

## A PRESUMPTION IN FAVOR OF OPENNESS: UNSEALING ADOPTION RECORDS

*Emily Ingall*<sup>†</sup>

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### INTRODUCTION

In the fall of 1980 three identical triplets, separated at birth, were reunited by chance.<sup>1</sup> Robert Shafran was beginning his sophomore year of college in Upstate New York, when students on campus began referring to

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<sup>†</sup> Emily Ingall is a Candidate, Benjamin N. Cardozo School of Law, Class of 2020. She is also the Business Editor, Cardozo Journal of Equal Rights and Social Justice, Volume 26. I would like to thank Professor Edward Stein for his comments and practical insights, and Cardozo for their support of my research.

<sup>1</sup> Amy Kaufman, *The Surreal, Sad Story Behind the Acclaimed New Doc “Three Identical Strangers”*, LOS ANGELES TIMES (Jul. 1, 2018, 2:45 PM), <http://www.latimes.com/entertainment/movies/la-et-mn-three-identical-strangers-documentary-20180702-story.html>.

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him as “Eddy.”<sup>2</sup> After lots of confusion and discussion with “Eddy’s” friends, Robert discovered he had an identical twin brother, Edward Galland.<sup>3</sup> When the local news began publishing this story, photographs of Eddy and Bobby caught people’s attention, including a woman who recognized her friend David Kellman, identical brother number three.<sup>4</sup> The documentary, *Three Identical Strangers*, depicts the story of these triplets reuniting.<sup>5</sup> But what starts as a fairytale story quickly turns “into a dark tale of deception.”<sup>6</sup> In 1995, after a long struggle with mental illness (specifically, manic depression), Eddy committed suicide.<sup>7</sup> As their story continues to unfold, viewers learn that all three triplets spent time in psychiatric hospitals, which suggests a predisposition for mental illness.<sup>8</sup> Before Eddy’s passing, the triplets were briefly able to locate their biological mother.<sup>9</sup> Bobby noted that she “had some serious emotional problems,” something that they would have been aware of had they received any information on their birth mother, biological background, and the psychological experiment they were a part of.<sup>10</sup> Bobby and David have pursued the unsealing of these records, but, due to confidentiality laws, “access to these records has been extremely narrow to these individuals.”<sup>11</sup> This film, which was released nationwide on July 13, 2018, left a lot of lingering questions surrounding psychology, science, legislation, and adoptees rights.<sup>12</sup>

United States adoption law is created by state legislators.<sup>13</sup> From the very first statute regarding adoption, passed by the Massachusetts Legislature in 1851, adoption law has focused on protecting the best interests of the

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<sup>2</sup> David Edelstein, “*Three Identical Strangers*” Tells The Astounding Story of Triplets Separated at Birth, NPR (Jul. 9, 2018, 1:32 PM), <https://www.npr.org/2018/07/09/627260971/three-identical-strangers-tells-the-astounding-story-of-triplets-separated-at-bi>.

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

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

<sup>5</sup> *Id.*

<sup>6</sup> Kaufman, *supra* note 1.

<sup>7</sup> Anna Menta, “*Three Identical Strangers*”: The Shocking Tale of a Study That Separated Triplets at Birth, NEWSWEEK (Jul. 2, 2018, 12:52 PM), <https://www.newsweek.com/three-identical-strangers-tim-wardle-robert-shafran-david-kellman-1004014>.

<sup>8</sup> *Id.*

<sup>9</sup> Neta Alexander, *A Triple Whammy: “Three Identical Strangers” Asks Disturbing Questions*, HAARETZ (Jul. 15, 2018), <https://www.haaretz.com/us-news/.premium.MAGAZINE-a-triple-whammy-three-identical-strangers-asks-disturbing-questions-1.6265707>.

<sup>10</sup> *Id.*

<sup>11</sup> Steven Zeitchik, *A Sundance Documentary About Adoption Hurls Questions at a Well-Known Charity*, THE WASHINGTON POST (Jan. 28, 2018, 9:23 PM), <https://www.washingtonpost.com/news/business/wp/2018/01/28/a-sundance-film-about-adoption-hurls-questions-at-a-well-known-charity/>.

<sup>12</sup> *Id.*

<sup>13</sup> Jason Kuhns, *The Sealed Adoption Records Controversy: Breaking Down the Walls of Secrecy*, 24 GOLDEN GATE UNIVERSITY L. REV. 259 (1994).

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child.<sup>14</sup> Part of this interest was reflected in state statute's protecting the confidentiality of adoption information.<sup>15</sup> However, each state statute varies greatly with respect to what information must be kept confidential, who can access information, and what standards should be used to determine when to release confidential information.<sup>16</sup> The three potential sources from which an adoptee can secure information are all regulated by statute.<sup>17</sup> These sources are the record from the adoption proceeding, the adoption decree, and the adoptee's original birth certificate.<sup>18</sup>

Beginning around the World War II era, adoption was marked by secrecy, which led to the idea of closed proceedings.<sup>19</sup> When parents relinquished their rights to their child, they received no identifying information regarding the child's placement, nor did children receive any information about their birth parents.<sup>20</sup> However, in the early 1970s adoptees began seeking legal access to their original birth records, which sparked the beginning of the open records movement.<sup>21</sup> Adoptees began arguing that they had a constitutional right to access their original records, which was violated when their records were sealed.<sup>22</sup> Adoptees also argued that this sealing procedure caused them the loss of "the right to know their complete identity."<sup>23</sup>

The open records movement, started largely by the Adoptees' Liberty Movement Association, focuses on lobbying for legislative reform and the unsealing of adoption records and original birth certificates.<sup>24</sup> As this movement has gained momentum, states have started allowing adult adoptees limited access to their records.<sup>25</sup>

Part I of this Note will begin by exploring the history of adoption records in the United States, from the first adoption statute through the closed records movement and now, the open records movement. Part II of this Note

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

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

<sup>16</sup> James R. Carter, Comment, *Confidentiality of Adoption Records: An Examination*, 52 TUL. L. REV. 817, 818–19 (1978).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 156 (1999).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 157.

<sup>22</sup> Jennifer R. Racine, *A Fundamental Rights Debate: Should Wisconsin Allow Adult Adoptees Unconditional Access to Adoption Records and Original Birth Certificates?*, 2002 WIS. L. REV. 1435, 1437 (2002).

<sup>23</sup> *Id.*

<sup>24</sup> Caroline B. Fleming, *The Open-Records Debate: Balancing the Interests of Birth Parents and Adult Adoptees*, 11 WM. & MARY J. WOMEN & L. 461, 462 (2005).

