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# The Only Americans Legally Prohibited from Knowing Who Their Birth Parents Are: A Rejection of Privacy Rights as a Bar to Adult Adoptees' Access to Original Birth and Adoption Records

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THE ONLY AMERICANS LEGALLY PROHIBITED FROM  
KNOWING WHO THEIR BIRTH PARENTS ARE: A REJECTION  
OF PRIVACY RIGHTS AS A BAR TO ADULT ADOPTEES'  
ACCESS TO ORIGINAL BIRTH AND ADOPTION RECORDS

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#### I. INTRODUCTION

Carolyn Dixon, a thirty-five year old wife and mother of three, fought in court to gain access to her adoption records<sup>1</sup> which had been sealed under a Michigan law mandating the sealing of all adoption records in that state.<sup>2</sup> Ms. Dixon testified that her inability to find out the identities of her birth parents had given rise to a severe depression lasting several years.<sup>3</sup> Her psychiatrist testified that Ms. Dixon had been emotionally deprived as a child, which led to a series of suicide attempts and hospitalizations.<sup>4</sup> In addition, her inability to find the identities of her birth parents compromised her recovery from depression and her ability to “establish a secure psychological base.”<sup>5</sup> Her psychiatrist also noted that experience had shown him

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<sup>1</sup>References to “original birth and adoption records” will be made throughout this Note. In his book, *THE ADOPTION TRIANGLE*, Arthur D. Sorosky explains, as a general matter, what is meant by an original birth record and what is meant by an adoption record. “Generally,” he explains, “[adoption records] contain a great deal of pertinent medical, legal, personal, and family information, including identifying information. After the adoption has been legalized by court action, [the adoption] record is sealed . . . .” ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE* 19 n.\* (1978). An original birth certificate, on the other hand, is “the birth certificate issued within the first few days after the child’s birth, which includes information regarding the birth father and mother.” *Id.* Sorosky goes on to explain what happens to the original birth certificate while the adoption proceedings are pending and after the adoption is finalized; he writes:

The child, although legally relinquished and placed for adoption, retains his/her true identity until the judge, in court, legalizes the adoption, issues an adoption decree, and orders a new, amended birth certificate, registering the child under his/her adoptive parents’ names. At that time, the original birth certificate is removed from the local and state files, sealed, and refilled elsewhere.

*Id.* In doing research for this Note, the author spoke to an adult adoptee about amended birth certificates and saw an actual amended birth certificate. The amended birth certificate looked exactly like a “normal” birth certificate; however, instead of listing the birth parents’ names in the spots reserved for “Mother” and “Father,” the amended birth certificate listed the adoptive parents’ names in those spots. The adult adoptee with whom the author spoke regarding this topic had been successful in accessing her original birth certificate, and she showed the author her two birth certificates (the original one and the amended one) side by side. The author could not help but think that the often-used legal term of art “legal fiction” is an accurate descriptor for amended birth certificates.

<sup>2</sup>Dixon v. Dep’t Pub. Health, 323 N.W.2d 549, 550 (Mich. Ct. App. 1982).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* A suggested reason for the connection between Ms. Dixon’s emotional troubles and the need to allow adult adoptees access to original birth and adoption records will be made in Part II.A: *Why Adult Adoptees Seek Access to Their Original Birth and Adoption Records.*

“there is generally a deep-seated need on the part of adoptees to know their biological origins, regardless of the quality of family life in their adopted families.”<sup>6</sup> Ultimately, citing a lack of good cause, the court rejected Ms. Dixon’s petition for access to her adoption records.<sup>7</sup> The court held that Ms. Dixon’s curiosity regarding her biological birth parents’ identities was greater than her actual psychological need to know, and thus, she could not establish the good cause necessary for the release of the records.<sup>8</sup>

Sadly, adult adoptees in America must confront the reality that, in most states,<sup>9</sup> their right to access their original birth and adoption records is a very narrow right statutorily granted only to those who can show good cause.<sup>10</sup> A general desire to know one’s biological parents or ancestral origins is not generally accepted as sufficient to support a petition for access.<sup>11</sup> In his book, Adam Pertman<sup>12</sup> highlights the absurdity of such narrow access statutes and asserts that adult adoptees’ general

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<sup>6</sup>*Id.* Several studies have shown that an adoptee’s search for his biological origins is a normal and natural exercise. For a discussion of these studies see, for example, Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367 (2001).

<sup>7</sup>*Dixon*, 323 N.W. 2d at 553.

<sup>8</sup>*Id.* at 552-53.

<sup>9</sup>Part II.B sets forth a list of states that allow adult adoptee access to original birth and adoption records. As will be shown, this is a very short (only six states) list, and it is this list that adult adoptee activists seek to expand.

<sup>10</sup>Courts generally find that good cause is shown only by a plaintiff with a severe physical or psychological condition or a suspicion of a severe physical or psychological condition. In Iowa, for example, a court rejected an adult adoptee’s request for access to his sealed adoption records on the basis of an Iowa statute mandating a showing of good cause defined as that which is “necessary to save the life of or prevent irreparable physical or mental harm to an adopted person or the person’s offspring.” *In re the Adoption of S.J.D.*, 641 N.W.2d 794, 801 (Iowa 2002). Compare *In re the Application of Hayden*, 435 N.Y.S.2d 541 (1981) (finding that the plaintiff’s suspicion that she was a “DES Baby,” supported by her physician’s same suspicion, constituted good cause; and if she proved the merits of her suspicion in a court hearing, she would be entitled to the release of her adoption records), with *In re Philip S.*, 881 A.2d 931 (R.I. 2005) (rejecting an adult adoptee’s request for access to his adoption records because the adoptee’s religious convictions did not constitute good cause in Rhode Island.) In *In re Philip S.*, the court wrote,

Speaking in general terms, it is our view that only a truly extraordinary claim can constitute good cause sufficient to trump the confidentiality and privacy rights of the other parties to the adoption triangle. While we are not without sympathy for those who seek to learn about their ‘roots,’ we must not allow the good cause requirement to become a nullity.

*Id.* at 935 n.8.

<sup>11</sup>See *Dixon*, 323 N.W.2d at 552.

<sup>12</sup>Because of his extensive research and writing on the topic of adoption, Mr. Pertman is cited as a leading expert in adoption issues. Evan B. Donaldson Adoption Institute About Staff Page, <http://www.adoptioninstitute.org/about/apertman.php> (last visited March 27, 2007). He worked as a reporter and editor for *The Boston Globe* for over twenty years and now serves as the Executive Director of the Evan B. Donaldson Adoption Institute. *Id.*

desire to know should be recognized as a sufficient basis for access.<sup>13</sup> He writes, “The desire to know about and connect with one’s genetic ancestry has long been accepted as a normal instinct, perhaps even a basic component of human nature . . . [I]t’s why drawing family trees has been a routine teaching technique for as long as anyone can remember . . . .”<sup>14</sup> While the rest of American citizens take unfettered access to their birth records for granted, most adoptees are statutorily blocked from such access and, thus, “marked as lesser citizens entitled to fewer rights.”<sup>15</sup>

Restricted access to original birth and adoption records affects adult adoptees in ways beyond treatment as marginalized citizens; adult adoptees often face great psychological obstacles because restricted access to original birth and adoption records hinders the adoptee’s search for identity. Pertman has remarked that there is a general consensus that “adoptees receive psychological treatment at higher rates than the population at large.”<sup>16</sup> He continues, “This disparity presumably stems largely from the tumult of having to deal with complex emotions and tough identity questions.”<sup>17</sup> These contentions are supported by the work of other researchers who have found that “adolescent and adult adoptees are more vulnerable to the development of identity conflicts than their nonadopted counterparts.”<sup>18</sup>

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<sup>13</sup>ADAM PERTMAN, *ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA* (2000).

<sup>14</sup>*Id.* at 32-33. In his very passionate argument that adult adoptees should be able to access their original birth and adoption records, Pertman makes two very powerful points; he writes: [T]he current genealogy craze in this country is being characterized on television, in books and magazines, and especially on the World Wide Web, as a fun hobby and a fulfilling activity for people of all ages.

*Except for adoptees. . . .* [J]udges continue to treat adults . . . as if they are children. Some even demand adoptive parents’ consent in requests for identifying documents, regardless of the applicant’s age, as if the adoptees were asking for something other than information that scam artists, murderers, and everybody else in the United States can obtain as a birth right.

*Id.* at 33 (emphasis added).

<sup>15</sup>*Id.* at 80.

<sup>16</sup>*Id.* at 85. A study looking at coping mechanisms in adopted persons also cited higher rates of receipt of psychological treatment in adoptees than in nonadoptees and tied the need for this treatment to the adoptees’ identity issues. Daniel W. Smith & David M. Brodzinsky, *Coping With Birthparent Loss in Adopted Children*, 43:2 J. CHILD PSYCHOLOGY & PSYCHIATRY 213, 213 (2002). Smith and Brodzinsky write:

[A]doptees as a group are at somewhat greater risk for maladjustment than their non-adopted peers. For example, adoptees are over-represented in outpatient and inpatient clinical settings and, regardless of clinical status, exhibit more academic problems and externalizing behavior problems, such as aggressiveness, oppositional behavior, impulsivity, hyperactivity, and running-away, than non-adoptees . . . .

. . . . At the core of this [understanding of adoptee behavior] is the assumption that adoption is inherently associated with a variety of loss-related experiences. For example, adoptees experience the loss of birthparents and extended birth family; loss of status; loss of ethnic, racial, and genealogical connections; . . . and loss of identity.

*Id.* (citations omitted).

<sup>17</sup>PERTMAN, *supra* note 13, at 85.

<sup>18</sup>SOROSKY, *supra* note 1, at 13.

If adopted persons are more likely to face identity issues,<sup>19</sup> and thus, are more likely in need of psychological treatment, it would make sense that a mechanism that might ease some of these identity issues, such as the ability to access information directly related to one's identity (information in an original birth certificate, for example), would result in greater mental health for adoptees. Improved mental health for any sector of society should be an important governmental interest; improved mental health for a sector such as adoptees, whose numbers are so great that 60% of Americans report having a direct connection to adoption,<sup>20</sup> should be considered a very important governmental interest.<sup>21</sup>

There are myriad reasons why courts have upheld the statutory bars to adult adoptee access to birth and adoption records. Courts have said these statutes do not violate: the adoptee's right to due process or equal protection under the Fourteenth Amendment,<sup>22</sup> the adoptee's right to privacy,<sup>23</sup> the adoptee's property rights,<sup>24</sup> or the

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<sup>19</sup>See *supra* notes 16-18 and accompanying text. See also *infra* Part II.A: *Why Adult Adoptees Seek Access to Their Original Birth and Adoption Records*.

<sup>20</sup>E. Wayne Carp, *Introduction*, in *ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES* 1, 1 (E. Wayne Carp ed., 2002). Carp remarks:

Adoption touches almost every conceivable aspect of American society and culture. Adoption commands our attention because of the enormous number of people who have a direct, intimate connection to it – some experts put the number as high as six out of every ten Americans. . . . In short, adoption is a ubiquitous social institution in American society, creating invisible relationships with biological and adoptive kin that touch far more people than we imagine.

*Id.* It is difficult to identify exactly how many adopted persons there are in this country or how many adoptions take place each year because there is no central database into which these numbers are compiled. Kathy P. Zamostny et al., *The Practice of Adoption: History, Trends, and Social Context*, 31 *THE COUNSELING PSYCHOLOGIST* 651, 657 (Nov. 2003). Zamostny reports that “there are no consistent and comprehensive data-keeping procedures on U.S. adoption . . .” *Id.* Recent estimates on the number of adopted persons in the U.S. range from one to five million. *Id.* at 658.

