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# CLOSED ADOPTION: AN ILLUSORY PROMISE TO BIRTH PARENTS AND THE CHANGING LANDSCAPE OF SEALED ADOPTION RECORDS

*Bryn Baffer\**

Over the past decade, the number of websites using deoxyribonucleic acid (“DNA”) to allow users to peer into their heritage and health has skyrocketed. In 2002, the already established ancestral search company, Ancestry, entered the DNA testing business.<sup>1</sup> In 2006, 23andMe was founded.<sup>2</sup> In 2012, Ancestry developed AncestryDNA, an autosomal test that provides users with information about their ethnicity.<sup>3</sup> An autosomal DNA test matches one’s DNA with the DNA of people of common ancestry to allow one to discover his or her ethnic origin and DNA relatives.<sup>4</sup> Although many of these companies have been established for at least a decade, popular interest in them continues to increase.<sup>5</sup>

The consumer interest in discovering what DNA can reveal has seen a large increase in recent years.<sup>6</sup> In 2011, 23andMe’s database had one hundred

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<sup>1</sup> *Our Story*, ANCESTRY, <https://www.ancestry.com/corporate/about-ancestry/our-story> (last visited Apr. 22, 2020).

<sup>2</sup> *About Us*, 23ANDME, <https://mediacenter.23andme.com/company/about-us/> (last visited Apr. 2, 2020).

<sup>3</sup> Ken Chahine, *Comments on Y-DNA and mtDNA Tests*, ANCESTRY (June 12, 2014), <https://blogs.ancestry.com/ancestry/2014/06/12/comments-on-y-dna-and-mtdna-tests/>.

<sup>4</sup> *Y-DNA, mtDNA, and Autosomal DNA Tests*, ANCESTRY, <https://support.ancestry.com/s/article/Y-DNA-mtDNA-and-Autosomal-DNA-Tests> (last visited Apr. 22, 2020).

<sup>5</sup> Charmaine D. Royal et al., *Inferring Genetic Ancestry: Opportunities, Challenges, and Implications*, 86 AM. J. HUM. GENETICS 661, 661 (2010).

<sup>6</sup> Antonio Regalado, *2017 Was the Year Consumer DNA Testing Blew Up*, MIT TECH.

thousand users.<sup>7</sup> By 2015, 23andMe had surpassed one million users.<sup>8</sup> Currently, 23andMe has over twelve million individuals within its DNA database.<sup>9</sup> There has been rapid growth in consumer interest in discovering what an individual's DNA could reveal about their ethnic origins.<sup>10</sup>

The process of determining one's genetic composition has become user-friendly and the information discovered has often proven to be beneficial.<sup>11</sup> For a relatively affordable price between \$99 and \$199, customers can purchase a home testing kit and send their DNA to 23andMe's lab.<sup>12</sup> All customers need to do is spit into a tube and place it in the mail.<sup>13</sup> From there, 23andMe analyzes the genetic composition of the DNA sent and compares it to thousands of data points in its ethnic database.<sup>14</sup> Each customer then receives a detailed report that separates their ethnic heritage into percentages.<sup>15</sup> Depending on which home kit is purchased, customers may also have the opportunity to discover if they have any genetic predispositions to certain diseases, such as Parkinson's disease or Celiac disease.<sup>16</sup>

In addition to tracing heritage, 23andMe also analyzes overlapping chromosome segments and matches customers with relatives according to their DNA results.<sup>17</sup> Customers have the option to either opt in or opt out of the DNA Relative Finder.<sup>18</sup> As 23andMe once advertised, "It's a new social network, with

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REV. (Feb. 12, 2018), <https://www.technologyreview.com/s/610233/2017-was-the-year-consumer-dna-testing-blew-up/> (explaining that Ancestry tested more than 7 million people in 2017 and 23andMe tested more than 3 million).

<sup>7</sup> *23andMe Database Surpasses 100,000 Users*, 23ANDME (June 15, 2011), <https://mediacenter.23andme.com/press-releases/23andme-database-surpasses-100000-users/>.

<sup>8</sup> *23andMe Genotypes One Millionth Customer*, 23ANDME (June 18, 2015), <https://mediacenter.23andme.com/press-releases/23andme-1million/>.

<sup>9</sup> *About Us*, *supra* note 2.

<sup>10</sup> Regalado, *supra* note 6.

<sup>11</sup> Tina H. Saey, *What Genetic Tests from 23andMe, Veritas and Genos Really Told Me About My Health*, SCIENCE NEWS (May 22, 2018), <https://www.sciencenews.org/article/review-genetic-tests-23andme-veritas-genos-health-comparison>.

<sup>12</sup> *Three Easy Ways to Discover You.*, 23ANDME, <https://www.23andme.com/compare-dna-tests/> (last visited Apr. 22, 2020).

<sup>13</sup> *Three Steps. It's Simple.*, 23ANDME, <https://www.23andme.com/howitworks/> (last visited Apr. 22, 2020).

<sup>14</sup> *Ancestry Composition: 23andMe's State-of-the-Art Geographic Ancestry Analysis*, 23ANDME, <https://www.23andme.com/ancestry-composition-guide/> (last visited Apr. 22, 2020).

<sup>15</sup> *Three Steps. It's Simple.*, *supra* note 13.

<sup>16</sup> *Health + Ancestry Service*, 23ANDME, <https://www.23andme.com/dna-health-ancestry/> (last visited Apr. 22, 2020).

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

<sup>18</sup> *DNA Relatives Privacy & Display Settings*, 23ANDME, <https://customercare.23andme.com/hc/en-us/articles/212170838-DNA-Relatives-Privacy->

a genetic twist.”<sup>19</sup> After customers opt in to the DNA Relative Finder, they can connect through the website and message each other.<sup>20</sup> Even if a genetic relative does not accept the invitation to connect, all DNA matches can still see “the percent DNA and number of segments [they] share ... [and] [r]elatives in common.”<sup>21</sup> Overall, the DNA Relative Finder has made it much easier to find relatives.

In the United States, adoption is a significant component of family-building. A National Council for Adoption (“NCFA”) study stated, “Some experts estimate that 100 million Americans have either been personally touched by adoption within their families or know someone who is or has adopted.”<sup>22</sup> Although there are alternative ways of creating a family, such as surrogacy, adoption has remained a key family formation tool.<sup>23</sup> The Children’s Bureau of the Health and Human Service’s Administration for Children and Families released data that shows 63,100 adoptions during fiscal year 2018 involved a child welfare agency.<sup>24</sup> Given that so many Americans are personally affected by adoption, the laws that apply to adoption need to effectively protect the interests of the adoptee, the birth parents, and the adoptive parents.

Over the past few years, 23andMe and adoptees have formed an unusual partnership. Through this website, adoptees are able to discover individuals with similar genetics.<sup>25</sup> In fact, 23andMe specifically advertises to adoptees.<sup>26</sup> The website even shares multiple stories of adoptees finding their respective birth families.<sup>27</sup> Gavin Kennedy is one such adoptee; he found his biological father

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Display-Settings (last visited Feb. 25, 2020).

<sup>19</sup> Anna Hecht, *Unlock Your Family History with 25% Off 23andMe DNA Kits*, CNN (June 19, 2018), <https://www.cnn.com/2018/06/19/cnn-underscored/23andme-deal-dna-kits-sale-shop/index.html>.

<sup>20</sup> *DNA Relatives Privacy & Display Settings*, *supra* note 18.

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

<sup>22</sup> Jo Jones & Paul Placek, *Adoption by the Numbers*, NAT’L COUNCIL FOR ADOPTION (Feb. 15, 2017), <https://www.adoptioncouncil.org/publications/2017/02/adoption-by-the-numbers>.

<sup>23</sup> *Adoption After Infertility*, ADOPTION NETWORK, <https://adoptionnetwork.com/how-to-adopt-a-baby/adoption-after-infertility> (last visited Mar. 4, 2020) (showcasing the benefits and ways to adopt).

<sup>24</sup> U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 1 (2019), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf>; *New Data Show 1st Foster Care Decrease Since 2011, Record Number of Adoptions*, ADMIN. FOR CHILD. & FAMILIES (Oct. 24, 2019), <https://www.acf.hhs.gov/media/press/2019/new-data-show-1st-foster-care-decrease-since-2011-record-number-of-adoptions>.

<sup>25</sup> *DNA Relatives Privacy & Display Settings*, *supra* note 18; Gary Clapton, *Helping Adopted Children Find Their Lost Relatives Is in Our DNA*, SCOTSMAN (Apr. 12, 2019), <https://www.scotsman.com/news/opinion/dr-gary-clapton-helping-adopted-children-find-their-lost-relatives-is-in-our-dna-1-4905704>.

