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The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination

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THE IMPACT OF FAMILY PARADIGMS, DOMESTIC CONSTITUTIONS, AND INTERNATIONAL CONVENTIONS ON DISCLOSURE OF AN ADOPTED PERSON'S IDENTITIES AND HERITAGE: A COMPARATIVE EXAMINATION

*D. Marianne Brower Blair**

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Among those nations that incorporate into their legal systems the institution of full adoption, recognition of the importance of information concerning identity and genetic and social heritage to both adopted persons and their adoptive and birth parents has developed slowly and at an uneven pace. A comparative examination of legal regulation of the collection and distribution of both identifying and non-identifying (medical and social) information, however, reveals a growing global recognition of the importance of each. Recent reform of the domestic laws of many nations, as well as global and regional international conventions, reflect increased awareness, to varying degrees, of the importance of a post-adoption connection to biological origins.

In the United States, the paradigm of adoptive family as “replacement family,” embraced by professionals and reflected in legislative reform during the mid-twentieth century, has evolved into a recognition of the importance of an adopted person’s connection with both her birth heritage as well as her adoptive family. Within the past two decades, government-sponsored registries and/or search programs have been created in almost every state, and the past five years mark an emerging trend to release birth records to adult adoptees. Statutory standards for the collection of full and complete medical and social history, early disclosure to prospective adoptive parents, and post-adoption supplementation of medical information for the benefit of both adoptees and birth families have become the norm, mandated to some degree in virtually every state. There is now widespread recognition in the United States that collection and disclosure of medical and social history, though not a substitute for disclosure of identifying information to adopted adults, serve important purposes, i.e., facilitating appropriate placement, fostering informed medical decisionmaking, and enabling adoptive parents to provide their child with age-appropriate information regarding her origins.

Other nations have undergone similar waves of reform, but in varying progressions. In some nations, birth records have been available for many decades to adult adoptees upon demand.¹ Other countries have more recently made identifying information available, or are considering such reform, in some instances in response to recent constitutional scrutiny or the influence of international conventions.² Recognition of the importance of legal mandates for the thorough collection and timely disclosure of health and social history is emerging as well, a matter of particular importance since the age of children at the time of

1. See *infra* notes 238–49, 269 and accompanying text.

2. See *infra* notes 209–27, 292, 358 and accompanying text.

adoption has been rising.³ Birth parents' access to post-adoption information is also beginning to receive legislative attention.⁴

Nevertheless, in the majority of jurisdictions in the United States⁵ and many provinces in Canada,⁶ adult adoptees still are not permitted access upon demand to their birth or adoption records. The remaining obstacle to universal acceptance of swift, automatic access to such records is disagreement over the appropriate mechanism for resolution of conflicts on those occasions when a birth parent opposes disclosure. In addition, in the United States, the United Kingdom, many Canadian provinces, and, until now, the Republic of Ireland, access to information by birth parents, other than through the use of registries and sometimes intermediary programs, has generally been disregarded.⁷ Moreover, collection, retention, and disclosure of background information to prospective adoptive parents outside of the United States has not yet been effectively mandated in many parts of the world.⁸

As we consider directions for future reform in the United States, we have much to learn from an examination of the reform efforts of nations with legal institutions and a cultural heritage similar to our own. Part One of this article provides an overview of the historical and current development of legal norms regulating disclosure of identifying and non-identifying information to adopted individuals, birth parents, and adoptive parents within the United States, Canada, the United Kingdom, and the Republic of Ireland. Changing social conditions and mores, the influence of social science research and constructs, and differing constitutional approaches that have shaped legislative reform in these nations are explored and compared.

Part Two of this article examines the extent to which international law has and will potentially influence the direction of the reform and implementation of adoption disclosure norms. Though it does not yet appear that international law mandates recognition of an absolute right to identifying information when such disclosure is opposed by a birth parent or adoptee, examination of these conventions and the response of the international community underscores the critical importance of identifying information to many adoptees, and a growing movement to afford primacy to their interests.

Drawing upon the insights of recent statutory proposals in both the United States and other nations, as well as the legislative history and

3. See generally *infra* notes 47, 265–66 and accompanying text.

4. See *infra* notes 210–27, 292 and accompanying text.

5. See *infra* notes 95–145 and accompanying text.

6. See *infra* notes 213–27 and accompanying text.

7. See *infra* notes 146–51, 213–27, 270–73, 292 and accompanying text.

8. See *infra* notes 262–65 and accompanying text.

administrative and judicial interpretation of relevant international conventions, Section Three sets forth a proposed model for future reform. Under this proposal, birth and adoption records would be opened retrospectively and prospectively for adult adoptees, a contact preference system would be implemented, and a judicial or administrative override would be created to afford birth parents the opportunity to show good cause to delete identifying information in compelling circumstances. In addition, the proposal would create mechanisms to provide birth parents with non-identifying information during an adopted child's minority, and identifying information thereafter, similarly subject to a contact preference system and judicial or administrative override. Regarding non-identifying information, some of the American statutes that comprehensively regulate the collection of medical and social history and its disclosure to prospective adoptive parents, adoptive parents, adult adoptees, and birth family members, might serve as models for American states and other nations that have not addressed these issues in similar detail. Federal legislation governing disclosure of medical and social history in international adoptions, however, should be revised to create more effective time frames for the provision of information to prospective adoptive parents. Enacting such reforms serves the needs of adopted individuals and birth families who wish to preserve a continuing link, while attempting to balance the privacy interests of those who do not, and facilitates appropriate placements and medical care for all adoptees and their birth families.

I. A COMPARATIVE VIEW OF THE REGULATION OF ADOPTION INFORMATION UNDER DOMESTIC LAW

Although the United States, Canada, the United Kingdom, and the Republic of Ireland enacted their first adoption statutes at different times throughout a 100 year span, by the mid-twentieth century similar social conditions and cultural mores fostered legal regulations imposing confidentiality and anonymity over the adoption process in each nation. Almost every American state and Canadian province, as well as England, Wales, Northern Ireland, and the Republic of Ireland have all at various times denied adoptees automatic access to birth records. Birth parents in these countries were denied information regarding the post-adoption identity and progress of their children, and legislation mandating the collection, disclosure and supplementation of medical and social history was neglected.

This section examines the forces that produced that regime of secrecy, and the gradual transformation of the legal regulation of adoption disclosure, albeit to varying degrees, that has occurred over the past several decades in these nations, as well as proposals recently proffered for further reform.

A. *United States*

1. Adoption as Rebirth and the Legacy of Secrecy

Although adoption existed in various forms in many ancient cultures,⁹ adoption as a legal institution had virtually disappeared in most European countries by the seventeenth century, and was not recognized by English common law.¹⁰ Among those nations whose legal systems were predominantly influenced by English jurisprudence, the first modern adoption statutes are often regarded as those enacted in the United States in the mid-nineteenth century.¹¹ The institution of adoption evolving from these statutes has been distinguished from earlier forms of adoption in that its central focus was the welfare of children, rather than the needs of adults for heirs or ancestral worship.¹² These

9. The ancient Babylonians, Hebrews, Egyptians, Greeks, Chinese and Romans; the tribal societies of Oceania and Africa; the Teutonic aristocracies, Slavonic Russians, the Celtic clan associations, and ancient Hindu law all recognized adoption in some form. E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* 3 (1998); KATRINA WEGAR, *ADOPTION, IDENTITY, AND KINSHIP: THE DEBATE OVER SEALED BIRTH RECORDS* 23 (1997); Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 743-44 (1956).

10. CARP, *supra* note 9, at 4; Joan Heifetz Hollinger, *Introduction to Adoption Law and Practice*, in 1 *ADOPTION LAW AND PRACTICE* 1-19 (Joan Heifetz Hollinger ed. 2000). Although England had no general statutory adoption prior to the twentieth century, it utilized wardships, guardianships, indentures, apprenticeships, and other arrangements which have been referred to as "quasi-adoptive" in nature. Hollinger, *supra* note 10, at 1-19.

11. Mississippi passed an adoption statute in 1846, Texas and Vermont in 1850, and Massachusetts in 1851. *Id.* at 1-22. New Zealand is alleged to be the first nation in the British empire to introduce legal adoption, doing so in 1881, although Maoris had practiced informal adoption for hundreds of years. Keith Griffith, *Adoption History and Reform in New Zealand*, available at <http://www.ouareau.com/inverc/histkeith.htm>. New Brunswick, in 1873, was the first Canadian province to enact adoption legislation. BEREND HOVIUS, *FAMILY LAW: CASES, NOTES AND MATERIALS* 993 (1992) (excerpting BALA & WILDGOOSE, *CANADIAN CHILDREN'S LAW: A COURSEBOOK* 371 (1985)). New South Wales, Australia, enacted an adoption statute in 1923 as part of its Child Welfare Act. N.S.W. L. REFORM COMM'N, REPORT NO. 69, REVIEW OF THE ADOPTION INFORMATION ACT 1990 (1992) available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R69TOC>. The first general adoption statutes were enacted for England and Wales in 1926, for Northern Ireland in 1929, and for Scotland in 1930; the Republic of Ireland did not enact an adoption statute until 1952. ALAN JOSEPH SHATTER, *SHATTER'S FAMILY LAW* 445-46 (4th ed. 1997).

12. WEGAR, *supra* note 9, at 23; Huard, *supra* note 9, at 749. Despite the fact that three states had earlier adoption statutes, Massachusetts' statute is widely considered the first modern adoption statute in the United States because it was the first American statute to emphasize

statutes also introduced the concept of judicial supervision over adoption. Under these early American statutory regimes, adoption proceedings, like other civil judicial matters, were open to the press and the public, as well as to the parties involved.¹³

Although secrecy between birth parents, adopters, and adoptees would not become a hallmark of adoption practice in the United States for almost a century after these statutes were first enacted, in the 1920s and 1930s a new emphasis on confidentiality set the stage for the subsequent envelopment of adoption in a blanket of anonymity. Beginning in 1917 and continuing throughout the next few decades, a majority of the states passed legislation requiring that adoption records be kept confidential and sealed from public scrutiny.¹⁴ These early confidentiality statutes were not intended to create anonymity between birth and adoptive families, however, and initially permitted access to records by parties and their attorneys.¹⁵ The statutes were motivated by the desire to shield birth parents and their children from the social stigma attached during this period to out-of-wedlock birth,¹⁶ and to protect adoptive parents from embarrassment or potential blackmail by an unscrupulous public.¹⁷ They also served the interests of professional social workers and agencies, who were the guiding force behind this new legislation.¹⁸ Jockeying to replace lawyers, doctors, clergy, and lay volunteers, who up until the 1920s were the primary facilitators of adoptions, professional adoption workers suggested that they could better guarantee confidentiality, and saw implementation of confidentiality legislation as an opportunity to solidify their “occupational

the child as the primary beneficiary of the proceeding. It was also the first to require judicial supervision of adoption proceedings by a judge. By contrast, the earlier statutes in Mississippi and Texas merely created a legal procedure to authenticate a public record of private adoption agreements, in order to ease the burden on legislatures which had been asked to pass many private adoption acts in the preceding decades. CARP, *supra* note 9, at 11; Hollinger, *supra* note 10, at 1–22.

13. Prior to 1920, newspapers routinely reported accounts of adoption proceedings. Adoption statutes in the 19th century did not address confidentiality, and, to the extent birth certificates existed, they were available to adoptees who requested them. Hollinger, *supra* note 10, at 1–37.

14. Joan Heifetz Hollinger, *Aftermath of Adoption: Legal and Social Consequences*, in 2 ADOPTION LAW AND PRACTICE 13-5 (Joan Heifetz Hollinger ed. 2000). Up until World War II, however, twenty-three states had not yet enacted confidentiality statutes, and thus their court adoption proceedings and records were open to public view. CARP, *supra* note 9, at 42.

15. Hollinger, *supra* note 14, at 13-5; CARP, *supra* note 9, at 42–43.

16. WEGAR, *supra* note 9, at 26; Hollinger, *supra* note 14, at 13-5.

17. CARP, *supra* note 9, at 42. Professor Carp observed that the records of agencies were typically not covered by these earlier statutes, and disclosure was left to agency discretion. *Id.* at 43.

18. WEGAR, *supra* note 9, at 28. See Hollinger, *supra* note 14, at 13-5; CARP, *supra* note 9, at 42.

niche.”¹⁹ Although members of the adoption triad (adoptive and birth parents and adopted persons) thus initially retained access to their adoption records after this first wave of legislative reform, inadequate record keeping at the time often rendered these records of little use, and highlighted the importance of birth records as a source of identifying information.²⁰

The stigma of illegitimacy, however, also motivated changes in the laws regulating birth records. Statutory reform during this period eliminated the term “illegitimate” from birth certificates and all public documents. By 1941, the registrars of vital statistics in thirty-five states were required to issue new birth certificates for adopted children, substituting the new name for the child and replacing the names of the birth parents with those of the adoptive parents. Again, however, these initial reforms generally preserved the right of the adopted person, upon reaching adulthood, to inspect the original certificate, and in fact, the retention of original certificates was required for just this purpose.²¹

Gradually, however, the aura of confidentiality transformed into a regime of secrecy imposed upon birth parents, adoptive parents, and ultimately, adopted persons. Beginning in the mid-1930s and throughout the 1940s and 1950s, states revised their statutes to close their adoption records to everyone, rendering them accessible only with a court order upon a showing of good cause.²² A similar shift occurred shortly thereafter regarding access to birth certificates. Professor Elizabeth Samuels, in her recent study of disclosure of birth records to adoptees, observed that in the immediate post-World War II era, very few states had statutorily foreclosed the access of adult adopted persons to their birth certificates,²³ and even in the mid-1950s, it was still the prevailing view that adoptees could inspect their own birth records when requested. By the end of the decade, however, a sea-change had occurred. Only twenty states still permitted access upon demand by 1960. Of these twenty states, four closed their birth records to adult adoptees during the 1960s, six additional states followed suit in the 1970s, and six more did so in the early 1980s. Alabama became the last state to close its birth records to adoptees in 1990.²⁴

19. CARP, *supra* note 9, at 42.

20. *Id.* at 44.

21. *Id.* at 52–55.

22. Elizabeth Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 373–74 (2001); Hollinger, *supra* note 14, at 13–16; see also Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 156–57 (1999).

23. New York closed birth records to adult adoptees in 1936, Maryland did so in 1939, and Hawaii is reported to have closed its records in 1945. Samuels, *supra* note 22, at 377 n.57.

24. *Id.* at 375–84.

This wave of statutory reform imposing anonymity between adoptive and birth families reflected the prevailing practices of adoption professionals of the era. Agencies placing Caucasian²⁵ infants as early as the 1930s and 1940s routinely prevented the birth parents from learning of the identity of the adopters, ostensibly to protect adoptive families from the possibility of harassment and to ensure the stability of the adoptive placement for the child.²⁶ By the 1950s, complete severance between Caucasian birth parents and the adopted person and his new family was supported not only by agency practice, but also by lawyers (who often facilitated independent adoptions),²⁷ psychologists,²⁸ and social service organizations.²⁹ The Child Welfare League of America (CWLA), described as “the international standard-setting body in the field of social welfare,” issued standards in 1938 and 1941 calling for anonymity and the sealing of birth records.³⁰ Following surveys of adoption practices in 1948, 1951, and 1954, CWLA again produced a Standards for Adoption Services Report in 1959 that supported the anonymity of all parties, the confidentiality of agency records, and the sealing of court and birth certificates.³¹ By

25. The development of confidentiality policies by agencies during the first half of the twentieth century reflected changing practices regarding white mothers. Although cultural stigma, new psychological theories, and an increasing demand for infants following World War II induced adoption professionals to encourage white unwed birth mothers to place their children for adoption, black mothers were not similarly encouraged to relinquish their children. See WEGAR, *supra* note 9, at 52. In addition, black unwed mothers found greater acceptance and encouragement to keep their children from both their families and communities. RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE 6-7, 156 (1992). During the decades when confidentiality and anonymity between birth and adoptive families became the model for placement of white infants, informal placement of children with relatives was the norm among black and immigrant families, when a need for alternate care arose. See Hollinger, *supra* note 14, at 13-6 to 13-7.

26. CARP, *supra* note 9, at 102-07; Samuels, *supra* note 22, at 385-86 (observing that the U.S. Children's Bureau, an influential force in the development of adoption law in the mid-twentieth century, repeatedly advised that birth and adoptive parents not have access to information about each other, and voiced particular concern that children must be protected from interference by birth parents after placement in an adoptive home).

27. Although the majority of non-relative adoptions were still arranged independently in 1950, the professional guidelines set by social workers still “set the parameters for the nation's adoption policy.” WEGAR, *supra* note 9, at 50.

28. By the mid-1940s, psychological theorists shifted their construct of white unwed mothers, from the pre-war notion of immutable deviants whose fate was biologically and environmentally determined, to a neo-Freudian view that such mothers suffered temporary neuroses or maladjustment that could be treated and transcended by preparing themselves for marriage, *sans* infants. SOLINGER, *supra* note 25, at 15-16.

29. Hollinger, *supra* note 14, at 13-7 n.21 (observing that the Family Law Section of the ABA consistently endorsed this position by the late 1960s).

30. CARP, *supra* note 9, at 107; Samuels, *supra* note 22, at 386.

31. Janette Thompson, *Roots and Rights—A Challenge for Adoption*, 47 SOC. WORKER 13, 13 (1979).

1976, a survey of 200 public and private agencies found that 90% of the agencies guaranteed adoptive and birth parents anonymity, and agencies almost never revealed identifying information. Only one of the 200 agencies reported that it would disclose the names of birth parents when requested.³² Proponents of anonymity argued that birth mothers and their children would be protected from stigmatization, bonding between adoptive parents and their children would be facilitated, and all parties would be permanently insulated from unwanted interference in their lives.³³

The movement to permanently separate adoptees and their adoptive families from birth families was supported by more than the proffered pragmatic considerations³⁴ and professional interests,³⁵ however. In large part it reflected a paradigm of adoption embraced by child welfare professionals during the mid-twentieth century. Adoption constituted a rebirth, through which all ties with the biological family would be severed and an illusion created that the adoptee was born into the adoptive family.³⁶ The prevailing practice of matching adoptive parents and children on the basis of physical characteristics and the

32. CARP, *supra* note 9, at 173.

33. See e.g., Hollinger, *supra* note 14, at 13-7 to 13-8, Cahn & Singer, *supra* note 22, at 156-57; CARP, *supra* note 9, at 170-71 (relating rationale of CWLA opposition in official documents in the mid-1970s to open records).

34. Recently, historians have attempted to delve more deeply into the explanations previously proffered for the leap from legislation protecting the confidentiality of adoption information from public scrutiny to legislation that prohibited adult adoptees from learning the identities of their birth parents. Professor Carp, following an intensive study of the records of one agency, postulates that the perception that secrecy was desired by the birth mothers, growing adherence to the principle of client confidentiality and the importance of professional secrecy, and psychoanalytic theory prevalent at the time that viewed searching as a sign of psychological disturbance all contributed to the switch. CARP, *supra* note 9, at 117-21. Professor Samuels counters by pointing to the absence in social welfare literature of the period of any articulated rationale based on birth mother fears regarding adoptee searching, but observes that the earlier closing of records, because they were tied to concern over the stigma of illegitimacy, may have contributed to the changing social meaning of searching by adoptees, making it appear unnatural and a sign of a failure of adoption. Samuels, *supra* note 22, at 373-74.

35. Professor Carp observed in his study of the records of the Children's Home Society of Washington that in the pre-World War II era, the majority of birth mothers were married or divorced, and only 35% of the children placed through the agency were born out of wedlock. Following the war, the percentage of children placed through the agency born out of wedlock rose to 95%. Increasing adherence to policies of secrecy, he suggests, was good for business, given the perception that privacy was an important criteria for birth mothers choosing agencies. CARP, *supra* note 9, at 110-13. See also WEGAR, *supra* note 9, at 52 (observing that white mothers were expected to keep their babies born out of wedlock prior to World War II); SOLINGER, *supra* note 25, at 13 (the number of children born out of wedlock rose sharply during the war and post-war years).

36. ARTHUR D. SOROSKY, ET. AL., *THE ADOPTION TRIANGLE* 38 (1978); Samuels, *supra* note 22, at 373.

issuance of new birth certificates were consistent with this philosophy.³⁷ Agencies, in fact, resisted the provision of post-adoption services to adoptive families, referring them instead to the community network of social services available to families in general, based upon the notion that adoptive families were like any other families, and needed no adoption-specific counseling.³⁸ One of the leading proponents of closed records, Austin Foster, argued in 1979 that, in contrast to the adoption systems of many European countries:

[T]he American pattern is based upon a daring legal fiction: our laws mean for the adopted child to become both in law and in fact a complete member of the family with precisely the same rights and privileges that would entail to a natural child, with the clear implication that this membership extends to all social, cultural, and emotional facets of that child's life. The American procedure makes the child a member of this family and no other.³⁹

Allegiance to the philosophy of "rebirth" influenced not only the increasing concealment of identifying information, but also an increasing reluctance on the part of adoption agencies and other intermediaries to provide information to adoptive parents about a child's medical and social background or information about the biological family.⁴⁰ Although practices regarding the release of non-identifying information in the 1930s and 1940s varied, by the 1950s agencies increasingly disclosed to adoptive parents only favorable medical and social information, or chose to reveal none at all.⁴¹ The conventional wisdom was that adoptive parents and their child were

37. Sanford N. Katz, *Rewriting the Adoption Story*, 5 FAM. ADVOC., Summer 1982, at 9, 9.

38. Thompson, *supra* note 31, at 13.

39. WEGAR, *supra* note 9, at 29 (quoting Austin Foster, *Who Has the 'Right' to Know?*, PUB. WELFARE, Summer 1979, at 34, 35).

40. See, e.g., SOROSKY, *supra* note 36, at 35-36; David Golden, *When Adoption Doesn't Work*, BOSTON GLOBE, June 11, 1989, at 16 n.3; Elizabeth Neuffer, *State Liable for Hiding Key Records in Adoption*, BOSTON GLOBE, Oct. 29, 1991, at 21 (explaining that Massachusetts Department of Social Services did not require disclosure of medical history to adoptive parents until 1990).

41. E. Wayne Carp, *Adoption Disclosure of Family Information: A Historical Perspective*, 74 CHILD WELFARE 217, 219, 225, 230, 233 (1995) (The author concludes that in the first half of the twentieth century, agencies disclosed what little information they possessed. *Id.* at 219. However, he also cites a 1937 study of 30 agencies which revealed that half disclosed all non-identifying information while the other half disclosed as little as possible, and a 1947 study concluding that 70% of the 95 agencies surveyed disclosed whatever non-identifying information that they had. *Id.* at 225. By the 1950s, however, his own study reveals that a marked change in attitudes had occurred that increasingly resulted in little or no disclosure of even non-identifying information. *Id.* at 230-33.).

better off without knowledge of the child's background,⁴² and that the potential impact of genetic inheritance should be downplayed.⁴³ This "fresh start" approach was consistent with a swing in social science literature during the mid-century that emphasized the importance of nurture over nature.⁴⁴ Adoption professionals suggested that to strengthen the bond between a child and her adoptive parents, "adoptive parents should be provided with as little information as possible regarding the 'shadowy figures' of the birth parents."⁴⁵ Negative information regarding birth family members, such as criminal behavior, mental illness, and alcoholism, was particularly likely to be withheld.⁴⁶ As older children again⁴⁷ began to comprise an increasingly significant number of the children placed for adoption, essential information about the child's own health and social history was also frequently not disclosed.⁴⁸

42. See Rob Karwath, *Teenager's Parents Sue in 'Wrongful Adoption'*, CHI. TRIB., Dec. 29, 1989, § 1, at 1 (David Schneidman of the Illinois Department of Children and Family Services proffered this rationale in defending the policy of Illinois adoption agencies prior to the enactment of disclosure laws in 1985).

43. See Rita B. Black, *Genetics and Adoption: A Challenge for Social Work*, in SOCIAL WORK IN A TROUBLED WORLD 193, 200 (Miriam Dinerman, ed., 1981).

44. See Samuels, *supra* note 22, at 404.

45. SOROSKY, *supra* note 36, at 36-37 (citing Enid W. Rothenberg, et. al., *The Vicissitudes of the Adoption Process*, 128 AM. J. PSYCHIATRY 590, 594 (1971)).

46. *Id.*; Hollinger, *supra* note 14, at 13-7 n.21 ("Adoption agencies typically withheld 'sordid or irrelevant details' about a child's biological family from prospective adopters," (citing MICHAEL SHAPIRO, A STUDY OF ADOPTION PRACTICE 27-28 (CWLA 1956)), and "adoptive parents were advised to 'try to keep [the biological parents] somewhat shadowy figures in your child's thoughts'" (citing LOUISE RAYMOND, ADOPTION AND AFTER 28-29 (1955))); see also CARP, *supra* note 9, at 121-24.

47. In the late 19th and early 20th centuries, older children were far more likely than infants to be adopted. Older children were often preferred in rural areas for farm labor, and in cities social workers disfavored placement of infants, due to high infant mortality rates and eugenic concerns that prompted "trial" periods of supervised care before placement. Hollinger, *supra* note 10, at 1-43 to 1-44. Recent decades have seen another shift, so that adoptions of children under two now comprise fewer than half of all domestic unrelated adoptions. National Committee for Adoption, 1989 ADOPTION FACTBOOK 4; Paul J. Placek, *National Adoption Data*, in National Council for Adoption (formerly the National Committee for Adoption), 1999 ADOPTION FACTBOOK III 24, 34.

48. See RICHARD BARTH & MARIANNE BERRY, ADOPTION AND DISRUPTION: RATES, RISK, AND RESPONSES 107-13 (1988); Lisa Belkin, *Adoptive Parents Ask States for Help with Abused Young*, N.Y. TIMES, Aug. 22, 1988, at A1; Golden, *supra* note 40, at 16; Dianne Klein, 'Special' Children, *Dark Past Can Haunt Adoptions*, L.A. TIMES, May 29, 1988, at 1; Neuffer, *supra* note 40, at 21.

2. Current Regulation of Adoption Disclosure and Recent Reform Efforts—A Shifting Paradigm

a. Identifying Information

i. Access by Adoptees

Certainly the nondisclosure policy that has generated the most public controversy in the United States has been the denial to adopted adults of access to their birth records. Beginning in the 1970s, an open records movement, propelled by the formation of hundreds of advocacy and search groups by adoptees and birth parents,⁴⁹ gained widespread media attention and influence. Fueled by the large numbers of adoptees who for the first time were coming of age without access to identifying information,⁵⁰ the concurrent development of the civil rights movement and activist groups,⁵¹ the burgeoning sexual revolution and concomitant undermining of the stigma of illegitimacy,⁵² and the emergence of forceful and visible leaders,⁵³ these groups challenged the prevailing ideology of the social work profession that had cloaked adoption information in secrecy, and attacked the legal framework that perpetuated it. Though the movement has not achieved complete success in the United States in attaining its goal of unconditional access on the part of adoptees to birth records, it has made significant progress in recon-

49. Although the first U.S. search organization, Orphan Voyage, was founded in 1953 by Jean Patton, Professor Carp contends that it was the founding of Adoptee's Liberty Movement Association (ALMA) by Florence Fisher in 1971 that prompted the creation of hundreds of similar organizations, most of which have become members of the umbrella organization, American Adoption Congress, which was formed in 1978. CARP, *supra* note 9, at 141–45. A national group of birth parents, known as Concerned United Birthparents, also lobbies for open records. WEGAR, *supra* note 9, at 4. Search groups spread internationally as well in countries that had closed records. Parent Finders and Birth Parent/Relative Group were created in Canada; Genealogy Source in the U.K.; and the Adopted Peoples Association in the Republic of Ireland. See PAUL SACHDEV, UNLOCKING THE ADOPTION FILES 2, 3 (1989); CARP, *supra* note 9, at 144–45; Adoptionireland.com, available at <http://adoptionireland.com>, respectively.

50. The influx of large numbers of out-of-wedlock children into the adoption system in the post-war years, combined with the movement in the 1950s and subsequent decades to close birth records, plus the growing refusal of agencies during these decades to provide identifying information to adult adoptees created, by the 1970s, a burgeoning group of adult adoptees without access to identifying information about their birth families. CARP, *supra* note 9, at 108–09, 138, 142.

51. WEGAR, *supra* note 9, at 19–20 (citing WILLIAM FEIGELMAN & ARNOLD R. SILVERMAN, CHOSEN CHILDREN: NEW PATTERNS OF ADOPTIVE KINSHIP 196 (1983)); CARP, *supra* note 9, at 142–43.