<sup>21</sup>Improving the mental health of adult adoptees by opening up access to original birth and adoption records and the mental health of birth parents should not be viewed as mutually exclusive. Clinical research into the effect of relinquishment (putting a child up for adoption) on birth mothers has shown that birth mothers tend to feel “a powerful sense of loss and isolation.” Mary O’Leary Wiley & Amanda L. Baden, *Birth Parents in Adoption: Research, Practice, and Counseling Psychology*, 33 *THE COUNSELING PSYCHOLOGIST* 13, 26 (Jan. 2005) (Wiley is a psychologist in independent practice and Baden is a psychologist at Montclair State University). This sense of loss is real; it is not simply a social construct that has been projected onto birth parents. *Id.* at 42. Making adoptions more open, however, can alleviate some of this sense of loss. *Id.* As Wiley and Baden report:

[B]irth parents experience a loss that is nearly unparalleled in society. When this loss is shrouded in secrecy, the feelings of shame, stigmatization, and marginalization are increased. The movement toward the spirit of openness in adoption as well as the actual level of openness between adoptees, adoptive families, and birth families holds promise for birth parents’ experience of relinquishment and adoption.

*Id.* Thus, as a part of making adoptions more open, the unsealing of original birth and adoption records could serve to alleviate the mental anguish not only of adoptees, but also birth parents.

<sup>22</sup>See, e.g., *Alma Soc’y Inc. v. Mellon*, 601 F.2d 1225 (2nd Cir. 1979).

adoptivee's right to receive information and ideas.<sup>25</sup> One of the most widely used arguments, however, is that allowing adult adoptees access to original birth and adoption records would violate birth parents' right to privacy.<sup>26</sup>

Courts should not base bars to adult adoptees' access to their original birth and adoption records on birth parents' right to privacy. Birth parent privacy claims in the adult adoptee context fail because open access systems threaten neither birth parent rights to make important decisions regarding fundamental rights free from government intrusion nor birth parent rights to prevent the excessive and unnecessary dissemination of personal information. In short, adult adoptee access to original birth and adoption records does not jeopardize the constitutional privacy rights of birth parents. Thus, the right to constitutional privacy must be read more narrowly in adult adoptee access cases, and all state courts and legislatures should espouse an open access system<sup>27</sup> that would allow adult adoptees to access their original birth and adoption records.

Part II of this paper will explore the reasons why adult adoptees search for information regarding their biological origins and the history of adult adoptees' access to original birth and adoption records. Part III will give a brief overview of the concept of constitutional privacy and discuss the several categories of privacy currently recognized in American law and the relationship between privacy and open access statutes. Part IV will assert that birth parent privacy interests are an insufficient basis for blocking adult adoptee access to original birth and adoption records. Part V explores some recent judicial and legislative approaches supporting and expanding upon the arguments made in Part IV. Finally, Part VI will briefly discuss one state's mitigation of the possible negative effects of open access systems and suggest that these measures might be a fair way to balance the interests of birth parents and adult adoptees. In the end, it is quite clear that legislatures and courts should not rely on birth parent privacy assertions in their examination of the validity of open access statutes. Instead, these governmental bodies should espouse open access statutes as a means to a more equal and healthy society.

## II. WHY ADULT ADOPTEEES SEARCH FOR INFORMATION PERTAINING TO THEIR ADOPTIONS AND THE HISTORY OF ADULT ADOPTEEES' ACCESS TO ORIGINAL BIRTH AND ADOPTION RECORDS

### A. *Why Adult Adoptees Seek Access to Their Original Birth and Adoption Records*

There is a general consensus that adult adoptees seek access to their original birth and adoption records primarily as a healthy means of gaining a better understanding

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<sup>23</sup>See, e.g., *In re Roger B.*, 418 N.E. 2d 751, 754 (Ill. 1981).

<sup>24</sup>See *Aimone v. Finley*, 447 N.E.2d 868 (Ill. App. Ct. 1983).

<sup>25</sup>See, e.g., *Roger B.*, 418 N.E.2d at 754-57.

<sup>26</sup>Several cases illustrating this statement will be discussed in Part III: THE CONCEPT OF PRIVACY IN AMERICA AND ITS RELATIONSHIP TO OPEN ACCESS STATUTES.

<sup>27</sup>Throughout this Note the author will be advocating for an "open access system." By "open access system," the author simply means a system in which adult adoptees have access to all their original birth and adoption records, just as non-adopted persons have access to their birth records.

of their own personal identities and existence. Arthur Sorosky, a psychiatrist, researcher, and author of the widely cited book, *The Adoption Triangle*, explains that three separate forces form identity concurrently: the psychobiological force, the psychosocial force, and the psychohistorical force.<sup>28</sup> The author further explains that “[t]he psychohistorical dimension includes that part of man’s identity that relates to his/her sense of genealogy . . . .”<sup>29</sup> Because most adoptees are prohibited from gaining information about their birth parents and the circumstances surrounding their births, they often lack the psychohistorical dimension of identity creation, and this contributes to the need for adult adoptees to seek out their origins through searches for their original birth and adoption records and ultimately, their birth parents.<sup>30</sup> Psychiatrist Robert Jay Lifton has asserted, “The quest itself and the curiosity I would in no way see as some sort of compensatory behavior or as an expression of disturbance; I would see it as healthy and necessary.”<sup>31</sup>

A study conducted by a licensed professional clinical counselor and a professor of counseling finds that adult adoptees seek access to original birth information and birth parents out of an existential need to find authenticity and truth in one’s existence.<sup>32</sup> The authors of this study assert that an adoptee’s search for information regarding her origins is central to achieving greater mental health.<sup>33</sup> The authors write, “For the adopted individual, the uncovering of his or her own truth begins with the awareness of the desire to search . . . for his or her biological beginnings.”<sup>34</sup>

Finally, Karen March of the Department of Sociology and Anthropology at Carleton University asserts that adoptees who seek out information pertaining to their birth and adoptions are actually in search of social acceptance.<sup>35</sup> In her studies, March found that many adult adoptees sensed that people treated them differently once they found out about the adoptee’s adopted status, and that society placed a

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<sup>28</sup>SOROSKY, *supra* note 1, at 13-14.

<sup>29</sup>*Id.* at 14.

<sup>30</sup>*Id.* Sorosky writes, “We believe that the adoptee, ignorant of his/her true background, despite a healthy, nurturing relationship with his/her adoptive parents and a lack of severe problems in his/her relationships with peers and others, will be handicapped in the psychohistorical dimension of identity.” *Id.*

<sup>31</sup>*Id.* at 138.

<sup>32</sup>Mary J. Jago Krueger & Fred J. Hanna, *Why Adoptees Search: An Existential Treatment Perspective*, 75 J. COUNSELING & DEV. 195, 195 (Jan./Feb. 1997). The authors explain that “[e]xistentialism deals with primary, inescapable, and transcultural . . . aspects of human existence. It is concerned with an individual’s struggle to come to terms with one’s being-in-the-world. It deals with the authenticity of one’s existence . . . and the desire to attain meaningfulness and one’s intrinsic freedom.” *Id.* at 197 (citations omitted). At the time of the writing of their study, Ms. Krueger was a licensed clinical professional counselor and a doctoral candidate in educational psychology; Mr. Hanna was a professor at Johns Hopkins University. *Id.* at 195.

<sup>33</sup>*Id.* at 195-96.

<sup>34</sup>*Id.* at 197 (citation omitted).

<sup>35</sup>Karen March, *Perception of Adoption as Social Stigma: Motivation for Search and Reunion*, 57 JOURNAL OF MARRIAGE AND THE FAMILY 653, 654 (Aug. 1995).

stigma on adoptive families as “different.”<sup>36</sup> The subjects of March’s research reported that they felt social stigmatization the most when asked questions about their origins that they were unable to answer because they lacked access to the information (and to persons who held information) regarding the circumstances of their births; this stigmatization came from the adoptees’ perceptions that people made negative assumptions about the circumstances of the adoptees’ births.<sup>37</sup> Adoptees are able to gain social acceptance, March argues, when they are able to find the answers to questions about their biological backgrounds.<sup>38</sup> This social acceptance is gained because, as March writes, “by removing the constraints of secrecy, [adoptees] have gained more power over their presentation of self and over negative assumptions that others might make about their biological history and the reasons for their adoption.”<sup>39</sup>

Whether adult adoptees seek access to their original birth and adoption records as a means to gaining a better understanding of their identities, as a natural reaction to an existential need for truth about their origins, or as a means to gaining social acceptance, there is clearly a need for adult adoptees to have access to their original birth and adoption records. Access to such information—information that includes relevant facts surrounding a person’s birth and biological relationships—replaces secrets with facts and closes the gaps in one’s biographical story. Unfortunately, as the history of open access statutes shows,<sup>40</sup> adoptees face difficulty in gaining such access.

### B. A Historical Overview of Open Access Statutes

The confidentiality and secrecy between parties to an adoption exhibited in today’s society is not indicative of the way things have always been. Adoption is a statutory creation dating back to 1851 when Massachusetts passed its Adoption Act.<sup>41</sup> The Act allowed both the parties to the adoption (the birth parents, the adopted child, and the adoptive parents) and the general public access to the adoption

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<sup>36</sup>*Id.* at 656.

<sup>37</sup>*Id.* One of March’s study subjects reported:

When someone is told that you are adopted, they usually start to ask you questions about your birth mother. Those questions generally have an underlying implication that she was a loose person. Like, sitting in the back of a cab with some guy or something. You carry that image. Because you don’t have the information to deny it. It makes you wonder where you came from.

*Id.*

<sup>38</sup>*Id.* at 658.

<sup>39</sup>*Id.*

<sup>40</sup>*See infra* Part II.B: *A Historical Overview of Open Access Statutes.*

<sup>41</sup>Caroline B. Fleming, *The Open-Records Debate: Balancing the Interests of Birth Parents and Adult Adoptees*, 11 WM & MARY J. WOMEN & L. 461, 463 (2005). The Massachusetts Adoption Act was “the first formal adoption statute . . . [it] standardized the adoption procedure . . . [and] required judicial confirmation of the adoptive parents’ fitness to raise the adoptee.” *Id.*

records.<sup>42</sup> This type of openness is demonstrative of the openness most state statutes displayed regarding adoption records until the early to middle twentieth century.<sup>43</sup>

In 1917, Minnesota passed the first statute sealing adoption records, but the statute prohibited access only to the general public, not the involved parties such as the birth and adoptive parents or the adoptees.<sup>44</sup> Beginning in the 1930s and continuing through to the 1980s, states started statutorily prohibiting adoptees from having unrestricted access to their original birth records.<sup>45</sup> Scholars have offered differing opinions as to why such a shift from an open to a closed system of birth and adoption records occurred.<sup>46</sup> Caroline Fleming<sup>47</sup> suggests that, in the post World War II years, America favored traditional ideas of family and children (parents raising their own biological children), and a closed records system protected children from “the stigma of illegitimacy” created in such a society.<sup>48</sup> Professor of Law Elizabeth J. Samuels<sup>49</sup> argues that while the earliest advocates for sealing records did not intend for adult adoptees to be prohibited from accessing their birth records (the original intent was to protect the adoptive family from birth parent interference), a “regime of secrecy” resulted nonetheless and perpetuated the notion that such secrecy was necessary to prevent adoptees from exhibiting the abnormal desire to identify their biological parents.<sup>50</sup> In summation, as the Chair of the History

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<sup>42</sup>*Id.*

<sup>43</sup>Samuels, *supra* note 6, at 368 (noting, “adoption procedures initially established by state statutes provided neither for confidentiality with respect to the public nor for secrecy among the parties . . .”).

