ADOPTION, IDENTITY, AND THE CONSTITUTION: THE CASE FOR OPENING CLOSED RECORDS

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I. INTRODUCTION

Children pose a puzzle for American constitutional jurisprudence. On the one hand, the Supreme Court has recognized that children are persons within the meaning of the Fourteenth Amendment and has accorded them some, but not all, of the individual rights enjoyed by adults.[1] On the other hand, the Court has largely reinforced the notion that the traditional family unit provides adequate constitutional protection for children. Particularly in the substantive due process context, the Court has tended to equate children's interests with those of their parents and to protect children derivatively through such doctrines as parental autonomy and familial privacy.[2]

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[1] *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (protecting a student's right to engage in silent and passive protest on school property); *In re* Gault, 387 U.S. 1 (1967) (holding that juvenile adjudication proceedings, where a commitment to a State institution is a possibility, must meet "due process" standards). Even these cases have generally failed to articulate any coherent theory of children's due process rights, particularly where children's interests conflict with the interests of their caretakers. *See* Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 172-82 (1999).

[2] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (allowing Amish parents to withdraw children from school after eighth grade); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (protecting, in dicta, parents' rights to educate their children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (reversing conviction of teacher who had instructed child in foreign language in violation of Nebraska statute, under reasoning that Fourteenth Amendment protects teacher's liberty); *see also* Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1586 (1996) (critiquing cases).

Reliance on parental liberty and privacy rights to protect children has always been problematic. As Professor Barbara Woodhouse argues in her "revisionist" account of *Meyer* and *Pierce,* locating a parental right to raise children in the liberty clause of the Fourteenth Amendment only makes sense if children are viewed as the property of their parents.[3] Moreover, the Court's insistence on protecting children derivatively through such doctrines as parental privacy ignores the interests of those children whose parents lack the economic means to provide protection, while prevailing notions of constitutional entitlements do little to guarantee parents such means. Perhaps more troubling, by limiting the State's authority to intervene in family life, conceptions of parental privacy and autonomy endanger children whose parents lack the will to protect them.[4]

Despite these shortcomings, the idea that society can best promote children's interests by reinforcing parental authority and preventing undue State interference with parental child-rearing decisions retains power as a jurisprudential construct and as a check against state-imposed orthodoxy.[5] This belief, however, must be separated from its development during a time when marriage and parenthood were closely tied, intra-family conflict was suppressed, and an elaborate network of legal and social incentives and sanctions forced (most) adult women to devote the bulk of their time and energy to caring for children. Today, these background legal and societal assumptions no longer hold true.[6] The law now recognizes that parenting takes place in a broad variety of familial settings. More importantly, the law now views adult family members as

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[3] *See* Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1041-42 (1992).

[4] *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 203 (1989) (holding that state officials did not breach a constitutional duty when they knowingly failed to protect a four-year old boy from a brutal beating at the hands of his biological father, and noting that, had state authorities moved too quickly to intervene "they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection"). This is not to suggest that the State has not historically intervened in children's lives, particularly the lives of poor children, but *DeShaney* reaffirms that the State is under no constitutional obligation to do so.

[5] For one argument as to its continued validity, see Martha Albertson Fineman, *What Place for Family Privacy?* 67 GEO. WASH. L. REV. __ (forthcoming 1999); Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. __ (forthcoming 1999); *see also* Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317 (1994).

[6] For an argument that these background assumptions have simply changed forms, see Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

autonomous individuals whose separate preferences and decisions demand social respect and legal protection. Parents are no longer partners for life, if, indeed, they become partners at all.[7] Women are no longer forced to choose motherhood as their only, or, indeed, their primary, career.[8] Yet neither fathers nor society has responded to women's changing investment in parenting by significantly increasing their role in caring for children. As Janet Dolgin recently observed, "Children— and, even more, childhood— continue to be understood in traditional terms, but the legal and familial structures within which those terms once made sense have largely disappeared."[9]

The demise of these traditional legal and familial structures has led some child advocates to seek enhanced constitutional rights on behalf of children. But constitutional rights, as conventionally understood, are ill-suited to address the needs of children because they fail to address the reality of children's lives, particularly their dependence on adult caretakers. Children require ongoing, intimate, hierarchical relationships. Legal doctrines and processes must both facilitate the formation and maintenance of these dependency relationships, and protect children from the vulnerability created when those relationships go awry. The conventional means for providing these protections is the use of "rights." For groups that have been historically subordinated, rights discourse can be powerful, indicating that they, too, are deserving of recognition under our Constitution.[10] Yet rights discourse remains an imperfect method for describing the realities of children's lives and for recognizing and protecting children's interests.[11]

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[7] *See* JUNE CARBONE, FROM PARENTS TO PARTNERS (forthcoming 1999).

[8] Indeed, most women are arguably economically precluded from choosing to work exclusively in the home. *See generally* ELLEN GALINSKY, ASK THE CHILDREN: WHAT AMERICA'S CHILDREN REALLY THINK ABOUT WORKING PARENTS (1999) (exploring children's and parents' views of working families).

[9] Janet Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 348 (1997).

[10] For a discussion of the importance of rights, see, e.g., Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 306-07 (1987); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 357 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 432-33 (1987).

[11] *See generally* Martha Minow, *Rights for The Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L. J. 1 (1986) (arguing that other social goals such as crime reduction and abortion regulation, rather than the well-being of children, are the dominant objectives of child welfare laws); Barbara Bennett Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 BYU L. REV. 497 (1993) (advocating a new approach based on a community ethos that values

The continuing controversy over the confidentiality of adoption records illustrates the inadequacy of existing constitutional law doctrine to address issues involving children and their families. The typical adoption concerns a child and the new family unit that is created to substitute for the child's biological family.[12] One aspect of this legal substitution has been the sealing of the adoptee's original birth certificate. As they mature, adoptees often seek information about their biological families, including their original birth certificates. Constitutional law has proved to be an awkward vehicle for articulating and evaluating the claims of adoptees to information about their biological families. Courts have unsuccessfully attempted to balance the rights of adoptees against those of their biological and adoptive parents, rather than recognizing and attempting to mediate the overlapping identity issues at stake.

This article first reviews the history of closed adoption records in the United States, focusing on the post-World War II shift from confidentiality to secrecy. Next, it discusses the constitutional law challenges brought initially by adult adoptees to the sealing of records and, more recently, the challenges of birth parents to efforts to open records. The article then turns to arguments in favor of, and against, open records and concludes that these arguments point strongly in the direction of openness, particularly for prospective adoptions. We thus propose a presumption of open records, at the election of an adult adoptee, to replace the current secrecy requirement. We question the assumption that life-long secrecy serves the interests of biological parents, adoptive parents, and adoptees. While we would preserve the biological parents' option to preclude contact, we believe that this opposition should not prevent the adoptee from accessing the original birth certificate. Our proposal would apply only to adult adoptees, in recognition of the evolving nature of children's and parents' identity interests. This approach recognizes the integrity of the adoptive family while the adoptee is young, but then privileges an adoptee's choice to seek addi-

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children as individual members of society and not just as an extension of their parents). As Catherine Ross points out, the usefulness of rights may also depend on the child's age. *See* Ross, *supra* note 1, at 178-201.

[12] Although we focus in this article on infant adoptions by adults unrelated to the child, these are actually a minority of the adoptions finalized in the United States. Professor Joan Hollinger notes that at least 60% of all adoptions are by relatives. *See* Joan Heifetz Hollinger, *Introduction* to 1 ADOPTION LAW AND PRACTICE § 1.05[2] 1-53 (Joan Heifetz Hollinger et al. eds., 1998). Adoption of adults remains relatively infrequent, but does serve as a means of allowing otherwise unrelated individuals to serve as "family."

tional familial ties when she is mature; it also protects the rights of biological parents by allowing them to establish a relationship with the adoptee, but respecting their choice to veto contact.

II. ADOPTEES AND OPEN RECORDS

Adoption is a state-sanctioned process in which the rights of a biological parent are terminated and the child becomes part of a new legally recognized family. The biological parents subsequently have no legally recognized relationship with the child, as the adoptive parents assume all of the rights and obligations attached to parenthood. The child is not a party to any of these arrangements, although, obviously, she is the subject of the situation. Since World War II, adoption in the United States has been marked by secrecy and closed proceedings.[13] Under the typical scenario, parents who relinquished a child for adoption received no identifying information about the child's placement, nor did the child receive identifying information about her biological parents.[14] Thus, neither adoptive parents nor adoptee children have had the means to contact a biological parent; nor did a biological parent have the means to contact anyone within the adoptive family. All records, including the adoptee's original birth certificate, were sealed by statute and could not be opened, except upon a judicial finding of "good cause." The state even issued a new birth certificate identifying the adoptive parents as the child's only parents.[15]

This secret, closed system is a relatively recent phenomenon. The first "modern" adoption statutes were enacted around the middle part of the nineteenth century. These statutes were "modern" in that they focused on protecting the welfare of the child, rather than merely providing heirs for the adoptive parents.[16] These statutes were not, however, con-

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[13] *See* Joan Heifetz Hollinger, *Aftermath of Adoption: Legal and Social Consequences*, *in* 2 ADOPTION LAW AND PRACTICE § 13.01[1] (Joan Heifetz Hollinger et al. eds., 1998).

[14] This description applies to non-relative adoptions, which account for approximately 40-50% of all domestic adoptions. *See* E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 1 (1998). Adoptions of older children, who have spent time in foster care, often do not conform to this model.

[15] *See* Hollinger, *supra* note 13, at § 13.01[1], 13-6.

[16] *See* Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 748-49 (1956) (arguing that the "true genesis" of American adoption law beginning about 1849 was concern for the welfare of neglected and dependent children); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1042-1043 (1979) (analyzing an 1851 Massachusetts adoption statute as the first "modern"

cerned with secrecy or confidentiality.[17] Adoption evolved over the next century, becoming more bureaucratic and professionalized.[18] The first state law that required a home investigation to determine the appropriateness of an adoptive household was enacted in Minnesota in 1917. This law also restricted access to adoption court files to the "parties in interest and their attorneys and representatives of the State board of control."[19] The purpose of these early confidentiality restrictions was *not* to prevent those involved in the adoption from having access to information, but to keep the public from viewing these files to determine whether a child was born outside of marriage.[20] Thus, these Progressive Era statutes made court files confidential, but not secret, as they did not prevent members of the adoption triad from obtaining information and viewing their adoption records. Reviewing the trend in 1941, a U.S. Children's Bureau researcher explained, "with the growing appreciation of the need for protecting adoption records from curious eyes, an increasing number of adoption laws have included provisions to keep the records confidential and available only to persons having legitimate reasons for knowing their contents."[21]

Similarly, during the 1930s and 1940s, when states began issuing new birth certificates to adopted children, the states' goals were to improve the collection of children's vital statistics and reduce the stigma of illegitimacy, not to prevent adopted children from gaining access to their original birth certificates. "Vital statisticians shared the basic assumptions of Progressive child welfare reformers that the birth record would be sealed to preserve family information *for* those connected to the adoption, not to prevent them from viewing such data."[22] Moreover, until the end of World War II, social workers involved in adoption compiled detailed family histories of the children they placed, under the assumption that

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adoption statute); Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Sustenance or Specter?*, 38 UCLA L. REV. 917, 924 (1991) (noting that the 1851 Massachusetts adoption statute made the welfare of the child and the parental qualifications of the prospective parents its primary concern).

[17] *See* Hollinger, *supra* note 13, at § 13.01[1], 13-5.

[18] For various historical perspectives on adoption, see MATTHEW A. CRENSON, BUILDING THE INVISIBLE ORPHANAGE (1998); Catherine J. Ross, *Families Without Paradigms: A Historical Perspective on the Varied Experiences of Out-of-Home Placement*, 60 OHIO ST. L.J. __ (forthcoming 1999).

[19] CARP, *supra* note 14, at 40 (quoting Children's Code of Minnesota, ch. 222, 1917 MINN. LAWS 335).

[20] *See id.* at 42.

[21] *Id.* at 41-42 (quoting MARY RUTH COLBY, U.S. CHILDREN'S BUREAU, PROBLEMS AND PROCEDURES IN ADOPTION (1941)).

[22] *Id.* at 54.

the children would eventually return to the agencies to request information about their birth families and that adult adoptees were entitled to such information.[23] Thus, through the first half of the twentieth century, "there existed among legislators, vital statisticians, and social workers a consensus both in policy and practice of openness in disclosing information to those most intimately connected to adoption."[24]

A number of social and professional pressures fueled the shift from confidentiality to secrecy during the post-World War II era. Adoption agencies used the promise of secrecy as a way to distinguish themselves from less respectable adoption sources.[25] Social workers argued that secrecy would help insure the integrity of the adoptive family by preventing disgruntled biological parents from later attempting to reclaim their children.[26] In addition, social workers believed that the secrecy of records would help biological mothers "recover" from their "indiscretion" and continue with their lives as though they had never had a child.[27]

The changing demographic composition of birth parents also contributed to the rise of secrecy. Prior to World War II, a majority of the birth mothers who surrendered children for adoption were either married or divorced, and often relinquished children only after struggling to support them financially. In the postwar era, birth mothers were younger and predominantly single; the vast majority of their children were born outside of marriage and were relinquished within days of their birth.[28] These changing demographics were accompanied by a shift in attitudes toward unwed mothers. Before World War II, out-of-wedlock pregnancy was often explained as the product of inherent and immutable biological and moral deficiencies. Children born under such circumstances were biologically suspect and women who gave birth outside of marriage were permanently marked as outcast mothers.[29] In the post-World War II era, this biological explanation was replaced with a psychological paradigm that asserted that illegitimacy reflected an emotional rather than a biological dis-

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[23] *See id.* at 68-70.