52. CARP, *supra* note 9, at 142–43.

53. Florence Fisher, author of THE SEARCH FOR ANNA FISHER (1973), and Betty Jean Lifton, author of TWICE BORN: MEMOIRS OF AN ADOPTED DAUGHTER (1975), both became prominent leaders of the movement and spokespersons for the rights of adopted persons to access their records. CARP, *supra* note 9, at 143–46, 162–63.

structing the adoption paradigm, by moderating the policies of social workers, prompting the creation of a multitude of private as well as state-sponsored registries or intermediary services in virtually every state, and inspiring re-examination of closed records legislation.

The reconstruction of the "adoption as rebirth" paradigm received support from the work of social scientists in the 1970s and 1980s who questioned its underlying assumptions. In the mid-1970s, a child psychiatrist, Arthur Sorosky, and two social workers, Annette Baran and Reuben Pannor, published numerous articles and a book challenging the model of "adoptive family" as "replacement family," and popularized the phrases "adoption triangle," later shortened to "triad," and "birth parents." Their work reintroduced birth parents as visible members of the construct and fostered an alternate paradigm of adoption as a lifelong experience creating adopted individuals who would be forever linked to members of both their birth and adoptive families.⁵⁴ They attacked the perceived notion that searching was a sign of mental instability and suggested instead that it was prompted by the need to "establish a clearer self-identity."⁵⁵ Although the flaws in their research design and methodology have subsequently been criticized, particularly concerning their conclusions regarding the incidence of identity conflicts in adoptees, the widespread reference to their work in the media, professional journals, and conferences caused significant impact.⁵⁶ The reform movement also relied upon the work of David Kirk, a Canadian sociologist who recognized the importance of the acknowledgment of differences between adoptive and biological parenthood,⁵⁷ and John Triseliotis, whose study of adoptee searches and reunions in Scotland concluded that continuing access to open records was beneficial.⁵⁸

Gradually, the social work profession responded. Increasingly, adoption professionals came to realize that adoption cannot "mirror biology,"⁵⁹ and that differences between families created by adoption

54. CARP, *supra* note 9, at 149.

55. *Id.* at 151 (citing Annette Baran, et. al., *The Dilemma of Our Adoptees*, PSYCHOLOGY TODAY, Dec. 1975, at 9, 38; Arthur D. Sorosky, et. al., *The Reunion of Adoptees and Birth Relatives*, 3 J. OF YOUTH AND ADOLESCENCE, 195, 203 (1974); Reuben Pannor, et. al., *Opening the Sealed Record in Adoption—The Human Need for Continuity*, 51 J. OF JEWISH COMMUNAL SERVICE, 188, 194 (1974)).

56. CARP, *supra* note 9, at 148–58; WEGAR, *supra* note 9, at 20. Ultimately, Baran and Pannor (by the 1990s) became advocates for the abolition of traditional adoption and its replacement with a new status they label as "guardianship adoption." CARP, *supra* note 9, at 222.

57. CARP, *supra* note 9, at 198.

58. JOHN TRISELIOTIS, IN SEARCH OF ORIGINS: THE EXPERIENCES OF ADOPTED PEOPLE (1973). For further discussion of the influence of this work in Great Britain, see *infra* notes 242–44 and accompanying text.

59. See e.g., Katz, *supra* note 37, at 9; H.D. Sants, *Geneological Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHOL. 133, 140 (1964).

and those created by birth should be appreciated and celebrated.⁶⁰ In the 1978 revision of its standards, CWLA advised agencies that they could no longer give birth or adoptive parents assurances of confidentiality, although they still advised disclosure of identifying information only when ordered by the courts or when legislation permitted.⁶¹ Agencies began assisting in searches for birth parents, but still did not reveal identifying information without birth parent permission.⁶² Professional journals by the late 1970s reported favorably on the open records movement.⁶³ The most recent CWLA Standards of Excellence for Adoption Services, issued in 2000, provides that agencies should “promote policies that provide adopted adults with direct access to identifying information.”⁶⁴ Although opposition to opening records still has some staunch adherents,⁶⁵ and social workers have not uniformly endorsed automatic access to records, appreciation for the importance to many adoptees of their connection to both birth and adoptive families is now the dominant philosophy in the profession.

A combination of changing cultural mores, the media attention captured by the issue of adoptee searches,⁶⁶ and the new vision of adoption espoused by adoption professionals have effected a shift in the paradigm of adoption in the eyes of both the general public,⁶⁷ and birth and adoptive families, as well. In the last few decades attitudes about premarital pregnancy and infertility have changed, and fear of stigmatization related to both have diminished. Neither adoption nor single pregnancies are the dark family secrets that they once were in the 1950s. Moreover, the process of adoption is now more open. Birth parents of infants voluntarily placed frequently participate in choosing the adoptive placement for their child, and open adoptions, involving some communication and possibly ongoing contacts between adoptive and birth families, are increasing.⁶⁸ The majority of adult adoptees and birth

60. Joan Heifetz Hollinger, *Adoption Law*, 3 FUTURE OF CHILDREN—ADOPTION 43, 49–50 (Center for the Future of Children, ed., 1993); H. David Kirk, *Foreword* to FEIGELMAN & SILVERMAN, *supra* note 51, at xiv.

61. CARP, *supra* note 9, at 175.

62. *Id.* at 181.

63. *Id.* at 182.

64. CHILD WELFARE LEAGUE OF AMERICA, CWLA STANDARDS OF EXCELLENCE FOR ADOPTION SERVICES § 6.22 (rev. ed. 2000) [hereinafter CWLA STANDARDS].

65. One of the leading critics of open records is the National Council for Adoption (formerly National Committee for Adoption). CARP, *supra* note 9, at 145.

66. See CARP, *supra* note 9, at 146–47, 154–62, 167–68, 223–24; WEGAR, *supra* note 9, at 109–20.

67. Oregon’s open records law, Measure 58, was passed by a voter referendum in November 1998.

68. See Irving Shulman & Richard E. Behrman, *Adoption: Overview and Major Recommendations*, 3 FUTURE OF CHILDREN—ADOPTION 4, 14 (Center for the Future of Children,

parents now express a willingness to be found.⁶⁹ Moreover, the majority of adoptive parents, once strong opponents of open records,⁷⁰ now favor the provision of identifying information to adult adoptees and do not oppose reunions between their adult child and the child's birth family.⁷¹

ed., 1993) ("[T]he question of whether adoption shall be open or closed is really moot because older-child adoptions are clearly 'open' in most instances, and independent adoptions, which now handle the majority of infant adoptions, are characteristically open."); see also Michael P. Sobol & Kerry Daly, *Adoption Practice in Canada: Emerging Trends and Challenges*, 74 CHILD WELFARE 655, 661 (1995) (reporting that in Canada 54% of practitioners normally have birth mothers choose adoptive parents from pre-selected family profiles without identifying information; in 34% of adoptions, regular exchange of information occurs; in 18%, preplacement meetings without exchange of identifying information occur, and in 13% of adoptions, names were exchanged); Tammy Somogye, *Opening Minds to Open Adoption*, 45 U. KAN. L. REV. 619, 623, 628 (1997) (Somogye reports that, at the time of her research (1996), at least three states—Tennessee, Washington, and New Mexico—regulated open adoption by statute; eight states, by statute or judicial precedent, would enforce open adoption agreements stipulated in the decree; and eight states, by statute or case precedent, specifically permitted parties to privately enter open adoption agreements, even though the provisions of the agreement would not be enforceable); Annette Baran & Reuben Pannor, *Perspectives on Open Adoption*, 3 FUTURE OF CHILDREN—ADOPTION 119, 124 (1993); see generally, Marianne Berry, *Risks and Benefits of Open Adoption*, 3 FUTURE OF CHILDREN—ADOPTION 125, 126 (1993).

69. See Hollinger, *supra* note 14, at 13-12 n.28 (reporting that the Maine Task Force on Adoption in its 1988–89 survey "found that nearly all of the 130 birth parents who responded to the questionnaire were willing to be found, [and] only 5% of the 164 adoptees [surveyed] did not want to be found") (citing MAINE DEP'T HUM RES. TASK FORCE, ADOPTION: A LIFE LONG PROCESS 3, 15–20, App. A, 54–60 (1989)); Paul Sachdev, *Adoption Reunion and After: A Study of the Search Process and Experience of Adoptees*, 71 CHILD WELFARE 53, 60–64 (1992) (a study by Prof. Sachdev, School of Social Work at the University of Newfoundland, which surveyed 124 adoptees reunited with their birth parents and other relatives, revealed that 86.9% were pleased or moderately pleased to meet their birth parents and 93.6% had no regrets about it; additionally, three-fourths of the birth mothers reacted with moderate to strong enthusiasm when contacted by an adoptee).

70. See CARP, *supra* note 9, at 145, 187 (reporting that following the formation of ALMA in the early 1970s, The Adoptive Parents Committee, with membership of at least 1000, quickly formed to denounce open adoption records; when commentary was solicited for the Department of Health, Education and Welfare's Model Adoption Act in 1980, 90% of the adoptive parents responding objected to the provision that would have opened adoption records to adopted adults upon demand).

71. See Hollinger, *supra* note 14, at 13-12 n.28 (reporting that the Maine Task Force on Adoption in its 1988–89 survey discovered that only 2% of the 248 adoptive parents who responded opposed reunions between their adoptive children and members of their birth families) (citing MAINE DEP'T HUM RES. TASK FORCE, *supra* note 69, at 15–20, App. A, 54–60); *What Adoptive Parents Think of Open Records*, at <http://www.homes4kids.org> (reporting that a 1992 survey by Adoptive Families of America of their predominantly adoptive-parent membership, published in OUR Magazine, May/June 1993, discovered that 80% of adoptive parents who responded stated that a birth parent should have the right to find the children given up for adoption, and 68% of adoptive parents stated that all adults adoptees should receive a copy of their original birth certificates if the birth parents do not file a written objection, although only 33% thought they should receive their original birth certificate if a birth parent objected. The cite also reports that a survey of adoptive parents who had adopted foster children through public agencies, conducted by New York State Citizens Coalition for Children, Inc., revealed "overwhelming support" of the right of adult adoptees to have their

In response to changing attitudes of both adoption professionals and the public, and lobbying by all members of the adoption triad,⁷² state legislatures in almost every state have created either a mutual consent registry, or a confidential intermediary service, or both, to facilitate the ability of adult adoptees and members of their birth families to find each other.⁷³ Mutual consent registries are typically passive. Identifying information is not revealed until both the adoptee and the birth relative have filed consents with the registry, and no attempt is made by registry administrators to contact the person the registrant is seeking in order to solicit consent. Some require consent from both birth parents; others require consent only from the registering parties.⁷⁴ Because the adoptee and at least one birth parent must independently contact the registry, passive registrants are often unsuccessful in locating their relatives.⁷⁵

Confidential intermediary services, sometimes referred to as “search and consent” programs, authorize a public or private agency to actively search for the person the search initiator wishes to locate, and to ascertain whether that person is willing to disclose identifying information and/or meet. About half of the states operate some type of intermediary service, although in some its use is restricted to adoptees only, or to instances of medical or other necessity.⁷⁶ Though these ser-

original birth certificate); Sachdev, *supra* note 69, at 60 (a study by Prof. Paul Sachdev, who surveyed 124 reunions between adoptees and their birth parents and other relatives, found that the majority of adoptive parents supported their children’s search efforts).

72. For example, during the mid-1990s when Oklahoma’s Adoption Law Reform Committee held public hearings, both adoptees and adoptive parents strenuously lobbied the Committee to open adoption records. Adoptee advocacy groups and Concerned United Birthparents also have been active lobbyists for open records. See CARP, *supra* note 9, at 183–86, 189–90; WEGAR, *supra* note 9, at 4. Legislators sponsoring open records legislation this year also report that they have been lobbied by both adoption advocacy groups and adoptive parents in favor of the legislation. Telephone interview with John Turoski, Legislative Assistant to Senator Ray Goodman, New York State Senate (June 5, 2001); Telephone interview with Catherine Harris, Legislative Assistant to Assemblyman Anthony Pescetti, California Assembly (June 1, 2001); Telephone interview with Representative Jane Wood, New Hampshire House of Representatives (June 1, 2001).

73. At least forty-three states now provide by statute for the operation of a mutual consent registry or an intermediary service operated by the state. Of the remaining seven states, two (Iowa and New Jersey) permit the release of identifying information from records of adoption proceedings upon mutual consent, and two states (Alaska and Kansas) have permitted adult adoptees access to their birth certificates for many years. Hollinger, *supra* note 14, at tables 13-A.01 to 13-A.03.

74. *Id.* at table 13-A.01.

75. A report by the State Department of Social Services on the first decade of the operation of Michigan’s registry, 1980–1990, indicated that despite more than 6,000 consents on file by birth parents, only 911 matches with adult adoptees were made during that time period. Hollinger, *supra* note 14, at 13–38; see also Cahn & Singer, *supra* note 22, at 164.

76. Hollinger, *supra* note 14, at 13A-5.

VICES have more potential for success than passive registries, they are typically more expensive, and still dependent upon the diligence and resources of the appointed intermediary.⁷⁷

State registries and intermediary services are also hampered by the transient nature of the American populace. Adult adoptees may not know the state in which they were born, or even the state in which they were adopted, and birth parents may have no idea in which state an adoptee might register. Though there have been efforts in Congress to pass a federal mutual consent registry since 1980, such efforts have thus far been unsuccessful.⁷⁸ Thus, while registries and search services have provided adoptees with the potential to discover identifying information, and both adoptees and birth relatives with the possibility of a reunion, they have not fully satisfied the desires of adoptees and birth relatives to locate each other. They also fail to address the need for self-affirmation that adoptee advocates attach to the ability to receive an original birth certificate, a right enjoyed by non-adopted persons.⁷⁹

While disclosure of identifying information with mutual consent is widely accepted, the major controversy in the United States now concerns the best method for ascertaining the wishes of both the individual adoptee and the birth parents, while accommodating the interests of each, and whether disclosure of such information should be made despite the objection of the person who is the subject of that information. Even though the vast majority of birth parents are amenable to or actively seeking a reunion,⁸⁰ a small minority still

77. Cahn & Singer, *supra* note 22, at 165. When Oklahoma began operation of its mutual consent registry and confidential intermediary service, the proposed fee for the registry was \$20, and for the intermediary service, \$400 for the first search and \$200 for any subsequent searches on behalf of the same searcher. D. Marianne Brower Blair, *The New Oklahoma Adoption Code: A Quest to Accommodate Diverse Interests*, 33 TULSA L. J. 177, 252 n.448, 255 n.461 (1997).

78. Cahn & Singer, *supra* note 22, at 163; *see also* CARP, *supra* note 9, at 190–92.

79. Some adopted adults who have located their birth parents still litigate in an effort to obtain a copy of their original birth certificate. Telephone Interview with Representative Jane Wood, *supra* note 72. Representative Wood sponsored legislation in the New Hampshire Legislature in the 2001 session that would have provided adopted persons at the age of 18 or older with an unequivocal right to their birth certificate and adoption records. *See also* Cahn & Singer, *supra* note 22, at 166.

80. Hollinger, *supra* note 14, at 13–12 n.28 (reporting on the 1988–89 survey of adoptees, birth parents, and adoptive parents conducted by the Maine Task Force on Adoption, which indicated that nearly all of the 130 birth parents who responded to the survey reported their willingness to be found, citing MAINE DEP'T HUM RES. TASK FORCE, *supra* note 69, at 3, 15–20, app. A, 54–60; Bonnie Miller Rubin, *Opposition Forces Cite Mom's Privacy, State Bill Would Let Adult Adoptees Fill in Missing Parts of Their History*, CHI. TRIB., March 17, 1997, at A1 (reporting that both supporters and foes of open records concede that only a small percentage of birth parents do not want to be found).

oppose contact or the release of their identity.⁸¹ In Delaware, where adult adoptees may receive copies of their original birth certificates unless a birth parent files an affidavit opposing disclosure, 13 birth parents have denied access to certificates between January 1999 and April 2001.⁸² During the first year that Oregon's new law opening birth certificates to adult adoptees has been in effect, 79 birth parents filed no contact preferences.⁸³ Since August 1, 2000, when Alabama reopened its birth records, approximately half a dozen "no contact" preferences have been filed.⁸⁴

It is also true that, while most adult adoptees are not opposed to being found, and many are actively searching, some adoptees, like some birth parents, oppose contact or open records legislation.⁸⁵ In Tennessee, of the 805 requests for contact that have been processed from the time the contact veto law took effect in 2000 through May 2001, 136 contacts were denied because the subject of the request objected. This figure includes birth parents, relatives of birth parents covered by the

81. Joel Tennenbaum, *Introducing the Uniform Adoption Act*, 30 FAM. L. Q. 333, 340-41 (1996) (the author, a member of the drafting committee for the Uniform Adoption Act, model legislation that was proposed in 1994 by the National Conference of Commissioners on Uniform State Laws, reports that the drafters heard from birth parents who "felt they had contracted with an agency on condition of confidentiality and privacy" and did not want contact at a time when they had established a life with a new family who was unaware of the existence of the adoptee.); Hollinger, *supra* note 14, at 13-38 (relating that the Michigan State Department of Social Services, reporting on the operation of its registry between 1980 and 1990, found that for children born before 1980, at least 6,000 consents to disclosure had been filed by birth parents, and denials had been filed by fewer than 150 mothers and 60 fathers).

82. Telephone interview with Louise Wishhart, Vital Statistics Clerk, Delaware Office of Vital Statistics (June 1, 2001). Ms. Wishhart reports that from January 1999 through April 30, 2001, 393 adopted persons requested copies of their birth certificates, 358 have been released, and 13 were declined because the birth parents objected to the release by affidavit.

83. Telephone interview with Ms. Chan Vannarath, Assistant to Ms. Carol Sanders, Certification Manager for Oregon's Vital Records Unit (June 1, 2001). The Oregon law went into effect on May 30, 2000. Janie Har, *Local Stories*, OREGONIAN, November 6, 2000, at E1. Ms. Vannarath reports that through May 30, 2001, 5,839 requests for birth certificates were received from adult adoptees and 411 contact preference forms were filed by birth parents. Of those 411, 305 preferred contact, 27 preferred contact only through an intermediary, and 79 preferred no contact.

84. Telephone Interview with Joan Stires, Vital Records, Ala. Dep't of Health (June 5, 2001). Ms. Stires reported that between August 1, 2000 and May 30, 2001, 1,366 requests for certificates had been made by adoptees. Of the 68 contact preference forms that had been filed, "perhaps half a dozen" preferred no contact.

85. See MAINE DEP'T HUM RES. TASK FORCE, *supra* note 69, (indicating that 5% of the 164 responding adoptees did not want to be found). See also, SACHDEV, *supra* note 49, at 42, 122x (study of 53 adult adoptees in Canada in 1980s revealed that 56.6% agreed that adoptees' identity should be released to birth mothers and 43.4% disagreed); Melissa Fletcher Stoeltje, *Adopted Teens Seek Answers*, HOUS. CHRON., May 28, 1997, at 1 (reporting that 65% of adopted adolescents say that they want to meet their birth parents one day); Maureen M. Hart, *Another Voice in the Adoption Triangle Seeks a Hearing*, CHI. TRIB., March 27, 1997, at 1 (adult adoptee writes in opposition to a proposed open records law).

veto, and adoptees who declined to consent to contact by birth parents.⁸⁶

These reports are consistent with the experiences of other countries as well, whose no-contact or no-disclosure veto systems have been in effect for longer periods of time. British Columbia, Canada, permits disclosure of identifying information to adult adoptees and birth parents, subject to no-contact declarations and disclosure vetoes that can be filed by adopted persons and by birth parents of children adopted before the new legislation took effect. Statistics released by the British Columbia Vital Statistics Agency reveal that between November 4, 1996 and March 31, 2000, 7,188 applications for records were received (21% from birth mothers, 2% from birth fathers, and 77% from adoptees). During that same period, 3,046 disclosure vetoes were entered⁸⁷ (75% from birth mothers,⁸⁸ 2% from birth fathers, and 23% from adoptees); and 323 no-contact declarations were received (65% from birth mothers, and 35% from adoptees).⁸⁹ New South Wales, Australia discovered that during the first year of operation of its contact veto registry, approximately 45% of the 3,432 contact vetoes registered were filed by birth parents, and the remaining 55% were filed by adult adoptees.⁹⁰

It is primarily concern for birth parents who object to disclosure that has thus far prevented most state legislatures in the United States from following the example of the majority of European countries,⁹¹ by

86. Telephone Interview with Anita Cowen, Tenn. Dep't of Children's Servs. (June 4, 2001). Ms. Cowen reported that the Department has completed 805 searches pursuant to contact requests since the Tennessee contact veto law has been in operation. Of those persons who were the subject of a search, 249 filed consents to contact, 21 could not be located, 174 were deceased, 225 who had not filed a contact veto did not say yes or no to the request for contact, and 136 objected to contact. The subjects of the search included both birth parents and relatives and adult adoptees, although Ms. Cowen related that most of the requests they had received had been from adoptees attempting to locate birth mothers or other birth relatives. Many other searches are still being processed, where perhaps one relative has been located but not others with whom contact was requested. In July 2001, a more complete and detailed annual report will be issued by the Department.

87. Nineteen of these were removed during the same period. Canadian Council of Birth-mothers, Provincial Info, at <http://www.nebula.on.ca/canmothers/prov.htm> (last visited Sept. 14, 2001).

88. This figure includes approximately 600 no-contact vetoes that were transferred from the British Columbia Adoption Reunion Registry and converted to no-disclosure vetoes under the new Act. *See id.*

89. *See id.*

90. N.S.W. L. REFORM COMM'N, REPORT 69, *supra* note 11, § 4.8. The study notes, however, that some veto registrants later removed their vetoes, and others registered with the reunion registry so as to have more control over the nature and timing of the contact.

91. Adult adoptees have had access to original birth certificates in England and Wales since 1976, in Northern Ireland since 1987, and in Scotland since legal adoption was introduced in 1930. *See infra* notes 240, 247-48 and accompanying text. Finland has also had open

providing adult adoptees with automatic access to their birth certificates. Some state legislators have recently introduced bills that would permit adoptees to receive a copy of their birth certificates upon request. Their staff members report that the principal rationale articulated by other legislators opposing the bills is the reluctance to jeopardize the privacy of birth parents.⁹² Concern that opening records would prompt some birth mothers to choose abortion rather than adoption has occasionally surfaced among opponents as well.⁹³ These recent reports are consistent with the experience of reformers who have supported open records over the past few decades.⁹⁴

While there does appear to be an emerging trend to open birth records to adult adoptees in the United States, its progress is likely to be laborious. Only six states appear to permit adult adoptees to access their birth certificates upon demand. Kansas⁹⁵ and Alaska⁹⁶ never closed birth records to adult adoptees; Tennessee, Oregon, and Alabama recently passed legislation opening their records. In South Dakota, court records, but not birth records, are available by statute to adult adoptees on demand; however, the prevailing practice is to petition the court for

records for many decades. See TRISELIOTIS, *supra* note 58, at 1. Recently, Greece and Poland opened records to adult adoptees. Ioannis Deliyannis, *Greece—Reforming the Law of Adoption*, in 1995 THE INTERNATIONAL SURVEY OF FAMILY LAW 174, 194 (Andrew Bainham ed., 1997); Wanda Stojanowska, *Poland—Adoption: Revision of the Family and Custody Code*, 1995 THE INTERNATIONAL SURVEY OF FAMILY LAW at 402. The Canadian press reports that France, Germany, Denmark, Iceland, Norway, Sweden, and the Netherlands permit adoptees access to birth records as well. Michele Landsberg, *Get with the 21st Century: Open Records for Adoptees*, TORONTO STAR, August 7, 1999, at L1; see also Ake Saldeen, *Sweden—The Rights of Children to Speak for Themselves and Obtain Access to Information Concerning Their Biological Origins*, in 1994 THE INTERNATIONAL SURVEY OF FAMILY LAW 441 (Andrew Bainham ed., 1996).

92. See Telephone Interview with Barbara Cohen, Lobbyist who has worked closely with Assemblyman Baggar, New Jersey State Assembly (June 1, 2001); Telephone Interview with Catherine Harris, *supra* note 72; Telephone Interview with Andrea Stingley, Legislative Aide to Representative Tony Goolsby, Texas House of Representatives (June 26, 2001); Telephone Interview with John Turoski, *supra* note 72; Telephone Interview with Julia Venema, Legislative Director for Senator Susan Fargo, Massachusetts State Senate (June 1, 2001); Telephone Interview with Representative Jane Wood, *supra* note 72.

93. Telephone Interview with Julia Venema, *supra* note 92 (reporting that although the Roman Catholic diocese had previously opposed bills they had introduced to open records, this year a Roman Catholic priest from the diocese testified in favor of this year's bill, which contained a contact preference provision). This author, who was a member of the Oklahoma Adoption Reform Committee in the mid-1990s, recalls that concerns over abortion surfaced from one member of the Committee during the discussion of opening records as well.

94. CARP, *supra* note 9, at 229.

95. KAN. STAT. ANN. § 65-2423 (1992).

96. ALASKA STAT. § 18.50.500 (Michie 2000).

access to both court records and birth certificates, and it is reported that the court will grant the petition *pro forma*.⁹⁷

Six other states, Maryland,⁹⁸ Indiana,⁹⁹ Delaware¹⁰⁰ Oklahoma,¹⁰¹

97. S.D. CODIFIED LAWS § 25-6-15 (Michie 1999) provides that adoptees may have access to the court record upon reaching maturity without a court order, although access to birth records requires a court order. S.D. CODIFIED LAWS § 34-25-16.4 (Michie 1999). However, Prof. Samuels reports that the South Dakota Adoption Program Specialist at the Division of Child Protective Services relates that as of Oct. 1999, the standard practice was for an adoptee to petition the court for access to both court and original birth records, which request would then be granted by the court. Samuels, *supra* note 22, at 436 n.71 and accompanying text.

98. For adoptions finalized after January 1, 2000, adoptees who are at least 21 years old may obtain their original birth certificates and decrees of adoption, and birth parents may obtain the new certificate of birth of the adoptee and the adoption decree, but both adoptees and birth parents may file disclosure vetoes that would cause identifying information about them to be deleted from the records before they are released. MD. CODE ANN., FAM. LAW §§ 5-3A-01 to -05 (1999).

99. An adoptee over the age of twenty who was adopted in an action filed after December 31, 1993 may obtain identifying information from the state registrar, the court, other state agencies, a licensed agency or the attorney who arranged the adoption, unless the birth parent has filed a non-release form. IND. CODE ANN. §§ 31-19-25-1 to -3. (West 1998).

100. Delaware's statutes are confusing. DEL. CODE ANN. tit. 16, § 3110(b) (Supp. 2000) provides that the State Registrar shall provide a non-certified copy of an original birth certificate to an adoptee aged 21 or older. Enacted concurrently, however, is DEL. CODE ANN. tit. 13, § 923 (1999), which provides that:

Notwithstanding any other provision of the Delaware Code to the contrary, an adoptee 21 years of age or older may obtain a copy of [an] original record of birth from the State Registrar pursuant to § 3110(b) of Title 16, even if that record has been impounded. This section shall not apply if the birth parent has, within the most recent 3 year period, filed a written notarized statement with the Department of Health and Social Services Office of Vital Statistics denying the release of any identifying information.

If the adoptee was born prior to January 18, 1999, the Office of Vital Statistics must determine if a birth parent affidavit is on file. If an affidavit denying the release of information is on file, or if no affidavit is on file, the Department must notify the birth parents by mail of the request and the need to file a nondisclosure affidavit within 35 days. If a nondisclosure affidavit is not received within that time, the record will be released. Louise Wishhart, Vital Statistics Clerk for the Delaware Office of Vital Statistics, confirmed that birth parents can deny access by affidavit. See Telephone Interview with Louise Wishhart, *supra* note 72. An adoptee who has obtained a copy of the birth certificate may request an agency to assist in locating a birth parent or birth sibling. The birth relative may make a no-contact declaration, after which further assistance in the search will not be provided to the adoptee. DEL. CODE ANN. tit. 13, § 962 (1999).

