

BIRTH CERTIFICATES FOR CHILDREN WITH SAME-SEX PARENTS: A REFLECTION OF BIOLOGY OR SOMETHING MORE?

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While same-sex families with children are becoming increasingly commonplace, these family structures are not always accurately reflected on a child's birth certificate. In most jurisdictions, birth certificates only allow for the inclusion of one mother and one father. This article analyzes the international and domestic laws pertaining to birth certificates to determine whether children with same-sex parents have a right to a birth certificate that accurately reflects their family structure. Who should be included on the birth certificates of children born to a lesbian couple, and how that should happen, has not been the subject of any scholarly research. This article fills this gap by analyzing the international and domestic laws and practices governing birth certificates for children of same-sex parents and identifying best practices when it comes to the information included on the birth certificates of such children.

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INTRODUCTION

President Barack Obama became all too familiar with the importance of birth certificates after his opponents accused him of not having been born in the United States and therefore of being ineligible to become President.¹ This campaign against Obama highlighted the importance of birth certificates and the role they play as proof of identity in contemporary society.

Around the world, an increasing number of countries are enacting legislation to allow same-sex couples to marry.² At the same time,

1. See Emma McDonald, *A Birth Certificate Is a Factual Document Not a Rewrite of History*, SYDNEY MORNING HERALD (Aug. 19, 2011), <http://www.smh.com.au/it-pro/a-birth-certificate-is-a-factual-document-not-a-rewrite-of-history-20110818-lizq4.html>.

2. At the time of this writing, same-sex couples are allowed to marry in Argentina, Belgium, Brazil, Canada, Denmark, Finland, France, Iceland, Luxembourg, the

modern technology is providing a variety of ways for same-sex couples to have children, including via insemination, in vitro fertilization, and surrogacy. The expansion of reproductive choices for same-sex couples refutes the outdated notion that the nuclear heterosexual family is the only or preferred family structure.³ Indeed, there is now extensive research, based on longitudinal studies, demonstrating that being raised by same-sex parents has no detrimental effect on children.⁴

Although raising children in same-sex families is now commonplace in many parts of the Western world, the birth certificates of children with same-sex parents generally fail to accurately reflect their family structures. In most jurisdictions, birth certificates only allow for the inclusion of a mother and a father. This Article analyzes international and domestic laws in order to determine whether children with same-sex parents have a right to birth certificates that correctly record their family structures. The focus is exclusively on birth certificates for children born to lesbian couples. While surrogacy is facilitating the birth of more and more children to gay men, the issues

Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Uruguay, England, Wales and Scotland, as well as parts of Mexico and numerous states within the United States. See *Gay Marriage Around the World*, PEW RES. CTR. (Mar. 9, 2015), <http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/#allow>. We recognize that the issue of birth certificates for children in same-sex families is not a concern in all countries, since in seventy-seven countries, homosexuality is still a crime and in many more countries LGBT people experience discrimination and violence. See Paula Gerber, *Countries Where Homosexuality Is Still a Crime*, COUNTRIES THAT STILL CRIMINALISE HOMOSEXUALITY, <http://antigaylaws.org/all-countries-alphabetical/> (last visited Mar. 19, 2015); see also Lucy Rodgers et al., *Where Is It Illegal to Be Gay?*, BBC NEWS (Feb. 10, 2014), <http://www.bbc.com/news/world-25927595>.

3. See Senthoran Raj, *Birth Certificates Fail to Tell Us the Whole Story*, AGE (Aug. 19, 2011), www.theage.com.au/it-pro/birth-certificates-fail-to-tell-us-the-whole-story-20110818-1izjr.html.

4. See, e.g., Simon R. Crouch et al., *Parent-Reported Measures of Child Health and Wellbeing in Same-Sex Parent Families: A Cross-Sectional Survey*, 14 BMC PUB. HEALTH, 635 (2014) (examining survey responses by 315 Australian parents who self-identified as same-sex attracted and finding that “Australian children with same-sex attracted parents score higher than population samples on a number of parent-reported measures of child health”); Nanette Gartrell & Henny Bos, *U.S. National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 PEDIATRICS 28 (2010) (studying mother-reported outcomes of adolescents raised by lesbian mothers who volunteered between 1986 and 1992 and finding that “[a]dolescents who have been reared in lesbian-mother families since birth demonstrate healthy psychological adjustment”); Loes van Gelderen et al., *Quality of Life of Adolescents Raised from Birth by Lesbian Mothers*, 33 J. DEV. & BEHAV. PEDIATRICS 1 (2012) (comparing quality-of-life metrics for adolescents raised in planned lesbian families to those raised in heterosexual families and finding no difference).

surrounding birth certificates for these children is distinctly different and has been well covered elsewhere.⁵

The Article begins by briefly analyzing the history and purpose of birth registration and birth certificates in Parts I and II, providing context for the subsequent discussion of modern-day practices. Part III discusses the harm done to children by birth certificates that do not include their same-sex parents. Part IV then analyzes states' obligations under international human-rights law in relation to birth registration and birth certificates. It examines the International Covenant on Civil and Political Rights,⁶ the Convention on the Rights of the Child,⁷ and the International Covenant on Economic, Social and Cultural Rights⁸ in order to determine whether these international instruments provide guidance on what information should be included in birth certificates.

Part V moves the discussion from the international arena to the domestic, with case studies of the practices and processes governing the issuance of birth certificates to children with same-sex parents in the United States, Australia, the United Kingdom, and Canada. These case studies reveal that, while some jurisdictions provide birth certificates that can identify two lesbian mothers as a child's parents, no jurisdiction has yet developed a birth certificate that addresses the full diversity of family structures that exist today.

We conclude that a birth certificate is more than a reflection of biology; it is a document that establishes a relationship of rights and

5. See, e.g., *SURROGACY, LAW AND HUMAN RIGHTS* (Paula Gerber & Katie O'Byrne eds.) (forthcoming Aug. 2015). See generally *INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL* (Katarina Trimmings & Paul Beaumont eds., 2013) (surveying domestic approaches to surrogacy in several countries and examining international surrogacy from a human-rights perspective).

6. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. There are currently 74 signatories and 168 parties to the treaty. See *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited July 11, 2015).

7. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. There are currently 140 signatories and 194 parties to the treaty. See *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en (last visited July 11, 2015).

8. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3. There are currently 70 signatories and 164 parties to the treaty. See *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=EN&mtdsg_no=IV-3&src=treaty (last visited July 11, 2015).

obligations between a parent (or parents) and a child, and plays a vital role in a person's sense of identity. In order to protect the rights of children with same-sex parents, birth certificates must reflect the varied forms of contemporary families. While the majority of children may continue to be born to a mother and father, a minority of children will have other family structures that should be equally recognized and respected.

I.

PROVENANCE OF BIRTH REGISTRATION AND BIRTH CERTIFICATES

The longer you can look back, the farther you can look forward.
—Sir Winston Churchill⁹

A. Ancient History

Birth registration can be traced back to the Xia Dynasty of Ancient China (2100–1600 BCE), when it was employed for the purposes of conscription and social control.¹⁰ The *hukou* registration scheme, created in 1958 and still employed in China today, is directly linked to this ancient system.¹¹

The Romans also registered births in order to prove children's births and social statuses, and issued birth certificates.¹² Such certificates were first issued during the reign of Augustus, and were written in Latin as an indicator of "Romanness" (*Romanitas*).¹³ Roman birth certificates could be used as *prima facie* proof of Roman citizenship, and as evidence of citizenship before courts of law.¹⁴ This enabled courts to establish jurisdiction over Roman citizens. However, there were no specific rules dictating uniform requirements for these documents, and they were often created by unofficial scribes.¹⁵ As a result

9. See CHURCHILL BY HIMSELF: THE DEFINITIVE COLLECTION OF QUOTATIONS 25 (Richard Langworth ed., 2011) (quoting Sir Winston Churchill, Prime Minister of the U.K., Address to the Royal College of Physicians (Mar. 2, 1944)).

10. Zhang Jijiao, *The Hukou System as China's Main Regulatory Framework for Temporary Rural-Urban Migration and Its Recent Changes*, 143 *DIE ERDE* 233, 244 n.1 (2012).

11. See *id.*

12. See Fritz Schulz, *Roman Registers of Births and Birth Certificates Part II*, 33 *J. ROMAN STUD.* 55, 57, 63 (1943).

13. See J.N. Adams, "Romanitas" and the Latin Language, 53 *CLASSICAL Q.* 184, 186–87 (2003).

14. Schulz, *supra* note 12, at 63.

15. See *id.* at 58, 64.

of this informality in birth certificates, Roman jurists did not ascribe them much weight.¹⁶

B. English History

Birth registration was first introduced in England in 1538 by Thomas Cromwell.¹⁷ Cromwell described the utility of the nationwide registration of baptisms, marriages, and burials as “for the avoiding of sundry strifes and processes and contentions arising from age, lineal descent, title of inheritance, legitimation of bastardy, and for knowledge, whether any person is our subject or no.”¹⁸ Later that decade, the nobleman Lord Burghley suggested that the Queen form a “General Register” recording *all* christenings, marriages, and burials (including those of laborers) within England and Wales.¹⁹ The statistics gained from these registrations would probably have been of greatest benefit to Lord Burghley himself, “for, down to the 14th, 15th and even the 16th century, the laborers were serfs, they were *property*, they could not *possess* property.”²⁰ Of these serfs, a writer for *The Lancet* in 1839 said that “the registration of their births, deaths and marriages, would no more have been thought of, in connection with the descent of lands or chattels, than would the births or deaths of domestic animals.”²¹ The universal registration of English citizens, the writer continued, and “the recognition and the registration of the serf’s birth, marriage, and death,” as required by the Queen’s registration system, “marked a decided step in the progress of civilisation.”²² However, this registration process was undertaken by the clergy and was fundamentally a record of religious rituals (baptisms), rather than secular events (births).²³

In 1652–1653, an Act established by the Law Reform Committee under the Protectorate directed that there be a registry of births rather than baptisms.²⁴ In 1695, the process of registration was formalized by a requirement that the parents of every child should, within five days of birth, give notice to the clergyman for registration.²⁵ A penalty of

16. *Id.*

17. Simon Szreter, *The Right of Registration: Development, Identity Registration, and Social Security: A Historical Perspective*, 35 *WORLD DEV.* 67, 73 (2007).

18. *Id.*

19. *See Registration of Births*, 32 *LANCET* 305, 305–06 (1839).

20. *Id.* at 306.

21. *Id.*

22. *Id.*

23. *See id.*

24. *Id.* at 307.

25. *See Defects of the Registration Acts*, 32 *LANCET* 369, 369 (1839).

forty shillings was prescribed for failure to comply.²⁶ This transition marked the beginning of the secularization of birth registration; however, births were still recorded by religious leaders and not secular clerks.

The birth registry system regressed back to a baptism registry system in 1812 when the 1652 Act was repealed and replaced with the Sir George Rose's Act.²⁷ This system was criticized in *The Lancet*, as details including time of birth and parentage were not recorded.²⁸ The journal noted that "although these [births] were of the utmost importance in a civil and scientific point of view; it was his own act—the baptism—that the clergyman recorded."²⁹ This scheme worked "very badly," merely recording "ecclesiastical performances, and not the . . . physical facts," to "no civil *earthly* advantage."³⁰

The English system differed from the French and Belgian systems of that time, which enforced secular registration.³¹ By contrast, the English registration system was said to be a "flagrant infringement of principles of religious liberty," as it forced citizens to subscribe to the religious ceremony of baptism (sometimes against their will) in order to have their children's births registered.³² Civil registration was restored to England in 1837 with the Acts for the Registration of Birth, Deaths and Marriages.³³

C. North American History

Birth registration was first introduced in the Commonwealth of Virginia in 1632 by the Grand Assembly, which viewed birth registration as a means for promoting individual rights, primarily with respect to property.³⁴ In 1639, Massachusetts began requiring that births be

26. *Id.*

27. Rose's Act 1812, 52 Geo. III, c. 146.

28. *Registration of Births*, *supra* note 19, at 307.

29. *Id.*

30. *Id.*

31. The French system was called "Code Napoleon." In that code, "any register of the *religious ceremony* has no civil effect; it cannot be *received in a court of justice*." *Defects of the Registration Acts*, *supra* note 25, at 369. The French system had harsh penalties for not registering children, including "imprisonment of a period not less than six days, nor more than six months, and a fine not less than sixteen nor more than 300 francs." *Id.* at 370. Belgium used the same compulsory system. *Id.*

32. *Registration of Births*, *supra* note 19, at 307.

33. *Id.* at 305.

34. See H.L. Brumberg, D. Dozor & S.G. Golombek, *History of the Birth Certificate: From Inception to the Future of Electronic Data*, 32 J. PERINATOLOGY 407 (2012).

recorded by the government, rather than having baptisms be recorded by the clergy.³⁵

Birth certificates were first introduced in the United States by the Bureau of the Census in 1900.³⁶ This institutional body was designated by an Act of Congress in 1902 as the agency charged with developing a standard birth certificate to be adopted nationally.³⁷ This responsibility was transferred to the United States Public Health Service in 1946.³⁸ However, the vision of a unified national certificate has not yet been achieved, since state governments issue birth certificates with marked variations in content and form between states.³⁹

D. Conclusion

This brief analysis of the history of birth registration and certificates reveals that the format and content of birth certificates are not frozen in time. For example, since the introduction of a recommended standard birth certificate across the United States in 1900, revisions to the recommended format have been made approximately every ten years.⁴⁰ The most recent recommended standard birth certificate⁴¹ has evolved to include nearly sixty items, almost doubling the amount of data found on the original standard certificate.⁴² The trend in birth certificate content has also been away from moral and religious classifications toward secular information. The wording of certain elements has changed significantly since birth certificates were first introduced. For example, in 1978 the classification of a child as being legitimate or illegitimate was replaced with a record of the marital status of the

35. *See id.*

36. *See id.* at 408.

37. *See id.*

38. DIV. OF VITAL STATISTICS, NAT'L CTR. FOR HEALTH STATISTICS, REPORT OF THE PANEL TO EVALUATE THE U.S. STANDARD CERTIFICATES 9 (2000), http://www.cdc.gov/nchs/data/dvs/panelreport_acc.pdf.

39. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., BIRTH CERTIFICATE FRAUD 8–10 (1988), <http://oig.hhs.gov/oei/reports/oai-02-86-00001.pdf>.

40. *See* ALICE M. HETZEL, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. VITAL STATISTICS SYSTEMS: MAJOR ACTIVITIES AND DEVELOPMENTS, 1950–95, at 28 (1997).

41. *2003 Revisions of the U.S. Standard Certificates of Live Birth and Death and the Fetal Death Report*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/nvss/vital_certificate_revisions.htm (last updated July 17, 2012).

42. *See Birth Edit Specifications for the 2003 Proposed Revision of the U.S. Standard Certificate of Birth*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/data/dvs/birth_edit_specifications.pdf (last updated July 2012).

child's mother.⁴³ This development reflects a shift from a morality-based classification of the child to an objective demarcation of reality.

II.

THE PURPOSE OF BIRTH REGISTRATION AND BIRTH CERTIFICATES

This Part distinguishes between the purpose of birth registration and the purpose of birth certificates. In some countries, a birth certificate is automatically issued upon birth registration.⁴⁴ However, in other countries, registering a birth and applying for a birth certificate are two distinct processes: for example, in the United States and Australia, parents can register a birth for free, but must complete an application form and pay a fee if they want a birth certificate for their child.⁴⁵ While birth registration is designed to benefit the state, birth certificates benefit the individual.

A. *Birth Registration*

The registration of births is important to the state because it enables governments to accrue scientific and sociological data in order to collate vital statistics.⁴⁶ The United Nations has defined civil registration of births as “the continuous, permanent, compulsory and universal recording of the occurrence and characteristics of vital events pertaining to the population as provided through decree or regulation in accordance with the legal requirements of a country.”⁴⁷

There are two essential characteristics that birth registration systems require in order to collate reliable data: universality and uniform-

43. See HETZEL, *supra* note 40, at 7.

44. See, e.g., UNICEF EASTERN & SOUTHERN AFRICA REGION OFFICE, CASE STUDY ON NARROWING THE GAPS FOR EQUITY: UGANDA 2–6 (2012) (describing efforts to use technology to improve rates of automatic birth registration in Uganda); WORLD HEALTH ORG., CIVIL REGISTRATION & VITAL STATISTICS 2013, at 14–15 (2013) (noting that Bangladesh has implemented a pilot program for automatic birth certificate issuance and that all babies born in health facilities in Namibia receive birth certificates before leaving the hospital). A common feature among these countries that automatically issue birth certificates upon birth registration is that they all have electronic birth registration systems. See WORLD HEALTH ORG., *supra*.

45. See *Where to Write for Vital Records*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/w2w.htm> (last updated June 20, 2014) (providing links to information about application forms and fees); *Apply for a Birth Certificate*, VICTORIAN REGISTRY OF BIRTHS, DEATHS & MARRIAGES, <http://www.bdm.vic.gov.au/home/births/apply+for+a+birth+certificate/> (last updated July 1, 2015) (providing an overview of the birth certificate application process in Australia).

46. See HETZEL, *supra* note 40, at 1; Szreter, *supra* note 17, at 77–81.

47. *Civil Registration Systems*, UNITED NATIONS STATISTICS DIV., <http://unstats.un.org/UNSD/demographic/sources/civilreg/default.htm> (last visited Mar. 10, 2015).

ity. In the United States in the 1930s, the need to collect data via birth registration was recognized as essential for monitoring public health interventions⁴⁸ and maintaining quality vital statistics.⁴⁹ Professor Simon Szreter observed that “vital registration provides the crucial information for implementing an accurate and precise epidemiological intelligence system.”⁵⁰ The data collected through birth registration can be used by governments to help respond to health issues such as infant mortality rates.⁵¹

Sociological data gained from birth registration can also be used by governments to inform policies regarding social welfare. The World Health Organization has remarked on this function of birth registration:

Decision-makers depend on sound and timely statistics for policy development, and for programme monitoring and evaluation. Reliable vital statistics on the numbers and distribution of births . . . are needed to inform social and economic planning across both public and private sectors. These sectors include health, education, labour and employment, urban planning, finance and economic development, industry and trade, social insurance, environment and population.⁵²

For example, information regarding population growth might be used to indicate a need for further infrastructure, such as increased public transport, to cater to a growing population. Birth registration is important for governments because it provides macro-level data.⁵³ This is distinct from birth certificates, which primarily benefit the individual by providing them with an official identity document.

B. Birth Certificates

A birth certificate is the most visible evidence of respect for every child's unique identity.

—DEVELOPING POSITIVE IDENTITIES: DIVERSITY AND YOUNG CHILDREN⁵⁴

48. See Earle G. Brown, *Value of the Vital Statistics Data on Birth and Death Certificates in County Health Work*, 28 AM. J. PUB. HEALTH 1398, 1400–01 (1938).

49. See HETZEL, *supra* note 40, at 47–50.

50. Szreter, *supra* note 17, at 79.

51. See WORLD HEALTH ORG., STRENGTHENING CIVIL REGISTRATION AND VITAL STATISTICS FOR BIRTHS, DEATHS AND CAUSES OF DEATH: RESOURCE KIT 26–27 (2013).

52. *Id.* at xi.

53. See SUSAN C. MAPP, HUMAN RIGHTS AND SOCIAL JUSTICE IN A GLOBAL PERSPECTIVE 75 (2014).

54. DEVELOPING POSITIVE IDENTITIES: DIVERSITY AND YOUNG CHILDREN 2 (Liz Brooker & Martin Woodhead eds., 2008).

While birth registration benefits the state, birth certificates benefit the individual. The benefits of having a birth certificate are both practical and abstract. In 2007, the United Nations Committee on the Rights of the Child published General Comment 10 on Juvenile Justice.⁵⁵ This commentary provided insight into the role that birth certificates play in the realization of children's rights: the Committee explicitly characterized birth certificates not only as a fundamental component of birth registration, but also as a means through which other rights are realized.⁵⁶ Thus, the Committee recognized that while birth registration is a gateway to certain rights for children, birth certificates are the key to that gateway.

Birth certificates offer an official record of lineage, which can be important for issues of inheritance. The connection between registration and property was espoused by Matthews in the nineteenth century, when he said that "it appears to me to be fully as necessary for the preservation of the titles and rights of individuals, to preserve a register of births, marriages, and deaths, as it is to preserve a register of deeds."⁵⁷ Thus, individual property rights are essential to the concept of both birth registration and certificates.

Birth certificates also provide individuals with an identity, both in the practical and abstract sense. Birth certificates afford an individual with legal proof of identity, which is essential for many day-to-day activities. In a report on identity fraud, the United States Department of Health and Human Services observed, "[A] birth certificate issued in the States is the key to opening many doors in our society—from citizenship privileges to Social Security benefits. Such certificates can then be used as 'breeder' documents to obtain driver's licenses, passports, Social Security cards or other documents."⁵⁸

Birth certificates further provide a sense of personal and social identity. Liz Brooker and Martin Woodhead describe a birth certificate as a child's "all-important proof of their name and their relationship with their parents and the state."⁵⁹ In regards to identity formation, David Kertzer and Dominique Arel argue that "the practice of inscribing cultural categories on personal identification documents can

55. Comm. on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).

56. *See id.* at para 39.

57. *Registration of Births*, *supra* note 19, at 309.

58. OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH & HUMAN SERVS., *supra* note 39, at i.

59. DEVELOPING POSITIVE IDENTITIES: DIVERSITY AND YOUNG CHILDREN, *supra* note 54, at 2.

clearly affect an individual's own sense of identity."⁶⁰ Viewing same-sex parentage as a "cultural category" suggests that the parentage inscribed on a person's birth certificate affects an individual's sense of personal identity.

Kertzer and Arel recognize that "literature is lacking on the relationship between state-enshrined identities on personal documents and collective identity formation."⁶¹ However, as the European Court of Human Rights has stated, "everyone should be able to establish details of their identity as individual human beings."⁶² One way to achieve this personal and social sense of identity is through accurate birth certificates.

If individuals define their identities in response to others and the society in which they live,⁶³ then their birth certificates are important state-recognized documents that represent their identities. The legal recognition of parentage via children's birth certificates, "represents a public validation of the social realities of their families . . . attract[ing] not only legal rights and obligations, but also the corroboration of a particular social status."⁶⁴ Thus, a birth certificate has the power to both declare the certificate-holder's identity to others and to allow the certificate-holder to identify him- or her-self in a certain way (namely, as a child born of particular parentage).

C. Conclusion

Birth registration and birth certificates are vital processes that benefit the state and the individual, respectively. As the analysis above demonstrates, it is essential to both processes that accurate data be collected. It is not necessary, or even appropriate, for the state to collect biological information about a child's genetic heritage. Such information is best left in children's private medical records, to be available to them when they wish to access it. The data that should be collected via birth registration, and recorded on a child's birth certificate, is the reality of the family structure to which that child has been

60. CENSUS AND IDENTITY: THE POLITICS OF RACE, ETHNICITY AND LANGUAGE IN NATIONAL CENSUSES 5 (David I. Kertzer & Dominique Arel eds., 2002).

61. *Id.*

62. *Mikulic v. Croatia*, 2001-I Eur. Ct. H.R. 141 (finding an interest in determining the identity of a child's genetic parents under the European Convention on Human Rights).

63. Here we apply a social concept of the "self" as discussed in IAN BURKITT, *SOCIAL SELVES: THEORIES OF SELF AND SOCIETY* (2008).

64. Adiva Sifris, *The Legal Recognition of Lesbian-Led Families: Justifications for Change*, 21 *CHILD & FAM. L.Q.* 197, 199 (2009).

born, whether that be a mother and father, two mothers, a single mother, or some other configuration.

III.

BIRTH CERTIFICATES FOR CHILDREN WITH SAME-SEX PARENTS

It would help if the government and the law recognized that I have two moms. It would help more people to understand. It would make my life easier. I want my family to be accepted and included, just like everybody else's family.

—Affidavit of 12-year-old child filed in *M.D.R. v. Ontario*, decided by the Ontario Superior Court of Justice in 2006⁶⁵

Cultural changes have created a need for reform of birth certificates. The multiplicity of family structures in modern society is evidenced by recent census data. In the United States in 2012, for example, the number of same-sex couples raising children was more than 110,000, a significant increase from the 2000 census, in which 63,000 same-sex couples reported that they were raising children.⁶⁶ In his analysis of U.S. census data, Professor Gary Gates found that “the geographic data suggest that many same-sex couples raising children live in states with legal environments that at best are not supportive and at worst are openly hostile toward LGB individuals and their families.”⁶⁷

What data should be included on the birth certificates of children with same-sex parents? Historically, birth certificates have reflected the identity of one “mother” and one “father.” Obviously, this is problematic for children with two parents of the same gender or with more than two parental figures. Advances in reproductive technology necessitate a re-examination of the most basic questions of who is a

65. *M.D.R. v. Ontario*, [2006] O.R. 3d 81, para. 216 (Can. Ont. Sup. Ct. J.).

66. See Gary Gates, *Family Formation and Raising Children Among Same-Sex Couples*, WILLIAMS INST. (Jan. 2012), <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/family-formation-and-raising-children-among-same-sex-couples/>. It must be noted, however, that some of these same-sex families may have formed when one member of the couple entered the relationship with children from a prior opposite-sex relationship, and so not all children from the 110,000 families required birth certificates listing same-sex parents. Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, FAM. FOCUS (Nat'l Council on Family Relations, Minneapolis, Minn.), 2011, at F1, F2 [hereinafter *FAMILY FOCUS*], <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf>.

67. *FAM. FOCUS*, *supra* note 66, at F4.

“mother” and who is a “father,”⁶⁸ and whether the exclusive use of this terminology is appropriate.⁶⁹ A child may now have two parents of the same gender, for example, where a lesbian couple uses an anonymous sperm donor. The reality of the child having two mothers and no father should be reflected on that child’s birth certificate. Alternatively, a lesbian couple may choose to have a child with a known donor, who will assume a father-type role. In this situation, the child effectively has three parental figures, a practice known as “triparenting.”⁷⁰ Ultimately, children’s birth certificates should reflect how they see themselves and their families, rather than contradicting their realities by excluding one or more of their parents because of terminological restrictions.

A. Social Impact

Failing to recognize a child’s non-biological parent on his or her birth certificate has a variety of adverse effects. Discrimination is one key social implication of states failing to recognize a child’s parents on his or her birth certificate. Liz Short notes that “[d]iscriminatory parentage (and other family-related) laws are regarded by both those who support them and those who oppose them as marking out same-sex parented families as less acceptable or desirable than other families, or even, as not families at all.”⁷¹ Rules and laws that sanction differential treatment of families based on the sexual orientation of parents are referred to as legislative discrimination.⁷² An advocacy group of lesbian parents wrote:

Discriminatory laws . . . ensure that children in [families with same-sex parents] are treated in a discriminatory way and face a range of unnecessary hardships [M]ost of our children are not aware that numerous laws in this state and country [Australia] construct their families as not real families and one of their parents as not even their parent.⁷³

68. See Nicole LaViolette, *Dad, Mom—and Mom: The Ontario Court of Appeal’s Decision in A.A. v. B.B.*, 86 CANADIAN BAR REV. 665, 679 (2007).

69. See, e.g., *A.A. v. B.B.*, 2007 ONCA 2 at para. 33 (Can.) (addressing reproductive technology’s implications for modern family structures).

70. See Daniela Cutas, *On Triparenting*, 37 J. MED. ETHICS 735, 735 (2011).

71. Liz Short, “*It Makes the World of Difference*”: *Benefits for Children of Lesbian Parents of Having Their Parents Legally Recognised as Their Parents*, 3 GAY & LESBIAN ISSUES & PSYCHOL. REV. 5, 5 (2007).

72. See AIDS COUNCIL OF N.S.W., INC., SUBMISSION TO SAME-SEX: SAME ENTITLEMENTS 2 (2006), https://www.humanrights.gov.au/sites/default/files/content/human_rights/samesex/inquiry/submissions/281.doc; see also Crouch et al., *supra* note 4, at 644–45.

