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SHAME ON U.S.: THE NEED FOR UNIFORM OPEN ADOPTION RECORDS LEGISLATION IN THE UNITED STATES

Lauren M. Fair*

I. INTRODUCTION

African-Americans, women, and homosexuals are three examples of sociological groups that have suffered repression and civil rights violations at the hands of the American government. Today in the United States, there exists a similar sub-class of people whose rights are trampled, while hidden by a veil of secrecy—adult adoptees. In relatively recent history, most state legislatures enacted laws that effectively sealed adoption records from the public as well as from the parties involved.¹ In many states, once a child is adopted, the state seals his or her original birth certificate to reflect only the names of the adoptive parents.² Subsequently, any interested party must petition the court to unseal the original birth certificate and any identifying information contained in the adoption records, based on a good cause standard.³ The secrecy inherent in this system

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implies shame. Furthermore, the circumstances under which closed records laws were adopted in the United States have drastically changed.

Closed records laws deny adoptees access to vital, personal information including medical history, social history, and the basic knowledge about the background from which they come. Consequently, the individual who had no voice in the adoption process, the adoptee, is often the one who bears the psychological and financial burden of locating his or her roots, while the rest of us enjoy the basic right of accessing our birth records and knowing from where we come. This disparate treatment of adoptees led to a movement to turn back the clock on adoption laws in America to a time when adoptees were not subjected to government-sanctioned shame.

Due to the nature of the debate, the most effective avenue for positive change is by lobbying state legislatures to pass legislation protecting adoptee rights. To understand why each state should enact open records legislation, it is necessary to explore the history of closed records statutes. Part II of this comment identifies the contents of adoption records that are relevant to this debate. It also traces the development of adoption records law in the United States. It then details three distinct views regarding open records legislation: open records advocates, opponents of open


5. Id.

6. Caballero, supra note 2, at 296.


9. See Kelley, supra note 7, at 235. The arguments on both sides of the debate allege constitutional violations. See id. at 227-35 (detailing various constitutional arguments made by both parties to the debate including: right to familial privacy, right to reproductive privacy, right to nondisclosure of personal information, and denial of equal protection). Historically, the Supreme Court has refused to hear these cases and other courts have deferred to state legislatures regarding changes in adoption records laws. Id.

10. Id. at 235.

11. See discussion infra Part II.A.

12. See discussion infra Part II.B.

13. See discussion infra Part II.C.
records, and those in favor of partially restricted open records.  

Part III identifies the precise problem with the current records legislation and the significance of the debate to the modern legal community. In Part IV, this comment highlights and analyzes how current adoption records laws do not sufficiently protect the rights of adoptees and describes the need for more widespread open records legislation. Finally, Part V proposes the adoption of a nationwide, uniform open records act favoring unrestricted records access for adult adoptees. Such legislation is needed in order to restore the status of adoptees as co-equals with the rest of society and to put the United States on par with other industrialized nations.

II. BACKDROP OF THE BATTLE FOR EQUALITY

A. Contents of Records

Before tracing the evolution of the state of adoption records in America, the relevant contents of such records require clarification. Many states today allow adult adoptees access to non-identifying information, such as medical and social history. Social history information generally includes the following information about the birth family collected during pre-placement interviews: occupations, ages, physical descriptions, notes about birth relatives, education levels, etc. The social and medical history form responses can range from being quite detailed to vague or non-existent, depending on the birth parents' willingness to fill the form out completely or the information
available at the time of relinquishment.

Crucial identifying information is withheld under closed records laws and includes: the adoption decree; names and contact information of birth parents and relatives; and the original, unamended birth certificate. Identifying information is the principal subject of this comment, as it is the portion of the birth records that open records legislation affects.

B. History of Adoption Records in the United States

Most state legislatures closed adoption records to interested parties and to the public only within the last century. Several states have reversed those laws, but the vast majority of states still maintain a restricted, closed records system.

1. The Development of Adoption Records Laws

An inquiry into the history of adoption records in the United States dispels the common misconception that states had always required the sealing of adoption records in this country. In fact, adoption law only became part of American jurisprudence in the late nineteenth and early twentieth centuries.

The earliest form of adoption in the United States, established by the Puritans, mirrored an apprenticeship system where a family took in an orphan as an apprentice. As such, the child was placed with a family and taught a trade. Since this system was familiar and historically informal, there was no need for formalized laws. The first formalization of adoption law in America occurred in

24. See Racine, supra note 3, at 1440.
25. See discussion infra Part II.B.1.
27. Samuels, supra note 1, at 368.
28. Id.
30. Silverman, supra note 29, at 86.
31. Id.
Massachusetts in 1851.\textsuperscript{32} In 1891, Michigan became the first state to require the prospective adoptive parents to undergo a home study type of evaluation.\textsuperscript{33} The adoption procedures originally established by state statutes did not guarantee confidentiality to the parties from either the public or from each other.\textsuperscript{34} It is only through subsequent amendments that the majority of states closed adoption records.\textsuperscript{35}

In the early twentieth century, states began to prohibit public inspection of court documents related to adoptions to protect the privacy of the parties involved.\textsuperscript{36} In 1917, Minnesota became the first state to seal adoption records.\textsuperscript{37} While the records were sealed to the general public, "parties in interest" were given access to the records.\textsuperscript{38} Later, in the 1930s, 40s, and 50s, nearly all states followed suit and sealed birth records, causing those adoptees and birth parents who were not acquainted with one another to live life behind a veil of secrecy.\textsuperscript{39}

Over a period of approximately fifty years, powerful social work organizations and state legislatures joined forces to strengthen closed records laws. Beginning in 1931, the names of adoptive parents replaced the names of birth parents on adoptee birth certificates.\textsuperscript{40} The majority of states were slower to deny adoptees access to their birth records upon reaching the age of majority than they were to close adoption records to the parties at the time of adoption.\textsuperscript{41}


\textsuperscript{33} Silverman, supra note 29, at 86. A home study evaluation typically consists of an in-depth investigation performed by a social worker to determine the fitness of the prospective adoptive parents. See Adoption.com, The Nuts and Bolts of an Adoption Home Study, http://home-study.adoption.com/nuts.php (last visited Mar. 22, 2008). The evaluation includes interviews both at the social worker's office and the applicants' home, background checks, reference checks, etc. \textit{Id}.