<sup>26</sup> *Customer Stories*, 23ANDME, <https://www.23andme.com/stories/> (last visited Apr. 22, 2020).

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

through 23andMe and was then able to meet the rest of his biological family at a family wedding.<sup>28</sup> His story is not uncommon, and there is a growing trend among adoptees to use DNA companies to find their biological families.<sup>29</sup> Through DNA matches with biological relatives, adoptees are bypassing adoption laws in place to protect the privacy of birth families.<sup>30</sup>

Although using DNA technology to find one's biological family is a great example of human ingenuity, this practice has also created a problem for adoption record laws. Many states do not allow an adoptee to access his or her Original Birth Certificate ("OBC") or adoption record.<sup>31</sup> Due to 23andMe, these laws have become irrelevant. Adoptees are finding their respective birth families, but the privacy interests of the parties involved in the adoption process are not being protected.<sup>32</sup> For that reason, there needs to be a system that protects the privacy of the birth parents who wish to remain anonymous while still recognizing that adoptees are entitled to certain types of information.

This Comment will analyze how direct-to-consumer DNA testing kits allow for the circumvention of current sealed adoption laws. It will discuss the need to protect the interests of all parties involved in the adoption process and suggest a Uniform Model Act as a solution. The prior law section will lay out the current state of American adoption law and the protocol for handling adoption records. This Comment will also trace the evolution of adoption law and provide reasons for the development of the current law. The Comment will then review the four main ways states treat adoption records. The explanation will highlight the

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<sup>28</sup> S.I. Rosenbaum, *The Twilight of Closed Adoptions*, BOS. GLOBE, <https://www.bostonglobe.com/ideas/2018/08/04/the-twilight-closed-adoptions/11u4c5da4W5qNbIPn5IEml/story.html> (last updated Aug. 4, 2018, 9:00 AM).

<sup>29</sup> *Id.*; Tara Bahrapour, *DNA's New 'Miracle': How Adoptees Are Using Online Registries to Find Their Blood Relatives*, WASH. POST (Oct. 12, 2016), [https://www.washingtonpost.com/local/social-issues/dnas-new-miracle-how-adoptees-are-using-online-registries-to-find-their-blood-relatives/2016/10/12/10433fec-8c48-11e6-bf8a-3d26847eed4\\_story.html?utm\\_term=.2a20a1235929](https://www.washingtonpost.com/local/social-issues/dnas-new-miracle-how-adoptees-are-using-online-registries-to-find-their-blood-relatives/2016/10/12/10433fec-8c48-11e6-bf8a-3d26847eed4_story.html?utm_term=.2a20a1235929) (explaining that professional family finders now use DNA websites to find birth families for people); Meagan Flynn, *A Baby Was Abandoned in a Phone Booth 64 Years Ago. Now, DNA Has Helped Explain Why.*, WASH. POST (Aug. 20, 2018, 6:52 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/08/20/a-baby-was-abandoned-in-a-phone-booth-64-years-ago-now-dna-has-helped-explain-why/> (showing how one man found his family through a DNA website); Clapton, *supra* note 25.

<sup>30</sup> Rosenbaum, *supra* note 28.

<sup>31</sup> *State Adoption Legislation*, AM. ADOPTION CONGRESS, <https://www.americanadoptioncongress.org/state.php> (last visited Apr. 22, 2020) (providing a list of states and their access to OBCs for adult adoptees).

<sup>32</sup> Rosenbaum, *supra* note 28; Brenda M. Cotter, *As You Were Saying ... Time to Open Adoption Records*, BOS. HERALD (Apr. 23, 2016), [http://www.bostonherald.com/opinion/op\\_ed/2016/04/as\\_you\\_were\\_saying\\_time\\_to\\_open\\_adoption\\_records](http://www.bostonherald.com/opinion/op_ed/2016/04/as_you_were_saying_time_to_open_adoption_records); Clapton, *supra* note 25 (explaining that relatives may be unaware an adoption even occurred).

differences between the systems and point out the few commonalities that exist between the various state approaches. In the analysis section, the current methods of handling records and personal information will be compared to the privacy strategies utilized by companies specializing in Assisted Reproductive Technology (“ART”). This section will then merge current adoption record law with the privacy strategies being employed by the largest sperm bank in the country to minimize the harm to donor privacy caused by direct-to-consumer DNA tests. In conclusion, this Comment will propose a Uniform Model Act that modifies current approaches to adoption law and attempts to protect the privacy of all interested parties.

## I. THE EVOLUTION OF RECORD SEALING LAWS

Historically, American domestic adoptions have been “closed” or completely confidential.<sup>33</sup> A closed adoption is “[a]n adoption in which the birth parent(s) and the adoptive parent(s) do not meet, do not exchange identifying information, and do not maintain contact with each other. Court records are usually sealed as well.”<sup>34</sup> Professor Ellen Herman of the University of Oregon summarized closed adoption as, “the idea that adoption substituted one family for another so carefully, systematically, and completely that natal kinship was rendered invisible and irrelevant.”<sup>35</sup> Throughout the 1900s, social workers and parents thought it was best for a child to live as if he or she was born into the adopted family, with little to no information about his or her birth family.<sup>36</sup> However, by the 1970s, closed adoptions had become the norm.<sup>37</sup>

Because of this idea that adoptees would not thrive if they knew their origins, states have passed bills limiting the information available to adoptees.<sup>38</sup> In 1917, Minnesota passed the first sealed adoption records law.<sup>39</sup> Under that law, however, adoptive parents, adoptees, and birth parents could still view the records.<sup>40</sup> Minnesota’s 1917 law primarily focused on the privacy of the parties involved and keeping the covered information from society at large, not

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<sup>33</sup> Rosenbaum, *supra* note 28.

<sup>34</sup> *Common Terms/Definitions*, ACAD. OF ADOPTION & ASSISTED REPROD. ATT’YS, <https://adoptionart.org/adoption/common-terms-definitions/> (last visited Apr. 22, 2020).

<sup>35</sup> Rosenbaum, *supra* note 28.

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

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (providing the evolution of record sealing laws).

<sup>39</sup> Rotem Peretz, *At A Glance: Adoptees Right to Know – The Decades-Long Battle for Unsealing Adoption Records*, SETON HALL U.: EREPOSITORY: L. SCH. STUDENT SCHOLARSHIP, 3–4 (May 1, 2013), [https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1284&context=student\\_scholarship](https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1284&context=student_scholarship).

<sup>40</sup> *Id.* at 4.

necessarily from parties to the adoption.<sup>41</sup> Nevertheless, Minnesota started the trend, and by the 1940s most states had enacted laws requiring adoption records to be sealed.<sup>42</sup> By the 1950s, almost all states had comparable statutes that sealed adoption records.<sup>43</sup>

In addition to sealing adoption records, states also started issuing amended birth certificates following adoptions.<sup>44</sup> By the 1960s, most states would place an adoptee's original birth certificate in the sealed court file.<sup>45</sup> The state would then issue an amended birth certificate that replaced the biological parents' names with the names of the adoptive parents, as if the adoptive parents had given birth to the child.<sup>46</sup> The rationale behind creating an amended birth certificate was that it would ease the transition between families for the adoptees and help connect them to their adoptive families.<sup>47</sup>

The push to seal adoption records and issue amended birth certificates was not to protect the privacy of the birth parents, but to protect the adoptee from the "stigma of 'illegitimacy.'" <sup>48</sup> However, the record sealing laws were enacted before many of the ground-breaking cases focused on women's rights were decided.<sup>49</sup> In 1965, the Supreme Court held that married couples have the right to privacy, which includes the right to seek contraception.<sup>50</sup> In 1972, the court extended this right to privacy to unmarried people when it decided *Eisenstadt v. Baird*.<sup>51</sup> Only a year later in 1973, *Roe v. Wade* further extended the right to privacy established in *Griswold* to include a woman's right to seek an abortion.<sup>52</sup> At the time, being an unwed mother was considered shameful and viewed negatively by society.<sup>53</sup> Since there was little access to contraceptives or legal abortions before these landmark cases, pregnant women had few options outside

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<sup>41</sup> *Id.* at 5.

<sup>42</sup> *Id.* at 4.

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

<sup>44</sup> See *Amending a Birth Certificate After Adoption*, JUSTIA, <https://www.justia.com/family/adoptions/adoption-procedures/amending-birth-certificate/> (last updated Aug. 2018).

<sup>45</sup> Jenni Bergal, *With Push From Adoptees, States Open Access to Birth Records*, PEW CHARITABLE TRS. (Aug. 12, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/08/12/with-push-from-adoptees-states-open-access-to-birth-records>.

