Secrecy and Genetics in Adoption Law and Practice

Demosthenes A. Lorandos
Consultants in Behavioral Science and Law

Follow this and additional works at: http://lawcommons.luc.edu/luclj

Part of the Family Law Commons, Health Law and Policy Commons, and the Juvenile Law Commons

Recommended Citation

Available at: http://lawcommons.luc.edu/luclj/vol27/iss2/5
Secrecy and Genetics in Adoption Law and Practice

Demosthenes A. Lorandos*

I. INTRODUCTION

Tens of thousands of children are adopted in America every year.¹ The state helps create these new families with the intent of fostering the needs of the child, the birth parents, the adoptive parents, and the community. To serve these needs, accurate health and genetic information is vital.

Forty-one states currently provide, to varying degrees, for the collection of health information from birth parents and the release of such information to adoptive families.² Adoption specialists have praised the existing legislation, but have also offered critical suggestions for improving and strengthening the information collection and dissemination process.³ While these laws have obvious practical benefits,⁴ no attempt has been made to justify their passage from a theoretical or jurisprudential basis.

This Article discusses health and genetic issues in adoption and describes the rights that children and their adoptive parents have to accurate health and genetic information. First, this Article establishes that health and genetic information can provide numerous benefits to

---

¹ Barbara Kantiowitz, Defying Simple Slogans, NEWSWEEK, May 1, 1989, at 36. Commentators agree that, because so many “private” (non-governmental) adoptions occur, it is difficult to quantify exact adoptions statistics. Id. (noting that although “nobody knows exactly how many adoptions there are each year[,] most experts put the figure at about 50,000”).


³ D. Marianne B. Blair, Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health-Related Information in Adoption, 70 N.C. L. REV. 681, 715 (1992) (discussing how commentators have criticized the placement of “special needs” adoptive children without proper background testing, proper preparation, and information about recessive problems that may show up later in the child’s life) (citations omitted).

⁴ Id. at 699-700 (explaining the benefits of full disclosure of medical and social history).
the physical and mental health of adopted children. Then, it briefly reviews the history of adoption law and existing legislation providing for the collection and dissemination of an adopted child’s health and genetic information. Next, the Article determines whether the status of a “right,” as defined by philosophers Wesley Hohfeld and Lawrence Becker, should be placed upon accessing genetic information in adoption settings. A brief review of case law tracing the history and development of children’s rights in the United States follows. Next, this Article discusses the use of the state’s parens patriae and police powers to further the state’s interest in the child’s welfare, as well as the constitutional limitations thereon. This Article then uses the above information to argue that the need for genetic and health information has created a right for adopted children and their families to such information. This Article also argues that the state has a corresponding duty, which can be fulfilled under the proper exercise of its parens patriae and police powers, to collect and provide such information. This Article concludes that legislation providing for the collection of genetic and health information properly recognizes the state’s duties to protect and enforce these rights.

II. HEALTH AND GENETIC ISSUES IN ADOPTION

Adopted children and adoptive families can learn vital information about an adopted child’s heritage from two main sources: (1) the health histories of an adopted child and the birth parents, and (2) the genetics of an adopted child. Research in both areas has produced data of vital importance to child rearing. This Part establishes that health and genetic information can provide numerous benefits to the physical and mental health of adopted children.

A. Health Issues in Adoption: What Can We Know?

In the last fifty years, science has made great strides in neonatology. For example, research has found that in 1987, the number of

---

5. See infra part II.
6. See infra part III.
7. See infra part IV.
8. See infra part V.A-B.
9. See infra part V.B.
10. See infra part V.C.
11. See infra part V.D.
12. See infra part VI.
children born addicted to crack almost doubled from the previous year\textsuperscript{14} and sharply increased again in the first four months of 1988.\textsuperscript{15} Children born with a crack addiction suffer severe withdrawal symptoms, from which many children die a painful death.\textsuperscript{16} If they survive, they often suffer from irritability, sleep disturbance, high-pitched crying, tremors, and damage to the reticular activating systems of their brains.\textsuperscript{17} The long-term effects of this tragedy are just beginning to be seen in serious behavior pathology, hyperactivity, and learning dysfunction.\textsuperscript{18}

Babies addicted to crack are only one example of the many significant health issues that affect child rearing and adoption. Proper diagnosis, treatment, and planning, however, can overcome problems with babies addicted to crack,\textsuperscript{19} as well as some of the other problematic maternal health issues, such as age, nutrition, emotional health, and medical care.\textsuperscript{20} Access to quality medical care and proper prenatal care also substantially affect fetal development.\textsuperscript{21}

Extremes of maternal age can have a serious impact on the health of a child. Children of older mothers have a disproportionately high rate

\begin{footnotes}
\item[14] Richard Levine, \textit{More Infants Showing Signs of Narcotics}, N.Y. TIMES, April 1, 1988, at B1, B3 (noting that 2521 children were born addicted to crack in the fiscal year ending in June 1987, as opposed to 1325 in the previous fiscal year).
\item[15] Id. (noting that 1336 children were born addicted to crack in the first four months of fiscal year 1988).
\item[16] \textit{See} Rachel Eisenstein, \textit{Prenatal Health Care: Today's Solution to the Future's Loss}, 18 FLA. ST. U. L. REV. 467, 469-70 (1991) (explaining that crack-addicted infants often suffer prenatal strokes, experience a higher than normal rate of kidney and respiratory disorders, and have a higher incidence of mental retardation) (footnotes omitted).
\item[19] \textit{See} Eisenstein, supra note 16, at 485 (indicating that "early and continuous prenatal health care will save lives").
\end{footnotes}
Babies born to teenage mothers face risks of substantially lower child birth weights and deficient intrauterine environments. Research suggests that teenage mothers run a higher than normal risk of having babies that face improper meiosis, premature delivery, and even death shortly after birth.

Maternal nutrition also has a direct impact on the health of the fetus. Pregnant women who suffer from proteinuria give birth to children who perform substantially lower on a variety of neurological tests than children born to women without proteinuria. Pregnant women who eat an enriched diet give birth to children who score significantly higher on standardized measures of cognitive ability than children born to mothers who do not eat an enriched diet. In addition to intellectual deficits, researchers have linked maternal nutrition to premature birth, growth retardation, low birth weight, and stillbirths.

22. See generally Linda F. Annis, The Child Before Birth 152-53 (1978) (explaining that a 40-year-old pregnant woman is 10 times more likely to give birth to a Down’s Syndrome baby than a 25-year-old woman).

23. See id. at 85 (indicating that teenage mothers are more likely to bear children with low birth weights and significant abnormalities due to the young mother’s “inadequately developed reproductive system”).

24. Meiosis is necessary for proper development. Meiosis is “a special method of cell division, occurring in maturation of the sex cells, by means of which each daughter nucleus receives half the number of chromosomes characteristic of the somatic cells of the species.” Dorland’s Illustrated Medical Dictionary 789 (26th ed. 1981). Without proper meiosis, chromosomal abnormalities will cause “abnormal development such as occurs with Down’s Syndrome.” Keith L. Moore, The Developing Human: Clinically Oriented Embryology 13-14 (4th ed. 1988).

25. See Annis, supra note 22, at 85-86.


28. Ruth F. Harrell et al., The Effect of Mothers’ Diets on the Intelligence of Offspring: A Study of the Influence of Vitamin Supplementation of the Diets of Pregnant and Lactating Women on the Intelligence of Their Children 23 (1995); Ruth F. Harrell, along with other experimenters, conducted a study in which the women’s diets were enriched by vitamins A, B, and C (which include ascorbic acid, thiamine, riboflavin, and niacinamide) and iron. Id.

29. Harrell concluded that there was a “significantly greater mean intelligent quotient for the children” of women who enriched their diets with vitamin supplements, as opposed to those women who were given placebo tablets. Id. at 43.

30. Id. at 8 (stating that the incidence of premature births was greater for women who had poor diets).

In addition to the foregoing physical factors, a woman's emotional health can have a strong effect on infant gestation and development. When pregnant women become upset, fetal activity often increases and birth weight may decline. Research has revealed a greater incidence of behavioral disorders and chronic illness among the children of women who are under stress during pregnancy. Other research has found strong correlations between maternal emotions and infant eating difficulties, birth size, and vomiting.

More subtle factors affecting the health of infants include the effects of specific teratogens, such as diseases, radiation, and drugs. Maternal diseases such as rubella (measles), syphilis, scarlet fever, and pneumonia can cause death, blindness, and brain damage to a child. Mumps and toxoplasmosis can cause heart damage and death. Mothers with herpes often give birth to infants with malformations and mental handicaps. Women with AIDS can transmit the virus to a fetus, which often is not detected until the antibodies are discovered in the newborn’s blood. Noninfectious maternal teratogens, such as

---

33. JAMES G. HUGHES, SYNOPSIS OF PEDIATRICS 158 (5th ed. 1980).
34. Lester W. Sontag, Implications of Fetal Behavior and Environment for Adult Personality, 134 ANNALS N. Y. ACAD. SCI., 782, 782-86 (1986).
36. FREDERIC BRIMBLECOMBE & DONALD BARLTROP, CHILDREN IN HEALTH AND DISEASE 19-23 (1978); HUGHES, supra note 33, at 56-85.
37. A teratogen is "any environmental or chemical agent that causes abnormal development of the fetus." IDA DOX ET. AL., MELLONI’S ILLUSTRATED MEDICAL DICTIONARY 470 (1985). Scholars Thomas Sheppard and Ronald Lemire note that “Teratogen” (from the Greek word *teras* (“monster”)) derived its name because radiation, drugs, chemicals, and viruses can have “monstrous” effects on the developing fetus. Thomas H. Sheppard & Ronald J. Lemire, Teratology, in FETAL AND MATERNAL MEDICINE 403, 403-17 (E. J. Quilligan & Norman Kretchmer, eds. 1980). For an explanation of the effects of teratogen generally, see id.
38. MOORE, supra note 24, at 151-52.
39. Toxoplasmosis is a cosmopolitan disease that occurs in all mammals and birds and may be transmitted congenitally. Henry Masur, Toxoplasmosis, in CECIL TEXTBOOK OF MEDICINE 1987-88 (James B. Wyngaarden et al. eds., 1992)
40. Id. at 1988.
41. See MOORE, supra note 24, at 152.
anemia, diabetes, and phenylketonuria (PKU), can cause serious damage, including small brain size and respiratory problems. Exposure to environmental teratogens such as radiation and mercury can cause severe malformations, brain damage, and death. Illegal drugs, however, are the most prevalent and most immediately damaging maternal teratogen, as well as the most preventable.

An expectant mother’s voluntary drug abuse can cause the most severe and long-term harm to her child. Amphetamines have been linked to fetal heart damage and circulatory malformations. LSD may cause severe chromosomal damage. Babies born to heroin users suffer clearly recognizable withdrawal symptoms and often die. Heroin use by pregnant women also has long term effects, such as hyperactivity and learning dysfunction. Pregnant women being treated for heroin use with methadone give birth to children who have even more serious problems.

No socially accepted drug causes more complications in pregnancy than alcohol. Fetal Alcohol Syndrome severely affects children’s
growth, intelligence, and overall health. Researchers believe that even moderate use of alcohol during pregnancy can cause fetal anomalies.