\textsuperscript{34} Silverman, supra note 29, at 86.

\textsuperscript{35} Id.

\textsuperscript{36} Samuels, supra note 1, at 369.

\textsuperscript{37} Racine, supra note 3, at 1440-41.

\textsuperscript{38} E.g., \textit{id} (defining "parties in interest" as birth parents, adoptive parents, and adoptees); Naomi Cahn & Jana Singer, Adoption, Identity, and the Constitution, 2 U. PA. J. CONST. L. 150, 155 (1999).

\textsuperscript{39} See Samuels, supra note 1, at 369.

\textsuperscript{40} Racine, supra note 3, at 1441; see also Samuels, supra note 1, at 376.

\textsuperscript{41} Samuels, supra note 1, at 376. The Child Welfare League of America
Following World War II, on the recommendation of professional social work organizations such as the Child Welfare League, almost all states modified their laws to deny all parties, regardless of age, access to adoption records. These amended statutes generally authorized the release of the records only upon court order. This is typical of state statutes currently in effect.

State legislatures originally designed closed records statutes to create a shield for birth parents, adoptive parents, and adoptees from public scrutiny. One purpose of the statutes was to "protect adoptees from the shame and embarrassment of their illegitimate" births. An additional reason cited for the enactment of these statutes was to "cement the bond between the adoptee and the adoptive family." The sealing of original records and the subsequent amendment of birth certificates served to effectuate the idea that adoption was "a perfect and complete substitute for the creation of families through childbirth." In other words, sealed records protected infertile couples from public embarrassment and allowed them to create the ideal family image.

Furthermore, these statutes allowed a "birthmother to 'recover from [her] indiscretion and continue with [her] life as though [she] had never had a child' while 'insuring the integrity of the adoptive family by preventing disgruntled biological parents from later attempting to reclaim their children.'" The original purpose of sealed records laws was

was founded in 1921 and became "the most important private national agency for child welfare." Id. at 390 (quoting E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 45 (Harvard Univ. Press 1998)). In 1958, the League issued a recommendation stating that court records "should be sealed and should not be open to inspection except on court order." Id. It further suggested that after a new birth certificate is issued, "the original birth certificate should then be sealed." Id.

42. Racine, supra note 3, at 1441.
43. See Samuels, supra note 1, at 369.
44. Racine, supra note 3, at 1441.
45. Id.
46. Id. at 1435; see also Samuels, supra note 1, at 369.
47. BASTARD NATION, A History of Sealed Records in the United States, in THE BASIC BASTARD, supra note 4, at II; see also Caballero, supra note 2, at 292.
49. Samuels, supra note 1, at 404.
50. See Kelley, supra note 7, at 224.
51. Id.; Cahn & Singer, supra note 38, at 156.
never to protect the identity of the birth parents from the adoptees or vice-versa.\textsuperscript{52} The statutes were initially adopted to protect the parties from the release of their confidential information to the public during a time when the stigma of being an unwed mother, an illegitimate child, or infertile was harsh.\textsuperscript{53}

The 1960s were a time of radical social change in America that affected public opinion regarding illegitimacy and the confidentiality of adoption records.\textsuperscript{54} This decade marked the beginning of a lessening of the stigma stemming from illegitimacy and fostered a more understanding view of families that did not comport with the traditional nuclear familial composition.\textsuperscript{55} Adoption agencies realized the importance of maintaining non-identifying information and adult adoptees began asserting the right to access this confidential information.\textsuperscript{56} Soon after, the formation of adult adoptee rights organizations commenced and these groups filed two unsuccessful class-action lawsuits challenging the constitutionality of sealed records statutes.\textsuperscript{57} At this time, society was unready to address the fact that the face of American families was changing.

However, during the early 1980s, it seemed as if a political shift in favor of open records was brewing.\textsuperscript{58} President Carter appointed an independent expert panel to draft what became known as the Model State Adoption Act.\textsuperscript{59}

\textsuperscript{52} Hildebrand, supra note 2, at 521; see also Cahn & Singer, supra note 38, at 155.
\textsuperscript{53} Cahn & Singer, supra note 38, at 155.
\textsuperscript{54} Racine, supra note 3, at 1441. Some important societal changes of this period include: "the sexual revolution, 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." Rueff, supra note 18, at 465.
\textsuperscript{55} Samuels, supra note 1, at 416; see also NANCY D. POLIKOFF, BEYOND (GAY AND STRAIGHT) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 26-27 (2008).
\textsuperscript{56} Silverman, supra note 29, at 87. Adoption agencies began maintaining information such as nationality, education, health factors, physical characteristics, occupations, and special abilities. Id.
\textsuperscript{58} Racine, supra note 3, at 1441.
\textsuperscript{59} Id. at 1441-42.
This Act would have given adult adoptees the right to access identifying information about their birth parents. During the Reagan Administration, however, the Act was substantially modified, eliminating the open records provisions. The amended Act (not yet enacted by any state legislature) is now known as the Uniform Adoption Act, which requires the sealing of records for a term of ninety-nine years and calls for criminal penalties for the disclosure of confidential information.

2. Open Records States

Only in recent years have adoptee rights groups begun to win their battles with state legislatures. Five states currently grant adult adoptees unrestricted access to identifying information in their adoption records: Alabama, Alaska, New Hampshire, Kansas, and Oregon. The legislators of Kansas and Alaska never closed adoption records to adult adoptees, and Alaska unsealed its records in 1950. In 1998, Oregon became the first state to open previously sealed adoption records to adult adoptees with the passage of Measure 58, a ballot initiative. Alabama followed

60. Id.
61. Id.
62. Id.
63. Hildebrand, supra note 2, at 515; see generally BASTARD NATION, supra note 4 (noting recent victories in the state legislatures of New Hampshire, Tennessee, Alabama, etc.).
64. Puerto Rico and the U.S. Virgin Islands also allow adult adoptees unconditional access to adoption records. BASTARD NATION, Open Records: Why it's an Issue, in THE BASIC BASTARD, supra note 4, at I.
65. E.g., Caballero, supra note 2, at 293.
66. BASTARD NATION, A History of Sealed Records in the United States, in THE BASIC BASTARD, supra note 4, at II.
67. Id.; Cahn & Singer, supra note 38, at 167. The Alaska law states:

After receiving a request by an adopted person 18 years of age or older for the identity of a biological parent of the person, the state registrar shall provide the person with an uncertified copy of the person's original birth certificate and any change in the biological parent's name or address attached to the certificate.

