and Nicot v. France*, the European Court of Human Rights held for the first time that a country's sterilization requirement violated the right to private life under Article Eight of the European Convention on Human Rights and obliged Member States of the Council of Europe to remove sterilization requirements as a condition of gender recognition.⁴⁷ The court had previously found Article Eight violations when Turkey denied a trans plaintiff the possibility of undergoing gender-affirming surgery⁴⁸ and when a public hospital in Slovakia sterilized a cisgender woman without her understanding of the procedure.⁴⁹ This 2017 decision was consistent with similar decisions by national courts.⁵⁰ A Swedish court acknowledged that "where individuals consent to sterilization purely as a means of obtaining official gender recognition, these people do not act voluntarily."⁵¹ A court in Germany acknowledged the plaintiff's sexual self-determination and physical integrity.⁵² And, a court in Italy recognized that imposing a specific medical treatment, whether hormonal treatment or gender-affirming surgery, would imply a serious and inadmissible limitation to the right to gender identity.⁵³ Sweden, the first European country to recognize trans people's gender identity, in 1972,⁵⁴ also became the first country to pay damages to trans people who were forced to undergo sterilization as a requirement for gender change.⁵⁵ Still, twenty-one out of forty-one jurisdictions that permit gender recognition within the Council of Europe continued to enforce a sterilization requirement.⁵⁶ Trans reproductive rights are still opposed by many within national legislatures, with critics raising concerns around the undermining of legal certainty and the ability of family law systems to function efficiently and coherently.⁵⁷

46. *Id.*

47. *AP, Garçon and Nicot v. France*, App. No.s 79885/12, 52471/13 and 52596/13, Eur. Ct. H.R. (2017); *see also* Peter Dunne, *Transgender Sterilisation Requirements in Europe*, 25 *MED. L. REV.* 554 (2017).

48. *See Y.Y. v. Turkey*, 2015-I Eur. Ct. H.R. 461.

49. *See V.C. v. Slovakia*, 2011-V Eur. Ct. H.R. 421.

50. *See Dunne, supra* note 47, at 556.

51. Marjolein van den Brink and Peter Dunne, *Trans and intersex equality rights in Europe – a comparative analysis*, EUROPEAN COMMISSION 61 (Nov. 2018), https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf.

52. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1 BvR 3295/07, Jan. 11, 2011, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2011/01/rs20110111_1bvr329507.html; *see also* Press Release No. 7/2011, Federal Constitutional Court Press Office (Jan. 28, 2011).

53. Corte Costituzionale, 21 Ottobre 2015, n. 221, *Foro it.* 2015, I (It.).

54. Dunne, *supra* note 47, at 554.

55. Yamaguchi, *supra* note 45.

56. Dunne, *supra* note 47, at 555.

57. *Id.* at 561.

However, the rollback of sterilization requirements for transitioning has increased the opportunity for trans people to give birth. While there are no firm statistics on the number of trans and nonbinary people who give birth, research has shown that “a growing number of trans people are choosing to start their own families in this way.”⁵⁸ Studies in Europe have shown a strong interest in having children among both trans men and women, and “an overwhelming majority” of trans women “expressed that sperm freezing should be available to trans women before they transition.”⁵⁹ Access to these options is expensive, and because preserving sperm is less expensive and medically invasive than preserving eggs, having biological children after transitioning may be easier for trans women than trans men (although, as Freddy McConnell from the *TT* case did, some trans men may be able to give birth if they retain their natal reproductive capacity).⁶⁰

C. Future Challenges

Increased developments in ART—such as the use of synthetic gametes, uterus transplants, and ExCG (gestation outside of the body)—will further erode presumed associations between femaleness and maternity and between maleness and paternity, as well as undercut the rationale through which the state has classified parents with the gender-associated labels of “mother” and “father.”⁶¹ This erosion could increase confusion and inconsistency for both parents and the state.⁶² ART developments have the potential to eventually render the act of giving birth irrelevant. As Timothy F. Murphy demonstrates in the Cambridge Quarterly of Healthcare Ethics:

“[I]magine a child conceived in vitro with synthetic gametes derived in a cross-sex way; namely, sperm from a genetically typical female and ova from a genetically typical male, after which the child is then gestated by ExCG. In this example, no genetic female has offered ova; no genetic male has offered sperm; and no cisgender woman, no transgender woman, and no cisgender man has gestated the child. What seems most relevant to the state from an example such as this is not ultimately the sex of the adults involved in the child’s origins so much as responsibility

58. Ruth Pearce et al., *Of trans fathers and male mothers – the importance of centering experience*, UNIVERSITY OF LEEDS TRANS PREGNANCY PROJECT (Sep 26, 2019), <https://transpregnancy.leeds.ac.uk/2019/09/26/of-trans-fathers-and-male-mothers-the-importance-of-centering-experience/>.