<sup>44</sup>Fleming, *supra* note 41, at 464.

<sup>45</sup>Samuels, *supra* note 6, at 369-70. Samuels remarks that in 1960, 60% of states prohibited adult adoptees from having unrestricted access to their birth certificates. *Id.* at 369. By the end of the 1980’s, forty-seven states had passed statutes sealing adoption records and prohibiting unrestricted access to adult adoptees. *Id.* States also began mandating the issuing of amended birth certificates to adoptees; these birth certificates listed the adoptive parents as the parents of record and were used to shield adopted children from the stigma of the circumstances of their birth, i.e. illegitimacy. Fleming, *supra* note 41, at 464-65. According to Fleming, 35 states had amended birth certificate statutes by 1941. *Id.*

<sup>46</sup>*See infra* notes 40-41 and accompanying text.

<sup>47</sup>Ms. Fleming made these observations while a Juris Doctor candidate at the College of William and Mary. Fleming, *supra* note 41.

<sup>48</sup>*Id.* at 465. *See also* SOROSKY, *supra* note 1, at 37. Sorosky and his fellow authors, in studying the reasons behind adoption record sealings, found that “the clear focus was upon the adoptee, who, [adoption experts] argued, should not be held responsible for the sins of the birth parent.” *Id.*

<sup>49</sup>Professor Samuels is an Associate Professor of Law at the University of Baltimore School of Law. She received her J.D. from the University of Chicago and is a graduate of Harvard College. Samuels, *supra* note 6.

<sup>50</sup>Samuels, *supra* note 6, at 370-71. Samuels writes:  
[T]he regime of secrecy itself inevitably influenced social attitudes and understandings. Actions once thought natural, such as attempts by adoptees to learn information about their birth families, came to be socially disfavored and considered abnormal. Such attempts acquired negative social meanings: they were the

Department at Pacific Lutheran University, E. Wayne Carp, definitively notes, “[S]ince World War II, the entire edifice of modern adoption has been enveloped in secrecy.”<sup>51</sup>

Most states continue to operate under the closed system today. In fact, only six states allow adult adoptees unrestricted access to birth and adoption records, and thus, birth parent identifying information.<sup>52</sup> The recent reasoning for a closed system, however, differs from the assertions given in the mid-twentieth century and outlined above. In the latter twentieth century, legislatures, courts, and closed-system advocates argued that a closed system is necessary, neither to protect the adoptee from the stigma of illegitimacy nor to protect the traditional notion of the family unit from the identity curiosities of an adoptee but to protect the privacy rights of the birth parent.<sup>53</sup> Thus, the adoption statutes, once founded on the premise of protecting children from stigmas attached to adoption, are now legitimized as a means of protecting the privacy rights of birth parents. This protection comes at the

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psychologically unhealthful product of unsuccessful adoptions that had failed to create perfect substitutes for natural families created by childbirth, and they indicated adoptees’ rejection of and ingratitude toward adoptive parents. Eventually, lifelong secrecy would be viewed as an essential feature of adoptions in which birth parents and adoptive parents did not know one another.

*Id.*

<sup>51</sup>Carp, *supra* note 20, at 2.

<sup>52</sup>The six states currently allowing adult adoptees unrestricted access to their birth records, and thus, the ability to access identifying information about their birth records are: Alabama, ALA. CODE § 22-9A-12(c) (LexisNexis 2006); Alaska, ALASKA STAT. § 18.50.500 (2006); Kansas, KAN. STAT. ANN. § 59-2122 (2006); New Hampshire, N.H. REV. STAT. ANN. § 5-C:9(I) (LexisNexis 2006); Oregon, OR. REV. STAT. § 432.240 (2006); and Tennessee, TENN. CODE ANN. § 36-1-127 (2006). In Tennessee, an adoptee may be subject to a contact veto, which would prohibit the adoptee from actually contacting his or her birth parent. *See* Part VI for a more in-depth discussion of Tennessee’s contact veto provision. For information on the status of each state’s adult adoptee access statutes, see The White Oak Foundation Map Page, <http://www.whiteoakfoundation.org/mappage.htm> (last visited July 15, 2007). The White Oak Foundation Map Page is particularly useful because it identifies which states allow adult adoptees to access their original birth and adoption records, which states have contact or disclosure veto provisions, which states have intermediary or registry programs that are used to “match up” birth parents and adoptees who are seeking each other, which states have other kinds of limited access programs, and which states have no programs available to searching adoptees or birth parents. *Id.* For a state-by-state legislative report regarding adoption record access statutes, see The American Adoption Congress Legislative Page, <http://www.americanadoptioncongress.org/legislation.htm> (last visited July 15, 2007). The American Adoption Congress Legislative Page is also particularly useful because it contains not only the most recent legislative report, but also legislative reports from years past (2004, 2005, and 2006), so one can trace legislation as it makes its way from grassroots activities to votes in the statehouse. *Id.* In addition, the American Adoption Congress homepage offers volumes of information surrounding open access system activism including suggested reading material for interested visitors and search guidance for adoptees seeking to learn more about their origins. *See generally* The American Adoption Congress Home Page, <http://www.americanadoptioncongress.org/home.htm> (last visited July 15, 2007).

<sup>53</sup>*See, e.g., In re Roger B.*, 418 N.E.2d 751 (Ill. 1981); *In re Janice Assalone*, 512 A.2d 1383 (R.I. 1986). These cases will be discussed later in this note; *see infra* notes 83-92 and accompanying text.

expense of adult adoptees who would simply like the opportunity to know more about their origins and identities.

### III. THE CONCEPT OF PRIVACY IN AMERICA AND ITS RELATIONSHIP TO OPEN ACCESS STATUTES

#### A. *The Meaning and History of Privacy*

The above discussion begs the question: what is the right to privacy? The right to privacy was first recognized as a protected right by the Georgia Supreme Court in 1905.<sup>54</sup> Richard A. Glenn, a professor of government and political affairs and the author of *The Right to Privacy: Rights and Liberties under the Law* explains, “Over the next fifty years, a majority of the states adopted a common law principle of an independent right to privacy. Today, the right to privacy exists, in some form or another, in all fifty states.”<sup>55</sup> The Supreme Court, in the 1965 landmark case of *Griswold v. Connecticut*, formally<sup>56</sup> recognized that an independent constitutional right to privacy emanated from the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution.<sup>57</sup> Today, then, there are both state and federal constitutionally recognized rights to privacy.

While there is no single definition of the right to privacy, many have been offered and debated. In his famous dissent in *Olmstead v. United States*, Justice Louis Brandeis said that the right to privacy, “as against the Government, [is] the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”<sup>58</sup> There are two categories of privacy—tort privacy and

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<sup>54</sup>RICHARD A. GLENN, *THE RIGHT TO PRIVACY: RIGHTS AND LIBERTIES UNDER THE LAW* 11 (2003). The Georgia Supreme Court recognized the right to privacy in *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

<sup>55</sup>GLENN, *supra* note 54, at 12. See also *PRIVACY LAW: CASES AND MATERIALS* 22 (Richard C. Turkington & Anita L. Allen eds., 2d ed. 2002). Turkington and Allen write, “Explicit recognition of rights to privacy in our legal system did not occur before the latter part of the nineteenth century. Privacy was protected prior to that time by legal norms which did not explicitly refer to privacy . . . .” *Id.*

<sup>56</sup>Although *Griswold v. Connecticut* is often cited as the first time the Supreme Court formally recognized the right to privacy, there were prior Supreme Court decisions that foreshadowed that the Supreme Court might recognize such a right. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (striking down a Nebraska law that outlawed the teaching of German and intimating that the 14<sup>th</sup> Amendment’s liberty provision, which seeks to protect rights “essential to the orderly pursuit of happiness by free men[,]” may necessarily give rise to privacy rights). See also *Pierce v. Society of Sisters*, 268 U.S. 510 (striking down an Oregon law that forced parents to send their children to public schools because parents should have the liberty to control the upbringing of their children; this case again intimates the recognition of a privacy right surrounding important decisions).

<sup>57</sup>*Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a statute barring the use of contraceptives is an unconstitutional violation of the right of marital privacy). The Supreme Court extended the right to use contraception to unmarried persons in *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>58</sup>*Olmstead v. United States*, 277 U.S. 438, 478 (1928).

constitutional privacy<sup>59</sup>—and the concept of constitutional privacy has evolved into “the right of the individual to be free from unwanted and unwarranted governmental intrusion into matters affecting fundamental rights.”<sup>60</sup> Today, conceptions of constitutional privacy not only include all that is discussed above, but also protecting individuals from the government’s acquisition and dissemination of personal information.<sup>61</sup> Thus, as the Supreme Court wrote in *Whalen v. Roe*, constitutional privacy involves two types of interests, “the interest in avoiding disclosure of personal matters . . . and . . . the interest in independence in making certain kinds of important decisions.”<sup>62</sup> Both kinds of privacy interests are at stake in the context of adult adoptees gaining access to their original birth and adoption records.

Privacy has long been valued by society as one of our most cherished and important rights. Aside from the role of privacy in enabling people to keep certain things from undergoing public scrutiny, the right of privacy has also been credited with helping individuals realize a full and happy life.<sup>63</sup> In fact, Raymond Wacks<sup>64</sup> highlights a study supporting this contention and asserting that four factors of privacy contribute integrally to the health of human existence. He writes:

First, [privacy] provides personal autonomy; the democratic principle of individuality is linked to the need for autonomy: the desire to avoid being manipulated or dominated by others. Secondly, “privacy” provides the opportunity for emotional release. Thirdly, it permits self-evaluation: the

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<sup>59</sup>GLENN, *supra* note 54, at 5-6. This Note is strictly investigating constitutional privacy, not tort privacy. “Tort privacy,” as Glenn explains:

permits those who are of the opinion that their privacy has been invaded or denied to request from a court of law an action for damages against the person or persons who have committed the wrong. For well over a century, privacy law was considered to be one of the components within the larger category of tort law.

*Id.* at 6. This Note solely investigates the possibility of governmental intrusions (via open access statutes) into privacy, not intrusions by private citizens; thus, it concerns constitutional privacy.

<sup>60</sup>*Id.* at 6.

<sup>61</sup>*See* *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980).

<sup>62</sup>429 U.S. 589, 599-600 (1977).

<sup>63</sup>RAYMOND WACKS, *PERSONAL INFORMATION: PRIVACY AND THE LAW* 11 (1989). Wacks writes, “[Privacy] is claimed to be important, for example, to the individual’s psychological health . . . creativity . . . ability to love . . . and social relationships . . .” *Id.* Another scholar has written, “A central and guiding principle of western liberal democracies is that individuals, within certain limits, may set and pursue their own life goals and projects. Rights to privacy erect a moral boundary that allows individuals the moral space to order their lives as they see fit.” Adam Moore, *Intangible Property: Privacy, Power, and Information Control*, in *INFORMATION ETHICS: PRIVACY, PROPERTY, AND POWER* 172, 183 (Adam Moore ed., 2005). Moore continues, “Privacy protects us from the prying eyes and ears of governments, corporations, and neighbors. Within the walls of privacy we may experiment with new ways of living that may not be accepted by the majority. Privacy, autonomy, and sovereignty, it would seem come bundled together.” *Id.* at 184.

