Mutual Consent: Balancing the Birthparent’s Right to Privacy with the Adopted Person’s Desire to Know

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The debate over whether and when an adult adopted person should be allowed access to those portions of his or her birth record that include the birthparents’ identifying information is among the most emotional and divisive to have emerged in the adoption community in the past forty years. On one side are those who support the principle of mutual consent, whereby each party must agree to the release of his or her identifying information to the other. On the other side are those who support mandatory openness, or granting adult adopted persons automatic access to their birthparents’ identifying information regardless of what promises of confidentiality were made to the birthparents at the time of the adoption placement.

Systems based on the principle of mutual consent respect both the birthparents’ right to privacy and the adopted person’s desire to know his or her birthparents’ identities by protecting a birthparent’s identity when the birthparent desires confidentiality, and facilitating the exchange of identifying information when both sides consent to such an exchange. Mandatory openness, on the other hand, ignores the birthparents’ right to privacy. The obvious injustice to birthparents which is inherent to mandatory openness helps to explain why fewer than 10 states have mandatory openness, whereas approximately 40 states have systems allowing for the release of identifying information based on the principle of mutual consent.

In November, 2007, the public debate over mandatory openness and mutual consent flared anew following the release of The Evan B. Donaldson Adoption Institute’s widely disseminated report, For the Records: Restoring a Legal Right for Adult Adoptees. This report recommends “[amending] every state’s laws to restore unrestricted access for adult adopted persons to their original birth certificates.” For the Records identifies five principal legal arguments and two principal social arguments which the authors feel summarize the case for mandatory openness. However, these arguments for mandatory openness rely on disproved assumptions and the misrepresentation of statistical data. It remains the case that any just legislation addressing the release of a birthparent’s identifying information must be based on the principle of mutual consent.

The Difference between Mandatory Openness and Openness in Adoption

Before proceeding, it’s necessary to make clear that opposition to mandatory openness in no way implied opposition to openness in adoption.

1. Such systems include mutual consent registries and confidential intermediary systems. Mutual consent registries are databases in which birthparents and adult adopted persons can register their names if they desire contact. If a “match” occurs, identifying information is exchanged. Confidential intermediary systems allow for one party to request the state to search for another party with the intention of making contact. Once the second party has been contacted by the state, he or she may consent to or deny the release of his or her identifying information to the first party.


Thousands of adoptive families, adopted children and birthparents have benefited from open adoption arrangements, which have generally proven healthy and positive for those who desire them. Opposition to mandatory openness is merely opposition to the idea that openness should be forced on those birthparents, adoptive parents, or adopted children who do not want it.

Principal Arguments for Mandatory Openness and their Refutations

The authors of For the Records identify five principal legal arguments and two principal social arguments for mandatory openness that have emerged over the course of the debate, to which they add their own support, explanations and analysis. These arguments and their refutations are as follows:

The Five Legal Arguments for Mandatory Openness

Argument 1: Adult adopted persons have a fundamental right to know personal information about themselves. Such information is defined here as a) information essential to the construction and understanding of their identities, including the identities of their birth parents and information about their births and their adoptions; b) information regarding their familial/medical history; and c) information on their inheritance rights, when available.

Response to 1a: Contrary to The Evan B. Donaldson Adoption Institute’s unsupported assumption, research shows that neither knowledge of birthparent identities nor information about their births and adoptions is in any way essential to adopted persons’ construction and understanding of their own identities. The best evidence on this issue comes from a study carried out by researchers from the Search Institute on a nationally representative sample of 715 adoptive families and 881 adopted adolescents from 1992 – 1993. This study was undertaken on behalf of the U.S. Department of Health and Human Services, National Institute of Mental Health. At the time of its publication in 1994, it was the largest study to date of adoptive families in the United States. Of the 881 adopted adolescents studied, fewer than one percent reported ever having met either of their birthparents.

The Search Institute study is rare among those on adopted children in that it paid significant attention to the effects of adoption on the adopted adolescents’ identity formation, as opposed to limiting its research to adopted adolescents’ behavioral and emotional outcomes. The study also examined a large, nationally representative sample of adolescents in closed adoptions without knowledge of their birthparents’ identities or of the situation surrounding their birth and adoption. These characteristics make it the ideal study to determine whether an adopted person requires knowledge of his or her birthparents’ identities to construct and understand his or her own, as mandatory openness advocates claim. The researchers found that:

“In itself, adoption appears to have little impact on the identity formation process of the majority of adolescents studied. They show healthy levels of self-understanding and self esteem.”

As 99 percent of these adolescents were in closed adoptions, this statement could be read, without any distortion of its original meaning, as:

“In itself, [closed] adoption [and lack of knowledge of their birthparents’ identities or of the situation surrounding their birth and adoption] appears to have little impact on the identity formation process of the majority of adolescents studied. They show healthy levels of self-understanding and self-esteem.”

This is not to deny that a significant percentage of adopted adolescents and adults have an understandable wish to know the identities of their birthparents and the situation surrounding their adoptions. However, it does call attention to an essential point in the debate which mandatory openness advocates frequently gloss over. Namely, adopted persons who search for their birthparents do so to establish their birthparents’ identities, not their own. Such information as “the identities of their birth parents and information about their births and their adoptions” may supplement an adopted person’s already-formed identity, but it is not necessary for the typical adopted person to construct or understand his or her identity.