[24] *Id.* at 100.

[25] *See id.* at 112-13.

[26] *See* CARP, *supra* note 14, at 105; Hollinger, *supra* note 13, at 13-8.

[27] *See* CARP, *supra* note 14, at 111, 115-16.

[28] *See id.* at 110; *see also* RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE *ROE V. WADE* 13 (1992) (noting that the rate of out-of-wedlock births increased dramatically during and after World War II). Professor Solinger also notes that adoption functioned differently for white and black mothers and children.

[29] *See* SOLINGER, *supra* note 28, at 8, 15.

order, and that such a "maladjusted" female could be "rehabilitated" and reintegrated into society.[30] Key to this rehabilitation was the immediate relinquishment of the child and the permanent severing of ties between the biological mother and the adoptive family:

> Through adoption, the unwed mother could put the mistake—both the baby *qua* baby and the proof of nonmarital sexual experience—behind her. Her parents were not stuck with a ruined daughter and a bastard grandchild for life. And the baby could be brought up in a normative family, by a couple prejudged to possess all the attributes and resources necessary for successful parenthood.[31]

Secrecy was thus seen as critical to the successful rehabilitation of unwed (white) mothers and to their reentry into the marriage market, as well as to the child's successful integration into her adoptive family.[32] Secrecy also served the interests of childless couples, who sought adoption in unprecedented numbers during an era of celebratory pronatalism, which viewed parenthood as a patriotic necessity and a prerequisite to marital success.[33] Adoption protected these couples from the shame of infertility and created families for them that were seemingly indistinguishable from their biological counterparts. By the mid-1960s, these factors had combined to transmute traditional confidentiality requirements into a regime of sealed records and secrecy which prevented all members of the adoption triad from accessing information about the connection between adopted children and their biological families.

A. The Early Claims for Opening Records

Beginning in the 1970s, adoptees sought legal access to their original birth records. They challenged the continuing secrecy of their birth certificates and pressured states to disclose the certificates, complete with the names of their biological parents.[34] Although adoptees articulated four different

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[30] *Id.* at 16-17; *see also id.* at 17 ("The postwar recasting of white illegitimate mothers offered these girls and women a remarkable trade-off. In exchange for their babies, they could reenter normative life.").

[31] *Id.* at 155.

[32] The secrecy provisions, of course, applied at the birth of the child; there is no evidence of any consideration given to the longevity of these secrecy restrictions. Telephone Interview with Joan Hollinger, Professor, University of California, Berkeley (June 23, 1999).

[33] *See* CARP, *supra* note 14, at 28-29; *see also* SOLINGER, *supra* note 28, at 26.

[34] For commentary on these efforts, see, for example, Leslie Allan, *Confirming the Constitutionality of Sealing Adoption Records*, 46 BROOK. L. REV. 717 (1980) (dis-

sets of constitutional claims— privacy rights under the Fourteenth Amendment's Due Process Clause, informational access rights under the First Amendment, equal protection claims under the Fourteenth Amendment, and anti-slavery rights under the Thirteenth Amendment— we will focus here only on the due process claims. This constitutional issue reappears in contemporary litigation about the confidentiality of birth records, but in an ironic transformation, it is the biological parents invoking the Fourteenth Amendment privacy claims to protect the continuing secrecy of birth records against states' efforts to unseal them.

The due process privacy claims dramatize the conflicting rights that courts believe are at issue in the open records cases. In discussing the meaning of the zone of family privacy, courts pose the issue of what is a family and whose rights within the family should be protected. In discussing the adoptees' interests, the courts invoke differing meanings of privacy— is privacy confidentiality, or is it identity-formation? Is identity based on individual development, or is it relational and contextual? By declining to find confidentiality protections for either the biological parents or for the adoptees, the courts continue to articulate these conflicting privacy interests— and definitions of privacy— for members of the adoption triad. The analysis in these cases reveals the shortcomings of applying traditional due process doctrine to claims by and involving children.[35]

In the most widely cited case brought by adoptees, the Second Circuit rejected the adoptees' claim that their "personhood" entitled them to open birth records.[36] The plaintiff

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cussing legal efforts of adult adoptees challenging the sealing of adoption records); Anne E. Crane, *Unsealing Adoption Records: The Right to Know Versus The Right to Privacy*, 1986 ANN. SURV. AM. L. 645 (discussing legislative and judicial challenges to sealed records); Debra D. Poulin, *The Open Adoption Records Movement: Constitutional Cases and Legislative Compromise*, 26 J. FAM. L. 395 (1988) (discussing legal and legislative challenges to the sealing of adoption records); Carol Gloor, Comment, *Breaking the Seal: Constitutional and Statutory Approaches to Adult Adoptees' Right to Identity*, 75 NW. U. L. REV. 316, 339-40 (1980) (arguing that a due process privacy claim presents the best option for opening records).

[35] This paper focuses primarily on issues involving adopted children. Although many of the claims concern adult adoptees, the claims derive from what happened to them as children. We are not, of course, suggesting that adoptees never grow up, but are instead making the simple point that one's status as an adoptee begins in childhood.

[36] Alma Soc'y Inc. v. Mellon, 601 F.2d 1225 (2d Cir. 1979). "Personhood" is defined as "those attributes of an individual which are irreducible in his selfhood." J. Braxton Craven, Jr., *Personhood: The Right to Be Left Alone*, 1976 DUKE L.J. 699, 702 n.15 (quoting Professor Freund). Professor Jed Rubenfeld notes that personhood is difficult to define, but that, at the least, it means that there are some aspects that are so fundamental to our identity that the State cannot infringe them. *See* Jed

adoptees argued that the New York statutes providing for sealed adoption records violated the Due Process Clause because the adoptees were constitutionally entitled to the information contained in the records.[37] Adoptees argued that the Constitution protected their access to information that was integral to their self-development.[38] The *Alma Society* court began by observing that the adoptees' claims did not conform to any existing articulation of the right to privacy and thus could be rejected solely on that basis.[39] Nonetheless, the court proceeded to analyze the adoptees' claims. The court noted that the adoptees' requests implicated the interests of two "families," the biological family and the adoptive family.[40] Drawing on Supreme Court cases addressing the importance of an intact family, notwithstanding the claims of a biological father, the Second Circuit recognized significant interests of the adoptive families which might be "adversely affected" through disclosure of the names of the biological parents:[41]

> [E]ven though appellants are adults we must assume that they are still part of their adoptive families, families still in existence as to each of them which might be adversely affected by the release of information as to the names of natural parents or the unsealing of the adoption records. At least it would seem that there is an interest on the part of the *adopting* parents that is of recognized importance . . . .[42]

The court, however, did not explain how disclosure would adversely effect adoptive families.

Turning to the interests of the biological parents, the Second Circuit used the fundamental right to marry as an argument that courts must look at "the nature of the relationships and that choices made by those other than the adopted child

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Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 753 (1989).

[37] The plaintiffs also claimed violations of the Equal Protection Clause for treating adopted children differently from other children, who had easy access to their original birth certificates, as well as several other claims. *See generally* Allan, *supra* note 34, at 723-24 (discussing constitutional challenges to the sealing of adoption records).

[38] *See id.* at 723 n.29.

[39] *See Alma Soc'y*, 601 F.2d. at 1231.

[40] *Id.*

[41] *Id.* at 1231-32. The court relied on *Quilloin v. Walcott*, 434 U.S. 246 (1978), to support its contention that the state has a strong interest in preserving the integrity of the family unit. Subsequent Supreme Court cases support this interpretation of *Quilloin*. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 123 (1989) (noting the "historic respect . . . traditionally accorded to the relationships that develop within the unitary family"); Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 655-72 (1993) (discussing judicial decisions regarding the meaning of family).

[42] *Alma Soc'y*, 601 F.2d at 1232.

are involved."[43] Thus, the biological mother's choice to keep the adoption confidential is a significant consideration because it presumably influenced her decision to place her child for adoption.[44] The court acknowledged that some birth and adoptive parents might not object to release of the information, but suggested that the state legislature had balanced the different relationships in allowing a hearing to show "good cause" as to why the records should be unsealed.[45]

The court observed that "appellants' novel claims do not fit into any as yet recognized category of 'privacy.'"[46] Nonetheless, the court proceeded to analyze the claims under existing due process precedents. The approach, however, is highly problematic because it attempts to apply constitutional individual rights analysis to an issue that is fundamentally about relationships among families and between family members. The court thus reasons by analogy to other interests protected as a form of liberty— first to a case concerning the rights of a biological father to prevent the adoption of his minor child, and second, to a case concerning the right to marry; these cases establish the court's framework for protecting an intact family.

Although there is no Supreme Court doctrine that squarely addresses the interrelated aspects of privacy and adoption, the analogies are inadequate because they deal with different sets of rights and relationships. The unwed father case concerns notions of family integrity for an existing unit against claims of related outsiders; in the case of adopted children, members of an "intact" family unit seek information about biologically-related family members.[47] The child is trying to pierce the privacy that surrounds the adoptive family unit in order to get information about what is, arguably, another family. Thus, it is a claim by someone from inside the family unit. The marriage cases are perhaps more similar to the adoption records cases: both concern issues created by a state-conferred status and both concern the

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[43] *Id.* at 1233. The court relied on *Zablocki v. Redhail*, 434 U.S. 374 (1978); other courts analogized the familial situation to that protected in *Loving v. Virginia*, 388 U.S. 1 (1967). In a recent decision concerning the due process rights of foster care parents when the biological parent-child relationship had been terminated, the court reiterated the protection accorded to freedom of choice in family life. *See* Rodriguez v. McLoughlin, 96 Civ. 1986, 1998 U.S. Dist. LEXIS 14712, at *20 (S.D.N.Y. Sept. 15, 1998) *vacated in part on other grounds*, 49 F. Supp. 2d 186 (S.D.N.Y. 1999).

[44] *See Alma Soc'y*, 601 F.2d at 1231-32.

[45] *Id.* at 1236.

[46] *Id.* at 1231.

[47] The cases are, of course, similar, in that they address issues of relationships between family members.

rights of individuals to choose a particular family form. But unlike cases involving access to marriage, the adoptees' claims of access to birth records may affect previous familial choices made by adoptive and biological parents. Perhaps this is why the *Alma Society* opinion analyzed the marriage cases as requiring the court to "look to the nature of the relationships and that choices made by those other than the adopted child are involved,"[48] a proposition which *Zablocki*, a right to marry case, does not really support.

Additionally, the *Alma Society* court was forced to erect monolithic interests, those of the "adoptive family," the "biological family," and the adoptee.[49] Even though the court acknowledged that not all members of each group would agree, it nonetheless yielded to the State's choices in deciding how best to protect those groups. The court balanced the rights of adoption triad members, but did not fully articulate anyone's privacy interests. Instead, the court viewed that States as the dominant actor. The court appeared to be applying a rational relationship test, complete with a high degree of deference to the states.

Although *Alma Society* is the best known case from this era, adoptees have repeatedly and unsuccessfully asserted their constitutional rights to information.[50] In addition, many adoptees have attempted either to satisfy the "good cause" standard in state statutes for disclosure of identifying information, or they have attempted to expand the meaning of "good cause" to become more inclusive.[51] These cases often

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[48] *Alma Soc'y*, 601 F.2d at 1233.

[49] This is echoed in the literature about these cases. As one note explains, "A comparison of . . . interests indicates the conclusion that interests other than the adoptee's (i.e. birth parent privacy) are compelling and possibly more deserving of constitutional protection." Poulin, *supra* note 34, at 401.

[50] For example, several courts have explicitly held that background information is not protected by the zone of privacy and thus applied a rational relationship test to uphold the state adoption statute. *See, e.g., In re* Roger B., 418 N.E.2d 751 (Ill. 1981); Mills v. Atlantic City Dep't of Vital Statistics, 372 A.2d 646, 651 (N.J. Super. Ct. Ch. Div. 1977). Courts have also rejected First Amendment claims that adoptees have a fundamental right of access to such important personal information. *See, e.g., Mills*, 372 A.2d at 652 (finding that adoptees' interests outweighed by interests of both sets of parents in maintaining confidentiality); Carolyn Burke, Note, *The Adult Adoptee's Constitutional Right to Know His Origins*, 48 S. CAL. L. REV. 1196, 1204-07 (1975) (arguing that adult adoptees should be granted access to their birth records under the First Amendment); *see also* Gloor, *supra* note 34, at 330-32 (discussing First Amendment arguments).

