

## *TT v. Registrar General for England & Wales: Regulatory Bodies, Transgender Bodies, and Human Rights*

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### I. OVERVIEW

Freddy McConnell gave birth to his son in January of 2018.<sup>1</sup> McConnell, who was registered as female at birth, medically transitioned<sup>2</sup> at the age of twenty-two to live as a man.<sup>3</sup> McConnell knew he wanted to be a parent from a young age but also knew he needed to transition for the sake of his mental health.<sup>4</sup> McConnell ultimately made use of hormone treatments and other therapies in conjunction with his social transition<sup>5</sup> but deliberately stopped short of any surgical procedures that would permanently end his ability to bear children in the hopes that he could one

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1. The Queen (on the application of TT) v. Registrar Gen. for Eng. & Wales [2019] EWHC (Fam) 2384 [7] (Eng.).

2. For a transgender person, medically transitioning from the sex assigned at birth to the identified gender may involve one or more gender confirming procedures, such as hormone therapy or gender affirming surgeries (e.g., chest augmentation or mastectomy, laser hair removal, and many others). *What Do I Need to Know About Transitioning?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/sexual-orientation-gender/trans-and-gender-nonconforming-identities/what-do-i-need-know-about-transitioning> (last visited Jan. 28, 2020). Not all transgender people choose to medically transition, and “transgender” for all purposes herein refers to any person whose identified gender does not conform to the sex assigned at birth. *Id.*; *Transgender FAQ*, GLAAD, <https://www.glaad.org/transgender/transfaq> (last visited Jan. 21, 2020).

3. *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [4].

4. Simon Hattenstone, *The Dad Who Gave Birth: ‘Being Pregnant Doesn’t Change Me Being a Trans Man,’* GUARDIAN (Apr. 20, 2019, 3:59 AM), <https://www.theguardian.com/society/2019/apr/20/the-dad-who-gave-birth-pregnant-trans-freddy-mcconnell>. He was advised that testosterone therapy would leave him infertile, meaning he could have a biological child either by freezing his eggs for use with a surrogate or by becoming pregnant before beginning hormone therapy. *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [5]; Hattenstone, *supra*.

5. For a transgender person, socially transitioning from the sex assigned at birth to the identified gender may include “coming out to [their] friends and family as transgender,” “going by a different name” and/or pronoun, presenting themselves through clothing and/or grooming in a manner that represents their identified gender, and more. *What Do I Need to Know About Transitioning?*, *supra* note 2.

day conceive.<sup>6</sup> In September 2016, three years after starting his medical transition, McConnell suspended his testosterone therapy in preparation for fertility treatment to conceive a child from one of the eggs in his reproductive system<sup>7</sup> and sought fertility treatment in the form of intrauterine insemination by an anonymous donor at a clinic licensed under the Human Fertilisation and Embryology Act 1990 (HFEA 1990).<sup>8</sup> While undergoing fertility treatments, McConnell was also gathering medical reports and documentation in order to legally change his gender to male. In January 2017, McConnell submitted his application for a Gender Recognition Certificate<sup>9</sup> (GR Certificate) under the Gender Recognition Act 2004 (GRA 2004)<sup>10</sup> and a declaration of his intent “to live in the acquired gender until death.”<sup>11</sup> McConnell’s application was granted, and a GR Certificate affirming McConnell’s male gender was issued on April 11, 2017.<sup>12</sup> Just ten days later, McConnell underwent the fertility treatment and subsequently became pregnant.<sup>13</sup>

After his son (herein, referred to as “YY”) was born, McConnell was informed by the Registry Office that he would have to be registered as the child’s “mother,” though it could reflect McConnell’s “current (male) name.”<sup>14</sup> McConnell, who wanted to be registered as “father,” or, alternatively, as “parent,” filed a claim in April 2018 in the Judicial Review hoping to reverse the decision of the Registrar General.<sup>15</sup> Although the High Court of Justice recognized the interference with the rights of parent and child under Article 8 of the European Convention on Human Rights (ECHR), the court ultimately deemed the violations against McConnell and YY to be necessary, proportionate, and fair and, therefore, justifiable under the law.<sup>16</sup> The High Court of Justice Family Division and Administrative Court *held* that being a “mother” is the “status afforded to

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6. *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [4], [5]; Hattenstone, *supra* note 4.

