

Who and What Is a Mother? Maternity, Responsibility and Liberty

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*Motherhood is no longer a clear-cut concept. Is it a mere biological fact, or does it require a volitional component? This question is answered differently throughout Europe. The French regime of *accouchement sous X* is more oriented towards the second option. Conversely, the English system identifies parturition as the exclusive determinant for defining legal motherhood.*

This debate has an impact on the resolution of another issue, namely whether an individual, preeminently a child, has a right to know about his/her origins. The recognition of an absolute right of a woman to give birth anonymously evidently contravenes France's obligation to protect the right to know one's origins, as enshrined in the UNCRC as well as in the ECHR. Furthermore, despite its laudable purpose, the French regime has proved unable to prevent tragic events, such as infanticide, abandonment and abortion.

*But does English law offer a solution that is more respectful of children's rights? To all appearances, it does, but not substantially. The denial of *accouchement sous X* should not be viewed as enhancing the overall protection of children's rights in England. By providing abortion on demand, a woman's right to renounce maternity is fully protected and, therefore, the legalization of anonymous birth would be superfluous.*

In light of the complexity of the issue whether a child has the right to know his/her origins, categorical positions are not appropriate, since they implicitly postulate hierarchies of rights. To the contrary, the acknowledgement of the competing rights as equally fundamental makes it possible to achieve a fair equilibrium between the interests of

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all parties involved. In this balancing exercise, the reconceptualization of identity as child-centered has the potential to overcome the culturally-constructed dichotomy of biological connections/social bonds and, therefore, to realize the best interests of every child.

INTRODUCTION

Who and what is a mother? What was once a straightforward question, barely deserving of an answer, is now fraught with difficulties. This Article is part of an ongoing project to examine every angle of this puzzle. It focuses on just one question, a particularly interesting one because different European legal systems approach it so differently: Can a woman, who is uncontroversially the gestational mother, renounce her maternity? Some legal systems allow this, and so the related question is whether it is right that they should be allowed to do so. Should those legal systems which do not currently allow this adopt a model which allows a woman who gives birth to deny she is the mother of the child? There is a body of opinion, ably led by Katherine O'Donovan,¹ which thinks this is the way forward.

The debate roughly coincides with another one, namely whether a child has the right to know his/her identity, and therefore his/her biological origins.² There is a clear conflict between these two putative rights. Which is to prevail: the woman's right to give birth anonymously or the child's right to knowledge

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- 1 Katherine O'Donovan, *Constructions of Maternity and Motherhood in Stories of Lost Children*, in *FEMINIST PERSPECTIVES ON CHILD LAW* 67 (Jo Bridgeman & Daniel Monk eds., 2000); Katherine O'Donovan, *Enfants Trouvés, Anonymous Mother's Children's Identity Rights*, in *HUMAN RIGHTS AND LEGAL HISTORY* 66 (Katherine O'Donovan & Gerry R. Rubin eds., 2000); Katherine O'Donovan, "Real" Mothers for Abandoned Children, 36 *LAW & SOC'Y REV.* 347 (2002) [hereinafter O'Donovan, "Real" Mothers]; Katherine O'Donovan & Jill Marshall, *After Birth: Decisions About Becoming a Mother*, in *FEMINIST PERSPECTIVES ON FAMILY LAW* 101 (Alison Diduck & Kathrine O'Donovan eds., 2006); see also Jill Marshall, *Giving Birth But Refusing Motherhood: Inauthentic Choice or Self-Determining Identity?*, 4 *INT'L J.L. CONTEXT* 169 (2008).
 - 2 See, e.g., Michael Freeman, *The New Birth Right? Identity and the Child of the Reproduction Revolution*, 4 *INT'L J. CHILD. RTS.* 273 (1996); see also Samantha Besson, *Enforcing the Child's Right to Know Their Own Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21 *INT'L J.L. POL'Y & FAM.* 137 (2007).

about his/her mother? The debate has resonances with abortion debates.³ These are not our concern here.

I. ACCOUCHEMENT SOUS X

Anonymous birth is principally associated with the French institution of *accouchement sous X*.⁴ In France, women have the choice to give birth anonymously and thus not become legal mothers. This right is protected by the Civil Code.⁵ It has existed since the French Revolution, but was only legally recognized in 1941 by a decree of the Vichy government.⁶ The mother has the right to ask that her admittance to hospital and her delivery of a child remain secret. The woman who gives birth is recorded on the birth certificate as X.

There are similar regimes in Italy⁷ and Luxembourg. Though both relate maternity to recognition, there are laws in both of these countries which allow a child, who was born anonymously, to institute an action to establish a legal tie with his/her mother. In both countries birth records are kept secret, but

3 See RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993); ROSALIND HURSTHOUSE, *BEGINNING LIVES* (1987); CHRISTOPHER KACZOR, *THE ETHICS OF ABORTION: WOMEN'S RIGHTS, HUMAN LIFE, AND THE QUESTION OF JUSTICE* (2011) (currently offering the best defence of the pro-life case); *ABORTION* (Belinda Bennett ed., 2004) (offering some key texts).

4 The child cannot establish any legal tie with the mother even if her identity is discovered, see Jacqueline Rubellin-Devichi, *Droits de la mère et Droits de l'enfant: Réflexions sur les formes de l'abandon*, 90 REV. TRIM. DR. CIV. 695 (1991) (Fr.).

5 CODE CIVIL [C. CIV.] art. 341-1 (Fr.) ("At the time of her delivery a mother may demand that the secret of her admission and of her identity be preserved") (translated from the French by the authors).

6 Legislative Decree, 2 September 1941; Nadine Lefaucheur, *The French "Tradition" of Anonymous Birth: The Lines of Argument*, 18 INT'L J.L. POL'Y & FAM. 319, 320-27 (2004).

7 See Law n. 184, 4 May 1983 (discussed in Joelle Long, *La Corte Europea dei Diritti dell'uomo, il parto anonimo e l'accesso alle informazioni sulle proprie origini: il caso Odièvre c. Francia*, in LA NUOVA GIURISPRUDENZA CIVILE COMMENTATA 298 (2004) (It.)); see also Giovanni Cattaneo, *Convenzioni Europee e Legge Interne in Tema di Adozione dei minori e di Trattamento dei figli naturali*, 1 RIVISTA DI DIRITTO CIVILE 319 (1981) (It.) (claiming that establishment of legal maternity against the woman's will would slur the adoption process to the detriment of the child's welfare); Joelle Long, *The Impact of the UNCRC on the Italian Legal System*, 17 INT'L J. CHILD. RTS. 155 (2009).

the childbirth and the mother's identity are recorded. However, the actual implications of this provision — at least the Italian one — must not be overestimated, because the action to establish a legal bond with the mother can only be instituted when a child born anonymously is not adopted, and this will be the exceptional case, as most such children are adopted.⁸

Other legal systems have considered introducing the system of anonymous birth. In Germany, there were three initiatives between 2000 and 2002.⁹ All three attempts would have decriminalized anonymous birth by amending the Civil Registry Act.¹⁰ The fact that proposed changes to the law failed has not stopped the development of a number of “*Babyklappen*” (“baby hatches” where unwanted babies may be dropped off at hospitals) since 2000.¹¹ One must read this as toleration of the practice of anonymous birth outside the legal system.¹² In Austria, baby hatches have been instituted by the state social welfare agency and are run by hospitals.¹³ The preservation of anonymity is protected by a clause which provides that the birth-giver is not obligated to disclose her identity if she can demonstrate that she is in a state of distress such that disclosure would put her own health at risk as well as that of the baby.

The common law world — we use England as an example — does not relate maternity to recognition, but simply says that giving birth implies motherhood.¹⁴ Indeed, policies dictate that becoming pregnant does so also; women are treated as mothers throughout pregnancy. Biology rules — at least here (we are ignoring, or rather reserving for a later paper, cases where the gestational mother is not the genetic mother, but the law, rejecting the biological imperative in favor of certitude, accords maternity to the gestator).¹⁵

8 On access to adoption records, see Geraldine Van Bueren, *Children's Access to Adoption Records — State Discretion or an Enforceable International Right?*, 58 MOD. L. REV. 37 (1995).