Thus, the pregnancy and birth processes can play a crucial role in an adoptee's life and health. Similarly, neglect and abuse dramatically affect an adoptee. Every day, children are beaten, burned, choked, sexually abused, and murdered. Many of the children who survive such abuse and neglect are subsequently adopted. Child abuse cripples children's efforts to realize his or her full potential as a human being. Children in lower socio-economic levels face a disproportionate rate of abuse and a greater probability of being placed for adoption. Many of these children enter their new families.


In the last 15 years, research has found alcohol use to be associated with permanent growth retardation both before and after birth, smaller brains, disfigured facial features, mental retardation, and heart and liver malformation. See, e.g., Ernest L. Abel, Fetal Alcohol Syndrome: Behavioral Teratology, 87 PSYCHOL. BULL. 29, 31-33, 44 (1980) (discussing the physical and cognitive impairments caused by the Fetal Alcohol Syndrome); Robert J. Sokol et al., Alcohol Abuse During Pregnancy: An Epidemiologic Study, 4 ALCOHOLISM 135, 135 (1980) (noting the principal features and defects of Fetal Alcohol Syndrome).

Children born to heavy drinkers often suffer from continuing mental and growth retardation throughout their lives. P. J. Bolton, Drugs of Abuse, in DRUGS AND PREGNANCY: HUMAN TERATOGENESIS AND RELATED PROBLEMS 128, 135-36 (D. F. Hawkins ed., 1983). Many children born to alcoholic mothers suffer withdrawal symptoms such as inability to sleep, increased yawning, sneezing, and hyperirritability. Id. at 136.

54. See generally Bolton, supra note 53, at 129, 135-37 (acknowledging that people have known for centuries that alcohol can cause damage to the fetus); HUGHEY & WEBER, supra note 52, at 87 (noting that alcohol readily passes through the placenta into the fetus's blood stream and therefore has disastrous effects).


56. See generally DAVID BAKAN, SLAUGHTER OF THE INNOCENTS 1-25 (1971) (describing the abuse of children and how society often looks the other way).

57. See Blair, supra note 3, at 700-01 (illustrating that many abused children are subsequently adopted).


59. See generally id. at 106-07 (illustrating that a disproportionate number of abusive parents come from low income families, which have far greater levels of stress than middle or upper class families).

60. See, e.g., James Garbarino, The Human Ecology of Child Maltreatment: A...
with serious psychological problems, unbeknownst to their adoptive families.\textsuperscript{61}

Long-term studies of adults who were abused as infants reveal a high correlation between serious child abuse and multiple personality disorder.\textsuperscript{62} Adults who were sexually abused as children are more likely to later abandon their own spouses and children.\textsuperscript{63} Any adoption process that fails to consider these important findings disserves the interests of all concerned.

\textbf{B. Genetic Issues in Adoption}

Just as they can learn volumes from health histories, adopted children and adoptive families can learn vital information from the genetics of an adopted child.\textsuperscript{64} Therefore, these children and their adoptive families have a critical interest in the child’s genetic information.\textsuperscript{65} Genetic trait transmission research has revealed strong genetic links to such divergent qualities as “activity level, alcoholism, anxiety, criminality, dominance, extraversion, intelligence, locus of control, manic-depressive psychosis, political attitudes, schizophrenia, sexuality, sociability, values, and vocational interests.”\textsuperscript{66} An explosion of genetic research in the last fifteen years has produced data of vital importance to child rearing.\textsuperscript{67} Curiously, while the most useful information has been developed in adoption studies, the adoption process has least utilized this information.\textsuperscript{68}


\textsuperscript{61} See Blair, supra note 3, at 684 (recognizing the long-standing policy of many states to provide little or no information on the medical or social history of an adopted child).

\textsuperscript{62} See Sally Koblinsky & Nory Behana, Child Sexual Abuse: The Educator’s Role in Prevention, Detection, and Intervention, YOUNG CHILDREN, Sept. 1984, at 3, 11 (explaining that child abuse can often be evidenced through personality disorders, such as behavior change, low self-esteem, and withdrawal from friends).

\textsuperscript{63} See, e.g., TOMMIE J. HAMMER & PAULINE TURNER, PARENTING IN CONTEMPORARY SOCIETY 298 (1996) (noting that adults who were abused as children had far greater difficulty in parenting their own children).

\textsuperscript{64} See infra notes 69-118 and accompanying text.

\textsuperscript{65} See infra note 118 and accompanying text.

\textsuperscript{66} Constance Holden, Does Biology Make Personality, WASH POST., Sept. 27, 1987, at D3.


\textsuperscript{68} See infra note 81 and accompanying text.
There are four basic periods in the history of behavioral genetics. The first began with Gregor Mendel's work on trait inheritance. The second period began with the theory that genes are found in objects called chromosomes, which are found in cell nuclei. The third period began when researchers explained the role of deoxyribonucleic acid (DNA).

During this third period, scientists gained the capability to predict and diagnose genetic dysfunctions by using DNA mapping techniques. Three basic classes of these dysfunctions have been categorized: chromosomal diseases, hereditary diseases with simple "Mendelian" modes of inheritance, and multifactorial diseases.

These genetic dysfunctions affect a substantial number of people. More than five percent of persons under twenty-five years of age suffer from genetic dysfunctions caused by microscopic deviations in the structure or number of their chromosomes. While chromosomal diseases are relatively rare, all humans carry genes that can produce severe handicaps. Many researchers believe that the number of

69. Mendel published his experimental results in 1866 in a paper printed by the Natural History Society of Brno. *Genetically Speaking*, PEORIA J. STAR, Jan. 10, 1994, at D2. Mendel described dominant and recessive transmission strength in certain traits in peas, which determined the smooth or wrinkled character of coverings. *Gregor Mendel's Experiments on Plant Hybrids*, SCIENCE, July 7, 1993, at 370. The mechanism by which this dominant or recessive strength is activated is now called a gene. *Id.* at 371.

For an explanation of genetics in human development, see Arno G. Motulsky & Gilbert S. Omenn, *Special Award Lecture: Biochemical Genetics and Psychiatry, in Genetic Research in Psychiatry* 3, 4-7 (Ronald R. Fieve et al. eds., 1975).

70. MARGARET W. THOMPSON ET AL., *GENETICS IN MEDICINE* 1 (5th ed. 1991) (providing an introduction that details the development of genetics research and its role in medicine). It has been estimated that each of a human being's 23 chromosomes contains between 50,000 and 100,000 genes. See Yvonne Baskin, *Spare Genes: Tampering with Human Embryos*, OMNI, Mar. 1982, at 52, 54, 109-14.

71. *See Thompson, supra note 70, at 2.*

72. *See generally id.* at 3 (recognizing that the expansion and application of genetic knowledge has had "fruitful consequences").

73. *See generally id.* at 4-5 (providing a table categorizing diseases under the three main classes of dysfunction).

74. *Id.* at 8. One of the most prevalent aberrations is trisomy 21, commonly known as Down's Syndrome. *See id.* at 219. Down's Syndrome children suffer from heart defects and face slower physical and intellectual development. *Id.* They usually do not live past their third decade. *Id.* Other genetic dysfunctions include "Cri du chat." *Id.* at 226-27. "Cri du chat" is a hereditary condition marked by smallness of the head and jaw, severe mental deficiency, and a characteristic high-pitched, cat-like cry. *Id.* at 226. Another aberration is Kleinfelter's Syndrome, which is caused by the presence of an extra X-chromosome in a male child and causes feminization and infertility. *Id.* at 239. Turner's Syndrome, which most often occurs in women missing a chromosome and causes masculinization and infertility, is a fourth aberration. *Id.* at 241.

75. *Id.* at 8.
“Mendelian” mode inheritable diseases exceeds 1800. While the total number of genetic dysfunctions is staggering, many are detectable.

More than 200 of the most devastating genetically transmitted diseases, including spina bifida, all known chromosomal abnormalities, and over seventy metabolic dysfunctions, can be detected through amniocentesis. Ultrasound, fetoscopy, cytogenetics, and chorionic villus sampling, can also detect genetic dysfunctions. Unfortunately, many pregnant women whose children will be placed for adoption severely underutilize these procedures: Recent “wrongful life” and “wrongful adoption” cases evidence the extent to which simple and available tests to obtain genetic information are not used.

The fourth period of behavioral genetic history began in earnest in the 1980s with research into the genetic transmission of personality traits and characteristics. This period revolutionized the “nature-nurture” controversy, and has had a profound impact on pediatric

---

76. See, e.g., VICTOR A. MCKUSICK, MENDALIAN INHERITANCE IN MAN xxxi-xxxviii (7th ed. 1986).

77. THADDEUS E. KELLY, CLINICAL GENETICS AND GENETIC COUNSELING 370 (1986) (explaining that amniocentesis can detect multifactorial genetic diseases).

78. THOMPSON, supra note 70, at 414-15; HAROLD KAPLAN AND BENJAMIN SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY IV 1359 (1985)

79. Amniocentesis is a testing procedure in which a small amount of amniotic fluid is withdrawn from the womb and analyzed. DOX, supra note 37, at 14; THOMPSON, supra note 70, at 427.

80. See KELLY, supra note 77, at 372.

81. See, e.g., Griffith v. Johnston, 899 F.2d 1427, 1433-34 (5th Cir. 1990) (explaining that an adoption agency failed to obtain important genetic information).

82. See Genes, Environment, and Personality, SCIENCE, June 17, 1994, at 1700; What Makes Them Do It?, TIME, Jan. 15, 1996, at 60 (stating that scientists believe they will eventually have the ability "to genetically map personality traits as precisely as... physical characteristics like height and weight").

83. The “nature-nurture” controversy began in the psychology field with Granville Stanley Hall’s “genetic psychology” in the late 1800s. See WILLIAM SAHAKIAN, HISTORY AND SYSTEMS OF PSYCHOLOGY 71 (1975). Hall relied heavily upon the work of Darwin and Spencer and postulated a strong genetic influence upon human psychology. Id. This
and developmental psychology. By studying trait and characteristic transmission between generations, researchers have made startling discoveries.

Studies of twins who were raised separately have provided behavioral genetics researchers the opportunity to separate genetic from environmental effects. This is particularly true in cases of identical twins, who share the same genetic material. Descriptions of genetic predispositions to specific traits best explain similarities between twins reared apart. A number of detailed adoption studies have enabled researchers to apply sophisticated correlational analyses to studies of adopted children in their new homes. When researchers correlate this data with detailed studies of the twins' adoptive and biological parents, researchers can determine separate genetic and environmental influences for a number of traits and characteristics.

For example, researchers have conclusively proven genetic links to schizophrenia. Virtually all genetic researchers urge parents to use

"genetic psychology" was a radical departure from the concept of the mind as a blank tablet ("tabula rasa") upon which experience wrote, a theory postulated by John Locke in his An Essay Concerning Human Understanding. Id. (citing John Locke, AN ESSAY CONCERNING HUMAN UNDERSTANDING, book 2, ch. 1 (1690)).


86. PLOMIN, PRIMER, supra note 85, at 342-53.

87. See, e.g., Remi J. Cadoret et al., Studies of Adoptees from Psychiatrically Disturbed Biological Parents: III Medical Symptoms and Illnesses in Childhood and Adolescence, 133 AM. J. PSYCHIATRY 1316, 1318 (1976) (explaining how researchers compared adoptees with psychiatrically ill (predominantly schizophrenic) biological parents with adoptees from biological parents free from pathology and found significantly higher rates of psychiatric illness in adoptees from biologically ill parents, regardless of environmental factors in adoptive homes); Lynn Cunningham et al., Studies of Adoptees from Psychiatrically Disturbed Biological Parents: Psychiatric Conditions in Childhood and Adolescence, 126 BRIT. J. PSYCHIATRY 534, 549 (1975) (explaining that researchers found higher rates of psychiatric dysfunction in adoptees whose biological parents had psychiatric disturbances).


