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CONCEALED BIRTHS, ADOPTION AND HUMAN RIGHTS LAW: BEING WARY OF SEEKING TO OPEN WINDOWS INTO PEOPLE'S SOULS*

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ABSTRACT. *Although rare, giving birth in secret or in concealed circumstances still happens in the United Kingdom. The new born child's existence is unknown to his or her biological 'father' and or to the wider biological family of the birth giver who wishes to place the child for adoption without his or her existence being revealed to them. Legal decisions need to be made judicially when a local authority seeks orders as to whether it is required to make further inquiries to identify and notify the biological father and or wider biological family as to any forthcoming adoption proceedings. Developments in European human rights law's protection of a right to respect one's private life provided by Article 8 of the European Convention on Human Rights (ECHR) towards a right to personal autonomy, identity and integrity can be interpreted in different ways. However, three positions are argued here to guard against an erosion of women's confidentiality and privacy in these circumstances. First, women's choices of concealment should be accepted with respect rather than perceived as inauthentic and therefore impermissible; this is in keeping with Article 2's right to life and Article 8's right to personal autonomy and integrity. Second, the right to family life protected by Article 8 of any wider biological family and father is not contravened by allowing women to give birth discreetly. Third, openness and transparency, when it comes to exact knowledge of one's parents in this context is not necessary for a child's identity rights, which are also protected by Article 8's right to personal identity, to be legally protected.*

KEYWORDS: *concealed births; adoption; human rights; European Convention Article 8*

INTRODUCTION

At the end of 2011, the British government announced it was drafting in a group of adoption experts with a view to overhauling the

* A paraphrase of Mr Justice Munby in *Re L* [2007] EWHC 1771 at [38].

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assessment process for prospective adopters in the UK.[1] The process of adopting a child is seen to have become overly cumbersome and restrictive with the potential to put many off adopting. The idea of adoption itself has been under increasing scrutiny, with questions being asked as to its place in the twenty first century era of genetic or biological truth, and human rights being called upon to assist in seeking out this "truth".[2] Unsurprisingly, of course, at a global level, adoption is not seen in the same light by every legal jurisdiction. Some countries do not favour adoption as it has traditionally been understood in the UK.[3] This understanding involves the biological family being completely legally replaced by the new adoptive, social family. Parental responsibility of biological parents is extinguished; the adopted child ceases to be a child of his or her biological parents and becomes the child of the adopters as though he or she was their legitimate child.[4] This has implications for our understanding of personal autonomy, identity and integrity, notions said to be protected by Article 8 of the ECHR's right to respect for one's private life.[5] For the majority of women, becoming pregnant, remaining pregnant, giving birth and being the social mother, all follow one from the other. There has been a massive shift in attitudes towards children born outside of marriage, including far less pressure in general on girls and women, because of social conditions or stigma, to give a child over for adoption. However, a sizeable number of people still consider stigma attaches to unmarried girls or women being pregnant and being mothers and these may be

[1] There was much reportage in the press. See for example, The Guardian 22 December 2011.

[2] For discussion of such issues see, for example, J.R. Spencer and A. Du Bois-Pedain (eds.), *Freedom and Responsibility in Reproductive Choice* (Oxford 2006); F. Ebtehaj et al (eds.) *Kinship Matters* (Oxford 2006); A. Bainham, "Arguments About Parentage" [2008] C.L.J. 322.

[3] On this, see, for example, Council of Europe, Commissioner for Human Rights *Adoption and Children: A Human Rights Perspective*, CommDH/Issue Paper (2011) 2 28 April 2011; European Commission, Joint Council of Europe and European Commission Conference: *Challenges in Adoption Procedures in Europe: Ensuring the best interests of the child*, 30 Nov–1 Dec 2009 Strasbourg.

[4] See Swinton Thomas L.J. in *Re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam. 239; *Webster and Webster v Norfolk County Council* [2009] EWCA Civ 59.

[5] The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Article 8 provides: "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 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." This has been judicially interpreted by the ECtHR to provide a right to autonomy, identity and integrity. See, for example, *Pretty v U.K.*(2002) 35 E.H.R.R. at [61]; *Tysiac v Poland* (Application no. 5410/03), Judgment 20 March 2007 at [107]; *Glass v U.K.* (Application no. 61827/00); *Sentges v The Netherlands* (Application no. 27677/02), Judgment 8 July 2003; *Penticova v Moldova* (Application no. 14462/03); *Nitecki v Poland* (Application no. 65653/01), Judgment 21 March 2002; *Odièvre v France* (Application no. 42326/98), (2004) 38 E.H.R.R. 43; *Niemietz v Germany* (1992) 16 E.H.R.R. 97; *Botta v Italy* (1996) 26 E.H.R.R. 241; *Bensaid v U.K.* (2001) 33 E.H.R.R. 10. See J. Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Leiden 2009).

tied to cultural reasons.[6] If the pregnancy is the result of a one night sexual encounter, a result of rape, incest, or other abusive relationships, a woman may want to give up the child for adoption regardless of any lack of social pressure she may or may not feel as an unmarried mother in general. She may not want to have anything to do with the child because of the memories it conjures up in her mind.[7] This, together with the legal availability of birth control, abortion in certain circumstances and reproductive technology developments, means that there has been a reduction in the number of babies, that is, children under twelve months, being placed for adoption in the UK.[8] Given that adoption usually takes place following care proceedings which are mainly involuntary and contested, these figures may not be surprising. Even given the reduction in adoption figures, it is rarer still for babies to be voluntarily relinquished or "given up" by the mother for adoption. From that small number, it is extremely rare for a baby's existence to be unknown to his or her biological "father" and to the wider biological family of the birth giver. No statistics exist as to the exact numbers.

There are different interpretations of the personal "choices" made by girls and women who seek to have their babies adopted in secret. The focus of this article is to examine these interpretations by reference to English court cases deciding whether or not a local authority is under a legal duty to make further inquiries and then inform the biological father, and or wider biological family of the mother, as to the child's existence to see if they may be suitable adopters of the child. Developments in European human rights law's protection of a right to

[6] Research in the UK, published in October 2008 showed that for Asian babies relinquished, the concept of family honour "izzat" played a significant part in this decision. The authors analyse this in a comparable way to case histories from the 1960s: a young single mother with a child born out of wedlock which brings shame on the family. For some Asian mothers, however, it was noted that the mothers expressed fear for their lives. J. Selwyn, P. Harris et al "Pathways to Permanence for Black, Asian and Mixed Ethnicity Children: Dilemmas, Decision-making and Outcomes", Department for Children, Schools and Families, October 2008 DCSF-RBX-13-08 Research Brief. With thanks to Julie Selwyn.

[7] For specific examples of this, consider children born as a result of rapes during conflict: the children are given various group names like, in the Rwandan conflict, *enfants mauvais souvenir*, or children of bad memories. See P.A. Weitsman, "The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda" 30 (2008) Human Rights Quarterly 561–578 at 567.

[8] The record low numbers of adoption in England and Wales have led some to describe the situation as an adoption crisis. See www.guardian.co.uk/news/datablog/2011/sep/29/adoption-statistics-england. In 2006, 197 babies under the age of one year were recorded in the Adopted Children's Register as having been adopted: www.statistics.gov.uk. The Department for Children, Schools and Families: National Statistics 20 September 2007 states that the number of children looked after who were under one year old at adoption decreased from 220 in 2003 to 150 in 2007. The average duration of the period of care that children looked after had before being adopted in 2007 was 2 years and 8 months: a figure said to have changed little over the past 5 years. This article does not deal with the issue of abandoned babies, left by a birth giver without notifying the authorities, as to which see K. O'Donovan, "Enfants Trouvés, Anonymous Mothers and Children's Identity Rights" in K. O'Donovan and G. Rubin (eds), *Human Rights and Legal History* (Oxford 2000) K. O'Donovan, " 'Real' Mothers for abandoned children" (2002) 36 Law and Society Review 247; L. Sherr, J. Mueller and Z. Fox, "Abandoned babies in U.K. – a review utilizing media reports" (2009) 35 Child: care, health and development 419.

respect one's private life can be interpreted in different ways but three positions are argued here to guard against an erosion of women's confidentiality and privacy in these circumstances. These are all consistent with a version of personal identity which is arguably less restrictive and coercive than some others. First, women's choices of concealment should be accepted with respect, rather than perceived as inauthentic and therefore impermissible, in keeping with Article 2[9] and Article 8 of the ECHR. Second, the right to respect for family life protected by Article 8 of the ECHR of any wider biological family and father is not contravened by allowing women to give birth discreetly. Third, openness and transparency as to the exact knowledge of one's parents in this context is not necessary for a child's identity rights to be legally protected.

I. Respecting a Woman's Choice in Giving Away a Child?

A. A New Child's Existence

A new born child's existence and his or her identity is enshrined as a legal public act through birth registration which will reveal the date and place of birth and name of the birth giver or mother.[10] It has long been the case that the father will be named if the couple are married and, following recent changes to the law, which are still to be implemented, an unmarried father will also be named unless the case falls within a list of exceptions. The circumstances discussed here should fall within such exceptions.[11] A girl or woman who gives birth is the legal mother, regardless of whether she is the genetic parent, is a surrogate or wishes to have the child adopted.[12] The principal context of adoption is care proceedings. In seeking placement of the new born child, adoption agencies and the relevant local authority are embroiled in a network of

[9] Article 2 provides: "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law … "

[10] K. O'Donovan and J. Marshall. "After Birth: Decisions about Becoming a Mother" in A. Diduck and K. O'Donovan (eds.), *Feminist Perspectives on Family Law* (London 2006), 101. For the purposes of this article, the word "mother" is used to denote the woman who has given birth, in line with the current legal position.