101. OKLA. STAT. ANN. tit. 10, § 7505-6.6 (West Supp. 2000). Adoptees whose adoptions were finalized after November 1, 1997 may obtain copies of their birth certificates, if a birth parent has not filed an affidavit of nondisclosure. If only one birth parent has filed an affidavit, only that birth parent's name will be removed from the copy given to the adoptee. Birth parents are advised of their right to file an affidavit of nondisclosure at the time consent is given, and may file or withdraw one any time thereafter, but there is no provision to notify a birth parent at the time a request for the birth certificate is made. Adoptees cannot receive copies of their original birth certificates if they have a minor birth sibling in an adoptive family whose location is known to the adoptee.

Montana,¹⁰² and Washington,¹⁰³ have all within the past decade enacted legislation permitting adult adoptees to obtain copies of their original birth certificates, unless a birth parent has filed a disclosure veto. However, the statutes of Maryland, Oklahoma, Montana (with the exception of adoptions finalized prior to July 1, 1967) and Washington operate only prospectively, applying to adoptions finalized after the effective dates of the amendments, and Indiana's statute applies only to adoptions filed after December 31, 1993. Thus, adoptees who are currently adults in those states have no recourse under the new provisions, except in Montana, where those who were adopted before the records were closed may utilize the statute. Adoptee advocacy groups object strenuously to the restriction that identifying information on their original certificates can be withheld from them if a birth parent objects, arguing that they should have the same right to information concerning them contained in public records that non-adopted individuals enjoy.¹⁰⁴

Tennessee's open records law, passed in 1995, opened adoption records retrospectively as well as prospectively. The new law contains two provisions designed to protect birth parent privacy. The first is an exception to disclosure of identifying information about a birth parent who was the victim of rape or incest, unless consent has been given by the parent.¹⁰⁵ The other is a contact veto registry, modeled after the system created in New South Wales, Australia.¹⁰⁶ A parent, sibling, spouse, lineal ancestor or lineal descendant of an adopted person is eligible to file a contact veto, or a consent to contact, with the registry at any time.¹⁰⁷ In addition, as part of the process for executing consent or surrender for adoption, birth parents are asked whether they wish to file a consent to contact or veto at that time.¹⁰⁸ When a contact veto is registered, the registrant's spouse, siblings or future siblings, lineal descendants and

102. Individuals adopted before July 1, 1967 or after October 1, 1997 may obtain copies of their original birth certificates upon request, but for those adopted after October 1, 1997, a court order is required if a birth parent has filed a nondisclosure request. Those adopted between July 1, 1967 and October 1, 1997 must have court orders to obtain their birth certificates. MONT. CODE ANN. § 42-6-109 (1999).

103. Adult adoptees whose adoptions are finalized after October 1, 1993 may obtain noncertified copies of their birth certificates, unless the birth parent has filed an affidavit of nondisclosure. WASH. REV. CODE ANN. § 26.33.345(3) (West 1997).

104. *See, e.g.*, Bastard Nation, the website of one such advocacy group, at <http://www.bastards.org>.

105. TENN. CODE ANN. § 36-1-127 (1996).

106. Adoption Information Act of 1990 (New South Wales, Australia), available at http://www.austli.edu.au/au/legis/nsw/consol_act/aia1990230.txt.

107. TENN. CODE ANN. § 36-1-128.

108. *Id.* § 36-1-129.

ancestors, and the spouses of any of those individuals, are automatically included in the veto, unless specifically excluded by the registrant.¹⁰⁹

Prior to acquiring information from adoption records, an adopted person must identify in writing anyone eligible to file with the registry whom the adoptee wishes to contact, and sign a sworn statement agreeing not to contact anyone eligible to register a veto until the Tennessee Department of Children's Services has completed a search of the registry.¹¹⁰ The Department then searches the registry, and if a veto or consent is found, the Department contacts the person for whom the contact request is made to determine if the individual still wishes to consent to contact, or to confirm, alter, or withdraw a contact veto. If the individual withdraws consent, or a contact veto remains on file, the adoptee will be notified that contact is not permitted.¹¹¹ If there is no registration for the person whom the adoptee wishes to contact, the Department will search for that person and provide notification of a ninety day period during which the person may file a contact veto to prevent contact.¹¹² Violation of the contact veto is a misdemeanor and gives rise to civil liability for both compensatory and punitive damages.¹¹³

Though the contact veto system is an attempt to accommodate the interests of searchers and those who wish to remain undisturbed, it has garnered criticism from both camps. Some argue that a contact veto should be treated like any other injunction or restraining order, and that birth parents should be required to prove the need for one in court, in a hearing in which both sides receive due process. The Tennessee contact system, they contend, treats adult adoptees in a condescending and paternalistic manner.¹¹⁴ Others have argued that the protection the contact veto affords birth parents desiring privacy is ineffectual, speculating that prosecutors will be disinclined to prosecute violations, and birth mothers will not want the publicity attendant with a civil suit for damages. An examination of the New South Wales Contact Veto system, in its early years of operation, however, revealed only one "arguable breach" by a birth mother who made contact with an adult adoptee through an intermediary, and no breaches by adoptees.¹¹⁵

Opponents also suggest that the automatic veto covering a spouse, children, or other relatives of the birth mother will not protect her

109. *Id.* § 36-1-130.

110. *Id.* § 36-1-127.

111. *Id.* § 36-1-130.

112. *Id.* § 36-1-131.

113. *Id.* § 36-1-132.

114. See Bastard Nation, *Contact Vetoes: Why They Are Not an Acceptable Solution*, (1998) at http://www.ibar.com/voices/activism/bn_contact_vetoes.htm.

115. N.S.W. L. REFORM COMM'N, REPORT NO. 69, *supra* note 11, § 5.182.

privacy, since the Department is required to contact some of these relatives to determine if they wish to withdraw the automatic veto, if the adoptee has requested contact with them. They also note that if the adoptee does not indicate on the form that she wishes contact, or if the birth parent cannot be found, the birth parent will have no notice that her identity has been released. Moreover, the contact veto statutes do not prohibit an adoptee from contacting a birth parent's friends, neighbors, clergy, co-workers, aunts or uncles,¹¹⁶ contacts that might be attractive to an adoptee who wishes to learn more about a birth parent he cannot meet, but which could jeopardize her emotional well-being nonetheless. It has also been suggested that a birth parent who cannot be found should be presumed to have vetoed contact, which is not the current application of the statute, and that the fees necessary to administer the program should be assessed against those requesting records, so that contact vetoes could be filed without cost.¹¹⁷

The most recent approach to opening records is to provide birth parents with the opportunity to communicate their "preference" regarding contact at the time that an adoptee receives his original birth certificate. Oregon pioneered this system when its legislature passed legislation in 1999 to accompany implementation of Measure 58, the constitutional referendum passed by voters in November 1998 that permits adoptees age 21 or older to obtain a copy of their original birth certificates.¹¹⁸ Birth parents may contact the state's voluntary registry program to receive a contact preference form, on which they may indicate that they desire contact, desire contact only through an intermediary, or prefer no contact.¹¹⁹ Before a "no contact" preference will be processed, however, the birth parent must complete a Birth Parent Updated Medical History form.¹²⁰ When an adoptee requests a copy of her birth certificate, the Contact Preference Form is also given to the adoptee. Alabama passed legislation implementing a very similar contact preference system when it reopened its birth records to adoptees over 18 years of age on August 1, 2000.¹²¹

116. See e.g., Carol Chumney, *Tennessee's New Adoption Contact Veto Is Cold Comfort to Birth Parents*, 27 U. MEM. L. REV. 843, 860-64 (1997).

117. Leslie J. Kelley, *Tennessee's Adoption Law and the Limitations of the Constitutional Arguments Regarding Open Records*, 39 FAM. CT. REV. 223, 227 (2001).

118. Due to legal challenges (see *infra* note 159 and accompanying text) Measure 58 and the accompanying legislation was not implemented until after May 31, 2000. See Oregon Health Division, Center for Health Statistics, *History of Ballot Measure 58*, at <http://www.ohd.hr.or.us/chs/certif/58update.htm> (last visited Sept. 16, 2001).

119. See OR. REV. STAT. § 432.240 (1999).

120. See *id.* § 109.460; OR. ADMIN. R. 413-130-0355 (2001).

121. ALA. CODE § 22-9A-12 (2000). Although the Alabama law suggests that parents must state that they have filed a medical history form when expressing a "no contact" veto, the

“Contact preference” legislation has received positive reviews from the advocacy groups for adoptees, because it provides them with birth certificates upon demand and an alternative method to receive some medical information from birth parents who desire not to be contacted, and it avoids the mandates of the contact veto system. The degree to which it will protect birth parents from disruption and breach of confidentiality, in those instances in which contact is not desired, remains to be seen, as the two statutes have both been in operation for only one year.

Nevertheless, the combination of opening records on demand with a contact preference system seems to be gaining in popularity. In 2001, legislation modeled after Oregon's was introduced in four influential states: Massachusetts,¹²² New York,¹²³ California,¹²⁴ and Texas.¹²⁵ However, the Texas bill did not make it out of the legislature before the session ended,¹²⁶ and the prospects for the New York bill¹²⁷ and California¹²⁸ bill passing in 2001 were also predicted to be slim. The Massachusetts bill was still under active consideration as of June 2001.¹²⁹

As in other years, there are also several bills pending in state legislatures in 2001 to open birth records to adult adoptees,¹³⁰ but none has passed at the time of publication. There is also legislation pending in New Jersey to open records, but permitting birth parents to exercise a

language is not quite as specific in mandating that the form should not be processed without the medical history form.

122. See S. 670, 2001 Leg., 182nd Gen. Ct. (Mass. 2001).

123. See S. 5002, 2001 Leg., 224th Sess. (N.Y. 2001).

124. See A. B. 1349, 2001 Reg. Sess. (Cal. 2001) (as amended in Assembly April 16, 2001).

125. See H.R. 1767, 2001 Leg., 77th Sess. (Tex. 2001).

126. Telephone Interview with Andrea Stingley, *supra* note 92. As the Texas Legislature meets only biennially, the bill cannot be reintroduced until 2003. Representative Goolsby was the sponsor of the bill.

127. Telephone Interview with John Turaski, *supra* note 72 (with three weeks left in the session, it was doubtful bill would get out of Committee and passed this session). Senator Goodman was the sponsor of the bill in the New York Senate.

128. Telephone Interview with Catherine Harris, *supra* note 72 (the bill had failed in Committee and they were asking for reconsideration to make it a two year bill; opponents wanted an amendment adding a disclosure veto provision). Assemblyman Pescetti was the sponsor of the bill in the California Assembly.

129. Telephone Interview with Julia Venema, *supra* note 92 (the bill had just had a hearing, which went well, and the contact preference provision seemed to get a more favorable response than a bill sponsored the previous year that opened the records on demand with no such provision). Senator Fargo was the sponsor of the bill in the Massachusetts Senate.

130. See H.R. 5407, 2001 Gen. Assem., Reg. Sess. (Conn. 2001); S.B. 30, 2001 Leg., Reg. Sess. (La. 2001); H.B. 355, 91st Gen. Assem., 1st Reg. Sess. (Mo. 2001); H.R. 449, 157th Sess., 2001 Leg. Sess. (N.H. 2001); G.A. 6271, 2001 Leg., Jan. Sess. (R.I. 2001).

disclosure veto if they fill out medical history forms.¹³¹ A disclosure veto bill was also introduced in Washington in 2001 that would open records prior to 1993.¹³²

At present, the majority of states still do not release identifying information to adult adoptees from birth or adoption records unless the adoptee obtains a court order for "good cause shown."¹³³ Even in states in which birth parents can exercise a disclosure veto, adoptees who have been refused records on this ground typically have the alternative to petition a court for records on the ground of good cause. The courts have usually applied a balancing test to determine whether good cause exists, focusing on the interests of the adoptee and the birth parent, but occasionally articulating the state's interest in maintaining an effective adoption procedure and the interests of adoptive parents as considerations as well.¹³⁴ In proceedings seeking records initiated by adopted adults, generally courts have been willing to find good cause to release them only when birth parents have consented.¹³⁵ When the wishes of birth parents were unknown, some courts have appointed an intermediary to determine their desires,¹³⁶ but others have refused,¹³⁷ or will do so only upon a showing of compelling need.¹³⁸

A review of the published opinions would indicate that adopted adults have had great difficulty establishing good cause. Courts have

131. S. Comm. Substitute for S. 2002, 1932, and 300, 209th Leg., 2nd Ann. Sess. (N.J. 2001). Though this bill does not have the support of some advocacy groups because of its disclosure veto, other adoptee's rights advocacy groups are supporting it as a step forward. *See also* Telephone Interview with Barbara Cohen, advocate who has worked with the bill's sponsor, Assemblyman Bagger (June 1, 2001).

132. H.B. 1351, 57th leg., 2001 Reg. Sess. (Wash. 2001).

133. *See* Hollinger, *supra* note 14, at 13A-4 & 13-26.

134. *See* *Dixon v. Dep't of Pub. Health (In re Dixon)*, 323 N.W.2d 549 (Mich. Ct. App. 1982); *In re Application of George*, 625 S.W.2d 151 (Mo. Ct. App. 1981); *Mills v. Atlantic City Dep't of Vital Statistics*, 372 A.2d 646 (N.J. Super. Ct. Ch. Div. 1977); *Golan v. Louise Wise Serv's*, 507 N.E.2d 275 (N.Y. 1987); *In re Adoption of Spinks*, 232 S.E.2d 479 (N.C. Ct. App. 1977); *In re Assalone*, 512 A.2d 1383 (R.I. 1986); *Bradey v. Children's Bureau of S.C.*, 274 S.E.2d 418 (S.C. 1981); *In re Sage*, 586 P.2d 1201, 1206 (Wash. Ct. App. 1979) (considering objection by adoptive parent in denying access to records).

135. *E.g.*, *In re D.E.D.*, 672 A.2d 582 (D.C. 1996); *In re Dixon*, 323 N.W.2d 549; *In re Anonymous*, 399 N.Y.S.2d 857 (N.Y. Sur. Ct. 1977) (disclosure necessary for applicant's mental rehabilitation, and parents consented). *See also In re Margaret Susan P.*, 733 A.2d 38 (Vt. 1999) (when birth parents consented to disclosure of information, adoption agency had no privacy interest of its own that would preclude disclosure of its records).

136. *In re Application of George*, 625 S.W.2d 151; *Mills v. Atlantic City Dep't of Vital Statistics*, 372 A.2d 646.

137. *In re P.M.H.*, 18 F.L.R. 1314 (Md. Cir. Ct. Montgomery County 1992); *In re Dixon*, 323 N.W.2d 549; *Backes v. Catholic Family & Cmty. Servs.*, 509 A.2d 283 (N.J. Super. Ct. Ch. Div. 1985).

138. *See In re Assalone*, 512 A.2d 1383.

rejected the desire to learn one's identity as good cause.¹³⁹ Although as a general principle courts acknowledge that severe emotional or psychological difficulties might, under some circumstances, be good cause,¹⁴⁰ in application, the psychological need to know has often been rejected, even in cases in which the adopted person was under professional treatment.¹⁴¹ General genetic concerns and other medical justifications have been found sufficient to obtain nonidentifying information from records, but generally have been rejected as a basis for obtaining identifying information.¹⁴² The most compelling justification was asserted in *In re Application of George*,¹⁴³ by an adopted adult with leukemia who needed to find a bone marrow donor. The Missouri appellate court found that the birth father must be contacted by an intermediary, who could disclose any information offered by the father anonymously. A similar approach has been taken in New York and New Jersey when adoptees desired information in order to establish membership in an Indian tribe. Several courts have held that the Indian

139. *E.g.*, *In re Roger B.*, 418 N.E.2d 751 (Ill. 1981); *Backes v. Catholic Family & Cmty. Servs.*, 509 A.2d 283; *In re Linda F.M.*, 418 N.E.2d 1302 (N.Y. 1981); *In re Assalone*, 512 A.2d 1383; *In re Sage*, 586 P.2d 1201.

140. *In re Estate of Dodge*, 413 N.W.2d 449 (Mich. Ct. App. 1987) (allegation of intense psychological need entitles adoptee to a hearing); *In re Wilson*, 544 N.Y.S.2d 886 (N.Y. App. Div. 1989) (allegation of psychological problems necessitating disclosure constitutes prima facie case, but must be remanded for hearing in which interests of birth parents are represented and balanced); *In re Hayden*, 435 N.Y.S.2d 541 (N.Y. Sup. Ct. 1981) (evidence from physician that adoptee might have been a "DES" baby, and from psychologist that she is under severe psychological strain and feels an enormous void, states a prima facie case for good cause, entitling applicant to full hearing); *In re Adoption of Spinks*, 232 S.E.2d 479 (N.C. Ct. App. 1977) (remanded back to trial court for specific finding on best interest of adoptee, whose interests are paramount).

141. *See In re Dixon*, 323 N.W.2d 549 (despite treatment for severe depression, suicide attempts, and testimony from psychologist that disclosure would be in adoptee's interest, court refused disclosure, finding lack of information was not the cause of her condition). *Cf. Backes v. Catholic Family and Cmty. Servs.*, 509 A.2d 283 (alleged anxiety and irritability not sufficient, when no pathological psychological problem had been diagnosed); *Bradey v. Children's Bureau of S.C.*, 274 S.E.2d 418 (S.C. 1981) (untreated emotional distress and anxiety not good cause).

142. *See In re P.M.H.*, 18 F.L.R. 1314 (generalized medical concern not good cause); *Golan v. Louise Wise Servs.*, 507 N.E.2d 275 (N.Y. 1987) (disclosure of identifying information denied to 54 year old adoptee with heart condition, despite evidence that medical history would be helpful for his treatment and essential to his certification as a commercial pilot); *Sandra L.G. v. Bouchey*, 576 N.Y.S.2d 767 (N.Y. Fam. Ct. 1991) (generalized genetic concern is not good cause to open records, but non-identifying health information must be released through statutory procedures); *Coleman v. Weiner*, 528 N.Y.S.2d 480 (N.Y. Sup. Ct. 1988) (neurological impairment of child is good cause for obtaining medical records of prenatal care and birth, with identifying information redacted); *In re Sage*, 586 P.2d 1201 (stating that Sage failed to establish the good cause required to permit disclosure of identifying information). *See also In re Hayden*, 435 N.Y.S.2d 541 (full hearing granted where adoptee-petitioner claimed that she might be a "DES" baby).

143. *In re Application of George*, 625 S.W.2d 151 (Mo. Ct. App. 1981).

Child Welfare Act requires that the information be released, but only to the appropriate tribal officials, and not to the adoptee.¹⁴⁴

On the other hand, the utility of good cause hearings to adoptees today is somewhat difficult to ascertain. Adoptees who have received their records through good cause hearings have no reason to appeal, and access to records is very dependent upon the predilections of the trial judge. For example, one Oklahoma judge who believed the desire to know one's identity was sufficient cause is reputed to have released hundreds of records during his years on the bench. Reports from Texas indicate that in at least one county records are currently very easy to obtain from the court in a good cause hearing, whereas in some other counties it is virtually impossible, even with compelling medical reasons.¹⁴⁵ Most of the published good cause decisions were issued in the 1970s and 1980s. By the 1990s, adoptees appear to have largely abandoned appeals of good cause decisions and utilized other methods to locate birth family, such as state registries or programs, private search groups, the Internet, or private investigators, so current judicial thinking about good cause is more difficult to discern.

ii. Access by Birth Parents

Though recognition of the continuing linkage between an adoptee and a birth parent is the key characteristic of the new adoption paradigm, American legislatures and courts have granted birth parents even fewer rights to identifying information and search assistance than have been afforded adoptees. Passive registries offer birth parents the opportunity to locate adult adoptees, if both parties register. Some, but not all, of the search programs offering the assistance of confidential intermediaries can be utilized by birth parents to locate their children.¹⁴⁶ Although twelve states permit adult adoptees access to identifying information in their birth or court records, either upon demand or in the absence of a disclosure veto,¹⁴⁷ only two of those states permit a birth parent to access information in adoption or vital statistics records that will provide her with information about the adoptive identity of her child.

In Maryland, a birth parent whose child was adopted after January 1, 2000 may obtain from state officials a copy of both the original and new certificates of birth of an adoptee and the report of the adoption decree or

144. See *In re Adoption of Mellinger*, 672 A.2d 197 (N.J. Super. Ct. App. Div. 1996); *In re Adoption of Linda J.W.*, 682 N.Y.S.2d 565 (N.Y. Fam. Ct. 1998); *In re Adoption of Rebecca*, 601 N.Y.S.2d 682 (N.Y. Sur. Ct. 1993).

145. Telephone Interview with Andrea Stingley, *supra* note 92 (Representative Goolsby is the sponsor of the bill in the Texas House of Representatives).

146. Hollinger, *supra* note 14, at 13A-1 to A-2.

147. See *supra* notes 95-103 and accompanying text.

judgment any time after the adoptee's 21st birthday, subject to a disclosure veto by the adoptee. Thus, for future adoptions, Maryland law will create relative parity between adult adoptees and birth parents, as each may file disclosure vetoes using the same process.¹⁴⁸

Tennessee permits birth parents access to adoption records existing prior to March 16, 1951 for any children adopted or for whom an adoption was attempted. For adoptions finalized after March 16, 1951, birth parents are entitled to information from adoption records only with the express written consent of the adult adoptee.¹⁴⁹ If a birth parent requests information, state officials will attempt to locate the adult adoptee to determine if she wishes to have contact. However, unlike the procedures for birth parents to file contact vetoes, the adoptee is under no obligation to file a veto, and no identifying information will be released to the birth parent without the adoptee's written consent.¹⁵⁰

The courts have also been unsympathetic to birth parents seeking identifying information from court records through a good cause hearing. Such requests have been uniformly rejected by courts, who find that the desire to see a child, even combined with the desire to leave the child an inheritance, does not constitute good cause.¹⁵¹

iii. Constitutional Challenges by Adoptees and Birth Parents

Both adult adoptees seeking identifying information and birth parents challenging open records laws have attempted to assert constitutional rights in support of their positions. In each such proceeding, however, the courts have determined that resolution of the open records debate is not to be resolved by resort to federal or state constitutional law.

In the late 1970s and early 1980s, many adopted adults attacked the constitutionality of statutory provisions that denied them an automatic right to information regarding the identity of their birth parents. These

148. MD. CODE ANN., FAM. LAW § 5-3A-05 (2000).

149. TENN. CODE ANN. § 36-1-127 (2000).

150. *Id.* § 36-1-130.

151. See *In re Adoption of Baby S.*, 705 A.2d 822 (N.J. Super. Ct. Ch. Div. 1997) (where 55 year-old adoptee had not filed a request for information, court refused to release information to 75 year-old birth mother or to contact adoptee to determine his wishes); *In re Robert R.B.*, 558 N.Y.S.2d 473 (N.Y. Fam. Ct. 1990); *In re Christine*, 397 A.2d 511 (R.I. 1979) (appellate court reversed order of lower court that would have permitted intermediary to contact adoptive parents to see if they would agree to permit release of identifying information, or permit birth mother to meet eleven year-old). Cf. *In re Baby Boy K.*, 701 N.Y.S.2d 600 (N.Y. Fam. Ct. 1999), *rev'd and remanded*, 719 N.Y.S.2d 311, 313 (N.Y. App. Div. 2001) (though trial court found no statutory authority to open adoption records on petition of birth parent who desired to communicate post-adoption medical information, appellate court interpreted statute to permit this request, observing information could be conveyed through an intermediary to protect privacy).

challenges were uniformly rejected.¹⁵² Plaintiffs' primary contention was that a federal constitutional right of privacy includes the right to receive information regarding their identity. Analogizing to previously recognized privacy rights to marry and procreate without unwarranted governmental interference, plaintiffs asserted that the right to know their own identity was fundamental, and under the doctrine of substantive due process, could not be impaired absent compelling state interests.

The courts considering these claims, however, refused to recognize the right to identifying information as a fundamental right or to invoke strict scrutiny.¹⁵³ Instead, applying a rational relationship standard, the courts readily determined that the states' desire to balance the interests of adoptees with the privacy interests of birth parents and, in some cases, adoptive parents, served a rational governmental objective and withstood constitutional attack.

The courts also rejected the contention that "adopted persons," like classifications based upon race or national origin, are a "suspect class," requiring strict scrutiny under the Equal Protection Clause for statutes that apply only to individuals who are adopted. Adoption is not a characteristic immutable at birth, the courts reasoned, but rather is a legal status created to protect the best interests of the children. Arguments that intermediate scrutiny¹⁵⁴ should be applied also failed.¹⁵⁵ Though recognizing that courts have applied intermediate scrutiny to classifications based upon out-of-wedlock birth, for the reason that the state has employed a questionable characteristic to distinguish those whom the law should burden from those whom it should not, the courts found that adopted adults are not denied access to birth records on the basis of out-of-wedlock birth, and have not been subject to the same stigma and legal disabilities that persuaded courts to give the protection of intermediate scrutiny to classifications based upon "illegitimacy." Moreover, these courts reasoned that adopted adults and nonadopted adults were not

152. *Alma Soc'y, Inc. v. Mellon*, 601 F.2d 1225 (2d Cir. 1979); *Mills v. Atlantic City Dep't of Vital Statistics*, 372 A.2d 646 (N.J. Super. Ct. Ch. Div. 1977); *Schechter v. Boren*, 535 F. Supp. 1 (W.D. Okla. 1980); *In re Roger B.*, 418 N.E.2d 751 (Ill. 1981); *Dixon v. Dep't. of Pub. Health*, 323 N.W.2d 549 (Mich. Ct. App. 1982); *In re Maples*, 563 S.W.2d 760 (Mo. 1978); *In re Sage*, 586 P.2d 1201 (Wash. Ct. App. 1979).

153. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978). To survive strict scrutiny by a court, a classification must be found to be necessary to achieve a compelling state interest. *Id.* at 381. Strict scrutiny is employed to review either governmental action that impairs fundamental rights under the doctrine of substantive due process, or governmental classifications that distinguish between persons upon a basis that is deemed "suspect" or impair fundamental rights under the doctrine of equal protection. *See id.*

154. *See, e.g., Trimble v. Gordon*, 430 U.S. 762 (1977). Intermediate scrutiny, which has been applied to classifications based upon gender or "illegitimacy," requires a court to uphold a statute only if it is substantially related to an important state interest. *Id.* at 767.

155. *Alma Soc'y, Inc. v. Mellon*, 601 F.2d 1225; *see also In re Sage*, 586 P.2d 1201.

similarly situated, in that the state has no similar need to protect the confidentiality of the parents of nonadopted adults. Therefore, statutes sealing adoption records were upheld using the rational relationship standard under equal protection analysis as well.

Several plaintiffs asserted additional constitutional arguments. Some adoptees contended that their right to receive information under the First Amendment was abridged. Rejecting such claims, the courts presented with this argument determined that the First Amendment does not guarantee a constitutional right of access to information not available to the public generally.¹⁵⁶ Moreover, the right to information is not unconditional, they reasoned, and is not unconstitutionally violated when the state limits it to balance conflicting rights of privacy and to protect the integrity of the adoption process.¹⁵⁷ A few plaintiffs also attempted the novel assertion that the Thirteenth Amendment's prohibition of slavery and involuntary servitude was intended to abolish the "incidents" of slavery, which included severance of parental relations, and thus protected their right to identifying information. Noting that no judicial authority supports such an interpretation of the Thirteenth Amendment, this argument was summarily rejected as well.¹⁵⁸

In the 1990s, statutory reform in Tennessee and Oregon, which provided adopted adults with an unrestricted right of access to identifying information, prompted litigation by birth parents, who asserted that opening records violated their constitutional right to privacy. Petitioners asserted that the right of privacy encompassed the right to freedom from governmental interference in reproductive decisions, the right to marry and bring up children, and a right to nondisclosure of private information. They contended that a decision to relinquish a child for adoption was analogous to decisions to abort or prevent pregnancy, which are constitutionally protected.¹⁵⁹

In *Jane Does v. State*,¹⁶⁰ the Oregon Court of Appeals rejected this analogy, reasoning that, unlike a decision to abort or use contraceptives,

156. *In re Roger B.*, 418 N.E.2d 751. *See also*, *Alma Soc'y, Inc. v. Mellon*, 459 F. Supp. 912 (S.D.N.Y. 1978) (First Amendment argument was raised and summarily disregarded).

157. *In re Maples*, 563 S.W.2d 760; *Mills v. Atlantic City Dep't of Vital Statistics*, 372 A.2d 646.

158. *Alma Soc'y, Inc. v. Mellon*, 459 F. Supp. 912; *Schechter v. Boren*, 535 F. Supp. 1 (W.D. Okla. 1980).