ALASKA STAT. § 18.50.500(a) (2006). The Kansas statute states: "Such sealed documents may be opened by the state registrar only upon the demand of the adopted person if of legal age or by an order of court." KAN. STAT. ANN. § 65-2428(a) (2003).
68. Racine, supra note 3, at 1442. The Oregon law states: "Upon receipt of a written application to the state registrar, any adopted person 21 years of age and older born in the State of Oregon shall be issued a certified copy of his/her unaltered, original and unamended certificate of birth in the custody of the
suit in 2000 by granting adult adoptees unconditional access to their records.69

New Hampshire’s open records law, modeled after Oregon’s Measure 58, went into effect on January 1, 2005 and enables an adoptee to receive a copy of his original birth certificate.70 However, an adoptee who wishes to access the rest of his adoption records in New Hampshire still must obtain a court order to do so.71

3. Several Other States Allow Conditional Access to Birth Records

Among the states that do not afford adoptees unrestricted access to their birth records, some state legislatures have carved out alternative methods by which members of the adoption triad72 can attempt to obtain the identifying information of the others.73 Members of the adoption triad include birth parents, adoptive parents, and the adoptee.74 The limited avenues available to the triad include a finding of good cause, registries, and search and consent laws.75

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69. Racine, supra note 3, at 1442. The Alabama law states:
   [A]ny person 19 years of age or older who was born in the State of Alabama and who has had an original birth certificate removed from the files due to an adoption, legitimation, or paternity determination may, upon written request, receive a copy of that birth certificate and any evidence of the adoption, legitimation, or paternity determination held with the original record.


   Upon written application by an adult adoptee, who was born in this state and who has had an original birth certificate removed from vital statistics records due to an adoption, the registrar shall issue to such applicant a non-certified copy of the unaltered, original certificate of birth to the adoptee.


72. See Hildebrand, supra note 2, at 527.

73. See Racine, supra note 3, at 1458-59 (describing mutual consent registries).

74. See Hildebrand, supra note 2, at 527.

75. See infra Part II.B.3.a-d.
a. Good Cause

Most states that enacted closed records provisions allow for the release of confidential information when the adoptee convinces a judge that "good cause" or "special circumstances" exist. For example, one may show that the release of the information will serve a medical or psychiatric need and that no alternative means to obtain the information are available. Courts generally have held that the desire to know where one comes from is insufficient.

b. Mutual Consent Registries

There are two types of adoption registries that facilitate the acquisition of identifying information: passive and active. Passive mutual consent registries, the most common type of registry, require adoptees and birth parents to seek out an available registry and supply that agency with their names and contact information in order to participate. If both parties go through this process and the two sets of identifying information align, the agency notifies each party that it found a match. The agency that originally collected their consents then releases the identifying information to the parties.

Active consent registries differ from passive registries in that only one party must initiate the process to find the other. Once that party registers, a trained intermediary attempts to contact the counterpart. Active registries are substantially similar to search and consent laws.

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76. See Silverman, supra note 29, at 87.
77. Id. at 87-88.
78. See id.; see, e.g., In re Maples, 563 S.W.2d 760, 766 (Mo. 1978) (holding a bare "psychological need to know" does not constitute good cause). Compare, e.g., In re Dixon, 323 N.W.2d 549, 552 (Mich. Ct. App. 1982) (stating severe psychological need to know may be sufficient to open birth records to adult adoptees); Bradley v. Children's Bureau, 274 S.E.2d 418, 422 (S.C. 1981) (indicating that the requirement of medical assistance for feelings of insecurity resulting from identity crisis or inability to maintain stable employment or relationships due to the same may rise to the level of good cause).
79. See Silverman, supra note 29, at 88. Approximately twenty-one states have created some type of mutual consent registry. Cahn & Singer, supra note 38, at 162.
80. See Silverman, supra note 29, at 88.
81. See id.
82. See id.
83. Id.
84. Id.
c. Search and Consent Laws

Search and consent laws require a state, upon the request of the adoptee, to search for a birth parent and request consent to release identifying information.\[^{85}\] The adoptee is responsible for paying a fee for the service and the time of the search is limited.\[^{86}\] If the birth parent denies consent, then the adoptee may appeal the denial in court on a good cause standard.\[^{87}\] Even if parents provide their consent, some states still reserve the right to prohibit the release of the identifying information.\[^{88}\]

\[^{85}\] Id.
\[^{86}\] Silverman, supra note 29, at 88.
\[^{87}\] Id.
\[^{88}\] Id. For example, state agencies can deny the release of identifying information for any case in which it feels the release of identifying information would be “seriously disruptive to or endanger the physical or emotional health” of the applicant or person whose information the applicant requests. \textit{E.g.}, \textit{CONN. GEN. STAT.} § 45a – 751 (1991).

\[^{89}\] Silverman, \textit{supra} note 29, at 88.
\[^{90}\] The veto is often termed a “request for nondisclosure.” \textit{See} Cahn \& Singer, \textit{supra} note 38, at 167.

\[^{91}\] Silverman, \textit{supra} note 29, at 89.
\[^{92}\] Id.

\[^{93}\] Id. at 86.

\[^{94}\] Id. A “contact veto” is a document filed by one party to register a refusal to be contacted by the searching party. This veto sometimes extends to all lineal relatives and descendants. Bastard Nation, Conditional Access Legislation (2003), http://bastards.org/mediaroom/condAccessLeg.html. In a traditional contact veto system, if no veto is filed, then the contact information is released to the adoptee. \textit{See} id.

\[^{95}\] Silverman, \textit{supra} note 29, at 86; \textit{see} \textit{TENN. CODE ANN.} § 36-1-127 (2005).
differs from a traditional contact veto. If an adoptee approaches Tennessee’s Department of Children’s Services (DCS) desiring to contact his birth parents, DCS will check to see if a contact veto is on file; if one is on file, then DCS bars the adoptee from contacting his biological parents. If no contact veto is on file, then DCS will try to contact the biological parents. If the parent is contacted or cannot be found, and no veto is filed within ninety days, the birth parents are deemed to have waived their objection to disclosure of their identifying information.