59. See Nixon, *supra* note 33, at 94–95.

60. See Minter, *supra* note 15, at 413.

61. See generally Timothy F. Murphy, *Sex before the State: Civic Sex, Reproductive Innovations, and Gendered Parental Identity*, 26 CAMBRIDGE QUARTERLY OF HEALTHCARE ETHICS 267 (2017).

62. States have justified laws impinging on trans individuals’ bodily autonomy by claiming that such laws reduce confusion and inconsistency. However, these decisions actually *increase* confusion and inconsistency by requiring a mismatch of gender identity and parenting-related gender identity. See, e.g., *The Queen (on the application of TT) v. Registrar General for England and Wales [2019] EWHC 2384 (Fam)*, (Eng.); Yamaguchi, *supra* note 45.

for the child. Who produced the synthetic gametes? Who orchestrated the in vitro fertilization (IVF) by which an embryo was conceived? Who made the decision to gestate the embryo by ExCG? Of all the parties involved, who has moral and legal responsibility as *parent or parents* to the child regardless of what their sex is as known by the state?”⁶³

The future and increased use of ART all but ensures that the state will face difficulty assigning “mother” and “father” designations to parents. Increasingly complex paths of conception will entangle the state into third-party donors and surrogates involved, as well as the private medical decisions of intended parents.

IV. HUMAN RIGHTS IMPLICATIONS OF DEFINING MOTHERHOOD AS THE ACT OF GIVING BIRTH

Defining legal motherhood as the act of giving birth has far-reaching implications for parents and children alike: It impinges on the right to privacy and non-discrimination, the right to family planning, and the right to travel. These rights are enshrined in international human rights law but are violated when trans parents are outed as trans through the designation on their child’s birth certificate or registration.

A. *Right to Privacy and Non-Discrimination*

International human rights law enshrines the right to privacy within several key legal frameworks: Article Twelve of the Universal Declaration of Human Rights, Article Seventeen of the International Covenant on Civil and Political Rights, Article Sixteen of the Convention on the Rights of the Child, and Article Fourteen of the International Convention on the Protection of All Migrant Workers and Members of Their Families.⁶⁴ Regionally, the right to privacy is protected by Article Eight of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article Eleven of the American Convention on Human Rights.⁶⁵ Furthermore, the United Nations General Assembly and Human Rights Council have issued resolutions that specifically protect people against violence and discrimination based on sexual orientation and gender identity.⁶⁶ Regionally, the Council of Europe Parliamentary Assembly’s Committee on Equality and Non-Discrimination explicitly recommended

63. See Murphy, *supra* note 61, at 267–75.

64. U.N. Human Rights Office of the High Commissioner, International standards, <https://www.ohchr.org/EN/Issues/Privacy/SR/Pages/Internationalstandards.aspx>.

65. *Id.*

66. U.N. Human Rights Office of the High Commissioner, United Nations Resolutions - Sexual orientation and gender identity, <https://ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx>.

that “transgender parents’ gender identity be correctly recorded on their children’s birth certificates” and that Member States “ensure that persons who use legal gender markers other than male or female are able to have their partnerships and their relationships with their children recognized without discrimination.”⁶⁷ Consistent with these international human rights legal frameworks, trans people should be able to keep their trans status private, both as a matter of individual dignity in establishing one’s identity and as a matter of protection from discrimination. An infringement on the right to privacy, which occurs when trans parents are outed by “mother” designation requirements, may result in discrimination not only for trans parents but also their children.