159. *Doe v. Sundquist*, 106 F.3d 702 (6th Cir. 1997); *Doe v. Sundquist*, 2 S.W.3d 919 (Tenn. 1999); *Does v. State*, 993 P.2d 822 (Or. Ct. App. 1999), *rev. denied* 6 P.3d 1098 (Or. 2000). In another case, a county official asserted that a mutual consent registry infringed birth parents' constitutional rights because the respondent feared the registry would not sufficiently ensure that the identity of birth parents would be safeguarded. *Axelrod v. Laurino*, 548 N.Y.S.2d 405 (N.Y. Sup. Ct. 1989). The court rejected the claim, noting that the registry contained safeguards limiting the disclosure of identifying information.

160. *Does v. State*, 993 P.2d 822, 836.

a decision to place a child for adoption cannot be made unilaterally, but requires a willing adoptive parent and approval of the state. Moreover, births are a public event, which for a long time have been recorded by state governments, and neither births nor adoptions “may be carried out in the absolute cloak of secrecy that may surround a contraception or the early termination of a pregnancy.”¹⁶¹ Thus, no fundamental right to place a child for adoption existed, the court determined, and no corresponding right to place in secrecy could exist.

Addressing the same constitutional challenge to the Tennessee disclosure statute in *Promise Doe v. Sundquist*,¹⁶² the Sixth Circuit Court of Appeals further concluded that even if a federal constitutional right to place a child for adoption were to be recognized, the open records statute did not unduly burden this right. Subsequently, reviewing the statute under the Tennessee Constitution, the Tennessee Supreme Court agreed, noting that the statutory right to place a child for adoption was created to protect the interests of children, and not to advance a procreational right of a birth parent.¹⁶³ Moreover, any effect of an open records law on a decision to place a child was found to be much too speculative to categorize it as an infringement of the right to procreational privacy.¹⁶⁴ The contention that opening records invaded a familial right to raise a child was also easily defeated by the fact that the records would not be opened until the adoptee reached adulthood.¹⁶⁵

None of these courts were willing to recognize that a right of privacy under either the federal or applicable state constitutions encompassed a general right to nondisclosure of personal information.¹⁶⁶ Arguments that opening records impairs contractual or vested rights in violation of the federal and state constitutions also failed, because these courts determined that absolute confidentiality had never been guaranteed to birth parents under either state’s laws.¹⁶⁷

Though many commentators have eloquently argued for the recognition of constitutional rights on behalf birth parents or adoptees to support

161. *Id.*

162. *Doe v. Sundquist*, 106 F.3d 702.

163. *Doe v. Sundquist*, 2 S.W.3d 919, 926.

164. *Id.*

165. *Id.*

166. In *Whalen v. Roe*, 429 U.S. 589, 599 (1977), the U.S. Supreme Court in dicta referred to one type of privacy right as “the individual interest in avoiding disclosure of personal matters.” The nature of this right has never been elaborated upon by the Supreme Court, and in *Doe v. Sundquist* the Sixth Circuit noted that it had previously held that the Constitution does not “encompass a general right to nondisclosure of private information.” 106 F.3d at 706. The Oregon Court of Appeals in *Does v. State* similarly noted that *Whalen* upheld a state records law requiring doctors to report prescriptions of controlled substances to the state, suggesting that a state’s legitimate need for records outweighed any privacy right. 993 P.2d at 835.

167. *Doe v. Sundquist*, 2 S.W.3d at 925; *Does v. State*, 993 P.2d at 831–32.

the sealing or opening of records,¹⁶⁸ others have agreed with the U.S. courts that constitutional rights analysis may be ill-suited to resolution of this issue. Professors Naomi Cahn and Jana Singer have commented that analogies to other cases involving fundamental familial rights are problematic, as the open records issue concerns relationships among families and family members, and involves a member of the legally recognized intact family, the adoptee, who desires to foster linkage with a biologically-related family member who may not desire a relationship.¹⁶⁹ Perhaps more importantly, as they correctly observed, "fundamental rights" analysis under prevailing constitutional constructs is an awkward vehicle for the necessary balancing and mediation of "the overlapping identity issues at stake."¹⁷⁰

b. Non-identifying information

By the 1980s, it was becoming apparent that the consequences of withholding medical and social background information from adoptive parents were frequently tragic. The failure to transmit available medical history has caused some adopted children to receive inappropriate medical treatment, undergo unnecessary painful and sometimes hazardous diagnostic testing, and in rare instances, suffer irreversible and preventable permanent disability.¹⁷¹ For others, delayed or inappropriate psychiatric care resulted in years of turmoil for the child and adoptive family, and on occasion, institutionalization in adolescence for mental

168. See, e.g., Chumney, *supra* note 116, at 864–84; Heidi Hildebrand, *Because They Want to Know: An Examination of the Legal Rights of Adoptees and Their Parents*, 24 S. ILL. U. L.J. 515, 531–35 (2000); I. Franklin Hunsacker, *Oregon's Ballot Measure 58: A Grossly Unfair and State-Sanctioned Betrayal of Birth Mothers*, 39 FAM. & CONCILIATION CTS. REV. 75, 76–81 (2001); Claudine R. Reiss, *The Fear of Opening Pandora's Box: The Need to Restore Birth Parents' Privacy Rights in the Adoption Process*, 28 SW. U. L. REV. 133, 141–51 (1998).

169. Cahn & Singer, *supra* note 22, at 160–61 (noting that a case considering rights of putative fathers opposing stepparent adoption involved an outsider imposing a claim on an intact family unit (as does the more recent decision of *Troxel v. Granville*, 530 U.S. 57 (2000), the grandparents visitation action decided after their article was published), and that the "right to marry" cases did not involve previous familial choices made by other family members).

170. Cahn & Singer, *supra* note 22, at 153.

171. See *Foster v. Bass*, 575 So. 2d 967, 976 (Miss. 1990) (child suffered brain damage due to phenylketonuria following failure of agency to confirm no screening test had been performed); John R. Ball & Gilbert S. Owen, *Genetics, Adoption, and the Law*, in II GENETICS AND THE LAW 277 (Aubrey Milunsky & George J. Annas eds., 1980); Bonnie Franklin, *What a Child is Given*, N.Y. TIMES MAGAZINE, Sept. 3, 1989, at 40–41 (adoptee underwent painful testing for juvenile chronic arthritis, which he later discovered was prevalent in his birth family); Ginny Whitehouse, *Consumers Viewpoint, Panel Discussion*, in GENETIC FAMILY HISTORY: AN AID TO BETTER HEALTH IN ADOPTIVE CHILDREN 19 (Nat'l Ctr. For Educ. In Maternal and Child Health ed., 1984) (discovery of history of fibrous breast lumps avoided repetition by adoptee of otherwise unnecessary painful treatment).

disorders that could have been successfully treated at a younger age.¹⁷² Siblings have frequently been subject to sexual molestation, torture, and threats by adopted children whose parents received no warning about similar past behavior or psychiatric problems of the child.¹⁷³ On a wider scale, children were placed with adoptive families unprepared emotionally and financially to cope with their child's special needs, sometimes contributing to disruption of the parents' marriage¹⁷⁴ or of the adoptive placement.¹⁷⁵ Past practices and the continued failure of some facilitators to satisfy their disclosure responsibilities has prompted hundreds of lawsuits against adoption intermediaries for intentional or negligent misrepresentation and nondisclosure.¹⁷⁶

Corresponding to the shift in adoption paradigms underpinning adoption practice, however,¹⁷⁷ the last two decades have witnessed a dramatic shift in the attitudes of adoption professionals regarding the

172. See e.g., BARTH & BERRY, *supra* note 48, at 176; Bonnie Jacob, *Raising Cain*, NEW DOMINION, May/June 1989, at 48. For additional sources, see also, Marianne Blair, *Liability of Adoption Agencies and Attorneys for Misconduct in the Disclosure of Health-Related Information*, in 2 ADOPTION LAW & PRACTICE, *supra* note 14, at 16-13 to -15.

173. David Postman, *Sins of Silence*, SEATTLE TIMES, Jan. 14, 1996, at A1 (adopted children in two families raped or sexually assaulted younger siblings); Jane Hadley, *Parents Sue Over Adoptions, State Blamed for Failure to Disclose Children's Sexual Problems*, SEATTLE POST INTELLIGENCE, Feb. 23, 1995, at B1 (adoptive son sexually abused adoptive daughter); Patricia G. Miller, *State Court Weighs Law to Protect Against Dishonest Adoption Agents*, PITTSBURGH POST GAZETTE, Apr. 17, 1994, at L4 (reporting that adoptive son removed from home after threats to younger brother); Belkin, *supra* note 48, at 1 (child with undisclosed history as both victim of physical abuse and perpetrator of previous attacks attempted to burn down home and threatened young sibling with knife); Golden, *supra* note 40, at 79, 82 (child's attempted suicide resulted in death of two younger brothers by fire); Klein, *supra* note 48, at 1 (child twice attempted to suffocate baby sister and threatened adoptive mother three times with knife); Andrea Sachs, *When the Lullaby Ends*, TIME, June 4, 1990, at 82 (adoptive whose psychiatric record was hidden attempted to amputate cousin's arm and set fire to another cousin's bed); Cf., *W. v. Essex County Council*, 3 All E.R. 111, 1998 WL 1043747(CA) (C.A. 1998) (parents sued local authority on behalf of four children sexually abused by foster child whose history of sexual abuse was unknown to them).

174. See Golden, *supra* note 40, at 79, 82 (relating one such breakup and quoting leader of workshops for adoptive families: "A lot of people stay in the [adoptive] commitment after it doesn't work out. And to me, that's really unhealthy because it affects the rest of the family. I've seen so many marriages break up over it."); Jacob, *supra* note 172, at 35.

175. BARTH & BERRY, *supra* note 48, at 20, 108-109 ("Among families that reported no information gaps, the disruption rate was only 19%. Among families reporting one or more gaps, the disruption rate was 46%." The term "disruption" is used here to describe any adoptive placement that has ended, whether before or after finalization.); see also KATHERINE NELSON, ON THE FRONTIER OF ADOPTION: A STUDY OF SPECIAL NEEDS ADOPTIVE FAMILIES 71, 74-77 (1985); Klein, *supra* note 48, at 32 (between 1983 and 1987, 69 adoption annulments in California were attributed to fraudulent misrepresentation by a county agency regarding a child).

176. For detailed discussions of these suits and the theories of liability, see Blair, *supra* note 172, at 16-1 *et seq.*; D. Marianne Blair, *Getting the Whole Truth and Nothing But the Truth: The Limits of Liability for Wrongful Adoption*, 67 NOTRE DAME L. REV. 851 (1992).

177. See *supra* notes 49-71 and accompanying text.

disclosure of health-related information. Professional guidelines currently endorse thorough collection and full disclosure of all pertinent non-identifying background information to prospective adoptive parents,¹⁷⁸ as well as ongoing supplementation of medical information and family history¹⁷⁹ and full provision of this information to adopted adults.¹⁸⁰ Experts now conclude that disclosure strengthens the bond between adoptive parents and their child by facilitating a more appropriate placement, and a better understanding of, and ability to provide for, a child's needs.¹⁸¹ Not only are medical and psychological care enhanced, but adopted adults are better able to make their own decisions about childbearing and medical treatment.¹⁸²

Reflecting these changing attitudes, in the United States almost every state has now enacted legislation compelling the disclosure of at least some health-related information to prospective adoptive parents.¹⁸³

178. CWLA STANDARDS, *supra* note 64, § 3.10.

179. *Id.* § 6.16.

180. *Id.* § 6.21.

181. *Id.* § 5.5.

182. Black, *supra* note 43, at 198; *see also* Gilbert S. Omenn et al., *Genetic Counseling for Adoptees at Risk for Specific Inherited Disorders*, 5 AM. J. MED. GENETICS 157, 162 (1980); Diane Plumridge et al., *ASGH Activities Relative to Education: Heredity and Adoption*, 46 AM. J. HUM. GENETICS 208, 209 (1990).

183. ALA. CODE § 26-10A-19 (1995 & Supp. 2000); ALASKA STAT. § 18.50.510 (Michie 2000); ARIZ. REV. STAT. ANN. § 8-129 (West 1999); ARK. CODE ANN. § 9-9-505 (Michie 1998); CAL. FAM. CODE §§ 8608, 8706, 8801.3, 8817, 8818, 8819, 8909, 9202 (West 1994 & Supp. 2000); COLO. REV. STAT. §§ 19-5-207, 19-5-402 (2000); CONN. GEN. STAT. §§ 45a-746, 45a-749 (Supp. 2001); FLA. STAT. ch. 63.162 (Supp. 2001); GA. CODE ANN. § 19-8-23 (1999); HAW. REV. STAT. § 578-14.5 (1993); IDAHO CODE § 16-1506(3) (Michie 2001); 20 ILL. COMP. STAT. ANN. 505/22.3 (West 1993); 750 ILL. COMP. STAT. ANN. 50/18.4 to 18.4a (West 1999); IND. CODE ANN. §§ 31-19-2-7, 31-19-18-1 to 31-19-21-6; 31-19-23-1 to 31-19-24-13 (West 1999); IOWA CODE ANN. § 600.8 (West 1996); KAN. STAT. ANN. §§ 59-2122, 59-2130 (1994); KY. REV. STAT. ANN. § 199.520 (Michie 1998); LA. CHILD. CODE, arts. 1124-27 (1995 & Supp. 2001); ME. REV. STAT. ANN. tit. 18-A, §§ 9-304 to 9-310 (West 1992); *id.* tit. 22, § 8205 (West Supp. 2000); MD. CODE ANN., FAM. LAW §§ 5-328 to 5-329.1 (1999); MASS. GEN. LAWS ch. 210, § 5D (2000); MICH. COMP. LAWS ANN. §§ 710.27, 710.68 (West Supp. 2001); MINN. STAT. ANN. §§ 259.27, 259.43, 259.47 (West 1998 & Supp. 2001); MISS. CODE ANN. § 93-17-205 (1999); MO. ANN. STAT. § 453.121 (West 1997); MONT. CODE ANN. §§ 42-3-101, 42-3-102, 42-6-102, 42-6-105 (1999); NEB. REV. STAT. § 43-107 (1998); NEV. REV. STAT. 127.152 (2000); N.H. REV. STAT. ANN. § 170-B:19 (1994); N.J. STAT. ANN. § 9-3-41.1 (West Supp. 2001); N.M. STAT. ANN. §§ 32A-5-3, 32A-5-12, 32A-5-14 (Michie 1998); N.Y. Soc. SERV. LAW § 373-a (McKinney 1992 & Supp. 2001); N.Y. DOM. REL. LAW §§ 112, 114, 115a (McKinney 1999 & Supp. 2001); N.Y. PUB. HEALTH LAW § 2782 (McKinney Supp. 2001); N.C. GEN. STAT. §§ 48-3-205, 48-9-103 (1999); N.D. CENT. CODE § 14-15-16 (1997); OHIO REV. CODE ANN. §§ 3107.091, 3107.12, 3107.17, 3107.60, 3107.65, 5103.16 (Anderson 2000 & Supp. 2001); OKLA. STAT. tit. 10, §§ 7504-1.1, 7504-1.2 (Supp. 2000); OR. REV. STAT. § 109.342 (1999); 23 PA. CONS. STAT. ANN. §§ 2101, 2503, 2504, 2511, 2533, 2905, 2909 (West 1991 & Supp. 2001); S.D. CODIFIED LAWS §§ 25-6-15.2, 25-6-22, 25-6-23 (Michie 1999); TENN. CODE ANN. § 36-1-133 (1996); TEX. FAM. CODE ANN. §§ 162.005 to .008, 162.018 (Vernon 1996 & Supp. 2001); UTAH CODE ANN. § 78-30-17 (1953); VT. STAT. ANN. tit. 15A, § 2-105 (Supp. 2000); VA. CODE ANN. §§ 63.1-219.35, 63.1-219.45 (Michie Supp.

During the past decade most states have amended these statutes to provide detailed guidance regarding the methods for collection and the content of the information that must be gathered, if reasonably available.¹⁸⁴ Following the recommendations of both national standards¹⁸⁵ and model legislation drafted by adoption experts,¹⁸⁶ these statutes require the preparation of reports, often on standardized forms,¹⁸⁷ to ensure comprehensiveness.

Particularly important are requirements specifying that any history of physical and sexual abuse of the child be included, as this has been one of the topics most frequently subject to nondisclosure in the United States in the past.¹⁸⁸ Another critical component is medical history of both birth parents,¹⁸⁹ as well as extended family,¹⁹⁰ and particularly in-

2000); WASH. REV. CODE ANN. §§ 26.33.350, 26.33.380 (1997); W. VA. CODE § 48-4A-6 (1999); WIS. STAT. ANN. § 48.432 (West 1997); WYO. STAT. ANN. § 1-22-116 (Michie Supp. 2001).

Other states permit the release of health information without a court order: DEL. CODE ANN. tit. 13, §§ 924, 1112 (1999); R.I. GEN. LAWS § 15-7.2-10 (2000); S.C. CODE ANN. §§ 20-7-1740, 20-7-1780 (Law. Co-op. Supp. 2000).

184. For examples of particularly comprehensive statutes, see OKLA. STAT. tit. 10, § 7504-1.1 (Supp. 2000); MICH. COMP. LAWS § 710.27 (Supp. 2001); VT. STAT. ANN. tit. 15A, § 2-105 (1989 & Supp. 2000).

185. CWLA STANDARDS, *supra* note 64, at 41-43.

186. UNIF. ADOPTION ACT § 2-106(a), 9 U.L.A. 36-37 (1999). For a detailed commentary on this section, see D. Marianne Brower Blair, *The Uniform Adoption Act's Health Disclosure Provisions: A Model That Should Not Be Overlooked*, 30 FAM. L.Q. 427 (1996).

187. For example, the medical and social history form published by the Oklahoma Department of Health, to be used in compliance with OKLA. STAT. tit. 10, § 7504-1.1 (2000), was drafted by members of Oklahoma's Adoption Law Reform Committee. It incorporated substantial portions of a Model Medical/Genetic Family History Form for Adoptions prepared by the [Oklahoma] Education Committee, Genetics and Adoption Subcommittee of the Council of Regional Networks for Genetic Services, and was reviewed by geneticists at Children's Medical Center in Tulsa and the Oklahoma Department of Health prior to its publication.

188. Information regarding past physical and sexual abuse of the child is critical to proper diagnosis and treatment when subsequent mental, emotional, and behavioral problems develop. See BARTH & BERRY, *supra* note 48, at 15. Yet the study conducted by Richard Barth and Marianne Berry in the early 1980s indicated that over half of the families interviewed had not been told of prior sexual abuse of their child, and almost one-third of the families whose adoptee had been physically abused were not informed. *Id.* at 78-87, 108. See also James A. Rosenthal, *Outcomes of Adoption of Children with Special Needs*, in 3 FUTURE OF CHILDREN—ADOPTION 81 (Center for the Future of Children ed., 1993) (A history of physical and particularly sexual abuse prior to adoption is a key predictor of increased risk for adoption disruption); D. Marianne Blair, *Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health-related Information in Adoption*, 70 N. CAR. L. REV. 682, 696, 715-717 (1992).

189. Unfortunately the prevailing practice in the United States until the past decade was for adoption facilitators (agency staff or private attorneys) to collect information regarding the birth father's family only from the birth mother. As birth mothers often lacked sufficient knowledge about the birth fathers' medical and genetic history, critical information was lost.

190. The failure of some states to require inquiry regarding the health history of relatives other than birth parents has been problematic. Many medical conditions skip generations, or

formation regarding mental and emotional disorders, another type of information that formerly was frequently withheld.¹⁹¹

Because much of the information regarding medical and social history is of a sensitive or personal nature, the privacy interests of birth parents must be respected. These statutes do not focus on efforts to coerce birth parents into providing information, but rather, the best statutory schemes provide guidance regarding the steps a professional facilitating the adoption must take in order to make "reasonable efforts"¹⁹² to gather the appropriate information. Information that cannot be obtained from birth parents, preferably through personal interviews, can be sought in interviews of other caretakers of the child, and other family members, as well as from providers of medical or psychological treatment or educational services to the child.¹⁹³

Moreover, the statutes focus on information that would otherwise exist absent adoptive placement, and do not encourage genetic testing solely for the purposes of adoptive placement. While recent medical advances make such testing possible, adoption experts and geneticists concur that genetic testing creates many potential risks for psychological well-being, availability of insurance, diminished expectations, and stigmatization,¹⁹⁴ and cannot be justified simply to provide prospective adoptive parents with information that would not otherwise be available

may not be detectable in birth parents, who are themselves often young at the time their infant is placed for adoption.

191. See generally Blair, *supra* note 172, at 16-23 to -25, 16-31 to -32, 16-39, 16-41.

192. The language in many statutes regarding all "reasonably available" information implies a duty to use reasonable efforts to investigate medical history. See Nat'l Conference of Comm'rs on Unif. State Laws, Unif. Adoption Act § 7-105 (1994) and Cmt., 9A Uniform Laws Annotated (West 1999); OKLA. STAT. tit. 10, § 7504-1.1 (2001); MICH. COMP. LAWS § 710.27 (Supp. 2001); VT. STAT. ANN. tit. 15A, § 2-105 (Supp. 2000).

193. Oklahoma's statute requires that along with the report, all medical, psychological, and dental records of the child be attached to the form. OKLA. STAT. tit. 10, § 7504-1.1(A). Even for adopted infants, complete records are essential. In one tragic case, a newborn who went straight to his adoptive home from the hospital suffered irreversible brain damage because information on the lack of phenylketonuria testing was not effectively communicated by the form given to the child's adoptive parents. *Foster v. Bass*, 575 So. 2d 967, 971-72 (Miss. 1990).

194. See CWLA STANDARDS, *supra* note 64, at 44. These standards suggest that genetic testing should be conducted only on a physician's advice "when a child presents symptoms suggesting the presence of a genetically linked condition or illness." *Id.* In response to increasing requests by prospective adoptive parents and adoption agencies for a wide range of genetic testing, the American Society of Human Genetics and the American College of Medical Genetics recently issued a statement recommending that testing occur only when it would otherwise be performed on children of a similar age for purposes of diagnosis and prevention of conditions which have manifested or for which preventive action may be taken during childhood. *Geneticists Propose Rules for Testing Kids*, AM. MED. NEWS, Mar. 20, 2000, at 4.

to birth parents.¹⁹⁵ On the other hand, the importance of genetic testing to legitimate medical treatment in future decades has been recognized by California, which recently amended its medical history statute to *permit* birth parents to provide a blood sample to the State Department of Health Services, which is required to store the sample for a period of thirty years after the adoption. The sample can be used for DNA testing at the request of the adoptive parents or the adoptee, but only after the adoption order has been entered.¹⁹⁶

Once the information is initially collected, many states mandate retention for a substantial length of time¹⁹⁷ by a governmental entity¹⁹⁸ to ensure lifetime access by the adoptee. The best of these statutes also create procedures to facilitate post-adoption supplementation of records by birth and adoptive family members and the adult adoptee with a notification process to ensure that information about serious genetic conditions is transmitted to those who could be affected.¹⁹⁹

Of critical importance is the fact that many disclosure statutes now require that a report containing all medical and social history currently available be provided to prospective adoptive parents before placement,²⁰⁰ and some require its disclosure "as early as practicable" before the adoptive parents even meet the child, and in any event, before they receive custody.²⁰¹ Following the adoption, adoptive

195. Madeleine Freundlich, *The Case Against Preadoption Genetic Testing*, 77 CHILD WELFARE 663, 667-70, 675-77 (1998).

196. CAL. FAM. CODE §§ 8706, 8817, 9202.5 (West Supp. 2001).

197. The best statutes require retention of the records for at least 99 years. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-129(B) (West 1999); 750 ILL. COMP. STAT. ANN. 50/18.4 (West 1999); TEX. FAM. CODE ANN. § 162.006 (Vernon 1996).

198. Because adoptions are facilitated by governmental entities, private agencies, and private attorneys, and are finalized through hundreds of county courts, the states that have most effectively regulated record retention have created a central registry for copies of medical and social history records for all adoptions in the state. *See, e.g.*, ALA. CODE § 26-10A-31 (1995 & Supp. 2000); ALASKA STAT. §§ 18.50.510, 25.23.185 (Michie 2000); IND. CODE ANN. §§ 31-19-2-7, 31-19-18-3, 31-19-20-2 (West 1999); NEB. REV. STAT. § 43-107 (1998).

199. For example, Oklahoma's statute, OKLA. STAT. tit. 10, § 7504-1.1 (Supp. 2000), requires the initial investigator to advise all who contribute information that additional information, as it becomes available, may be submitted to the agency that prepared the report or the clerk of the court that issued the adoption decree. OKLA. STAT. tit. 10, § 7504-1.2 (Supp. 2000), requires court clerks and agencies to retain any supplemental medical information and current mailing addresses filed with them and to send a birth parent, adoptive parent, or adult adoptee, at the last address on file in the court's records, a notice when supplemental health information has been received. *See, e.g.*, MICH. COMP. LAWS ANN. § 710.68 (West Supp. 2001); OHIO REV. CODE ANN. §§ 3107.09 to .091 (Anderson 2000).

200. *E.g.*, ARIZ. REV. STAT. ANN. § 8-129 (West 1999); CAL. FAM. CODE § 8706 (West Supp. 2001); MICH. COMP. LAWS ANN. § 710.27 (West Supp. 2001); TEX. FAM. CODE ANN. § 162.005 (Vernon 1996); VT. STAT. ANN. tit. 15A, § 2-105 (Supp. 2000).

201. OKLA. STAT. tit. 10, § 7504-1.2 (Supp. 2000). *See also* TEX. FAM. CODE ANN. § 162.005 (Vernon 1996).

parents have a right to any additional information that becomes available, at least during the adoptee's minority, and the adoptee has a statutory right to all medical and social history, plus any supplementary material that has been added, upon reaching adulthood.²⁰² Some states offer equivalent disclosure rights to adults whose parents' rights were terminated, but who were never adopted.²⁰³ In several states birth parents and birth siblings also have a statutory right to disclosure of genetically significant supplemental information, such as the onset of a hereditary disorder in the adoptee or foster child, that has been provided by an adoptive or foster parent or adult adoptee after a final decree of adoption or termination of parental rights has been issued.²⁰⁴

Despite the progress most states have made to regulate in this area, many gaps remain in current legislation. Not all statutes describe the information that must be collected or the sources that must be investigated in a comprehensive fashion. Some still require information to be transmitted to adoptive parents upon or after finalization,²⁰⁵ thus failing to address the need of adoptive parents to have this information prior to placement. Moreover, statutory enforcement provisions and sanctions for noncompliance are still generally absent.²⁰⁶

B. Canada

Like the United States, Canada has a federal system of government. Adoption is regulated by the provincial governments. Although New Brunswick enacted adoption legislation as early as 1873, most

202. Many disclosure statutes provide for disclosure of health-related information to others, such as legal guardians of minor adoptees, adult direct descendants of deceased adoptees, and the parents or guardians of minor descendants of deceased adoptees. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-129 (West 1999); OKLA. STAT. tit. 10, § 7504-1.2 (2000); OR. REV. STAT. § 109.500 (1999); TEX. FAM. CODE ANN. § 162.006 (Vernon 1996); UNIF. ADOPTION ACT § 6-103, 9 U.L.A. 119-20 (1999). Oklahoma limits the information available to descendants and their custodians to medical, rather than social information, as the social history would be of less importance to descendants and the privacy interests of those whose history is reported becomes paramount. For a detailed discussion of disclosure statutes, see Blair, *supra* note 188, at 730-31.

203. These statutes often apply to the descendants and guardians of these individuals as well. CONN. GEN. STAT. ANN. § 45a-746 (West Supp. 2001); OKLA. STAT. tit. 10, § 7504-1.2 (2000); WIS. STAT. ANN. § 48.432 (West 1997).

204. *See, e.g.*, ALA. CODE § 26-10A-31 (Sup. 2000); MICH. COMP. LAWS ANN. § 710.68 (West Supp. 2001); OKLA. STAT. tit. 10, § 7504-1.2 (2000); UTAH CODE ANN. § 78-30-17 (1996). Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 192, § 6-103. For further discussion of the importance of disclosure to birth relatives, see Blair, *supra* note 188, at 730-31.

205. *E.g.*, CONN. GEN. STAT. ANN. § 45a-746 (Supp. 2001) (not later than finalization); KY. REV. STAT. ANN. § 199.520 (Michie Supp. 2000) (same); 23 PA. CONS. STAT. ANN. § 2909 (Supp. 2001) (prior to finalization).

206. *See* Blair, *supra* note 172, at 16-139 to 16-143.