The claim of mandatory openness advocates that the typical healthy and well-adjusted adopted person needs to know his or her birthparents’ identities in order to construct and understand his or her own identity is a romantic notion without empirical support.

Response to 1b: Information on genetic and familial medical histories can be and often is provided to adopted persons without jeopardizing the birthparent’s right to privacy. When the state possesses information on the medical history of an adopted person’s biological family, the state can easily inform the adopted person of that history without providing the names and identities of her birthparents.

In some cases, however, the state may not have this information on file. This is often the case for adoptions that occurred decades ago, before the importance of such information was fully appreciated. In these instances, however, adopted persons are free to petition a court to release their birthparents’ identifying information for the purpose of obtaining their biological families’ medical histories.

Response to 1c: While information on inheritance rights does identify the birthparent involved, the timing of such information’s release ensures that no living person’s fundamental right to privacy is being violated. No one, adopted or otherwise, can inherit from a birthparent until the birthparent is deceased, at which point the release of that birthparent’s identifying information violates no living person’s right to privacy.

Argument 2: States do not have a legitimate role in withholding birth and/or adoption information from adopted persons once they are adults.

Response: The state does have a legitimate role in withholding a birthparent’s identifying information from the adopted person – or anyone else – if the birthparent has not consented to its release because the state has a legitimate role in protecting the birthparent’s right to privacy. Interestingly, The Evan B. Donaldson Adoption Institute includes the following quotation in support of this argument:

“This argument [that states do have an interest in withholding birth and/or adoption information from adult adopted persons], as historically made, rests on the assumption that the state has a legitimate interest in sealing records upon adoption to allow the child to develop stable and loving relationships with the adoptive family… …Once adopted persons attain the age of majority, they no longer require the state to act in their best interests.”

This is actually only one of two primary arguments those opposed to mandatory openness make in terms of the state’s role in withholding identifying information. The second argument – which The Evan B. Donaldson Adoption Institute chooses to ignore – is the one referred to above. Namely, that the state has a legitimate role in withholding a birthparent’s identifying information from the adopted person if the birthparent has not consented to its release because the state has a legitimate role in protecting the birthparent’s right to privacy.

**Argument 3:** Withholding birth and/or adoption information from adult adopted persons violates legal equal protection guarantees by denying them the same rights as other persons.

**Response:** Because there is no fundamental right to know the identities of others, birthparents or otherwise, adopted persons are not being unlawfully discriminated against if they are denied access to their birthparents’ identities.

**Argument 4:** Placing the decision on release of this information in the hands of courts has resulted in inequitable decision making. This argument refers to the fact that, in states without mandatory openness, an adult adopted person has the option of appealing to the courts for access to identifying information in his or her original birth certificate if blocked from accessing this information by state law. In such cases, it is incumbent on the adopted person to show that he or she has “good cause” for accessing said information. Proponents of mandatory openness argue that, because some adopted persons have been granted access by the courts while others have not due to the unique merits of each individual case, mandatory openness laws should be enacted to ensure “equity.”

**Response:** Inequitable decision making – i.e. different judges making different decisions in regard to different cases – is inherent to the nature of the judicial system and cannot be used as an argument for removing any decision or process from the courts’ purview. In other words, if the state were to remove every class of dispute which could be shown to result in inequitable decision making from the courts’ jurisdiction in the interest of “equity,” we would end up abolishing the judicial system entirely.

**Argument 5:** Adopted persons should not be bound by decisions on anonymity made by birthparents and adoptive parents at the time of their adoption.

**Response:** Adopted persons should be bound to respect their fellow citizens’ right to privacy, just as everyone else is. The simple argument that “adopted persons should not be bound by decisions on anonymity made by birthparents and adoptive parents at the time of their adoption,” fails to take into account the important question, “bound from what?” In this instance, adopted persons are being bound from accessing the identifying information of individuals who don’t want this information made available. In other words, they are being bound to respect their fellow citizens’ right to privacy, which is as it should be.

The Two Social Arguments for Mandatory Openness

**Argument 1:** The vast majority of birthparents, contrary to popular belief, support the release of information to the children they placed for adoption.

**Response:** Contrary to the picture painted by The Evan B. Donaldson Adoption Institute’s misrepresentation of data, the vast majority of birthparents (and adopted persons) support the release of identifying information to the children they placed for adoption based on the principle of mutual consent, not mandatory openness. In support of their argument that “the vast majority of birthparents…support the release of [identifying] information to the children they release for adoption,” the authors of For the Records state “A 1991 study found that a substantial majority of birthmothers (88.5 percent) supported access by adult adopted persons to identifying information on their birthparents.”

