

Adoption Contracts and the Adult Adoptee's Right to Identity

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I. Introduction

It is early January. The sun is rising over the Mississippi. My car is headed south. My mind is in the future. Anxious, excited, my appointment with the social worker at the adoption agency is at 9:00. Driving toward one of the greatest mysteries of my life, into the darkness of the past, I glance over at the frozen waters of the great river. The ice has begun to melt in the premature warmth of winter. I have chosen to look deeply into the void I have ignored for so many years. I am an adult adoptee, and I am about to relive the earliest chapter in my life story.

Many adults who were adopted as children have made this sojourn. Nearly one-third of all adopted persons search for vital information from their birth records, in total, approximately 1,650,000 searching adults.¹ This paper focuses on the difficulties encountered by adults who wish to know about their personal history but are barred from such self-discovery by hostile adoption laws. It also examines the issue of whether adoption contracts, which legalize the veil of secrecy, are binding with respect to adopted adults. In particular, legal skepticism about surrogacy contracts, first cousins to adoption contracts, encourages us to look

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1. As of 1981 there were approximately five million adoptees in the United States. About 25 million people have been involved in adoptions directly as parents or children. Statement submitted by Jean Paton, Director of Orphan Voyage, to the Members of the U.S. Senate Comm. on Labor and Human Resources (July 31, 1988) (on file with *Law & Inequality*). The actual number of persons who search for birthparents is difficult to ascertain since there is no national network to assist and track adoptees. The statistic about the number of searching adult adoptees is a rough figure that varies from one organization to another. The National Committee for Adoption claims a smaller figure of one percent of the adoptive population who actually search. They derive this statistic from records in Great Britain since the opening of birth records became mandatory. National Comm. for Adoption, *Adoption Factbook: United States Data, Issues, Regulations, and Resources* 66 (1985).

again at the validity of the adoption contract. Traditionally, the basic rights of individual adoptees are compromised to protect the state's interest in guaranteeing the privacy of parties to adoptions, an interest founded on some essential misconceptions about adoptees, adoptive parents, and birth parents. The article suggests proposals for freeing the channels of information in a way that benefits all parties to the adoption contract.

II. Evolution of Adoption Law

The social worker gazed benevolently upon my confusion. She had witnessed it all before: the anger, the sadness, the resignation. "You see, the law in Minnesota protects everyone. You have access to non-identifying information within our files. And your birth mother is assured of her privacy until she wants to reveal herself." She added proudly, "I helped draft this legislation." My eyes were on my checkbook. I wrote out the check to the agency. Two hundred twenty-five dollars in fees for searching. I left the office and went back to sit. Alone. Looking at the river. I had driven all this way to find out what? Thirty years ago, I had four siblings on my mother's side, four siblings on my father's side, and there was no record of any hereditary diseases. Thirty years ago. Now the long wait began as the social worker tried to contact my birth mother to find out if she would be willing to hear from me, to fill in the blank of thirty years. Was she still alive? Would she reject my inquiry? The key to my past was in her hands. Everything was riding upon the consent of a stranger.

Although the rules maintaining the secrecy of adoption are followed in the majority of states, statutes upholding confidentiality are not the only model for adoption proceedings.² Several countries have open adoption records with no known deleterious effects on the numbers of children who are placed for adoption.³

2. Alabama and Kansas have open birth record laws that allow adoptees to obtain their original birth certificates which contain their birthparents' names. Sixteen states have a registry system which allows birthmothers and adoptees to send their names and addresses to a central location to be released if the other person begins a search. Registry states are Arkansas, California, Colorado, Florida, Idaho, Illinois, Louisiana, Maine, Michigan, Nevada, New York, Ohio, Oregon, South Carolina, South Dakota, and Texas. Seven states have a search and consent procedure which provides that no confidential information is released until birthparents and adoptees consent: Connecticut, Minnesota, Nebraska, North Dakota, Pennsylvania, Tennessee, and Wisconsin. The remaining twenty-six states retain confidential birth records. National Committee for Adoption, *supra* note 1, at 65-66, 100.

3. Israel, Great Britain, and Finland all have open birth records for adopted adults and have not experienced the negative effects envisioned by U.S. legislators and judges. The U.S. adoption laws are the most highly structured and secretive in

In some cultures, such as ancient Rome, adoption was used to extend the family line and to amass wealth.⁴ In such a society, adoption was an accepted practice for building stronger stock in the family. In contrast, adoption was not formally recognized in England until passage of an adoption act in 1926. This was largely due to the cultural emphasis upon establishing strong blood lines.⁵

Just as there is no common law with respect to adoption in England, adoption in the United States is governed solely by state statutes.⁶ Adoption information was not always restricted in the United States. In fact, adoption records remained available to all parties involved until well into the twentieth century.⁷ From 1920 to 1950, in both England and the United States, adoption increasingly became part of the auspices of private adoption agencies and social workers. Adoption was depersonalized and became a service provided by "professionals,"⁸ instead of a transaction between people who knew one another as friends, kin, or members of the same community.⁹ In an era in which illegitimacy and out-of-wedlock pregnancy stigmatized children and mothers, legislatures acted to stop the selling of babies by baby brokers and decided that adoption proceedings ought to be secret in order to protect both sets of parents from harassment and blackmail.¹⁰ Many of these strict adoption laws still apply today and act as an iron curtain for adult

the world. Arthur Sorosky, Annette Baran & Reuben Pannor, *The Adoption Triangle* 224 (1978).

4. Brenda Hoggett, *Adoption Law: An Overview*, in *Adoption* 131, 131-32 (Philip Bean ed. 1984).

5. Lita Schwartz, *Adoption Custody and Family Therapy*, 12 *Am. J. Fam. Therapy* 51, 51 (1984).

6. *In re Linda F.M.*, 95 Misc. 2d 581, 586, 409 N.Y.S.2d 638, 641 (Sur. Ct. 1978) (because adoption is a creature of statute, not of the common law, statutes regarding adoption must be strictly construed), *aff'd*, 72 A.D.2d 734, 442 N.Y.S.2d 963 (1979), *aff'd sub. nom. Linda F.M. v. Department of Health*, 52 N.Y.2d 236, 418 N.E.2d 1302, 437 N.Y.S.2d 283, *appeal dismissed*, 454 U.S. 806 (1981).

7. Minnesota was the first state to seal adoption records in the 1920's, followed by Iowa in 1932. Letter from Jean Paton to Heidi Schneider (Oct. 8, 1987) (on file with *Law & Inequality*). Jean Paton is the founder of Orphan Voyage, one of the original adoption search organizations, and a well-known activist for promoting the rights of adult adoptees. See also *Larned v. Parker*, 360 So. 2d 906, 907 (La. Ct. App. 1978).

8. Hoggett, *supra* note 4, at 134.

9. Yasuhide Kawashima, *Adoption in Early America*, 20 *J. Fam. L.* 677, 689 (1981-1982). One quaint, if unusual, example is a 1643 case in which a man adopted his friend: "I doe make and adopt my dearest beloved Friend Robert West to bee my lawful adopted heire and Executor to possesse enjoye and inhirrit all my whole estate remayning within the Collony of Virginia . . ." *Id.* (quoting County Court Records of Accomack-Northampton, Virginia, 1640-1645, at 307 (S. Ames ed. 1968)).

10. Schwartz, *supra* note 5, at 52. Legislators might have feared that unscrupulous people might blackmail a birthmother years later by threatening to disclose the illegitimate child to her present family, who know nothing of her "indiscretion."

adoptees and birth parents who wish to discover answers to their personal questions.

With this general history in mind, we turn to an examination of the people who are affected by adoption laws: birthparents, adoptive parents, and adoptees.

III. The Adoption Triangle: Introducing the Parties

It was the most difficult letter I had ever written. She was, after all, a person utterly unknown to me. An empty slate, the opportunity of a lifetime, to tell my life story to someone who was intimately concerned. She was the ultimate audience. Unlike a pen pal with whom one can create a persona and sustain it for years, I felt it was crucial to sketch flesh and blood on paper. I wanted her to know me as I know myself, without the filters of family, friendship, career, or education. No autobiography could be more terrifying or more exhilarating.

A. The Adoptive Parents

Parents adopt children for many reasons, but the two most common reasons cited are infertility and strong religious, social, or humanitarian beliefs.¹¹ Fertile parents who adopt are more willing to adopt hard-to-place children¹² and often have biological children as well.¹³ In one sense, their concerns differ somewhat from parents who adopt because they are infertile. Infertile couples often experience a sense of inadequacy or failure because they are unable to produce children of their own.¹⁴ These feelings of insecurity are often manifested in the relationship with the adopted child. For example, infertile parents are typically more possessive of the child, allowing less independence as the child grows.¹⁵ It follows that infertile couples are most threatened by opening adoption records and most strongly discourage their child from search-

11. Jean Pierce, *Misconceptions About Adoptive Families*, 13 *Early Child Dev. & Care* 365, 367 (1984). William Feigelman & Arnold Silverman, *Chosen Children: New Patterns in Adoptive Relationships* 44, 60 (1983). Other reasons for adoption may include wanting a child of a particular nationality, wanting to expand a family without further pregnancy, and having the option of choosing the sex of the child.

12. Feigelman & Silverman, *supra* note 11, at 42-43.

13. *Id.* at 62. Parents who adopt hard-to-place children express a desire to give a disadvantaged child a loving home. Some describe a concern about their responsibility as Americans to provide a family to a third-world child whose plight as an orphan was the result of U.S. military intervention. Others want to enlarge their families without increasing world population.

14. Sorosky, Baran & Pannor *supra* note 3, at 84.

15. *Id.* at 77-78.

ing for birthparents.¹⁶

Adoptive parents, both fertile and infertile, have a number of characteristics in common.¹⁷ They suffer from a basic conflict with respect to their adopted child, as if to say "I want you to know about your heritage, but I want you to be mine."¹⁸ To maintain the birthmother's confidentiality, information about the child's background is closed to the adoptive parents, as well as to the adopted child. The secrets surrounding the adoption may have an impact on the way the child is brought up as the adoptive parents struggle with their own doubts and fears about the child's background.

Most of the difficulties of bringing up an adopted child have to do with intimacy issues. Emotionally, insecurities about being infertile trouble many adoptive parents. Adoptive parents have a fundamental, mostly subconscious fear that they will lose their adopted child.¹⁹ Obtaining the child is not in itself an easy process. Adoptive parents are screened by social workers and evaluated on their home life and parenting skills.²⁰ The adoptive parents often worry that if they are not perfect parents, the professionals will come and remove the child as suddenly as she arrived.²¹ These anxieties lurk beneath the surface and are reflected in over-protectiveness, intense concern for the child's health, and excessive concern about the child's academic and social success.²² On the other hand, adoptive parents may dissociate themselves from the behavior problems of the adopted child and blame the difficulties on "bad blood" or the suspicious parentage of the child.²³

16. Feigelman & Silverman, *supra* note 11, at 67-68.

17. The typical adoptive mother is white, between the ages of 30- and 44-years old, and has some college education. She is unable to have children and has no other children besides her adopted children. She works part-time or is out of the labor force entirely. About two percent of the United States population adopts children. National Committee for Adoption, *supra* note 1, at 54-56.

18. Rita Dukette, *Value Issues in Present Day Adoption*, 63 Child Welfare 233, 235 (1984).

19. Sorosky, Baran & Pannor, *supra* note 3, at 84.

20. For a discussion of the factors social workers do and should examine when researching potential adoptive parents, see Roberta Andrews, *Adoption: Legal Resolution or Legal Fraud?*, Ann. Progress Child Psychiatry & Child Dev. 351, 354-56 (1979).

21. Because the majority of adoptees who search for birthparents are female, I have used feminine pronouns throughout the article when referring to adoptees. For the sake of contrast, male pronouns are used to describe biological children and other people who are not adoptees.

22. Sorosky, Baran & Pannor, *supra* note 3, at 77.

23. *Id.* at 78. See also Jill Hodges, *Two Crucial Questions: Adopted Children in Psychoanalytic Treatment*, 10 J. Child Psychiatry 47, 56 (1984) (adoptive parents may see approved characteristics of their child as products of the adoptive environment and disliked characteristics as products of biological heredity). Parents may

The irony of adoptive parents' fears about losing the child emotionally or physically is that they are unfounded. The bonding of a baby to its mother can take place for some time after birth, and young children bond psychologically to the mother they know best.²⁴ Furthermore, after the child is formally adopted, the social workers may not remove the child without bringing a lawsuit against the parents under child protection statutes. Given childhood bonding patterns and legal protections, parents should not fear losing an adopted child any more than they fear losing a biological child. Nonetheless, the insecurities remain and are exacerbated by the lack of knowledge that adoptive parents have about their child's origins.

B. *The Birthmother*

There are many misconceptions about the typical birthmother. The stereotype sketches her as very young, unmarried, promiscuous, and emotionally unstable. Contrary to stereotype, studies of mothers who have placed their children for adoption show that they are as varied as the general population.²⁵

Birthmothers do however have some traits in common. The primary conflict for a birthmother is "I want to keep you, but I have to give you up to get on with my life."²⁶ Perhaps unexpectedly, birthmothers frequently display emotional maturity; they have less of a need to rely on a baby for love and security. Birthmothers demonstrate their independence by placing the child for adoption.²⁷ A majority of birthmothers expressed a sense of love or commitment to the birthfather but realized that circumstances did not allow for a child in the relationship.²⁸ Many birthmothers remain curious about the child they placed for adoption throughout their lives.²⁹ Most talk of the love they feel for

be troubled as the child reaches adolescence and begins to discover herself as a sexual person. Since sexuality issues, such as out-of-wedlock pregnancy and infertility, are also adoption issues, this period in the adopted child's life may be particularly rocky for the adoptive parents. Stanley Schneider & Esti Rimmer, *Adoptive Parents' Hostility Toward Their Adopted Children*, 6 Children & Youth Serv. Rev. 345, 350-51 (1984). These authors also posit that antagonism heightens between the adopted adolescent and the opposite sex parent because of the weaker incest barriers in adoptive families. *Id.* at 349-50.