[51] For a discussion of these cases, see, e.g., Gloor, *supra* note 34, at 340-42. Courts have generally defined good cause restrictively to require documented medical or psychiatric need and have generally rejected claims based simply on emotional difficulties or a desire to know one's biological origins. *See* Kathryn J. Giddings, Note, *The Current Status of the Right of Adult Adoptees to Know the Identity of Their*

have a much less developed understanding of the constitutional claims and focus primarily on the narrow meaning of the good cause standard for disclosure.[52]

B. *Approaches to Opening Records*

Following their failure in the courts, adoptees turned their efforts toward enacting legislation that would provide them with access to information about their birth families.[53] These legislative efforts have met with some success. Most states now allow for the release of non-identifying information to adoptees and adoptive parents.[54] In addition, over the past twenty years, states have established a variety of procedures designed to allow for contact between adoptees and their biological relatives when both parties agree to meet. These procedures typically take one of two forms: mutual consent registries and confidential intermediary systems. In general, however, these efforts fall short of the openness desired by many adult adoptees because the methods are flawed and underutilized. Only a few states have moved toward completely open records.

1. *Mutual Consent Registries*

At least twenty-one states have enacted some form of mutual consent registry, which allows persons directly in-

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Natural Parents, 58 WASH. U. L.Q. 677, 699 (1980).

[52] *See, e.g.*, *In re* Adoption of Baby S., 705 A.2d 822, 826 (N.J. Super. Ct. Ch. Div. 1997) (finding that biological mother who sought access to records failed to meet the good cause standard for disclosure); Backes v. Catholic Fam. & Community Servs., 509 A.2d 283, 291-94 (N.J. Super. Ct. Ch. Div. 1985) (denying adult adoptee's good cause argument to open sealed birth records based on state statutory grounds); *In re* Christine, 397 A.2d 511 (R.I. 1979). In an interesting response to the good cause requirement, the New Jersey courts shifted the burden of proof to the State to show that good cause did not exist to release records to adult adoptees. *See Mills*, 372 A.2d at 654 (finding that when adult adoptees request access to their birth records the burden to show good cause is on the State).

[53] *See* CARP, *supra* note 14 (discussing adoptees' failures in New York courts and the proposed Model States Adoption Act and Model State Adoption Procedures); Wendy Weiss, Note, *Ohio House Bill 419: Increased Openness in Adoption Records Law*, 45 CLEV. ST. L. REV. 101, 107 (1997) ("[A]t least thirty-five states have passed laws granting automatic access to non-identifying information and establishing registry systems for the release of identifying information.").

[54] The Uniform Adoption Act provides for the release of non-identifying medical and other relevant information to the adoptive parents prior to the adoption. *See* UNIF. ADOPTION ACT § 2-106, 9 U.L.A. 17 (Supp. 1999). Adult adoptees can also request this information from the court or agency that handled the adoption. *See id.* at § 6-103, 9 U.L.A. 83 (Supp. 1999). This information, however, is available only as of the time of the adoption and is not updated.

volved in an adoption to register their willingness to meet and exchange information.[55] Mutual consent registries are passive: unless a biological relative and an adult adoptee have each filed a formal consent to release identifying information, no information will be released. In some states, both biological parents must have filed consents before the release of identifying information.[56] In other states, only one parent need consent.[57] Additionally, registries often limit applicants to those whose adoptions occurred within the state.

Even after one party has filed a consent to information disclosure, the state agency will not seek out other parties who have not registered to ask if they are willing to have their identities released. Indeed, the statutes prevent state employees associated with the registry from releasing any confidential information without the consent of the other party, much less from assisting an adoptee or a biological parent in actively searching for each other. Because of the passive nature of mutual consent registries, adoptees and biological relatives may not know of the existence of the registry nor know that they can consent to the disclosure of identifying information.[58] Mutual consent registries operate at the individual state level, rather than interstate, although Congress has repeatedly considered the creation of a national mutual consent registry that would allow all adoptees and their biological relatives to register in one place.[59]

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[55] *See* Hollinger, *supra* note 13, at 13-35; Alan W. Strasser, *Adoption Search and Registry Laws of Vermont and New York: Whose Best Interest is Being Served*, 28 SUFFOLK U. L. REV. 669, 670 (1994) (criticizing the passivity of the Vermont registry system). The Uniform Adoption Act authorizes a state mutual consent registry. *See* UNIF. ADOPTION ACT, §§ 6-104 to 6-107, 9 U.L.A. 83-86 (Supp. 1999).

[56] *See, e.g.*, N.Y. PUB. HEALTH LAW § 4138-d (McKinney 1985 & Supp. 1998) (requiring both parents' consent). *See generally* Hollinger, *supra* note 13.

[57] *See, e.g.*, MASS. ANN. LAWS ch. 210, § 50 (Law. Co-op. 1994); 23 PA. CONS. STAT. § 2905 (1998).

[58] While there has been little sustained critique of mutual consent registries in the law review literature, several articles have discussed some of the flaws. *See* Jason Kuhns, *The Sealed Adoption Records Controversy: Breaking Down the Walls of Secrecy*, 24 GOLDEN GATE U. L. REV. 259, 282-83 (1994) (pointing out that the poor publicity of such registries requires considerable initiative by birth parents); Bobbi W. Y. Lum, *Privacy v. Secrecy: The Adoption Records Movement and its Impact on Hawai'i*, 15 U. HAW. L. REV. 483, 506 (1993) (noting problems with mutual consent registries, including lack of publicity, inability to afford registration fees, and problems with counseling requirements); Strasser, *supra* note 55, at 688 (noting the low match rate of New York's registry).

[59] Senator Carl Levin has advocated the enactment of legislation to establish a federal mutual consent registry since 1980. The legislation has passed the Senate several times, but has never passed the House. The House Ways and Means Subcommittee recently held hearings to consider the registry.

The federal registry would overcome some of the problems of state registries by establishing a national clearinghouse, thus providing one repository of information

While the registries provide a mechanism for biological parents and adoptees to contact each other, registries have been relatively unsuccessful in publicizing their existence as well as in matching registrants.[60] State mutual consent registries are typically both underfunded and understaffed; for example, few of them have a presence on the Internet.[61] One recent study reported that finding a "staff member knowledgeable about registry operations in at least half of the 21 states surveyed required 8 to 10 phone calls."[62] The restrictions on many registries further limit their utility; if an adoptee does not know whether she was born and/or adopted in a particular state, then she may be unable to use that state's registry.[63] Because there is little, if any, interstate communication, a biological parent who registers in Pennsylvania will not be contacted if her biological child registers in New Jersey.[64] In addition to incurring various fees for using the registry, the applicant may also be required to undergo counseling.[65] Furthermore, the registration form may demand information unavailable to the registrant.

The story of football player Tim Green is typical of some of the problems associated with registries.[66] He was born and adopted in New York. When he decided to search for his biological parents, one of his first steps was to register with New York's registry. To do so, however, he needed a waiver from both of his adoptive parents, and this initially dissuaded him

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and eliminating the multiple and often conflicting requirements in state registries. It would also solve the problem of interstate cooperation. *See Mutual Voluntary Adoption Registries: Hearings on S. 1487 Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. (1998) (statement of Naomi R. Cahn, Associate Professor of Law, George Washington University Law School), *available in* 1998 WL 12761111 [hereinafter *Cahn Statement*].

Nonetheless, the national registry is a passive device, and subject to all of the problems inherent in not letting the interested parties control the process. Even so, it has met with violent opposition. *See The Levin Bill: Federal vs. Private National Registries in the "Open Records" Policy Debate*, NAT'L ADOPTION REP. (Nat'l Council for Adoptions, Washington, D.C.), Oct./Nov. 1998, at 1 (claiming the bill would invade privacy and labeling some of its advocates as "anti-adoption and anti-privacy").

[60] Professor Strasser reports that, in its first nine years of existence, the New York registry reported a total of 4,000 registrants and 36 matches. *See* Strasser, *supra* note 55, at 688.

[61] *See* Melisha Mitchell et al., *Mutual Consent Voluntary Registries: An Exercise in Patience--and Failure*, ADOPTIVE FAM. 30, 31-32, Jan./Feb. 1999.

[62] *Id.* at 31.

[63] In Oklahoma, for example, prior to 1997, registration was limited to adoptees whose adoptions had been arranged by the State Department of Human Services. *See* D. Marianne Brower Blair, *The New Oklahoma Adoption Code: A Quest to Accommodate Diverse Interests*, 33 TULSA L.J. 177, 250-51 (1997).

[64] *See Cahn Statement*, *supra* note 59.

[65] *See* Lum, *supra* note 58, at 506.

[66] *See* TIM GREEN, A MAN AND HIS MOTHER: AN ADOPTED SON'S SEARCH (1997).

from registering lest he cause them undue pain. Once he decided to do so, he describes his adoptive mother's reaction to signing the waiver documents:

> I knew from her words, from her body language, and from the quavering tone of her voice the impact this event was having on her. It was as though I had brought her to the brink of that same chasm I had dreamed about .... It was as if I were standing behind her as she teetered, and if I moved that paper just an inch, it would tilt the balance. She would fall.[67]

2. *Confidential intermediary systems*

At least eighteen states have gone a step further than mutual consent registries and have enacted "search and consent" procedures designed to be more active in facilitating an exchange of information between adoptive and biological families. Under these statutes, if an adoptee or biological parent requests identifying records, then the State has an affirmative obligation to search for and to request consent from the other parties to the adoption for the release of the identifying information.[68] If consent is obtained, the information is released. If consent is denied, or if the other party cannot be found, then the applicant adoptee may still petition the court to open the records under the traditional good cause standard.[69] Where both parties consent, intermediaries may also help arrange meetings of adoptees and birth relatives.

Because they are more active than the mutual consent registries— instead of waiting for a matching registration, the State seeks out the other party— the search and consent procedures may be more helpful in facilitating contact. Nonetheless, like the mutual consent registries, the confidential intermediary process is problematic. As with the registries, states may provide little publicity about the availability of the intermediary process. When there is little information about the location of the biological parent, it becomes the state's responsibility to search for the parent.[70] The diligence and resources of the intermediary thus determine whether the biological parent is found. Consequently, the intermediary system is more expensive than the consent registry.[71]

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[67] *Id.* at 112.

[68] *See* Lum, *supra* note 57, at 507 (discussing the State's affirmative duty to seek out parties to the adoption and request consent).

[69] *See, e.g.*, MINN. STAT. ANN. § 259.89(3)(6) (West Supp. 1998).

[70] *See* Lum, *supra* note 58, at 507-08 (noting that an intermediary's success depends on state law and judicial interpretation).

[71] *See* Rosemary J. Avery, *Information, Disclosure and Openness in Adoption: State Policy and Empirical Evidence*, 20 CHILDREN & YOUTH SERVS. REV. 57, 61-62 (1998)

Moreover, as one article points out, "[a] birth parent's refusal to consent effectively ends" the process, preventing the adoptee from access to any information.[72] At the time of initial contact by an intermediary, the parent may be completely unprepared for any contact, and will not be given any support and counseling concerning her choice to remain unidentified. Because the intermediary program is designed only for this initial contact, the adoptee may never know if a non-consenting parent changes her mind.

In addition, the confidential intermediary programs may include restrictive conditions that make them difficult to use. For example, the Oklahoma registry is unavailable to an adult adoptee who knows of a minor biological sibling, for fear that the sibling's information will also be disclosed.[73] Furthermore, an adoptee can only apply after she has been registered with the state's mutual consent registry for at least six months.[74]

The underlying problem with both the mutual consent registry and the confidential intermediary approach is the lack of control experienced by the registrants. Even after an adoptee has taken the step of attempting to make contact, she must wait for someone else to file with the mutual consent registry or for the confidential intermediary to do her work well.[75] Moreover, these approaches do nothing to address the issues of shame and status identified by many adoptees' rights organizations. For example, Bastard Nation, perhaps the most radical of the adoptees' rights organizations, categorically rejects mutual consent registries as well as the confidential intermediary system.[76] The name Bastard Nation results from a:

> reclaim[ing of] the badge of bastardy as placed on us by those who would attempt to shame us for our parent's marital status at the time of our births. We see nothing shameful in being adopted, nor in being born out of wedlock, and thus we see no reason for adoption to continue to be veiled in secrecy through use of the sealed record system and the pejorative use of the

(noting that "search and consent" laws requiring intermediaries are often complex and costly); Letter from Annette Appell, to Naomi Cahn (May 31, 1999) (on file with the *University of Pennsylvania Journal of Constitutional Law*).

[72] Kuhns, *supra* note 58, at 283.

[73] *See* OKLA. STAT. tit. 10, § 7508-1.3(c)(2) (Supp. 1998).

[74] *See* Blair, *supra* note 63, at 254 (listing this and other "restrictions upon those eligible to apply for or be the subject of a search"). For other criticisms of the confidential intermediary system, such as the lack of training of intermediaries, see CARP, *supra* note 14, at 230.

[75] *See* Mitchell, *supra* note 61, at 33.