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

<sup>47</sup> Peretz, *supra* note 39, at 4.

<sup>48</sup> Cotter, *supra* note 32 (explaining the reasons for sealed records in the mid-1900s); Gabrielle Glaser, *Don't Keep Adopted People in the Dark*, N.Y. TIMES (June 17, 2018), <https://www.nytimes.com/2018/06/17/opinion/closed-adoptions-birth-certificates.html> (detailing the evolution of closed adoption and progress towards a culture of open adoption).

<sup>49</sup> See Peretz, *supra* note 39, at 4.

<sup>50</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>51</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453–55 (1972).

<sup>52</sup> *Roe v. Wade*, 410 U.S. 113, 154 (1973).

<sup>53</sup> Cotter, *supra* note 32 (explaining the reasons for sealed records in the mid-1900s).

of adoption. As a result, lawmakers sought to protect adoptees from the societal judgment of illegitimacy by sealing adoption records.<sup>54</sup> However, as court cases extended the right to privacy, the argument that sealed adoption records protected the adoptees morphed into an argument for protecting the privacy of birth families.<sup>55</sup>

In the 1970s, adult adoptees started creating organizations to lobby against sealed adoption records.<sup>56</sup> On a grassroots level, groups such as the Adoption Liberation Movement of America created a mutual registry,<sup>57</sup> which served as a platform for adoptees and birth parents to reconnect.<sup>58</sup> Twenty years later, a renewed movement for open adoption records led to the formation of Bastard Nation, another adoptee rights organization.<sup>59</sup> Still, there was little progress made toward opening up adoption records.<sup>60</sup>

Since the creation of these movements in the 1970s, the domestic adoption process has gradually become more transparent and less surrounded by secrecy. As S.I. Rosenbaum of the *Boston Globe* writes, “As recently as the 1970s, almost all American adoptions were confidential; today, only 5% are.”<sup>61</sup> American society is moving away from the concept of “anonymous” adoption, largely for cultural reasons, but also because technological developments, such as direct-to-consumer DNA kits, have made finding one’s birth family much easier.<sup>62</sup> There is also a growing trend favoring transparency in the adoption process, which should be reflected in the adoption record laws.

## II. CURRENT ADOPTION RECORD LAWS

Historically, states have had jurisdiction over family law issues.<sup>63</sup> In 1890, the Supreme Court in *In re Burrus* stated, “The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”<sup>64</sup> Even when holding the Defense of

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<sup>54</sup> *Id.*

<sup>55</sup> *See id.*

<sup>56</sup> Peretz, *supra* note 39, at 6.

<sup>57</sup> Rosenbaum, *supra* note 28.

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

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

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

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

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

<sup>63</sup> Linda D. Elrod, *The Federalization of Family Law*, ABA (July 1, 2009), [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol\\_36\\_2009/summer2009/the\\_federalization\\_of\\_family\\_law](http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol_36_2009/summer2009/the_federalization_of_family_law).

<sup>64</sup> *In re Burrus*, 136 U.S. 586, 593–94 (1890); *Ankenbrandt v. Richards*, 504 U.S. 689, 692 (1992); Courtney G. Joslin, *The Perils of Family Law Localism*, 48 U.C. DAVIS L. REV. 623, 627–28 (2014).

Marriage Act unconstitutional in 2013, the Supreme Court again cited *In re Burrus* when clarifying that the power to adjudicate domestic relations issues resides in state courts.<sup>65</sup> The belief that there is “something inherently local about family law”<sup>66</sup> has arisen repeatedly in family law jurisprudence, which may explain why states approach adoption records differently.<sup>67</sup>

Currently, there is a wide disparity in the amount of adoption information each state releases. Nineteen states and the District of Columbia have laws in place that seal adoption records.<sup>68</sup> Only ten states have allowed adoptees unrestricted access to their adoption files, with New York opening access in January 2020.<sup>69</sup> The other twenty-one states permit limited access to adoption records.<sup>70</sup> There are some common themes among these laws, but the laws do vary by state.

The American Adoption Congress, an adoption rights organization, has separated adoption record laws into five categories based on stringency: unrestricted access, access with restrictions, partial access, partial access with restrictions, and sealed.<sup>71</sup> Since each state falls into an approximately accurate level, this Comment will analyze four states that represent each category of access.

#### A. Alabama: Unrestricted Access to Adoption Records

Having unrestricted access to adoption records means that “an adult adoptee may apply for and obtain an original birth certificate without any discriminatory restrictions or conditions, other than following regular procedures for obtaining a state vital record.”<sup>72</sup>

In Alabama, an amended birth certificate is issued upon receiving a notice of adoption.<sup>73</sup> The OBC is then placed in the adoption file, which itself is under seal. However, any adoptee who is at least nineteen years old may file to obtain

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<sup>65</sup> *United States v. Windsor*, 570 U.S. 744, 767 (2013); Joslin, *supra* note 64, at 627–28.

<sup>66</sup> Joslin, *supra* note 64, at 629.

<sup>67</sup> *See id.* at 627–34 (analyzing the common belief that family law is delegated to the states and not for federal jurisdiction).

<sup>68</sup> *See State Adoption Legislation*, *supra* note 31 (providing a list of states and their access to original birth certificates for adult adoptees).

<sup>69</sup> *See id.*; *Governor Cuomo Signs Legislation Allowing Adoptees to Receive a Certified Birth Certificate at Age 18*, N.Y. STATE (Nov. 14, 2019), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-allowing-adoptees-receive-certified-birth-certificate-age-18>.

<sup>70</sup> *See State Adoption Legislation*, *supra* note 31.

<sup>71</sup> *Id.*

<sup>72</sup> *Unrestricted*, ADOPTEE RTS. L. CTR., <https://adopteerightslaw.com/focus/unrestricted-access> (last visited Apr. 26, 2019).

<sup>73</sup> ALA. CODE § 22-9A-12(a)(1) (2019).

access to the OBC and “any evidence of the adoption ... held within the original record.”<sup>74</sup>

In addition, birth parents can sign both contact preference and medical history forms.<sup>75</sup> The contact preference form allows birth parents to choose one of three options: no contact at all, contact through an intermediary only, or contact at any point.<sup>76</sup> This form is not binding and can be amended at any point.<sup>77</sup> Furthermore, this contact preference form is only provided by the state upon request by the birth parent.<sup>78</sup> Therefore, a birth parent is not required to complete this form when placing a child up for adoption.<sup>79</sup> Upon request for a contact preference form, a birth parent is also given a medical history form.<sup>80</sup> If the medical history form is completed, it is packaged with the contact preference form and placed in the sealed file.<sup>81</sup> If an adoptee requests the OBC, it will be provided along with the contact preference and medical history forms.<sup>82</sup>

#### B. Arkansas: Access with Restrictions

Arkansas is an “access with restrictions” state.<sup>83</sup> An access with restriction record law is categorized as, “[a]ccess for adult adoptees with limits.”<sup>84</sup> In Arkansas, this level of access to adoption information is relatively new as the relevant legislation went into effect in 2018.<sup>85</sup>

Similar to Alabama, Arkansas issues an amended birth certificate to replace an OBC after receiving proof of an adoption.<sup>86</sup> However, an adoptee can still request to open the “adoption file” and thus gain access to an OBC.<sup>87</sup> This access is limited as the adoptee must be at least twenty-one years old and pay a fee.<sup>88</sup> However, birth parents have the opportunity to file for a redaction of identifying information.<sup>89</sup> If redactions have been made, the adoptee still receives the file,

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<sup>74</sup> *Id.* § 22-9A-12(c).

<sup>75</sup> *Id.* § 22-9A-12.

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

<sup>77</sup> *Id.*; see Gregory D. Luce, *Alabama*, ADOPTEE RTS. L. CTR., <https://adopteerightslaw.com/alabama-obc/> (last updated May 9, 2018).

<sup>78</sup> ALA. CODE § 22-9A-12 (2019).

<sup>79</sup> *Id.*

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

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

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

<sup>83</sup> See Gregory D. Luce, *Arkansas Summary*, ADOPTEE RTS. L. CTR., <https://adopteerightslaw.com/arkansas-obc/> (last updated Mar. 31, 2019).

<sup>84</sup> *State Adoption Legislation*, *supra* note 31.

<sup>85</sup> Luce, *supra* note 83.

<sup>86</sup> ARK. CODE ANN. § 20-18-406 (2019).

<sup>87</sup> ARK. CODE ANN. § 9-9-801 (2019).

<sup>88</sup> *Id.*; ARK. CODE ANN. § 9-9-803 (2019).