24. For a discussion of the effects of maternal deprivation and infant development, see Martin Herbert, *Causes and Treatment of Behavior Problems in Adoptive Children*, in adoption 83, 86 (Philip Bean ed. 1984).

25. See generally Sorosky, Baran & Pannor, *supra* note 3, at 47-72.

26. Dukette, *supra* note 18, at 235.

27. Sorosky, Baran & Pannor, *supra* note 3, at 48-49.

28. *Id.*

29. *Id.* at 54.

the child and express a strong desire to know of the child's well being.³⁰

According to one study, the vast majority of birthmothers favor procedures that would help adoptees and birthparents reunite.³¹ More than half of the birthmothers agreed that opening birth records would be a positive step.³²

What binds birthmothers together is the feeling of guilt or failure for having had to give up a child for adoption.³³ For many, this guilt could be lessened by opening birth records to give birthmothers access to information about the child. Most birthmothers would probably discover that the child is healthy and loved and that their difficult choice at such a crucial time was good for the child.

C. The Adopted Child

Adopted persons go through life with a hole inside.³⁴ It is

30. See *id.* at 55-72. Jean Paton stressed the impact of the secrecy on birthmothers: "[W]hen the birthmother anticipates reunion with her surrendered child at some future date she has no way of knowing what special developments in the character of that child . . . will be there to greet her." Paton, *supra* note 7. One mother petitioned a Rhode Island court to gain access to her daughter's adoption records. She described her desire to meet her child in this way:

"[I want to] see what type of child she's turned out to be and what she looks like and what her voice sounds like and what, you know, how she acts and things like this and what type of a relationship she has in the home. I'd like to see her relationship with the people, how she interacts. I'd like her to know me as her mother; but, also, I'd like her to realize that her adoptive mother is also her mother. She has two mothers no matter how you look at it."

In re Christine, 121 R.I. 203, 205, 397 A.2d 511, 513 (1979).

31. Sorosky, Baran & Pannor, *supra* note 3, at 54 (82% of birthmothers surveyed). See also Leverett Millen & Samuel Roll, *Solomon's Mothers: A Special Case of Pathological Bereavement*, 55 Am. J. Orthopsychiatry 411, 413 (1985).

32. Sorosky, Baran & Pannor, *supra* note 3, at 54 (53% of birthmothers surveyed). Of course, there are birthmothers who have tried to sever any ties with the past and have no wish to be reminded of the infant they once carried. These women, a small minority of all birthmothers, are alarmed at the possibility of opening birth records to adopted children. See, e.g., Sorosky, Baran & Pannor, *supra* note 3, at 70-71.

33. "The commonly held assumption that the birth mother wants to completely sever her ties with the child and begin life anew needs to be re-examined. In actuality, the mother's greatest concern is usually that her child will never forgive her for abandoning him/her." Sorosky, Baran & Pannor, *supra* note 3, at 49. A mother forms an intimate relationship with a baby even before it is born. The bonding happens during the nine months of being pregnant, not during the first hours after birth. That bonding continues during the birth process as a mother risks her health and goes through taxing physical labor. Katha Pollitt, *The Strange Case of Baby M*, *The Nation*, May 23, 1987 at 682, 686. The grief process of giving up a child is much like that of bereaving a death and may have lasting effects upon the birthmother. Millen & Roll, *supra* note 31, at 418.

34. The adoptee, no matter how well adjusted, always suffers in the psychohis-

most tangible when filling out a simple form at the doctor's office and having to leave the section called "Family Medical History" blank. From early childhood, an adoptee is forced to fill gaps for herself and others. The adopted child learns a retort to the remark: "That's funny, you don't look like your sisters/parents."³⁵ Being adopted is like living in a vacuum, creating oneself in one's own image. But inside there is emptiness, and the emptiness feels like abandonment.

During adolescence the hole begins to ache. Adolescence is the time when young people set out to discover their identities. This task is especially challenging for an adopted child.³⁶ Moreover, an adopted child's questions about her origins may be seen as a way to antagonize her parents. Other conflicts arise in dealing with sexuality. The adopted child may be afraid of her own sexual awakening, fearing she may repeat the "mistake" her birthmother made. Some psychologists also theorize that the incest taboo is not as strong in adoptive families and that fear of incest may cause ambivalent feelings about sex in adolescent adoptees.³⁷ Typically, adolescent adoptees deal with these conflicts by isolating themselves or acting out their frustrations.³⁸ Adopted children in general seem to be prone to conduct problems related to stress.³⁹

A common escape for the adopted child is to fantasize about the birthmother. While a biological child may fantasize about evil witches and fairy godmothers, eventually he learns to sort out his angry feelings toward his parents and outgrows his belief in fairy tales. The fairy tale never disappears for the adopted child.⁴⁰ The

torical realm. The psychohistorical realm includes the part of a person's identity that relates to his or her sense of genealogy, a feeling of connection to past and future family members. Sorosky, Baran & Pannor, *supra* note 3, at 14.

35. See Hodges, *supra* note 23, at 50-53 for a discussion of how the adopted child tries to construct a physical representation of the biological parents.

36. See Sorosky, Baran & Pannor, *supra* note 3, at 13-14. As adopted children approach and go through adolescence, it is common for them to question their origins. The urge to know one's origins is a fundamental human desire. This desire is related to the need to become whole through an understanding of where one comes from and from whom physical traits and characteristics are inherited. Schwartz, *supra* note 5, at 55. The body is a strong link to the birthparents. For this reason, many adoptees are anxious about their bodies and feel that they were given up because something was physically wrong with them. Hodges, *supra* note 23, at 52.

37. See Schneider & Rimmer, *supra* note 23, at 349-50.

38. See *id.* at 350-51.

39. Sorosky, Baran & Pannor, *supra* note 3, at 96. *But see* Herbert, *supra* note 24, at 84 (emotional and behavior problems are not necessarily more prevalent in adopted children than in non-adopted children).

40. Sorosky, Baran & Pannor, *supra* note 3, at 99. Not all fantasies about birthparents are positive. For example, the birthmother may become the "bad" parent in the adoptee's imagination. Stanley Kaye, *Self-Image Formation in Adopted Children*, 13 J. Contemp. Psychotherapy 175, 179 (1982).

kindly birthmother is always out there somewhere, and the child dreams of being rescued. Because of the birthmother fantasy, it may take longer for an adopted child to work through feelings of anger and frustration at the adoptive parents. Some adopted children may also have a deep fear that if they misbehave they will be abandoned again.⁴¹

An inherent conflict for the adopted child is "I love you both, but I have to find my birthparents."⁴² The child may be afraid to ask questions about the past, especially if given the feeling that such questions are not welcome.⁴³ This only exacerbates the feeling of a void in the child and may also lead to feelings of inadequacy or worthlessness.⁴⁴ Adopted children really want to feel that the adoptive parents are the real parents, but the question of origin creates a rub. The sense of low self-esteem found in so many adopted children has to do with the question: "Why was I given up by my first parents?"⁴⁵ As children, adoptees may discover that discussing the adoption is painful for their adoptive parents. Because fears of hurting the adoptive parents continue into adulthood, many adopted adults will not begin the search until after their adoptive parents have died.⁴⁶

IV. The Role of the State

Her first letter to me was retyped on the agency stationery.

41. See Kaye, *supra* note 40, at 177-78.

42. Dukette, *supra* note 18, at 235.

43. Feigelman & Silverman, *supra* note 11, at 206-07. See also Hodges, *supra* note 23, at 48-49.

44. While the adopted child deals with her own uncertainties about the past, she also receives subtle messages from her adoptive and birth families that can lead to feelings of worthlessness. "The tragedies, inabilities and failures of both the biological and adoptive parents are reflected in the adopted child and his psychological development." Kaye, *supra* note 40, at 175-76. The sense of worthlessness may reflect the child's sense that she does not fit in. Among interracial adoptees, for example, those from groups who are most readily assimilated are least likely to search. Black adoptees search most frequently, followed by Caucasians, Koreans and Columbians. Feigelman & Silverman, *supra* note 11, at 222. See also Hodges, *supra* note 23, at 55-56 (adopted child's sense of self as a precious and valued child may be damaged).

45. Robin Henig, *Chosen and Given*, N.Y. Times, Sept. 11, 1988, (Magazine), at 70, 70-71.

46. Michael Sobol & Jeanette Cardiff, *A Sociopsychological Investigation of Adult Adoptees' Search for Birth Parents*, 32 Fam. Rel. 477, 481 (1983). An important piece of the adoptee's identity is tied up with her adoptive family. For some adoptees, the search to explore the rest of their identities may not be worth the risk of destroying the ties to the family they know. See Andrews, *supra* note 20, at 357-58. "It should not be forgotten that many adopted children have made life richer, more meaningful and more rewarding for their parents. This experience can surround the adoption with a positive aura strong enough to bind parents and child through identification and mutual need." *Id.* at 357.

The social worker enclosed a cover letter indicating that they had made a few changes in order to delete identifying information. "You may call me Marion," she had written. "What is your name?" A surprising question, but of course she did not know my name. I wondered about what she had called me in her mind all these years. The Baby? The Little Girl? "Dear Marion," I wrote, "My name is Heidi."

Each state retains a strong interest in the adoption process from a public policy perspective. By passing statutes with respect to adoption, the states are attempting to preserve normal family relationships, protect their citizens' right to privacy, and, perhaps, encourage adoption over abortion or single parenthood.

Courts, which are bound to interpret the state statutes, continue to hold that the secrecy which surrounds birth records is maintained in order to protect the adoptee. "[It] is the very essence of the State's interest in the adoptive process—to help the adoptee grow to be a full and healthy member of society."⁴⁷ At least one court held that this infringement upon the adoptee's right to know is justified by the state's police power, an extensive "power [that] can be neither abdicated nor bargained away, and is inalienable even by express grant. [A]ll contract and property rights are held subject to its fair exercise."⁴⁸

Specifically, the states fear that more relaxed standards of access to birth records would be a detriment to the adoption process. Potential adoptive parents might be unwilling to adopt a child if birthparents had access to the child's name and address, and adoption agencies would have trouble placing the children in their care.⁴⁹ There is also a concern that a birthmother who has begun a new life might have her future destroyed if the adopted child reentered her life without her consent. A woman might select to

47. *Mills v. Atlantic City Dep't of Vital Statistics*, 148 N.J. Super. 302, 312, 372 A.2d 646, 656 (N.J. Super. Ct. Ch. Div. 1977). See also *Bradey v. Children's Bureau*, 275 S.C. 622, 626, 774 S.E.2d 418, 421 (1981) (the confidentiality of the adoption process serves the best interests of adoptees generally); *Golan v. Louise Wise Serv.*, 69 N.Y.2d 343, 347, 507 N.E.2d 275, 278, 514 N.Y.S.2d 682, 685 (1987) (even when all parties have consented to the release of information, the court must protect the state's interest in maintaining the secrecy of adoption proceedings).

48. *In re Linda F.M.*, 95 Misc. 2d 581, 586, 409 N.Y.S.2d 638, 643 (Sur. Ct. 1978) (quoting *Atlantic Coast Line v. Goldsboro*, 232 U.S. 548, 558 (1914)), *aff'd sub nom. Linda F.M. v. Department of Health*, 52 N.Y.2d 236, 418 N.E.2d 1302, 437 N.Y.S.2d 283, appeal dismissed, 454 U.S. 806 (1981).

49. See *In re Maxtone-Graham*, 90 Misc. 2d 107, 109, 393 N.Y.S.2d 835, 838 (Sur. Ct. 1975) (court concerned that disturbing confidential relationship between foster parents and social services agencies would discourage people from being foster parents).

abort the fetus rather than to face such a frightening scenario.⁵⁰

The state's interest in adoption is essentially a concern for the privacy of all parties involved in the adoption. The adoptive parents want a peaceful, normal family life, free from the prying eyes of birthparents or agents of the court.⁵¹ Adoptive parents also deserve the devotion of their adopted child, particularly in later life when they need special care.⁵² Birthparents have a need for anonymity so that they can pursue their goals without fear of interruption by strangers.⁵³ Adopted persons deserve a fresh start, without any danger of harassment by birthparents and free from unpleasant background information.⁵⁴

These being the reasons given for regulating adoptions, it is important to examine the process itself to see if it truly meets the goals of privacy so important to the state. Then one must look at the needs of the parties to determine if exercise of the police power with respect to adoptions is actually required.

V. The Elements of the Adoption Contract

It came as such a shock. My birthfather refused to give his consent to any contact with me. Everything had gone so smoothly. The social worker was able to locate my birthmother in a week. My birthmother had agreed to correspond with me through the social worker. We had exchanged photos and letters. Suddenly the first rejection. I was unprepared for the powerlessness.

There are four basic considerations in the adoption procedure: the consent of the parties, due process and the right to be heard, the adoption decree, and the sealing of the birth records. Following is a discussion of the procedures used in adoption that are designed to support the state's interest in protecting the privacy rights of the individuals involved.

50. National Committee for Adoption, *supra* note 1, at 65-66.

51. *In re Christine*, 121 R.I. 203, 205, 397 A.2d 511, 513-14 (1979). The court worried that even the appointment of a guardian to check on the well-being of the child "casts a cloud of uncertainty upon the minds of all adoptive parents who now realize that some day a court attache may be at their doorstep acting as a courier for a parent whose right to visit with or talk to the adoptive couple's child was supposedly terminated." *Id.* See also *Hall v. Post*, 85 N.C. App. 610, 616, 355 S.E.2d 819, 825 (1987) (adoption of baby abandoned by carnival workers was exposed in local newspaper when birthmother returned seventeen years later to meet her daughter; court held adoptive family had a cause of action for tortious invasion of privacy).

52. See *infra* note 93 and accompanying text.

53. See *Humphers v. First Interstate Bank*, 68 Or. App. 573, 580, 684 P.2d 581, 588 (1984) *aff'd in part & rev'd in part en banc*, 298 Or. 706, 696 P.2d 527 (1985).

