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THE SEALED ADOPTION RECORDS CONTROVERSY: BREAKING DOWN THE WALLS OF SECRECY

Jason Kuhns*

> "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."[1]

I. INTRODUCTION

When a child is adopted in the United States, the adoptee's original birth certificate and the records from the adoption proceedings are placed under seal.[2] States issue new birth certificates pronouncing the adoptee as born to the adoptive parents.[3] Nearly every state has enacted legislation to permanently seal these records;[4] thus, even adult adoptees do not have an absolute right to access them.[5] This process has created a clash between adult adoptees who desire access to these original records identifying their biological parents and the states' policy of secrecy. States have made some progress in this "sealed records"

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1. CYNTHIA D. MARTIN, BEATING THE ADOPTION GAME 226 (1988).

2. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 10,434 (West 1994).

3. *See, e.g., id.* § 10,433.

4. Alaska and Kansas currently allow adoptees access to their original birth certificates upon reaching majority. *See* ALASKA STAT. § 18.50.500 (1991); KAN. STAT. ANN. § 65-2423 (1992).

5. Although these states permanently seal the adoptee's original birth certificate and the records from the adoption proceedings, statutory provisions exist for opening these records upon court order. *See infra* notes 33-38 and accompanying text.

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controversy by amending their statutes to reflect changing social mores.[6] However, to keep pace with societal needs, states must go further in allowing adult adoptees easier access to their original birth records.

This article will discuss the statutory history of adoption in the United States and advocate why a present day understanding of the interests of the parties to the adoption process requires that adoptees have greater access to these records. The author will examine the reasons why current statutory approaches do not adequately address adoptees' needs and recommend a procedural device that would sufficiently balance the interests of the parties to this controversy.

II. THE HISTORY OF SEALED RECORDS IN THE UNITED STATES

English common law did not recognize the practice of adoption.[7] Thus, in the United States adoption law is entirely a creation of statute.[8] In 1851 the Massachusetts Legislature passed the first general adoption law.[9] From the beginning, American adoption law protected the "best interests of the child."[10] The first statutes did not bar access to court records,[11] for adoption

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6. *See infra* notes 29-47 and accompanying text.

7. Adoption was not introduced into common law because the concept conflicted with the principles of inheritance. The English held the belief that land should only be inherited by blood relatives. *See* Leo A. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 745-46 (1956); James R. Carter, Comment, *Confidentiality of Adoption Records: An Examination*, 52 TUL. L. REV. 817, 817-18 (1978).

8. Because United States law has its roots in English common law which does not provide for adoption, adoption law had to be created by statute. "In the absence of common law precedent, American jurisdictions did not develop the concept of adoption jurisprudentially but deferred to legislative authority." Carter, *supra* note 7, at 818. *See also* Mills v. Atlantic City Dep't of Vital Statistics, 372 A.2d 646, 649 (N.J. Super Ct. Ch. Div. 1977).

9. 1851 Mass. Acts ch. 324. *See* Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 465 (1971).

10. The attention to the needs of the parentless child was a break from the traditional focus on the childless parent. Historically, children were recognized only as property or 'chattel' of their parents or as wards of the state. Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L.Q. 173 (1983). *See also* Nancy Sparks, Note, *Adoption: Sealed Adoption Record Laws—Constitutional Violation or a Need for Judicial Reform?*, 35 OKLA. L. REV. 575, 577-78 (1982) (stating that before the statutory law, the primary purpose of adoption was to provide the adopting parents with an heir).

11. *See* Joan H. Hollinger, *Aftermath of Adoption: Legal and Social Consequences,*

proceedings were generally informal, and confidentiality was not a significant issue.[12]

The New York law of 1916 was among the first statutes to provide for confidentiality by mandating that illegitimacy not appear in the transcript of the judicial proceedings.[13] This statute "barred all persons from inspecting the files and records of an adoption *except* for the parties to the adoption."[14] Thus, confidentiality merely concealed the adoption proceedings from the public, not from the actual participants.

Institutionalized secrecy was introduced into American adoption in 1917 with Minnesota's enactment of the nation's first sealed records law closing adoption files from inspection by adult adoptees, their birth parents, and the general public.[15] Other states were slow to follow Minnesota's lead, but in 1938, the Child Welfare League of America began promoting secrecy in adoption as official policy.[16] By the end of the 1940's, most states had followed suit.[17] These "sealed records" laws purported to erase the stigma of illegitimacy by ensuring equal status and treatment of adopted and non-adopted offspring.[18] States began to view the adoptee as "reborn" to a new family and possessing a new identity.[19] States sealed the original birth certificate and replaced it with an amended one.[20]

Beyond the purpose of protecting the welfare of the adoptee, the state legislatures intended the statutes to foster productive relationships between adoptees and adoptive parents without the threat of interference from the biological parents.[21]

ADOPTION LAW & PRACTICE, 13-1, 13-5 n.6 (Joan H. Hollinger ed., 1991).

12. *Id.* at 13-4 to 13-5.

13. 1916 N.Y. Laws ch. 453, § 113. *See* Hollinger, *supra* note 11, at 13-5.

14. *Id.*

15. 1917 Minn. Laws ch. 222, p.337. See HAL AIGNER, ADOPTION IN AMERICA COMING OF AGE 8 (1992); Hollinger, *supra* note 11, at 13-5.

16. AIGNER, *supra* note 15, at 8.

17. *Id.*

18. ARTHUR D. SOROSKY ET AL., THE ADOPTION TRIANGLE 37 (1978) (stating that adoption experts felt the adoptee should not be held responsible for the sins of the parent).

19. *Id.* at 38.

20. *Id.*

21. *See, e.g.*, Mills v. Atlantic City Dep't of Vital Statistics, 372 A.2d 646, 649 (N.J. Super. Ct. Ch. Div. 1977); *In re* Anonymous, 390 N.Y.S. 2d 779, 781 (1976).

Further, states believed confidentiality afforded the biological mother a chance to rebuild her life with the assurance that the ordeal would not become public knowledge.[22]

Secrecy has continued to pervade the adoption process, but during the 1970's adoptees organized[23] and began to assert a "right to know" the truth about their origins.[24] In response to these challenges, state legislatures again began amending their statutes to recognize the concerns of adoptees.[25] These amendments generally allow adoptees access to their original birth records under special circumstances which are defined as "good cause."[26] Additional amendments provide for the release of identifying information to adoptees if the birth parents file their consent with a registry.[27]

III. CURRENT STATUTORY APPROACHES

No statute in the United States allows adoptees unlimited access to the records of their adoption proceedings. However, there are currently two states which allow adoptees of legal majority access to their original birth certificates which disclose the identity of their biological parents.[28] Most states have enacted

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22. *See, e.g., Mills*, 372 A.2d at 649; Sparks, *supra* note 10, at 578.

23. In 1972, Florence Fisher founded the Adoptees' Liberty Movement Association, now the ALMA Society. Since that time, the number of searchers has increased dramatically, and orthodox American adoption has been held to account for its philosophy and procedures for the first time in its history. HAL AIGNER, FAINT TRAILS: A GUIDE TO ADULT ADOPTEE-BIRTH PARENT REUNIFICATION SEARCHES 7 (1986). Aigner states that searching took root as a movement with the founding by adoptee Jean Paton of the country's first search self-help organization, Orphan Voyage, in 1953. Aigner suggests that public recognition was slow to gather possibly due to the Civil Rights Movement, the resurgence of political feminism, the Vietnam protests, and other causes of the ensuing time, competing more urgently for public attention. *Id.*

24. Adoptees argue that they have a constitutional right to their original birth records. *See infra* notes 49-62 and accompanying text. Furthermore, many adoptees feel a compelling psychological need to know the identity of their birth parents. *See infra* notes 88-105 and accompanying text.

25. *See infra* notes 33-47 and accompanying text for a discussion of these statutes.

26. *See, e.g.*, FLA. STAT. ANN. § 63.162 (West Supp. 1993). *See infra* note 33 for a list of factors which are balanced to determine if "good cause" exists.

27. *See, e.g.*, CAL. FAMILY CODE §§ 9203, 9204 (West Ann. 1993) (replacing CAL. CIV. CODE §§ 229.40, 229.50); N.Y. PUB. HEALTH LAW §§ 4138-c, 4138-d (McKinney Supp. 1993).

28. ALASKA STAT. § 18.50.500 (1991); KAN. STAT. ANN. § 65-2423 (1992). These states allow adult adoptees to obtain their original birth certificates upon request without the necessity of a judicial or administrative hearing. The original birth certificate provides an

provisions allowing adoptees access to non-identifying information.[29] These states now require agencies or private intermediaries to complete comprehensive profiles of adoptees and their biological parents at the time of adoption placement.[30] Although nearly every state gathers and shares background information available at the time of adoption, state policies still vary considerably regarding the maintenance and disclosure of such non-identifying information subsequent to placement.[31] While non-identifying information is more accessible today, states continue to prohibit disclosure of identifying information except under special circumstances.[32]

A. THE "GOOD CAUSE" STATUTES

Most states which permanently seal adoption records provide for the release of information identifying biological parents upon a judicial finding of "good cause."[33] This burden is easiest to establish if documented medical or psychiatric needs exist and the adoptee cannot obtain the information elsewhere.[34] A

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adoptee with the identities of his or her birth parents.

29. *See* Hollinger, *supra* note 11, at 13-12 to 13-13. Non-identifying information generally consists of the date and place of the adoptee's birth; the age of the biological parents at the time of placement and a description of their general physical appearance; the race, ethnicity and religion of the biological parents; the medical history of the biological parents and adoptee; whether the termination was voluntary or court-ordered; the facts and circumstances relating to the adoptive placement; the age and sex of any other children of the biological parents at the time of adoption; the educational levels of the birth parents, their occupations, interests, skills, etc.; and any supplemental information about the medical or social conditions of members of the biological family provided since the adoption was complete. *Id.* at 13-13 to 13-14.

30. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-746 and § 45a-748 (West 1993) (stating that the agency must provide certain information, if known, about the biological parents to the adoptive parents and mandating the exercise of a reasonable effort by the agency to obtain such information as a precondition to the granting of a decree of adoption).

31. Hollinger, *supra* note 11, at 13-14.

32. *Id.* at 13-20 to 13-21.

33. *Id.* at 13-21. In determining whether good cause for the release of identifying information exists, courts uniformly 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. *In re* George, 625 S.W.2d 151, 156 (Mo. App. 1981); *In re* Assalone, 512 A.2d 1383, 1385 (R.I. 1986).

34. *See, e.g.*, ALMA Society v. Mellon, 601 F.2d 1225, 1233 (2d Cir.), *cert. denied*, 444 U.S. 995 (1979) (acknowledging that an appropriate showing of psychological trauma, medical need, or of a religious identity crisis would require the New York courts

few courts have allowed adoptees to contact their biological parents in the hope of obtaining more accurate and up-to-date medical information,[35] but the mere desire of adoptees for data about potential susceptibility is most often found insufficient to justify releasing names of biological parents.[36] Courts will occasionally allow disclosure of adoption records to adult adoptees who offer proof of a serious psychological disorder stemming from an identity crisis.[37] However, mere curiosity will not suffice.[38]

B. Mutual Consent Registries

In addition to a "good cause" statute, at least nineteen states have enacted some form of a mutual consent registry where parties to the adoption process can indicate their willingness to meet.[39] Both the biological parent and adult adoptee

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under their own statute to grant permission to release all or part of the sealed adoption records).