The right to respect for a private life implies everyone must be able to establish the substance of their identity, including the legal parent-guardian relationship. As discussed in the *TT* case, in *Mennesson v. France*, the European Court of Human Rights considered a surrogacy case in which French authorities had refused to register a married couple as the parents of twins born to a gestational carrier using the male applicant’s sperm and a donor egg. The court held that the children’s rights under Article Eight of the ECHR had been violated, stating that the “right to respect for their private life—which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship—[had been] substantially affected.”⁶⁸

However, the privacy issues that arise from a “mother” designation on a birth certificate may persist long after the birth of the child, as well as directly affect the child. Imagine a child producing a birth certificate for school registration purposes. The person listed on the child’s birth certificate as the child’s mother is expected to meet with the school administrators, and the school administrators are surprised to see that someone who presents as a man arrives. The trans male parent has now been outed as trans. In this scenario, the state is effectively requiring trans male birth parents to officially out themselves while their children use important legal documents that are often necessary to access essential services such as healthcare and education.

Participants in a recent study of trans parenthood voiced their difficulties and fears around registering their child’s birth;⁶⁹ many of these fears involve being outed as trans and the subsequent impact on their children for years to come. In a recent study, a trans male birth parent described his experience registering his daughter’s birth:

“It was supposed to be the day she got registered and I was trying to be happy and positive but . . . you have to be put as

67. EUR. PARL. DOC. (COM 14620).

68. *Mennesson v. France*, 2014-III Eur. Ct. H.R. 255.

69. See Pearce et al., *supra* note 58.

mother. And that's really crap. Because that's her official documentation for the rest of her life. And not everyone's gonna understand that. So, her safety is put into question."⁷⁰

These parents, like all good parents, would agree with the *TT* plaintiff, Freddy McConnell, who stated that “protecting my child has always been and will always be my number one concern.”⁷¹ These concerns are validated when parents face a system that is “confused, unclear, and incapable of catering to their specific needs” when utilizing birth certificates to access necessary social services.⁷² Additionally, reports of bullying and other issues that children with LGBTQ parents face further emphasize these concerns.⁷³

Indeed, discrimination against trans people is widespread and likely also affects their families. According to the National Center for Transgender Equality's 2015 survey in the United States, nearly half of survey respondents were verbally harassed during that year, nine percent were physically attacked, and nearly one-third experienced at least one type of mistreatment in a place of accommodation—including denial of equal treatment or service, verbal harassment, and physical attacks inspired by animus.⁷⁴ In Europe, according to a report by the Council of Europe's Human Rights Commissioner, “many transgender people live in fear and face violence in the course of their lives. This violence ranges from harassment, bullying, verbal abuse, physical violence and sexual assault, to hate crimes resulting in murder.”⁷⁵ While a lack of disaggregated records by national authorities makes it difficult to determine the extent of discrimination and violence against trans people on a country-by-country basis in many other regions of the world, the Trans Murder Monitoring project, as cited by a United Nations fact sheet, has documented more than 2,000 murders in 66 countries between 2008 and 2016—approximately one murder every two days.⁷⁶ When such discrimination and violence is widespread, trans people must have the right to keep their trans status private, including the right to not be designated as “mother” on legal documents if they so choose.

70. *Id.*

71. Robert Booth, *Transgender man who gave birth loses high court privacy ruling*, THE GUARDIAN (Jul. 16, 2019), <https://www.theguardian.com/society/2019/jul/16/transgender-man-who-gave-birth-loses-high-court-privacy-case-fred-mcconnell>.

72. See Dunne, *supra* note 47, at 569.

73. See generally Tracey Peter et al., *Are the Kids All Right? The Impact of School Climate among Students with LGBT Parents*, 39 CAN. J. EDUC. / REVUE CANADIENNE DE L'ÉDUCATION 1 (2016).

74. Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NATIONAL CENTER FOR TRANSGENDER EQUALITY 13–14 (2016).

75. Commissioner for Human Rights, *Human Rights and Gender Identity*, COUNCIL OF EUROPE (July 29, 2009), <https://rm.coe.int/16806da753>.

76. United Nations Free & Equal, *Transgender Fact Sheet*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, https://www.ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/UNFE_FactSheet_Transgender_EN.pdf.

B. Right to Family Planning

The term “mother” is associated with gender identity and the family-planning act of giving birth, and people should be free to reject that term in favor of a gender-neutral term. The International Conference on Population and Development (ICPD) Programme of Action, adopted in 1994 by 179 Member States, asserted the right to plan one’s family and emphasized gender equality and individual dignity with respect to reproductive rights.⁷⁷ A “mother” designation signifies a gender-associated role in a family, and the choice to retain one’s natal reproductive capacity and use it to give birth is related to gender equality and family planning.