[11] See the Welfare Reform Act 2009 Part 4. This provides for the naming of the unmarried biological father. Schedule 6 of the 2009 Act at 2B explains that the mother will not be required to provide information if she makes a declaration to the Registrar that one of a list of conditions exist. These include if she does not know the father's identity, if she does not know his whereabouts, if she has reason to fear for her safety or that of the child if the father is contacted. For an analysis of the problematic nature of these changes see S. Sheldon, "From 'absent objects of blame' to 'fathers who want to take responsibility': reforming birth registration law" (2009) 31 Journal of Social Welfare and Family Law 373; J. Wallbank, " 'Bodies in the Shadows': joint birth registration, parental responsibility and social class" (2009) 21 Child and Family Law Quarterly 267; C. Smart, "Family Secrets: law and understandings of openness in everyday relationships" (2009) Journal of Social Policy 551; C. Smart, "Law and the Regulation of Family Secrets" (2010) 24 International Journal of Law, Policy and the Family 397.

[12] Human Fertilisation and Embryology Act 2008, s. 33.

regulations and seek to provide surroundings which are in the child's best interests.[13] The most relevant legislation is the Adoption and Children Act 2002 (the ACA 2002), s. 1(2) of which states that "the paramount consideration of the court or adoption agency must be the child's welfare, throughout his life". A successful adoption order is estimated to take up to 12 months on average but varies according to the age of the child.[14] In the unusual situation analysed here where a girl or woman relinquishes a new born child, the adoption procedure is usually swifter. If there is no dispute from the birth mother, and the biological father is unaware of the existence of the child, it seems self explanatory that proceedings that are not contentious can be dealt with more quickly. In keeping with the ACA, preference is given to avoidance of delay in the placement of a child in a stable, permanent home all of which is considered by legislation and judicial interpretation to be in the child's best interests. The Registrar General makes an entry in the Adopted Children Register which supersedes the entry relating to that child on the birth register. A full certificate from the Adopted Children Register is used as the birth certificate – it is clear from that that the child has been adopted.[15]

The starting assumption is that the best person to bring up the child is, what the court often calls, the "natural" parent, provided the child's moral and physical health are not endangered.[16] However, adoption is permanent and provides the child with a new family and all the legal rights which go with this new identity.[17] A checklist is set out in the legislation of factors for the court to consider when making an adoption order. These include: the likely effect on the child throughout his or her life of having ceased to be a member of the original family and become an adopted person; the relationship the child has with any relatives; the likelihood of any such relationship continuing and the value to the child of its doing so; the ability and willingness of any of the child's relatives to provide the child with a secure environment and the wishes of the child's relatives.[18] In the current era of human rights, it

[13] The government website www.everychildmatters.gov.uk lists in excess of 30 pieces of legislation as relevant to adoption in England and Wales.

[14] The organisation CAFCASS puts a rough estimate on adoption timeline between 6 to 12 months. http://www.cafcass.gov.uk/cafcass_and_you/info_for_families/adoption_questions_answered.aspx accessed 30 July 2011.

[15] The Adoption and Children Act 2002 provides for adults who were adopted before 30 December 2005 to apply to the Register General for a copy of their original birth certificate with additional provisions to enable the adopted adult to have access to birth records and information to trace birth relatives.

[16] *Re KD (A Minor) (Access Principles)* [1988] 2 F.L.R. 139 per Lord Templeman at 141: "the best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate … provided the child's moral and physical health are not endangered."

[17] It is extremely difficult to overturn an adoption order as was recently demonstrated in the Court of Appeal case of *Webster and Webster* cited at note 4 above.

[18] Adoption and Children Act 2002 s. 1(4).

appears to be generally accepted that if we live in a liberal democracy, everyone is legally entitled to equal rights, including the right to make their own choices in life, which should not be dictated by the state or other people against their will. If people are able to make decisions and plans of their own, in the sense of choosing how they want to live their lives, there is more than a strong possibility that many of their choices will be met with disapproval by others. Many human rights relating to this freedom of choice are, of course, qualified rights. In the ECHR, rights to respect one's private life can be qualified by, amongst other things, the rights and freedoms of others. This can impact on the choices women are permitted to make. What has been called the "ideology" of motherhood has been said to construct both maternity and motherhood in terms of connection, physically and emotionally, and in ways which can be seen to constrain women's choices.[19] Whether maternity and motherhood are natural phenomena to be reclaimed and celebrated for womankind,[20] or to be overcome and transcended,[21] or to be constantly interrogated,[22] depends on one's feminist, or other, perspective. For many feminists, pregnant women, and possibly all women, have not fitted the mould of the traditional idea of legal persons capable of making fully informed choices, in the Kantian traditional sense many see as evident in our legal system.[23] Therefore the "connection" present in maternity and motherhood means that some have trouble viewing pregnant women or all women as persons – or human beings – in their own right, as legally and philosophically understood, with choices to make about ways of being and living.[24] Whichever view is taken, any choices women make about motherhood are generally presented as ones to be made before pregnancy by choosing to prevent pregnancy, or during pregnancy in the form of a termination. Little attention has focused on choices made by girls and women who remain pregnant, give birth, and then wish to conceal the birth from the

[19] S. Ruddick, *Maternal Thinking* (New York 1989); S.J. Douglas and M.W. Michaels, *The Mommy Myth: the Idealization of Motherhood and How it has Undetermined Women* (New York 2004).

[20] See, for example, A. Rich, *Of Woman Born* (London 1976).

[21] See, for example, S. de Beauvoir, *The Second Sex* (London 1953); S. Firestone, *The Dialectic of Sex: the case for feminist revolution* (New York 1971).

[22] See, for example, N. Chodorow, *The Reproduction of Mothering: psychoanalysis and the sociology of gender* (Berkeley 1978); M. O'Brien, *The Politics of Reproduction* (London 1981); A. Dally, *Inventing Motherhood: the consequences of an ideal* (London 1982).

[23] See, for example, G. Lloyd, *The Man of Reason: Male and Female in Western Philosophy* (London 1984); S.M. Okin, *Women in Western Political Thought* (Princeton NJ 1979); A. Barron, "Feminism, Aestheticism and the Limits of Law" (2000) 8 F.L.S. 275; N. Naffine, "The Legal Structure of Self-Ownership: or the Self-Possessed Man and the Woman Possessed (1998) 25 J.L.S. 193; N. Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford 2009). See generally C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (London 1982).

[24] R. West, "Jurisprudence and Gender" (1988) 55 University of Chicago Law Review 1; C.A. MacKinnon, *Are Women Human? And Other International Dialogues* (London 2006); N. Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford: Hart 2009).

"father" and or/wider biological family and have no further role to play in the child's life.

B. Personal Autonomy of the mother

In some European countries, anonymous or discreet birthing conditions exist for women who have given birth but do not wish to keep the child. In France, a legal distinction exists between a woman who gives birth and a mother. Anonymous births are legally permitted: a woman can enter a hospital registering herself as X, give birth and leave. This situation has come under review by the European Court of Human Rights (the ECtHR). In *Odièvre v France*, a majority of ten judges to seven, upheld the French legal provisions allowing anonymous birthing.[25] The unsuccessful adult applicant had been born of a birth giver registering herself as X. She alleged that because her birth had been kept a secret, with the result that it was impossible for her to find out the full identity of her biological parents and any siblings – with particular emphasis placed on arguing for her right to exact knowledge of her biological mother's identity – this amounted to a violation of her ECHR Article 8 right to respect for a private life. The issue in the case is presented in terms of the applicant's right to access information about her origins as an interpretation of this provision. The system was further considered in *Kearns v France*[26] where the birth giver, an Irish citizen, had travelled to France to give birth anonymously and subsequently changed her mind after registering as X. The issue there was whether the two month period available to a birth giver in France to change her mind was proportionate. The ECtHR noted that the applicant had been 36 years old when she gave birth anonymously. Her application was unsuccessful because the time limit was considered to be sufficient to allow a biological "mother" to reflect on her actions. Emphasis was placed on child-welfare professionals' studies showing it is in the child's interests to enjoy stable emotional relations with a new family as quickly as possible.

