2012

Balancing the Adoptive Triangle: The Need to Protect Biological Parents' Privacy Rights

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I. Introduction

Access to adoption records has been fiercely contested for decades, particularly because it involves the right to privacy, which is inherent in the concept of liberty.[1] The Supreme Court has found that the right to privacy – or "the right to be let alone – [is] the most comprehensive of rights and the right most valued by civilized men."[2] The desire to be left alone is intricately intertwined with a biological parent's decision to place her child for adoption. On the other hand, adoptees assert that they have a "right" to know their heritage. In order to reach a middle ground and balance the competing interests of the parties involved, many states have made significant advancements with regard to openness in the adoption process by (1) allowing adoptees to access non-identifying information, (2) creating a voluntary access registry, and (3) judicially authorizing "open adoptions" when deemed in the child's best interest.

Part II of this paper reviews the historical roots of adoption in the United States and the shift in adoption statutes from confidentiality to secrecy. Part III discusses the substantial hurdle of demonstrating "good cause" that adoptees face in petitioning the courts to unseal adoption records. Part IV addresses the fierce debate over adoptees' access to identifying information. It discusses the constitutional challenges brought by adult adoptees to the sealed records statutes, and the public policy arguments touted by proponents of open records. Also, it analyzes the fundamental constitutional rights that would be violated by allowing adoptees access to the biological parents' identifying information. Finally, Part V proposes a strategy to serve and more efficiently protect the interests of all parties in the adoption process, specifically requiring biological parents to disclosure their family's medical history and undergo genetic testing,

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[1] *See generally* Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367 (2001).

[2] Stanley v. Georgia , 394 U.S. 557, 564 (1969) (*citing* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

establishing a national voluntary mutual consent registry, and protecting open adoptions and agreements regarding post-termination contact between the biological parent and the adoptee.

II. Historical Context of Adoption

During the Colonial Period and in the early years of the Republic, adoptions were rare.[3] Abandoned or orphaned children were placed with extended families if possible or "bounded out" to strangers as indentured servants or apprentices.[4] These arrangements typically exploited the children and were far short of a nurturing, stable family environment.[5] At the time, there was great demand for indentured orphans due to a labor shortage.[6] Therefore, the orphans' welfare was overlooked in favor of economic interests.[7]

In the early nineteenth century, immigrants became the preferred source for cheap labor, and fewer families were willing to take in orphans.[8] Moreover, the influx of poor immigrants caused a swell in the number of homeless children. [9] States initially tried to corral these children into orphanage, but they were overly crowded, poorly funded, and demoralizing for the children.[10] After this unsuccessful initiative, pursuant to their *parens patriae* power, states legislatively created the adoption process to protect children's welfare.[11] In 1851, Massachusetts enacted this country's first adoption statute.[12]

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[3] David R. Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. VA. L. REV. 459, 461 (1999).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 467.
[9] *Id.*
[10] *Id.*at 468.
[11] *Id.*
[12] Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Court, 1796-1851*, 73 NW. U. L. REV. 1038, 1041 (1979).

Today, the vast majority of states have laws that deny adopted children access to their original birth certificates; however, adoption laws did not begin this way.[13] Initially, adoption statutes provided "neither for confidentiality with respect to the public nor for secrecy among the parties, but were subsequently amended to protect the parties from public scrutiny."[14] The earliest adoption laws provided no restrictions on who could access adoptees' original birth certificates or adoption records because confidentiality was not a concern due to the informal nature of adoptions.[15] In 1916, New York was the first to limit access to the adoption records to only the parties involved in the matter.[16] Shortly thereafter, Minnesota enacted the first statute requiring the sealing of adoption records, which prohibited the general public as well as the parties involved from accessing the records.[17] It was not until the 1930s that states began altering their approach to adoption records and required the issuance of new birth certificates with the adoptive parents' names substituted for the birth parents' names.[18]

The final movement from adoptive "confidentiality to secrecy" has been attributed to the deepening stigmas on unwed mothers, infertile couples, and illegitimate children which emerged from the post-World War II baby-boom atmosphere.[19] It was argued that changing the parents' names on an adopted child's birth certificate and placing the original certificate under seal protected the biological mothers from the stigma of being an unwed mother, protected the adoptive parents from the stigma of infertility, and protected the child from the stigma of

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[13] Rosemary Cabellero, *Open Records Debate: Finding the Missing Piece*, 30 S. ILL. U. L. J. 291, 291 (2006).
[14] Samuels, *supra* note 1, at 368.
[15] Caroline B. Fleming, *The Open-Records Debate: Balancing the Interests of Birth Parents and Adult Adoptees*, 11 WM. & MARY J. WOMEN & L. 461, 461-62 (2005); *see also* Joan H. Hollinger, *Aftermath of Adoption Legal and Social Consequences, in* ADOPTION LAW & PRACTICE 13:01, at 13-4 to 13-5 (Joan H. Hollinger ed. 1998).
[16] *See* 1916 N.Y. Laws ch. 453, 113; *see also* Hollinger, *supra* note 15, at 13-5.
[17] *See* 1917 Minn. Laws ch. 222, 337; *see also* Hollinger, *supra* note 15, at 13:5.
[18] Samuels, *supra* note 1, at 375-76.
[19] Fleming, *supra* note 15, at 462.

illegitimacy.[20] By the 1970s, every state, with the exception of Alaska and Kansas, required the adoption records and original birth certificates to be placed under seal and denied access to such records except by court order upon a showing of "good cause."[21]