<sup>89</sup> *Id.* § 9-9-802.

but it does not include any identifying information.<sup>90</sup> Upon request, a contact preference form is also available to birth parents and can be placed within the adoption file.<sup>91</sup>

In another effort to provide a more transparent adoption process, Arkansas operates a mutual consent registry.<sup>92</sup> Arkansas's mutual consent registry allows "adult adoptee[s] and each birth parent and each individual related within the second degree" to voluntarily join the list of potential matches.<sup>93</sup> If there is a match on the list, the identifying information is then released.<sup>94</sup> Unlike with access to the adoption file, adoptees only need to be eighteen years old to register for the mutual consent registry.<sup>95</sup> There is a fee for users of the registry and individuals are required to attend one hour of counseling before being added to the registry.<sup>96</sup>

### C. Massachusetts: Partial Access

While the American Adoption Congress separates "partial access"<sup>97</sup> and "partial with restrictions," this Comment will combine these two categories in this analysis. Partial access is "access for adult adoptees born during certain years."<sup>98</sup> Partial access with restrictions is "access for adult adoptees born during certain years, and with limits."<sup>99</sup> The main difference between the two categories is that some states only allow access to adoptees born during certain years if the adoptees can overcome other restrictions.

Since 2007, adoptees born before July 17, 1974 are allowed access to their respective OBCs.<sup>100</sup> Adoptees who are at least eighteen years old or adoptive parents of children born after 2007 may also receive access to an adoptee's OBC.<sup>101</sup> However, adoptees born between July 17, 1974 and January 1, 2008 are not provided access to OBCs.<sup>102</sup>

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<sup>90</sup> *Id.* § 9-9-803.

<sup>91</sup> *Id.* § 9-9-802.

<sup>92</sup> *Id.* § 9-9-504.

<sup>93</sup> *Id.*

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

<sup>95</sup> *Id.*; ARK. CODE ANN. § 9-9-501(5) (2019).

<sup>96</sup> *Id.* § 9-9-504.

<sup>97</sup> *State Adoption Legislation*, *supra* note 31.

<sup>98</sup> *Adult Adoptee's Original Birth Certificate (OBC) Access U.S. States Overview*, AM. ADOPTION CONGRESS, <https://www.americanadoptioncongress.org/state.php> (last updated May 29, 2018).

<sup>99</sup> *See id.* (providing a list of states and their access to original birth certificates for adult adoptees).

<sup>100</sup> MASS. GEN. LAWS ch. 46, § 2B (2019).

<sup>101</sup> *Id.*

<sup>102</sup> Gregory D. Luce, *Massachusetts*, ADOPTEE RTS. L. CTR.,

Upon the requestor reaching the age of eighteen, Massachusetts will release non-identifying information about the birth parents, adoptive parents, and adoptee.<sup>103</sup> Non-identifying information includes “[s]uch information ... which the agency holds concerning the medical, ethnic, socio-economic, and educational circumstances of the person.”<sup>104</sup> At its discretion, the adopting agency may provide more non-identifying information about an individual’s adoption.<sup>105</sup> If both parties proffer written permission, the adoption agency can share the identity of the adoptee with the birth parents and the identities of the birth parents with the adoptee and adoptive parents.<sup>106</sup> In order to provide permission to release identifying information, the adoptee must be twenty-one years old or the adoptive parents must consent.<sup>107</sup>

Currently, there is legislation pending that would grant access to OBCs for adoptees born between July 17, 1974 and January 1, 2008.<sup>108</sup>

#### D. Virginia: Sealed Records

Virginia seals all adoption records and these records can only be unsealed with a court order.<sup>109</sup> As with all the other states analyzed previously, Virginia creates amended birth certificates and the OBCs are sealed in the adoption files.<sup>110</sup> However, an eighteen year old adoptee may apply to have identifying information released.<sup>111</sup> Upon receiving that application, the adoption agency is required to attempt to locate the birth family and to inquire about “the relative effects that disclosure of the identifying information may have on the adopted person, the adoptive parents, and the birth family.”<sup>112</sup> If good cause is shown, identifying information and access to the adoptee’s OBC will be provided.<sup>113</sup> The Virginia Department of Social Services defines good cause as “consent from the birth family on whom identifying information is being sought.”<sup>114</sup> Non-identifying information is always accessible to the adoptive parents, the adoption

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<https://adopteerightslaw.com/massachusetts-obc/> (last updated Dec. 4, 2019).

<sup>103</sup> MASS. GEN. LAWS ch. 210, § 5D (2019).

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

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

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

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

<sup>108</sup> H.R. 1892, 191st Gen. Assemb., Reg. Sess. (Mass. 2019); S. 1267, 191st Gen. Assemb., Reg. Sess. (Mass. 2019).

<sup>109</sup> VA. CODE ANN. § 63.2-1246 (2019).

<sup>110</sup> VA. CODE ANN. § 32.1-261(E) (2019).

<sup>111</sup> VA. CODE ANN. § 63.2-1246 (2019).

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

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

<sup>114</sup> VA. DEP’T OF SOC. SERVS., WHO MAY HAVE ACCESS TO INFORMATION FROM A FINALIZED ADOPTION RECORD IN VIRGINIA? 1 (2020), [https://www.dss.virginia.gov/files/division/dfs/ap/intro\\_page/guidance\\_procedures/adoptiondisclosure.pdf](https://www.dss.virginia.gov/files/division/dfs/ap/intro_page/guidance_procedures/adoptiondisclosure.pdf).

agency, and the adoptee if he or she is at least eighteen years old.<sup>115</sup>

The only exception to Virginia's strict sealed record law deals with parental placement adoptions.<sup>116</sup> Parental placement adoptions involve placements selected and arranged by the birth parents without the help of an intermediary.<sup>117</sup> In parental placement adoptions that occurred after July 1, 1994, "the entire adoption record shall be open to the adoptive parents, the adoptee who is eighteen years of age or older, and a birth parent who executed a written consent to the adoption."<sup>118</sup>

### III. ARGUMENTS FOR OPEN ADOPTION

#### A. Fundamental Right to Know

Advocates supporting open access to adoption records and OBCs consistently argue that adoptees have a fundamental Right to Know their origins, genetic history, and familial identity.<sup>119</sup> This argument is based on the notion that adoptees own their personal information once they reach adulthood.<sup>120</sup> As such, states should not be able to prohibit adoptees from accessing their own personal information.<sup>121</sup>

The Right to Know is based on the belief that an adoptee deserves to understand his or her identity and to know his or her medical history.<sup>122</sup> Having a strong identity and understanding one's background is essential to forming healthy relationships. By not providing an adoptee with any of his or her personal information, states are creating another barrier to the adoptee's identity formation.<sup>123</sup> In addition, having knowledge of one's family medical history can provide critical diagnostic information.<sup>124</sup> By limiting access to detailed medical information, states are preventing adoptees from receiving potential life-saving care. As information about identity and family medical history is kept private

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<sup>115</sup> VA. CODE ANN. § 63.2-1246 (2019).

<sup>116</sup> *Id.* § 63.2-1247.

<sup>117</sup> VA. DEP'T OF SOC. SERVS., PARENTAL PLACEMENT ADOPTION 1 (2020), [https://www.dss.virginia.gov/files/division/dfs/ap/intro\\_page/guidance\\_procedures/parental\\_placement.pdf](https://www.dss.virginia.gov/files/division/dfs/ap/intro_page/guidance_procedures/parental_placement.pdf).

<sup>118</sup> VA. CODE ANN. § 63.2-1247 (2019).

<sup>119</sup> MADELYN FREUNDLICH, EVAN B. DONALDSON ADOPTION INST., FOR THE RECORDS: RESTORING A LEGAL RIGHT FOR ADULT ADOPTees 12 (2007).

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

<sup>121</sup> *Id.* at 26, 28.

<sup>122</sup> *Id.* at 28.

<sup>123</sup> Rosenbaum, *supra* note 28 (explaining her daughter's personal identity struggle).

<sup>124</sup> *Why Is It Important to Know My Family Medical History?*, U.S. NAT'L LIBR. OF MED., <https://ghr.nlm.nih.gov/primer/inheritance/familyhistory> (last updated May 12, 2020).

from adoptees, states are preventing adoptees from accessing information that belongs to them.<sup>125</sup>

Critics of the Right to Know claim that it violates the privacy of birth families as it could cause an unwelcome disturbance in their lives.<sup>126</sup> However, that criticism is based on the assumption that the adoptee will want to connect with the birth family. The Right to Know is not a right to a relationship.<sup>127</sup> Assuming that an adoptee will want to connect with his or her birth family expands the notion of the Right to Know beyond its intended boundaries and should not be used as an excuse to prevent adoptees from accessing pertinent personal information.