In relation to a birth giver's right to confidentiality, privacy and bodily and psychological integrity in these circumstances, two opposing positions are presented in the *Odièvre* case and related empirical studies into the practice in France.[27] It is argued, on the one hand, that

[25] *Odièvre v France* (Application no. 42326/98), Judgment 13 February 2003, 38 E.H.R.R. 43.
[26] *Kearns v France* (Application no. 35991/04), Judgment 10 January 2008.
[27] For more detailed analysis of these issues, see O'Donovan, "Enfants Trouvés", and " 'Real' Mothers"; J. Marshall, "Giving Birth but Refusing Motherhood: Inauthentic Choice or Self-Determining Identity?" (2008) 4 International Journal of Law in Context 169. The two empirical studies are by French experts: C. Bonnet, *Gesture of Love* (Paris 1991) and N. Lefaucheur, *Etude-Enfants nés sous X* (Paris 2000). See also N. Lefaucheur, "The French 'tradition' of anonymous birthing: the lines of argument" (2004) 18 International Journal of Law, Policy and the Family 319.

these women give up their children to protect them, as a gesture of love.[28] The children are safeguarded from infanticide and abuse because anonymity was a *choice* for the birth giver. A woman's right to give birth anonymously is a fundamental freedom, linked to privacy,[29] and is a right to renounce forever the motherhood of a particular child.[30] Thus refusing motherhood is a valid exercise of a woman's freedom enshrined in a legal right to have her own life and live it as she chooses. This idea involves ideas of privacy including potentially the woman's privacy to withhold the fact of the birth from others. Such choice may be, in practice, tied into safeguarding, protecting, or offering a better life to, children, and not necessarily based on what might be selfishly preferable to the woman concerned. Considerations may include, for example, the possibility of abuse of the newborn child from others close to the woman. But, ultimately, regardless of the reasons, it is the individual woman who makes the decision to refuse motherhood. The French government has argued that the aim of permitting anonymous birthing in France is to prevent infanticide, abortion, and babies being abandoned. Further, it is said to alleviate a woman's distress when she does not have the means to bring up the child.[31] On the other hand, the contrasting empirical study emphasises the hardships of various kinds by the women involved. The emphasis reflects not a right to choose but a lack of choices and resources and evidence of no "real" autonomy. Fear of parental reaction, pressure by parents from a religious or conservative background, personal problems, an inability to cope with another child, domestic violence and large families in economic difficulties are all expressed to be considerations.[32] For those sympathetic to such findings, it seems the only moment to exercise choice in relation to motherhood is the moment of confirmation of pregnancy. Those women who enter into a state of denial, or fail to confront a decision on abortion, might be regarded as powerless and paralysed.[33] The applicant in *Odièvre* used this argument, claiming that women who give

[28] Which is the title of the author, Bonnet's, book on the subject and was influential in the early 1990's in debates in the French parliament on the issue of anonymous birthing as well as in country-wide debates generally.

[29] Of such importance in the French legal system that it is a breach of an aspect of private life to publish without her consent, information that a woman is pregnant, even though her condition is visibly public – see para. [37] of the *Odièvre* judgment, above note 25.

[30] O'Donovan. " 'Real' Mothers", p. 363.

[31] *Odièvre v France*, above note 25, at [15], [36]–[39].

[32] The French government in *Odièvre* presented evidence of three main categories of women who chose to give birth anonymously: young women who were not yet independent; young women still living with parents in Muslim families originally from North African or Sub-Saharan African societies in which pregnancy outside marriage was a great dishonour; isolated women with financial difficulties, some the victims of domestic violence. Reasons for seeking confidentiality sometimes included rape or incest – see paragraph [36]. See also J. Selwyn et al.'s research as explained in footnote 6 above.

[33] Research on infanticide suggests that a proportion of cases can be explained in these terms. See O'Donovan, " 'Real' Mothers" above note 8.

birth anonymously are not exercising a woman's right but are making "an admission of failure". In her critical view, the French legal position of allowing a woman to act as if she had never given birth is a "legal fiction".[34] In the applicant's arguments, the distress of such women could be addressed by providing the necessary help or enabling them to make their children available for adoption. However, with changing views on adoption and contact with the birth family, including human rights arguments on children's identity, the existing structure of adoption's permanency and replacement of the biological parents is being questioned in the name of human rights.[35]

What does it mean to make a permissible choice, one that is safeguarded by Article 8 as protecting one's personal autonomy and integrity, in these circumstances? It has been argued that in English law, and in the general understanding of "womanhood", the "*idea that a woman, after giving birth, might make a rational decision not to become a mother is not entertained.*"[36] In adoption or surrogacy situations, her decision is framed in terms of the welfare of her child; she may be seen to be acting as a "good" mother if she appears to be sacrificing her motherhood for the good of her child. When put in terms of her exercising a real choice about her life, however, her actions become recast as selfish and her "abandonment" of her child damages his or her welfare. As O'Donovan points out, the conventional reaction to a woman who "gives away" her child is one of distaste, even horror. This is an "unwomanly" woman, one more like the wicked stepmother of fairytales than a "real woman".[37] Even those sympathetic to her plight may tell the woman that the decision to renounce motherhood after giving birth is a debilitating action. In the UK, a woman is unable officially to give her child over for adoption within the child's first six weeks of life.[38] When it is said "you will regret that later", or "it is not natural" the message is that the self is divided against the self, that the proposed action is inauthentic.[39] The stated purpose of European human rights law is to enable a man [sic] to be "*free to shape himself and his fate in the way that he deems best fits his personality*".[40] This is in keeping with a self-determining notion of personal freedom, the

[34] *Odièvre v France*, above note 25, at [30].
[35] This seems to be the implication of A. Bainham "Birthrights? The Rights and Obligations Associated with the Birth of a Child" in J.R. Spencer and A. Du Bois-Pedain (eds.) *Freedom and Responsibility in Reproductive Choice* (Oxford 2006), 162 and Bainham, "Arguments about Parentage" above note 2.
[36] O'Donovan, "Enfants Trouvés", pp. 66 and 77.
[37] Ibid., and " 'Real' Mothers" above note 8.
[38] Adoption and Children Act 2002, s. 52(3).
[39] H. Reece, *Divorcing Responsibly* (Oxford 2003), in a different context, argues that the search for authenticity, in following the right path in personal decisions, can be never ending, and is an aspect of the therapeutic state. Eventually this search is coercive, as much so as the traditional rules it replaces.
[40] *Cossey v U.K.* (Application no. 10843/84) (1990) 13 E.H.R.R. 622.

autonomy to choose for yourself how you decide to live. In contrast to this notion is an idea of personal freedom as the ability to make a self realising choice which directs you to discover and to be that which you already are, through a process of self-discovery and realisation to re-cover the lost, real, authentic and true you.[41] This type of "essentialism" has a long history from Aristotle through to Marx, and to modern communitarianism, some versions of radical and cultural feminism, the post-liberal self, and can also be evidenced in much of the popular personal development industry and the therapeutic state highlighted in diverse work.[42] The basic assumption built into the ideal of authenticity is that, lying within each individual, there is a deep, "true self" or "real core of identity".[43] The ideal of authenticity asks you to get in touch with the real you, achieving genuine self-knowledge and to express your inner traits in your actions in the external world. It is only by expressing your true self that you can achieve self-realisation and self-fulfilment as a human being. But the constant effort of seeking authenticity is exhausting, can be frustrating and produce a sense of failure for non-achievement. If this is an account of moving towards always making the "right" decision, it may mask coercion, including by the state.

A sense that women who relinquish their children are committing an act of self-betrayal and personal disintegration,[44] is implicitly to be found in policy and literature encouraging birth givers to keep their child. The assumption seems to have become: if a girl or woman does not want a child and becomes pregnant, she will have a termination.[45] Relinquishing a new born child is different from reproductive choices before or during pregnancy because a new, living, breathing, separate human being exists with a life of his or her own to live. But that life has still to be lived socially. Relinquishment does not mean that the woman

[41] Charles Taylor describes the evolution of this development as modern freedom being won by our breaking loose from older moral horizons. People used to see themselves as part of a larger order. In some cases, this was a cosmic order, a "great chain of Being," in which humans figured in their proper place along with the angels, heavenly bodies, and our fellow earthly creatures. This hierarchical order in the universe was reflected in the hierarchies of human society. People were often locked into a given place, a role and station that was properly theirs and from which it was almost unthinkable to deviate. Modern freedom came about through the discrediting of such orders: C. Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge 1989); id., *The Ethics of Authenticity* (London 1991) and see also C. Guignon, *On Being Authentic* (London 2004), p. 3.

[42] Aristotle *The Nichomachean Ethics* (Oxford 1986); for modern communitarians see M. Sandel, *Liberalism and the Limits of Justice*, 2nd edn. (Cambridge 1998), S. Avineri and A. De-Shalit (eds.), *Communitarianism and Individualism* (Oxford 1992). For radical feminists see MacKinnon, above note 24; for cultural feminists see Gilligan above note 23, West above note 24, and Rich above note 20. For the post-liberal self see, for example, M Griffiths *Feminisms and the Self: the Web of Identity* (London 1995) and analysis by H Reece, *Divorcing Responsibly*, in the context of divorce. For an example of the personal development industry on this see P. McGraw *Self Matters* (London 2001).

[43] Guignon, *On Being Authentic*, p. 3.

[44] The wording, but not the context, is from T. Regan, *Matters of Life and Death* (London 1986), 27.