III. The Adoptee's Burden of Showing "Good Cause"

State statutes, which mandate the sealing of adoption records, allow the records to be released upon the adoptee's showing of "good cause."[22] However, no adoption statute defines the term "good cause."[23] The New York Court of Appeals noted that good cause has "no universal, black-letter definition," and that "whether it exists, and the extent of disclosure that is appropriate, must remain for the courts to decide on the facts of each case."[24] In determining whether good cause exists to lift the cloak of confidentiality, and the extent of disclosure necessary, courts attempt to balance the competing interests of the adoptee, the birth parents, and the adoptive parents.[25] These competing interests include the following:

> (1) the nature of the circumstances dictating the need of the identity of the birth parents; (2) the circumstances and desires of the adoptive parents; (3) the circumstances of the birth parents and their desire or at least the desire of the birth mother not to be identified; and (4) the interests of the state in maintaining a viable system of adoption by the assurance of confidentiality.[26]

Unfortunately, judicial interpretation of the good cause standard varies significantly from state to state.[27] Despite the variance, the good-cause requirement is a formidable hurdle[28] which

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[20] *Id*.
[21] Samuels, *supra* note 1, at 378-82.
[22] DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW – DOCTRINE, POLICY, AND PRACTICE 743-44 (West Group 2000).
[23] Audra Behne, *Balancing the Adoption Triangle: The State, the Adoptive Parents and the Birth Parents – Where Does the Adoptee Fit In?*, 15 BUFF. JOUR. PUB. INT. LAW 49, 71 (1996).
[24] *Matter of* Linda F. M. , *supra* note 32, at 240.
[25] *See, e.g., In re* Assalone, 512 A.2d 1383, 1385 (R.I. 1986).
[26] *Application of* George, 625 S.W.2d 151, 156 (Mo. Ct. App. 1981).
[27] *See* Maureen A. Sweeney, *Between Sorrow and Happy Endings: A New Paradigm of Adoption*, 2 YALE J.L. & FEMINISM 329, 343-44 (1990).
[28] Abrams & Ramsey, supra note 22, at 744.

requires a party to demonstrate "a compelling need for the identifying information."[29] In general, to overcome this hurdle, the adoptee must demonstrate an urgent need for medical, genetic, or other reasons.[30] Although each jurisdiction determines what constitutes good cause, certain commonalities exist in the case law. Courts have held that "mere curiosity" or a "desire to know one's ancestry" do not constitute good cause.[31]

In *Matter of Linda F.M. v. Dept. of Health*,[32] a 40-year-old adoptee unsuccessfully sought the release of her adoption records. The adoptee alleged that her inability to discover the identity of her biological parents had caused her psychological problems that led to the dissolution of her marriage and hampered her artistic and musical creativity.[33] She asserted that she "[felt] cut off from the rest of humanity" and needed to know "who I am."[34] The court acknowledged that the "desire to learn about one's ancestry should not be belittled," but held that a "mere desire to learn the identity of one's natural parents cannot alone constitute good cause, or the requirement… would be a nullity."[35]

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[29] *In re* Adoption of S.J.D., 641 N.W.2d 794, 799-800 (Iowa 2002); *see also In re* Estate of McQuesten, 578 A.2d 335, 339 (N.H. 1990) ("an adoptee bears a heavy burden"); *In re* Long, 745 A.2d 673, 675 (Pa. Super. Ct. 2000) (good cause must be established by "clear and convincing evidence"); Bradey v. Children's Bureau of S.C., 274 S.E.2d 418, 422 (S.C. 1981) ("disclosure follows in extraordinary circumstances").

[30] Abrams & Ramsey, *supra* note 22, at 744.

[31] *See In re* Maples, 563 S.W.2d 760, 766 (Mo. 1978) (holding a thinly supported claim of "psychological need to know" will not support a finding of good cause); *but see In the Matter of* Robert Wilson, 153 A.D.2d 748, 749 (N.Y. App. Div. 1989) (psychological trauma is sufficient to establish "good cause" if the trauma is directly connected to the lack of knowledge of ancestry); *In re* Assalone, 512 A.2d 1383, 1386 (R.I. 1986) (severe psychological need to know one's origins may present compelling circumstances that constitute good cause); Bradey v. Children's Bureau of South Carolina, 274 S.E.2d 418, 422 (S.C. 1981) (implying that adoptee might have shown good cause if he had required medical assistance for his feelings of insecurity or demonstrated that he was unable to maintain steady employment or a stable family life due to an identity crisis).

[32] 418 N.E.2d 1302, 1304 (N.Y. 1981).

[33] *Id.*

[34] *Id.*

[35] *Id.*

In the context of medical necessity, courts have held that good cause is not established when adoptees assert that having access to the biological family's medical history would be "very helpful" in assisting the treating physicians in "better diagnosing" and "more effectively" caring for the adoptee, who does not have a serious medical condition.[36] Moreover, courts have noted that granting access to the biological parents' medical records any time an adoptee presented with a condition that had some genetic component or potential hereditary implication would undermine the confidentiality afforded by adoptions statutes.[37]

In *Golan v. Louise Wise Servs.*,[38] a 54-year-old adoptee, who was suffering from a heart condition, unsuccessfully sought the release of his adoption records. The adoptee and his attending physicians argued that the genetic information of his biological parents would assist in his treatment and help enable the physicians to evaluate the severity of his condition.[39] The adoptee alleged that his career was in jeopardy because the Federal Aviation Administration would not recertify his pilot's license without this information.[40] The court sought to weight "the medical danger in which adopted children may be placed in the absence of their genetic histories" against the fact that "as virtually any adopted person advances in age, his or her genetic history will be desirable for treatment of a variety of ailments."[41] In denying his request, the court noted that a "rule which automatically gave full disclosure to any adopted person