89. Literally hundreds of studies have traced the genetic causation of schizophrenia.
this data in child rearing by understanding a child's genetic predispositions and by planning to cope with foreseeable difficulties. Integrating these findings into the processes by which parents and others raise high-risk children could thereby help limit the effects of this debilitating disease.

Research into the genetic etiology of alcoholism and drug abuse follows a similar path. Numerous twin and adoption studies indicate a strong genetic link to alcoholism. A subsequent study described

By the mid 1970s, researchers reported a strong genetic predisposition to breakdown in schizophrenic illness. See, e.g., Cadoret, supra note 87, at 1318.


By the mid 1980s, researchers from around the world reported a variety of studies of families, mono and dizygotic twins, and adoption processes, which led to the inescapable conclusion that schizophrenia had a strong genetic component. See, e.g., Robin M. Murray et al., Genetic Vulnerability to Schizophrenia, 9 PSYCHIATRIC CLINICS N. AM. 3, 16 (1986) (describing family, adoption, and twin studies, as well as modes of transmission theories and molecular genetics).

By the late 1980s, researchers used DNA technology in an attempt to find specific genetic markers, or "probes," for schizophrenia. See, e.g., Irving I. Gottesman et al., Clinical Genetics as Clues to the "Real" Genetics of Schizophrenia, 13 SCHIZOPHRENIA BULL. 23, 47 (1987). Further research revealed that periventricular atrophy in the third trimester is a genetically produced defect that brings about the predisposition to breakdown in schizophrenia. Sarnoff A. Mednick et al., The Copenhagen High-Risk Project, 1962-86, 13 SCHIZOPHRENIA BULL. 485, 495 (1987).

By the close of the 1980s, a leading psychiatric journal devoted an entire issue to emerging theories of the genetic transmission of schizophrenia. 21 J. PSYCHIATRIC RES. 365-575 (1987).

90. See, e.g., PLOMIN, GENETICS AND EXPERIENCE, supra note 83, at 82-89; PLOMIN, PRIMER, supra note 85, at 343; Franklin, supra note 67, at 36-43; Holden, supra note 66, at D5.

91. In the early 1970s, researchers found that sons of alcoholics raised with their biological parents and raised by non-alcoholic adoptive parents had comparable rates of alcoholism. Donald W. Goodwin et al., Drinking Problems in Adopted and Non-Adopted Sons of Alcoholics, 31 ARCHIVES GEN. PSYCHIATRY 164, 166 (1974). See also Donald W. Goodwin, Genetic Factors in the Development of Alcoholism, 9 PSYCHIATRIC CLINICS N. AM. 427, 428-32 (1986) (citing various international studies linking alcoholism to genetics); Donald W. Goodwin, The Genetics of Alcoholism, 34 HOSP. & COMMUNITY PSYCHIATRY 1031, 1033-34 (1983) (finding adopted sons of alcoholics to be four times as likely to become alcoholics as adopted sons of non-alcoholics, all other circumstances being equal).

A study of over 2000 adoptees revealed significant correlations between alcoholic
strong genetic links in the development of alcoholism, anti-social personality, and drug abuse.\textsuperscript{92} By the close of the 1980s, researchers were investigating the "pharmacogenetics" of psychoactive drugs,\textsuperscript{93} as well the inheritance of distinct types of alcoholic syndromes.\textsuperscript{94} These researchers stressed the genetic components contributing to the development of alcoholism and other drug abuse, and urged prevention of these diseases by utilizing their data in informed child rearing practices.\textsuperscript{95}

The most controversial area of recent behavioral genetics research has been the heritability of intelligence.\textsuperscript{96} Critics have questioned the motives of such inquiries.\textsuperscript{97} Nonetheless, in the last twenty years, research has continually suggested that intelligence has a strong genetic component.\textsuperscript{98}

\begin{itemize}
\item A 1985 study of the Swedish adoption records of over 862 male and 913 female adoptees similarly described these two distinct types of alcoholism, and further concluded that both have significant genetic etiologies. Robert Cloninger et al., \textit{Psychopathology in Adopted-out Children of Alcoholics: The Stockholm Adoption Study, in Recent Developments in Alcoholism} 37, 44 (Mark Galanter, ed., 1985).

\item Remi J. Cadoret et al., \textit{Alcoholism and Antisocial Personality: Interrelationships, Genetic and Environmental Factors}, 42 ARCHIVES GEN. PSYCHIATRY 161, 163-65 (1985); Remi J. Cadoret et al., \textit{An Adoption Study of Genetic and Environmental Factors in Drug Abuse}, 43 ARCHIVES GEN. PSYCHIATRY 1131, 1133 (1986).


\item Robert C. Cloninger et al., \textit{Genetic Heterogeneity and the Classification of Alcoholism}, 7 ADVANCES ALCOHOL & SUBSTANCE ABUSE 3, 4-15 (1988).

\item See Cadoret, supra note 87, at 1317.

\item See Herrnstein & Murray, supra note 83, at 1. See also Charles A. Murray, \textit{The Real 'Bell Curve,'} WALL ST. J., Dec. 14, 1994, at A14 (acknowledging the controversial nature of his book, \textit{The Bell Curve: Intelligence and Class Structure in American Life}) (citing Herrnstein & Murray, supra note 83); Poole, supra note 83, at 35-43; Plomin, Primer, supra note 85, at 366 (noting that "although group differences have their place, we need to avoid slipping into typological traps"); Rowe, supra note 83, at 7-8 (concluding that the family setting may have less influence on a child's intelligence and social attitudes than the child's genetics).

\item Rowe, supra note 83, at 19-26; Herrnstein & Murray, supra note 83, at 1 (noting that the attempt to measure any genetic correlation with intelligence has been "dismissed as an artifact of racism [and] political reaction").

\item In 1978, researchers published findings that differences in the I.Q.s of
Many of the same data used to describe the genetic bases of schizophrenia, alcoholism, and drug abuse have also indicated the existence of strong genetic links to major depressive diseases. Significantly higher rates of "affective disorders," such as depression and depressive diseases, exist among adoptees whose biological parents exhibit these disorders. In the late 1980s and early 1990s, researchers found significant genetic links to neurotic depression, simple adolescents studied were due more to genetic than to environmental factors. Sandra Scarr & Richard A. Weinberg, The Influence of 'Family Background' on Intellectual Attainment, 43 AM. SOC. REV. 674, 688-91 (1978). Other researchers have come to similar conclusions. PLOMIN, PRIMER, supra note 85, at 333 (using adoption studies to show that genetics have a much higher role in intelligence than environment); Rowe, supra note 83, at 105-11 (same).

In 1989, two scientists attempted to describe heritability issues concerning intelligence and other factors. See Franklin, supra note 67, at 36; Karen Wright, The Blood-Brain Barrier: More Evidence Links Genes and Intelligence, SCIENTIFIC AM. 27, 27-28 (1989). Examining 60 years of research into genetics and intelligence, one scientist concluded that genetics plays a profound role. Wright, supra, at 28. The second scientist concluded that "[t]hough the debate over the value of intelligence quotient tests continues . . . there is ample evidence that whatever it is they measure is in large part inherited." Franklin, supra note 67, at 36, 38.

Two 1990 studies that used the sophisticated "methodology of quantitative behavioral genetics" and "multivariate conditional path models" found significant indicators of genetic transmission of intelligence. Hilary Coon et al., Home Environment and Cognitive Ability of 7-year-old Children in the Colorado Adoption Project: Genetic and Environmental Etiologies, 26 DEV. PSYCHOL. 459, 462-66 (1990).

99. "Major depressive diseases," also called "major affective disorders," refer to a class of mental disorders ranging from serious to incapacitating depressions. See KAPLAN & SADOCK, supra note 78, at 593.


A 1986 study compared the relatives of 71 adult adoptees who developed severe mood disorders with a control group of the relatives of 71 adult adoptees who did not. Paul H. Wender et al., Psychiatric Disorders in the Biological and Adoptive Families of Adopted Individuals with Affective Disorders, 43 ARCHIVES GEN. PSYCHIATRY 923, 929 (1986). The report noted a significantly increased frequency of major mood disorders, including unipolar depression, alcohol abuse, and attempted suicide. Id. at 926. The report also recognized "a striking and significantly increased incidence of successful suicide among the biological relatives of the [adoptees with serious mood disorders] compared with the biological relatives of the controls." Id. at 927.

101. George Winokur, Family (Genetic) Studies in Neurotic Depression, 21 J. PSYCHIATRIC RES. 357, 363 (1987). Neurosis depression is "a depression occurring in the context of chronic personality problems or neuroses. It occurs in the presence of long standing instability in interpersonal relations, sexual, marital and work circumstances or neurotic symptoms." Id. at 357.
depression,102 and major depressive disorders.103 Researchers have begun looking for a specific gene cluster that predisposes people to bipolar depressions,104 and for a genetically transmitted molecular catecholamine in manic-depression.105 Once again, these researchers have recommended that child development specialists use their data to better the lives of at-risk children.106

As research into the genetic etiology of schizophrenia and alcoholism exploded in the mid-1970s, forensic psychologists began studying links between genetics and criminal behavior and found strong evidence of a genetic link to criminal predisposition.107 Additional studies


103. Theodore Reich et. al., The Familial Transmission of Primary Major Depressive Disorder, 21 J. PSYCHIATRIC RES. 613, 624 (1987). A depressive disorder is “a major subdivision of mood disorders (affective disorders) comprising major depression, dysthymia, and otherwise unclassified depressions.” Campbell, supra note 102, at 194.

104. Daniela S. Gerhard et al., Search for a Gene that Predisposes Individuals to BPI Disorder, 21 J. PSYCHIATRIC RES. 569, 575 (1987). A bi-polar disorder is an “affective disorder characterized by episodes of both mania and depression.” Campbell, supra note 102, at 194.

105. J. Mallet et al., Molecular Genetics of Catecholamine as an Approach to the Biochemistry of Manic-Depression, 21 J. PSYCHIATRIC RES. 559, 568 (1987). The catecholamine (“CA”) (a fluid which affects neurotransmitters and hormones) hypothesis stated that “there is a functional increase in CA during mania and a decrease during depression.” Id. at 559.

Recently, two psychologists reviewed the work done to date in the genetic etiology of depression and mood disorders, and concluded that the “most ubiquitous of psychiatric symptoms” are genetically transmitted. Randy Katz & Peter McGuffin, The Genetics of Depression and Manic-Depressive Disorder, 155 BRIT. J. PSYCHIATRY 294, 304 (1988).


