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At A Glance: Adoptees' Right to Know – The Decades-Long Battle for Unsealing Adoption Records

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I. INTRODUCTION

In New Jersey, the average individual need only complete three steps to obtain his or her birth certificate: identify name, as well as date and place of birth, provide identification, such as a copy of a valid driver's license (even a simple combination of bank statement and school ID would suffice), and pay a \$25 fee.¹ Of course, Vital Statistics has an entire page dedicated to walking individuals through the process, as simple as it may be. As for adoptees, Vital Statistics has one simple message: "When the adoption is placed on file with the Office of Vital Statistics and Registry, the original birth certificate and all documents related to the adoption are placed under seal. This seal can only be broken by court order."²

As one reads on, it will soon become apparent that breaking the seal via court order is no easy endeavor. Still, such has been the life of most adoptees for the better part of the twentieth century. This paper seeks to provide an overview of the "right to know" movement – adoptees' legal and political fight to freely obtain copies of their original birth certificates, learn the names of their biological parents, and any other such information contained in state-sealed adoption records. It will highlight the adoptees' struggles, while also providing insight into the viewpoints of the other two members of the adoption triad, namely, birth parents³ and adoptive parents. First, the history leading to the sealing of birth records is examined, followed by an assessment

¹ New Jersey Department of Health and Senior Services: Vital Statistics and Registry, *Getting Copies of Non-Genealogical Records*, available at <http://www.state.nj.us/health/vital/nongen.shtml> (last visited May 12, 2012).

² New Jersey Department of Health and Senior Services: Vital Statistics and Registry, *Frequently Asked Questions: Adoption*, available at <http://www.state.nj.us/health/vital/faq.shtml#AD> (last visited May 12, 2012).

³ The terms birth parents, natural parents, and biological parents are synonymous and will be used interchangeably based on the source from which the information is derived. Additionally, the term "birth mothers" will often be used in lieu of "birth parents," the reason for which is outside the scope of this paper.

of the various types of statutory confidentiality provisions and where each individual state stands on the matter today. Next, constitutional challenges to sealed records laws are discussed, first from the perspective of adoptees seeking to unseal the records, and then from the perspective of birth parents fighting for the records and their information to remain confidential. Once the constitutional (and several non-constitutional) challenges are fleshed out, insight is provided into the competing interests of the adoption triad, in terms of their natural, instinctive response to the debate notwithstanding any legal support, with each member-group discussed separately. Lastly, this author will propose a statutory solution that would serve as a compromise, attempting to (ideally) account for and protect the objectively legitimate interests of each party, while disregarding those subjective, thinly-supported “interests” that only serve to impede any progress towards a truly attainable goal.

II. TRACING THE EVOLUTION OF CONFIDENTIALITY IN U.S. ADOPTION LAW

Some would say that “[a]doption as a practice is certainly as old as the human race.”⁴ While this may be true, the standardization of adoption practices has long been undergoing evolution in North America. Prior to the passing of the first adoption statutes, orphaned children not placed with relatives were placed in an apprenticeship,⁵ essentially equating to adoption without the legal recognition.⁶ At the time, familiarity of the apprenticeship system negated any need for legislation regulating adoption.⁷

⁴ Brett S. Silverman, *The Winds of Change in Adoption Laws: Should Adoptees Have Access to Adoption Records?*, 39 FAM. CT. REV. 85, 85 (2001); Shea Grimm, *Sealed Records and Adoption Reform: An Historical Perspective*, available at <http://www.bastards.org/reform.htm> (last visited March 25, 2012).

⁵ Introduced by the Puritans, apprenticeship was the earliest form of adoption in the United States, in which children were placed in surrogate homes where they were trained in a certain trade. Silverman, *supra* note 4, at 86.

⁶ *Id.*

In 1851, however, Massachusetts became the first state to pass a formal adoption statute, standardizing the adoption procedure.⁸ Under the Massachusetts Adoption Act, before being permitted to adopt, the adoptive parents were required to receive judicial confirmation as to their fitness to raise adopted children.⁹ Additionally, the Act ended the legal relationship between the birth parents and adoptee, while replacing it with the recognized familial status of the new, adoptive family unit.¹⁰ Most pertinent to this discussion, though, is that under the Act all adoptions were open, allowing for anyone to access the adoption records.¹¹ Other states ultimately followed in passing adoption statutes and, like Massachusetts, did not ensure confidentiality of the adoption records.¹²

As society's views and morals evolved, so did laws pertaining to adoption. States became more cognizant of individuals' rights to privacy, and their legislation reflected such, as states began restricting the general public's access to court records pertaining to adoption proceedings in order to protect the privacy of the parties involved.¹³ The first step was taken by New York in 1916, as it legislatively prohibited the term "illegitimacy" from appearing in judicial transcripts.¹⁴ In turn, Minnesota became the first state to address confidentiality. In 1917

⁷ *Id.*

⁸ Caroline B. Fleming, *The Open-Records Debate: Balancing the Interests of Birth Parents and Adult Adoptees*, 11 WM. & MARY J. OF WOMEN & L. 461, 463 (2005).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 463-64.

¹² Lauren M. Fair, *Shame on U.S.: The Need for Uniform open Adoption Records Legislation in the United States*, 48 SANTA CLARA L. REV. 1039, 1043 (2008).

¹³ *Id.*

¹⁴ Silverman, *supra* note 4, at 86.