<sup>25</sup> *Id.*

will discuss why the current systems in place are improper, and why the systems need to change. Part III will examine and compare statutory approaches recently taken by some other states which allow adult adoptees to view their birth records. Finally, Part IV proposes a new approach that the state of New York should implement, which would allow adult adoptees to access their previously sealed records and birth certificates, and also create contact preferences and registries for all parties involved in the adoption. This approach will best protect adoptees' rights to information, while still maintaining privacy between the parties.

## I. HISTORY OF ADOPTION RECORDS IN THE UNITED STATES

Almost every state in the United States has enacted legislation to permanently seal an adoptee's original birth certificate and the records from the adoption proceeding.<sup>26</sup> This sealing process was not always in place, and it is this aspect of adoption law that I will argue should be revised to reflect current societal needs.<sup>27</sup>

The process of sealing an adoptee's birth records originated to "protect adoptees from the shame and embarrassment of their illegitimate births."<sup>28</sup> The social attitudes and stigmas towards illegitimacy made sealed records legislation easy to pass.<sup>29</sup> The first state to adopt a statute implementing the sealed records process was Minnesota in 1917.<sup>30</sup> However, the process of sealing records during this time period was only to close the records to the general public.<sup>31</sup> The "parties in interest," such as birth parents and adoptees were still given access to their records.<sup>32</sup> Throughout the early 1900s, the prevailing view was to keep records sealed until the adoptee became an adult, when they could then receive their records and their birth parent's information.<sup>33</sup> It was only after World War II that states enacted statutes that sealed the adoption records for all parties, and the only way to release these

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<sup>26</sup> Kuhns, *supra* note 13, at 259.

<sup>27</sup> *Id.* at 260.

<sup>28</sup> Racine, *supra* note 22.

<sup>29</sup> Kathleen Caswell, *Opening the Door to the Past: Recognizing the Privacy Rights of Adult Adoptees and Birthparents in California's Sealed Adoption Records while Facilitating the Quest for Personal Origin and Belonging*, 32 GOLDEN GATE U.L. REV. 271, 285 (2002).

<sup>30</sup> Racine, *supra* note 22, at 1440.

<sup>31</sup> *Id.* at 1441.

<sup>32</sup> *Id.*

<sup>33</sup> Wayne Deloney, *Unsealing Adoption Records: The Right to Privacy versus the Right of Adult Adoptees to Find Their Birthparents*, 7 WHITTIER J. CHILD. & FAM. ADVOC. 117, 122 (2007).

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records was by court order.<sup>34</sup> This type of sealed records statute is one that most states still retain today.<sup>35</sup>

In the 1970s, adoptees began challenging the sealed records process, as they asserted their “right to know.”<sup>36</sup> These challenges were brought in large part because of changes in society, specifically surrounding stigmas and views on race and religion, as transracial adoptions became popular.<sup>37</sup> The traditional views about race and religion was first re-examined during the 1950s due to many transracial adoptions involving Asian children after the Korean War.<sup>38</sup> This trend continued with Indian adoptions as well as black adoptions during the civil rights movement.<sup>39</sup> In many instances, society started to view adoption as a blessing.<sup>40</sup> Award-winning actress and singer Kristin Chenoweth has stated publicly how she feels about her adoption.<sup>41</sup> She has stated that “an adoption is a full circle blessing.”<sup>42</sup> In terms of her feelings regarding her birth mother, she stated, “I knew my birth mother loved me so much that she wanted to give me a better life.”<sup>43</sup> Chenoweth’s statements reflect a change in how society views adoption, specifically that the negative stigmas prevalent in the 1900s are no longer prevalent today.<sup>44</sup>

State legislatures began responding to adoptees assertions of their “right to know” by enacting provisions that allowed adoptees to gain access to non-identifying information about their adoption.<sup>45</sup> States that have enacted this type of legislation require that agencies write complete adoptive profiles on both the adoptee and their biological parents at the time of their adoption placement.<sup>46</sup> While this does give an adoptee some information, such as demographics of their birth parents, states are still in control of how much information can be shared, and most only allow “non-identifying

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<sup>34</sup> Racine, *supra* note 22, at 1441.

<sup>35</sup> *Id.*

<sup>36</sup> Brett Silverman, *The Winds of Change in Adoption Laws: Should Adoptees Have Access to Adoption Records?* 39 FAMILY CT. REV. 1, 85, 103 (2001).

<sup>37</sup> Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958–1983*, 17 FAMILY LAW QUARTERLY 2, 173 (1983).

<sup>38</sup> *Id.* at 182.

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

<sup>40</sup> Kristin Chenoweth, *Kristin Chenoweth: Why Adoption is the Biggest Blessing of Them All*, PEOPLE MAG. (Nov. 20, 2015, 12:00 PM), <https://people.com/celebrity/national-adoption-day-kristin-chenoweth-blogs-about-being-adopted/>.

<sup>41</sup> *Id.*

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

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Kuhns, *supra* note 13, at 263.

<sup>46</sup> *Id.*

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information.”<sup>47</sup> Non-identifying information usually consists of descriptive details about an adoptee’s birth relatives.<sup>48</sup> This type of information includes: date and place of birth, age of birth parents and general physical description, race/religion and medical history of birth parents at the time of birth.<sup>49</sup> On the other hand, identifying information consists of names, addresses, employment, and other information that may lead to identification of birth parents.<sup>50</sup>

While non-identifying information can provide an adoptee with some sense of their background, many jurisdictions still limit the release of this information.<sup>51</sup> For example, New York requires that an adoptee register with the State adoption registry before seeking this information.<sup>52</sup> In addition, some critical information for adoptees, such as whether their birth parents’ and their families suffered from alcoholism, mental illness, and criminal behavior is not considered identifying information and therefore cannot be shared with an adoptee.<sup>53</sup> This type of information would have been critical for Eddy Galland, as knowing his mother had a history of mental illness may have been a warning sign and caused his family to seek help.<sup>54</sup> Although there is a deeply rooted question here about what information is actually critical, but this paper will not delve into that question. However, in the case of many adoptees, like Eddy, expanded access to information can be critical in the sense that it can give adoptees’ knowledge and help them take preventative measures, to both save their lives and improve their quality of life.