According to an international group of researchers of trans pregnancy, the designation of “mother” on a child’s birth certificate is akin to a gender identity designation.⁷⁸ As a result, tying this gendered term to an act that does not necessarily need to be gendered does not comport with the lived experience of trans men and nonbinary people who give birth. These individuals have experienced gender dysphoria and have fought to socially and legally transition, and they have done so regardless of whether they have chosen to retain their natal reproductive capacity.⁷⁹ They may consider their typically feminine name assigned at birth to be their “dead name” and may no longer be addressed by she/her pronouns.⁸⁰ They may have devoted a great deal of effort, time, and treasure into transitioning physically (through medical treatments) and/or legally (through changes to identity documents).⁸¹ A growing number of trans men and nonbinary people who give birth have made great personal strides in transitioning only to be stuck with a feminine-gendered term with respect to something as important as their legal relationship with their child.⁸²

When nurses called Jason Barker, a trans man who gave birth, “mum” in a UK hospital, he perceived it as a misstep.⁸³ Indeed, Jason’s perception exemplifies a common concern among trans birth parents. An international collaboration of researchers studying trans pregnancy in the United Kingdom, United States, Australia, and Italy found that the top items that trans

77. International Conference on Population Development, *Programme of Action* (20th Anniversary ed. 2014), UNITED NATIONS POPULATION FUND, https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf.

78. See Pearce et al., *supra* note 58.

79. Jessica Smith, *Enforcing ‘mother’ status on a transgender man harms both parent and child*, BioNews (Oct. 29, 2018), https://www.bionews.org.uk/page_139322.

80. Stanley R. Vance, Jr., *The Importance of Getting the Name Right for Transgender and Other Gender Expansive Youth*, 63 J. ADOLESCENT HEALTH 379, 379 (2018).

81. University of California, San Francisco Transgender Care, Transition Roadmap, <https://transcare.ucsf.edu/transition-roadmap>.

82. Ruth Pearce, *Trans Pregnancy poster: initial findings presented at WPATH*, TRANS PREGNANCY (Nov. 22, 2018), <https://transpregnancy.leeds.ac.uk/2018/11/22/trans-pregnancy-poster-initial-findings-presented-at-wpath/>.

83. Paula Cocozza, *The story of one man’s pregnancy: ‘It felt joyous, amazing and brilliant’*, THE GUARDIAN (Mar. 22, 2018), <https://www.theguardian.com/lifeandstyle/2018/mar/22/story-one-mans-pregnancy-trans-jason-barker>.

birth parents desire include “recognition that someone who becomes pregnant and gives birth may be a parent or father, not necessarily a mother” and “respect for gender and pronouns, including non-binary possibilities.”⁸⁴

While some commentators have tried to reimagine the word “mother” to represent a role that is absent of any associated gender,⁸⁵ this reimagination does not reflect the current social reality, in which powerful dichotomous thinking has characterized our perception of gender and sex as binary.⁸⁶ Forcing a legal definition of “mother” that is not in touch with the word’s social meaning does not seem to be consistent with what trans parents view as respect for their gender identity.

Furthermore, while cisgender women who biologically conceive their own children and view their parent-child relationship as one of mother and child may not mind the permanent legal designation of “mother” on their child’s birth certificate, trans men and nonbinary individuals who give birth may view their pregnancies differently.⁸⁷ For example, the aforementioned Jason Barker viewed his pregnancy as “a transient state” and a “strange bit” of his life, after which normality would be restored.⁸⁸ For trans male parents like Jason, a nine-month-long family planning choice should not necessarily require the permanent gender-associated designation of “mother” on legal documents.

C. Right to Travel

Misgendering someone on documents by designating them a “mother” may result in tenuous situations for trans parents and their children while traveling abroad. Article Thirteen of the Universal Declaration of Human Rights reads: “Everyone has the right to freedom of movement and residence within the borders of each state, [and] [e]veryone has the right to leave any country, including his own, and to return to his country.”⁸⁹ Furthermore, according to a report by the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, a lack of proper gender identity recognition on trans people’s identity documentation results in “mockery and humiliation

84. Pearce, *supra* note 82.

85. In her tribute to Martha Fineman and Fineman’s 1995 book, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, Teemu Ruskola discusses motherhood as “subsuming fathers as well as mothers” and as “shorthand for taking care of ‘the ill, the elderly, the disabled, as well as actual children.’” She asks: “Is a nurturing father a queer mother?” and suggests that “*The Neutered Mother* offers a benevolent . . . conception of state power.” Teemu Ruskola, *Notes on The Neutered Mother, or Toward a Queer Socialist Matriarchy*, 67 EMORY L.J. 1165, 1171 (2018).