54. *In re Estate of Walker*, 64 N.Y.2d 354, 358, 476 N.E.2d 298, 302, 486 N.Y.S.2d 899, 903 (1985). See also *Linda F.M. v. Department of Health*, 52 N.Y.2d 236, 237, 418 N.E.2d 1302, 1303, 437 N.Y.S.2d 283, 284, *appeal dismissed*, 454 U.S. 806 (1981).

A. Consent to Adoption

The primary issue of consent has to do with the birthmother's decision to give up the child. There seems to be no contention about the consent of the adoptive parents.⁵⁵ Consent of birthfathers to adoption is an emerging area of the law, and it may be unnecessary to obtain the putative father's consent in order to place the child.⁵⁶ The child, of course, cannot legally give consent to the adoption.⁵⁷

In order to protect birthmothers from being coerced into giving up the child, state statutes allow the birthmother a certain period of time during which she may withdraw her consent to the adoption.⁵⁸ Naturally, the possibility that the birthmother might withdraw her consent to the adoption is one of the deepest fears of adoptive parents. Withdrawal of consent places the adoptive parents in a very difficult bind. They must choose between surrendering their child without protest⁵⁹ and enduring a custody

55. The author's search for relevant case law revealed no cases in which consent of the adoptive parents was at issue when the child had been adopted shortly after birth. In an unusual case, an immigrant to the U.S. offered to adopt his niece if she moved to this country and took care of him in his old age. She moved as planned but was not adopted before the old man had remarried and died. The question in the case was, though she was not formally adopted, was she still entitled to a child's share in his estate. The court decided in her favor on a contract issue. *Pangarova v. Nichols*, 419 P.2d 688 (Wyo. 1966). See also *Roberts v. Sutton*, 317 Mich. 458, 27 N.W.2d 54 (1947) (stepdaughter raised by deceased but not adopted by him until she was 25 was sole heir under laws of intestacy).

56. *In re Adoption of Jessica XX*, 54 N.Y.2d 417, 420, 430 N.E.2d 896, 899, 446 N.Y.S.2d 20, 23 (N.Y. 1981), *aff'd*, *Lehr v. Robertson*, 463 U.S. 248 (1983). For a discussion of the policy behind not requiring the putative father's consent, see *In re Adoption of Malpica-Orsini*, 36 N.Y.2d 568, 572-73, 331 N.E.2d 486, 489-90, 370 N.Y.S.2d 511, 516-17 (1975), *appeal dismissed*, 423 U.S. 1042 (1976). Even if the putative father's consent is unnecessary, the putative father may have the right to present evidence relevant to the child's best interests to the court during the adoption proceeding. *In re "Male F"*, 97 Misc. 2d 505, 509, 411 N.Y.S.2d 982, 986 (Sur. Ct. 1978).

57. See Unif. Adoption Act § 5, 9 U.L.A. 23-24 (1988) (consent of child required only if child is above age 10).

58. The statutory waiting period to withdraw consent ranges from one to twelve months. Schwartz, *supra* note 5, at 53. Even withdrawing her consent does not guarantee that the birthmother will recover her infant. If the court decides that the birthmother is not acting in the child's best interests, then the petition of the adoptive parents can be granted without her consent. See *In re McTaggart*, 4 Oh. App. 2d 359, 365, 212 N.E.2d 663, 670 (1965) (birthmother who withheld her consent after giving up the child for adoption was estopped by the court). *Contra In re Steve B.D.*, 111 Idaho 285, 290, 723 P.2d 829, 834 (1986) (natural parents' consent to adoption final and irrevocable upon execution of consent and delivery of child to adoptive parents).

59. Adoptive parents who give up the child without a fight are apt to experience intense grief, depression, and shame at not having contested the withdrawal of consent. Schwartz, *supra* note 5, at 53-54. Not surprisingly, these emotions parallel

battle.⁶⁰ If the birthmother has not expressed her desire to keep the child during the statutory period allowing withdrawal of consent, her rights to the child are terminated unless she can later prove that she acted under fraud, duress, or undue influence.⁶¹

B. *The Adoption Hearing*

An uncontested adoption proceeding is a simple affair. No party is represented by legal counsel. The adoptive parents represent themselves.⁶² The child is not considered a necessary party to the action and is never represented at the hearing unless the petition is contested. Apparently, the reasoning is that in an uncontested proceeding the child's interests are identical to the adoptive parents' interests. Therefore, the child, who is of course a minor, is deemed adequately represented by the primary caretakers at the adoption proceeding.⁶³

When a petition is contested, the adoptive parents, the birthmother, and in some jurisdictions, the birthfather, are given the opportunity to be heard.⁶⁴ The child may be represented by a guardian ad litem.⁶⁵ Some of the parties may choose not to be present at the hearing in order to maintain personal anonymity.⁶⁶ They are represented by counsel at the hearing. If the attorney has represented both parties in the adoption process, however, the shield of confidentiality may fail at the contested hearing. The attorney may be forced to disclose the names of both parties he

the birthmother's feelings after she gives up the child. Millen & Roll, *supra* note 31, at 413.

60. Adoptive parents who fight for custody "may suffer debilitating anxiety." Schwartz, *supra* note 5, at 54. Additionally, a custody contest "that is prolonged until the child has been with the [adoptive] parents for six months or more is likely to have deleterious effects on the child." *Id.*

61. See *In re Steve B.D.*, 111 Idaho 285, 290, 723 P.2d 829, 834 (1986).

62. Telephone interview with Robert DeNardo, A.C.S.W., Supervisor of Child Welfare, Catholic Charities of St. Paul (Oct. 26, 1988).

63. After the birthparents terminate their parental rights, the state, through the Human Services Commission, has guardianship of the child. The state delegates guardianship to a social services agency. In Minnesota, the child is placed with the adoptive parents, but the parents must wait three months before they may file a petition for adoption with the court. The court notifies the agency of the petition for adoption. At that time, the agency sends a consent form. The consent is a statement by the social services agency supporting the adoption of the child by the adoptive parents. With the agency's consent is documentation of the birthparents' termination of parental rights. *Id.*

64. See *supra* notes 55-61 and accompanying text.

65. See *In re Adoption of Female Infant*, 237 A.2d 468, 469 (D.C. 1968).

66. The identity of the parties may be protected upon a motion from either party and proper service upon the opposing counsel. *In re Procedure for Protecting Identity of Parties in Certain Adoption Proceedings*, 604 S.W.2d 949, 949 (Ark. 1980).

represented.⁶⁷

C. The Adoption Decree

As a young teenager interested in astrology, I wanted to know the time of my birth. When I asked my mother when I was born, she pulled out my birth certificate. I had never seen it, but the certificate told me nothing I didn't already know. Mom suggested I write to the adoption agency and ask them for the time of my birth, but she added: "Better not tell them what you want it for. I'm sure a Catholic agency would not be happy to hear that you are serious about astrology."

The adoption decree is a formal document which proves that the adoption is legally valid.⁶⁸ It is issued at the conclusion of the adoption hearing. The adopted child is given a new birth certificate which contains the date of birth, place of birth, and the adoptive parents names as parents. No other information is provided on the new birth certificate.

After the decree has been issued, the adoptive parents become the legal parents, and the birthparents forfeit any rights to the child.⁶⁹ If the adoption agency misrepresents the child's health to the adoptive parents, they may have legal standing to bring suit for wrongful adoption.⁷⁰ Birthparents may not have an analogous cause of action.⁷¹

The adoption decree is the physical manifestation of the adoption contract. Some may question its validity as a contract, however, particularly because the consent of the birthmother is

67. *Tierney v. Flower*, 32 A.D.2d 392, 396, 302 N.Y.S.2d 640, 644 (1969) (an attorney who represented both the birthmother and the adoptive parents in the proceeding was required to disclose the names and addresses of his clients when later the birthmother sought to have the baby returned to her).

68. See *Succession of Hilton*, 175 So. 2d 366, 368 (1965) (if the original decree is not in existence, extrinsic evidence may be used to prove an adoption has taken place).

69. Unif. Adoption Act § 14, 9 U.L.A. 44 (1971).

70. In an Ohio case, the parents who adopted a child were told by the agency that he was a normal, healthy baby. Later the parents discovered that the child was born to a mental patient in a psychiatric institution. The boy was retarded and had numerous physical and psychological problems. The adoptive parents were awarded \$125,000 in damages to cover medical expenses and extra care for the child. *Burr v. Board of County Comm'rs*, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986).

71. In a well-publicized Minnesota murder trial, Lois Jurgens, an adoptive mother, was found to have killed her adopted son. The birthmother asked the state agency to investigate after she learned that the child she had placed for adoption twenty-three years before had died at age three. *St. Paul Pioneer Press Dispatch*, May 30, 1987, at 1, col. 1. It is doubtful that the birthmother could bring a civil action against the adoptive parents, since she had relinquished her rights to the child at his birth.

often obtained under conditions that do not lend themselves to rational decision-making.⁷²

D. Sealing the Birth Records

Birth records are sealed by the court after the adoption decree is finalized. Maintaining the secrecy of adoption records originally mirrored the secrecy sought by the unmarried birthmother who sequestered herself during the pregnancy to hide her disgrace.⁷³ Though pregnancy outside marriage is no longer viewed in such a harsh way by society, records are still closed for public policy reasons to assure privacy rights of the parties.⁷⁴ The major concern of courts which receive petitions to open court records concerning adoption is the issue of invasion of privacy. As a consequence, birth records are seldom made accessible to any of the parties to the contract unless the judge determines that there is good cause for the disclosure.⁷⁵

Eighteen years or more after the adoption procedure is completed, a new chapter may begin for the adoptee: the search for confidential birth records. The success of the state in guarding this "private" information from idle or malevolent curiosity-seekers also serves to barricade the adult adoptee from a background story which is rightfully hers. The next section focuses on what many adoptees must endure to acquire personal information which belongs to them.

VI. The Trials of the Adult Adoptee

I sent her a Polaroid photo taken in December. She wrote back: "You have an uncanny resemblance to one of his daughters. People would know whose daughter you are." That moment, my world was irrevocably altered. No longer disembodied, I felt a physical connection to someone else. I share my eyes, my hair

72. Paton, *supra* note 7.

73. Dukette, *supra* note 18, at 236.

74. See *supra* notes 47-54 and accompanying text. Statutes which prohibit release of adoption information contained in court records may not apply to information obtained through other channels. See *Jordan v. Pensacola News-Journal*, 314 So. 2d 222, 223-24 (Fla. Dist. Ct. App. 1975) (statute prohibiting release of court records pertaining to adoption proceeding not applicable to publication of information received from other sources). If adoption statutes are inapplicable, a person may have a cause of action in tort. See *Humphers v. First Interstate Bank*, 68 Or. App. 573, 582, 684 P.2d 581, 587 (1983) (a doctor who released hospital records to an adopted child he delivered twenty years before was liable for breach of confidential relationship with the birthmother), *aff'd in part and rev'd in part en banc*, 298 Or. 706, 696 P.2d 527 (1985).

75. See *infra* notes 86-89 and accompanying text.

color, my body shape with another person. Unlike Eve I am not the beginning of my line. I began to accept my body, my appearance. For the first time. But I wonder, will I ever meet her, my sister-of-the-body?

For most adopted people, beginning the search for their birthparents is a struggle. It is difficult on an emotional level (What will I find? Will I be turned away?), and it is discouraging on a procedural level because of numerous legal barriers that must be overcome. Many adopted people find themselves in court early in the process, having to prove that they have a good reason for asking to see their birth records. The majority of courts seem annoyed with suits by adoptees and deal with their petitions harshly. But there is a gathering opposition, and adopted adults should take heart that before long there will be some legal precedent for granting access to confidential birth information. At present, however, the path to self-enlightenment is fraught with obstacles for the adult adoptee.

A. Gaining Access to Birth Records Through the Courtroom

The rules with respect to judicial proceedings for opening adoption records vary from state to state. Three basic procedures are applied.⁷⁶ The most open method permits adopted adults access to their birth records without consulting any other parties.⁷⁷ Another process allows access to confidential information when the adopted adult and the birth parents both consent to the mutual exchange.⁷⁸ This is usually handled through an adoption agency.

76. The legislative history of adoption in Louisiana provides a short course in these various approaches and exemplifies the tightening of restrictions with respect to access. As of 1938 records were open to all the parties on demand. Beginning in 1942, a court order was required for adoptive parents or adoptees to gain access to records. Birthparents were excluded from obtaining a court order. In 1977 the law changed once again so that records were only opened upon compelling reason shown by adoptees or adoptive parents. See *Chambers v. Parker*, 349 So. 2d 424, 425-26 (La. 1977).

77. See *supra* note 2. An earlier version of the Model State Adoption Act provided the same open access to birthparents.

Section 502 (d), Birth Certificates—An original birth certificate, sealed pursuant to this section, shall at any time be opened as a matter of right to the birthparent whose rights were terminated or to the adult adoptee upon application to the Office of Vital Statistics. The applicant shall be provided a true copy of the original certificate, without official certification and bearing a notation that the original certificate has been amended.

Jayne Askin with Bob Oskam, Search 8 (1982).

78. National Committee for Adoption, *supra* note 1, at 93. Some states have es-

The third and most restrictive method requires a court hearing at which all parties are represented and are given notice and an opportunity to be heard.⁷⁹ If birthparents cannot be found by the court, a guardian ad litem is appointed to represent their interests.⁸⁰ At the hearing, the person petitioning for access to information must prove that she has "good cause" for searching.⁸¹ The process is so byzantine that even when adoptive parents and birthparents have given full consent to having the court records opened to the adoptee, the court may still require an investigation into good cause.⁸²

tablished voluntary adoption registries to facilitate contact, the approach favored by the National Committee for Adoption. *Id.*

79. Birthparents may be necessary parties and should be notified of any petition for release of confidential information. *In re Anonymous*, 92 Misc. 2d 224, 225, 399 N.Y.S.2d 857, 858 (Sur. Ct. 1977). In Louisiana, a curator is appointed to look at the court records to aid in determining if the birthparents are necessary parties to the proceeding. See *Massey v. Parker*, 369 So. 2d 1310, 1315 (La. 1979). The adopted person is not allowed to examine the birth record to determine the validity of her claim but must rely on the decision of the curator. *Kirsh v. Parker*, 383 So. 2d 384, 387 (La. 1980); *Stahel v. Brown*, 422 So. 2d 1291, 1292 (La. Ct. App. 1982). Louisiana has statutes which permit an adopted person to inherit from both adoptive parents and birthparents. As a result, there is substantial adoption litigation in Louisiana where adopted adults have their potential inheritance as a reason for searching.