Canadian provinces did not do so until after the First World War, when changing social conditions prompted a dramatic increase in the number of children born out of wedlock.²⁰⁷ As in the United States, secrecy was the prevailing paradigm in Canada for many decades during the mid-twentieth century.²⁰⁸

In recent years, however, many adoption professionals in Canada have been promoting more openness in adoption. In fact, the research studies of Canadian social scientists have been influential in both Canada and the United States in creating awareness of the new paradigm of adoption as a lifelong experience connecting adopted persons with their birth, as well as their adoptive, families.²⁰⁹

Almost every Canadian provincial government has responded by enabling both adult adoptees and birth parents²¹⁰ to seek identifying information and reunions through active government-sponsored search programs that release information with the consent of the subject of the search,²¹¹ in addition to operating passive

207. BEREND HOVIUS, *FAMILY LAW: CASES, NOTES AND MATERIALS* 1051 (5th ed. 2000); BALA & WILDGOOSE, *CANADIAN CHILDREN'S LAW: A COURSEBOOK* 371 (1985).

208. See Thompson, *supra* note 31, at 13 (article by Canadian social worker and adoption expert, who served on the Advisory Committee on Standards of the Child Welfare League of America, observing the international impact of CWLA's standards during the mid-twentieth century).

209. See, e.g., *id.* at 16 (reporting on implications of study conducted by Children's Aid Society of Metro Toronto of adoptees asking for birth family information); SACHDEV, *supra* note 49; Sachdev, *supra* note 69; Kirk, *supra* note 60; Michael Sobol, *Adoption Trends and a Political Agenda for Ontario*, Address at the 10th Annual General Meeting of the Adoption Council of Ontario, available at <http://www.adoption.ca/sobol.htm> (last visited on June 26, 2001).

210. Most of these programs enable other selected family members, such as birth siblings and grandparents, to register as well. Searches by other birth relatives and descendants of adoptees, however, are beyond the scope of this article.

211. Child Welfare Act, R.S.A. ch. C-8.1, § 66.2 (1984), as amended by Child Welfare Amendment Act, R.S.A. ch. C-8.1, § 66.2 (1999), available at <http://www.gov.ab.ca/qp/ascii/Acts/WPD/C08P1.TXT> (last visited Oct. 22, 2001); British Columbia Adoption Act, R.S.B.C. ch. 5, § 71 (1996), available at http://www.qp.gov.bc.ca/statreg/stat/A/96005_01.htm (last visited Nov. 4, 2001) (adoptee who obtains identifying information or birth parent, unless disclosure veto or no-contact veto has been filed); Manitoba Adoption Act, R.S.M. ch. 47, §§ 111, 114-16, 118 (1997), available at <http://www.gov.mb.ca/chc/statpub/free/pdf/a002.pdf> (last visited Oct. 22, 2001); New Brunswick Family Services Act, R.S.N.B., ch. C-16, § 9, ¶ 92(3) (1983), available at <http://www.gov.nb.ca/acts/acts/f-02-2.htm> (last visited Nov. 6, 2001). On December 14, 2000, the New Brunswick Family and Community Services Minister announced that the search program, previously open only to adult adoptees, would now be accessible for searches initiated by birth relatives as well. See Percy Mockler, *New Brunswick Family and Cmty. Servs. Minister, Announcement of Change to New Brunswick Post Adoption Disclosure Register*, at http://www.parentfinders.org/News_New%2Brunswick.htm (last visited Oct. 28, 2001). Nova Scotia Adoption Information Act, S.N.S. ch. 3, § 12 (1996), available at <http://www.gov.ns.ca/legi/legc/statutes/adoption.htm> (last visited Oct. 22, 2001); Ontario Child and Family Services Act, R.S.O. ch. C-11, § 169 (1990), available at http://192.75.156.68/DBLaws/Statutes/English/90c11_e.htm (last visited Nov. 4, 2001); Prince

registries.²¹² Six provinces—Alberta,²¹³ Manitoba,²¹⁴ and Saskatchewan,²¹⁵ for prospective adoptions only, and British Columbia,²¹⁶ the Northwest Territories,²¹⁷ and Nunavut,²¹⁸ for adoptions under acts preceding their current act—also permit the release of identifying information

Edward Island Adoption Act, R.S.P.E.I. ch. A-4.1, § 50 (1992), available at http://www.gov.pe.ca/law/statutes/pdf/a-04_1.pdf (last visited Oct. 22, 2001). See also Civil Code of Quebec, tit. 2, C.C.Q. § 583, available at <http://www.lexum.umontreal.ca/ccq/en/12/t2/c2/s4/0582a0584.html> (last visited Oct. 22, 2001) (identifying information may be given to adoptee over 14 or birth parents if the subject of the information has previously consented); Canadopt, *Quebec Government Information*, at <http://www.canadopt.ca/pqgov.htm> (last visited Oct. 28, 2001) (information on Quebec's search program and active registry); Saskatchewan Social Services, *Common Questions*, at <http://www.gov.sk.ca/socserv/commonq/adoption.html> (last visited Oct. 28, 2001); Yukon Children's Act, S.Y.T. ch. 22, § 96 (1986) (permits a government official to disclose identifying information regarding birth relatives "subject to any regulations that may be prescribed"); Canadian Council of Birthmothers, *Provincial Information & Regional Updates*, at <http://www.nebula.on.ca/canbmthers/prov.htm> (last visited Oct. 28, 2001); Parent Finders, *Yukon Territory*, at http://www.parentfinders.org/News_Yukon.htm (last visited Oct. 28, 2001) (reporting on Order in Council signed January 27, 1997, permitting release of identifying information where birth parents cannot be located in search).

212. British Columbia Adoption Act, R.S.B.C., ch. 5, § 69 (1996), available at http://www.qp.gov.bc.ca/bcstats/96005_01.htm (last visited Oct. 27, 2001); Manitoba Adoption Act, R.S.M., ch. 47, § 117 (1997), available at <http://www.gov.mb.ca/chc/statpub/free/pdf/a002.pdf> (last visited Oct. 27, 2001); New Brunswick Family Services Act, R.S.N.B., ch. 16, § 9, ¶ 92(2) (1983), available at <http://www.gov.nb.ca/acts/acts/f-02-2.htm> (last visited Oct. 27, 2001); Nova Scotia Adoption Information Act, R.S.N.S., ch. 3, § 9 (1996), available at <http://www.gov.ns.ca/legi/legc/statutes/adoption.htm> (last visited Oct. 27, 2001); Ontario Child and Family Services Act, R.S.O., ch. C-11, § 167 (1990), available at http://192.75.156.68/DBLaws/Statutes/English/90c11_e.htm (last visited Nov. 4, 2001); Prince Edward Island Adoption Act, R.S.P.E.I., ch. A-4.1, § 49 (1992), available at http://www.gov.pe.ca/law/statutes/pdf/a-04_1.pdf (last visited Oct. 28, 2001); Canadopt, *Quebec Government Information*, at <http://www.canadopt.ca/pqgov.htm> (last visited Oct. 28, 2001) (information on Quebec's search program and active registry); Saskatchewan Adoption Act, S.S., ch. A-5.1, § 30 (1989-90), available at <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/A5-1.pdf> (last visited Oct. 28, 2001); Saskatchewan Social Services, *Common Questions*, at <http://www.gov.sk.ca/socserv/infocntrl/progserv/Family> (last visited Oct. 28, 2001); Yukon Children's Act, S.Y.T., ch. 22, § 96 (1986) (permits a government official to disclose identifying information regarding birth relatives subject to any regulations that may be prescribed).

213. Child Welfare Amendment Act, R.S.A., ch. C-8.1, § 66.12 (1999), available at <http://www.gov.ab.ca/qp/ascii/Acts/WPD\C08P1.TXT> (birth certificates and other adoption records may be released in adoptions prior to January 1, 2000 with written consent of a birth parent or upon birth parent's death).

214. Manitoba Adoption Act, R.S.M., ch. 47, §§ 112(1), 112(7), 113(1), 113(4), 115, 116 (1997), available at <http://www.gov.mb.ca/chc/statpub/free/pdf/a002.pdf>.

215. Saskatchewan Social Services, *Common Questions*, at <http://www.gov.sk.ca/socserv/commonq/adoption.html> (last visited Oct. 13, 2001).

216. British Columbia Adoption Act, R.S.B.C., ch. 5, §§ 63-66 (1996), available at http://www.qp.gov.bc.ca/bcstats/96005_01.htm.

217. Consolidation of Adoption Act, O.N.W.T., ch. 13, § 66 (2000), available at http://legi.acjnet.org/TNO/Loi/a_en.html.

218. *Id.*

to adult adoptees and birth parents upon request, subject to a disclosure veto or a contact veto, either of which the subject of the information can choose to file. No active search is required in those provinces to release identifying information, however, unless a disclosure veto has been filed. In Alberta, an adopted person age 18 or older is also automatically entitled to disclosure of his or her birth surname upon request,²¹⁹ a provision that is not dependent upon birth parent approval. Moreover, by the end of this year, four provinces will release identifying information upon demand for prospective adoptions to both adopted individuals and birth parents. British Columbia's statutes currently entitle those adopted under the 1996 Adoption Act who are aged 19 or over to copies of their original birth registration and adoption orders, and provide birth parents of those individuals a right of access to records that convey any change of name resulting from the adoption.²²⁰ Newfoundland is scheduled to proclaim its new Adoption Act, which follows British Columbia's approach,²²¹ by the end of 2001.²²² The statutes of Nunavut and the Northwest Territories also appear to open adoption registry records containing identifying information upon request to adult adoptees and birth parents "in accordance with regulations" for prospective adoptions (post November 1, 1998).²²³

Most of these statutes that permit disclosure of identifying information outside of search programs and registries have been the result of reform efforts initiated since the mid-1990s. There have been efforts to reform the laws regulating disclosure of identifying information in other provinces as well, but they have not yet come to fruition. For the past three years Marilyn Churley, a birth mother and Member of the Provincial Parliament, has introduced adoption bills in Ontario that would provide access to birth and adoption records to adult adoptees and birth parents upon demand, implement a no-contact notice, and make counseling available upon request.²²⁴ Despite the fact that the government's

219. Child Welfare Act, R.S.A. ch. C-8.1, § 66.9 (1984), amended by R.S.A., ch., 4 § 6 (1999), available at <http://www.gov.ab.ca/qp/ascii/Acts/WPD/C08P1.TXT>.

220. British Columbia Adoption Act, R.S.B.C. ch. 5, §§ 63-65 (1996), available at http://www.qp.gov.bc.ca/bcstats/96005_01.htm.

221. See Newfoundland Adoption Act, S. NFLD. ch. A-2.1, §§ 50, 51 (1999).

222. Telephone Interview with Mr. Coats, Newfoundland Department of Health (June 26, 2001) (Mr. Coats advised that the Act is scheduled for proclamation at the end of this calendar year, 2001.).

223. Consolidation of Adoption Act, O.N.W.T., ch. 13, ch. 9, §§ 64, 66 (2000); Consolidation of Adoption Act, O.N.W.T., ch. 9, §§ 64, 66 (1998) (both use a disclosure veto only, not a contact veto).

224. See *Churley Press Release Bill 77, MPP Marilyn Churley Introduces Adoption Bill*, at <http://www.nebula.on.ca/canbmothers/churley.htm> (last visited June 26, 2001). See also Shirley Senoff, *Open Adoption in Ontario and the Need for Legislative Reform*, 15 CAN J.

Standing Committee on Social Development in Ontario proposed as early as 1994 enacting legislation that would provide adult adoptees and birth parents with greater access to information, these efforts have not yet succeeded.²²⁵ Reform legislation that would provide identifying information to adult adoptees and birth parents was introduced in Nova Scotia as well in 2000, by the new Premier, John Hamm, but failed to make it through the legislature.²²⁶ Reforms have also been suggested in Quebec to implement a disclosure veto system, but have not yet resulted in new legislation.²²⁷

Thus, regarding the disclosure of identifying information, Canada appears to be following a track similar to that of the United States, but it is further down the path. The disclosure of identifying information to both adults and birth parents through governmental search programs, with consent of the subject of the search, is almost universal in Canada, and disclosure subject to a disclosure veto is in wider use among the provinces than it is among American states. Release of identifying records upon demand to adult adoptees, at least in prospective adoptions, is gaining broader acceptance as well, and at a proportionately faster rate than in the United States. Moreover, the Canadian provinces appear to be more willing, when they open records, to grant birth parents privileges to obtain identifying information similar to those granted to adult adoptees, once the adopted children have reached the age of majority.

Less legislative attention appears to have been paid to the disclosure of medical and social history information in Canada. In British Columbia²²⁸ and Manitoba,²²⁹ and under the soon-to-be proclaimed Adoption Act of Newfoundland,²³⁰ birth parents who file a disclosure or contact veto may, but are not required, to file medical and social history information. The provincial statutes generally make non-identifying information

FAM. L. 183 (1998); Michele Landsberg, *Get with the 21st Century: Open Records for Adoptees*, TORONTO STAR, Aug. 7, 1999, at L1.

225. LAW REFORM COMM. OF THE L. SOC'Y OF IR., *Adoption Law: The Case for Reform* (2000), at [http://www.lawsociety.ie/Adoption\(report\).htm](http://www.lawsociety.ie/Adoption(report).htm) (last visited Sept. 16, 2001).

226. PARENT FINDERS OF CAN., NOVA SCOTIA, UPDATE OF JANUARY, 2000, at http://www.parentfinders.org/News_NS.htm (last modified June 15, 2001).

227. Canadian Press Newswire, *Quebec May Become Second Province to Open its Adoption Records*, GLOBAL NEWS, Jan. 24, 2000 (reporting on expected release of government report recommending opening records with disclosure veto option); *see also*, Bill Modifying the Civil Code of Quebec and the Youth Protection Act, September 27, 1996, presented to the National Assembly by Desaulniers, available at http://www.total.net/adoption/a_proposition_de_projet_loi/bill_of_law.htm.

228. British Columbia Adoption Act, R.S.B.C., ch. 5, §§ 65–66 (1996), available at <http://www.qp.gov.bc.ca/stat/A/96005.01.htm>.

229. The Adoption and Consequential Amendments Act, R.S.M., ch. 47, §§ 112(3), 113(3) (1997), available at <http://www.gov.mb.ca/chc/statpub/free/pdf/a002.pdf>.

230. Adoption Act, S. NFLD., ch. A-2.1, §§ 50, 51 (1999) (Assented to December 14, 1999, not yet proclaimed), available at <http://www.gov.nf.ca/hoa/statutes/a02-1.htm>.

available to adoptive parents, at least during their child's minority, and to adopted adults.²³¹ British Columbia specifically regulates by statute the collection and retention of medical and social history and requires disclosure to prospective adoptive parents,²³² and Manitoba specifically requires it in private adoptions.²³³ Prince Edward Island permits, but does not require disclosure of background information to prospective adoptive parents,²³⁴ and many of the other provinces do not appear to address pre-adoption disclosure to adoptive parents in their statutes.²³⁵

Thus, although reform addressing the disclosure of identifying information to adult adoptees and birth parents in Canada is more widespread than reform efforts in the United States, Canada's legislation addressing the collection, disclosure, and supplementation of medical and social history is far less comprehensive. Both countries have lagged behind the United Kingdom, which embraced legislation opening records to adoptees and addressed the collection of non-identifying information decades earlier. As will be seen in the following section, however, the recent reform efforts in Canada and the United States have been more receptive to the interests of birth parents than have been recent reform movements in the United Kingdom.

C. United Kingdom

Although earlier English law incorporated some practices that were "quasi-adoptive," statutory adoption came later to the United Kingdom than it did to the United States or Canada. This is often attributed to the importance of blood lineage in the British social hierarchy and legal system at the time, as well as to the strong disapprobation associated with

231. *E.g.*, Child and Family Services Act, R.S.O., ch. C-11, § 166 (1990), available at http://192.75.156.68/DBLaws/Statutes/English/90c11_e.htm.

232. British Columbia Adoption Act, R.S.B.C., ch.5, §§ 6, 8, 9 (1996), available at http://www.qp.gov.bc.ca/statreg/stat/A/96005_01.htm.

233. The Adoption and Consequential Amendments Act, R.S.M. ch. 47 §§ 50(g)(i), 56(b), 67(g)(i) (1997), available at <http://www.gov.mb.ca/chc/statpub/free/pdf/a002.pdf> (medical and social history must accompany application for order of adoption; in private adoptions, the agency is required to obtain medical and social history of child and birth parents and share it with prospective adoptive parents).

234. Prince Edward Island Adoption Act, R.S.P.E.I., ch. A-4.1, § 48 (1992), available at <http://www.gov.pe.ca/law/statutes/pdf/a-04-1.pdf>.

235. New Brunswick requires adoptive parents to include with their adoption petition to the court a social and health history of the child, the parents, and the adopting parents prepared in accordance "with the regulations." New Brunswick Family Services and Family Relations Act, R.S.N.B., ch. 16, § 8, ¶ 75(3) (1983), available at <http://www.gov.nb.ca/justice/acts/f%2D02%2D2.htm>. The collection of medical and social history and its disclosure to prospective adoptive families may be regulated in other provinces by administrative regulations that are not readily accessible to this author.

illegitimacy.²³⁶ The first general adoption statute was enacted in 1926 for England and Wales, in 1929 for Northern Ireland, and in 1930 for Scotland.²³⁷

Under early English adoption law, the same paradigm that fostered closure of records in the United States and Canada in mid-century was reflected in provisions requiring a court order for adult adoptees to access records containing identifying information.²³⁸ Pointing to the “twin stigmata of infertility and illegitimacy” that has shaped many Western adoption systems, scholars suggest that adoption in Great Britain was “associated with secrecy, which has served to preserve certain social standards of morality and normality, as well as, within certain constraints, the reputation of individuals.”²³⁹

Only in Scotland were adoption and birth records made accessible to adult adoptees continuously since the introduction of statutory adoption. Dr. John Triseliotis, who published an important study regarding access to identifying information and reunions in the 1970s, concluded that it is improbable that in 1930 the open records provision was motivated by recognition of the importance of identity.²⁴⁰ It was more likely prompted, he suggests, by inheritance laws that until 1964 permitted adopted individuals to inherit from birth parents but not their adoptive parents.²⁴¹

By the 1970s, the shift to the new paradigm of adoption had clearly superceded the “rebirth” philosophy in Great Britain and motivated significant reform. In the early 1970s a group of professionals in the fields of law, social work, psychiatry, government, and medicine were commissioned to perform a major assessment of adoption law in Great Britain, including the issue of access to information. Although an earlier working draft of this Departmental Committee on the Adoption of Children (often referred to as the Houghton Committee) expressed a preference for retaining English law and recommending that Scottish law be amended to close access, the Committee reversed this position in its final report, in

236. Hollinger, *supra* note 10, at 1-19; WEGAR, *supra* note 9, at 24.

237. Shatter, *supra* note 11, at 445.

238. Cf. TRISELIOTIS, *supra* note 58, at 1 (observing that the provision in Scottish law making identifying information available to adopted persons was not included in the English Adoption Act of 1926, and that English law required a court order to inspect registers that would provide identifying information).

239. WEGAR, *supra* note 9, at 36-37 (quoting ERICA HAIMES & NOEL TIMMS, *ADOPTION, IDENTITY AND SOCIAL POLICY: THE SEARCH FOR DISTANT RELATIVES* 77 (1985)).

240. TRISELIOTIS, *supra* note 58, at 1. No minutes of the discussion of the Scottish Standing Committee in the House of Commons that inserted the relevant section in the Scottish Adoption Act of 1930 were kept. *Id.*

241. *Id.*

large part due to the influence of the research of Dr. Triseliotis.²⁴² Interviews with 70 adoptees who had obtained their original birth records suggested that access was valuable to these adults in fostering their sense of identity,²⁴³ and the Scottish Registrar who released records had received no complaints from birth parents who had been traced.²⁴⁴ The Committee was also influenced by the changing perceptions of adoption professionals, observing in its report the “growing acceptance that bringing up children by adoption is different from bringing up natural children.”²⁴⁵ Recognizing that disclosure of information about birth families “is not easily reconciled with some aspects of the concept of adoption as a completely new start,” the Committee supported “changing attitudes” toward “more openness about family and social matters” and “more honesty about the adoptive status” of the child.²⁴⁶

The Houghton Committee recommended that access remain open in Scotland and that the law of England and Wales be revised to permit all adopted persons to obtain access to their original birth records upon reaching the age of 18.²⁴⁷ This reform was accomplished in the English Adoption Act of 1976,²⁴⁸ which also established a passive register to facilitate searching.²⁴⁹

In addition, the Committee suggested that agencies utilize pediatric advisors to consult prior to placement, and that a full health history of the child and his family be obtained and provided to prospective adoptive parents, to enable them to make a decision regarding the child with full knowledge of any potential medical problems or special needs the child might have in the future.²⁵⁰ These suggestions were implemented in England and Wales through adoption agencies regulations in 1983,²⁵¹ and

242. HOME OFFICE, SCOTTISH EDUC. DEP'T, REPORT OF THE DEPARTMENTAL COMM. ON THE ADOPTION OF CHILDREN 84-86 (1972) [hereinafter REPORT OF THE DEPARTMENTAL COMM.].

243. TRISELIOTIS, *supra* note 58, at 159-60, 166.

244. REPORT OF THE DEPARTMENTAL COMM., *supra* note 242, at 85.

245. *Id.*

246. *Id.* at 8, 85.

247. *Id.* at 86-87.

248. Adoption Act, 1976, c. 36, §§ 50-51 (Eng.).

249. *Id.* § 51A.

250. REPORT OF THE DEPARTMENTAL COMM., *supra* note 242, at 95-97 (observing that prior practice utilized a form that omitted the family health history and required little comment on the child's development).

251. Adoption Agencies Regulations, (1983) SI 1983/1964 Regs. 6, 7, 12, 13A (Eng.). Regulation 12 requires an adoption agency that has located a prospective adoptive parent for a particular child to provide to the prospective adopter written information about the child, his personal history and background, including his religious and cultural background, and his health history and current state of health. If the placement is accepted by the prospective adopter, a written report of the child's health history and current state of health must be sent to the prospective adopter's registered medical practitioner before placement. Regulation 13A

in Scotland through similar regulations,²⁵² which mandate the appointment of medical advisors and a thorough collection of health and social history from both mother and father, and require that a written report about medical and social history be provided to prospective adopters before placement. These regulations also mandate that adoption agency records be maintained for 75 years,²⁵³ in accordance with another of the Committee's recommendations.²⁵⁴

Adoption law and practices have been the subject of another major review in England during the past year, in which disclosure issues have surfaced in two contexts. Although adult adoptees now have access to their birth records by law, access to information in court records is subject to court discretion.²⁵⁵ A government Performance and Innovation Unit Report issued in July 2000²⁵⁶ and a White Paper²⁵⁷ addressing adoption presented to Parliament in December 2000 revealed that the exercise of that discretion resulted in inconsistent access to information across the country. In addition, the requirement in current law that counseling be required for those adopted before November 12, 1975 and offered to those adopted after that date, before they receive their birth records, proved unduly restrictive, given the limitations upon who could provide such counseling and the other duties required of those professionals.²⁵⁸ One of the eight recommendations for legislative reform included in the White Paper was to "provide adopted people with access to information about their history."²⁵⁹ To implement this recommendation, an Adoption and Children Bill was introduced in Parliament in 2001 that would give adopted adults the right to certain documents in court records, and any information in court records that the agency provided to the adoptive

requires agencies to provide adopters with "such information about the child as they consider appropriate" as soon as practicable after making the adoption order.

252. The Adoption Agencies Regulations, (1996) SI 1996/3266, Regs. 6, 8, 9, 19, 25 (Scot.).

253. Adoption Agencies Regulations, (1983) SI 1983/1964 Reg. 14 (Eng.); The Adoption Agencies Regulations, (1996) SI 1996/3266, Reg. 23 (Scot.).

254. See REPORT OF THE DEPARTMENTAL COMM., *supra* note 242, at 86.

255. Adoption Rules, Rule 53 (1984) SI 1984/265, (Eng.). The Court Rules of Scotland, by contrast, give an adopted person access to court records at the age of 16. Act of Sederhunt (Child Care and Maintenance Rules) (1997) SI 1997/291, Rules 2.4 § 2, 2.33 § 2 (Scot.).

256. Performance and Innovation Unit Report, Cabinet Office, July 2000 [hereinafter PIU Report], Part 3, at 31, *available at* <http://www.cabinet-office.gov.uk/innovation/2000/adoption/html/o3.htm> (last visited Nov. 4, 2001).

257. SECRETARY OF STATE FOR HEALTH, ADOPTION: A NEW APPROACH, White Paper at 16 (2000), *available at* <http://www.doh.gov.uk/adoption/whitepaper.pdf> [hereinafter White Paper].

258. PIU Report, *supra* note 256, Part 3, at 31, Part 5, at 7.

259. White Paper, *supra* note 257, at 5.

parents pursuant to regulation.²⁶⁰ The Act also broadens the types of agencies permitted to provide predisclosure counseling.²⁶¹

The other concern has been that the amount of information given to prospective adopters and the time of its disclosure are up to the discretion of the agency.²⁶² The practice is in fact quite variable. Mr. James Payton, Department of Health Bill Principal for the Adoption and Children's Bill, observed that adopters have expressed dissatisfaction over the issue of release of information, sometimes contending that they are not getting full information early enough in the process for them to take it into consideration when making a decision. The White Paper alluded to this problem, suggesting that prospective adopters must be given full written information on children currently waiting to be adopted.²⁶³ Draft National Adoption Standards issued by the British Department of Health, scheduled to be implemented soon, will require that approved adopters be given "full information to help them understand the needs and background of the particular children awaiting adoption, including any risks to the family or to other children."²⁶⁴ The Department of Health currently anticipates developing a Code of Practice, after the fate of the Adoption and Children's Bill has been determined, which would underpin the broad statements in the regulations about the provision of information to prospective adoptive parents and examine what information should be provided when.²⁶⁵

260. Adoption and Children Act 2001, No. 113, § 48, available at <http://www.baaf.org.uk/home.htm>. The Act was not enacted during the Parliamentary session in which it was introduced. Ben Russell, *Hunting Bill among Seven Statutes Abandoned in Deal with Tory Whips*, INDEP. (LONDON) May 9, 2001, at 2. The bill failed because a general election was called before consultation could be completed, and not due to strong political opposition. It is likely that it will be reintroduced when Parliament reconvenes, and has support from both parties. E-mail from Jennifer Lord, Child Placement Consultant, British Agencies for Adoption and Fostering, to Marianne Blair, Professor, University of Tulsa College of Law (June 6, 2001) (on file with author); E-mail from Phil Bates, Professor, Law School, King's College, London, to Marianne Blair, Professor, University of Tulsa College of Law (May 30, 2000) (on file with author).

261. Adoption and Children Bill, 2000-01, Bill 66, § 64 (Eng.), available at <http://www.baaf.org.uk/home.htm> (this bill has not passed into law during this session).

262. See *Children and Young Persons*, (1983) SI 1983/1694, Reg. 12 (Eng.).

263. White Paper, *supra* note 257, at 33.

264. UK DEPARTMENT OF HEALTH, DRAFT NATIONAL ADOPTION STANDARDS FOR ENGLAND, SCOTLAND AND WALES, at <http://www.doh.gov.uk> (last visited Oct. 20, 2001). Mr. James Payton of the Department of Health reported that the Draft National Standards would be implemented if the current government was retained in the election, which occurred subsequent to our conversation. E.g., Warren Hoge, *Blair Leads Labor to Second Sweep Over the Tories*, N.Y. Times, June 8, 2001, at A1. Mr. Payton also noted that implementation of the Standards was not dependent upon passage of the Adoption and Children's Bill Act. Telephone interview with Mr. James Payton, Bill Principal for the Adoption and Children's Bill, Dep't of Health, Gr. Brit. (May 20, 2001).

265. Telephone interview with Mr. James Payton, *supra* note 264.

The inspiration for the current examination of adoption through the PIU report and the White Paper was to facilitate increased use of adoptive placement for the 58,000 children currently in protective care in England.²⁶⁶ Among many other reasons suggested for the perceived underutilization of adoptive placement, the report noted that in 1999–2000, 18% of adoptive placements of children in protective care broke down before an adoption order was made.²⁶⁷ Given the link social scientists have discovered between incomplete disclosure of background information prior to placement and adoption disruption,²⁶⁸ increased regulation promoting uniformity and comprehensiveness in the release of information may well be an important goal to be pursued.