9 See Barbara Willenbacher, *Legal Transfer of French Traditions? German and Austrian Initiatives to Introduce Anonymous Birth*, 18 INT'L J.L. POL'Y & FAM. 343, 345 (2004).

10 See Kirsten Scheiwe, *Giving Birth Anonymously — A Suitable Export from France to Germany?*, INT'L FAM. L.J. 146 (2003).

11 See Willenbacher, *supra* note 9, at 344.

12 See O'Donovan, “*Real*” Mothers, *supra* note 1, at 372.

13 See Willenbacher, *supra* note 9, at 344.

14 Lord Simon of Glaisdale stated that “[m]otherhood, although also a legal relationship, is based on a fact, being proved demonstrably by parturition,” The Ampthill Peerage Case [1977] A.C. 547, 577 (Eng.); see also Lord Scott's observation that “mothers are special,” Re G (Children), [2006] 2 FLR 629, 631 (H.L.); MICHAEL FREEMAN, UNDERSTANDING FAMILY LAW 164-66 (2007).

15 Human Fertilisation and Embryology Act, 2008, c. 22, § 33(1) (Eng.) (replacing

In England, a woman who gives birth cannot refuse legal motherhood. She is not allowed to oppose the registration of her name on the birth certificate.¹⁶ Nor can she, legally, abandon her baby. Of course, some babies are abandoned;¹⁷ that it attracts media attention suggests it is very uncommon today. In England the only avenue open to a pregnant woman who does not wish to become a mother is to terminate her pregnancy. However, it is unlawful for her to do this by herself,¹⁸ and she has no right to an abortion. What rights there are inhere in the medical profession.¹⁹ But in practice there is abortion on demand.

The Belgian model should also be addressed briefly. It neither allows anonymous birth, nor totally rejects it. Belgian legislation recognizes a right to give birth “discreetly.”²⁰ Apparently, this is the result of an appreciation that Belgian women were simply having their babies in France in order to take advantage of *accouchement sous X*. (There is no suggestion of this in the case of English women, which may be surprising, given the ways that other forms of “procreative tourism” have taken off). As a result of cross-border

the Human Fertilisation and Embryology Act, 1990, c. 37, § 27(1) (Eng.), which was in identical language).

16 Births and Deaths Registration Act, 1953, 1 & 2 Eliz. 2, c. 20 (Eng.).

17 Fewer than was the case in the past, see PATRICIA CRANFORD, *PARENTS OF POOR CHILDREN IN ENGLAND 1580-1800*, at 46-47, 59-61 (2010). It is usually said that girls were abandoned more readily than boys, but Valerie Fildes’s study of foundlings in London from the 1560s to the 1790s found that the only fifty year period in which the percentage of girls exceeded that of boys was the second half of the seventeenth century, and then not by much, Valerie Fildes, *Maternal Feelings: Child Abandonment and Neglect in London and Westminster 1550-1800*, in *WOMEN AS MOTHERS IN PRE-INDUSTRIAL ENGLAND 150* (Valerie Fildes ed., 1990). On the subject of abandonment and its difference from separation, as well as insights from literature, see Carol Sanger, *Mother from Child: Perspectives in Separation and Abandonment*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATIONS OF MOTHERHOOD 27*, 37-42 (Martha Fineman & Isabel Karpin eds., 1995).

18 Offences Against the Person Act, 1861, 24 & 25 Vict., c.100, §§ 58-59 (Eng.).

19 Abortion Act, 1967, § 1(1) (Eng.). Doctors may conscientiously object to an involvement in the termination of a pregnancy, see *id.* § 4.

20 The mother has two months after childbirth to decide whether she wishes to preserve anonymity or not; the child has the chance to request access to his or her birth records later in time, and if the mother still does not allow the removal of anonymity, the child has the right to appeal and a mediator is responsible for clarifying the interest of the child to know his or her origins to the mother. See *Le Droit de Savoir d’on Je Viens: Problematique de l’accouchement sous X*, INSTITUT EUROPÉEN DE BIOÉTHIQUE (Aug. 1, 2007), <http://www.ieb-eib.org/fr/document/accouchement-sous-x-30.html>.

births, the Belgian Consultative Committee on Bioethics has encouraged the institutionalization of *accouchement dans la discretion*.²¹ But this is to contain arrangements to facilitate the child's access to genetic information.

Space precludes consideration in this Article of all these systems and models. We therefore propose to concentrate on the French concept of *accouchement sous X*, employing the English legal system by way of comparison.

II. JUSTIFYING AND OBJECTING TO ANONYMOUS BIRTH

A. The Traditional Argument

The traditional argument is that *accouchement sous X* reflects the "French tradition of secrecy,"²² and is instituted to forestall the occurrence of such tragic events as infanticide, abandonment of newborn babies, abortion and unsupervised delivery of babies. If anonymity is allowed, women are encouraged to give birth and abandon the child in the hospital rather than choose to abort, brutally abandon or even kill the newborn. In addition, French family law is rooted in the idea of spontaneous parental acceptance: Parenting is a choice and thus a woman who gives birth cannot be obliged to perform parental functions against her will. French law has never granted children the means of establishing connections to their biological parents. This explains the existence of a step between maternity and motherhood within French legal reasoning, as well as the right of the birth-giver to choose whether to become the mother of the newborn baby.²³

But if this represents French legal culture, it is at odds with France's obligation to protect the right to know one's origins.²⁴ This is found in international human rights instruments, including the U.N. Convention on the Rights of the Child (UNCRC²⁵) and the European Convention on Human

21 In order to oppose cross-border births, the Committee has supported legislative initiatives aimed at legitimating anonymous birth, *see id.*

22 Lefaucheur, *supra* note 6, at 328.

23 4 juillet 2001 Loi n° 2001-588 relative à l'Interruption Volontaire de Grossesse et à la contraception [Law 2001-588 of July 4, 2001 related to the Voluntary Termination of Pregnancy and Contraception] confers a right to abortion for twelve weeks.

24 On this right see Lefaucheur, *supra* note 6.

25 United Nations Convention on the Rights of the Child (UNCRC), Nov. 20, 1989, 1577 U.N.T.S. 3, arts. 7, 8 [hereinafter UNCRC]; *see also* JANE FORTIN, CHILDREN'S RIGHTS AND THE DEVELOPING LAW (2009).

Rights (ECHR).²⁶ (We will come to the *Odièvre* case²⁷ presently; it was in our opinion wrongly decided).

The UNCRC of 1989 has been ratified by all nations save Somalia and the United States.²⁸ It is the first human rights instrument that expressly establishes a right to an identity.²⁹ George Stewart points to four different facets of identity which Articles 7 and 8 of this Convention protect: familial, tribal, biological and political.³⁰ “Tribal” and “political” identity are not central to our subject, and so we leave them aside. The right to family identity is more significant. It includes not only the right to be with one’s family, but also the “right to know one’s true identity.”³¹ Thus, an obligation is imposed on states to grant access to information in cases of adoption or other removal from the family of origin. The increasing use of techniques of medically assisted reproduction has made it imperative that we think constructively about the need to expand Article 8 to include a right to biological identity.³² As Stewart describes this, it is about the right to know one’s ancestral background, including medical and genetic information about oneself and one’s biological parentage, the

26 European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S 221, art. 8 [hereinafter ECHR].

27 *Odièvre v. France*, Eur. Ct. H.R., 1 FCR 621 (2003); see also Therese Callus, *Tempered Hope? A Qualified Right to Know One’s Genetic Origins*, 67 MOD. L. REV. 658 (2004).