[76] *See* Marley Greiner, et al., *Bastard Nation Mission Statement* (visited Sept. 1, 1999) <http://www.bastards.org/whoweare/mission1.htm>.

term 'bastard.'[77]

3. *Open Records*

Finally, some states provide for varying degrees of openness in their adoption records. Two states, Alaska and Kansas, allow adult adoptees access to their original birth certificates upon request, without a judicial or administrative hearing.[78] The Alaska statute simply provides that, when an adoptee who is eighteen or older requests the name of her biological parent, the State must provide a copy of the original birth certificate.[79] Other states provide that, for adoptions finalized after the date of a statutory change, an adult adoptee may obtain a copy of her original birth certificate, unless a birth parent has filed a denial of consent or a request for nondisclosure.[80] These states may also require that birth parents be given the opportunity to file a nondisclosure form. In Vermont, for example, the state will disclose information about the biological parents, unless they have filed a "request for nondisclosure."[81] Similarly, Delaware recently enacted a

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[77] *Id.*; *see also* Katheryn D. Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past*, 57 ALB. L. REV. 733, 758 (1994) (discussing how the stigma and shame of illegitimacy have framed the laws of adoption).

[78] *See* ALASKA STAT. § 18.50.500 (Michie 1998); KAN. STAT. ANN. § 65-2423 (Supp. 1998). Kansas never enacted legislation sealing records, and Alaska unsealed the records in the 1950s. *See* Rene Sanchez, *Oregon Unseals and Painful Adoption Issue: Adoptee Access to Birth Records Raises Issues of Dignity, Privacy*, WASH. POST, Nov. 26, 1998, at A1.

[79] *See* ALASKA STAT. § 18.50.500(a) (Michie 1998). The statute also allows the biological parent to receive the name and address of an adult adoptee if the adoptee has indicated in writing her consent to disclosure. *See id.* at § 18.50.500(d). The Kansas statute allows for the opening of a sealed birth record "upon the demand of the adopted person if of legal age or by an order of court." KAN. STAT. ANN. § 65-2423 (Supp. 1998).

[80] *See* MINN. STAT. ANN. § 259.89(b) (West 1998); WASH. REV. CODE § 26.33.345 (1997).

[81] VT. STAT. ANN., tit. 15A, § 6-105(b)(2) (Supp. 1998). The statute explicitly provides that an adoptive parent can withdraw the disclosure veto. *See id.* at § 6-106. This procedure applies only to adoptions finalized after July 1, 1986; for adoptions finalized prior to that date, there must be an affirmative indication from the biological parent that she consents to disclosure. *See id.* at § 6-105(b)(1)(2). The Vermont Supreme Court recently issued its first decision under the new open records statute. *See In re* Margaret Susan P., 733 A.2d 38 (Vt. 1999) (holding that an adoptee is entitled to a photocopy of her adoption records under the Vermont Adoption Act).

The Washington procedure is similar. For adoptions after October 1, 1993, the state will release the information to an adoptee over the age of eighteen, unless there is a disclosure veto. *See* WASH. REV. CODE. § 26.33.345.

In Minnesota, an adoptee who is at least nineteen can request her original birth certificate. *See* MINN. STAT. ANN. § 259.89(subd. 1). The state must then attempt to notify the biological parents of this request and may charge the adoptee for this service. *See id.* at (subd. 2). The notification must be through a personal contact in

statute, effective in January of 1999, that allows adoptees over the age of twenty-one to receive their original birth certificates, unless the biological parent has filed a disclosure veto in the three years prior to the request.[82]

Two other states, Tennessee and Oregon, have recently attempted to open records, but their laws have been challenged in court. On November 3, 1998, Oregon voters passed a ballot initiative that allows adoptees to receive their original birth certificates in the same manner as any other person.[83] Opponents quickly challenged the measure in court, arguing that it elevated the rights of adoptees over those of the biological parents and provided insufficient protection to biological parents who wished to preserve the privacy of their adoption decisions.[84] In December 1998 an Oregon trial court issued a preliminary injunction blocking the initiative from becoming law.[85] Trial is scheduled for late 1999.

C. Challenges to Open Records Statutes

In response to the limited success of the adoption rights movement in persuading states to unseal original birth records, biological parents have begun to assert a due process

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which the parent is given information about the adoptee's request and about the parent's right to consent or to veto disclosure. *See id.* If the state is unable to contact the biological parents, and if there is no disclosure veto, then for adoptions finalized after August 1, 1977, the identifying information is released; for adoptions finalized earlier, the adoptee must petition the court for the information. *See id.* at (subd. 3).

[82] *See* DEL. CODE. ANN. tit. 13, § 923 (Supp. 1998).

[83] *See Talk of the Nation: Adoption and Birth Records* (NPR radio broadcast, Nov. 17, 1998) (transcript on file with the *University of Pennsylvania Journal of Constitutional Law*). The proposed law provides:

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 or her unaltered original and unamended certificate of birth in the custody of the state registrar with procedures, filing fees, and waiting periods identical to those imposed upon nonadopted citizens of the state of Oregon.

Oregon Measure No. 58 (visited, Nov. 30, 1999) <http://www.sos.state.or.us/elections/nov398/guide/ measure/m58.htm>.

This represents a dramatic change from existing law, which sealed the original records of adoptees and issued new birth certificates with the names of the adoptive parents. The existing law has only been in place since 1957; prior to that, adoption records were not sealed. *See* OR. REV. STAT. § 7.211 (1998).

[84] *See* Lynette Clemetson, *Haunted by a Painful History*, NEWSWEEK, Feb. 22, 1999, at 46 ("A group of birth mothers filed suit against the state, claiming it [the Oregon law] violated their right to privacy. With adoptees and birth mothers pitted against each other, the court must now wrestle with the tough question of whose rights are more important."); *see also* Oregon Measure No. 58, *supra* note 83 (offering arguments against passage of the Oregon statute).

[85] *See* Jeff Wright, *Judge Blocks Adoption Ruling from Becoming Law*, THE REGISTER GUARD, Dec. 3, 1998, *available in* 1998 WL 16352212.

claim to maintain confidentiality in the adoption process. In the most recent federal case considering the confidentiality of adoption records, the Sixth Circuit considered a challenge to the 1996 Tennessee statute that allows adult adoptees to access their birth records, but requires adoptees to honor a "contact veto" filed by a biological relative.[86] The 1996 legislation reversed the 1951 law that had precluded adoptees from accessing their birth records.[87] The 1996 statute allows the release of all records relating to an adoption to any adoptee over the age of twenty-one, as well as to her biological relatives, with the adoptee's written consent. Just as adoptees had earlier argued that their right to privacy rendered unconstitutional the sealing of records, biological and adoptive parents now argue that the unsealing violates *their* right to privacy.

Both biological and adoptive parents challenged the statute's constitutionality. As amicus curiae, the National Council for Adoption asserted that "the adoption decision is one of 'the most intimate and personal choices a person may make in a lifetime, [one of the] choices central to personal dignity and autonomy,' and essential to 'the right to define one's own existence . . . [and] attributes of personhood.'"[88] Biological parents argued that the legislation violated their privacy rights because the State had promised them confidentiality at the time of adoption.[89] If a child were to find her biological parents, they argued, this could be extremely disruptive to the new life created by the parents.[90] Moreover, the biological

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[86] Doe v. Sundquist, 106 F.3d 702, 704-05 (6th Cir. 1997), *cert. denied*, 522 U.S. 810 (1997). The Tennessee legislature amended its adoption law after three years of study. *See* TENN. CODE ANN. § 36-1-127 (1998). The statute provides that adoption records will be made available to adopted persons over the age of 21. *See id.* at § 37-1-127(c)(1)(A)(i). The birth parents can record their willingness or unwillingness for contact through a "contact veto registry" which differs from a disclosure veto. *Id.* at § 36-1-128. The statute also provides that no identifying information shall be released without the consent of the biological parent if the records indicate that the biological parent was the victim of rape or incest. *See* Dianna L. Schmied, *A Road Map Through Tennessee's New Adoption Statute*, 27 U. MEM. L. REV. 885, 901-02 (1997); *see also* M. Christina Rueff, Note, *A Comparison of Tennessee's Open Records Law with Relevant Laws in Other English-Speaking Countries*, 37 BRANDEIS L. J. 453 (1998-99) (discussing the statutorily recognized right to access adoption information in England, Scotland, New Zealand, and New South Wales, though Canada, Ireland, and the United States deny access to this information).

[87] *See* TENN. CODE ANN. § 36-1-127(a)(1)-(2) (1998).

[88] Brief of Amicus Curiae National Council for Adoption for Appellants at 7, Doe v. Sundquist, 943 F. Supp. 886 (M.D. Tenn. 1996) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)), *aff'd* 106 F.3d 702 (6th Cir. 1997).

[89] *See* Brief for Appellants at 15, *Doe*, 106 F.3d at 702 [hereinafter Appellants' Brief].

[90] *See id.* at 16 (quoting Mills v. Atlantic City Dep't of Vital Statistics, 148 N.J. Su-

parents argued that more parents would choose abortion over adoption if they lost the guarantee of privacy with respect to their decision to relinquish a child for adoption. Finally, biological parents asserted that the statute violated individuals' right to avoid disclosure of confidential information concerning personal issues.[91]

The challengers also asserted claims on behalf of adoptive parents. They argued that the familial rights of adoptive parents would be violated because siblings of adopted children would obtain information.[92] Moreover, they claimed that the release of records infringed upon the adoptive parents' reproductive privacy: "[T]he decision to adopt a child is as much a reproductive choice as is the decision to conceive through natural means."[93]

In examining the open records statute, the Sixth Circuit expressed:

> skepticism that information concerning a birth might be protected from disclosure by the Constitution . . . . The Tennessee legislature has resolved a conflict between . . . [the public nature of births] and the competing interest of some parents in concealing the circumstances of a birth. We are powerless to disturb this resolution unless the Constitution elevates the right to avoid disclosure of adoption records above the right to know the identity of one's parents.[94]

The court, almost summarily, dismissed the plaintiffs' claims that the Tennessee statute infringed their right to marry and to raise children, asserting that the statute had no such effect. The court similarly rejected the reproductive privacy claim, doubting whether the statute burdened the adoption process at all. Finally, the court concluded that any constitutionally protected right to avoid the disclosure of private information was not sufficiently broad to include the interests

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per. 302 (Ch. Div. 1977)) ("'It is highly likely' that the natural parent of an adult adoptee will choose 'not to reveal to his or her spouse . . . the facts of an emotionally upsetting and potentially socially unacceptable occurrence of many years past.'").

[91] *See id.* at 22; *see also* Carol Chumney, *Tennessee's New Adoption Contact Veto Is Cold Comfort to Birth Parents*, 27 U. MEM. L. REV. 843, 872 (1997) ("Both the Sixth Circuit and the district court opinions noted the Supreme Court's recognition of an individual interest in avoiding the disclosure of personal matters.").

[92] *See* Appellants' Brief, *supra* note 89, at 17. This claim appears to apply to siblings from the same biological family. It received short shrift in the Sixth Circuit's opinion, which seemed generally concerned with the rights of biological parents. *See Doe*, 106 F.3d at 702.

[93] Appellants' Brief, *supra* note 89, at 20. Unlike the decision to conceive a child, however, the decision to adopt a child involves several sets of parties in addition to the ultimate parents.

[94] *Doe*, 106 F.3d at 705.

alleged by plaintiffs.[95] The court reframed the issues to focus on confidentiality of information, rather than on privacy within the family. The Tennessee Supreme Court ultimately reached similar conclusions with respect to the Tennessee Constitution.[96] That court held that the statute did not violate the birth parents' right to privacy because it included protections for their privacy interests, because it did not infringe on procreative decision making, and because adoption is a statutory creation.[97]

Doe resembles the earlier decisions in three respects. First, like the earlier decisions, *Doe* is somewhat cursory in describing the particular interests that might be protected. Second, the rights are framed as conflicting: birth parents and adoptive parents versus adoptees.[98] Indeed, throughout the "open records" cases, the interests of adoptees are counterposed against those of the two different sets of parents, who are, somewhat ironically, deemed to have virtually identical interests. There is little recognition of the diversity of positions within each group.[99] Third, the court is especially protective of the State's interest in establishing its own pro-

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[95] In *Alma Society*, the court justified the confidentiality of birth records because "the state does have an interest that does not wane as the adopted child grows to adulthood, namely the interest in protecting the privacy of the natural parents." Alma Soc'y Inc. v. Mellon, 601 F.2d 1225, 1236 (2d Cir. 1979).

[96] *See* Doe v. Sundquist, No. 01-S-01-9901-CV-00006, 1999 Tenn. LEXIS 429 (Sept. 27, 1999), *rev'g* No. 01-A-01-9705-CV-00209, 1998 Tenn. App. LEXIS 597 (Aug. 24, 1998) (holding that legislation allowing disclosure of adoption information does not violate the right to privacy or impair the vested rights of birth parents).

[97] *See id.* at *19-22.

[98] The District Court explicitly articulates the issue as "whether a birth parent's right to prevent an adult adoptee from accessing confidential adoption information, including the identity of the birth parent, is analogous to fundamental privacy and autonomy rights . . . found elsewhere." Doe v. Sundquist, 943 F. Supp. 886, 893 (M.D. Tenn. 1996). In the *Roger B.* case, the court similarly framed the adoptees' claims as counter to the rights of the biological and adoptive parents. *See In re* Roger B., 418 N.E.2d 751, 752-755 (Ill. 1981); *see also* Mills v. Atlantic City Dep't of Vital Statistics, 372 A.2d 646, 651 (N.J. Super. Ct. Ch. Div. 1977) ("[T]he right to privacy asserted by . . . [the adoptees] is in direct conflict with the right to privacy of another party, the natural parent . . . . The New Jersey statutes which seal adoption records protect the right to privacy of the adopting parents and that of natural parents from unwarranted intrusion.").