Minnesota enacted a law that sealed adoption records, although access was still granted to "parties in interest," specifically, the adoptive parents, biological parents, and adoptees.¹⁵

The culture in the United States became increasingly more conservative, specifically as it related to society's views of the family unit.¹⁶ As illustrated by New York's 1916 statute, there was a growing feeling of stigma regarding illegitimacy, causing a need to protect adoptees (who often were the products of "illegitimate" births) from shame and embarrassment.¹⁷ As such, states followed Minnesota's lead throughout the 1930s, enacting statutes requiring that adoption records be sealed.¹⁸ By the late 1940s most states had enacted such legislation, with nearly all states having such laws by the late 1950s.¹⁹ These statutes not only protected adoptees from the stigma of illegitimacy, but also helped "further to cement the bond between the adoptee and the adoptive family."²⁰

In addition to sealing adoption records, many statutes enacted during that time span also required that amended birth certificates be issued once a child is adopted, replacing the birth parents' names with that of the adoptive parents.²¹ However, these amended birth certificates did not entirely replace the original birth certificates, and indeed were not intended to, as indicated by the lack of evidence to suggest that child welfare or public health officials intended for the

¹⁵ Fair, *supra* note 12; Fleming, *supra* note 8, at 464.

¹⁶ Fleming, *supra* note 8, at 464.

¹⁷ Silverman, *supra* note 4, at 87; Fair, *supra* note 12.

¹⁸ Fair, *supra* note 12.

¹⁹ Silverman, *supra* note 4, at 87; Fair, *supra* note 12.

²⁰ Silverman, *supra* note 4, at 87 (quoting M. Christina Rueff, *A Comparison of Tennessee's Open Records Law with Relevant Laws in Other English-Speaking Countries*, 37 BRANDEIS L. J. 453 (Spring 1998)).

²¹ Fleming, *supra* note 8, at 464.

new birth certificates to serve as a bar to the original birth certificates.²² In fact, the evidence that does exist indicates that these officials specifically recommended that the birth records should "be seen by no one except the adopted person when of age or upon court order."²³ This position gains more credence by research that suggests the amended birth certificates did not entirely replace the original birth certificates precisely for the purpose of allowing adopted children the opportunity to access certain information contained exclusively in the originals.²⁴ As previously noted, the sealing of adoption records was intended to solidify the bonds in the newly formed family unit; combined with the amendment of birth certificates, it was hoped that the two would reinforce the notion that adoption was "a perfect and complete substitute for the creation of families through childbirth."²⁵

In the years that followed, as legislation continued to shift from confidentiality towards total concealment of adoption records, the sexual revolution and women's rights movement took full effect, as more progressive cultural views of women pertaining to sex and parenthood led to changing attitudes about illegitimacy, the availability of contraceptives, and the legitimization of abortion.²⁶ These changes in societal mores caused the culture among adoptees to shift towards a thirst for information pertaining to their adoption process, because the stigma of illegitimacy lessened and family units that did not comport with the traditional view began gaining

²² *Id.* at 464-65.

²³ *Id.* (quoting E. Wayne Carp, *Family Matters: Secrecy and Disclosure in the History of Adoption*, 142-44 (1998)).

²⁴ *Id.* at 465.

²⁵ Fair, *supra* note 12, at 1044.

²⁶ Fleming, *supra* note 8, at 465.

approval.²⁷ Recognizing the need, during the 1960s, adoption agencies began compiling non-identifying information pertaining to the birth parents, such as their nationality, education, health factors, physical characteristics, occupations, talents, and abilities.²⁸ This information was then relayed to adoptive parents; however, information that was not provided included alcoholism, mental illness, criminal behavior, and other negative information.²⁹

By the 1970s, the "right to know" argument had been introduced, increasingly gaining momentum, leading to two class action lawsuits³⁰ that challenged the constitutionality of statutes that sealed adoption records.³¹ The Adoptees' Liberty Movement Association ("ALMA"), formed in 1971, led the way in the adoptees'-rights movement.³² The movement appeared to make ground in the early 1980s during President Carter's administration, during which a panel of independent experts appointed by the President proposed the Model State Adoption Act.³³ The general public was even granted an opportunity to provide comments before the Act was completed and published in the Federal Register.³⁴ Originally, the Act granted adoptees the right to access confidential identifying information about their birth parents.³⁵ However, the Act was

²⁷ Fair, *supra* note 12, at 1045.

²⁸ Silverman, *supra* note 4, at 87. Also by the 1960s, however, thirty states enacted legislation that prohibited adoptees from gaining access to their original birth certificates unless they could prove "good cause" before a judge. Fleming, *supra* note 8, at 465.

²⁹ Silverman, *supra* note 4, at 87.

³⁰ *See infra* Parts IV & V.

³¹ Fair, *supra* note 12, at 1045.

³² Fleming, *supra* note 8, at 466.

³³ Fair, *supra* note 12, at 1045; Silverman, *supra* note 4, at 87.

³⁴ Silverman, *supra* note 4, at 87.

³⁵ Fair, *supra* note 12, at 1046.

stripped of adoptees' hard-fought victories when, during the Reagan Administration, the Act was modified and renamed the Uniform Adoption Act.³⁶ To date, no state has adopted the amended version of the Act.³⁷

III. STATUTES RESTRICTING ACCESS TO ADOPTION RECORDS

States have chosen from various recognized approaches when enacting provisions relating to the confidentiality of adoption records and birth certificates. Clearly, the most adoptee-friendly approach would be unconditional access to all the information contained therein. On the other end of the spectrum lies permanently sealing such records, forever barring adoptees from accessing them. In the United States, most states fall somewhere in between those two extremes. Although some states try to find a middle ground by which to balance the competing interests of the members of the adoption triad, other states undoubtedly lean in one direction or the other.³⁸ Below is a chart providing a summary of the various approaches, along with the number of states that have adopted it and a brief description. To avoid confusion, note that when counting the states they add up to over fifty; this is because several states are listed more than once, as they adopt one approach in conjunction with another.

³⁶ *Id.* Specifically, the open records provision was altered to require that adoption records be sealed for ninety-nine years, and provided for criminal penalties for any violations. *Id.*

³⁷ *Id.*

³⁸ *E.g.*, Alaska and Kansas have always permitted adoptees 18 or older to request a copy of their original birth certificate. *Id.*; Alaska Stat. § 18.50.500; Kan. Stat. Ann. § 59–2122.