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[36] *Matter of* Timothy A.A.., 72 A.D.3d 1390, 1391 (N.Y. App. Div. 2010); *see also In re* George, 625 S.W.2d 151, 153 (Mo. App. 1981) (holding that a fatal leukemia condition that could potentially be treated with a bone marrow transplant from a close blood relative was not sufficient good cause to open an adult adoptee's records).
[37] *Id.*
[38] 507 N.E.2d 275, 276 (N.Y. 1987).
[39] *Id.*
[40] *Id.*
[41] *Id.* at 279.

confronted with a medical problem with some genetic implications would swallow New York's strong policy against disclosure as soon as adopted people reached middle age."[42]

In *Sandra L.G. v. Bouchey*,[43] an adult adoptee sought access to her adoptive records to determine whether she was genetically predisposed to a medical problem with respect to potential marriage and child bearing. The court found that the New York legislature had taken adequate steps to give adopted children the benefit of the advances in scientific knowledge while maintaining the confidence of the biological parents.[44] The adoption statute gave adoptees access to various information about their biological parents, including heritage, ethnic background, general physical attributes, and health history.[45] The court found that good cause did not exist as the information mandated by the statute was adequate to satisfy the adoptee's general medical concerns.[46]

IV. Debate Over Access to Identifying Information in Adoption Records

The debate over access to identifying information in adoption records has raged for decades.[47] This debate can be assessed on two levels: on the one, both proponents and opponents have sought to assert constitutional rights that merit special legal deference to their positions; on the other, each side has argued that for the sealing or unsealing adoption records based on public policy considerations.[48]

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[42] *Id.*
[43] 576 N.Y.S.2d 767 (N.Y. Fam. Ct. 1991).
[44] *Id.* at 768.
[45] *Id.* at 769.
[46] *Id.*
[47] *See generally* Samuels, *supra* note 1.
[48] Brent J. Clayton, *How Much Do You Need to Know About Yourself? Why Utah Should Start Letting More Adult Adoptees Decide*, 10 J. L. FAM. STUD. 421, 424 (2008).

A. *Arguments in Favor of Open Records Statutes*

1. Constitutional Arguments

Constitutional challenges to closed records statutes have primarily focused on three main arguments: (1) the Equal Protection Clause in the Fourteenth Amendment, (2) the penumbra of privacy rights that have grown out of the Bill of Rights, and (3) adoptees' First Amendment fundamental right to receive information about his origins.

First, proponents of open records statutes argue that all adults in the United States should have equal rights to access their birth records. Adoptees have challenged sealed records statutes on the grounds that such statutes deny adoptees as a class the equal protection of the laws guaranteed by the Fourteenth Amendment.[49] They argue that requiring adoptees to obtain a court order to gain access to their birth records when non-adopted persons may obtain a copy of their birth certificate simply upon the payment of a minimal registrar's fee constitutes unconstitutional discrimination.[50] Additionally, adoptees assert that these statutes create a "suspect" or "quasi-suspect" class for which there is no compelling State justification.[51] They rely on Supreme Court decisions which have scrutinized legislative classifications based on race, national origin, sex, and illegitimacy.[52]

The Supreme Court provided that "suspect classes are those that suffer from an 'immutable characteristic determined solely by accident of birth' and have had a history of the relegation of the class to an inferior status."[53] Courts have unanimously held that adoptees do

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[49] *See, e.g.*, Mills v. Atlantic City Dept. of Vital Statistics, 372 A.2d 646, 652 (N.J. Super. Ct. Ch. Div. 1977).
[50] *Id.*
[51] *Id.* at 653.
[52] *See* Loving v. Virginia, 388 U.S. 1 (1967) (race); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Korematsu v. United States, 323 U.S. 214 (1944) (national origin); Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy); Frontiero v. Richardson, 411 U.S. 677 (1973) (sex).
[53] Frontiero, *supra* note 52, at 685-87.

not comprise a suspect class because their status is the result of a legal proceeding, not a product of birth.[54] Moreover, courts maintain that the adoption process, of which the closed records statutes are an integral part, often improve the situation of the children, rather than "vilify or relegate the adoptee to an inferior status."[55]

Secondly, adoptees contend that the constitutional right to privacy in familial relationships[56] includes a right to know the identity of birth parents.[57] Challenges based on the adoptee's right to privacy have failed for two reasons: courts have either found that the adoptee's right to privacy does not exist[58], or that it is subordinated to the privacy right of the birth parents."[59]

Lastly, adoptees argue that the right to know, or receive information, as protected by the First Amendment right to free speech, is violated by the sealed adoption statutes because they are not allowed access to their original birth certificates or to the identity of the birth parents.[60] Courts have also unanimously rejected this argument on the grounds that the "First Amendment does not guarantee a constitutional right of special access to information not available to the public generally."[61]

2. Public Policy Arguments

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[54] *See, e.g.*, Mills, *supra* note 49, at 653.
[55] *Id.*
[56] Supreme Court cases finding rights of family privacy: Roe v. Wade, 410 U.S. 113 (1973) (woman's right to terminate her pregnancy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (matters involving contraception); Loving v. Virginia, 388 U.S. 1 (1967) (freedom to marry); Prince v. Massachusetts, 321 U.S. 158 (1944) (matters involving child rearing); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (right to procreate).
[57] *See, e.g., In re* Roger B., 8418 N.E.2d 751, 753 (Ill. 1981).
[58] *See id.* (court held that "although information regarding one's background, heritage, and heredity is important to one's identity, it does not fall within any heretofore delineated zone of privacy implicitly protected within the Bill of Rights").
[59] *See* Mills, *supra* note 49, at 651-52.
[60] *See, e.g., In re* Roger B, *supra* note 57, at 757.
[61] *Id.*