<sup>64</sup>Wacks is a Professor of Law and Legal Theory at the University of Hong Kong. Hong Kong University Press Author’s Profile Page, [http://www.hkupress.org/asp/author\\_profile.asp?id=13](http://www.hkupress.org/asp/author_profile.asp?id=13) (last visited March 31, 2007).

creative and moral activities, and the formation and testing of ideas. Finally, it provides opportunities for sharing confidences and intimacies: limited and protected communication.<sup>65</sup>

Because privacy is so valued by society, recent privacy trends have centered on giving individuals greater control over how and when their personal information is collected, disseminated, and used.<sup>66</sup>

*B. Categories of Privacy Recognized Under American Law and the Relationship Between Privacy and Adoption*

In America today, there are six broad categories of privacy rights that are generally recognized: reproductive/procreational privacy,<sup>67</sup> familial privacy,<sup>68</sup> informational privacy,<sup>69</sup> personal privacy,<sup>70</sup> sexual privacy,<sup>71</sup> and the right to die.<sup>72</sup> The right to privacy first expanded from its most basic form, the right “to be let

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<sup>65</sup>WACKS, *supra* note 63, at 11-12.

<sup>66</sup>Fred H. Cate, *The Privacy Problem: A Broader View of Information Privacy and the Costs and Consequences of Protecting It*, 4 FIRST AMENDMENT CENTER PUBLICATION 5-6 (March 2003). William Safire echoed this sentiment in an essay in the *New York Times* when he wrote:

Your bank account, your health record, your genetic code, your personal and shopping habits and sexual interests are your own business. That information has a value. If anybody wants to pay for an intimate look inside your life, let them make you an offer and you'll think about it. That's opt in. You may decide to trade the desired information about yourself for services like an E-mail box or stock quotes or other inducement. But require them to ask you first.

William Safire, *Nosy Parker Lives*, N.Y. TIMES, September 23, 1999, at A29.

<sup>67</sup>See generally GLENN, *supra* note 54, at 66-117 (discussing the past and current state of reproductive autonomy rights in America). See also Turkington & Allen, *supra* note 55, at 757-839, for a collection of articles regarding reproductive privacy.

<sup>68</sup>See generally *id.* at 839-868 (discussing privacy rights as they relate to marriage, divorce, and the rearing of children). See also GLENN, *supra* note 54, at 117-32, 182-99 (discussing the past and current state of familial autonomy rights in America).

<sup>69</sup>See generally *id.* at 204-14 (discussing informational privacy rights in America). See generally MADELINE SCHACHTER, INFORMATIONAL AND DECISIONAL PRIVACY 199-769 (2003) (discussing access to and disclosure of personal information).

<sup>70</sup>See generally GLENN, *supra* note 54, at 141-42 (discussing personal autonomy rights in America). For purposes of this Note, the category of personal privacy will not be discussed because it has not been cited by courts as a basis for prohibiting adult adoptee access to birth and adoption records, and thus, birth parent identifying information.

<sup>71</sup>See generally *id.* at 132-40, 199-204 (discussing sexual autonomy rights in America). For purposes of this paper, the category of sexual privacy will not be discussed because it has not been cited by courts as a basis for prohibiting adult adoptee access to birth and adoption records, and thus, birth parent identifying information.

<sup>72</sup>See generally SCHACHTER, *supra* note 69, at 889-994 (discussing rights surrounding the right to die in America). For purposes of this paper, privacy rights regarding the right to die will not be discussed because it has not been cited by courts as a basis for prohibiting adult adoptee access to birth and adoption records, and thus, birth parent identifying information.

alone,” when the Supreme Court recognized that such a right was necessary in order for individuals to be able to exercise their reproductive and familial rights.<sup>73</sup> Reproductive privacy has now evolved to include matters such as sterilization,<sup>74</sup> contraception,<sup>75</sup> pregnancy and childbirth,<sup>76</sup> and abortion.<sup>77</sup> Activities such as marriage,<sup>78</sup> divorce,<sup>79</sup> and childrearing<sup>80</sup> have enjoyed constitutional protection under familial privacy because courts have generally been hesitant to encroach upon the family unit.<sup>81</sup> Informational privacy is a more recently recognized category of privacy protecting the disclosure or dissemination of personal information.<sup>82</sup>

Given these conceptions of privacy, courts have argued that sealing birth records is necessary to protect birth parent constitutional privacy. In *In re Roger B.*, an Illinois court rejected an adult adoptee’s claim that the state adoption record statute was unconstitutional because birth parents deserved to have the highly personal decision to place a child for adoption protected as a matter of privacy.<sup>83</sup> The court

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<sup>73</sup>Glenn, *supra* note 54, at 143.

<sup>74</sup>*See, e.g.,* Skinner v. Oklahoma 316 U.S. 535 (1942) (holding the Oklahoma Habitual Criminal Sterilization Act unconstitutional on equal protection grounds but the dicta of the opinion showed a recognition of reproductive privacy).

<sup>75</sup>*See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965). In this landmark case, the Supreme Court held that a law forbidding a married couple from using contraception violates the right to marital privacy, which is grounded in the Bill of Rights. *Id.*

<sup>76</sup>*See* GLENN, *supra* note 54, at 82-83 (illustrating situations in which the state is not allowed to intrude upon a woman’s autonomy just because she is pregnant).

<sup>77</sup>*See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973) (holding an antiabortion law unconstitutional because the law intruded upon a woman’s constitutionally protected privacy right to decide to terminate a pregnancy). After discussing the historical evolution of the constitutionally protected right to privacy and other areas of human activity that have been protected under the right to privacy, the Court wrote, “We, therefore, conclude that the right of personal privacy includes the abortion decision . . .” *Id.* at 154.

<sup>78</sup>*See, e.g.,* Zablocki v. Redhail, 434 U.S. 374 (1978) (holding that a Wisconsin law, which prohibited persons who were behind on their child support payments from marrying, was unconstitutional because it intruded upon a person’s fundamental right to decide whether to marry).

<sup>79</sup>*See, e.g.,* Boddie v. Connecticut, 401 U.S. 371 (holding that a state cannot deny a person the right to a divorce simply because the person is unable to pay the court fees related to divorce proceedings because it violates the person’s fundamental right to decide whether to dissolve his marriage).

<sup>80</sup>*See, e.g.,* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (recognizing that parents and guardians have a fundamental protected right to direct the upbringing of their children). In this case, Oregon passed a statute entitled the Compulsory Education Act, and it mandated that children between the ages of eight and sixteen attend *public* school. *Id.* The court held that, while the state could reasonably mandate that all children must attend *some* school (whether public or private), a state could not interfere with a parent’s right to choose which school the child attended. *Id.* *See also* discussion *infra* text accompanying notes 116-18.

<sup>81</sup>*See infra* note 111 and accompanying text.

<sup>82</sup>*See infra* text accompanying notes 138-47 for a discussion of informational privacy.

<sup>83</sup>*In re Roger B.*, 418 N.E.2d 751, 754 (Ill. 1981).

said that the statutes mandating the sealing of adoption records “represent a considered legislative judgment that confidentiality promotes the integrity of the adoption process. Confidentiality is needed to protect the privacy of the natural parent.”<sup>84</sup> The court went on to cite case law highlighting the court’s view that the natural parents, especially those who have moved on to have families of their own in later years, have the right to be let alone.<sup>85</sup> Similarly, in *In re Janice Assalone*, the Supreme Court of Rhode Island rejected an adult adoptee’s petition for disclosure of her adoption records because she failed to show good cause to the extent necessary to overcome the birth parents’ constitutionally protected privacy rights surrounding the decision to relinquish a child for adoption.<sup>86</sup>

In *Doe and Doe v. Ward Law Firm*, the Supreme Court of South Carolina did allow the adoptive parents of a severely mentally and physically disabled adult adoptee to access the medical information in the adoptee’s adoption records.<sup>87</sup> The court found that the adoptee’s severe mental health issues met the good cause standard for South Carolina and warranted the disclosure of the information.<sup>88</sup> Shielding the biological parents from any threat of disruption of their privacy interests, however, the court mandated that a court appointed intermediary should be the only person to physically access the file.<sup>89</sup> The intermediary was directed to prepare a report for the court, and then the court would disseminate only non-identifying information to the adoptee and his parents.<sup>90</sup> The court implemented the intermediary mechanism to maintain the birth parent’s privacy by protecting her from possible dissemination of her personal information by the state to the adoptee and his adoptive family.<sup>91</sup> In the words of the court, “The intermediary is considered

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<sup>84</sup>*Id.*

<sup>85</sup>*Id.* The *Roger B.* court quotes *In re Maples*, 563 S.W.2d 760, 763 (Mo. 1978):

[T]he state at the behest of those concerned undertook through the adoption process to sever the parental relationship, award custody and establish a new relationship of parent and child. Much of the information coming into the court’s records during that process is for good reason treated as a confidence, offering a fresh start to the parties so that natural parents making this agonizing decision are assured the parent-child relationship will be completely severed, both legally and socially and may put behind the mistakes and misfortunes precipitating this fateful act. They are assisted in this traumatic experience by the knowledge that the records may be compromised only on order of the court and that neither the child nor the adoptive parents may question why they consented to the adoption or circumstances of the abandonment or neglect. If it were otherwise, the adopted child might reenter their lives with disastrous results. There must be finality for the natural parents and a new beginning; *if there is a right of privacy not to be lightly infringed, it would seem to be theirs.* *Roger B.*, 418 N.E.2d at 754 (emphasis added, citation omitted).

<sup>86</sup>*In re Janice Assalone*, 512 A.2d 1383 (R.I. 1986).

<sup>87</sup>*John Doe and Jane Doe v. Ward Law Firm*, 579 S.E.2d 303 (S.C. 2003).

<sup>88</sup>*Id.* at 306.

<sup>89</sup>*Id.* at 307.

<sup>90</sup>*Id.*

<sup>91</sup>*Id.*

an officer of the court and is required to guard any information received as confidential.”<sup>92</sup>

These cases illustrate the notion that courts hold birth parent constitutional privacy as the paramount concern in adoptee access cases. Even where adult adoptees are able to show the requisite good cause, the courts seek to allow access only in ways that simultaneously protect birth parent privacy. It is clear from these cases that courts have hinged the issue of open access statutes on a larger privacy rights debate.

#### IV. BIRTH PARENT PRIVACY INTERESTS ARE AN INSUFFICIENT BASIS FOR BLOCKING ADULT ADOPTEE ACCESS TO ORIGINAL BIRTH AND ADOPTION RECORDS

If a case is to be made for adult adoptees’ unrestricted access to their original birth and adoption records, then it is quite clear that such a case must be able to overcome the birth parent privacy assertions that courts have recognized and supported as an impediment to open access statutes.<sup>93</sup> The premise of constitutional privacy as it is described above<sup>94</sup> provides a valuable framework for making the case against birth parent privacy assertions.

Constitutional privacy has two prongs. As the Supreme Court in *Whalen v. Roe* explained, first, it involves an individual’s freedom from governmental interference with fundamental rights such that the individual is able to make decisions surrounding important matters independently.<sup>95</sup> Secondly, constitutional privacy includes an individual’s right to be free from the government’s gathering and disclosure of his or her personal information.<sup>96</sup>

When examined against these two prongs, birth parent privacy assertions lack sufficient weight to be afforded the protection that they have enjoyed. Privacy assertions made under the first prong, for example, do not work because open access statutes will not impede the exercise of fundamental rights and because adoption rights, as statutory creations, do not give rise to privacy protections only afforded to fundamental rights.<sup>97</sup> Privacy assertions made under the second prong fail because open access statutes do not violate a birth parent’s right to informational privacy. For these overarching reasons, and for the supporting reasoning outlined below, birth parent privacy claims against open access statutes should not be given the legal weight that they have historically enjoyed, and adult adoptees should have unrestricted access to their original birth and adoption records.

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<sup>92</sup>*Id.*

<sup>93</sup>See *supra* notes 83-92 and accompanying text for a discussion of cases where the courts have used birth parent privacy as a basis for blocking adult adoptee access to their original birth and adoption records.

<sup>94</sup>See *supra* notes 58-62 and accompanying text.