[99] In its focus on groups, rather than on individuals, family law has been a constitutional anomaly. *See* JANET DOLGIN, REDEFINING THE FAMILY 43 (1997). Dolgin remarks that:

American law has steadfastly concerned itself with relations between, or the rights and obligations of, autonomous individuals, and in general cannot or will not seriously address group needs or responsibilities except by focusing on the needs or responsibilities of the individuals that compose such groups. Family law has been a remarkable exception in this regard . . . .

Id.

cedures concerning adoption,[100] regardless of the form those procedures take or their apparent conflicts with earlier adoption laws.

The *Doe* trial court is ultimately correct in noting that "the disclosure of private information to adult adoptees under the Act is not sufficiently analogous to fundamental familial and reproductive privacy rights."[101] The traditional articulation of the fundamental right to privacy does not comprehend the various interests at stake in the adoption cases. The cases' discussions of personhood and privacy provide conflicting notions of whose rights and interests merit protection at any one time. The very notion of privacy— the right to be let alone— has developed as protection for individuals from state interference. Because adoption is a state-created status involving relationships within and between families, the traditional formulation of the doctrine is problematic.

III. OPENING RECORDS

As a policy matter, we believe that records should be opened for adult adoptees. Adult adoptees have a strong interest in having access to information about their biological origins. This information may be critical to an adoptee's sense of identity.[102] Moreover, the sealed and self-contained nature of the adoption process has never accorded with the realities of the experiences of adoption triad members, who often feel strong emotions about the secrecy of the process. Finally, although opening records of completed adoptions may disrupt the expectations of biological and adoptive parents who have relied on continued secrecy, adoption remains a state-sanctioned process that is subject to legislative change. While similar policy arguments could support openness in the context of sperm and egg donors, there are some

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[100] To show its respect for federalism, the court even cites *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (noting that to uphold the challenged federal statute would wrongfully grant a general police power to Congress). *See* Doe v. Sundquist, 106 F.3d 702, 707 (6th Cir. 1997).

[101] *Doe*, 943 F. Supp. at 893.

[102] Minor adoptees may also need information about their biological origins, especially as they mature. *See* Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1016 n.94 (1995) [hereinafter Appell, *Blending Families*] (discussing the evolution of adoptees' questions as they mature); Harold Grotevant, *Coming to Terms with Adoption: The Constriction of Identity from Adolescence into Adulthood*, 1 ADOPTION Q. 3 (1997). On children's general need for information critical to forming their identity, see Ross, *supra* note 1, at 180-82. While we recognize the importance of this information, we believe that until maturity, parents, rather than children, should control access to this information. *See* discussion *infra* text accompanying notes 110-11.

differences that make these cases much more difficult than claims to open adoption records.

A. Adoptees' Strong Identity Interests

There is substantial, albeit controversial, evidence that, for some adult adoptees, access to information about their biological origins may be central to their construction of identity.[103] Adoptees often feel a need to understand their "heritage" and to integrate the circumstances surrounding their birth into their overall sense of self.[104] Research on adoptees' development of identity also suggests that adoption plays a role in their concept of self. While there may be little difference in the integral sense of identity between adopted and non-adopted children, adoptees believe that their membership in two families plays a significant role in how they think about themselves.[105] Further, the relationship between having been adopted and one's sense of self changes as the adoptee develops.[106] Consequently, it is important to look at identity as a dynamic and constructed concept. For adopted children, identity is particularly complex; as Barbara Woodhouse points out, not only do adopted children have their "social"/legal families, they also have their families of origin.[107]

The Supreme Court has recognized the strong connection between identity and liberty, as well as the extent to which identity formation depends upon the development of close relationships with others. As the Court explained in *Roberts v. United States Jaycees*,[108] the protection that the Constitution accords to highly personal relationships "reflects the re-

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[103] *See generally* BETTY JEAN LIFTON, JOURNEY OF THE ADOPTED SELF (1994); THE PSYCHOLOGY OF ADOPTION (David M. Brodzinsky & Marshall D. Schechter eds., 1990) [hereinafter JOURNEY]. Many adoptees have written about the relationship between their search for self and their search for their biological parents. *See, e.g.*, GREEN, *supra* note 66; BETTY JEAN LIFTON, TWICE BORN: MEMOIRS OF AN ADOPTED DAUGHTER (1977).

[104] *See* GREEN, *supra* note 66; Janice DeVore et al., *A Love that Never Died: Estranged Mother and Daughter Reunited*, GOOD HOUSEKEEPING, May 1998, at 118, *available in* 1998 WL 9928085; Mary Ann Fergus, *The Search: One Man's Search for His Birth Mother Ends with Help of Intermediary*, PANTAGRAPH, Apr. 14, 1998, at D1; Mardell Groth et al., *An Agency Moves Toward Open Adoption of Infants*, 66 CHILD WELFARE, 247, 255 (1987).

[105] *See* Grotevant, *supra* note 102, at 15.

[106] *See id. See generally* JOURNEY, *supra* note 103.

[107] *See* Barbara Bennett Woodhouse, *"Are You My Mother?": Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 128 (1995).

[108] 468 U.S. 609 (1984).

alization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."[109]

Focusing on the concept of identity, and particularly on its fluidity, suggests that the appropriate solution to the adoption records controversy is one that allows for change over time. At the time a birth parent relinquishes a child for adoption, it is that parent's identity that is most salient. A birth parent who decides, often after painful soul-searching, to construct an identity for herself (and her child) that does not include an ongoing parent-child relationship should be permitted to do so.[110] Respecting a birth parent's desire for separation and confidentiality is also consistent with the broad deference accorded to parental decisionmaking on behalf of children in other contexts.[111] In addition, respecting the decision not to maintain a parent-child relationship is consistent with the protection afforded to other reproductive choices. Moreover, the wishes of the adoptive family are also important at this point, particularly because they are concerned with building a stable familial relationship for the child; if the adoptive parents do not wish to have open records at the time of adoption, then their wish should be respected.

As an adopted child matures, however, and the birth parent's relinquishment recedes in time, the child's identity should begin to predominate. By the time the child reaches the age of majority, the child's need to construct her own identity may include the need to know her birth parents. At this point, the child's identity interests outweigh the birth parent's earlier desire to prevent the establishment of a parent-child relationship. Moreover, the child's status as an adult diminishes any claim a birth parent may have to make

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[109] *Id.* at 619.

[110] We are not here concerned with conflicts between biological parents as to whether their child should be adopted; we are assuming that both parents consent to the adoption.

[111] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972) (allowing Amish parents to withhold their children from compulsory education beyond the eighth grade); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (protecting, in dicta, parents' rights to educate their children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (reversing conviction of teacher who had instructed child in foreign language in violation of Nebraska statute, under rationale that Fourteenth Amendment protects teacher's liberty). *See also* Naomi Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. ___ (forthcoming 1999); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375 (1996) (examining the law on adoption, surrogacy, and maternal employment).

decisions on behalf of the child. This analysis suggests that there should be a strong presumption of open records at the election of an adult adoptee.

In an amicus brief in the *Doe* litigation, adoptees explained why they sought access to their birth records.[112] For some, there were medical reasons, such as the need to know of a hereditary form of cancer or a family history of heart disease.[113] Additionally, the brief explained, all of the adoptees "need to know who gave them their lives, their bodies, their faces and their hereditary characters."[114] Adoptees' desire to search for their biological relatives develops from many different sources and may include both physical and psychological reasons.[115]

Many adoptees will not choose to access their original birth certificates, and they will, of course, be under no pressure to do so. As one adoptee explains, these "laws are not about searching or reunion, but about rights . . . to access their birth records without hindrance."[116] Adoptees can thus become more active participants in the confidentiality process.

B. Rejection of the Sameness Model

The secrecy of the adoption process actually serves to reinforce the difference between adoptive and biological families and the traditional stigma that has been attached to adoption.[117] Policies and practices within the adoption community for the past half century have attempted to make adoptive

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[112] *See* Brief of Amici Curiae in Support of Defendants' Rule 11 Application, Doe v. Sundquist, 943 F. Supp. 886 (M.D. Tenn. 1996).

[113] *See id.* at 4.

[114] *Id.* at 5.

[115] *See* Marshall D. Schechter & Doris Bertocci, *The Meaning of the Search*, *in* THE PSYCHOLOGY OF ADOPTION, *supra* note 103, at 62.

[116] Shea Grimm Redmond, Letters to the Editor, SEATTLE TIMES, Aug. 27, 1998, at B5.

[117] As an example of the negative attitudes towards adoption, consider the results of the first general adoption survey ever undertaken. In the survey of more than 1500 adults, 90% of the participants had a favorable opinion of adoption, and 95% generally supported it, acknowledging that adoption serves a useful purpose in society. Nonetheless, when it came to an examination of the adoptive family, respondents were somewhat more cautious. Half of the respondents believed that, while having an adopted child was better than having no child at all, it was not quite as good as having a biological child. Furthermore, only two-thirds of the respondents believed that it was highly likely that an adoptee would love her adoptive parents as much as her biological parents. *See* Cheryl Wetzstein, *Qualms Temper Americans' Favorable View of Adoption; Demographics have Big Effect on People's Views*, WASH. TIMES, Nov. 19, 1997, at A2; *see also* PRINCETON SURVEY RESEARCH ASSOCIATES, BENCHMARK ADOPTION STUDY 1 (1997).

families "the same as" biological families. In the past, one of the principal strategies was an attempt to replicate the family that the adoptive couple and the child would have had, absent adoption, by making the adoptive parents look as though they were the "real" parents.[118]

The philosophy underlying this attempt to create a new family, unmoored from the adoption process, has never accounted for the reality of the adoption process, and has begun to disintegrate as adoptees, biological parents, and adoptive parents question this model. Indeed, over the past decade adoption professionals have increasingly recognized that adoption is a life-long process, and that adopted children are forever members of not one, but two families.[119] All members of the adoption triad generally experience complicated emotions about the process throughout their lives.[120] Early research suggested that adoptees experienced more psychological problems than did members of the general population. While this research has been partially discredited,[121] adoptees nevertheless often face special, and distinct, psychological issues. For the biological parents, their identity as "parents" remains, regardless of when they relinquished their child. Quite commonly, biological parents still feel that they are parents, and adopted children often search, quite desper-

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[118] There is an eerie resemblance to the past adoption matching process in the contemporary process of "choosing" the appropriate egg or sperm donor – one that is free of blemish. *See* Jeanne Marie Laskas, *Left Unsaid*, WASH. POST MAG., Mar. 29, 1998, at W35; Barbara Vobejda, *Egg Donation: A Growing Business; Fertility Successes Raise Demand, Price*, WASH. POST, Mar. 7, 1999, at A1 (citing a newspaper advertisement that appeared in various newspapers) ("Egg donor needed. . . . You must be at least 5'10". Have a 1400+ SAT score.").

[119] *See* ARTHUR D. SOROSKY ET AL., THE ADOPTION TRIANGLE 220 (1978) (concluding that adoption is a life-long process for birth parents, adoptive parents, and the adoptee); Appell, *Blending Families*, *supra* note 102, at 997 (noting the "increasingly widespread recognition that adoption can best be described as a life-long three-way link between the adoptee and his or her two families"); Kenneth W. Watson, *The Case for Open Adoption*, PUB. WELFARE, Fall 1988, at 24, 24.

[120] *See* Appell, *Blending Families*, *supra* note 102, at 998-99 ("In addition to the positive aspect of providing children with permanent homes, adoption involves a series of losses . . . . These multiple losses . . . undermine the mythic foundation of contemporary adoption as a simple substitution of the adoptive family for the birth family."); Joan Heifetz Hollinger, *Adoption Law*, FUTURE OF CHILDREN, Spring 1993, at 43, 49-50 ("The notion that adoptive relationships should or can substitute completely for biological ones is now being questioned. . . . [A]doptive relationships are not identical to biological ones except in the sense of formal legal equivalence.").

[121] While many studies have found that the rate of psychiatric problems is higher among adoptees than among non-adoptees, some studies have reached a contrary conclusion. *See* Barbara Ingersoll, *Psychiatric Disorders Among Adopted Children: A Review and Commentary*, 1 ADOPTION Q. 57, 59, & 68 n.2 (1997). There are several possible reasons for the higher rate of psychiatric problems, including a "referral bias" among adoptive families. *Id.* at 59.

ately, to re-form their connection with these "parents."

The stories of birth mothers who have relinquished their children for adoption, and who remain confident that this was the right decision for them,[122] provide insights into their feelings as parents. Although these women are often seen as unnatural— who else but an unnatural woman could give up her child for adoption?— they typically have powerful and well-thought-out explanations for why they have relinquished their children. These explanations often center on the many different pressures they experienced to give up their child in the hope of ensuring for that child a better life.[123] Margaret Moorman explains that "[i]t was easy to believe that a child could have no worse start in life than to be born to a mother like me. The baby's only hope was to go to someone else as quickly as possible and be spared any further contamination."[124] The women were reassured that their lives would continue as before their pregnancy (even if they had cause to disbelieve this).[125]

Nonetheless, many birth mothers still feel a closeness to the children that they relinquished for adoption.[126] The very term used to describe them— "birth mothers"— recognizes their status as parent, albeit not as unmodified mothers. Years after the adoption, many birth mothers still feel that they are parents, that they are connected to their children,[127] and that they want to find those children.[128]

As some feminists have argued, there is generally (though

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[122] The stories of women who have relinquished their children, and subsequently changed their minds, clearly show that their identity as mothers had a profound influence on them. We are interested, however, in the stories of women who remain committed to their decision to relinquish a child; by examining their feelings about their identities as parents, we gain insight into the identities of women who are not conventionally defined as parents.