86. Adam R. Chang & Stephanie M. Wildman, *Gender In/sight: Examining Culture and Constructions of Gender*, 18 GEO. J. GENDER & L. 43, 46 (2017).

87. See Cocozza, *supra* note 83.

88. *Id.*

89. ART. 13, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

inflicted on them in daily life as well as when they seek to cross borders or access services and facilities.”⁹⁰

The Canadian government warns its citizens that border officials may question a same-sex couple traveling with a small child and may request documentation to explain why there is no biological other-gendered parent, and, as a result, the government suggests carrying documentation such as a birth certificate.⁹¹ A trans male parent traveling with a male partner and child may be questioned at the border, and a document that lists the trans male parent as the “mother” may confuse border officials rather than explain the parent-child relationship. Even worse, such designation would out a male-presenting parent as trans, which could lead to discrimination and make it difficult to “be discreet, especially in countries where LGBTQ people face discrimination,” as the Canadian government suggests.⁹² Similarly, the United Kingdom acknowledges that trans travelers sometimes face difficulties at border controls even when their gender presentation is consistent with the gender marker in their documentation.⁹³

Discrimination against trans travelers has resulted in difficulty traveling in the first place. The 2018 report on human rights violations against LGBTQ people in Liberia described a particular situation in which a trans traveler was discriminated against:

[I]n 2016, a transgender woman was mocked by an official of the [Liberian] Ministry of Justice and then barred from boarding a flight to South Africa. While the transgender woman was waiting in the boarding queue, the official came up and told her that she looked strange and funny. Shortly afterward, when the woman tried to board her flight, she was barred from doing so without any explanation. As a result, she was not able to travel to South Africa until the next available flight, which was not until two days later.⁹⁴

However, even if a trans traveler passes through border security without any issues, the gender identity on their identity documentation may later present an issue while traveling. In 2017, two Singaporeans—a cis male photographer and a trans woman fashion model—traveling in the United Arab Emirates with passports with male gender markers were arrested in an Abu

90. U.N.G.A., *Protection against violence and discrimination based on sexual orientation and gender identity: report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, U.N. Doc. A/72/172 (July 19, 2017).

91. *Lesbian, gay, bisexual, transgender, queer and two-spirit Canadians abroad*, GOVERNMENT OF CANADA (last updated July 19, 2011), <https://travel.gc.ca/travelling/health-safety/lgbt-travel>.

92. *Id.*

93. *Lesbian, Gay, Bisexual and Transgender foreign travel advice*, GOV.UK (last updated Mar. 5, 2020), <https://www.gov.uk/guidance/lesbian-gay-bisexual-and-transgender-foreign-travel-advice>.

94. Stop AIDS in Liberia et al., *Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Liberia*, Submitted for consideration at the 122nd Session of the Human Rights Committee (Feb. 2018).

Dhabi shopping mall. They were initially sentenced to one year of imprisonment, but they were later released after three weeks in custody, fined, and deported.⁹⁵

The risks of travel for trans people are exacerbated for trans parents who fear travel difficulties affecting their children. Trans parents have perceived these risks as so high that they have been dissuaded from international travel altogether. According to the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) in a submission to the European Court of Human Rights in *O.H. and G.H. v. Germany*, “trans parents reported . . . that they chose not to travel abroad with their children, fearing an inability to prove their parenthood to security staff or border patrols while at a foreign airport.”⁹⁶

V. FURTHERING TRANS MEN’S RIGHTS THROUGH GENDER-INCLUSIVE TERMINOLOGY AND THE LAW

Families already exhibit wide variation in structure, and parenting roles need not be gender specific.⁹⁷ Many courts may not have adequately considered the option for trans male birth parents to be classified as “gestational parents” or another gender-neutral/inclusive term. The adoption of gender-inclusive language to legally designate birth parents would likely address many of the international human rights concerns described previously in this Note. Using gender-inclusive language furthers—rather than detracts from—ECHR Article Eight’s right to privacy and does not raise potential issues with respect to ECHR Article Fourteen’s prohibition on discrimination. It would protect from—rather than increase the likelihood of—being outed as a trans parent or the child of a trans parent, and potentially of being the target of discrimination or violence. The right to privacy prevents discrimination against trans individuals in environments where stigma, discrimination, transphobia, and violence are responsible for human rights violations against trans people.⁹⁸ Furthermore, if states not only have an obligation to not violate international human rights, but also to not engender environments in which other parties may more easily commit human rights violations, gender-inclusive terminology in the law would foster a more inclusive environment and therefore reduce the likelihood of violence,

95. Trans Legal Mapping Report 2019: Recognition before the law, ILGA (3d ed. 2019), https://ilga.org/downloads/ILGA_World_Trans_Legal_Mapping_Report_2019_EN.pdf.