35. *See, e.g., In re* Hayden, 435 N.Y.S.2d 541 (1981) (holding that an adult adoptee who feared she was at risk of developing uterine cancer because her biological mother might have taken DES while pregnant is entitled to inspect her adoption records).

36. *See, e.g.*, Golan v. Louise Wise Services, 514 N.Y.S.2d 682, 686 (1987). The court states:

> [A]s 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. 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.

Id.

37. *See, e.g., In re* Dixon, 323 N.W.2d 549, 552 (Mich. App. 1982) (psychological reasons may be sufficient to open sealed records); *In re* Assalone, 512 A.2d at 1386 (severe psychological need to know one's origins may present compelling circumstances that constitute good cause to permit adopted adults access to their birth records); Bradey v. Children's Bureau, 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).

38. *See, e.g., In re* Maples, 563 S.W.2d 760, 766 (Mo. 1978) (en banc) (holding a thinly supported claim of "psychological need to know" will not support a finding of good cause); *In re* Assalone, 512 A.2d at 1389 (implying that mere curiosity does not amount to good cause).

39. *See* Hollinger, *supra* note 11, at app. 13-A (Supp. 1992) for a complete list of these states. "Typically, biological parents are given the chance to manifest their consent to the release of identifying information, either at the time of the adoption, or later upon their own initiative." Melissa Arndt, Comment, *Severed Roots: The Sealed Adoption*

must file a formal consent to the mutual disclosure of their identities; otherwise no identifying information is released.[40] Once a "match" occurs, a state administrator or private adoption agency will release the identifying information to the consenting parties.[41]

These statutes are considered passive in nature because the states typically prohibit those involved with the registry from assisting either the biological parent or the adoptee in actively searching for each other.[42] The mutual consent registries are designed as a short cut to waive the good cause requirement when both parties consent.[43] Thus, where a biological parent's consent is not on file, the mutual consent states force the adoptee to challenge confidentiality by meeting the state's "good cause" standard.[44]

C. "Search and Consent" Procedures

At least seventeen states have amended their statutes to more actively facilitate the exchange of information between adoptees and biological parents than occurs with passive mutual consent registries.[45] These "search and consent" laws authorize public or private agencies to assist adult adoptees in locating biological parents to ascertain whether they are willing to disclose their identities or actually meet with their adoptee.[46] Where the biological parents refuse consent, these states will not release identifying information unless the adoptee can establish "good

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Records Controversy, 6 N. Ill. U. L. Rev. 103, 121 (1986). Adult adoptees are allowed to manifest in writing their consent to release of identifying information about themselves. Consent can be revoked by either party at any time. *Id.*

40. *See, e.g.*, Cal. Family Code § 9203 (West Ann. 1993) (replacing Cal. Civ. Code § 229.40).

41. *See, e.g., id.* § 9204 (replacing § 229.50); N.Y Pub. Health Law §§ 4138-c, 4138-d (McKinney Supp. 1993).

42. *See, e.g.*, Cal. Family Code § 9204 (West Ann. 1993) (replacing § 229.50); N.Y Pub. Health Law §§ 4138-c, 4138-d (McKinney Supp. 1993) ("Any employee of the department or any employee of an authorized agency who solicits or causes another to solicit a registation . . . shall be guilty of a misdemeanor . . . .").

43. Hollinger, *supra* note 11, at 13-41.

44. *See, e.g.*, Fla. Stat. Ann. § 63.162 (West Supp. 1993).

45. *See* Hollinger, *supra* note 11, at app. 13-A (Supp. 1992) for a complete list of these states.

46. *See, e.g.*, 23 Pa. Cons. Stat. Ann. § 2905 (Purdon Supp. 1993); Ala. Code § 26-10A-31(j) (1992); Colo. Rev. Stat. § 19-5-304 (West 1990); Wis. Stat. Ann. § 48.433 (West Supp. 1993).

cause."[47]

Neither the "good cause" nor the "mutual consent" variations of statutory change have satisfied adoptees in their quest for information about their backgrounds, for today adoptees challenge these statutes more adamantly than ever.[48] Adoptee activists demand legislative reform, for they feel that these statutes do not adequately address their psychological needs or their constitutional rights.

IV. THE CONSTITUTIONAL CHALLENGES

Adoptees argue that the sealed records statutes are unconstitutional.[49] They contend that denying them access to these records abridges their constitutional rights to privacy, to receive important information, and to equal protection of the law.[50] They base the right to privacy argument on Supreme Court cases which recognize a right to privacy emanating from the penumbra of express guarantees of the First, Fourth, Fifth, and Ninth Amendments which apply to the states through the Fourteenth Amendment.[51] Adoptees specifically argue that, because

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47. *See, e.g.*, GA. CODE § 19-8-23 (1991); WIS. STAT. ANN. § 48.433 (West Supp. 1993).

48. "[T]he roster of search self-help organizations throughout the country carries more than 200 entries with names such as Adoptees as Adults, Adoptees in Search, Concerned United Birthparents, Lost and Found, Truth Seekers in Adoption, and Yesterday's Children. A handful have chapters in more than one state. . . . Many are joined in loose affiliation under the umbrella of the American Adoption Congress. New groups regularly form; a few dissolve sporadically." AIGNER (Faint Trails), *supra* note 23, at 8.

49. *See, e.g.*, ALMA Society v. Mellon, 601 F.2d 1225, (2d Cir.), *cert. denied*, 444 U.S. 995 (1979); Yesterday's Children v. Kennedy, 569 F.2d 431 (7th Cir. 1977), *cert. denied*, 432 U.S. 904 (1978); Mills v. Atlantic City Dep't of Vital Statistics, 372 A.2d 646 (N.J. Super. Ct. Ch. Div. 1977); *In re* Roger B., 418 N.E.2d 751 (Ill. 1981); *In re* Maples, 563 S.W.2d 760 (Mo. 1978) (en banc).

50. *See, e.g.*, *Yesterday's Children*, 569 F.2d 431; *Mills*, 372 A.2d 646; *In re* Roger B., 418 N.E.2d 751; *Maples*, 563 S.W.2d 760; *ALMA Society*, 601 F.2d 1225. Adoptees have based a fourth constitutional argument on the Thirteenth Amendment which prohibits slavery and involuntary servitude. Adoptees argue that this prohibition extends to "badges or incidents" of slavery, and severing the parental-child relationship is one of the incidents the framers of the amendment intended to address. *Id.* at 1236-37.

51. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Roe v. Wade, 410 U.S. 113, 152-53 (1973). Justice Stewart's concurring opinion in *Roe* expressed the right of privacy as a "freedom of personal choice in matters of marriage and family life [in-

the due process clause of the Fourteenth Amendment extends protection to an individual's right to privacy within family relationships,[52] it must also protect an individual's right to know his or her true identity.[53] Thus, adoptees contend that they have a fundamental right to know the identities of their biological parents, for such information is necessary to achieve their own identity development.[54]

Adoptees also rely on the First Amendment right to receive information as a challenge to the sealed records statutes.[55] They assert that denying them access to their original birth records interferes with their right of freedom to participate in and contribute to social and governmental decision-making processes.[56] To develop into integrated, healthy people capable of intelligent participation, adoptees argue that they need access to information that will contribute to their self-fulfillment.[57] Because the information adoptees desire will enhance their sense of identity and therefore their ability to participate intelligently, adoptees

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cluding] the right of the *individual*, married or single, to be free from governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child." *Id.* at 169-70.

52. *See, e.g., Griswold*, 381 U.S. at 485 (right of privacy includes married couples' use of contraception); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (unmarried person has a right to use contraception); *Roe v. Wade*, 410 U.S. at 153 (woman has a right to terminate her pregnancy). *See also* Cythia A. Rucker, *Texas Adoption Laws and Adoptees' Right of Access to Confidential Records*, 15 ST. MARY'S L. J. 153, 162 n.42 (1983) (listing various other Supreme Court decisions which have recognized areas within the family relationship that are protected by the right of privacy).

53. *See, e.g., Mills*, 372 A.2d at 650; *Maples*, 563 S.W.2d at 762; *ALMA Society*, 601 F.2d at 1231; *Roger B.*, 418 N.E.2d at 753.

54. *See, e.g., ALMA Society*, 601 F.2d at 1231; *Mills*, 372 A.2d at 650. Because of the necessary interrelationship between the individuals' identity and their fundamental decision-making, adoptees argue that the right to privacy must also protect the individuals' control over the development of identity. "[I]t is difficult . . . to separate a person's identity from his choices in fundamental relationships. The core of his identity is indeed more private than his role as a parent or as a sexual partner, and any interference with its development necessarily affects his private decisions." Carolyn Burke, Note, *The Adult Adoptee's Constitutional Rights to Know His Origins*, 48 S. CAL. L. REV. 1196, 1208 (1975).

55. *See Mills*, 372 A.2d at 652; *Maples*, 563 S.W.2d at 762; *Roger B.*, 418 N.E.2d at 752.

56. Kathryn J. Giddings, *The Current Status of the Right of Adult Adoptees to Know the Identity of their Natural Parents*, 58 WASH. U. L. Q. 677, 689 (1980); Burke, *supra* note 54, at 1204-05. "To the extent it is true that only people who have developed fully and healthily are capable of intelligent decisionmaking, the protection of the First Amendment would seem to extend to information which affects that development, even though unrelated to any particular societal decision." *Id.* at 1205.

57. Burke, *supra* note 54, at 1205.

maintain that the right to receive information must protect their access to their original birth records.[58]

The equal protection argument arises from the fact that non-adoptees can readily access their birth records.[59] Adoptees argue that the adopted status shares the same burdensome characteristics that have made illegitimacy a "quasi-suspect class";[60] thus, legislation which discriminates against them should be subject to heightened scrutiny.[61] Adoptees assert that the sealed records statutes would fail a heightened scrutiny test because they do not advance an important or compelling state interest.[62]

No federal or state court has accepted these constitutional challenges.[63] Although recognizing that adoptees have a general right to privacy and to receive information, the courts have rejected the argument that adoptees have a fundamental right to learn the identities of their biological parents.[64] The courts maintain that no constitutional or personal right is unconditional and absolute to the exclusion of the rights of all other

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58. *Id.* at 1205-06.

59. *See, e.g., Mills*, 372 A.2d at 652; *ALMA Society*, 601 F.2d at 1233; *Maples*, 563 S.W.2d at 764.

60. Leslie Allan, *Confirming the Constitutionality of Sealing Adoption Records: ALMA Society v. Mellon*, 46 BROOK. L. REV. 717, 731 (1980). Adoptees argue:

> Because most adoptees are illegitimate, legislation differentiating adoptees as a class should be given at least the same level of judicial scrutiny as that affecting illegitimates . . . . [T]he state treats adoptees less favorably than it treats illegitimates by denying adoptees the knowledge of their natural parents' identities; therefore, legislation affecting adoptees should be given more rigorous scrutiny than that given to legislation which affects illegitimates.

Id.