[45] See, for example, Arden L.J.'s remarks in *Re C (a child) (adoption: duty of local authority)* [2007] EWCA Civ 1206 discussed below in the third part of this article.

may not think about that child every day of her life but it does involve an acknowledgement of choice to do something which many may find unsatisfactory. Empirical research shows that, aside from women who do not seek an abortion for personal, including religious, reasons, or cannot do so because of legal prohibitions, some women enter into a state of denial; others, aware of their pregnancy, cannot cope with the steps necessary to terminate.[46] A relatively recent study of abortion decisions shows that young women from areas of social deprivation are more likely to become pregnant and are less likely to have an abortion. In contrast, young women from more affluent backgrounds are less likely to become pregnant, but once they do, are more likely to terminate the pregnancy.[47] Other scholars in different contexts have pointed to the vulnerability of many unmarried mothers, including in terms of their educational disadvantage, their young age and social class.[48] Such studies indicate a need for focusing on these issues as a matter of social justice requiring further investigation. In the UK,[49] it is not legally possible to give birth anonymously. Giving birth in secret and leaving the child involves the commission of at least one crime.[50] What is still legally permitted is a situation where the birth giver leaves the child at the hospital, having given her name and details, and gives the baby over for adoption. The question then arises whether the local authority has a legal obligation to inform the father or any wider biological family. This means that it is ultimately a decision that the state, and not the woman, makes. It is to some of these English court cases where judicial concern is shown for the women's situation that I now turn.

C. "Much humanity and wisdom"

Where very little is known factually about the biological father, particularly his identity because the mother refuses to provide information, English courts have made clear that an inquisition will not take place to force the woman to reveal information she is keeping secret. The local authority is not under a duty to make further inquiries. The cases concern unmarried mothers, as the legal position varies depending on whether or not the couple are married as will be more fully explored in part two below. Usually these involve factual scenarios

[46] I. Brockington, *Motherhood and Mental Health* (Oxford 1996).
[47] E. Lee *et al.*, *A Matter of Choice?* (York 2004).
[48] See references above note 11. See also the Family Law Committee of the Law Society response to the DWP 2007 consultation on joint birth registration referred to by Sheldon, "From 'Absent Objects of Blame' ", p. 379.
[49] See further O'Donovan and Marshall, "After Birth", above note 10.
[50] See above note 8: O'Donovan "Enfants Trouvés" and O'Donovan " "Real" Mothers"; Sherr et al., "Abandoned babies". As already stated, giving birth in secret "abandonment" situations is beyond the scope of this article.

where an unmarried woman conceals her pregnancy from everyone, does not seek antenatal care, presents herself at hospital in labour, gives birth and shortly after leaves hospital without seeing the child.[51]

Where the mother knew the identity of the father but refused to disclose it saying that both of them supported the child's adoption and that she wished to protect the father from embarrassment and any disruption to "his own family", the court told the local authority they were under no further obligations.[52] In *Z County Council v R*, the mother opposed the authorities contacting her relatives. It was held that no notice ought to be given to the wider birth family. The following words of Holman J. were "applauded" in a later case by Munby J.:

> Although no statistics are available, many children must have been adopted over the years, outside their birth families, and with no knowledge by, or investigation of, other members of the birth family. Adoption exists to serve many social needs. But high among them has been, historically, the desire or need of some mothers to be able to conceal from their own family and friends, the fact of the pregnancy and birth … If [the mother's confidentiality] is now to be eroded, there is … a real risk that more pregnant women would seek abortions or give birth secretly, to the risk of both themselves and their babies … There is … a strong social need, if it is lawful, to continue to enable some mothers, such as this mother, to make discreet, dignified and humane arrangements for the birth and subsequent adoption of their babies, without their families knowing anything about it, if the mother, for good reason so wishes.[53]

The judge accepted the mother's views that the relatives could not and would not care for R; that to reveal the information would create huge problems and disruptions for her family, and that there would be no future for R within a family disrupted in this way. Thus informing the wider family was likely to risk jeopardising the current and helpful co-operation of the mother with the adoption agency and, perhaps, also R.[54] Accordingly, he held that it was not in the child's interests to reveal the information. It had been made clear by the mother right

[51] As for example reported in *Re L* [2007] EWHC 1771 at [2].

[52] *Z County Council v R* [2001] 1 F.C.R. 238; *Re R (a child) (adoption: disclosure)* [2001] 1 F.C.R. 238. The relevant law was then to be found in the Adoption Act 1976 and the Children Act 1989. This is to be contrasted with a case very different on the facts, *Birmingham City Council v S and Others* [2006] EWHC 3065 (Fam). In that case, it was the unmarried father who sought to stop the mother from revealing the child's existence to his family. He was unsuccessful. However, in that case, one of the reasons for this was that the judge was not satisfied that he had either the authority, or should try to exercise it if he had, to forbid the mother from disclosing to anyone not associated with the proceedings the identity of the child's father, at [72].

[53] *Z County Council v R* [2001] 1 F.L.R. 365, 367, also reported as *Re R (a child) (adoption: disclosure)* [2001] 1 F.C.R. 238, 240. Lord Justice Thorpe in the case of *Re C (a child) (adoption: duty of local authority)*, alternatively known as *C v X, Y and Z* [2007] EWCA Civ 1206 also noted that there are no statistics as to the number of young mothers who seek to conceal their pregnancy, avoid prenatal preparation and who then "abandon" their new born baby immediately on birth relying on the State to find an adoptive family.

[54] *Re R* at p. 244.

from the start, when she told the local authority about the baby, that she wanted R's existence to remain a secret from the wider family. The judge stated that it would therefore be a grave interference with her right to respect for her private life if this information was revealed to her family by the local authority.[55] Issues of the child's and the wider family's rights to a family life were analysed and the judge balanced these with the mother's right to privacy. For him, the balance came down in favour of the mother in terms of preserving her confidence.[56]

Whilst *Z County Council* dealt with informing the mother's wider family, the idea of compelling the mother to identify the father, so that he may be informed, was explored fully in the case of *Re L*. Munby J., giving judgment in this case, directed that no further steps be taken when a mother had twice refused to identify the father. This was so even though, it is reported, it is generally understood she could have identified him albeit that they had had a relationship of no more than a few weeks. He applauded Holman J.'s "*much humanity and wisdom*" in *Z County Council*. In his view, the idea that a mother should be forced, through judicial legal power, to try to make her reveal the identity of the biological father and the nature and extent of her relationship with him, by, for example, cross-examination, was "*deeply unattractive and unsettling*".[57] As he puts it:

> In relation to matters as personal and intimate as this we should be wary of seeking to open windows into people's souls.[58]
>
> The whole process smacks too much of the Inquisition to be tolerable.[59]

The decision in this case has been described by Arden L.J. as effectively meaning "*there is nothing in practical terms which can usefully be done*" when a mother refuses to identify the father.[60] As Holman J. had expressed it in *Z County Council*, there was no power to compel the mother to reveal information. In *Re L*, it was doubted whether, as a matter of law, the court had *no* power to order a mother to disclose the identity of her child's father. Instead, Munby J. points out, the powers of a judge exercising inherent jurisdiction are "*theoretically limitless*", but "*whether it is proper, whether it is appropriate and prudent*" to do so was queried.[61] He elaborates:

> ….And suppose that I was satisfied to the criminal standard that she was telling lies. Could it seriously be suggested that she should

[55] Ibid at p. 248.
[56] Ibid.
[57] *Re L* at [38].
[58] Ibid. at [38].
[59] Ibid. at [40].
[60] *Re C (a child) (adoption: duty of local authority)* [2007] EWCA Civ 1206. See further discussion below.
[61] *Re L* at [29].

> be punished, even sent to prison? Surely not. Punishment would surely be unthinkable …And it is not to be justified merely because we believe, however strongly, that what we are doing is being done in the best interests of the child … We can reason with someone in the mother's position. We can seek to persuade. But we should not seek to force or to coerce...the matter is not to be determined on the say-so of a mother, but we have to face the realities. And the reality here … is, I am quite satisfied, that we have to accept what the mother has told us …

Whilst it may be unfashionable to say so, this respect for a mother's wish to stay silent, not impart information and retain her own confidentiality and privacy, is welcomed in the face of the growing trend focusing on freedom meaning authenticity and unallowable, impermissible choices which could erode the privacy and confidentiality some birth givers seek.[62] Such views need to be treated with great caution particularly with the growing emphasis on biological father's rights and children's identity rights which are in danger of being misinterpreted to the detriment of the mother as will be explained in the next two sections. A mother's right to life, health and integrity are all protected under Article 2 and Article 8 of the ECHR. To ensure those rights continue to be protected, it is important that a mother is able to retain the confidentiality of concealing her pregnancy from others and giving birth discreetly, but safely, with health care and social care professionals' assistance. In her concurring opinion in *Odièvre*, Judge Greve argued that "*no society should in the name of the promotion of human rights be forced to leave a woman with abortion as the only apparent safe option*." If an unmarried mother knows that the child's existence will be revealed and her confidentiality not respected, this may result in such an outcome. As Helen Reece has argued in a different context, obliging highly vulnerable young mothers to disclose details of their sex lives is a cause for concern.[63]

Dame Elizabeth Butler-Sloss has been critical of confidentiality arguments stating that:

> The degree of confidentiality offered to mothers who place their children for adoption with local authorities … needs to be reviewed as a matter of some urgency. … A considerable degree of confidentiality is clearly important but it ought not, in the majority of cases, to deprive the father of his right to be informed and consulted about his child. In my view, social workers counselling mothers ought to warn them that, at some stage, the court will have to make a decision in adoption proceedings as to whether to add the father … to the proceedings … If the mother refuses to

[62] It is hoped in this regard that when the mandatory joint registration provisions are implemented that there is no corresponding rise in concealed births, abandoned babies or infanticide.

[63] H. Reece "The Paramountcy Principle: Consensus or Construct" (1996) 49 C.L.P. 267. See also Sheldon above note 11.