Scotland has also engaged in recent reform of its adoption disclosure legislation. In 1997 the age at which an adoptee can seek identifying information from the Registrar General was lowered from 17 to 16 years of age.²⁶⁹

Despite the current interest in Great Britain in the disclosure of adoption information, however, there has been no corresponding movement to afford birth mothers access to records or information enabling them to find their adopted children, other than through passive registries that require an adoptee to initiate a registration before a match can be made. In fact, in the recent appellate case of *In re L*,²⁷⁰ the court confirmed the denial of a request by a birth mother for a confidential intermediary to obtain non-identifying information regarding how her daughter was faring. The daughter, an adult in her mid-30s who had been placed for adoption in infancy, had not registered with the passive registry.²⁷¹ The Court, expressing concern that the adult adoptee might be distressed by the request, or that she may be unaware that she was adopted, determined that the circumstances must be exceptional to grant such a request, and the understandable emotional desire of a birth parent to obtain information about her child was insufficient justification.²⁷² Although apparently some consideration was given during the development of the recent adoption reform legislation to moving towards an active

266. See White Paper, *supra* note 257, at Foreword, Executive Summary at 4; PIU Report, *supra* note 256, at Foreword.

267. White Paper, *supra* note 257, at 15; PIU Report, *supra* note 256, Part 2, at 11.

268. See BARTH AND BERRY, *supra* note 48; *supra* note 175 and accompanying text.

269. Adoption (Scotland) Act, 1978, c. 28, § 45(5) (Eng.), *amended by* Children (Scotland) Act, 1995, c. 36, sched. 2(22) (Eng.).

270. *In re L*, 1996 Fam. 19 (Eng. C.A. 1996), 1996 WL 1091028 (Eng. CA Dec. 12, 1996).

271. *Id.* at 21, 24.

272. *Id.* at 22, 28.

registry that would afford birth parents the ability to search, there was not sufficient support for the idea to pursue it at the time.²⁷³

It is interesting to contrast the approach of the British on this issue with the recent reform proposals introduced in the Republic of Ireland. Though the Irish government has been far slower than American, Canadian, or British governments to open records or create governmental systems for the disclosure of information, legislation now under consideration would surpass most jurisdictions in all three countries in the access to identifying information that it would afford both adult adoptees and birth parents, as will be examined in the next section.

D. Republic of Ireland

Because the first adoption statute was not enacted in the Republic of Ireland until 1952,²⁷⁴ when concern over anonymity was at its peak in other Western countries, it is not surprising that closed records have been the prevailing norm in Ireland during much of the past half century. As of now, adoptees do not have a statutory right of access to identifying information, nor do birth parents have a statutory right to information that would facilitate a search for a child who was adopted. A court or the Adoption Board, An Bord Uchtála, may release records if they find it is in the best interest of the child to do so.²⁷⁵ Until recently, An Bord Uchtála very rarely released records to adoptees,²⁷⁶ but in the past few

273. Telephone interview with Mr. James Payton, *supra* note 264. The approach of the United Kingdom thus far, suggested Mr. Payton, is that the call is the adopted person's choice.

274. SHATTER, *supra* note 11, at 445-46. The vast increase in the number of orphans and illegitimate children in the aftermath of World War I gave impetus to the enactment of adoption statutes in many European countries between the two World Wars. *Id.* Mr. Shatter suggests that the reluctance of Ireland to enact legislation sooner was due to a variety of factors, including (1) a fear parents would place their children with inadequate people or sell them, (2) opposition by the Roman Catholic Church grounded in concern that Protestant families would adopt Catholic children, (3) recognition that adoption of a child could interfere with another child's inheritance rights, and (4) concern that it would be unjust and perhaps unconstitutional to permit parents to permanently waive their rights to their child. *Id.*

275. Section 22 of the Adoption Act 1952 provides that the index that records the connection between an entry in the Adopted Children Register and the corresponding entry in the Register of Births is not open to public inspection; information from that index may be released only by order of the court or by An Bord Uchtála. Adoption Act 1952. Pursuant to Section 8 of the Adoption Act 1976, a court may order release of information in the records of An Bord Uchtála only if the court is satisfied that it is in the best interests of the child to do so. Adoption Act 1976. In *C.R. v. An Bord Uchtála*, the High Court confirmed that An Bord Uchtála must apply the same best interests standard as would the court when it receives an application for release of confidential information. [1993] 3 I.R. 535, 541 (Ir. H. Ct.).

276. In *C.R. v. An Bord Uchtála*, the High Court rejected what it viewed as a "blanket policy" of refusal to open records, and determined that An Bord Uchtála must conduct an individualized determination involving screening both the adopted person and the birth parent who is being traced. [1993] 3 I.R. 535 (Ir. H. Ct.). Though the decision must be made by An

years, that policy has changed. Currently, the Board makes a case by case determination²⁷⁷ after contacting the birth parent and providing counseling to the adoptee. Though the consultation process creates delays,²⁷⁸ most requests for records have been granted in the past few years.²⁷⁹

Like many U.S. courts,²⁸⁰ the Supreme Court of Ireland in 1998 was called upon to address the conflicting constitutional interests implicated in a request for disclosure of identifying information. *I.O'T. v. B.*²⁸¹ consolidated actions brought by two women who had been placed for de facto adoption (before legal adoption became available in Ireland), who were seeking an order directing the agency that placed them to disclose to them the identities of their birth mothers. Four of the five justices hearing the case determined that the right of a child to know the identity of her parents, though not absolute or unqualified, is an unenumerated right of privacy guaranteed by Article 40.3.1 of the Irish Constitution,²⁸² which requires the state to guarantee the "personal rights" of its citizen. Writing for the majority, Chief Justice Hamilton declared:

'Though not specifically guaranteed by the Constitution, the right to privacy is one of the fundamental personal rights of the citizen which flows from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, by the requirements of the common good and it is subject to the requirements of public order and morality.' The right to know the identity of one's natural mother is a basic right flowing from the natural and special relationship which exists between a mother

Bord Uchtála, the Court held, adoption agencies may perform the screening and counseling and provide advice on the issue of disclosure. *Id.* at 538, 541-42.

277. Telephone Conversation with Thomas Doyle, Exec. Officer, An Bord Uchtála (Nov. 30, 1999); Letter from David Wolfe, Registrar, An Bord Uchtála, to Prof. Marianne Blair (Oct. 21, 1999) (on file with author).

278. Recent media reports suggest that the consultation process is lengthy, and that during the previous year only forty-five certificates were issued, even though 139 requests had been received. Pdraig O'Morain, *Adopted People May Get Access to Birth Certificates*, IR. TIMES, May 21, 2001, at 1.

279. Pdraig O'Morain, *Adoption Board Is Granting Access to Names of Mothers*, IR. TIMES, June 30, 1999, at 1; *Adoption Files Open*, IR. MIRROR, July 1, 1999; *New Chance to Reunite with Missing Parents*, IR. INDEPENDENT, July 3, 1999; *New Policy Is a Welcome Boost for Adoptees*, EXAMINER, July 1, 1999. It was reported that in 1999 only two applicants were refused their original birth certificates. O'Morain, *supra* note 278.

280. See *supra* notes 152-67 and accompanying text.

281. *I.O'T. v. B.*, [1998] 2 I.R. 321 (Ir. S.C.).

282. Article 40.3.1 provides: "The State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen." Art. 40.3.1, Constitution of Ireland, 1937.

and her child, which relationship is clearly acknowledged in [prior case law]. The existence of such right is not dependent on the obligation to protect the child's right to bodily integrity or such rights as the child might enjoy in relation to the property of his or her natural mother but stems directly from the aforesaid relationship. It is not, however, an absolute or unqualified right: its exercise may be restricted by the constitutional rights of others, and by the requirement of the common good.²⁸³

At the same time, all five justices found that a birth mother who opposes disclosure and who was promised confidentiality at the time of placement has her own constitutional right to privacy, although her right to privacy also is not absolute. Writing for the majority, the Chief Justice created a balancing test to be used when those rights cannot be harmonized, suggesting consideration of the following factors:

- the circumstances giving rise to the relinquishment;
- the birth mother's present circumstances and the effect of the disclosure on her;
- the birth mother's attitude toward disclosure and her rationale;
- the ages of the birth mother and adoptee at the time of the disclosure request;
- the reasons the adoptee wishes to know and meet the birth mother;
- the present circumstances of the adoptee; and
- the views of the adoptive parents.²⁸⁴

The court recommended that a social worker should contact the birth mothers to determine their wishes and report to the court, so the court could make a determination as to whether it was necessary to require them to participate in the proceedings. Given the advanced age of many birth mothers, the Chief Justice agreed with the following assessment of the Circuit Court Judge:

I would not be at all happy, nor do I think it would be a safe course for the court to adopt, to compel a natural mother of her age to endure what, may be for her a significantly traumatic and anxiety provoking participation in these proceedings without a

283. *I.O'T. v. B.*, 2 I.R. at 348 (quoting *Kennedy v. Ireland*, [1987] 1 I.R. 587, 592 (Ir. H. Ct.)).

284. *Id.* at 355.

full report from an appropriate professional skilled person in this area.²⁸⁵

The applicability of the decision to legal adoptees remains an open question. At one point the court distinguished the petitioners, de facto adoptees who remain legally the children of their birth parents, from legal adoptees who are the legal children of their adoptive parents.²⁸⁶ Nevertheless, the court also observed that the right to know one's identity was a basic right and not dependent upon the child's right to bodily integrity or the existence of property rights (which would be retained by de facto but not legal adoptees).²⁸⁷ As Justice Barron observed in his concurring opinion, the emotional impact of disclosure on the adoptee and the birth parent should be the primary consideration.²⁸⁸ If psychological needs are in fact at the center of recognition of a constitutional right to know one's identity, extension of this right to the legally adopted would seem inevitable.²⁸⁹

It is interesting to contrast the Irish Supreme Court's constitutional treatment of the disclosure of identifying information with that of U.S. courts. Though Ireland's Supreme Court found both the interests of adoptees who seek identifying information and the privacy interests of birth parents opposing disclosure to be constitutionally protected, and the U.S. courts rejected the constitutional claims of both groups, in neither constitutional contest did one group emerge victorious. Ireland's constitutional approach appears preferable to the traditional good cause hearings in the United States, because it requires individualized determinations rather than placing the burden on an adoptee to prove good cause, often without knowledge of the birth mother's wishes or the intensity of her feelings.²⁹⁰ However, Ireland's recognition of the constitutional rights of both birth mothers and adoptees may restrict the government's options to try new approaches. That potential became evident two years later, in the spring of 2000, when the Law Reform Committee of the Law Society of Ireland issued a position paper on adoption in which they revealed that the *I.O'T. v. B.* decision had

285. *Id.* at 354.

286. *Id.* at 348.

287. *Id.*

288. *Id.* at 379 (separate opinion of Barron, J.).

289. Despite the author's analysis above, it should be noted that the Law Reform Committee of the Law Society of Ireland reads the decision more narrowly, concluding that the Chief Justice "appears to take the view that lawfully adopted children will not, under any circumstances, be able to assert the right to know the identity of their birth mothers," a position the Committee itself takes issue with. *Adoption Law: The Case for Reform*, at [http://www.lawsociety.ie/Adoption\(report\).htm](http://www.lawsociety.ie/Adoption(report).htm) (2000) (hereinafter LAW REFORM COMM. OF THE L. SOC'Y OF IR.).

290. See *supra* notes 133-38 and accompanying text.

significantly influenced their ultimate recommendations. The Committee stated that although they favored giving adult adoptees an absolute right to identifying information, and permitting birth parents to lodge a contact veto, they read the *I.O'T.* decision to preclude this alternative, and therefore opted for a disclosure veto system.²⁹¹ While recognition of the importance of the interests at stake is vital to effectuating the new adoption paradigm, constitutionalizing the rights at issue could hamper the flexibility necessary to resolve this sensitive issue.

Despite the potential constitutional concerns of the Law Reform Committee, however, the current government of Ireland apparently has not interpreted *I.O'T. v. B.* as restrictively. In May, 2001, the Minister of Children, Mary Hanafin, announced that the Cabinet approved the Heads of a Bill that would permit all adult adoptees access to their birth certificates and personal information from their files.²⁹² Those adopted after the legislation is enacted would also be entitled to relevant information about their birth parents. In addition, responding to the Law Reform Committee's recognition of the interests of many birth parents in tracing their children, birth parents will have the right to a copy of the adoption certificate and personal information from the file, regardless of when the adoption took place.²⁹³ A contact veto register would be created so that adoptees and birth parents may register their wish not to be contacted.²⁹⁴ In accordance with other recommendations of the Law Reform Committee, counseling will be made available to both adoptees and birth parents, and a state-funded voluntary contact register and tracing and reunion service will be established, along with a National Search Service and

291. LAW REFORM COMM. OF THE L. SOC'Y OF IR., *supra* note 289. The Committee recommended that adult adopted persons, their adult siblings, and birth parents should be granted a qualified statutory right to information, subject to a right of adoptees and birth parents to veto the disclosure of identifying information. Such vetoes could be registered with an Information Veto Register administered by the Adoption Board, the Committee suggested. An adoptee or birth parent wishing to register a veto would indicate such an intent by post, and the veto would be confirmed after a personal visit from a qualified official who could explain the issues involved and discuss non-identifying information that could be made available. A veto could be revoked at any time, and would need to be renewed every five years, following contact by registry personnel to ascertain the wishes of the party who lodged the veto. Because identifying information under this proposed scheme could be released upon request unless a veto is in place, the Committee recommended an extensive media campaign to publicize the veto system, as well as implementation of methods to inform affected parties of attempts by others to access records or make contact, and to seek out those living in remote areas or isolated conditions who may otherwise fail to make application.

292. Press Release, Dep't of Health and Children, An Roinn Slainte Agus Leanai, Republic of Ireland, Hanafin Announces New Draft Legislation on Adoption Information (May 24, 2001), at <http://www.doh.ie/pressroom/pr20010524.html>. See also O'Morain, *supra* note 278.

293. Press Release, Dep't of Health and Children, *supra* note 292.

294. *Id.*

National Files Index to be operated by the Adoption Board.²⁹⁵ The bill would also extend information rights to those raised in protective care, who were removed from their parents' custody but not adopted.²⁹⁶ Particularly novel is the proposal that birth parents will have the right in adoptions concluded after the legislation is enacted to information about their child's progress and well being while the child is under the age of eighteen.

The disclosure of non-identifying medical and family background information to adoptive parents is at present left to agency discretion and not regulated by statute, although An Bord Uchtála's current policies direct agencies to provide adoptive parents with a medical report on a short standardized form.²⁹⁷ Following recommendations of the Law Reform Committee, the proposed new legislation would create a statutory right of the adoptive parents of a child under the age of eighteen to non-identifying information on the child's medical and family background. The Committee's report does not address the provision of information to prospective adoptive parents, however, nor is there mention of this topic in the description of the draft legislation.

Lack of attention to this issue may be influenced by the fact that relatively few non-relative domestic adoptions occur each year (e.g., 93 in 1998)²⁹⁸ and most of these involve infants and toddlers. This, combined with An Bord Uchtála's administrative policies that mandate disclosure of some health history to adoptive parents, may have diminished the chances that serious health risks have thus far gone undisclosed and caused severe repercussions. Unlike the situation in the United States and England, children in protective custody of the state in the Republic of Ireland have only rarely been adopted,²⁹⁹ due to stringent legal restrictions on non-consensual adoptions. Nevertheless, as calls increase to provide these children with more permanent familial arrangements,³⁰⁰ the provision of statutory rights to prospective adoptive parents to receive full medical

295. *Id.*

296. *Id.*

297. Telephone Conversation with Mr. Thomas Doyle, *supra* note 277.

298. LAW REFORM COMM. OF THE L. SOC'Y OF IR., *supra* note 289.

299. Paul Ward, *Life, Death and Divorce*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 287, 312–15 (Andrew Bainham ed., 1995). Tom Doyle, Executive Officer of An Bord Uchtála, indicates that only ten to twenty long-term foster children are adopted in Ireland per year. Telephone Interview by Paul Ward with Tom Doyle, Exec. Officer, An Bord Uchtála, Dublin, Ir. (July 25, 2000). See also Dr. Kerry Joseph O'Halloran, *Adoption in the Two Jurisdictions of Ireland—a Case Study of Changes in the Balance Between Public and Private Law*, 4 IR. J. FAM. L. 43, 51, 53 n. 19 (April 2001) (Of the 400 adoption orders made in 1998, only one involved a child with special needs and only one involved a child subject to a care order.).

300. See, e.g., Geoffrey Shannon, *Editorial*, 4 IR. J. FAM. L. 1 (2000).

and social history would ensure appropriate placements and enable adoptive families to meet their children's special needs.

II. THE INFLUENCE OF INTERNATIONAL LAW ON DISCLOSURE RIGHTS

During the past century, the scope of international law has extended well beyond the conduct of foreign relations and regulation of territorial boundaries that were its predominant focus in an earlier era. The development of human rights treaties and customary norms, as well as the rapid growth of conventions regulating transnational relationships, has extended the impact of international law to the realm of family law, affecting not only international adoptions, but the conduct of domestic adoptions as well. This Section therefore extends our examination beyond domestic law, and considers the impact of both global and regional conventions, as well as customary international law and general principles of international law, on the rights of adopted individuals and their birth and adoptive parents to both identifying and non-identifying information during and subsequent to the adoption process.

A. Identifying Information

It has frequently been asserted that the right of an adult adoptee to know the identity of her birth family is a human right that must be unequivocally recognized and honored without exception.³⁰¹ It is certainly true that many would find such a statement true as a matter of moral imperative, but is it true as a matter of international law? A number of international conventions, as well as customary international law and general principles of international law, could potentially have a bearing on the resolution of this question. Foremost among them is the Convention on the Rights of the Child ("CRC"),³⁰² which has been frequently cited by advocates of adoptees as the source of a right to identifying information. While such a right may be evolving under the CRC, its legislative history does not confirm that creation of an absolute right to such information was the original intent of the drafters.³⁰³ Moreover, sub-

301. See, e.g., *Bastard Nation Action Alerts*, at <http://www.bastards.org/alert> (last visited Nov. 16, 2001); George Annon, *Ethics in a World Ruled by Law and the Market Adoption*, Speech Summary (Nov 3, 1999), at <http://www.bastards.org/bq/bq/edrep.htm>; Denise Castellucci and Damsel Plum, *Ethics and Adoption*, at <http://www.bastards.org/documents/world.html> (last visited Nov. 16, 2001); Peter F. Dobbs, *International Adoption: Opening Pandora's Box*, at <http://www.bastards.org/bq/dodds1.htm> (last visited Nov. 16, 2001).

302. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (hereinafter CRC).

303. See *infra* notes 309–37 and accompanying text.

sequent practice under the Convention reveals conflicting interpretations by various state parties and the absence of consistent recognition and enforcement of such a right by the CRC's implementing body, the Committee on the Rights of the Child.³⁰⁴ The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption also regulates the retention of identifying information, but does not mandate its release.³⁰⁵ Implementing legislation in the United States, however, may make some information transmitted in the course of an international adoption available. Various regional conventions, such as the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, and the Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, focus on preserving confidentiality.³⁰⁶ Recent decisions of the European Court of Human Rights, interpreting a general right to privacy and familial life under the European Convention for the Protection of Human Rights and Fundamental Freedoms, recognize the importance of both rights to information and rights to privacy, neither of which is unequivocal, and suggest a balancing approach.³⁰⁷ Moreover, the current practices of the nations of the world regarding release of identifying information are not sufficiently uniform to support an absolute right to information under customary international law or general principles of law.

Thus, examination of these conventions and doctrines in the following subsections supports the conclusion that the right of adopted individuals to identifying information and the right of birth parents to privacy both receive some support under international law. While the importance of access to identifying information for adult adoptees is receiving increasing recognition under international law, it can not yet be said that an absolute right to such information is created by international conventions, customary international law, or general principles of international law.

1. Convention on the Rights of the Child

One of the primary sources upon which proponents of open adoption records rely is the Convention on the Rights of the Child (CRC).³⁰⁸ Drafted under the auspices of the United Nations, the convention entered into force on September 2, 1990, and in ten years has been ratified by

304. See *infra* notes 338–71 and accompanying text.

305. See *infra* notes 374–79 and accompanying text.

306. See *infra* notes 382–88 and accompanying text.

307. See *infra* notes 389–403 and accompanying text.

308. CRC, *supra* note 302.

every nation in the world except the United States of America and Somalia.³⁰⁹ The Convention's genesis was a draft convention introduced to the U.N. Commission on Human Rights by the Polish delegation in 1978.³¹⁰ A working group was appointed by the Commission and met annually from 1979 through 1988 to revise the draft.³¹¹

A review of the discussions and proposals of this group related to the three articles of the Convention that have a bearing on the disclosure of identifying information to adopted individuals, the reflections of scholars who participated and subsequent academics who assessed the group's work, and implementation of the Convention through states reports and the work of the Committee on the Rights of the Child, suggest that the CRC does not create an unequivocal right to disclosure of identifying information. Moreover, despite references in Article 7 of the CRC requiring implementation of rights in other international instruments, the U.N. Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement Nationally and Internationally, does not establish an absolute right to identifying information that could become binding through Article 7 of the CRC.³¹²

a. Article 21

The first CRC article that must be examined is Article 21 on Adoption. Under Article 21, states party to the Convention pledge that, if they have a system of adoption, the best interests of the child shall be the paramount consideration, and they agree to five explicit principles. Reference to disclosure of identifying information is notable for its absence in this article. The legislative history of the Convention indicates that, in 1982, the report of the Working Group to the Commission on Human Rights included a proposal by the United States to add language to the article that would read:

The States Parties to the present Convention shall take all appropriate legislative and administrative measures to safeguard the confidentiality of adoption records and shall permit access to

309. Cynthia Price Cohen & Susan Kilbourne, *Jurisprudence of the Committee on the Rights of the Child: A Guide for Research and Analysis*, 19 MICH. J. INT'L L. 633, 635 (1998).

310. *Id.*

311. See Cynthia Price Cohen, *Role of the United States in Drafting the Conventions on the Rights of the Child: Creating a New World for Children*, 4 LOY. POVERTY L. J. 9, 10, 18 (1998).

312. See *infra* note 372 and accompanying text.

such records only by judicial order in accordance with applicable law and procedures.³¹³

A summary of the discussion indicated that “although it was agreed that confidentiality in respect of family and civil status is on the whole desirable for the sake of family privacy,” the provision might create implementation issues in many countries.³¹⁴ Several delegates also thought this provision was not appropriate within the Convention because the question “had no direct bearing on the rights of the child.”³¹⁵ The proposal was not accepted by the Working Group. In response, the United States submitted an alternate proposal in 1985:

The States Parties to the present Convention may take legislative and administrative measures, where appropriate, to safeguard the confidentiality of the adoption records.³¹⁶

In 1986, however, the United States withdrew the proposal, with the explanation to the Working Group that “since the relevant provision adopted by the Group was neutral on the subject and did not require the disclosure of adoption records, the amendment had been withdrawn on the understanding that [the] delegation might return to it if any later amendment to the Convention made it necessary.”³¹⁷

In 1988 Argentina circulated a report of the Latin American meeting of NGOs, which included among other provisions the following:

In all circumstances, the adopted minor shall have the right to know which is his natural family. This right shall be guaranteed in the judicial proceeding.³¹⁸

However, this provision was never incorporated into the final draft. Thus, while the topic was raised and discussed at least twice during the drafting of Article 21, neither the provision mandating disclosure nor the provisions permitting or mandating confidentiality were retained. Though the topic was of great interest, it appears no clear consensus could be reached.

313. Radda Barnen, *Legislative History of the Convention on the Rights of the Child* (1978–1989), art. 21, at 14 (excerpting the 1982 report of the Working Group to the Commission on Human Rights, ¶¶ 64–90, U.N. Doc. E/CN.4/1982/30/Add.1 (1982)).

314. *Id.* at 14.

315. *Id.*

316. *Id.* at 15 (excerpting U.N. ESCOR, 41st Sess., at Annex II, U.N. Doc. E/CN.4/1985/63 (1985)).

317. *Id.* at 16 (excerpting U.N. ESCOR, 42nd Sess., ¶ 12, U.N. Doc. E/CN.4/1986/39 (1986)).

318. *Id.* at 21–22.

b. Article 7

Article 7 of the CRC, addressing name and nationality, has been suggested as a possible source for a right to identifying information. It provides:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would be stateless.

Most of the discussion and debate surrounding this article during the drafting stage involved the terms under which a child would acquire a nationality, and particularly the tension between the immigration laws of the various potential states parties and the need to ensure that each child acquired some nationality. However, an earlier draft of this article, proposed by Egypt and many of the Arab nations, would have provided that “[a] child shall have the right from his birth to know and belong to his parents. . . .” Egypt suggested their proposal was essential to the psychological stability of the child.³¹⁹

During the same time that this proposal was made to amend Article 7, these same nations objected to the language in Article 21 referring to adoption, suggesting instead that Article 21 should address “alternate care for a child who does not have a natural family.”³²⁰ In the debate over Article 21, those nations argued that the Islamic Shari’a (law) does not permit or recognize the relationship of adoption, providing instead for individual and collective responsibility for raising a child whose parents cannot provide care through *Kahfala* (a relationship similar to guardianship),³²¹ which continues to recognize the child’s relationship with his birth family.³²²

The Egyptian/Arab proposal to amend Article 7 was met with concern expressed by representatives of the German Democratic Republic, the Union of Soviet Socialist Republics, and the United States of America because it conflicted with their laws providing for “secret

319. Barnen, *supra* note 313, at 16–17.

320. *Id.* at 19–20.

321. *Id.* at 20 (excerpting U.N. Doc. E/CN.4/1989/WG.1/WP.3 (1989)). This issue was later resolved by adding language to Article 21 qualifying its application to states parties “which recognize or permit the system of adoption.” *Id.* at 4, 23.

322. See Imad-ad Dean Ahmad, *The Islamic View of Adoption*, 1999 ADOPTION FACTBOOK III 245–46 (observing that under Islamic law, identity is defined by blood).

adoption.”³²³ They suggested that the right to know one’s parents could not be applied everywhere.³²⁴ They also suggested that the use of the word “belong” implied a concept of property that was not applicable to children.³²⁵

A representative of the United States suggested the current language of Article 7, as an alternative to the Egyptian/Arab proposal. This current language qualifies the “right to know one’s parents” with the language “as far as possible,” a compromise text that was accepted by the Working Group.³²⁶ This language, combined with the obligation in para. 2 to implement the right in accordance with national laws as well as relevant international instruments, suggests that the Convention as ratified creates no absolute right to access to identifying records.

c. Article 8

The third article bearing on this issue is Article 8, which addresses Preservation of Identity. Article 8 provides:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law, without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

This article was initially proposed in 1985 by Dr. Jaime Sergio Cedra,³²⁷ an Argentinian representative, and originally read:

The child has the inalienable right to retain his true and genuine personal, legal, and family identity.

In the event that a child has been fraudulently deprived of some or all of the elements of his identity, the State must give him special protection and assistance with a view to re-establishing his true and genuine identity as soon as possible. In particular,

323. Barnen, *supra* note 313, at 17.

324. *Id.*

325. *Id.*

326. *Id.* at 16–17 (excerpting U.N. ESCOR 45th Sess., ¶¶ 92-116, U.N. Doc. E/CN.4/1989/48 (1989)).

327. George Stewart, *Interpreting the Child's Right to Identity in the U.N. Convention on the Rights of the Child*, 26 *FAM. L.Q.* 221, 221 (1992) (citing Convention on the Rights of the Child, G.A. Res. 44/25 U.N. GAOR Annex, U.N. Doc. A/44/736 (1989), reprinted in 28 *I.L.M.* 1456 (1990)).

this obligation of the State includes restoring the child to his blood relations to be brought up.³²⁸

The proposal was inspired by the abduction of children in Argentina between 1975 and 1983, in what has been referred to as the “dirty war,” when several hundred children were either taken from their parents in captivity, or taken at birth from their mothers, who were being held in detention camps. After the junta, family members had great difficulty trying to trace these children, and later discovered that many were given to childless families of military and police officers to raise.³²⁹ Argentina thus wished to establish a duty of states “to preserve or safeguard the identity of the child” and to “establish appropriate mechanisms to reestablish the child’s identity when it has been partly or wholly deprived of it.”³³⁰

In 1986, Poland presented a modified version of Article 8:

1. The States Parties undertake to guarantee to the child the right to preserve his true and genuine personal, legal and family identity.
2. If a child has been fraudulently deprived of some or all of the elements of his identity, the States Parties shall provide the child with necessary assistance and protection, with a view to speedily re-establishing his true and personal identity.³³¹

Poland’s proposal was inspired by the historical separation of children from their parents during the Second World War.³³²

Thus, the focus of Article 8 was on the duty of nations to create mechanisms to rectify situations in which children were wrongfully separated from their parents. In response to arguments made during discussion of the proposal that it overlapped with matters already addressed in the adoption article, now Article 21, language was inserted to reflect that the right to preservation of identity is the right to be free from “unlawful interference” in the right to preservation of name and family

328. Barnen, *supra* note 313, at 4 (excerpting U.N. ESCOR 41st Sess., annex II, art. III, ¶ 9, U.N. Doc. E/CN.4/1985/64 (1985)).