Most adoption statutes provide for all records to be sealed unless specific circumstances are met, such as “compelling reasons, good cause and exceptional circumstances, the protection or promotion of the welfare of the child, the best interests of the child or the public, or psychological trauma or medical need.”<sup>55</sup> States that have permanently sealed adoption records have implemented a system of good cause.<sup>56</sup> This burden is on the requesting

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<sup>47</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., ACCESS TO ADOPTION RECORDS 2 (Jul. 2015) [hereinafter ACCESS TO ADOPTION RECORDS], <https://www.childwelfare.gov/pubPDFs/infoaccessap.pdf>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Silverman, *supra* note 36, at 87.

<sup>54</sup> Alexander, *supra* note 9.

<sup>55</sup> Deloney, *supra* note 33.

<sup>56</sup> *Id.* at 138.

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party, and they must show that there is a medical or psychiatric need for the sealed information, and that the information is not attainable elsewhere.<sup>57</sup>

Another system that some states have implemented is a Mutual Consent Registry.<sup>58</sup> There are two types: passive and active.<sup>59</sup> A passive Mutual Consent Registry is one that requires both adoptees and birth parents to register, and there must be formal consent to disclose the information.<sup>60</sup> If all parties agree, the good cause requirement is bypassed, and the information can be disclosed.<sup>61</sup> An active Mutual Consent Registry implements a system where if one of the party's registers, the other party is notified and can make an individualized decision regarding disclosure.<sup>62</sup>

Similar to these consent registries, another process states have implemented is Search and Consent Laws.<sup>63</sup> These laws grant adoptees access to identifying information if both parties consent.<sup>64</sup> These laws create a duty on behalf of the state to search for the birth parent and request consent to release the identifying information based upon the adoptees request.<sup>65</sup> If a birth parent refuses to consent, the adoptee can only receive identifying information if they establish good cause.<sup>66</sup>

Under New York law, non-identifying information can be accessed, but only after the adoptee registers for the Mutual Consent Registry.<sup>67</sup> In terms of identifying information, New York follows the good cause approach. New York Domestic Relations Law provides that, "no order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and to such additional persons as the court may direct."<sup>68</sup> If an adoptee is petitioning the court to gain access to identifying information on medical grounds, they must obtain a medical certification from a physician licensed to practice in New York, which addresses a serious physical or mental illness.<sup>69</sup> This certification must identify that the information, if obtained, would address said illness.<sup>70</sup> In

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 137.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 122.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 138.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 138.

<sup>66</sup> *Id.*

<sup>67</sup> ACCESS TO ADOPTION RECORDS, *supra* note 47, at 2.

<sup>68</sup> N.Y. Dom. Rel. §114 (1994).

<sup>69</sup> *Adoption Proceedings*, N.Y. UNIFIED COURT SYSTEM: SURROGATE'S COURT (Mar. 27, 2013), <https://www.nycourts.gov/courts/7jd/courts/surrogates/proceedings/adoption.shtml>.

<sup>70</sup> *Id.*

addition, in New York, an adoptee can only access their original birth certificate upon order of the court.<sup>71</sup> Section 114 states that “no person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made.”<sup>72</sup> Based on this statute, a New York adoptee is denied access to all of their adoption records unless they can show good cause. As I will discuss in Part II of this Note, the good cause standard poses a lot of problems in the court system, as it is a blurry standard and has never been explicitly defined.<sup>73</sup>

## II. THE NEED FOR CHANGE

### A. *General Overview: Why the Current Systems are not Working*

In the 1940s, adoption records were sealed in most states to protect the confidentiality of birth parents, specifically those who were unwed and faced “the stigma of having a child out of wedlock.”<sup>74</sup> However, adoptees have begun challenging the sealed records process, starting in the 1970s, in large part because of changes in society, specifically surrounding sex, parenthood, illegitimacy, and availability of contraceptives.<sup>75</sup> By this time, the stigmas surrounding children born out of wedlock had dissipated, and non-traditional family structures became more prevalent in our society.<sup>76</sup>

There is a general problem that exists within the variety of systems currently in place throughout the United States: lack of information. Many of these systems are ineffective because they are not properly or commonly advertised, and there are no informational guidelines in place to demonstrate how they work.<sup>77</sup> For example, Mutual Consent Registries are not advertised, which reduces the likelihood that a birth parent or an adoptee would know to register, or that these registries even exist.<sup>78</sup>

### B. *Specific Problems with Current Approaches*

Some states, such as Florida, Montana, and New Mexico, have implemented a system where all records remain sealed, except upon a

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<sup>71</sup> ACCESS TO ADOPTION RECORDS, *supra* note 47, at 2.

<sup>72</sup> *Id.*

<sup>73</sup> Rosemary Cabellero, *Open Records Adoption: Finding the Missing Piece*, 30 S. ILL. U. L.J. 291, 304 (2006).

<sup>74</sup> Jenni Bergal, *With Push From Adoptees, States Open Access to Birth Records*, PEW TRUSTS: STATELINE (Aug. 12, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/08/12/with-push-from-adoptees-states-open-access-to-birth-records>.

<sup>75</sup> Silverman, *supra* note 36, at 87.

<sup>76</sup> *Id.*

<sup>77</sup> Deloney, *supra* note 33, at 138.

<sup>78</sup> *Id.*

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showing of good cause.<sup>79</sup> While it is clear that the burden is on the requesting party to justify this good cause, courts vary in their definition of what is sufficient to satisfy this standard.<sup>80</sup> This approach does not provide guidelines as to what constitutes good cause and what an adoptee must prove in order to gain access to their birth records.<sup>81</sup> In order for adoptees to meet the good cause standard, they must “leap an impossibly high legal hurdle of good cause, and they must guess what the court will accept as evidence sufficient to meet the good cause standard.”<sup>82</sup> In these cases, a judge balances the interests of all parties to determine good cause.<sup>83</sup> In other instances, a judge may deny access altogether, sidestepping the issues of this blurry standard.<sup>84</sup> While one court may find religious obligation sufficient to satisfy the good cause standard, another may not.<sup>85</sup> The same holds true with psychological claims and right to inheritance claims.<sup>86</sup> Courts have argued that it is the job of the legislature to create a new procedure for releasing information in order to reflect “changes in societal attitudes.”<sup>87</sup>

Mutual Consent Registries, used in states such as Arkansas and Iowa, require consent of at least one birth parent and an adopted person over the age of eighteen or twenty-one in order to release identifying information.<sup>88</sup> In addition, most states also require that the parties seeking to exchange information file affidavits consenting to the release of this information.<sup>89</sup> This system is voluntary, and consent is often given, or not given, at the time of birth.<sup>90</sup> While a birth parent may have failed to provide consent at the time the child was born, they may change their minds later in life.<sup>91</sup> However, many birth parents do not know or understand the process of changing their consent response, or may not be aware of what their lack of consent may cause for their child.<sup>92</sup>

Lorraine Dusky, who placed her child for adoption in 1966, stated that when she signed surrender paperwork she was told that sealing these records

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<sup>79</sup> ACCESS TO ADOPTION RECORDS, *supra* note 47, at 2.