28 Somalia, because it lacks a government; the United States, for a number of reasons elaborated in Linda McLain, *Child, Family, State and Gender Equality in Religious Stances and Human Rights Instruments: A Preliminary Comparison*, in WHAT IS RIGHT FOR CHILDREN? 19 (Martha Fineman & Karen Worthington eds., 2009); Barbara Bennet Woodhouse & Kathryn A. Johnson, *The United Nations Convention on the Rights of the Child: Empowering Parents to Protect Their Children’s Rights*, in WHAT IS RIGHT FOR CHILDREN?, *supra*, at 7; see also Marsha Garrison, *Why Has the United States Failed to Ratify the U.N. Convention on the Rights of the Child?*, in MARGINALIZED IDENTITIES IN THE DISCOURSE OF JUSTICE: REFLECTIONS ON CHILDREN’S RIGHTS 55 (Giuseppina Cortese ed., 2011).

29 See UNCRC, *supra* note 25, arts. 7, 8 (the right to birth registration and the right to preservation of identity); see also JAAP DOEK, A COMMENTARY ON THE UN CONVENTION ON THE RIGHTS OF THE CHILD 5 (2006) (claiming that Article 8 is “unique” in international human rights provisions).

30 George A. Stewart, *Interpreting the Child’s Right to Identity in the UN Convention on the Rights of The Child*, 26 FAM. L.Q. 221 (1992).

31 *Id.* at 227.

32 See MICHAEL FREEMAN, THE MORAL STATUS OF CHILDREN: ESSAYS ON THE RIGHTS OF THE CHILD ch. 10 (1997).

circumstances of one's conception, time and place of birth, and records of other events meaningful to the individual (such as when baptized and by whom).³³

The French legal system has responded to this. In 2002 legislation was passed — the *Loi Royal* — under which, when a woman demands at the time of the delivery of her baby that her admittance and delivery be kept secret, she must be informed of the importance for every individual to know his/her own origins and must be invited to leave information concerning her health and that of the father, the origins of the child, and the circumstances of birth, as well as her identity, in a sealed envelope.³⁴ However, these responsibilities are voluntary, and there is no sanction for refusing to accept them. Despite this welcome reform, the right of *accouchement sous X* remains entrenched in the *Code Civil*.³⁵ Blandine Mallet-Bricout, asking what *équilibre* there was between the rights of the child and of the biological mother, replied that the “hierarchy” between the woman's right to give birth anonymously and the child's right to know his/her identity was maintained in the new law.³⁶ The ball remains in her court.

The U.N. Committee on the Rights of the Child recently (in June 2009) condemned France's failure to comply with Articles 7 and 8 of the UNCRC in continuing the system of *accouchement sous X*.³⁷ It recommended that France take all appropriate measures to enforce fully the child's right to know his/her biological parents, having regard to the Convention and principles of non-discrimination (Article 2) and the best interests of the child (Article 3).³⁸

It is also questionable how compatible *accouchement sous X* is with Article 8 of the ECHR.³⁹ The latter does not, of course, provide explicitly for a right

33 Stewart, *supra* note 30, at 226.

34 See Loi 2002-92 du 22 janvier 2002 relative à l'accès aux origines des personnes adoptées et pupilles de l'État [Law 2002-92 of January 22, 2002 related to the access to origins of adopted persons and children in care].

35 CODE CIVIL [C. CIV.] art. 341-1 (Fr.).

36 Blandine Mallet-Bricout, *Réforme de l'accouchement sous X: quel équilibre entre les droits de l'enfant et les droits de la mère biologique?*, I 119 LA SEMAINE JURIDIQUE EDITION GÉNÉRALE 485 (2002) (Fr.).

37 U.N. Committee on the Rights of The Child, Concluding Observations on France para. 43, U.N. doc. CRC/C/FRA/CO/ (June 22, 2009).

38 *Id.* para. 44.

39 ECHR, *supra* note 26, art. 8, Right to Respect for Private and Family Life, states that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or

to know one's origins, but it has been substantially developed through the jurisprudence of the European Court of Human Rights to protect a right to personal identity.⁴⁰ In *Gaskin v. U.K.*,⁴¹ the court recognized that children have a "vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development."⁴² David Feldman sees the judgment in *Gaskin* as establishing a "right not to be deprived of one's personal history,"⁴³ and this, he says, might eventually lead to the development of a right to an identity.

The scope of Article 8 has been expanded by the Court's decision in *Mikulić v. Croatia*.⁴⁴ According to Jill Marshall, some of the language used by the Strasbourg Court appears to create a right to "self-realisation and authenticity."⁴⁵ In *Mikulić*, Article 8 was interpreted as including the right of a child to establish a legal relationship with a biological father through DNA testing.⁴⁶

The issue of the scope of Article 8 arose also in *Odièvre v. France*,⁴⁷ which was a challenge to the *accouchement sous X* law in France. The Court decided by a vote of ten to seven that the legal protection of the right to give birth anonymously does not violate respect for private life. A majority of the judges held that the French legislator had attempted to strike a fair balance among the various interests at stake without exceeding the margin of appreciation.⁴⁸

the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

40 See *Bensaid v. United Kingdom*, 2000-I Eur. Ct. H.R., para. 47 (stating that the "right to identity and personal development" is protected by Article 8 of the ECHR, *supra* note 26); *Odièvre v. France*, 2003-I Eur. Ct. H.R. 621 (establishing that "birth and the circumstances in which a child is born" is a part of a child's private life); *Pretty v. United Kingdom*, 2346/02 Eur. Ct. H.R. 423 (the right to an identity is an essential condition of "the right to autonomy"); see also Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968) (arguing that "control over knowledge about oneself" is inherent in the right to privacy).

41 *Gaskin v. U.K.*, 12 Eur. Ct. H.R. 36 (1989).

42 *Id.* para. 49.

43 David Feldman, *The Developing Scope of Article 8 of the European Convention on Human Rights*, 3 EUR. HUM. RTS. L. REV. 265, 269 (1997).

44 *Mikulić v. Croatia*, 2002-I Eur. Ct. H.R. 720.

45 Jill Marshall, *A Right to Personal Autonomy at the European Court of Human Rights*, 3 EUR. HUMAN RTS. L. REV. 337, 350 (2008).

46 See also *Rozanski v. Poland*, Eur. Ct. H.R., 2 FCR 178 (2006).

47 *Odièvre v. France*, 2003-I Eur. Ct. H.R. 621.

48 *Id.* para. 49. The margin of appreciation is a doctrine developed by the European Court of Human Rights, which allows the same Court to take into consideration that the Convention will be interpreted differently in different member states.

But the dissenting judges were of the opinion that the French law gives the mother a right that interferes not only with the child's right to know his/her origins, but also with the interests of third parties, in particular those of the biological father and the siblings.⁴⁹ Eventually, the Court affirmed that the right to respect for private life includes the right to personal development and to self-fulfillment. It noted:

Matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining the information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents . . . Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's private life guaranteed by Article 8 of the Convention.⁵⁰

Consonant with this, the dissenting judges offered this clarification: "Being given access to information about one's origins and thereby acquiring the ability to retrieve one's personal history is a question of liberty and, therefore, human dignity that lies at the heart of the rights guaranteed by the convention."⁵¹

Odièvre v. France also referred to the tragic events, which the institution of *accouchement sous X* seeks to prevent, namely infanticide, willful abandonment of babies, abortion and unsupervised pregnancy and birth. This was one of the major arguments adduced by France in the *Odièvre* challenge. The French state argued that the interference in the private life of children born *sous X* pursues a legitimate aim, namely to assist women in distress who lack the necessary resources to bring up their child. In France's view, the option of confidentiality is essential to protect the health of both the mother and the child, since it encourages women to give birth in a safe medical environment.⁵² A majority of the judges agreed: Anonymous births, as they saw it, protect not just an important private interest, but also a fundamental public interest, the respect for life.