329. Jaime Sergio Cedra, *The Draft Convention on the Rights of the Child: New Rights*, 12 HUM. RTS. Q. 115, 116 (1990); Geraldine Van Bueren, *Children’s Access to Adoption Records—State Discretion or an Enforceable International Right?*, 58 MOD. L. REV. 37, 47 (1995) [hereinafter Van Beuren I]; GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 119 (1995) [hereinafter VAN BUEREN II].

330. Cedra, *supra* note 329, at 116.

331. Barnen, *supra* note 313, at 4–8 (excerpting U.N. ESCOR, 42nd Sess., ¶¶ 33–49, U.N. Doc. E/CN.4/1986/39 (1986)).

332. Cedra, *supra* note 329, at 116.

relations as "recognized by law" and the duty to provide "appropriate" assistance is invoked when a child is "illegally" deprived of elements of her identity.³³³ Article 8's proponent, Dr. Cedra, in fact took care to differentiate the article from matters covered in the article on adoption, noting that the retention of children that had not been abandoned did not lead in the majority of cases to the initiation of illegal or fraudulent adoption practices.³³⁴ Thus, the qualifying language inserted into Article 8 diminishes its effectiveness as a source for an unqualified right to identifying information. Moreover, the context in which Article 8 was proffered, in reaction to atrocities in Argentina and Poland, further supports its inapplicability to adoptions that do not involve the wrongful taking of children.

Thus, the legislative history of the drafting of the Convention on the Rights of the Child does not support the proposition that the articles ultimately adopted in the final text create an unequivocal right of access to adoption records, although it seems clear that some delegations submitted proposals that would have supported such a right. International experts on the Convention seem to concur. Cynthia Price Cohen, who participated in the drafting of the Convention from 1983 until it was adopted in 1989, has stated that in her opinion nothing in the language of the Convention or the intent of the drafters at the time created an absolute right to identifying information.³³⁵ Geraldine Van Bueren, Director of the Programme on International Rights of the Child, also concluded that although the Convention created many new rights, access to adoption records "appears to have gone mostly unremarked."³³⁶ Jaime Cedra, the original proponent of Article 8, concluded in 1990 that the article was an outcome of lengthy negotiations, and that the nature of the new right created will depend on development of the ratifying nations' legal systems rather than the specific phenomena that initially prompted the creation of Article 8.³³⁷

333. *Id.*

334. *Id.* at 117.

335. Personal Interview with Cynthia Price Cohen, Executive Director of ChildRights International Research Institute (May 24, 2001).

336. Van Beuren I, *supra* note 329, at 44.

337. Cedra, *supra* note 329, at 116-17. Dr. Cedra observed that the concept of identity was not defined in the text, in part because the discussions of the proposal were influenced by the desire of countries to exclude certain matters rather than to try to positively define the right. *Id.* Some nations were concerned that the article might interfere with in vitro fertilization or genetic engineering; others, that it might be interpreted to create obstacles to their laws authorizing abortion; and others objected that the concept of "identity" was not recognized in their national laws. *Id.*

d. Subsequent Practice

Legislative history, such as that discussed above, plays a limited role under Article 32 of the Vienna Convention,³³⁸ which is recognized in the United States and abroad as establishing the norms for treaty interpretation.³³⁹ According to the Vienna Convention, treaties must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³⁴⁰ Subsequent practice, which establishes the parties’ agreement regarding interpretation, will also be considered, along with any relevant rules of international law.³⁴¹ Therefore, it is important to look at how ratifying nations have regarded their obligations regarding access to identifying information in adoption records, and how the duty has been interpreted by the Committee on the Rights of the Child, the Committee charged with monitoring implementation of the treaty.

The Committee on the Rights of the Child is composed of ten experts elected by the nations that are parties to the Convention. It meets three times per year to review periodic reports on implementation from the governments of the state parties, as well as from international non-governmental organizations. It then issues its own reports, entitled Concluding Observations and Recommendations, for each country reviewed.³⁴² As of January 2001, 202 initial and periodic reports had been submitted to the Committee, of which the Committee had considered 146.³⁴³

Examination of the reports of state parties to the Committee on the Rights of the Child regarding their implementation of Articles 7 and 8 reveals no clear pattern. Several nations that permit adoptees access to

338. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (hereinafter Vienna Convention).

339. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 145, introductory note (1987). The Restatement generally regards the Convention as reflecting the law of the United States regarding international agreements, departing from the Convention only in those few instances in which the Convention deviated or moved beyond accepted customary international law. *Id.* The United States has signed the treaty but not yet ratified it, due to a dispute between Congress and the Executive branch regarding the allocation of authority to enter and terminate international agreements. Frederic Kirgis, *Treaties as Binding International Obligation*, ASIL Insight (1997), at <http://www.asil.org/insight9.htm>.

340. Vienna Convention, *supra* note 338, art. 31.

341. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 1, 145, art. 31 (1987).

342. Cohen and Kilbourne, *supra* note 309, at 638, 640–42.

343. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, STATEMENT OF THE COMMITTEE ON THE RIGHTS OF THE CHILD TO THE SECOND SUBSTANTIVE SESSION OF THE PREPARATORY COMMITTEE FOR THE SPECIAL SESSION ON CHILDREN, New York, 29 January–2 February 2001, ¶ 1, at <http://www.unhchr.ch/html/menu2/6/crcstat.htm>.

their records have reported that practice.³⁴⁴ Similarly, some nations that restrict access of adoptees to identifying information, in whole or part, mention the restriction in their reports.³⁴⁵ Many nations that practice adoption do not mention their disclosure policies in their reports,³⁴⁶ even

344. *Initial Report of Iceland*, U.N. CRC, ¶ 129, U.N. Doc. CRC/C/11/Add.6 (1995) (stating that adoptee has right of access to adoption records and there is no minimum age—some have accessed records as young as age 12); *Initial Report of the Netherlands*, U.N. CRC, ¶ 76, U.N. Doc. CRC/C/51/Add.1 (1997) (reporting both on access of adoptee, which is permitted, and access of AID child, which appears to require balancing); *Initial Report of Germany*, U.N. CRC, ¶ 26, U.N. Doc. CRC/C/11/Add.5 (1994); *Initial Report of Malta*, U.N. CRC, ¶ 81, U.N. Doc. CRC/C/3/Add.56 (1998) (granting right of access for adoptee at age 18); *Initial Report of the Former Yugoslav Republic of Macedonia*, U.N. CRC, at 17, U.N. Doc. CRC/C/8/Add.36 (1997); *Second Report of Finland*, U.N. CRC, ¶ 65, U.N. Doc. CRC/C/70/Add.3 (1998) (noting under Finnish law adoptee has right of access, unless it would be against interests of adoptee or others); *Initial Report of Liechtenstein*, U.N. CRC, ¶ 20, U.N. Doc. CRC/C/61/Add.1 (1999); *Initial Report of Palau*, U.N. CRC, ¶¶ 28–29, U.N. Doc. CRC/C/51/Add.149 (2001); *Supplementary Report to Second Periodic Report of Mexico*, U.N. CRC, ¶ 39, U.N. Doc. CRC/C/65/Add.16 (1998) (reporting on measures to bring the Federal and State legislation into line with the provisions of the Convention, a new federal adoption law was described that provides that an adult adoptee who wishes to find out about his natural family may obtain information from the civil registry with judicial authorization). Cf. *Initial Report of Dominican Republic*, U.N. CRC, ¶ 68, U.N. Doc. CRC/C/8/Add.40 (1999) (stating that adoptive parents are required by law to inform adopted children of their biological origins).

345. *Initial Report of Canada*, U.N. CRC, ¶¶ 88, 459 (Alberta), 712 (Ontario), 871 (Quebec), U.N. Doc. CRC/C/11/Add.3 (1994) (reporting on the policies of some of the provinces regarding adoption disclosure, some of which permit disclosure only by court order or with birth parent permission or through a registry, but it is not mentioned in the reports on other provinces); *Initial Report of Poland*, U.N. CRC, ¶ 18, U.N. Doc. CRC/C/Add.11 (1994) (noting Poland's reservation to Article 7 on the ground that it maintains legal provisions enabling the adopting party to keep secret the child's origin); *Initial Report of Luxembourg*, U.N. CRC, ¶ 35, U.N. Doc. CRC/C/41/Add.2 (1997) (stating that registration of births allows parents of infants placed for adoption to not contain the name of the natural parents, at their option). Cf. *Initial Report of Armenia*, U.N. CRC, ¶ 9, U.N. Doc. CRC/C/28/Add.9 (1997) (reporting that Criminal Code provides that persons who divulge adoptions without the adopters' consent will be held liable); *Initial Report of Belgium*, U.N. CRC, ¶ 128, U.N. Doc. CRC/C/11/Add.4 (1994) (observing that the Belgian practice of changing the name of an adopted child does not violate Article 8, because it is recognized by law); *Initial Report of Monaco*, U.N. CRC, ¶ 12, U.N. Doc. CRC/C/28/Add.15 (2000) (stating that mother has option of leaving newborn with social welfare service and keeping her identity off of the birth certificate); *Initial Report of Uzbekistan*, U.N. CRC, ¶ 25, U.N. Doc. CRC/C/41/Add. 8 (1999) (stating that disclosure of adoption records is forbidden by law without the consent of the adoptive parents).

346. E.g., *Initial Report of Sweden*, U.N. CRC, ¶ 61 U.N. Doc. CRC/C/3/Add.1 (1992) (Sweden allows access); *Initial report of Belarus*, U.N. CRC, ¶ 42, U.N. Doc. CRC/C/3/Add.14 (1993); *Initial Report of Republic of Ireland*, U.N. CRC, ¶¶ 137–38, 246, U.N. Doc. CRC/C/11/Add.12 (1996) (Ireland law did not recognize a right of access at that time); *Initial Report of Italy*, U.N. CRC, U.N. Doc. CRC/C/8/Add.18 (1994); *Initial Report of Czech Republic*, U.N. CRC, U.N. Doc. CRC/C/11/Add.11 (1996); *Initial Report of United Kingdom*, U.N. CRC, ¶¶ 150–60, U.N. Doc. CRC/C/11/Add.1 (1994) (Great Britain, Scotland, and Northern Ireland permitted access); *Initial Report of Australia*, U.N. CRC, U.N. Doc. CRC/C/8/Add.31 (1996); *Initial Report of Romania*, U.N. CRC, U.N. Doc. CRC/C/3/Add.16 (1993); *Initial Report of the Slovak Republic*, U.N. CRC, U.N. Doc. CRC/C/11/Add.17

though some of them do make identifying information available to adoptees. Some nations in which adoption is practiced reported on the access of children conceived by artificial insemination by donor (AID) to identifying information about the donor, but did not include information about access to adoption records,³⁴⁷ even though in several instances adoption records are accessible by adoptees in those countries.

Canada's approach to the Convention is of particular interest, as many of Canada's provinces follow procedures similar to those of the United States regarding disclosure of information, and do not permit automatic access.³⁴⁸ Canada made a few reservations to the Convention on the Rights of the Child when it ratified the Convention, but it did not address the issue of non-access of adoptees to identifying information in those reservations.³⁴⁹ When Canada submitted its report, the policies of some of the provinces regarding restrictions on the disclosure of identifying information were reported. Despite this revelation, the nondisclosure of information to adoptees did not arise in the Summary Record of the Committee meeting to review the report,³⁵⁰ nor was it raised as a matter of concern by the Committee on the Rights of the Child in its Concluding Observations.³⁵¹

The Republic of Ireland, which did not permit adopted persons access to birth records at the time of its review by the CRC, did not raise the issue in its initial report on compliance with the Convention. The Summary Record of the three sessions of the Committee held to review the report reveals that Ms. Qedraogo, a Committee member, did ask the representative from Ireland whether an adopted child had the right to know his real identity and obtain information about his biological parents.³⁵² The Irish representative responded that the right of adopted children to know the names of their natural parents was restricted by the current legislation, that a Constitutional Review Group had recom-

(1998); *Initial Report of Cape Verde*, U.N. CRC, U.N. Doc. CRC/C/11/Add.23 (2001); *Initial Report of Latvia*, U.N. CRC, U.N. Doc. CRC/C/11/Add.20 (1998); *Initial Report of Isle of Mann*, U.N. CRC, U.N. Doc. CRC/C/11/Add.19 (1998).

347. E.g., *Initial Report of Austria*, U.N. CRC, ¶ 149, U.N. Doc. CRC/C/11/Add.14 (1997) (reporting on Article 7); *Initial Report of Sweden*, U.N. CRC, ¶ 61, U.N. Doc. CRC/C/11/Add.6 (1995); *Periodic Report of Norway*, U.N. CRC, ¶ 132, U.N. Doc. CRC/C/70/Add.2 (1998); *Periodic Report by Denmark*, U.N. CRC, ¶ 56, U.N. Doc. CRC/C/70/Add.6 (2000).

348. See *supra* notes 208–27 and accompanying text.

349. CRC, *supra* note 302.

350. *Summary Record of the 216th Meeting*, Canada, U.N. CRC, U.N. Doc. CRC/C/SR.216 (1995).

351. *Concluding Observations of the Committee on the Rights of the Child: Canada*, U.N. CRC, U.N. Doc. CRC/C/15/Add.37 (1995).

352. *Summary Record of the 437th Meeting*, Ireland, U.N. CRC, ¶ 38, U.N. Doc. CRC/C/SR.437 (1998).

mended that adopted children should have access to their birth records, and that the Ministry of Health and Children had accorded priority to that question.³⁵³ Again the issue of nondisclosure was not raised as a matter of concern in the Concluding Observations of the Committee.³⁵⁴

Ms. Judith Karp, a member of the Committee on the Rights of the Child for the past six years, recently observed that the Committee sometimes, but not consistently, asks a question regarding the right of a child to know her biological parents when it reviews the reports of state parties.³⁵⁵ During her time on the Committee, Ms. Karp has stated that she does not recollect any insistence on this issue, nor does she recall whether in Concluding Observations she had raised this as a matter of concern.³⁵⁶ Noting that the time allotted the Committee to review each nation's report does not permit entering into detail concerning adoption, she attributed the Committee's failure to raise the issue more frequently to the shortage of time rather than an indication that the Committee does not regard disclosure of identifying information as a matter of implementing the article relating to the right to know one's identity.³⁵⁷

The record of one discussion by the Committee, however, about information the child should receive (during childhood, presumably), illustrated the complexity of both the issue and the Committee members' perceptions regarding the Convention's mandates. During a review of a report prepared by the Ukraine in 1995, one Committee member observed that an increasing number of countries encouraged parents to inform their children about adoption, rather than surrounding it in secrecy.³⁵⁸ The Chairperson of the Committee responded that the "question of secrecy was a very delicate matter," recalling cases in other countries in which children had committed suicide because they had unexpectedly discovered they were adopted.³⁵⁹ She noted that more countries were considering laws that would permit a child to discover his origins anytime and, if he wished, to renew contact with the biological family, but she observed the situation was complex and that might not always be in the best interest of the child.³⁶⁰ Another Committee member mentioned

353. *Id.* at ¶ 52.

354. *Concluding Observations of the Committee on the Rights of the Child: Ireland*, U.N. CRC, U.N. Doc. CRC/C/15/Add.85 (1998).

355. Telephone Interview with Judith Karp, Member of Committee on the Rights of the Child from Israel (June 4, 2001).

356. *Id.*

357. *Id.*

358. *Summary Record of the 240th Meeting: Ukraine*, U.N. CRC, ¶ 64, U.N. Doc. CRC/C/SR.240 (1995). Ukraine reported during the discussion that it does grant an adult adoptee access to information regarding his origins when he comes of age.

359. *Id.* at ¶ 67.

360. *Id.*

there was interest in an adoption data bank, but suggested that issues of secrecy and access to computerized personal data must be balanced against the right of people to know what information the data bank stored about them.³⁶¹ A third Committee member suggested that the right to know parents from birth “as far as possible” was well phrased.³⁶²

When the issue of identifying information was raised in state reports, it was evident that some nations perceived balancing, rather than an absolutist approach, to be desirable, while others interpreted the Convention more stringently. The Netherlands, for example, reported on a 1994 opinion regarding the identity of AID sperm donors in which the Netherlands Supreme Court held that “the general right of personality underlying such fundamental rights as the right to respect for privacy, the right to freedom of opinion, conscience and religion and the right to freedom of expression also includes the right to know the identity of the parents from whom one is descended,” and referred specifically to Article 7 of the Convention on the Rights of the Child.³⁶³ Nevertheless, the report goes on to say, the Court found that “[t]he right to know the identity of the parents from whom one is descended is not absolute. This right must yield to the rights and freedoms of others if they weigh more heavily in a given case.”³⁶⁴ Finland reported that an adopted child has a right of access to documents to get information on his or her own biological background, but that access may be denied if it would endanger the health or development of the child or would otherwise be against the interest of the child or other private interests.³⁶⁵ The Canadian provinces, which reported their various restrictions on access to identifying information, also reflected their concern with finding the appropriate balance of the right to privacy and the right to know one’s biological parents.³⁶⁶ On the other hand, the German Report implied that its law, which permits anyone over the age of 15 to inspect the state registers and obtain identifying knowledge about her parents,³⁶⁷ was required by Article 8 of

361. *Id.* at ¶ 70.

362. *Id.* at ¶ 76. It appears that a question was also asked of a Chinese representative during a Committee review of its state report about “the right of a child to know his origins [and] the age at which the child could seek information on biological parents.” *Summary Record of the 299th Meeting: China*, U.N. CRC, ¶ 38, U.N. Doc. CRC/C/SR.299 (1996).

363. *Initial Report of the Netherlands*, U.N. CRC, ¶ 76, U.N. Doc. CRC/C/51/Add.1 (1997).

364. *Id.*

365. *Second Report of Finland*, U.N. CRC, ¶ 65, U.N. Doc. CRC/C/70/Add.3 (1998).

366. *See Initial Report of Canada*, U.N. CRC, ¶¶ 712, 871, U.N. Doc. CRC/C/11/Add.3 (1994).

367. *Initial Report of Germany*, U.N. CRC, ¶ 26, U.N. Doc. CRC/C/11/Add.5 (1994).

the Convention, and Poland felt compelled to make a reservation to preserve their law of "secret" adoption.³⁶⁸

The variety of state reporting practices and the lack of insistence by the Committee that opening adoption records is compelled suggests that subsequent state practice is not yet sufficiently uniform to conclude that, despite the legislative history, the Convention should be interpreted to create an unequivocal right to identifying information. Nevertheless, the record does establish that many countries and the Committee see the Convention as supporting a right to information about one's family of origin, although the circumstances in which that right applies and the extent to which it may be balanced with other rights and interests are not sufficiently clear.

Scholarly assessment of the Convention as a source of an unequivocal right to identifying information has been mixed. Some scholars have argued that the principles of Articles 7 and 8 of the Convention support a right of a child to know of his origins,³⁶⁹ or have attributed legislative changes opening records in their countries to the Convention on the Rights of the Child.³⁷⁰ Often, however, scholars incorporate into their arguments principles from the Convention recognizing the importance of identity, yet concede that there may be circumstances in which the right will not be unequivocally granted.³⁷¹

e. Rights under the U.N. Declaration by Cross Reference

One final source under the Convention on the Rights of the Child upon which to hinge a right to access to identifying information upon demand might be the reference in Article 7 to "other international standards." The U.N. Declaration on Social and Legal Principles relating to

368. *Initial Report of Poland*, U.N. CRC, ¶ 72, U.N. Doc. CRC/C/8/Add.11 (1994).

369. See, e.g., SHATTER, *supra* note 11, at 527 (concluding that Article 8 requires affording adult adoptees a right of access to their birth records).

370. Wanda Stojanowska, *Adoption: Revision of the Family and Custody Act*, in 1995 THE INTERNATIONAL SURVEY OF FAMILY LAW 401, 402 (Andrew Bainham, ed. 1997) (discussing a recent change in Polish law permitting adult adoptees access to their records); Cecilia P. Grossman, *The Recent Reform of Adoption Law*, in 1996 THE INTERNATIONAL SURVEY OF FAMILY LAW 13, 15-16 (Andrew Bainham ed., 1998) (addressing reform in Argentina law permitting adult adoptees access to their records); Ake Saldeen, *The Rights of Children to Speak for Themselves and Obtain Access to Information Concerning Their Biological Origins Etc.*, in 1994 THE INTERNATIONAL SURVEY OF FAMILY LAW 441, 444 (Andrew Bainham ed., 1996) (Sweden).

371. See Tshepo L. Mosikatsana, *Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution*, 3 MICH. J. RACE & L. 341, 370-71 (1998) (noting "adoptee's right must be limited by birth parent's right to privacy"); Van Beuren I, *supra* note 329, at 49, 51 (recognizing that the Convention supports a right of access, but also the possibility that a court could balance needs of parties if birth parents object to disclosure); George A. Stewart, *Interpreting the Child's Right to Identity in the U.N. Convention on the Rights of the Child*, 26 FAM. L. Q. 221, 233 (1992).

the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally,³⁷² though it is not a legally binding treaty, could be used as a source for such standards. Two articles of the Declaration are relevant:

Article 8—The child should at all times have a name, a nationality and a legal representative. The child should not, as a result of foster placement, adoption or any alternative regime, be deprived of his or her name, nationality or legal representative unless the child thereby acquires a new name, nationality, or legal representative.

Article 9—The need of a foster or an adopted child to know about his or her background should be recognized by persons responsible for the child unless this is contrary to the child's best interests.

Since a child acquires a new name in adoption, the Declaration could be interpreted to be satisfied by providing non-identifying information about background, or it could be read simply to require that the child be told he is adopted, which itself was an issue in many of the countries that submitted reports to the Committee on the Rights of the Child discussed above. Given the ambiguity of the U.N. Declaration, its usefulness as the core of a right to access on demand is doubtful. Thus, other international instruments must be explored.

2. Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

Drafted under the auspices of the Hague Conference on Private International Law, the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereinafter Hague Convention on Intercountry Adoption)³⁷³ establishes norms and procedures intended to govern international adoptions between its states parties.³⁷⁴ The Convention entered into force on May 1, 1995 and has now been ratified by over 40 nations.³⁷⁵

372. Adopted by G.A. Res. 41/85, U.N. GAOR, 41st Sess., Supp. No. 53, at 265, U.N. Doc. A/41/53 (1986).

373. May 29, 1993, 2 Hague Conference on Private Int'l Law, Proceedings of the 17th Session 523, 32 I.L.M. 1134 [hereinafter Hague Convention on Intercountry Adoption].

374. See Rebeca Rios-Kohn, *Intercountry Adoption: An International Perspective on the Practice and Standards*, ADOPTION Q., Vol. 1, No. 4, 1998, at 3.

375. As of June 13, 2001, 42 nations had ratified or acceded to the Convention, and 15 nations had signed but not yet ratified. Hague Conference on Private International Law, *Status Sheet Convention #33*, at <http://www.hcch.net/e/status/adoshte.html> (last visited June 13, 2001).

The Convention addresses the retention of identifying information, but does not mandate that contracting countries unconditionally release such information to adult adoptees. Under the Convention, each state party is required to create a Central Authority, either a governmental entity or an organization delegated with certain responsibilities by the government, to perform a variety of tasks to facilitate appropriate inter-country adoptive placement. Article 16 requires the Central Authority of the child's country of origin to prepare a report including information about the child's identity, adoptability, background, social environment, family history, medical history of the child and his family, and any special needs of the child. The sending country is required to transmit the report to the receiving country, but is permitted to "tak[e] care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed."³⁷⁶ Article 30 requires contracting states to ensure the preservation of information concerning the child's origin, including the identity of the child's parents and medical history.³⁷⁷ They are also bound to ensure that the child or her representative "has access to such information, under appropriate guidance, in so far as is permitted by the law of that State."³⁷⁸ The Hague Convention therefore does not require any contracting nation to modify its disclosure policies with respect to identifying information.

The United States has signed the Hague Convention, the U.S. Senate gave its consent to ratification on September 20, 2000, and implementing legislation, the Intercountry Adoption Act of 2000,³⁷⁹ was enacted on October 6, 2000 in preparation for ratification within the next year. The Intercountry Adoption Act requires the federal government to establish a case registry of all adoptions involving immigration or emigration of children to or from the United States, regardless of whether the adoption is covered under the Convention.³⁸⁰ Adoptee advocacy groups lobbied in favor of the final legislation, which removed access restrictions in earlier drafts and provides some ability of adoptees to access information held in the federal records pursuant to the U.S. Immigration and Nationality Act.³⁸¹

376. Hague Convention on Intercountry Adoption, *supra* note 373, art. 16, at 527.

377. *Id.*, art. 30, at 531.

378. *Id.*

379. Pub. L. No. 106-279, 114 Stat. 825 (2000).

380. 42 U.S.C.A. § 14912(e) (West Supp. 2001).

381. Bastard Nation, *Bastard Nation Urges Congress to Proceed with Hague Convention Ratification*, at <http://www.bastards.org/alert/bnhague.htm> (March 20, 2000).

3. Regional Conventions

Earlier regional conventions specifically addressing the topic of adoption appear to reinforce the policy of secrecy. The European Convention on the Adoption of Children,³⁸² which was drafted under the auspices of the Council of Europe and entered into force on January 9, 1983, currently has 17 states parties.³⁸³ Article 20 provides that adoptions shall be completed without disclosing to the child's natural family the identity of the adoptive family. It also provides that adoption proceedings are to take place in camera, and that adoption records must be confidential. The article guarantees that the adoptee and adoptive family "shall" be able to obtain records of the fact, date, and place of the adoptee's birth, but "not expressly revealing the fact of adoption or the identity of [the] former parents."³⁸⁴

The Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, drafted under the auspices of the Organization of American States and entered into force on May 26, 1988, takes a similar approach.³⁸⁵ Currently ratified by Belize, Brazil, Columbia, Mexico, and Panama, the Convention in Article 7 provides that: "Where called for, the secrecy of adoption shall be guaranteed."³⁸⁶ The article suggests that medical information on the minor and the birth parents should be communicated, with identifying information excluded.³⁸⁷

A more recent regional convention, the African Charter on the Rights and Welfare of the Child, devotes a specific article to adoption, but does not address the disclosure issue.³⁸⁸

Recent decisions of the European Court of Human Rights suggest that Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter European Convention on Human Rights) could also have some bearing on the disclosure issue in Europe, and by analogy, in other parts of the world based on similar rights protected by the International Covenant on Civil and Political Rights.³⁸⁹ Article 8 of the European Convention on Human Rights affords

382. April 24, 1967, 634 U.N.T.S. 255.

383. For the text and status of the European Convention on the Adoption of Children, *see* the official website of the Council of Europe, at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>.

384. European Convention on the Adoption of Children, *supra* note 382, art. 20.

385. Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, May 24, 1984, O.A.S. Treaty Series No. 62, 24 I.L.M. 460.

386. *Id.* at 461.

387. *Id.*

388. African Charter on the Rights and Welfare of the Child, O.A.U. Doc. CAB/LEG/249/49 (1990), art. 24.

389. Dec. 16, 1966, S. Treaty Doc. 95-2, 999 U.N.T.S. 171.

a right to respect for a person's "private and family life."³⁹⁰ In *Gaskin v. United Kingdom*,³⁹¹ the European Court of Human Rights considered a claim by the petitioner that his rights under Article 8 had been violated by the failure of government authorities to grant him complete access to case records concerning his maintenance in foster care during a substantial portion of his childhood. The government had withheld information that was given in confidence, and refused to release it unless the provider of the information could be located and give consent to its release.³⁹² The Court found that the files could constitute Mr. Gaskin's principal source of information about his childhood and related to his basic identity.³⁹³ It therefore determined that Article 8 required striking a fair balance between the needs of the individual and the effective operation of the child care system.³⁹⁴ Acknowledging the vital interest in receiving information necessary to understand one's early childhood, and the importance to the government to be able to receive objective and reliable information, the court found that an appropriate balance required that an independent authority should decide whether access should be granted when a contributor failed to answer or withheld consent, rather than automatically denying the information.³⁹⁵ The absence of such a procedure in Mr. Gaskin's case was held to constitute a violation of Article 8.³⁹⁶ The Court also determined that the freedom of expression protected in Article 10 prohibits a government from withholding information from a person that others are willing to impart to him, but it does not provide a right of access to government files in these circumstances.