107. A study of female offenders and their adopted-out infants revealed significantly higher rates of antisocial personality disorder among adoptees of offender mothers. Raymond R. Crowe, An Adoption Study of Antisocial Personality, 31 ARCHIVES GEN. PSYCHOL. 785, 791 (1994) [hereinafter Crowe, Adoption Study]. In a subsequent study, Crowe compared 52 adult adoptees of female offender mothers he studied for 15 to 46 years with a control group. Raymond R. Crowe, An Adoptive Study of Psychopathology: Preliminary Results from Arrest Records and Psychiatric Hospital Records, in GENETIC RESEARCH PSYCHIATRY 96 (Ronald R. Fieve et al. eds., 1975) [hereinafter Crowe, Psychopathology]. Although there was some criminality in control group adoptees, the rates of antisocial personality and criminality among the adopted out children of female offenders were significantly higher. Id. at 98-100. See also Sarnoff A. Mednick et al., Genetic Influences in Criminal Convictions: Evidence from an Adoption Cohort, SCIENCE, May 25, 1984, at 891, 894 (finding that a biological parent’s criminality affects children’s propensity for criminal behavior).

A study of 800 Swedish adoptees revealed strong correlations for petty criminality between male adoptee offenders and their biological parents, and concluded that genetics is a significant factor in the transmission of criminality. See Robert Cloninger et al., Predisposition to Petty Criminality in Swedish Adoptees: I Genetic and Environmental
into the relationship between genetics and criminal behavior revealed two conclusions. First, a significant correlation exists between adopted children's criminality and that of their biological parents. Second, proper utilization of this information by pediatric and child development specialists would lead to an increased prevention of crime and delinquency.

In addition to these well established areas of genetic inquiry, researchers have found significant genetic factors in a vast array of human characteristics, including infant temperament, blood pressure, obesity, social interaction, panic disorder, "Type-A" heterogeneity, and antisocial personality. A unique study of antisocial personality compared fathers of adopted and non-adopted children who were admitted to psychiatric facilities. Mark L. Jary & Mark A. Stewart, *Psychiatric Disorder in the Parents of Adopted Children with Aggressive Conduct Disorder*, 13 NEUROPSYCHOBIOLOGY 7, 11 (1985). The study found that the biological fathers of the adoptees so diagnosed had much higher rates of antisocial behavior and alcoholism. *Id.* at 8-9.

By 1987 researchers believed that it was clearly reasonable to "expect that some biological predisposition toward antisocial behavior may characterize the most serious of recidivistic and violent criminal offenders." Terrie E. Moffitt, *Parental Mental Disorder and Offspring Criminal Behavior: An Adoption Study*, 50 PSYCHIATRY 346, 360 (1987).


behavior, and premature death in adoptees. These researchers have joined earlier geneticists in urging that prevention can be dramatically enhanced if parents use these findings in their child rearing practices.

III. HEALTH INFORMATION DISCLOSURE LEGISLATION: THE NEED FOR ADEQUATE DISCLOSURE IN THE ADOPTION PROCESS

Adoption laws in the United States historically cloaked the adoption process in secrecy. State legislatures have responded only recently to the criticism of the anonymity and secrecy in the adoption process by enacting laws granting adopted children and their adoptive families access to relevant health and genetic information. This Part reviews the history of adoption in the United States and existing legislation providing for the collection and dissemination of an adopted child's health and genetic information.

A. The History of Adoption in the United States

The adoption process begins in a quagmire of conflicting interests. These conflicts may be subtle, as when all parties agree to an adoption, or overt, as when one party initiates legal proceedings to terminate parental rights. Four distinct interest groups exist in the adoption process: birth parents, who may be aligned together or opposed to each other; adoptive parents who, while seemingly aligned with each other, come to the adoption process with a variety of conscious and unconscious motives and goals; the child, whose interests may seem
simple, but grow more complex as time passes; and the state, ostensibly with the simplest interest to serve the best interests of the child, although the state may attempt to serve too many interests and disserve most as a result.

Adoption law in the United States has a long and convoluted history. The Massachusetts legislature enacted the nation’s first adoption law in 1851. Soon thereafter, other states enacted similar laws, which were little more than attempts to codify a fairly informal process. As the United States entered the Progressive Era, the emerging disciplines of sociology and social work affected the actions of state legislatures. Numerous social problems emerged as thousands of immigrants joined a population that was rapidly moving from rural to urban areas. Philanthropic and charitable organizations established schools of philanthropy (now called schools of social work) in an attempt to meet the needs of this burgeoning class of urban Americans.

During the Progressive Era, new adoption laws focused on granting a “new start” for the state’s adoptees, and professional organizations of social workers championed a number of new regulations. These reforms were indicative of a united movement supporting strict confidentiality in adoption processes.

Believing that secrecy was necessary to protect birth mothers as well as the children stigmatized by the “shame of illegitimacy,” states enacted laws providing for the complete anonymity of birth parents. These laws denied adoptees and their families access to information

122. 1873 N.Y. Laws 830.
124. Id. at 85-87.
Secrecy and Genetics in Adoption Law

concerning birth records, health histories, and biological origins, and mandated the sealing of records and the issuance of new "birth certificates" to adoptees.\(^{128}\)

Legislators based these adoption policies on a belief that confidentiality protected the privacy rights of all parties to the adoption process.\(^{129}\) Much of the support for these laws came from the efforts of social workers, who believed that birth mothers desired anonymity and a chance to start over after the stigma of an out-of-wedlock birth.\(^{130}\) Confidentiality shielded adoptive parents from unwanted intrusions into their redefined family unit.\(^{131}\) Facilitating the child's "new start," removing any lingering stigma of illegitimacy, and promoting "bonding" with a primary set of parents all guarded the interests of the adopted child.\(^{132}\) Creating a lawful family, providing for orderly transfer and heritability, protecting parties from needless intrusions and public scrutiny, and eliminating additional requirements of record keeping and maintenance served the state's interests.\(^{133}\)

B. Criticism of Anonymity and Secrecy in the Adoption Process and Legislative Responses

Despite these initial safeguards of confidentiality, a growing body of research questioned the legitimacy of anonymity and secrecy in the adoption process.\(^{134}\) States began to allow adopted children and their families access to relevant health and genetic information. Forty-one

\(^{128}\) As early as 1917, Minnesota created one of the first and most stringent of the sealed records and secrecy laws. 1917 Minn. Laws 222. A complete severance is still the norm in American adoption laws. See Hollinger, supra note 126, at 13-1 to 13-5.

\(^{129}\) See Blair, supra note 3, at 681, 687.

\(^{130}\) Rationales put forth for the "closed system" of adoption suggest that: (1) birth mothers need protection and a chance to start over; (2) the child's integration into the adoptive home will be undermined by the presence of a birth mother of unknown location; (3) adoptive parents wish to be free from interference from birth parents; and (4) interference could ultimately lead to a fight over custody. See SACHDEV, supra note 121; see also Carmelo Cocozelli, Predicting the Decision of Biological Mothers to Retain or Relinquish Their Babies for Adoption: Implications for Open Placement, 68 CHILD WELFARE 33, 38 (1991) (opining that in light of the growing use of "open placement" procedures, in which adoptive parents meet biological parents, it is advantageous to accurately predict what variables impact a biological mother's decision to actually relinquish her child after birth); Fady Hajal & Elinor B. Rosenberg, The Family Life Cycle in Adoptive Families, 61 AM. J. ORTHOPSYCHIATRY 78, 83-85 (1991) (analyzing the effects on the adoptive family of disclosing adoption).

\(^{131}\) Blair, supra note 3, at 695.


\(^{133}\) Id. at 923-24.

\(^{134}\) See, e.g., Blair, supra note 3, at 698; Bebensee, supra note 2, at 398.
states have enacted legislation either mandating or allowing the disclosure to adoptive families of an adopted child’s health and genetic information.  

135 States passed these statutes largely in response to attacks on the anonymity and secrecy of traditional adoption policy in the mid-1980s, when adoptive parents attempted to revoke adoptions after discovering genetic, mental, or physical problems in their adopted children.  

Within a few years, adoptive parents began to successfully sue adoption agencies for fraud and misrepresentation.  

136 See generally Elizabeth N. Carroll, Abrogation of Adoption by Adoptive Parents, 19 Fam. L. Q. 155, 160-173 (1985) (detailing the legislative response to problems that had been caused by lack of information provided by adoption agencies about adopted children).  

137 See, e.g., Meracle v. Children’s Serv. Soc’y, 437 N.W.2d 532, 540 (Wis. 1989) (holding adoptive parents had a cause of action against agency for misrepresentation of adoptive child’s risk of Huntington’s Disease); Jay M. Zittler, Annotation, Action for Wrongful Adoption Based on Misrepresentation of Child’s Mental or Physical Condition or Parentage, 56 A.L.R. 4th 375, 379 (1987).  

138 See Zittler, supra note 137, at 375-81. See also D. Marianne B. Blair, Getting the Whole Truth and Nothing But the Truth: The Limits of Liability for Wrongful Adoption, 67 Notre Dame L. Rev. 850, 871-77 (1992) (examining the treatment of intentional misrepresentation and nondisclosure by the courts); Robert A. Clifford &
The statutes provide for varying degrees of collection and disclosure of health and genetic information. Some states loosely define the types of information which must be obtained from birth parents and released to adoptive parents, while others list with a high degree of specificity the information that must be available. While most states require that certain information be released to the adoptive parents, two states do not address this issue. Despite these differences, states clearly recognize the vast benefits derived from making such information available to adoptive families.

Amidst the conflicting interests inherent in every adoption, the interests of the adopted child must be preeminent. Although policies of confidentiality and secrecy have served a legitimate purpose, scientific advances in the fields of genetic counseling, prenatology, and neonatology can provide parties to an adoption with important information. If appropriately utilized, this information can enhance the lives of adopted children and all who interact with them. Thus, legislation mandating the collection and dissemination of an adopted child's health and genetic history can prove invaluable in helping the child live a healthy and productive life.

IV. DEFINING RIGHTS

The child's happiness, too, is willed by the Deity; the child, too, has faculties to be exercised; the child, too, needs scope for the exercise of those faculties; the child therefore has claims to freedom—rights as we call them—coextensive with those of the adult. We cannot avoid this conclusion, if we would. Either we must reject the law altogether, or we must include under it both sexes and all ages.

Pamela S. Menaker, Wrongful Adoption Gains Acceptance, Nat'L J., Sept. 28, 1992, at 38 (discussing how wrongful adoption has been recognized as a new tort in courts); John R. Maley, Wrongful Adoption as Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud, 20 Ind. L. Rev. 709, 712-14 (1987) (discussing fraud between adoptive parents and a public or private agency regarding the health of the adoptee).

139. For a discussion of the various statutes, see Bebensee, supra note 2, at 397. See also Blair, supra note 3, at 681 (discussing non-disclosure policies and the current status of state law).


143. See supra notes 134-42 and accompanying text.

144. See supra notes 126-33 and accompanying text.

145. See supra part II.

Having noted the usefulness of health and genetic information for parties in adoption, the question remains whether access to that information rises to the level of a right. This Part determines whether the status of a "right," as defined by philosophers Wesley Hohfeld and Laurence Becker, should be placed upon accessing genetic information in adoption settings.