<sup>95</sup>*Whalen v. Roe*, 429 U.S. 589, 599-600.

<sup>96</sup>*Id.*

<sup>97</sup>For a discussion of how adoption statutes allowing adult adoptees access to original birth and adoption do not implicate fundamental rights and their associated privacy protections, see *infra* note 135.

A. *Open Access Statutes Do Not Impede Birth Parent Exercises of Fundamental Rights and Adoption Rights Do Not Give Rise to Privacy Protections*

1. Reproductive Privacy

Birth parents have made the claim that open access statutes violate the reproductive privacy of birth parents. They base this claim on the possibility that the child, once he or she reaches the age of majority, could seek out his or her biological parent someday, and this possibility interferes with the birth parent's decision of whether or not to have the child, and thus, the birth parent's reproductive privacy.<sup>98</sup> This argument can be overcome. In looking at the types of issues or important decisions affecting fundamental rights that have been afforded reproductive privacy protections, one can see that the courts have extended privacy protections to decisions or activities that are sure to have an immediate or nearly immediate impact on the decision maker such as sterilization and abortion.<sup>99</sup> The whole idea that the possibility that a child *might* seek out his birth parent eighteen to twenty-one years after the birth parent has decided to put the child up for adoption interferes with a woman's reproductive privacy seems quite speculative, and thus, not worthy of privacy protection.

As stated above, modern reproductive privacy protections have been extended to activities such as sterilization, contraception, pregnancy and childbirth, and abortion.<sup>100</sup> All these activities have one thing in common: they all involve a person's right to be free from governmental intrusion into decisions that will immediately and directly affect their reproductive liberties. In *Skinner v. Oklahoma*, for example, the Supreme Court reversed an Oklahoma statute which provided "for the sterilization of 'habitual criminals.'"<sup>101</sup> In his opinion, Justice Douglas said, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . . There is no redemption for whom the law touches. . . . He is forever deprived of a basic liberty."<sup>102</sup> Justice Douglas's opinion intimates the idea that once a person has been sterilized, he is immediately (and permanently) deprived of his freedom to exercise his reproductive rights; by its very nature, government-sanctioned sterilization necessarily interferes with a person's future reproductive choices.

Similarly, in *Roe v. Wade*, the Supreme Court asserted several immediate and direct consequences that could ensue if the right to privacy did not encompass a woman's right to an abortion.<sup>103</sup> The Court wrote,

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm

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<sup>98</sup>See *Doe v. Sundquist*, 2 S.W.3d 919, 926 (Tenn. 1999).

<sup>99</sup>See *infra* text accompanying notes 101-06.

<sup>100</sup>See *supra* notes 74-77 and accompanying text.

<sup>101</sup>*Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>102</sup>*Id.* at 541.

<sup>103</sup>*Roe v. Wade*, 410 U.S. 113, 153 (1973).

medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with an unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>104</sup>

The Court acknowledged that if it denied a woman the right to have an abortion, that denial could manifest directly and immediately in the circumstances listed above.<sup>105</sup> Thus, the Court extended the right to privacy to a woman's decision of whether to have an abortion because interference with the right to an abortion necessarily affects a woman's reproductive choices.<sup>106</sup>

In the case of open access statutes for adult adoptees, however, there is minimal risk of governmental interference with the important decision making of the birth parents, and thus, there is no need for an extension of birth parent privacy rights. Open access statutes do not have a direct and immediate effect on birth parent reproductive decision making. It is simply too speculative to argue that the possibility that an adult adoptee *might* seek out a birth parent *eighteen to twenty-one years after* the birth parent has conceived or given birth to the child would have a significant effect on a birth parent's reproductive decision making.

Furthermore, even if one argues that *any* interference in the reproductive decision-making process is unacceptable, reproductive privacy case law illustrates that it is within government's authority to promote policies that interfere, to some extent, with reproductive privacy rights. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court upheld three restrictions on a woman's right to terminate a pregnancy.<sup>107</sup> The Court said that the state could exercise a policy of promoting life over abortion by mandating that, before a woman could get an abortion, she would have to be educated on the procedure, give informed consent, wait twenty-four hours between the time of consent and the procedure, and minor females would have to get parental consent.<sup>108</sup> The Court approved these restrictions on abortion because, while they interfered to some extent with the decision to terminate a pregnancy, they did not place an undue burden on the woman's right to have an abortion.<sup>109</sup> If mandating that a woman must be educated on the consequences of her decision to have an abortion and a twenty-four hour waiting period do not constitute an undue burden on reproductive privacy rights, then, surely, the mere possibility that an adult adoptee might seek out his or

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<sup>104</sup>*Id.*

<sup>105</sup>*Id.*

<sup>106</sup>*Id.*

<sup>107</sup>505 U.S. 833 (1992).

<sup>108</sup>*Id.* at 881-87, 899-900. The parental consent restriction did allow for a medical emergency exception and a judicial bypass. *Id.* at 899.

<sup>109</sup>*Id.* at 881-87, 899-900.

her birth parents eighteen years in the future does not constitute something that will unacceptably burden reproductive privacy rights.

Allowing adult adoptees access to their original birth and adoption records does not directly and immediately interfere with birth parents' reproductive privacy rights, nor does it unreasonably burden birth parents' procreational decisions. Reproductive privacy assertions are better made against governmental intrusions that have a more immediate and direct effect on birth-parent decisions than governmental intrusions that may not even ever manifest in an effect on the birth parent.

## 2. Familial Privacy

Birth parents have also attacked open access statutes on the grounds that the statutes infringe on birth parent rights to familial autonomy and the right to be free from familial disruption.<sup>110</sup> These claims can be overcome on two grounds. First, in examining familial privacy protections from a legal-historical perspective, it is clear that the kind of familial privacy assertions birth parents make in the context of open access statutes (the right to be free from familial disruption) are not the kind of assertions that have won privacy protections from the Supreme Court. Secondly, similar to the analysis of birth parent reproductive privacy assertions in the open access statute context, familial privacy assertions prove to be too speculative to deserve protection.

The family unit has long been protected from governmental intrusion based on the notion that the family is an independent entity.<sup>111</sup> This protection from governmental intrusion has evolved into privacy protections surrounding basic familial decisions such as the choice to get married<sup>112</sup> or divorced<sup>113</sup> and choices surrounding the rearing and education of children.<sup>114</sup> The Supreme Court has recognized a privacy interest in these decisions because the right to get married, divorced, or to have and raise children are all fundamental liberties rooted in the Fourteenth Amendment's Due Process Clause.<sup>115</sup>

Familial privacy law evolved out of a case regarding a parent's right to determine the upbringing of her child. In *Pierce v. Society of Sisters*, the Supreme Court struck down an Oregon law requiring every parent to send his or her child to a public school.<sup>116</sup> The Court reasoned that such a law violated the liberty of parents to

<sup>110</sup>See *Doe v. Sundquist*, 2 S.W.3d 919, 926 (Tenn. 1999).

<sup>111</sup>Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law*, in *PRIVACY LAW: CASES AND MATERIALS* 838, 839 (Richard C. Turkington & Anita L. Allen eds., 2002). Minow writes, "Traditional family law embraced a particular notion of family autonomy which barred the legal system from invading the private enclave of the family . . . ." *Id.*

<sup>112</sup>See *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down a Virginia law banning interracial marriages because it infringed on the fundamental freedom to marry that is guaranteed under the Due Process Clause of the Fourteenth Amendment).

<sup>113</sup>See *supra*, note 79.

<sup>114</sup>*Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>115</sup>See, e.g., *Loving*, 388 U.S. 1; *Pierce*, 268 U.S. 510. See also *infra* note 135, for a discussion of fundamental rights.

<sup>116</sup>268 U.S. 510 (1925).

choose how their children would be raised and educated.<sup>117</sup> *Pierce* also highlighted the State's need to respect and defer to the decision making of parents so that parents could prepare their children for citizenship in the manner they found most appropriate.<sup>118</sup> Thus, in *Pierce*, the Court established a reluctance to interfere with decisions of parents regarding their children, and, on a more broad interpretation, a reluctance to interfere with familial decisions in general.

Nearly a half a century later, and citing *Pierce*, the Court continued to protect the privacy interests parents have in steering the upbringing of their children.<sup>119</sup> *Wisconsin v. Yoder* involved a Wisconsin law mandating all children to attend school until the age of sixteen.<sup>120</sup> Several Amish parents were convicted of failing to send their fourteen- and fifteen-year-old children to school as mandated by the law.<sup>121</sup> The Amish parents argued that the law violated their rights as parents to direct the upbringing of their children, particularly the religious upbringing of their children.<sup>122</sup> The parents feared that forced attendance at non-Amish schools would endanger their salvation and the salvation of their children because the Amish believed salvation could only be attained by those who led lives "separate and apart from the world and worldly influence."<sup>123</sup> The Court recognized these concerns and, citing familial privacy rights of parents to direct the upbringing of their children, held that the Amish families did not have to abide by the compulsory attendance law.<sup>124</sup> The Court wrote,

[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.<sup>125</sup>

Thus, the Court's recognition of the important right of Amish parents to be free from State interference with their familial traditions and religious beliefs is a modern illustration of the familial privacy law set forth in *Pierce*.

The right to privacy as it relates to the right to marry provides further valuable insight into the court's recognition of familial privacy. It was not until the latter twentieth century, in *Zablocki v. Redhail*, that the Supreme Court first recognized

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<sup>117</sup>*Id.* at 534.

<sup>118</sup>*Id.* at 535.

<sup>119</sup>*Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>120</sup>*Id.*

<sup>121</sup>*Id.*

<sup>122</sup>*Id.* at 209.

<sup>123</sup>*Id.* at 209-10.

<sup>124</sup>*Id.* at 234.

<sup>125</sup>*Id.* at 232.

that a right to privacy surrounded the decision of whether to marry.<sup>126</sup> At issue in that case was a Wisconsin statute requiring a person who had a child but did not live with the child to show proof of fulfillment of his child support obligations to a court before he could get the court's permission to marry.<sup>127</sup> The Supreme Court struck down the statute holding that the decision to marry was protected by the right of privacy, and as such, the Wisconsin statute, which interfered with this privacy right, was unconstitutional.<sup>128</sup> In its reasoning, the Court highlighted the fundamental nature of marriage.<sup>129</sup> Quoting an earlier decision, the Court said, "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."<sup>130</sup> This strong language illustrates the notion that familial privacy rights only extend to those rights that are so fundamental that human existence relies upon them.

Thus, today, familial privacy rights surround the important decisions inherent in family relationships. Whether regarding a decision to marry or decisions regarding the upbringing of children, courts have recognized that the State does not have the right to interfere with decisions central to the nature of a family.

Birth parent familial privacy assertions against open access statutes are flawed, however, because they lack a foundation in a fundamental right worthy of privacy protections. Birth parents argue that open access statutes violate their right to familial privacy because such statutes give rise to the possibility that the birth parent's family could be disrupted when an adult adoptee accesses his original birth and adoption records and seeks out his birth parents.<sup>131</sup> When compared to the fundamental rights surrounding marriage, divorce, or the having and raising of children, which have all been found to be rights essential to human survival and existence,<sup>132</sup> the right to be free from disruption clearly lacks the weight of importance necessary to constitute a fundamental right worthy of familial privacy protections. It definitely would make life more pleasant if one could be assured that his life would never be disrupted, but no one has a legal right to live a life free from disruption nor is it essential to human existence and survival to live a life free from disruption. Thus, birth parent privacy assertions based on a right to be free from the disruption that *might* occur should an adoptee seek out his birth parents are not sufficient to give rise to familial privacy protection, and open access statutes should not be undermined on the premise of familial privacy.