61. *See, e.g., Mills*, 372 A.2d at 653; *ALMA Society*, 601 F.2d at 1233; *Maples*, 563 S.W.2d at 764.

62. *See, e.g., ALMA Society*, 601 F.2d at 1233; *Maples*, 563 S.W.2d at 764; *Roger B.*, 418 N.E.2d at 756.

62. Hollinger, *supra* note 11, at 13-44.

64. *See, e.g., Mills*, 372 A.2d at 650. "[W]hile information regarding the heritage, background and physical and psychological heredity of any person is essential to that person's identity and self-image, nevertheless it is not so intimately personal as to fall within the zones of privacy implicitly protected in the penumbra of the Bill of Rights." *Id. See also Roger B.*, 418 N.E.2d at 754; *ALMA Society*, 601 F.2d at 1233. The ALMA court refused to simply hold that because adoptees' interests in knowing the identities of their biological parents does not fall within the recognized categories of "privacy", it is not constitutionally protected. Rather, the court analyzed the asserted right in light of the social context in determining the right is not fundamental. *Id.* at 1231-33.

individuals.[65] The right to privacy and to information asserted by adoptees directly conflicts with the right to privacy of birth parents to be left alone.[66] Due to these conflicting interests, the sealed records statutes are upheld because they bear a rational relationship to the permissible state objective of protecting the integrity of the adoption process.[67] Although the adoptee may no longer need the state's protection upon reaching adulthood, courts state that the birth parents' interest in confidentiality may actually become stronger.[68]

Courts have also rejected the equal protection argument.[69] Courts state that the adopted status does not share the burdensome characteristics that have made illegitimacy a quasi-suspect class;[70] thus, classification based on the adopted status does not require intermediate or strict scrutiny.[71] Even assuming that the adopted status classification was subject to intermediate review, courts maintain that the sealed records statutes would still not violate the equal protection clause because the statutes are substantially related to an important state interest.[72] Moreover,

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65. *See, e.g.*, *Mills*, 372 A.2d at 652; *ALMA Society*, 601 F.2d at 1233.

66. *See, e.g.*, *ALMA Society*, 601 F.2d at 1231; *Mills*, 372 A.2d at 651; *Roger B.*, 418 N.E.2d at 755-56.

67. *See, e.g.*, *Maples*, 563 S.W.2d at 762-64; *Mills*, 372 A.2d at 651-52. The sealed records statutes represent the legislative judgment that confidentiality promotes the welfare of all parties to the adoption relationship. Adoptees benefit from the removal of the illegitimacy stigma. Adoptive parents and birth parents benefit from the freedom of possible intrusion in the future. *Roger B.*, 418 N.E.2d at 754-55.

68. *See Mills*, 372 A.2d at 651 (stating that it is highly likely that the birth parent has established new relationships and chosen not to reveal the facts of such an emotional experience that occurred in the past). *See also Roger B.*, 418 N.E.2d at 755-56; *ALMA Society*, 601 F.2d at 1235-36.

69. *See, e.g.*, *Mills*, 372 A.2d at 653-54; *ALMA Society*, 601 F.2d at 1233-36; *Roger B.*, 418 N.E.2d at 756-57.

70. *See Mills*, 372 A.2d at 653. "An adoptee does not derive [the adopted status] from an accident of birth but as a result of a legal proceeding which has as the very essence of its purpose the protection of the adoptee's best interest." *Id. See also ALMA Society*, 601 F.2d at 1234 (stating that the distinguishing trait between adult adoptees and non-adopted illegitimates is not illegitimacy, but the adopted status). "Discrimination against illegitimates is generally so treated because of the illogic and injustice of stigmatizing a child in order to express disapproval of the parents' liasons . . . . If adopted persons experience social stigma, it is not as intense or pervasive as illegitimates suffer." *Id.*

71. *See, e.g.*, *Mills*, 372 A.2d at 653; *ALMA Society*, 601 F.2d at 1234; *Roger B.*, 418 N.E.2d at 756.

72. *ALMA Society*, 601 F.2d at 1234; *Mills*, 372 A.2d at 653 ("The state has more than a rational basis, it has a compelling interest."). *See supra* notes 18-22 and accompanying text for a discussion of the legislative purposes behind sealed records statutes.

courts note that the "good cause" provisions allowing for the release of adoption records substantially mitigates the possible overbreath of the statutes.[73]

Although the United States Supreme Court has not addressed the sealed records controversy, it is highly unlikely adoptees will ever establish a constitutional right of access to their birth records.[74] Thus, the strongest possibility for further open access to birth records lies in legislative reform.[75] Adoptees must persuade their state legislatures to reevaluate the interests involved in light of present day social mores. By forcing their respective legislatures to take a closer look at the sealed records controversy, adoptees can demonstrate that the need for state-imposed secrecy no longer exists.

V. CHANGING VIEWS ABOUT SECRECY

The "sealed records" policy in adoption served adoptees, birth parents, and adoptive parents extremely well at a time when society was not generally well-accepting of out-of-wedlock pregnancies or single parent families.[76] The public not only accepted the closure of records but demanded such a policy.[77] Society has changed a great deal since sealed records first became widely accepted as the perfect solution to a complex problem.[78]

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73. *See, e.g., ALMA Society*, 601 F.2d at 1236; *Roger B.*, 418 N.E.2d at 757.

74. *See, e.g.*, Allan, *supra* note 60, at 726; Michael J. Hanley, *A Reasonable Approach to the Adoptee's Sealed Records Dilemma*, 2 OHIO N. U. L. REV. 542, 549-50 (1975).

75. *See, e.g.*, Handley, *supra* note 74, at 552; Carter, *supra* note 7, at 852-53.

76. *See, e.g., Task Force on Confidentiality in the Adoption Program*, A REPORT TO THE CALIFORNIA STATE DEP'T OF HEALTH, July, 1977, at 1; ELINOR B. ROSENBERG, THE ADOPTION LIFE CYCLE 1-2 (1992). Rosenberg states:

> [A]doption of children was commonly thought to be the perfect solution to a myriad of problems: birth parents who chose to continue a pregnancy but could not raise their child could expect the child to be well cared for and supported; infertile couples who longed for a child were able to fulfill their wishes for a family; fertile couples who chose to enlarge their families while meeting a social need could do so; children who needed parents were provided with a welcome home; and child welfare agents in the legal, social, and medical systems were able to offer a solution that, for once, was opposed by no one.

Id.

77. REPORT TO THE CALIFORNIA STATE DEP'T OF HEALTH, *supra* note 76, at 1.

78. ROSENBERG, *supra* note 76, at 10.

The sexual revolution of the 1960's, changes in the social situation of women in relation to sex and parenthood, changing attitudes about illegitimacy, the availability of contraceptives, and the legitimization of abortion have all contributed to changing views about the confidentiality of birth records.[79] At the same time, some of the basic social and psychological beliefs that supported the "as if"[80] quality of the adoption system began to change.[81] These shifts have altered the concept of adoption as a perfect solution and raised many questions about existing adoption practices.[82]

Today, people who study adoption realize that while confidentiality is in the best interests of adoptees as children, this does not always hold true for adoptees who have reached adulthood.[83] Moreover, many biological and adoptive parents have vocalized that confidentiality is not in their best interests either.[84] Surely a few members of the adoption triad oppose disclosure; nevertheless, the interests of these participants must be balanced against the overwhelming majority of members who strongly support openness. The interests of a small minority in secrecy should not impose secrecy on everyone else.

A. THE ADOPTEES' BEST INTERESTS

A common complaint of adult adoptees is that society continues to treat them as "children," and they are never allowed to grow up.[85] Adoption legislation forgets that what is in adoptees'

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79. *See id.*; John Triseliotis, *Obtaining Birth Certificates, in* ADOPTION 43, (Philip Bean ed. 1984).

80. It was as if the birth mother had never borne the child, and as if the adoptive mother had. ROSENBERG, *supra* note 76, at 10.

81. "One important shift was away from the belief in the predominance of nurture over nature as an influence on individual development . . . . New information about genetic structure and heredity shifted this view so that both nature and nurture were seen as influential, the balance different between each individual." *Id.*

82. *See id.* at 11.

83. *See infra* notes 88-105 and accompanying text.

84. *See infra* notes 112-130 and accompanying text.

85. SOROSKY, *supra* note 18, at 121. The authors mention how an adoption agency refused to release background information to a forty-year-old adoptee. The agency administrator informed the woman that she would need to obtain permission from her seventy-six-year-old adoptive mother. *Id.* at 122. The authors also quote an adoptee as saying:

> In a way, I am very angry at the law. The law still refers to me as a child when they refer to "in the best interests of the

best interests as children may no longer be so once they have reached adulthood.[86] Adoptees argue that they no longer need the state's protection as adults, for they are quite capable of deciding what is in their best interests.[87]

The limited research[88] on adult adoptees suggests that they often suffer from identity crises[89] due to a lack of knowledge about their origins.[90] The ignorance of their true genealogical

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> child." I resent that because in my opinion, I am twenty-one years old and I feel I am quite old enough, mature and responsible enough to be making my own decisions. I don't feel as if any decision concerning my life should be left up to a judge or anyone else.

Id. at 121.

86. *See* Patricia Gallagher Lupack, Note, *Sealed Records in Adoptions: the Need for Legislative Reform,* 21 CATH. LAWYER 211, 217 (1975).

87. *See, e.g.*, SOROSKY, *supra* note 18, at 146. The authors quote an adoptee as stating:

> No one, no social worker ha[s] the right to decide for me what I should know about me. If I don't like what I find out, that's my problem. I'm an adult in every other way, and I make my own decisions about what risks I take, and I face the consequences, too.

Id.

88. Although much research exists on adoption, Betty Jean Lifton mentions that there has been very little research on adopted adults. She suggests that this lack of research reflects society's difficulty in thinking of the adoptee who has reached adulthood. BETTY JEAN LIFTON, LOST & FOUND 63 (1988). Hal Aigner suggests that because secrecy has imposed limited access to adoptees, birth parents, and adoptive parents as study subjects, much of the research about the adoptive experience may be considered of dubious value at best. AIGNER (Coming of Age), *supra* note 15, at 19.

89. *See, e.g.*, SOROSKY, *supra* note 18, at 14. The authors state that an adoptee:

> [I]gnorant of his/her true background, despite a healthy, nurturing relationship with his/her adoptive parents and a lack of severe problems in his/her relationships with peers and others, will be handicapped in the psychohistorical dimension of identity . . . . The psychohistorical dimension includes that part of man's identity that relates to his/her sense of genealogy, an existential concern that views man as going through a cycle of life stages which are connected to the previous and future generations through the phenomena of birth and death.

Id. See generally Paul Sachdev, *Unlocking the Adoption Files: A Social and Legal Dilemma*, ADOPTION: CURRENT ISSUES AND TRENDS 141, 142-46 (Sachdev, ed. 1984) (discussing various studies which indicate the identity problems which adoptees face).