73. Short, *supra* note 71, at 9 (quoting the Lesbian Parents’ Project Group).

Peer stigmatization has been identified as another area where children raised in same-sex families are disadvantaged.⁷⁴ For example, “children of gay parents are vicarious victims of rampant homophobia and institutionalized heterosexism. They suffer all of the considerable economic, legal and social disadvantages imposed on their parents, sometimes even more harshly.”⁷⁵ In 2014, the largest study into the health and wellbeing of children of same-sex parents ever conducted was undertaken in Australia. The results established that “stigma related to parental sexual orientation is associated with a negative impact on child mental and emotional wellbeing.”⁷⁶ The study supported the existing data, which suggest that “stigma and homophobia are related to problem behavior and conduct problems in children with same-sex attracted parents.”⁷⁷

In *United States v. Windsor*,⁷⁸ the U.S. Supreme Court recognized the significant social impact that discriminatory laws may have on children when it observed that the Defense of Marriage Act, a federal law that defined the term “spouse” to cover heterosexual marriages, “humiliate[d] tens of thousands of children now being raised by same-sex couples. . . . [and] made it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”⁷⁹

Of course, the inclusion of both mothers on a child’s birth certificate is not a panacea. A child may very well still experience discrimination and stigmatization. However, reforming birth certificates would remove one area of legislative discrimination and send a clear signal to children with same-sex parents that their families are recognized by the State, even if some sectors of society do not recognize it.

Further, we recognize that having two mothers on a birth certificate can also lead to *more* discrimination against a child by demonstrating that the child’s family does not conform to traditional ideas of the “nuclear family.”⁸⁰ On balance, though, recording the accurate composition of a child’s family on their birth certificate is worthwhile since it may lead to same-sex families becoming more socially accept-

74. See JUDITH STACEY, *IN THE NAME OF THE FAMILY* 135 (1996).

75. *Id.*

76. Crouch et al., *supra* note 4, at 644–45.

77. *Id.* at 644.

78. 133 S. Ct. 2675 (2013).

79. *Id.* at 2694.

80. See, e.g., Angelica Leicht, *DPS Tells Mayor Parker’s Daughter She Can’t Have Two Moms*, HOUS. PRESS (Oct. 24, 2014), http://blogs.houstonpress.com/news/2014/10/dps_denies_mayor_parkers_child_a_license_for_having_two_moms.php.

able and over time reduce the stigma that some children born into these families endure. Official documentation of children's families on their birth certificates demonstrates that the government recognizes and respects a plurality of family structures.⁸¹

B. *Practical Impact*

There are also significant legal and financial implications if all parents are not represented on their children's birth certificates. Short discusses the potential financial harms children may suffer if their parents separate, as well as issues of inheritance (from the non-birth mother or extended family) and workers' compensation.⁸² The U.S. Supreme Court in its *Windsor* opinion also highlighted the ways in which failure to officially recognize parentage can cause significant financial detriment to families with same-sex parents.⁸³ Another potential problem arises if a child's birth mother dies and the non-biological mother has not been recorded on the birth certificate. In these circumstances, the child may be legally classified as an orphan, even though the other mother is still alive.⁸⁴

Furthermore, the non-recognition of one parent in a two-parent family also "means that children have only one parent who can legally give permission for treatment in a medical emergency, enroll them at school, approve school excursions, and take them in or out of the country."⁸⁵ Thus, failure to include both of a child's same-sex parents on the child's birth certificate creates obstacles that range in severity from day-to-day annoyances to long-lasting financial or potential medical harms.

C. *Emotional Impact*

Significant emotional implications also arise for children who do not have birth certificates that accurately represent their parentage. Many children of same-sex parents face discrimination: a 2005 study of seventy-eight ten-year-old children of lesbian parents in the United States found that forty-three percent of them had experienced homophobia.⁸⁶ Official state recognition of same-sex families via a child's birth certificate could contribute to a reduction in discrimina-

81. See Sifris, *supra* note 64, at 198.

82. See Short, *supra* note 71, at 9.

83. See *Windsor*, 133 S. Ct. at 2695.

84. See Short, *supra* note 71, at 9.

85. *Id.*

86. Nanette Gartrell et al., *The National Lesbian Family Study: 4. Interviews With the 10-Year-Old Children*, 75 AM. J. ORTHOPSYCHIATRY 518 (2005).

tion towards such children by normalizing same-sex parenting. Indeed it has been noted that “a lack of legal recognition in a child-parent relationship creates a degree of uncertainty for both the child and parent and consequently has an impact on their health and wellbeing.”⁸⁷

Similarly, research conducted in Australia found that among children with same-sex parents, forty-four percent of children ages eight to twelve had experienced “teasing, bullying or derogatory language in relation to their family,” while forty-five percent of children ages thirteen to sixteen had experienced bullying which ranged “from verbal abuse, teasing, and joking to physical and sexual violence.”⁸⁸ Legally recognizing a child’s family on his or her birth certificate is one factor that could contribute to overcoming the stigma that children in same-sex families continue to face.

D. Conclusion

There is a significant connection between law and social change.⁸⁹ Laws have the power to influence the ways in which people think of each other and evaluate “normality.”⁹⁰ An advocacy group representing prospective lesbian parents has argued for the importance of this linkage:

Legal reform [provides] a strong message to the community that the family of a child of lesbians is as legitimate and deserving of support and protection as any other. The flow-on effects in social attitudes are as important . . . as legal reform itself, particularly in terms of the acceptance (or otherwise) our children and future children will experience in the broader community.⁹¹

Furthermore, researchers examining the effects of non-discriminatory parentage laws on same-sex couples and their children reported:

[B]eing part of a family which is recognised in the law can assist children, along with their parents, to feel more “at ease”, “respected”, “accepted”, and “acceptable”, and less likely to feel the need to be “vigilant” and “brave” or be “selective” about who to speak about the family with.⁹²

87. AIDS COUNCIL OF N.S.W., INC., *supra* note 72, at 6.

88. Short, *supra* note 71, at 10.

89. See Sifris, *supra* note 64, at 199.

90. Short, *supra* note 71, at 10.

91. *Id.* at 11 (quoting PROSPECTIVE LESBIAN PARENTS, SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION ENQUIRY “ASSISTED REPRODUCTIVE TECHNOLOGY AND ADOPTION: SHOULD THE CURRENT ELIGIBILITY CRITERIA IN VICTORIA BE CHANGED?” 20 (2004)).

92. *Id.* at 12.

Thus, the inclusion of *all* the parents of children on birth certificates has the power to improve the lives of children in same-sex families from a variety of perspectives, including social, practical and emotional.

IV.

INTERNATIONAL LAW REGARDING PARENTAL REPRESENTATION ON BIRTH CERTIFICATES

[A] child, like all other human beings, has inalienable rights.

—Lucretia Coffin Mott, Remarks at the First Annual Meeting of the New England Non-Resistance Society, 1839⁹³

The Universal Declaration of Human Rights (UDHR) is silent when it comes to birth registration and birth certificates.⁹⁴ However, the right to birth registration is addressed in both the International Covenant on Civil and Political Rights (ICCPR)⁹⁵ and the Convention on the Rights of the Child (CRC),⁹⁶ albeit with no express reference to a right to a birth certificate.⁹⁷ The provisions of each of these two treaties, along with relevant articles in the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁹⁸ are analyzed below to ascertain the precise nature of the rights and whether states that are parties to the agreements have an obligation under international law to record same-sex parents on the birth certificates of children born within their territories.

The ICCPR and the ICESCR give rise to legally enforceable rights, as enunciated in the UDHR.⁹⁹ These three instruments collectively form what has become known as the International Bill of Human Rights, representing the “core of human rights protection in the world community.”¹⁰⁰ The CRC, as the human-rights treaty with

93. Lucretia Coffin Mott, Remarks at the First Annual Meeting of the New England Non-Resistance Society (Sept. 25–27, 1839), *quoted in* Margaret Hope Bacon, *By Moral Force Alone: The Antislavery Women and Nonresistance*, in *THE ABOLITIONIST SISTERHOOD: WOMEN’S POLITICAL CULTURE IN ANTEBELLUM AMERICA* 275, 292 (Jean Fagan Yellin & John C. Van Horne eds., 1994).

94. See G.A. Res. 217 (III), Universal Declaration of Human Rights (Dec. 10, 1948); Paula Gerber, Andy Gargett & Melissa Castan, *Does the Right to Birth Registration Include a Right to a Birth Certificate?*, 29 *NETH. Q. HUM. RTS.*, 434, 442 (2011).

95. International Covenant on Civil and Political Rights, *supra* note 6.

96. Convention on the Rights of the Child, *supra* note 7.

97. See Gerber, Gargett & Castan, *supra* note 94, at 442–43.

98. International Covenant on Economic, Social and Cultural Rights, *supra* note 8.

99. See SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* 7 (3d ed. 2013).

100. MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* xix, xx (1st ed. 1993).

the greatest number of state parties, is also an important source of international human-rights law; all signatories have ratified it except the United States, Somalia, and Southern Sudan.¹⁰¹

Treaty bodies have been established by the United Nations to monitor state parties' compliance with these three treaties. This Part examines the work of these treaty bodies, namely, the Human Rights Committee (HR Committee), the Committee on the Rights of the Child (CRC Committee) and the Committee on Economic, Social and Cultural Rights (CESCR). These bodies play an important role "in establishing the normative content of human rights and in giving concrete meaning to individual rights and state obligations."¹⁰²

The HR Committee, CRC Committee, and CESCR have provided commentary on the provisions of their respective treaties, and pursuant to Article 31 of the Vienna Convention on the Law of Treaties, the treaty committees' jurisprudence can be used to interpret the Articles in accordance with their objects and purposes.¹⁰³ To date, none of the treaty committees have specifically dealt with the issue of same-sex parents being recorded on a child's birth certificate. However, their observations regarding the normative content of the relevant articles provides guidance as to how these committees might apply international human-rights laws to this issue.

101. See *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited July 11, 2015) The CRC currently has 104 state parties. *Id.* The United States signed the treaty on February 16, 1995. *Id.* For discussion of the debate about the United States' ratification, see David L. Gregory, *The United States' Concerns About the Convention on the Rights of the Child*, 14 EDUC. & L. 141 (2002); Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449 (1996); Celé Hancock, *The Incompatibility of the Juvenile Death Penalty and the United Nations Convention on the Rights of the Child: Domestic and International Concerns*, 12 ARIZ. J. INT'L & COMP. L. 699 (1995); Andre R. Imbrogno, *Corporal Punishment in America's Public Schools and the U.N. Convention on the Rights of the Child: A Case for Nonratification*, 29 J.L. & EDUC. 125 (2000); Susan Kilbourne, *The Wayward Americans: Why the USA Has Not Ratified the UN Convention on the Rights of the Child*, 10 CHILD & FAM. L.Q. 243 (1998); Richard G. Wilkins et al., *Why the United States Should Not Ratify the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 411 (2003).

102. Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 908 (2009).

103. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

A. *International Covenant on Civil and Political Rights*

The HR Committee is responsible for monitoring state parties' compliance with the ICCPR.¹⁰⁴ Although its recommendations are not legally enforceable, its findings provide the most authoritative interpretation of the ICCPR.¹⁰⁵ Accordingly, analysis of the work performed by the HR Committee is essential when interpreting the ICCPR.¹⁰⁶

There are three aspects to the work of the HR Committee, namely, General Comments, Concluding Observations, and "Views" on individual communications.¹⁰⁷ After reviewing these three categories of treaty committee work, Gerber and others concluded that the right to a birth certificate is necessarily implied in the right to birth registration.¹⁰⁸ However, international law is silent as to *who* should be registered on a child's birth certificate as the parents of a child.

Article 24(2) of the ICCPR states that "every child shall be registered immediately after birth and shall have a name."¹⁰⁹ The HR Committee has said that this article "specifically addresses the protection of the rights of the child, as such or as a member of a family,"¹¹⁰ but has not provided any specific guidance as to the precise content of that right. However, the essential aim of Article 24(2) is to provide all individuals with an identity, and accurately recording children's parents on their birth certificates is essential to ensuring that they can establish their true identities.

The case of Ximena Vicario¹¹¹ provides important guidance as to the application of Article 24(2) of the ICCPR. Ximena (at the time, age nine months) and her parents were taken by the Argentinean police in the 1970s.¹¹² Though her parents were never seen again, a

104. See *Human Rights Committee*, UNITED NATIONS HUM. RTS. <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (last visited Mar. 22, 2015).

105. See Gerber, Gargett & Castan, *supra* note 94, at 444.

106. See *id.* at 445.

107. See OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, CIVIL AND POLITICAL RIGHTS: THE HUMAN RIGHTS COMMITTEE, FACT SHEET NO. 15 19, 24, 26, <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>.

108. See Gerber, Gargett & Castan, *supra* note 94, at 436.

109. International Covenant on Civil and Political Rights, *supra* note 6, art. 24.

110. Human Rights Comm., General Comment No. 19: Article 23 (Protection of the Family, the Right to Marriage and Equality of the Spouses), U.N. Doc. HRI/GEN/1/Rev.9 (July 27, 1990).

111. Human Rights Committee, *Mónaco de Gallicchio v. Argentina*, Comm. No. 400/1990, U.N. Doc. CCPR/C/53/D/400/1990 (Apr. 3, 1995), <http://www1.umn.edu/humanrts/undocs/vs40053e.pdf>.

112. *Id.* ¶ 2.1.

nurse, S.S., adopted Ms. Vicario and cared for her as her own child.¹¹³ After a seven-year search, Ms. Vicario's biological grandmother, Ms. Monaco, finally located her lost granddaughter.¹¹⁴ A long legal battle ensued, as the nurse who adopted Ms. Vicario sought to establish visitation rights with her after Ms. Monaco was awarded provisional guardianship of the child.¹¹⁵ Ms. Monaco spent years trying to gain custody of her granddaughter through the Argentinian court system and to ensure that her birth certificate accurately reflected her birth details.¹¹⁶ When Ms. Monaco received no satisfaction in the Argentinian court system, she submitted a complaint to the HR Committee.¹¹⁷ The HR Committee found the following:

[T]he abduction of Ximena Vicario, the falsification of her birth certificate and her adoption by S.S. entailed numerous acts of arbitrary and unlawful interference with their privacy and family life, in violation of article 17 of the Covenant. The same acts also constituted violations of article 23, paragraph 1, and article 24, paragraphs 1 and 2, of the Covenant.¹¹⁸

Thus, the HR Committee concluded that by failing to ensure that the child had a birth certificate that accurately recorded the names of her parents, Argentina had violated the provisions of the ICCPR relating to birth registration.