However, statistical evidence does not support the view that *accouchement sous X* prevents the aforementioned tragic events. A comparison may be made between France and European states which have not legalized anonymous birth. We can, of course, only use official statistics, but there is no reason to believe they are grossly inaccurate. It is suggested that one fetus is aborted every eleven seconds in the original fifteen member states of the European

49 *Id.* Dissenting Opinion para. 7.

50 *Id.* para. 29.

51 *Id.* Dissenting Opinion para. 3.

52 *Id.* para. 45.

Union.⁵³ The highest abortion rates are in the United Kingdom, France, Italy, Spain (and also Romania, a legacy no doubt of the Ceaucescu era). Abortions are increasing in Spain since changes were made in Spanish abortion law, and decreasing in the United Kingdom and Italy (and mercifully in Romania). Abortion rates are not falling in France.⁵⁴ France is second only to the United Kingdom in the number of terminations currently carried out each year.⁵⁵

The German experience with *Babyklappen* is also worth citing: The number of babies being abandoned has not decreased since these were introduced.⁵⁶ Of course, much of this may be attributed to the failure of the systems — *accouchement sous X* and *Babyklappen* — to reach really desperate women. They may be very young, badly educated, and poor; we simply do not know — the evidence is not there. Back in 1993, Catherine Bonnet argued that *accouchement sous X* was determined by economic hardship.⁵⁷ In a study conducted between 1987 and 1989, she discovered the psychodynamics behind the choice of the mother to preserve her anonymity: the denial of pregnancy and fantasies of violence towards the fetus. Even though their bodies' shape changes and their menstruation ceases, many women are unable rationally to connect these physical alterations with having conceived a child. Through a mechanism of psychic protection, all these ordinary symptoms of pregnancy are attributed to unrelated events, for instance bulimia or menstrual delays due to recent changes of living conditions.⁵⁸ Consequently, the discovery of pregnancy occurs only in circumstances where the mechanism of denial has lost its initial efficacy. According to Bonnet, the actual reality is often discovered during the fifth month, or even as late as the last month of pregnancy.⁵⁹ In extreme cases, the mechanism of denial is so efficient that women do not even realize that labor has started and become aware of their pregnancy only when the baby emerges from their bodies.⁶⁰ In these cases, the sudden discovery of the newborn provokes psychological distress and panic and might lead to the killing of the baby.⁶¹ In other cases, women do

53 See INSTITUTE FOR FAMILY POLICIES, BIRTH IN EUROPE AND IN SPAIN: ANNUAL REPORT (2010).

54 *Id.*

55 *Id.*

56 See Adéla Flidrová, *Anonymous Child Birth?*, 5 COMMON L. REV., http://review.society.cz/index.php?Itemid=2&id=77&option=com_content&task=view.

57 Catherine Bonnet, *Adoption at Birth: Prevention Against Abandonment or Neonaticide*, 17 CHILD ABUSE & NEGLECT 501, 505 (1993).

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

not recognize the newborn even as an infant.⁶² The lack of recognition is likely to induce the death of the baby due to the absence of first aid and total neglect.⁶³ Bonnet's research clearly demonstrates that the difficulty of coping with the idea of being pregnant and the impossibility of benefiting from legal abortion may lead to tragic events.

B. The Feminist Argument

A second argument used to support *accouchement sous X* is the feminist one.⁶⁴ There are feminists who see anonymous birth as an extension of a woman's right to abortion.⁶⁵ Bonnet considers the right to anonymous birthing as a fundamental freedom.⁶⁶ She sees it as connected to privacy and to a right to renounce forever the motherhood of a particular child. On this view, if it is too late to terminate a pregnancy, women should still be able to exercise autonomy by consenting to secret childbirth. Thus, *accouchement sous X* is seen as a backstop to abortion, and it then performs similar functions to abortion. Just as abortion enables a woman to refuse to become a mother, so, on this argument, does the institution of anonymous birth.

But does the analogy hold? Whatever one's views about the status of a fetus,⁶⁷ *accouchement sous X* is about babies, not fetuses. Fetuses may only be human "becomings"; babies are human "beings."⁶⁸ (We do not intend to debate here the arguments of Tooley,⁶⁹ Singer,⁷⁰ etc. which deny personhood

62 *Id.*

63 *Id.*

64 *See, e.g.,* CATHERINE BONNET, *GESTE D'AMOUR: L'ACCOUCHEMENT SOUS X* (1991) (Fr.). *But see* IRÈNE THÉRY, *COUPLE, FILIATION ET PARENTE AUJOURD'HUI* (1998) (Fr.) (concerned that *accouchement sous X* prevents the child from establishing filiation links with the father and thus undermines children's rights).

65 *See* Reva Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATIONS OF MOTHERHOOD*, *supra* note 17, at 43.

66 Bonnet, *supra* note 57.

67 A fetus has no rights in the European Court of Human Rights, *see Vo v. France*, 2004-II Eur. Ct. H.R. 577 (discussed in J. Kenyon Mason, *What's in a Name? The Vagaries of Vo v. France*, 17 *CHILD & FAM. L.Q.* 97 (2005)). For a different view, see CHRISTOPHER KACZOR, *THE ETHICS OF ABORTION: WOMEN'S RIGHTS, HUMAN LIFE, AND THE QUESTION OF JUSTICE* (2011).

68 *See* Michael Freeman, *The Human Rights of Children*, 63 *CURRENT LEGAL PROBS.* 1 (2010).

69 MICHAEL TOOLEY, *ABORTION AND INFANTICIDE* (1983).

70 PETER SINGER, *WRITINGS ON AN ETHICAL LIFE* (2000).

to babies, and even justify infanticide.) Babies are unquestionably human beings with all that this entails.⁷¹ Thus, it is inarguably clear that the UNCRC applies to a baby at birth,⁷² and that is as it should be. This is not the place to debate whether the convention got it right in limiting the concept of “child” to the event of birth.⁷³ But, interestingly, others are beginning to question this limitation as well.⁷⁴

If one accepts that the fetus becomes a legally recognized being by virtue of birth, there is no obvious reason why maternal rights should prevail. Indeed, the contrary applies. At the heart of the issue is whether birth terminates the woman’s right to freedom of choice and control over her own body. This relates to many other questions, for example, her right to decide what should happen in the case where a termination produces a live viable child.⁷⁵ This is not an irrelevant question since this problem is likely to occur more as medical technology improves. Nor should we forget what might happen when ectogenesis (growth of a human fetus outside the body of a woman) becomes possible, even perhaps common.⁷⁶ Of course, by giving birth to a child, a woman creates an autonomous human being whose existence is no longer exclusively dependent on her. And we may, rightly, ignore the father’s contribution when the fetus is *in utero*, thus denying him a say in whether there is a termination,⁷⁷ but it is less easy to negate the interests he has once the child is born.

The conceptualization of a baby as a human being with full legal status is difficult to gainsay. But it is still possible to argue against the automatic ascendancy of the baby’s rights over the mother’s right to deny she is the

71 For evidence that even premature babies can participate in decision-making, see Priscilla Alderson, Margaret Killen & Joanna Hawthorne, *The Participation Rights of Premature Babies*, 13 INT’L J. CHILD. RTS. 31 (2005).

72 See PRISCILLA ALDERSON, *YOUNG CHILDREN’S RIGHTS* (2d ed. 2008).

73 UNCRC, *supra* note 25, art. 1; see also MICHAEL FREEMAN, ARTICLE 1 (forthcoming 2012).

74 See Marc Cornock & Heather Montgomery, *Children’s Rights in and out of the Womb*, 19 INT’L J. CHILD. RTS. 3 (2011); see also Phillip Veerman, *The Ageing of the UN Convention on the Rights of the Child*, 18 INT’L J. CHILD. RTS. 585 (2010).

