A Step Toward Resolving The Adoption Records Controversy: The Adoption Agency as The Key to Unlocking Sealed Identities

Traditionally, state legislatures and courts have considered the sealing of adoption records to be a necessary ingredient of successful adoption schemes. In recent years, however, scientists and adoptee activists have argued that denying adoptees access to knowledge of their ancestries and identities may lead to harmful psychological and emotional effects upon adoptees. This article analyzes various means of reconciling these interests and advocates a new approach to the adoption records controversy.

During the last ten years, the controversy over the right of adopted persons to gain access to their adoption records has developed into a significant legal problem which now confronts a growing number of state legislatures and courts. The vast majority of states have "sealed adoption records" statutes that deny "adoptees" the right to discover their family backgrounds. Individual adoptees, who often have spent years searching for their natural parents, have initiated the fight to open adoption records throughout the country.[1] Bolstered by recent scientific studies recognizing adoptees' need to know their ancestries[2] and a social

---

[1] An example is Jean M. Paton, who is recognized as the founder of the open records movement in America. Ms. Paton is an adopted social worker who searched for and found her natural mother when she was forty-seven and her mother sixty-nine. J. PATON, THE ADOPTED BREAK SILENCE (1954).

A similar example is Florence Fisher, who is currently the most publicized and active worker in the adoptee movement. She spent over twenty years after the death of her adoptive parents searching for her natural parents. F. FISHER, THE SEARCH FOR ANNA FISHER (1973). *See also* note 3 *infra*.

[2] Recent scientific studies by John Triseliotis in Scotland and the team of Sorosky, Baran, and Pannor in the United States indicate that adolescent and adult adoptees tend to experience identity crises resulting from their lack of knowledge about their natural parents and ancestries. These scientists suggest that the need for continuity in one's ancestry is basic to all persons yet adoptees are deprived of this continuity by the legal process of adoption which places much of their "identity" under seal. *See* J. TRISELIOTIS, IN SEARCH OF ORIGINS,

environment more tolerant of such genealogical searches, increasing numbers of adoptees and adoptee organizations are urging legislatures and petitioning courts to break the seals on adoption records.[3]

The adoption records controversy pits the interests of adoptees seeking information about their natural families against states' interests in safeguarding the privacy of natural parents and adoptive families. Adoptees seek access to their adoption records for a variety of reasons. In some cases they seek access for medical[4] or religious[5] reasons or to establish a right of inheritance from their natural parents.[6] In several recent cases access has been sought to fulfill the psychological and emotional needs of adoptees to learn their identities.[7] In addition to the psychological

---

THE EXPERIENCES OF ADOPTED PEOPLE (1973); A. SOROSKY, A. BARAN, & R. PANNOR, THE ADOPTION TRIANGLE (1978) [hereinafter cited as THE ADOPTION TRIANGLE]; Sorosky, Baran, & Pannor, *The Effects of the Sealed Record in Adoption,* 133 AM. J. PSYCH. 900 (1976); Sorosky, Baran, & Pannor, *Identity Conflicts in Adoptees,* 45 AM. J. ORTHOPSYCH. 18 (1975); Pannor, Sorosky, & Baran, *Opening the Sealed Record in Adoption — The Human Need For Continuity,* 51 J. JEWISH COMMUNAL SERVICE 188 (1974).

[3] The Adoptees' Liberty Movement Association (ALMA), for example, was founded by Florence Fisher in 1971. Its current membership of 20,000 adults is composed primarily of adult adoptees. Jurgens, *The Emotional Struggle Over The Adoptees' 'Right To Know',* 9 CAL. J. 262, 263 (1978). However, many natural and adoptive parents who support the organization's goals are also members. *Id.* A primary goal of this organization is to obtain the repeal of sealed adoption records statutes. ALMA has recently initiated a class action suit in New York arguing that its sealed records law is unconstitutional. This constitutional challenge was unsuccessful at the Federal district court level. ALMA Soc. Inc. v. Mellon, 459 F. Supp. 912 (S.D.N.Y. 1978). Another adoptees organization, Yesterday's Children, brought a similarly unsuccessful constitutional challenge to the Illinois sealed records law. Yesterday's Children v. Kennedy, 569 F.2d 431 (7th Cir. 1978).

[4] *See, e.g.*, in Chattman v. Bennett, 57 App. Div. 2d 618, 393 N.Y.S.2d 768 (1977), an adult adoptee considering whether to start a family sought and obtained access to medical information in her sealed records on the grounds that the possibility of problematic genetic factors in her background constituted good cause. The court, however, limited access to nonidentifying medical information.

[5] *See, e.g.*, in In re Gilbert, 563 S.W.2d 768 (Mo. 1978) an adoptee sought access to his records on grounds that his religious beliefs as a member of the Church of Jesus Christ of Latter Day Saints required that he trace his ancestry.

[6] *See, e.g.*, in Spillman v. Parker, 332 So. 2d 573 (La. Ct. of App. 1976) an adoptee argued that the denial of a right of inspection would have the effect of violating the right of inheritance an adopted child may have as a forced heir of his natural parents.

[7] *See, e.g.*, In Mills v. Atlantic City Dep't of Vital Statistics, 148 N.J. Super. 302, 372 A.2d 646 (1977) the court agreed with the petitioners' contention that

need to learn their identities, many adoptees seek access to their records in hopes of locating and meeting their natural parents.[8]

Sealed records statutes, on the other hand, reflect the legislative judgment that certain restrictions guaranteeing the anonymity and privacy of the parties to an adoption are needed to encourage use of the adoption process. For the natural parents, the guarantee that their identities will not be disclosed to the adoptee and the adoptive parents makes the difficult decision to surrender the child for adoption easier because it enables the natural parents to make new lives for themselves without fear of later unwanted appearances by their natural child.[9] For the adoptive parents, the knowledge that the natural parents will be unable to locate their adopted child provides a sense of security and reinforces the development of a healthy parent-child relationship within the adoptive family.[10] Freedom from intrusion by the natural parents also benefits the young adoptee who may be unprepared to deal with the emotional confusion of having two sets of parents.[11] Apart from the parties' individual interests in confidentiality, states have an interest in preserving the integrity of the adoptive process.[12] A viable system of adoption is an important means of preventing the social problems resulting from unwanted, abused, and neglected children.

The primary purpose of adoption is to promote the best interests of the adoptee.[13] Most adoption statutes, however, continue to ignore the need of adoptees to know their natural origins and their true identities. The time has come for legislatures, courts, and adoption agencies to question whether sealed records actually promote the best interests of adoptees in the manner intended.

The state legislatures' and courts' perception that continued guarantees of anonymity to natural parents are essential to the

---

the pervasive need of adoptees to complete their self-images by learning their identities did constitute sufficient cause to warrant access. In In re Maples, 563 S.W.2d 760 (Mo. 1978) the court did not find sufficient support behind petitioner's claim of a psychological need to know to warrant disclosure of the natural parents' identities.

[8] *See, e.g.*, F. FISHER, *supra* note 1.

[9] In re Maples, 563 S.W.2d 760, 763 (Mo. 1978).

[10] Klibanoff, *Genealogical Information In Adoption: The Adoptee's Quest and the Law*, 11 FAM. L.Q. 185, 188 (1977).

[11] *Id.*

[12] *Id.* at 196.

[13] J. GOLDSTEIN, A FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 4 (1973) [hereinafter cited as GOLDSTEIN, FREUD & SOLNIT].

success of the adoptive process[14] constitutes the primary barrier to reform in the law of sealed adoption records. In those countries where adult adoptees may obtain their original birth certificates,[15] no evidence exists that this policy leads to fewer adoptions, an epidemic of unwanted reunions, or unhappy adoptive families.[16] Moreover, in this country, a recent scientific survey of the parties to the adoption triangle indicates that a surprisingly large percentage of responding natural and adoptive parents support the right of adult adoptees to have access to their original birth certificates.[17] Studies also reveal that reunions between adoptees and their natural parents tend to enhance the relationship between adoptees and their adoptive parents, as well as psychologically benefit adoptees.[18] Although such scientific evidence may be insufficient to rebut the assumption concerning the continued need for anonymity in adoption,[19] enough scientific and popular support exists for relaxing access to adoption records to warrant a serious reconsideration of current adoption practices and laws.[20]

Proponents of open adoption records have suggested a variety of legislative, judicial, and agency approaches which would allow adoptees greater access to their records.[21] The legislative ap-

---

[14] *See* text accompanying notes 46-66 and 79-159 *infra*.

[15] In Great Britain, Finland, and Israel, adult adoptees may obtain access to their original birth certificates. Klibanoff, *supra* note 10, at 188.

[16] THE ADOPTION TRIANGLE, *supra* note 2, at 224. *See* Levin, *Tracing the Birth Records of Adopted Persons*, 7 FAM. L. 104, 105 (1977).

[17] A recent survey conducted by the Children's Home Society of California revealed that out of 1,294 respondents (adult adoptees 288, birth parents 102, and adoptive parents 904) 88.9% of the adoptees, 82.4% of the birth parents, and 73.1% of the adoptive parents supported the right of adult adoptees to have access to their original birth certificates. CHILDREN'S HOME SOCIETY OF CALIFORNIA, THE CHANGING FACE OF ADOPTION, REPORT OF RESEARCH PROJECT 24 (1977) [hereinafter cited as REPORT OF RESEARCH PROJECT].

