

NINA ANNE M. GREELEY

Cal Open, The Voters' Movement to Uphold Identity Rights

**OPEN RECORDS LEGISLATION: IMPACT ON THE RIGHT TO
PRIVACY UNDER THE CALIFORNIA CONSTITUTION**

Submitted to the Counsel for the
Assembly Judiciary Committee
California State Legislature in connection with AB 372

April 21, 2009

OPEN RECORDS LEGISLATION: IMPACT ON THE RIGHT TO PRIVACY UNDER THE CALIFORNIA
CONSTITUTION

OPEN RECORDS LEGISLATION: IMPACT ON THE RIGHT TO PRIVACY UNDER THE CALIFORNIA CONSTITUTION

I. INTRODUCTION

This analysis is a revised and updated version of the “Analysis of the Impact of A.B. 1349 on the Right to Privacy under the California Constitution,” submitted to the Assembly Judiciary Committee on behalf of the Post Adoption Center for Education and Research in December, 2001. I am indebted to my former colleagues, Robert E. Borton, Irene K. Chong, Steven G. Mason and P. James Zibarras for their contributions to the original analysis.

Cal Open supports efforts to pass legislation that would permit adult adoptees unfettered access to their original birth certificates. Such legislation, which will be termed “open records legislation” in this analysis, seeks to accord to a class of adult citizens of California—adults who were adopted as children—a right that is given by law to, and assumed as an entitlement of personhood and citizenship by, every other Californian: the right to know one’s own origins and to access one’s own original birth records.

Concerns have been raised that an open records law may violate a birth parent’s right to privacy under the California Constitution. This focus on the concerns of parents who have elected to relinquish their natural children for adoption, in Cal Open’s view, fails fully to acknowledge the legal limitations on the privacy rights of birth parents and, more crucially, fails to consider the fundamental interests of adult adoptees.

To begin, the law mandating the amendment and sealing of original birth certificates is not about protecting the privacy rights of birth parents, and never was. Rather, closed adoption laws arose out of a now-antiquated view about illegitimacy and

adoption, and aimed to protect adoptive families from, among other things, shame and extortionate practices.

More important, under controlling California case law, a birth parent's constitutional right to privacy will not be violated by open records legislation because: (1) birth parents have no fundamental right to permanently hide their identities from their adult children; (2) birth parents have no reasonable expectation of privacy in the information that an open records law would make available to adult adoptees; and (3) revealing crucial information about a person's origins to that person cannot be said to violate current social norms.

Any one of these points compels the conclusion that open records legislation would not violate the constitutional right to privacy. However, as we demonstrate below, even if a birth parent has a protectible privacy right in the fact of his or her child's birth and adoption, **the right of adult adoptees to their own most fundamental personal information** is a competing and compelling privacy interest that plainly tips the balance in favor of allowing disclosure of the information.

Cal Open recognizes that there are political and social concerns about protecting birth parents' wishes with respect to contact by their relinquished offspring and, accordingly, would support a provision in an open records law for use of a "contact preference form." Open records laws recently passed in Oregon, Alabama, New Hampshire and Maine make use of such forms, which allow birth parents to express their wishes regarding contact or lack of contact with the adult adoptee without abrogating the adult adoptee's right to his or her own information. These forms also give birth parents the opportunity to submit current familial medical history to the adult adoptee. Contact preference form provisions therefore honor the needs and rights of both birthparents and

adult adoptees; the parties are free to make their own decisions about familial contact and relationship without unnecessary interference by the State.

II. DISCUSSION

A. A Brief History Of The Laws Mandating The Sealing Of Birth Records

1. The intent behind laws sealing birth records in the United States was not protection of birth parent privacy.

Adoption records and original birth certificates have not always been sealed. Birth certificates themselves only came to be required in the United States in the first decade of the twentieth century. In the mid-1920s, there were virtually no confidentiality or secrecy provisions in adoption law. Elizabeth J. Samuels, “The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records,” 53 Rutgers L. Rev. 367, 374 (Winter, 2001).¹ When adoption records began to be closed in the 1930s, most laws precluded only the general public—not the participants themselves—from access to those records. The intent of those laws was to protect the adopted child from the stigma of illegitimacy. Samuels, 53 Rutgers L. Rev. at 373-75.²

Initially, therefore, there was no intent or thought to bar adoptees from obtaining the original, unamended certificates comprising the official public record of their own births. *Id.* at 377-78. However, from the 1930s forward, as the process of adoption itself began to grow more secretive, state legislatures began to pass laws sealing original birth certificates, and by the early 1980s, legislatures in most states had passed laws sealing

¹ See also, Elizabeth J. Samuels, “How Adoption in America Grew Secret,” *The Washington Post*, Sunday, October 21, 2001; Page B5.