The right to identity is established by Article 16 of the ICCPR, which states that "everyone shall have the right to recognition everywhere as a person before the law."¹¹⁹ This Article provides a person with a right to recognition of personhood.¹²⁰ A birth certificate that accurately reflects a person's family structure is key to realizing the right to identity. Nowak suggests that an individual's right to have his or her birth registered is "closely related to the right of every person to his or her *identity*, which follows from the protection of privacy, and the right to recognition *as a person before the law* guaranteed by Art. 16."¹²¹ In order to substantially fulfill the right of all persons to a

113. *Id.*

114. *Id.*

115. *Id.* at paras. 2.2–4.

116. *Id.*

117. *Id.* at para. 2.4.

118. *Id.* at para. 10.4.

119. International Covenant on Civil and Political Rights, *supra* note 6, art. 16.

120. See HUMAN RIGHTS AND THE CAPABILITIES APPROACH: AN INTERDISCIPLINARY DIALOGUE 101 (Diane Elson et al. eds., 2012); International Covenant on Civil and Political Rights, *supra* note 6, art. 16.

121. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 559–60 (2d ed. 2005).

legally recognized identity, it is necessary that they have birth certificates that correctly reflect their identities.

Article 2(1) of the ICCPR is also relevant to a consideration of birth certificates and their content. It requires a state party to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind.”¹²² In other words, this provision requires state parties to avoid any discrimination in giving effect to the rights set out in the ICCPR. Provisions such as this are found at the beginning of all major human-rights treaties and have been termed “umbrella clauses” because they apply to all other rights set out in the treaties.¹²³

Article 2(2) requires that if current law does not already provide for equal treatment, the state party has an obligation to “undertake[] the necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”¹²⁴ If Articles 24 (universal registration) and 16 (recognition of personhood) are applied in a discriminatory way by denying children of same-sex parents the protection of having all of their parents recorded on their birth certificate, this could constitute a breach of Article 2.

A general right to non-discrimination is found in Article 26 of the ICCPR, which states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹²⁵

The non-discrimination provision encompassed in Article 26 applies to *all* state action, not just ICCPR-related action, and is therefore broader than Article 2.¹²⁶ It provides a right to equality before the law and guarantees equality in regards to the enforcement of the law.¹²⁷ This right is “directed at the legislature and requires State Parties to prohibit discrimination.”¹²⁸ In order to uphold the obligations placed

122. International Covenant on Civil and Political Rights, *supra* note 6, art. 2(1).

123. NOWAK, *supra* note 100, at 28.

124. International Covenant on Civil and Political Rights, *supra* note 6, art. 2(2).

125. *Id.* art. 26.

126. See HUMAN RIGHTS & EQUAL OPPORTUNITY COMM’N, SAME-SEX: SAME ENTITLEMENTS 39 (2007), https://www.humanrights.gov.au/sites/default/files/content/human_rights/samesex/report/pdf/SSSE_Report.pdf.

127. See *id.*

128. NOWAK, *supra* note 100, at 473.

on governments by Article 26, all parental figures should be named on the birth certificate of children born into same-sex families. That is, governments should not differentiate between children with opposite-sex parents and children with same-sex parents when it comes to the information recorded on birth certificates.

The right of children to have both same-sex parents equally represented on their birth certificates is also supported by Article 23(1) of the ICCPR, which states that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”¹²⁹ In General Comment No. 19, the HR Committee recognized that “the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.”¹³⁰ As a consequence, the HR Committee gives states that are parties to the covenant a wide scope of interpretation of the term “family” in applying the obligations of the treaty, and requires that “States parties should report on how the concept and scope of the family is construed or defined in their own society and legal system.”¹³¹ As discussed above, same-sex parented families are becoming more prevalent in modern society. Therefore, in order to comply with Article 23, recognition of *all* parents should occur on the birth certificates of children born within such families.

To simply record biological information does not properly recognize the identity of the child. Rather, it attributes a “mother” and “father” to a child, when this may not be an accurate representation of the child’s identity. In countries where same-sex families exist, governments should ensure that their regulatory regimes provide for the recording of *all* parents of a child—not just one mother and one father—in order to comply with Articles 2, 16, 23, 24 and 26 of the ICCPR.

B. *Convention on the Rights of the Child*

The CRC Committee monitors the practical application of the CRC and provides an authoritative interpretation of the treaty provisions.¹³² It has not yet published a General Comment on the right to birth registration set out in Article 7, but there are other aspects of its work that provide insight into the content of the right to birth registration, and the way in which the right should be applied and protected.

129. International Covenant on Civil and Political Rights, *supra* note 6, art. 23(1).

130. Human Rights Comm., *supra* note 110, ¶ 2.

131. *Id.*

132. See Gerber, Gargett & Castan, *supra* note 94, at 445.

The preamble of the CRC states that a child “should grow up in a family environment in an atmosphere of happiness and understanding.”¹³³ This provides the context for an analysis of the treaty, and in particular, a determination of whether a state party is required to provide a child with same-sex parents with a birth certificate that reflects that reality.

Article 7(1) of the CRC requires all children to be “registered immediately after birth” and states that all children have “the right to know and be cared for by his or her parents.”¹³⁴ Article 7(2) requires that State Parties ensure that these rights are implemented under national law.¹³⁵ The content of this provision echoes that of Article 24 of the ICCPR, and similarly provides little guidance as to the precise content of the right.¹³⁶ For example, “parent” is not defined in the CRC. Sifris argues that nothing in the wording of Article 7 suggests that it is limited to heterosexual parents.¹³⁷ At the time the CRC was drafted, same-sex couples becoming parents would not have been contemplated, as this type of family unit was largely unknown in the 1980s.¹³⁸ However, human-rights treaties are “living instruments” and should be interpreted in light of modern society, not frozen in time.¹³⁹ Given the rising number of same-sex families in many parts of the world, Article 7 should be interpreted in such a way that the term “parent” includes all the persons performing that role in a same-sex family.

Article 3 of the CRC requires that all “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies” that undertake actions concerning children hold the “best interests of the child” as “a primary consideration.”¹⁴⁰ The effect

133. Convention on the Rights of the Child, *supra* note 7, pmbi.; see also International Covenant on Civil and Political Rights, *supra* note 6, art. 23.

134. Convention on the Rights of the Child, *supra* note 7, art. 7(2).

135. *Id.* art. 7(2).

136. See Gerber, Gargett & Castan, *supra* note 94, at 445–46.

137. Sifris, *supra* note 64, at 208.

138. See Dawn Michelle Baunach, *Changing Same-Sex Marriage Attitudes in America from 1988 Through 2010*, 76 PUB. OPINION. Q. 364, 364, 368 (2012) (finding that in the late 1980s, most United States survey respondents viewed same-sex marriage negatively). *But see* CAROL THORPE TULLY, LESBIANS, GAYS, AND THE EMPOWERMENT PERSPECTIVE 37 (2013) (describing the “emergence of visible family units composed of gay male and lesbian couples” in the United States in the 1980s).

139. See Human Rights Committee, *Judge v. Canada*, Comm. No. 829/1998, para. 10.3, U.N. Doc. CCPR/C/78/D/829/1998 (Aug. 5, 2002) <http://www1.umn.edu/humanrts/undocs/829-1998.html> (“The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.”).

140. Convention on the Rights of the Child, *supra* note 7, art. 3.

of Article 3 is that state parties must consider what is in the best interests of the child when regulating birth registration and birth certificates, including when determining whom to record as the parents of a child. In its report entitled *Same-Sex: Same Entitlements*, the Australian Human Rights and Equal Opportunity Commission found that “laws which discriminate against same-sex parents may have a negative impact on that couple’s child.”¹⁴¹ Furthermore, the Commission asserted that “[i]f such a negative impact is a reasonably foreseeable outcome of a particular law it suggests that the best interests of the child were not a primary consideration in the decision to enact such legislation.”¹⁴² It is likely that birth certificates that do not allow a child to have his or her same-sex parents recorded are contrary to the best interests of children.¹⁴³

Some have argued that the biological parentage of a child is what should be represented on a birth certificate in order for accurate medical data to be collected. One proponent of this view is Margaret Somerville, who argues:

[B]ringing children into a same-sex relationship should not be seen as within the norm, but rather, as an exception to it. . . . I believe that a child needs a mother and a father and, if possible and unless there are good reasons to the contrary, preferably its own biological mother and father as its raising parents. (Adopted children’s search for their birth parents and current moves to give children born through reproductive technologies, using donated gametes, access to the gamete donors’ identity, show a deep human need to know our biological family origins.)¹⁴⁴

This argument is readily refuted by considering the “best interests of the child,” encapsulated in Article 3. Having a child’s actual parental figures (not merely their biological parents) named on their birth certificate does not preclude a child from knowing their biological origins. A child’s biological origins may be recorded through the mechanism of birth registration, and this information should be accessible to the child. However, donors of eggs or sperm should not be conflated with a child’s parents by inclusion on a child’s birth certificate. Naming all parental figures on birth certificates provides children with a sense of personal and social identity, which is likely to be in their best interests.

141. HUMAN RIGHTS & EQUAL OPPORTUNITY COMM’N, *supra* note 126, at 48.

142. *Id.*

143. *See id.* at 50–51; *supra* Part III.

144. Margaret Somerville, *The Case Against “Same-Sex Marriage,”* CATH. EDUC. RES. CTR., <http://www.catholiceducation.org/en/controversy/marriage/the-case-against-same-sex-marriage.html> (last visited Apr. 13, 2015).

Another key pillar of the CRC is non-discrimination. Article 2 mandates:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.¹⁴⁵

The CRC Committee has expressly stated that discrimination on the basis of sexual orientation is discrimination for the purpose of Article 2.¹⁴⁶ Furthermore, the Committee has found that direct and indirect discrimination against children, their parents, or legal their guardians constitutes a breach of Article 2.¹⁴⁷

The Australian Human Rights Commission has asserted: "Article 2(2) of the CRC creates a stand alone right which protects children from suffering any discrimination on the basis of the status of their parents—including the sexual orientation of their parents."¹⁴⁸ For example, a law that protects an opposite-sex family but not a same-sex family breaches the right under Article 23(1) of the ICCPR to protection of the family in conjunction with ICCPR Article 2(1)'s right to non-discrimination.¹⁴⁹

Adiva Sifris argues that Article 2 requires protecting children from discrimination based on the sexual orientation of their parents.¹⁵⁰ This understanding is supported by the wording of the provision, which prohibits discrimination based on not only the child's "race, colour, sex, language, religion, political or other opinion, national, eth-

145. Convention on the Rights of the Child, *supra* note 7, art. 2.

146. Comm. on the Rights of the Child, General Comment No. 4: Adolescent Health and Development in the Context of the Convention of the Rights of the Child, para. 6, U.N. Doc. CRC/GC/2003/4 (July 1, 2003); Comm. on the Rights of the Child, General Comment No. 3: HIV/AIDS and the Rights of the Child, para. 8, U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003).

147. See Comm. on the Rights of the Child, Concluding Observations: Morocco, 33rd Sess., May 19–June 6, 2003, ¶ 25, U.N. Doc. CRC/C/15/Add.211 (July 10, 2003); Comm. on the Rights of the Child, Concluding Observations: Libyan Arab Jamahiriya, ¶ 23, U.N. Doc. CRC/C/15/Add.209 (July 4, 2003).

148. HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N, *supra* note 126, at 39.

149. *Id.*

150. Sifris, *supra* note 64, at 217.

nic or social origin, property, disability, birth or other status,” but also those of his or her parents.¹⁵¹ Failing to allow children born of same-sex parents to have their parents included on their birth certificates arguably amounts to discrimination against these children on the basis of their parents’ sexual orientation, in breach of Article 2.¹⁵² In addition, in a submission to the Australian Human Rights Commission inquiry, Philip Lynch of the Human Rights Law Resource Centre invoked the CRC when he characterized same-sex parents’ inability to access financial entitlements as harm to their children in violation of Article 2(2).¹⁵³

Article 8 of the CRC is also relevant to a consideration of the information that should be included on the birth certificates of children with same-sex parents. It requires states to “respect the right of the child to preserve his or her identity, including . . . family relations as recognized by law.”¹⁵⁴ This provision recognizes that a child’s identity is closely linked to his or her family relationships. The UNICEF handbook outlining implementation of the CRC recognizes that the legal meaning of the phrase “family relations recognized by law” is unclear, but argues that a child’s sense of identity depends on more than just knowing his or her biological parents.¹⁵⁵ It states:

[P]sychological parents—those who cared for the child for significant periods during infancy and childhood—should also logically be included [in the definition of parents] since these persons too are intimately bound up in children’s identity and thus their rights under article 8.¹⁵⁶

Furthermore, “family relations as recognized by law” should be interpreted in accordance with the “best interests of the child” principle and therefore should be interpreted broadly to have the widest application.¹⁵⁷ The concept of “family relations” has not been examined and defined by the CRC Committee. A General Comment focusing on Articles 7 and 8 of the CRC would be helpful to establish whether the failure of state parties to allow all parents to be represented on a

151. Convention on the Rights of the Child, *supra* note 7, art. 2.

152. See Sifris, *supra* note 64, at 219.

153. HUMAN RIGHTS & EQUAL OPPORTUNITY COMM’N, *supra* note 126, at 48 (quoting Philip Lynch).

154. Convention on the Rights of the Child, *supra* note 7, art. 8.

155. RACHEL HODGKIN & PETER NEWELL, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 114 (United Nations Children’s Fund 3d rev. ed 2007); see also *supra* Part II.B (examining the relationship between a person’s official identity documents and his or her sense of personal identity).

