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# Adoption

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## Adoption

In historical terms, the legal institution of adoption in the United States is relatively new. It was between the mid-1800s and the 1920s that the states began to pass laws providing for the adoption of children. Before then children had been adopted informally and in some instances by individual legislative acts, or they had come to live with other families under indenture contracts or as a result of legislation authorizing charitable organizations to place children. Under these new adoption statutes, initially the court records of adoptions were not subject to **confidentiality**, and adopted children were not issued new **birth certificates**. Over time, states began to issue new birth certificates and, gradually, to close adoption records—to the public, to all parties to the adoption except for the adult adoptee, and ultimately (in almost all the states by 1990) to the adult adopted individuals themselves.

The notion of privacy is a complex one in relation to adult adoptees' access to their own original birth certificates. Denying adult adoptees access preserves the **secrecy** of the birth parent's identity, but it also keeps information about the adoptee's own birth and identity secret. Beginning in the late 1960s and the 1970s, a movement to restore adult adoptees' access to their records has been led by a coalition of adoptees, birth parents, and adoptive parents. In response to this movement, a number of states have opened to adult adoptees birth records that were not closed at the time of their births, and have prospectively provided for such access in future adoptions. A number of other states also have opened original birth records that were closed at the time they were prepared. Mechanisms established in most of these states to protect birth parents' privacy consist of either "contact vetoes," which permit birth parents to choose whether they wish to be contacted by adoptees, or "**disclosure** vetoes," which permit birth parents to prohibit the release of identifying information. Many other states have considered but not enacted similar "open records" legislation. Opponents of the legislation argue that it violates promises of confidentiality and denies the privacy of birth parents. In legal challenges to the laws that have opened records, the courts have held that neither state law nor the U.S. Constitution guarantees lifelong **anonymity** for birth parents.

The 1930s were a key period in the history of adoption records. States then began providing for the issuance of new birth certificates in which the adoptive parents' names were substituted for the birth parents' names. Also during the 1930s and early 1940s, many states enacted laws to make adoption records confidential. Most of these laws restricted access to the parties to the proceedings. By the mid-1940s more than half the states reportedly protected adoption court records from public inspection. By 1955, according to legal commentators of the time, it had become commonplace and noncontroversial to make the records available only by court order, and to keep the original birth certificates available to adult adoptees but make them accessible to others only by court order.

Rapid changes in state laws continued, however, and by 1960 twenty-eight states reported to the federal government that they made original birth certificates available only by court order, although in a number of those states access to court records remained available to the parties of the proceedings. Twenty states reported making original birth certificates available on demand to adult adoptees. Of those states, four closed the birth records to adult adoptees as well as to the public in the 1960s, seven more did so in the 1970s, and another seven did so after 1979. Two states, Alaska and Kansas, never closed the original birth records to adult adoptees.

In the period from the 1930s through the 1960s, the reasons proffered for closing adoption records were, first, to protect adoptees and their families from public disclosure of the circumstances of the adoptee's birth and, second, in adoptions in which the adoptive parents and birth parents did not know one another, to protect adoptees and their adoptive families from interference or harassment by birth parents. Many commentators and courts later assumed that one important reason for closing the records was to permanently conceal the identities of birth parents; however, in the legal, social service, and other social science literature of the time there is virtually no discussion of the need to protect birth parents from adult adoptees who might seek information about their original families. On the contrary, leading legal and social service authorities in the 1940s and 1950s recommended that original birth certificates remain available to adult adoptees. This was the recommendation, for example, of the United States Children's Bureau, one of the most influential national voices in adoption law and practice: it was echoed by the American Association of Registration Executives and in the first Uniform Adoption Act, which was promoted in 1953 by the National Conference of Commissioners on Uniform State Laws. The surrender documents that many birth mothers signed required them to promise not to search out their children or their children's adoptive families, and in many cases the adoptive parents retained documents that contained the birth mother's name. With respect to counseling birth mothers, the most influential private child welfare organization, the Child Welfare League of America, advised adoption services providers to make it clear to birth mothers that they have no right to any information about the children they placed for adoption.

It is only possible to speculate as to why many states were closing birth records to adult adoptees when the stated reasons for doing so related only to protection of the adoptee and adoptive **family**, and when adoption services and adoption law experts were recommending keeping original birth certificates available to adult adoptees. The policy of closing records to adult adoptees appears to have been associated with changing ideas about adoption rather than with remedying any

problems that had arisen as a result of adult adoptee access. As records were closed generally to the public and then to the parties, and as adoption increasingly came to be seen as a perfect substitute for family formation via childbirth, it appears that lifelong secrecy came to be regarded as an essential feature of adoptions in which birth and adoptive parents are unknown to one another.