Due to their unsuccessful constitutional challenges, proponents of open records statutes have focused their campaign on public policy arguments. For instance, they argue that adoptees need access to their birth records to ensure their psychological and physical health. According to psychologists' reports, adoptees feel a sense of "genealogical bewilderment," which is "a state of confusion and uncertainty in a child who either has no knowledge of his biological parents or only uncertain knowledge of them."[62] Courts have recognized the importance of an adoptee's psychological need to know, which has "its origins in the psychological makeup of the adoptee's identity, self-image, and perceptions of reality."[63] In *Mills*, the court noted that these feelings may "manifest themselves in physical symptoms such as nervousness or insomnia, or in a psychological inability of the adoptees to devote themselves fully and wholeheartedly to their efforts."[64]

In addition, proponents allege that when adoption records are sealed, adoptees do not have access to potentially life-saving medical information. If an adoptee is facing a serious medical condition, such as organ failure or leukemia, he may quickly need to find a person who is genetically connected to him in order to receive a necessary donation to save his life.[65] Moreover, adoptees should be allowed the same opportunities that non-adopted persons have to know their family medical histories in order to prevent genetically inherited conditions.[66]

Adoption statutes are purported to be in the "best interests of the child."[67] The problem noted by open records proponents is that state statutes and courts fail to address the fact that the

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[62] *See* Wendy L. Weiss, *Ohio House Bill 419: Increased Openness in Adoption Records Law*, 45 CLEVE. ST. L. REV. 101, 125 (1997).
[63] Mills, *supra* note 49, at 655.
[64] *Id.*
[65] Cabellero, *supra* note 13, at 296.
[66] *Id.*
[67] *See generally* JOSEPH H. HOLLINGER, ET. AL., BEYOND THE BEST INTERESTS OF THE CHILD (The Free Press 1973).

state's role as *parens patriae* ends upon the adoptee reaching the age of majority.[68] Open records proponents concede that the sealing of records at the time of relinquishment may be temporarily appropriate and in the best interests of the child.[69] However, they reason that as an adopted child matures and the birth parents' relinquishment recedes in time, the child's identity interests should begin to outweigh the interests of the state, adoptive parents, and biological parents.[70] As adults, adoptees should have the right to decide what is in their best interests, yet "adoption legislation forgets that what is in adoptees' best interests as children may no longer be so once they have reached adulthood."[71]

Open records proponents argue that adoptees are the only party in the adoption process who did not voluntarily consent to the sealing of the birth records.[72] Moreover, they believe that fairness dictates the unsealing of records because adoptees are the co-owners of that information.[73]

In the early twentieth century, state legislatures originally enacted sealed records statutes to protect the parties from the stigmas attached to illegitimacy, unwed mothers, and infertility.[74] Proponents of open records purport that these stigmas are not prevalent in today's society, and, therefore, these statutes are no longer warranted.[75] They point to the rise in open adoptions as

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[68] *See, e.g., In re* Sage, 586 P.2d 1201, 1203 (Wash. Ct. App. 1978) ("We must keep in mind that the adopted child eventually becomes an adult, and one may question whether continued confidentiality remains in the adoptee's best interests once he reaches majority.").
[69] Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution*, 2 U. PA. J. CONST. L. 150, 172 (1999).
[70] *Id.*; *see also* Cabellero, *supra* note 13, at 301.
[71] Jason Kuhns, *The Sealed Adoption Records Controversy: Breaking Down the Walls of Secrecy*, 24 GOLDEN GATE U. L. REV. 259, 271-72 (1994).
[72] Cabellero, *supra* note 13, at 296.
[73] *See* Bobbi W. Y. Lum, *Privacy v. Secrecy: The Open Adoption Records Movement and its Impact on Hawaii*, 15 U. HAW. L. REV. 483, 493 (1993).
[74] Fleming, *supra* note 15, at 462.
[75] *See* Heidi Hildebrade, *Because They Want to Know: An Examination of the Legal Rights of Adoptees and Their Parents*, 24 S. ILL. U. L. J. 515, 536-37 (2000).

indicative that this type of secrecy is not justified.[76] Moreover, proponents argue that closed records statutes further entrench these stigmas and perpetuate the myth that adoption is shameful.[77]

Advocates of open records contend that birth parents have no reasonable expectation of lifelong privacy because adoption records may always be unsealed upon a judicial finding of good case.[78] In *Doe v. Sundquist*, the court held that "there simply has never been an absolute guarantee or even a reasonable expectation by the birth parent or any other party that adoption records were permanently sealed."[79] In fact, the court noted that a review of the history of Tennessee's adoption statutes reveals just the opposite.[80]

Further, proponents point to the statistics which reveal that a significant number of birth parents support open records.[81] Numerous birth parent organizations, including the Concerned United Birthparents, promote adoptees' right to unrestricted access to their birth records.[82] Supporters contend that the presumption that birth parents wish to have no contact with their children is a myth.[83] On the contrary, birth parents claim to have an enduring connection to their