96. ILGA-Europe, Submission to the European Court of Human Rights in *O.H. and G.H. v. Germany*, App Nos. 53568/18 & 54741/18, Eur. Ct. H.R. (2019), https://www.ilga-europe.org/sites/default/files/OH%20and%20GH%20v%20Germany%20_%20TPI_2019.pdf.

97. See Sheelagh McGuinness & Amel Alghrani, *Gender and Parenthood: The Case for Realignment*, 16 MED. L. REV. 261 (2008).

98. United Nations Development Program, *Stigma, Discrimination, Violence & Human Rights in IMPLEMENTING COMPREHENSIVE HIV AND STI PROGRAMMES WITH TRANSGENDER PEOPLE: PRACTICAL GUIDANCE FOR COLLABORATIVE INTERVENTION* (2016).

discrimination, and other human rights violations against trans people and their families.

Transitioning to gender-inclusive legal terminology for all parents would be beneficial, as it would respect gender identity, negate the need to strike a balance between the parent's individual right to privacy and the child's right to know about their biological identity, and provide for consistency before the law.

A. Respecting Gender Identity

It is certainly possible for the law to utilize clear, gender-inclusive language to refer to people who give birth, and the adoption of such language would respect the gender identity of everyone involved.

Some governments and organizations involved in birth-giving have already begun using gender-inclusive language. In 2014, the Midwives Alliance of North America revised the language in their Core Competencies document by changing terms such as “mother” and “pregnant woman” to “birthing parent” and “pregnant individual.”⁹⁹ In Victoria, Australia, the government encourages public employees to use the term “parent” and other gender-inclusive language.¹⁰⁰ The United Nations also publishes gender-inclusive language guides.¹⁰¹

Generally, cisgender women who give birth raise their children in their female gender, interact with their children (as they interact with the rest of society) as female, identify with their female-associated role of “mother” and use names that are variations of their legal “mother” designation, such as “mom,” “mama,” “mommy,” or “mum” in English. Contrast this experience with trans men who give birth: They generally raise their children in their male gender and interact with their children (as they interact with the rest of society) as male, but their legal “mother” designation does not match their male-associated role of “father” or names they likely use such as “dad,” “papa,” or “daddy.”¹⁰² Therefore, for cisgender women who give birth to their own children, the legal and social meanings of “mother” are uniform and are both aspects of their parental identity, whereas for trans men who give birth, the legal and social meanings of “mother” are not uniform and are not both part of their parental identity.¹⁰³

In the United Kingdom, assigning a gendered term to people who are not of that gender creates an exception to the Gender Recognition Act of

99. See Pfeffer, *supra* note 35.

100. See *LGBTIQ Inclusive Language Guide*, GOVERNMENT OF VICTORIA, <https://www.vic.gov.au/sites/default/files/2019-06/LBGTIQ-Inclusive-Language-Guide.pdf>.

101. *Guidelines for gender-inclusive language in English*, UNITED NATIONS, <https://www.un.org/en/gender-inclusive-language/guidelines.shtml>.

102. See Dunne, *supra* note 47.

103. *Id.* According to European Court of Human Rights case law, the “social reality” for families with trans men birth parents is based on the birth parent’s male identity. *Kroon and Others v. Netherlands*, App. No. 00018535/91, Eur. Ct. H.R. (1994).