The Tennessee law was unsuccessfully challenged in both federal and state courts on constitutional grounds, and the Supreme Court denied certiorari.

C. The Open Records Debate

The open records debate has produced three basic, distinct advocacy groups: those in favor of open records, those in favor of closed records, and those in favor of a partially restricted open records system. This section presents the arguments of each side of the debate.

1. Arguments in Favor of Unrestricted Access

Those who are in favor of unqualified open records legislation desire that all American adults be given equal rights regarding access to their birth records, adopted or not. They contend that closed records or any other type of restrictions on access to birth records segregates adoptees as a separate “class” of people and perpetually treats them as children requiring the supervision of adults (and the courts).

Next, advocates of open records highlight that closed

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96. Silverman, supra note 29, at 89. DCS plays an active role in investigating the whereabouts of birth parents under the Tennessee contact veto system, whereas the state plays a more passive role in a traditional contact veto system. Id.

97. Id.

98. Id.

99. Id.

100. Id. at 86; see Doe v. Sundquist, 943 F. Supp. 886 (M.D. Tenn. 1996), aff’d, 106 F.3d 702 (6th Cir. 1997), cert. denied, 522 U.S. 810 (1997); Doe v. Sundquist, 2 S.W.3d 919 (Tenn. 1999).


102. Id. at 3.

103. Id.
records schemes perpetuate the myth that adoption is shameful. Adoption author Marcy Axness asks, "[i]f we didn't find [adoption] so contemptible, so laced with shame, why would our laws be so vehemently constructed to protect everyone from the shame returning to their doorsteps?"

Finally, open records advocates argue that adoptees have a fundamental "right to know." In an opinion on an adoptee's petition to access his adoption records, Judge Wade S. Weatherford, Jr., of the Seventh Judicial Circuit Court, proclaimed in an unpublished opinion:

[M]ankind is possessed of no greater urge than to try to understand the age-old question: 'Who am I?' 'Why am I?' . . . Those emotions and anxieties that generate our thirst to know the past are not superficial and whimsical. They are real and they are 'good cause' under the law.

Unfortunately, the Supreme Court of South Carolina disagreed and reversed Judge Weatherford's ruling in 1981.

2. Arguments in Favor of Closed Records

Opponents of open records laws generally advance two principal arguments in support of their position. First, if social workers promise lifelong anonymity and confidentiality, then that promise should be kept. If adoption records were to be unsealed, then it would unfairly breach the expectation of privacy of birth parents and adoptive parents created at the time of adoption. They further claim that birth parents possess a fundamental right to privacy.

104. See id.


106. E.g., Ashe, supra note 23, at 3.


108. Braden, 274 S.E.2d at 422.

109. Caballero, supra note 2, at 306.

110. Id. Some birth parents have claimed that they were promised lifelong anonymity at the time of relinquishment, however relinquishment contracts do not guarantee that the child's birth certificate will be forever sealed. See BASTARD NATION, Do Birth Parents Have a Right to Privacy?, in THE BASIC BASTARD, supra note 4, at IX.

111. Caballero, supra note 2, at 307.

112. E.g., Ashe, supra note 23, at 4; see infra Part IV.D.2.
Second, opponents of open records laws aver that the existence of open records would cause birth parents, birth mothers in particular, to choose abortion over adoption because they cannot be promised future confidentiality as to their identity.113 This argument assumes that birth parents who relinquish their child for adoption wish to permanently sever all ties with the child.114 Therefore, under an open records regime, birth parents would prefer to terminate the pregnancy rather than run the risk of the child seeking them out later in life.115

Other bases for the support of closed records include: the potential inconvenience caused to the birth parents should the adoptee later re-enter their new lives, the potential psychological implications for the birth parents of such a possibly unwanted reunion, and the re-opening of a difficult time in their lives.116

3. Arguments in Favor of a Compromise Agreement

Proponents of a compromise agreement typically support open records legislation, but are willing to compromise by accepting conditions, such as contact vetoes or the use of intermediaries.117 Here, there still must be some sort of permission from, or intervention by, the state before the adult adoptee can access his records.118 Open records advocates will often agree to compromise legislation in order to make strides in the right direction with a legislature that is still reluctant to grant unconditional access.119

Another reason in support of a compromise agreement is that many people feel that birth parents and adoptees have valid competing interests.120 It then becomes difficult to determine whose rights should prevail.121

III. CURRENT STATE ADOPTION RECORDS SUBORDINATE

113. Caballero, supra note 2, at 307.
114. See id.
115. Id.
118. Id.
120. Cahn & Singer, supra note 38, at 190.
121. Id.
ADOPTEES IN SOCIETY

Most states deny adult adoptees access to their birth records, a right the rest of adult Americans enjoy. Only five states currently give adoptees this right. State adoption laws mandate that those children adopted in any of the other forty-five states be prohibited from learning about their pasts, which forces them to live in shame. Those who manage to access their records despite this bureaucratic barrier suffer the shame implicit in the whole process. Further, many of the search methods available impose costs on the searching party. This discriminates against low-income individuals solely wishing to know what their non-adopted counterparts already know.

Statistics indicate that there are approximately six million adoptees in the United States. This number, combined with the number of birth parents, adoptive parents, other adoptive or birth family relatives, judges, attorneys, counselors, and adoption professionals constitutes a significant portion of the United States population affected by the state of adoption records law. The opening of adoption records countrywide is essential to put adult adoptees on par with the rest of American citizens and to treat all citizens equally under the law.