Also of interest is a more recent decision of the European Court of Human Rights, in which the court confirmed that the protection of personal data was also of fundamental importance to a person's right to respect for private and family life.³⁹⁷ In *Z. v. Finland*, the applicant

390. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Eur. T.S. No. 5. Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home, and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

391. *Gaskin v. United Kingdom*, App. No. 10454/83, 12 Eur. Ct. H.R. at 36 (1989).

392. *Id.* at 39.

393. *Id.* at 45.

394. *Id.* at 47.

395. *Id.* at 54.

396. *Id.* at 50.

397. *Z v. Finland*, App. No. 22009/93, 25 Eur. Ct. H.R. at 371 (1997).

claimed that release by the state of information concerning her medical condition (HIV positive) violated her right under Article 8 to protection of personal data.³⁹⁸ In determining whether her privacy rights had been violated, the court considered whether the disclosures could be justified by a legitimate governmental aim.³⁹⁹ The court determined that requiring certain testimony regarding her condition in the setting of a court proceeding was justified. No legitimate government aim, however, justified the decision to make the trial record accessible to the public within ten years, or to reveal the applicant's identity to the press with the details of her medical condition. These latter governmental actions, the court concluded, constituted a violation of Article 8.⁴⁰⁰

Thus, Article 8 of the European Convention of Human Rights might be asserted to support a right to identifying information on the part of adoptees, as well as a right of privacy for those birth parents who wish anonymity. Similarly, by analogizing to the interpretation of Article 8 in *Gaskin and Z.*, Article 17 of the International Covenant on Civil and Political Rights ("ICCPR"),⁴⁰¹ which prohibits arbitrary or unlawful interference with privacy, family or home, might be used to support claims in nations that are parties to that Convention.⁴⁰² *Gaskin* would appear to support the proposition that neither right is superior, nor unequivocal, and that when there is an objection to the disclosure, the issue must be examined by an independent authority, balancing the interests of both parties if possible, rather than by automatic denial of the request.⁴⁰³

4. Customary and General Principles of Law

The international community has long recognized customary international law and general principles of law as primary sources of international law, separate from treaties and conventions.⁴⁰⁴ Through customary international law, nations are regarded as capable of creating binding rules of law by implied consent through their international cus-

398. *Id.* at 385.

399. *Id.* at 393.

400. *Id.* at 396-97.

401. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 19, 1966). As of September 23, 2001, 144 nations, including the United States, were party to this Convention. See <http://www.un.org> (visited on Sept. 23, 2001).

402. Article 17(1) of the ICCPR provides: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, not to unlawful attacks on his home and reputation."

403. See generally Jane Fortin, *Rights Brought Home for Children*, 62 MOD. L. REV. 350 (1999).

404. See Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060, T.S. No 993.

tomary practice. Establishing the existence of a norm of customary international law requires two elements: (1) the particular practice is consistently and uniformly, though perhaps not unanimously, adhered to by the international community; and (2) the practice is followed out of a sense of legal obligation, often referred to as *opinio juris*, rather than convenience or courtesy.⁴⁰⁵ Though detecting *opinio juris* is often particularly problematic in the area of human rights, where norms often concern a government's treatment of its own citizens rather than its relations with other nations or their citizens, some scholars have suggested that *opinio juris* in this arena can be found in the "shared sense of the moral reprehensiveness" that leads nations to collectively abandon certain practices and undertake others.⁴⁰⁶

General principles of international law are derived by examining the domestic law of many nations, in search of legal norms that can be deemed so fundamental that they will be found in the major legal systems of the world.⁴⁰⁷ Although general principles are typically used to fill gaps when issues arise that are not resolved by international agreements or customary international law, one type of principle, categorized under the doctrine of *jus cogens*, accepts the existence of certain norms as so fundamental that they can invalidate customary law as well as the provisions of international agreements. In effect, these norms are considered so fundamental that they cannot be derogated by the consent of nations, and are characterized by some as a modern version of natural law.⁴⁰⁸ The rights not to be subjected to genocide, enslavement, murder, prolonged arbitrary detention, and systematic racial discrimination are examples of the kinds of peremptory norms that have been recognized by both international and domestic tribunals, including U.S. courts.⁴⁰⁹

Though some may wish to rely upon customary international law or *jus cogens* to assert the unequivocal right of an adult adoptee to identifying information, it does not appear that the required level of international recognition necessary to satisfy either doctrine has been realized at this

405. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 44–48 (3d ed. 1999).

406. Joan F. Harman, "Unusual" Punishment: *The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 671 (1983). See also Ved P. Nanda, *The United States Reservations to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1334 (1993).

407. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, reporters note 1 (1987).

408. See Janis, *supra* note 405, at 55–59, 62–66.

409. *Id.* at 62–66; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715–17 (9th Cir. 1992); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, reporters note 1 (1987).

point in time. Certainly, many countries provide adult adoptees automatic access to their birth records or other identifying information. In much of Western Europe,⁴¹⁰ parts of Australia,⁴¹¹ Israel,⁴¹² and increasingly in other countries,⁴¹³ a right of adult adoptees to access is becoming the legal norm. Nevertheless, most of the United States,⁴¹⁴ Canada,⁴¹⁵ New Zealand,⁴¹⁶ parts of South America,⁴¹⁷ and many other nations⁴¹⁸ still do not provide unequivocal access to all adoptees. Given the differing perspectives of the drafters of the U.N. Convention on the Rights of the Child, the failure of the Hague Convention on Intercountry Adoption to mandate disclosure, the conflicting or ambiguous positions of other international conventions and instruments, and the recognition for the need to balance privacy interests displayed by the European Court of Human Rights and periodically in the implementing review process conducted by the Committee on the Rights of the Child, the elements of *opinio juris* or characterization as a “fundamental norm,” would be difficult to establish at this time to support an unequivocal right to identifying information in all instances.

410. See TRISELIOTIS, *supra* note 58, at 1 (stating that Finland makes identifying information available to adult adoptees); *supra* notes 240, 248 and accompanying text (stating that the United Kingdom makes identifying information available to adult adoptees). Most of the rest of Western European nations also make identifying information available to adult adoptees. See *supra* note 91 and Press Release of Dep’t of Health and Children, *supra* note 292. See also *supra* note 344, regarding the initial reports of states parties to the CRC reporting their disclosure laws.

411. N.S.W. L. REFORM COMM’N, REPORT NO. 69, *supra* note 115, ¶¶ 2.22–2.35 (reporting on the law of New South Wales opening records to adult adoptees and birth parents, and permitting each to file contact vetoes, and on the laws, as of 1992, in the other Australian jurisdictions: Victoria—adult adoptees entitled to records; Queensland—access of adult adoptees subject to disclosure veto; South Australia—access of adult adoptees subject to disclosure veto; Western Australia—open records system was anticipated in the near future; Tasmania—adult adoptees had access only with consent; Australian Capital Territory—access subject to disclosure veto was under consideration).

412. Stewart, *supra* note 327, at 228 (citing Adoption of Children Law, 5720–1960, No. 45 § 27(3), 14 Law of the State of Israel, 93, 97 (1960)), *confirmed in* Telephone Interview with Judith Karp, Member of Committee on the Rights of the Child representing Israel (June 4, 2001).

413. See also *supra* notes 344, 370, regarding the initial reports of states parties to the CRC reporting their disclosure laws and recent reforms in response to the CRC.

414. See *supra* notes 95–133 and accompanying text.

415. See *supra* notes 210–23 and accompanying text.

416. Persons adopted before commencement of the Adult Adoption Information Act of 1985 are entitled to identifying information on their birth certificates only if no disclosure veto has been filed. Adult Adoption Information Act, 1985, §§ 3–6 (N.Z.).

417. See Claudia Lima Marques, *Assisted Reproductive Technology (ART) in South America and the Effect on Adoption*, 35 TEX. INT’L L.J. 65, 79 (2000) (observing that secrecy is the traditional approach to adoption in Brazil and most other South American countries, although a few countries permit a court to give access to records in exceptional circumstances, and Columbia provides for the right of a child to know its origins).

418. See *supra* note 345.

International conventions have not specifically addressed the interests of birth parents to post-adoption identifying information. Moreover, the disparity of approaches to granting birth parents access to information enabling them to locate or receive information about their adopted children, among the different nations, renders recognition of any type of "right" on their behalf under customary international law or general principles of law premature at this time.

B. Non-identifying Information

The critical importance of requiring collection and disclosure of medical and social history at appropriate times has received less attention in international conventions than has the disclosure of identifying information. Nevertheless, several more general provisions of the Convention on the Rights of the Child support the creation of such legal mandates. The Hague Convention on Intercountry Adoption does require collection and disclosure of medical and social history in international adoptions. Unfortunately, the time frames for disclosure established by the implementing legislation in the United States, the Intercountry Adoption Act, do not adequately serve the interests of adopted children or their adoptive families. These themes will be explored in greater detail in the following sections.

1. Convention on the Rights of the Child

The Convention on the Rights of the Child does not directly address the collection or transmission of health information in Article 21, which addresses adoption, but good practices regarding such disclosure are supported by the underlying requirement that the best interests of the child must be the paramount consideration.⁴¹⁹ Moreover, the commitment in Article 23 to provide special care and assistance to children with special needs, and recognition in Article 24 of the right of a child to enjoyment of the highest attainable standard of health and to necessary medical assistance underscore the importance of collection of complete medical histories and early transmission of this information to prospective adoptive parents.

2. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

The Hague Convention on Intercountry Adoption facilitates good practice in international adoptions with the requirement in Article 16 that a report on the background, social environment, family history, medical

419. CRC, *supra* note 302, art. 21.

history of the child and birth family, and special needs of the child be prepared in the country of origin and transmitted to the receiving country. Article 30 requires contracting states to preserve this information and ensure that the child or his representative has access to it, as permitted by the domestic law of each country. Testimony before the U.S. Foreign Relations Committee when the U.S. implementing legislation, the Inter-country Adoption Act, was under consideration, underscored the need for this requirement, recounting the use of such records to find a Korean birth mother for an adoptee with leukemia who needed a bone marrow transplant, as well as the psychological satisfaction that the preservation of records has afforded to other international adoptees when they reached maturity.⁴²⁰

The implementing legislation in the United States, while helpful in directing attention to the issue, would benefit from stricter standards. The federal Inter-country Adoption Act requires an agency to provide prospective adoptive parents in a Convention adoption with a copy of the child's medical records, including an English translation, if possible, no later than two weeks before (1) the adoption, or (2) the date the prospective parents travel to the foreign country to complete all procedures relating to the adoption, whichever is earlier.⁴²¹ An earlier timetable for parents traveling to foreign countries, when possible, would give prospective adopters time to read, digest, and consider the information,⁴²² and, when desired, to receive outside expert evaluation before making a commitment.⁴²³ Moreover, the provisions relating to parents who do not travel to their child's country of origin is inadequate. Two weeks prior to a domestic adoption of an international child in such circumstances would often occur many months after the child has been placed in the custody of prospective adoptive parents, at a time when disruption would be devastating to both the child and the family. When prospective adopters are not traveling to the country of origin, medical records should be provided at the time the assignment is made, when possible. At the latest, these records should be provided a substantial period of time before the child is scheduled to be removed from her caregivers in her country of

420. Testimony of Susan Soon-Keum Cox, Senate Foreign Relations Committee, October 5, 1999, FDCH Congressional Testimony.

421. 42 U.S.C. § 14923.

422. See Testimony of Barbara Holtan, Director of Adoption Services of Tressler Lutheran Services, October 5, 1999, FDCH Congressional Testimony.

423. See Testimony of Dr. Roland Steven, Senate Foreign Relations Committee, October 5, 1999, FDCH Congressional Testimony (describing the many instances in which he has been asked to evaluate medical records of children placed for international adoption and discovered serious medical problems, despite assurances from agencies that the child was healthy, and observing that he had seen approximately 2000 children with serious medical conditions who had been adopted from institutions).

origin, so that any information that would cause the adopters to decline the assignment is available before the child's life is disrupted. Recent experience with international adoptions in the United States, and the high incidence of disruption that has occurred when prospective adoptive parents have not been adequately prepared for or informed of their child's special needs, highlight the need for earlier disclosure than the legislation now provides.⁴²⁴

III. CONCLUSION—DIRECTIONS FOR FUTURE REFORM

Despite some assertions to the contrary, international law does not appear to require a monolithic approach to the complex issues surrounding the desire of many adopted individuals for an unequivocal right to access to identifying information, on those occasions when such disclosure is contrary to the wishes of birth parents.⁴²⁵ Neither has examination of these conflicting interests under the constitutional standards of the United States⁴²⁶ and the Republic of Ireland⁴²⁷ yielded an absolute mandate favoring disclosure or confidentiality. Nevertheless, recent international reform efforts,⁴²⁸ and the exploration of this issue by courts and administrative bodies charged with implementing relevant international conventions,⁴²⁹ underscore the critical importance of identifying information to many adoptees and a growing movement to afford it primacy.

Although many adoptees never seek their records or a reunion with birth family members,⁴³⁰ for others access to identifying information and the possibility of a meeting is a compelling psychological need.⁴³¹ In addition to fulfilling their sense of identity and ability to achieve closure,

424. See Testimony of Barbara Holton, *supra* note 422 (relating that her agency had received 82 disruption requests in five years from families adopting from Eastern Europe, placements her agency did not facilitate).

425. See *supra* notes 308–418 and accompanying text.

426. See *supra* notes 152–70 and accompanying text.

427. See *supra* notes 281–89 and accompanying text.

428. See *supra* notes 209–27, 291–96, 370 and accompanying text.

429. See *supra* notes 352–68, 389–96 and accompanying text.

430. In Scotland, where birth records have been open since 1930, it was estimated in the mid-1980s that only 7% of adult adoptees sought information about their birth parents. In England, following the opening of birth records to adoptees in the mid-1970s, one researcher extrapolated from a two-year period that approximately 21% of adult adoptees would seek their records. CARP, *supra* note 9, at 156–57. Another study in Great Britain estimated that about 15% of all adoptees search at some point during their lifetime. Studies in Canada and the United States have reported that 32 to 35% of adoptees desire to search. WEGAR, *supra* note 9, at 63.

431. See, e.g., *Mills v. Atlantic City Dep't of Vital Statistics*, 372 A.2d 646, 655 (1977); Sachdev, *supra* note 69, at 58–59.

location of birth family members is often a critical source of medical history, which was often unrecorded in previous decades or has recently come to light. Moreover, permitting access is consistent with the modern paradigm of adoption that honors continuing connection with both birth and adoptive families. Disclosure laws should therefore, at a minimum, be created with a presumption favoring access by adult adoptees to their birth records and identifying information concerning their families of origin, in addition to providing all non-identifying background information as a matter of right.

In accordance with that presumption, state governments in the United States should open birth and adoption records to adult adoptees, retrospectively as well as prospectively, implementing a contact preference system similar to Oregon's⁴³² for birth parents who do not wish to be contacted, and requiring medical information to be filed with any "no-contact" preferences. However, consideration should also be given to affording birth parents access to a judicial or administrative review process to seek a good cause order to delete identifying information in compelling circumstances, subject to the requirement that medical information be provided if such an order were to be issued. In order to provide the opportunity to prepare for possible contact, or to seek a good cause order, if desired, an advance notification system, such as the one implemented by New South Wales, Australia,⁴³³ could be utilized to afford birth parents notice that an adoptee has requested identifying information.

Creation of a system for judicial or administrative override would provide a court or administrative⁴³⁴ officer an opportunity to perform an individualized assessment of the conflicting needs of the adoptee and birth parent in those rare instances in which a birth parent strongly ob-

432. See *supra* notes 118–22 and accompanying text.

433. Several years after New South Wales, Australia enacted its open records law, it amended its legislation to permit a birth parent (or an adoptee about whom identifying information is released) to lodge an advance notice request, which would stay the release of information for a period of up to three months after the request for information, during which time advance notice would be afforded and the person who lodged the request would be able to prepare for the release of information and any impact this might have on the person's family or associates. Adoption Information Act, N.S.W.R., §§ 15A–15J, available at http://www.austlii.edu.au/au/legis/nsw/consol_act/aia19990230. The advantage of such a system is that it delays release of information only in those instances in which a birth parent specifically desires advance notice, rather than for everyone. However, such a system would need to be accompanied by significant publicity efforts to alert birth parents to the change in the law and the specifics of filing.

434. Ideally, if such authority were given to an administrator with particular expertise in adoption, such as a director of a state registry system or a director of adoption services with a state agency, a right of judicial appeal from the administrative decision would also be created, with the ability to stay any disclosure pending resolution of the appeal.

jects to disclosure. Recognizing the need for individualized review in some instances is consistent with the approach suggested by the Irish Supreme Court in *I.O'T.*,⁴³⁵ and the European Court of Human Rights in *Gaskin*.⁴³⁶ Placing the burden on the birth parent to seek the order, and creating a presumption favoring disclosure that requires the birth parent objecting to disclosure, rather than the adoptee seeking disclosure, to show good cause, is in accord with the recognition of the importance of identity interests emerging in international law and the international community. Yet, in those rare instances in which the severe psychological or emotional damage that a birth parent would suffer as a result of the disclosure outweighs the psychological need of a particular adoptee to obtain information, the opportunity for a judicial or administrative override affords some protection to the privacy interests of birth parents. Moreover, in an individualized setting, a judge or administrative officer might often be able to achieve a resolution that accommodates the needs of both parties.

When accommodation cannot be accomplished, good cause orders prohibiting disclosure, because of the burden placed on the birth parent, would normally only be available in adoptions that occurred prior to enactment of legislation opening records. Only then would expectations created by prior confidentiality laws be likely to have engendered a situation in which the emotional health or current relationships of the birth mother could be severely compromised by disclosure. It is difficult to conceive a scenario in which a birth parent who relinquished a child when open access laws were in force could overcome the presumption and show good cause, but there might be rare instances involving risks of domestic violence that justify leaving the option open in prospective adoptions as well.⁴³⁷ Geraldine Van Bueren, a prominent scholar in the field of international law and the rights of children, has observed that the provision in the Hague Convention on Intercountry Adoption permitting states of origin to withhold information identifying the birth parents is justified on the ground that in some countries of origin, confidentiality may be a matter of life or death for the birth mother.⁴³⁸ While that would rarely be the case in the United States and most Western countries, there

435. See *supra* notes 281–85 and accompanying text.

436. See *supra* notes 391–96 and accompanying text.

437. For example, even though birth records have been open to adult adoptees in England since 1976, an English Court of Appeal upheld the refusal of the Registrar General to release a birth certificate to an inmate of a mental institution, adopted as an infant, who had been convicted of two murders, following assessment by two psychiatrists who concluded that his birth mother might be at risk from him if the records were released. *Ex parte Smith*, 2 Q.B. 393, (Eng. C.A. 1991), 1991 WL 839566 (Eng. C.A. 1991).

438. Van Bueren I, *supra* note 329, at 44.

may be individual instances in which such concerns require individual assessment.

Combining a contact preference system with the opportunity for a good cause hearing and a method to request advance notification should afford those birth parents who desire it some protection of their privacy interests, and perhaps circumvent what is now widespread use of private search methods, a system far more likely to result in an unanticipated "knock at the door." Because advance notice requests will not be made in most cases, the vast majority of adoptees would receive the information they seek far more quickly than they now do in most states. Given the opportunity for mediating conflicting needs and the presumption favoring disclosure, almost all adoptees would eventually receive the information they seek. Under the proposed system, the granting of orders withholding identifying information from adult adoptees should occur only on those rare occasions in which a birth parent could overcome the presumption favoring disclosure, and show that her interests in confidentiality strongly outweigh the interests of the adoptee in receiving identifying information. While this approach permits balancing the needs of two adults, it is balancing heavily weighted in favor of the adoptee.

Examination of the disclosure laws of other countries also reveals that when identifying information is provided, it is often accompanied by the opportunity for government-sponsored counseling from a social worker trained to provide advice regarding the unique psychological issues that accompany revelation and reunion.⁴³⁹ Although some search programs in the United States operate in a manner that provides a similar opportunity,⁴⁴⁰ states that simply provide information through a Vital Records clerk may not make such counseling available. Because access to counseling often assists both adoptees and birth parents to deal with the emotional complexities of identity formation and reunion, provision of such services at government expense, on a voluntary basis, should be formally incorporated into U.S. statutory schemes.

Although some countries permit adoptees to have automatic access to identifying information during childhood,⁴⁴¹ the preferable approach

439. *E.g.*, Adoption Act, 1976, c. 36, § 51 (Eng.); Adoption (Scotland) Act, 1978, c.28, § 45 (Eng.).

440. For example, when Oklahoma's confidential intermediary system and registry were created, they were designed so that information is not received directly from an intermediary, but rather from an employee of the state-sponsored program, who would be trained to provide counseling regarding sensitive issues that may arise. *See* OKLA. STAT. tit. 10, §§ 7508-1.2, 7508-1.3 (West Supp. 2000).

441. *See* Adoption (Scotland) Act, 1978, c.28, § 45 (Eng.) (reporting age 16); *Initial Report of Iceland*, U.N. CRC, ¶ 129 U.N. Doc. CRC/C/11/Add.6 (1995) (reporting no minimum age to access records, and that adoptees as young as 12 have obtained records); *Initial Report of Germany*, U.N. CRC, ¶ 26, U.N. Doc. CRC/C/11/Add.5 (1994) (reporting age 16).

would be to leave adoptive parents with control over access during their child's minority, as most registry systems in the United States currently do. Adoptive parents have the best opportunity to assess when access to information would serve their minor child's emotional needs.

On the other hand, when adoptees reach the age of majority, adoptive parents should have no further control over the disclosure issue. Though some earlier U.S. courts⁴⁴² and the Irish Supreme Court⁴⁴³ made references to taking into account the interests of adoptive parents, and in fact some countries⁴⁴⁴ prohibit disclosure without the adoptive parent's consent, legal consideration of the desires of adoptive parents regarding their adult child's search for information or contact with birth relatives is not warranted. Adoptive parents have no privacy interests at stake that are equivalent to those of birth parents. While adoptive parents may have some concerns over the effect of a reunion on their relationship with their child, research has shown that such relationships are rarely impaired in this manner.⁴⁴⁵ In any event, such concerns should be addressed by counseling rather than nondisclosure. Just as parents in our culture have no control over other legal affairs of their adult children, similarly, adoptive parents should have no legal role in the disclosure issue.

Allegiance to a paradigm of adoption fostering connections with birth as well as adoptive families requires that governments in the United States give more attention to meeting the emotional needs of birth parents as well as adoptees. Ireland's proposal for a statutory provision entitling birth parents with periodic progress reports or letters, if they desire them,⁴⁴⁶ merits serious consideration. Provision of non-identifying information carries no risks or burdens for the adopted child or adoptive parents. Moreover, it would certainly be an important step in meeting the psychological needs of birth mothers and acknowledge the importance of their continuing link with the child whom they have placed.⁴⁴⁷ While

442. See *Golan v. Louise Wise Services*, 507 N.E.2d 275 (N.Y. App. 1987); *In re Sage*, 586 P.2d 1201 (Wash. App. 1979).

443. See *I.O'T. v. B.*, [1998] 2 I.R. 321 (Ir. S.C.).

444. See *Initial Report of Uzbekistan*, U.N. CRC, U.N. Doc. CRC/C/41/Add.8 (1999); *Initial Report of Armenia*, U.N. CRC, U.N. Doc. CRC/C/28/Add.9 (1997).

445. See Thompson, *supra* note 31, at 14–15 (discussing study in 1970s by Children's Aid Society of Metro Toronto finding that adoptive relationships were not destroyed, and many were improved); Sachdev, *supra* note 69, at 64–65 (discussing survey of 124 adoptees who had completed a reunion with birth parents revealed a majority (61.7%) who reported no change in their relationship with their adoptive parents, five who experienced a deterioration, and the remainder who felt the relationship had improved considerably).

446. See DEP'T OF HEALTH AND CHILDREN, *supra* note 292 and accompanying text.

447. See SACHDEV, *supra* note 49, at 130–33 (discussing survey of birth mothers, adoptive parents, and adoptees in late 1980s in Canada, and showing that an overwhelming majority of all three groups favored release of information on adoptee's well-being to birth

such communication obviously occurs now in many adoptions, establishing statutory systems to facilitate it would assure birth parents of a conduit to receive the information and give them a right to seek this non-identifying information in those instances when it has not been provided.⁴⁴⁸

Once an adoptee has reached adulthood, birth parents who have voluntarily placed children for adoption (i.e., children who were not in state custody or protective care at the time of adoptive placement) should be entitled to access to the adoptive identities of their children and to search programs that would facilitate reunions, on the same basis as adult adoptees. Many birth parents, like many adult adoptees, strongly desire information or reunion with adult children from whom they have been separated through adoption.⁴⁴⁹ Because many adoptees who do not initiate a search also are not opposed to being found,⁴⁵⁰ birth parents' emotional needs should be addressed in our statutory disclosure schemes as well.

Some adult adoptees, however, do not wish to be contacted.⁴⁵¹ Therefore, a contact preference system, with an option for advance notice, and a judicial or administrative good cause hearing to obtain a no-disclosure order, should be implemented for these adoptees as well. The system would essentially operate for them in the same way as the system for disclosure to adult adoptees, with one major difference. If an adoptee requests an order prohibiting disclosure, the presumption should favor granting the adoptee's request. Alternatively, a simple disclosure veto system could be implemented for adult adoptees. While adoptees would rarely if ever have the "confidentiality" concerns that often trouble birth parents who have kept their placement decision secret, they also may on occasion find the prospect of a reunion or contact emotionally troubling.⁴⁵² Even though adoptive placement was a decision made with their best interests in mind, they were not the parties who initiated placement.

mothers, and reflecting birth mothers contention that such information was "vital to their peace of mind").

448. Various forms of open adoption also would serve to meet these needs and merit serious consideration as well. Discussion of this major topic is beyond the scope of this paper. A rich collection of scholarly work, however, addresses the topic. See, e.g., Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997 (1995).

449. See SACHDEV, *supra* note 49, at 122–23 (discussing survey of Canadian birth mothers, adoptive parents, and adoptees in late 1980s, revealing that many birth mothers "yearned to see the birth child and wanted to be assured of its well-being").

450. See *supra* note 85.

451. See *supra* notes 85–90 and accompanying text.

452. See SACHDEV, *supra* note 49, at 123–24, 127–28 (reporting that some adoptees felt that appearance by the birth mother would be "chaotic" or exacerbate stress they might already be undergoing at certain periods in their life).

A contact preference system should serve the needs of most, but for those adult adoptees who find the prospect of a potential meeting psychologically disturbing, they should have the option to preclude disclosure completely.

Birth parents whose children have been placed for adoption following termination of their parental rights, or whose children were in protective custody when they agreed to terminate their rights, also may desire to locate their children as adults. In many cases such reunions may be beneficial for both the children and the parents. Because the risk of psychological or other harm to the adult adoptee is greater, however, this group of birth parents should be required to go through a government-sponsored search program, through which identifying information and reunion assistance would only be provided with the affirmative consent (as opposed to the mere absence of a disclosure veto or nondisclosure order) of the adult adoptee.

Just as consideration of the experience of other countries and international institutions can offer valuable guidance to U.S. legislators, so too may some of the U.S. statutes regulating the collection and disclosure of medical and social history, particularly to prospective adoptive parents, be worthy of examination by other countries. Implementation of a scheme that fosters thorough collection efforts, requires preservation and the ability to supplement records throughout the lifetime of an adoptee, and mandates pre-placement disclosure of medical and social history to prospective adoptive parents, as well as post-placement disclosure to adoptive parents, adoptees, and when relevant, birth family members, will best serve the interests of adoptees and their families by fostering successful placements and appropriate medical care. The statutes implementing conventions addressing international adoption,⁴⁵³ and any future such conventions, should be drafted with these goals in mind, to ensure that children who cross borders to their new adoptive homes, and those adopted domestically, receive the best possible care when they join their new families.

453. See *supra* notes 421–24 and accompanying text.