[123] For case law articulating the position that children fare better in stable nuclear families than with their unwed mothers, see cases cited in Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 316 n.94 (1988).

[124] MARGARET MOORMAN, WAITING TO FORGET 66 (1996); *see also* DeVore et al., *supra* note 104.

[125] *See, e.g.*, MOORMAN, *supra* note 124, at 68 ("I had been told, again and again, that I would give my baby up and *put this all behind me.*"). For further discussion of the treatment and attitudes of biological mothers during the mid-twentieth century, see SOLINGER, *supra* note 28.

[126] *See* Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101 (1998).

[127] See the stories in KATHLEEN SILBER & PATRICIA MARTINEZ DORNER, CHILDREN OF OPEN ADOPTION (1989); SOROSKY ET AL., *supra* note 119, at 55-67 (1978).

[128] *See* MOORMAN, *supra* note 124, at 142; DeVore, *supra* note 104 ("[E]very December 20, my daughter's birthday, I realized that she was very much on my mind. I found myself praying that the phone would ring and she'd be on the other end of the line.").

not always) a bond between the pregnant woman and her developing fetus.[129] In recognition of this, birth mothers were often blindfolded in the delivery room, so they would not see their children.[130] The affinity and closeness between birth mother and child is accorded little respect by adoption law. The birth father has been, if anything, accorded even less protection.[131]

For birth parents to maintain contact with their children following an adoption is extremely difficult. Until recently, many states prohibited meetings between adoptive parents and birth parents.[132] There is often no way to trace an adopted child, because she receives a new birth certificate with the names of her adoptive parents, and the adoption records are sealed. Consequently, it can be extremely difficult for the birth parent to find an adopted child.[133] Indeed, this is what happened to Professor Cahn's husband. After beginning his own search, his birth mother, dying of brain cancer, had written to the adoption agency asking for information about her son. The agency coldly informed her that it was unable to provide any information about him.

In recent years, birth mothers have begun to speak out about their experiences.[134] Interviews with birth mothers show the ambivalence and pain that they feel about giving up

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[129] *See, e.g.*, BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY (1989); Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355, 375 (1989) ("Barbara Johnson . . . finds in the pronomic usages embodied in those texts evidence not only of the non-binary nature of the pregnancy experience but also the reality of a recollective identification with the experience of pre-natality, of "fetal" being."); Vicki C. Jackson, *Baby M and the Question of Parenthood*, 76 GEO. L.J. 1811, 1820 n.23 ("[T]hat a strong and powerful relationship is often created during pregnancy is an undeniable and generally wonderful feature of our reproductive life."); Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325 (1990) (emphasizing the importance of maternal-fetal interdependence). As some of the opponents of open records emphasize, the biological mother may not feel such a bond, particularly where a child has been conceived as the result of a rape.

[130] *See* Janet Hopkins Dickson, *supra* note 16, at 938.

[131] Until recently, unless he was married to the birth mother, the father's consent was unnecessary for an adoption to be finalized.

[132] *See* Barbara Yngvesson, *Negotiating Motherhood: Identity and Difference in "Open" Adoptions*, 31 L. & SOC'Y. REV. 31 (1997).

[133] *See generally* Patrick McMahon, *Adoptees Demand Right to Past*, USA TODAY, June 25, 1999, at 3A; Adam Portman, *Oregon Voters Could Open Door to Adoptees' Past*, BOSTON GLOBE, Oct. 2, 1998, at A1.

[134] *See* Maureen A. Sweeney, *Between Sorrow and Happy Endings: A New Paradigm of Adoption*, 2 YALE J.L. & FEMINISM 329 (1990); Mary Jo Kochakian, *'90s Family: Adoption Gives New Meaning to Families*, L.A. TIMES, July 20, 1994, at 3E; *cf.* Lucinda Franks, *The War for Baby Clausen*, NEW YORKER 56 (Mar. 22, 1993) (describing the goals of Concerned United Birthparents).

their children for adoption, as well as the hopes that they have for their children. Many birth mothers still see their children as "a part of me" with whom they would like to maintain at least occasional contact.[135] When anthropologist Judith Modell interviewed birth parents, she found that "[b]irth parents . . . insisted that a birth bond could not be severed no matter what happened to a birth certificate."[136] Modell found that the birth parents she interviewed were completely unable to forget the birth of their child, contrary to the advice they had received from adoption experts. Birth parents generally do not wish for the return of the child or desire to regain a direct parental role in the child's life; rather, birth parents simply want to know whether the child was placed in an adoptive home, how she is developing, and whether she is alive.[137]

While many studies focus on the feelings of biological mothers, biological fathers may also have a strong interest in information about their children. In a case requesting the release of information about American servicemen who had fathered children overseas, affidavits from numerous fathers expressed a strong desire in finding their biological children. These affidavits rebutted the government's claims that the release of identifying information could be "both highly embarrassing and personally disturbing to [the servicemen]."[138] Based on these affidavits, the court rejected the government's contention that the release of identifying information "would invite an unwanted intrusion."[139]

For adoptive parents, there have always been a set of special issues that implicate secrecy. How do they explain the adoption to their child, their families, their community? What should they say when a stranger asks a blond-haired, blue-eyed mother about her brown-haired and brown-eyed son? While adoptive parents today generally support allowing adoptees access to identifying information, they are not without ambivalence and apprehension.[140] Nevertheless, a recent

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[135] Yngvesson, *supra* note 132, at 56.

[136] JUDITH MODELL, KINSHIP WITH STRANGERS: ADOPTION AND INTERPRETATIONS OF KINSHIP IN AMERICAN CULTURE 90 (1994).

[137] *See id.* at 1018.

[138] War Babes v. Wilson, 770 F. Supp. 1 (D.D.C. 1990).

[139] *Id.* at 4. For a summary of the affidavits, see Mem. Supp. Pl.'s Partial Summ. J. at 11-13, *War Babes* (No. 88-3633). This case was litigated by our colleague, Professor Joan Meier.

[140] *See* Paul Sachdev, *The Triangle of Fears: Fallacies and Facts*, 68 CHILD WELFARE 491 (1989) (relating study of Canadian adoptions in which most adoptive parents supported the release of information, but, not surprisingly, were somewhat uncomfortable when asked to think about disclosure to their own children).

survey of more than 1200 adoptive parents found that 84% of the adoptive mothers and 73% of the adoptive fathers agreed that an adult adoptee should be entitled to disclosure of her original birth certificate.[141]

Members of the adoption triangle have always struggled with reconciling the (non)existence of their families. Allowing adoptees access to their birth records serves as an acknowledgment of the distinct challenges that they experience as they develop their identity, and helps biological parents reconcile themselves to the relinquishment decision. Ironically, without needing to keep secrets, adoptive families may indeed become more like non-adoptive families.

C. Consistency With Other Family Law Developments

The opening of adoption records is also consistent with developments in other areas of family law that have questioned the model of the unitary family and have encouraged and protected the involvement of multiple caretakers in a child's life.[142] For example, in the divorce context, many legal and mental health professionals have endorsed the concept of post-divorce co-parenting and have emphasized the importance to children of maintaining close and continuing contact with both parents.[143] Similarly, the law has increasingly fa-

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[141] *See* Rosemary J. Avery, *Information Disclosure and Openness in Adoption: State Policy and Empirical Evidence*, 20 CHILDREN &YOUTH SERVS. REV. 57, 73 (1998). The respondents were divided as to whether an adoptee was an "adult" at age 18 or 21. *See id.*

[142] *See generally* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879 (1984) [hereinafter *Rethinking Parenthood*]; Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 393 (1994).

[143] *See, e.g.*, ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 277 (1992); Peter Salem, *Education For Divorcing Parents: A New Direction for Family Courts*, 23 HOFSTRA L. REV. 837 (1995) ("[P]rograms are designed to provide parents with information about children's needs, divorce adjustment, and post-divorce parenting. In addition . . . parent education programs may serve to mitigate the acrimony between parents so often associated with divorce."); Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 691 (1985) (advocating the view that "the role of the state must change to encourage a shift from combative to cooperative postdivorce parenting"); W. Glenn Clingempeel & N. Dickon Reppucci, *Joint Custody After Divorce: Major Issues and Goals for Research*, *in* READINGS IN FAMILY LAW 163 (Frederica K. Lombard ed., 1990) ("In the majority of cases, frequent interaction with the noncustodial parent has been found to have a positive effect on children's adjustment to divorce."). One recent study of divorcing families in Wisconsin reports that joint legal custody now accounts for more than 80% of all post-divorce custody arrangements. *See* Marygold S. Melli et al., *Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin*, 1997 U. ILL. L. REV. 773.

cilitated the involvement of unmarried fathers in their children's lives, regardless of whether those fathers have previously established a relationship with the child's mother.

Legal protection for "multiple parenthood" also extends beyond biological parents. Grandparent visitation statutes in all fifty states now allow grandparents to seek court-ordered visitation with their grandchildren, even over parental objection.[144] While early grandparent visitation statutes were generally limited to families affected by parental death or divorce, more recent amendments apply as well to so-called "intact" two-parent families.[145] Moreover, many states have expanded their grandparent visitation statutes to include other members of the child's family, such as aunts, uncles, and siblings. The law has also increasingly recognized the relationship between step-parents and children, even after dissolution of the marriage between the step-parent and the biological parent.[146]

Similar changes have occurred within adoption law. Most private infant adoptions are now "open" from the outset, meaning that the biological and adoptive parents "choose" each other, often after a face-to-face meeting. In many cases, biological and adoptive parents also agree to ongoing post-adoption contact, which can range from an annual exchange of photographs to regular visitation or telephone communication.[147] In a study of the changes in adoption agency practices, researchers found a significant increase in the number

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[144] *See generally* Anne Marie Jackson, Comment, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563 (1994) (noting that most state statutes allow courts to grant visitation rights to grandparents if it is in the best interest of the child).

[145] *See* Sarah Norton Harpring, *Wide-Open Grandparent Visitation Statutes: Is the Door Closing?*, 62 U. CIN. L. REV. 1659 (1994). Some commentators have criticized the trend toward "wide open" grandparent visitation statutes. *See, e.g.*, Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 OKLA. L. REV. 29 (1996). The Supreme Court recently agreed to hear a constitutional challenge to a grandparent visitation statute. *See* Troxel v. Granville, 120 S. Ct. 11 (1999). In *Troxel*, the parents of a deceased biological father sought visitation with their grandchildren, who had been adopted by the mother's new husband.

[146] *See, e.g.* CAL. FAM. CODE § 3101(a) (West 1994) (authorizing court to grant reasonable visitation to step-parent if such visitation is in the child's best interest); N.H. REV. STAT. ANN. § 458:17(VI) (1992 & Supp. 1995) (authorizing custody awards to step-parents). *See generally* Bryce Levine, Note, *Divorce and the Modern Family: Providing In Loco Parentis Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding*, 25 HOFSTRA L. REV. 315 (1996); Jennifer Klein Mangnall, Comment, *Stepparent Custody Rights After Divorce*, 26 SW. U. L. REV. 399 (1997).

[147] *See* Carol A. Gorenberg, *Fathers' Rights vs. Children's Best Interests: Establishing a Predictable Standard for California Adoption Disputes*, 31 FAM. L.Q. 169, 207-08 (1997) (discussing various types of open adoption arrangements).

of agencies offering adoptions with contact.[148] The primary reason for the increase was a response to client demand.[149]

Moreover, a number of states have recently enacted legislation designed to validate and enforce open adoption agreements when both the biological and adoptive parents have consented to the contact.[150] Other states have passed statutes authorizing a court to award post-adoption visitation rights to a child's biological relatives whenever such visitation is in the child's best interest.[151] Open adoption is also being touted as an option in the foster care context, in part to encourage biological parents, who are unable to care for a child, to voluntarily relinquish their parental rights without completely severing their connection to the child.[152] Even the Uniform Adoption Act, which is generally hostile to open adoption, recognizes the desirability of post-adoption visitation in the context of step-parent families.[153]

Modern psychological theory also supports the recognition and protection of children's relationships with multiple caretakers. Psychologists now believe that children can form and maintain attachments to multiple adult caretakers and that neither parental authority nor caretaking need be exclusive to be effective.[154]

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[148] *See* Susan M. Henney et al., *Changing Agency Practices Toward Openness in Adoption*, 1 ADOPTION Q. 45, 53 (1998) (finding that 65% of the 35 agencies studies did not offer a completely open option from 1987-89, while only 23% did not offer such service in 1993). The researchers identified three different types of openness options: (1) "confidential adoptions," where there is no contact between biological and adoptive parents; (2) "mediated adoptions," where the agency facilitates contact between the two sets of parents; and (3) "fully disclosed" adoptions, where the parents contacted each other directly. *Id.* at 52. It was in this last category that agencies experienced such dramatic change.