156. HODGKIN & NEWELL, *supra* note 155, at 106.

157. See Convention on the Rights of the Child, *supra* note 7, art. 3, para. 1.

child's birth certificate constitutes a breach of a child's right to identity.¹⁵⁸

Some countries, including Australia, have concluded:

[T]he lesbian co-mother or gay co-father of a child should be included under the CRC definition of 'parents.' If an Australian law fails to recognise the potential significance of such a person it may deny the child's right to know his or her 'psychological parent' or interfere with a child's sense of identity.¹⁵⁹

Article 18 of the CRC requires:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.¹⁶⁰

A failure to record both same-sex parents of a child on the child's birth certificate could amount to a breach of the obligation to support and promote the common responsibilities of both parents in raising that child.¹⁶¹ The UNICEF Implementation Handbook does not specifically refer to same-sex parents, but does state that "[u]nder the terms of article 18, the law must recognize the principle that both parents have common responsibility Government measures should be directed at supporting and promoting the viability of joint parenting."¹⁶² Having both same-sex parents on children's birth certificates is one way of supporting the family unit, both practically and symbolically.

The above analysis suggests that, read together, Articles 2, 3, 7, 8 and 18 of the CRC require state parties to provide children with same-sex parents with birth certificates that accurately reflect and record their family structures. Restricting birth certificates to the recording of only one mother and one father can amount to discrimination against children with same-sex parents (in breach of Article 2), not be in their best interests (Article 3), fails to recognize their right to identity (Articles 7 and 8), and fails to support the family unit (Article 18).

158. The Australian Human Rights Commission found that "the definition of 'parents' has been interpreted broadly to include, genetic parents, birth parents and psychological parents" in regards to a child's right to know his or her parents (Article 7) and preserve his or her identity (Article 8). HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N, *supra* note 126, at 50.

159. *Id.* at 50–51.

160. Convention on the Rights of the Child, *supra* note 7, art. 18, para. 1.

161. See HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N, *supra* note 126, at 50.

162. HODGKIN & NEWELL, *supra* note 155, at 236.

C. International Covenant on Economic, Social and Cultural Rights

The ICESCR is also relevant to the determination of what data should be recorded on the birth certificates of children with same-sex parents. Article 10(1) of the ICESCR provides that the family “is the natural and fundamental group unit of society” and that states parties recognize that “the widest possible protection and assistance should be accorded to the family.”¹⁶³ Article 10(3) states that “special measures of protection and assistance” are to be taken by state parties “on behalf of all children and young persons without any discrimination for reasons of parentage.”¹⁶⁴ This provision should be read in conjunction with the more general non-discrimination requirement encompassed in Article 2(2), which requires state parties to “undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind.”¹⁶⁵

The CESCR has explicitly stated in a number of its General Comments that discrimination on the grounds of sexual orientation is prohibited under Article 2(2).¹⁶⁶ In General Comment No. 20, the CESCR described non-discrimination and equality as “fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights,”¹⁶⁷ and clarified that “other status,” as recognized in Article 2(2), includes sexual orientation¹⁶⁸: “States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights.”¹⁶⁹

The Yogyakarta Principles provide guidance on the interpretation and application of these provisions of the ICESCR.¹⁷⁰ The Principles

163. International Covenant on Economic, Social and Cultural Rights, *supra* note 8, art. 10, para. 3.

164. *Id.* art. 10, para. 3.

165. *Id.* art. 2, para. 2.

166. *See, e.g.*, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, para. 32, U.N. Doc. E/C.12/GC/20 (July 2, 2009) [hereinafter General Comment No. 20]; Comm. on Econ., Soc. and Cultural Rights, General Comment No. 18: The Right to Work, para. 12(b)(i), U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006); Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 18, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter General Comment No. 14].

167. *See* General Comment No. 20, *supra* note 166, para. 2.

168. *Id.* para. 32.

169. *Id.*

170. *See* THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 7 (2007), http://www.yogyakartaprinciples.org/principles_en.pdf.

were drafted by leading human-rights law experts to assist with the application of international human-rights law to sexual-orientation and gender-identity issues.¹⁷¹ The CESCR cited the Yogyakarta Principles in General Comment 20 when defining “gender identity.”¹⁷² Although the CESCR did not cite a specific principle within the Yogyakarta Principles, the fact that a United Nations treaty body referred to the Principles is evidence of their authority.¹⁷³

Principle 24 of the Yogyakarta Principles focuses on the “right to found a family.”¹⁷⁴ This principle requires that states take steps to ensure that all people have access to all available mechanisms to found a family, without discrimination on the basis of their sexual orientation.¹⁷⁵ Significantly, this principle also requires states to recognize the diverse range of family constructions and to legislate with a view toward eliminating all forms of discrimination that may arise as a result of sexual orientation or gender identity.¹⁷⁶ Applying the Yogyakarta Principles to the relevant provisions of the ICESCR indicates that because failing to allow children to have their same-sex parents’ names on their birth certificates is discriminatory, it is a breach of Articles 2 and 10 of the ICESCR.

Article 12 of the ICESCR is also relevant to the rights of children with same-sex parents. It requires that states recognize that everyone has the right to the “highest attainable standard of physical and mental health.”¹⁷⁷ State parties must take steps to “achieve the full realization” of the right, including measures to ensure “the healthy development of the child.”¹⁷⁸

Failing to recognize a child’s true parentage on his or her birth certificate might affect that child’s mental health. As discussed above, legislative discrimination has been found to be a factor that contributes to the social exclusion of people in same-sex relationships.¹⁷⁹ As social exclusion and stigmatization “are recognized social determi-

171. *See id.*

172. *See* General Comment No. 20, *supra* note 166, at n.25.

173. *See* PAULA L. ETTLEBRICK & ALIA TRABUCCO ZERÁN, THE IMPACT OF THE YOGYAKARTA PRINCIPLES ON INTERNATIONAL HUMAN RIGHTS LAW DEVELOPMENT 17 (2010), http://www.ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf.

174. THE YOGYAKARTA PRINCIPLES, *supra* note 170, at 27.

175. *Id.*

176. *Id.* at 27–28.

177. International Covenant on Economic, Social and Cultural Rights, *supra* note 8, art. 12(1).

178. *Id.* art. 12(2).

179. *See supra* Part III.A.

nants of an individual's and a community's standard of health,"¹⁸⁰ legislation that does not support children of same-sex parents arguably contravenes the right to health guaranteed by Article 12 of the ICESCR.

In 2000, the United Nations Committee on Economic, Social and Cultural Rights published General Comment No. 14 on the right to the highest attainable standard of health as set forth in Article 12.¹⁸¹ The Committee noted that the ICESCR proscribes any discrimination with respect to underlying determinants of health, on all grounds, including sexual orientation.¹⁸² Thus, state parties to the ICESCR arguably have an obligation to allow the names of same-sex parents to be recorded on children's birth certificates in order to avoid facilitating discrimination that may negatively impact a child's health, in violation of Article 12.

Article 9 of the ICESCR recognizes the "right of everyone to social security, including social insurance."¹⁸³ In General Comment No. 19, the CESCR recognized the importance of social security and other financial benefits to families, stating that "all persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalized groups, without discrimination" prohibited by Article 2.¹⁸⁴ The United States law known as the Defense of Marriage Act (DOMA) excluded same-sex couples from the definition of marriage and thereby impacted access to federal benefits.¹⁸⁵ The *Windsor* case, discussed *supra* Part III.A, arose out of the death of Thea Spyer, who left her estate to her surviving spouse, Edith Windsor.¹⁸⁶ Section 3 of DOMA had the effect of denying Windsor the exemption from estate taxes afforded to heterosexual widows.¹⁸⁷ Although the State of New York recognized Spyer and Windsor's marriage, federal law did not.¹⁸⁸ The United States Supreme Court held that Section 3 of Doma was unconstitutional and affirmed the judgment of the courts below in Windsor's favor.¹⁸⁹ The

180. AIDS COUNCIL OF N.S.W., INC., *supra* note 72, at 9.

181. General Comment No. 14, *supra* note 166.

182. *Id.* para. 18.

183. International Covenant on Economic, Social and Cultural Rights, *supra* note 8, art. 9.

184. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 19: The Right to Social Security, U.N. Doc. E/C.12/GC/19, art. 9, para. 23 (Feb. 4, 2008).

185. Defense of Marriage Act § 3, 110 Stat. 2419, 2419–20 (1996) (current version at 1 U.S.C. § 7 (2013)).

186. United States v. Windsor, 133 S. Ct. 2675, 2683 (2013).

187. *Id.*

188. *See id.*

189. *Id.* at 2696.

Court observed that DOMA caused financial detriment to children of same-sex couples by raising the cost of healthcare for same-sex-parented families through taxing the health benefits provided by employers to their workers' same-sex spouses.¹⁹⁰ Furthermore, the Court noted that DOMA denies or reduces social security benefits for children and families upon the loss of a spouse and parent.¹⁹¹

The Court highlighted the ways in which lack of official recognition of parentage can cause significant financial harms to families with same-sex parents, and also recognized the substantial social impact that discriminatory laws may have on children.¹⁹² The arguments in opposition to DOMA are equally applicable to birth certificates. Naming both parents on a child's birth certificate makes it much easier for that child to establish a parental relationship with his or her non-biological parent, should that be necessary to access a benefit like social security.¹⁹³

Ensuring all parents are included on the birth certificate of a child with same-sex parents is one way of protecting the child's rights to social security benefits. Such reform would help give full effect to the right to social security provided by Article 9 of the ICESCR.

D. Conclusion

In sum, in order to fully comply with the rights set out in the ICCPR, CRC and ICESCR, governments should ensure that:

1. birth certificates protect a child's identity by accurately recording his or her family structure (Articles 16 and 24 of the ICCPR, and Articles 7 and 8 of the CRC);
2. children with same-sex parents are not discriminated against in the recording of their parental details on birth certificates (Articles 2 and 26 of the ICCPR, Article 2 of the CRC, and Article 2 of ICESCR);
3. all necessary measures are taken to protect the family, including same-sex families (Article 23 of the ICCPR, Article 18 of the CRC, and Articles 9 and 10 of ICESCR); and

190. *See id.* at 2695.

191. *Id.*

192. *Id.* at 2694–96.

193. *See* HUMAN RIGHTS CAMPAIGN FOUND. & NAT'L COMM. TO PRES. SOC. SEC. & MEDICARE FOUND., *LIVING OUTSIDE THE SAFETY NET: LGBT FAMILIES & SOCIAL SECURITY* 8–9 (2014), <http://www.ncpssmfoundation.org/Portals/0/lgbt-report.pdf> (“Children whose parental relationships to a worker are not recognized for purposes of Social Security receive nothing when a parent retires, dies, or becomes disabled, even if that parent is the primary breadwinner for the family.”).

4. the best interests of the child are a primary consideration when regulating birth certificates.

The above analysis of relevant provisions of the ICCPR, CRC and ICESCR demonstrates that in order to fully comply with international human rights law, states should protect the rights of children and the family unit, without discrimination on the basis of family structure. A good-faith interpretation of these three human-rights treaties leads to the conclusion that children with same-sex parents have a right to be provided with birth certificates that accurately reflect their parentage.

V. CASE STUDIES

Even if one is interested only in one's own society, which is one's prerogative, one can understand that society much better by comparing it with others.

—Peter Berger¹⁹⁴

Several countries around the world are currently considering what information should be included on the birth certificates of children with same-sex parents. In this section, we compare four countries and find that there is little consistency in approaches. This section examines the different ways in which the United States (California, Iowa, and New York specifically), Australia, the United Kingdom, and Canada have addressed this issue, with a view to ascertaining what constitutes best practice.

A. *The United States of America*

In the United States, the issuance of birth certificates falls within the jurisdiction of state governments rather than the federal government.¹⁹⁵ The result is that the content of birth certificates for children with same-sex parents varies from state to state. Three of the states that do allow same-sex parents to be recorded on a child's birth certificate have been selected for analysis below.

194. *Epistemological Modesty: An Interview with Peter Berger*, 114 CHRISTIAN CENTURY 972, 972 (1997) (interview with Peter Berger, Director of the Boston University Institute for the Study of Economic Culture).

195. See *Where to Write for Vital Records*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/w2w.htm> (last updated June 30, 2014).

1. California

In California, same-sex parents may both be named on their children's birth certificates if the parents were Registered Domestic Partners or legally married when the child was born.¹⁹⁶ The relevant state law, known as the Domestic Partner Rights and Responsibilities Act,¹⁹⁷ (DPRRA) "provides registered domestic partners with most of the rights and responsibilities given to spouses under Californian law."¹⁹⁸ Under the DPRRA, same-sex parents can be registered on the birth certificate of their child under the terminology of "Mother/Parent" and "Father/Parent."¹⁹⁹ The result is that the birth certificate can read "Mother and Parent" or "Father and Parent" but not "Mother/Mother" or "Father/Father." Thus, while the DPRRA does provide greater recognition of same-sex parents than was previously afforded, it still does not fully represent the reality of all children's family structures.

In response to this issue, in 2014 California State Assembly Member Jimmy Gomez introduced Bill 1951,²⁰⁰ which would modify California birth certificates to provide three checkboxes with the options of "mother," "father," and "parent" to describe the identity of the parents.²⁰¹ Thus, the parents themselves would choose how they would be described on their child's birth certificate. Gomez explained the reform by saying, "I believe that parents do see themselves as a mother or a father and that they want to express that on their child's birth certificate. We should give people the flexibility to accurately reflect their relationship with their child."²⁰² Gomez regarded A.B. 1951 as essential in order to ensure that a child's parent or parents "are

196. See L.A. LGBT CTR., RECOGNIZING OUR FAMILIES 2 (n.d.), <https://drive.google.com/uc?export=download&id=B304rgUKOzDROVZiNWp5RGdTNWdnTkdcCHZkbjNLV2ItTTNn>.

197. The Domestic Partner Rights and Responsibilities Act, 2003 Cal. Legis. Serv. 205 (West).

198. NAT'L CTR. FOR LESBIAN RIGHTS & EQUAL. CAL., THE CALIFORNIA DOMESTIC PARTNERSHIP LAW (AB 205): WHAT IT MEANS FOR YOU AND YOUR FAMILY 1 (2005), <http://www.eqca.org/atf/cf/%7B687DF34F-6480-4BCD-9C2B-1F33FD8E1294%7D/AB205FAQ.pdf>.

