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Information Disclosure and Openness in Adoption: State Policy and Empirical Evidence

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This paper presents the rationale and details of state policy with regard to sealed record statutes and open adoption practice. The empirical work focuses on attitudes toward, and experiences with, openness in adoption in a sample of 1,274 adoptive parents in 743 adoptive homes in New York State. Results indicate that a substantial majority of adoptive parents in the study favor a change in state statutes allowing greater openness in adoption and that mothers are more open to the concept of information disclosure than adoptive fathers. Open adoptions were practiced in only a minority of adoptions in this study. When contact does exist, it is far more likely to be with a birth mother than a birth father. Openness in adoption was found to differ by age, race, and by prior experience with fostering or adoption. Older adoptive mothers were more supportive of open adoption records, while white adoptive fathers and both adoptive mothers and adoptive fathers who had prior experience with fostering or adoptions were less open to the concept of open adoption records. Conclusions are draw and recommendations made for future policy in this area.

Information disclosure and openness in adoption have surfaced as salient policy issues in the courts, statutory reform efforts, and social work practice in almost all states in the nation during the past few years (DeWoody, 1993; Sachdev, 1989). Confidentiality and secrecy are central components of state policy on adoption. When a child is adopted in the United States, the original birth certificate and the records from the adoption proceedings are placed under seal (Kuhns, 1994), and a new birth certificate is issued pronouncing the adoptee as born to the adoptive parents. The majority of states have enacted legislation to seal adoption records permanently. In most states these records may be accessed only by court petition, and if successful, only nonidentifying information such as medical and genealogical history may be released.

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The process of sealing records has created a controversial clash between adoptees desiring information about their past on the one hand and state policy of confidentiality on the other. On the one hand the argument is made that sealed records statutes protect the birth parents' "right of privacy," on the assumptions that birth parents desire to sever all ties with a birth child and that they continue to rely on past assurances of anonymity to protect them against intrusions by the child they gave up for adoption. Organizations such as Concerned United Birthparents (CUB) challenge the accuracy of these assumptions (Kuhns, 1994). Supporters of open adoption records argue that closed record statutes impose on the adoptee a lifelong familial amnesia at a time when he or she is too young to consent or to know what is happening (Crane, 1987). They argue that adoptees should have access to pertinent information central to their lives and future development (Kuhns, 1994).

Adoptees have challenged sealed record statutes in federal court on the grounds that they are unconstitutional. In these hearings it has been argued that that sealed records abridge the adoptee's constitutional right to privacy, to receive important information, and to equal protection under the law. The right to privacy argument rests on the contention that adoptees have a fundamental right to know the identity of their birth parents because such information is necessary for healthy psychological development (Kuhns, 1994; Lum, 1993). In these hearings it has been contended that adoptees are co-owners of the information about themselves, and thus it is unfair to deny this information to them, especially because they never consented to the sealing of such information (Crane, 1987; Lum, 1993). The right to receive information argument rests on the contention that secrecy interferes with the adoptee's right of freedom to participate in and contribute to social and governmental decision-making processes and holds that sealed records laws violate the equal protection clause of the Fourteenth Amendment. The outcome of these constitutional challenges has been unsuccessful. Despite several efforts, no federal court has upheld the argument that sealed records laws are unconstitutional, and the issue continues to rest with the individual states as one of "conflicting best interests."