In other states, investigation of court records is left to the judge or other court personnel, rather than to an outside administrator. *In re George*, 625 S.W.2d 151, 159 (Mo. Ct. App. 1981). When an extensive search is necessary to find the birthparents, however, the notice requirement may be waived. *In re Linda F.M.*, 92 Misc. 2d 828, 831, 401 N.Y.S.2d 960, 962 (Sur. Ct. 1978).

80. *In re Maples*, 563 S.W.2d 760, 766 (Mo. 1978); *In re Assalone*, 512 A.2d 1383, 1390 (R.I. 1986). The guardian ad litem must oppose the adoptee's petition because "it must be presumed that it is in [the birthparents'] interest to keep the records sealed." *In re Hayden*, 106 Misc. 2d 849, 851, 437 N.Y.S.2d 541, 543 (N.Y. Sup. Ct. 1981). The court reasoned that the statute was written, not to protect the adoptee, but to protect the anonymity of birthparents, the implication being that birthparents desire anonymity.

81. See *infra* notes 87-89 and accompanying text.

Even if the adoptee is able to show good cause, many courts will use their own discretion to determine a remedy "short of full disclosure." *In re George*, 625 S.W.2d 151, 160 (Mo. Ct. App. 1981). In one case, the adoptee was given an option of reviewing all medical information with the identifying information redacted or obtaining a medical history through the guardian ad litem who would continue to correspond with the birthparents. *Golan v. Louise Wise Servs.*, 69 N.Y.2d 343, 349, 507 N.E.2d 276, 279, 514 N.Y.S.2d 682, 686 (1987).

The showing of good cause may precede giving notice to birthparents in order to save the birthparents from being disturbed unnecessarily if the adoptee fails in her burden of proof to show good cause. *In re Romano*, 109 Misc. 2d 99, 105, 438 N.Y.S.2d 967, 972 (Sur. Ct. 1981).

New Jersey's burden of proof standard differs from that of other states. Before the age of majority, an adoptee bears the burden of proof in demonstrating good cause. When the adoptee becomes an adult, however, the burden of proof shifts to the state. The state must show why good cause is not present in the petition. *Mills v. Atlantic City Dep't of Vital Statistics*, 148 N.J. Super. 302, 317-18, 372 A.2d 646, 654 (N.J. Super. Ct. Ch. Div. 1977).

82. *In re Anonymous*, 92 Misc. 2d 224, 225, 399 N.Y.S.2d 857, 858 (Sur. Ct. 1977).

B. The "Good Cause" Requirement

In states which require a judicial hearing in order to open confidential birth records, the petitioner must prove that she has an important reason for asking the court to make an exception to state adoption statutes. The courts, as guardians of the state's interest in individual privacy, are rigid in their adherence to the good cause requirement.⁸³ Adult adoptees, however, may claim certain property and liberty interests in their birth information.⁸⁴ A birth certificate with vital information left blank is an example of deprivation of personal property of adult adoptees, property which without question is given to and belongs to non-adopted people. All citizens have access to their vital statistics, and akin to that, own a kind of possessory interest in their family background. No one would question a non-adopted person's freedom to research their genealogy and develop a family tree to share with future generations. The opposite is true for adult adoptees who are denied the basic freedom of finding out, not only their family heritage, but also an essential piece of their own identity. It is noteworthy that the courts are so assiduous in protecting the alleged privacy rights of a small section of the population when rights to liberty and property are expressly guaranteed by the Constitution. When a state's interest collides with the liberty interest of the individual, the state's interest must yield. Not so in the case of adoption, where the information that adult adoptees desire is held to be neither a liberty nor a property interest.⁸⁵

There are few considerations courts accept as good cause. A significant need to obtain medical information is one.⁸⁶ The right

83. See *supra* note 81 and accompanying text. Even if good cause is shown the court still has the right to restrict the amount of information the adoptee receives. For example, no identifying information is released unless all of the parties consent. *In re Maples*, 563 S.W.2d 760, 766 (Mo. 1978).

84. See *In re Roger B.*, 85 Ill. App. 3d 1064, 1070, 407 N.E.2d 884, 893 (1980) (Rizzi, J., dissenting) (the right to know the identity of one's genetic parents is a private and personal right guaranteed by the ninth amendment).

85. See *infra* notes 152-56 and accompanying text regarding the adoptee's constitutional right to information.

86. See *In re Rocci*, 96 A.D.2d 743, 743, 465 N.Y.S.2d 330, 331 (1983) (birthmother who wishes to pass along important medical information may do so upon showing good cause); *In re Chatman*, 57 A.D.2d 618, 619, 393 N.Y.S.2d 768, 768-69 (1977) (fear of genetic defects is good cause). But see *In re George*, 625 S.W.2d 151 (Mo. Ct. App. 1981) (adoptee in need of bone marrow transplant was denied names of birthparents, but court administrator was instructed to contact birthparents and ask if they would be willing to participate in surgery anonymously); *Golan v. Louise Wise Servs.*, 69 N.Y.2d 343, 507 N.E.2d 275, 514 N.Y.S.2d 682 (1987). In the *Golan* case, a commercial pilot was laid off until he could find medical history from birthparents to explain his heart disease and heart attack. In denying this adoptee access to his medical records the court rationalized: "A rule

to inherit property is another.⁸⁷ Some jurisdictions have held that treatment of severe psychological disorders is also good cause for releasing birth records.⁸⁸ However, mere curiosity, interest in the

which automatically [gives] full disclosure to any adopted person confronted with a medical problem with some genetic implications [will] swallow New York's strong policy against disclosure as soon as adopted people [reach] middle age." *Id.* at 349, 507 N.E.2d at 279, 514 N.Y.S.2d at 686.

87. *Massey v. Parker*, 369 So. 2d 1310, 1314 (La. 1979); *Prentice v. Parker*, 376 So. 2d 568, 571 (La. Ct. App. 1979). The dilemma, of course, is that the adopted adult has no idea and receives no notification of a birthparent's death until it is too late. Not all courts are convinced that inheritance is a compelling reason to open birth records. Adopted children are not the "issue" of biological family after they are placed for adoption. *In re Estate of Best*, 66 N.Y.2d 151, 156, 485 N.E.2d 1010, 1013, 495 N.Y.S.2d 345, 348 (1985), *cert. denied*, 475 U.S. 1083 (1986). Furthermore, a mere expectation of a right to inherit is not sufficient good cause to open records. *Aimone v. Finley*, 113 Ill. App. 3d 507, 509, 447 N.E.2d 868, 870 (1983), *appeal dismissed*, 465 U.S. 1095 (1984).

88. *See In re Anonymous*, 92 Misc. 2d 224, 226, 399 N.Y.S.2d 857, 859 (Sur. Ct. 1977) (adoptee was a "deeply troubled young man"); *In re Assalone*, 512 A.2d 1383, 1386 (R.I. 1986) (psychological need to know must be severe). *But see Mills v. Atlantic City Dep't of Vital Statistics*, 148 N.J. Super. 302, 319, 372 A.2d 646, 655 (N.J. Super. Ct. Ch. Div. 1977) (psychological need showing that there is a continued sense of unreality in the adoptee's self-image is sufficient good cause).

Contra In re Dixon, 116 Mich. App. 763, 771, 323 N.W.2d 549, 552-53 (1982) (severe psychological illness not good cause because it seemed to be rooted in adoptee's troubled adoptive home as opposed to resulting from a need to learn of her identity). In the *Dixon* case, the adoptee's psychiatrist wrote the following letter to the court:

"It has been my experience that 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. This desire does not necessarily manifest itself in a wish to form a relationship with their family of origin, but a need to know something of their biological origins. Conversely, I have seen a parallel desire on the part of natural parents to know something of the lives of their biological children. Preventing this information from being available when requested by either party only encourages doubt and uncertainty based on fantasy on the part of children and guilt on the part of the natural parents.

"I have seen Carolyn Dixon in intensive psychotherapy since August of 1979. She is suffering from a severe depressive illness which has manifested itself in several near lethal suicide attempts and has required two hospitalizations. At present her condition remains guarded. This depression, in fact, has its origins in the severe emotional deprivation she suffered in her adopted family. This deprivation and abuse prevented the establishment of the intimacy and security normally expected of a family which allows for healthy psychological development and the establishment of a secure identity. At present Mrs. Dixon is desperately trying to establish a secure psychological base. The denial of access to her adoption records will only be experienced as further deprivation and therefore have a negative impact on her condition. It is my opinion that the release of this information is in the interest of Carolyn's recovery from her depression."

Id. at 766 n.2, 323 N.W.2d at 550 n.2. Although the psychiatrist spoke sensitively about the needs of adoptees and birthparents with respect to birth information, his statement was not enough to persuade the Michigan court to release identifying information to the adoptee.

It is unfortunate that an adoptee must reveal such intimate details of her life in

past, or a desire to know one's origin, without medical or inheritance reasons pleaded as well, is not sufficient to establish good cause.⁸⁹

The typical adult adoptee who seeks access to birth records is searching in order to satisfy an interest in her background. Further, she is not suffering from significant physical or mental problems. As a consequence, the good cause requirement serves to withhold from the adult adoptee vital information about her identity.⁹⁰ The real paradox of the good cause approach is that the healthier and more well-adjusted the adult adoptee is, the less likely she is to gain access to confidential information.⁹¹

C. Judicial Hostility Toward Suits by Adoptees

From reading the many opinions which follow petitions by adoptees, it appears that many judges feel that suits by adoptees are frivolous and a waste of the court's time. The adult adoptee is treated like an ungrateful child or a rebellious malcontent.⁹² One

an effort to convince a court that her psychological need to know is concrete. One wonders here if she told too much. Perhaps, the court was afraid to release identifying information to someone it deemed too unstable to act responsibly.

It appears that it is difficult to describe the need to know in words persuasive enough to convince a court that it is good cause to open birth records. This indicates that it may be nearly impossible for those who have knowledge of their own parentage and family history to know how an adoptee experiences the absence of this information. Most people, including judges and lawmakers, have the privilege of knowing their roots and, as a result, take this self-knowledge for granted.

89. *Linda F.M. v. Department of Health*, 52 N.Y.2d 236, 240, 418 N.E.2d 1302, 1304, 437 N.Y.S.2d 283, 285, *appeal dismissed*, 454 U.S. 806 (1981); *In re Romano*, 109 Misc. 2d 99, 104, 438 N.Y.S.2d 967, 971 (Sur. Ct. 1981). See also *In re Christine*, 121 R.I. 203, 207, 397 A.2d 511, 513 (1979) (interest in her child's welfare alone was not sufficient good cause to open birth records to a birthmother). The position that a need to know is not sufficient good cause contradicts widespread expert opinion that "the need to be connected with one's biological and historical past is an integral part of one's identity formation." Sorosky, Baran & Pannor, *supra* note 3, at 219.

Maturity is not a factor to consider in weighing good cause. Courts do not equate adulthood with good cause for desiring birth information. *In re Roger B.*, 85 Ill. App. 3d 1064, 1069-70, 407 N.E.2d 884, 889 (1980), *aff'd*, 84 Ill. 2d 323, 418 N.E.2d 751, *appeal dismissed*, 454 U.S. 806 (1981); *In re Romano*, 109 Misc. 2d 99, 103, 438 N.Y.S.2d 967, 971 (Sur. Ct. 1981).

A Mormon wishing to trace his ancestry as one of the tenets of his faith met with court resistance. The case was remanded for more facts and the lower court was instructed to be aware of preferential treatment of one religious group over another. *In re Gilbert*, 563 S.W.2d 768 (Mo. 1978).

90. After conducting a study of twins at the University of Minnesota, psychologist David Lykken remarked: "[We have a] strong sense that vastly more of human behavior is genetically determined or influenced than we ever supposed." Askin, *supra* note 77, at 14.

91. See *Bradey v. Children's Bureau*, 275 S.C. 622, 629, 274 S.E.2d 418, 422 (1981).

92. Several courts still apply the best interests of the child standard to adult

judge articulated his heartfelt disapproval succinctly:

[I]t should be stated that adoptive parents need and deserve the child's loyalty as they grow older and particularly in their later years. The statute promotes a posture from which the child's attention and emotional attachments are directed toward the relationship with the new parents and so it should be.⁹³

The conclusions reached by many judges seem to reflect this position.

The hostility of the courts is out of line with the facts about adult adoptees. Most adopted adults are as mature, loving, and attentive to their parents as the rest of the general population. The adopted people who choose to search more often describe their childhoods as difficult in comparison to non-searchers, but there is no indication that they are making the search to punish their adoptive parents or their birthparents.⁹⁴ The overwhelming reason that adopted people search is to enlighten themselves about the darkness of the past.

D. The Search

Even after the struggle to gain access to birth records, the adopted person has just begun the search for answers to her questions. The search itself is often long and arduous.

There have been numerous studies to determine the motivations of adopted adults who choose to search for their birthparents. Some search in order to supplement the background information in court or adoption agency files.⁹⁵ Inaccurate medical history provides one example of the need to follow up. Much of this information is woefully outdated in the birth records themselves because few birthparents take advantage of the opportunity to update the files as the family medical history changes over time.⁹⁶

Other adoptees follow the suggestions of counselors who urge them to obtain more information in order to come to terms with the earliest experience of abandonment. One of the basic questions that adopted children ask is: "Why did my mother give me

adoptees' petitions to open birth records. See, e.g., *In re Adoption of Spinks*, 32 N.C. App. 422, 429, 232 S.E.2d 479, 483 (1977). The language used in referring to the adult petitioner as a child reflects the absurd paternalistic attitude held by the courts toward adoptees, regardless of the adoptees' ages.

93. *In re Maples*, 563 S.W.2d 760, 764 (Mo. 1978). Here too the judge refers to the adult as a child. Apparently the judge recommends that each adoptee wait until both adoptive parents have died before beginning a search for origins. *Id.* at 763.