7. *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [5].

8. Human Fertilisation and Embryology Act 1990, c. 37, § 12 (Eng.), <http://www.legislation.gov.uk/ukpga/1990/37/contents>; *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [5], [7].

9. Such a certificate enables the applicant to become the acquired gender “for all purposes.” Gender Recognition Act 2004, c. 7, § 9 (Eng.), <http://www.legislation.gov.uk/ukpga/2004/7/contents>; *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [6].

10. Gender Recognition Act 2004, § 1.

11. *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [6].

12. *Id.*

13. *Id.* at [7].

14. *Id.* at [8].

15. *Id.*

16. *Id.* at [227], [273].

a person who undergoes the physical and biological process of carrying a pregnancy and giving birth,” and therefore McConnell must be registered as the “mother” on YY’s birth certificate. *The Queen (on the application of TT) v. Registrar General for England & Wales* [2019] EWHC (Fam) 2384 [279], [282] (Eng.).

## II. BACKGROUND

No English common law court has previously defined the word “mother.”<sup>17</sup> However, the Births and Deaths Registration Act of 1953 (BDRA 1953)<sup>18</sup> requires that the birth of every child born in England and Wales be registered “by entering prescribed details,” including the “natural” mother and father.<sup>19</sup> The Registration of Births and Deaths Regulations of 1987 (RBDR 1987) sets the process that the Registrar General must follow when recording parentage.<sup>20</sup> Section 7 of RBDR 1987 prescribes the relevant form for the registration of a live birth and stipulates that the parents of the child shall be recorded as “those appropriate” at the date of the birth but offers no further clarification; the prescribed form has spaces reserved for “Mother” and “Father.”<sup>21</sup>

The Human Fertilisation and Embryology Act of 2008 (HFEA 2008) was passed to update HFEA 1990 and, for the first time, provided definitions for “mother” and “father” when fertility assistance is used under a section entitled “Parenthood in Cases Involving Assisted Reproduction.”<sup>22</sup> “Mother” is defined as “[t]he woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs.”<sup>23</sup> “Father” is defined extensively under a variety of different circumstances, all of which are in relation to the woman who has given birth and therefore would not apply to the particular circumstances of a transgender parent giving birth.<sup>24</sup>

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17. *Id.* at [1], [125].

18. The Births and Deaths Registration Act 1953, 1 & 2 Eliz. 2 c. 20, § 41 (Eng.), <http://www.legislation.gov.uk/ukpga/Eliz2/1-2/20/section/41>.

19. *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [27]-[28].

20. The Registration of Births and Deaths Regulations 1987, SI 1987/2088, art. 7 (Eng.); *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [29].

21. The Registration of Births and Deaths Regulations 1987, ¶ 2; *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [30].

22. Human Fertilisation and Embryology Act 2008 (HFEA 2008), c. 22, §§ 33-58 (Eng.), <http://www.legislation.gov.uk/ukpga/2008/22/contents>; *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [23].

23. HFEA 2008, § 33; *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [23].

24. HFEA 2008, §§ 35-41.

In 2008, the RBDR 1987 was updated to harmonize with the HFEA 2008 being introduced.<sup>25</sup> The amendment updated the relevant form referenced in section 7 of the RBDR 1987; now, on that form, the space formerly reserved for “Father” is reserved for “Father/Parent.”<sup>26</sup> The U.K. government, however, contended that this term is available only to a second female parent who is the partner of the mother who has given birth.<sup>27</sup>

While prior European Union (EU) case law in this area is extremely limited,<sup>28</sup> the European Court of Human Rights (ECtHR) held in *Christine Goodwin v. United Kingdom* that the U.K. government’s failure to legally recognize the plaintiff’s change of sex was a violation of her ECHR rights under Articles 8 and 12.<sup>29</sup>

Article 8 of the ECHR states:

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.<sup>30</sup>

In *Goodwin*, the plaintiff was assigned male at birth and transitioned to live as a woman, but government records allowed her employer to discover that she had previously worked for the company under a different name and gender.<sup>31</sup> Goodwin alleged that this discovery, which effectively outed Goodwin as transgender, resulted in embarrassment, humiliation, and sexual harassment at work. In response, the government argued that, while Article 8 violations against transgender individuals may sometimes arise from a lack of legal recognition, Goodwin’s case was insufficient in part because she had been able to obtain some updated documents and

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25. *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [32].