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

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Christopher G. A. Lorient, *Good Cause is Bad News: How the Good Cause Standard for Records Access Impacts Adult Adoptees Seeking Personal Information and a Proposal for Reform*, 11 U. MASS. L. REV. 100, 112 (2016).

<sup>85</sup> *Id.* at 114.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 119.

<sup>88</sup> Racine, *supra* note 22, at 1441.

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

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

<sup>91</sup> Caswell, *supra* note 29, at 122.

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

would be in her daughter's best interest.<sup>93</sup> At the time, when her daughter was an infant, she agreed.<sup>94</sup> However, she questioned why her "grown up daughter can't decide for herself?"<sup>95</sup> This is just one example of the lack of information birth parents receive on how they can change their decisions over time. Many birth parents were told, at the time they surrendered their parental rights, that they were legally not allowed to have contact with their biological child.<sup>96</sup> Many birth parents were never given the opportunity to contemplate whether they wanted to share information with their child in the future.<sup>97</sup> While these registries protect the parties' best interests at the time of the adoption, they fail to consider changes that often take place as time progresses.

### C. *Medical Necessity*

At the time a birth parent surrenders their rights and a child is placed for adoption, they may have minimal or no medical problems.<sup>98</sup> However, that does not mean that no medical issues will arise later in life that an adoptee should know about.<sup>99</sup> In addition, a birth mother may be unaware of her family's medical background or the birth father's medical history at the time of the adoption.<sup>100</sup>

Cindy Sippin, an adoptee who found her birth mother in 2014, discussed her medical condition and the battles she faced due to lack of genetic information.<sup>101</sup> Sippin and her daughter both struggle from a genetic condition, and while Sippin searched for her biological family she expressed that finding any biological member would "help her exchange vital medical history."<sup>102</sup> Sippin was concerned with the progression of her condition and felt that finding medical history could help her prepare for what was to come

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<sup>93</sup> Maryann Bird, *Issue and Debate Closed Adoption Records: New Challenges to Established Tenets*, N.Y. TIMES (Nov. 23, 1979), <https://www.nytimes.com/1979/11/23/archives/issue-and-debate-closed-adoption-records-new-challenges-to.html>.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> David D. Biklen, *Sealed Adoption Records: Report of the Connecticut Law Revision Commission to the Judiciary Committee of the Connecticut General Assembly* (Feb. 17, 1999), <https://www.cga.ct.gov/lrc/adoption/SealedRecordsReport.htm>.

<sup>97</sup> *Id.*

<sup>98</sup> Caswell, *supra* note 29, at 285.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Michael Fitzgerald & Kim Phagan-Hansel, *Adoptees Gaining Ground in the Fight to Open Adoption Records*, THE CHRONICLE OF SOCIAL CHANGE (Feb. 5, 2018), <https://chronicleofsocialchange.org/adoption/adoptees-gaining-ground-in-the-fight-to-open-birth-records>.

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

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as she gets older.<sup>103</sup> After finding her birth mother, and tracking down many of her other birth relatives, Sippin conveyed that she felt like she “hit the lottery each day,” as she was lucky enough to find a long string of ancestry sequences going back to her great-great-grandparents.<sup>104</sup> Not only was Sippin lucky in that she was able to gain knowledge from such a long ancestry sequence, but finding this information in general was overcoming a huge unknown in her life.<sup>105</sup> Sippin’s story is just one of the many examples of how gaining access to biological medical information and history can positively change a person’s life.

Sealed records can also create major challenges for adoptive parents of special needs children. Medical histories in these situations could provide insight into the child’s needs, as well as any information that was detected during a birth mother’s prenatal care.<sup>106</sup> Not only does this information directly impact an adoptee, but it also impacts an adult adoptee’s children.<sup>107</sup> Without medical histories, adult adoptees may not be able to adequately provide for their children’s medical care.<sup>108</sup> Carol Barbieri, an op-ed contributor to the New York Times, expressed the struggle she and her husband faced with providing medical treatment for their son.<sup>109</sup> In order for her son to receive proper care, Barbieri was asked if a specific syndrome ran in her family.<sup>110</sup> For her husband, a non-adoptee, the answer was simple.<sup>111</sup> But the non-identifying information Barbieri was able to receive about her biological family, from the time of her adoption, was not enough.<sup>112</sup> Her frustration was consuming:

But I didn’t know if I had any family members. I didn’t even know my real last name. My birth records were collecting dust in a vault somewhere. New Jersey law forbade me or my son from opening them. If I waited for court orders and hearings, the information might come too late. For the first time, I felt inadequate as a mother. Simply because my son was the child of an adoptee, his rights were being denied.<sup>113</sup>

In cases like Barbieri’s, sealed records laws are a life-threatening barrier. In situations like these, adoptees feel like “victims of a system that was set up to protect everyone in the adoption triangle,” except for the

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<sup>103</sup> *Id.*

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

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

<sup>106</sup> SUSAN FRELICH APPLETON & D. KELLY WEISBERG, *ADOPTION AND ASSISTED REPRODUCTION: FAMILIES UNDER CONSTRUCTION* 188 (2009).

<sup>107</sup> *Id.*

<sup>108</sup> Carol Barbieri, *Your Mother Would Know*, N.Y. TIMES (Nov. 29, 2005), <https://www.nytimes.com/2005/11/29/opinion/your-mother-would-know.html>.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

adoptee.<sup>114</sup> Nobody has disputed that birth mothers' and adoptive parents' have rights that should be protected. But adoptees were too young to voice their opinions and desires at the time of their surrender, so the other parties involved decided for them.<sup>115</sup> But no system in place accounts for what should happen when an adoptee is old enough to decide for themselves.<sup>116</sup>

#### D. *Psychological Necessity*

No matter how much love and affection an adoptee receives from their adoptive family, research indicates that adoptees still feel a sense of abandonment and rejection.<sup>117</sup> These emotions stem in large part from the sealing of their records.<sup>118</sup> Robert Shafran, one of the triplets from *Three Identical Strangers*, commented on the difficulty he faced during his adolescence: "We all had really tough adolescent years. Just growing up adopted can add another log to the fire, another dimension to the whole identity crisis of adolescence. We were really emotionally disturbed kids."<sup>119</sup>

The denial of essential information, such as nationality, ancestry, and genealogy, and the lack of control over this access, can be enraging for adoptees.<sup>120</sup> This anger is often manifested as embarrassment, low self-esteem, and feelings of hopelessness and worthlessness.<sup>121</sup> This lack of information often leads to developmental struggles and identity crises.<sup>122</sup>

Developmental psychologists have identified ages thirteen to nineteen as a time of exploration of identity, as a child becomes an adult.<sup>123</sup> This is a common time for adoptees to start asking their parents questions surrounding their adoption and birth families.<sup>124</sup> The development of an adoptee's identity may be more difficult, due in large part to unanswered questions surrounding

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<sup>114</sup> Fitzgerald & Phagan-Hansel, *supra* note 101.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Racine, *supra* note 22, at 1443.