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<sup>126</sup>434 U.S. 374 (1978).

<sup>127</sup>*Id.* at 374.

<sup>128</sup>*Id.* at 384-85. The Court wrote:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.

*Id.* at 386.

<sup>129</sup>*Id.* at 383.

<sup>130</sup>*Id.* (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

<sup>131</sup>*See Doe v. Sundquist*, 2 S.W.3d 919, 926 (Tenn. 1999).

<sup>132</sup>*See supra* notes 112-130 and accompanying text.

Birth parent claims to familial privacy can be overcome for another reason: these claims are too speculative to be given privacy protection. Similar to the reasons provided in the analysis of reproductive privacy above,<sup>133</sup> birth parents should not be granted familial privacy protection on the basis of potential “harms” that may not even occur. The existence of open access statutes will not necessarily give rise to the disruption of birth parent lives. Access to original birth and adoption records may be enough for many adult adoptees; they will not have to seek out their birth parents in their search for identity. Furthermore, there are mechanisms that can be put in place to mitigate a birth parent’s life from being disrupted, such as Tennessee’s contact veto system,<sup>134</sup> which will be discussed below. For all the reasons outlined above,<sup>135</sup> adult adoptee access to their original birth and adoption records should not be prohibited based on unfounded birth parent claims to familial privacy.

*B. Open Access Statutes Do Not Violate Birth Parent Informational Privacy Rights*

The second prong of constitutional privacy encompasses a person’s right to determine if, when, and the terms upon which personal information will be disclosed.<sup>136</sup> Birth parents argue that open access statutes violate their right to informational privacy because the statutes allow adult adoptees to gain access to birth parent personal information, including the birth parent’s identity and the fact

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<sup>133</sup>See *supra* notes 99-109 and accompanying text.

<sup>134</sup>See *infra* Part VI for a discussion of the Tennessee contact veto system.

<sup>135</sup>In addition to the preceding arguments, birth parent claims to privacy in the open access statute context can also be undermined on the more general premise that adoption is not a fundamental right; and, therefore, adoption issues are not afforded privacy protections. To reiterate, it is generally accepted that privacy protections are afforded only to matters affecting fundamental rights. GLENN, *supra* note 54, at 216. The Supreme Court has explained that fundamental rights are “principle[s] of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In other words, fundamental rights were not created by statute, they were created by tradition and by the notion of what is most highly valued in our society. Government activities infringing on fundamental rights are met with the highest level of scrutiny by the courts and measured against their necessity in accomplishing compelling governmental interests. Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 11 N. Ill. U. L. Rev. 479, 503 (1990). Adoption, however, is a statutory creation. See *supra* Part II.B: *A Historical Overview of Open Access Statutes*, for a discussion of the statutory nature of adoption. Every state has had to create statutes in order for adoption to be recognized as a legal activity in that state. See Cornell Law School Legal Information Institute Webpage, [http://www.law.cornell.edu/topics/Table\\_Adoption.htm](http://www.law.cornell.edu/topics/Table_Adoption.htm) (last visited July 15, 2007) for links to each state’s adoption statutes. Adoption, then, cannot be considered a fundamental right and cannot be considered worthy of privacy protections. If adoption rights are statutory, and thus, are not the kinds of rights that have associated privacy protections, birth parents cannot claim that adult adoptee access to original birth and adoption records violates a birth parent’s right to privacy. See *Does 1, 2, 3, 4, 5, 6, and 7 v. Oregon*, 993 P.2d 822 (Or. 2000); see also *infra* Part V.B. Thus, birth parent privacy is an insufficient basis for the prohibition of adult adoptee access to their original birth and adoption records.

<sup>136</sup>Madeline Schachter, *Access to Information*, in *INFORMATIONAL AND DECISIONAL PRIVACY* 199, 199 (2003).

that the birth parent had a child and gave it up for adoption, and such access constitutes an unjustified disclosure of personal information by the state.<sup>137</sup> Birth parent claims to informational privacy are undermined in the open-access-statute context because government has an important interest at stake in allowing adult adoptees to gain access to their original birth and adoption records and can facilitate access in a responsible fashion; therefore, informational privacy should not be accepted as a basis for the continued rejection of open access statutes.

To make the assertion that birth parent claims to informational privacy are unfounded, one must first have an understanding of informational privacy. Informational privacy is one of the more recently recognized categories of privacy; the Supreme Court did not formally recognize it until 1977 in *Whalen v. Roe*.<sup>138</sup> Since *Whalen*, informational privacy has been recognized as including both freedom from government disclosure of one's intimate affairs,<sup>139</sup> and protection from governmental surveillance of highly personal matters.<sup>140</sup> Put more succinctly, Richard Turkington<sup>141</sup> wrote, "The right to informational privacy entails a claim that someone has acquired or disseminated personal or intimate information about you without your consent."<sup>142</sup> Informational privacy protections, however, do not extend to all disclosures of personal information because no all-encompassing right to the nondisclosure of personal information exists.<sup>143</sup> Thus, determining whether a person's right to informational privacy has been violated requires a two-step analysis.<sup>144</sup> First, courts look at the nature of the information that was disclosed to determine whether it was of an intimate or personal nature; second, courts then determine whether the government's disclosure of the information was justified.<sup>145</sup>

The crux of the debate over what constitutes a violation of a person's right to informational privacy seems to revolve more around the second prong of the analysis because even if the government has disclosed intimate information, it still may have been justified in doing so. In *United States v. Westinghouse Electric Corp.*, the United States Court of Appeals for the Third Circuit laid out a set of factors that should be considered in deciding whether the government's disclosure of personal

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<sup>137</sup>*See Doe v. Sundquist*, 2 S.W.3d 919, 926 (Tenn. 1999).

<sup>138</sup>429 U.S. 589 (1977).

<sup>139</sup>Madeline Schachter, *The Informational Privacy Right*, in *INFORMATIONAL AND DECISIONAL PRIVACY* 288, 288 (2003).

<sup>140</sup>*Whalen v. Roe*, 429 U.S. 589, 600 n.24.

<sup>141</sup>Mr. Turkington is now deceased, but before his death in 2004 he taught at the Villanova University School of Law for twenty-seven years. He specialized in privacy law. His biography can be found at <http://old.law.villanova.edu/facultyandstaff/facultyprofiles/faculty/turkington/tribute.asp> (last visited June 16, 2007).

<sup>142</sup>Turkington, *supra* note 135, at 488.

<sup>143</sup>GLENN, *supra* note 54, at 208.

<sup>144</sup>*See generally* Turkington, *supra* note 135, at 505-510 (1990).

<sup>145</sup>*Id.*

information was justified or whether it violated a person's right to privacy.<sup>146</sup> The court analyzed the following factors to make the determination:

[1] [T]he type of record requested, [2] the information it does or might contain, [3] the potential for harm in any subsequent nonconsensual disclosure, [4] the injury from disclosure to the relationship in which the record was generated, [5] the adequacy of safeguards to prevent unauthorized disclosure, [6] the degree of the need for access, [7] and whether there is an express statutory mandate, articulated in public policy, or other recognizable public interest militating toward access.<sup>147</sup>

Thus, it seems from *Westinghouse*, the Court, in seeking to protect informational privacy rights, is going to look to see whether there is a sufficient public interest at stake and whether access, once it is granted to one person or entity, can be controlled. Birth parent objections to open access statutes on the basis of the right to informational privacy must, then, be assessed against the government's interest in allowing adult adoptees to have access to their original birth and adoption records and the government's effort in preventing too many people, or the wrong people, from gaining access to the birth parents' personal information.

As discussed above, adoptees tend to struggle with identity formation issues that affect their lives greatly and lead to a greater chance of the need for psychological care.<sup>148</sup> It is surely within the government's interest to adopt public policy initiatives that would aid in increasing the mental health of its citizens. After all, the government constantly makes public policy decisions and engages in activities to promote and support other aspects of individuals' health and well-being. For example, government welfare programs such as Medicaid seek to ensure that all citizens will have at least a modicum of access to medical care to protect basic physical and mental health needs. Additionally, state funding of public schools illustrates the government's commitment to education and the fostering of resourceful citizens who will, hopefully, make positive choices for themselves and society in the future.

Allowing adult adoptees to have access to their original birth and adoption records is a simple and direct mechanism within a greater public policy scheme to promote the well-being of individuals that the government can undertake to enable

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<sup>146</sup>United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3rd Cir. 1980). In *Westinghouse*, the court had to decide whether Westinghouse's release of employee medical information to the National Institute for Occupational Safety and Health (NIOSH) constituted a violation of the employees' right to privacy, or, whether the public health interest at stake outweighed the employees' privacy interests. *Id.* at 570. In the end, the court decided that the public health interest was substantial so as to legitimize the release of the information; however, NIOSH had to give the employees notice of the disclosure and employees were permitted to contest the disclosure of their own personal information. *Id.* at 581.

<sup>147</sup>*Id.* at 578. Turkington describes these factors as "a flexible weighing of interests." Turkington, *supra* note 135, at 509 (1990).

<sup>148</sup>*See supra* notes 16-18 and accompanying text for a discussion of the mental health issues that adoptees often face as a result of their inability to access information that would aid in the process of identity formation.

adoptees and the people they affect, a large sector of society,<sup>149</sup> to achieve greater mental health and a more fulfilling life.<sup>150</sup> And granting adult adoptees access to their original birth and adoption records need not come at the expense of the birth parents' psychological health. Research has shown that greater openness within the adoption process may alleviate mental health issues arising from a secretive adoption.<sup>151</sup> Psychologists Wiley and Baden write that research suggests "[t]he movement toward openness [in the adoption process] . . . may actually decrease the emergence of negative symptoms for birth parents."<sup>152</sup>

Furthermore, open access statutes demonstrate that the government can further an important societal interest while ensuring that birth parent personal information is not unnecessarily or excessively disclosed. A responsible and sufficient open access statute system is one in which only adult adoptees, not the public at large, are able to access their original birth and adoption records. Under a system such as this, adult adoptees are able to gain the information that they desperately need in order to live more fulfilled lives, and the government is able to limit the dissemination of birth parent personal information to the only person who is most directly and intimately affected by the information—the adoptee.<sup>153</sup> Because the government has a legitimate interest in bettering the mental health and well-being of its citizens and because the government can do this in a way that severely limits the possibility of excessive dissemination of birth parent personal information, open access statute systems can overcome birth parent informational privacy assertions.

The above discussion demonstrates that open access systems do not result in a violation of birth parent privacy rights as they are conceived under the two-prong notion of constitutional privacy. First, open access systems do not interfere with a birth parent's independence in making important decisions concerning fundamental rights. Neither familial nor reproductive decision making is imposed upon by open access systems. Furthermore, because the right to give one's child up for an

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<sup>149</sup>See *supra* note 20 and accompanying text.

<sup>150</sup>In addition to bettering the mental health of adult adoptees, open access to birth and adoption records would also put an end to the continued discrimination against adoptees in America. Because adult adoptees are the only citizens in the United States that are legally prohibited from knowing who their birth parents are, open access statutes would give them the same rights as non-adopted persons. Equal treatment of its citizens surely is a legitimate governmental interest sufficient to overcome birth parent informational privacy assertions.

<sup>151</sup>Wiley & Baden, *supra* note 21, at 42.