90. *See, e.g.*, Sachdev, supra note 89, at 143. Sachdev states:

> While all children during their adolescence experience in varying degrees the problems of identity formation, adopted adolescents are particularly vulnerable to interference with the development of their self-identity because of their sense of deprivation of "rootedness" and linkage with their biological past.

background causes many adoptees to feel a deeply-rooted psychological need to learn the identities of their birth parents.[91] The fact that adoptees have two sets of parents can complicate the formation of their self-identities because this fact seems to set adoptees apart from the vast majority of people, including their adoptive family.[92] Thus, the search for origins can have a beneficial effect on adoptees' sense of identity.[93] Even when adoptees are disappointed by what they discover, they can still benefit from learning the truth.[94]

Evidence exists that adoptees make up a disproportionately high percentage of psychiatric patients in the United States.[95] Some adoptees fear the possibility of incest with an unknown biological relative.[96] Many adoptees concern themselves with the hereditary and genetic aspects of illness, physical features, and life span.[97] They experience further frustration for not being able to pass this information on to their own children.[98] Some adult adoptees appear to suffer from low self-esteem and seem to be angry at the world which has withheld knowledge of their birthright from them.[99] Adoptees have used this research as am-

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Id. As identity formation is a life-long process, adoptees' need to know their origins continues into adulthood. Burke, *supra* note 54, at 1202. Betty Jean Lifton speaks of the adoptive adult as "the child now grown, although it is hard to know where one ends and the other begins." LIFTON, *supra* note 88, at 62.

91. *See* JOHN TRISELIOTIS, IN SEARCH OF ORIGINS 154 (1973).

92. Burke, *supra* note 54, at 1201. "In addition, the adoptee is totally deprived of that sense of what makes his family unique which would come simply from observing and talking with his natural parents." *Id.*

93. *See, e.g.*, Burke, *supra* note 54, at 1203; Sachdev, *supra* note 89, at 145; TRISELIOTIS, *supra* note 91, at 139. Triseliotis mentions various comments of adoptees after conducting searches including: "knowing where I stand", being "more at peace with myself", "contented", "much happier", "having bridged the gap". *Id.*

94. *See, e.g.*, Burke, *supra* note 54, at 1203; TRISELIOTIS, *supra* note 91, at 140.

95. *See, e.g.*, SOROSKY *supra* note 18, at 96; ROSENBERG, *supra* note 76, at 118.

96. *See, e.g.*, ROSENBERG, *supra* note 76, at 113; SOROSKY *supra* note 18, at 124. Sorosky et al. mention one case where a young man brought his fiancée home to meet his parents. Upon looking at the young woman and learning that she was adopted, the mother became immediately uncomfortable. "It didn't take too long for her to determine that this was the grown-up version of the child she had relinquished for adoption twenty years earlier." *Id.*

97. *Id.* at 126. *See also* Jackie Weber, *'Who Am I?'—a Basic Right*, L.A. TIMES, July 7, 1990, at 7b. Weber, an adoptee, asks "WHO AM I? I still don't know. At 22, I don't know whose nose I have, my genealogy, my family medical history, why I weighed about as much as a cantaloupe at birth. These are gaping holes in my life." *Id.*

98. SOROSKY, *supra* note 18, at 128.

99. *Id.* at 130. *See also* ROSENBERG, *supra* note 76, at 112. Rosenberg quotes an adoptee as wondering:

munition in their court petitions to show good cause for release of their birth records.[100] However, courts have rarely enabled adoptees to open their records based on a thinly supported psychological need.[101]

Ample evidence exists in the literature to suggest that adoptees' desire to know their biological roots is not an idle curiosity of individuals who are psychologically and socially impaired.[102] These writers contend that this psychological need is a nearly universal phenomenon in normal personality development.[103] The adoptee's compelling need for his or her true identity is an undeniable basic human need to know one's true place in history.[104] The intensity of this desire no doubt varies with each individual; some adoptees may have an apparent disinterest in seeking knowledge about or contact with their biological parents; others may manifest their interest more compulsively.[105]

Whether the need to search for one's origins is viewed as the result of psychological impairment or a normal curiosity about one's genealogy, the current literature on adoption demonstrates that the sealed records statutes are not in the best interests of many adult adoptees.[106] Current state laws do not adequately address adoptees' need for information about their background.

> Who am I? What do I present to the world out there as I explore intimate relationships and work? Am I really a college graduate prepared for a professional life like my adoptive parents or have I just been groomed to look like one? Sometimes I feel like a total fraud and that I am really an auto mechanic dressed up to look like a lawyer.

Id.

100. *See supra* notes 33-38 and accompanying text.

101. *See supra* note 38.

102. Sachdev, *supra* note 89, at 143.

103. *See* Sachdev, *supra* note 89, at 143 (listing these authors).

104. *See, e.g.*, SOROSKY *supra* note 18, at 139 (citing Margaret Lawrence who had interviewed two hundred adult adoptees); Sachdev, *supra* note 89, at 143 (citing the same study). *See also* In re Maples, 563 S.W.2d 760, 767 (Mo. 1978) (en banc) (Seiler, J., concurring) ("All of us need to know our past, not only for a sense of lineage and heritage, but for a fundamental and crucial sense of our very selves: our identity is incomplete and our sense of self retarded without a real personal historical connection.").

105. Sachdev, *supra* note 89, at 143-44 (citing Margaret Lawrence). *See supra* note 104.

106. Carolyn Burke suggests that whatever adoptees' reasons for searching out their identity, the fact that they attempt to do so despite the current legislation serves as testimony to the depth of their need to know. Burke, *supra* note 54, at 1202-03.

B. THE BIRTH PARENTS' INTERESTS

The sealed records statutes purport to protect the birth parents'[107] right of privacy.[108] State legislatures and courts base this view on the traditional assumption that birth parents want to sever all ties with their adoptee and forget about the entire experience.[109] Proponents of sealed birth records maintain that birth parents continue to rely on past assurances of anonymity to protect themselves against intrusions by the children they gave up for adoption.[110]

State legislatures should reevaluate the traditional assumptions in light of the changed social context and studies which demonstrate the inaccuracy of these assumptions.[111] With the advent of activist organizations such as Concerned United Birthparents (CUB),[112] birth parents are increasingly revealing

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107. The ensuing discussion of birth parents' interests occasionally refers specifically to birth mothers because they actually bore the adoptee. Moreover, the majority of the author's sources referred specifically to the experiences of birth mothers after giving up their adoptee. Nevertheless, this discussion applies to birth fathers as well. *See, e.g.*, *Dear Abby*, S.F. CHRON., Jan. 4, 1994, at E8. Abby prints the letter of a birth father who writes:

> We are always reading about unwed mothers who give up their children for adoption. What about the fathers of these children? I am the father of a baby boy born out of wedlock. I would give my right arm to have raised that child, but I had no say in the matter; he was given to strangers who adopted him.

Id.

108. *See, e.g.*, Mills v. Atlantic City Dep't of Vital Statistics, 372 A.2d 646, 649 (N.J. Super. Ct. Ch. Div. 1977); *In re* Assalone, 512 A.2d 1383, 1386 (R.I. 1986); Bradey v. Children's Bureau, 274 S.E.2d 418, 422 (S.C. 1981).

109. *See Mills*, 372 A.2d at 651.

110. *See id. See also On the Confidentiality of Adoption Records*, NATIONAL COMMITTEE FOR ADOPTION 2 (on file with the National Committee for Adoption, Wash. D.C.).

111. *See, e.g.*, SOROSKY, *supra* note 18, at 53 (reporting eighty-two percent of birth parents said they were interested in a reunion with adoptee); *Adoption: A Life Long Process*, REPORT OF THE ADOPTION TASK FORCE, MAINE DEPARTMENT OF HUMAN SERVICES, March 1989, at 17. None of the 130 birth parents polled were adverse to a reunion with their adoptee. Five percent of the adoptees and two percent of the adoptive parents were adverse to a reunion. *Id. See also* REPORT TO THE CALIFORNIA STATE DEP'T OF HEALTH, *supra* note 76, at 32 (citing a study of the Children's Home Society of California which found that eighty-two percent of the 102 birth parents polled supported the right of adult adoptees to have access to their original birth certificates and that eighty-nine percent of adoptees and seventy-three percent of adoptive parents supported this access as well). *Id.*

112. CUB is a nonprofit organization that advocates the opening of adoption records to adoptees and recommends an acceptance of two sets of parents, similar to stepparent

that the sealed records statutes are not in their best interests either.[113]

Birth parents express that the adoption agencies advised them to pretend the adoptee does not exist and assured them that they would forget the entire experience, but they never actually do.[114] Many birth mothers experience emotional conflicts such as anger, grief, guilt, and depression as an aftermath of adoption.[115] Many wish they had never given up their child.[116] Others wish they could explain to the adoptee their reason for choosing adoption.[117]

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and foster home arrangements. CUB espouses a primary goal of avoiding unnecessary adoptions and keeping biological families together. ROSENBERG, *supra* note 76, at 11.

113. *See* Sachdev, *supra* note 89, at 149. *See generally* SOROSKY, *supra* note 18, at 47-72 (discussing the feelings of various birth parents).

114. *See* SOROSKY, *supra* note 18, at 58. The authors quote a birth mother as saying:

> I was told I would forget—nonsense. That I would get over it; other children would help me forget this child. These empty promises and pat theories of social workers simply have no basis in reality, no basis in the feelings of natural mothers who have been through this devastating experience.

Id. See also Leslie Dreyfous, *Dead Ends, Red Tape Mark One Birth Mother's Search for Son*, L.A. TIMES, November 29, 1992, at 1A ("I was told that I'd forget the experience, that I'd have other children and go on with life. What happened is I've never had other children, and I've never forgotten the experience.").

115. Sachdev, *supra* note 89, at 149. *See also* Mary McGrory, *Adoption's Last Anguish*, WASH. POST, July 8, 1990, at C1 ("They tell you that you will put it all behind you and get on with your life. But it gnaws at you constantly. They do not prepare you for the pain. You are made to feel responsible to make some childless couple happy."); ROSENBERG, *supra* note 76, at 168. Rosenberg states that some birth mothers say they accepted the idea that they would put the pain of the relinquishment behind them and go on with successful lives; instead, they have experienced a lifetime of grieving and regret. *Id.*

116. Many birth parents feel that had they been offered financial and emotional support, they would have been able to raise the child themselves. "They blame opinionated social workers and families for forcing them into the belief that adoption was the best option for them and for their child." ROSENBERG, *supra* note 76, at 168.

117. *See, e.g.*, SOROSKY, *supra* note 18, at 62. The authors quote a biological mother as saying:

> I was a mother who gave up her rights, but not her feelings, about the daughter she gave up for adoption. I would like her to know that I didn't give her up because I didn't want her, or love her. I wanted her to have something I couldn't give her at the time that she needed it most.

Id. The authors also mention a biological mother who says:

> I gave up a male child for adoption thirteen years ago . . . . I want to explain to him why he was given up for adoption and to help him to know that he was not rejected by me. I was raped and know little about the father; still I feel that my child has a right to know the truth.

The traditional assumption was that opening birth records would subject many birth parents who are found by their adoptees to renewed fears of guilt or shame. However, for a majority of birth parents, the reunion experience provides an opportunity to resolve old feelings of guilt and erase years of questions about the fate of their relinquished child.[118] Even those birth parents who are originally adverse to a reunion with the adoptee often change their minds after being contacted, for they realize the healing effect from discarding the veil of secrecy.[119]

There remain a few birth parents who undoubtedly want to retain their anonymity and would definitely not welcome a reunion.[120] For these parents, the reappearance of a child given up years before could be potentially disruptive or even devastating. However, the feelings of these birth parents must be weighed against the strong desire for openness held by searching adoptees and the overwhelming majority of birth parents. The current statutes allow the desire for secrecy held by a small minority to impose secrecy on everyone else.