2004, which says that the person's gender becomes "the acquired gender" for all purposes; therefore, the use of a gendered term that conflicts with one's gender identity on a legal document presents a concerning conflict between gender recognition laws and birth laws.¹⁰⁴ As Freddy McConnell, the plaintiff in *TT*,¹⁰⁵ says, "[t]he identities of trans people get invalidated as soon as they become parents," as requiring the state to recognize trans male birth parents as "mothers" effectively creates an exception to their gender recognition and requires British transgender people to knowingly forego their gender identity if they want to become birth parents.¹⁰⁶

Trans men who are socially "fathers" but legally "mothers" not only experience a mismatch as a result of giving birth but also may experience a mismatch within their own families. For example, if a trans man has two children, A and B, and is the gestational parent for A but not for B, he would be legally designated as the "mother" to A but the "father" to B. Meanwhile he may likely assume the social role of "father" to both A and B. This confusing outcome undermines the argument of those opposing trans reproductive rights, who say that designating the birth parent as the "mother" is required for legal certainty and for family law systems to function efficiently and coherently. A gender-neutral designation as "parent," on the other hand, would respect parents' gender identity and would be consistent within families that experience multiple types of birth situations among different parents, whether trans or cisgender.

B. Negating the Need to Strike a Balance Between the Parent's Individual Right to Privacy and the Child's Right to Know About Their Biological Identity

Adopting gender-inclusive language to legally designate birth parents would achieve both the parent's right to privacy and the child's right to know about their biological identity. The court need not strike a balance between the two rights; they would both be fully and equally addressed in a gender-inclusive legal parenthood scheme. Although a child's right to know about their biological identity is not fully established in some juris-

104. See Dunne, *supra* note 47. Additionally, under the Danish Children's Act, which requires that the individual giving birth be designated as the child's "mother," the "only institution that does not respect and acknowledge the gender of these male birth parents is the law." *Id.* at 569.

105. Sir Andrew McFarlane, the judge in *TT*, noted that Freddy did not disclose that he was undergoing fertility treatment to the Gender Recognition (GR) Panel. Concerned about fraud, Sir McFarlane wrote in the opinion that he "enquired whether there was to be any challenge to the validity of the GR certificate in the light of the close chronological alignment of the GR certificate application with the Claimant's IUI treatment." He referred to this as a "potentially striking aspect of the factual background." *TT* ¶¶ 44–45.

106. Patrick Strudwick, *A High Court Judge Has Ruled That "Mother" No Longer Means "Woman"*, BUZZFEED NEWS (Sept. 25, 2019), <https://www.buzzfeed.com/patrickstrudwick/mother-no-longer-means-woman-judge-rules>.

dictions,¹⁰⁷ Article Seven of the United Nations Convention on the Rights of the Child, ratified by most countries in the early 1990s, guarantees children “the right to know” their parents.¹⁰⁸

However, if the child’s right to know about their biological identity is justification for requiring a trans man birth parent to be listed as the “mother” on their child’s birth certificate, how can courts also justify their holdings that surrogates and egg donors need not be listed as the “mother” on relevant birth certificates produced after births that they helped conceive?¹⁰⁹ Why would a court determine that children have the right to know who gave birth to them when the birth giver is a trans man, but not when the birth giver is a surrogate?¹¹⁰

One could postulate that this discrepancy could be evidence of a pretextual argument, since anti-trans bias is prevalent within the legal system, and children born to trans male parents are probably more likely to know about the conditions of their birth than those born from surrogates.¹¹¹ Trans male birth parents have a familial relationship and legal guardianship with their children, so they are likely able to simply explain biological and/or medical information to their children, whereas these relationships are far less likely to exist with surrogates or egg donors; notably, however, concerns about children’s access to biological and/or medical information arise with the former group and not the latter.

C. *Treating Families Equally Under the Law*

In some circumstances, governments have legally designated parents as “parent” rather than “mother” or “father” in circumstances in which the parent has utilized assisted reproductive technology, and so applying the term to trans parents would afford them equal treatment under the law.

Sir Andrew McFarlane, the judge in the *TT* case, held that requiring Freddy to register as his child’s “mother” was imperative in order to maintain a “coherent and certain” scheme of birth registration. However, in the United Kingdom, parental orders and adoption certificates, which transfer parenthood in cases of surrogacy and adoption, respectively, use the term “parent” rather than “mother” or “father.” Consequently, “a child can

107. For more information on the original and historical development on the right to privacy in the United States and Germany and how it relates to assisted reproductive technologies, see Andreas S. Voss, *The Right to Privacy & Assisted Reproductive Technologies: A Comparative Study of the Law of Germany and the U.S.*, 21 N.Y.L. SCH. J. INT’L & COMP. L. 229 (2002).