> disclose the identity of the father, her reasons must be carefully considered and, unless those reasons are cogent, it would be wise for the local authority to seek legal advice …[64]

This reflects a growing trend which could be argued to provide more support for father's rights, regardless of the marital status of the couple. One of the arguments for supporting such rights is to be found in Article 8's right to respect for one's family life. Increasingly, arguments are made that this means that unmarried men have a right to family life with their biological offspring. In the context of concealed births, some may seek to say that the biological father or wider family have a right to family life by virtue of biology. It is to that issue that I now turn.

II. Concealed Births and a Right to Family Life

In *Lebbink v the Netherlands*, the ECtHR decided that "*mere biological kinship without any further legal or factual elements indicating the existence of a close personal relationship*" is insufficient to establish a right to family life for a biological "father".[65] As has been widely noted and analysed, notions of the family and fatherhood have in many ways changed beyond recognition in recent times, with mixed responses, opposition or support to these changes.[66] Corresponding human rights implications from the ECHR and the Human Rights Act 1998 and their judicial interpretations on the family and fatherhood have also developed over the last few decades. My purpose is not to review all the case law from the ECtHR or the English courts on family life and fatherhood. Nor is it my aim to analyse the role of fatherhood generally and the way it has seemingly changed over the last few decades: including, as Sally Sheldon expresses it, "the geneticisation" of fatherhood.[67] These subjects are beyond the scope of this article. As my

[64] *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 F.C.R.726 at [53]. She referred to this judgment in the later Court of Appeal decision *Re B (a child) (by her guardian ad litem, the Official Solicitor) v RP, "W" County Council, SB* (2001) 1 F.L.R. 589. However, this Court of Appeal judgment was successfully appealed to the House of Lords. Whilst expressing her understanding for a desire among local authorities to treat information as confidential and not to pursue investigations in relation to a father if the mother was anxious that it should not be done, Dame Elizabeth Butler-Sloss P explicitly stated that her judgment was "designed to alert local authorities to the fact that this is the wrong way round and they should be looking to inform the father in the majority of cases. The desire of the mother for confidentiality is not in itself a reason for not giving the father an opportunity to be heard as to the future welfare of this child." at paragraph [45] referring to her earlier decision of *Re H; Re G*.

[65] *Lebbink v the Netherlands* (Application no. 45582/99) (2005) 40 E.H.R.R. 18 at paragraph 37.

[66] See, for example, Mr Justice Munby "Families old and new – the family and Article 8" [2005] 17 C.F.L.Q. 487; R. Collier *Masculinity, Law and the Family* (London 1995); R. Collier and S. Sheldon, *Fragmenting Fatherhood: A Socio Legal Analysis* (Oxford 2008); A. Diduck, " 'If only we find the appropriate terms to use the issue will be solved': Law, Identity and Parenthood" [2007] C.F.L.Q. 458; C. Smart "The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood" in A. Diduck and K. O'Donovan (eds.), *Feminist Perspectives on Family Law* (London 2006), 123; J. Herring *Family Law* (London 2007); S. Choudhry and J. Herring, European Human Rights and Family Law (Oxford 2010).

[67] Sheldon above note 11.

Introduction explains, my main focus is to show how Article 8 of the ECHR has been developed and interpreted in ways which do not need to, and should not, erode women's confidentiality and privacy in the very specific context of concealed births. So, instead, this part evaluates how a human right to family life is dealt with by the English courts in specific cases which directly impinge on issues to be resolved in concealed birthing cases. As *Lebbink* makes clear, biological "fatherhood" does not establish a right to a family life under Article 8. One of the key factors in establishing such a right's existence is, in contrast, cohabitation.[68] As such, an unmarried father who does not know of the existence of any child, and therefore has never cohabited with the child, may not on first glance appear to have any such right. Even if a right to family life is established for any unmarried fathers, it can, of course, be justifiably interfered with, if such interference is in accordance with law, serves a legitimate purpose and is necessary in a democratic society, as set out in Article 8(2) of the ECHR.

A. Married biological parents

The legal position varies depending on whether or not the couple in question are married. In the UK, if the woman seeking to conceal her birth and place the child for adoption is married, the court's discretion is required to be exercised to vary the normal practice of a husband, as the presumed father, being a party to any care and subsequent adoption proceedings. A very recent case, judgment being given by the Court of Appeal on 17 March 2011,[69] made clear that the court would not sanction the withholding of information from the married father "*in anything other than exceptional circumstances where there are … strong countervailing factors*."[70] On the facts of the case, there was no evidence to support the mother's case that revealing the child's existence would affect her husband adversely: "*[t]his was not the sort of harm that would justify keeping [the father] ignorant of his son's existence …* "[71]

In this case, the mother who wished to conceal her pregnancy and the child's existence from the father was in her 40s, had been married to him for 25 years, and they had adult children together. They are described by the court as being of Sikh origin,[72] and having previously lived in Afghanistan. The father had mental health problems which appeared to have originated from his experiences at the hands of the

[68] *Kroon v the Netherlands* (Application no. 18535/91) (1995) 19 E.H.R.R. 263; *X, Y and Z v the United Kingdom* (Application no. 32666/10) (1997) 24 E.H.R.R. 143; *Gorgulu v Germany* (Application no. 74969/01) Judgment 26 February 2004.
[69] *M v F* [2011] EWCA Civ 273 (CA).
[70] Ibid. per Black L.J. at [37].
[71] Ibid. at [49].
[72] The mother gave oral evidence in Punjabi through a translator – see paragraph 24 of the judgment.

Taliban in Afghanistan in the late 1980s. The mother alleged that this made his behaviour unpredictable and sometimes violent: domestic violence had been reported to the police in the past. The first instance judge states "*[a]lthough it seems incredible, M did not become aware that she was pregnant until the GP sent her for an ultrasound … [b]y then it was too late for an abortion*."[73] In his view, "*nothing less than a significant physical risk … must clearly be demonstrated*" before deciding not to inform a married father of the existence of the child. At the Court of Appeal, it was decided that the legal authorities do not impose a requirement of significant physical risk. The Court of Appeal did not want to define what may make a case exceptional enough to justify departing from normal principles. In any event, this case was incapable of satisfying any test of exceptionality in their view and so the father needed to be informed.[74] Despite the facts being very different, including the mother claiming her husband was not the father, but that the child had been conceived following a rape, a 2003 case was also unsuccessful at achieving confidentiality in birth giving and giving the baby over for adoption without the husband's knowledge.[75] The Court of Appeal giving judgment in the case seemed to doubt the mother's credibility.[76] Even though it is a remote possibility and " … *hard … to envisage an adoption process ever legitimately proceeding without the knowledge of, and consent being sought from, a parent with parental responsibility*",[77] it is still a possibility. It is surely significant, in an era of family life rights for fathers, that exceptional circumstances may justify keeping a married father who has had a long relationship, and other children, with the mother from knowing of his child's existence.[78]

B. Unmarried biological parents

Where the couple are unmarried, the ACA 2002 permits the placement of a child for adoption and the making of an adoption order without the consent of, and without notice to, a father who does not have parental responsibility. However, the court has power to direct such a

[73] *M v F* per Thorpe L.J. at paragraph 4, quoting paragraph 15 of Mostyn J.'s judgment from the court of first instance.

[74] *M v F* per Black L.J. at [45], Longmore L.J. at [25], and Thorpe L.J. at [22]-[23] who stated that "in family proceedings it is extremely dangerous to state that there is only a single path to exceptionality."

[75] Re *AB (Care Proceedings)* [2003] EWCA Civ 1842.

[76] Ibid at paragraph 19. See K. O'Donovan and J. Marshall, above note 10. In *M v F*, above note 69, Mostyn J stated the relationship between the mother and the putative father in *Re AB* as "likely the result of an adulterous affair while she was in a long established marriage with her husband" at [40], as quoted by Thorpe L.J. at the CA.

[77] *M v F* [2011] EWCA Civ 273 at [46], set out in Thorpe L.J.'s judgment at the CA, at [7].

[78] S. 47(2)(c) and s. 52(1) of the Adoption of Children Act 2002 permit the court to dispense with the consent of a parent with parental responsibility, like a married father, if the welfare of the child requires it.

father to be joined as a party to such proceedings. The court has an unfettered discretion which is to be exercised having regard to all the circumstances in a manner that complies with the ECHR.