94. See *infra* note 99 and accompanying text regarding dissatisfaction as motivation of search.

95. Askin, *supra* note 77, at 15; Sobol & Cardiff, *supra* note 46, at 480.

96. Askin, *supra* note 77, at 16.

away?"⁹⁷ As an adult the question still remains to be answered. Some adoptees are looking for birth siblings in order to compare talents, preferences, and appearances. One study indicated that searching behavior in adults was linked to dissatisfaction in the adoptive home.⁹⁸ Other studies have indicated that searchers tend to come from socially liberal families.⁹⁹ Other factors include sex,¹⁰⁰ age of child at the time she found out she was adopted,¹⁰¹ and general satisfaction with life as an adult.¹⁰² Whatever the reasons for searching, many adopted people experience difficulty in tracking down both birthparents. Even searches conducted by the courts through a special administrator in order to serve notice on the birthparents may take a long time and often delay the hearings for months.

Of course, it is never clear what awaits the adopted person at the end of the search. Adoption search organizations report that most reunions between adoptees and birthparents are highly successful.¹⁰³ Sometimes parents and children meet, exchange stories, and part ways without further plans for reunions. Others become intimate with each other's families. The experiences vary

97. Many adoptees suffer from a poor self-image, having internalized adoption as rejection by the birthparent. Feigelman & Silverman, *supra* note 11, at 213; Sorosky, Baran & Pannor, *supra* note 3, at 118; Sobol & Cardiff, *supra* note 46, at 480.

98. Sue Aumend & Marjie Barrett, *Self-Concept and Attitudes Toward Adoption: A Comparison of Searching and Nonsearching Adult Adoptees*, 63 *Child Welfare* 251, 254 (1984).

99. Feigelman & Silverman, *supra* note 11, at 214.

100. Most searchers are female. Some researchers have hypothesized that more women search because they have a heightened interest in pregnancy, women are often more in touch with their feelings, women identify more with the mother figure, and more women are interested in genealogy and maintaining kinship ties. Sorosky, Baran & Pannor, *supra* note 3, at 196.

101. Sobol & Cardiff, *supra* note 46, at 479. Cf. Aumend & Barrett, *supra* note 98, at 253. A related factor is that the older the child at the age of adoption, the more likely she is to search as an adult. Sobol & Cardiff, *supra* note 46, at 479.

102. Those who are more dissatisfied are more apt to search. Aumend & Barrett, *supra* note 98, at 257; Sobol & Cardiff, *supra* note 46, at 480.

103. In a study of 50 randomly selected adoptees in 1975, 90% of all adoptees were satisfied with the results of their reunions. Eighty-two percent of birthparents felt favorably about the outcome. Ten percent of all participants reacted adversely to the reunion. Sorosky, Baran & Pannor, *supra* note 3, at 195.

Unfortunately, the secret nature of adoptions makes gathering statistical evidence extremely difficult. Researchers have limited means of finding large numbers of adoptees and birthmothers, since their identities are carefully hidden. Most of the statistics mentioned in this paper are derived from studies involving a relatively small number of participants who have volunteered their names to researchers. If birth records become more accessible, it will be easier to conduct research regarding the effects of adoption on all parties to the triangle. Such information would undoubtedly be of great value to lawmakers and social scientists, and is an important example of how the general public may benefit, as well, from opening birth records.

considerably, depending upon expectations, preparation for the meeting, and the needs of each of the parties.¹⁰⁴

E. Winds of Change: Dissent on the Bench

Though there are few opinions that deal sympathetically with the needs of adult adoptees who desire access to their birth records, more dissenting judges have begun to recognize the adoptee's need to know as a valid legal claim. These judges weight the interests of the adult adoptee more heavily than those of other parties to the contract:

[T]he compelling need of the child—born through the laws of nature and of God to his blood parents, divested of his parents through no choice of his own, innocent of any blame whatsoever—must always outweigh those interests of the parents to hide from their child and others the unalterable fact of their parentage through which they brought into this world their child.¹⁰⁵

Several justices advocate relaxing the good cause requirement.¹⁰⁶ One judge remarked that the current good cause standard "treat[s] [adoptees] perpetually as children who must be shielded from the truth."¹⁰⁷ In fact, it is the adoptive parents and birthparents who are treated like children; they are the ones who are protected from reality by a legislative shield. The good cause requirement may serve its purpose in protecting minor adoptees and their families from unwelcome intrusion by a birthparent, but the requirement is unnecessary when all the parties are adults.

The dissenting judges are ahead of their time in advocating the rights of adult adoptees. Four dissenting opinions by state court judges in the last ten years, however, does not establish a trend. Currently, they stand alone as judicial advocates for adoptees in search of personal information. Still, their voices offer guidance to the decision-makers of the future. Even as state legislators are slow in altering the laws regarding secrecy in adoption, courts in the years ahead should become more active in protecting the rights of this important minority.

104. *Id.* at 196.

105. *Massey v. Parker*, 369 So. 2d 1310 (La. 1979) (Tate, J., dissenting). See also *In re Roger B.*, 85 Ill. App. 3d 1064, 1073, 407 N.E.2d 884, 893 (1980) (Rizzi, J., dissenting) (compelling state interest in protecting the welfare of the adopted child ends when the child becomes an adult).

106. See, e.g., *In re Maples*, 563 S.W.2d 760, 767-78 (Mo. 1978) (Seiler, J., concurring in result); *Golan v. Louise Wise Servs.*, 69 N.Y.2d 343, 351, 507 N.E.2d 275, 280, 514 N.Y.S.2d 682, 688-89 (1987) (Bellacosa, J., dissenting).

107. *In re Maples*, 563 S.W.2d at 768 (Seiler, J., concurring in result).

VII. The Adoption Contract Revisited

My mother did not believe me when I told her my earliest memory. "You were carrying me down some wide stairs into a big dark room. Daddy was standing next to you, and there was a big desk. You and Daddy were facing the big desk and there was a strange man in black looking at me. That's all I remember, except that it was so cold and dark in there." My mother shook her head, "That was the day we legally finalized the adoption. But you can't possibly remember that. You were only sixteen months old."

An examination of the sociological background of adoption belies many of the public policy concerns of lawmakers and judges. Following is a discussion of the legal problems inherent in the concept of the adoption contract. The legal incongruities are inevitable because of the mistaken assumptions underlying the rules governing adoptions.

A. Adoption Contracts and Surrogate Mother Contracts

Of late, surrogate contracts have received a great deal of public attention following the tragic battle between William Stern and Mary Beth Whitehead for custody of the child called Baby M by the court. Each of the parties took on archetypal significance in the public imagination. The Sterns became the couple who so desperately wanted a child, but for medical reasons could not or should not conceive themselves. Adoptive parents everywhere could identify with their need. Mary Beth Whitehead was the birthmother who changed her mind. How many birthmothers across the country wept when they heard her story? And little Baby M was the child that everyone wanted, the baby who was, ultimately, never adopted.¹⁰⁸

In *In re Baby M*, Superior Court Judge Sorkow thoroughly analysed the surrogate mother contract and decided the contract was valid.¹⁰⁹ The Supreme Court of New Jersey overturned the decision but awarded custody to William Stern using a best interest of the child standard.¹¹⁰ The supreme court found the surrogate mother contract unenforceable because it involved adoption through private placement and coercion of the mother to relin-

108. Elizabeth Stern was not permitted to adopt Baby M because Mary Beth Whitehead refused to consent to the baby's adoption. William Stern who got custody of the child did not need to adopt Baby M since he was her natural father. *In re Baby M*, 109 N.J. 396, 411, 537 A.2d 1227, 1234 (1988).

109. *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part & rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

110. *In re Baby M*, 109 N.J. at 411, 537 A.2d at 1234.

quish her parental rights.¹¹¹ Furthermore, the court held that the surrogate mother contract prematurely determined custody of the child before a court had an opportunity to decide what was in the child's best interest.¹¹²

If the New Jersey Supreme Court's objections to the surrogate contract seem at odds with the results in adoption cases, it is because courts continue to view surrogate contracts differently from adoption contracts.¹¹³ The differences, however, are subtle. In many respects, the two contracts closely resemble each other. In both contracts, a biological mother relinquishes rights to the child she carried for nine months and to whom she gave birth. All parties to the contract suffer the stress of uncertainty. The birthmother wonders about the well-being of the child and wrestles with a desire to keep the baby. The adoptive parents remain anxious that the birthmother will decide to keep the child after all.¹¹⁴

The surrogate contracts must be drafted very carefully to avoid the appearance and impropriety of baby-selling.¹¹⁵ In most adoptions, money changes hands, but this is viewed as a legitimate processing fee by agencies or private attorneys who handle adoptions. Rather than buying the child, adoptive parents, including those hiring a surrogate mother, are said to be paying for medical expenses and/or the efforts of the mother and the placement agency.¹¹⁶

When disputes arise between the parties in surrogacy and adoption cases, a court may review contracts by analyzing what is in the best interests of the child.¹¹⁷ Such a review is misguided be-

111. *Id.* at 422, 537 A.2d at 1240.

112. *Id.* at 427, 537 A.2d at 1242.

113. *See, e.g.,* Surrogate Parenting Ass'n v. Armstrong, 704 S.W.2d 209, 211 (Ky. 1986); *In re Baby M*, 109 N.J. 396, 438, 537 A.2d 1227, 1248 (1988).

114. One commentator contends that surrogate mother contracts should be invalid because of the terrible stress to the parties involved. Peter Bromley, *Aided Conception: The Alternative to Adoption*, in *Adoption* 174, 192 (Philip Bean ed. 1984). Interestingly, he does not discuss the potential for stress to the child of the contract.

115. *See Armstrong*, 704 S.W.2d at 213. When the mother signs away rights to her child in exchange for money, the contract is unenforceable, however, a custody contract between parents is enforceable. *See generally* Hutton Brown, *Surrogate Parenting: A Quagmire of Legal Issues*, 39 Vand. L. Rev. 597, 649 (1986). One commentator argues that surrogacy is nothing like adoption because it is "reproductive prostitution." Pollitt, *supra* note 33, at 684.

116. *See* Avi Katz, *Surrogacy*, 20 Colum. J.L. & Soc. Probs. 1, 21 (1986).

117. *In re Baby M*, 217 N.J. Super. 313, 323, 525 A.2d 1128, 1132 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part & rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988). When the adoption arrangement is done for the best interest of the child and not for the monetary reward of the mother, then the contract is valid. Brown, *supra* note 115, at 646.

cause the adoption contract and the surrogate mother contract are written in the best interests of the parents, and in particular the adoptive parents, who are often the only ones represented by an attorney.¹¹⁸

Arguments that have arisen in recent months concerning the validity of surrogate mother contracts can be applied with equal rigor to the adoption contract, because surrogacy and adoption are sister relationships. As the courts begin to wrangle with the new ethical dilemmas posed by the surrogate contract,¹¹⁹ the time is ripe for adoptees to draw the analogy to the fundamental unfairness of the adoption contract which has been held sacrosanct for so many years. By engaging in this comparative analysis, the courts and state legislatures may also realize the need for reform of adoption laws.

B. The Problem with Contract Analysis

The law of contracts embraces several areas of domestic relations. Antenuptial agreements, contracts between married couples regarding property divisions, dissolution agreements, surrogate mother contracts, and adoption contracts represent some contemporary examples. In spite of the union of contract and family law, contracts which involve family relationships are fundamentally different in character from commercial contracts. A transaction between husband and wife which is formalized in writing is generally not presumed to be at arm's length unless certain precautions are taken to assure fairness.¹²⁰ The relationships between family members are intimate ones, and regulating the conduct of intimate relations with commercial contract law can lead to discordant results. Contracts between family members aim to promote domestic peace and harmonious living, not simply to regulate the exchange of goods and services between the parties.

This was the dilemma Judge Sorkow faced when he applied commercial contract law to the relationship between the Sterns and Mrs. Whitehead. Using commercial contract analysis, the sur-

118. *In re Baby M*, 217 N.J. Super. at 313, 525 A.2d at 1128.

119. The ethical issues include: Does a contract for a baby diminish the concept of family? Should an unwilling mother be forced to give up her baby? Who does society recognize as the primary parents? Should unmarried couples procreate artificially to create a child for the male? Is the "surrogate child" deprived when access to the biological mother is denied? Should society allow the exchange of money for the creation of human life? See generally Katz, *supra* note 116.

120. For example, the antenuptial contract is not enforceable unless there is full disclosure of assets and liabilities, spousal support provisions remain intact, and both parties execute the agreement voluntarily. See Unif. Premarital Agreement Act § 6, 9B U.L.A. 369 (1983).

rogate mother contract appeared to be valid. The result, however, was harsh, and the reviewing court overturned Judge Sorkow's decision.¹²¹ When adoption contracts are treated as commercial contracts, the same problems arise. Contrary to decisions against surrogate mother contracts, no higher court has overturned a case involving rights to birth information on the ground that the adoption contract is invalid or on the ground that the results of the secrecy are harsh.

C. *The Child as a Party to the Adoption Contract*

In his painstaking review of the Baby M surrogate contract, Judge Sorkow refuted a number of arguments against the contract, including unconscionability,¹²² adhesion,¹²³ fraud and duress,¹²⁴ illusory effect,¹²⁵ third-party beneficiary,¹²⁶ child as chattel,¹²⁷ and provisions contrary to public policy.¹²⁸ Despite his careful analysis, the judge never decided one of the most basic issues of contracts involving children: Was the child a party to the contract? Judge Sorkow may have deliberately avoided the question because a definitive answer would have undermined the basis of both surrogate mother and adoption contracts.

Assuming the child is a party to the contract, then the terms of the contract would be binding on the child. However, the child is a minor, and therefore unable to contract. This suggests the child is not a party to the contract, yet the child is raised under the terms of the contract. Her life is irrevocably changed because of the contract. The child is treated as a quasi-party to the contract.