A. "Rights" and Children

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."147 Giving "rights holders" status to minors may provide an additional hurdle for children in the adoption process because of the peculiar nature of children's rights. Philosopher Laurence Houlgate has noted that any discussion of children's rights must confront a "confusing and often incoherent set of intuitions."148 Houlgate stated that "the problem of constructing a theory of juvenile rights properly belongs to social philosophy. There is no agreed-upon definition of this rather amorphous area of inquiry. . . . It deals with a large miscellaneous set of philosophical questions about social problems."149

Legal rights have been granted to children in a fragmentary and inconsistent way.150 The dismaying lack of legal scholarship attempting to formulate a theory of rights, upon which decisions concerning children's rights can be based, typifies one difficulty of the present discussion. Existing theories fail as either overly simplistic descriptions of the present status of children’s rights or polemical attacks on the status of children coupled with proposals for radical legal reform.151 The result often leaves legislatures and courts with incoherent and inconsistent ideas and policies about children. Thus, a thesis that adopted children have a right to state-provided health and genetic infor-

148. LAURENCE D. HOULGATE, THE CHILD & THE STATE—A NORMATIVE THEORY OF JUVENILE RIGHTS xii (1980). Houlgate, a philosopher at California's Polytechnical University, postis a "normative" theory: "a justifiable (set of) normative principle(s) that can be used to guide decision and judgment making about legal rights." Id. at 4.
149. Id. at 4.
150. See infra part V.A.
151. See, e.g., Katherine H. Federle, On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle, 42 DePaul L. Rev. 983, 1022 (1993) (noting that "if [legal scholars] are to acknowledge a valid theory of children’s rights, one that accounts for power and status, then our rights talk must change dramatically").
mation should be supported by a discussion of the nature, concept, and definition of rights.

In the late seventeenth century, political philosopher Benedict de Spinoza suggested that an individual's natural rights derive from the power he can exert over others.152 Under de Spinoza's theory, the rights of the sovereign derive from the combined power of the individuals who support him or her, and an individual's rights derive from the sovereign's decision to uphold the law.153 In the eighteenth century, Jeremy Bentham defined rights in terms of corresponding duties, and stressed the importance of sanctions when such duties are breached.154 Bentham observed that "[w]ithout the notion of punishment..., no notion can we have of either right or duty."155 Bentham argued that rights are interrelated with duties in support of the notion that duty and obligation form the underpinnings of social responsibility.156 In 1753, Blackstone stated:

The rights of persons considered in their natural capacities are also of two sorts, absolute, and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons[;] relative, which are incident to them as members of society, and standing in various relations to each other.157

In the twentieth century, notions of the nature of rights have dramatically expanded. These notions of rights as powers or as predictors of the power that others will wield have given way to more modern philosophical views.158 Legal realists have maintained that statements which purport to describe rights are merely predictions of what a court will do, or of what one can expect a court to do.159 Today, rights have

152. A.G. WERNHAM, BENEDICT DE SPINOZA: THE POLITICAL WORKS 270 (1958) (noting that "a man in the state of nature is possessed of his own right, or free, only as long as he can protect himself from being subjugated by others").
153. Id. at 277, 279.
155. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT, reprinted in COLLECTED WORKS OF JEREMY BENTHAM 495 (J.H. Burns & H.L.A. Hart, eds. 1977). See also 4 ROSCOE POUND, JURISPRUDENCE 74 (1959) ("Thus a right is what we should call a power which one toward whom there is a duty may exercise in case of a breach... ").
156. See COLIN A. WRINGE, CHILDREN'S RIGHTS—A PHILOSOPHICAL STUDY 82 (1981).
157. I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 119 (1897) (emphasis added).
159. See, e.g., POUND, supra note 155, at 41-90 (including useful summaries of some of the main juristic theories of rights, footnotes, and an extensive bibliography).
a much broader definition. Rights qualify as “in personam” if they impose an obligation on a single person, or “in rem” if they impose an obligation on all persons. Further classifications on rights split them into primary, those that exist without reliance upon other rights, and secondary, those that modify or are designed to protect or enforce primary rights. Four categories of constitutional rights exist: (1) natural rights, which grow out of the nature of man; (2) civil rights, which belong to every citizen; (3) political rights, which address participation in government; and (4) personal rights, which include “personal security, comprising those of life, limb, body, health, reputation and the right of personal liberty.”

B. Wesley Hohfeld's System of Rights

In 1919, Wesley Hohfeld described a system of rights in terms of expectations and relationships. Hohfeld's system places the concepts of inter-relationship and duty into pairs of opposites. Hohfeld's dynamic divides people into two non-exclusive categories: “right-holders” and “right-regarders.” Hohfeld considered right-holders in relation with right-regarders, who have a duty that corresponds to the right-holder’s right. Similarly, Hohfeld considered privilege holders in relation to those privilege regarders that have a corresponding lack of right with respect to that privilege. Hohfeld described these relationships as jural correlates:

<table>
<thead>
<tr>
<th>right</th>
<th>privilege</th>
<th>power</th>
<th>immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>duty</td>
<td>no-right</td>
<td>liability</td>
<td>disability</td>
</tr>
</tbody>
</table>

In this system, each concept is the jural correlate of the concept directly above or below it. Placing Hohfeld’s scheme of jural correlates into grammatical syntax, the following inter-relationships arise:

Right/Duty = “I claim and you must;”

161. Id. Secondary rights can be preventive or protective with respect to whether they prevent or protect against the infringement of primary rights. Id.
162. Id. at 1324-25.
163. WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 35-64 (1923).
164. Id. at 35-64. "Regarders" is not Hohfeld's term, but is used here to refer to those actors upon whom a claim of a right will have an impact. For example, with respect to a right, Hohfeld's system would ask: "Right of whom, that who do what?" The "who" that must do something is the right-regarder. Id.
165. A right signifies one's affirmative claim against another. Id. at 7. A privilege signifies one's freedom from the right or claim of another. Id.
166. Id. at 37-64.
Secrecy and Genetics in Adoption Law

Privilege/No-Right = "I may and you cannot;"
Power/Liability = "I can and you must accept it;"
Immunity/Disability = "I can with impunity and you cannot."

Hohfeld called these four correlates the common denominators of the law.

C. Lawrence Becker and Laurence Houlgate's Use of Hohfeld's System of Rights

Philosopher Lawrence Becker has described an analysis, consisting of ten elements, to be used with Hohfeld's system when determining whether a right exists. The first five of Becker's elements have central importance in the present discussion. They consist of 1) specification of the right-holders; 2) specification of the right-regarders (those who must observe, respect, or honor the right); 3) specification of the general nature of the Hohfeldian relation (such as right/duty, privilege/no-right, power/liability, and immunity/disability) between right-holders and right-regarders; 4) specification of the act, forbearance, status, or benefit owed to or possessed by the right-holder; and 5) specification of the conditions under which a claim-right may be said to be sound, or general justification of those conditions.

In Becker's analysis:

[A claim-right posits the] existence of a state of affairs such that one individual or institution (the right-holder) has a claim on another (the duty-bearer) for an act or forbearance in the sense that, should the claim be in force or exercised, and the act or forbearance not done, it would be moral (or legal) . . . to use coercive measures to extract either the specific performance . . .

167. For example, these relationships might be such that in Right/Duty, one has a claim to the payment of a debt, and the other has a duty to pay it. Id. at 36-38. In Privilege/No-Right, one has a privilege to speak, and the other has no such privilege. Id. at 38-50. In Power/Liability, a drill sergeant may have power to give orders, and a recruit has the liability of having to follow them. Id. at 50-60. And in Immunity/Disability, one may exercise protected free speech, while the other, who feels defamed by the speech, has no ability to sue. Id. at 60-63.

168. Id. at 63-64.


170. BECKER, supra note 169, at 8-10. Becker's other elements, which are beyond the scope of the present analysis, are: specification of the conditions under which a right may be said to have been violated, specification of the conditions under which the violation of a right is excusable, specification of the appropriate remedies when a right has been justifiably overridden, or otherwise violated; specification of the methods to be used in extracting the remedies; and specification of the agent(s) who may extract the remedies. Id. at 10-11.
or compensation in lieu of it.\textsuperscript{171}

By using Hohfeld’s system and Becker’s analysis of the ten elements of a claim-right, Houlgate has described a number of examples of children’s “claim-rights.”\textsuperscript{172} Claim-rights can be further separated into “positive claim-rights,” or duties to act, and “negative claim-rights,” or duties to forbear.\textsuperscript{173} A positive claim-right is the right of an individual to another’s action (such as medical treatment) that is necessary for the protection of the individual’s life and limb.\textsuperscript{174} Positive claim-rights impose duties on others to provide these necessities.\textsuperscript{175} A negative claim-right is the right of an individual to be free from the actions of another, and imposes a duty on others not to perform certain acts.\textsuperscript{176} This Article argues that proper health and genetic information is a positive claim-right of adopted children and their families, and that the state has a corresponding duty to provide such information.

Both Becker and Houlgate draw a further distinction, labeled a “capacity claim”.\textsuperscript{177}

One may wish, in asserting one’s rights, to call particular attention to one’s status as a potential holder of rights. That is, one may wish merely to assert, with a statement such as ‘I have a right to get married’, that one is of age and mentally competent—that one has the legal capacity to get married.\textsuperscript{178}

\begin{footnotes}
\item[171] Id. at 11.
\item[172] HOULGATE, supra note 148, at 6. Houlgate states that:
the right that a child has to be provided with a proper home, subsistence, education, medical care, and a proper moral climate is a claim right in the sense defined. The duty bearer may be either the parents or other legally responsible custodians or the state itself . . . . If a child is not being provided with the aforementioned items, and he chooses to exercise his right, then the court may . . . either order the parents (or other custodians) to improve the child’s situation while the child remains at home or, in extreme cases, take the child out of the home into institutional care or a foster home . . . . It is the state that becomes the ultimate duty bearer.
\item[173] Id. at 6-7.
\item[174] Id. at 6.
\item[175] See id. at 6-7.
\item[176] Id. at 7. The right to live free from physical and sexual abuse can be seen as a negative claim right, as a right to privacy.
\item[177] Capacity claim rights are discussed in depth in BECKER, supra note 169, at 11-13 and HOULGATE, supra note 148, at 7.
\item[178] HOULGATE, supra note 148, at 7 (quoting BECKER, supra note 169, at 12). Houlgate suggests that “capacity claim rights” may cause confusion, because the
\end{footnotes}
Advocates of children’s rights implicitly assert that children should have the status or standing to be holders of rights. While scholars have made noble attempts at fairness in accounting for the rights of children, many confusing and unexamined terms remain hidden within the work of legal scholars concerning the rationale for children’s rights. Therefore, this analysis will use a system based upon Hohfeld’s correlates and Becker’s analysis of the elements of Hohfeldian rights to assert the existence of adopted children’s rights to health and genetic information. Becker’s and Hohfeld’s definitions of rights are well suited to justify the collection of health and genetic information relevant capacity is usually presupposed. Id. at 7. For example, a person asserting that she has the right to marry also impliedly asserts that she is of sufficient age and mental capacity to marry.

179. Becker states:

Right-claim locutions come naturally here, they amount to the assertion that others ‘owe’ one the recognition that one has the capacity—the relevant qualifications or standing as defined by the right making institutions or considerations—to possess one or more sorts of rights.

BECKER, supra note 169, at 12. Houlgate concludes that “[i]n the case of children, the relevant right-claim locution often heard in their behalf is . . . that they should have the standing to possess many of the sorts of rights possessed by adults.” Houlgate, supra note 148, at 7.