TYPE	No. of STATES	DESCRIPTION
Good Cause, Medical Necessity, Mutual Consent (no formal registry)	5 ³⁹	<p>While most, if not all, states have “good cause” provisions, these five states do not offer additional, official avenues to obtaining information contained in adoption records other than the stringent “medical necessity” exception. However, several of these states do also allow for “mutual consent” as a means of gaining access, but do not have established, formal registries through which to seek such consent.⁴⁰</p> <p>In determining whether good cause for the release of identifying information exists, courts tend to balance the following competing interests: 1) the nature of the circumstances dictating the need for release of the identity of the parents; 2) the circumstances and desires of the adoptive parents; 3) the circumstances of the biological parents and the desire of at least the birth mother; and 4) the interest of the state in maintaining a viable system of adoption by the assurance of confidentiality.⁴¹</p>
Mutual Consent Registries	22 ⁴²	<p>Provisions of these registries vary greatly from one state to another. Most require affirmative consent of at least one birth parent and adoptee over age of 18 or 21, or of adoptive parents of adoptee who is still a minor, in order to release identifying information. Some require consent of both birth parents; others will presume consent from “silence.” Still others will allow biological siblings of adoptees to seek and release identifying information upon mutual consent or will allow adoptees to have identifying information about birth parents who are deceased. Many, like California or Michigan, ask a birth parent to indicate at the time of consent or relinquishment whether they are willing to have their identity revealed to the adoptee when he or she is 18 or 21.⁴³</p>

³⁹ District of Columbia, Iowa, Nevada, New Jersey, North Carolina. LexisNexis, 3-13A Adoption Law and Practice [13-A.01].

⁴⁰ *Id.*

⁴¹ Jason Kuhns, *The Sealed Adoption Records Controversy: Breaking Down the Walls of Secrecy*, 24 GOLDEN GATE U. L. REV. 259, 264 n.33 (1994).

⁴² Arkansas, California, Florida, Idaho, Illinois, Indiana, Louisiana, Maine, Massachusetts, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, West Virginia. LexisNexis, 3-13A Adoption Law and Practice [13-A.02].

⁴³ *Id.*

TYPE	No. of STATES	DESCRIPTION
Confidential Intermediary Services	25 ⁴⁴	As with the more passive mutual consent registries, there is no uniformity among the states that have intermediary services to assist an adoptee in searching for a birth parent or other birth relative in order to ascertain if they are willing to release their identities. Some states require a court order to appoint an intermediary; others allow an agency to serve as intermediary if there are no forms filed in the Registry; others will not authorize an intermediary unless there are mutual consent forms on file; several states will allow adoptees to seek an intermediary's services, but not birth parents. Many states allow intermediary searches only when adoptee has a "medical emergency." ⁴⁵
Conditional Access Upon Adulthood	4 ⁴⁶	These states allow adoptees to request their original birth certificate when reach adulthood (which varies by state, set at either 18, 19, or 21); several states allow access regardless of when the adoption was finalized; others do so only prospectively, allowing access only for adoptions completed after a certain date; <i>however</i> , birth parents may file either "disclosure vetoes" or "affidavits of non-disclosure" to nonetheless prevent the adoptee from accessing the records. ⁴⁷
Unconditional Access Upon Adulthood	7 ⁴⁸	Differ from "conditional access" states only in that birth parents do <i>not</i> have the option to file disclosure vetoes; access to the birth records is absolutely unconditional upon reaching adulthood; still, while birth parents do not have the disclosure veto, they do have the option to file "contact vetoes" or "no-contact preferences, which carry criminal penalties if violated by adoptees." ⁴⁹

⁴⁴ Alabama, Arizona, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, Virginia, Washington, Wisconsin, Wyoming. LexisNexis, 3-13A Adoption Law and Practice [13-A.03].

⁴⁵ *Id.*

⁴⁶ Maryland, Montana, Oklahoma, Washington. LexisNexis, 3-13A Adoption Law and Practice [13-A.04].

⁴⁷ *Id.*

⁴⁸ Alabama, Alaska, Delaware, Kansas, New Hampshire, Oregon, Tennessee. *Id.*

⁴⁹ *Id.*

A final thought to keep in mind after assessing the chart – while states may be placed in certain groups based on their overall approach to the matter, it is important to keep in mind that many provisions are still unique.⁵⁰

IV. CONSTITUTIONALITY OF STATUTES SEALING ADOPTION RECORDS

Adoptees’ argument in favor of unsealing adoption records and original birth certificates is comprised of several underlying, constitutionally-based claims. The four oft-cited constitutional challenges are: (1) the right to privacy under the Fourteenth Amendment’s Due Process Clause, (2) the right to equality under the Fourteenth Amendment’s Equal Protection Clause, (3) the right to certain useful information under the First Amendment, and (4) anti-slavery rights under the Thirteenth Amendment.⁵¹ Additionally, adoptees have made other, non-constitutionally-based arguments, such as having a “psychological need” or “medical necessity” for the information. The different facets of the constitutional arguments will be discussed first, followed by the non-constitutionally-based arguments.

A. Fourteenth Amendment – Due Process & Equal Protection

The Fourteenth Amendment claim is two-fold and based on two distinct rights the Amendment gives rise to. The first claim is the right to privacy as protected by the Fourteenth Amendment’s Due Process Clause, and the second claim is based on the Equal Protection Clause. Each will be discussed separately.

⁵⁰ Compare 750 ILCS 50/18.3a (intermediary services available only for seeking information from birth family concerning adoptee’s psychological or genetically-based medical problems) with Mo. Stat. Ann. §§ 453.120, 453.121 (intermediary services limited to unusual circumstances; adoptive parents as well as birth parents may have to consent).