As a consequence of being adopted, the child is forever separated from her birthparents. Perhaps more significantly, the child is denied knowledge of any of the circumstances surrounding her birth, including information about her biological parents and siblings. The adoption contract binds the parties, including the child, in secrecy. Considering the serious nature of the contract and the fact that the terms are binding on the child, the problems of the surrogate mother contract, as exemplified in the *Baby M* case resonate in the adoption contract.

121. *In re Baby M*, 109 N.J. at 411, 537 A.2d at 1234.

122. *In re Baby M*, 217 N.J. Super. 313, 376, 525 A.2d 1128, 1159 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part & rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

123. *Id.*

124. *Id.* at 379, 525 A.2d at 1161.

125. *Id.* at 304, 525 A.2d at 1163.

126. *Id.* at 400-01, 525 A.2d at 1171-72.

127. *Id.* at 372, 525 A.2d at 1157.

128. *Id.* at 372-73, 525 A.2d 1157-58.

The child is not represented by an attorney at an uncontested adoption hearing. Instead, the judge is said to act in the child's behalf as *parens patriae*.¹²⁹ Furthermore, "[n]o court in the nation has granted the adoptee child a right to counsel."¹³⁰ The same is true in the negotiation of a surrogate mother contract, and it is not until the contract is contested that a guardian ad litem is appointed by the court to represent the independent interest of the infant.¹³¹ That interest might be defined in a number of ways: access to identifying information about the birthmother after a certain age, specified age of disclosure about the circumstances of birth, establishing a reunion date between the child and mother at a certain time, and perhaps even visitation rights. These points of negotiation are different from the best interests of the adoptive parents and the birthparents, yet the child has no one to argue for protection of her rights at the time the contract is settled.¹³²

Ironically, some states have laws which permit birth records to remain open if one of the parties requests it at the adoption proceeding.¹³³ Without a guardian ad litem to make such a request, the infant adoptee is unlikely to be able to take advantage of this opportunity. At present, few adoptive parents are apt to request open birth records, especially while the child is a minor.

In a court of equity, a contract may be held invalid if one party lacks representation and the issues involved in the contract revolve around life, liberty, or property.¹³⁴ Access to one's birth

129. *In re Dixon*, 116 Mich. App. 763, 772-73, 323 N.W.2d 549, 553 (1982). *Parens patriae* literally means parent of the country. It refers to the state as a sovereign, which acts as a guardian of those citizens who are unable to fend for themselves. Black's Law Dictionary 579 (5th ed. 1983). The question remains: How can the state protect the child's interest in her birth information when those interests are in direct conflict with the state's express interest that adoption records be sealed? See also *In re Adoption of Female Infant*, 237 A.2d 468, 469 (D.C. 1968).

130. *In re Dixon*, 116 Mich. App. at 772, 323 N.W.2d at 553.

131. *In re Baby M*, 217 N.J. Super. 313, 327-28, 525 A.2d 1128, 1135 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part & rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988). The identity of a person must be known before a guardian ad litem can be appointed. This effectively leaves the child-to-be without legal protection during contract negotiations. *NACAC v. Department of Social and Health Servs.*, 108 Wash. 2d 433, 441, 739 P.2d 677, 681 (1987).

132. Hoggett, *supra* note 4, at 135.

133. *In re William Sage*, 21 Wash. App. 803, 807-09, 586 P.2d 1201, 1204-05 (1979). These provisions have probably been drafted to allow adopted stepchildren and people adopted as adults to retain access to their own birth records.

134. See Hoggett, *supra* note 4, at 135 (the child may be very much in need of someone to represent her interest alone). See also Carol Amadio & Stuart Deutsch, *Open Adoption: Allowing Adopted Children to "Stay in Touch" with Blood Relatives*, 22 J. Fam. L. 59, 86 (1983-1984) (a guardian ad litem is essential to negotiations in an open adoption). *Contra In re Baby M.*, 217 N.J. Super. at 377, 525 A.2d at 1160 (there is no rule of contract which states that parties must be represented in order to contract legally).

records, an assumed right of non-adopted people but a "privilege" denied adoptees, is arguably both a liberty and a property interest for the adopted person. Babies who are not represented at the time the contract is signed grow to adulthood bound by the terms of a contract that prevents them from gaining access to fundamental facts about their own existence.¹³⁵

Arguments concerning adhesion, unconscionability, duress, and illusory effect are all connected to the same basic facts about adoption. A vulnerable child is denied the right to know about her past in order to provide security and privacy to mature adults. Yet it is the adults who have all the resources of the legal system to enforce their own privacy rights. They do not need the special protection of the adoption contract. The child, on the other hand, has no guardian to represent her. As an adult, the adopted person must overcome a nearly impossible legal burden to gain access to her birth information.¹³⁶ She is further disadvantaged in her search by the length of time that the records have remained sealed. Lawmakers and judges have cooperated in creating an impenetrable legal shield that protects birthparents and adoptive parents. It is undoubtedly the adoptive parents who receive the great benefit of the contract. They receive a child to love and parent. The birthmother may benefit as well, but her right to privacy comes with a penalty: She is completely severed from her infant.

This inherent inequality of power between the parties to the contract raises questions about the validity of the terms of the adoption contract. A contract is unconscionable when the terms of the contract are oppressive to one party.¹³⁷ In any contract, there is an assumption of risk by one party.¹³⁸ In the adoption contract it is the infant adoptee, without benefit of counsel, who assumes the greatest risk—the burden of the secret. In the negotiation process the child is treated like an orphan by the other parties. They presume one should be grateful to give up one's heritage in exchange for winning the tender loving care of another set of parents, as if the two options are mutually exclusive.¹³⁹ The trade-off may have had some validity during an era in which illegitimate births were a matter of shame for mothers, children, and families

135. Jean Paton depicts the injustice of the situation graphically by describing an ink print of a baby's foot with a caption underneath that reads, "Not in the contract." Paton, *supra* note 7.

136. See *supra* notes 86-89 and accompanying text.

137. *In re Baby M*, 217 N.J. Super. 313, 376, 525 A.2d 1128, 1159 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part & rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

138. *Id.*

139. Jean Paton, *The Quest of Adult Orphans* (1969) (on file with *Law & Inequality*).

generally. In reality, illegitimacy does not carry the same social and legal stigma as in the past.¹⁴⁰ The courts are overdue in reevaluating the best interest of the adopted child by considering the changing mores of contemporary society.

A contract is one of adhesion and invalid if a party to the contract has no right to influence the terms of the contract, and there are no other ways to obtain the product or service.¹⁴¹ The adopted infant is not represented during contract negotiations and has no bargaining power. Given the profound effect of the adoption contract on the adoptee, the adoptee should be considered a party to the contract. Therefore, it is unreasonable for the child to be bound by the terms of the contract. The terms, which impose a lifelong secrecy upon the adoptee, are not in the best interest of the child, because the child later becomes an independent adult whose need to know is different from her childhood need for security. The adoption contract is arguably an adhesion contract because the child, who may be considered a party to the contract and is bound by its terms, has no opportunity to influence the terms, either as an infant or as an adult. Furthermore, the infant adoptee has a fundamental need for a loving home and family to nurture her. To obtain this loving care, she has no alternatives but to accept the terms of the adoption contract.

Equitable fraud is defined as a misrepresentation of a material fact that one has relied upon to one's detriment.¹⁴² Fraud is commonly argued by birthmothers who have changed their minds about the adoption process and wish to keep their babies.¹⁴³ The argument might be used by adopted children as well.

A child has no option but to rely on adults to protect her interests. Primarily because of the adoption contract, the child is taught by well-meaning adults, including her parents, to live the lie that knowledge about the past will only harm her happy home life. Because adopted persons are treated as orphans by the law and by society, the implication to the child is that the alternative to her adoption is stark abandonment.¹⁴⁴ Such messages, direct

140. See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977) (illegitimate children may inherit from both mother and father); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (illegitimate children are entitled to disability benefits of the father who would support them if he were able to work).

141. *In re Baby M*, 217 N.J. Super. at 376, 525 A.2d at 1159.

142. *Id.* at 379, 525 A.2d at 1161.

143. See, e.g., *In re Nolan*, 94 Ill. App. 3d 1081, 1086-88, 419 N.E.2d 550, 554-56, (1981). See also *In re Baby M*, 109 N.J. 396, 425, 537 A.2d 1227, 1241 (1988) (the surrogate agreement may be coercive to the mother because of the monetary incentive to sell her child).

144. Contemporary Hansels and Gretels are rarely turned out into the woods to

and subliminal, constitute duress, forcing the child to succumb to the desires of her primary caretakers.¹⁴⁵

In the end, the adopted child is a victim of fraud, duress, and coercion made all the more poignant because the parties who are misrepresenting the facts do so out of love for the infant. The fact is that the adopted person never really feels complete until the darkness of the past is brought to light.¹⁴⁶ The misrepresentation is that an adopted person should be able to feel free and fulfilled without the knowledge of fundamental personal information.

A contract that assigns all benefits to one party and all obligations to the other party is considered illusory and, therefore, invalid.¹⁴⁷ An adoption contract is illusory because the child bears the obligation to ignore the past, to obey the terms of the contract, and not to search for confidential information about her birthparents. Because many adoptive children harbor the fear that if they disobey or disappoint their parents, they will be "sent back," it is highly likely that they will take their obligations seriously, often well into adulthood.¹⁴⁸

Furthermore, the adoption contract does not provide the child with any particular benefits. It is a basic view in most states that all children deserve shelter, food, and protection. If these are fundamental rights of children, then they cannot be called benefits under an adoption contract. The adopted child receives only what all children deserve, a home and a family.

Even assuming that the child benefits from the adoption contract, the benefit of the contract diminishes as the child matures. At a certain age, the adoptee becomes conscious of the mysterious hole in her life story. At that point, the questions about her identity may create great insecurity in the adoptee. The needs of the adopted adolescent are different from the needs of the adopted infant. The security afforded the infant by the adoption contract exacts a heavy price of insecurity from the adolescent adoptee.

fend for themselves. Unwanted children end up in foster care until they are placed for adoption. There are some "special needs" children who are never adopted and remain in the foster care system permanently. These are children who are difficult to place because of their ethnic backgrounds, mental, physical or emotional handicaps, older ages, or their desire to remain with a group of siblings. National Committee for Adoption, *supra* note 1, at 41.

145. Fear of abandonment is common in adoptees, and this primal fear may play an important part in the behavior of adopted children. See *supra* notes 40-46 and accompanying text.

146. See *infra* note 188 regarding desires of adult adoptees to feel "complete".

147. *In re Baby M*, 217 N.J. Super. 313, 384, 525 A.2d 1128, 1163 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part & rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

148. See *supra* note 41 and accompanying text regarding adoptees' concerns about being "sent back".

Similarly, the adult adoptee who no longer relies on the daily support of her adoptive family bears the full burden of the secret at the heart of the adoption contract. In the end, adopted persons carry all the obligations of the adoption contract which come to outweigh any earlier benefits.

The problems that arise at the time the adoption contract goes into effect are sufficient reason to invalidate the contract. Even if one is willing to overlook the inherent difficulties at the time of execution of the contract, the long-term effects are fatally flawed. In time, the infant adoptee matures to adulthood. The secrecy that was once deemed in the best interest of the child is no longer necessary, and may, in fact, be detrimental to her complete development as an adult.¹⁴⁹ Thus, the contract's purpose has been frustrated.

A contract becomes invalid under the doctrine of frustration when the contract's principal purpose cannot be fulfilled because of unforeseeable changes in circumstance.¹⁵⁰ The needs of the parents and children change with time. What those changes might entail is not foreseeable at the time the contract is established. One of the most astonishing things about the adoption contract is that it purports to govern the entire lifetime of each of the parties.

The party whose needs alter most dramatically over time is the adopted infant. The adoption contract becomes unenforceable as the child becomes an adult with her own family, medical needs, and personal goals. Many birthparents agree that after the child has become an adult, the old contract has lost its meaning. They are ready to meet their children, now mature persons and peers.¹⁵¹

There are numerous constitutional issues which have been raised with respect to adoption contracts.¹⁵² The major constitutional questions center around the fourteenth amendment's equal protection clause. It has been argued that adoptees are a suspect class with immutable characteristics and that adult adoptees have the right to acquire useful information.¹⁵³ It has also been asserted that closed birth records violate the thirteenth amendment in that the good cause requirement is a badge of slavery.¹⁵⁴ Fur-

149. See *supra* note 36 and accompanying text regarding the identity conflicts of adolescent adoptees.

150. "[W]hen a change in circumstances makes one party's performance virtually worthless to the other," then the party is discharged of duties under the contract. Restatement (Second) of Contracts § 265 (1979).

151. Sorosky, Baran & Pannor, *supra* note 3, at 69.

152. See *ALMA Soc'y, Inc. v. Mellon*, 459 F. Supp. 912 (S.D.N.Y. 1978), *aff'd.*, 601 F.2d 1225 (2d Cir.), *cert. denied*, 444 U.S. 995 (1979).

153. *Id.* at 915.

154. *Id.*

thermore, the good cause requirement has been claimed to be violative of the fourteenth amendment's procedural due process guarantee.¹⁵⁵ Courts have not found the constitutional arguments in themselves persuasive.¹⁵⁶ However, in connection with other contract arguments, the adoptee can call upon the Constitution to seek both legal and equitable remedies to the problems caused by confidential birth records.

If denying an individual access to vital personal information is considered illegal in some respect, then the adoption contract itself must fail as contrary to public policy.¹⁵⁷ So far no court has been willing to go so far to protect the rights of adult adoptees.

The adoption contract which provides for sealing the child's birth records permanently has a binding effect on birthparents, adoptive parents, and the adopted child. Given the broad reach of the contract and, in particular, its profound effect on the adoptee, it can be argued that the infant is a party to the contract. If, however, this is the case, then numerous problems arise because the child is without counsel, and the interests of the state conflict with the interests of the adoptee. Hence, the child is bound by a contract, but has never given consent to its terms. On reaching adulthood, the adoptee experiences the full force of the legal burden: the initial chapter of her life story and the characters who peopled her early life are locked away. The truth is hidden, because years ago a court decreed it was in her "best interests."