#### B. Best Interests of the Child

The underlying principle governing adoptions is the “best interests of the child.”<sup>128</sup> The focus is on the healthy development and happiness of the child in the adoptive family. However, the state’s role in the “best interests of the child”<sup>129</sup> analysis ends when the adoptee reaches the age of majority.<sup>130</sup> At adulthood, adoptees should be able to make all the decisions related to their best interests and the state should no longer be a part of the decision-making process.<sup>131</sup>

In the United States, eighteen is the age of adulthood and the beginning of all “adult” decisions.<sup>132</sup> At age eighteen, parents can no longer make legal decisions that are in the best interests of their children. If parents lose this right at age eighteen, the government should as well.<sup>133</sup>

#### C. No Guarantee of Confidentiality

Finally, although the sealed records may have secured some level of privacy,

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<sup>125</sup> FREUNDLICH, *supra* note 119, at 3–4.

<sup>126</sup> Clapton, *supra* note 25 (explaining that some family members might not know an adoption even occurred).

<sup>127</sup> Ann M. Haralambie, *Use of Social Media in Post-Adoption Search and Reunion*, 41 CAP. U. L. REV. 177, 203 (2013).

<sup>128</sup> *Quilloin v. Walcott*, 434 U.S. 246, 251 (1978) (explaining the standard used in adoption is the “best interests of the child”).

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

<sup>130</sup> FREUNDLICH, *supra* note 119, at 13; Jessica R. Caterina, *Glorious Bastards: The Legal and Civil Birthright of Adoptees to Access Their Medical Records in Search of Genetic Identity*, 61 SYRACUSE L. REV. 145, 148 (2010).

<sup>131</sup> FREUNDLICH, *supra* note 119, at 13; Caterina, *supra* note 130, at 161–62.

<sup>132</sup> *Age of Majority by State 2020*, WORLD POPULATION REV. (Feb. 9, 2020), <http://worldpopulationreview.com/states/age-of-majority-by-state/>.

<sup>133</sup> *See id.*

birth families have never been guaranteed confidentiality.<sup>134</sup> While privacy surrounding adoption was a courtesy extended to birth families and to protect adoptees, statutes never provided complete anonymity.<sup>135</sup> Courts have concluded that a promise of confidentiality can occur “only if the laws expressly state that closure is (1) absolute and (2) permanent.”<sup>136</sup> Even states with “completely sealed” laws allow court orders to open previously sealed adoption records.<sup>137</sup> Therefore, the “absolute” requirement is not actually met because records can still be opened.<sup>138</sup> Furthermore, promises made by adoption professionals do not carry the force of law, so courts need not honor these statements.<sup>139</sup>

#### IV. PROPOSED REFORM IN ADOPTION RECORD LAWS

##### A. Change in Social Stigma

Laws concerning adoption records need to be updated because technology has surpassed the reasoning behind these laws. Laws are designed to protect societal interests and accomplish goals. With record sealing laws, state governments attempted to protect birth families and adoptees from societal judgment. These laws were designed to accomplish the goals of providing a “proper adoption” and a happy childhood for the adoptee.<sup>140</sup> The Relative Finder has erased the need to review adoption records to find birth families, but it also ignores the fact that some birth families might not want to be found.

Moreover, society’s perspective on adoption has changed in the past thirty years and this has decreased the need to protect the privacy of the parties involved. Some of the reasons adoption has become more accepted are the increase in the number of individuals being adopted and the fact that technology has made it significantly easier to find birth families than in previous decades. The culture of secrecy surrounding the adoption process has transformed into a culture of transparency.

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<sup>134</sup> FREUNDLICH, *supra* note 119, at 13.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 17.

<sup>137</sup> *See id.* at 10; Caterina, *supra* note 130, at 156.

<sup>138</sup> FREUNDLICH, *supra* note 119, at 17–18; *see* Caterina, *supra* note 130, at 152.

<sup>139</sup> FREUNDLICH, *supra* note 119, at 18.

<sup>140</sup> Caterina, *supra* note 130, at 161.

## B. Psychological Effects

Even though all parties attempt to make the adoption process as painless as possible for the adoptee, adoption itself has a significant impact on an adoptee's mental health. Adoptees often experience loss and grief from separation from their birth families, which can be intensified depending on the age of the child at adoption.<sup>141</sup> Similarly, adoptees can have difficulty forming their own identities if they are unaware of their origins and heritage.<sup>142</sup> Studies have demonstrated that adoptees often have lower self-esteem than their peers, which could be linked to adoption.<sup>143</sup> A survey of adolescent adoptees discovered that "13 percent never thought about adoption, 54 percent thought about their adoption once a month or more, and 27 percent thought about their adoption once a week or more."<sup>144</sup> This statistic shows that the emotional effects of the adoption process do not disappear when the adoption forms are signed, but continue to impact adoptees on a regular basis. Adoption is a significant life event, and it does affect the mental health of adoptees.

As many adoptees think about their own adoption regularly, there are also a number of adoptees who want to know more about their birth parents. According to the American Adoption Congress, "72 percent of adopted adolescents wanted to know why they were adopted, 65 percent wanted to meet their birth parents, and 94 percent wanted to know which birth parent they looked like."<sup>145</sup> The desire to learn more information about one's birth parents is a common theme among adoptees, and this is a fact that legislators should consider.

Adoption is supposed to prioritize the "best interests of the child" but the psychological effects of adoption are often ignored. While not guaranteed, offering some basic information on birth families could lessen some of the psychological effects of adoption.<sup>146</sup> Studies have shown that if an adoptee has some contact with his or her birth family, more conversations about adoption are likely to arise.<sup>147</sup> Knowing information about one's birth family and having an increased number of conversations about adoption can have positive long-term effects on identity formation.<sup>148</sup> In fact, there is concrete evidence that knowing

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<sup>141</sup> CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., IMPACT OF ADOPTION ON ADOPTED PERSONS 6, 13 (2013).

<sup>142</sup> *Id.* at 2.

<sup>143</sup> *Id.* at 3.

<sup>144</sup> *Id.*

<sup>145</sup> *Reform Myths*, AM. ADOPTION CONGRESS, [https://www.americanadoptioncongress.org/reform\\_myths.php](https://www.americanadoptioncongress.org/reform_myths.php) (last visited Apr. 26, 2020).

<sup>146</sup> *Id.*

<sup>147</sup> Lynn Von Korff & Harold D. Grotevant, *Contact in Adoption and Adoptive Identity Formation: The Mediating Role of Family Conversation*, 25 J. FAM. PSYCHOL. 393, 393-94 (2011).

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

information about one's birth family can benefit an adoptee.<sup>149</sup> Given that the "best interests of the child" should include the psychological wellbeing of the adoptee, these emotional considerations should be a piece of the analytical framework when deciding whether to seal adoption files. The psychological benefits of the adoptee knowing basic information about his or her birth family should not be ignored by lawmakers.

Critics of opening adoption files argue that allowing adoptees to have access to identifying birth family information would violate the birth families' trust, as they believed the adoptions would be confidential.<sup>150</sup> However, this emphasis on privacy is excessive. There is little evidence that birth parents rely on the confidentiality of the adoption as a determining factor in the adoption.<sup>151</sup> The United Kingdom started providing adoptees with access to their OBCs over forty years ago.<sup>152</sup> Since that time, the United Kingdom commissioned a study which "found that 94 percent of birth mothers whose children made contact with them were pleased."<sup>153</sup> As discussed in previous sections of this Comment, birth families never receive a formal court proclamation of confidentiality.<sup>154</sup> While possibly comforting, most birth families do not decide to place a child up for adoption based on the promise of confidentiality. If the birth parents do wish to remain unidentified, they can use their state's safe haven law; every state has a safe haven law that allows a birth parent to surrender a newborn child at certain locations with no questions asked.<sup>155</sup> Birth parents who complete the entire formal adoption process understand that their names are on certain forms and there is a possibility of identification.<sup>156</sup> Therefore, to overemphasize the role of confidentiality in adoption decision-making would be a mistake.

Second, adoption is supposed to be in the "best interests of the child,"<sup>157</sup> not the best interests of the birth parents. The focus of opening adoption records should be on the impact on the adoptee. If it is in a child's best psychological interest to know information about his or her birth family, the government should not intervene in this area. In fact, preventing adoptees from accessing information critical to their psychological well-being is antithetical to the goal

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

<sup>150</sup> Glaser, *supra* note 48.

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

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

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

<sup>154</sup> See FREUNDLICH, *supra* note 119, at 15.

<sup>155</sup> *Safe Haven Laws*, U.S. LEGAL, <https://safehavenlaws.uslegal.com/> (last visited Apr. 26, 2020).

<sup>156</sup> Glaser, *supra* note 48.