Thorpe L.J. in *Re S (a child)*[79] refers to the changing shift in attitudes to the role of unmarried fathers:

> There will undoubtedly be cases in which the court will exercise that discretion against joining a natural father. An extreme and obvious instance would be the mother whose conception was as a consequence of a violent rape. But in a case such as this where the father has intermittently but transiently sought to play a part in the child's life, it seems to me that a judge acts wisely in ensuring that at least the father has notice of the proceedings. The climate has undoubtedly shifted since the mid-1980s, and the shift is towards according greater involvement of natural fathers, even though there has been no marriage and even though there had been no formal order of parental responsibility. The arrival of the Convention probably does not greatly impact on this discretionary balance. But it is a factor that the judge was not only entitled to take account of, but was wise to take account of.[80]

It seems if a family life can be established and none of the qualifications to Article 8(2) apply, then, the father will be contacted.[81] It is sometimes assumed for the sake of argument that a father's Article 8 family life rights are engaged.[82] Case analysis shows that the significant factors which militate in favour of disclosure are a relationship of some duration, cohabitation, which itself is said to illustrate "*sufficient constancy to create de facto family ties*",[83] and the couple having other children together.[84] By contrast, the court is unlikely to order disclosure where the child is conceived as a result of a one night sexual encounter[85] and where there was "a real danger of very serious violence".[86] Even where a couple had been engaged to be married and had a

[79] *Re S (a child) (adoption proceedings: joinder of father)* [2001] 1 F.C.R. 158 (CA).
[80] *Ibid* at paragraphs 20 and 21.
[81] In *Re M (Adoption: Rights of Natural Father)* [2001] 1 F.L.R. 745, the father was not contacted as there was "no established family life". See also *Re M (Adoption: Rights of Natural Father)* [2001] F.L.J.240. Where "family life" is established the Court will require that the father be contacted: *Re R (Adoption: Father's Involvement)* [2002] 1 FLR 302. In *Re J (Adoption: Contacting Father)* Family Division 14 February 2003, upon the woman's request, the father of a child placed for adoption was not contacted.
[82] See for example, *Re L* above note 51. However, in this case, as explained in Part One above, the judge decided in the unmarried woman's favour.
[83] *Kroon's case* cited above at note 68.
[84] Re *H; Re G* above note 64.
[85] *Re C* above note 60.
[86] *Re X (Care: Notice of Proceedings)* [1996] 1 F.L.R.186. In this case, the unmarried mother was described as a Bangladeshi girl of 17 years old. The father was her brother-in-law who did not know of the birth of the child. There was evidence that if the liaison was known to "the community", the mother would face ostracism, the family of the father would be put under great strain and the "overall effect would be catastrophic, with a real danger of very serious violence". This being the case, the court did not require the father to be informed.

seven year relationship, it was decided that the facts were not strong enough to join the father who had no family life right under Article 8.[87] Significance was attached to the fact that the couple had never cohabited, so that the "*exceptional factors … that the relationship had sufficient constancy to create de facto family ties*" were not present.[88]

C. Where the parents have cohabited or the child has a sibling

In concealed birth cases where the father has cohabited with the mother and or where there is another sibling by the same parents, it seems more likely that the court will order that the father needs to be told. So where the mother had previously cohabited and had another child with the father with whom the father had contact, notice had to be given to the unmarried father.[89] The mother did not wish the father to be informed of the adoption proceedings. She argued that their now platonic relationship, and his existing relationship with their older child, would be jeopardised if he knew of the new birth which she had concealed from him. Whilst each case needs to be decided on its own merits, in this case it was stated that particular weight seems to be given to the effect on the child if the father became aware of the child's existence and whether it would be better for the child if the father found out *at this stage*.[90]

These cases seem to indicate a balancing of rights of all the relevant parties. For example, a father's continued relationship with the older child and evidence of an attempted reconciliation between the parents was said to illustrate a genuine commitment to each other and their ongoing relationship. Yet balanced against this is the confidentiality sought by the mother. The desire of the mother for confidentiality and non-disclosure could prevail over notice to the father *if there were strong countervailing factors*. Evidence of a strong connection between a couple, and a family unit in existence, particularly with past cohabitation and an existing child, is compared to a breakdown of a marriage prior to the birth of the second child. Yet, even in such circumstances, a woman's right to confidentiality *could* have prevailed if there were strong countervailing factors. Examples of such factors include rape, or other serious domestic violence that placed the mother at serious physical risk. The court states however "*there may well be other situations in which a father should not be informed of the proceedings and my*

[87] *Re H; Re G* above note 64.
[88] Ibid at [51]–[52].
[89] *Re H* part of the *Re H; Re G* judgment above note 64.
[90] Per Dame Elizabeth Butler Sloss referring to Ewbank J. in *Re P (adoption)* in her judgment in *Re H; Re G* at [30]–[31].

examples are, of course, not exhaustive."[91] Having said all this, as the court expresses it:

> this raises the practical question of how to identify [the father]. In this difficult and delicate case, where this young mother has had to make the agonising decision to place H for adoption, I do not consider it just to require her by court order to disclose the identity of the father in circumstances in which she would be at risk of going to prison for her failure to comply … steps should be taken to notify the father of the adoption proceedings. I shall request the mother to give the name and address of the father to [the relevant local authority] and to the court. I shall also direct that the Child Support Agency, who have the name and address of the father … , should disclose that information to this court.[92]

Such cases preceded the new regime under the ACA 2002 which came into force on 30 December 2005. Arden L.J. in *Re C*, a case which is discussed in more detail in Part three, confirms the position at the ECtHR, that an unknowing, unmarried father has no right to respect for family life under Article 8 of the ECHR. If the child's existence is unknown to him, he has no family life with the child and therefore there is no violation of Article 8.[93] In that regard, the situation where a mother wishes to relinquish the child immediately after birth is different to that of a mother who later in the child's life is deemed unsuitable in some way to care for the child by the state and care proceedings are taken. That situation is not the focus of this article because I am dealing with very specific circumstances of concealed births and their relationship with the development of autonomy and identity rights under European human rights law. However, in that situation, the child will have had a social relationship with the biological mother, invariably also her mother's wider biological family, and probably, to varying degrees of contact, with the biological father. Whilst the state places importance on the biological parents or wider biological family being considered as carers in these circumstances, important in the distinction is the existing life that the child has lived before being moved from the birth mother into care or fostering and onto adoption. It is this existing life that is more prominent in the ECHR personal identity rights' case law emanating from Article 8, and which, it is argued here, is the more consistent interpretation of identity, rather than emphasising blood and genetics. That case also makes clear that the Court's discretion is still retained following the enactment of the ACA 2002.[94] As Lori Chambers has recently argued, a woman cannot make a fully informed and free decision to carry a child to term and

[91] Ibid. at [48].
[92] Ibid at [50].
[93] *Re C* above note 60 at [32].
[94] Ibid. per Thorpe L.J. at [76].

place him or her for adoption if she fears the intervention of the biological "father" when the child is born.[95] If a mother is forced to reveal who the "father" is, infanticide or abandonment could increase and, as Chambers points out, a mother, forced to notify a father might feel, for the sake of the child, that her only option is to discontinue adoption proceedings and retain custody against him. In this regard, Chambers refers to the US safe haven legislation which allows for anonymous abandonment immediately after birth, a situation most would consider much more extreme than that analysed in this article. The inconsistency in allowing abandonment without identifying fathers while insisting that a mother who does not abandon her child must name the father is noted. [96]

So far, for unmarried women in a concealed pregnancy and birth situation, adoption without the "father" or wider biological family knowing has been sympathetically, humanely dealt with, largely in line with the mother's wishes. Those cases which directly examine the issue always express revulsion towards the idea of forcing a woman to reveal information about the father through cross-examination and penal notices. In terms of informing the "father", there is little discussion of distinguishing the reasons for doing so. For example, ought the focus rest on fairness to him, in that he has a right to know about the existence of "his" child, or a right to be given the chance of arguing he is capable and willing to look after the child? Ought the focus to rest on a child's right to know the exact identity of his or her biological father or does the importance rest on being given the chance to be brought up by the biological father?

III. A Right to Know Everything About One's Parentage?

In adoption situations, arguments are increasingly being presented that a child has an identity right, as a matter of human rights law, most notably through an interpretation of Article 8 of the ECHR, but also as enshrined in the United Nations Convention on the Rights of the Child (the CRC). The CRC states that a child has "*as far as possible, the right to know and be cared for by his or her parents*."[97] Regardless of the words "as far as possible", some seek to use it to justify arguments for a child's legal human rights entitlement to exact knowledge of parentage.[98] As Choudhry and Herring have recently noted, in the context of paternity

[95] L. Chambers, "Newborn Adoption: Birth mothers, Genetic fathers, and Reproductive Autonomy" (2010) 26 Can. J. Fam. L. 339–393 at 344.
[96] Ibid., p. 343.
[97] United Nations Convention on the Rights of the Child adopted by General Assembly Resolution 44/25 of 20 November 1989, Article 7.
[98] A. Bainham, "What is the point of birth registration?" [2008] Child and Family Law Quarterly 449.

blood tests, the English courts appear to have gone too far in their interpretation of the CRC which is misguided. This is so particularly in the light of the ECtHR's jurisprudence on this matter which has not established such a right to identity through exact knowledge of paternity.[99] Whilst some could argue that in their view it is morally wrong for a child not to have this knowledge, some argue it is also legally wrong and prohibited as a matter of human rights law.[100] The moral wrong is said to be committed by preventing the offspring from leading a complete life in accordance with their "true" identity. This identity right is said to entitle a child to a personal history, to a sense of completeness through this knowledge and through being brought up by his or her parents or blood relatives. It seems to be assumed that without this knowledge, and experience, the child will be, always and forever, in some sense incomplete, lacking, and have an inauthentic or false sense of identity. The current social climate seems to base much support for keeping children with their biological families because of links to kinship and genetics. The assumption seems to be that it is in the child's interests to know exactly who his or her blood relatives are and that damage is caused and suffering created by withholding this information and from the child not being brought up by or amongst those relatives. Such arguments query how such a person will be able to make sense of their life if they do not know their genetic and or biological origin. How will they discover who they truly are? How can they realise what's already within them to become? It has recently been written that we love such things because they display a controlled environment in which the self is shaped to make sense of itself – the popularity of researching family history, the longing to be placed within an ongoing historical tradition where we have come from and where we belong.[101]

A trend towards "biological truth" for the offspring has gathered momentum which could be interpreted as validating the self-realisation, authenticity, version of freedom already referred to above. Such a version is creeping its way into the legal sphere. It can, for example, be seen in the strong dissenting opinion of seven of the 17 judges of the ECtHR who gave judgment in *Odièvre*. This dissenting opinion highlights the child's identity right but in a way which, it is respectfully argued here, misinterprets identity which needs to be interpreted instead in line with the purpose of human rights law. Whilst it is established ECHR law that a right to respect one's private life

[99] Choudhry and Herring, *European Human Rights and Family Law*. See also S. Besson, "Enforcing the Child's Right to Know her Origins: Contrasting Approaches under the Convention on the rights of the child and the European Court of Human Rights (2007) 21 International Journal of Law, Policy and the Family 137; E. Jackson "What Is a Parent?" in Diduck and O'Donovan (eds.), *Feminist Perspectives*, 59.