26. *Id.*

27. *Id.*

28. Prior EU case law addressing gender and record-keeping in relation to transgender individuals pertained to modification of the transgender individual’s own documents. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 6. Therefore, prior EU case law does not engage directly with the issues presented in the noted case. *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [125].

29. *Goodwin*, 2002-VI Eur. Ct. H.R. at 27, 30.

30. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

31. *Goodwin*, 2002-VI Eur. Ct. H.R. at 5.

records.<sup>32</sup> The government submitted that it had struck a reasonable balance between the rights of the individual and the general interests of the public.<sup>33</sup> The court held for Goodwin and made specific mention of the impact on the birth register system:

It may be noted however that exceptions are already made to the historic basis of the birth register system, namely, in the case of legitimisation or adoptions, where there is a possibility of issuing updated certificates to reflect a change in status after birth. To make a further exception in the case of transsexuals . . . would not, in the Court's view, pose the threat of overturning the entire system. . . .<sup>34</sup>

No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and . . . the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.<sup>35</sup>

The court ordered that the U.K. government implement measures to fulfill its Article 8 obligations to both Goodwin and other transgender citizens who may experience similar breaches.<sup>36</sup>

The GRA 2004 was then drafted and enacted to remedy the human rights breach identified in *Goodwin*.<sup>37</sup> The GRA 2004 creates legal paths to gender recognition for individuals whose sex as recorded at birth does not correspond to their gender identity.<sup>38</sup>

In order to obtain legal codification of one's "new" gender, the applicant must submit evidence and testimony to a private panel of legal and medical professionals who then choose to grant or deny the GR Certificate.<sup>39</sup> An exception to becoming the acquired gender "for all purposes"<sup>40</sup> is explained under a section of the act entitled "Parenthood," which states, "The fact that a person's gender has become the acquired

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32. Examples of documents include a driver's license and passport that reflected her name and gender; other records, such as National Insurance numbers, are not updated to preserve the integrity and fairness of the systems. *Id.* at 6.

33. *Id.* at 20.

34. *Id.* at 25.

35. *Id.* at 26.

36. *Id.* at 33.

37. ZOWIE DAVY, *RECOGNIZING TRANSSEXUALS: PERSONAL, POLITICAL AND MEDICOLEGAL EMBODIMENT* 37 (2016).

38. *Id.*

39. *Id.* at 38.

40. Gender Recognition Act 2004, c. 7, § 9 (Eng.), <http://www.legislation.gov.uk/ukpga/2004/7/contents>.

gender under this Act does not affect the status of the person as the father or mother of a child.”<sup>41</sup> The provision does not specify if this is meant to apply retroactively,<sup>42</sup> proactively,<sup>43</sup> or both.

### III. COURT’S DECISION

In the noted case, the High Court of Justice analyzed several different pieces of domestic legislation addressing gender and parentage to issue a broad ruling that would ease the tension between modern methods of procreation and traditional modes of record keeping.<sup>44</sup> McConnell had alleged that if the GRA 2004 is interpreted correctly, the Registrar General is obliged to register McConnell as YY’s father because McConnell is, for all purposes, male.<sup>45</sup> McConnell further asserted that to acquire the gender “for all purposes” under the GR Certificate includes for the “purpose of determining his status as a parent to a child”; therefore, his parental status should be recorded as “father” to reflect his gender.<sup>46</sup>

McConnell also argued that, under EU law, requiring registration as “mother” would represent a breach of his and YY’s rights under the ECHR,<sup>47</sup>

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41. *Id.* § 12.