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

<sup>119</sup> Kara Weisenstein, *The Conspiracy Behind "Three Identical Strangers" Is Beyond Messed Up*, VICE (Jul. 9, 2018, 1:04 PM), [https://www.vice.com/en\\_us/article/594mek/the-conspiracy-behind-three-identical-strangers-is-beyond-messed-up](https://www.vice.com/en_us/article/594mek/the-conspiracy-behind-three-identical-strangers-is-beyond-messed-up).

<sup>120</sup> Jessica Colin-Greene, *Identity and Personhood: Advocating for the Abolishment of Closed Adoption Records Laws*, 49 CONN. L. REV. 1271, 1298 (2017).

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

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

<sup>123</sup> Rhonda Jarema, *Talking to Adopted Children About Birth Parents and Families of Origin: How to Answer the "Hard Questions,"* ADOPTION ADVOCATE, Sept. 2015, at 6, <http://www.adoptioncouncil.org/files/large/4b8ee1acd722414>.

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

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their adoption.<sup>125</sup> Some of these unanswered questions include: whether they have biological siblings; whether they resemble their birth parents; and the reasons they were placed for adoption.<sup>126</sup>

In addition to developmental struggles, the secretive nature that previously surrounded the adoption process has created a sense of loss for adoptees that can cause a variety of emotional issues.<sup>127</sup> One major example of loss felt by adoptees include the loss of their birth parents, through death or a court-ordered decision of adoption.<sup>128</sup> Oftentimes, there is also a feeling of loss of biological siblings, who they may know exist through non-identifying information, but who they are unable to find or contact.<sup>129</sup>

Along with identity crises and feelings of loss, research has shown that adoptees are more likely to struggle with self-esteem issues.<sup>130</sup> In a study completed in 2000, researchers found that adoptees reported a lower self-esteem and were less likely to classify themselves as secure in adult attachment.<sup>131</sup> The self-esteem struggle goes hand in hand with identity crises, as adoptees may view themselves as out of place, unwelcome or rejected by their birth family.<sup>132</sup> This low self-esteem may also be due to an adoptee feeling different compared to a non-adoptive child, who knows their genetic background and birth family.<sup>133</sup>

The standards currently in place for unsealing records, specifically the good cause approach, have not recognized these psychological issues. In 1980, the New York Court of Appeals held that psychological problems that have hampered one's development, broken relationships, and caused identity crises were not sufficient to constitute good cause.<sup>134</sup> These Mutual Consent Registries also do not take into account these types of problems that arise from sealed records, largely in part due to the fact that most birth parents don't know or understand how to change their contact preferences over time.<sup>135</sup>

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<sup>125</sup> CHILD WELFARE INFO. GATEWAY, DEP'T OF HEALTH & HUMAN SERVS., IMPACT OF ADOPTION ON ADOPTED PERSONS 2 (Aug. 2013) [hereinafter IMPACT OF ADOPTION], [https://www.childwelfare.gov/pubpdfs/f\\_adimpact.pdf](https://www.childwelfare.gov/pubpdfs/f_adimpact.pdf).

<sup>126</sup> *Id.*

<sup>127</sup> Keeley Minzenmayer, *How Adoptees Continue to Struggle with Emotional, Behavioral, and Educational Issues Post-Adoption*, 2 INT'L J. THERAPEUTIC JURIS. 1, 8 (2016).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 9.

<sup>130</sup> *Id.* at 10.

<sup>131</sup> L. DiAnne Borders et al., *Adult Adoptees and Their Friends: Current Functioning and Psychosocial Wellbeing*, 49 FAMILY RELATIONS 407 (2000).

<sup>132</sup> IMPACT OF ADOPTION, *supra* note 125, at 3.

<sup>133</sup> *Id.*

<sup>134</sup> *Linda F. M. v. Department of Health of City of New York*, 52 N.Y.2d 236 (N.Y. 1981).

<sup>135</sup> *Deloney*, *supra* note 33, at 122.

*E. Constitutional Rights Violations*

In the early 1970s, courts rejected adoptees' arguments that sealed records laws violated a variety of their constitutional rights, including their right to privacy, the right to receive information, and equal protection.<sup>136</sup> However, today commentators suggest that courts would reach different conclusions, due to shifts in societal views surrounding the traditional unitary family and the importance of identity interests.<sup>137</sup>

## 1. Fundamental Right of Privacy

*Griswold v. Connecticut* recognized that a constitutional right to privacy exists and is protected under the U.S. Constitution.<sup>138</sup> This right encompasses both individual privacy and the right to make choices about personal matters.<sup>139</sup> *Eisenstadt v. Baird* also recognized a constitutional freedom regarding personal choices in matters of family life and marriage.<sup>140</sup> In *Roe v. Wade*,<sup>141</sup> Justice Blackmun reviewed the expansion of this right and how courts have applied it to areas including marriage,<sup>142</sup> procreation,<sup>143</sup> family relationships,<sup>144</sup> child rearing,<sup>145</sup> and education.<sup>146</sup> Based on this long-standing precedent, the issue of adoption records most definitely involves family relationships and child rearing, encompassed in the right to privacy.

Adoptees also argue that, based on this fundamental right to privacy, their individual identity development must be protected.<sup>147</sup> Individual decisions are viewed as an "expression of self," and therefore influence one's personal reflection and development.<sup>148</sup> Adoptees argue that the "core of their identity is indeed more private than their role as a parent or as a sexual partner." Courts have been recognizing these rights for centuries, and this privacy right surely extends to an adoptee's personal development and identity.<sup>149</sup>

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<sup>136</sup> Cahn & Singer, *supra* note 19.

<sup>137</sup> *Id.*; see also Racine, *supra* note 22.

<sup>138</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>139</sup> *Id.* at 485.

<sup>140</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972).