² See also, Naomi Cahn and Jana Singer, “Adoption, Identity and the Constitution,” 2 U. Pa. J. Const. L. 150, 154-55 (Dec. 1999); Desmond Tuck, “The End of Adoption Secrecy is Nigh” 7 S.F. L. Rev. 41 (1997).

adoption records not just from the public at large but even from adult adoptees. *Id.* at 381-385.

The reasons for that change had almost nothing to do with protecting the privacy of birth parents.

When one searches the historical record from the 1930s through the 1960s to understand how and why the adoption process became cloaked in secrecy—specifically why court records in most states came to be closed to all, and birth records in many states came to be closed even to adult adoptees . . . one finds that the reasons proffered for confidentiality and secrecy focus solely on protecting **adoptees** from embarrassing disclosure of the circumstances of their birth and on protecting **adoptive parents** and their adoptive children from being interfered with or harassed by birth parents, as it was believed they might be if birth parents and adoptive parents who were unknown to one another were to learn one another’s identity. Among the legal, social service, and other social science commentators, there appears to be no or virtually no discussion of a need to protect birth parents from adult adoptees seeking and acquiring information about their birth families.

Id. at 385.³ [Emphasis added.]

Elizabeth Samuels points out that the impetus for sealing records in the 1940s and 1950s was the emerging social idea that adoption was “a perfect and complete substitute for creating a family by childbirth.” The adopted child was intended to grow up without any other family and without expressing any interest in any other family. *Id.* at 404-405.⁴ “The law could confer on children in need of families new identities that would obliterate forever their original identities, and the law could provide adoptive parents with children who, like children born to them, would have no connection with any other family.” *Id.* at

³ Open records legislation is only about acquiring **information**. We note that California law has long protected, and continues to protect, legitimate interests in freedom from abusive interference, harassment or meddling.

⁴ *See also*, Cahn and Singer, 2 U. J. Pa. Const. L. at 154.

404. Essentially, the child was seen as a blank slate ready for the adoptive parents to write upon, it being assumed that “well adjusted” adoptees would have no interest in their origins. *Id.* at 409-12. As any student of human nature will readily acknowledge, however, this assumption about a basic lack of curiosity and about the absence of a deep psychological need to know one’s origins is simply wrong.

Samuels concludes that “[t]he paucity of explicit reasons articulated through the 1960s for eliminating adult adoptee access to birth records suggests that when many court records were sealed and some original birth records were sealed even from adult adoptees, the closings of the birth records to adult adoptees reflected . . . [this] social context, and not a legislative response to real or imagined problems associated with such access.” *Id.* at 403.

2. The California laws sealing adoption records were initiated to hide the shame surrounding adoptions, not to protect the privacy rights of birth parents.

The California law providing for an amended birth certificate to be issued for an adopted child (currently Health and Safety Code sections 102635 and 102680) was first enacted in 1933. It provided that when a decree of adoption was entered:

[u]pon request a certificate of birth shall be issued bearing the name of the child as shown in the decree of adoption, the names of the foster parents of said child, the age of the foster parents, the sex, date of birth and place of birth, but no reference in any birth certificate shall have reference to the adoption of said child.

(Stats. 1917, p. 717, sec. 15a., effective 1933).⁵

⁵ The original version of the statute, enacted in 1915, provided for the registration and preservation of records of births, marriages and deaths by the state.