199. See CAL. GOV'T CODE § 14771(a)(14) (West 2014); STATE OF CAL. HEALTH & HUMAN SERVS. AGENCY, VS 111 (01/15), APPLICATION FOR CERTIFIED COPY OF BIRTH RECORD 1 (2015), <http://www.cdph.ca.gov/pubsforms/forms/CtrlForms/Vs111.pdf>.

200. A.B. 1951, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

201. *Id.* § 4; see also Press Release, Jimmy Gomez, Member, Cal. State Assemb., Governor Signs Gomez Bill to Correctly I.D. Same-Sex Parents on Birth Certificates (Sept. 16, 2014), <http://asmcd.org/members/a51/news-room/press-releases/governor-signs-gomez-bill-to-correctly-i-d-same-sex-parents-on-birth-certificates>.

202. Press Release, *supra* note 201.

able to make important decisions regarding health care, education, extracurricular activities and other critical needs.”²⁰³

Commenting on the bill, Rick Zbur, executive director-elect of Equality California, observed that “[b]irth certificates reflect real rights and responsibilities, and it’s important to have them reflect the progression of what defines family. . . . Every child deserves a parent or parents who love them, and A.B. 1951 will ensure an accurate representation of the child’s family.”²⁰⁴

This new law represents best practices for terminology used on the birth certificates of children with same-sex parents as it provides flexibility in the way parents are described on birth certificates. In this way, A.B. 1951 respects the autonomy of the parents, allowing them to decide for themselves how they wish to be represented on their child’s birth certificate—either as a gendered “mother” or “father,” or a neutral “parent.”

California law determining who is considered a “parent” by the state, as distinct from how that parent is described on a birth certificate, provides:

Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.²⁰⁵

The effect of this provision is that registered domestic partners are *automatically* considered the legal parents of children born of that relationship, “regardless of their biological connection to the child,” just as are married heterosexual couples.²⁰⁶ If lesbian parents are not married or registered domestic partners, then only the parent who actually gave birth to the child will be automatically listed on the birth certificate; the other parent must obtain a court order to be listed.²⁰⁷

203. Press Release, Equal. Cal., Bill to Modernize California Birth Certificate Passes Assembly and Moves to Governor’s Desk (Aug. 20, 2014), <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=KULRJ9MRKrH&b=5609563&ct=14162545¬oc=1> (quoting California State Assemblymember Jimmy Gomez).

204. *Id.* (quoting Rick Zbur, Executive Director of Equality California).

205. CAL. FAM. CODE § 297.5(a) (West 2007).

206. NAT’L CTR. FOR LESBIAN RIGHTS & EQUAL. CAL., *supra* note 198, at 14.

207. *See Parentage/Paternity*, CAL. CTS., <http://www.courts.ca.gov/selfhelp-parentage.htm> (last visited Apr. 13, 2015).

Unmarried heterosexual couples do not need to apply for a court order to enable the male partner to be listed on a birth certificate,²⁰⁸ so it is discriminatory to require that same-sex couples who are not married or registered domestic partners do so. Couples who have a child and who both consent to being on the birth certificate should not have to get a court order, regardless of whether they are married, registered domestic partners or a de facto couple with no formal recognition of their relationship. To achieve best practices, reform is necessary to remove this barrier.

Naming both same-sex parents on a Californian birth certificate does not guarantee that the parental interests will be recognized in other states within the United States, or in other countries.²⁰⁹ If the family travels abroad or moves to another state, they may not be recognized as a family under another state's law.²¹⁰ Therefore, some lesbian, gay, bisexual, and transgender rights groups recommend that same-sex couples "solidify parentage through adoption."²¹¹ This clearly is not an ideal solution, as discussed below.²¹²

Some California legislators attempted to amend birth certificates to recognize that children can have more than two parents by proposing Bill 1476, which would have allowed judges to recognize parent-child relationships between a child and more than two parents if it was in the child's best interest.²¹³ The bill was prompted by the case of *In Re M.C.*,²¹⁴ in which the state court held—in a decision that reportedly concerned State Senator Mark Leno²¹⁵—that it did not have the

208. See *Establish Paternity*, L.A. COUNTY CHILD SUPPORT SERVS. DEP'T, <http://cssd.lacounty.gov/wps/portal/cssd/parents/info/?current=true&urile=wcm:path:/CSSD+Content/CSSD+Site/CSSD+Home/Parents-Caretakers/Child+Support+Process/Parents+Caretakers-Child+Support+Process-Establish+Paternity> (last visited Apr. 16, 2015).

209. See L.A. LGBT CTR., *supra* note 196, at 2.

210. See *id.*

211. *Id.*

212. For further exploration of this issue, see the discussion of the case of Carolyn Trzeciak and Nina Sheldon Trzeciak, *infra* Part V.A.3; see also *infra* Part III.A.

213. See S. 1476, 2011–2012 Leg., Reg. Sess. § 4 (Cal. 2012) ("Nothing in this part shall be construed to preclude a finding that a child has a parent and child relationship with more than two parents."); see also Press Release, Nat'l Ctr. for Lesbian Rights, Bill Clarifies a Judge's Ability to Protect Best Interests of a Child Who Has Relationships with More than Two Parents (Feb. 24, 2012), <http://www.nclrights.org/press-room/press-release/bill-clarifies-a-judges-ability-to-protect-best-interests-of-a-child-who-has-relationships-with-more-than-two-parents/>.

214. *In re M.C.*, 123 Cal. Rptr. 3d 856 (Ct. App. 2011).

215. See Susan Donaldson James, *My Three Daddies: California Eyes Multiple Parenting Law*, ABC NEWS (July 3, 2012), <http://abcnews.go.com/Health/GMA/Health/california-considers-bill-multiple-legal-parents/story?id=16705628>.

statutory authority to place a girl with her biological father when her two lesbian mothers became unable to care for her.²¹⁶

The bill was not enacted because Governor Jerry Brown refused to sign it, stating that he needed more time to consider all potential “unintended consequences” of the proposed law.²¹⁷ In his veto statement, Governor Brown did not specify which potential unintended consequences concerned him, but opponents of the bill had argued that it would have extensive ramifications in areas of law such as tax deductions, probate, social security, wrongful death, and education benefits.²¹⁸ Furthermore, opponents argued that implementing the bill would require new guidelines and programs for determining child-support payments, which could cost an estimated \$6.4 million.²¹⁹

Legal reform should be undertaken with the best interests of the child as the paramount consideration. While adapting governmental financial support systems to accommodate such reforms may be costly to the state, these fiscal considerations should not be prioritized over addressing the best interests of children. The legal ramifications of birth certificate reforms in regards to financial support for families is one key reason why reform is necessary—to ensure that all children enjoy the social welfare benefits of the state.

The failed California bill suggests another best practice based on the reality of children’s lives: allowing the inclusion of more than two parents on a birth certificate. We do not advocate the inclusion of an unlimited number of parents on birth certificates, but believe that naming up to four parents does serve the best interests of children with multiple parental figures.

A conceivable—though, we predict, unlikely—“unintended consequence” of allowing an *unlimited* number of parents to be listed on birth certificates is that groups such as spiritual sects or cults might seek to have multiple members registered as parents as a way of asserting improper control over children. Psychiatrist Dr. Bruce Perry studied the negative impact of a cult-based upbringing in 1992,

216. See *In re M.C.*, 123 Cal. Rptr. at 872–73, 878.

217. Letter from Edmund G. Brown, Jr., Governor of Cal., to the Members of the Cal. State Senate (Sept. 30, 2012), http://gov.ca.gov/docs/SB_1476_Veto_Message.pdf (“I am sympathetic to the author’s interest in protecting children. But I am troubled by the fact that some family law specialists believe the bill’s ambiguities may have unintended consequences. I would like to take more time to consider all of the implications of this change.”).

218. See Jim Sanders, *Jerry Brown Vetoes Bill Allowing More than Two Parents*, SACRAMENTO BEE (Sept. 30, 2012), <http://blogs.sacbee.com/capitolalert/latest/2012/09/jerry-brown-vetoes-bill-allowing-more-than-two-parents.html>.

219. See *id.*

through his work with Branch Davidian children taken out of the cult compound in Waco, Texas.²²⁰ Allowing an unlimited number of parents on the birth certificate would not be in the best interests of a child, as it might give recognition and credibility to this type of sect-based “family.”

Allowing for three or four parents to be recorded on a child’s birth certificate in appropriate circumstances, such as those presented in the case of *In Re M.C.*, should be an option, provided sufficient safeguards are in place to ensure it is not open to abuse. One possible safeguard would be to require judicial approval to add a third or fourth parent to a child’s birth certificate. This would ensure that birth certificates are created or modified with the best interests of the child as the paramount consideration.

Recording more than two persons as parents on a birth certificate would recognize that some children have a lesbian couple as their parents but also a donor (and his partner) who may be regarded as father(s) and play an active parenting role in the child’s life. In order to achieve best practices, *all* parental figures should be able to be named on a birth certificate, as opposed to only two.

2. Iowa

The 2013 Iowa Supreme Court decision in *Gartner v. Iowa Department of Public Health* led to both lesbian parents being named on a birth certificate for the first time in the state.²²¹ The Gartners were legally married in Des Moines, Iowa in June 2009, when Heather Gartner was six months pregnant with the couple’s second child.²²² The couple commenced legal proceedings against the Department of Public Health after they were refused a birth certificate for their daughter Mackenzie that identified both women as parents.²²³ The court unanimously held that the exclusion of one of Mackenzie’s parents from her birth certificate was a violation of the equal protection clause of the Iowa Constitution.²²⁴

The Department of Public Health argued, in part, that paternity must be established in order “to ensure financial support of the child

220. See BRUCE PERRY & MAIA SZALAVITZ, *THE BOY WHO WAS RAISED AS A DOG* 57–58 (2007). After working with the children, Perry wrote that the “children lived in a world of fear” and that “even babies were not immune.” *Id.* at 57. He found that David Koresh, the sect’s leader, targeted girls as young as 10 in what Perry called “a unique form of sanctioned sexual abuse.” *Id.* at 58.

221. *Gartner v. Iowa Dep’t of Pub. Health*, 830 N.W.2d 335, 336 (Iowa 2013).

222. *Id.* at 341.

223. *Id.* at 341–42.

224. *Id.* at 354.

and the fundamental legal rights of the father.”²²⁵ Justice David Wiggins, writing for the Iowa Supreme Court, rejected this argument, stating that “by naming the nonbirthing spouse on the birth certificate of a married lesbian couple’s child, the child is ensured support from that parent and the parent establishes fundamental legal rights at the moment of birth.”²²⁶ Justice Wiggins noted further that “the only explanation for not listing the nonbirthing lesbian spouse on the birth certificate is stereotype or prejudice.”²²⁷ As a result of the decision in *Gartner*, the state registrar is now required to allow mothers in same-sex relationships to have their names registered on their children’s birth certificates. In Iowa, both parents may choose to be named as “mother,” “father,” or “parent” on their child’s birth certificate.²²⁸

Thus, the decision in *Gartner* was important for its recognition that birth certificates are not a biological record, but a record of identity, and should therefore not be restricted to recording a child’s biological origins. Similarly to California, Iowa laws regarding birth certificates contain some elements of best practice in that parents may choose whether they wish to be recognized as parents through either a gendered term or gender-neutral language.

3. New York

In May 2008, Governor David Paterson’s office directed all state agencies to review their policy statements and regulations to ensure that their agencies extended respect to legal same-sex marriages performed in other jurisdictions to the fullest extent permitted by law.²²⁹ In 2008, before New York had legalized same-sex marriages, the New York State Department of Health agreed to allow married same-sex couples to include both their names on their children’s birth certificates.²³⁰ The policy change was prompted by a lawsuit filed by Carolyn Trzeciak and Nina Sheldon Trzeciak, a lesbian couple who

225. *Id.* at 353.

226. *Id.*

227. *Id.*

228. Email from Jill France, Iowa Dep’t of Pub. Health, to author (Feb. 9, 2014) (on file with author).

229. Memorandum from David Nocenti, Counsel to the Governor, State of N.Y., to All Agency Counsel in State of N.Y. (May 14, 2008), http://www.nyclu.org/files/Nocenti_Order_05.14.08.pdf. The directive was upheld as lawful by a state trial court in *Golden v. Paterson*, 877 N.Y.S.2d 822, 837 (Sup. Ct. 2008).

230. Jennifer Peltz, *Gay Couples Gain Birth-Certificate Rights*, WASH. TIMES (Dec. 15, 2008), <http://www.washingtontimes.com/news/2008/dec/15/gay-couples-gain-birth-certificate-rights/>.

argued that Paterson's directive should apply to them in an efforts to have both of their names recorded on their child's birth certificate.²³¹

The 2011 legalization of same-sex marriage in New York allowed same-sex parents to include both of their names on their child's birth certificate due to a state law under which children born to married couples are presumed to be the children of both members of the couple, even if conceived using artificial insemination.²³² A further development in the ability of same-sex parents to be named on their children's birth certificates arose in 2014, when Amalia C., a lesbian woman, tried to adopt the son she raised with her lesbian partner Melissa M., the child's birth mother.²³³ The couple had married in Connecticut, and both their names were recorded on their son's birth certificate.²³⁴ However, the non-birth mother desired to adopt the child for further legal protection, for fear that her parentage, while secure in the state of New York, would not be recognized in other states or jurisdictions in which same-sex marriage and parenthood were not similarly recognized.²³⁵ Kings County Surrogate's Court judge Margarita López Torres held that because New York had legalized same-sex marriage and allowed both women to be listed on the boy's birth certificate, the court could not approve the adoption, as there was already "an existing, recognized and protected parent-child relationship."²³⁶

This case highlights the complexities of the legal situation that same-sex couples face in the United States, where same-sex marriage and parentage are recognized in some states but not others. Susan Sommer, a lawyer with the Lambda Legal Defense Fund, noted that "we continue to live in a country that has a patchwork of respect and disrespect of same-sex couples,"²³⁷ and argued that "[i]t's very important for this couple to have an adoption, because the presumption of parentage may not be respected if they leave the state."²³⁸ Judge Torres later acknowledged in a news interview that her ruling had significant legal implications for same-sex couples; however, she

231. *See id.*

232. *See* N.Y. DOM. REL. LAW § 73 (McKinney 2008); James C. McKinley Jr., *N.Y. Judge Alarms Gay Parents by Finding Marriage Law Negates Need for Adoption*, N.Y. TIMES (Jan. 28, 2014), <http://www.nytimes.com/2014/01/29/nyregion/ny-judge-alarms-gay-parents-by-finding-marriage-law-negates-need-for-adoption.html>.