After World War II adoption became increasingly popular in an atmosphere that strongly encouraged the establishment of traditional families and in which nature—that is, genetic inheritance—was no longer viewed as more important than nurture—or environment—in the development of children. Psychological literature began to portray unmarried, expecting white women, at least, as having become pregnant because of emotional problems. If these women placed their children for adoption, they could avoid the powerful stigma attached to unwed motherhood, and could be helped to become stable wives and mothers later on. In the process, infertile couples would have an opportunity to form families. Adoption agencies increasingly engaged in “matching” practices, attempting to carefully match infants and adoptive parents on the basis of socioeconomic status and expected intellectual capacity, as well as physical characteristics. If adoptive families were truly to be no different from biological ones, then the sealing of records would make their legal documentary existence identical. Closed records, of course, would also shield adoption arrangements from later scrutiny, to the advantage of less-than-scrupulous adoption providers.

As lifelong secrecy became viewed as a desirable if not essential feature of adoption, adult adoptees who sought information about their birth families increasingly were seen as emotionally disturbed and ungrateful, and even as posing a threat to their birth parents. In opposition to such attitudes, and inspired in part by several books by adoptees—including social worker Jean Paton, adoptees’ rights advocate Florence Fisher, and psychologist Betty Jean Lifton—a nationwide advocacy movement developed in the 1960s and early 1970s seeking greater openness in adoption, including adult adoptee access to original birth certificates. In the following years, adoptees individually sought access to records, arguing in court, usually without success, that there was good cause for opening their records. Collectively, adoptees argued in court, again usually unsuccessfully, that they had a constitutional right to the information in their records. At the same time, studies were showing that most birth parents either were willing or wished to be contacted by the child or children they had relinquished. Other studies, professionals involved in adoption, and national professional organizations began characterizing adoptees’ interest in their birth families as a normal and natural part of adoption. By the end of the century, the movement for greater openness had led to the creation of hundreds of mutual support organizations and search services for adoptees and birth parents seeking information about or contact with one another.

In 1980 an advisory panel of the U.S. Children’s Bureau drafted a model state adoption act under which adult adoptees would have access to both original birth certificates and court records. After receiving negative comments on the draft, however, the Department of Health, Education, and Welfare ultimately promulgated a model law dealing only with the adoption of children with special needs. Instead of opening adoption records, many states began establishing passive or active mutual consent registries, or both, through which adoptees and birth relatives could



exchange information or make contact. In passive registries both parties must register and provide sufficiently detailed and accurate information to establish a match; success rates for those using these registries are very low. In active registry systems one party, most often the adult adoptee, can register and have an intermediary conduct a search for the birth parents.

Whether today's adult adoptees are successful in their search for information about birth relatives depends on factors such as the information the adoptive families already have in their possession; the luck, experience, and resources adoptees have in their search for birth relatives, often including the funds they have available for hiring private assistance; and the states in which they were born and adopted. In recent years, four states have opened to adult adoptees records that had been sealed when they were adopted, one state has agreed to open records to adult adoptees unless a birth parent has filed a disclosure veto, an additional number of states have opened records prospectively and have opened records that were not closed at the time the adoptions were made, and both Alaska and Kansas have continued to provide unrestricted access to original birth certificates by adult adoptees.

Tennessee was the first of the four states that in recent years have provided unrestricted access to adult adoptees. In 1995 Tennessee enacted legislation allowing adoptees who are at least 21 years old to access their original birth certificates as well as the court and agency records of their adoptions. Protection of the privacy of birth parents whose children were born after the date records were closed is provided by a contact veto system (and a disclosure veto option for living birth parents in cases of rape or incest). Birth parents and other specified birth relatives may register their willingness or unwillingness to have contact, and contact initiated in violation of a contact veto is both a misdemeanor and grounds for a civil suit. In 1998 Oregon citizens voted in a ballot initiative for a state constitutional amendment allowing adoptees 21 years of age and older to receive copies of their original birth certificates upon request. Birth parents may file contact preference forms on which they indicate whether they would like to be contacted and, if so, whether they would prefer to be contacted through an intermediary. Alabama, in 2000, and most recently New Hampshire, in 2004, also passed laws under which adult adoptees may receive copies of their original birth certificates upon request. In both of those states, birth parents may file contact preference forms to indicate whether they wish to be contacted directly, whether they wish to be contacted through an intermediary, or whether they would prefer not to be contacted but have an updated medical form available to the adoptee.