[18] THE ADOPTION TRIANGLE, *supra* note 2, at 222-23.

[19] Klibanoff, *supra* note 10, at 193-97.

[20] *See Editorial*, 55 CHILD WELFARE 73 (1976).

[21] Klibanoff, *supra* note 10; Note, *Sealed Records in Adoptions: The Need for Legislative Reform*, 21 CATH. LAW. 211 (1975); Note, *Recognizing The Needs of Adopted Persons: A Proposal To Amend The Illinois Adoption Act*, 6 LOY. CHI. L.J. 49 (1975); Note, *The Adoptee's Right To Know His Natural Heritage*, 19 N.Y.L.F. 137 (1973) [hereinafter cited as *The Adoptee's Right To Know*]; Note, *A Reasonable Approach To The Adoptee's Sealed Records Dilemma*, 2 OHIO N.U.L. REV. 542 (1975); Note, *The Adult Adoptee's Constitutional Right To Know His Origins*, 48 SO. CAL. L. REV. 1196 (1975) [hereinafiter cited as *The Adult Adoptee's Constitutional Right*]; Note, *Confidentiality of Adoption Records: An Examination*, 52 TUL. L. REV. 817 (1978).

proach is manifested by an increasing number of proposals to repeal or amend sealed records laws.[22] The proponents' judicial approach to the obstacle of sealed records laws is evidenced by two alternative strategies. The first strategy is to appeal to state courts to recognize adoptees' psychological need to know as meeting the good cause requirement of most sealed records statutes.[23] The second strategy challenges sealed records statutes on constitutional grounds.[24] Finally, the agency approach to the sealed records controversy is to have adoption agencies assume greater responsibility for the collection and disclosure of information relating to adoptees' natural families.[25]

A review of the various legislative, judicial, and agency responses to the suggested legal solutions indicates that widespread legislative or judicial reform in this area is not likely in the near future. Although legislatures and courts have recognized the needs of adoptees in a few instances, most legislatures and courts continue to favor the privacy interests of the natural and adoptive parents over the interests of searching adoptees.

Although legislatures and courts may be justified in sealing adoption records to the extent necessary to protect the parties to an adoption, the comprehensive sealing of all adoption records reflects an unwillingness by most legislatures and courts to balance the particularized needs of the parties in each case. Most sealed records statutes impose restrictions upon access which are unecessary for the protection of natural and adoptive parents' privacy interests. The proper solution to the adoption records controversy requires an approach which is capable of determining and balancing the needs of all the parties that might be affected by a specific request for information.

This comment contends that adoption agencies must take the lead in this area by assuming greater responsibility for the collection and disclosure of information concerning adoptees' natural and adoptive families. This article looks first at the purpose and coverage of sealed records statutes as well as their open records counterparts. It next discusses the overall effects of various legislative attempts to amend both sealed and open records statutes. This article then examines the attempts by proponents of open records to obtain favorable judicial interpretation of the good

---

[22] *See, e.g., Note, Recognizing The Needs of Adopted Persons, supra* note 21. *See also* text accompanying notes 46-74 *infra.*

[23] *See* Klibanoff, *supra* note 10, at 198.

[24] *See, e.g., The Adult Adoptee's Constitutional Right, supra* note 21.

[25] *See* Klibanoff, *supra* note 10, at 197-98.

cause requirement of existing statutes or to have sealed records laws declared unconstitutional. Finally, it suggests various ways adoption agencies can help to fulfill adoptees' need to know their identities without impairing the integrity of the adoption process. The agency approach best protects the interests of all the parties to the adoption triangle because it deals with the problem in a manner which is most sensitive to the particular needs and fears of the parties involved.

I. Information Barriers of Adoption Records Statutes

Both sealed and open records statutes, to differing degrees, deny access to adoptees' original birth certificates and court adoption records.[26] Forty-six states and the District of Columbia possess sealed records statutes which call for the sealing of adoptees' original birth certificates and the courts' records of their adoptions.[27] These laws generally deny access to those documents

---

[26] In all states minor adoptees need to obtain a court order to view their sealed records.

[27] Alaska Stat. § 20.15.150 (1975); Ariz. Rev. Stat. §§ 8-120, 36-326 (West 1974 & Cum. Supp. 1978); Ark. Stat. Ann. §§ 56-217, 82-519 (1976 & Cum. Supp. 1977); Cal. Civ. Code § 227, Cal. Health & Safety Code § 10439 (West 1975 & Cum. Supp. 1979); Colo. Rev. Stat. §§ 19-4-104, 25-2-113 (1973); Conn. Gen. Stat. Ann. §§ 7-53, 45-66, 1977 Conn. Public Acts 77-243 (West Cum. Supp. 1978); Del. Code tit. 13, §§ 923-925 (1975); D.C. Code Encycl. §§ 16-311, 16-314(d) (West 1966); Fla. Stat. Ann. §§ 63.162, 63.181, 382.22 (West 1973 & Cum. Supp. 1978 & 1979); Ga. Code Ann. §§ 74-417, 88-1714, 88-1723 (1971 & Cum. Supp. 1978); Haw. Rev. Stat. § 578-15 (1968); Idaho Code §§ 16-1511, 39-218 (1977 & Cum. Supp. 1978); Ill. Ann. Stat. ch. 4, § 9.1-18 (Smith - Hurd 1975), ch. 11½, § 73-17 (Smith - Hurd 1977); Ind. Code Ann. §§ 31-3-1-5, -12 (1973); Iowa Code Ann. §§ 144.24, 600.16 (West 1972 & Cum. Supp. 1978-79); Ky. Rev. Stat. § 199.570 (1977); La. Rev. Stat. Ann. §§ 9:437, 40:76, 40:81 (West 1965, 1977); Me. Rev. Stat. tit. 19, § 534, tit. 22, § 2765 (1965); Md. Ann. Code art. 43, § 19 (1971), Md. Ann. Code, Rule D81 (1977); Mass. Gen. Laws Ann. ch. 46, § 13 (West Cum. Supp. 1979), ch. 210, § 5c (West Cum. Supp. 1979); Mich. Comp. Laws §§ 333.2832, 710.67 (Mich. Stat. Ann. §§ 14.15(2832), 27.3178(555.67)) (Callaghan Supp. 1978, 1978-79); Minn. Stat. Ann. §§ 144.176, 259.27 (West 1970 & Cum. Supp. 1979); Miss. Code Ann. §§ 93-17-21, -25 (1973); Mo. Ann. Stat. §§ 193.250, 453.120 (Vernon 1972, 1977); Neb. Rev. Stat. §§ 43-113, 71-626.01 (1974, 1976); Nev. Rev. Stat. §§ 127.140, 440.310 (1977); N.H. Rev. Stat. Ann. §§ 126.13, 170-B:19 (1977 & Cum. Supp. 1977); N.J. Stat. Ann. §§ 9:3-52, 26:8-40.1 (West 1964 & Cum. Supp. 1978-79); N.M. Stat. Ann. §§ 12-4-39, 22-2-34 (Supp. 1975 & 1976); N.Y. Dom. Rel. Law § 114, N.Y. Pub. Health Law § 4138 (Mckinney 1977); N.C. Gen. Stat. §§ 48-25, -26, 130-60 (1974, 1976 & Cum. Supp 1977); N.D. Cent. Code §§ 14-15-16, 23-02.1-18 (1971, 1978); Ohio Rev. Code Ann. §§ 3107.17, 3705.18 (Page 1971 & Supp. 1978);

except by court order granted upon a showing of good cause.[28] Four states have open records statutes which specifically give adoptees the right to obtain their original birth certificates without a court order once they attain legal age.[29] These open records laws recognize that as adoptees attain majority, the states' interest in confidentiality diminishes and is outweighed by adoptees' need to know.[30] Even open records states, however, require a petitioner regardless of his or her age to obtain a court order for access to those sealed adoption documents other than the original birth certificate.[31]

Few adoption records statutes, sealed or open, distinguish between information which does or does not identify the natural parents.[32] This legislative omission is important. By treating nonidentifying information in the same manner as identifying information, most records statutes prevent the release of information which could aid adoptees in fulfilling their psychological needs without revealing the identities or location of their natural parents.

Only two states, Connecticut and South Carolina, have records statutes which expressly provide for the release, in certain cir-

---

OKLA. STAT. ANN. tit. 10, §§ 57, 60.18 (West 1966 & Cum. Supp 1978-79), tit. 63, § 1-316 (West 1973); OR. REV. STAT. §§ 432.415-.420 (1977); R.I. GEN. LAWS §§ 23-3-14, -15, -23 (1968 & Cum. Supp. 1977); S.C. CODE § 15-45-140, -150 (Supp. 1978); S.D. CODIFIED LAWS §§ 25-6-15, 26-6-20, 34-25-16.4 (1976, 1977); TENN. CODE ANN. §§ 36-128, -130, -132 (1977); TEX. FAM. CODE ANN. tit. 2, § 11.17 (Vernon 1975), TEX. REV. CIV. STAT. ANN. art. 4477, rule 47a (Vernon 1976 & Cum. Supp. 1978-79); UTAH CODE ANN. §§ 26-15-16, 78-30-15 (1976, 1977); VT. STAT. ANN. tit. 15, §§ 451, 452 (1974); VA. CODE §§ 32-353.19, 63.1-236 (1973 & Cum. Supp. 1978); WASH. REV. CODE ANN. §§ 26.32.120, .150, .260, .36.030 (1961 & Cum. Supp. 1977); W. VA. CODE §§ 16-5-18, 48-4-4 (1972, 1976); WIS. STAT. ANN. §§ 48.93, 69.33 (1957, 1965); WYO. STAT. §§ 1-22-104, 35-1-417 (1977).