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[76] *Id.*
[77] *See* Nancy S. Ashe, Adopting.org, *The Open Records Debate*, http://www.adopting.org/adoptions/the-open-records-debate-2.html (last visited April 22, 2012).
[78] *See id.*
[79] 2 S.W.3d 919, 925 (Tenn. 1999).
[80] *Id.* The court stated that early adoption statutes required neither that records be sealed nor that the parties' identities remain confidential. Later statutory amendments provided that even if sealed, records could be disclosed upon a request by an adopted person and a judicial finding that disclosure was in the best interests of the adoptee and the public. Even later amendments permitted disclosure of sealed records under certain circumstances even without a judicial finding. *Id.*
[81] Lum, *supra* note 73, at 495 (nearly 90% of birth mothers surveyed supported the release of identifying information to adoptees).
[82] *See* Cahn & Singer, *supra* note 69, at 179.
[83] Brett S. Silverman, *The Winds of Change in Adoption Laws: Should Adoptees Have Access to Adoption Records?*, 39 FAM. CT. REV. 85, 92 (2001); *see also* Elizabeth S. Cole, *The Effects of Unsealing Adoption Records in New Jersey,* http://www.americanadoptioncongress.org/reform_materials.php (last visited on April 20, 2012) (noting that the New Jersey Division of Youth and Family Services, which contacts birth parents whose adopted children are searching for them, reports that 95% of birth parents desire contact).

child long after relinquishment and often desire a reunion in order to "resolve old feelings of guilt and erase years of questions about the fact of the relinquished child."[84]

Open records advocates also argue that open records do not threaten the role of the adoptive parents and that the majority of adoptive parents support adult adoptees having the ability to access to their original birth certificates.[85] Most adoptive parents have a healthy, stable relationship with their adopted child and, thus, are open to the adoptee's desire to investigate his birth parents.[86]

B. ***Arguments Against Open Records Statutes***

Open records statutes violate numerous constitutionally protected rights, including the familial right of privacy, the right of confidentiality, and the right of reproductive autonomy.

In *Griswold v. Connecticut*,[87] the Supreme Court first recognized a constitutionally protected zone of privacy created within the "penumbra" of the Bill of Rights. The Court has found that the right to privacy includes the right to make certain personal decisions regarding marriage, procreation, contraception, child-rearing, and family relationships.[88] In *Stanley v. Georgia*,[89] the Court stated that the drafters of the Constitution conferred as against government

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[84] Kuhns, *supra* note 71, at 277.
[85] Cahn & Singer, *supra* note 69, at 187 (84% of adoptive mothers and 73% of adoptive fathers surveyed supported).
[86] Silverman, *supra* note 83, at 96.
[87] 381 U.S. 479, 498 (1965) (right of marital privacy invoked to void a statute prohibiting the use of contraception).
[88] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 895-98 (1992) (striking down a state's spousal notice requirement as an undue burden on a woman's right to abortion); Eisenstadt v. Baird, *supra* note 56, at 453 (upholding the right of unmarried persons to use contraceptives, "the right of privacy…is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

Legal Information Institute, *Right of Privacy: Personal Autonomy*, http://www.law.cornell.edu/wex/Personal_ Autonomy (last visited April 22, 2012).
[89] 394 U.S. 557, 564 (1969) (*citing* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

"the right to be let alone – the most comprehensive of rights and the right most valued by civilized men."

The vast majority of courts have held that sealed records statutes protect the biological parents' "right to privacy, a right to be let alone."[90] Upon the relinquishment of the child for adoption, the biological parents receive an actual statutory assurance that their identity will remain confidential.[91] Relying upon this assurance, the biological parent of an adult adoptee has established new life relationship and perhaps a new family unit.[92] It is highly likely that she has chosen not to disclose to "her spouse, children, or other relations, friends, or associates the facts of an emotionally upsetting and potentially socially unacceptable occurrence 18 or more years ago."[93] The adult adoptee's "preverbal knock on the door" may be a source of great pleasure to the biological parent.[94] However, in other cases, it may be a "destructive intrusion into the life that the [biological] parent has built since the adoption."[95] This sudden emergence may contribute to family disharmony, domestic violence, and possibly divorce.[96] Moreover, it makes the biological parent susceptible to blackmail threats to disclose embarrassing circumstances surrounding the birth.[97]

Respecting a birth parent's desire for separation and confidentiality is also consistent with the broad deference accorded to parental decision-making on behalf of children in other

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[90] *E.g.*, Mills, *supra* note 49, at 651; *but see* Doe v. Sundquist, 2 S.W.3d 919, 925 (Tenn. 1999) (holding that a state statute allowing disclosure of sealed adoptions records to adult adoptees does not violate biological parents' rights to familial privacy because the statute permits biological parents to register a "contact veto").
[91] Mills, *supra* note 49, at 651.
[92] *Id.*
[93] *Id.*
[94] *Matter of* Linda F. M., *supra* note 32, at 1303.
[95] *Id.*
[96] *Cf.* Planned Parenthood v. Casey, 505 U.S. 833, 876-78 (1992) (striking down a state's spousal notice requirement before a woman can obtain an adoption as an "undue burden" on a woman's right to abortion and as an intrusion on a woman's right to privacy in general because the notice may cause domestic violence).
[97] *Matter of* Linda F. M., *supra* note 32, at 1303.

contexts.[98] In addition, respecting the decision not to maintain a parent-child relationship is consistent with the protection afforded to other reproductive choices.[99]