42. E.g., to preclude a transgender man who gave birth to a child before obtaining a GR Certificate from altering his designation as “mother” on the child’s birth certificate.

43. E.g., to preclude a transgender man who gives birth after obtaining his GR Certificate from being designated as anything other than “mother” on his child’s birth certificate.

44. *The Queen (on the application of TT) v. Registrar Gen. for Eng. & Wales* [2019] EWHC (Fam) 2384 [130], [279]-[285] (Eng.).

45. *Id.* at [63].

46. *Id.*

47. While the United Kingdom’s eventual departure from the European Union will end the application of EU law and the jurisdiction of the European Court of Justice, the European Convention on Human Rights is an international treaty that the United Kingdom has committed to separately from EU membership. *Brexit and the European Convention on Human Rights*, DISABILITY RTS. UK, <https://www.disabilityrightsuk.org/brexit-and-european-convention-human-rights> (last visited Jan. 29, 2020). Therefore, unless or until the United Kingdom chooses to withdraw from the ECHR, the United Kingdom will remain a Member State of the treaty and be subject to the jurisdiction of the European Court of Human Rights (ECtHR), regardless of its EU status. *Id.* While much of the United Kingdom’s legislative future is in flux, past policy proposals have explicitly expressed intent to remain committed to the ECHR after EU departure. DEP’T FOR EXITING THE EUROPEAN UNION, *THE FUTURE RELATIONSHIP BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION* 2018, Cm. 9593, at 52 (UK). The European Union (Withdrawal Agreement) Bill was drafted to be compliant with the ECHR and is accompanied by a memorandum analyzing potential ECHR issues. European Union (Withdrawal Agreement) Bill 2019-20, HC Bill [1] (UK); DEP’T FOR EXITING THE EUROPEAN UNION, EUROPEAN UNION (WITHDRAWAL AGREEMENT) EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM (2019), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/841009/EU\\_\\_Withdrawal\\_Agreement\\_\\_Bill\\_ECHR\\_Memorandum.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841009/EU__Withdrawal_Agreement__Bill_ECHR_Memorandum.pdf).

for which the court should issue a Declaration of Incompatibility under section 4 of the 1998 Human Rights Act.<sup>48</sup>

The case was first analyzed under U.K. legislation to determine if an applicable statute alters the common law definition of “mother” as the person who became pregnant and gave birth to a child has to be the mother.<sup>49</sup> After reaching preliminary domestic conclusions of law, the facts of the case and the preliminary outcomes were examined for the ECHR breaches that McConnell alleged.<sup>50</sup>

#### A. Domestic U.K. Law

McConnell received fertility treatments in a clinic licensed by the HFEAs of 1990 and 2008, which may implicate the HFEA legislation in defining parentage.<sup>51</sup> However, McConnell was treated while living as male and is identified as male in his medical charts from the clinic, despite HFEA licensing limiting services to those that assist women to carry children.<sup>52</sup> Neither party contended that the services were provided unlawfully, although the court expressed skepticism of their legality under the current HFEA legislation scheme.<sup>53</sup> Accordingly, the case was analyzed under domestic law first as though the HFEA did not apply and again under the premise that it did.<sup>54</sup>

Under its first analysis, the court addressed the impact of the GRA 2004 upon the position at common law.<sup>55</sup> Prior to recent legislative changes, the position of the courts had been that the person who becomes pregnant, carries, and gives birth to a child is that child’s “mother.”<sup>56</sup> Motherhood, more specifically, was construed as a consequence of “parturition,” or the act of giving birth, and not necessarily a function of sex or gender.<sup>57</sup>

The court rejected McConnell’s assertion that section 12 of the GRA 2004 is meant to apply only retrospectively to prevent parents who

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48. Human Rights Act 1998, c. 42, § 4 (Eng.), <http://www.legislation.gov.uk/ukpga/1998/42/section/4>; *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [8].

49. *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [133].

50. *Id.* at [246].

51. *Id.* at [124].