75 See EMILY JACKSON, *MEDICAL LAW: TEXT, CASES AND MATERIALS* (2009).

76 See Amel Alghrani, *Regulating the Reproduction Revolution: Ectogenesis — A Regulatory Minefield*, in 11 LAW AND BIOETHICS 303 (Michael Freeman ed., 2008); see also CHRISTOPHER KACZOR, *THE ETHICS OF ABORTION: WOMEN’S RIGHTS, HUMAN LIFE, AND THE QUESTION OF JUSTICE* ch. 9 (2011).

77 As the courts have done, see *Paton v. United Kingdom*, Eur. Comm’n H.R., 3 EHRR 408 (1981).

mother. There remains a debate because there may not be a right to know one's origins, or at least an absolute right to this information. There is an inevitable tension between a woman's right to give birth anonymously and a child's right to know his/her origins.

The question of *accouchement sous X* cannot be considered without investigating the other interests that may be involved. The ECHR refers in Article 8 to "everyone." In this context, that embraces not just the mother and the child, but also those who will raise the child born *sous X* (adoptive parents, foster parents, etc.), the biological father and any siblings (who may also have been born *sous X*).⁷⁸ Nor should we overlook the fact that if a mother can deny her child knowledge of who she is, she is also preventing the child from discovering who his/her father is.

Feminists reject the legitimacy of the biological father's interests.⁷⁹ They see the protection of anonymous birth as essential to preserving equilibrium between the parental obligations of men and women. It is easy for fathers to preserve anonymity.⁸⁰ Even when they are sperm donors, many countries still allow them to donate anonymously, and there is evidence that supply decreases when this anonymity is removed.⁸¹ That was certainly the Swedish experience,⁸² and is now the English one too.⁸³ France still allows sperm donors to do so anonymously.⁸⁴ It could barely do otherwise as long as it retains the practice of *accouchement sous X*. Of course, the anonymity rule protects the interests of adults, certainly not those of the yet-to-be-born child.

Debates about the father — his rights and obligations — are often rooted in making men pay for their children's upbringing.⁸⁵ In England, child support

78 Also the interests of the state should be considered, in particular, that of ensuring the "orderly assumption of responsibility by parents from the moment of a child's birth." See Andrew Bainham, *What Is the Point of Birth Registration?*, 20 CHILD & FAM. L.Q. 449 (2008).

79 See Sally Sheldon, *From "Absent Objects of Blame" to "Fathers Who Want to Take Responsibility": Reforming Birth Registration Law*, 31 J. SOC. WELFARE & FAM. L. 373 (2009).

80 Though it will become less easy, see Welfare Reform Act, 2010 (Eng.).

81 See Ilke Turkmendag, Robert Dingwall & Therese Murphy, *The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would-Be Parents*, 22 INT'L J.L. POL'Y & FAM. 283 (2008).

82 See JANE STOLL, SWEDISH DONOR OFFSPRING AND THEIR LEGAL RIGHT TO INFORMATION 15-16 (2008).

83 See Eric Blyth & Lucy Frith, *Donor-Conceived People's Access to Genetic and Biographical History*, 23 INT'L J.L. POL'Y & FAM. 174 (2009).

84 There appears to be no pressure for change.

85 See FREEMAN, *supra* note 14, ch. 12.

has been an intractable problem for two decades or more. The government, back in 1991, said in a White Paper that “Children Come First,”⁸⁶ but John Eekelaar clearly got it right when he retorted in an article in *The Independent* that “Taxpayers Come First.”⁸⁷ The imperative to make fathers pay is economic, not child-motivated. Recently, England passed legislation to make it compulsory for both unmarried parents to register the child’s birth unless the registrar deems it impossible, impracticable or unreasonable.⁸⁸ The last government (New Labour) proposed to change the law to make it compulsory for unmarried fathers to be jointly named on the child’s birth certificate with the mother. The objective is to make unmarried fathers acknowledge their responsibilities towards their children and thus promote the welfare of children. But birth registration will not be mandatory if it is impossible (e.g., his identity is not known), impracticable (e.g., his whereabouts are not known), or unreasonable (e.g., the child was conceived by rape).⁸⁹ Whether these changes, if implemented, will increase parental responsibility of fathers is debatable, but there is a real concern that their impact on this will be negligible.⁹⁰ It is more likely to enable irresponsible men to interfere in their child’s upbringing and to harass the mother.⁹¹

C. The Anti-Biological Argument

A third argument — Nadine Lefaucheur calls it the “biologization of society”⁹² — defends anonymous birth as a way of overcoming the sociological relevance placed on consanguinity and emphasizing instead the significant role of social and emotional links.⁹³ In France this is underpinned by the French conception of citizenship based on *droit du sol* (right of the soil), rather than *droit du sang*

86 DEPARTMENT OF HEALTH AND SOCIAL SECURITY, CHILDREN COME FIRST (1990).

87 John Eekelaar, *Taxpayers Come First*, THE INDEPENDENT, NOV. 2, 1991.

88 Welfare Reform Act, 2010 (Eng.).

89 It has been overlooked that these things happen also where there are *married* fathers, see Chris Barton, *Joint Birth Registration: “Recording Responsibility” Responsibly?*, 38 FAM. L. 789 (2008).

90 Currently, eighty-four percent of children born to unmarried couples are jointly registered already, so only a minority will be affected by the legislation, DEPARTMENT FOR WORK AND PENSIONS, JOINT BIRTH REGISTRATION: PROMOTING PARENTAL RESPONSIBILITY 10 (2007), available at <http://www.official-documents.gov.uk/document/cm71/7160/7160.pdf>.

91 See Julie Wallbank, “Bodies in the Shadows”: *Joint Birth Registration, Parental Responsibility and Social Class*, 21 CHILD & FAM. Q. 267 (2009).

92 Lefaucheur, *supra* note 6, at 332.

93 *Id.*

(right of blood), so that the right to be a French citizen is not fundamentally dependent on membership in a particular ethnic or identity group.⁹⁴ Clearly, some of the Roma children being expelled from France are therefore French citizens.⁹⁵

Secondly, and oddly in the light of this treatment of the Roma, the French opposition to biology can be seen as symbolic of the rejection of the European history of racism, not least the French practices of it.⁹⁶ Thus, François Dagognet supports the recognition of the right to *accouchement sous X* on the basis that the existence of the family must not be rooted in blood connections.⁹⁷ Pierre Legendre argues that humanity should be regarded as a product of “history,” “speech” and “institutionalisation” rather than nature and biology.⁹⁸ Looked at in this way, “the right to one’s origins” is regarded as a dangerous formulation, oozing racist connotations. What are “origins”?, asks Christine Delphy.⁹⁹ In her view a child born *sous X* but adopted should not search for the woman who gave birth to him or her, but accept adoptive parents as their parents. This is a common view. For Katherine O’Donovan as well, the principal advocate of introducing *accouchement sous X* into English law, the emphasis on consanguinity is socially induced in any event.¹⁰⁰ Western culture is responsible for constructing identity on genes, and so for under-evaluating the importance of social bonds for the development of personality and identity.

But there seems to be a psychological need to know one’s biological origins to develop identity. For example, children without such knowledge

94 *Id.*

95 *Id.* at 333. Roma children are a part of the largest national minority in Europe and suffer from social exclusion throughout the continent.

96 Notable examples of French racist practices are the Dreyfus affair, see JEAN-DENIS BREDIN, *THE AFFAIR: THE CASE OF ALFRED DREYFUS* (1987); and Vichy France, see MICHAEL MARRUS ET AL., *VICHY FRANCE AND THE JEWS* (1981). There is, of course, considerable Islamophobia in France today.

97 François Dagognet, *L’institutrice et l’enfant perdu*, LIBÉRATION, Nov. 13, 1999, <http://www.liberation.fr/tribune/0101299776-l-institutrice-et-l-enfant-perdu> (quoted in Lefaucheur, *supra* note 6, at 333).