⁵¹ See Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 157-58 (1999); *ALMA Soc’y v. Mellon*, 459 F. Supp. 912, 915-16 (S.D.N.Y. 1978).

i. Due Process Clause – Privacy Rights

The Due Process clause of the Fourteenth Amendment “affords not only a procedural guarantee against the deprivation of ‘liberty,’ but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State.”⁵² The United States Supreme Court has held that one such aspect of liberty is an individual’s right to privacy.⁵³ Although courts lack consensus as to the precise meaning of the term “privacy” in the realm of adoption,⁵⁴ the court in the seminal case initiated by ALMA explained that the term connoted entitlement to one’s “personhood.”⁵⁵ Essentially, ALMA’s line of reasoning flows as follows: in a line of Supreme Court cases, the Court recognized privacy rights pertaining to familial relationships as protected under the Fourteenth Amendment; one’s identity, and right to discover that identity falls within the scope of protected family-related privacy rights; therefore, because “the State has, by sealing his records, imposed lifelong familial amnesia . . . injuring the adoptee in regard to his personal identity,”⁵⁶ it violated the Fourteenth Amendment Due Process Clause.

⁵² ALMA Soc’y v. Mellon, 601 F.2d 1225 (2d Cir. 1979) (quoting Kelley v. Johnson, 425 U.S. 238 (1976)), *cert. denied*, 444 U.S. 995 (1979).

⁵³ *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

⁵⁴ Cahn & Singer, *supra* note 51, at 158 (“In discussing the adoptees’ interests, the courts invoke differing meanings of privacy - is privacy confidentiality, or is it identity-formation? Is identity based on individual development, or is it relational and contextual? . . . [C]ourts continue to articulate these conflicting privacy interests - and definitions of privacy - for members of the adoption triad. The analysis in these cases reveals the shortcomings of applying traditional due process doctrine to claims by and involving children.”).

⁵⁵ ALMA, 601 F.2d at 1231. According to the Second Circuit, the term “personhood” is used as an alternative to “autonomy” or “privacy.” *Id.* at 1231. Scholars have interpreted the term to mean “that there are some aspects that are so fundamental to our identity that the State cannot infringe them.” *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 753 (1989).

⁵⁶ ALMA, 601 F.2d at 1231.

While the court did not dispel the notion that these “rights of identity, privacy, or personhood” are constitutionally protected, it nonetheless held the New York statute⁵⁷ in question was constitutional.⁵⁸ The court reasoned that the adoptees’ privacy rights were not the only affected party’s rights – both the biological parents and adoptive parents had certain constitutionally protected rights that also needed to be balanced when assessing the statute’s constitutionality.⁵⁹ Ultimately, the statute was deemed to be somewhat of a compromise, as it protected the rights of both sets of parents, while granting adoptees’ access to the information under certain circumstances.⁶⁰

ii. Equal Protection Clause

The crux of adoptees equal protection argument is premised on the notion that they are treated differently from non-adoptees, as non-adoptees can access their birth certificates unimpeded by any statutes sealing same.⁶¹ As an initial matter, adoptees argue that they constitute a “suspect class,” or at least a “quasi-suspect class,” to decrease the statute’s odds of passing constitutional muster.⁶² However, courts have uniformly rejected that contention, concluding that adoptees do not meet the definition of a suspect class, namely, one that suffers

⁵⁷ The statute required a “showing of good cause” before releasing information contained in the adoption records. *Id.*

⁵⁸ *Id.* at 1233.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Kuhns, *supra* note 41, at 268.

⁶² If a class of individuals is consequently treated differently under a statute, the Equal Protection Clause may be invoked. If a court deems the class to be “quasi-suspect,” intermediate scrutiny is applied, and the statute must be substantially related to an important state interest to be held constitutional. Strict scrutiny is applied when a “suspect” class is involved, necessitating that the statute be narrowly tailored to advance a compelling state interest. *See, e.g., ALMA*, 601, 1233-34.

from “an immutable characteristic determined solely by the accident of birth and have had a history of the relegation of the class to an inferior status.”⁶³

After holding that adoptees constitute neither a suspect nor quasi-suspect class, courts proceeded to dispel with the rest of the equal protection argument using rational basis review.⁶⁴ Specifically, courts found confidentiality statutes to be rationally related to the state’s legitimate interest in protecting the integrity of the adoption process and the privacy rights of all the parties involved.⁶⁵ Courts point out that this state interest stems from the fact that the parties’ rights and interests resulted from adoption proceedings that took place pursuant to state statutes, thereby enhancing the state’s interest in regulating the process to control the ramifications.⁶⁶

B. First Amendment – The Right to Important Information

The Supreme Court has held that among the rights protected by the First Amendment is the right to receive important information.⁶⁷ Accordingly, adoptees argue that the right to access information relating to their adoption and identity is constitutionally protected.⁶⁸ While courts may agree with that position,⁶⁹ no constitutional or personal right is unconditional and absolute to the exclusion of the rights of all other individuals.⁷⁰

⁶³ Mills v. Atlantic City Dep’t of Vital Statistics, 148 N.J. Super. 302, 315 (Ch. Div. 1977); *see also* ALMA, 601 F.2d at 1233.

⁶⁴ Under rational basis review, the statute need only be rationally related to a legitimate state interest in order to pass constitutional muster. Mills, 148 N.J. Super. at 316.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See* Stanley v. Georgia, 394 U.S. 557 (1969).

⁶⁸ Mills, 148 N.J. Super. at 313.

⁶⁹ The Mills Court stated it “agrees that plaintiffs have a right to receive important information. Certainly the information sought here is vitally important to these parties.” Mills, 148 N.J. Super. at 312-13.

When courts assess a statute that interferes with an individual's right to receive important information, it must balance the affected individual's rights against those whose privacy rights would be affected by the dissemination of the information.⁷¹ In the context of adoption, it is the birth parents' right to privacy – having been assured that their identities would be shielded from public disclosure and that they would be let alone – that must be considered in light of adoptees request for the information.⁷² With that said, however, states have acknowledged that even the birth parents' privacy rights are not absolute, and that adult adoptees “may have a countervailing interest which may warrant disclosure in spite of assurances of secrecy.”⁷³ Accordingly, statutes permitting adult adoptees, upon a showing of good cause, to access the information they seek addresses both parties' First Amendment concerns, and does not abridge either's constitutionally-protected rights.⁷⁴

C. Thirteenth Amendment

A less-fashionable constitutional challenge is based on the premise that confidentiality statutes forbidding adoptees from learning the identities of their natural parents, thereby preventing adoptees from contacting or visiting them, equates to wearing a “badge or incident” of slavery.⁷⁵ The basis of adoptees' argument is derived from a speech made by Senator James Harlan of Iowa on April 6, 1864, in which he described five “necessary incidents of slavery” that

⁷⁰ Mills, 148 N.J. Super. at 313.