C. The Adoptive Parents' Interests

Sealed records protect the interests of adoptive parents from unwanted intrusion.[121] Adoptive parents should be able to raise the adoptee without the fear of interference from the birth parents.[122] Many adoptive parents fear that liberalization of the sealed records statutes could lead to the loss of their adoptive

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Id. at 63.

118. *See generally* Sorosky, *supra* note 18, at 157-96.

119. *See* Lifton, *supra* note 88, at 115 (describing how it is not uncommon for birth mothers to deny they are the right person when first contacted). "Taken by surprise, she needs time to work through her emotions before she is able to reopen this painful and often secret part of her life." *Id.*

120. *See* Sorosky, *supra* note 18, at 70. The authors quote a birth mother as saying:

> I had an illegitimate child when I was nineteen. No one knew about it except my parents. Three years later I got married. My husband has no idea of my past nor will he be told. I now have a prestigious job, a child and a lovely home. I am thirty years of age. I'm afraid that if the child ever came to my front door it would be the end of my marriage. My husband would probably get custody of our child.

Id.

121. *See* Mills v. Atlantic City Dep't of Vital Statistics, 372 A.2d 646, 649 (N.J. Super Ct. Ch. Div. 1977).

122. *Id.*

child to his or her birth parents.[123] Often, they interpret an adoptee's interest in his or her birth parents as an indication of their failure as parents.[124]

The continuing enlightenment about adoption as a life long process will enable many adoptive parents to understand and overcome their traditional fears.[125] The literature on the needs of adoptees regarding their genealogical identity explains to adoptive parents that an adoptee's interest in his or her biological parents is not an indication of parental failure.[126] Furthermore, many adoptive parents find that their relationships with their adoptees improve after a reunion with the adoptees' biological parents.[127] Once an adoptee can put aside his or her fan-

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123. *See, e.g.*, Terry Brick, *Letters to the Editor*, L.A. TIMES, July 12, 1990, at 10B (discussing how open records statutes would reduce adoptive parents to uncompensated foster parents). Brick, an adoptive parent, states:

> The decision to adopt is not one that a couple makes lightly and usually comes after years of trying to conceive a child of their own. Adoption is a way of filling those dreams one has for one's life; however, under [an open records statute] one would only fill those dreams for 18 years, then the "real parent" comes back on the scene. Not a very happy prospect. Frequent articles about adoptees finding birth parents never mention the devastation this can bring to the adoptive parents who have spent a lifetime treating this child as their own, only to have it turn against them.

Id.

124. SOROSKY, *supra* note 18, at 73.

125. *Id.* at 15. The authors state:

> Parenthood (adoptive or biological) is a psychological phenomenon based upon the growth of love and mutual respect between parent and child . . . . [T]he true "psychological parent" is the mother or father who has nurtured the child during the developmental years. This relationship can never be seriously endangered by outside persons or influences. If the adoptive parents can understand the primary importance of their role, . . . they will not feel threatened by the implications of opening the sealed records.

Id.

126. *See supra* notes 88-105 and accompanying text.

127. *See* AIGNER (Faint Trails), *supra* note 23, at 16. Aigner states:

> [R]eunifications not only pose no hazard to adoptive families, they may instead strengthen the ties that bind. Reasons cited for this begin with the fact that an adoptive family is in place, grounded in shared experience, and has affections and a history that are not voided by a reunification anymore than a marriage. In addition, a search commonly prompts adoptees to contemplate, perhaps for the first time, the meaning of their familial relationships. Being found often has the same effect.

tasies about their biological parents, a greater sense of appreciation for adoptive parents is finally possible.[128]

Accepting the reality that their adopted children may feel compelled to search for their birth parents is difficult for adoptive parents. Nevertheless, an increasing number of adoptive parents now understand that if their adoptee wants to search for his or her birth parents, they should support this decision.[129] Most adoptive parents realize they adopted because they wanted the chance to parent, not because they were promised confidentiality.[130]

> Such contemplation commonly leads to a deeper appreciation of what there is to value. Finally, as adoptees finally put to rest the frequently disquieting questions of their heredity, why they were relinquished, and the like, the satisfactions they derive from the answers tend to have beneficial consequences for all of their relationships.

Id.

128. *See* AIGNER (Coming of Age), *supra* note 15, at 188. Aigner describes how the potential for an adoptee-birth parent reunification to strengthen an adoptive family is nowhere more fully illuminated than during occasions at search workshops when adoptees who have recently completed their quests tell of the ups and downs of their own adventures. Aigner states:

> In these moments of highly charged sentimentality, a point is often reached in which adoptees will look to their adoptive parents and, in voices choking with emotion and with tears in their eyes, thank them for the affection, trust, and support shown during the search. In this exceptionally public setting, usually before a gathering comprised, for the most part, of strangers, these adoptees are avowing to their parents that, "When my need was great, you were there and I love you." For these adoptive parents, their share in the rewards of searching comes, in part, from knowing that life with their sons and daughters has been enriched by the experience.

Id.

129. *See, e.g.*, Bill Blanning, *Unsealing the Past*, BOSTON GLOBE, June 10, 1983, at Section: Living. An adoptive father of four children states of adoptees, "They're not pieces of furniture. They have their own lives." The adoptive mother adds, "We feel they have a right to their heritage . . . . We're not threatened. Our relationship [with the son who found his mother] has not changed." *Id.*

130. *See* SOROSKY, *supra* note 18, at 86. The authors quote an adoptive mother as saying:

> I will not feel threatened or hurt if [the adoptee] should decide to seek out his birth parents. When he became our son, we wanted no guarantees that he would accept us forever, with never a thought of the people who gave him life. We only wanted to love him and have the privilege of sustaining and nurturing that life. He has another "mother" somewhere, but I am his Mother. He will have no memories of her—she was not there to comfort him when he was sick . . . . She will not be

No doubt quite a few adoptive parents exist who clearly oppose open records and insist that they would not have adopted without the promise of confidentiality.[131] Although this position is justifiable while the adoptee is a minor, the adoptee eventually grows up. Upon reaching majority, adoptive parents no longer have legal control over their adoptee. Thus, arguably, adoptive parents should not be able to control adult adoptees' access to this information. Moreover, if permanent confidentiality is the determinative factor in a potential parent's decision to adopt, the author posits the question whether these people should adopt in the first place.[132]

VI. THE NEED FOR LEGISLATIVE REFORM

Current statutory approaches to the sealed records controversy are inadequate in light of the changing views about se-

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> there for his first day of school or his graduation. Even if our son should some day meet his birth parents, why should I feel threatened? If he should become friends with them, or grow to love them, it would not diminish the relationship that we share with him. Love for one individual does not diminish because we also love another individual. If knowing and loving his birth parents would give our son more security and happiness, we would welcome the opportunity for him. We love him—his happiness will make us happy.

Id. at 80-81. *See also* Patty Lanoue Stearns, *Mother, Where Are You? Adoptee's 17-Year Quest Brings Only Dead Ends*, DETROIT FREE PRESS, Aug. 18, 1992, at 1D. Stearns quotes an adoptive mother regarding her daughter's search for her biological mother as saying, "I don't have any hard feelings . . . . She gave me something I couldn't have . . . . I'd like to meet [the biological mother] myself." *Id.*

131. *See* SOROSKY, *supra* note 18, at 83. The authors quote an adoptive parent as saying:

> If we had known that there was a possibility of the records being opened, we never would have adopted. We did not adopt our children to be caretakers or baby sitters for the natural mothers who gave them up for adoption. We adopted because we were granted total anonymity, and we feel that promise must be honored.

Id.

132. Because adoption agencies attempt to procure the "best interests" of the adoptee in placing children with adoptive parents, the agencies extensively screen potential parents. If confidentiality is still consequential to adoptive parents after their adoptee reaches adulthood, the author suggests that the adoptive parents might be considering adoption mainly for self-seeking reasons rather than the adoptee's best interests. Thus, the author suggests that adoption agencies should hesitate to place children with these families simply because the adoption process can be quite difficult even when the focus is primarily on the best interests of the adoptee.

crecy.[133] Although most states provide for the release of non-identifying information[134] on demand, inaccuracy and out-of-date information continue to plague this process.[135] The statutory provisions allowing adoptees access to identifying information under special circumstances are inadequate as well. These "good cause" statutes fail to truly balance the competing interests involved.[136] Although some statutes have "mutual consent" provisions which can potentially relieve adoptees from demonstrating good cause, these mechanisms also fail to address adoptees' needs. Many birth parents simply are not aware they can consent to the release of the original birth records.[137] Where consent is refused, the states simply force adoptees to face the pitfalls of the "good cause" standard.[138]

A. THE DEFICIENCIES OF "GOOD CAUSE" AND "CONSENT" STATUTES

States have not consistently applied the "good cause" standard which adoptees must meet to obtain their original birth records.[139] This standard fails to provide adoptees with guidelines as to what they must allege and prove to demonstrate the

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133. *See supra* notes 76-132 and accompanying text.

134. *See supra* note 29 for a general list of non-identifying, background information kept by states.

135. Hollinger, *supra* note 11, at 13-16. Lack of diligence by investigators in questioning biological parents, or their good faith failures to ask about certain conditions not generally known at the time to be a cause of concern (e.g., AIDS) contributes to this inaccuracy. Furthermore, biological parents may only have limited information about their own physical, psychological or genetic characteristics, or they may simply be reluctant to disclose what they do know about each other. *Id.*

136. *See, e.g.*, Arndt, *supra* note 39, at 120; Hanley, *supra* note 74, at 544; Sparks, *supra* note 10, at 589.

137. *See infra* notes 148-149 and accompanying text.

138. *See supra* notes 33-38 and accompanying text for a discussion of the good cause standard. *See infra* notes 139-145 and accompanying test for a discussion of the inadequacies of this standard.