<sup>157</sup> See *Quilloin v. Walcott*, 434 U.S. 246, 254 (1978) (explaining the standard used in adoption is the "best interests of the child").

of acting in the “best interests of the child.”<sup>158</sup>

Nevertheless, while the culture around adoption may have changed, states still need to recognize that some birth families may desire anonymity. Since technology has essentially made anonymity impossible, there needs to be some action to protect the privacy of birth families. The government needs to both mitigate the damage to birth parents’ privacy and prioritize the right of adoptees to know critical information about their births.

## V. DIFFICULTIES WITH REGULATING TECHNOLOGY

There are few ways to limit what information a third party, such as 23andMe, can release to its private users. None of the information released by 23andMe originates in government documents, nor does it touch any government services.<sup>159</sup> Furthermore, a biological parent does not have to participate in 23andMe’s services to be identified; an adoptee could discover a biological connection to a relative of a birth parent and then use this relationship to find the birth parent.<sup>160</sup> By participating in this service, a relative could accidentally reveal the identity of a birth family.<sup>161</sup> While the government has significant power over adoption records, it is still difficult for the government to regulate a consumer’s use of a third party company. A relative may be using 23andMe or another service for an unrelated reason and may not even be aware that an adoption has occurred.

## VI. SIMILAR ISSUES WITH TECHNOLOGY IN FAMILY LAW JURISPRUDENCE

Although this Comment focuses on adoption record laws, family law as a whole has experienced a number of changes due to technology. For example, surrogacy was only legalized in Washington, D.C. in 2017.<sup>162</sup> While surrogacy

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<sup>158</sup> *See id.*

<sup>159</sup> Ashley May, *Took an Ancestry DNA Test? You Might Be a ‘Genetic Informant’ Unleashing Secrets About Your Relatives*, USA TODAY (Apr. 27, 2018), <https://www.usatoday.com/story/tech/nation-now/2018/04/27/ancestry-genealogy-dna-test-privacy-golden-state-killer/557263002/> (detailing the privacy concerns of DNA tests).

<sup>160</sup> Clapton, *supra* note 25.

<sup>161</sup> May, *supra* note 159.

<sup>162</sup> Michael A. Chandler, *With New Surrogacy Law, D.C. Joins Jurisdictions that Are Making It Easier for Gay and Infertile Couples to Start Families*, WASH. POST (June 3, 2017), [https://www.washingtonpost.com/local/social-issues/with-new-surrogacy-law-dc-joins-jurisdictions-that-are-making-it-easier-for-gay-and-infertile-couples-to-start-families/2017/06/03/845c90d4-3c99-11e7-8854-21f359183e8c\\_story.html?utm\\_term=.14ad8a83daa7](https://www.washingtonpost.com/local/social-issues/with-new-surrogacy-law-dc-joins-jurisdictions-that-are-making-it-easier-for-gay-and-infertile-couples-to-start-families/2017/06/03/845c90d4-3c99-11e7-8854-21f359183e8c_story.html?utm_term=.14ad8a83daa7).

developed in the 1980s,<sup>163</sup> D.C. criminalized surrogacy in 1993.<sup>164</sup> As the use of surrogacy became more prevalent, D.C. lawmakers had to reexamine the purpose behind the statute. Thus, in 2017, D.C. decriminalized surrogacy and defined the legal parents of a child born through surrogacy.<sup>165</sup> This example is provided to illustrate that many of these technology-related family law issues are only now being addressed by legislators. To say that the law has not kept up with the rapid growth of technology is an understatement.

In one of the most notable and cutting-edge cases of its time, a California court of appeals ruled that legal parentage could be established by consent.<sup>166</sup> In *Buzzanca*, a married couple used a donor egg, donor sperm, and a gestational surrogate to conceive a child.<sup>167</sup> The question at issue was who the legal parents of the child were as neither the husband nor the wife had provided any genetic material.<sup>168</sup> The court borrowed law from the Uniform Parentage Act (“UPA”), which stated that a man who consented to the insemination of his wife consented to being a legal parent of the resulting child.<sup>169</sup> The court applied that statute to the wife as well, making the statute gender-neutral.<sup>170</sup> This case illustrates that in some states, if a parent consents to the procedures that would result in the birth of the child, that parent is the legal parent of the resulting child.<sup>171</sup>

The D.C. surrogacy law<sup>172</sup> and the *Buzzanca* decision<sup>173</sup> demonstrate how courts and legislators have been trying to amend the law to provide fairer outcomes for parties. As many of these issues stem from relatively new technological developments, the legal community has had to modify current laws to fit new situations.<sup>174</sup>

## VII. COMMONLY ADOPTED STANDARDS

As family law issues have traditionally been local issues, states have been reluctant to adopt a uniform standard for family law issues, including adoption

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<sup>163</sup> Brett Thomaston, *A House Divided Against Itself Cannot Stand: The Need to Federalize Surrogacy Contracts as a Result of a Fragmented State System*, 49 J. MARSHALL L. REV. 1155, 1160 (2016).

<sup>164</sup> Chandler, *supra* note 162.

<sup>165</sup> D.C. CODE § 16-401 (2017).

<sup>166</sup> *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998).

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

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 284–85.

<sup>170</sup> *See id.* at 282.

<sup>171</sup> *Id.*

<sup>172</sup> D.C. CODE § 16-405(a) (2019).

<sup>173</sup> *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

<sup>174</sup> *See id.* at 282 (explaining how the judge modified an insemination statute intended for males to apply the concept of parentage through consent to females).

records.<sup>175</sup> As discussed above, each state handles its adoption records differently. However, the federal government has incentivized states to change family laws through funding.<sup>176</sup> One such example involves the Adoption and Safe Families Act of 1997 (“ASFA”).<sup>177</sup> The ASFA was enacted because children were in the foster care system for extensive periods of time and Congress wanted to increase the availability of permanent homes for foster children by encouraging adoption.<sup>178</sup> The ASFA conditioned federal funding for state foster care systems on the encouragement of kinship care, a time limit on the duration of foster care before termination of parental rights, and the creation of subsidies to fund the adoption process for potential adoptive parents.<sup>179</sup> While there have been many critics of ASFA, the result has been an increased focus on achieving stability and permanence for children in the foster care system in every state.<sup>180</sup>

Another example of a family law statute adopted throughout the United States is the Uniform Parentage Act.<sup>181</sup> The UPA was developed by the National Conference of Commissioners on Uniform State Laws in 1973.<sup>182</sup> Before promulgation of the UPA, state laws varied dramatically in terms of how they defined legal parentage.<sup>183</sup> The UPA sought to create a more standard approach across the country and to help clarify emerging issues in the law.<sup>184</sup> Although states still have to pass their own legislation, the UPA has successfully influenced family law.<sup>185</sup> Nineteen states have enacted laws based significantly

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<sup>175</sup> See *United States v. Windsor*, 570 U.S. 744, 766–67 (2013) (explaining that family law matters belong in state court).

<sup>176</sup> See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.); *Adoption and Safe Families Act (ASFA)*, CHILD & FAM. SERVS. REV., <https://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/2999> (last visited Feb. 23, 2020).

<sup>177</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.); CHILD & FAM. SERVS. REV., *supra* note 176.

<sup>178</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101, 111 Stat. 2115, 2116; CHILD & FAM. SERVS. REV., *supra* note 176.

<sup>179</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 306, 111 Stat. 2115, 2132–33; CHILD & FAM. SERVS. REV., *supra* note 176.

<sup>180</sup> See John B. Mattingly, “Twenty” Years with the Adoption and Safe Families Act, IN INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 57 (2009).

<sup>181</sup> Courtney G. Joslin, *Nurturing Parenthood Through the UPA* (2017), 127 YALE L.J. 589, 597 (2018).

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

<sup>183</sup> See *id.*

<sup>184</sup> Jennifer Sroka, *A Mother Yesterday, but Not Today: Deficiencies of the Uniform Parentage Act for Non-Biological Parents in Same-Sex Relationships*, 47 VAL. U. L. REV. 537, 539–40 (2013).