[149] *See id.* at 56-57.

[150] *See, e.g.*, N.M. STAT. ANN. § 32A-5-35 (Michie 1998 & Supp. 1999); OR. REV. STAT. ANN. § 109.305 (1990 & Supp. 1998); WASH. REV. CODE ANN. § 26.33.295 (West 1997). For a comprehensive discussion of such legislation, see Annette R. Appell, *Increasing Options to Improve Permanency: Considerations in Drafting an Adoption with Contact Statute*, 18 CHILDREN'S LEGAL RTS. J. 24, 36-42 (1998).

[151] *See, e.g.*, IND. CODE ANN. § 31-19-16-1 to 16.5-7 (West 1999); NEB. REV. STAT. § 43-162 (1998); N.Y. SOC. SERV. LAW § 383-c (McKinney 1992).

The Uniform Adoption Act allows for the creation and enforcement of adoption-with-contact orders in step-parent adoptions, even where the parties have not agreed to permit the contact. *See* UNIF. ADOPTION ACT § 4-112 to 113, 9 U.L.A. 75-77 (1999); Margaret M. Mahoney, *Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents under Uniform Adoption Act* § 4-113, 51 FLA. L. REV. 89 (1999).

[152] *See, e.g.*, Appell, *Blending Families*, *supra* note 102, at 1013-1021.

[153] *See* UNIF. ADOPTION ACT § 4-103, 9 U.L.A. 69-70 (1999).

[154] *See* Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 356 (1996) (analyzing research that indicates that children can be securely attached not only to their mothers, but also to their fathers and other care givers); Marsha Garrison, *Why Terminate Parental*

Ironically, despite the many changes in the structure of the traditional family, there has been resistance to open records. The growing acceptance of adoption-with-contact presents a significant challenge both to adoption practices and to notions of who counts as family, yet there remains significant opposition to the unsealing of birth records. To some extent, this may be a transition problem; as adoptions more frequently involve contact between biological and adoptive parents, an adoptee may no longer need an original birth certificate to identify her biological parents. Assuming that not all adoptions are "open," however, access to adoption records remains a significant issue.

D. Relational View

Open birth records allow for a more "relational" view of the adoption process. Under the traditional view, parenthood is a unitary bundle of rights: it is (1) exclusive, meaning that there can be only one set of parents; (2) a zero sum game, in that legal recognition of an adoptive family precluded any further relationship between the child and her biological parents; and (3) a status that can be renounced or transferred.[155] In adoption, this traditional view has meant only one set of parents for each child because it was believed that recognizing anyone else as having anything akin to a parental relationship deprived the adoptive parents of their exclusive legal status and disrupted traditional conceptions of the family.[156]

By contrast, under a relational view, parenthood is not

Rights?, 35 STAN. L. REV. 423, 460-74 (1983) (discussing a number of studies that support the notion that contact between the child and his natural parents is preferable to absolute termination of parental rights); Eleanor Willemson & Kristen Marcel, *Attachment 101 for Attorneys: Implications for Infant Placement Decisions*, 36 SANTA CLARA L. REV. 439 (1996); Candace M. Zierdt, *Make New Parents But Keep the Old*, 69 N.D. L. REV. 497, 507 (1993) (maintaining that it is possible for children to have strong psychological bonds with more than one adult).

[155] *See* Bartlett, *Re-Expressing Parenthood*, *supra* note 123, at 297-98; Bartlett, *Rethinking Parenthood*, *supra* note 142, at 879; Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 6-9 (1997); David Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV 753 (1999).

[156] Adoption also complicates the notion that parenthood is biologically based. In a society that clings to the notion that blood is thicker than water, camouflaging adoption serves to replicate biologically formed families rather than challenging the relationship between reproduction and parenthood. For further discussion, see Linda Lacey, *"O Wind, Remind Him That I Have No Child": Infertility and Feminist Jurisprudence*, 5 MICH. J. GENDER & L. 163 (1998); Perry, *supra* note 126; Naomi R. Cahn, *Family Issue(s)*, 61 U. CHI. L. REV. 325 (1994) (book review). *See generally* ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993); HELENA MICHIE & NAOMI R. CAHN, CONFINEMENTS: FERTILITY AND INFERTILITY IN CONTEMPORARY CULTURE (1997).

necessarily a zero-sum game, and recognizing a biological parent's ongoing connection with an adoptive child does not diminish the adoptive parents' legal rights, nor does it inevitably threaten the integrity of the adoptive family. Under the relational view, parenthood is viewed as a relationship rather than a status.[157] Parenthood, therefore, cannot be terminated, even if it becomes either temporarily or permanently attenuated. This relational view allows for many more variations or nuances within adoption. Thus, for example, adoption with contact represents a recognition of multiple relationships, rather than a threat to the adoptive parents' legal status. Further, unsealing birth records recognizes that adopted children may seek connection with their biological relatives.

E. Objections to Opening Records

A policy of unsealing birth records is not uncontroversial, however. As applied to adoptions that have already occurred pursuant to a sealed records regime, there may be retroactivity problems. Moreover, allowing access could be viewed as promoting "genetic essentialism," that is, the view that people are merely the sum of their genes. Additionally, some have argued that unsealing records may undermine adoption by discouraging prospective adoptive parents. Finally, although this article focuses on adoption, some of the same reasoning may be applicable to gamete donors; this application of an openness policy deserves further consideration.

1. *Retroactivity*

The unsealing of adoption records is most controversial with respect to adoptions that took place under a sealed records regime. Opponents of open records have argued that unsealing the records of these adoptions unfairly breaches promises of confidentiality made to biological and adoptive parents at the time the adoptions took place. As the Tennessee Court of Appeals explained, "'Life-changing decisions were made based on this expectation . . . .'"[158] Although initially appealing, such breach of promise arguments are ultimately unpersuasive. First, the evidence suggests that few birth

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[157] *See* Bartlett, *Re-Expressing Parenthood*, *supra* note 123, at 295, 337 (critiquing notion of parenthood as a status).

[158] Doe v. Sundquist, No. 01-A-01-9705-CV-00209, 1998 Tenn. App. LEXIS 597, at *25 (Aug. 24, 1998) *rev'd* No. 01-S-01-9901-CV-00006, 1999 Tenn. LEXIS 429 (Sept. 27, 1999).

mothers were offered a choice about confidentiality. Rather, "many birth parents report that they were not promised confidentiality but instead were informed by agencies that their anonymity would be a condition of the adoption."[159] Nor could adoption agencies lawfully have promised birth parents or adoptive families absolute confidentiality, since adoption records can be opened upon a judicial finding of good cause under virtually all sealed records regimes.[160] Thus, the effect of an open records statute on adoptions completed under a sealed records regime may simply be to shift the locus of decision-making from the judicial system to the adult adoptee.

Some birth parents also argue that opening previously sealed adoption records impermissibly interferes with their vested legal rights.[161] Although the intermediate court accepted this argument in *Doe v. Sundquist*, the Tennessee Supreme Court did not. That court noted that adoptees have always been able to gain access to information through court, and that the state had been gradually allowing adoptees access to additional information. Thus, "[T]here simply has never been an absolute guarantee or even a reasonable expectation . . . that adoption records were permanently sealed."[162] Moreover, courts have uniformly rejected such vested rights arguments in other areas of family law relating both to personal rights and to property rights. For example, courts have held that the application of no-fault divorce laws to marriages entered into under a prior fault-based regime did not violate the vested rights of "innocent" spouses who wished to preserve a marriage.[163] Similarly, courts have ruled that equitable distribution statutes, widely adopted in the 1970s to give each divorcing spouse an ownership interest in property previously owned by one spouse alone, could constitutionally be applied to property acquired and marriages entered into before the ownership rules were changed.[164] In both contexts, courts have firmly rejected the assertion that family members have a legally protected interest in having their rights and obligations remain static. These cases indi-

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[159] Madelyn Freundlich, *Adoptees have Rights*, N.Y. TIMES, Feb. 5, 1999, at A26 (letter to the editor).

[160] *See* CARP, *supra* note 14, at 43-44.

[161] *See, e.g.*, *Doe*, 1998 Tenn. App. LEXIS 597, at *25 (holding that "retroactive" application of Tennessee open records law impermissibly impairs vested rights of biological parents in violation of Tennessee Constitution).

[162] *Doe*, 1999 Tenn. LEXIS 429, at *16.

[163] *See, e.g.*, Ryan v. Ryan, 277 So. 2d 266 (Fla. 1973); Gleason v. Gleason, 256 N.E.2d 513 (N.Y. 1969).

[164] *See, e.g.*, McCree v. McCree, 464 A.2d 922 (D.C. 1983); Rothman v. Rothman, 320 A.2d 496 (N.J. 1974).

cate that popularly elected legislatures retain the authority to alter the contours of state-created family law structures, and that neither promises nor expectations about the continuing consequences of those structures rises to the level of a vested constitutional right.

2. *Genetic Essentialism*

Unsealing birth records allows adoptees to find their biological relatives. Such a focus raises the danger of overemphasizing one's genetic identity. As Professors Rochelle Dreyfuss and Dorothy Nelkin point out, "'How to' books and articles written for adoptees stress the importance of finding one's natural or birth parents and suggest that knowing one's genetic heritage is a way to define identity."[165] These books and articles are part of a trend, which Dreyfuss and Nelkin define as "genetic essentialism," the concept that a person is the sum of her genes and that behavior can be predicted based on genetic information.[166] Critics have accused open records advocates of endorsing such essentialism and of asserting that blood kinship is superior to adoptive relationships.[167] While we advocate disclosing the identity of biological parents, we do not justify such disclosure based on the genetic information that disclosure will provide.[168] Instead, we believe that having the same genetic heritage creates the opportunity for a connection and knowledge that the State should not foreclose. Further, we do not believe that acquiring this genetic information will allow an adoptee to predict or explain all of her personal characteristics and traits.

Ironically, adoption law increasingly mandates extensive disclosure of non-identifying genetic information, while resting the calls for disclosure of identifying information. This practice of fully disclosing anonymous genetic information, with corresponding secrecy of the identity of the person, seems itself to be an example of genetic essentialism. A primary rationale for requiring disclosure of non-identifying genetic information is to enable prospective adoptive parents to

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[165] Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 319-20 (1992).

[166] *Id.* at 320-21.

[167] *See* CARP, *supra* note 14, at 229 ("[O]ne of the central tenets of the [Adoption Rights Movement's] ideology rests on the superiority of blood ties and the denigration of adoptive kinship.").

[168] *See also* Lori B. Andrews & Nanette Elster, *Adoption, Reproductive Technologies, and Genetic Information*, 8 HEALTH MATRIX 125, 150-51 (1998) (opposing the release of the identity of biological parents for the sole purpose of allowing adoptees to obtain current genetic information).

guard against any dangers that might be posed through "faulty" genes. By contrast, the purpose of disclosing the identity of biological relatives is to aid adoptees and parents in their personal and emotional development, though providing genetic information may be a by-product. Knowing the identity of her biological parents may help the adoptee in her identity development, but it is certainly not the only factor in that development.

3. *Discouraging Prospective Adoptive Parents*

The objections raised by adoptive parents are even less persuasive in view of the fact that open records do not appear to affect the ability of parents to adopt. Indeed, the experiences of both Kansas and Alaska, which have long had open records regimes, indicate that open records may even encourage adoption. Rates of adoption in these two jurisdictions are considerably higher than the national average.[169] Nor does the available evidence suggest that open records regimes compromise the integrity of the adoption process. Indeed, as Professor Joan Hollinger observes, more 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.[170] Similarly, research on open adoption suggests that most adoptive parents who participate in open adoptions view their experiences positively, even if they were initially hesitant about openness.[171] Moreover, whatever constitutionally protected interests adoptive parents may have in controlling a child's access to information while the child is a minor weakens considerably once a child reaches majority.

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[169] In 1992, the national rate of adoptions per 1000 live births was 31.2; in Alaska, it was 53.5, and in Kansas, it was 48.4. Their abortion rates were also significantly lower than the national average; the national rate was 25.8, while it was 19.4 in Alaska and 12.7 in Kansas. *See* J. Cameron Tew, *A Family Found: Raleigh Resident Susan Miller used an Internet search to find her long-lost Biological Family*, HERALD-SUN, June 22, 1997, at E1.

[170] *See* Hollinger, *supra* note 13, at 13-38. She also reports, based on her own informal survey, that the "overwhelming majority" of biological mothers agree, at the time of their child's adoptive placement, to the disclosure of their identity when the child becomes an adult. *Id.* at 13-39.

[171] *See, e.g.*, Marianne Berry, *Risks and Benefits of Open Adoption*, 3 FUTURE OF CHILDREN 125, 130-31 (1993); Harriet E. Gross, *Open Adoption: A Research-Based Literature Review and New Data*, 72 CHILD WELFARE 269, 273-75 (1993); Deborah Siegel, *Open Adoption of Infants: Adoptive Parents' Perception of Advantages and Disadvantages*, 38 SOCIAL WORK 15, 18 (1993).