<sup>141</sup> *Roe v. Wade*, 410 U.S. 113, 169–70 (1973).

<sup>142</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>143</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>144</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>145</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>146</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>147</sup> Carolyn Burke, *The Adult Adoptee's Constitutional Right to Know His Origins*, 48 S. CAL. L. REV. 1196, 1200 (1975).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1207.

## 2. Equal Protection Under the Fourteenth Amendment

While the Equal Protection Clause of the Fourteenth Amendment does not require every person to be treated as equals, this clause does mandate that all legislation must be reasonable or bear a substantial relation to the objective legislation.<sup>150</sup> While there have been multiple standards used in determining this reasonableness, where a fundamental right is impaired courts should employ strict scrutiny.<sup>151</sup> When applying strict scrutiny, the statute will only be upheld if it promotes a compelling state interest.<sup>152</sup>

Adoptees argue that their equal protection rights are violated based on the requirement that they must obtain a court order to gain access to their birth records.<sup>153</sup> This argument rests on the idea that a non-adoptee has routine access to this type of information, and does not have to go through any court system to receive access.<sup>154</sup> Adoptees also contend that a non-adoptee simply has to write a short summary and pay a small fee in order to receive their original birth certificate.<sup>155</sup> Requiring only adoptees to obtain a court order is a substantial burden, and a violation under the Fourteenth Amendment.<sup>156</sup> The burdens that sealed records place on adoptees are incompatible with their best interests. In addition, the statutory objective of sealed record statutes at the time of their enactment was to shield birth parents from public disclosure.<sup>157</sup> However, as previously discussed, there is not such a strong need for this shield today. Therefore, the statute no longer bears such a rational relationship to the statute's objective. In addition to societal shifts, a state's compelling interest is much stronger in protecting birth parents during the time of the adoption. This interest naturally diminishes once an adopted child reaches adulthood, and unsealing these records would not create "public disclosure."<sup>158</sup> The purpose of unsealing records is not to give the public general access, but to give adoptees specific rights to their personal records.

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<sup>150</sup> Ruth Clement Scheppers, *Discovery Rights of the Adoptee - Privacy Rights of the Natural Parent: A Constitutional Dilemma*, 4 U. SAN FERNANDO VALLEY L. REV. 65, 84 (1975).

<sup>151</sup> *Id.* at 72.

<sup>152</sup> Kathryn J. Giddings, *The Current Status of the Right of Adult Adoptees to Know the Identity of their Natural Parents*, 58 WASH. U. L. Q. 677, 691 (1980).

<sup>153</sup> *Id.* at 692.

<sup>154</sup> *Id.*

<sup>155</sup> Deloney, *supra* note 33.

<sup>156</sup> Deloney, *supra* note 33, at 131.

<sup>157</sup> Giddings, *supra* note 152, at 696.

<sup>158</sup> *Id.* at 693.

### 3. First Amendment Right to Receive Information

While it may not be explicitly written in the Bill of Rights, the First Amendment encompasses an individual's right to receive information.<sup>159</sup> Courts have held that the right to receive information is essential to individual autonomy and freedom of expression in society.<sup>160</sup> An individual's right to receive information is essential to one's personal life because it directly impacts one's ability to develop into an "integrated, healthy person capable of intelligent participation in society."<sup>161</sup> In order to become a contributing individual, one needs access to information which will improve their self-fulfillment.<sup>162</sup> These access restrictions have been proven to damage one's emotional and psychological development, therefore denying adoptees' their right to meaningful participation in social and political decision-making.<sup>163</sup>

In the 1964 Supreme Court decision, Justice Brennan again emphasized the position that the right to receive information is an implicit right: "It is true that the First Amendment contains no specific guarantee of access . . . however the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful."<sup>164</sup> This longstanding precedent makes clear that the Supreme Court has recognized this implicit right to receive information.

#### *F. What Opponents of Unsealing Records May Argue*

The most natural reaction to adoptee's claims is premised on confidentiality.<sup>165</sup> Opponents of unsealing records argue that the current methods keep this personal information from the public.<sup>166</sup> What opponents may not realize is that this protection of confidentiality implies secrecy, and asserts control over one's own information.<sup>167</sup> Advocates for unsealing records have never asserted that confidentiality and privacy are unimportant in the adoption scheme. Conversely, states which have started changing their approach to sealed records have continued to preserve all of the parties' confidentiality.<sup>168</sup> Records are not open to the public, and Mutual Consent Registries allow parties to record their choice of preference regarding

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<sup>159</sup> *Id.* at 689.

<sup>160</sup> *See* *Miller v. California*, 413 U.S. 15, 44 (1973).

<sup>161</sup> *Burke*, *supra* note 147, at 1205.

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

<sup>163</sup> *Giddings*, *supra* note 152, at 689.

<sup>164</sup> *Lamont v. Postmaster General*, 85 S. Ct. 1493, 1497 (1964) (Brennan, J., concurring).

<sup>165</sup> *Burke*, *supra* note 147, at 1210.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> ACCESS TO ADOPTION RECORDS, *supra* note 47.

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contact.<sup>169</sup> Lastly, individuals who want to remain anonymous have the opportunity to redact identifying information, while still providing the adoptee with updated information.<sup>170</sup>

Regarding the constitutional arguments, opponents assert that sealed records statutes represent a compelling state interest, and are therefore constitutional.<sup>171</sup> The statutes protect three state interests: they protect the adoptive family from outside interference, allowing them to function as an independent social unit; they protect the adoptive parents who fear their adoptee will abandon them for their natural parents; and they keep the natural parents anonymous, which arguably is required in order for the child to be adopted in the first place.<sup>172</sup> However, while these interests may be compelling when the adoptee is young, they are not as weighty when the adoptee reaches adulthood. The interest of allowing the family to function as its own unit has been protected for the adoptee's childhood, and as the child reaches legal age, they are no longer in need of such parental control.<sup>173</sup> In addition, the adoptive parents fear of abandonment significantly dissipates with age.<sup>174</sup> Research has shown that adoptees develop emotional attachment to their adoptive parents "as a result of their day-to-day attention" to all of the child's needs.<sup>175</sup> Despite an adoptee's search for origins, studies show that adoptees consider their adoptive parents their true parents as they mature.<sup>176</sup> The third interest that states protect is the birth parents privacy rights. States argue that a birth parent's privacy is essential in their decision to place their child for adoption.<sup>177</sup> However, there is no evidence to establish that this fear has any impact on a birth parent's decision.<sup>178</sup> The fact that some states and other foreign countries have never adopted confidentiality statutes or have unsealed their records suggests that confidentiality is not necessarily a pre-requisite to maintaining the adoption process.<sup>179</sup> Weighing these state interests against the wide array of arguments presented by adoptees and advocates demonstrates that the states interests may no longer be so compelling.