[28] *See, e.g.*, CAL. CIV. CODE § 227 (West Cum. Supp. 1979).

[29] ALA. CODE tit. 27, §§ 4, 5 (Cum. Supp. 1973); KANSAS STAT. §§ 59-2279, 65-2423 (1972, 1976); MONT. REV. CODES ANN. §§ 59-512, 61-213, 69-4421 (1970 & Cum. Supp. 1977); PA. STAT. ANN. tit. 1, § 505 (Purdon Cum. Supp. 1978-79), tit. 35, § 450.603 (Purdon 1977).

[30] *The Adult Adoptee's Constitutional Right, supra* note 21, at 1211-12.

[31] *See, e.g.*, KANSAS STAT. § 59-2279 (1976).

[32] This article will consider nonidentifying information to be any information other than that which would lead to the identification of a member of the natural family. Information such as personal, social, and medical history is normally considered nonidentifiable. Examples of identifying information are names, addresses, and details, such as the specific job title of a natural parent. CALIFORNIA STATE DEPARTMENT OF HEALTH, TASK FORCE ON CONFIDENTAILITY IN THE ADOPTION PROGRAM 24 (1977) [hereinafter cited as TASK FORCE ON CONFIDENTAILITY].

cumstances, of nonidentifying information to the adoptee. Connecticut's statute lists various items of nonidentifying information which adoption agencies must collect from the natural parents and provides that such information may be released to the adult adoptee upon demand.[33] The South Carolina statute provides for the sealing of all adoption agency records in addition to court records and birth certificates but specifically authorizes agencies to release nonidentifying information if such release is in the best interests of the child.[34]

The restrictiveness of most states' adoption records statutes is puzzling in light of their failure to place similar constraints upon the release of adoption agency records.[35] Adoption agency records generally contain more information that identifies the natural parents and the circumstances underlying the adoption than court records or original birth certificates. Agency files typically contain the reports of agency counselors on the circumstances surrounding the relinquishment of the child, a complete description of the natural mother and a brief description of the natural father, a medical history of the natural parents and the birth, and a study of the suitability of the adoptive parents.[36]

A possible explanation for the failure of most records statutes to restrict access to agencies' records is that in the past agencies did not collect the comprehensive data that they collect today. Until recently, the Child Welfare League of America[37] discouraged adoption agencies from collecting and disclosing detailed genealogical and descriptive data about the natural parents to the adoptive parents.[38] Adoption agencies have largely adhered to the League's guidelines. In 1976, however, the League revised several of its standards dealing with the collection and disclosure

---

[33] 1977 Conn. Pub. Acts 77-246 §§ 3, 6 (1977).

[34] S.C. CODE § 15-45-140 (Cum. Supp. 1978).

[35] Of the 51 jurisdictions listed in footnotes 27 and 29 supra, only 13 have provisions which expressly address the confidentiality of adoption agency records.

[36] Klibanoff, *supra* note 10, at 187.

[37] The Child Welfare League of America (CWLA) is a privately supported membership organization with 376 affiliates nationwide. CWLA devotes its efforts to improvement of care and services for deprived, dependent, neglected children and their families. One of its services is to develop standards of policy and practice for social service agencies nationwide. 1 ENCYCLOPEDIA OF ASSOCIATIONS 652 (13th ed. N. Yakes & D. Akey 1979). *See* also THE ADOPTION TRIANGLE, *supra* note 2, at 33.

[38] CHILD WELFARE LEAGUE OF AMERICA, (CWLA) STANDARDS FOR ADOPTION SERVICE: REVISED, §§ 4.12-.15 (rev. ed. 1973).

of information about the natural parents.[39] CWLA now encourages agencies to collect and disclose detailed nonidentifying information about the natural parents to the adoptive parents.[40] As a result of this change in policy, adoption agencies are beginning to collect information that could help to fulfill adoptees' need to know their identities.

Despite the lack of statutory language holding adoption agency records to be confidential, most agencies have nonetheless created *de facto* seals for their records as a matter of agency policy and procedure.[41] A recent survey of adoption agency policies and practices indicates that over ninety-nine percent of all agencies do not give adult adoptees the names of their natural parents without the natural parents' consent.[42] When babies were available more readily for adoption in the 1950's and early 1960's, many natural mothers opted for agency adoptions instead of independent adoptions[43] for the sole purpose of obtaining and maintaining this anonymity.[44] Consequently, many agencies feel bound by the assurances of confidentiality they made to their clients at the time of relinquishment and adoption.[45]

In sum, sealed records statutes appear to be the preferred method of regulating access to confidential adoption information in most states. The few state open records laws do not *open* access to records, but merely *facilitate* adoptees' access to their birth certificates once they reach adulthood. Moreover, very few statutes, sealed or open, provide for different treatment of nonidentifying and identifying information about natural parents. Interest-

---

[39] CHILD WELFARE LEAGUE OF AMERICA, (CWLA) STANDARDS FOR ADOPTION SERVICE, Revisions Adopted on Dec. 1, 1976 [hereinafter cited as CWLA REVISED STANDARDS].

[40] *Id.*, at §§ 4.12-.15.

[41] M. JONES, THE SEALED ADOPTION RECORD CONTROVERSY: REPORT OF A SURVEY OF AGENCY POLICY, PRACTICE AND OPINION 13-14 (1976).

[42] *Id.* at 9, 28.

[43] An agency adoption is one which is arranged by a licensed agency which accepts relinquishments from the natural parents and places the child with adoptive parents approved by the agency but not known to the natural parents. In an independent adoption, the natural parents, often with the help of an intermediary such as a doctor, lawyer, or licensed agency, place the child directly with the adoptive parents. *See* REPORT OF RESEARCH PROJECT, *supra* note 17, at 5. *See also* note 174 *infra.*

[44] TASK FORCE ON CONFIDENTIALITY, *supra* note 32, at 12-13.

[45] However, due to the likelihood that sealed records laws may be changed or reinterpreted in the near future, CWLA advises agencies not to make firm assurances of confidentaility to either the natural parents or the adoptive parents. CWLA REVISED STANDARDS, *supra* note 39, at § 2.3.

ingly, a majority of records statutes fail to regulate adoption agency records and files, an important source of information relating to adoptees' natural parents. In recent years, however, increased public exposure to the plight of searching adoptees and to the effects of natural parent-adoptee reunions has caused a substantial number of legislatures to review their adoption records laws.

II. Legislative Developments

Although the roll of states with sealed records laws or open records laws has changed slightly in the past few years, the number of states with sealed records laws is the same today as it was in 1973.[46] Recent legislative activity in the adoption records area can be grouped into three categories. Most state legislatures continue to favor the use of sealed records statutes despite repeated introduction of various open records proposals. A number of states with open records statutes have recently moved to replace them with more restrictive provisions. While a few states have minimally relaxed access to adoption records, only one state, Connecticut, has adopted a comprehensive statute that permits free access to nonidentifying information as well as court-regulated disclosure of identifying information. Still, the continued adherence to the traditional adoptive scheme with its sealed records provision would appear to provide a strong testament for retaining the *status quo.*

Reflecting a concern for maintaining adoption as a viable solution to the problem of unwanted children, a number of state legislatures have rejected or refused to act upon proposals for open records laws. In 1977, bills were introduced in Maryland and the District of Columbia which would have given adult adoptees access to their original birth certificates and certain agency records of their adoptions.[47] Neither of these proposals, however, resulted in enactment of an open records statute.[48] Recently, the Virginia legislature rejected an amendment to its adoption records law which would have given adoptees over eighteen an absolute right to learn their natural parents' identities.[49]

California's experience provides a further example of the reluc-

---

[46] *C.f., The Adoptee's Right To Know, supra* note 21, at 137 n.5 *with* note 27 *supra.*

[47] 4 Fam. L. Rep. (BNA) 2084 (Dec. 6, 1977).

[48] 5 Fam. L. Rep. (BNA) 2098 (Dec. 5, 1978); 5 Fam. L. Rep. (BNA) 2328 (Feb. 20, 1979).