52. Human Fertilisation and Embryology Act 1990, c. 37, sch. 2 (Eng.), <http://www.legislation.gov.uk/ukpga/1990/37/contents>; *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [124].

53. *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [127].

54. *Id.* at [130].

55. *Id.*

56. *Id.* at [131].

57. *Id.* at [131], [133].

transition after their child's birth from changing their status on the birth certificate.<sup>58</sup> The court instead held that it is both retrospective and prospective; therefore, although McConnell was legally male at the time of YY's birth, he is not, as a matter of law, "father" to his child as a result of the GRA 2004, and the GRA 2004 does not alter the common law position that the person who carries and births a child is that child's mother.<sup>59</sup>

The court next analyzed the case as though HFEA did apply to find whether the HFEA definitions would determine parental status if McConnell's treatment took place lawfully within the existing regulations.<sup>60</sup> HFEA 2008 provides a definition for "mother," but only under the circumstances in which "an embryo" or "sperm *and* eggs"<sup>61</sup> are implanted into the womb of the person who is meant to be impregnated and subsequently give birth.<sup>62</sup> Artificial insemination is therefore not a method of conception included under this definition.<sup>63</sup> The definitions of "father" in the HFEA 2008 are similarly not applicable in respect to McConnell's situation.<sup>64</sup> HFEA legislation is therefore not outcome-determinative in the noted case, regardless of whether or not the legislation applies.<sup>65</sup>

### B. *European Convention on Human Rights Law*

Analyzing the facts of the case under the ECHR, the court found that Article 8, which addresses the right to respect for private and family life, was most relevant to the noted case.<sup>66</sup> The court acknowledged that requiring McConnell to register as YY's mother would be a violation of both parties' rights to respect for private and family life under Article 8.<sup>67</sup> Specifically, the court noted that forcing McConnell, who lives a social and psychological reality in which he is male, to register as a "mother" would be adverse to his dignity, freedom, and the integrity of his acquired

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58. *Id.* at [144].

59. *Id.* at [144], [146].

60. *Id.* at [150].

61. HFEA 2008, c. 22, § 33 (Eng.), <http://www.legislation.gov.uk/ukpga/2008/22/contents> (emphasis added).

62. *Id.*; *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [164].

63. *See The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [164].

64. HFEA 2008, §§ 35-47; *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [167].

65. *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [168].

66. *Id.* at [169]. Breaches of Article 8 are assessed concerning the particular context and characteristics of the individual at question. *Id.* at [251].

67. *Id.* at [250].

gender sufficient to constitute an Article 8 breach.<sup>68</sup> For YY, the court stated that the child’s “psychological and social reality” is that McConnell is his father, and to require YY to have a birth certificate that is contrary to that reality may lead to embarrassment, confusion, anxiety, and distress on the part of YY sufficient to constitute an Article 8 breach.<sup>69</sup>

The court next addressed whether the violation of privacy was lawful.<sup>70</sup> Such a violation is lawful where the action causing the breach is “in accordance with the law,” in pursuit of a “legitimate societal aim[,]” and “necessary.”<sup>71</sup> The court quickly disposed of the first two elements and held that the requirement for registration as a “mother” was in accordance with the 1953 BDRA as well as the GRA 2004 and was in pursuit of the “legitimate social aim[.]” of a consistent registration system for the population.<sup>72</sup>

The consideration of necessity hinges on two factors: (1) whether the action causing the breach is “proportionate to a pressing social need,” and (2) whether it “strike[s] a fair balance between the needs of society” and the needs of the parties whose rights are being violated.<sup>73</sup> While the court considered McConnell’s rights to gender identity and personal development of high priority, the requirement that every person who gives birth to a child be registered consistently is essential to the functioning of the registry and is of high “importance to society.”<sup>74</sup>

The analysis of YY’s rights and best interests under Article 8 was more complex; YY has the right to establish his identity, including the right to know who gave birth to him, which may be breached by *not* recording McConnell as “mother.”<sup>75</sup> Additionally, to not record McConnell as “mother” on YY’s birth certificate would make YY the only child under U.K. law to not have, and to never have had, a “mother” as a matter of law, which, the court explained, must be interpreted as a detriment to YY.<sup>76</sup> The court conceded that YY’s best interest is reflected in McConnell registering as something other than “mother,” but that the infringement on YY’s Article 8 rights is less severe.<sup>77</sup>

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68. *Id.* at [251].