IV. FAIRNESS REQUIRES THE UNSEALING OF ADOPTION RECORDS

Societal sentiment regarding the changing face of the American family unit has drastically changed in recent decades. Family law advocates have been making important, progressive strides in related areas of law pertaining to

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122. See generally BASTARD NATION, Open Records: Why It's An Issue, in THE BASIC BASTARD, supra note 4, at I.
123. See id.
125. Id.
126. See Kelley, supra note 7, at 231-34. Both proponents and opponents of open records have made numerous, yet unsuccessful equal protection constitutional violation claims. Id. Opponents (generally birth mothers) have failed for three reasons: (1) they fail to qualify as a suspect class, (2) they do not establish that birth mothers would be disproportionately affected by the legislation, and (3) they fail to prove that the legislation has a discriminatory purpose. Id. at 231-32.
familial relationships in the legislative and judicial arenas. Specifically, more and more states have begun to modify their current adoption records laws to ameliorate adoption record accessibility for adult adoptees. However, unrestricted access for adult adoptees, as opposed to veto-type systems, is imperative to fully appreciating adoptee equality.

A. Closed Records Are Unsuitable to the Current Societal Context

The policy reasons behind closed records statutes no longer exist today. State legislatures originally enacted sealed records laws to protect birth mothers and adoptees from the shame and embarrassment of having a child out of wedlock and being illegitimate. The stigma that existed in the early twentieth century, and served as the purpose behind closed records legislation, is no longer prevalent in the United States. The rise in open adoptions is one indication that this type of secrecy is no longer of comparable concern in our society.

The United States is behind most other countries in

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127. See, e.g., POLIKOFF, supra note 55, at 23-33 (discussing, among others, Levy v. Louisiana, 391 U.S. 68 (1968) and Glona v. Am. Guarantee & Liability Ins. Co., 391 U.S. 73 (1968)). In Levy, the Supreme Court found unconstitutional a Louisiana statute that denied nonmarital children the ability to recover for the wrongful death of their mother simply because they were "illegitimate." Levy, 391 U.S. at 68. Simultaneously, in Glona, the Court struck down a statute denying a mother the right to recover for the wrongful death of her nonmarital child on the basis that the child was born out of wedlock. Glona, 391 U.S. at 73. In these cases, the Supreme Court declared that "encouraging marriage and expressing disapproval of nonmarital sex were no longer constitutionally sufficient reasons to deny rights to children and their parents." POLIKOFF, supra note 55, at 27.


129. See generally Hildebrand, supra note 2, at 515 (analyzing changes in modern American society regarding the stigma of adoption-related issues).

130. Silverman, supra note 29, at 91.

131. Open adoptions involve on-going contact and the development of a relationship between the birth parent and the adoptee. Semi-open adoptions refer to adoptions in which the birth parents choose which prospective parents will adopt their child. Open Adoption Insight, What is Open Adoption?, http://www.openadoptioninsight.org/what_is_open_adoption.htm (last visited Mar. 23, 2008).

132. Hildebrand, supra note 2, at 515.
adoption law reform. Adult adoptees in at least eight European countries have the right to obtain their original birth certificates without any judicial or administrative proceeding. These countries include: Germany, Belgium, Spain, Netherlands, United Kingdom, Greece, Norway, and Poland. Scotland led the way for other nations by enacting open records legislation in 1935. The Scottish legislature recognized, among other things, the "adoptive's indefeasible right to adoption records and an original birth certificate.

In 1990, the United Nations Convention on the Rights of the Child entered into force. Article 2 of the Convention provides:

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

Brazil is a party to the Convention and has interpreted Article 2, along with its own constitutional provisions, to require the disclosure of birth information to adoptees upon inquiry. The United States is a signatory to the Convention, but has not ratified it.

B. Adoption Records Law Reform Must Be Remedied at the

133. See Rueff, supra note 18, at 465.
134. ETHICA, OPEN RECORDS, at 4, http://www.ethicanet.org/openrecords.pdf (last visited Mar. 23, 2008) (comparing sealed records laws in the U.S. with the open record laws of other countries and noting that these countries are considered by the U.S. to be peers in the areas of law and human rights).
138. Id. art. 2 (emphasis added).
139. ETHICA, supra note 134, at 6.
Legislative Level

The appropriate venue for adoption records law reform is at the legislative level. Constitutional challenges to closed records provisions have proven unsuccessful, arguably because of the current state of constitutional doctrine and the nature of this debate. Adoptees argue that their right to privacy necessitates the unsealing of adoption records, while biological and adoptive parents now assert that unsealing the records would violate their right to privacy. The privacy interests of the involved parties implicate complex questions of constitutional law and ostensibly counterbalance. Nonetheless, “[i]n considering the [Tennessee] open records statute, the Sixth Circuit expressed ‘skepticism that information concerning a birth might be protected from disclosure by the Constitution.’” Moreover, openness may become essential to an adult adoptee in a way that is more compelling than continued secrecy is to the birth parents.

Because the Supreme Court historically has been unwilling to address this predominately state-based issue, the most effective avenue for change is through state legislatures. Legislators nationwide have achieved recent success in passing laws that extend adult adoptees full or partial access to their birth records. Senator Paula Benoit, an adoptee, reigned victorious in her quest to open adoption records in Maine. The legislature mandated that identifying information shall be available to adult adoptees as of January 1, 2009.

141. See Cahn & Singer, supra note 38, at 190; supra text accompanying note 9.
142. See Cahn & Singer, supra note 38, at 169. “Adoptees argue that their right to privacy about the facts of their lives inherently includes the right to control those facts.” Caballero, supra note 2, at 303.
143. Cahn & Singer, supra note 38, at 190.
144. Id. at 170 (quoting Doe v. Sundquist, 106 F.3d 702, 705 (6th Cir. 1997), cert. denied, 522 U.S. 810 (1997)).
145. Cahn & Singer, supra note 38, at 191.
146. Koch, supra note 128.
147. Id.
C. Compromise Legislation Does Not Adequately Address the Open Records Problem

While a step in the right direction, partially restricted open records laws, such as those passed in Delaware and Tennessee, are inadequate to restore adoptees' equal status. Compromise legislation typically includes features such as registries and contact vetoes.