[49] 5 Fam. L. Rep. (BNA) 2258 (Jan. 30, 1979).

tance of many legislatures to change their sealed records laws. Both the California Civil Code and Health and Safety Code contain provisions governing access to adoption records.[50] Although the language of these sections differs, both require a court order granted upon a showing of good and compelling cause before permitting access to either court records or original birth certificates.[51] In the 1975-76 legislative session, the California Legislature considered Assembly Bill 4200,[52] which would have established a statewide confidential registry of requests by adult adoptees and by natural parents of adopted children who desired to meet each other.[53] AB 4200 passed both houses of the California Legislature in 1976, but Governor Brown vetoed the bill stating that it "would have a chilling effect on the family relation."[54] In 1977, the measure was reintroduced as SB 535.[55] Although a favorable task force report by the State Department of Health[56] and Assembly amendments[57] directed at eliminating Governor Brown's criticisms of the earlier bill seemed to ensure passage of

---

[50] CAL. CIV. CODE § 227 (West 1954 & Cum. Supp. 1979); CAL. HEALTH & SAFETY CODE § 10439 (West 1975 & Cum. Supp. 1979).

[51] *Id.* Even when a petitioner can show good cause, however, these provisions require that the names of natural parents or any information tending to identify them be deleted from the documents to be released. The statute does permit adoptees to obtain the names and addresses of their natural parents when necessary to establish a legal right. *Id.*

[52] Introduced by Assemblyman Campbell, March 22, 1976. 7 ASSEM. J. (1975-76 Reg. Sess.) p. 12825.

[53] Legislative Counsel's Digest of Assembly Bill No. 4200 (1975-76 Reg. Sess.). The State Department of Health would have been charged with matching requests, verifying such requests by personal interview, and arranging meetings between the parties. *Id.*

[54] Veto message of Governor Brown, September 22, 1976.

[55] Introduced by then Senator Campbell on March 14, 1977. 1 SEN. J. (1977-78 Reg. Sess.) p. 824.

[56] A task force established under the auspices of the State Department of Health to develop a comprehensive proposal relating to the confidentiality of adoption records in California recommended the establishment of a voluntary registration system like that envisioned in SB 535. See TASK FORCE ON CONFIDENTIALITY, *supra* note 32, at 30-31.

[57] The Assembly amended SB 535 to insure that in cases where two of more adopted children resided in the same home, the Department would have refused to handle requests by an older sibling until the youngest sibling reached the age of majority.

Governor Brown had indicated that he would sign the amended SB 535 into law if it reached his desk. Interview with Richard Koppes, member of the Task Force on Confidentiality and former Chairman of the State Bar Committee on Adoption (Nov. 6, 1978).

SB 535, the bill failed to get enough support in the Senate[58] after passing the Assembly. The unexpected failure of SB 535 has significantly reduced prospects for passage of other open records proposals in California.

At the same time as many states were rejecting open records proposals, several states with open records statutes replaced them with more restrictive laws. In 1968, Arizona changed its open records provision[59] relating to original birth certificates to a sealed records provision.[60] Prior to 1973, Florida's statutes permitted a copy of the original birth certificate to be issued to adoptees who signed affidavits requesting that their sealed files be opened.[61] Due to instances where natural parents were contacted by their relinquished children against their wishes, the Florida Legislature amended the laws in 1973 to allow opening of adoption records only by court order.[62] In 1976, a Louisiana appellate court[63] suggested, in dicta, that the state's adoption records law gave adoptees an unqualified right to a court order opening their records. The following year, the Louisiana Legislature amended that provision so that a court order opening sealed records would only be granted for compelling reasons and only to the extent necessary to satisfy such compelling necessity.[64] Prior to 1978, Virginia had the only statute which allowed adult adoptees unqualified access to their court records.[65] Beginning in 1978, however, a court order entered upon a showing of good cause will be required for disclosure of identifying information concerning the natural parents.[66]

The change by a few jurisdictions to statutes which allow access only upon a court order may reflect legislative dissatisfaction with the small amount of protection which their open records laws gave to natural parents. Due to the states' interest in adoption as a viable solution to the problem of unwanted children, legislatures appear anxious to prevent the release of sealed infor-

---

[58] Despite the bill's earlier passage by the Assembly, the Senate was unable to agree with the Assembly amendments and rejected the conference report by a 13 to 17 vote at the close of the legislative session. CAL. LEG., SENATE WEEKLY HISTORY p. 132, Friday, Sept. 1, 1978.

[59] ARIZ. REV. STAT. § 36-332 (1956).

[60] ARIZ. REV. STAT. § 36-326 (1974).

[61] FLA. STAT. ANN. § 382.22 (West 1973).

[62] FLA. STAT. ANN. § 382.22 (West Cum. Supp. 1978).

[63] Spillman v. Parker, 332 So. 2d 573, 576 (La. Ct. of App. 1976).

[64] LA. REV. STAT. ANN. § 40:81 (1977).

[65] VA. CODE § 63.1-236 (1973).

[66] VA. CODE § 63.1-236 (Cum. Supp. 1978).

mation which might result in a traumatic intrusion upon the natural parents by an adoptee. Although existing sealed records statutes place unnecessary restrictions upon adoptee access to adoption information, conversely, many open records laws may not go far enough to protect the interests of natural parents.

In response to these concerns, in 1977, Connecticut enacted a "hybrid" adoption records statute[67] which allows substantial access to adoption records while affording considerable protection to natural parents' privacy rights. Connecticut's new law is similar to a sealed records statute because it is based upon the presumption that, unless otherwise provided for, adoption records, original birth certificates, and adoption agency records are to be sealed or held confidential.[68] It differs, however, from most sealed records laws in several ways. First, it specifies that adoption agencies must collect certain nonidentifying descriptive and genealogical data concerning natural parents that may be released to adult adoptees without any showing of need.[69] Second, the new law establishes a procedure for adult adoptees to petition the probate court for the release of identifying information about their natural parents.[70] When an adoptee petitions for the release of identifying information, the adoption agency which placed the adoptee must attempt to locate the natural parents for the purpose of obtaining a consent for the release of any identifying information requested.[71] The law requires this agency to conduct an investigation of the matter, including an interview with the adoptee to ascertain the reason for the request.[72] The court will grant such a petition unless it finds that one of three conditions exists: the request involves identifying information for which no consent has been obtained from the natural parents; the petitioner has a minor sibling who is an adoptee and the adoptive parents or guardians of that sibling have not consented to the release of such information; or the release of such information would be harmful to the physical or emotional health of the adoptee or the natural parents.[73]

---

[67] 1977 Conn. Public Acts 77-246 (1977).

[68] *Id.* §§ 9-12.

[69] *Id.* §§ 3,6.

[70] *Id.* §§ 14-16.

[71] *Id.* § 16.

[72] *Id.* § 15. The agency must also notify and interview the adoptive parents concerning the request. After receiving the agency's report of its investigation, the court must conduct a hearing on the matter within 15 days. At the hearing the petitioner may give appropriate evidence to support the request. *Id.*

[73] *Id.*

The Connecticut statute deserves careful scrutiny as a model for legislative reform in other states. This new law goes well beyond current sealed records provisions by regulating agency records and providing for the collection and release of nonidentifying information and the consensual release of identifying information. It stops short of open records statutes because it would not allow the release of identifying information without the natural parents' consent. Although the Connecticut provision far exceeds most records laws in detail and complexity, it nonetheless fails to address certain questions. In failing to establish a central registry of requests by adoptees and consents by natural parents the statute may require unnecessary court involvement and agency effort to match willing adoptees and natural parents. Furthermore, it is probably not possible for natural parents to use the new law to obtain information about an adoptee.[74] These oversights, however, are minor when compared to the sophisticated manner in which the statute balances the needs of the parties involved.

In summary, the vast majority of states retain sealed records laws which place unnecessary restrictions upon nonidentifying information relating to natural parents. Legislators are rejecting open records proposals because they feel that these laws do not provide enough protection to natural parents' interests. However, Connecticut has enacted a "hybrid" records statute which may eventually serve as a model for legislative reform in this area. Until legislatures can be convinced to remove barriers to the disclosure of adoption records, however, proponents of open adoption records must explore other methods of fulfilling the needs of adoptees.

III. Judicial Approaches to the Controversy

Advocates of adoptees' right to know have used two arguments when petitioning courts to gain access to sealed adoption records. The first argument, which has had limited success, is that adoptees' psychological need to know meets the good cause requirement of existing sealed records statutes. The second argument, which so far has been rejected by all courts, attacks sealed records laws on various constitutional grounds.

Although the litigation seeking the interpretation of good cause

[74] The provisions of the Connecticut statute relating to requests for sealed nonidentifying and identifying information refer only to requests by adult adoptees.

requirements is increasing, this judicial approach to the sealed records controversy is not likely to produce a satisfactory solution. Despite the limited success of the good cause argument, judicial interpretation of good cause may lead to inconsistent results. Furthermore, it may be of little help to adoptees in states where government agencies and courts will not disclose identifying information regarding their natural parents even upon a showing of good cause.[75]

Constitutional challenges to sealed records laws are likely to fail regardless of the standard of review which courts apply. The statutes will certainly be upheld under the equal protection clause of the Constitution if tested according to the rational basis standard.[76] The use of this test implies that the courts in accordance with the doctrine of separation of powers are deferring to the legislatures' judgment on the matter.[77] Even if the courts feel obligated to test these statutes by the strict scrutiny standard,[78] sealed records laws will probably be upheld. This is because states have strong, perhaps compelling, interests in maintaining the confidentiality of the adoptive scheme. Furthermore, any constitutional right to access claimed by adoptees must be weighed against the privacy rights of natural parents.