⁷¹ *Id.*

⁷² Mills, 148 N.J. Super. at 311.

⁷³ Mills, 148 N.J. Super. at 312.

⁷⁴ *Id.*

⁷⁵ ALMA, 601 F.2d at 1236-37.

the Thirteenth Amendment was intended to abolish.⁷⁶ The relevant portion of the Senator’s speech pertained to the second incident, namely, “the abolish practically of the parental relation, robbing the offspring of the care and attention of his parents, severing a relation which is universally cited as the emblem of the relation sustained by the Creator to the human family.”⁷⁷

Courts have universally rejected this approach on several grounds. First, the Supreme Court has never given any indication that the Amendment applied to any situation lacking the actual conditions of slavery and involuntary servitude, unlike peonage.⁷⁸ Second, adoptees’ interpretation of the Amendment would be over-inclusive – it would necessarily also include “the conjugal and parental relation, the right to hold property, the right to bring suit in court, the right to testify, freedom of speech and of the press, and the right to an equal education.”⁷⁹ Third, even if a court was to accept adoptees’ likening their situation to that of a slave being deprived of parental care, and thus potentially falling within the scope of the Amendment, it is not sealed records laws that deprive adoptees of their parental relation; rather, it is states’ adoption laws that divest birth parents of their parental rights while creating a parent-child relationship between adoptees and adoptive parents.⁸⁰

⁷⁶ *Id.* at 1237.

⁷⁷ *Id.* In context, Senator Harlan was referring slave states’ depriving slaves’ parental guardianship over (i.e. caring for) their own children in order “to secure the perpetuity of slavery.” *Id.*

⁷⁸ *Id.* See *Pollock v. Williams*, 322 U.S. 4 (1944) (striking down state laws imposing the condition of peonage). The court’s reaction was in response to adoptees’ attempted argument that sealed records laws are “less humane” than peonage. *ALMA*, 601 F.2d at 1237.

⁷⁹ *Id.* at 1238. Such a result would render unnecessary the Supreme Court’s significant step of making the First Amendment applicable to the states through incorporation via the Fourteenth Amendment. *Id.*

⁸⁰ *Id.*

D. Non-Constitutionally-Based Challenges

In addition to constitutionally-based arguments, adoptees litigate other aspects of sealed records laws in order to gain access to items such as their original birth certificates. However, these arguments differ not only in their basis, but also in their effect. While constitutional challenges seek to invalidate the statute altogether, the following bases – psychological need and medical necessity – are sought as exceptions to the confidentiality requirements. It is important to note that while these arguments have succeeded in some instances, primarily when the exceptions are built into the confidentiality statutes, courts have been inconsistent in their application, seemingly leaving it up to chance as to whether or not adoptees will succeed.⁸¹

i. Psychological Need

The “psychological need” approach is intended to satisfy the “good cause” requirement in those states that otherwise do not unseal adoption records.⁸² The argument is based on the premise that various aspects of the unknown information cause adoptees psychological harm so severe so as to constitute “good cause.” Scholars have supported this position by pointing to evidence indicating “that adoptees make up a disproportionately high percentage of psychiatric patients in the United States.”⁸³ This is due to a variety of factors, such as fear of incest with an unknown biological relative,⁸⁴ fear of hereditary and genetic illnesses, concern over life span, and frustration caused by the yearn to provide their children with such genealogical

⁸¹ Kuhns, *supra* note 41, at 267.

⁸² *Id.* at 263-64.

⁸³ *Id.* at 273.

⁸⁴ See e.g., *Id.* (citing Arthur D. Sorosky et al., *The Adoption Triangle* 124 (1976)) (describing a situation in which the mother of a young man who brought his fiancé home to introduce to the family, upon learning the woman was adopted, quickly realized it was “the grown-up version” of the child she gave up for adoption twenty years earlier).

information.⁸⁵ Additionally, adoptees may suffer from low self-esteem, and may even exhibit physical symptoms stemming from the psychological harm.

Case in point, for instance, the court in *In the Matter of Linda F.M.*, suggested that it would not rule out the possibility that “concrete psychological problems” could constitute good cause.⁸⁶ In *Linda*, Petitioner argued that her inability to learn her natural parents’ identity caused psychological problems that had broken up her marriage and impeded development of her artistic and musical creativity.⁸⁷ However, such contentions,⁸⁸ as well as feeling “cut off from the rest of humanity” were not sufficient to constitute good cause when balanced against the interests of her birth parents.⁸⁹ As the court explained, if “mere desire to learn the identity of one’s natural parents” was sufficient to constitute good cause, the requirement “would become a nullity.”⁹⁰

ii. Medical Necessity

Although discussed separately, not all states treat “medical necessity” as an exception separate and apart from “good cause”; rather, medical conditions often simply constitute “good cause” for unsealing either all or certain information contained in adoption records.⁹¹ With that said, the “medical necessity” argument presents a distinct, interesting dilemma for courts. While

⁸⁵ *Id.* at 273-74.

⁸⁶ 418 N.E.2d 1302, 1303-04 (1981).

⁸⁷ *Id.* at 1304.

⁸⁸ The *Linda* Court found that Petitioner’s alleged problems with her failed marriage and creativity were not credibly connected to her need to know her birth parents’ identities. *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See LexisNexis, 3-13A Adoption Law and Practice [13-A.02].

courts are reluctant to release the sealed information in protecting the interests of biological parents, many – if not most, or even all – individuals will at some point in their lives require the type of genetic or general medical history that is contained in adoption records.