139. Variations of the good cause statutes are found in many states. *See, e.g.*, ARK. CODE ANN. § 9-9-506(c) (Michie 1991) (good cause demonstrated by clear and convincing evidence); N.D. CENT. CODE § 14-15-16 (Supp. 1993) (good cause shown by demonstrating that disclosure will not result in any substantial harm to biological parent); TENN. CODE ANN. § 36-1 131(a) (Supp. 1993) (good cause requires a showing that it is in the best interest of the child or the public); CONN. GEN. STAT. § 45a-754 (West 1993) (good cause demonstrated by health or medical reasons); LA. CIV. CODE ANN. art. 9:437 (West 1991) (good cause by a showing of compelling reasons); MINN. STAT. § 259.49(3) (West 1992) (good cause established by a showing that disclosure would be of greater benefit than nondisclosure).

requisite necessity.[140] Even where guidelines exist to aid a court in deciding whether the adoptee has demonstrated good cause, the court must still make a case-by-case determination.[141] However, courts cannot balance the real, present needs of adoptees against the theoretical needs of birth parents on a case-by-case basis.[142] Because the biological parents will never stand before the court, the court must determine their desires conjecturally.[143] Courts will invariably presume that birth parents oppose disclosure.[144] Courts then typically decide that the adoptee's interest is not as strong as that of the parents and therefore deny disclosure. Thus, the states' failure to ascertain the actual position of birth parents prevents many adoptees from access to their records even though the birth parents would not object.[145]

"Mutual consent" statutes also fail to achieve an acceptable balance of interests. Although they eliminate the necessity of demonstrating good cause where a birth parent's consent is on file, the same inadequacies of "good cause" statutes exist without this consent.[146] Adoptees are forced to confront the inconsistent and theoretical balance of a "good cause" determination that weighs heavily against them.[147] Furthermore, because mutual consent registries are generally not well publicized,[148] many birth parents are unaware they exist.[149] Thus, requiring their af-

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140. Arndt, *supra* note 39, at 119; Carter, *supra* note 7, at 853. *See also* Paul J. Tartanella, *Sealed Adoption Records and the Constitutional Right of Privacy of the Natural Parent*, RUTGERS L. REV. 451, 477 (describing how evaluation of the adoptee's psychological problems presents practical difficulties beyond these interpretative inconsistencies). "Courts generally lack the knowledge necessary to determine the adoptee's psychiatric needs. Psychologists may be able to distinguish curiosity from true mental distress, yet, admitting such evidence invites a battle of the experts speculating on a subject about which the courts have very little expertise." *Id.*

141. Hollinger, *supra* note 11, at 13-22 to 13-23.

142. *See* Arndt, *supra* note 39, at 119.

143. *See, e.g., In re* Dixon, 323 N.W.2d 549, 551 (Mich. App. 1982).

144. *See, e.g., id.*; Mills v. Atlantic City Dep't of Vital Statistics, 372 A.2d 646, 649 (N.J. Super. Ct. Ch. Div. 1977).

145. Arndt, *supra* note 39, at 119.

146. *See supra* notes 139-145 and accompanying text.

147. *Id.*

148. *See, e.g.*, R. Bruce Dold, *Adoption Registry Makes Tiny Splash*, CHI. TRIB., Dec. 30, 1986, at C1 (discussing the ineffectiveness of the Illinois Adoption Registry). The registry had matched just one parent and child in its two years of existence. Dold states, "The registry has operated in virtual anonymity, with no budget for publicity and a state directive that limits the release of information." *Id.*

149. Arndt, *supra* note 39, at 122. The mutual consent registries are passive in the sense that agencies are prohibited from assisting adoptees in actively searching for their

firmative action to register consent prevents possible consensual reunions from taking place.[150] Some birth parents may have refused to give consent at the time of adoption but subsequently changed their minds. Nevertheless, mutual consent registries do not attempt to ascertain the wishes of these birth parents who have simply not come forth on their own initiative.

Even the "search and consent" states cannot achieve a fair balance of interests. Search and consent statutes eliminate the defects of considering birth parents' interests conjecturally[151] and the inadequate publicity of mutual consent statutes.[152] However, search and consent statutes cannot achieve a fair balance because they fail to weigh any interests at all. A birth parent's refusal to consent effectively ends the court's inquiry,[153] for the adoptee must then meet the good cause standard.[154] Because the birth parent has actually communicated to the court a desire to remain anonymous, the adoptee's burden of establishing good cause will likely be even more difficult to sustain than in a simple "good cause" system.[155] Good cause is rarely found even in cases where no such refusal to consent is present, so presumably, a court will find good cause even less frequently in cases of parental refusal.[156]

B. The Downside to "Open Records" Statutes

Adoption activists for greater disclosure advocate com-

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birth parents. *See supra* note 42 and accompanying text. Combined with the lack of publicity, such a passive system precludes many birth parents from learning the existence of a registry and their option to release their consent. Hollinger, *supra* note 11, at 13-36. However, where adoptions have taken place since the enactment of these statutes, adoption agencies will likely have informed birth parents of this option.

150. *See* Arndt, *supra* note 39, at 122 ("It is probable that many birth parents in these states do not realize that their silence may mean that their child will be prevented from seeing his records, and that they may not even be made aware of his wish to do so.").

151. *See supra* notes 142-145 and accompanying text.

152. *See supra* notes 148-150 and accompanying text.

153. *See, e.g.*, Wis. Stat. Ann. § 48.433(7) (West Supp. 1993) (stating that no information in the sealed records will be disclosed if the birth parent objects for any reason).

154. *See, e.g., id.* § 48.433(9).

155. *See* Arndt, *supra* note 39, at 123 ("It can be assumed that [the] birth parents' refusal to consent will be given strong consideration by the court . . . . The adoptee is again faced with all the problems of the good cause system, and his case is even further weakened by this new factor.").

156. *Id.*

pletely open records upon the adoptee's attainment of majority. Beyond the psychological and constitutional arguments they make,[157] activists simply do not want judiciary involvement.[158] They view the possibility of adoption reunions as personal matters concerning only adult adoptees and their biological parents.[159] Further, they point to the "open records" states and countries as an indication that allowing adoptees absolute access to their birth records is truly effective.[160]

While open records statutes would please adult adoptees who choose to search for their birth parents, these statutes suffer the same balancing inadequacies as all the other statutes; they specifically fail to address the interests of birth parents who oppose disclosure. Open records make the interests of adoptees absolute while completely disregarding any adverse interests of birth parents. Just as sealing records fails to take account of adult adoptees' interests, full disclosure wholly ignores the interests of birth parents who adamantly oppose revealing their identity. A truly fair birth records statute must at a minimum give these birth parents some voice.

VII. RECOMMENDATIONS

A birth records statute that sufficiently addresses the interests of all parties involved must balance these interests within the current social context. The statute should not presuppose that adoptees and biological parents are adversaries in this controversy. Rather, an ideal statute would recognize that a substantial majority of members of the adoption process favor openness, and only a small minority still desire state-imposed

157. *See supra* notes 49-62 and accompanying text for a discussion of the constitutional challenges. *See supra* notes 88-105 for a discussion of the psychological evidence adoptees use in their attempt to establish "good cause" for accessing their original birth records.

158. *See* AIGNER (Faint Trails), *supra* note 23, at 9 ("The search and reunification movement places a great deal of emphasis on the right of adopted adults to make key decisions affecting who they choose to regard as family.").

159. *See id.*

160. *See, e.g., In re* Maples, 563 S.W.2d 760, 768 n.2 (Mo. 1978) (en banc) (Seiler, J., concurring) ("I do not believe [Kansas' open records statute] would have endured this long if its effect were to discourage adoptions."). *See also* Sachdev, *supra* note 89, at 149 (stating that birth mothers cite the examples of Finland, Scotland, and Israel, where adoption is practiced effectively without confidentiality statutes).

secrecy. Activists for reform have gradually dispelled the traditional assumptions about the need for confidentiality in the adoption process,[161] and studies indicate that greater openness would benefit all parties.[162] Thus, the time is ripe for change.

A. MICHIGAN'S CONSENT REGISTRY

The author recommends that some form of a consent registry should accompany any statutory change short of completely open records. Consent registries allow an adoptee or a biological parent to bypass any court proceedings where both their consents are on file.[163] An ideal consent registry would model itself after the registry in Michigan.[164] Michigan employs a consent registry where biological parents take affirmative action only if they desire to remain anonymous.[165] Their failure to express a desire to retain confidentiality acts as an implicit consent to the release of identifying information.[166]

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161. *See supra* notes 76-132 and accompanying text.

162. *See* REPORT OF THE ADOPTION TASK FORCE, MAINE DEP'T OF HUMAN SERVICES, *supra* note 111, at 3 ("The practice of sealing adoption records has . . . contributed negatively to emotional and psychological health issues suffered by members of the triad. In general, 'openness' in adoption is a more sound approach . . . ."). *See also* REPORT TO THE CALIFORNIA STATE DEP'T OF HEALTH, *supra* note 76, at 27 (recommending that adult adoptees should have access to their original birth certificate); SOROSKY, *supra* note 18, at 223 (stating that adult adoptees should have access to their birth records, if they so desire, when they reach the age of eighteen); TRISELIOTIS, *supra* note 91, at 166 (citing the recommendation of a task force report covering adopted adults in England, Wales, and Scotland which proposed that an adopted person age eighteen years or over should be entitled to a copy of his or her original birth certificate).

163. *See supra* notes 39-44 and accompanying text.

164. MICH. COMP. LAWS ANN. § 710.68 (West 1993).

165. *See id.* The statutory change requiring biological parents to act affirmatively if they want to prevent disclosure took effect in September of 1980:

> For all adoptions in which the biological parents' rights were terminated after September 12, 1980, an adoptee not less than 18 years of age shall have the right to obtain the identifying information . . . and any additional information on file . . . except that if a biological parent has filed a statement currently in effect with the department denying consent to have identifying information released, identifying information shall not be released about that parent.

Id. § 710.68(7).

166. *See id.* Because biological parents must register a formal refusal to consent if they desire to protect their anonymity, their failure to register gives the state permission to release this information. Thus, Michigan's mutual consent registry shifts the advantage of passivity to the adoptee by placing the burden of affirmative action on the biological parent. Arndt, *supra* note 39, at 126.

Michigan's mutual consent registry is superior to those in other states because it creates a presumption in favor of openness. Changing the procedure under which circumstances a biological parent must act affirmatively sends a clear message that consenting to the release of the original birth records is the accepted practice.[167] If Michigan's statistics are representative of the nation, employment of this type of registry will cause approximately eighty percent of biological parents to implicitly consent to the release of their identities upon the adoptee's reaching majority.[168] By not signing any form, biological parents would be subject to the statutory presumption that they have consented.[169] Therefore, in most cases an adult adoptee will never need to petition a court for the release of these records. Nevertheless, a solution is still necessary for the situations where a refusal of consent is on file.

Filing a denial of consent in Michigan acts as an absolute veto, for no information will be released about that parent.[170] The recommended solution would not allow the denial of a consent to act as an absolute veto; rather, filing such a denial would simply reserve for a biological parent the right to be heard in a court proceeding before identifying information is released to an adoptee. Filing a statement denying consent would prohibit automatic disclosure of identifying information but would not bar the release of this information altogether. Where the biological parent has requested non-disclosure, states should establish guidelines for courts that will create easier access to the sealed records.

B. Shifting the Burden of Proof

A few commentators have suggested that the New Jersey

167. *See* Hollinger *supra* note 18, at 13-38 (stating that requiring biological parents to act affirmatively shifts the adoption records policy in favor of disclosure).

168. For children born and placed for adoption in Michigan since 1980, over eighty percent of the mothers and nearly seventy percent of the fathers have prospectively consented to the release of their identities when the child reaches adulthood. These parents have either signed an explicit consent form or, by not signing any form, are subject to the statutory presumption that they have consented. Hollinger, *supra* note 18, at 86 (Supp. 1992) (describing data provided by Michigan Dept. Soc. Serv., April 1991).