A. Judicial Interpretation of Good Cause

Sealed records statutes generally provide for access to such records by petitioners who obtain a court order.[79] Many statutes expressly require that some form of good cause be shown before such an order will be granted,[80] while some statutes are silent as to the standard to be applied.[81] In either case, the decision to allow access to the sealed records is wholly within the court's discretion.[82]

Traditionally, courts have rejected certain classes of requests

---

[75] *See* note 51 *supra.*

[76] *See* notes 109-14 and accompanying text *infra.*

[77] Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 366 (1949).

[78] *See* note 120-30 and accompanying text *infra.*

[79] *See, e.g.,* ALASKA STAT. § 20.15.150 (1975); MISS. CODE ANN. §§ 93-17-21, -25 (1973); OR. REV. STAT. §§ 432.415, .420 (1977). *See generally* Annot., 83 A.L.R.3d 800 (1978).

[80] *See, e.g.,* CAL. CIV. CODE § 227 (West 1954 & Cum. Supp. 1979); LA. REV. STAT. ANN. § 40:81 (West 1977).

[81] *E.g.,* ARIZ. REV. STAT. § 36-326 (1974); ILL. ANN. STAT. ch. 111½, § 73-17 (Smith-Hurd 1977).

[82] Klibanoff, *supra* note 10, at 189.

so regularly as to create presumptions governing the right to access. Given the strong state interest in protecting the privacy of the parties to an adoption,[83] courts find that petitioners from outside the adoption triangle can rarely, if ever, show sufficient cause to warrant access to adoption records. Courts have held, for example, that such a petitioner's need for information in a collateral proceeding to determine the devolution of property,[84] a grand jury's request to examine court adoption records,[85] or the need for such records in the preparation of legal arguments on collateral matters is not sufficient cause.[86] Two courts, however, have given access to such petitioners when the sealed records were needed to attack the validity of the adoption decree.[87]

Although strangers to adoptions can rarely show sufficient cause for access, good cause requirements also present formidable barriers to adoptees who seek access to their sealed records. The vague nature of the standard coupled with the broad discretion granted courts in these matters make unfavorable rulings almost impossible to overturn.[88] Moreover, courts are free to focus on adoptees' reasons for seeking access without reference to the state's interest in holding the information confidential. The language of most sealed records laws compels adoptee petitioners to make some showing of good cause to gain access to their records regardless of the type of information sought. Under such statutes, courts could conceivably require equal showings of cause for different requests involving identifying and nonidentifying information. For example, one New York court indicated that mere curiosity as to one's forebearers could not constitute good cause regardless of the information sought.[89] Such judicial sentiment,

---

[83] The court in ALMA Soc. Inc. v. Mellon, 459 F. Supp. 912, 917 (S.D.N.Y. 1978) characterized the state's interest in regulating access to adoption records as "compelling."

[84] Hubbard v. Superior Court, 189 Cal. App. 2d 741, 11 Cal. Rptr. 700 (3rd Dist. 1961).

[85] People v. Doe, 138 N.Y.S.2d 307 (Erie Cty. Ct. 1955).

[86] In re Minicozzi, 51 Misc. 2d 595, 273 N.Y.S.2d 632 (Sup. Ct. Suffolk Cty. 1966) (paternity suit); In re Glasser, 198 Misc. 889, 100 N.Y.S.2d 723 (Sur. Ct. Bronx Cty. 1950) (suit for alienation of affections and criminal conversion).

[87] In re Adoption of Brundage, 134 N.Y.S.2d 703 (Sup. Ct. Orange Cty. 1954); In re Lord, 29 App. Div. 2d 1202, 288 N.Y.S.2d 27 (1967).

[88] *See, e.g.*, Hubbard v. Superior Court, 189 Cal. App. 2d 741, 11 Cal. Rptr. 700 (3rd Dist. 1961) where the appellate court refused to reverse an order denying access to sealed adoption records absent proof the lower court had abused its discretion.

[89] In re Ann Carol S., 172 N.Y.L.J. 12, August 13, 1974 (Sur. Ct. Broxnx Cty.).

however, should not be the basis for withholding access to information which the state has little interest in concealing.

A more productive approach to good cause would require courts to balance the needs of adoptee petitioners against the possible adverse effects of releasing the requested information. Recently, a few courts have indicated that the need to show good cause to gain access may become nonexistent if the state's interest in withholding the particular information requested is slight. For example, courts viewing good cause in this manner generally find little justification for withholding nonidentifying information from adoptee petitioners. In *In re Maples,*[90] the Missouri Supreme Court construed the Missouri sealed records law to permit a court to release such sealed information it deemed necessary to satisfy the needs of the applicant when measured against the interests of the natural parents, the adoptive parents, and the state. The court in *Maples* perceived the good cause requirement as a "sliding scale" which, depending upon the type of information sought from sealed records, could be met by varying degrees of good cause shown.[91] This approach would generally allow adoptees access to most information that would not disclose the natural parents' identity.[92] In *Mills v. Atlantic City Department of Vital Statistics,*[93] a New Jersey court went even further by holding that in cases of adult adoptee requests the burden of proof should shift to the state to demonstrate that good cause is not present.[94] The *Mills* court stated that nonidentifying medical, hereditary, or ethnic background information should generally be released as a matter of course.[95] In rejecting a monolithic good cause requirement, these courts properly recognized that the state's interest in preventing adoptees' access to nonidentifying information is less than its interest in preventing access to information identifying the natural parents.

Careful analysis by the courts of the policies underlying sealed records statutes is likely to result in the growing acceptance of a

---

[90] 563 S.W.2d 760 (Mo. 1978).

[91] *Id.* at 765-66.

[92] The logical extension of the *Maples* "sliding scale" approach is the approach taken by the court in *Mills. See* note 95 and accompanying text *infra.*

[93] 148 N.J. Super. 302, 372 A.2d 646 (1977).

[94] *Id.* at 318, 372 A.2d at 654. The court also stated that the adoptee's psychological need to know may constitute the good cause required by the New Jersey statute. *Id.* at 319, 372 A.2d at 655.

[95] *Id.* at 318, 372 A.2d at 655. The court also indicated that identifying information could be released to adult adoptees as a matter of course where the natural parents have given their consent to such a release. *Id.*

flexible good cause standard.[96] In the past, the courts have jealously guarded the sealed records of adoptees without considering whether states were really justified in withholding all of that information. A closer look at the state's interest in the confidentiality of such records, however, reveals that the courts simply may not be justified in withholding nonidentifying information from an adoptee petitioner. Neither the natural parents nor the adoptive parents are likely to be harmed by such a release of information. The release of nonidentifying information should not increase the likelihood of intrusion by others into the natural and adoptive parents' lives since their anonymity with respect to the adoptee and each other would continue. Courts, therefore, could substantially lower the good cause showing required for the release of nonidentifying information to adoptee petitioners.

A more troublesome question arises when adoptees wish to know the identities and whereabouts of their natural parents. Courts must then determine under what circumstances, if any, adoptees will be allowed access to such information. Here courts generally recognize that the state's interest in asserting the natural parents' presumed wish for privacy will predominate over the adoptees' interest unless the natural parents consent to such a release.[97] Since the natural parents are not in court when adoptees petition to break the seals on their records, some courts have had to devise plans whereby the interests and wishes of the natural parents could be made known to the court without revealing their identities. In several cases courts have appointed the adoption agency which made the petitioner's placement,[98] the court's juve-

---

[96] In In re C.A.B., 384 A.2d 679 (D.C. Ct. App. 1978) the District of Columbia Court of Appeals concluded that an adult adoptee petitioning for access to her sealed records should have been given a full evidentiary hearing on her request. In remanding the case to the trial court for such a hearing, the Court of Appeals commended the opinion in *Mills*.

However, on remand, the trial court held that under the District of Columbia statute the privacy interests of the birth parents must bow to the interests of the adoptee whenever there is any conflict between the interests of birth or adoptive parents and child. The court felt compelled not to balance the interests of the parties since the governing statute did not require that good cause be shown but rather that the welfare of the child be promoted. *Sub nom.* In re Adoption of Female Infant, (D.C. Super. Ct. 1979), 5 FAM. L. R. (BNA) 2311, 2312 (Feb. 20, 1979).

[97] In re Maples, 563 S.W.2d 760, 766 (Mo. 1978). *But see* In re Adoption of Female Infant, (D.C. Super. Ct. 1979), 5 FAM. L. R. 2311 (Feb. 20, 1979).

[98] Mills v. Atlantic City Dep't of Vital Statistics, 148 N.J. Super. 302, 320, 372 A.2d 646, 656 (1977).

nile officer,[99] or an attorney[100] as the court's agent to locate and represent the natural parents in the proceedings.

Courts which appoint intermediaries to locate the natural parents and to inquire if they will consent to the release of identifying information realize that many natural parents may be willing to disclose their identities to their natural children and may even desire to meet with them.[101] In cases where consent is given by the natural parents or where the natural parents have died,[102] the state's interest in holding identifying information under seal is no longer justified. Unfortunately, only a few state courts appear to recognize any obligation to adoptee petitioners to locate their natural parents to request their consent to the release of such identifying information.[103] Failure by other state courts to attempt to ascertain natural parents' wishes in this regard may prevent many adoptee petitioners from ever obtaining identifying information.