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Burke, *supra* note 147, at 1211.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1212.

<sup>174</sup> *Id.* at 1213.

<sup>175</sup> *Id.*

<sup>176</sup> Burke, *supra* note 147.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

### III. RECENT TRENDS AND CHANGES IN STATE LAWS

Based on the trends and changes in society and the arguments put forth by advocates of unsealing records, many states have begun amending their statutes regarding adoption records.<sup>180</sup> These states have revealed a variety of ways in which states can improve the records system while still protecting all parties involved.

In 1995, Tennessee implemented the Contact Veto.<sup>181</sup> The state passed a law which gave adult adoptees access to their original birth certificates, as well as their birth records that contain identifying information.<sup>182</sup> The law provides that if a birth parent does not wish to be contacted, the adoptee is forbidden from contacting them, but they can still obtain the information sought.<sup>183</sup> In creating this law, Tennessee properly and fairly balanced the interests of the involved parties. The state protects the adoptive family during the adoptee's age of minority, allowing the family to form a permanent bond.<sup>184</sup> However, once the adoptee reaches adulthood, the state recognizes that their interest is not so compelling.<sup>185</sup>

In 1998, Oregon passed Measure 58.<sup>186</sup> This law gives adult adoptees the right to access their original birth certificate once they reach age twenty-one.<sup>187</sup> One year later, in 1999, the Oregon legislature amended this law to include a contact preference form.<sup>188</sup> This form allows birth parents to specify whether or not they consent to being contacted by a biological child.<sup>189</sup> If the birth parent does not consent to contact, they are still required to file an updated medical history that can be given to the adoptee.<sup>190</sup> While this contact preference form largely resembles Tennessee's Contact Veto, there is one major difference: Tennessee's Contact Veto establishes civil and criminal penalties for individuals who do not respect contact preferences, while Measure 58 imposes no penalties.<sup>191</sup>

After the implementation of this new measure, Oregon's Office of Vital Records received an influx of requests.<sup>192</sup> When the law went into effect in

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<sup>180</sup> Deloney, *supra* note 33, at 117.

<sup>181</sup> *Id.* at 123.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 124.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 127.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 128.

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2000, a total of 3,800 orders for original birth certificates were received.<sup>193</sup> As of May 31, 2005, over 8,400 records were ordered, and over 500 contact preference forms were submitted.<sup>194</sup> Of the 500 forms, fewer than eighty-five birth parents did not wish to be contacted.<sup>195</sup> These statistics reveal that Measure 58 is in the public interest. In addition, these statistics support a major argument asserted by adoptees, that courts often assume birth parents want to remain anonymous forever.<sup>196</sup> Courts often make the assumption that just because a birth parent chose to remain anonymous when they first surrendered their rights, they want to continue this anonymity forever.<sup>197</sup> A study done by the Main Department of Human Resources Adoption Task Force found that 95% of birth parents were open to being contacted by their child.<sup>198</sup> This type of data lends strong support to the idea that birth parents are not as has been previously argued.

On May 27, 2014, Governor Christie signed the New Jersey Adoptees' Birthright Act, allowing adoptees who were born and/or adopted in the state of New Jersey to obtain their original birth records and birth certificates.<sup>199</sup> This law, which went into effect in 2017, requires that birth mothers fill out a medical history form, identifying any medical conditions that she or other family member has suffered.<sup>200</sup> However, in order to maintain a birth parent's privacy rights, the Act includes a provision for birth parents to record their choice of preference regarding future contact.<sup>201</sup> They can choose from a variety of contact options, including direct contact, contact through an intermediary, or no contact.<sup>202</sup> In addition, birth parents can request to change their preference at any time in the future.<sup>203</sup>

The New Jersey Adoptee's Birthright Act, however, is not the first attempt the state has made in reforming its sealed record laws.<sup>204</sup> In 1977, the New Jersey courts took a new stance in applying the good cause standard

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Jennifer Mellon, *Nine Statistics About Adoption in America*, ADOPTION.COM (Jul. 4, 2016), <https://adoption.com/9-statistics-about-adoption-in-america>.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Susan K. Livio, *Christie Signs Law Allowing Adoptees Access to Birth Certificates in 2017*, N.J. POLITICS (May 29, 2014), [https://www.nj.com/politics/index.ssf/2014/05/christie\\_signs\\_law\\_releasing\\_adoptees\\_birth\\_certificates\\_in\\_2017.html](https://www.nj.com/politics/index.ssf/2014/05/christie_signs_law_releasing_adoptees_birth_certificates_in_2017.html).

<sup>200</sup> *Id.*

<sup>201</sup> *New Records System for Birth Parents, Adult Adoptees*, STATE OF NEW JERSEY DEPARTMENT OF HEALTH, <https://www.state.nj.us/health/vital/adoption/> (last visited July 19, 2017).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Mills v. Atl. City Dep't of Vital Stat.*, 372 A.2d 646 (N.J. Super. Ct. Ch. Div. 1977).

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to adoptees.<sup>205</sup> In *Mills v. Atlantic City Dept. of Vital Statistics*, the court shifted the burden of proof in showing good cause from the adoptee to the state to show that good cause is not present.<sup>206</sup> The court also dictated specific circumstances where an adult adoptee's request should be granted as a matter of course, such as when the natural parents have placed a consent on file.<sup>207</sup> According to *Mills*, requests for medical history and hereditary or ethnic background should be granted, absent a showing of compelling reasons not to disclose such information.<sup>208</sup> In assessing whether a psychological need demonstrates good cause, the court found that this psychological need stems from a deficiency in an adoptees sense of self, which may constitute good cause.<sup>209</sup> The court in *Mills* found that while an adoptees' right to adoption information was a fundamental right, the judge noted that this right is not absolute and can be regulated when the state's interest are compelling.<sup>210</sup> The state's interest is to protect the privacy and confidentiality of the parties, which is a legitimate interest.<sup>211</sup> However, while the state can regulate, they may not completely take away this fundamental right.<sup>212</sup> In addition, the above analysis demonstrates that these interests may no longer be deemed compelling when an adoptee reaches adulthood.