69. *Id.* at [250], [252].

70. *Id.* at [254].

71. *Id.* at [253]-[254].

72. *Id.* at [253].

73. *Id.* at [254].

74. *Id.* at [271].

75. *Id.* at [256]-[257].

76. *Id.* at [258]-[259].

77. The court therefore accepted that, though there is interference with the Article 8 rights of YY and McConnell, in requiring McConnell to register as the “mother,” the “interference is

The court ultimately held that the status of “mother” arises from the biological process of carrying and giving birth to a child, regardless of the legal gender of that person.<sup>78</sup>

#### IV ANALYSIS

In the noted case, the court challenged notions of traditionally gendered terms by holding that McConnell is a legal “mother,” not because of his birth sex, but because “mother” is a term reserved for the gestational parent regardless of sex or gender.<sup>79</sup> While the violation of McConnell’s Article 8 rights is not an ideal outcome, the court has opened up potential to accommodate the gender spectrum in the U.K.’s existing government schemes.<sup>80</sup>

McConnell wished to be recorded as “father” because of his status as a male parent who gave birth; from McConnell’s position, parental designation is therefore a question of gender identity over biological function.<sup>81</sup> The court in *Goodwin* drew attention to the likely minor impact on the birth registration system in comparison and was more amenable to the notion of occasional inconsistencies in the birth registration system than in the noted case.<sup>82</sup>

While the compromise suggested in *Goodwin*<sup>83</sup> may facially appear to be more unified with modern respect for self-determination, gender identity, and human rights, the approach ultimately applied by the court in the noted case has the potential to set a progressive and flexible precedent for integrating transgender identity into existing regulatory bodies.

Although understandable that McConnell would want his reality as a male parent to be reflected on his child’s birth certificate, it begs the question of how a non-binary or gender-non-conforming gestational parent would be expected to register if that person identifies as neither female *nor* male. A 2015 U.K. survey of 895 non-male-or-female identifying respondents yielded more than twenty-seven different categories of self-description, including “agender,” “genderfluid,” and

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justified as being in accordance with the law, for a legitimate purpose and otherwise necessary, proportionate and fair.” *Id.* at [273].

78. *Id.* at [280].

79. *Id.* at [271].

80. *Id.* at [251].

81. *Id.* at [8].

82. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 25-26.

83. *Id.* at 25-26, 33.

“androgynous.”<sup>84</sup> Sixty-five percent of respondents identified as transgender, sixty-three percent considered themselves non-binary, some considered themselves both, and some neither.<sup>85</sup>

While the United Kingdom does not currently recognize a legal gender designation other than “male” or “female,” this is an emerging topic in international human rights law.<sup>86</sup> In 2007, Nepal became the first country to recognize a third gender option.<sup>87</sup> In 2015, Malta became the first European nation to do so.<sup>88</sup> Since then, at least ten other countries, and some U.S. states like New York and Oregon, have followed suit.<sup>89</sup> As government registries and records adapt to modern understandings of gender,<sup>90</sup> the holding of the noted case presents a simple but effective way to incorporate the gender spectrum: by defining the legal “mother” as the gestational parent, the court opens up the possibilities of not just “male mothers and female fathers,” but also agender mothers and genderfluid fathers.<sup>91</sup>

Should the United Kingdom adopt legislation to recognize gender designations beyond the current “male” or “female,” the noted case preserves a record keeping structure that can easily accommodate the

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84. VIC VALENTINE, SCOTTISH TRANS ALL., NON-BINARY PEOPLE’S EXPERIENCES IN THE UK 11 (2016), <https://www.scottishtrans.org/wp-content/uploads/2016/11/Non-binary-report.pdf>.