180. Several authors have attempted to clarify these confusing issues. Margaret Steinfels has classified children’s rights into three major categories: the first views parents’ desires and authority as dominating, with the child having no interests apart from her parents’ interests; the second holds that parents have duties of care to their children with an ultimate goal of raising the child to fulfill some religiously, socially, or professionally agreed upon ideal state that does not necessarily represent the direct self-interests of either the parent or the child; and the third states that the child has individual interests and needs apart from those of the parents or others seeking to define what is proper for the child. Margaret O. Steinfels, Children’s Rights, Parental Rights, Family Privacy and Family Autonomy, in WHO SPEAKS FOR THE CHILD—THE PROBLEMS OF PROXY CONSENT 223, 226 (Willard Gaylin & Ruth Macklin eds., 1988). Professor Michael Wald divides childrenized claims children have against the world, or duties of everyone to a child; a child’s rights to adequate care and protection from harm, which implicates the state’s parens patriae responsibilities; the child’s rights to fuller legal status, or the right claims of children to due process and adult legal status; and the rights of children against their parents and care-givers, or the right of each child to act independently of their parents. Michael Wald, Children’s Rights: A Framework for Analysis, in CHILDREN’S RIGHTS IN THE PRACTICE OF FAMILY LAW 3, 3-27 (Barbara Landau ed., 1986). See also LAURA M. PURDY, IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN 16-17, 211-233 (1990) (observing that children’s rights to a proper home, subsistence, education, medical care, and moral environment comes at the price of being named, told where the education will occur, where to live, and what to eat); PHILIP VEERMAN, THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD (1992) (citing Hohfeld for his valuable definition of rights); Gerald P. Koocher, Different Lenses: Psycho-Legal Perspectives on Children’s Rights, 16 NOVA L. REV. 711, 717 (1992) (discussing the ability of the child in her decision-making and the unwillingness of courts to intervene on family conflicts unless absolutely necessary).
for adopted children. The first five of Becker’s elements used in determining whether a right exists advance the present analysis.  

Identification of the right-holders constitutes Becker’s first element. This Article describes adopted children and their adoptive parents as these rights-holders. The state, in its social welfare, adoption, and public health institutions, fulfills Becker’s second element, identification of the right-regarder. Part V below discusses the third element, the nature of the relationship between right-holders and right-regarders. The fact that health and genetic information are often vital to the care and upbringing of a child satisfies Becker’s fourth element, specifying the act, forbearance, or benefit owed. Similarly, the fact that the state’s adoptive agents ‘owe’ its adoptees and their families a duty to collect, store, and make this vital information available satisfies Becker’s fifth element, specifying the conditions under which the claim-right may be considered sound.

V. CHILDREN’S RIGHTS

The third element Becker used to analyze the validity of a claim-right is specifying the nature of the relationship between the right-holders (adoptive children and their adoptive parents) and the right-regarders (the state). To address fully the nature of the relationship between adoptive children, adoptive parents, and the state, this Part discusses the historical status of parents, families, children, and the state.

A. Children and the Law

Many early cases addressing the rights of children and families failed to recognize such rights because of the federal courts’ reluctance to enter the field of domestic relations. Further, many courts

181. See supra note 170 and accompanying text.
182. BECKER, supra note 170, at 8.
183. Id. at 9.
184. See infra part V.E.
185. See supra part II.
186. BECKER, supra note 169 at 9.
187. Id. at 9-10.
188. See supra note 169 and accompanying text.
189. See, e.g., Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858) (“We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce . . .”]. In 1890, the Supreme Court explicitly rejected a constitutional basis for children’s rights. Ex Parte Burrus, 136 U.S. 586, 592 (1890). In Burrus, a father obtained custody of his child from his former in-laws. Id. at 588. After the child’s grandfather retook her by force, he was imprisoned for contempt, and petitioned the
refused to recognize children's rights, and instead adopted the view held by English courts that parents' rights to their children are absolute, and similar to those of property owners' rights to their chattels. One commentator has described a contractual basis for this theory, under which parents' obligations to care for and educate their children entitles the parents to custody of their children. As late as the 1890s, American courts described parents' entitlement to the custody and labor of their children as a trust relationship, wherein the parents served the state's interests in promoting the child's welfare.

Federal courts did not begin to give constitutional recognition to family rights until the 1920s. In *Meyers v. Nebraska*, the Supreme Court for a writ of habeas corpus. In ordering the grandfather's release, the Supreme Court held that the district court lacked the jurisdiction to make out its writ:

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. As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States, nor any authority of the United States, has any special jurisdiction.

The federal courts exercised jurisdiction over a number of domestic matters when one of the parties asserted a constitutional right. For example, in *Simms v. Simms*, 175 U.S. 162, 168 (1899), the Supreme Court recognized the power of Congress to legislate for the territories and considered an appeal of a divorce granted in a territory. In *McNeil v. McNeil*, 78 F. 834 (N.D. Cal. 1897), the federal court exercised jurisdiction over a divorce obtained through fraud. In *Chapsky v. Wood*, 26 Kan. 650, 652-53 (1881) (emphasizing that a child is not a piece of property); *State v. Richardson*, 40 N.H. 272, 273 (1860) (claiming that the relationship of the father and minor child is like a trust that can be displaced for inability or unfaithfulness).

The traditional view that the jurisdiction of the federal courts did not include domestic relations issues lingered. For example, in *Ohio ex. rel. Popovici v. Alger*, 280 U.S. 379 (1930), Justice Holmes offered in dictum: "[I]t has been unquestioned for three quarters of a century that the Courts of the United States have no jurisdiction over divorce. . . . *The domestic relations of husband and wife and parent and child were matters reserved to the States . . . ."
The Supreme Court recognized the fundamental right of parents and families to educate and rear their children. The concept of children as chattels or wards of the state began to lose support in Pierce v. Society of Sisters, where the Court held that a "child is not the mere creature of the state." Subsequently, in Prince v. Massachusetts, the Court noted that the "custody, care and nurture of the child reside first in the parents." Greater recognition of family rights continued with Ginsberg v. New York, in which the Court reiterated that parents have a constitutionally protected right to direct the upbringing of their children, and insisted that parents are entitled to the support of laws designed to reinforce their authority.

In 1972, the Supreme Court decided two cases that further recognized parental rights. In Stanley v. Illinois, the Court held that a state cannot deprive a father of the care and custody of his child based on a presumption that the father's unwed status made him an unfit parent. The Court acknowledged that the integrity of the family unit is accorded constitutional protection, and described the right to raise

195. Id. at 399. Meyers involved the rights of a Nebraska teacher convicted for teaching a foreign language in the schools. Id. at 396-97. The Court squarely addressed the issues of state intervention into family life and parents' right to plan for their children's education. Id. at 400.
196. 268 U.S. 510 (1925).
197. Id. at 535. Pierce involved Oregon statutes that mandated attendance at public school. Id. at 530-31. The appellees argued that the statute interfered with "the right of parents to choose schools where their children will receive appropriate mental and religious training." Id. at 532.
199. Id. at 166. In Prince, the Court upheld the conviction of an aunt and custodian of children for encouraging the children to sell a religious magazine on the streets. Id. at 159-60. While noting that parents and guardians must be preeminent in making decisions that concern their children, the Court nevertheless affirmed the conviction by recognizing the significant state interests involved in controlling child labor. Id. at 166.
201. Id. at 639.
202. Id. This growing recognition of constitutionally protected parental rights led one state court to describe the rights of parents to their children as "more precious to many people than their right to life itself." In re Gibson, 483 P.2d 131, 135 (Wash. 1971).
204. 405 U.S. 645 (1972).
205. Id. at 649. In Stanley, a father and mother of three children lived together for various periods over an 18 year period. Id. at 646. After the mother's death, the State asserted that the fact that the father was not married to the mother created an irrebuttable presumption of unfitness. Id.
one's child as essential. In addition, in Wisconsin v. Yoder, the Court weighed the interests of the State against the interests of parents when determining that a compulsory education statute was unconstitutional.

Recognition of family rights continued in Parham v. J.R. In Parham, the Court supported a presumption that parents act in their children's best interests. The Court held that a child has a substantial and protectible interest in freedom from unnecessary bodily restraint, and that parents have the same interest in their child's freedom and well being. Parents, the Court noted, "possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." Additionally, in H.L. v.
Matheson, the Court concluded that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." In Hodgson v. Minnesota, the Court addressed a Minnesota statute that required dual parental notification and a forty-eight-hour waiting period for a minor to obtain an abortion. The Court held that, while the dual parental notification requirement alone was unconstitutional, a judicial bypass provision "saved" the statute. In his concurrence as to one part of the opinion, Justice Stevens discussed the competing interests of the parents and the State in protecting the minor. He noted that:

Parents have an interest in controlling the education and upbringing of their children . . . . [T]he demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility may give the natural parent a stake in the relationship with the child rising to the level of a liberty interest.

The states, however, have "a strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and

493 (1983) (holding that a Missouri statute, which required minors to secure parental consent or consent from the juvenile court for an abortion, was constitutional, where the juvenile court could not deny the minor's application for consent to an abortion "for good cause" unless the court first found that the minor was not mature enough to make her own decision).


214. Id. at 410. In Matheson, a minor alleged that the parental notification provision in a Utah abortion statute violated her rights to privacy. Id. at 400. The Court found that requiring parental notification furthered the legitimate interests of the State by fostering parent/child communication. Id. at 411.


216. Id. at 422. The plaintiffs, two physicians, four clinics, a parent, and six pregnant minors opposed portions of Minnesota statute prohibiting an abortion on a woman under the age of 18 until at least 48 hours after both of her parents had been notified. Id. at 429. The district court concluded that the two parent notification and the 48 hour waiting period provisions were invalid. Id. at 430. The Eighth Circuit Court of Appeals affirmed this decision. Id. Several years later, the Eighth Circuit reheard the case en banc, and unanimously rejected the State's argument that the two parent notification requirement was valid without the judicial bypass procedure. Id. at 431. However, a majority held that the judicial bypass procedure protected minors from an undue and unconstitutional burden of two parent notification and therefore upheld the statute. Hodgesn v. Minnesota, 853 F.2d 1452, 1465 (8th Cir. 1988) (en banc).

217. Hodgesn, 497 U.S. at 455. The Court found the 48 hour waiting period constitutional. Id.

218. Id. at 444-45 (Stevens, J., concurring). Justice Stevens wrote the opinion of the Court with regard to certain parts, but wrote a separate concurring and a dissenting opinion for two other parts.

219. Id. at 445-46 (Stevens, J., concurring).
lack of judgment may sometimes impair their ability to exercise their rights wisely."

The Court's recognition of "family life" as essential to our society complements its pronouncements concerning parents' rights. One commentator has stated that in this century, America is witnessing the "constitutionalization of family law." In the last twenty years, the Court has addressed emotional attachment in families, procedural mechanisms for assuring child support upon remarriage, the rights of unwed fathers to maintain relationships with their children, family autonomy and parental authority, and the burdens of proof required to break up a natural family. However, the inconsistency with which the Court addressed family law cases has confused commentators. Thus, while children's rights are protected by the Constitution, the extent of this protection is unclear, as are the permissible actions a state may take to protect the health and safety of children.

220. Id. at 444 (Stevens, J., concurring).
221. Homer H. Clark, The Supreme Court Faces the Family, 5 Fam. Advoc. 20, 22 (1982). Clark attempts to portray the state regulation of the family as severely limited by "the injection of constitutional doctrine into so many family law cases." Id. at 24. His essay describes how the Supreme Court's application of due process and equal protection analysis has transformed family law. Id. at 21.
224. Caban v. Mohammed, 441 U.S. 380, 394 (1979) (holding that a father's right to bar the adoption of an illegitimate child must be the same as the mother's right).
B. A History of Children's Rights in America

The modern notion that children have rights has strong intuitive, legislative, and judicial grounding, but this has not always been true. For example, in 1874, a social worker (without another remedy) convinced an attorney for the Society for the Prevention of Cruelty to Animals to prosecute a child abuse case under laws preventing cruelty to animals, as no laws against child abuse existed. The publicity surrounding the case stimulated child abuse and neglect legislation throughout the United States.