<sup>185</sup> Joslin, *supra* note 181, at 598.

on the 1973 version of the UPA,<sup>186</sup> while eleven states have chosen to follow the 2002 version.<sup>187</sup> The latest edition of the UPA was suggested in 2017 and states are beginning to adopt these amendments.<sup>188</sup>

Despite family law historically being a state issue,<sup>189</sup> the legislation discussed herein is proof that national standards can be implemented. To argue that it would be impossible to pass a national standard focused on adoption records would be to ignore the family law legislation that has already been widely accepted throughout the country.<sup>190</sup>

## VIII. PRIVACY ISSUES FOR FAMILIES CREATED USING ASSISTED REPRODUCTIVE TECHNOLOGY

### A. Overview of ART

For children conceived through methods of Assisted Reproductive Technology (“ART”), such as artificial insemination or donation of eggs, their privacy is also impacted by the direct-to-consumer DNA tests.<sup>191</sup> Many sperm donors in the 1980s and 1990s donated sperm on the promise of anonymity, never anticipating that direct-to-consumer DNA testing could identify them.<sup>192</sup> However, adoptees and children conceived through ART have the same identity questions and concerns. Using the same methods employed by adoptees in their search for birth parents, individuals conceived through ART are using direct-to-consumer DNA tests to find other individuals with the same donor.<sup>193</sup> People have held family reunions with other individuals that share their same donor, joined sibling registries, and established full communities of the offspring of one donor.<sup>194</sup>

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

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

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

<sup>189</sup> See *United States v. Windsor*, 570 U.S. 744, 766–67 (2013) (explaining that family law matters belong in state court).

<sup>190</sup> See Joslin, *supra* note 181, at 597, 601, 603, 605–06, 610–11 (citing examples of the Uniform Child Custody Jurisdiction and Enforcement Act and the Uniform Parentage Act).

<sup>191</sup> Ashley Fetters, *Finding the Lost Generation of Sperm Donors*, THE ATLANTIC (May 18, 2018), <https://www.theatlantic.com/family/archive/2018/05/sperm-donation-anonymous/560588/>.

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

<sup>193</sup> Jacqueline Mroz, *A Mother Learns the Identity of Her Child’s Grandmother. A Sperm Bank Threatens to Sue.*, N.Y. TIMES (Feb. 16, 2019), <https://www.nytimes.com/2019/02/16/health/sperm-donation-dna-testing.html>.

<sup>194</sup> Ashley Fetters, *The Changing Norms Around Donor-Sibling Networks*, THE ATLANTIC (Dec. 4, 2018), <https://www.theatlantic.com/family/archive/2018/12/donor-sibling-network-alumni/577294/>.

There is minimal government regulation that addresses whether identifying information should be provided to children conceived through ART. In 2011, Washington State enacted a law that requires sperm banks to make “ ‘open’ sperm donation the default.”<sup>195</sup> If desired, a sperm donor can still remain anonymous, but anonymity must be requested, and confidentiality is not automatically provided to sperm donors.<sup>196</sup> Washington is still the only state that has such a law,<sup>197</sup> but the National Conference of Commissioners on Uniform State Laws recently amended the UPA to address the release of identifying information.<sup>198</sup> The Prefatory Note of the UPA explains Article 9 as:

[T]he right of children born through assisted reproductive technology to access medical and identifying information regarding any gamete providers. While Article 9 does not require disclosure of the identity of a gamete donor, it does require that donors be asked whether they would like their identity disclosed. It also requires a good faith effort to disclose nonidentifying medical history information regarding the gamete donor upon request.<sup>199</sup>

While there are a few government regulations focusing on identifying information provided to children conceived through ART, some private companies specializing in ART have established their own standards for handling requests for donor information.<sup>200</sup>

#### B. Privacy Strategies Adopted by Private ART Companies

The California Cryobank, the largest sperm bank in the country, has developed several strategies to reduce the privacy concerns of donors while still allowing children to learn more about their respective donors.<sup>201</sup> First, at age eighteen, the offspring can request any non-identifying personal information, such as education level, personal history, ethnicity, physical characteristics, and family medical history.<sup>202</sup> Second, a 2017 change in California Cryobank policy now requires new sperm donors to consent to identification once the offspring

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<sup>195</sup> Fetters, *supra* note 191.

<sup>196</sup> *Id.*

<sup>197</sup> Fetters, *supra* note 191.

<sup>198</sup> Courtney G. Joslin, Professor of Law, UC Davis Sch. of Law, Uniform Parentage Act (2017): What You Need to Know, Remarks at the ABA Section of Family Law 2018 Spring CLE Conference (May 11, 2018).

<sup>199</sup> *Id.*

<sup>200</sup> See *Anonymous Donor Contact Policy*, CAL. CRYOBANK, <https://www.cryobank.com/services/post-conception-services/anonymous-donor-contact-policy/> (last visited Feb. 16, 2020) (outlining California Cryobank’s company policies for handling requests for donor information).

<sup>201</sup> Mroz, *supra* note 193.

<sup>202</sup> Fetters, *supra* note 191.

reaches the age of eighteen.<sup>203</sup> As a result of this new policy, the offspring is provided with the “donor’s name, donation location, last known address, and email address...”<sup>204</sup> While each sperm bank has its own policies and regulations, California Cryobank represents a large portion of the ART industry and provides an example of how ART companies are handling donor information.

California Cryobank appears to have recognized the effect that direct-to-consumer DNA tests have on privacy and has attempted to reconcile the interests of all parties involved in the ART process. On California Cryobank’s website, strong language heavily emphasizes the company’s desire to be the link between child and donor.<sup>205</sup> The company underlines the phrase, “Under no circumstances should you, or anyone known to you, attempt to identify or contact any donor without the assistance of California Cryobank.”<sup>206</sup> The company is insistent that any initiation of contact between parties originate from the company.<sup>207</sup> By acting as the intermediary between the donor and the child, California Cryobank can partially protect the donor’s privacy if he does not want to be identified.

If California Cryobank discovers that a child or family has contacted a donor, there may be serious repercussions. A child who reaches out to a donor without California Cryobank’s assistance can be barred from further opportunities to make contact with the donor.<sup>208</sup> A family that contacts a donor on behalf of an underage child violates the company’s Client Contract and can be prevented from using the company’s services again.<sup>209</sup> For example, a mother who accidentally identified her daughter’s sperm donor after using 23andMe was threatened by NW Cryobank with \$20,000 in penalties and the possibility of being denied access to four vials of sperm from the same donor.<sup>210</sup> While these legal actions against families cannot arise in the adoption context, adoption laws could implement some of the strategies used by private ART companies to mitigate privacy concerns.

### C. Donor-Sibling Registries

Many children conceived through artificial insemination have formed

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

<sup>204</sup> *Id.*

<sup>205</sup> *Anonymous Donor Contact Policy*, *supra* note 200.

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

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

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

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

<sup>210</sup> Mroz, *supra* note 193.

relationships with each other through the Donor-Sibling Registry (“DSR”).<sup>211</sup> The DSR is a matching website that connects users who have the same donor identification number.<sup>212</sup> The registry currently has more than sixty-seven thousand members.<sup>213</sup> Through DSR, children from the same donor can connect and meet half-siblings.

The DSR demonstrates that the search for identity information is common among children conceived through ART.<sup>214</sup> Each member of DSR joins the website voluntarily and has to personally communicate with any matches.<sup>215</sup> While the emphasis is usually on meeting other half-siblings, occasionally donors will be matched with children conceived through donations.<sup>216</sup> Sociologist Tabitha Freeman of the University of Cambridge describes donor siblings as “a new form of family.”<sup>217</sup> The DSR has allowed children conceived through ART to develop their own sense of identity by meeting their half-siblings.<sup>218</sup>

The comparable website for adoptees to utilize is 23andMe. Adoptees may have the same curiosity about their identity as children conceived through ART.<sup>219</sup> The difference between adoptees and children conceived through ART is that the latter group’s curiosity may be fulfilled through the meeting of half-siblings. Meeting someone with the same genetic background and physical traits might be enough for children conceived using ART to avoid searching for a donor. Here, there is still a level of anonymity provided since the children only possess the donor’s identification number.<sup>220</sup> For adoptees, by contrast, finding someone with the same genetic background could directly lead to the birth family. There is no intermediate level of anonymity between the shared genetic relationship and a birth family in this context.

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<sup>211</sup> See Ariana Eunjung Cha, *Children of Sperm Donors Find Their Half Siblings and Demand Change*, CHI. TRIB. (Sept. 13, 2018), <https://www.chicagotribune.com/lifestyles/health/ct-children-of-sperm-donors-20180913-story.html>.

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

<sup>213</sup> *Educating, Connecting & Supporting Donor Families*, DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com/> (last visited Feb. 12, 2020).

<sup>214</sup> Eunjung Cha, *supra* note 211; Chris Bodenner, *When the Children of Sperm Donors Want Answers*, THE ATLANTIC (Jan. 29, 2017, 9:00 PM), <https://www.theatlantic.com/notes/2017/01/kids-of-sperm-donors/514814/>.

<sup>215</sup> Eunjung Cha, *supra* note 211.

<sup>216</sup> See *generally id.* (detailing the story of children conceived through donation meeting up with their half-siblings and donor father).