<sup>152</sup>*Id.*

<sup>153</sup>It seems clear from the scholarship surrounding the debate over informational privacy rights that the primary concern revolves around the way modern advancements in technology have made the limited or controlled dissemination of information so difficult. For example, in his essay, *Intangible Property: Privacy, Power, and Information Control*, Adam Moore shows that he is most concerned with the way that use of the internet and other technologies results in individuals leaving "digital footprints" of personal information that can be tracked and exploited for both legitimate and illegitimate purposes. See generally Moore, *supra* note 63, at 172-190. Moore writes, "We will have to be much more careful about what we do and say in the future both publicly and privately. Any information or ideas that we disclose, including inventions, recipes, or sensitive personal information, might soon be bouncing around cyberspace for anyone to access." *Id.* at 187.

adoption is a statutory right and not a fundamental right, birth parents cannot expect privacy protections to flow out of the exercise of that right.<sup>154</sup> Secondly, open access systems can achieve their goal of giving adult adoptees access to their birth and adoption records in a responsible and reasonable manner that does not violate birth parent informational privacy rights. Constitutional privacy, while so very important to the functioning of a healthy society, should not be stretched and distorted to encompass birth parent privacy rights at the expense of open access systems.

V. JUDICIAL AND LEGISLATIVE APPROACHES IN SUPPORT OF ADULT ADOPTEE ACCESS TO ORIGINAL BIRTH AND ADOPTION RECORDS

Birth parent privacy assertions have recently been addressed in the Tennessee and Oregon court systems. These courts looked at birth parent privacy assertions from two different perspectives. One court (the Supreme Court of Tennessee) analyzed the assertions against traditional notions of what constitutes familial, reproductive, or informational privacy. The other court (the Oregon Court of Appeals) looked at whether statutory rights, such as those surrounding adoption, could ever be afforded the privacy protections given to fundamental rights. Neither method of analysis led the courts to find validity in birth parent privacy claims against open access systems, and thus, these assertions failed.

A. *Doe v. Sundquist (Tennessee): Open Access Statutes Do Not Violate a Birth Parent's Right to Familial, Reproductive, or Informational Privacy*

In *Doe v. Sundquist*, the Tennessee Supreme Court held that birth parent privacy should not be accepted as a basis for barring adult adoptees' access to their original birth and adoption records because birth parent privacy assertions are too speculative, differ too greatly from the kinds of protections traditionally granted under the right to privacy, and are not sufficient to overcome society's interest in adoptee access to such information.<sup>155</sup> In that case, a group of birth mothers argued that a Tennessee law allowing adoptees aged twenty-one years or older to access their sealed adoption records violated birth parent privacy under the Tennessee Constitution.<sup>156</sup> Tennessee's Supreme Court rejected the plaintiff birth mothers' privacy claims on several grounds.<sup>157</sup>

In responding to the plaintiffs' claims that the law violated their rights to procreational, familial, and informational privacy, the court acknowledged that such rights are recognized under both the Tennessee and Federal Constitutions.<sup>158</sup> The

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<sup>154</sup>*See supra* note 135.

<sup>155</sup>*Doe v. Sundquist*, 2 S.W.3d 919 (Tenn. 1999).

<sup>156</sup>*Id.* at 920-21. Pertman gives some insight into the history behind the Tennessee law: "politicians were extremely skeptical when an adoptee named Caprice East began lobbying them to unseal records. But on March 18, 1995, the state Senate approved the legislation thirty to two. The House followed suit, ninety-nine to zero, after which the lawmakers gave Caprice a standing ovation. PERTMAN, *supra* note 13, at 82.

<sup>157</sup>*Sundquist*, 2 S.W.3d at 920. It should also be noted that the Supreme Court of Tennessee upheld the law against the birth parents' attack that it "impair[ed] the vested rights of birth parents who surrendered children under [a prior adoption] law." *Id.* at 921.

<sup>158</sup>*Id.* at 926.

court rejected the plaintiffs' claims "that disclosure of adoption records invades the rights to familial privacy by . . . disrupting both biological and adoptive families by releasing identifying information previously sealed."<sup>159</sup> The court held that birth parents' rights to familial privacy were not invaded for two primary reasons. First, the court held that the plaintiffs' fears of familial disruption were too speculative because such disruption "may or may not occur a minimum of 21 years after the adoption occurs."<sup>160</sup> In addition, the court reminded the plaintiffs that traditional conceptions of familial privacy seek to protect a person's choice to get married or have and raise children, not to protect a family from disruption that may or may not even occur.<sup>161</sup>

Addressing the plaintiffs' argument that the open access statute violated the birth parents' right to reproductive privacy, the court emphasized the purpose of adoption rights and posited that the plaintiffs' argument for reproductive privacy was misdirected.<sup>162</sup> The court stated that "[Adoption] was created to protect the interests of children whose parents are unable or unwilling to provide for their care . . . and not to advance a procreational right to privacy of the biological parent."<sup>163</sup> The court continued, "Although the prospect of having the records of the adoption released to the child 21 years later may have some bearing on the decision, it is far too speculative to conclude that it interferes with the right to procreational privacy."<sup>164</sup>

The *Sundquist* court also rejected the plaintiffs' arguments against the open access statute by holding that the statute did not violate the birth parents' right to informational privacy.<sup>165</sup> The court decided that birth parents lacked a fundamental right not to have personal information released to their biological children.<sup>166</sup> In making this argument, the court cited several Sixth Circuit cases rejecting the assertion of a "constitutional right to the non-disclosure of personal information."<sup>167</sup>

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<sup>159</sup>*Id.*

<sup>160</sup>*Id.*

<sup>161</sup>*Id.*

<sup>162</sup>*Id.*

<sup>163</sup>*Id.* (citation omitted).

<sup>164</sup>*Id.*

<sup>165</sup>*Id.*

<sup>166</sup>*Id.* The Tennessee Supreme Court wrote, "Absent a fundamental right or other compelling reason, we reject the invitation to extend constitutional protection to the non-disclosure of personal information." *Id.*

<sup>167</sup>*Id.* at n.7. The Tennessee Supreme Court cited *Jarvis v. Wellman*, 52 F.3d 125, 126 (6th Cir. 1995). The *Jarvis* court held that the unauthorized release of medical records does not violate a constitutionally protected right to privacy because the release of medical records does not concern a fundamental right. *Id.* Quoting its conclusion in an earlier case, the *Jarvis* court wrote, "the Constitution does not encompass a general right to nondisclosure of private information." *Id.* Similarly, in another Sixth Circuit case, the court held that an inmate's right to privacy was not violated when a prison official was able to peruse the inmate's medical records and find out that the inmate was HIV positive. *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994). The court, quoting itself from an earlier case said that "recognition of a constitutional right of nondisclosure would force courts to 'balance almost every act of

The court asserted that a birth parent cannot claim informational privacy protection because if there is no constitutional guarantee to the non-disclosure of personal information,<sup>168</sup> then a birth parent cannot have an expectation that her personal information will never be disclosed to her children.

In sum, the Supreme Court of Tennessee raised the bar of privacy rights analysis in the adoption context. The court went beyond traditional arguments that birth parents have a general right to be left alone<sup>169</sup> and examined specific birth parent familial, reproductive, and informational privacy rights assertions.<sup>170</sup> The court's finding that birth parent claims to familial, reproductive, and informational privacy claims all lacked a sufficient basis to receive privacy protection shows that birth parents should not be able to couch their assertions that adoptees should be denied access to their original birth and adoption records in a right to privacy argument. Thus, adult adoptees should have access to their original birth and adoption records because allowing access will not violate birth parent privacy claims.

*B. Does 1, 2, 3, 4, 5, 6, and 7 v. Oregon (Oregon): The Statutory Nature of Adoption Further Undermines Birth Parents' Privacy Claims*

In 2000, several Oregon birth mothers who had placed their children for adoption between 1960 and 1994 challenged a voter-enacted initiative entitled Measure 58.<sup>171</sup> Measure 58 gave adult adoptees in Oregon a procedural mechanism to access their original birth records without requiring the adoptees to show good cause.<sup>172</sup> The birth mothers argued that Measure 58 violated their constitutionally protected fundamental right to reproductive privacy "because it constitutes an unwanted governmental intrusion into their decisions concerning whether to bear or beget children . . . the decision to surrender [a child] for adoption should be protected to the same extent as a decision to have an abortion or to give birth to . . . and raise the child."<sup>173</sup>

Instead of pointing to the speculative nature of this reproductive privacy argument as the court in *Sundquist* did,<sup>174</sup> the Oregon Court of Appeals attacked the argument by holding that the statutory nature of adoption segregates adoption rights

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government, both state and federal, against its intrusion on a concept so vague, undefinable, and all-encompassing as individual privacy." *Id.* at 740.

<sup>168</sup>*Sundquist*, 2 S.W.3d at 926.

<sup>169</sup>*See In re Roger B.*, 418 N.E. 2d 751 (Ill. 1981).

<sup>170</sup>*Sundquist*, 2 S.W.3d 919.

<sup>171</sup>*Does 1, 2, 3, 4, 5, 6, and 7 v. Oregon*, 993 P.2d 822, 822 (Or. 2000).

<sup>172</sup>The Court of Appeals of Oregon wrote:

Measure 58 provides: "Upon request of a written application to the state registrar, any adopted person 21 years of age or older born in the state of Oregon shall be issued a certified copy of his/her unaltered, original and unamended certificate of birth in the custody of the state registrar . . . . Contains no exceptions."

*Id.* at 826.

<sup>173</sup>*Id.* at 835 (citation omitted).

<sup>174</sup>*Sundquist*, 2 S.W.3d at 926.

from privacy protections enjoyed by fundamental (non-statutory) rights.<sup>175</sup> The Oregon court asserted, “Statutes do not create fundamental rights”<sup>176</sup> and concluded that since adoption is a statutory creation, rights surrounding adoption cannot be afforded fundamental status or their associated privacy protections.<sup>177</sup> The court summarized its holding that Measure 58 does not violate the privacy rights of birth mothers by stating, “Because a birth mother has no fundamental right to have her child adopted, she can also have no correlative fundamental right to have her child adopted under circumstances that guarantee her identity will not be revealed to the child.”<sup>178</sup>

In making privacy arguments in the adoption context, birth parents assume that the rights associated with the adoption process give them the right to be left alone in making the decisions to give a child up for adoption and to remain anonymous to the child. As the Oregon case shows, however, if all the rights associated with adoption are created by statute and are not fundamental,<sup>179</sup> and only fundamental rights are afforded privacy protections,<sup>180</sup> then adoption rights do not afford privacy protections. In the absence of statutorily created privacy rights, a birth parent is left without any claim to privacy protection in the adoption context. Thus, the statutory nature of adoption undermines birth parents’ privacy assertions. Adult adoptees should not be barred from accessing their original birth records based on birth parent privacy claims inappropriately asserted against statutory rights that lack the fundamental status necessary for guaranteed privacy protections.

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<sup>175</sup>*Does 1, 2, 3, 4, 5, 6, and 7*, 993 P.2d at 836.

<sup>176</sup>*Id.* at 835 n.8.

<sup>177</sup>*Id.* at 836. In bolstering its argument that adoption rights are not fundamental rights, and thus, should not be protected by the right to privacy, the court illustrated some differences between a choice to give a child up for adoption and a choice to use contraception or to abort a child. The court wrote:

A decision to prevent a pregnancy, or to terminate a pregnancy in an early stage, is a decision that may be made unilaterally by individuals seeking to prevent conception or by a woman who wishes to terminate a pregnancy. A decision to relinquish a child for adoption, however, is not a decision that may be made unilaterally by a birth mother or by any other party. It requires, at a minimum, a willing birth mother, a willing adoptive parent, and the active oversight and approval of the state. Given that reality, it cannot be said that a birth mother has a fundamental right to give birth to a child and then have someone else assume legal responsibility for that child . . . . Although adoption is an option that generally is available to women faced with the dilemma of an unwanted pregnancy, we conclude that it is not a fundamental right.

*Id.* at 836 (citation omitted).