D. The Child is Not a Party

Legal problems arise when a child is considered a party to the adoption contract. An alternative argument may be made that the child is not a party, but the contract is made to her benefit. This creates a new legal question: is the child a beneficiary or a chattel?

If the child, a minor, is not a party to the adoption contract, some might argue that she is a beneficiary of the contract. In particular, the question of whether a third party has enforceable rights under the contract is determined by the parties to the con-

155. See Askin, *supra* note 77, at 2-3. See also *In re Gilbert*, 563 S.W.2d 768, 771 (Mo. 1978) (no denial of due process).

156. See, e.g., Mellon, 459 F. Supp. 912.

157. When courts characterize a contract as illegal, they generally mean the contract is unenforceable on public policy grounds. A court has several options. It may void the entire contract, it may hold that the offending provision of the contract is unenforceable, or it may hold that the contract is unenforceable by one or both of the parties. See E. Allan Farnsworth, *Contracts* § 5.1 (1982).

tract—did they intend to confer a benefit upon the third party.¹⁵⁸ Since the basis of all court decisions about adoption has to do with the best interests of the child, the law presumes the birthparents and the adoptive parents intend to bestow a benefit upon the adopted child. Indeed, if they were motivated by some other reason, for instance a desire for financial gain, the contract would be void.¹⁵⁹

The question is, what benefits are given to the child through the contract? The implication that a child receives benefits from the adoption contract is deceptive. What the adopted child receives is only what all children need and rightfully deserve. It would be a sad commentary on our society if it became necessary for orphaned children to contract in order to receive the fundamental elements necessary for survival. This is the very essence of *parens patriae*. Our child protection laws and social service agencies were created to save children from being placed in such compromising situations.

Alternatively, the terms of the contract may be so construed that they are not actually to the child's benefit, but rather to protect and hide the identities of the parties, the birthmother, and the adoptive parents. However, if the terms of the contract serve only to benefit the parents as parties, the child becomes a legal object of the contract, a chattel. This is also problematic.

If the child is not a party or beneficiary to the contract, then the child must be seen as the object of the contract.¹⁶⁰ The danger with this analysis is that a contract which treats the child as a chattel is illegal under state baby-selling laws.¹⁶¹ Even if no money changes hands at the contract closing, the mere fact that the baby is treated as a piece of property raises questions of involuntary servitude and slavery, and the contract would be unenforceable for these reasons.¹⁶² Moreover, some adoptive parents have expressed distaste with terms of the contract which bar their child's access to birth records because they feel such a contract

158. *In re Baby M*, 217 N.J. Super. 313, 400, 525 A.2d 1128, 1163 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part & rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

159. See *infra* notes 160-62 and accompanying text.

160. What actually happens in a surrogacy situation is that the biological father pays the biological mother for the right to have his infertile wife adopt the child. This violates Kentucky's baby-selling statute which forbids the purchase and sale of children. *Surrogate Parent Ass'n, Inc. v. Armstrong*, 704 S.W.2d 209, 215 (Ky. 1986) (Wintersheimer, J., dissenting).

161. Payment of money for a child denigrates human dignity. *In re Baby M.*, 217 N.J. Super. at 372, 525 A.2d at 1157.

162. The 13th amendment forbids dealing with human beings as property. *Id.*

treats the child as chattel.¹⁶³

One may discuss the unfairness and absurdity of the adoption contract at length, but courts will continue to enforce it. Even though the contract serves to shield the identities of the adults involved in the contract, the courts still believe that they act primarily in the best interests of the child. Lawmakers and judges have been willing to overlook the many defects in the adoption contract in order to encourage adoption, which is supposedly in the child's best interest. The best interest of the child doctrine involves a complex set of considerations that the judge must weigh in awarding legal custody of the child. In the case of adoption, the best interest of the child has an added dimension: Access to the truth about the child's parentage is often denied forever.

E. The Irony of the Best Interest of the Child Doctrine

*The Child is father of the Man.*¹⁶⁴

The major problem with the best interest of the child doctrine as applied in adoption cases is that what appears to benefit the adopted child is actually detrimental to the adult adoptee. There is room for debate about whether secrecy truly is in the child's best interest at all. Consequentially, many contemporary adoptions are "open."¹⁶⁵ The birthparents, or at least the birthmother, and the adoptive parents are acquainted with each other, and the birthparents are allowed visitation with the child while the adoptive parents retain full legal custody. Those in an open adoption relationship hope that the child will experience less painful abandonment feelings as she grows and avoid many of the identity conflicts of adolescence.¹⁶⁶

The traditional adoption places an emphasis on maintaining a secret of identity from the adoptee. For most adoptees, living with this secret is living with a void. The confusion experienced by the adopted child who has no answers to her questions about why she was adopted becomes a hole in the self-image of the adult.¹⁶⁷ Feelings of inadequacy, lack of fulfillment in life, difficulties in intimate relationships, and distrust of others in an adult adoptee can

163. Sorosky, Baran & Pannor, *supra* note 3, at 118.

164. William Wordsworth, *My Heart Leaps Up*, in 1 *The Poetical Works of William Wordsworth* 226 (E. de Selincourt ed. 1967).

165. Dukette, *supra* note 18, at 240. See also *infra* note 208 and accompanying text regarding open adoptions.

166. Dukette, *supra* note 18, at 240.

167. See *supra* note 40 and accompanying text regarding what adoptees feel.

be traced to the adoption secret.¹⁶⁸

There are adult adoptees who prefer to have their past remain anonymous and hidden.¹⁶⁹ Courts and legislatures, however, do not seem to be concerned about what the child and later the adult would prefer in her life development.¹⁷⁰ Assumptions are based on sketchy psychological information, and presumably also based on the lawmakers' own experience as parents. As judges and legislators ponder the horrors of "losing" one's child to a total "stranger", they continue to render decisions and create statutes that in effect favor adoptive parents.¹⁷¹ Such laws are not necessarily in the best interest of the child and are certainly not in the best interest of the adult adoptee.

VIII. The Adoption Triangle Revisited

"Hello, Heidi? This is Marion." I pause, trying to place the name. Then the recognition—my birthmother. We talk about her health, her family. Her voice, at last I hear her voice, and it is nothing like I imagined. In my mind's eye as we talk I picture her photo. The photo speaks to me in this unfamiliar voice. The call ends. Her last words are "Well, maybe when I visit some of my friends in Milwaukee, I'll just take a little side trip over to Minneapolis to visit you." This is what I wanted to hear. Suddenly the

168. See *supra* notes 35-46 and accompanying text. The goal of the state ought to be to heal the wounds of the adoptee's identity crisis:

The goals for a child's successful adoption experience may be thought about as steps that move through a natural sequence: first, separation from the biological parents; then, union with the adoptive parents; and finally, autonomy for the young adult adoptee. Whatever supports the sequential tasks supports the ultimate achievement, the adoptee's ability as an adult to incorporate his or her membership in both biological and adoptive families into a unique identity.

Dukette, *supra* note 18, at 241-42.

169. Sue Aumend & Marje Barrett, *Searching and Non-searching Adoptees*, 7 *Adoption & Fostering* 37, 38 (1983).

170. One court held the best interest of the child doctrine is secondary to the interests of birth parents, adoptive parents and the state after the "child" becomes an adult. *In re William Sage*, 21 Wash. App. 803, 806, 586 P.2d 1201, 1203 (1978), *review denied*, 92 Wash. 2d 1002 (1979).

171. Adoptive parents are typically better off financially than the birthparents, another aspect of adoption which may influence the court. However, some courts claim to go out of their way to overcome this bias: "[We go] well beyond a balance sheet financial comparison." *In re Steve B.D.*, 111 Idaho 285, 291, 723 P.2d 829, 835 (1986). See also, *In re Adoption of Spinks*, 32 N.C. App. 422, 427, 232 S.E.2d 479, 483 (1977) (in conflict of rights between adoptee and birthparents or adoptive parents, court must rule in favor of child, but opening of birth records is not in the best interests of the child); *In re McTaggart*, 4 Ohio App. 2d 359, 368-69, 212 N.E.2d 663, 669 (1965) (birthmother denied custody even after withholding her consent to adopt the baby, and the custody to "adoptive" parents held to be in the best interest of the child).

strange voice is familiar. I hang up the phone. "Who was that?" my husband asks from the kitchen. A voice from the past, but no stranger.

This article has examined the characteristics of the parties to the adoption contract and the assumptions that judges and lawmakers have about these people and their contract. The laws that have resulted from these assumptions are rigid and misguided. It is time to return to the parties and hear from them what they would like the contract to represent. Unfortunately, few states have asked adoptive parents, birthparents, and adopted children what they desire in an effort to make adoption laws mirror the needs of the parties involved. The answers challenge the assumptions upon which the statutes and case law are based.

A. What Do Adoptive Parents Really Want?

Though many adoptive parents are initially concerned about the stability of their relationship with their adopted child, in most instances the child and the parents bond more closely as they grow together as a family. Contrary to the apparent beliefs of many lawmakers, adoptive parents feel secure about their relationships with their adoptive children and do not express a need for withholding information from their adopted child after adulthood.

The majority of adoptive parents are supportive of their child's search for birthparents.¹⁷² Mothers generally favor more openness about the whole adoption process than do fathers,¹⁷³ although both parents tend to agree that opening adoption records to adult children is a good idea.¹⁷⁴ Adoptive parents, however, are leery of opening records to adoptees before they reach the age of majority.¹⁷⁵ Many adoptive parents express anxiety about having a birthparent interfere with the family while the adoptee is still a child. This anxiety lessens as the child becomes an adult. Adoptive parents are generally not in favor of barring adult adoptees from access to confidential birth records.¹⁷⁶

172. Feigelman & Silverman, *supra* note 11, at 204-05. Parents who encouraged the search tended to be liberal, highly educated, nonreligious, and accepting of women working outside the home. *Id.*

173. *Id.* at 201-03. Women have traditionally been more connected to family and assumed the role of maintaining kinship ties. This may be an explanation for the greater interest of mothers in disclosing background information to the child. *Id.*

174. *Id.* at 198.

175. Sorosky, Baran & Pannor, *supra* note 3, at 83. Some parents express anger at the suggestion of opening records to minor adoptees saying that they adopted the child because they were guaranteed anonymity, not to "babysit." *Id.*

176. Feigelman & Silverman, *supra* note 11, at 199; Sorosky, Baran & Pannor, *supra* note 3, at 81. The anxiety experienced by adoptive parents may be a manifes-

B. What Do Birthparents Really Want?

Most birthmothers say that they never stop wondering about the child they placed for adoption.¹⁷⁷ It is not surprising that most birthmothers welcome opening records for their own use and for the use of adoptive adults.

In one survey, the majority of birthparents interviewed were married and had told their families and spouses about the adoption experience.¹⁷⁸ Some were curious about the child's development as the child grew,¹⁷⁹ and the dream expressed most often by birthparents was to develop a "friendship" with the adult adoptee.¹⁸⁰ The majority of birthparents wanted a reunion with the child after the adoptee became an adult if the adoptee wanted to meet them.¹⁸¹ Birthparents also expressed gratitude toward adoptive parents and did not want to interfere in the child's relationship with them.¹⁸²

In a majority of states, access to birth records is denied birthparents as well as adult adoptees. Yet most birthmothers desire the same information that their children seek.¹⁸³ Naturally, they are in favor of opening birth records.

C. What Do Adult Adoptees Really Want?

Though not all adult adoptees choose to look into their hidden backgrounds, studies in England have shown that given the opportunity of looking into their birth records, many adult adoptees take advantage of the chance to discover more about

tation of latent anger toward the birthparents. This rage is the result of sexual insecurities in adoptive parents who have been unable to conceive a child of their own. Schneider & Rimmer, *supra* note 23, at 348.

177. Schwartz, *supra* note 5, at 56. It is common for birthmothers to make inquiries of the adoption agency about the well-being of the child. Sorosky, *supra* note 3, at 49, 60.

178. Sorosky, *supra* note 3, at 51.

179. *Id.* at 52. Sorosky and colleagues found this to be true of 82% of the birthparents in the survey. This was a survey of 38 birthparents selected at random in 1976. *Id.* at 50-54.

180. *Id.* at 53.

181. *Id.* (82% of birthparents polled).

182. Eighty-seven percent of the birthmothers agreed. This helps to explain why only 5% of the sample searched for their adult children. *Id.*

183. As one birthmother wrote, "I gave up my child five years ago. I was told that the agency would find a family for my child if I gave up complete rights to him, which meant that I would never be able to see him or know anything about him. . . . I do not feel that agreement was fair to me or the child I relinquished." *Id.* at 60-61.

Of course, not all birthmothers feel this way. Another birthmother disclosed her anger in a letter, "I learned from my mistake and do not wish to have it thrown in my face now or ever." *Id.* at 71.

their personal histories.¹⁸⁴

Most adult adoptees who opt for the struggle of beginning a search are interested in answering the question, "Why was I placed for adoption?"¹⁸⁵ Others are interested in learning more about their family histories;¹⁸⁶ still others are trying to construct complete medical histories.¹⁸⁷ There are relatively few who desire long-term relationships with their birthparents.¹⁸⁸ To adoptees, their concerns about the past and motivations for searching appear reasonable, appropriate, and mature. Not surprisingly, adult adoptees frequently state that they wish to be treated like the adults that they are, rather than as ungrateful children who are a disappointment to their parents and society.¹⁸⁹

A small minority of adult adoptees favors keeping birth records closed,¹⁹⁰ but the majority favors either opening records to adult adoptees or establishing a national registry so that persons

184. From 1977 to 1982, 12,505 English adults sought information from their records. Under the Children Act of 1975, all adoptees over 18 have had access to birth records, although those adopted before passage of the Act must first attend a "counselling interview" with a social worker. Erica Haimès & Noel Timms, *Counselling and the Children Act of 1975*, 7 *Adoption & Fostering* 42, 42 (1983).