98 Lefaucheur, *supra* note 6, at 333 (quoting Pierre Legendre).

99 Christine Delphy, *Avec la crémière, je taille des bavettes*, LIBÉRATION, Mar. 8, 2001, <http://www.liberation.fr/societe/0101366477-christine-delphy-avec-la-cremiere-je-taille-des-bavettes>.

100 Katherine O’Donovan, *A Right to Know One’s Parentage?*, 2 INT’L J.L. & FAM. 27 (1988); Katherine O’Donovan, *What Shall We Tell the Children?*, in BIRTHRIGHTS: LAW AND ETHICS AT THE BEGINNINGS OF LIFE 96 (Robert Lee & Derek Morgan eds., 1989).

are said to suffer “geneological bewilderment.”¹⁰¹ It may be right to challenge the supposed “biologization of society,” but this does not mean that the psychological need of children born *sous X* to search for information about their genetic background should be disregarded by policy-makers. Even though it is commonly thought — and rightly so — that parents are those who are actually the caregivers regardless of blood ties, the importance of genetic ties cannot be ruled out *a priori* merely as a socially constructed paradigm.

There is no reason why the importance of biological connections and the relevance of social bonds cannot be recognized at the same time. Why can't we accept that a child can have more than one mother¹⁰² — in a surrogacy arrangement perhaps three,¹⁰³ or even more? English law says the gestational mother is the mother,¹⁰⁴ but she is not going to bring the child up; the commissioning mother is going to do that. And the egg may come from a third woman. All three of these women play a “mother” role. There are also situations when two lesbians bring up a child — English law now allows one to be the mother, the other the “parent.”¹⁰⁵ The child may well regard both women as mothers. English law emphasizes the rights of the gestational mother here too; as one judge has said, “mothers are special.”¹⁰⁶ The presence of two individuals sharing the function of motherhood might diminish the child's state of confusion about who his/her “real” mother is and alleviate the sense of instability from which the children of *accouchement sous X* may suffer.

Another example of the importance of knowing one's biological origin is the case of post-adoption contact that is known to be beneficial to all parties involved.¹⁰⁷ In particular, evidence suggests that contact with their

101 See H.J. Sants, *Geneaological Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHOL. 133 (1964); see also MICHAEL FREEMAN, *THE MORAL STATUS OF CHILDREN: ESSAYS ON THE RIGHTS OF THE CHILD* 185-212 (1997).

102 See Randy Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy*, 47 RUTGERS L. REV. 165 (1994); see also Re D, [2006] 1 FCR 556 para. 57.

103 The gestational, the genetic and the social mothers all play significant parts in the child's life. The UNCRC, *supra* note 25, does not define “parents.”

104 Human Fertilisation and Embryology Act, 2008, c. 22, § 33 (1) (Eng.).

105 *Id.* §§ 42, 44; see also Julie McCandless & Sally Sheldon, *The Human Fertilisation and Embryology Act 2008 and the Tenacity of the Sexual Family Form*, 73 MOD. L. REV. 175 (2010).

106 Lord Scott in Re G (Children), [2006] 2 FLR 629 (H.L.); see also Alison Diduck, *If Only We Can Find the Appropriate Terms to Use the Issue Will Be Solved: Law, Identity and Parenthood*, 19 CHILD & FAM. L.Q. 458 (2007).

107 Hence the trend towards “open adoption.”

child assists birth parents to overcome their distress at losing their child.¹⁰⁸ At the same time, post-adoption contact may help the child throw light on uncertain and difficult aspects of his/her past experience. Contact offers the child the reassurance that there is recognized respect between birth parents and social parents, and that both families are willing to cooperate to ensure the child's wellbeing. Contact also offers social parents a sense of security in their relationship with their child, since they are not hiding the truth and thus their relationship with the adopted child is not at stake,¹⁰⁹ and this helps the child develop a sense of identity.¹¹⁰ This experience of adoption practices suggests ways of improving the model of anonymous birth, if it is to be retained, or transplanted elsewhere.

III. BUT DOES ENGLISH LAW OFFER THE ANSWER?

In England, legal motherhood is not constructed as a matter of choice. Rather, it is a direct consequence of biology. As a result, there is a legal obligation on a woman who gives birth, and also on those who assist her in giving birth, to record her name as mother on the birth certificate.¹¹¹ When applying the *mater semper certa est* (the mother is always certain) rule, the birth mother becomes the legal mother of the newborn baby by virtue of parturition.¹¹² She cannot relinquish the child for adoption for six weeks.¹¹³ If she has given birth under a surrogacy arrangement, she is the mother even though neither she nor the commissioning mother intends her to be so.¹¹⁴ The commissioning parents require an adoption order or a parental order to change this.¹¹⁵

In England, there is thus no anonymous birth. The mother's details are registered on the birth certificate, even though she wishes to reject motherhood. Her options were to terminate her pregnancy — obviously no longer open to

108 See Sonia Harris-Short, *Making and Breaking Family Life: Adoption, the State and Human Rights*, 35 J.L. & SOC'Y 28 (2008).

109 See Murray Ryburn, *In Whose Best Interests? Post-Adoption Contact with the Birth Family*, 10 CHILD & FAM. L.Q. 60 (1998).

110 On the importance of siblings keeping contact, see Re P. [2008], 2 FCR 85 (Eng.).

111 Births and Deaths Registration Act, 1953, 1 & 2 Eliz. 2, c. 20, § 10(1)(a) (Eng.).

112 Human Fertilisation and Embryology Act, 2008, c. 22, § 33(1) (Eng.).

113 Adoption and Children Act, 2002, c. 38, § 52(3) (Eng.).

114 Cf. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (emphasizing intention).

115 On parental orders, see Human Fertilisation and Embryology Act, 2008, c. 22, § 54 (Eng.).

her — or abandonment, which is a criminal offense.¹¹⁶ This happens — and gets a disproportionate amount of publicity — but it is rare. There is no reason to believe that it would be any more common in France were they not to have the *accouchement* possibility.

The English system does enhance the child's right to know his or her own origins, but does this mean that more fetuses are eventually adopted?¹¹⁷ It is impossible to tell. Is it possible that more children are killed by desperate mothers and abandoned in bus shelters, the steps of police stations, etc.? Again, we have no way of knowing. Certainly, the statistics on abortions in England are alarmingly high.¹¹⁸ There were foundling hospitals at one time; the last one closed in 1954.¹¹⁹ Today, the emphasis is on supporting young mothers and on reducing infant mortality. As a result, there may be less infanticide and abandonment than once was the case. But we cannot be certain.

It is interesting to reflect upon how the “problem” of child abandonment is looked at today in England. There is no research on this, but our understanding is that the concern is more with the mother — she may need urgent medical treatment — than with the welfare of the child. Media reports clearly demonstrate that the attention is directed towards the mother, perceived as an individual who needs assistance, rather than towards the child who was abandoned.¹²⁰ The concern is not to activate the criminal law but to help the mother, if she can be found. Child abandonment should be seen through children's rights spectacles. But it is not so viewed.

Perhaps this is but a continuation of the way English law views pregnancy termination. In theory, women have no right to an abortion; doctors have the

116 Children and Young Persons Act, 1933, Geo. 5, c. 12, § 1(1) (Eng.). Abandonment is defined as “[l]eaving a child to its fate,” *see* *Watson v. Nikolaisen*, [1955] 2 ALL E.R. 427 (Eng.).

117 Adoption is an institution in decline. We could, of course, construe an intention to abort a fetus as abandonment.

118 In 2009, 189,100 — a slight decline from the previous year. But it rose in 2010 to 189,574. There has been an eight percent increase in a decade, *see* DEPARTMENT OF HEALTH, ABORTION STATISTICS, ENGLAND AND WALES: 2010 (2011), *available at* http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_127062.pdf.

119 On the history of foundling hospitals, *see* GILLIAN WAGNER, THOMAS CORAM, GENT., 1668-1751 (2004); *see also* JOHN WALLER, THE REAL OLIVER TWIST (2006).