<sup>178</sup>*Id.* The court also stated its opinion that a law allowing adult adoptees to access their birth parent identifying information would not have “the same sort of constitutional infirmities as the laws that criminalized contraception and abortion that were struck down in *Griswold, Eisenstadt, and Roe.*” *Id.* at 835-36.

<sup>179</sup>These contentions were asserted in Part II.B of this Note; *see supra* notes 41-45 and accompanying text, and *see supra* notes 174-78 and accompanying text for the discussion of the Oregon case law.

<sup>180</sup>*See supra* note 135.

The Tennessee and Oregon cases illustrate how two states, and their legislative and judicial systems, have been able to assess birth parent privacy claims in ways that are not dismissive or trivializing, but rather, true to the manner in which privacy has been interpreted and protected throughout history. In finding that birth parent privacy claims do not constitute what has traditionally been considered worthy of familial, reproductive, or informational privacy, and finding that adoption rights, as statutory creations, should not be afforded the privacy protections only given to fundamental rights, these courts have sought to balance the rights of both parties within the confines of traditional privacy law. As the next section illustrates, the balancing of the interests of birth parents and adult adoptees is perhaps best accomplished through a novel legislative approach.

#### VI. A LEGISLATIVE APPROACH

While adult adoptees should not be denied access to their original birth and adoption records on the basis of birth parent privacy, some negative effects could result from such access, and the negative effects could undermine the integrity of the adoption process.<sup>181</sup> For example, an adult adoptee, after obtaining the name of his birth mother, could seek her out and face the reality that she does not want to have contact with him. This could be emotionally devastating for the adoptee and seriously disrupt the life of the birth mother. Many might argue that no one benefits from a system that could give rise to these circumstances. There are, however, mechanisms that can be put into place that, while protecting the interests of all parties, are not premised on a superior privacy right of birth parents.

Tennessee has attempted to mitigate these risks by giving birth parents the option of establishing a contact veto.<sup>182</sup> Under this system, a birth parent who does not wish to be contacted by her biological child can register a contact veto with the state. If that child accesses his original birth records, he will be notified of his biological parent's unwillingness to be contacted.<sup>183</sup> Should the adoptee violate the contact

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<sup>181</sup>Some argue that open access statutes will inhibit people from giving their child up for adoption and increase abortion rates. Statement of Marley Elizabeth Greiner, Executive Chair, Bastard Nation: The Adoption Rights Organization, *Written Testimony in Support of SB 355: Hearing on Open Records for Adult Adoptees Before the NH H. Children and Family Law Comm.* (Apr. 6, 2004), available at <http://www.bastards.org/activism/local/nh/nh-sb335-marley-testimony.htm>. Greiner opposes this argument. *Id.*

<sup>182</sup>TENN. CODE ANN. § 36-1-128 (2006). The language of the statute is as follows:

(a) The department shall establish and maintain a contact veto registry for the purpose of permitting registration of the willingness or unwillingness of the persons or classes of persons named herein for contact with persons eligible to have access to any records covered by this part . . . (b) The following persons may have their names entered in the registry either to file a contact veto or to give consent to contact: (1) A parent, sibling, spouse, lineal ancestor, or lineal descendant of an adopted person or a person for whom records are maintained . . . either before or after such persons reach twenty-one (21) years of age. (2) The legal representative of any person described in subdivision (b)(1).

*Id.*

<sup>183</sup>TENN. CODE ANN. § 36-1-128(a) (2006). Before an adult adoptee can gain access to his original birth and adoption records in Tennessee, he must complete and sign a sworn statement that: he is aware of the contact veto registry, he will not attempt to contact his birth parent if

veto, he would be guilty of a misdemeanor and face the possibility of civil suit and the payment of damages.<sup>184</sup> The contact veto addresses the needs of birth parents because it literally makes it illegal for an adult adoptee to contact his birth parent if the birth parent has filed a veto with the state. This puts the control of making contact into the hands of the birth parent, empowering her to allow or deny contact. Notice, however, that it simultaneously empowers adult adoptees to gather pertinent information about their origins.

A proponent of the Tennessee system has noted that the contact veto “establish[es] a presumption of openness” in the Tennessee adoption system (because an adoptee can seek out his birth parent unless the birth parent has filed a veto) and argues that Tennessee’s contact veto system should be the model for a standardized open records system in which adult adoptees would have unrestricted access to their original birth and adoption records.<sup>185</sup> Through this system, Tennessee has sought to maintain the integrity of the adoption process while, at the same time, eschewing the secrecy and stigmas attached to adoption through the years by proposing that openness will be the rule, not the exception.<sup>186</sup> If openness is the rule, this proponent argues, then the era where birth parents’ privacy interests are so much more heavily weighted than adult adoptees’ right to access will end.<sup>187</sup>

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the birth parent has filed a contact veto, and he understands the legal implications of a violation of a contact veto. TENN. CODE ANN. § 36-1-127(f) (2006).

<sup>184</sup>TENN. CODE ANN. § 36-1-132 (2006). Under this statutory section, a birth parent that has been contacted by her biological child despite the birth parent’s registry of a contact veto has a cause of action against the child. *Id.* The child’s act of contacting the parent despite the contact veto is classified as a Class B misdemeanor under Tennessee law. TENN. CODE ANN. § 36-1-132(g) (2006). The biological parent could receive injunctive relief, compensatory and punitive damages, and attorney’s fees and proceedings costs if successful in the cause of action. TENN. CODE ANN. §§ 36-1-132(a), (d) (2006). Note, at the time of this writing, there were no reported cases of birth parent suits in Tennessee against a biological child for damages resulting from a violation of a contact veto. It should also be noted that one author believes that codification of mechanisms such as Tennessee’s contact veto are unjust. PERTMAN, *supra* note 13, at 80. Referring to “search and consent” mechanisms, Pertman writes, “While it may sound reasonable to prevent communications unless both sides agree to it first, enshrining the prohibition in law is ludicrous. No other adults in America are treated in this way, and singling out adoptees marks them as lesser citizens entitled to fewer rights.” *Id.*

<sup>185</sup>Fleming, *supra* note 41, at 478. Fleming writes:

States should adopt a contact veto system similar to Tennessee’s. The contact veto allows all adult adoptees to gain access to the identifying information contained in their adoption records, while honoring the wishes of those birth parents who do not want to make any connection with the children they surrendered. This system addresses the concerns of individual birth parents while maintaining and facilitating access for the large majority of birth parents and adoptees who desire openness and contact.

*Id.*

<sup>186</sup>*Id.*

<sup>187</sup>*Id.* at 478-79. It is important to note here that there are vehement critics of the Tennessee contact veto system. Bastard Nation, a group dedicated to advancing adoptee rights argues that contact vetoes, such as the one in Tennessee, “are a violation of an adoptee’s right to due process and equal protection under the law.” *Conditional Access Litigation and Other*

Through the use of the contact veto, Tennessee has recognized adult adoptees' right and need to know their biological origins and gives birth parents, should they so desire, the chance to deny contact and leave the circumstances of their past in the past.<sup>188</sup>

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*Legislative Compromises*, [www.bastards.org/documents/conditional.html](http://www.bastards.org/documents/conditional.html) (last visited February 9, 2007). The group continues:

Conditional access legislation in the form of the "contact veto" implies that adoptees and birthparents are not capable of handling adult contact. If either party in an adoption does not wish contact, they can simply say no, as in any other adult situation. If they feel they are being unduly harassed, they can use the same remedies at their disposal as other citizens. Traditional no-contact orders and orders of protection are issued via court order after a person has demonstrated a pattern of threatening or abusive behavior. Even then, the person who has the order issued against him has the right to answer and face his accuser in a court of law. Contact vetoes, however, are issued based solely on the adoptive status of an individual, and are without recourse. In open records states where no contact veto exists, such as Kansas and Alaska, there are no reports of incidents that would demonstrate a necessity for special protections of the birth family.

*Id.*

<sup>188</sup>There are several other mechanisms that have either been put into place in some states or have been discussed as a possible solution to the issue of adult adoptee access to original birth and adoption records. For example, several states have experimented with registries where interested parties can put their name into a registry if they are interested in gaining access to their original records or if they are interested in contacting a biological relative. PERTMAN, *supra* note 13, at 44. As Pertman explains:

[I]n a "search and consent" state, an adoption agency or a court-appointed intermediary usually looks for the birth parents and, with their approval, either gives the adoptee the requested data or facilitates a reunion. In states with "mutual consent" registries, people can list their names at a central location; if both the seeker and the person being sought enroll, then the desired records are released.

*Id.* The problem with these registries, however, is that they perpetuate the notion that birth parents have a superior right to privacy that must be protected even at the expense of adult persons who simply wish to know more about their own backgrounds. For example, in the case of "search and consent" registries, the birth parents must give their approval before an adoptee is able to access the requested data. If, as this Note has argued, birth parent claims to privacy rights are unfounded in the adoption-record-access context, then these registry systems, which place birth parent privacy above adult adoptee rights, are an unacceptable solution. In addition, there is a general feeling among the adult adoptee activist community that these registries are not only legally improper, but that they are unreliable and inadequate. Pertman writes that registries are "obscure and inconsistent." *Id.* The Executive Committee of Bastard Nation, in a letter to the United States House of Representatives Ways and Means Committee regarding a pending national adoption reunion registry bill wrote:

We believe that the formation of a reunion registry might be appropriate if adoptees were already able to obtain their original birth certificates in the same manner as the rest of the American population. But reunion registries are not substitutes for righting the wrong of sealed records, and the issue of opening sealed records should not be confused with search and reunion. Access to one's birth document is nothing less than a civil right. Measures which aid in reunions do nothing to remedy the violation of this right caused by the denial of access. Searching and non-searching adoptees alike want and deserve the same rights as all other adult U.S. citizens.

Bastard Nation Executive Committee, *Resolution of the Executive Committee of Bastard Nation on a National Voluntary Mutual Consent Registry*, June 10, 1998, available at <http://www.bastards.org/activism/nationalregistry.html>.

## VII. CONCLUSION

“The right to be let alone”<sup>189</sup> is perhaps the most simple and direct way privacy has ever been described. But like many legal doctrines, things tend to become less clear and more nuanced as the law evolves. Now, privacy protections are more about keeping government out of the personal decision making of individuals and government’s responsible collection and dissemination of personal information. These ideas are very important and highly valued by our society, as they should be, but they are not at risk in the context of open access statutes for adult adoptees.

Adult adoptees should not be barred from accessing their original birth and adoption records on the basis of faulty birth parent privacy claims. As this note has shown, open access statutes do not jeopardize the important reproductive or familial decision making of birth parents. It is simply too speculative to assert that open access statutes interfere with birth parent choices. Furthermore, open access statutes do not threaten the kind of rights worthy of privacy protection—fundamental rights. Adoption itself is not a fundamental right, so birth parents are also without support in their argument that the fact that they gave a child up for adoption entitles them to any kind of privacy protection. Finally, it is clearly within the government’s interest to allow adult adoptees to access their original birth and adoption records. This governmental interest, accompanied by the fact that such access can be limited to only the adoptee, undermines birth parent claims to informational privacy.

An open access system is not a zero sum game; there need not be a winner and a loser. The possibility of mechanisms such as Tennessee’s contact veto shows that the adult adoptee’s interest in gaining information about his origins and the birth parent’s interest in not having her life disrupted can both be respected in an open access system. State legislatures and courts should allow adult adoptees to have access to their original birth and adoption records; and perhaps then, adoptees such as Carolyn Dixon<sup>190</sup> will be able to move a step closer to knowing their origins and gain a better understanding of themselves.

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<sup>189</sup>Justice Louis Brandeis said these words in *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

<sup>190</sup> See *supra* Part I: Introduction