1. Mutual Consent Registries and Confidential Intermediary Systems Are an Ineffective Solution

Although many states have instituted mutual consent registries, these methods are an ineffective solution. First, in some states, information will not be released to the adoptee unless both birth parents have consenting documents on file. In many situations, these requirements can be prohibitive. For example, if the mother never informed the father of her pregnancy, he would be unaware of the necessity of filing his consent. Second, mutual consent registries are maintained at the state level, and when adoptees do not know where they were born and/or adopted, they are left without any guidance as to where to register. Third, because most registries are passive, adoptees, birth parents, and biological relatives may not know the registry even exists. Fourth, mutual consent registries often lack sufficient resources to serve their users and few have a presence on the Internet. Fifth, some states even require a waiver, signed by both adoptive parents, before allowing an adult adoptee to register. Finally, the provision of information that is unavailable to the registrant may be required as a prerequisite to registration. Therefore, registries are "relatively unsuccessful in publicizing their existence as well

149. See supra text accompanying notes 68-74.
150. See generally Cahn & Singer, supra note 38, at 163-65.
151. Id. at 164. Other states only require one parent to consent. Id.
152. Id. at 163.
153. Id.; see also Silverman, supra note 29, at 88.
154. Cahn & Singer, supra note 38, at 164.
155. Id. at 165; see also TIM GREEN, A MAN AND HIS MOTHER: AN ADOPTED SON'S SEARCH (HarperCollins Publishers 1997).
156. Cahn & Singer, supra note 38, at 164. For example, a registry may require the names of the adoptee's birthparents, which is something rarely known by adoptees in closed adoptions.
as in matching registrants."\textsuperscript{157}

Confidential intermediary systems established by search and consent laws\textsuperscript{158} are an equally ineffective means of solving the open records problem.\textsuperscript{159} First, if the party being sought cannot be located, the searching party is subject to the traditional "good cause" standard.\textsuperscript{160} Second, like mutual consent registries, states do not go to great lengths to make interested parties aware of the available intermediary systems.\textsuperscript{161} Since these systems entail the expenditure of resources on the part of the intermediary, its success depends largely on the interested parties' willingness to pay for these related costs.\textsuperscript{162} Such costs can create a substantial burden on the low-income applicant.\textsuperscript{163}

Furthermore, if an intermediary contacts the birth parent and she refuses to consent, this ends the process and the adoptee is prohibited from accessing any identifying information.\textsuperscript{164} At the time the birth parent is contacted by the intermediary, she is not provided with any counseling regarding her decision to grant or deny consent.\textsuperscript{165} Since the intermediary system is designed to facilitate this initial contact only, there is a strong likelihood the adoptee will never know if the birth parent subsequently changes her mind regarding the release of identifying information.\textsuperscript{166}

The principal problem with mutual consent registries and confidential intermediary systems is the inability of the registrant to control the process.\textsuperscript{167} Even if an adoptee is able to register, he is at the mercy of either the birth parent or the intermediary to make the next move.\textsuperscript{168} That time may never come. Finally, these proposed solutions perpetuate the "issues of shame and status identified by many adoptees' rights organizations."\textsuperscript{169}

\begin{thebibliography}{169}
\bibitem{157} Id.
\bibitem{158} See supra text accompanying notes 85-88.
\bibitem{159} See generally Cahn & Singer, supra note 38, at 165-66.
\bibitem{160} Id. at 165.
\bibitem{161} Id.
\bibitem{162} See id.
\bibitem{163} See Silverman, supra note 29, at 88.
\bibitem{164} Cahn & Singer, supra note 38, at 166.
\bibitem{165} Id.
\bibitem{166} Id.
\bibitem{167} Id.
\bibitem{168} E.g., id.; Silverman, supra note 29, at 88.
\bibitem{169} Cahn & Singer, supra note 38, at 166.
\end{thebibliography}
2. Contact Vetoes Are an Inappropriate Feature of "Open" Records Legislation

Contact veto and affidavit provisions of compromise legislation deny adoptees procedural due process by extinguishing their ability to obtain identifying information without even so much as a hearing.\(^{170}\) Furthermore, some contact veto legislation provides for separate, special remedies for those who violate a contact veto. For instance, the Uniform Adoption Act criminalizes searching for members of the adoption triad.\(^ {171}\) By creating a specific, criminal remedy to address the situation in which an adoptee searches for the birth parent over the written objection of the latter to be found, the Act essentially treats the adoptee as a second-class citizen. Adoption law should not address this problem. If an adoptee’s actions were to rise to the level of harassment, the birth parent would have the same remedy available to her as any other harassed individual.\(^ {172}\) However, by allowing a contact veto to end the inquiry for the adoptee denies the adoptee procedural due process of law.\(^ {173}\)

Moreover, if a birth parent files a contact veto at the time of relinquishment, at least eighteen years have since passed and many birth parents may never amend those contact vetoes to reflect their current point of view. As such, the adoptee would not have an opportunity for potential resolution.

D. Public Policy Necessitates the Opening of Birth Records to Adult Adoptees

The adoption law reform movement is supported by modern public policy considerations and changing societal attitudes. To be sure, current scholarship indicates scores of birth parents support open records, birth parents have no reasonable right to lifelong privacy, abortion rates have not increased in open states, and open records promote the personal best interests of adoptees.