This version of the statute also stated that the amended birth certificate “shall be the only birth certificate open to **public** inspection.” *Id.* (Emphasis added.) However, the statute allowed **any** member of the adoption triad access to the “original record of birth.” Specifically, it provided that the original birth certificate “shall not be accessible to any one except upon request of the child or his foster or natural parents or upon order of the court of record.” *Id.*

In 1935, the statute was amended to provide that the original birth certificate, along with the certificate of the decree of adoption “shall be available only upon the order of a court of record.” Subsequent amendments in 1941 and 1963 applied the law to children born in California, but adopted elsewhere, and prohibited omission of the name and address of the hospital or facility where the birth had occurred from the amended birth certificate unless requested by the adopting parent.⁶ The California legislature also subsequently passed laws allowing release of adoption records on a showing of good and compelling cause.⁷

The 1935 amendment contains no expression of legislative intent. However, proposed bills restricting access to adoption records were described in contemporary newspaper articles as intended to protect adoptive parents from blackmail by unscrupulous people who “threaten[ed] to tell the child it was adopted,” and to save adoptive parents and adoptees from embarrassment—issues that are no longer a realistic concern today. *Sacramento Bee*, January 22, 1935, p. 6; January 14, 1935, p. 6. There is no evidence that the “privacy interest” now being cited by some persons as an impetus

⁶ An amendment in 1957 was a nonsubstantive reorganization of the law.

⁷ Health & Safety Code § 102705 (added in 1995), formerly Health & Safety Code § 10439 (added in 1957), formerly Health & Safety Code § 10254 (added 1939).

for the legislature’s decision—that is, the birth parent’s ostensible desire for anonymity—was actually in the mind of the legislature at the time it sealed adoption records.⁸

B. The Right To Privacy Guaranteed Under The California Constitution Will Not Be Violated By Open Records Legislation

The constitutional right to privacy is found in Article I, Section 1 of the California Constitution, which reads as follows:

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

(Enacted November 5, 1974.)

This provision does not guarantee a blanket right to privacy.⁹ The California Supreme Court set out guidelines to be followed in addressing alleged violations of California’s constitutional right to privacy in *Hill v. National Collegiate Athletic Ass’n*, 7 Cal. 4th 1 (1994). Under *Hill*, a right to privacy claim has three elements: (1) the identification of a specific, legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by the defendant [assuming an adversarial proceeding] that is sufficiently serious in its nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the

⁸ The right to privacy provision of the California Constitution was not enacted until almost forty years later.

⁹ Indeed, the provision gives fundamental rights to **every** citizen to pursue happiness and to be allowed appropriate rights of privacy. It does not give the adult adoptee—who is the captive of decisions made long ago by others—a lesser right than other citizens to the pursuit of his own happiness or autonomy. Yet, current law does exactly that. Every other person or entity involved with the adoption—the birth parents, the adoptive parents and the state—has the right to know the facts of the adopted child’s birth, and can choose to make those facts public or keep them secret. Only the adoptee is denied that right.

privacy right. *Id.* at 35-37. If all three elements are established, *Hill* additionally requires that the individual’s privacy interest be balanced against countervailing interests, because an “[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest.” *Id.* at 37-38. In short, there can be no violation of the state constitutional right to privacy if any of the three elements just discussed is lacking or if there exist one or more countervailing interests to an otherwise protectible privacy interest. *Id.* at 40.

1. Whatever privacy interest a birth parent may have in permanently hiding his or her identity from his or her children does not implicate a fundamental right.

“The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest.” *Hill*, 7 Cal. 4th at 35. “Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information (“informational privacy”); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference (“autonomy privacy”). *Id.*

The birth parent’s interest at issue here does not fall cleanly into either class. Disclosing identifying information to an adult adoptee at least eighteen years after the birth of the adoptee is neither a widespread dissemination nor a misuse of sensitive and confidential information. Furthermore, while a birth parent may have an interest in making personal decisions or conducting personal activities without interference from the general public, it cannot reasonably be argued that this interest extends to the withholding of essential information from one’s own children, especially where the protection of such an interest can only be bought by denying another person his or her identity—an

extremely high price.¹⁰ Even assuming that a birth parent does have a protectible privacy interest in the information that he or she relinquished a child, that interest, for reasons discussed below, cannot rise to the level of a constitutionally protected right.