The study cited is Sadchev’s Achieving Openness in Adoption: Some Critical Issues in Policy Formation, and it does indeed state that 88.5 percent of the birthmothers surveyed supported the release of identifying information to adult adopted persons. However, the study also found that 75 percent of birthmothers who supported the release of
identifying information prescribed “consent of the birth mother as [a] condition for permitting adoptees access to this information.” In other words, three out of four birthmothers who supported the release of identifying information to adult adopted persons believed that an adult adopted person’s access to that information should not be mandatory but rather, based on the principle of mutual consent. The Evan B. Donaldson Adoption Institute’s misrepresentation of Sachdev’s study, which clearly shows a majority of birthmothers supporting the principle of mutual consent, as support for their argument that birthmothers favor mandatory openness is either sloppy or disingenuous. A precise breakdown of Sachdev’s findings regarding attitudes toward the release of identifying information is as follows:

- Among birthmothers, 66.4 percent felt that a birthmother’s identifying information should only be released with the birthmother’s consent, 22.1 percent believe that a birthmother’s identifying information should be released with or without the birthmother’s consent, and 11.5 percent felt that a birthmother’s identifying information should not be released at all.

- Among adoptive parents, 58.5 percent felt that a birthmother’s identifying information should only be released with a birthmother’s consent, 11.2 percent felt that a birthmother’s identifying information should be released with or without a birthmother’s consent, and 30.3 percent felt that a birthmother’s identifying information should not be released at all.

- Among adopted persons, 56.6 percent felt that a birthmother’s identifying information should only be released with the birthmother’s consent, 24.5 percent felt that a birthmother’s identifying information should be released with or without a birthmother’s consent, and 18.9 percent felt that a birthmother’s identifying information should not be released at all.

Sachdev’s study, which The Evan B. Donaldson Adoption Institute cites in support of mandatory openness, shows that a majority of birthmothers (66.4 percent), adoptive parents (58.5 percent), and adopted persons (56.5 percent) agree with the principle of mutual consent. Furthermore, large majorities of birthmothers (77.9 percent), adoptive parents (88.8 percent) and adopted persons (75.5 percent) would prefer sealed birth records or the release of identifying information based on mutual consent to mandatory openness. This stands as extremely strong evidence that mandatory openness advocates in no way represent the majority of adopted persons. As the study’s author states, “Adoptees by and large feel that the birthmother’s right to remain anonymous outweighs their own need to know.”

Argument 2: In states that have granted adult adopted persons access to their records, predictions of negative outcomes have proven to be incorrect.

Response: That predictions of negative outcomes may have proven to be incorrect – an assertion for which The Evan B. Donaldson Adoption Institute offers no direct evidence – is irrelevant to the fact the release of identifying birthparent information without the birthparent’s consent is a violation of the birthparent’s right to privacy. Strikingly, The Evan B. Donaldson Adoption Institute admits that “no empirically-based studies have been conducted of states’ experiences following changes in their adoption records laws.” The above assertion is based instead on “anecdotal accounts,” and statistics showing that in Alabama, Delaware, New Hampshire, and Oregon, very small numbers of birthparents filed contact vetoes or contact preference forms after state legislation unsealed the records. Such statistics can be taken as evidence that large numbers of birthparents welcome contact, that large numbers of birthparents were unaware that the records had been unsealed, or, more likely, some combination of the above.

Neither anecdotal accounts nor statistics regarding contact vetoes constitute any sort of

7. Evan B. Donaldson, For the Records. 16.
“proof” that predictions of negative outcomes were incorrect, however. Nor are they relevant to the issue of whether the nonconsensual release of said information violates the birthparents’ right to privacy.

The Principle of Mutual Consent Balances the Birthparents’ Right to Privacy with the Adopted Person’s Desire to Know his or her Birthparents’ Identities

In conclusion, the debate over mutual consent versus mandatory openness is fundamentally a debate over how to best balance the birthparent’s right to privacy with the adopted person’s desire to know his or her birthparents’ identities. Arguments for mandatory openness which attempt to create an equivalent right – the adopted person’s “right to know” – to compete with the birthparents’ fundamental right to privacy rely on disproved assumptions regarding the formation of an adopted person’s identity. That information to which adopted persons can be said to have a right – namely, information on their familial/genetic medical histories – is non-identifying by nature, and therefore does not belong in the debate over whether and when a birthparent’s identifying information ought to be released. The just position is to support the exchange of information in cases where both parties consent to the release of identifying information, and to protect the birthparent’s right to privacy when the birthparent does not consent.

Birthparents should not have to be proactive in protecting their fundamental right to privacy. As noted, some state legislatures have unsealed adoption records while allowing birthparents time to file a “contact veto” preventing the release of their identifying information. Not only is there no guarantee in these instances that birthparents will be aware of the legislative change, such legislation unjustly puts the onus on birthparents to protect their privacy.

Since 2001, nearly 15 states have rejected more than 30 pieces of mandatory open-records legislation. Yet despite these legislative setbacks, a small minority of activists continue to push for mandatory openness. These activists demand nothing short of complete openness for all adoptions—a demand which belies their claim that they are interested in access to specific information such as familial or genetic history. The relatively silent majority who support mutual consent must be proactive as well. Otherwise, mandatory openness advocates may yet succeed in abolishing the right to privacy for birthparents’ living today, as well as the option of making a confidential adoption placement for birthparents in the future.