120 *See, e.g.*, C. Erskine, *Fears for Mother After Abandoned Baby Dies*, SKY NEWS ONLINE (Mar. 19, 2010), <http://news.sky.com/skynews/Home/UK-News/Cwmcarn-Baby-Boy-Dies-After-Being-Abandoned-Outside-Convenience-Store/Article/201003315577049>.

rights.¹²¹ English law has “medicalized” abortion.¹²² But in practice there is usually abortion on demand. It is the interests of the woman, not the future child, which are considered. Could this go some way towards explaining why England has never considered introducing *accouchement sous X*? Could it be, in other words, that it is otiose in England? That English law also prioritizes the interests of mothers (and potential mothers) over children (and fetuses)? Could it be that the English legal system, despite rejecting *accouchement sous X*, fails adequately to incorporate issues of child law into its public and social policy?

Despite adherence to the *mater semper certa est* rule, English law has traditionally hesitated to promote the right to know one’s origins. Legal frameworks regulating medically assisted reproduction have generally tended to prioritize the interests of infertile parents (and donors) over those of artificially procreated children, conceived as the result of successful treatment.¹²³ Donor-conceived children over the age of eighteen gained the right to access identifying information about their gamete donors only in April 2005.¹²⁴ However, despite this legislative reform, current English law does not satisfactorily fulfill its international obligation to protect the right of children to know about their biological parentage. The recording of false information is not challenged by the current birth registration system, and no obligation to inform artificially procreated children about their origins has been imposed on parents.¹²⁵ As pointed out by Susan Golombok et al., forty-six percent of parents fail to disclose to their child the truth of his/her conception.¹²⁶ As a consequence, a large number of donor-conceived

121 Abortion Act, 1967, c. 87, § 1(1) (Eng.).

122 See Andrew Grubb, *Abortion Law in England: The Medicalization of a Crime*, 18 LAW MED. & HEALTH CARE 146 (1990).

123 But see ANDREA BONNICKSEN, IN VITRO FERTILISATION ch. 4 (1989).

124 See Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations, 2004, S.I. 1511 (Eng.) (made under the Human Fertilisation and Embryology Act, 1990, c. 37, §§ 31(4)(a), 45(1)-(3) (Eng.)); see also Michael Freeman, *Medically Assisted Reproduction*, in PRINCIPLES OF MEDICAL LAW 818 (Andrew Grubb, Judith Laing & Jean McHale eds., 2010).

125 See Eric Blyth et al., *The Role of Birth Certificates in Relation to Access to Genetic and Biographical History in Donor Conception*, 17 INT’L J. CHILD. RTS. 207 (2009); Melanie Roberts, *Children by Donation: Do They Have a Claim to Their Genetic Parentage?*, in FEMINIST PERSPECTIVES IN CHILD LAW 47 (Joe Bridgeman & Daniel Monk eds., 2001).

126 Susan Golombok et al., *Families with Children Conceived by Donor Insemination*, 73 CHILD DEV. 952 (2002); see also Rachel Cook, *Villain, Hero or Masked Stranger: Ambivalence in Transaction with Human Gametes*, in BODY LORE

children will be left ignorant of the circumstances of their conception and prevented from effectively exercising their identity rights.¹²⁷ It is doubtful whether anyone would choose to live their life knowing that they had been deliberately deceived as to their genetic origins.

One other major area where the legal system has constructed a series of obstacles to the promotion of the right to know one's origins concerns births to unmarried mothers (now nearly half of all mothers are not married, though most are cohabiting).¹²⁸ Despite the imminent introduction of joint birth registration, the ability of the Welfare Reform Act 2010 to mitigate the prevalence of the mother's preference and to treat the child's best interests as a paramount consideration is questionable. What is the registrar to do if "the mother says she met the father once in a pub and does not remember much about him?"¹²⁹

To conclude, the peculiar characteristic of the English legal system, namely its extreme attachment to biology, has played a misleading role in the protection of the right to know one's origins. This is particularly evident in the context of medically assisted reproduction. By requiring the birth-giver's identity to be recorded on the birth certificate, regardless of the actual genetic connection between the woman and the newborn, English law encourages the registration of biological facts known to be false. Furthermore, while prevention programs have been increasingly developed to enhance parental responsibility, the current regulation of abortion, both on paper and in practice, has encouraged women to act irresponsibly.

A more inclusive analysis of the present legal system reveals that issues of child law have not traditionally inspired the adoption of public and social

AND LAWS 211 (Andrew Bainham et al. eds., 2002); Sarah Maclean & Mavis Maclean, *Keeping Secrets in Assisted Reproduction — The Tension Between Donor Anonymity and the Need of the Child for Information*, 8 CHILD & FAM. L.Q. 243 (1996) (suggesting seventy percent). Doubt was expressed in *J v. C*, [2006] EWCA (Civ) 551, [13] (Eng.), as to whether a specific issue order could be made to enforce disclosure by a parent.

127 Disclosure is encouraged by the Human Fertilisation and Embryology Authority, see Victoria Grace & Ken Daniels, *The (Ir)relevance of Genetics: Engendering Parallel Worlds of Procreation and Reproduction*, 29 SOC. HEALTH & ILLNESS 692 (2007).

128 See Jamie McGinnes & Cara Waters, *Up To 75% Of Births to Be Outside Marriage*, SUNDAY TIMES, Apr. 18, 2010, http://women.timesonline.co.uk/tol/life_and_style/women/families/article7100811.ece.

129 JONATHAN HERRING, FAMILY LAW 330 (2011); see also Sally Sheldon, *From "Absent Objects of Blame" to "Fathers Who Want to Take Responsibility"*, 31 J. SOC. WELFARE & FAM. L. 373 (2009).

policies in England. In light of these considerations, which demonstrate the actual disregard of children's rights, the denial of *accouchement sous X* is explained by the entrenched importance placed on blood ties that has consistently pervaded English legal and public culture. A reconsideration of the concept of identity in light of the emerging relevance of social bonds would represent an optimal entry point for constructing a legal system respectful of children's rights. The importance of biological origins does not imply the irrelevance of social bonds and vice versa. The two concepts are not mutually exclusive.

IV. CONCLUSION: CAN THE DILEMMA BE SOLVED?

What we have seen is that there are essentially two models, represented respectively by the French system of *accouchement sous X*, on the one hand, and by the English system which compels birth-givers to be mothers, on the other.

The child's right to know his/her origins has emerged more recently. This is not surprising: Children's rights have only assumed any real profile in the last generation. Whether an individual, preeminently a child, has a right to know about his/her origins is one of the most complex of issues to have emerged in this era when we have begun to take children's rights seriously.¹³⁰ Samantha Besson points to three reasons for this.¹³¹ First, the situations in which a child's right to know can be undermined are multiple and diverse, thus precluding a comprehensive and unique solution.¹³² Secondly, the child's right to know incorporates not only legal and ethical considerations, but also psychological and sociological insights that create further difficulties in assessing the overall situation of the child.¹³³ Thirdly, and perhaps most significantly, the child's right to know his/her own origins competes with other private and public interests.¹³⁴

130 Crystallized by the UNCRC, *supra* note 25. On taking children's rights seriously, see Michael Freeman, *Why It Remains Important to Take Children's Rights Seriously*, 15 INT'L J. CHILD. RTS. 5 (2007).

131 Samantha Besson, *Enforcing the Child's Right to Know Their Own Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21 INT'L J.L. POL'Y & FAM. 137 (2007).

132 *Id.* at 138.