[100] For example, see Bainham, "Birthrights" above note 35.

[101] M. Thompson, *Me* (Stocksfield 2009), 91–92.

encompasses a right to personal identity, the way the dissenters in *Odièvre* interpret this right is restrictive and constraining. The dissenting opinion points to the developing jurisprudence of Article 8 that is said to include the right to personal development and to "*self-fulfilment*" as part of the right to respect for private life.[102] The issue of access to information about one's origins is said to concern "*the essence of a person's identity*", and is "*an essential feature of private life protected by Article 8*". Being given such access and "*thereby acquiring the ability to retrace one's personal history is a question of liberty, and therefore, human dignity*". As such, it is stated to lie "*at the heart of the rights guaranteed by the Convention*". Although the mother's right is said to concern her personal autonomy, the dissenters found that the different interests involved had not been balanced but instead "*the mother … has a discretionary right to bring a suffering child into the world and to condemn it to lifelong ignorance*". They make clear that, in their opinion, the right to identity – as an essential condition of the right to autonomy and development – is within the inner core of the right to respect of one's private life guaranteed by Article 8.[103] Notions of what identity means are presented in short phrases and sentences without explanations or any substantiated evidence of the importance of such knowledge to a person's identity. The dissenters' views chime with ideas of fixed, essential, core identity as self-realisation or authenticity, with its ideas of needing to know and therefore having a right to know everything about one's origins before one can be "complete". They thus mask potential state coercion of individual self-determining free choice and identity formed through existence. Article 8 clearly provides a right to personal identity and in the later case of *Jaggi v Switzerland*,[104] the Court follows a line of cases which do make it clear that such a right includes a right, to some extent, to find out, or be enabled to ascertain, some knowledge surrounding one's parentage.[105] In *Jaggi*, the Court states that:

> persons seeking to establish the identity of ascendants have a vital interest, protected by the Convention, in receiving information necessary to uncover the truth about an important aspect of their personal identity. At the same time, it must be borne in mind that the protection of third persons may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing.[106]

[102] *Odièvre v France* above note 25, at paragraph O-IV3 of Joint Dissenting Opinions of Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää.
[103] Ibid. at paragraph O-IV11.
[104] Application No, 58757/00, (2008) 47 E.H.R.R. 30.
[105] Including *Gaskin v U.K.* (1989) 12 E.H.R.R. 36, *Mikulic v Croatia* (Application No. 53176/99), Judgment 7 February 2002.
[106] *Jaggi* at [38].

In striking a fair balance between these rights, the ECtHR in *Jaggi* decided in favour of the 67 year old applicant whose right to personal identity was said to have been violated by not being allowed to exhume the body of his dead pututative biological father, to confirm through DNA testing that the man was his biological father. Without presenting any psychological evidence in support of its position, the Court took the view that an individual's interest in discovering his parentage does not disappear with age, in fact "*quite the reverse*". Because the applicant had sought to establish this paternity throughout his life, the Court equated this to implying "*mental and psychological suffering, even if this has not been medically attested*".[107]

It appears we live in a quickly changing environment of developments in geneticism, bioethics, reproductive technologies, and a corresponding social change in attitudes towards adoption and bio-genetic links. Whilst these are not explored or investigated or sourced in support of the dissenters' opinion in *Odièvre*, or the majority in *Jaggi*, the judges' views there seem to rest on such unexplored notions.[108] Attitudes towards anonymity in relation to adoption have been described as having undergone a complete reversal in recent decades.[109] Although initially characterised by secrecy and concealment, openness about the fact of adoption is now considered to be good practice.[110] In the UK, the provision of anonymity for gamete donation in artificial reproduction techniques was abolished in relation to any donations from 1 April 2005.[111] Reasons given for this change depend in large part on ideas of personal identity equating to self-realisation, authenticity and truth as to one's parentage, reflecting a seemingly growing attitude that one is not "complete", is deprived of a fixed identity, unless there is exact knowledge of one's genetic or biological origins.[112] Debates in parliament on this legislation, for example, illustrate the strong and

[107] Ibid. at [38] and [40].
[108] *Odièvre v France*, 38 E.H.R.R. at paragraphs O-IV17-20.
[109] K. O'Donovan, *Sexual Divisions in the Law* (London 1985); E. Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford 2001).
[110] See O'Donovan, *Sexual Divisions*. In 1975, in U.K. it became possible, once they had reached 18, for adopted children to receive their original birth certificate, although this does not necessarily reveal very much about one's genetic origins. See Jackson, *Regulating Reproduction*, pp. 214–5; Report of the Committee of Inquiry into Human Fertilisation and Embryology (Cmnd. 9314), paras 4.21–4.22, 6.6, 7.7. D Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn. (Oxford 2002), 748.
[111] Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004. See also Human Fertilisation and Embryology Authority Act 2008, ss. 31ZA ff.
[112] A similar version can be seen in the English case of *Rose and another v Secretary of State for Health and another* [2002] EWHC 1593 (Admin). This concerned the right of a child to know who donated sperm to help create their life. It was decided before the recent changes to the previous anonymous system. Scott Baker J. interpreted Article 8 as providing the right to obtain information about a sperm donor expressed in terms of a person who contributed to the identity of the child. As Article 8 incorporates the concept of personal identity, in his interpretation, this "plainly included" the right to obtain information about a biological parent. In his view, the information sought went to "*the very heart of the claimants' identity and to their make up as human beings*" (my emphasis).

emotive language used to suggest that children born following anonymous gamete donation may suffer "genealogical bewilderment" that the "right to identity is a right not to be deceived about one's true origins."[113] For example, Baroness Andrews on presenting the relevant 2004 Regulations to the House of Lords for approval, stated that over the time when the previous law was in force, it became apparent that in adulthood some donor-conceived people "*have said … very poignantly that not being able to find out about their origins has left them with a gap in the way they see themselves, a gap in their identity, in their ability to tell their own story – and we are, after all, story-telling animals – and an inability to make complete sense of their lives*." She continues: "*[w]e feel it is now time … to reflect the paramount rights of the child in these provisions as we are seeking to do consistently and in many other aspects of law and practice*." Whilst acknowledging that there are ethical and practical needs to balance the rights of the child with the rights of the donors "*who make such a valuable gift of life*", it was felt that the offspring should have the right to access information about their origins "*which will help them, if they so choose, to complete their life history*." For Lord Patel, in the same debate concerning anonymity in gamete donation, this is not just an ethical issue, it engages the *right* of children to know their biological identity. In England, the emphasis is placed squarely and firmly with the welfare of the child, which seems to include not only before they are conceived, but also when they become adults, as any information is only available when they reach adulthood at 18 years old, so would not seem to be about the rights of a child.[114] Additionally, "the powerful symbolic resonance" of incest and inbreeding leads to demands that children should have sufficient information to avoid sexual contact with their genetic relatives. In debates surrounding the enactment of the joint birth registration provisions for unmarried fathers, in the Welfare Reform Act 2009, reference was made to ideas that a child has a right to know who his or her parents are and a right to be acknowledged and cared for by his or her father. It is assumed that these rights exist and ought to do so as a good thing independently of the state of the parents' relationship.[115] Whilst some of these arguments have substance, *exact* knowledge of genetic or biological parentage is unnecessary to overcome them. Indeed, it has

[113] All of the quotes that follow are taken from House of Lords debates 9 June 2004 www.theyworkforyou.com/lords.

[114] Ibid. On before children are conceived see E. Jackson, "Conception and the Irrelevance of the Welfare Principle" (2002) 65 *Modern Law Review* 176–203. There is no duty on parents to disclose that the child has been conceived through donor gametes. As Bainham has pointed out, this may have implications for a child born to a woman and a man as compared to a child born to a same sex couple where the need for a donor is obvious: "Arguments about Parentage", above note 2.

[115] See Department of Work and Pensions, "Joint Registration: Promoting Parental Responsibility" (Cm. 7160), paragraph 6.

been noted that only 4% of children born of the women X ask for access to origins information that is legally available under the French law.[116] 96% do not.