169. *See id.*

170. *See supra* note 165.

court in *Mills v. Atlantic City Dept. of Vital Statistics*[171] struck an adequate statutory balance through its interpretation of the state's "good cause" standard.[172] The *Mills* court upheld the constitutionality of New Jersey's "good cause" statute against a challenge by four adult adoptees.[173] After stating that a court must look to the intent of a statutory law rather than simply to its form, the court established procedural guidelines to effect its interpretation of the state legislature's intent but more adequately protect the rights of all parties.[174]

The court held that while the adoptee is still a minor, the current procedure would remain the same so that the party seeking access has the heavy burden of demonstrating good cause.[175] However, where adult adoptees seek access to their original birth records, the burden shifts to the state to prove an absence of good cause.[176] The court reasoned, "An adoptee who is moved to a court proceeding . . . is impelled by a need to know which is far deeper than 'mere curiosity.' "[177] Further, the court suggested that because the state creates the adoptive relationship, it has a duty to assist adoptees in their growth to become full and healthy members of society.[178]

C. The Improvidence of *Mills*

The author commends the *Mills* court for its attempt to maneuver around the inequities of the New Jersey "good cause" statute at a time when society was generally more accepting of secrecy. However, the *Mills* court did not go far enough. In practice, the *Mills* approach may not make it any easier for adult adoptees to learn the identities of their biological parents than

171. 372 A.2d 646 (N.J. Super. Ct. Ch. Div. 1977).

172. *See. e.g.*, Sparks, *supra* note 10, at 589-90; Allan, *supra* note 60, at 744; Arndt, *supra* note 39, at 125.

173. *Mills*, 372 A.2d 646.

174. *Id.* at 654.

175. *Id.*

176. *Id.*

177. *Id.* at 655. The court went on to state that this compelling psychological need may well constitute the good cause required by New Jersey's statute.

178. *See id.* at 656. Hollinger has interpreted the *Mills* holding as essentially stating, "If the state wants to prevent adoptees from learning the names of their biological parents, it must bear the burden of showing why the petitioners' reasons are insufficient to satisfy the statutory good cause exception." Hollinger, *supra* note 11, at 13-26.

in jurisdictions where the initial burden of demonstrating good cause remains on adoptees.[179] If the state fails to show an absence of good cause, the *Mills* court would appoint an intermediary to locate the biological parents and solicit their consent.[180] Where consent is refused, the court must then weigh the adoptee's presumed justifications for disclosure against the biological parents' desire for privacy.[181] Thus, the court must perform the same type of balancing required where the burden is initially on the adoptee, and the procedure suffers the same inadequacies of the "search and consent" statutes.[182] Because a biological parent could almost certainly maintain confidentiality simply by refusing consent, this approach tilts the balance too much in favor of secrecy. The shifting burden of proof employed by the *Mills* court simply does not accomplish a true presumption in favor of openness. Thus, the Mills approach fails to actually establish a procedure that fairly addresses the competing interests.

The inadequacies of the Mills approach aside, this decision also lacks precedential value. Eight years after *Mills*, a court in the same jurisdiction declined to follow this approach. In *Backes v. Catholic Family and Community Services*,[183] a New Jersey court rejected the *Mills* interpretation of the state's "good cause" statute. The *Backes* court held that, as written, the New Jersey "good cause" statute requires adoptees to do more than merely file a complaint to establish good cause.[184] Adoptees must demonstrate some need beyond desire or curiosity before a court should authorize contact with the biological parents.[185] The *Backes* court concluded that a procedure such as suggested in *Mills* should come only from the legislature.[186]

179. *Id.*
180. *Mills*, 372 A.2d at 656.
181. *Id.*
182. See *supra* notes 153-156 and accompanying text.
183. 509 A.2d 283 (N.J. Super. Ct. Ch. Div. 1985).
184. *Backes*, 509 A.2d at 300.
185. *Id.* at 299.
186. *Id.* at 294.

D. Extending *Mills* to Achieve a True Presumption of Openness

A true presumption in favor of open records would not permit a refusal of consent to sustain a biological parent's burden of proof. Such a presumption would require biological parents themselves to demonstrate why their interest in confidentiality outweighs society's interest in disclosure. To protect their identities, biological parents necessarily would have to establish that their interests substantially outweigh the public policy in favor of openness.[187] Biological parents could not sustain this burden of proof simply by showing that disclosure would cause them inconvenience or emotional harm. Rather, courts would require truly compelling reasons so that anonymity would remain only in exceptional circumstances.[188] Even where a biological parent sustained his or her burden of proof, every possible effort would be made to alleviate this strong desire for confidentiality so a court could still grant disclosure.[189]

Although a perfect adoption records statute is impossible to achieve, states should attempt to find the best solution for the greatest number of people. Changing the presumption in favor of disclosure would achieve that goal. Were a statute to frame the sealed records dilemma in this way, it could finally relieve courts from the necessity of pitting adoptees against biological parents generally when determining whether to disclose these records. Such a statute would more accurately reflect the make-up of the actual parties to this controversy: those in favor of candor, and those against it.

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187. The court proceeding would require that the biological parents be able to make an appearance through counsel in such a way as to protect their identities in the event that they sustained their burden of proof.

188. The author believes that it is inappropriate to delineate what would amount to an "exceptional circumstance." Due to the factually intensive nature of such a court proceeding, each decision would require a case-by-case determination. Nevertheless, a showing by a biological parent that the adoptee was the product of an extra-marital affair should probably sustain that biological parent's burden of proof.

189. In the situation where the biological parent sustained his or her burden of proof because the adoptee was the product of an extra-marital affair, a court might still find a solution agreeable to that biological parent which would allow for disclosure. For instance, the court might fashion a way for the adoptee to meet with the biological parent without the knowledge of that parent's spouse.

E. Biological Parents Should Benefit as Well

This recommendation presupposes that an adult adoptee, not a biological parent, is attempting to open the birth records. Where a biological parent petitions a court for access to the sealed birth record of an adoptee, a strong case can be made that the burden of proving good cause should remain on the birth parent. The difference in treatment could be justified because the biological parents sign away their own legal rights at the time of adoption while adoptees do not. Unlike birth parents, adoptees had no voice in the original adoption process. Their birth parents, adoptive parents, and the state made this decision for them. Regardless of any coercion some birth parents claim to have experienced that might have driven them to give up their child, the reality is that they did give the child away. Thus, one might view forcing adult adoptees to affirm a contract which they took no part in as unjust; yet arguably, the same logic does not apply to biological parents who agreed to anonymity in the original proceeding.

Although such an argument might be justified, the author recommends that biological parents should also benefit from the suggested procedural change establishing a presumption of openness. Because secrecy is the evil that this article attempts to combat, the author suggests that the presumption in favor of open records apply equally to biological parents and adoptees. Such a presumption would only occur once adoptees reach adulthood. Because adoptees maintain that they no longer need the state's protection as adults, they should accept the risk of being found as an incident to their individual autonomy. An adoptee who desires to remain anonymous could still attempt to establish that his or her interest in confidentiality substantially outweighs the public policy in favor of openness. If the adoptee is unsuccessful, opening the adoption records will only give biological parents identifying information. The adoptee can refuse to meet or maintain a relationship with a biological parent just as any other adult is free to choose with whom they associate.

F. Prospective Change Only

Drawing upon the experiences of adoption participants

helps demonstrate the changing views about secrecy and the need for legislative reform. However, this author does not propose that statutory change be applied retroactively. The literature suggests that a statute facilitating the opening of records retroactively would surely be in the best interests of most adoptees and biological parents. Nevertheless, an unyielding stance on this issue stands in the way of the necessary legislative reform. Irrespective of the benefits retroactive legislation would confer upon most, lobbyists cause state legislatures to shy away from such change due to the confidentiality which birth parents have supposedly been assured of in the past.[190] State lobbyists insist that birth parents continue to rely on these promises,[191] and these lobbyists create the fear of potential lawsuits and undesirable emotional trauma.[192] Thus, the author suggests that adoption reform activists concede this loss and concentrate on the attainment of prospective change. Prospective reform will at

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190. *See Adoption Defense Fund Enters California Legislative Battle Over Privacy Rights For Women Who Have Placed Children For Adoption, Others Who Would Be Victimized By Rewriting Laws Meant To Protect Confidential Decisions*, ADOPTION DEFENSE FUND 1, Aug. 10, 1990. The Adoption Defense Fund is a Washington, D.C. based national lobbying organization which is affiliated with the National Committee For Adoption. The Adoption Defense Fund issued a press release as a reaction to A.B. 3907, Reg. Sess., Cal. (1989-90) which would have opened sealed adoption records in California retroactively. The press release quotes William Pierce of the National Committee For Adoption as stating:

> Imagine what would happen if promises and guarantees made by any segment of our society were suddenly torn up by the California legislators. Consider the reaction if everyone who had confided in their lawyer, their physician, their psychiatrist, their psychologist, their social worker, their clergy, or their mental health professional suddenly woke up one morning to find that California had retroactively opened up their sealed records to people they did not want to see them.

Id. A.B. 3907 was not enacted.

191. *See Id.* at 2. *But see* LIFTON, *supra* note 88, at 264. Lifton states:

> A close look at the lobby groups [for sealed records] reveals that it is the conservative adoption agencies and the adoptive parents, not the birth mothers, who are struggling to keep the records closed. The adoption agencies are more afraid of losing their business, and adoptive parents of losing their children, than birth mothers are afraid of being found.

Id.

192. *See, e.g.*, Dold, *supra* note 148, at C1. Dold quotes Illinois State Representative John Cullerton as responding to the quest for open records by saying, "We don't want to get into that. It's too controversial. That used to be an incredibly emotional issue in Springfield." *See also* ADOPTION DEFENSE FUND, *supra* note 190, at 5 ("[Opening adoption records retroactively would] stimulate a flood of litigation against the state, agencies, attorneys and others who have had any role in past confidential adoptions.").

least secure greater openness in the future, and breaking down the walls of secrecy is the ultimate goal.

For those adoption participants who will fail to profit under such a proposal, all is not lost. The inequities of today's sealed records statutes have induced adoption activist groups to become adept at accessing identifying records despite this present legislation. Self-help organizations such as ALMA[193] currently teach many methods to facilitate the reunification searches of both adult adoptees and birth parents, thereby circumventing the need to petition the courts.[194]

VIII. DISPELLING THE FEARS

A. ADOPTION V. ABORTION

Opponents of open records frequently argue that greater access to adoption records will cause many birth mothers to abort a child rather than carry it to term and relinquish that child to the adoption process.[195] These opponents often characterize access to adoption records as a pro-life versus pro-choice issue.[196] They believe that they are protecting adoptees because without confidentiality, adoptees might never live to protest sealed records at all.[197]

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193. *See supra* note 23.

194. *See* AIGNER (Faint Trails), *supra* note 23, at 67. Aigner states:

> [T]he movement organizations earn very high marks. They are staffed primarily by volunteers, by and large motivated simply by a desire to help. So far as search skills are concerned, they tend to run circles around private investigators. Their understanding of adoption, search and reunification is unrivaled. Time has shown most of these groups to be exemplary at the service they provide.

Id.