Additionally, the adoptive parents, who have taken into their home a child whom they will regard as their own, have a right to privacy and an interest in placing the original birth records under seal.[100] They must be permitted to "raise this child without fear of interference from the natural parents and without fear that the birth status of an illegitimate child will be revealed or used as a means of harming the child or themselves."[101]

Secondly, open records statutes violate the biological parents' right to confidentiality. In *Whalen v. Roe*,[102] the Supreme Court defined the right to confidentiality as "the individual interest in avoiding disclosure of personal matters." Courts have held that information regarding one's "intimate relationships"[103] or sexual activities[104] is protected from disclosure. Courts have also recognized the need to preserve the legitimate privacy claims of persons affected by the disclosure of confidential information sought under the Freedom of Information Act.[105] Accordingly, the unsealing of adoption records violates a biological parent's zone of privacy as it exposes her past sexual activities and potentially the fact that she was an unwed mother.[106]

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[98] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972) (allowing Amish parents to withhold their children from compulsory education beyond the eighth grade); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (protecting parents' rights to educate their children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (reversing conviction of teacher who had instructed child in foreign language in violation of Nebraska statute, under rationale that Fourteenth Amendment protects teacher's liberty).

[99] *See, e.g.*, Roe v. Wade, *supra* note 56, at 14.

[100] *See, e.g.*, Mills, *supra* note 49, at 649.

[101] *Id.*

[102] 429 U.S. 589, 599 (1977).

[103] Martinelli v. District Court, 612 P.2d 1083, 1092 (Colo. 1980.

[104] *See* Shuman v. City of Philadelphia, 470 F. Supp. 449, 459 (E. D. Pa. 1979).

[105] *See, e.g.*, Wine Hobby U.S.A., Inc. v. I.R.S., 502 F.2d 133, 136-37 (3d Cir. 1974) (holding that the disclosure of the names of persons registered to produce wine would be an unwarranted invasion of privacy).

[106] Claudine R. Reiss, *The Fear of Opening Pandora's Box: The Need to Restore Birth Parents' Privacy Rights in the Adoption Process*, 28 SW. U. L. REV. 133, 142 (1998).

Finally, open records statutes violate women's right to reproductive choice and the right to terminate the parent-child relationship. In *Margaret S. v. Edwards*,[107] the court noted that the freedom over reproductive autonomy includes the entire decisional range, both the decision to bear children,[108] as well as the decision not to bear children.[109] Accordingly, a birth parent's right to terminate the relationship with her child by placing the child for adoption should be afforded the same anonymity, confidentiality, and privacy that is given in the context of the right to abortion. When faced with an unwanted or unplanned pregnancy, many women struggle with the decision to abort or to place the child for adoption. Woman who fear public disclosure of their unwanted pregnancies may be more likely to choose abortion, as it affords for lifelong anonymity.[110] Thus, eliminating the guarantee of confidentiality in the adoption process limits a woman's reproductive autonomy.

V. Alternative to Open Records Statutes

There are better ways to balance the birth parents' privacy interests against the adoptees' desire for information other than the going to the extreme of unsealing adoption records. The optimum balance can be achieved by requiring birth parents to disclose medical and ethic information and undergo genetic testing and establishing, promoting mutual consent registries, and protecting open adoptions and post-termination contact agreements.

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[107] 488 F. Supp. 181, 190 (E.D. La. 1980).
[108] *See, e.g.,* Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 640 (1974) (striking down regulations that "penalized the pregnant teacher for deciding to bear a child"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (striking down court-ordered sterilization as violative of right to procreate, which is "fundamental to the very existence and survival of the race").
[109] *See*, Carey v. Population Services Int'l, 431 U.S. 678, 685 (1977); Roe v. Wade, *supra* note 56, at 13; Eisenstadt v. Baird, *supra* note 56, at 453; Griswold v. Connecticut, *supra* note 87, at 498.
[110] *See* Massey v. Parker, 362 So. 2d 1195, 1199 (La. Ct. App. 1978) (Schott, J., dissenting) ("a cavalier disregard for the mother's right of privacy might discourage abortion as an alternative to abortion").

A. *Medical Information and Genetic Testing*

Most states have statutes dictating precisely what information must be disclosed to the adopted parents at the time of adoption. Although the specific requirements vary by state, biological parents are often required to disclose some or all of the following information: the circumstances under which the child came to be placed for adoption; a medical history of the biological mother and, if known, the biological father; a medical history of the adoptee, if such history exists; information regarding the age, nationality, race, ethnic background, and religious preferences of the biological parents; the educational level of the biological parents; a physical description of the biological parents; and the existence of other children born to the biological parents.[111] While the biological parents are required to disclose this information at the time of the adoption, not all states mandate the release of this information to adoptees upon reaching the age of majority.[112] However, the adoptees' interest in their medical and genetic background supersedes the birth parents' privacy interests in this own non-identifying medical information. Therefore, the states must require its disclosure.