Courts in most early American cases involving children decided these cases against the children. Traditionally, neglect and delinquency statutes allowed juvenile and family courts to use informal and discretionary procedures more characteristic of courts of equity than those of law in dispositional decisions. Popular belief dictated that such informality and discretion facilitated the state's objective of rehabilitating a wayward child.

The state's police powers have been described as "the least limitable of the exercises of government," and have been utilized to justify state interventions to promote the "public health, safety, morals,

229. See, e.g., Laureen D'Ambia & Thomas Finn, Lawyering for Children in Care of the States, 42 R.I. B.J. 7, 18 (1994) (giving an example of legislative grounding with Rhode Island's General Assembly encouraging "legislative advocacy 'to ensure the legal, civil, and special rights of children'") (citation omitted).
230. See In re Gault, 387 U.S. 1, 11-17 (1967).
231. HULGATE, supra note 148, at xi.
232. Mason P. Thomas, Jr., Child Abuse and Neglect Part I: Historical Overview, Legal Matrix and Social Perspectives, 50 N.C. L. REV. 293, 310 (1971-1972). To help protect children and pressure legislatures, the New York Society for the Prevention of Cruelty to Children was formed in 1874, followed by 161 similar groups formed over the next 25 years. Id. at 312.
233. See infra notes 243-54 and accompanying text.
234. See HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES (1927), for a discussion of the history of the juvenile court system in its formative years.
235. See Note, Misapplication of the Parens Patriae Power in Delinquency Proceedings, 29 IND. L.J. 475, 477-89 (1953-1954) for an extensive review of cases that protected juvenile court procedures against constitutional attack.
236. Powers not reserved by the Constitution for the federal government are left to the states through the Tenth Amendment. U.S. CONST. amend. X. Included in these powers is the states' power to regulate for public safety reasons, or "police power." Keller v. United States, 213 U.S. 138, 144 (1908); Richard E. Levy, An Unwelcome Stranger: Congressional Individual Rights Power and Federalism, 44 KAN. L. REV. 61, 70 (1995).
or general welfare,"238 as well as to promote more abstract goals, such as aesthetic239 and family values.240 States have consistently used police powers to intervene in citizens' lives to prevent or punish acts that threaten the security of the state or its interests.241 The exercise of police powers has been most pronounced in the area of state intervention into the family.242

While the Due Process Clause of the Fourteenth Amendment requires a state to assert some aspect of the public welfare in order to invoke its police power,243 state interventions in family relations have been recognized as a legitimate exercise of such powers. The "public custody" cases provide an example of the broad discretion states once had when exercising their police powers.244 In many of these cases, a state invoked its parens patriae powers245 to further police power objectives, when doing so could be unconstitutional, and even contrary to the child's best interests.246

Parens patriae powers have their genesis in thirteenth century England, when the King assumed the guardianship of lunatics.247 The

241. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ix (1974). Even advocates of a "minimal state" agree that the state has a legitimate role in acting against those who directly threaten its existence and/or the life of its citizens.
243. See Munn v. Illinois, 94 U.S. 113, 118 (1877).
244. See, e.g., Reynolds v. Howe, 51 Conn. 472, 475 (C.P. 1884); see also Developments, supra note 242, at 1224 (citing various cases showing the nearly unchecked powers that states once had when acting on a child's behalf).
245. Developments, supra note 242, at 1226. The parens patriae doctrine enables the state to act as a "father," intervening in family relationships to protect children. Id. at 1221-22. See also Prince v. Massachusetts, 321 U.S. 152, 158, 166 (1944) (explaining that a state can invoke its parens patriae power to protect the welfare of minors); Lawrence B. Custer, The Origins of the Doctrine of Parens Patriae, 27 EMORY L.J. 195, 196-97 (1978) (tracing the parens patriae theory back to the English Crown of the thirteenth century).
246. See infra note 251 and accompanying text.
247. See, e.g., Gilbert T. Venable, Note, The Parens Patriae Theory and its Effect on the Constitutional Limits of Juvenile Court Powers, 27 U. PITT. L. REV. 894, 894-913 (1966). The King assumed guardianship after the lords responsible for the wardship of incompetent heirs committed a number of abuses that operated to disinherit the incompetents. Id. at 895.

The first reported judicial use of parens patriae power to protect children was Eyre v. Shaftsbury, 24 Eng. Rep. 659 (Ch. 1722), in which the court analogized its power to
courts of the early United States subsequently greatly expanded the state’s *parens patriae* power. To rationalize the exercise of such powers, courts noted that a parent’s custody of a child is based only upon the extent to which the custody furthers the state’s interest in the child’s welfare. Expanding *parens patriae* powers met little constitutional challenge in the nineteenth century. By the late 1800s, however, the intervention of the state into the family had become problematic, as procedural safeguards were virtually nonexistent.

---

248. See, e.g., Rebecca Owings’s Case, 1 Bland’s Ch. 290, 294 (Md. 1827); *In re Mason*, 1 Barb. ch. 436, 443 (N.Y. App. Div. 1847); The Parsee Merchant’s Case, 11 Abb. Pr. (n.s.) 209, 219-22 (N.Y.C.P. 1871). In *Ex Parte Crouse*, 4 Whart. 9 (Pa. 1839), an American court for the first time upheld the removal of a child from a natural parent under *parens patriae* authority. Noting that there is “no natural right to exemption from restraints which conduce to an infant’s welfare,” the court denied a father’s habeas corpus petition that sought the return of his daughter from the reform school to which she had been committed. *Id.* at 11.

249. See, e.g., United States v. Green, 26 F. Cas. 30, 31 (C.C.R.I. 1824) (No. 15,256). In *Green*, Justice Story offered: “As to the question of the right of a father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant . . . .” *Id.* See also *State v. Richardson*, 40 N.H. 272, 273 (1860) (holding that a father’s right of custody is “regarded as a trust . . . upon the presumption that the natural affection of the parent will ensure its faithful execution”).

250. See, e.g., State v. Bailey, 157 Ind. 324, 329 (1901), in which the court upheld a statute permitting the State to intervene into any area of child rearing without any demonstration of parental inadequacy. See also *State ex rel Sharpe v. Banks*, 25 Ind. 495, 499-500 (1865) (holding that the State may remove a child from an unfit father); Chapsky v. Wood, 26 Kan. 650, 662 (1881) (recognizing a child’s interest must be considered in a custody case); English v. English, 32 N.J. Eq. 738, 741-44 (1880) (determining which parent takes custody of the children based on the well-being of the children); Gishwiler v. Dodez, 4 Ohio St. 615, 624 (1855) (explaining that it is the court’s duty to protect the child’s interest in a custody hearing).

251. See, e.g., Reynolds v. Howe, 51 Conn. 472 (C.P. 1884) (upholding a statute allowing the commitment of children whenever they were in danger of “being brought up to lead idle or vicious lives”); *In re Ferrier*, 103 Ill. 367, 373-76 (1882) (upholding a statute providing no due process to family members and allowing the State to remove children from their families and place them in industrial schools); Farnham v. Pierce, 141 Mass. 203, 204 (1886) (upholding a statute authorizing the removal of a child from its parents if the child was “growing up without education or salutary control, and in circumstances exposing him to lead an idle and dissolute life”); Cincinnati House of Refuge v. Ryan, 37 Ohio St. 197, 201-03 (1881) (denying a parent’s challenge to an Ohio statute allowing a child to be committed to a “house of refuge” without providing the parents with notice or an opportunity to be heard); Milwaukee Indus. Sch. v. Supervisors of Milwaukee County, 40 Wis. 328, 334 (1876) (upholding a statute allowing state intervention into a family whenever a child “frequents the company of reputed thieves, or of lewd, wanton, or lascivious persons in speech and behavior, or notorious resorts of bad characters”).
As state intervention became more problematic, courts and commentators offered three rationales for the state's exercise of its *parens patriae* power. The first asserted that children lack the capacity or maturity to look after themselves, so the state must do it for them.\(^{252}\) The second argued that the state must occasionally intervene in family life when parents are unwilling or unfit to discharge their parental responsibility.\(^{253}\) The third rationale stated that once it is determined that children are in need of protection and that their parents are unwilling or unable to provide adequately for them, the state will intervene in its *parens patriae* capacity to further the "best interests" of the child.\(^{254}\)

Nevertheless, a state's exercise of its *parens patriae* powers is now subject to constitutional limitations. By the 1960s, a growing number of scholars and courts questioned the constitutionality of unchecked *parens patriae* powers, regardless of what rationales its proponents asserted.\(^{255}\) In *In re Gault*, the Supreme Court announced that the *parens
*patriae* doctrine is of "dubious relevance," and insisted that state courts must "candidly appraise" a state's assertion of *parens patriae* powers when doing so denies children the procedural safeguards guaranteed by the Constitution. The *Gault* Court weighed the state's claim to benevolent paternalism through *parens patriae* powers against the due process claim of a juvenile enmeshed in the state's criminal process. The Court's analysis began with a powerful statement: "[w]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."

In *Goss v. Lopez*, the Court addressed the procedural due process to which a child is entitled when under suspension from public school. The Court reasoned that the state's guarantee to its citizens of a free public education rose to the level of a property right that cannot be taken without due process of law.

The following year, the Court reaffirmed that children's status as "persons" with constitutional rights when it declared unconstitutional a statute that required a pregnant woman under the age of eighteen to obtain the consent of her parent(s) or guardian(s) in order to obtain an abortion. The Court declared that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." While the Court acknowledged that "the State has somewhat broader authority to regulate the activities of children than of adults," it found that the state

---

257. *Id.* at 16.
258. *Id.* at 26.
259. *Id.* at 13. Two years later, in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), the Court announced that "First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. In overturning a school policy which forbade students from wearing armbands to protest the Vietnam War, the Court noted that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect . . . ." *Id.* at 511.
261. *Id.* at 574.
262. Planned Parenthood v. Danforth, 428 U.S. 52, 72-75 (1976). In a complicated, multi-part and badly fractured decision, five justices supported the Court's holding, striking down the parental consent provision, although two questioned the Court's rationale. *Id.* at 52-54. Four justices dissented, writing that the provision was constitutional. *Id.* at 89-104 (White, J., Rehnquist, J., Burger, C.J., Stevens, J., concurring in part and dissenting in part).
263. *Id.* at 74.
could not demonstrate a significant enough interest to abridge the rights of its minor citizens.\textsuperscript{264}

C. Disclosure of Health and Genetic Information in Furtherance of Children's Rights

Amidst the uncertainty of the constitutional limitations upon a state's exercise of its \textit{parens patriae} power,\textsuperscript{265} the balancing test used in \textit{Matthews v. Eldridge}\textsuperscript{266} provides a logical and firm foundation for the rights proposed by this analysis. In \textit{Matthews}, the Court articulated its clearest attempt to establish guidelines for balancing the state's interests against an individual's interests. The Court stated that three factors must be balanced when determining whether procedural due process protections have been met.\textsuperscript{267} These factors also influence a determination of whether a right should be granted to an individual or group, when doing so might infringe upon the rights of others. The \textit{Matthews} factors consist of 1) the private interests affected by granting the right; 2) the risk of erroneous deprivation of that interest; and 3) the government's interest.\textsuperscript{268}