85. Gender categories and identities are not exclusive to one another, but they can overlap. *See id.* at 9.

86. *See* LENA HOLZER, ILGA-EUROPE, NON-BINARY REGISTRATION MODELS IN EUROPE 2-5 (2018), [https://www.ilga-europe.org/sites/default/files/non-binary\\_gender\\_registration\\_models\\_in\\_europe\\_0.pdf](https://www.ilga-europe.org/sites/default/files/non-binary_gender_registration_models_in_europe_0.pdf).

87. *Id.* at 2.

88. Kurt Sansone, *Malta Releases First Passport with Neutral ‘X’ Gender Marker*, MALTATODAY (Jan. 23, 2018, 10:46 AM), [https://www.maltatoday.com.mt/news/national/83920/malta\\_releases\\_first\\_passport\\_with\\_neutral\\_x\\_gender\\_marker#.Xb54LZNKi-t](https://www.maltatoday.com.mt/news/national/83920/malta_releases_first_passport_with_neutral_x_gender_marker#.Xb54LZNKi-t).

89. Andy Newman, *Male, Female or ‘X’: The Push for a Third Choice on Official Forms*, NY TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/nyregion/gender-neutral-birth-certificate.html> (discussing gender-marker changes made in New York and California, as well as mentioning that at least ten countries, including Australia, Bangladesh, Canada, Denmark, Germany, India, Malta, Nepal, New Zealand, and Pakistan, have gender-neutral options for passports and/or national identity cards); Annie Tritt, *States Are Starting to Recognize a Third Gender. Here’s What That Means for Nonbinary Youth*, VOX (Apr. 2, 2018, 9:08 AM), <https://www.vox.com/identities/2018/3/28/17100252/trans-nonbinary-third-gender-youth-legal-recognition>.

90. *See* JACK BYRNE, THE OPEN SOC’Y FOUND., LICENSE TO BE YOURSELF: LAWS AND ADVOCACY FOR LEGAL GENDER RECOGNITION OF TRANS PEOPLE 27-32 (2014), <https://www.opensocietyfoundations.org/uploads/4bcc8c11-db97-4cea-87ad-f9a8b7b21d09/license-to-be-yourself-20140501.pdf>.

91. *The Queen (on the application of TT) v. Registrar Gen. for Eng. & Wales* [2019] EWHC (Fam) 2384 [251] (Eng.).

expansion because it is based on biological processes.<sup>92</sup> The diversity of the transgender community<sup>93</sup> may also ameliorate some of the ill side effects of the holding, namely, the concern for future Article 8 violations against similarly situated transgender parents who may wish to register under the scheme McConnell advocated. For gestational parents who identify as transgender, but not specifically a transgender *man* or transgender *woman*, basing parental identification on biological realities may be the preferred interpretation, suggesting that not every transgender parent's Article 8 rights are at risk.<sup>94</sup>

The noted case ultimately identifies a fair balance between the rights of the individual and the importance of preserving regulatory schemes not because the infringement on McConnell's human rights is unimportant, but precisely because of the importance of protecting the dignity and the ability to self-identify for persons of all genders. As more nations begin to recognize genders outside of the traditional binary,<sup>95</sup> McConnell's case sets an example for these countries to simply move beyond unnecessary gendering of legal definitions in order to maintain records and still respect the dignity of members of transgender, agender, non-binary, genderqueer, and other LGBTQ+ communities.

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92. *Id.* at [280]; see *Biological Steps to Becoming Pregnant*, U.C., SANTA BARBARA: SEXINFO ONLINE, <https://www.sexinfo.soc.ucsb.edu/article/biological-steps-becoming-pregnant> (last updated Feb. 15, 2017).

93. *Understanding the Transgender Community*, HRC, <https://www.hrc.org/resources/understanding-the-transgender-community> (last visited Jan. 28, 2020).

94. *The Queen (on the application of TT)* [2019] EWHC (Fam) 2384 at [280]; see *Biological Steps to Becoming Pregnant*, *supra* note 92.

95. See BYRNE, *supra* note 90, at 27-32.

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