For instance, in one oft-cited case, New York’s highest court denied a disclosure motion made by a 54-year-old adoptee suffering from a heart condition.⁹² The adoptee and his attending physicians argued that genetic information would be useful in his treatment and significantly aid the physicians in assessing the severity of his condition.⁹³ Furthermore, the adoptee, supported by an affidavit by the Federal Aviation Administration medical examiner, asserted that his career as a commercial pilot would otherwise be in jeopardy, as he would not be recertified absent medical information on the adoptee’s biological family background.⁹⁴ In denying his motion, the court weighed “the medical danger in which adopted children may be placed in the absence of their genetic histories,” against the reality that “as virtually any adopted person advances in age, his or her genetic history will be desirable for treatment of a variety of ailments including, for example, heart disease, diabetes and cancer.”⁹⁵ In so doing, the court determined that “[a] rule which automatically gave full disclosure to any adopted person confronted with a medical problem with some genetic implications would swallow New York’s strong policy against disclosure as soon as adopted people approached middle age.”⁹⁶ While this case demonstrates the

⁹² *Golan v. Louise Wise Servs.*, 507 N.E.2d 275, 279 (N.Y. 1987).

⁹³ *Id.* at 276-77.

⁹⁴ *Id.* at 279 (Bellacosa, J., dissenting).

⁹⁵ *Id.* at 279.

⁹⁶ *Id.*

degree of difficulty in sufficiently showing a medical necessity, it is worth noting that two lower courts granted the adoptee's motion, while another judge dissented from the deciding opinion.⁹⁷

V. CONSTITUTIONALITY OF STATUTES UNSEALING ADOPTION RECORDS

While adoptees presented constitutional challenges in support of disclosure, birth mothers have put forth constitutional challenges in support of maintaining confidentiality. In particular, birth parents assert that disclosure violates their fundamental constitutional rights of privacy and confidentiality.⁹⁸

The leading case on this matter was brought by birth mothers challenging the constitutionality of a Tennessee statute that granted adoptees age 21 or older access to adoption records and birth information.⁹⁹ While birth parents, or any relative of the adoptee for that matter, may file a contact veto, they have no means of preventing the adoptee from obtaining any and all of the information contained in the adoption records.¹⁰⁰

The constitutional challenge rests on three separate grounds. First, the statute was challenged on the basis of familial privacy established by the Supreme Court, specifically as it related the guaranteed right to “marry, establish a home and bring up children.”¹⁰¹ Second, the freedom to make decisions concerning adoption was likened to the freedom to decide whether to

⁹⁷ In relevant part, the dissent stated: “Here, Mr. Golan has established good cause for the disclosure of the identity of his natural parents to the satisfaction of both courts below. Unlike the merely curious adoptee in *Matter of Linda F.M.*, Mr. Golan has established substantial and uncontroverted medical and professional reasons authorizing disclosure. . . . In light of the efforts of LWS, the relatively advanced age of the natural parents, and the fact that the adoptive parents were deceased, there was good and sufficient reason for the courts below to proceed expeditiously and without additional, unnecessary procedural safeguards.” *Id.* at 281 (Bellacosa, J., dissenting).

⁹⁸ *Doe 1 v. State*, 164 Ore. App. 543, 563 (1999).

⁹⁹ *Doe v. Sundquist*, 106 F.3d 702 (6th Cir. 1997).

¹⁰⁰ See LexisNexis, 3-13A Adoption Law and Practice [13-A.04].

¹⁰¹ *Doe v. Sundquist*, 106 F.3d at 705-06 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

carry a baby to term, thus warranting an extension of the right to reproductive privacy established in *Roe v. Wade*¹⁰² and its progeny.¹⁰³ Third, the argument was made that the law violated birth mothers' right to avoid disclosure of confidential information, stemming from dicta in *Whalen v. Roe*,¹⁰⁴ in which one type of privacy right described was "the individual interest in avoiding disclosure of personal matters."¹⁰⁵

In upholding the Tennessee statute, the Sixth Circuit methodically rejected each of these arguments. First, the statute does not prohibit birth mothers from marrying or raising a family, and simply does not extend as far as birth mothers sought to stretch it.¹⁰⁶ Second, because the statute does not *prohibit* placing one's child for adoption or adopting, it is not analogous to abortion laws *prohibiting* abortion.¹⁰⁷ Finally, in rejecting the third argument, the court factually distinguished this case from *Whalen*.

While birth mothers may not have prevailed in those states allowing unconditional access to adult adoptees, their interests were often cited in those cases in which adult adoptees' constitutional challenges for unsealing adoption records were rejected. For instance, the *Mills* Court described birth parents' interests as follows: "This natural parent has a right to privacy, a right to be let alone, that is not only expressly assured by [New Jersey statutes] but has also been recognized as a vital interest by the United States Supreme Court¹⁰⁸."¹⁰⁹

¹⁰² 410 U.S. 113 (1973).

¹⁰³ *Doe v. Sundquist*, 106 F.3d at 706.

¹⁰⁴ 429 U.S. 589 (1977).

¹⁰⁵ *Doe v. Sundquist*, 106 F.3d at 706.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See Stanley v. Georgia*, 394 U.S. 557 (1969).

VI. CONFIDENTIALITY vs. DISCLOSURE

Constitutional challenges aside, there are many reasons for and against confidentiality of adoption records. Nonetheless, as one might imagine, these rationales differ from one group of the adoption triad to the next. It is because of this balance, or perhaps imbalance, between the upsides and the downsides that members of a group are not unanimous in their views of confidentiality. While adoptees appear to be more united in their call for unsealing adoption records, the same cannot be said for birth parents and adoptive parents. The following will discuss each member-group of the triad separately. Due to the fact that adoptees are relatively united in their view that they should at least have the *option* because it is their *right* to be able to access their birth records, their section shall mostly be discussed in terms of “pros” and “cons,” rather than pitting one faction against another. The latter two sections will then shed some light on the reasons behind the lack of uniformity, discussing the competing views and interests of the factions within each of the parent groups.