The \textit{Matthews} balancing test is one of the preeminent tools available to scholars, jurists, and commentators to understand the interests to be balanced among the state, the child, and the parents when the child's rights are asserted.\textsuperscript{269} The first \textit{Matthews} factor is the private interests

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{264} \textit{Id.} at 75. The Court found the parents' interest in the termination of their child's pregnancy "no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." \textit{Id.} at 75.
\item See also \textit{Carey v. Population Servs. Int'l}, 431 U.S. 678 (1977), in which the Court used similar reasoning when overturning a law prohibiting the sale of contraceptives to minors. In a plurality decision, four justices wrote it was "unreasonable to assume that the state has prescribed pregnancy and the birth of an unwanted child (or the physical and psychological dangers of an abortion) as punishment for fornication." \textit{Id.} at 694-95 (plurality opinion) (citing \textit{Eisenstadt v. Baird}, 405 U.S. 438, 448 (1972)).
\item \textsuperscript{265} \textit{See supra} note 251 and accompanying text.
\item \textsuperscript{266} 424 U.S. 319 (1976) (upholding a procedural due process challenge to the administrative procedure used by the Secretary of Health, Education and Welfare for assessing whether a continuing disability exists).
\item \textsuperscript{267} \textit{Id.} at 332-35.
\item \textsuperscript{268} \textit{Id.} at 335.
\item \textsuperscript{269} \textit{See also} \textit{Lassiter v. Department of Social Servs.}, 452 U.S. 18, 46 (1981) (holding that the failure to appoint counsel for indigent parents in a parental termination proceeding did not deprive parents of due process rights because no criminal charges were specified or charged, the case was relatively trouble free, and the presence of counsel would not have changed the outcome); Raymond C. O'Brien, \textit{An Analysis of Realistic Due Process Rights of Children Versus Parents}, 26 CONN. L. REV. 1209, 1209, 1211, 1247-56 (1994) (arguing that the \textit{Matthews} test is frequently used in all procedural due process questions at both the state and federal level).
\end{itemize}
\end{footnotesize}
that are affected.\textsuperscript{270} In the adoption context the private interests that are affected involve the health and welfare of the state’s adoptive children and the legitimate but conflicting privacy interests of the birth parents. The second Matthews factor is the risk of erroneous deprivation of the interest that will be affected.\textsuperscript{271} Here, the risks of erroneously depriving such interests encompass quality of life considerations, with these decisions having potentially grave consequences for the state’s adopted children,\textsuperscript{272} and a conflicting intrusion into the privacy of the children’s birth parents. Finally, the third Matthews factor is the government’s interest.\textsuperscript{273} In the adoption context, the government’s interests include both the children’s health and welfare interests as well as the parental privacy concerns described above.\textsuperscript{274} When the state implements appropriate privacy protections, the needs of adopted children for health and genetic information then outweighs the privacy interests of their birth parents.

\textbf{D. Police Power and Confidential Health Information}

The Supreme Court has long acknowledged that, subject to constitutional limitations, a state may use its police power to legislate to protect the health, welfare, and the safety of its citizens. In \textit{Jacobson v Massachusetts},\textsuperscript{275} the Court held that a state may use its police power to mandate smallpox vaccinations.\textsuperscript{276} The Court noted that the exercise of personal liberty “does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.”\textsuperscript{277} Because public health is a primary obligation of the state,\textsuperscript{278} the Court rejected an argument that mandatory vaccination constituted an impermissible assault upon personal freedoms.\textsuperscript{279}

\begin{flushright}
270. Matthews, 424 U.S. at 332-35.
271. Id.
272. See supra part I.
274. See, e.g., \textit{In re Adoption of J.S.P.L.}, 532 N.W.2d 653, 662 (N.D. 1995) (noting that the government has an interest in the welfare of the child and “shares the parent’s interest in an accurate and just decision”) (citations omitted); Juman v. Louise Wise Servs., 608 N.Y.S.2d 612, 617-18 (1994) (requiring an adoptive family or adopted child to show “good cause” to access information regarding biological parents, as public policy dictates that the government keep this information confidential under most circumstances).
275. 197 U.S. 11 (1905).
276. Id. at 31-33.
277. Id. at 26.
278. Id. at 27-29.
279. Id.
\end{flushright}
Similarly, many states have passed laws mandating venereal disease screening,280 which their courts have upheld.281

By holding that the state may diminish the privacy rights of an individual on behalf of the health of another,282 the Supreme Court laid a foundation upon which a justification for genetic and health information disclosure can be based.283 Commentators have made numerous arguments to justify the assembly of genetic screening information.284 These include the need to collect information concerning the incidence and prevalence of genetic diseases;285 the need to protect the citizenry from transmission of genetic diseases;286 the savings achieved by conserving resources through premorbid screening,287 and the ability of screening and information banks to protect future generations from genetic disease.288 In light of the tremendous benefits to be gained from the disclosure to adoptive families of the adopted child's health and genetic history,289 the compiling of such information is a legitimate exercise of the state's police powers.

282. See, e.g., Roe v. Wade, 410 U.S. 113 (1973). See also Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992) (reaffirming Roe's holding that, subsequent to fetus viability, a state may "regulate, and even proscribe, abortion except where it is necessary . . . for the preservation of the life of health of the mother").
283. See, e.g., Sonia M. Suter, Note, Whose Genes Are These Anyway?: Familial Conflicts over Access to Genetic Information, 91 MICH. L. REV. 1854 (1993). The author provides a cogent analysis of the constitutional privacy issues involved with genetic testing in a variety of situations. Id. at 1863. Inter and intra family conflicts over the acquisition and use of genetic information is discussed in depth. Id. at 1864-69. The author makes an argument from tort law as to the differences inherent in prohibiting misfeasance versus prohibiting nonfeasance, and opines that it may be a fundamental breach of personal liberty interests to force genetic screening when the diseases screened for may not be curable. Id. at 1898-1900. She argues that "compulsory genetic testing can be narrowly tailored to the compelling state interest." Id. at 1900.
286. Id. at 173-74.
287. Id. at 178-81.
288. Id. at 175-78.
289. See supra part II.
E. Becker’s Third Element and the Historical Status of Parents, Families, Children, and the State

Becker’s and Hohfeld’s definitions of rights\(^{290}\) are well-suited to justify the collection of health and genetic information for adopted children. The first five of Becker’s elements used to determine whether a right exists advance this analysis.\(^{291}\) This Article has previously established the first, second, fourth, and fifth elements.\(^{292}\)

Above, this Part has established Becker’s third element. This element,\(^{293}\) used to analyze the validity of a claim-right, is a specification of the general nature of the relationship between the right-holders (adoptive children and their adoptive parents) and the right-regarders (the state). This Part has discussed the general nature of the historical relationship between and status of parents, families, children, and the state.

VI. CONCLUSION

This Article has discussed children’s rights from philosophical and legal perspectives. An attempt has been made to ground a discussion of children and rights in the work of noted philosophers and scholars. This analysis concludes with a discussion of the first five of Becker’s analytical elements concerning rights\(^{294}\) in the context of an adopted child’s need for health and genetic information.

In the present discussion, the adopted children are the right-holders, while their adoptive parents are the children’s agents. The state, by and through its adoption and social welfare agencies, is the right-regarder. Employees of adoption and social welfare agencies are in the best position to obtain gestation, health, and genetic information.

This Article has explored this relationship between the right-holders and right-regarders.\(^{295}\) The clear mandate from a string of recent cases\(^{296}\) clearly demonstrates the continued validity of the Court’s

\(^{290}\) See supra part IV.
\(^{291}\) See supra text accompanying note 170.
\(^{292}\) See supra notes 182-87 and accompanying text (discussing and applying Becker’s elements one, two, four, and five).
\(^{293}\) See supra note 170 and accompanying text.
\(^{294}\) See supra notes 169-289 and accompanying text.
\(^{295}\) See supra part V.
\(^{296}\) See Hodgson v. Minnesota, 497 U.S. 417, 456 (1990) (holding that the dual parental notification requirement for minors seeking an abortion was unconstitutional); Maryland v. Craig, 497 U.S. 836, 854 (1990) (holding that one-way closed circuit television would be admissible under the confrontation clause when necessary to protect a child witness’ rights); Planned Parenthood v. Danforth, 428 U.S. 52, 72-73 (1976) (holding that a written parental consent requirement for minors seeking an abortion was
assertion that "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."297 All parties to the adoption process must remain cognizant of the Court’s instruction that constitutional rights apply to all individuals alike, adults as well as children.

Becker’s fourth element requires the specification of the act, forbearance, or benefit owed by the right-regarders to the right-holders.298 The first part of this Article explained that science has made such progress in the last fifty years that many of the gestational and genetically linked physical and psychological difficulties that face adopted children can be foreseen and planned for if the proper information is gathered and appropriately used.299 This Article suggests that legislation mandating the gathering and use of this health and genetic information is an appropriate recognition by the state of its duty to provide such information.

This Article applauds legislatively created duties requiring adoption agencies to establish a record of the adopted child’s health and genetic history.300 Further, this Article compliments legislatures for creating in adoption agencies a privilege of the birth parents to produce this record. In effect, the legislatures have vested in the birth parents a “no right” that the adoption agencies not produce such a record. Finally, legislatures have created a power in the adoptive parents or guardians of the children to obtain the information from the record holder.

Becker’s last analytical element, a specification of the conditions under which a right claim is sound,301 addresses conditions under which a child, by its adoptive parents or guardian, may obtain access to otherwise confidential health and genetic information. This is easier than some would suggest. The competing interests of adopted chil-

unconstitutional); Goss v. Lopez, 419 U.S. 565, 573 (1975) (holding that students were entitled to notice of changes and opportunity to present their side of the story under the Due Process Clause when faced with possible suspension from school); In re Winship, 397 U.S. 358, 368 (1970) (holding that juveniles, like adults, are constitutionally entitled, when charged with a violation of criminal law, to proof beyond a reasonable doubt); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 513 (1969) (holding that regulation prohibiting students’ right to wear an armband as an expression of opinion was unconstitutional); In re Gault, 387 U.S. 1, 9-14 (1967) (holding that juveniles enjoy the same rights as adults when they involve issues such as right of notices of changes, to counsel, to confrontation and cross-examination of witnesses and to privilege against self-incrimination).

298. See supra note 170 and accompanying text.
299. See supra part II.
300. See supra part III.B.
301. See supra note 170 and accompanying text.
dren and the legitimate privacy concerns of birth parents must be weighed, it is suggested here, not by courts but by the same kind of community groups that are created to determine matters of community concern such as zoning, school board policy, and parole.

It is beyond the scope of this analysis to suggest the criteria which should govern access to health and genetic databases. Existing legislation has addressed this issue in varying ways. Some states may determine that access to this confidential health data should be limited to life and death matters such as AIDS or congenital heart disease. Other states might allow access when maternal drug use is suspected. Still other legislatures might approve access when schizophrenia, alcoholism, or depression are distinct possibilities. These decisions are best left to the sound process of debate and consideration at the state level. Adopted children’s need for this information, and the consequences to the quality and duration of their lives absent this information are profound. Adopted children have a right to have this data collected and made available to them. Considering the vital importance of this information to the life of the adopted child, states are justified in creating legislation granting them this right.

302. See supra note 135 and accompanying text.