<sup>217</sup> Joseph Shapiro, *Donor-Conceived Kids Connect with Half Siblings*, NPR (Feb. 26, 2009, 1:59 PM), <https://www.npr.org/templates/story/story.php?storyId=101384262>.

<sup>218</sup> Eunjung Cha, *supra* note 211 (describing the benefits of meeting other children with the same donor).

<sup>219</sup> See Korff & Grotevant, *supra* note 147, at 394–95 (highlighting identity issues in adoptees and strategies to combat them).

<sup>220</sup> See Eunjung Cha, *supra* note 211.

## IX. UNIFORM MODEL ACT APPROACH

## A. Need for a Model Act

Given all of the uncertainties surrounding privacy in the adoption and ART contexts, there should be a standard approach.<sup>221</sup> Technology has developed so fast that closed adoption records and ART have not kept pace.<sup>222</sup> If the privacy interests of a birth family or a donor are to be balanced with a child's interest in genetic information, there needs to be some type of compromise. A Uniform Model Act ("Model Act") for adoption could be created for states to implement. A Model Act that incorporates some of the privacy strategies of ART companies while still molding them to address problems unique to adoption would help adoption record laws adapt to new technology. Today, websites such as 23andMe are forcing states to move toward open adoption laws because anonymity no longer exists.

## B. Uniformity in Laws

A Model Act would create a more efficient adoption system and give birth families in every state the same level of privacy. As Americans move around the country, adoptees may end up living in states different from the state in which they were adopted. Since the states allow differing amounts of access to adoption files, a disparate system of access has been created across the country. However, a Model Act would encourage the acceptance of standard laws across all the states, thereby eliminating this problem and potentially encouraging adoption.

## C. Access to the OBC and Mutual Consent Registries at Age Eighteen

A Model Act would create an open system that provides adoptees with the right to receive their OBC at age eighteen. The California Cryobank now allows access to identifiable information to all children conceived through ART once they reach the age of eighteen.<sup>223</sup> Accordingly, every party understands the expectations and knows that there may be later contact. Given that 23andMe allows an adoptee to discover the identity of his or her birth family, there seems to be no benefit to prohibiting adoptees from accessing such information. The privacy of birth parents is no longer protected since these websites already reveal identifying information.

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<sup>221</sup> Rosenbaum, *supra* note 28.

<sup>222</sup> *See id.*

<sup>223</sup> Fetters, *supra* note 191.

In addition, there should be one standard age of adulthood across the states for granting access to mutual consent registries. Currently, some states require adoptees to be twenty-one years old before allowing them access to adoption files, but only eighteen to join a mutual consent registry.<sup>224</sup> Another state requires adoptees to be nineteen before they can be given access to an adoption file or join a mutual consent registry.<sup>225</sup> Moreover, states create laws that address the underlying privacy concerns stemming from these registries, but each law impacts adoptees differently due to their varying age restrictions.<sup>226</sup> Implementing a Model Act would create a standard age across the country that could be used in each of these contexts and would help set expectations while protecting privacy.

#### D. Contact Preference Form and Any Personal Effects

A Model Act would encourage birth parents to submit a contact preference form when placing a child up for adoption. If a birth parent wishes to be contacted when a child turns eighteen, an updated address, e-mail address, and phone number can all be provided. However, if a birth parent states that he or she does not want to be contacted, that information might deter an adoptee from contacting his or her birth family.

Furthermore, under a Model Act, birth parents could be given the opportunity to place photos or letters within an adoption file. Currently, sperm donors may only write about their personal interests and hobbies on a donor profile.<sup>227</sup> However, allowing a birth parent to provide more information may ultimately help a child with identity formation and may decrease the parent's concerns about adoption.<sup>228</sup>

In addition to a contact preference form, birth parents should also be strongly encouraged to complete a detailed medical history to be placed in an adoption file. In adoption cases, depending on the circumstances, birth parents may refuse to fill out any health information.<sup>229</sup> In order not to deter adoption, such a

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<sup>224</sup> See H.R. 1636, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (providing an example of a state with differing age restrictions).

<sup>225</sup> ALA. CODE § 22-9A-12 (2019); see Luce, *Alabama*, *supra* note 77.

<sup>226</sup> Jordan Gass-Poore, *Most American Adoptees Can't Access Their Birth Certificates. That Could Soon Change.*, MOTHER JONES (Mar. 13, 2019), <https://www.motherjones.com/politics/2019/03/most-american-adoptees-cant-access-their-birth-certificates-that-could-be-about-to-change/>.

<sup>227</sup> *Donor Information*, CAL. CRYOBANK, <https://www.cryobank.com/donor-search/donor-information/> (last visited Feb. 16, 2020).

<sup>228</sup> See Korff & Grotevant, *supra* note 147, at 394–95 (highlighting identity issues in adoptees and strategies to combat them).

<sup>229</sup> CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., ACCESS TO ADOPTION RECORDS 83–84 (2019), <https://www.childwelfare.gov/pubPDFs/infoaccessap.pdf>.

provision cannot be mandatory. Nevertheless, if a birth parent wishes to maximize privacy, a detailed medical history might prevent later contact from the adoptee.

If an adoptee knows a family name, medical history, and that a birth parent does not wish to be contacted, that information might prevent an adoptee from searching for a birth family and intruding upon their lives.

#### E. Disclaimer Added to Every Consent to Adopt Form

Finally, a Model Act could require that a paragraph be added to every consent to adopt form that informs birth parents that anonymity cannot be guaranteed. California Cryobank informs every donor that his identity may be revealed and requires consent to the disclosure of identifiable information.<sup>230</sup> Similarly, birth parents should be made aware that modern technology has made anonymity impossible and that they should not have any expectations of privacy.

A Model Act could balance the psychological need of adoptees to learn information about their birth families with the privacy desires of some birth families. While adoption records should be sealed from parties not affiliated with the adoption, the government cannot ensure that an adoptee will never use technology to find his or her birth family. One promising example of pending legislation is Arizona's House Bill 2600.<sup>231</sup> This bill has not yet passed the Arizona Senate, but this legislation follows many of the suggestions outlined in this Comment.<sup>232</sup> With current direct-to-consumer DNA testing, a Model Act will only encourage an adoptee to respect a birth family's wish to be anonymous. Technology has created a world in which more transparency in adoption records is the only way forward.

## X. CONCLUSION

Admittedly, regulating adoption records is a difficult task. Adoptees want to understand their respective identities and they should have a right to know about themselves. However, for many adoptees who were adopted in the 1970s or 1980s, birth parents might have placed them up for adoption assuming that anonymity was guaranteed forever.<sup>233</sup> Adoption in the 1970s had a much different cultural connotation than adoption has nowadays. Today, adoption is

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<sup>230</sup> Fetters, *supra* note 191.

<sup>231</sup> H.R. 2600, 54th Leg., Reg. Sess. (Ariz. 2020); Mary Jo Pitzl, *Birth-Record Bill Opens Adoption Secrecy Debate*, ARIZ. REPUBLIC, Mar. 5, 2020, at A13.

<sup>232</sup> H.R. 2600, 54th Leg., Reg. Sess. (Ariz. 2020).

<sup>233</sup> *Id.*

no longer a secret process, but one that is much more open. Websites like 23andMe have made identifying birth families the norm.<sup>234</sup> Legislators need to recognize that in order to protect privacy interests, laws must account for the power of technology.

Along with adjusting to technology, the government needs to understand the psychological undertones of the adoption process. Such a sensitive family issue makes it difficult to draft legislation. Nevertheless, adoptees have the right to know more about their own genetic information. When a birth family places a child up for adoption, the birth parents sign away their right to make decisions on behalf of the adoptee. Other rights waived include the right to decide what information should be provided to a child about his or her adoption and birth family. Birth parents have no right to privacy with respect to adoption, so that interest should not be valued more than the psychological well-being of adoptees.<sup>235</sup>

A Uniform Model Act would create a more standard process for adoptees in every state and could preserve some privacy for birth parents who wish to remain anonymous. By providing an adoptee with the names, medical history, contact preference form, and any other materials provided by the birth parents, states might be able to deter an adoptee from approaching a birth family who does not want to be contacted. The identifying information might also quell the adoptee's curiosity, especially if an adoptee understands a birth parent has no wish to be contacted. A Uniform Model Act could mitigate the potential damage to the privacy of certain birth parents while concurrently satisfying an adoptee's desire for birth information, thereby ensuring that the law is able to serve the interests of all the parties involved in the adoption process.

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<sup>234</sup> See Stephanie Pappas, *Genetic Testing and Family Secrets*, MONITOR ON PSYCHOL., June 2018, at 44, 44.

<sup>235</sup> See Glaser, *supra* note 48 (highlighting identity formation issues common in adoptees).