1. Significant Numbers of Birth Parents Support Open

\(^{170}\) Conditional Access Legislation, supra note 94.
\(^{172}\) Conditional Access Legislation, supra note 94.
\(^{173}\) Id.
Records

Despite the general resistance to open records provisions in the United States, a significant number of birth parents support the unsealing of adoption records to adult adoptees.\(^{174}\) In fact, several birth parent organizations, including the preeminent organization Concerned United Birthparents (CUB),\(^{175}\) have formed in order to promote open records legislation.\(^{176}\)

When considering the rights of birth parents, one often thinks primarily of the birth mother, but biological fathers also have important interests in this debate.\(^{177}\) For example, in a case involving the request for release of information regarding American servicemen who fathered children overseas, numerous fathers submitted supporting affidavits indicating their strong desire to have contact with their biological children.\(^{178}\) These assertions sharply contrasted with the government's averments that release of the information could prove "highly embarrassing and personally disturbing to [the servicemen]."\(^{179}\)

The presumption that birth parents have no desire to have contact with their child is also a myth.\(^{180}\) Long after the relinquishment of a child, a birth parent still often feels an enduring connection to him and may even want to find him.\(^{181}\) "[M]ore than 80% of the biological mothers who have relinquished children for adoption in Michigan since 1980 have consented to the disclosure of their identity when their children become adults."\(^{182}\) Many birth parents want to

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175. Lee Campbell founded the non-profit organization Concerned United Birthparents (CUB) in October 1976. Concerned United Birthparents, What is CUB?, http://www.cubirthparents.org/page9.html (last visited Mar. 14, 2008). CUB members include "birthparents, adoptees, adoptive parents, and . . . others affected by adoption." Id. CUB's purposes include: "providing mutual support for coping with the ongoing challenges of adoption, working for adoption reform in law and social policy, . . . and educating the public about adoption issues and realities." Id.
176. See Ashe, supra note 23, at 3.
177. See Cahn & Singer, supra note 38, at 179.
180. Silverman, supra note 29, at 92-93.
181. Cahn & Singer, supra note 38, at 177.
182. Id. at 187 (citing Joan Heifetz Hollinger, Aftermath of Adoption: Legal and Social Consequences, in 2 ADOPTION LAW AND PRACTICE § 13.01[1], at 13-38
reassure the adoptee that they gave him up out of love.\textsuperscript{183}

In any case, the vast majority of birth parents understand that they have no "legal claim" to the adoptee and do not try to interfere by attempting to take on a parental role.\textsuperscript{184} One birth mother explains the feeling after her reunion with her child as, "like being reborn," and stating further, "I have peace of mind . . . I feel complete now."\textsuperscript{185} As the state amends birth certificates upon relinquishment to reflect the adoptive name of the child and adoptive parents, it can be nearly impossible for a birth parent to find a relinquished child.\textsuperscript{186} If neither the adoptee nor the birth parent ever has any avenue through which to obtain identifying information, they may never be able to locate one another despite subsequent changes of heart. It is not the place of the state to regulate adult relationships in this manner.

2. Birth Parents Have No Reasonable Expectation of Lifelong Privacy

Supporters of closed records laws argue that birth parents who have relinquished a child for adoption have an expectation of privacy that unfairly would be breached by subsequently opening the records.\textsuperscript{187} However, many birth parents indicate that adoption agencies conditioned the adoption on confidentiality, rather than promising it to them.\textsuperscript{188} Moreover, the child's birth certificate is only sealed and amended once the court finalizes his adoption.\textsuperscript{189} Therefore, if a child is never adopted, then his birth certificate will remain unsealed and retain the names of his biological parents.\textsuperscript{190} If the intent of sealing adoption records were to protect a birth parent's right to privacy, then the

\begin{footnotesize}
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\item 183. Silverman, \textit{supra} note 29, at 92.
\item 184. \textit{See id.} at 93.
\item 186. Cahn & Singer, \textit{supra} note 38, at 178.
\item 187. \textit{Id.} at 184; Silverman, \textit{supra} note 29, at 91; \textit{see supra} text accompanying note 102.
\item 188. Cahn & Singer, \textit{supra} note 38, at 185.
\item 189. Caballero, \textit{supra} note 2, at 293.
\item 190. \textbf{BASTARD NATION, Do Birth Parents Have a Right to Privacy?}, in \textbf{THE BASIC BASTARD}, \textit{supra} note 4, at IX.
\end{itemize}
\end{footnotesize}
adoption record would be sealed at relinquishment, not at the establishment of the new legal family.191

Another argument advanced by birth parents is that opening sealed adoption records would violate their vested legal rights.192 The Tennessee Supreme Court, in Doe v. Sundquist,193 stated, “there simply has never been an absolute guarantee or even a reasonable expectation . . . that adoption records were permanently sealed.”194 In upholding the constitutionality of the Tennessee adoption records statute, the court also noted that there has always been some avenue for the adoptee seeking identifying information,195 and that states are gradually allowing adoptees greater access to this information.196

3. Abortion Rates Will Not Increase As a Result of Open Records

Anti-abortion activists and proponents of closed records systems claim that confidentiality is central to a woman’s choice to give her child up for adoption rather than abort it.197 They argue that if confidentiality were removed from the process, then women would prefer abortion to adoption in order to protect their identities.198 However, no nexus exists between open records and increases in abortion rates.199 This lack of evidence suggests that the assumption that birth parents intend to sever all ties with a relinquished child is a misconception.200 In fact, it is conceivable that birth parents may be more likely to choose adoption over abortion if a chance existed that they could regain contact with the child later on in life.201

191. Id.
192. Id.
194. Id. at 925.
195. For example, a court could order the release of identifying information upon the satisfaction of the “good cause” standard.
196. Cahn & Singer, supra note 38, at 161.
197. Silverman, supra note 29, at 96.
198. Id.
199. Id.
201. Id.
4. Open Records Do Not Threaten the Role of Adoptive Parents

Open records do not negatively affect the prospective adoptive parent’s ability to adopt. In fact, the rates of adoption in Kansas and Alaska, two states with seasoned open records systems, are substantially higher than the national average. These statistics suggest that open records may even encourage adoption.

In a recent survey, eighty-four percent of adoptive mothers and seventy-three percent of adoptive fathers surveyed supported adult adoptee access to their original birth certificates. Most adoptive parents have a healthy, stable relationship with their adopted child and, thus, are very open to the adoptee’s curiosity about his past once he attains the age of majority. Additionally, following a reunion between an adoptee and his biological parent, his relationship with the adoptive family may actually strengthen.