108. Convention on the Rights of the Child, G.A. Res. 42/25, U.N. Doc. E/CN.4/RES/1990/74 (Nov. 20, 1989).

109. See, e.g., *In re Baby M*, 537 A.2d 1227 (N.J. 1988). But see *A.G.R. v. D.R.H.*, No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250 (Super. Ct. Ch. Div. Dec. 23, 2009).

110. Compare *The Queen* (on the application of *TT*) v. Registrar General for England and Wales [2019] EWHC 2384 (Fam) (Eng.) with *H v. S* (Surrogacy Agreement) [2015] EWFC 36 (Eng.).

111. See generally A. Yasmine Rassam, “Mother,” “Parent,” and Bias, 69 IND. L.J. 1165 (1994) (discussing how judges’ stereotyping, bias, and limited perspectives shape their approach to statutory interpretation).

only have a mother and father (correctly identified) by being born to a cisgender, heterosexual woman and her male partner,” which implies that “[t]he law may be seen to privilege a certain portrayal of ‘family’ life.”¹¹² It is irrational and discriminatory to disregard the biological aspect of parentage on birth certificates in cases of adoption, surrogacy, or fertility treatment but to demand the biological aspect of parentage on birth certificates where the parents are trans.

As Human Rights Watch recently argued in a submission to the European Court of Human Rights in *A.M. and Others v. Russia*, a case about parental rights of a trans parent, “[p]rotection of ‘family values’ does not justify differences in treatment based on gender identity because protection of the family cannot be premised on an understanding of ‘family values’ that values some families less than others.”¹¹³

CONCLUSION

The implications of defining legal motherhood around the world have wide impacts on trans male parents. As more trans men come out, are not sterilized, choose to retain their natal reproductive capacity, gain access to assisted reproductive technology, and give birth, many will continue to be misgendered. Being misgendered and outed facilitates discrimination and violence, as well as infringements on the rights to family planning and travel. Jurisdictions committed to equality must adjust their legal documentation requirements so as to not require non-female parents to be designated as mothers. So, how should jurisdictions legally define motherhood?

One practical answer is that adopting gender-inclusive terminology on all legal documents, including birth certificates, would likely render this question obsolete. This is the approach that Canada and Sweden have taken.¹¹⁴ Another practical answer is that the state could issue birth certificates that allow parents to choose their parental designation—mother, father, or parent—on their child’s birth certificate. This is what California has done in the United States since 2016.¹¹⁵ An overhaul of birth certificate and registration regimes is needed in many jurisdictions anyway, since many children are not registered with their governments in the first place; according to UNICEF, the births of around one-quarter of children under the age of five worldwide have never been recorded.¹¹⁶ For states in need of

112. Smith, *supra* note 79.

113. Transgender Europe and ILGA-Europe, Written Comments Submitted Jointly to the European Court of Human Rights in *A.M. and Others v. Russia*, App. No. 47720/19, Eur. Ct. H.R. (2020).

114. Sarah Green, *Does the legal definition of a “mother” suit modern society?*, LEXOLOGY (Oct. 3, 2019), <https://www.lexology.com/library/detail.aspx?g=1452c4d8-b920-462c-8a40-27627a6273f7>.

115. Megan Brodie Maier, *Parental Gender Designations on Children’s Birth Certificates: The Need for a Modifiable Form*, 8 DEPAUL J. WOMEN, GENDER & L. 16 (2019).

116. Leah Selim, *What is birth registration and why does it matter?*, UNICEF (Dec. 10, 2019), <https://www.unicef.org/stories/what-birth-registration-and-why-does-it-matter>.

massive registration reform in order to account for unregistered births and those that simply need a change of parental designation, the “mother” label should not be required on birth certificates. Either route—utilizing standard gender-inclusive terminology or allowing all parents to choose their designation—would respect trans parents’ rights to privacy and family planning and would align with the human rights approach to defining motherhood in surrogacy cases. For trans parents, having their gender appropriately marked—or more simply, not having to deal with being misgendered—on their child’s birth certificate is a matter of basic dignity, respect, privacy, and human rights, as well as safety for their child.¹¹⁷ As Freddy McConnell aptly answered in a recent interview:

“But why was it so important? Why consider suing the government to ensure you are recognized as the parent or father?”

‘Because that is who I am,’ he says, ‘and that is our reality. On the basic, primal level, that feels true and important. If birth certificates weren’t important, then their status wouldn’t be enshrined in law.’¹¹⁸

117. See Pearce, *supra* note 82.

118. See Strudwick, *supra* note 106.