In Delaware, under a law that took effect in 1999, birth parents may file a disclosure veto blocking the release of identifying information. The veto must be periodically renewed. When an adult who was adopted before the law was enacted requests a copy of an original birth certificate, and there is no veto on file, the state attempts to notify the birth parents. Sixty-five days after the request, if no veto has been filed as a result of the state's efforts, a copy is provided to the adoptee. Similar options to the disclosure veto are available in the states that have opened records prospectively. These states include Colorado, Hawaii, Maryland, Montana, Nevada, Oklahoma, Washington, and Vermont. States that have re-opened some records that were not sealed when the adoptions took place include Ohio, Michigan, and Montana.

Both Tennessee's and Oregon's laws providing adult adoptees with access to records were challenged unsuccessfully in court. The parties challenging the Tennessee law—two unnamed birth mothers, an adoptive couple, and a child-placing agency—argued in federal court that the law violates the constitutional rights of birth mothers to familial privacy, to reproductive privacy, and to the nondisclosure of private information. The United States Court of Appeals for the Sixth Circuit in 1997 held, first, that the law does not interfere with any constitutional right to marry and bring up children or with any right individuals may have to either adopt or give up children for adoption. Second, the court held that the right to give up a child for adoption is not part of a constitutional right to reproductive privacy, and that even if it were, such a right would not be unduly burdened by the law. Finally, the court held that the Constitution does not include a general right to nondisclosure of private information.

The challengers then filed suit in state court, claiming that the law impairs the vested rights of birth parents who surrendered children under prior law, and also that it violates the right to privacy guaranteed by the Tennessee Constitution. In its 1999 decision, the Supreme Court of Tennessee noted that early adoption statutes had not sealed records, and that later amendments permitted disclosure to an adoptee if a court found that disclosure was in the adoptee's and the public's best interest. The court concluded, therefore, that there had never been "an absolute guarantee or even a reasonable expectation" that records were permanently sealed (*Doe v. Sundquist* 1999, 925). The court explained that when courts made determinations that records should be disclosed, there was no requirement that birth parents be notified. In addition, the court held that under the Tennessee Constitution, the law does not infringe on familial privacy rights related to marrying and having children, does not interfere with the right to procreational privacy, and does not implicate any right to nondisclosure of personal information.

Similarly, the Oregon law was challenged in the state courts. In a 1999 decision of the Oregon Court of Appeals, to which the Oregon Supreme Court denied review, the court's reasoning was similar to that of the Tennessee Supreme Court. According to the court, Oregon adoption laws had never "prevented all dissemination of information concerning the identities of birth mothers. At no time in Oregon's history have the adoption laws required the consent of, or even notice to, a birth mother on the opening of adoption records or sealed birth certificates" (*Does v. State* 1999, 832). The court further noted that under Oregon law, the decision to seal the original certificate was within the discretion not of birth parents but of the adoptive parents, the adoptee, or the court granting the adoption. The court concluded that earlier state law had not indicated any intent to enter into a statutory contract with birth mothers to prevent disclosure of their identities and, therefore, the new law does not impair obligations of contract in violation of the Oregon Constitution. If employees of private entities or even state agents misrepresent state law, the court said, they cannot bind the state to arrangements in contravention of state law.

Rejecting the challengers' additional claims that the law violates state and federal constitutional rights to privacy, the Oregon court noted that adoption had been unknown at common law, that early adoption statutes had no provisions for protecting the identity of birth mothers, and that there is neither a fundamental right to





place a child for adoption nor a correlative right to place a child for adoption under circumstances that guarantee her anonymity. Unlike a unilateral decision to prevent pregnancy or not to carry a pregnancy to term, placing a child for adoption "requires, at a minimum, a willing birth mother, a willing adoptive parent, and the active oversight and approval of the state" (see *Does v. State* 1999, 836).

*See also:* **Health privacy; Reproductive rights**

**Suggested Reading:** Cahn, Naomi R., and Joan Heifetz Hollinger. *Families by Law: An Adoption Reader*. New York: New York University Press, 2004; Cahn, Naomi R., and Jana Singer. "Adoption, Identity, and the Constitution: The Case for Opening Closed Records," *University of Pennsylvania Journal of Constitutional Law* 2 (1999): 150–194; Carp, Wayne C. *Adoption Politics: Bastard Nation and Bully Initiative* 58. Lawrence: University Press of Kansas, 2004; Carp, Wayne C. *Family Matters: Secrecy and Disclosure in the History of Adoption*. Cambridge, MA: Harvard University Press, 1998; Samuels, Elizabeth J. "The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records," *Rutgers Law Review* 53 (2001): 367–437; Weegar, Katarina. *Adoption, Identity, and Kinship: The Debate over Sealed Birth Records*. New Haven, CT: Yale University Press, 1997.

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