5. Open Records Are in the Best Interests of the Adoptee

Adult adoptees should have unrestricted access to their original birth records. An abundance of evidence indicates that information about an adoptee’s biological history is often “central to [his] construction of identity.” Adoptees often desire to learn more about their pasts, ethnic heritage, or even where a particular physical feature came from.

Professors Naomi Cahn and Jana Singer propose a solution to the adoption records controversy that caters to fluidity over time. The sealing of records at the time of...
When a birth parent gives a child up for adoption, she often desires to redefine her life and to distance herself from any parent-child relationship. At the same time, the adoptive family typically wishes to avoid contact with the biological parents in order to create a stable home life for, and a strong bond with, their new child. These are legitimate desires that are often congruent with the best interests of the child and open records legislation should respect them.

However, "[a]s an adopted child matures . . . and the birth parent's relinquishment recedes in time, the child's identity should begin to predominate." As the adoptee learns more about himself, numerous questions arise that can only be answered by his birth parents. From that point, the identity interests of the adoptee "outweigh the birth parent's earlier desire to prevent the establishment of a parent-child relationship." Furthermore, the adoptee attaining the age of majority nullifies the birth parent's ability to make decisions on behalf of the child.

Even though the adoptee often forms close, meaningful relationships with others, it is easy to sympathize with the desire to learn more about one's roots. "Without the completion of identity formation, individuals are not capable of achieving a healthy sense of self-esteem." For example, adoptees typically do not resemble adoptive family members. As a result, the adoptee frequently experiences emotional pain and can develop an underlying sense of being an outsider. One manifestation of these feelings is the tendency of adoptees to desire (and often conceive) children at

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212. See generally id. at 173-74.
214. Id.
215. Id.
216. Id.
217. See generally id.
219. Id. at 174-75.
220. Silverman, supra note 29, at 93. While some adoptees have no problems establishing stable relationships, others have difficulty doing so, stemming from the separation from the biological parents. See id.
221. Id. at 93 (quoting DAVID M. BRODINSKY & MARSHALL D. SHECTER, THE PSYCHOLOGY OF ADOPTION 320 (Oxford Univ. Press 1990)).
222. Silverman, supra note 29, at 94.
223. See id.
an early age to establish a link to a biological relative. In some circumstances, the lack of a complete sense of identity can lead to more severe psychological consequences.

The foregoing reasons strongly implicate the need for open records legislation that protects adult adoptees regardless of their state of birth or adoption.

V. PROPOSAL: THE RESURRECTION OF THE MODEL STATE ADOPTION ACT

This comment proposes the enactment of a uniform statute permitting adult adoptees' unconditional access to their birth records, similar to the original Model State Adoption Act provisions, coupled with a central registry. Under this system, states seal birth records at the time of relinquishment until the time at which the adoptee reaches the age of majority.

The Act's provisions relating to birth records (Title V) provide for the maintenance of records for ninety-nine years after the adoptee attains the age of majority to ensure the availability of the records to interested parties. Once the adoptee reaches adulthood, he then has the right to inspect the unamended birth certificate. The Act considers the interests of birth parents by allowing agencies to redact portions of the birth records that would be a source of embarrassment for the adoptive parents, such as infertility or sexual difficulties. The statute also takes into account the interests of adoptive parents, by providing for the initial sealing of birth records in order to create a stable home environment and relationship with their newly adopted child.

Title V creates minimum record retention standards for

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224. See id.
225. Id.
226. Silverman, supra note 29, at 97 (noting the importance of a central registry).
228. Id. at 10,639. The Act provides for retroactivity of its provisions. Id. at 10,640.
229. Id. at 10,639.
230. Id.
adoption agencies to follow. Instead of allowing individual adoption agencies to be the sole guardian of records, the proposed amendment suggests the creation of a centralized national registry to which the individual adoption agencies must forward their adoptee files. This alleviates the difficulty of the adoptee who does not know where he was born and/or adopted and lessens the power that private adoption agencies have over the adoptee's access to records. Furthermore, it increases the likelihood that the adoptee will have easy access to the records and that the records will be maintained as mandated by the Act. If some states were slower to adopt the proposed uniform legislation, at least a central registry would exist where an adoptee and/or birth parent could go to attempt to more easily locate the other. However, all state legislatures would be encouraged to incorporate the uniform provisions into their state laws to avoid discrimination of adoptees based on their state of birth and/or adoption.

This proposal takes into account the interests of all relevant parties and puts the best interests of the child first, a standard imposed everyday in family courts around the nation. Moreover, it would mirror achievements of foreign nations around the globe, which have long respected the plight of members of the adoption triad (and some that even consider it mandated by international human rights law).

VI. AMERICA IS READY: THE TIME FOR CHANGE IS NOW

Numerous adoptees go through life not knowing basic things, such as whom in their family they resemble, whose personality they have, and whether they should be aware of any particular familial health concerns. The incorporation of a uniform adoption records statute permitting adoptees, who so desire it, to know more about where they came from is of paramount importance and results in treating all American citizens equally.

This comment aims to provide the reader with a comprehensive understanding of the development of American adoption records law, from the early, simple

231. Id.
233. See Cahn & Singer, supra note 38, at 156.
234. See supra text accompanying note 145.
apprenticeship system,\textsuperscript{235} to today’s complex, asymmetrical, legal adoption system that is riddled with discriminatory provisions.\textsuperscript{236} This journey through American history leaves us in an era of change.\textsuperscript{237} The tide is turning in favor of adoptees’ individual rights and organizations such as Bastard Nation are winning key victories.\textsuperscript{238} When adoption law arrived in the United States from Europe,\textsuperscript{239} its focus shifted from serving the best interests of adoptive parents to “protect[ing] the welfare of the adopted children.”\textsuperscript{240} This is said to be one of the United States’ most important influences on adoption law.\textsuperscript{241} It is time to renew dedication to this purpose and finally remove the veil of secrecy and shame of all adult adoptees.