Examining such arguments in my context of the concealed birth and adoption situation, there is no knowledge on the part of the "father" as to the existence of the child, and the child does not know the identity of his or her biological father. Using and perpetuating genetic and biological views of what constitutes a child's identity right pits the child against a woman who wishes not to reveal the identity of the biological father; it risks making the adopted child feel he or she is living an inauthentic life, and that the child's "right to identity" is being contravened and damaged in some way. It could also be used, not only to argue for revelation of this information, but to make the woman feel her "morally wrong", inauthentic choice in giving the child over for adoption is in itself impermissible and a contravention of human rights. It does not appear convincing that a child's best interests are served by forcing the mother to reveal information she does not want to disclose. If this becomes the legal position, the mother may feel forced to have an abortion or to keep a child against her (the mother's) will, with potential for care proceedings later in the child's life. In the context of debates and any future changes to the French law, it is stated that "if we were to go back on that possibility of anonymous birth, then some women would not go to the maternity hospitals but they might just give birth in the street or without proper protection."[117] The arguments presented here are in favour of a woman's autonomy and identity right in the context of pregnancy, through the right to keep the fact of the pregnancy private, and on birth, in the context of giving birth and being able to relinquish the child on birth. However, this does not, in my view, mean that the child's interests are subsidiary to the woman's: there does not need to be a balancing of rights exercise or a conflict between the child's and the mother's rights if a human right to identity is interpreted in a self-determining fashion in keeping with the overall purpose of human rights law to respect human dignity and human freedom. The child does have an identity right as a matter of human rights law: under the CRC to know *as far as possible* his or her parentage, and under the ECHR, as more convincingly interpreted in line with human rights law's purpose, to have a right to personal identity meaning self-determining existence. This protection is given through knowledge of, and information concerning, his or her existent life, not on an entitlement to exact knowledge of his or her genetic or

[116] See Joint Council of Europe and European Commission document, above note 3, p. 28.
[117] Ibid. at p 29.

biological parentage.[118] There is no human right to have exact knowledge of the identity of your genetic or biological parents. In this regard, Jane Fortin has provided detailed analysis as to why the right to know one's genetic origins is going "too far, too fast".[119]

The Court of Appeal's examination of concealed births and adoption appears to confirm this. In *Re C*, the unmarried 19 year old mother had made it clear she wished the child to be placed for adoption at birth. The question for the Court of Appeal was again whether the local authority was under a duty to make inquiries to find out as much information about the background of the "father" or any of the child's birth family to see if they would be suitable carers for the child. The mother had not told her family of her pregnancy or the birth and considered them to be unsuitable carers for the child. There was no relationship with the father, other than a one night sexual encounter; she refused to identify him, and she had never spent time caring for the child.[120] The Court of Appeal decided that there was no duty to make inquiries. Importantly for the purposes of interpreting what an identity right may mean in this context, the Court of Appeal made clear that inquiries are not in the interests of the child *simply because they will provide more information about the child's background*. Instead, they must genuinely further the prospect of finding a long-term carer for the child without delay.[121] This contrasts clearly with the judge of first instance, Judge Taylor. In his judgment, the ACA 2002 now made the law "quite straightforward". In his words:

> The Local Authority have no choice, they are under a duty to inform themselves of as much information about the background of the extended family as they are able to do. It may well be that somebody suitable is in a position to come forward and offer a home for this child and if so then obviously it will be in the interests of this child to be placed within the family. … (at paragraph 26 of his judgment)

He continued:

> When one looks at the likely effect on the child throughout her life one has to concentrate on the child and not the mother's wishes and the reality is – as we all know nowadays – that when children are adopted they come to a time in their life when they do enquire about their parentage and it would be cruel in the extreme to prevent this child having as much knowledge as possible about her

[118] Article 7 of the CRC. See interpretations of Article 8 of the European Convention on Human Rights 1950 right to private life in *Gaskin v U.K.*(1990) 12 E.H.R.R. 36 and *Mikulic v Croatia* (Application No. 53176/99), Judgment 4 Sept 2002, [2002] F.C.R. 20.

[119] J. Fortin, "Children's Right to Know their Origins – Too far, too fast?" (2009) 21 Child and Family Law Quarterly 336.

[120] *Re C (a child) (adoption: duty of local authority)* [2007] EWCA Civ 1206 at [1].

[121] Ibid., at [3] per Arden L.J.

> background in the event that she is adopted, even if that information comes without the consent of the mother … (at paragraph 27 of his judgment)[122]

In overturning this decision and considering the issues in the mother's favour, Arden L.J.'s decision turns on an interpretation of section 1 of the ACA 2002, considering the interests of the child. Where a child has never lived with his or her birth family, and is too young to understand what is going on, any arguments as to the wider "natural" family are weaker. In a case such as this, such arguments are overtaken by the need to find the child a permanent home as soon as that can be done; a preference is given to avoiding delay with focus on the child's long term care.[123] Whilst she states that "*it is likely these days that, in the absence of some religious objection, a woman would have an abortion rather than take an unwanted child to term*", Arden L.J. continues that if matters of potential harm to the mother's health or the child's health can be supported, they may constitute an additional reason for the court having power to withhold information from relatives or the father of a child in an appropriate case.[124] The learned judge states that it is *self-evident* that "*it would be inappropriate to reveal the existence of a child to a father who was violent, or to relatives who suffered from illnesses which would make it impossible for them to look after the child*".[125] It is also made clear that there is no policy or legislative preference for the "natural" family.[126] Whilst stating that there is an interest in the child retaining his or her identity, and this is likely to be important in adulthood, this is "*only one factor in the balance that has to be struck.*"[127] The Court of Appeal was not convinced by the guardian's arguments that there is now an expectation of disclosure and a societal shift in support of greater involvement of the "natural" father.[128] Preference is given to permanence, avoidance of delay and placement of a child in a stable home.

The way that Article 8's right to respect one's private life has developed into a right to personal identity in the majority of cases at the ECtHR, and as can be interpreted from *Re C* at the Court of Appeal, shows in legal form that the development of one's personality does not need to entail a belief in an inner human *essence*, manifesting itself here in geneticism. To reiterate, the idea of identity presented by the dissenters in *Odièvre*, in *Jaggi*, in many campaigners for removing donor anonymity, and in some interpretations of children's identity rights in

[122] Ibid., quoted by Thorpe L.J. at [75].
[123] Ibid. at [21] and [17].
[124] Ibid., at [37] and [38].
[125] Ibid. at [25].
[126] Ibid. at [43].
[127] Ibid. at [15] per Arden L.J. referring to Adoption and Children Act 2002, s. 1.
[128] Ibid. at [23].

the 21st century, all of which highlight genetics and biology, depend on an idea of identity which relies on an unchanging foundational core of the human person. This may be constraining because it can be used to justify the state coercing people into behaving in a certain way in the name of realising, bringing to fruition and liberating some inner core, with people "finding out" who they "truly" are, and acting "authentically". It is argued that when the ECtHR interprets Article 8's personal identity right to be more in line with a self-determining version of identity, it presents a more sophisticated version of identity. When personal choices can be made which accept the potential of each individual to form projects and exist in the world in a meaningful way as they see it and or to change their identity, to live the life of their own choosing.[129] While the right to access information relating to one's childhood existence and development,[130] is also part of this idea of identity, it is very different to linking identity with one's biological parentage in the sense that it is more "natural" and "authentic". The danger with presenting a view of the "human core" which is always there and can somehow be reclaimed or discovered and realised consists in fixing and constraining identity, taking us back to ideas of human nature or function and can amount to forcing us to be free. A more fluid idea of identity focusing on lived experience and one's existence, permitting change and space to change or personal choice to remain is one that is seen in many identity rights legally protected through the ECtHR's jurisprudence.

Conclusion

Whilst the English court decisions analysed here are based on considerations of the welfare of the child, as is legally required, they allow a woman to choose not to reveal the identity of the child's biological father and to conceal the child's existence from the wider biological family. They also allow her to make choices which many would find not in keeping with a view of authentic identity freedom. In an era of human rights and the growing importance of issues of personal identity, querying the right of a woman to give over her baby for adoption is a worry that requires consideration of the issues raised in this paper in an effort to interrogate a constraining version of identity and permissible choice from becoming more prominent. In analysing the way the Article 8 right has developed in the majority of cases at the ECtHR, correlations have been found with a concept of human freedom and

[129] See, for example, *Goodwin v the United Kingdom and I v the United Kingdom* (2002) 35 E.H.R.R. 18.

[130] As in *Gaskin v U.K.* 12 E.H.R.R. 36; *M.G. v U.K.* (Application no. 39393/98), Judgment 24 September 2002.

identity as self-determination, not authenticity.[131] Limiting economic and social circumstances may contribute to the reasons why a woman gives her baby over for adoption and such injustices need to be fought at the level of changing those circumstances. Rather than, however, viewing the birth giver as a victim of those circumstances, or as someone who is exercising inauthentic choices and thus sabotaging her identity, and that of the child, it seems more convincing to encourage a capacity and freedom to make choices that take both her conditions and her agency seriously and help her forge her own sense of self through respecting her choices. Showing care and respect by listening to, and acting upon, a woman's choice not to disclose information concerning the "father" and her wider family respects her privacy and confidentiality rights including her health, and possibly her life, and that of the child. It is also in keeping with a child's best interests and identity in terms of aiming to assist them in living in security, cared for by those who love and want them, support them, and are capable of looking after them. It is hoped that readers will consider the issues raised here with an open mind, acknowledging the variety of complex issues surrounding such choices, including legally treating people with respect, sensitivity and care, and not treat their actions with paternalistic disdain or disregard.

[131] J. Marshall, "Personal Freedom", above note 5.