¹⁰ It has been suggested that the birth parent's interest at issue may involve fundamental "rights of family privacy" that protect "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing," and thus is subject to the protections afforded reproductive choice by the federal constitution. See letter from Diana G. Lim to The Honorable Robert Presley, "Adoption Records: Open Access - #26071" (1990) (referenced in the Analysis) at pp. 2-3 [Ex. I]. This suggestion cannot withstand serious scrutiny. As the Oregon Court of Appeals has pointed out:

[W]e are unable to conclude that a law that permits adult adoptees access to vital records concerning their birth has the same sort of constitutional infirmities as the laws that criminalized contraception and abortion that were struck down in *Griswold*, *Eisenstadt* and *Roe*. A decision to prevent pregnancy, or to terminate pregnancy in an early stage, is a decision that may be made unilaterally by individuals seeking to prevent contraception or by a woman who chooses to terminate a pregnancy. A decision to relinquish a child for adoption, however, is not a decision that may be made unilaterally by a birth mother or by any other party. It requires, at a minimum, a willing birth mother, a willing adoptive parent, and the active oversight and approval of the state. Given that reality, it cannot be said that a birth mother has a fundamental right to give birth to a child and then have someone else assume legal responsibility for that child . . . Although adoption is an option that generally is available to women faced with the dilemma of an unwanted pregnancy, we conclude it is not a fundamental right. Because a birth mother has no fundamental right to have her child adopted, she also can have no correlative fundamental right to have her child adopted under circumstances that guarantee that her identity will not be revealed to the child.

Does 1-6 v. State of Oregon, 164 Or. App. 543, 565 (1999).

Several years earlier, the United States Court of Appeals for the Sixth Circuit, having reached the same conclusion, noted:

Even should it ultimately be held some day that the right to give up a baby for adoption or to adopt a child is protected by the Constitution, such a right would not be relevant to this case. Because the challenged law [opening adoption records to adult adoptees] does not limit adoptions, cases striking

(Footnote continued)

Nor would the withholding of information pursuant to any such right extend to the adopted child. Indeed, Elizabeth Samuels' examination of social services literature through the 1960s reveals that, although unmarried mothers who relinquished their children for adoption may sometimes have sought "a measure of confidentiality," what they sought "was not protection from the discovery of their surrendered children as adults." Rather, "[t]hey sought arrangements that would conceal their pregnancies from their parents or from other members of their communities, or from both." *Id.* at 399-400.¹¹

down laws restricting abortion are not analogous. And even assuming that a law placing an undue burden on adoptions might conceivably be held to infringe on privacy rights in the *Roe* realm, much as laws placing "undue burden[s]" on abortions are unconstitutional under *Planned Parenthood v. Casey* [complete citation omitted], [the proposed law] does not unduly burden the adoption process. Whether it burdens the process at all is the subject of great dispute . . . Any burden that does exist is incidental and not "undue."

Doe v. Sundquist, 106 F.3d 702, 706 (6th Cir. 1997).

¹¹ Some have argued that there exists a contractual or quasi-contractual arrangement between the state and birthmothers that involves the promise and corresponding duty of confidentiality on the part of the state. That argument was squarely rejected in *Does 1-6 v. State of Oregon*, 164 Or. App. 543, 549-562 (1999) (state legislative scheme governing sealing of adoption records not part of a contract between state and birth mothers, hence open records law did not impair obligations of contract). Adoption statutes are based on the legislature's determination as to what is in the best interest of the child, which is in turn based on prevailing sociological and psychological concepts. What may be "in the best interests of a child" may not be in the best interests of the adult that child becomes. Moreover, secrecy in adoption is no longer endorsed by the mental health community. *See* discussion at pp. 16-17, *infra*.

2. Birth parents of adult adoptees do not have a “reasonable expectation of privacy” in the information at issue.

Even if birth parents may have a privacy **interest** here, they do not have a **reasonable expectation** of privacy. Under settled California law, a reasonable expectation of privacy with regard to particular information is a threshold element that must be met before a court need undertake any analysis of whether the information is subject to the constitutional right of privacy. *Hill*, 7 Cal. 4th at 36.

For the following reasons, birth parents of adult adoptees do not have a reasonable expectation of privacy with regard either to the fact that they had a child or to the fact that they relinquished that child for adoption.

a. California law limits the confidentiality of adoptees’ birth records.