Although a few courts have been able to mitigate the harshness of sealed records laws by liberally construing the good cause requirement, the vast majority of jurisdictions apparently retain a monolithic good cause standard. Even if a flexible good cause approach were to gain wider acceptance, there remain several shortcomings to such a judicial solution. First, resolving the question of access in a judicial proceeding will tend to create legal

---

[99] In re Maples, 563 S.W.2d 760, 766 (Mo. 1978).

[100] In re Anonymous, 89 Misc. 2d 132, 390 N.Y.S.2d 799 (Sur. Ct. Queen's Cty. 1976), held that the natural parents of the petitioner were necessary parties to a proceeding in which the petitioner sought access to his sealed adoption records. The court designated an attorney to act as guardian ad litem for the natural parents as "incapacitated persons" since the very issue to be litigated involved their right to anonymity. This device eliminated the need to identify them during the proceeding.

[101] The *Mills* court suggested in *dicta* that the state established a central registry of consents given by natural parents in order to facilitate the release of identifying information where such consent has been given. Mills v. Atlantic City Dep't of Vital Statistics, 148 N.J. Super. 302, 318, 372 A.2d 646, 654 (1977).

[102] Arguably, states may have an interest in protecting the privacy of surviving member of the natural parents' families. *See* In re Maples, 563 S.W.2d 760, 763 (Mo. 1978). It can be argued, however, that the guarantee of anonymity offered by sealed records laws should be personal to the natural parents and should vanish when they die. The natural parents' interest in anonymity is analogous to the protection of reputation given by defamation law. That protection is extinquished on the death of the person involved, even if there might be a collateral tarnish on the "reputation" of a surviving family member.

[103] It is doubtful that many state courts outside of New York, New Jersey, Connecticut, and Missouri uniformly attempt to locate the natural parents through use of an intermediary.

adversaries of the parties to the adoption triangle. Second, the necessity of obtaining a court order for the release of nonidentifying information may result in wasted court time and expense. Third, in cases of requests for identifying information, courts will be faced with the problem of locating natural parents and ascertaining their wishes without revealing their identities. Finally, resort to judicial proceedings to regulate the release of sealed information perpetuates the misconception that all the information containd in the sealed records needed to be withheld in the first place.

The judicial responses to the good cause argument indicate that the courts still do endeavor to protect the interests of the various parties to the adoption triangle by sealing birth and adoption records except upon a showing of good cause. When adult adoptees petition for the unsealing of their records, courts must balance the adoptees' needs against the interests of the natural parents in confidentiality. If the good cause requirement is to serve its proper function, courts should not use it as an obstacle to a release of nonidentifying information which will benefit the adoptee but not harm the natural parents. Furthermore, courts should no longer reject adoptees' requests for identifying information without first contacting their natural parents to see if they would consent to a release of such information. Just as sealed records may not always be in the best interests of the adoptee, protection from disclosure may not always be the wish of the natural parents.[104] Thus, flexible judicial interpretation of good cause could allow greater adoptee access to sealed records in many cases without compromising the policies underlying sealed records statutes.

B. Constitutional Challenges to Sealed Records Laws

Various individual adoptees and adoptee organizations[105] be-

---

[104] The Los Angeles County Department of Adoption reported that in 1976, almost as many birth parents (248) as adoptees (278) contacted the Department for information and/or assistance in learning about their children. TASK FORCE ON CONFIDENTIALITY, *supra* note 32, at 32-33.

[105] One of the main goals of ALMA and its founder, Florence Fisher, is the repeal of sealed records statutes. Ms. Fisher sees sealed records as an affront to human dignity and believes the need to learn one's hereditary background is essential to identity formation. Pannor, Sorosky, & Baran, *Opening the Sealed Record in Adoption — The Human Need for Continuity*, 51 J. JEWISH COMMUNAL SERVICE 188, 190 (1974).

lieve that liberal judicial construction of the existing sealed records laws is not the proper basis for obtaining access to adoption records.[106] These adoptees and organizations feel that adoptees have a constitutional right to learn their identities. Because they believe that sealed records statutes impermissibly infringe upon their rights, they have brought a number of constitutional challenges to these laws.

The success of these constitutional attacks against the sealed records laws depends on the standard of review courts choose to apply. Two different standards of review are available to the courts considering the constitutionality of sealed records statutes. The rational basis standard is the traditional standard of reviewing legislation that distinguishes between different classes of people.[107] The strict scrutiny standard applies only when the classification is based upon suspect criteria or when the law infringes upon a fundamental right.[108] As applied, each standard raises a different presumption as to the validity or invalidity of the challenged statute. The court's characterization of the competing interests is critical since the characterization determines the standard of review to be applied and the resulting success or failure of the constitutional challenge.

Although advocates of open records have suggested that existing laws discriminate on the basis of a suspect classification and impair fundamental rights, thereby requiring the strict scrutiny of the courts, the Supreme Court cases that they cite as authority for their position do not necessarily support this contention. Orthodox application of constitutional law principles seems to require application of the rational basis standard. If the validity of sealed records laws is measured by the rational basis standard,

---

[106] In ALMA Soc. Inc. v. Mellon, 459 F. Supp. 912, 915 (S.D.N.Y. 1978) ALMA argued that "any requirement of cause whatsoever is unconstitutional, not merely that the New York courts have set too high a standard." This strategy may have been in part an attempt to avoid the doctrine of federal court abstention as announced in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). 459 F. Supp. at 916. The *Pullman* decision requires federal courts to abstain from deciding the constitutional issues raised by a complaint where there is the possibility that the state courts may interpret the challenged statute so as to eliminate or at least alter materially the constitutional question presented. 459 F. Supp. at 914-15.

[107] *See generally* Barrett, *Judicial Supervision of Legislative Classifications — A More Modest Role for Equal Protection?*, 1976 B.Y.U.L. REV. 89 (1976); Tussman & tenBroek, *supra* note 77; Note, *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Equal Protection*].

[108] *Id.*

it seems clear that these laws will be upheld. Furthermore, due to the strong state interest in protecting the privacy of the natural parents and the adoptive family, it is quite likely that the restrictions of sealed records laws will be upheld even under the strict scrutiny of the courts.

1. The Rational Basis Standard

The rational basis standard is the traditional equal protection standard of review for judging the constitutionality of legislative classifications which neither involve suspect criteria nor impair fundamental rights guaranteed by the Constitution.[109] Mindful of the separate roles of legislatures and courts, courts apply the rational basis standard in deference to the legislative determination that particular laws are necessary to achieve particular public goals.[110] The use of this standard creates a strong presumption in favor of the constitutionality of the challenged statute since under it "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[111]

The application of the traditional rational basis standard to sealed records laws will undoubtedly result in these laws being upheld. The sealing of adoption records clearly furthers the states' interest in encouraging the continued use of adoption by insulating the parties to an adoption from disruptive and unwanted intrusions.[112]

Courts, however, may apply a more rigorous version of the rational basis standard to statutes restricting adoptees' access to their birth records. When such personal rights are threatened, the United States Supreme Court has ruled that "the classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation . . . ."[113] Arguably, this standard should apply to sealed records laws since they involve the privacy rights of the parties rather than their economic interests.[114]

Assuming the applicability of this new rational basis standard,

---

[109] *Equal Protection, supra* note 107, at 1077-87.
[110] *See* note 77 *supra.*
[111] McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).
[112] *See* Klibanoff, *supra* note 10, at 196.
[113] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
[114] *See, e.g., The Adoptee's Right To Know, supra* note 21, at 144.

opponents of sealed records have argued that sealed records laws may not meet this test.[115] They start with the premise that the fundamental purpose of adoption legislation is the promotion of the adoptee's best intersts.[116] They then argue that failure to fulfill adoptees' psychological need to know may be harmful to their well-being.[117] Therefore, they argue, sealed records provisions do not bear a substantial relation to the goal of promoting the adoptee's interests.

Courts applying this new rational basis standard are nonetheless likely to uphold sealed records laws. In judging the rational relation of such statutes to their legislative objective, the courts are more likely to perceive the purpose of the sealed records laws as insuring the privacy of the parties so as to encourage continued use of adoption, thus serving the best interests of children.[118] Ineffective sealed records laws which do not insure the confidentiality of the parties may discourage the use of adoption as a solution to the problem of unwanted, neglected, or abused children. Thus, the argument that sealed records laws do not serve the best interests of the adoptee can be negated by the contention that such laws are essential to the continued use of the adoption process.[119]

2. The Strict Scrutiny Standard

The strict scrutiny standard of review is applied to statutes employing classifications which discriminate on the basis of suspect criteria,[120] such as race or alienage, or which impair fundamental rights,[121] such as the right of free speech and the right to vote. The use of the strict scrutiny standard creates a presump-

---

[115] *Id.* at 145.

[116] *See* note 13 *supra.*

[117] J. TRISELIOTIS, *supra* note 2, at 162-63.

[118] Klibanoff, *supra* note 10, at 196.