In 2015, Ohio unsealed birth certificates and court decrees for adoptees and their direct descendants.<sup>213</sup> Birth parents had the option of having their names redacted from the documents, but, if they chose to exercise this right, they were then required to submit updated medical and social histories to add to their files.<sup>214</sup> This approach is unique in that direct descendants are included as individuals who have a significant interest in this adoption information.<sup>215</sup> As discussed previously in this Note, the type of information in these records, such as medical information, has a direct effect on not just an adoptee, but an adoptee's family as well.

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 655.

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

<sup>210</sup> *Id.* at 651.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Jim Provance, *Ohio Set to Open Adoption Records Sealed for 50 Years*, PITTSBURGH POST-GAZETTE (Mar. 16, 2015, 12:00 AM), <http://www.post-gazette.com/news/nation/2015/03/16/Ohio-set-to-open-adoption-records-sealed-for-50-years/stories/201503150103>.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

## IV. PROPOSAL

As adoptees continue to desire to learn about their biological families, adoptive parents have become more comfortable disclosing adoption information to their children.<sup>216</sup> In addition, the stigmas surrounding adoption and the “rigid boundaries of the nuclear family” are less prevalent and less important to society than they once were.<sup>217</sup> As the law’s main goal is to protect public and society, it is certainly necessary that the laws are updated and amended to reflect these societal changes. Twenty-nine states have already amended their laws regarding sealed records in a variety of ways, such as giving unrestricted access, partial access, or access with restrictions.<sup>218</sup> It is time for New York to become the thirtieth state to amend its laws.

The first aspect of this proposal is to implement a Contact Veto Registry for adult adoptees. Executing this system protects the rights and interests of all parties, while providing adoptees with vital information. First, this system allows for birth parents and adoptees to choose whether or not they would like to make contact with one another.<sup>219</sup> It gives each party a choice, and it respects their right to privacy in this matter. Similar to Tennessee’s Contact Veto Registry, penalties should be included as a consequence for any individual who disrespects another’s contact preference.<sup>220</sup> This penalty serves as a reminder that each party’s rights must be respected.<sup>221</sup> While each individual will have a choice in terms of contact, those birth parents who choose no contact would still be required to submit updated medical and social histories for adult adoptees. This approach protects a birth parent’s privacy rights while still recognizing an adoptee’s right to access their information. When Ohio unsealed their records, up to 400,000 adoptees were given rights to their information.<sup>222</sup> Of those 400,000, fewer than 100 birth parents requested that the state redact identifying information.<sup>223</sup> Those birth parents still submitted updated social and medical history for the adoptee to retain.<sup>224</sup> States that have given this type of contact option have received

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<sup>216</sup> Kaiponanea Matsumara, “*Three Identical Strangers*” Opens Pandora’s Box of Privacy Law, ASU NOW (Sept. 6, 2018), <https://asunow.asu.edu/20180906-discoveries-three-identical-strangers-triplets-opens-pandora-box-asu-law-professor>.

<sup>217</sup> *Id.*

<sup>218</sup> *State Adoption Legislation*, AMERICAN ADOPTION CONGRESS, <https://www.americanadoptioncongress.org/state.php> (last visited Sept. 23, 2018).

<sup>219</sup> Deloney, *supra* note 33, at 124.

<sup>220</sup> *Id.* at 127.

<sup>221</sup> *Id.*

<sup>222</sup> Provance, *supra* note 213.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

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praise for this method.<sup>225</sup> In Ohio, opponents of unrestricted access favored this method because they felt that both adoptees' and birth parents' rights were taken into account.<sup>226</sup>

The second aspect of this proposal recommends that New York adopt the Vital Statistics system as was implemented in New Jersey. While Contact Veto Registries address communications, there is still significant importance in adoptees receiving their original birth records. While some adoptees may be looking for information for search and reunion purposes, many are just looking to obtain their documents for personal use.<sup>227</sup> While the proposed Contact Veto Registry does include a requirement of updating medical history, these birth records contain so much more.<sup>228</sup> Adoption records include family history, birth parent background, and bits of information such as "what part of the world" an adoptee is from.<sup>229</sup> This type of information helps an adoptee "complete their story," which addresses potential identity struggles and psychological deficits.<sup>230</sup>

In order to protect the privacy rights of both adoptees and birth parents, certain limitations may be imposed on who can access these records. While this proposal is similar to Tennessee's Contact Veto Registry and New Jersey's Vital Statistics, my proposal includes certain specific limitations on granting access in order to best protect the rights of all involved parties and address the concerns of opponents to unsealing records. First, setting an age restriction on who can access these records protects the state's interest in respecting the adoptive family's growth and development.<sup>231</sup> I propose that this age restriction is set at eighteen years of age. This limitation ensures that the adoptive family unit is protected and that the adoptive family has the necessary bonding time before this information becomes accessible. In addition to the age restriction, these records will remain sealed to the public, and access will only be given to involved parties. These parties include adoptees, birth parents, adoptive families, and direct relatives of the adoptee, such as their children. As stated in *Mills*, even when the right to privacy is constitutionally protected, the right is not absolute.<sup>232</sup> This proposal gives an adoptee their fundamental rights, while allowing some regulations and limitations where appropriate. This approach blends together many different

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<sup>225</sup> Bergal, *supra* note 74.

<sup>226</sup> *Id.*

<sup>227</sup> Provance, *supra* note 213.

<sup>228</sup> Meg Baker, *Shift in Law Will Allow Adopted Children in New Jersey to Learn Names of Birth Parents*, CBS N.Y. (Dec. 28, 2016, 6:12 PM), <https://newyork.cbslocal.com/2016/12/28/new-jersey-adoption/>.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Burke, *supra* note 147, at 1211.

<sup>232</sup> *Mills v. Atl. City Dep't of Vital Stat.*, 372 A.2d 646 (N.J. Super. Ct. Ch. Div. 1977).

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systems that other states have already implemented, in order to best balance each party's rights and interests.

## V. CONCLUSION

A change in society calls for a change in law. As adoption has become more popular, the law must be amended to reflect the affected parties' best interests. Many states have begun amending their approaches to sealed records, which gives New York the opportunity to join the movement. New York's current approach no longer serves the needs of the involved parties, and it does not protect the best interests of the adoptee. Adopting a Contact Veto Provision and implementing Vital Statistics balances the rights of all parties by maintaining privacy and confidentiality, while recognizing an adoptee's right to receive personal information. Adopting a new approach would protect adoptees, such as the triplets in *Three Identical Strangers* by allowing individuals access to non-identifying information which could be essential to their health, development and well-being. In addition, biological parents who may be in favor of fostering these relationships would have such an opportunity, while still having protections in place for those who wish to reserve their privacy rights.