233. *In re Seb C-M*, 40 Fam. L. Rep. (BNA) 1159 (Feb. 11, 2014); *see also* McKinley Jr., *supra* note 232.

234. *See In re Seb C-M*, 40 Fam. L. Rep. (BNA), at 1159.

235. *Id.*

236. *Id.*

237. McKinley Jr., *supra* note 232.

238. *Id.*

said that her decision “flowed from her strong belief that all married couples, gay or straight, should be treated equally.”²³⁹ Judge Torres continued, “This is a straightforward child born of a marriage. Think of all your friends who are married and have children. They don’t go to court to seek an adoption. There is a presumption of parentage.”²⁴⁰ While Judge Torres’s reasoning is sound, her judgment had a significant negative impact on the ability of nontraditional families to travel.

The State of New York’s birth certificates constitute best practices in that they allow lesbian mothers to be named on their children’s birth certificates automatically, without requiring that these couples apply for a court order. However, this case highlights the need for national, rather than merely state-based, reform in order to ensure recognition of birth certificates and same-sex parents across all of the fifty states.

B. Australia

As in the United States, the issuing of birth certificates in Australia falls within the jurisdiction of states, rather than the federal government.²⁴¹ However, unlike the United States, there are only six states and two territories, and each of these jurisdictions has enacted legislation enabling both lesbian mothers to be named on their children’s birth certificates: the first jurisdictions to enact such legislation were Western Australia, Australian Capital Territory, and the Northern Territory.²⁴² In these three jurisdictions, the law provides that “the birth mother and lesbian co-mother of an [assisted reproductive technology]

239. *Id.*

240. *Id.*

241. See *Australian Birth, Death and Marriage Records*, NAT’L LIBR. AUSTR., <https://www.nla.gov.au/research-guides/australian-birth-marriage-and-death-records> (last visited Apr. 13, 2015).

242. Unlike in the United States, the legislative reform was not made in response to court cases on the matter, but in response to a social necessity. The laws came into effect in Western Australia in 2002, *Artificial Conception Act 1985* (WA) s 6A, Australian Capital Territory in 2004, *Status of Children Act 1978* (NT) div 2A, and Northern Territory in 2004, *Parentage Act 2004* (ACT) div 2.2 s 8(1). Next to follow this model of legislative reform was New South Wales, which permitted the registration of two mothers in 2008. *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW) sch 2. Similar legislation came into effect in Tasmania, *Relationships (Miscellaneous Amendments) Act 2009* (Tas) sch. 1, and Victoria, *Assisted Reproductive Treatment Act 2008* (Vic) pt. 3, on January 1, 2010, and in Queensland on June 1, 2010, *Civil Partnership Act 2011* (Old) pt 6 div 19. South Australia was the final state to enact legislation allowing lesbian mothers to appear on their children’s birth certificate. *Family Relationships (Parentage) Amendment 2011* (SA). Under Australian federal law, two fathers can apply to the Family Court for a parenting order recognizing them both as parents. See *Family Law Act 1975* (Cth), ss 64B–64C. However, no state currently allows two fathers to be named on a birth certificate.

child are presumed to be the legal parents of the child, if they are in a genuine relationship when the child is born.”²⁴³ In order for the lesbian co-parent to be recognized by law as the parent of the child created with the assistance of artificial reproductive technology, a number of requirements must be fulfilled. For example, the Western Australia provision requires that a woman be in a de facto relationship with the birth mother and that the birth mother undergo artificial conception with the consent of that partner.²⁴⁴ Consent is presumed between de facto partners; however, this presumption is rebuttable.²⁴⁵

Similar to the laws of most states in the United States, the New South Wales legislation only permits two people to be named as parents on a birth certificate at any one time.²⁴⁶ This can have an adverse effect where there are more than two parents. The case of *AA v Registrar of Births Deaths and Marriages and BB* highlights this.²⁴⁷ A lesbian couple (A.A. and A.C.) had a girl, A.B., following artificial insemination.²⁴⁸ At the time of A.B.’s birth, the law did not allow birth certificates listing two female parents, and so the space for “father” was left blank on A.B.’s birth certificate.²⁴⁹ In 2002, however, B.B.’s name was placed on A.B.’s birth certificate, with the agreement of A.C. in response to court proceedings initiated by B.B.²⁵⁰

For all intents and purposes, B.B. fulfilled the role of a father to A.B.²⁵¹ He and his family had a close relationship with the child and he contributed large sums of money to the child’s maintenance over the years.²⁵² However, A.B. lived with, and was primarily raised by, the lesbian couple until 2006 when their relationship broke down.²⁵³ In 2007, consent orders were made allowing A.A. and A.C. to share

243. HUMAN RIGHTS & EQUAL OPPORTUNITY COMM’N, *supra* note 126, at 92; *see Artificial Conception Act 1985 (WA) s 6A; Status of Children Act 1979 (NT) div 2A; Parentage Act 2004 (ACT) s 8.*

244. *Artificial Conception Act 1985 (WA) s 6A(1).*

245. *Id.* s 6A(2).

246. *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008 (NSW) sch 3 pt 5.*

247. *AA v Registrar of Births Deaths and Marriages and BB*, [2011] NSWDC 100.

248. *Id.* at para. 6.

249. *See id.* at para. 8. A.C. reported, “I left the spot for ‘father’ blank. . . . If it had been possible, I would have listed [A.A.] as [A.B.’s] other parent.” *Id.* at para. 8.

250. *See id.* at paras. 9–10. B.B.’s relationship with A.A. and A.C. had soured by 2002, and B.B. applied to the Family Court for contact orders. *See id.* at para. 9. In 2003, consent orders were made in favor of B.B. *See id.* In an affidavit, A.C. stated: “In 2002 I agreed to [B.B.’s] request to go on [A.B.’s] birth certificate because I was advised by our solicitor at the time that it was the best course of action to settle the Family Court proceedings for contact that [B.B.] had initiated.” *Id.* at para. 10.

251. *Id.* at para. 2.

252. *Id.*

253. *Id.* at para. 12.

parental responsibility, and increasing the amount of time the child spent with B.B.²⁵⁴

When the law changed so that two women could be named on a child's birth certificate, A.A. commenced proceedings seeking to have B.B.'s name removed from the birth certificate so that A.A.'s name could be placed on the child's birth certificate.²⁵⁵ The legislation allowed only two parents to be named on a birth certificate, so for A.A. to be recorded as a parent, B.B. had to be removed.²⁵⁶ The court held:

[U]nder the provisions of the Status of Children Act . . . the rebuttable presumptions in BB's favour that he is a parent, are displaced by the irrebuttable presumption that because AB was conceived through a fertilisation procedure, he is presumed not to be her parent, whereas AA is presumed to be one of her parents.²⁵⁷

As a result, the court ordered that B.B.'s name be removed from the birth certificate, so that A.A.'s name could be added.²⁵⁸ The judge recognized: "No doubt a provision for registration of a third parent for a situation such as this one might be a neat answer to the problem this case presents."²⁵⁹ However, he also noted that "there might be unexpected consequences" which arise as a result of allowing more than two parents on the birth certificate.²⁶⁰ The judge did not elaborate further on what these consequences might be.²⁶¹

In December 2013, the Australian Family Law Council released a report on the Family Law Act, the law that currently governs legal parentage within Australia.²⁶² The report recognized that "questions of legal parentage also raise issues about birth certificates" and recom-

254. *Id.* at para. 13.

255. *Id.* at para. 19. At the time A.B. was born, A.A. could not be included on the birth certificate under New South Wales law. *Id.* at para. 14. The law was amended in 2008. *See id.*

256. *Id.* at para. 14.

257. *Id.* at para. 36.

258. *See id.*

259. *Id.*

260. *Id.*

261. *See id.* The judge did not think it appropriate to speculate on potential consequences, as "the issue was not explored" before him. *Id.* The two concerns discussed above in Part V.A.1, *supra*, in relation to California's proposed bill A.B. 1476, namely the potential financial impact of legislative reform on social security, and therefore, the state's finances, and the danger of sects or cults creating "families," are two possible "unexpected consequences." These arguments do not justify delaying legislative reform that would allow more than two parents on a birth certificate where that would be in the best interests of the child. Further, as discussed above, requiring parents to apply to the courts to record more than two persons as parents on a child's birth certificate would be one way to safeguard against abuse.

262. *Family Law Act 1975* (Cth); *see also* FAMILY LAW COUNCIL, REPORT ON PARENTAGE AND THE FAMILY LAW ACT (2013), <http://www.ag.gov.au/FamiliesAndMar>

mended “further harmonisation and integration between states and territories and the Commonwealth.”²⁶³ The Council made a number of recommendations regarding the future development of birth certificates to ensure that birth certificates reflect a plurality of family forms, including recommending that references to “both” of a child’s parents should be removed from certain sections of the Family Law Act.²⁶⁴ Furthermore, the Australian Family Law Council recommended that the definition of “parent” be amended so that the term would not be limited to parents recognized under the law.²⁶⁵ This reform would allow a court to take into account the “empirical evidence of family diversity and children’s perspectives of family.”²⁶⁶ Thus, the Australian Family Law Council was of the view that a child’s view of his or her own identity should be a primary consideration when determining who is a “parent.”

A significant recommendation from this report is that “the *Family Law Act* should make specific provision for the making of orders in favor of one person or more than two persons where that supports the child’s best interests.”²⁶⁷ If the government adopts the Council’s recommendations, Australia may soon have legislation that recognizes that a child may have more than two parental figures. Best practices require that all parents should be named on the child’s birth certificate if they were instrumental in, and consented to, the conception of the child. More in-depth analysis on this topic will be undertaken below in Part VII.B.

C. United Kingdom

The United Kingdom’s Human Fertilisation and Embryology Act 2008²⁶⁸ provides the legal basis for same-sex couples to “be treated as equal parents of a child.”²⁶⁹ Since the Act went into force in April 2009, female same-sex couples in civil partnerships or who are mar-

riage/FamilyLawCouncil/Documents/family-law-council-report-on-parentage-and-the-family-law-act-december2013.pdf.

263. FAMILY LAW COUNCIL, *supra* note 262, at xiv.

264. *See id.* at xv.

265. *See id.*

266. *See id.*

267. *Id.* at xvi.

268. Human Fertilisation and Embryology Act 2008, c. 22.

269. Caroline Gammell, *Lesbian Couple Becomes “First Same Sex Couple to Sign Joint Birth Certificate,”* TELEGRAPH (Apr. 19, 2010), <http://www.telegraph.co.uk/health/healthnews/7604343/Lesbian-couple-becomes-first-same-sex-couple-to-sign-joint-birth-certificate.html>.

ried at the time of conception and who conceive a child through artificial insemination are *automatically* treated as the child's parents.²⁷⁰

For lesbian couples who are not civil partners or married, the non-birth mother will be treated as a legal parent if the child is conceived at a United Kingdom-licensed clinic and both mothers sign the applicable parenthood election forms.²⁷¹ The non-birth mother will only have legal parental responsibility if she obtains a court order for parental responsibility or becomes the birth mother's civil partner, and either makes a parental responsibility agreement or jointly registers the child's birth.²⁷²

If a lesbian couple is not in a civil partnership or married, and conception takes place outside of a clinic, the non-birth mother will not benefit from the automatic recognition as a legal parent and cannot be named on the birth certificate.²⁷³ In this situation, the second mother must apply for a parental responsibility order from the court,²⁷⁴ or, alternatively, adopt the child.²⁷⁵ When a court considers whether or not to award a parental responsibility order, the court's paramount consideration must be the welfare of the child.²⁷⁶ In this way, the United Kingdom is giving effect to the "best interests" principle in Article 3 of the CRC. The same-sex partner of the birth mother will be recognized on the child's birth certificate as the "legal second parent."²⁷⁷ While it is a positive improvement to allow both mother's names to appear on a child's birth certificate, it is not yet possible in the United Kingdom for two women to both be named "mothers" of the child. Furthermore, while more than two people can have "parental responsibility" for a child,²⁷⁸ more than two parents cannot be recorded on a child's birth certificate in the United Kingdom.

270. See Human Fertilisation and Embryology Act 2008, § 42; see also STONEWALL, PARENTHOOD FOR SAME-SEX COUPLES 2 (2010), http://www.stonewall.org.uk/documents/parenthood_for_same_sex_couples_1.pdf.

271. See Human Fertilisation and Embryology Act 2008, §§ 43–44; see also STONEWALL, *supra* note 270, at 2.

272. See *Parental Rights and Responsibilities*, GOV.UK, <https://www.gov.uk/parental-rights-responsibilities/who-has-parental-responsibility> (last updated Nov. 12, 2014).

273. See Human Fertilisation and Embryology Act 2008, § 44(1)(a).

274. See *Parental Rights and Responsibilities*, *supra* note 272.

275. See STONEWALL, *supra* note 270, at 3.

276. Children Act 1989, c. 41, § 1.

277. *General FAQs About the New Parenthood Law*, HUM. FERTILISATION & EMBRYOLOGY AUTH., <http://www.hfea.gov.uk/2918.html> (last updated Oct. 22, 2013).