[119] Several recent court decisions have upheld the constitutionality of sealed records laws by applying the new rational basis standard of review. For example, the court in Mills v. Atlantic City Dep't of Vital Statistics, 148 N.J. Super. 302, 372 A.2d 646 (1977) stated that the purpose of the sealed records law "is to promote policies and procedures necessary and desirable for the protection not only of the child placed for adoption but also for the natural and adoptive parents . . . ." *Id.* at 307, 372 A.2d at 649. By characterizing the state's interest as protecting all the parties in the adoption triangle and not just the adoptee, the Mills court had little difficulty finding that the sealed records statute bore a substantial relationship to its objective. *Id.* at 316, 372 A.2d at 653-54. *Accord,* In re Maples, 563 S.W.2d 760 (Mo. 1978); ALMA Soc. Inc. v. Mellon, 459 F. Supp. 912 (S.D.N.Y. 1978).

[120] *Equal Protection, supra* note 107, at 1087-120.

[121] *Id.* at 1120-32.

tion against the validity of the challenged statute by shifting the burden to the state to show that the classification is justified by a compelling state interest.[122]

The Supreme Court has expressly found classifications based on race,[123] alienage,[124] and national origin[125] to be suspect and therefore subject to the strict scrutiny of the courts. In addition, the Court recently has treated classifications based on sex[126] and illegitimacy[127] in much the same manner as suspect classifications without explicitly recognizing them as such.[128] Each of the classifications which the Court has been willing to recognize or treat as suspect involves "an immutable characteristic determined solely by the accident of birth . . . ."[129] Since individuals have no control over the immutable characteristics they acquire at birth, fairness dictates that these characteristics should rarely serve as bases for legislative classifications.[130]

Advocates of the adoptees' constitutional "right to know" suggest that an analogy can be drawn between classifications based on persons' status as adoptees and classifications based on immutable characteristics.[131] This analogy may be valid to the extent that sealed records laws distinguish between nonadoptees, who can obtain their birth records, and adoptees, who cannot. Furthermore, adopted persons seldom have any control over the events which create their status as adoptees. The analogy probably fails, however, because adoptees acquire their status as such as the result of special legal proceedings and not at birth. In light

---

[122] *Id.* at 1090, 1122.

[123] Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

[124] Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[125] Oyama v. California, 332 U.S. 633 (1948).

[126] Frontiero v. Richardson, 411 U.S. 677 (1973).

[127] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Jiminez v. Weinberger, 417 U.S. 628 (1974).

[128] None of the sex or illegitimacy discrimination cases have explicitly held either sex or illegitimacy to be inherently suspect. However, in Frontiero v. Richardson, 411 U.S. 677 (1973), a plurality of the Court agreed that discrimination of the basis of sex was inherently suspect. *See* Barrett, *supra* note 107.

[129] Frontiero v. Richardson, 411 U.S. 677, 683 (1973).

[130] *See* Justice Marshall's dissent in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 109 (1973). *See generally* Barrett, *supra* note 107, at 93-108.

[131] *See, e.g.*, Note, *Discovery Rights of the Adoptee — Privacy Rights of the Natural Parent: A Constitutional Dilemma*, 4 U. SAN. FERN. V.L. REV. 65, 73 (1975).

of the Supreme Court's hesitancy in recognizing either sex or illegitimacy as suspect criteria, the Court appears unwilling to expand its view of suspect classes to include adoptees.[132]

The courts which have been faced with the argument that the adoptee status is suspect have had little trouble finding that such status is not suspect. In *Mills,*[133] the court found the status of adoptees not to be suspect stating:

> An adoptee does not derive that status from an accident of birth but as the result of a legal proceeding which has as the very essence of its purpose the protection of that adoptee's best interest. Rather than vilify or relegate the adoptee to an inferior status, the adoption process of which the challenged statutes are an itegral part often improves the situation of the child, insuring a home, family unit and loving care which might otherwise not be guaranteed.[134]

If sealed records laws can be shown to impair fundamental rights they must be reviewed by courts according to the strict scrutiny standard.[135] The Supreme Court has applied the strict scrutiny standard to statutes which have restricted the right of interstate travel,[136] the right to procreate,[137] and the right to vote.[138] The fundamental rights guaranteed by the Constitution may be the subject of an express provision, such as the right to vote,[139] or may be only implied within the Constitution, such as the right of interstate travel.[140]

Advocates of open adoption records suggest that adoptees may claim a fundamental "right to know" based upon the first amendment right to receive information.[141] The Supreme Court has recognized that the free speech guarantees of the first amendment also protect the reciprocal right to receive public information and ideas.[142] The right of individuals to receive public information is

---

[132] *See* Barrett, *supra* note 107, at 108.

[133] 148 N.J. Super. 302, 372 A.2d 646 (1977).

[134] *Id.* at 315-16, 372 A.2d at 653. *Accord,* In re Maples, 563 S.W.2d 760, 764 (Mo. 1978).

[135] *See* note 121 *supra.*

[136] Memorial Hosp. v. Maricopa County, 415 U.S. 250, 269 (1974); Shapiro v. Thompson, 394 U.S. 618, 630, 631, 634, 638 (1969).

[137] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[138] Harper v. Virginia Bd. of Educ., 383 U.S. 663, 666, 670 (1966); Reynolds v. Sims, 377 U.S. 533, 561, 562, 568 (1964).

[139] U.S. CONST. amend. XXVI.

[140] *See* note 135 *supra.*

[141] *The Adult Adoptee's Constitutional Right, supra* note 21, at 1204-07.

[142] Red Lion Broadcasting Co. v. Sullivan, 376 U.S. 367, 390 (1969); Lamont v. Postmaster Gen., 381 U.S. 301 (1965); Martin v. City of Struthers, 319 U.S. 141 (1943).

essential to their intelligent decisionmaking and thus, like the right to vote, to their intelligent participation in and contribution to society and government.[143] Arguably, this right should extend to information concerning persons' identities since knowledge of one's identity and family background is essential to making intelligent decisions concerning marriage, procreation, and religion. Therefore, many adoptees argue, the right to receive information must protect adoptees' access to their adoption records.[144]

The success of a first amendment "right to receive information" claim by adoptees is unlikey. To begin with, the first amendment right to receive information extends only to public information.[145] Information collected and sealed during the process of adoption does not fall readily into the category of public information. Furthermore, although first amendment rights have held a "preferred position"[146] in constitutional adjudication, it is well settled that no right is absolute to the exclusion of the rights of other individuals.[147] Finally, it is important that sealed records statutes do not totally deny access to the sealed information but require that good cause be shown to justify release.[148]

In response to adoptee claims of a first amendment right to receive adoption information, courts have stated that if such a claim is valid[149] the resulting right is not absolute, but is subject to reasonable regulation which promotes a valid state interest.[150] One court questioned the validity of the first amendment claim, emphasizing that the information sought was not public information since it was the product of the judicial process.[151] Another court cited a number of Freedom of Information Act cases to

---

[143] New York Times Co. v. Sullivan, 376 U.S. 254, 271, 272 (1964). *See* Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 882-84 (1963).

[144] *The Adult Adoptee's Constitutional Right, supra* note 21, at 1205-06.

[145] *See* note 142 *supra.*

[146] Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). *See also* Herndon v. Lowry, 301 U.S. 242, 258 (1937); Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

[147] Mills v. Atlantic City Dep't of Vital Statistics, 148 N.J. Super. 302, 313, 372 A.2d 646, 652 (1977). *Accord,* ALMA Soc. Inc. v. Mellon, 459 F. Supp. 912, 917 (S.D.N.Y. 1978).

[148] Mills v. Atlantic City Dep't of Vital Statistics, 148 N.J. Super 302, 313, 372 A.2d 646, 652 (1977).

[149] In In re Maples, 563 S.W.2d 760, 762 (Mo. 1978), the court began its analysis of the petitioner's first amendment claim by questioning whether any first amendment right extends to information sealed during adoption.

[150] Mills v. Atlantic City Dep't of Vital Statistics, 148 N.J. Super. 302, 314, 372 A.2d 646, 652 (1977).

[151] In re Maples, 563 S.W.2d 760, 762 (Mo. 1978).

illustrate that in many instances legitimate privacy interests can outweigh the right to receive information.[152] Whether these courts have rejected the basic validity of the claim or have simply found any such right to be permissibly regulated by sealed records laws, the first amendment claim of a right of access to adoption records has not met with success.

The Supreme Court has also recognized an unenumerated right of privacy guaranteed by the Constitution[153] which may serve as a basis for adoptees' claim of a fundamental right to know.[154] Although the Court has not yet fully defined the scope of this unenumerated right, it appears to include "the right of the individual, married or single, to be free from governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."[155] It has been argued that due to the critical interrelationship between individuals' identities and their ability to make fundamental decisions concerning marriage, divorce, procreation, contraception, and education, this right of privacy must also protect individuals' control over the development of their identities.[156] Since sealed records laws deny adoptees access to this personally vital information, these laws limit adoptees' ability to make such decisions and commitments.

The argument that the right of privacy requires that adoptees be given access to information about their identities will probably be rejected by the courts. Unlike the right to be free from governmental intrusion with respect to decisions concerning marriage,[157] the right of privacy asserted by adoptees conflicts with the privacy rights of their natural and adoptive parents. Even if courts recognize the adoptees' claim as a privacy right, they are likely to find it is outweighed by the states' interest in protecting the privacy rights of natural parents. Already the few courts which have faced this right of privacy claim have rejected it either upon

---

[152] Mills v. Atlantic City Dep't of Vital Statistics, 148 N.J. Super. 302, 313-14, 372 A.2d 646, 652 (1977).