At the state level, legislators and practitioners continue to make conflicting claims about the rationality of greater openness in adoption. Advocates for openness in adoption argue that it would benefit all parties involved. First, it would give birth parents a greater sense of control over the adoption process and make them more willing to relinquish their child into the care of an adoptive parent (Barth & Berry, 1988; Byrd, 1988; McRoy & Grotevant, 1988; McRoy, Grotevant, & White, 1988; Rompf, 1993). In addition, they argue that greater openness enhances adoptive parents' ability to raise their adopted

children (Etter, 1993; Siegel, 1993). For example, results of a study by Grotevant, McRoy, Elde, and Fravel (1994) found that adoptive parents in open adoptions had greater empathy toward both birthparents and the adopted child and a stronger sense of permanence in the adoptive relationship. Disclosure of complete medical, genetic, and social history information at the time of placement could permit earlier diagnosis and appropriate treatment of adopted children who may be subject to adverse mental or physical health conditions. Continued contact with a birth parent after adoption finalization could help adoptive parents deal with difficult child adjustment problems during adolescence. For adoptees, it is suggested that greater openness will contribute significantly toward healthy identity development during adolescence and lessen feelings of rejection and insecurity (Kuhns, 1994; Rompf, 1993; Van Bueren, 1995).

Advocates for maintaining confidentiality in adoption argue that greater disclosure would open a "Pandora's Box" with negative consequences for all parties involved. They argue that it would hinder the process of closure on birth parents' grieving, while heightening their sense of ambivalence and confusion (Blanton & Deschner, 1990). Furthermore, it would contribute to adoptive parents' insecurity, uncertainty, and feelings of tenuousness, which might lessen bonding and attachment between adoptive parent and child (Kaye & Warren, 1988). They argue that adoptive parents should be given the opportunity to raise their children without the intrusion of the birth parent (Kuhns, 1994) and be protected from the additional burden of potential dependency between the adoptive and birth parent (Churchman, 1986; Silber & Dorner, 1989). It is argued that greater openness would lead to confusion rather than resolution for adopted children because they would be forced to deal with the conflicting value systems of both sets of parents.

Today many professionals working in the adoption arena hold that although confidentiality and closed adoption may be in the best interest of adoptees as children, this is not always the case when these children have reached adolescence and adulthood. Many birth and adoptive parents have stated that confidentiality is not in their best interests either (Kuhns, 1994). In fact, the open adoption movement has been fueled by a proliferation of both adoption rights and birth parent groups such as the Adoptees Liberty Movement Association (ALMA) and Concerned United Birthparents (CUB), many of whom practice open adoptions.

This paper sets out both the rationale and details of state policy with respect to sealed records and open adoption practice. The empirical work reported in this paper investigates adoptive parents' attitudes toward, and experi-

ences with, openness in adoption in a sample of 743 adoptive homes in New York State.

Adoption Law And Practice

State Policy

English common law inherited by the United States did not recognize the practice of adoption, and U.S. adoption law is entirely a creature of state statutes (Kuhns, 1994). From their earliest beginnings, state adoption statutes were designed to protect the "best interests of the child." In the late 1800s, the first state statutes did not bar access to court records. Court hearings on adoption at this time were usually informal, and confidentiality was not a significant issue. Institutionalized secrecy in adoption proceedings was first introduced into American law in 1917 when Minnesota enacted the nation's first sealed records law which closed adoption files from inspection by the adult adoptees, their birth parents, and the general public (Kuhns, 1994). Other states followed Minnesota's lead. New York statutes mandated that "illegitimacy" not appear in the transcript of judicial hearings. Confidentiality statutes in New York, however, merely concealed the adoption proceedings from the public, not from the actual participants in the adoption proceedings (Kuhns, 1994). By the end of the 1940s most states had enacted confidentiality statutes, and these laws protected adoption confidentiality through the decades 1940-1970. By the end of the 1970s, however, in response to societal pressure for greater openness, state legislatures began to pass amendments to the sealed records laws (Kuhns, 1994).