278. See *Parental Rights and Responsibilities*, *supra* note 272.

D. Canada

Similar to Australia and the United States, Canada's birth certificates are regulated by the provincial governments, rather than the central government.²⁷⁹ In *Gill v. British Columbia (Ministry of Health)*, two lesbian couples applied to the British Columbia Human Rights Tribunal for a declaration that the Vital Statistics Agency had discriminated against them by not allowing the non-biological mother to be named on their child's birth certificate without first adopting the child.²⁸⁰ The couples argued that it was necessary for both mothers to be named on their children's birth certificates for practical purposes such as day care and school registration.²⁸¹ The complainants argued that the legislation was discriminatory, as biological accuracy was not required on the birth certificates of heterosexual couples.²⁸² For example, if a heterosexual couple used an anonymous sperm donor, the male partner would automatically be named as the father on the child's birth certificate.²⁸³

The Tribunal held that the legislative scheme discriminated against both the couples and their children, in part because it denied them the benefit of documentation of their parent-child relationships.²⁸⁴ The Tribunal found that, while the purpose of the *Vital Statistics Act* was to gather and record "facts about important events," there was nothing in the Act that suggested that an ancillary purpose was to "collect biological or genetic information about the parents of the child."²⁸⁵ Furthermore, the Tribunal held that the holders of a birth certificate have "distinct advantages" because the certificate is "*prima facie* proof of the [parental] relationship."²⁸⁶ Accordingly, the Tribunal ordered the Vital Statistics Agency to amend birth certificate forms to allow registration of non-biological parents "in a way that does not discriminate against same-sex parents."²⁸⁷ As a result of this

279. See *Birth Certificate*, SERV. CAN., http://www.servicecanada.gc.ca/eng/subjects/cards/birth_certificate.shtml (last updated July 9, 2014).

280. *Gill v. Ministry of Health*, 2001 BCHRT 34, *vacated in part*, Minister of Health Planning v. B.C. Human Rights Tribunal (2003), 17 B.C.L.R. 4th 193 (Can. B.C.); see also Alison Bird, *Legal Parenthood and the Recognition of Alternative Family Forms in Canada*, 60 U.N.B. L.J. 264, 275–77 (2010).

281. *Gill*, 2001 BCHRT 34, at para. 12.

282. *Id.* at para. 39.

283. *Id.*

284. *Id.* at para. 83.

285. *Id.* at para. 74.

286. *Id.* at para. 76.

287. *Id.* at para. 103; see also Bird, *supra* note 280, at 276–77.

decision, the term “parent” is used on British Columbia birth certificates, rather than “mother” and “father.”²⁸⁸

The Ontario case of *A.A. v. B.B.* involved an application for a declaration of parentage by a lesbian co-parent, based on the court’s *parens patriae* jurisdiction.²⁸⁹ The Ontario Court of Appeals found that the child, D.D., had three parents: his lesbian mothers A.A. and C.C., and his biological father, B.B.²⁹⁰ Judge Rosenberg found that the *parens patriae* jurisdiction could be applied in this case to rescue the child from discrimination due to a legislative gap.²⁹¹ The historical purpose of the Children’s Law Reform Act²⁹² (CLRA) was to declare equal status for children born outside of marriage.²⁹³ When drafting the Act in 1990, the legislature did not consider the possibility of families created by same-sex couples.²⁹⁴ However, modern social conditions and advances in reproductive technology have created gaps in the CLRA legislation.²⁹⁵ The judge issued a declaration that A.A. was a mother of D.D.²⁹⁶

The identification of this gap in public policy and legislation highlighted the need for reform of Canadian laws regulating birth certificates. This reform came to British Columbia in 2013 when, for the first time, children were able to have three parents listed on their birth certificates.²⁹⁷ Section 30 of the British Columbia Family Law Act provides an exception to the rule that a donor may not be a parent.²⁹⁸ Where a child is conceived using methods of assisted reproduction, the child may have more than two parents in certain limited circumstances, namely, when:

1. two intended parents in a relationship with each other agree, with a birth mother who also wants to be a parent, to be the child’s parents, or

288. See *Frequently Asked Questions—Birth*, PROVINCE OF B.C. VITAL STATS. AGENCY, <http://www.vs.gov.bc.ca/questions-birth.html> (last visited Mar. 31, 2015).

289. *A.A. v. B.B.*, 2007 ONCA 2, para. 3.

290. *Id.* at para. 1.

291. See *id.* at paras. 7, 35–37 (“Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the [Children’s Law Reform Act]’s legislative scheme.”).

292. Children’s Law Reform Act, R.S.O. 1990, c C.12.

293. See *A.A.*, 2007 ONCA at para. 20.

294. See *id.* at para. 21.

295. See *id.*

296. *Id.* at para. 41. For further discussion of this case, see LaViolette, *supra* note 68.

297. See Family Law Act, S.B.C. 2011, c 25, s 30.

298. *Id.*

2. the birth mother and the person with whom she is in a relationship agree with a donor who wants to be a parent to be the child's parents.²⁹⁹

In order for this section to apply, there must be a written agreement between all parties prior to the assisted conception of the child, stating that all parties agree to be parents to the child.³⁰⁰ In regards to this section of the Family Law Act, the British Columbia Ministry of Justice stated: "Establishing rules regarding the circumstances under which there may be more than two parents ensures a consistent approach and provides greater certainty for children and families when planning for children where assisted reproduction is required."³⁰¹ This new regulatory regime means that children with same-sex parents can now have up to four parental figures recorded on their birth certificates without having to apply for a court order.³⁰²

In October 2013, Della Wolf Kangro Wiley Richards became the first child to be issued a birth certificate recording the names of three parents: a lesbian couple and their male friend, who was the child's biological father.³⁰³ Before beginning their family, the lesbian couple agreed that they hoped their child's biological father would not be simply a sperm donor, but would also act as a father figure.³⁰⁴ Before undergoing artificial insemination, all three parents signed a formal contract that laid out the exact nature of the relationship.³⁰⁵ They decided that the lesbian couple would be the primary caregivers and also take charge of finances and custody, while the biological father was to be considered a caregiver in the capacity of taking part in vital decisions like schooling and medical issues.³⁰⁶ Although her parents were unable to list all three names on her birth certificate through an online application, they succeeded in procuring a birth certificate with all of

299. *See id.*

300. *See id.*

301. B.C. MINISTRY OF JUSTICE, *THE FAMILY LAW ACT EXPLAINED* 25 (2013), <http://www.ag.gov.bc.ca/legislation/shreddocs/family-law/notes-binder.pdf>.

302. *See* Catherine Rolfsen, *Della Wolf Is B.C.'s 1st Child with 3 Parents on Birth Certificate*, CBC NEWS (Feb. 10, 2014, 4:30 PM), <http://www.cbc.ca/news/canada/british-columbia/della-wolf-is-b-c-s-1st-child-with-3-parents-on-birth-certificate-1.2526584>.

303. Kimberly Ruble, *British Columbia Baby Has Three Different Parents on Her Birth Certificate*, LIBERTY VOICE (Feb. 11, 2014), <http://guardianlv.com/2014/02/british-columbia-baby-has-three-different-parents-on-her-birth-certificate/>.

304. *Id.*

305. *Id.*

306. *Id.*

their names included after modifying a paper application that had only two spaces available.³⁰⁷

Because birth certificates fall within the jurisdiction of provinces, it is unclear whether Della's birth certificate will be recognized in other Canadian provinces. No other Canadian jurisdiction has legislation that is analogous to the allowance in the Family Law Act of British Columbia for up to four parents on a child's birth certificate.

VI.

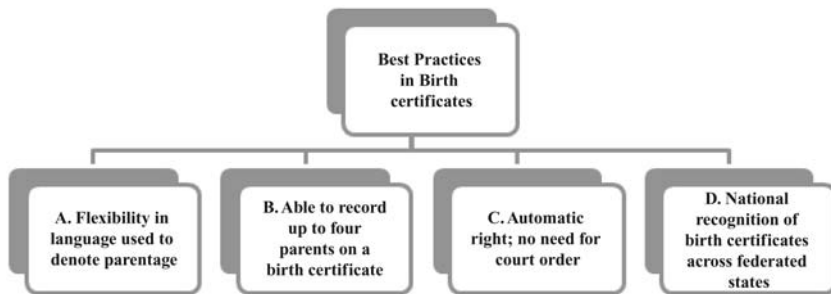
BEST PRACTICES IN BIRTH CERTIFICATES

It is common sense to take a method and try it: If it fails, admit it frankly and try another. But above all, try something.

—President Franklin D. Roosevelt³⁰⁸

It is apparent from the above analysis of international and domestic laws and practices that reform of current birth certificates is necessary in order to protect the rights of children born of same-sex parents. Each jurisdiction considered above had *some* aspects of their regulation that constituted best practices, but no single jurisdiction had *all* the elements necessary to comply with international human rights law and achieve best practices.

Figure 1 below sets out four essential elements in the regulation of birth certificates that must be satisfied in order to respect the best interests of the child and achieve best practices.



A. *Language Denoting Parentage*

The language used to denote parentage on a birth certificate must uphold that child's right to be free from discrimination on the basis of the sexual orientation of his or her parents, as required by Articles 2 and 26 of the ICCPR, Article 2 of the CRC, and Article 2 of ICESCR.

307. *Id.*

308. President Franklin D. Roosevelt, Address at Oglethorpe University (May 22, 1932).

In order to fulfill this international requirement of non-discrimination, governments should follow the Californian approach, by which same-sex parents are able to choose the terminology they want to appear on their children's birth certificates. For example, some parents may prefer "mother" and "mother," whereas others may prefer that everyone to be denoted as a "parent."

A recent decision of the High Court of Australia indicates that greater flexibility in the language used on birth certificates is necessary. In *NSW Registrar of Births, Deaths and Marriages v Norrie*, the High Court held that individuals could have their sex recorded on their birth certificates as "non-specific."³⁰⁹ This decision has far-reaching implications. If a person's sex is registered as "non-specific" on a birth certificate, and that person starts a family, he or she cannot be classified by either of the gendered terms of "mother" or "father." Thus, it will be necessary to have the term "parent" available as an option for all parents—biological and non-biological—in order to avoid discriminating against people of a non-specific gender.

B. Number of Parents

The above case studies demonstrate that in order to accurately reflect the family structures of some children, it is necessary to provide an option for recording more than two parents on a child's birth certificate. This is already possible in parts of Canada, and needs to be adopted more widely. To force parents (or the court, as in the Australian case of *AA v Registrar of Births Deaths and Marriages and BB*)³¹⁰ to choose which parent(s) will be left off a child's birth certificate is an entirely unsatisfactory situation when viewed through the lens of the best interests of the child.

Since birth certificates are intrinsically linked to a person's sense of identity, both personally and socially, they must genuinely reflect the reality of children's family structures in order to uphold these children's right to identity, as recognized and protected by Articles 24 and 16 of the ICCPR, and Articles 7 and 8 of the CRC. The upper limit of four parents is necessary to account for situations in which a lesbian couple and a gay male couple agree to have a child who they will parent together.³¹¹ A limit of four parents on a birth certificate should

309. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11, para. 2.

310. See *supra* notes 247–61 and accompanying text.

311. For discussion of the parenting scenario of four parents (a lesbian couple and a gay couple) who had two children together in the Netherlands, see AFP News Agency, *Dutch Debates Three or More Gay Parents Per Child*, YouTube (Feb. 6,

be imposed in order to avoid potential abuse of the system.³¹² In order to ensure that abuse does not occur, individuals seeking to add a third or fourth parent to a child's birth certificate should be required to apply for a court order. In this way, the courts can ensure that any modifications to a child's birth certificate are in the best interests of the child, in accordance with Article 3 of the CRC.

C. *Automatic Process*

Changes to the regulation of birth certificates should be brought about by legislative reform rather than through litigation. Requiring parents to apply to a court to obtain a birth certificate that correctly reflects a child's family is expensive, time-consuming, and emotionally draining, and also creates an unnecessary burden on same-sex parents.³¹³ There should be no requirement that a lesbian couple obtain a court order before they can both be named on their child's birth certificate. Nor should there be any need for a non-biological mother to formally adopt her child.

All legislative reform should be made with the best interests of the child as a primary consideration, in accordance with the CRC.³¹⁴ In this regard, legislative reform should specifically provide that it operates retroactively, so that all children with same-sex parents can have their birth certificates corrected to accurately reflect their parentage.

D. *National Recognition of Birth Certificates*

In federated countries such as the United States, Australia, and Canada, there is an urgent need for mutual recognition of the validity of birth certificates denoting same-sex parents. National recognition of birth certificates would be consistent with state parties' obligations to protect the family pursuant to Article 23 of the ICCPR, Article 18 of the CRC, and Articles 9 and 10 of ICESCR. If a child's family is only recognized in some states, it may leave a child without adequate legal protection should his or her family move between states. It should not be necessary for same-sex families moving interstate to undergo an expensive and time-consuming adoption process in order to guarantee that a child's parents will be recognized, which—as the New York case study demonstrated—is not even always possible.

2013), <https://www.youtube.com/watch?v=T4Vmzgnx9MY>; see also Cutas, *supra* note 70.

312. See *supra* note 220 and accompanying text.

313. See HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N, *supra* note 126, at 102.

314. Convention on the Rights of the Child, *supra* note 7, art. 3.

CONCLUSION

I don't want to inhabit the human world under false pretences.

—Janet Frame, *Towards Another Summer*³¹⁵

There is a critical need to modernize birth certificates so that they accurately reflect children's parentage. Advances in the area of reproductive medicine have resulted in an increasing number of children being born into same-sex families. It is essential that the law keep up with medical innovation by adequately respecting and protecting the rights of children in these families.

The emergence of same-sex families has exposed significant gaps in the regulation of birth certificates. It is no longer appropriate to limit the data recorded on a child's birth certificate to only one mother and one father. The failure to accurately record the diverse family structures that children are being born into deprives children of the respect and protection to which they and their families are entitled.³¹⁶ This foundational legal document must have the flexibility to record the many forms that families take in contemporary society. It should recognize and respect that a child may have two parents of the same sex or more than two parents.

Ultimately, legislative reform regarding children's rights must be informed by what is in the best interests of the child.³¹⁷ Recognition of non-traditional forms of parentage on birth certificates is not only beneficial for the development of a child, but is also essential to ensure the full protection of that child's rights. Birth certificates are the key through which individuals access the benefits and protections of society. This key must be molded to reflect the individual family structures of each child.

315. JANET FRAME, *TOWARDS ANOTHER SUMMER* 105 (2007).

316. *See* A.A. v. B.B., 2007 ONCA 2, para. 35 (Can.).

317. *See* Convention on the Rights of the Child, *supra* note 7, art. 3.