A review of the statutes and code sections relating to birth records of adopted persons reveals that California law on the confidentiality of information relating to birth parents’ identities contains inherent contradictions. Some laws – for example, Family Code section 9203, which provides that the state cannot disclose a birth parent’s identity to an adult adoptee who was relinquished after 1984 without the birth parent’s written consent – evince the state’s intent to protect information relating to birth parent identities.¹² (*See also*, Civil Code § 1798.24(a), (b) and (q), added in 1977). Other statutes and official practices, however, indicate that birth parents’ identities have been and still are accessible by various parties under a variety of circumstances. Those laws and practices limit the confidentiality of birth records and effectively negate any expectation of absolute anonymity or privacy a birth parent may have.

¹² Family Code section 9203 was enacted in 1992 and became operative in 1994.

First, the birth of a child cannot be an entirely private act because California law requires that every live birth be registered with a public entity. Health & Safety Code § 102400.¹³ Additionally, under California law, all records and information pertaining to adoption, including the adopted child's original birth certificate, may, without the birth parents' permission, be released by court order upon a showing of good and compelling cause. Health & Safety Code § 102705.¹⁴

Further, although current law provides for the creation of a new birth certificate upon adoption of a child, showing the adoptive parents as the birth parents, the law does not provide for destruction of the original birth certificate. Health & Safety Code §§ 102635, 102645, 102680, 102685.¹⁵ Indeed, because an amended certificate is not issued **unless and until a report of adoption is received** (and therefore cannot supplant the original certificate unless and until the adoption has taken place) there is no confidentiality attached to the birth and relinquishment of a child **unless and until that child is adopted—something which may not occur for years, if ever.** *Id.*

Equally important, adoptive parents have the power under the law to prevent the state from amending the original birth certificate. Health & Safety Code § 102640. *Id.* Indeed, under Family Code § 9200, the adoption petition, relinquishment of consent,

¹³ Added in 1995, formerly Health & Safety Code § 10100 (added in 1957), formerly Health & Safety Code § 10175 (added in 1939).

¹⁴ Added in 1995, formerly Health & Safety Code § 10439 (added in 1957), formerly Health & Safety Code § 10254 (added 1939).

¹⁵ Section 102635 was added in 1995, formerly section 10432 (added in 1957), formerly section 10253.7 (added in 1941); Section 102645 was added in 1995, formerly sections 10433 (added in 1957), formerly sections 10252, 10253 (added in 1935); Section 102680 was added in 1995, formerly section 10434 (added in 1957), formerly section 10253 (added in 1939); Section 102685 was added in 1995, formerly section 10435 (added in 1957), formerly section 10253.5 (added in 1941).

agreement, order, report to the court from any investigating agency, and any power of attorney or deposition filed in the office of the county clerk are – **again without the permission of the birth parents** – open to inspection by the parties to the adoption proceeding, with no court order and no requirement of good cause shown, and open to inspection by others by court order.¹⁶ Parties to the proceeding expressly include the adoptive parents, the State of California, and, in some cases, the adoption agency; under a fair reading of the statute, moreover, they would also include the adoptee. *Hubbard v. Superior Court*, 189 Cal. App. 2d 741, 751-752 (1961) (construing Family Code § 9200, formerly Civil Code § 229.10). Again, this statute negates any reasonable expectation of absolute birth parent anonymity.

In order to create an arguably protectible privacy right, the expectation of privacy must be not only subjectively, but also objectively, reasonable. *Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034, 1037 (1990). Where, as here, confidentiality of records is conditional and limited, there can be no objectively reasonable expectation of privacy in regard to those records. *Rosales v. City of Los Angeles*, 82 Cal. App. 4th 419, 426, 428-29 (2000); *Michael v. Gates*, 38 Cal. 4th 737, 745 (1995).