195. *See* William L. Pierce, *Letters to the Editor*, PHILADELPHIA INQUIRER, Mar. 8, 1986, at A8 ("[B]y failing to provide for a confidential adoption choice, many woman would in effect have no option except a confidential abortion."). *See also* Michael Drexler, *Adoptee Rights at Issue Push to Open Records Continues*, PLAIN DEALER REPORTER, November 9, 1992, at 1B. Dr. John C. Willke, past president of National Right to Life, headed an aggressive anti-abortion contingent that testified against an Ohio bill that would have allowed adult adoptees access to their original birth certificates because the group felt the bill promoted abortion. *Id.*

196. Evidence of this view exists in bumper stickers which declare, "Adoption, Not Abortion."

197. *See, e.g.*, Pierce, *supra* note 195.

Because adoption and abortion are both complex and emotionally charged issues, linking the two together acts as a convenient method for open record opponents to discourage legislative reform. Nonetheless, in the determination of whether greater disclosure of adoption records is desirable, legislatures should not reduce adoption and abortion to alternative choices.[198] Some birth mothers dismiss the option of abortion immediately for religious, health, moral, or other reasons.[199] Others struggle toward a resolution, but the ultimate decision by a birth mother to give up a child for adoption occurs after she has already ruled out abortion.[200] Generally, when a birth mother walks into an adoption agency, she has already made the decision to continue her pregnancy.[201] She is only trying to figure out whether to keep the child or place it in an adoptive home.[202]

Although the threat of being found years later by their adoptee might act as a determining factor in the decision to abort for a few birth parents,[203] such a decision remains within their legal rights.[204] By reducing adoption and abortion to alter-

198. *See* LINCOLN CAPLAN, AN OPEN ADOPTION 120 (1990). Caplan states, "To anoint adoption as the alternative to abortion is to link federal policy about the former with the almost fanatical politics surrounding the latter."

199. A truly fair discussion of the motivating factors which drive a woman to abort or bear a child is beyond the scope of this article.

200. This reasoning is based on the fact that a birth mother must first choose to bear a child before she can decide to relinquish the child to the adoption process. This decision to bear the child physically precludes the option of abortion.

201. Michael Drexler, *Abortion Foes Oppose Bill for Access to Adoption Records*, PLAIN DEALER REPORTER, March 22, 1992, at 1A. Drexler quotes a social worker who states, "If they wanted an abortion, they would have already done it. We're not dealing with women who don't know that abortion is already an option."

202. *Id.*

203. *But see* Arndt, *supra* note 39, at 115-16. Arndt states:

> [L]ogic also suggests that as many women might choose adoption over abortion if they felt that they were not necessarily losing all contact forever with the child when they surrendered him. The existence of "open" adoption, where visitation by the natural parents is allowed after the adoption takes place, and the rising popularity of private adoptions, which allow the birth parents to choose the adoptive family for their child, suggest that some birth parents have chosen adoption over other alternatives when, and perhaps because, relinquishment of the child did not mean complete loss of contact.

Id.

204. *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973) (establishing a woman's constitutional right to have an abortion).

native choices for a birth mother, open record opponents drag adoption participants into an entirely distinct controversy. An artificial link between adoption and abortion should not deny adult adoptees access to their original birth records. Thus, the author argues that the effect of sealed record laws is to unfairly protect the interests of unborn, putative adoptees against the needs of living adoptees for disclosure.

B. Opening Pandora's Box

Opponents of open records fear that adoptees everywhere, armed with identifying information, will invade the lives of their biological parents.[205] These opponents commonly mention how adoptees will simply show up on the doorsteps of their biological parents and create a great disturbance in their lives.[206] Such fears are unwarranted for many reasons. First, greater access of adoption records will not cause all adoptees to search for their biological parents, for many adoptees are content to live with the mystery of their past.[207] Secondly, many adoptees feel compelled to search partially because they believe the sealed records statutes wrongly deny them the ability to make their own choice.[208] Making the search more accessible could potentially lessen this urge. Third, adoptees who do decide to engage in a search are generally very considerate of their biological parents' feelings.[209] Most adoptees obtain some sort of counseling before

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205. *See* Adoption Defense Fund, *supra* note 190, at 2.

206. *See id.* ("[Many biological mothers] are terrorized by the prospect of their most intimate past lives being public knowledge. Their husbands, their children, their co-workers, their neighbors—none of whom may know about an out-of-wedlock pregnancy years earlier, even decades earlier—may react unpredictably when the child shows up on their doorstep.").

207. *See* David Keene Leavitt, *The Model Adoption Act: Return to a Balanced View of Adoption*, 19 Fam. L.Q. 141, 147 (1985) ("In those few jurisdictions where original birth records are not sealed, inquiry concerning birth parents is made only about 3 percent of the time. The most reliable estimates of frequency of searching in this country fall between 3 and 5 percent of the total adoptees."). *See also* Triseliotis, *supra* note 91 at 2 (stating that in Scotland, where adult adoptees are permitted access to their original birth certificates, only a small number of adoptees feel compelled to seek out this genealogical information).

208. Sorosky, *supra* note 18, at 156. *See also* Triseliotis, *supra* note 91, at 55. Triseliotis finds generally that "adoptees who were given no information about their origins . . . were predominantly wanting to meet their natural parents. In contrast, those who were given some information in a positive and understanding way were mostly interested in additional particulars about their origins." *Id.*

209. *See* Triseliotis, *supra* note 91, at 44. Triseliotis states that in a study of

attempting contact,[210] and nearly all adoptees proceed cautiously due to their fear of rejection.[211] Adoptees understand that their biological parents' lives will surely have changed and that a reunion will likely startle biological parents who probably have not had time to mentally prepare for such an encounter. Lastly, not all searching adoptees desire to maintain a close relationship with their biological parents.[212] For most, ending the secrecy is the primary goal, and they are content simply to let the future run its own course.

Opponents of greater disclosure also argue that opening records will devastate adoptees who reunite with their biological parents only to find that their concocted fantasies[213] are inaccurate.[214] Some reunions will surely result in disappointment, but the success of a reunion cannot be measured by a lack of pain or suffering. Reunions are extremely emotional experiences for adoptees and birth parents, and each one is unique; but all reunions are successful in that they provide adoptees that sense of identity or rootedness that was previously missing in their lives.[215] Even if adoptees are disappointed by what they find, they can at least put an end to their fantasies and get on with

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adoptees who were searching for their birth parents there was no evidence of any abuse or harassment of biological parents by adoptees who found their biological parents. *Id.* "The various studies carried out so far suggest that the vast majority of adoptees act thoughtfully and with great consideration for the feelings of both their birth and adoptive parents." *Id.* at 51.

210. *See* AIGNER (Faint Trails), *supra* note 23, at 15.

211. *See Dear Abby*, S.F. CHRON., Oct. 25, 1993, at E10. An adoptee states, "there's someone missing, someone I'm afraid to look for, because if I find her, she may reject me again." *Id.*

212. *See* TRISELIOTIS, *supra* note 91, at 15 (discussing a study of adoptees in Scotland where access to original birth certificates is available to adult adoptees). Of the seventy adoptees in the study, only sixty percent desired to even meet their biological parents. The rest were content to simply have more information about their sociological and biological background.

213. *See, e.g.*, ROSENBERG, *supra* note 76, at 123 (stating that adoptees fantasize about who their birth parents are, where they are, how they look, what kind of family and work life they have, and why they gave the adoptee up).

214. *See* NATIONAL COMMITTEE FOR ADOPTION, *supra* note 110, at 8.

215. *See* REPORT OF THE ADOPTION TASK FORCE, MAINE DEP'T OF HUMAN SERVICES, *supra* note 111, at 3. Each member of the adoption triad carries a perception of the other members varying from fantasy to reality. The degree of acceptance of and comfort with one's identity in relation to other members of the triad is often dependent upon one's having access to information about and opportunity to come to terms with one's past, present and future. *Id.*

the rest of their lives.[216]

IX. CONCLUSION

An analysis of the history behind today's sealed records statutes reminds us that adoptees' original birth records were not always sealed.[217] Permanent confidentiality became the norm in the 1940's mainly in response to societal attitudes toward illegitimacy.[218] Sealed records laws may have served an important purpose when society frowned upon unwed mothers and their "illegitimate" children, but times have changed. Adoption participants have vocalized that permanent state-imposed confidentiality no longer serves their needs,[219] and various studies have borne out this truth.[220]

By permanently sealing original birth records, states inappropriately tell adoption participants that biological ties are insignificant. Maybe state legislatures fear the worst possible consequences of greater openness, or possibly they feel this

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216. *See, e.g.*, SOROSKY, *supra* note 18, at 168. The authors quote an adoptee whose biological mother wrote her one letter after receiving an initial phone call:

> After that letter, she refused to answer my letters, and I finally stopped writing. I still hope that someday she will change her mind and feel more comfortable meeting me and letting me know her and her family. In thinking this over, I have to say that although I was still confused, I was also relieved that my search was over. I could at last lay my fantasies to rest. I knew who I looked like, where my talents came from and who my ancestors were. I realized too that for the first time in my life I had come into contact with a blood relative. I found that immensely satisfying, as if this somehow bound me more to the physical world.

Id. See also LIFTON, *supra* note 88, at 29. Lifton states that adoptees share the fantasy of royal blood along with non-adoptees, but adoptees also have negative fantasies—of whores, rapists, murderers:

> [T]he possibilities are limitless. Back and forth they go between them, polarizing the good and the bad as it suits their psychological need. But unlike the nonadopted who can eventually resolve their family romance by unifying the good and bad parents into the one set they have, there is no way for the Adoptee to resolve the polarization short of knowing about the birth parents as real people.

Id.

217. *See supra* notes 7-17 and accompanying text.

218. *See supra* notes 18-22 and accompanying text.

219. *See supra* notes 76-132 and accompanying text.

220. *See supra* note 162.

controversy is of less moment than other pressing social issues. Nevertheless, even with states' current policy of secrecy, there is no guarantee that biological parents or their adoptees will retain their anonymity. Not only have self-help search organizations become adept at assisting adoption members in locating their biological relatives, but a market has arisen for private investigators due to the profit they can make searching. Several legal methods exist to maneuver around the sealed records statutes,[221] and some searchers use illegal tactics as well.[222] The fact that people are willing to break the law to get around the sealed records statutes lays testament to the compelling need many feel for this information. When people feel driven to disobey what they perceive to be an inequitable law, perhaps society should question the morality of the law, not the morality of the actual law breaker.

History has demonstrated from time to time that unjust laws subsist. Government often responds lethargically to the need for legislative reform because it fears the unknown. The continued existence of sealed adoption records statutes in the face of needed reform is symptomatic of this fear; however, as adoption participants place increasing pressure on their state legislatures, states will finally be forced to address their needs. The fear of openness by a minority of adoption participants no longer warrants statutory protection. The personal experiences of adoption participants demonstrate the propriety of greater openness in the adoption process, and after all, no one is in a better position to determine what is best for these participants than adoptees, biological parents, and adoptive parents themselves.

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221. *See generally* AIGNER (Faint Trails), *supra* note 23.

222. *See 60 Minutes: Who Am I?* (CBS television broadcast, Jan. 2, 1994). This segment centers around Sandy Musser, a woman who started her own search and reunification business. Musser was sentenced to four months in federal prison after being convicted of fraud, conspiracy and theft of government property. Musser's conviction stemmed from her employment of a woman who impersonated government officers in order to obtain identifying information from sealed adoption records. Musser believes sealed records laws are immoral and considers her conduct a form of civil disobedience. *Id.*