At the present time, one state (New Jersey) upholds the policy of complete confidentiality in adoption records, three states (Hawai'i, Kansas, and Minnesota) have open adoption records (with or without age limitations), three states (Alaska, Kansas and Tennessee1) allow adoptees access to their original birth certificates (with or without age limitations), six states (Washington, D.C., Maryland, North Carolina, Oklahoma, Virginia, and West Virginia) allow the unsealing of adoption records subject to a "good cause" hearing. The majority of states (42 states) have statutes restricting access to only nonidentifying

1 Tennessee passed a law in 1995 which allows persons adopted before March 16, 1951 access to all of their adoption records in the state. Those adopted after this date are to have access from July 1, 1996 forward. The law has a "contact veto" system built in where birth parents are notified the adoptee has requested the records and may file a contact veto to do just that. A class action law suit has been filed in federal court to prevent Tennessee from releasing any records. The stay against the state is currently under appeal in federal court in Cincinnati, Ohio.

information (with or without age limitations or a court order) (National Adoption Information Clearinghouse, 1992). Nonidentifying information could include date and place of birth, age of birth parents, description of birth parents' physical appearance, race, ethnicity, religion, medical history of the birth parents, circumstances leading to placement, age and gender of biological siblings, education and occupation of the birth parents (Berry, 1993), and medical history of the adopted child (Crane, 1987). "Good cause" hearings are conditioned on the assumption of a need for privacy on the part of the birth parent. The adoptee has the burden of persuasion in these cases (Kuhns, 1994; Lum, 1993). "Good cause" is usually demonstrated on the basis of need for documented medical or psychiatric information that the adoptee cannot obtain elsewhere. Mere desire to know (curiosity) is deemed insufficient in most states to justify releasing information. Some courts have accepted "serious psychological disorder stemming from an identity crisis" as adequate demonstration for good cause (Kuhns, 1994). In successful good cause hearings the courts usually require agencies or private intermediaries to collect the nonidentifying information contained in adoption records, although state policies vary considerably regarding the maintenance and disclosure of such information (Kuhns, 1994).

Within the past decade some states have made progress toward greater openness, amending their statutes to reflect changing mores (Kuhns, 1994). At least 20 states have enacted some form of "mutual consent" registry statutes facilitating the process whereby parties to an adoption can indicate their willingness to meet at a later date (Lum, 1993). Some states also permit adult biological siblings to register their consent to have contact (Crane, 1987). Some people consider the "mutual consent" registries a sensible solution to the conflicting interests of the adoption triad members. Others criticize them on the grounds that they favor the rights of the birth parents and a policy of confidentiality over an adoptee's right to know. They argue that registry statutes condition the adoptee's right to information on the birth parents' consent but fail to require that the birth parent even be informed of the opportunity to register their consent or denial at the time of relinquishment (Crane, 1987). Other grounds for criticism are that people often don't know about the statutes because they are not widely advertised, that people move, marry, and change names so that information in this registry rapidly becomes out of date (National Committee for Adoption, 1996), that some registries charge a fee which not everyone can afford (Lum, 1993), and that registries fail to take account of changes over time in birth parents' willingness to have contact.

Attempting to improve on the "mutual consent" statutes, at least 17 states have passed "search and consent" statutes to more actively facilitate openness

between adoptees and their birth parents. These search and consent laws authorize public or private agencies to assist adult adoptees in locating birth parents and to ascertain their willingness to disclose their identities or actually meet with the adoptee (Kuhns, 1994). "Search and consent" laws require a complex process involving petitions, intermediaries, and court hearings. They usually involve a large number of individuals at great expense. Search and consent statutes have the same limitations as "mutual consent registries" in that the information they contain is often inaccurate and out of date. Some states have established procedures for updating medical information, but their success has been dependent on the continued willingness of birth parents to provide such information (Crane, 1987).

Organizations such as the National Committee for Adoption (NCFA) have come out in strong opposition to search and consent statutes on the grounds that they too often become intrusive "search and confront" systems, exerting pressure on birth parents to meet or divulge information, both of which violate their right to privacy. The possibility of abuse is made even more likely by the means chosen by some states to implement searches. They allow independent contractors to conduct searches rather than trained social workers in state or private adoption agencies (National Committee for Adoption, 1992).