A. Adoptees

In large part, the “pros” for adoptees of unsealing adoption records turn on issues discussed *supra*. Specifically, disclosure affords adoptees the opportunity to satisfy their need for construction of identity.¹¹⁰ Evidence suggests that adoptees tend to suffer from identity crisis, which is in large part due to ignorance of their origins.¹¹¹ Especially in a society that prides itself in diversity and vast traditions due to its composition of various cultures and religions, it is easy to understand why adoptees long to understand their heritage.

¹⁰⁹ Mills, 148 N.J. Super. at 313.

¹¹⁰ Cahn & Singer, *supra* note 51, at 173.

¹¹¹ *Id.*

Yet, knowledge of their genealogical background is not the exclusive driving force – the need to know may also simply be a byproduct of the mere prohibition against knowing, or an allure to the “forbidden fruit,” so to speak. Society is well-versed in the desire to want what you cannot have, and these circumstances appear to be no exception.¹¹² Additionally, and relatedly, the need to know may simply be a matter of principle. As one adoptee put it, disclosure “laws are not about searching or reunion, but about rights ... to access their birth records without hindrance.”¹¹³

Another advantage to disclosure is the maturation and mental development of adult adoptees. As one may recall, confidentiality was originally, at least in part, designed to protect adoptees from social stigma, as states sought to protect the children’s best interest.¹¹⁴ Likewise, states sought to shield adoptees “from possibly disturbing facts surrounding his or her birth and parentage.”¹¹⁵ However, such paternalistic intervention becomes unnecessary once adoptees reach adulthood, and indeed becomes resented, as evidenced by adult adoptees’ complaint against society continuing to treat them as “children,” thus interfering with their natural mental growth.¹¹⁶

On the other hand, one of the disadvantages to disclosure, and thus an advantage to confidentiality, is the potential risk of further psychological harm to the adoptee. Specifically, many adoptees, especially in the few states that do not even offer birth parents the choice to file a

¹¹² *Id.*

¹¹³ *Id.* at 175.

¹¹⁴ *See supra* Part II.

¹¹⁵ *Linda F.M.*, 418 N.E.2d at 1303.

¹¹⁶ *Kuhns*, *supra* note 41, at 271.

no-contact preference or contact veto, may attempt to contact their birth parents. Therefore, there is the potentiality of adoptees being rejected – in their view, possibly for a second time – by their birth parents, or at least the possibility of being met with a negative reaction.¹¹⁷ In that regard, birth parents, and specifically birth mothers, fall on both sides of the argument, as discussed next.

B. Birth Mothers (Parents)

To this point, much has been discussed concerning birth parents' right to privacy and reliance upon assurances of confidentiality. However, Concerned United Birthparents, Inc. ("CUB") – touting itself as “the only national organization focused on birthparents”¹¹⁸ – takes a strong position that “birthparents were never promised such secrecy and do not want it.”¹¹⁹ What is more, CUB supports adoptees in their quest for unrestricted access to their original birth records.¹²⁰ Many birth mothers feel that opening birth records could potentially provide them with certain opportunities if a reunion were to take place, such as explaining their reasons for relinquishment and forming a bond with a child that many wish they never gave up in the first place.¹²¹

On the other side of the spectrum, however, are those parents that indeed prefer both that their information never be disclosed to, and they never be contacted by, adoptees.¹²² This group

¹¹⁷ *Id.* at 272.

¹¹⁸ Concerned United Birthparents, Inc., *Mission Statement: Who We Are*, available at <http://www.cubirthparents.org/home/sample-page/who-we-are/>. (Accessed?)

¹¹⁹ Concerned United Birthparents, Inc., *Where We Stand: Open Records*, available at <http://www.cubirthparents.org/home/where-we-stand/position-papers/open-records/>.

¹²⁰ *Id.*

¹²¹ Kuhns, *supra* note 41, at 277.

¹²² *Id.*

of birthparents arguably does not need to form an organization or appoint a spokesperson, as courts have consistently perpetuated this view in the form of horror stories. For example, in *Mills*, the court described an incident in which an adoptee appeared at her birth mother's home unexpectedly, one that she shared with her husband who was unaware she gave birth to an illegitimate child before marriage. Following the encounter, the marriage was "disrupted" and there had not been reconciliation by the date the case was decided.¹²³

C. Adoptive Parents

Despite being the "third wheel" of the adoption triad in this debate, as well as lacking in prominent cases rejecting any of their alleged constitutional rights, adoptive parents have strong albeit contrasting opinions on the matter. Adoptive parents that oppose unsealing birth records do so primarily out of fear of interference by the birth parents, or worse, losing the child to the birth parents altogether.¹²⁴ Meanwhile, other adoptive parents found that their relationship with the adoptee improves subsequent to the adoptee meeting the birth parents, as curiosity is satisfied and fantasies of the perfect birth parents turn out to be just that – fantasies.¹²⁵

Another point of contention is the adoptee's age. Many who support adoptive parents' position that records should remain sealed do so to the extent that adoptees be granted access once they reach adulthood, as the adoptive parent then lose legal control over the adoptee.¹²⁶

¹²³ *Mills*, 148 N.J. Super. at 320; *see also* Linda F.M., 418 N.E.2d at 1303 (defending the "good cause" requirement, in part, by explaining that the sudden reappearance of an adoptee may "open the way for the child or others to blackmail the natural parents by threatening to disclose embarrassing circumstances surrounding the birth").

¹²⁴ Kuhns, *supra* note 41, at 277-78. Adoptive parents often fear the adoptee's interest in the birth parents is somehow a result of their shortfalls as parents. *Id.* at 278.