133 *Id.*

134 *Id.*

Take the case of *accouchement sous X*: As shown throughout this Article, there are several conflicts of rights which can be seen here. There is a major tension between the child's right to know and the right to privacy of the birth mother. The child's right to know may also conflict with adoptive parents' interest in protecting their social and psychological connections with the child against the discovery by the child or others of the child's birth family. Nor can we ignore the fact that the child's right to know may conflict with other interests of that child. For instance, in particular situations, protecting the child's right to knowledge of his or her biological origins can jeopardize the protection of the child's right to life. The interest of the genetic father and, more generally, of the birth family in developing familial and emotional links with the child stands in stark contrast to the protection of the right of the birth mother to preserve her anonymity. Nor can one ignore the interest of the state in avoiding tragic events and protecting the life and health of both the mother and the child.¹³⁵

Conflicts of human rights are the result of the plurality of fundamental values that are simultaneously protected by human rights provisions.¹³⁶ The most obvious example of this is found in Article 8 of the ECHR, which protects the right to respect for the private and family life of a variety of subjects: As is pointed out in *Odièvre v. France*,¹³⁷ *accouchement sous X* is a striking example of the way these interests may conflict.¹³⁸ Since Article 8 protects the respect for private and family life of everyone, it might contemporaneously protect competing interests of different individuals — the child, the mother, the adoptive parents, etc.

In light of these considerations, both the French acceptance of anonymous birth and the English rejection of the concept of *accouchement sous X* may be thought to be inappropriate, since both of them implicitly presuppose hierarchies of rights. Having regard to the equal weight of the competing rights, categorical positions do not offer valuable chances of reconciliation. Accordingly, Jean Marie Thévoz suggests that it is preferable that the law does not take sides, either guaranteeing an absolute right to know one's origins or establishing confidentiality as an insuperable obstacle.¹³⁹ Therefore, the

135 Jean-Marie Thévoz, *The Rights of Children to Information Following Assisted Conception*, in *CONCEIVING THE EMBRYO: THE ETHICS, LAW AND PRACTICE OF ASSISTED REPRODUCTION* 195 (Donald Evans & Neil Pickering eds., 1996).

136 See SHAZIA CHOUDHRY & JONATHAN HERRING, *EUROPEAN HUMAN RIGHTS AND FAMILY LAW* (2010).

137 *Odièvre v. France*, 2003-I Eur. Ct. H.R. 621.

138 *Id.*

139 Thévoz, *supra* note 135.

first essential step consists of acknowledging that the conflicting rights and interests are equally fundamental and legitimate.

The absoluteness of the right to know one's origins is expressly denied by the text of the European convention. Article 8 constructs the right to respect for private and family life as capable of restrictions when it clashes with other rights and freedoms.¹⁴⁰ This formulation of the right in question prepares the ground for the actual resolution of the conflict of rights. By admitting possible restrictions, the provision contemplates the situation where a fair equilibrium may be achieved between rights of a conflicting nature.

The ECHR provision clearly identifies the principle of legality, the existence of rights and freedoms of others and the principle of proportionality as the adjudication guidelines that national authorities are supposed to refer to when implementing Article 8. However, divergences among national concretizations of the right to know one's origins are dependent on the exercise of the margin of appreciation, traditionally granted to the contracting parties on issues of particular sensitivity.

Nonetheless the more recent jurisprudence of the European Court of Human Rights, in an attempt to review its decision in *Odièvre v. France*, has placed the conditions for the recognition of a more limited margin of appreciation in matters regarding the right to know one's origins. In *Jäggi v. Switzerland*, the Court has held that

[t]he extent of the State's margin of appreciation depends not only on the right or rights concerned but also, as regards each right, on the very nature of the interest concerned. The Court considers that the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life. In such cases, particularly rigorous scrutiny is called for when weighing up the competing interests.¹⁴¹

In cases which concern the right to know one's origins, a concrete balancing of the competing rights appears to be the most appropriate method of resolving the conflicts which inevitably exist. If we balance the rights involved, we recognize the competing rights as equally fundamental, and we envisage a solution that treats them as being of equal importance. But should we do so? This is to fly in the face of the UNCRC, which attaches preeminence to the child's interests. At the very least they are a primary consideration.¹⁴² In Besson's view, a holistic approach to the U.N. Convention would legitimize

140 See ECHR, *supra* note 26, art. 8(2).

141 *Jäggi v. Switzerland*, 427 Eur. Ct. H.R. para. 37 (2006).

142 UNCRC, *supra* note 25, art. 3(1) (discussed in MICHAEL FREEMAN, ARTICLE 3: THE BEST INTERESTS OF THE CHILD (2007)).

the interpretation of Articles 7 and 8 as establishing an hierarchical relationship between the interests of the child and those of the parents.¹⁴³

But can the tension between these two international treaties be readily resolved? One way of doing so is suggested by Ya'ir Ronen.¹⁴⁴ He argues for the protection of what he calls a "child-constructed identity," as opposed to a "majority identity."¹⁴⁵ This reconceptualization of identity, as suggested by Ronen, assumes that the development of one's identity does not occur in an empty space, but is triggered by dialogue and contact with other human beings, essentially those persons who are significant to the subject whose identity is evolving.¹⁴⁶ On this way of thinking, the recognition of an individualized identity implies the priority of the subjective perceptions of the child over cultural sensitivity.¹⁴⁷ The main emphasis is placed on the child's understanding of the surrounding environment, regardless of what is commonly perceived as good and important for the development of the child's identity.¹⁴⁸ In other words, identity is intended as the synthesis of the child's preferences and experiences rather than a parental or social imposition.¹⁴⁹

The recognition of a right to an individualized identity clearly reflects the UNCRC's emphasis on the primary interest of the child and mediates the conflict with the more balanced approach of the ECHR. The Strasbourg jurisprudence does not contemplate a child-constructed vision of identity. On the contrary, it adopts an isolated and de-contextualized notion of identity that, in addition to disregarding the child's feelings and wishes, constructs identity as the product of perceptions imposed or conveyed by society at large. The recognition of the child's right to an "atomistic" identity would frustrate the realization of an accurate balancing of rights, since the actual preferences of the child would not even be considered as part of the conflict between competing rights. It may thus be argued that the redefinition of the child's right to identity as a "right to state protection of ties meaningful to the child"¹⁵⁰ is essential to ensure that, in the balancing of rights, the interests of the child receive the same amount of consideration as do the interests of the other parties.

In addition to bringing the UNCRC's approach in line with the ECHR's notion of identity, the recognition of the child's right to an individualized

143 Besson, *supra* note 131.

144 Ya'ir Ronen, *Redefining the Child's Right to Identity*, 18 INT'L J.L. POL'Y & FAM. 147 (2004).

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* at 147.

identity reduces considerably the complexity of the tension between biological links and social bonds. Obviously, the protection of a child-centered identity precludes the absolute preeminence of one type of connection over others. However, since the evolution of the child's personality is principally determined by his or her relationships with other human beings, social bonds are likely to be identified as ties that are meaningful to the child. Hence, the recognition of the child's right to an individualized identity would inevitably jeopardize the entrenched importance of biological ties, when the child privileges his or her social and emotional links over his or her genetic background.

Of course, a problem with this is that children do not construct identities at birth. They bond with their caregiver and have no notion of identity beyond this. They are not capable of exercising their right to an individualized identity. The identity they acquire subsequently is in large part the product of socialization and upbringing. It is perhaps part of a child's "right to an open future"¹⁵¹ that compels us to leave these cognitive and emotional developments as open as possible.

The institution of *accouchement* gets in the way of this. For this reason, if for no other, we believe it must be rejected. We must find other answers for women who do not want to be mothers. The French 2002 reform shows awareness of this but is an inadequate response. The thrust to emphasize a right to their origins is part, as we have indicated, of the importance of taking children's rights seriously. *Accouchement* takes a woman's right to reject her motherhood dogmatically. We must now consider how best to take the responsibilities of maternity more seriously.

151 See Joel Feinberg, *The Child's Right to an Open Future*, in *WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY AND STATE POWER* 80 (William Aiken & Hugh LaFollette eds., 1980). For the best book on childbearing, see ROBBIE PFEUFER KAHN, *BEARING MEANING: THE LANGUAGE OF BIRTH* (1993). But it does not address the issues in this Article at all, and anonymous birth and the French model are not considered.