[153] Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965).

[154] *The Adult Adoptee's Constitutional Right, supra* note 21, at 1208.

[155] Roe v. Wade, 410 U.S. 113, 169, 170 (1973) (Stewart, J. concurring), quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[156] *The Adult Adoptee's Constitutional Right, supra* note 21, at 1208. In ALMA Soc. Inc. v. Mellon, 459 F. Supp. 912 (S.D.N.Y. 1978) the plaintiffs argued, *inter alia*, that the sealing of adoption records may cause adoptees to inadvertently engage in incestuous marriage. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 55.

[157] Loving v. Virginia, 388 U.S. 1, 12 (1967).

the ground that the claim was not protected by the right of privacy[158] or that such a right has been permissibly subordinated to natural parents' right of privacy.[159]

In summary, the recent cases interpreting the good cause requirement of sealed records laws indicate a willingness by a few courts to treat the good cause requirement as a more flexible standard. At the same time, courts have rejected the various constitutional arguments by characterizing the state interest in sealed records as the protection of the natural parents' and adoptive families' privacy interests so as to encourage future use of the adoptive process. The courts have found this state interest to outweigh any possible right of access which adoptees might have. Given the inadequate legislative and judicial responses to the adoption records controversy, some other entity may be in a better position to take the lead in reforming the system.

IV. The Emerging Role of the Adoption Agency

The inability of most legislatures and courts to depart from decades of sealed records policies requires adoption agencies to take the lead in this difficult area. Given their role in the adoption process, adoption agencies have the greatest familiarity with the parties and records which might be involved in any information request. When compared with the courts, adoption agencies appear better equipped to handle all the problems inherent in dealing with a request for sealed information. Finally, adoption agencies can do much to alleviate the basic problem of access by educating the parties as to the others' needs.

Adoption agencies are in a superior position to deal with the parties and the subject matter involved in the sealed records controversy. Adoption agencies are responsible for handling the relinquishment of a child for adoption by its natural parents.[160] These agencies also arrange the placement of the child with adoptive parents after conducting an investigation of the adoptive

---

[158] In Mills v. Atlantic City Dep't of Vital Statistics, 148 N.J. Super. 302, 310, 372 A.2d 646, 650 (1977) the court decided that the information sought by the petitioners was "not so intimately personal as to fall within the zones of privacy implicitly protected in the penumbra of the Bill of Rights."

[159] In In re Maples, 563 S.W.2d 760, 763 (Mo. 1978) the court reasoned that since the state's primary interest is in fostering an effective scheme of adoption, if any right of privacy is to predominate it must be that of the natural parents who make the initial decision to relinquish their child.

[160] *See* Child Welfare League of America, (CWLA) Standards for Adoption Service: Revised, §§ 2.2, 2.4 (rev. ed. 1973). *See* also note 43 *supra* and note 174 *infra.*

family's suitability.[161] Throughout the process of relinquishment, investigation, placement and obtaining court approval of the adoption, the agency becomes familiar with the needs and concerns of the parties involved.[162] In addition to its close dealings with the parties, the agency usually collects and retains detailed information about each of the parties to the adoption triangle.[163] To the extent existing adoption records laws do not place mandatory seals upon agency records as well as court records and birth certificates,[164] agencies can adopt certain policies which will assist adoptees in learning their identities without harming the natural or adoptive parents.

Agencies can start to fulfill the adoptees' need to know without unduly compromising the natural parents' rights by uniformly gathering comprehensive nonidentifying information about adoptees' natural families.[165] This information can then be shared with the adoptee, preferably through the adoptive parents,[166] without prejudice to the natural parents' right of privacy. Similar nonidentifying information about the development of the adoptee should be made available to the natural parents.[167] Both the natural parents and the adoptive parents should be encouraged to update this nonidentifying information since this will give the parties a more realistic "view" of one another.

Since current laws generally do not prevent the consensual release of identifying information by the natural parents to adult adoptees,[168] adoption agencies should assume responsibility for collecting such consent from willing natural parents. Under current laws, most agencies would also be free to serve as informal registries for requests by adult adoptees and natural parents who desire to meet each other.[169] Such meetings should be arranged

---

[161] *Id.* ch. 4.

[162] *Id.* § 1.7.

[163] *See* note 36 and accompanying text *supra.*

[164] *See* note 35 and accompanying text *supra.*

[165] Klibanoff, *supra* note 10, at 197.

[166] THE ADOPTION TRIANGLE, *supra* note 2, at 223-24.

[167] *Id.* at 224.

[168] None of the sealed records statutes expressly prohibit the release of identifying information once consent has been given by the natural parents. There are indications, however, that some states, such as California, interpret their laws to prohibit the release of agency records even if the natural parents give their consent. Interview with Ms. Barbara Merritt, Social Service Consultant, California State Department of Social Services (Nov. 1, 1978).

[169] THE ADOPTON TRIANGLE, *supra* note 2, at 223.

only in the case of mutual requests by adoptees and their natural parents.[170]

Furthermore, agencies can prevent some of the future problems involving adoptee access by counseling both the adoptive parents and the natural parents about the advantages and disadvantages of greater openness between the parties.[171] If natural parents consent to the release of identifying information to the adoptive parents from the start of the adoptive relationship, adoptive parents will be in a position to fully answer young adoptees' questions about their identities as they arise, thereby eliminating the possible adverse effects of an unfulfilled need to know. At the same time, natural parents, particularly natural mothers, could be fulfilling their own need to let their children know that they still cared about them.[172] Finally, the natural parents could be kept informed by the agency of the child's development through information supplied by the adoptive parents. The knowledge that the child is developing a normal parent-child relationship within the adoptive family will enable many natural parents to dispel their feelings of guilt resulting from the decision to relinquish their unwanted children.[173]

Admittedly, the type of adoption relation described above would not be suitable or acceptable to all parties in all cases. At the time of relinquishment,[174] many natural mothers are simply not prepared to share the circumstances and causes of the relinquishment with others such as the adoptive parents by revealing their identities.[175] Agencies, however, can be sensitive to the particular circumstances of each case and can suggest such arrangements under the appropriate conditions.

The goal of the agencies should not be to force all natural parents and adoptive parents to consent to open adoption records. Instead, these agencies should take all steps possible to counsel the parties and to facilitate the exchange of information where the parties are willing. Once the parties are made aware of these alternatives, consensual releases of identifying information

---

[170] *Id.*

[171] *See* Baran, Pannor, & Sorosky, *Adoptive Parents and the Sealed Record Controversy*, 55 SOCIAL CASEWORK 531, 536 (1974).

[172] THE ADOPTION TRIANGLE, *supra* note 2, at 54.

[173] *Id.* at 54, 222.

[174] Relinquishment is the legal process by which a natural parent voluntarily terminates parental rights and responsibilities to a child. *See* REPORT OF RESEARCH PROJECT, *supra* note 17, at 5. *See also* CAL. CIV. CODE § 224m (West 1954 & Cum. Supp. 1979).

[175] In re Maples, 563 S.W.2d 760, 763 (Mo. 1978).

should increase significantly. An increased flow of identifying information and an increased number of successful reunions will hopefully alert both the legislatures and the courts to the advantages of permitting greater access to adoption records.

V. Conclusion

In recent years, many adoptees curious about their ancestries have begun to seek information about their natural parents. New scientific evidence which supports adoptees' psychological need to know serves to fuel their interest. As a consequence, many adoptees are now seeking to overturn laws denying them access to their adoption records and original birth certificates.

It is apparent that most state legislatures and courts still believe that a viable system of adoption requires the anonymity of natural parents at all stages of adoptees' lives. The blanket assumption that all natural parents desire anonymity throughout their lives may be unjustified. Recent studies indicate that many natural parents support adoptees' right to know their identities. Moreover, growing numbers of natural parents appear willing to exchange current nonidentifying information about themselves with the adoptive family for similar information about the adoptee. There are also increasing numbers of natural parents interested in meeting their child if such a meeting would be beneficial to the child.

Proponents of open adoption records have suggested legislative, judicial, and agency approaches to the adoption records controversy. All but a few legislative proposals for more open records, however, have been rejected. In some cases, state legislatures have even further restricted access to adoption records. The judicial approach to the adoption records controversy has met with partial acceptance. On the one hand, a few courts have shown a willingness to construe good cause requirements with more flexibility. On the other hand, the constitutional challenges to the sealed records laws have all failed.

The general inadequacy of legislatures and courts to address the adoption records controversy requires adoption agencies to take the lead in the transition from sealed adoption records to more open records. The perceived need for secrecy and anonymity should not prevent agencies from collecting and releasing comprehensive nonidentifying information concerning natural parents. The states' interest in withholding such information is not justified. Adoption agencies can also take advantage of their expertise and close working relationship with the parties to an adop-

tion by counseling natural and adoptive parents about adoptees' psychological need to learn their identity. Finally, adoption agencies should encourage natural parents who feel less need for anonymity to consent to the release of identifying information which would help their children to fulfill their psychological need to know.

Jeffrey C. Chang