Another extremely contentious policy issue facing the states is the age at which information about birth parents and medical/social history may be disclosed to an adoptee. Five states allow access to nonidentifying information with good cause before age 18, 14 states stipulate that such information be made available only at age 18, and 9 states require adoptees to be 19 or older before they may obtain such information. The remaining states require a court order for the disclosure of nonidentifying information, regardless of the age of the adoptee. Furthermore, an active policy debate surrounds retrospective changes in state open records statutes. The issue here is whether adoptees should have access to information contained in their adoption records, regardless of when they were adopted. At the time of writing this paper, this very issue is under debate in the New York State (NYS) legislature. NYS adoptive parents' attitudes toward these potential changes form the focus of the empirical research reported here.

While every state in the nation has statutes governing the release of information contained in the adoption records, only three states (Washington, Ohio, and Indiana) have legal statutes specifically allowing open adoptions. In these states birth and adoptive parents can enter into an agreement allowing formal visitation rights after finalization. Washington State statutes cover court enforcement of open adoption agreements and allow for monetary damages under tort law for failure to uphold the agreement, without penalty of disrup-

tion of the adoptive placement. The Ohio and Indiana (Post Adoption Visitation Privilege Act) statutes do not cover court enforcement of such agreements but do protect the integrity of the adoptive placement in the case of later disputes. In other states the courts have recognized open adoption agreements between adoptive parents and birth parents, even though there is no statute specifically authorizing them. In the case of *In re Adoption of Minor* (Massachusetts, 1973) the court found that these agreements are enforceable by the court as long as visitation is in the best interests of the child (North American Council on Adoptable Children, 1996). In New York State, birth and adoptive parents can agree to have continued contact or visitation as part of the voluntary relinquishment of parental rights proceedings (N.Y. Social Service Law §383-c), also known as "conditional surrenders." Although Alabama does not have an open adoption statute, a supreme court in that state favored a particular placement because the adoptive parents were willing to provide the birth mother and her family with continued access to the child. However, in an Illinois appellate court decision in which the issue of open adoption was faced more directly, the court rejected a lower court's effort to establish a *de facto* open adoption (Hafemeister, 1994).

Despite the lack of specificity in state statutes, open adoptions are frequently and informally practiced in the United States. In a study of older-child adoptions undertaken by Nelson (1985), 20 percent of adoptees had maintained contact with a biological relative (usually the mother), and Belbas's study (1986) found a similar contact rate. However, Feigelman and Silverman's study (1986) found contact rates as low as 8 percent. Both Berry (1991b) and Katz (1990) found that many adoptive families in their studies practiced open adoptions, with mostly positive outcomes. Berry (1991b) found that contact was more frequent in independent adoptions and less frequent in agency adoptions. Berry's (1993) study of 1,268 adoptions found that openness was far more likely for infant adoptions, for adoptions of children who did not have a history of mistreatment, and for adoptions by relatives. Siegel's (1993) study of recently adopted infants found that in many situations open adoption can be a desirable option, and a wide array of different types and frequencies of pre- and post-adoption contact work well. Siegel notes that the adoption triad members' feelings about, and reactions to, open adoption may evolve over time and that each developmental stage requires new coping skills.

Agency Policy and Practice

The social work practice of disclosure in adoption has been cyclical in nature (Carp, 1992). From the early 1900s through the late 1930s adoption

agencies generally practiced a "full disclosure" policy toward adoption. This policy made sense at the time because there was little information to provide to adoptive parents. Record keeping was usually sketchy and incomplete, and there was no extensive questioning of birth parents or probing into their medical or social background. In addition, many (perhaps most) adopted children were older and had clear memories of their parents and families. For these older children the agency was not the sole source of information regarding their history. This relieved the agency of much of the burden of disclosure (Carp, 1992).