185. See Katherine Kowal & Karen Schilling, *Adoption Through the Eyes of Adult Adoptees*, 55 *Am. J. Orthopsychiatry* 354, 359 (1985) (while medical history was the most desired information, well over half of those surveyed reported an interest in why they were placed for adoption). As adult adoptees reach their own childbearing years, they often become concerned with identifying their birthparents. *Id.* at 359. See also Sorosky, Baran & Pannor, *supra* note 3, at 125-27 (pregnancy may precipitate search for birthparents).

186. Sorosky, Baran & Pannor, *supra* note 3, at 128. Many adult adoptees recognize the undeniable impact of closed birth records on an entire line of descendants—their children and grandchildren lack crucial pieces of their own genealogies. *Id.* at 128.

187. Approaching middle age, adult adoptees see their family medical histories as a blank that can cause some apprehension about the future. Sorosky, Baran & Pannor, *supra* note 3, at 126-27. See also Kowal & Schilling, *supra* note 185, at 359.

188. Of 110 adult adoptees surveyed in 1982-83, only 15% said they were looking for a sense of belonging or a replacement family. Most adult adoptees seek to fill a void of identity. Kowal & Schilling, *supra* note 185, at 360-61. Some research indicates that when the relationship between the adoptee and her adoptive parents is good, the adoptee is simply looking for more complete information about herself. Conversely, adoptees seeking a lasting relationship with their birthparents often experienced a difficult adoption relationship. Martin Shaw, *Growing Up Adopted*, in *Adoption* 113, 121 (Philip Bean ed. 1984). See also Feigelman & Silverman, *supra* note 11, at 213. Other studies indicate that it is the most well-adjusted adult adoptees who make the effort to retain contact with birthparents. See also Feigelman & Silverman, *supra* note 11, at 213-14.

189. Kowal & Schilling, *supra* note 185, at 354. Many adult adoptees in fact are caught in a "lingering childhood" attachment to the adoptive parents and refuse to search at all for fear of hurting them. Sorosky, Baran & Pannor, *supra* note 3, at 121-22.

190. Twenty-six percent of non-searchers said they favored closed records while no searching adoptees favored closed records. This represents only 14% of the 131 total participants in the survey. Aumend & Barrett, *supra* note 98, at 257.

wishing to make contact with birthparents or adopted children can more easily do so.¹⁹¹ The sealing of birth records is contrary to the desires of most adult adoptees, regardless of their intent to search for birthparents.

D. What Does the State Really Want?

The court decisions barring access to confidential birth information repeatedly stress the same points: the best interest of the child, the anonymity required by the parties to the adoption, and "preserving the integrity of the adoption process."¹⁹² Courts generally seem concerned that granting adult adoptees and birthparents the right to examine adoption records will destroy the fabric of adoption. Though courts have not been specific about what in this "adoption revolution" is so alarming, the issues seem to be that adoptive parents will be unlikely to adopt "orphan" children with less than total confidentiality and that birthparents will not give up their children if they cannot be assured of complete secrecy. In addressing these fears *sub silentio*, courts maintain the secrecy of adoption proceedings, even when all the parties to the adoption have consented to the release of information.¹⁹³

In fact, research has indicated that most birthparents welcome contact with their adopted children-turned-adults but do not attempt to search for the adoptee for fear of disturbing the adoptive parents.¹⁹⁴ Similarly, a majority of adoptive parents understand their adopted child's need to explore the darkness of the past.¹⁹⁵ Adoptive parents support the opening of confidential birth records as being in the best interest of their adult adoptee.¹⁹⁶

The experience in England, where birth records have been open since 1975, has shown that the new law has not altered the

191. Fifty-one percent of 131 adult adoptees surveyed said birth records should be open, and 30% selected a registry option instead. *Id.* at 258.

192. See, e.g., *In re William Sage*, 21 Wash. App. 803, 807, 586 P.2d 1201, 1204 (1979).

193. See, e.g., *Golan v. Louise Wise Servs.*, 69 N.Y.2d 343, 348, 507 N.E.2d 275, 278, 514 N.Y.S.2d 682, 685 (1987) (even when all parties consent to disclosure, a court must satisfy itself that "good cause" exists for disclosure and that no limitations on use of disclosed information are necessary).

194. See *supra* notes 179-82 and accompanying text.

195. See *supra* notes 172-74 and accompanying text.

196. As one adoptive father explained, "We don't look upon Chris' [the birthmother] continuing presence as a threat or even a necessary evil. She is a wonderful person who made a difficult, loving decision, and I know someday she will do a lovely job of explaining it to Sacha, in person. She sees Sacha regularly, and Sacha, when she can talk, will call her Chris and know that her "title" in the family is birth mother, a term we plan to use as matter-of-factly as we would say stepfather, aunt, or half-brother." Michael Blake, *Letter to a Television Station*, *Pacer Newsletter*, Nov./Dec. 1987, at 7.

number of parents who want to adopt children.¹⁹⁷ The reduction in the number of children placed for adoption has more to do with a declining birth rate and socially acceptable alternatives to adoption, such as single motherhood and abortion, than to any lack of "confidentiality".¹⁹⁸

One concern may be that granting access to birth records may spur some adoptive parents and birthmothers to "private adoptions," in which a lawyer, rather than an agency, makes the arrangements between the respective parents. Often these circumstances involve contracts, very similar to the surrogate mother contract, which may include terms regarding acceptance based on the health of the baby and the payment of huge fees to cover the attorney's fee and the birthmother's medical expenses.¹⁹⁹ These contracts, like all the contracts that have to do with the exchange of a human being who is excluded as a party to the contract, should be void as against public policy.

The assumptions of courts and lawmakers regarding withholding confidential birth information are based on mistaken premises. Opening access to birth records to the parties after the adopted child has reached the age of majority will not diminish the integrity of the adoption process. To the contrary, the integrity of the adoption process is likely to be revitalized if birthmothers know that the separation is not forever, adoptive parents no longer feel as though they have "stolen" a baby from a stranger, and the adult adoptee may eventually find answers to the questions about the past from the person who can best respond to them.

IX. Recommendations

A conversation between my maternal grandmother and my mother:

Grandmother: That woman is going to steal Heidi away from you!

Mom: I think her husband David already did that, Mother.

A conversation between my mother and me at an intimate birthday lunch:

Mom: It seems strange to think that you have an Other Mom. But I've had to share you with other mothers before—your Swiss mother, when you were an exchange student, and David's mother, of course.

197. See Philip Bean, *Introduction*, in *Adoption* 1, 2 (Philip Bean ed. 1984).

198. Feigelman & Silverman, *supra* note 11, at 16.

199. See *supra* notes 115-17 and accompanying text.

Me: Mom, do you feel like my contact with my birthmother has changed our relationship? I feel closer to you than ever.

Mom: No, I always knew you would find her. There are some things I would like to say to her—do you mind if I send her a note to tell her I have thought of her all these years on your birthday?

Giving adult adoptees access to their birth records is long overdue. The ways that this can be accomplished include changing state laws, relaxing the common law standard, and altering the adoption contract itself.

A. *Changes in the Law*

One solution is for each state to adopt provisions that would allow adoptees and birthparents to see birth records at the child's age of majority.²⁰⁰ The statute should also permit adoptive and birth families to continue contact with each other following an adoption through a mutual agreement approved by the court.²⁰¹

The advantages of changing the law include abandoning the arbitrary good cause standard and doing away with the need for judicial intervention each time an adoptee wishes to see her birth records. Access to the birth records of adoptees could be handled through the department of vital statistics in each county, much like access to death certificates, or through the agencies where the adopted children were placed.²⁰²

The major disadvantage of this approach is that it will take a long time to enact this kind of legislation in every state. Additionally, there are likely to be disparities in the adoption laws from state to state. Differences in the laws would likely advantage some adult adoptees who search but disadvantage others. In our highly mobile society, uniform legislation would be an advantage to all parties to the contract who might find themselves in very different locations after eighteen years have passed.

At the federal level, Congress could enact legislation creating a national reunion registry to supplement access to birth records. Such a national registry would provide adult adoptees, birthparents, birth siblings, and adoptive parents a central location to provide current addresses and telephone numbers in order to assist in the search process.²⁰³ Those who did not wish to be con-

200. See Model State Adoption Act reprinted in Askin, *supra* note 77, at 8.

201. Amadio & Deutsch, *supra* note 134, at 61.

202. In England, adoptees receive this information from social workers at a mandatory counselling interview. Haines & Timms, *supra* note 184, at 42.

203. Paton, *supra* note 1.

tacted directly or at all could leave appropriate information at the reunion registry expressing their desires.

Another alternative is for legislatures to create a presumption in favor of adult adoptees who request access to birth records, placing the burden on the state to show a reason to deny access. This option would best suit states which believe that each adult adoptee's petition ought to go through the court system in order to provide a safety net to catch the extremely rare case of a "disturbed" person who is making the search in order to inflict harm on others. Thus the state would bear the burden of showing why the adult asking for the information is unfit to handle it.²⁰⁴ A presumption favoring adult adoptees would be appropriate in light of modern attitudes of all parties to adoption.

B. Changes in the Courtroom

Although the adult adoptee's dilemma can best be addressed by legislative changes in favor of open adoption or new language creating a presumption in favor of the adult adoptee, the access problem can also be handled in court. Providing each adopted child with a guardian ad litem at the adoption proceeding is one solution. The guardian ad litem's task would be to advocate for the best interest of the child, and the adult adoptee, as well. At each adoption proceeding, the guardian ad litem would request that the birth records of the child be unsealed at the age of majority.

The advantage of making a guardian ad litem mandatory at every adoption proceeding is that the child, who is currently not represented as a party to the adoption contract, would have someone to address her interests at the formal adoption. By requesting that adoption records be opened when the child becomes an adult, the guardian ad litem would assure that at least some adult adoptees will be able to take advantage of state laws which allow access to records if requested at an adoption proceeding.²⁰⁵ The guardian ad litem would remind judges that the adult adoptee has needs which are distinct from those of the infant in the courtroom.²⁰⁶

The disadvantage of the guardian ad litem is that it would

204. See *supra* notes 105-06 and accompanying text regarding dissent in relaxing the good cause standard.

205. See *supra* note 133 and accompanying text.

206. Courts increasingly appoint guardian ad litem in cases involving children, even unborn children. For instance, in a dispute over the provision in a trust of a will, the courts have appointed guardian ad litem to represent the interests of the heir not yet born. *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559, 566 (D.C. Cir. 1966). A

add expense to the adoption, an expense which states might be unwilling to assume. If states refused to assume the additional expense, the guardian ad litem might drive up the costs of adoption to adoptive parents who might be required to handle the costs. Ideally, attorneys could be encouraged to donate their time to represent infant clients in adoption proceedings.

Another solution is a redefinition of the best interest of the child standard which is applied to adoption proceedings and cases evaluating the petitions of adult adoptees. The best interest of the child deviates from that of the adult adoptee, so courts should adopt a best interest of the adult adoptee standard in weighting adult petitions. An adult's need to know identifying information ought to be given special weight at the time of the original decree. The adult adoptee should be given credit for having the maturity and experience to know her own needs and to use this personal information with respect and sensitivity.

C. *Changes in Adoption*

One can also get at the source of the birth records dilemma by altering the way society views adoption. One option is to change the terms of the adoption contract to last only until the adoptee reaches the age of majority.²⁰⁷ Adoption agencies should emphasize this in placing children for adoption. This can be done through legislative action or through negotiations at the adoption proceeding with a guardian ad litem representing the child. As part of their role in counseling adoptive parents, adoption agencies should emphasize that the confidentiality about birth information will end when the child reaches adulthood.

Many enlightened individuals have started a new trend in adoption, without the guidance of courts, legislatures, or agencies. This is called open adoption. While open adoption is not ideal for every family, many professionals agree that an arrangement in which all the parties know one another and maintain contact through correspondence or visits benefits parents and children alike.²⁰⁸ The adoptive parents know the birthmother's grief in giving up custody of the child, and the birthmother knows of the joy of the adoptive parents who have a new member of the family.²⁰⁹

person's right to information about her background is at least as important as an unborn child's pecuniary interest in an estate.

207. Dukette, *supra* note 18, at 240.

208. Hoggett, *supra* note 4, at 140; Amadio & Deutsch, *supra* note 134, at 66; Reuben Pannor & Annette Baran, *Open Adoption as Standard Practice*, 63 Child Welfare 245, 246-47 (1984).

209. Blake, *supra* note 196, at 7.

As the child matures, both parents have the privilege of watching the child learn and ask questions, grow, love and, perhaps, someday become a parent in her own turn.

Open adoption requires extra expenses in attorneys' fees for the custody and visitation contract and in family counseling as needed. However, the advantages of openness take away the mystery and stigma of traditional adoption and may actually reduce some of the developmental problems which seem to affect adopted children who grow up with the secret of their own adoption.²¹⁰

X. Conclusion

The time has come for a change in how adult adoptees are treated in our society. Denying adult adoptees access to their birth records through the terms of a contract in which they had no voice or power to alter is unconscionable. Secrecy and permanent sealing of birth records of adoptees should no longer be considered in the best interest of anyone. Courts and legislatures are long overdue in listening to the prevailing concerns of psychologists, social workers, adoptive parents, birthparents, and adult adoptees. These official and unofficial experts agree that changes need to be made in order to help the adult adoptee develop to her fullest potential, emotionally and psychologically.

Changes can be made at a number of different levels in order to assist adult adoptees in finding out about their origins. State laws need to be altered so that adoptees over the age of majority can look at their birth records. If judicial intervention is considered important, lawmakers can provide guidelines for judges by granting adult adoptees the presumption of access to birth records and eliminating altogether the requirement of showing good cause. The child should be represented by a guardian ad litem at the adoption proceeding to guarantee that the rights of the adult-to-be are secure. The courts can also broaden the best interests of the child standard to include the needs of the adult adoptee. Finally, open adoptions should be encouraged among adoptive and birth families, thereby avoiding the issue of secrecy altogether.

In my imagination I see myself holding my own daughter in my arms. And at my side are my two mothers, one dark haired, and one blonde. At this gathering there is a love that transcends guilt, abandonment, and self-doubt, a love that promises healing, reconciliation, and rebirth. There will be no secrets for my daughter. Only mother-love: tripled.

210. Pannor & Baran, *supra* note 208, at 247.