Unfortunately, information collected at the time of the child's adoption may be of limited value.[113] Parents who surrender children for adoption are often young, and many diseases will not be manifested at that time. Thus, requiring information about other family members, such as grandparents and other extended relatives, will provide further clues. Nevertheless, the potential benefits to the child of possessing this genetic information is further limited by the lack of a mechanism for updating this health information. Currently, Texas is the only state that mandates

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[111] Lindsay J. Mather, *The Impact of the Genetic Information Nondisclosure Act on the Disclosure of Information in Adoption Proceedings*, 78 U. CIN. L. REV. 1629, 1638 (2010).
[112] *See id.*
[113] Lori B. Andrews & Nanette Elster, *Adoption, Reproductive Technologies, and Genetic Information*, 8 HEALTH MATRIX 125, 130 (1998).

updating health information, although no penalties are imposed by the statute for failing to supplement the record.[114]

Currently, no statutes require the biological parents to undergo genetic testing during the adoption process.[115] However, doing so would greatly benefit the adoptee, birth parents, adoptive parents, and the state. Adoptees should be aware of their genetic makeup and their families' because depending on the way a particular genetic condition is inherited, an individual could be a carrier of the genetic mutation that causes a particular condition, even if the person is unaffected.[116] Adoptees would benefit from this testing requirement by being able to prepare for and prevent potential conditions to which they may be genetically predisposed. In addition, providing birth parents' genetic test results to adoptees gives them a more complete picture of their genetic makeup than merely the results of their own genetic test.

By undergoing genetic testing, birth parents gain more insight into their own genetic information and predispositions.[117] It may reassure biological parents that their children are as well-equipped as possible to prevent and treat future genetic-based conditions. Moreover, giving this genetic information to adoptees may protect the birth parents' privacy by reducing the court's willingness to unseal the adoption records.[118] Courts may no longer find "good cause" to unseal records so that adoptees may obtain their biological parents' genetic and medical information.

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[114] Tex. Fam. Code Ann. § 162.005(f) (West 1996) ("The department, licensed child-placing agency, parent, guardian, person, or entity who prepares and files the original report is required to furnish supplemental medical, psychological, and psychiatric information to the adoptive parents if that information becomes available and to file the supplemental information where the original report is filed.").
[115] Andrews & Elster, *supra* note 113, at 131.
[116] Mather, *supra* note 111, at 1641.
[117] *Id.*
[118] *Id.* at 1647.

Adoptive parents are automatically have less information about their adopted child than if they had biologically conceived the child. Mandating genetic for birth parents helps to alleviate this disadvantage by providing adoptive parents with more information about the adoptee's background, which further equips them to raise and care for the child.[119] Supplying this information to adoptive parents further solidifies the new family and mimics the normal birth parent-child relationship as children naturally question their parents about their heritage, and parents disseminate this information.[120] It also enables the adoptive parents to better prepare for and prevent the child's future genetic conditions. In turn, medical expenses are lessened because adoptive parents can focus on prevention, rather than treatment.[121]

States would reap the rewards of a genetic testing requirement in numerous ways. It would lower overall health care costs as it is less costly to prevent a genetically-predisposed condition than to treat it once it manifests.[122] Additionally, judicial resources would be conserved as fewer adoptees would petition the courts to unseal their adoption records for medical reasons.[123]

Ultimately, a requirement that biological parents undergo genetic counseling during the adoption process would be advantageous to all parties involved. All parties benefit by being able to focus on preventing the manifestation genetic conditions. Adoptees benefit by obtaining a more complete overview of their background and history. Biological parents' privacy is protected by reducing the likelihood that a court would unseal the adoption records and disclose their identifying information. Finally, the state benefits by reducing its health care costs and conserving its judicial resources.

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[119] *Id.* at 1648.
[120] Reiss, *supra* note 106, at 141.
[121] *Id.*
[122] *Id.* at 1649.
[123] *Id.*

B. ***Mutual Consent Registries***

There are two types of adoption registries that facilitate the acquisition of identifying information: (1) passive, voluntary mutual consent registries and (2) active, confidential intermediary system.[124] Passive mutual consent registries, which are coordinated by the state or outsourced to an agency, require adoptees and birth parents to seek out the registry and provide their names and contact information in order to participate. If both parties have provided their identifying information and consent to its release, then each party is notified and given the information.

Another system which may be employed to manage birth records is an active consent registry. If either the birth parents or adoptee desires to locate the other, then a confidential intermediately is appointed to locate the "missing" party.[125] Once the "missing" party is found, the intermediary informs him that the other party requested release of her identifying information and that she may choose whether or not to do so.[126] Then, her response is relayed by the intermediary to the party that initiated the search.[127] A biological parent's refusal to consent effectively ends the process, preventing the adoptee from access to any information.

Passive mutual consent registries are the preferable option as they better protect the biological parents' expectation of privacy. However minimal it may be, the confidential intermediary is still intruding into the biological parent's "new " life. These registries have been criticized as being ineffective because most people do not know of their existence or how to register and use them.[128] Therefore, it is imperative that states not only counsel biological

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[124] Cabellero, *supra* note 13, at 294-95.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] Cabellero, *supra* note 13, at 296.

parents about the registry and their options, but also run a public information campaign to create and raise awareness of the registry's existence.

Moreover, current mutual consent registries operate only at the individual state level.[129] In today's transient society, this system could hinder the reunification of parties that have moved from the state where the adoption occurred. Thus, it is crucial that Congress create a national mutual consent registry or the states must promote the interstate cross-referencing of registries.