¹²⁵ *Id.*

¹²⁶ *Id.*

However, as one court put it: “Even though appellants are adults we must assume that they are still part of their adoptive families, families still in existence as to each of them which might be adversely affected by the release of information as to the names of natural parents or the unsealing of the adoption records.”¹²⁷

VII. ARGUMENT

Pointing out the flaws in a particular statute, weighing the pros and cons of open records statutes, and assessing the competing views of the members of the adoption triad is relatively easy. Putting pencil to paper, and coming up with a solution that is fair to all involved that would bring a sense of finality to this matter, is when this matter truly becomes difficult. As a threshold matter, one must accept the fact that there is no “master key” that would unlock the door leading to each party’s complete satisfaction. At best, one can conceptualize a provision that would represent a middle ground for all.

In setting the foundation, the provision must first follow in the steps of those states that have allowed adoptees to access their birth certificates at the age of majority.¹²⁸ As such, the “showing of good cause” element would be relegated to applying only to juveniles,¹²⁹ but would cease to apply to statutorily defined “adult” adoptees.

With the adoptees’ primary concern dealt with, the provision must then address the rights of the birth parents. As several states have already done,¹³⁰ birth parents should be afforded the opportunity to sign and submit contact vetoes in order to protect their privacy rights. Use of

¹²⁷ ALMA, 601 F.2d. at 1231.

¹²⁸ See *supra* Part III.

¹²⁹ See Iowa Code Ann. § 600.16A.

¹³⁰ See *supra* Part III.

contact preferences serves to appease the competing views among birth parents – those that oppose contact with the adoptee and those that would welcome it.

Certain issues that currently exist in states with such veto options must be resolved in order to truly effectuate the goal of the no-contact veto. Specifically, awareness as to the option of submitting this veto, along with the widespread issue of incomplete adoption records must be attended to.¹³¹ Accordingly, at the time birth parents place their children for adoption, they *must* sign either a contact veto or a consent form. Clearly, it would be an expensive endeavor to correct seemingly incomplete adoption records. Therefore, this author proposes that, absent a contact preference and upon locating the birth parents, the adoptee be required to enlist an intermediary service (state-run or private, may vary by state) to secure a contact preference from the birth parents prior to personally attempting to make contact.

Additionally, in order to ensure compliance with contact vetoes, criminal penalties would have to be established for deterrence purposes. To prevent opening the floodgates to civil litigation over negligent infliction of emotional distress and similar causes of action that may arise as a consequence of adoptees contacting birth parents, the statute should also explicitly ban any such civil actions in this context. Criminal penalties should suffice for the time being, until society is more experienced and better prepared to address any flaws that may come to light in the future.

The next element is based upon an aspect of the Tennessee provision enacted in 1996. The Tennessee legislature provided that birth parents could access information about adoptees only upon written consent of the adoptees.¹³² This author strongly supports Tennessee's

¹³¹ Cahn & Singer, *supra* note 51, at 156.

¹³² See Tenn. Code Ann. §§ 36–1–125 through–141; LexisNexis, 3-13A Adoption Law and Practice [13-A.04].

approach. By prohibiting birth parents from accessing information about the adoptees without first obtaining written consent, the provision reinforced the reality that the biological parents have relinquished all parental rights, and do not have grounds for obtaining that information. Allowing birth parents access to adoptees' information would also undermine the familial relationship cultivated by adoptees and their adoptive parents. For the latter reason, unlike adoptees, birth parents generally would not be permitted to seek assistance from a confidential intermediary in obtaining consent from the adoptee.

Lastly, adoptive parents' legitimate interests must also be attended to in any proposed legislation. Adoptive parents should be granted the right to make the important decisions for their adoptive children, just as any other parent for any other child, among them being the right to control the information the child receives concerning the adoption. This right would endure only until the adoptee reaches the age of majority, at which point the initial discussion in this section concerning adoptees would take effect.

However, due to the unique circumstances of this familial relationship, and the states' hand in forming that relationship,¹³³ certain exceptions must be contemplated. For instance, while the adoptive parents should be able to make most medical decisions relating to their adoptive children, states must take extra precautions when parents refuse to seek access to medical records contained in adoption records.¹³⁴ This is due to the possibility that adoptive parents may be acting in their own self-interest rather than the child's best interest. As such, if a state's child welfare agency notifies a court of such suspicions, the court should be granted the authority to hold a hearing and appoint a guardian *ad litem*. While these cases present

¹³³ See *supra* Part IV.A.ii.

¹³⁴ Adoptive parents may fear, for example, that accessing the records may spark the child's interest in learning more about the adoption and its biological parents.

monitoring issues, so do many child abuse and neglect cases, leaving the state to rely on medical professionals, teachers, and other concerned citizens to alert it of any suspicions.

VIII. CONCLUSION

Society's views of sealed adoption records have come a long way since Minnesota began sealing records in 1917. Nonetheless, with only seven states granting adoptees unfettered access to their birth certificates, adoptees and their supporters understand that there is still a long way to go. While it is not out of the realm of possibility that the Supreme Court will one day step in and decide the matter in adoptees' favor by upholding any of the constitutional challenges to sealing records, the more probable route to success is through state legislatures. Congress can set the tone by drafting a Model Act based on the proposed legislation outline above, but it is ultimately up to the individual states to adopt it. The aforementioned proposal would take into account the primary, legitimate interests of each member of the adoption triad – adoptees would get the unrestricted access to the information they seek, yet are restrained from interfering with birth parents' lives if the birth parents so wish, while adoptive parents are ensured of unnecessary interference into the upbringing of their adoptive child leading up to adulthood.

In closing, if after reading all of the above one is still unsure as to what caused and continues to perpetuate the “right to know” debate, consider this final, parting proposition:

Secrets are powerful. They are powerful producers of curiosity, action, guilt, rumor, and panic. They cause people to feel worthless. They demean and shame people. They haunt people and they obsess people. The impact of secrets is jolting and far-reaching.¹³⁵

That should suffice to conjure up sufficient personal experiences so as to fathom the legal and physical implications involved with certain deep, life-altering unknowns.

¹³⁵ Kuhns, *supra* note 41, at 259 (quoting Cynthia D. Martin, *Beating the Adoption Game*, 226 (1988)).