4. *The Slippery Slope Argument*

Allowing children to find the identity of their biological parents could apply in contexts outside of adoption. For at least one hundred years, women have become pregnant through insemination of "donor"[172] sperm. The donors are often promised anonymity by the sperm bank or under state statute;[173] but, of course, so were many biological parents of adoptees. Using new reproductive technologies, women can donate eggs, enabling otherwise infertile women to become pregnant. In 1996, there were more than 5,000 cases of egg donation.[174] Should a child ever be able to discover the identity of her gamete donor?[175]

Frankly, we find the issue of secrecy and gamete donation highly problematic. There are both similarities to and differences from issues surrounding secrecy in the context of adoption. For the child, the interests in finding out about gamete donors may be similar to those of adoptees. The child seeks to learn of her biological origins. On the other hand, issues of "relinquishment" or "abandonment" may be far less complex; "giving up" sperm or an egg may be far more comprehensible to a child than is "giving up" a baby. Thus, "donor" children may have fewer psychological issues surrounding their origins, and knowing the identity of their genetic parents may be less central to their sense of self. Even these children, however, sometimes express strong interest in meeting their biological relatives.[176] This interest has even been used in popular culture. In the movie "Made in America," Whoopi Goldberg's daughter searches for her sperm donor "dad." The daughter tracks down her father and develops a relationship with him, notwithstanding the fact that she is a highly intelligent, extremely race-conscious young African-American woman, and the white father, played by Ted Danson, is a loud used-car salesman.

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[172] The use of "donor" in the gamete area is problematic. Men who produce sperm are paid for their efforts and egg donors are generally paid at least several thousand dollars. *See* Kathryn D. Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past*, 57 ALB. L. REV. 733, 739 (1994); Vobejda, *supra* note 118, at A7.

[173] For example, the Uniform Parentage Act provides that all documents relating to an insemination are "subject to inspection only upon an order of the court for good cause shown." UNIF. PARENTAGE ACT § 5(a), 9b U.L.A. 301 (1987).

[174] *See* Vobejda, *supra* note 118, at A7 (citing Centers for Disease Control numbers).

[175] *See* Laskas, *supra* note 118 (reporting on friend who had agreed never to tell anyone about an egg donation).

[176] *See* Laskas, *supra* note 118 (discussing adult children of mothers who became pregnant with donated sperm); Vobejda, *supra* note 118, at A7 (citing potential problems related to secrecy and gamete donation).

For gamete donors, the issues are similarly complex. Like birth parents after adoption, gamete donors lack a legal relationship with their "children."[177] However, unlike a gamete donor, a birth mother who relinquishes a child for adoption has carried and nurtured that child for nine months of pregnancy. The issues may also be different for male and female donors; like many biological fathers, sperm donors seem far less troubled by anonymity than some egg donors, who have undergone more invasive procedures and may have created a bond with the recipient family.[178] Additionally, male donors are capable of "fathering" many more children than are female donors.

From the perspective of the intending parents, there may be more secrecy surrounding gamete donation than adoption; while many parents disclose that their children are adopted, parents are much less likely to disclose that their children were conceived through gamete donation. Moreover, unlike the typical adoption situation, at least one intending parent typically has a genetic connection to the child.[179] At least with respect to children conceived through artificial insemination by donor, there is no need for formal adoption by the intended father, as long as the parents have complied with applicable state procedures.[180]

Finally, issues of state involvement differ in the two contexts. Only nine states currently protect the anonymity of gamete donors, while most states still protect the secrecy of biological parents.[181] Adoption is also a state-created legal status, while gamete donation remains a largely private transaction that is handled through contract and intention.[182] The anonymity of gamete donors is more likely to be protected through private contracts; state-imposed disclosure requirements that impair these contracts may raise addi-

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[177] For a discussion of the curious and ambivalent legal relationships between adoptees and their biological parents, see Naomi Cahn, *Thicker than What?* (1999) (unpublished manuscript on file with the *University of Pennsylvania Journal of Constitutional Law*).

[178] *See* Vobejda, *supra* note 118, at A7 (discussing the bond formed between egg donees and recipient families).

[179] *See* Lori B. Andrews, *Alternative Reproduction and the Law of Adoption*, in 2 ADOPTION LAW AND PRACTICE, *supra* note 13, at § 14.01, 14-1.

[180] *See* UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, Commentary to § 4, 9b U.L.A. 155 (Supp. 1994).

[181] *See* Allan, *supra* note 34, at 719 (noting that every state protects the confidentiality of adoption records and citing statutes).

[182] *See* Katz, *supra* note 77, at 774. Professor Katz proposes that children of gamete donors receive identifying information; she argues that "gamete donors [who] are unwilling to have their sons and daughters meet them face to face one day . . . should not participate in the creation of children." *Id.* at 780.

tional legal issues.

IV. ADOPTION, IDENTITY, AND THE CONSTITUTION

The state is necessarily involved in adoption because adoption is a state-created process and status.[183] The state determines who is eligible to adopt, and who is eligible to be adopted. The state also controls the consequences of adoption, including the availability of any records. Thus, the question is not whether the state should regulate adoptions records, but how.

As discussed above, the Constitution does not preclude states from opening adoption records.[184] Does it, however, *require* states to take this step? As the *Alma Society* case illustrates, it is difficult to construct a persuasive argument using conventional due process doctrine, which focuses on concepts of individual privacy and liberty. Framed in terms of privacy/due process, the privacy interests of the birth and adoptive parents appear to counterbalance (or cancel out) the privacy interests of the adult adoptee. Hence, this analysis suggests that there is no due process right to open records. Moreover, when intra-familial disputes are constitutionalized, they inevitably place the rights of various members of a family in conflict with one another.[185] This, in turn, threatens the connections that characterize relationships within the family.

However, as the opening section of this article suggests, these difficulties may say more about the inadequacy of current constitutional doctrine than about the merits of the constitutional claims in favor of open records. A reconstituted understanding of due process, which focuses not on negative liberty, but on the development of identity and personhood that zones of liberty and privacy make possible, might well support a more robust set of constitutional arguments.

This reconstituted vision would recognize that identity is a central aspect of personhood, but that the construction of identity is necessarily relational and dynamic. Identity is not constructed autonomously or in isolation from other people, particularly family members. For adoptees, constructing an

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[183] *See generally* Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985) (arguing that rhetoric of state non-involvement in the family is more harmful than helpful); Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135 (discussing the historical involvement of government in the family).

[184] *See supra* text accompanying notes 88-101.

[185] This is not to deny the importance of rights for family members. *See generally* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989) (arguing for the application of notions of justice to the family).

adult identity may involve processing information about more than one family and may even entail establishing a relationship with biological, as well as adoptive parents. The construction of identity is one of the important things that privacy makes possible. In this sense, an important function of protecting "privacy" is to give individuals the space to construct their identities, in part through their relationships with others. Thus, privacy is not just decisional autonomy. Children, in particular, form identities, even though they do not make decisions autonomously.

What seems most objectionable about sealed birth records is *not* that the State is interfering with the decisional autonomy of adoptees but that, by controlling access to this information, the State is playing far too large a role in constructing an identity for them.[186] Consequently, in *Alma Society*, the court was wrong in not looking beyond competing privacy interests to a more careful analysis of whether the interests really did conflict and/or whether the state had any affirmative obligation to find that out. A robust understanding of the liberty protected by the due process clause may require that a state not structure its adoption process to preclude access to this information.

Focusing on the identity-formation function of privacy also affects the constitutional analysis by suggesting that the parties' interests are not mutually exclusive and that they evolve over time. In particular, once an adoptee reaches young adulthood, openness may be much more central to her identity than continued secrecy is to the identities of the birth (or adoptive) parents. Thus, to the extent that the State relies on protecting the identity of birth parents, it at least has the obligation to make sure that the parent still wants to keep her identity secret from her adult child.

What the Constitution may require, then, is *either* an open records regime *or* an active, state-facilitated search process that ensures that records remain closed only where a birth parent (still) insists on secrecy. Thus, a state could maintain a closed records system if, and only if, it put in place a confidential intermediary system with an openness default. Such a confidential intermediary regime would differ from current, mutual consent registries in that it would be active, rather than passive. It would differ from current "search and consent" statutes in that openness, rather than continued se-

[186] Professor Jeb Rubenfeld has made a related point about privacy and the reproductive freedom cases, arguing that privacy in that context consists of a right to self-determination. *See* Rubenfeld, *supra* note 36, at 752-54.

crecy, would be the default position. Under such a system, a request by an adult adoptee would trigger a confidential search; records would be opened *unless* a parent were found and said no.[187] As a constitutional matter, a system that would allow a birth parent to remain anonymous on a current, case-by-case basis is far less troubling than the traditional sealed records system, which precludes adoptees from even asking if a birth parent is willing to be contacted (and vice versa).

This analysis makes sense from a constitutional perspective because it means that adoptees could be denied access to their records only when their birth parent actually and currently chooses to preclude a parent/child relationship. In this situation, it is no longer the State that is centrally controlling the construction of the adoptees' identity. Of course, a State can (and we think, should) take a further step and open records upon the request of an adult adoptee. But, as a constitutional matter, perhaps the most sympathetic reading of *Alma Society* from an "identity" perspective is that, where there really is a conflict between parents' and children's identity interests, the state is not required to take sides. What the State is required to do, however— even if that takes an affirmative act— is to make sure that a conflict exists before it denies an adult adoptee access to this information.

Because such an affirmative understanding of liberty would require a new vision of the Constitution— a highly unlikely proposition at this point in our legal history— we ground our belief that states should open adoption records primarily in public policy considerations. The solution that we propose recognizes both the strong identity interests of adult adoptees and the concerns of birth parents (particularly mothers) who relinquished children for adoption under social and familial circumstances significantly different from those that prevail today. Our proposed solution thus distinguishes between prospective and completed adoptions. For prospective adoptions, we believe that records should be open at the election of an adult adoptee. While we would allow a birth parent, at the time of relinquishment, to note her (or his) objection to future contact, that objection would not preclude the disclosure of information to the adult adoptee.[188] When

[187] Existing evidence suggests that, in the overwhelming majority of cases, parents who are found would consent to the release of identifying information. *See* Hollinger, *supra* note 13, at 13-38.

[188] We leave for another article the complex issues regarding the biological father's involvement in the adoption process, as well as the difficult questions posed by disagreements between the biological parents regarding confidentiality.

an adult adoptee seeks her original birth certificate, and there is a contact objection in the file, the identifying information would be released, together with the provisions of the contact veto. As under the Tennessee statute, an adoptee's violation of the contact veto could lead to civil tort liability.[189]

We would establish a different procedure for past adoptions. A request by an adult adoptee to open records of a past adoption would obligate the State to conduct a confidential search for the birth parent to ascertain whether she objects to the release of identifying information. If no birth parent could be found, then the request to open records would be granted. A birth parent who was found and who did object would have the right to request a confidential hearing before any such information would be released.[190] At that hearing, the burden would be on the birth parent to show good cause as to why she (or he) should not be identified.[191] In the context of completed adoptions, we are uneasy about automatic disclosure over the current objection of a birth parent, particularly because some birth mothers may have strong reasons for maintaining secrecy. In the case of rape or incest, for example, a woman's safety and psychological health may depend on preserving her anonymity, as well as on avoiding contact. In these cases, a court is likely to find that the potential harm to the biological parent from disclosure is likely to exceed the benefits of openness to the adult adoptee. We recognize that even this solution may require some birth mothers to confront a painful or stigmatizing past that they believed they had put behind them. We believe, however, that allowing such complete erasure, in the face of an adoptee's request for disclosure, generally serves to perpetuate the stigma involved in relinquishing a child for adoption.[192] Moreover, the adult child's search for identity

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[189] *See* TENN. CODE ANN. § 36-1-132 (1996) (imposing civil liability for violation of the contact veto). A state could make violation of the contact veto grounds for civil and/or criminal liability, but only if it also provided a mechanism for determining whether the birth parent continued to object to contact at the time an adult adoptee seeks disclosure.

[190] A birth parent could also file an objection on his or her own, assuming that the parent knew the state in which the adoption took place.

[191] One article proposes requiring both biological parents to show good cause as to why identifying information should not be released, or adoptees to show good cause as to why the information should be released, then letting a court decide. *See* Audra Behnē, *Balancing the Adoption Triangle: The State, the Adoptive Parents and the Birth Parents – Where Does the Adoptee Fit In?*, 15 BUFF. J. PUB. INT. L. 49, 81-82 (1996-97).

[192] In the first survey of attitudes towards adoption, 90% of the 1500 participants had a positive opinion of adoption, and 95% generally supported it. Nonetheless, when it came to an examination of the adoptive family, respondents were somewhat

and connection become an extremely significant consideration at this point. Thus, even for completed adoptions, our proposal would shift the traditional presumption from continued secrecy to openness. For prospective adoptions, openness would become the norm; while a birth parent could indicate her opposition to contact, she could not prevent the disclosure of identifying information. This shift would help dissolve the aura of secrecy that surrounds adoption in contemporary culture and would recognize and mediate between the different interests inherent in the adoption process.

more cautious. Half of the respondents believed that, while having an adopted child was better than infertility, it was not quite as good as having a biological child. *See* Wetzstein, *supra* note 117. Only two-thirds believed that it was highly likely that an adoptee would love her adoptive parents as much as her biological parents. *See id.*