C. *Open Adoptions*

In open adoptions, the biological and adoptive parents agree to maintain an ongoing relationship after the parties relinquish their parental rights.[130] The parties decide on the degree of contact between the biological parents and the adoptee, which can range from sporadic letters or telephone calls to regular visits.[131] Supporters of open adoptions contend that open adoptions benefit all members of the adoption triangle.[132] Open adoption may ease the pain and anguish that biological parents experience in giving a child up for adoption. The biological parents retain some ties to their child, thus "alleviating the fears the birth [parent] has about the adoptive placement."[133] Any form of contact or communication, from pictures to visits, will likely provide the birth mother with comfort, knowing the child was placed in a loving family. [134]

Some adoptive parents fear that the biological parent may come to regret her decision to place her child for adoption and come back to "reclaim" the child.[135] However, allowing the biological parent to be a part of the child's life, and see how happy the child is with the adoptive

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[129] Cahn & Singer, *supra* note 69, at 163.
[130] ARTHUR D. SOROSKY, ET AL., THE ADOPTION TRIANGLE 63 (1984).
[131] *Id.*
[132] Behne, *supra* note 23, at 80.
[133] *Id.*
[134] LOIS GILMAN, THE ADOPTION RESOURCE BOOK 116 (1998).
[135] *Id.* at 115.

parents, may alleviate these fears.[136] If the biological parent does later come to regret her decision, there is often little recourse in the courts.[137] The adoptive parents' failure to comply with any post-termination agreement for visitation or communication would not provide a biological parent with grounds to revoke her consent or the adoption.[138] However, the adoptive parents' fear that the biological parents will return and interfere with their familial unit is eliminated because the adoptive parents are aware of the biological parents' involvement and can monitor it.[139] Moreover, any relationship with the biological parents will likely facilitate the adoptive parents in explaining adoption to the child.[140]

Lastly, open adoptions benefit the adoptees by allowing them ability to communicate with the biological parents allows immediate and constant access to any information about which they may be curious.[141] Open adoption provides children with opportunities to learn about who they are, without guilt or concern that such communication is a betrayal to their adoptive family.[142] Ideally, the child will come to realize that both his biological parents and relatives and his adoptive parents love them, and in turn providing an extended support network on which the child may rely.[143]

Some states have embraced open adoptions by permitting courts to grant limited post-termination contact within the final adoption decree.[144] For instance, Section 161.2061(a) of the

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[136] *Id.*
[137] Leigh Gaddie, *Children's Interests: Open Adoption*, 22 J. AM. ACAD. MATRIMONIAL LAW. 499, 504 (2009).
[138] *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-116.01(F); FLA. STAT. ANN. § 63.0427(1); MD. CODE ANN., FAM. LAW. § 5-308(d); OR. REV. STAT. ANN. § 109.305(7).
[139] Gaddie, *supra* note 137, at 507.
[140] *Id.*
[141] *Id.* at 511.
[142] *Id.*
[143] *Id.* at 512.
[144] Dan Tilly, *Confidentiality of Adoption Records in Texas: A Good Case for Defining Good Cause*, 57 BAYLOR L. REV. 531, 546 (2005).

Texas Family Code permits a court to order limited post-termination contact between an adoptee and a biological parent who has voluntarily relinquished her parental rights.[145] If the court finds that limited post-termination contact would be in the best interest of the child, the court may include provisions in the termination decree allowing the biological parent to receive information about the child, provide written communication to the child, and have limited access to the child.[146]

VI. Conclusion

Not only does confidentiality in the adoption process protect the biological parents' fundamental right of privacy, but it promotes the state's interest in ensuring the integrity of the adoption process. When biological mothers opt for adoption rather than abortion, which guarantees lifelong anonymity, they must be able to rely on the statutory promise of confidentiality. In reliance of this promise, the biological parent of an adult adoptee has established new life relationship and perhaps a new family unit and may have chosen not to disclose her past unwanted pregnancy and decision to place the child for adoption. Her right to familial privacy must be protected from the preverbal "knock on the door" by the adult adoptee.

Adoption represents a new beginning for the adoptee, adoptive parents, and biological parents. Confidentiality in adoption records permits biological parents to move beyond a painful chapter in their lives in favor of a fresh start. It also enables the newly formed adoptive family to develop strong, loving relationships without the stigma of illegitimacy on the child. While confidentiality may unfortunately serve as a barrier to a happy reunion between adoptees and their biological parents, it serves a vital function of ensuring the parties new chapters in life that will not be disrupted without a proper demonstration of "good cause."

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[145] Tex. Fam. Code Ann. 161.2061(a) (Vernon Supp. 2004-2005).
[146] *Id.*

The proper balance between confidentiality and openness can be achieved by mechanisms other than the dramatic, unwarranted step of opening adoption records. Adoptees should be given as much information about their origins and backgrounds as possible, short of any information that would identify their biological parents. Requiring birth parents to disclose family medical histories and ethnic information and undergo genetic testing and establishing and promoting mutual consent registries gives significant opportunities to adoptees while continuing to protect the identity of biological parents.

Today, doctors are more adept at combating and predicting diseases and disorders due in part to the advent of genetic testing and expanding knowledge about hereditary diseases and medical predispositions. The genetic testing requirement would afford adoptees an opportunity to take advantage of these medical advancements, placing them in virtually the same position as non-adopted persons. However, biological parents' privacy is protected by maintaining the confidentiality of their identifying information. All parties involved, including the state, benefits from the decrease in medical expenses may focusing on preventing diseases, as opposed to treating them after manifestation.

The voluntary consent adoption registries create a mechanism for the disclosure of identifying information only where there is a mutual desire for that information to be revealed. Therefore, the biological parents' privacy is more adequately protected.

Finally, open adoptions and agreements regarding post-termination contact between the biological parent and the adoptee gives the parties the autonomy to decide what is in their best interests. Obviously, biological parents who desire confidentiality would not opt for such an arrangement. But it affords biological parents the opportunity to have some level of continuing contact with the child that they have placed for adoption, while simultaneously permitting the

child to know the identity of his biological parents without having to overcome the significant good cause hurdle and allowing the child to seek answers to any questions he may have regarding his origins, medical history, and the circumstances of his adoption.

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