In 1938 the Child Welfare League of America (CWLA) began promoting secrecy in adoption as its official policy, and social work practice of "full disclosure" took a rapid turn (Carp, 1992). Prevailing social mores regarding sexuality which ostracized women who became pregnant outside of marriage and stigmatized children born under such circumstances (Dukette, 1984) created pressure on legislators in almost every state to pass laws fostering secrecy, anonymity, and confidentiality in adoption. In the period 1940-1970 a greater number of infants were available for adoption. Adoption was primarily used to emulate "natural" family formation (Carp, 1992), and many adoptive parents avoided telling their children that they were adopted or postponed telling them until they were adolescents.

By the early 1970s, the philosophy of openness in social work adoption practice had reemerged in response to four major social changes. First, there was a significant increase in the number of female-headed households, out-of-wedlock birth was becoming increasingly accepted by society, and unwed birth parents emerged from their "shadow of shame" (Siegel, 1993). The sexual revolution of the 1960s changed the social situation of women in relation to sex and parenthood, including attitudes about illegitimacy, contraception, and the legitimization of abortion (Kuhns, 1994). Second, tracing genealogical roots and ethnic heritage during this period became a socially popular philosophy, and adult adoptees became increasingly vocal about their rights and needs for information establishing their identity. Third, during the 1970s the population of children available for adoption changed. Children were older, and significantly fewer "healthy white infants" were available for adoption. In addition, there was greater diversity in the characteristics of adoptive parents (older parents, single parents), and these parents were more active and informed. Many of them formed adoption rights activist groups lobbying for change (Carp, 1992; Kuhns, 1994). Their efforts were highly successful. Between 1978 and 1990 at least 21 states enacted mandatory disclosure statutes requiring adoption agencies or intermediaries to provide adoptive parents

with nonidentifying information about an adopted child's health, education, and family background (Carp, 1992; Rompf, 1993).

During the past decade adoption agency policy and practice in regard to information disclosure has become a matter of huge potential liability (DeWoody, 1993). Legal precedent has been established for agency liability in failure to disclose relevant information, and "wrongful adoption" has become a new basis for lawsuits with significant implications for public and voluntary child welfare agencies (DeWoody, 1993; Goldenhersh, 1992). The basis for wrongful adoption suits is provided in tort law, which permits adoptive parents to sue adoption agencies and collect monetary damages if the agency deliberately conceals, intentionally misleads or misrepresents, or negligently fails to disclose the health status or family background of an adopted child (information that later proves to be inaccurate or failure to disclose information in a way that misleads the adoptive parents as to the truth) (Connelly, 1991; DeWoody, 1993; Dickson, 1991; Goldenhersh, 1992; Maley, 1987).

To date six state appellate courts have issued decisions that impose liability on agencies and their workers in wrongful adoption suits (DeWoody, 1994; Gustavsson, 1995; Kopels, 1995). In 1986, the Ohio Supreme Court, in *Burr vs. Stark County Board of Commissioners*, awarded adoptive parents $125,000 in damages because the adoptive agency deliberately concealed information about the adoptive child's inherited life-threatening medical conditions (Hollinger, 1990). Since this decision, courts in at least five other states have upheld wrongful adoption suits against child-placing institutions (Goldenhersh, 1992; Woo, 1992). In Massachusetts in 1991, for example, a jury awarded an adoptive couple $3.8 million on the grounds that the placing agency deliberately withheld the information that their child was developmentally disabled and that the child's mother suffered from schizophrenia (Lambert & Moses, 1991). Other cases have been similarly successful: *Michael J. v. Los Angeles County Department of Adoptions* (1988); *Meracle v. Children's Service Society of Wisconsin* (1989); *M. H. and J. L. H. v. Caritas Family Services* in Minnesota (1992); *Gibbs v. Ernst* in Pennsylvania (1992); and *Juman v. Louise Wise Services* in New York (1994). In 1992 alone at least 17 wrongful adoption cases were pending in courts in Texas, Illinois, Florida, Massachusetts, Pennsylvania, and New York (Kopels, 1995).