In considering the identical issue, the Tennessee Supreme Court held:

Early adoption statutes did not require either that the records be sealed or that the identities of the parties remain confidential. Later amendments to the statutes provided that, even if sealed, records could be disclosed upon a

¹⁶ Family Code § 9200 was added in 1992, formerly Civil Code § 229.10 (added in 1990); *see also* Family Code §§ 222.15, 224.73 (providing parties to the adoption proceeding with unfettered access to birth parent’s relinquishment statement). It has been held that notice of future government action (here, the Legislature’s 1992 notice, through enactment of Health & Safety Code section 9200, of its intention to make records available to parties to the adoption) can negate a reasonable expectation of privacy regarding information that will be made available as a result of that action. *Hill*, 7 Cal. 4th at 36.

request by an adopted person and a judicial finding that disclosure was in the best interest of the adopted person and the public. Still other amendments enacted in 1982 and 1985 permitted disclosure under certain circumstances even without a judicial finding. There simply has never been an absolute guarantee or even a reasonable expectation by the birth parent or any other party that adoption records were permanently sealed. In fact, reviewing the history of adoption statutes in the state reveals just the opposite. Accordingly, we disagree with the Court of Appeals' conclusion that plaintiffs had a vested right in the confidentiality of records concerning their cases with no possibility of disclosure.

Doe v. Sundquist, 2 S.W.3d 919, 925 (Tenn. 1999).¹⁷

b. The recent public sale of the California Birth Registry means that birth parents' identities are in the public domain.

Where information is, for whatever reason, already in the public domain, there is no objectively reasonable expectation of privacy with regard to that information.

Bradshaw v. City of Los Angeles, 221 Cal. App. 3d 908, 921 (1990). California has made its birth registry available for sale pursuant to the Public Records Act, Government Code §§ 6250 *et seq.* In the 1990s, several genealogy websites purchased the registry and posted it on the internet, thus bringing it into the public domain. See Jennifer Coleman, "Online Birth Records Raise Privacy Worries," Associated Press, published in *The Contra Costa Times*, November 30, 2001. The registry lists all births in California, including adoptees, from 1905 to the present, by date and county of birth, and, in many instances, includes birth parents' names.

In 2002, the Legislature passed Health & Safety Code § 102230, exempting the birth registry from the Public Records Act. (This law was ostensibly intended to protect

¹⁷ *Sundquist* is especially relevant because the Tennessee constitution, like that of California, provides a right to privacy greater than that created by the federal constitution. *Sundquist*, 2 S.W.3d at 925, 926; *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307, 326 (1997).

citizens from identity theft, although, at the time of its passage, the bill's sponsors could identify no reported incident of the use of the registry to commit identity theft.) Nonetheless, copies of the birth registry remain in the possession of members of the public who purchased them, and remain available on the internet.

Cal Open respectfully submits that the public disclosure of identifying information contained in the registry nullifies any reasonable expectation of absolute anonymity or privacy that birth parents may have had in the information. Indeed, even after the passage of Health & Safety Code § 102230, the portion of the birth registry already released to the public and containing the identity of birth parents would still arguably be required, by the waiver provision of the California Public Records Act, to be disclosed and made public for inspection by every citizen. Government Code § 6254.5.¹⁸ As a result, there is no reasonable expectation of privacy, much less anonymity, in the information contained in those records. *Benjamin Stackler v. Department of Motor Vehicles*, 105 Cal. App. 3d 240, 247 (1980) (“no reasonable expectation of privacy in that

¹⁸ The California Public Records Act provides that state agencies shall make public records available except where such public records are expressly exempt from disclosure by provisions of law. Government Code § 6253. The Act provides, however, that notwithstanding any provision of law, whenever a state or local agency discloses a public record, which is otherwise exempt from disclosure under the Act, such disclosure shall constitute a waiver of the specified exemption. Government Code § 6254.5. The practice of disclosing exempt records thus destroys the privilege of confidentiality otherwise permitted by the Act. *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 656 (1974). Since records are either completely public or completely confidential, every citizen has a right to inspect records that have lost their exempt status. 42 Cal. App. 3d at 656.

Prior to 2002, the California Birth Registry was never protected from disclosure, and, under the precepts of the Act, certainly cannot be thus protected after its public dissemination. Here, although adoptees' birth certificates themselves (that is the protected records) have not been released to the public, the identifying information within them has been. Under principles of equity, the state arguably has waived its right to assert that that material is protected.

which is already public.”) Without a reasonable expectation of privacy, birth parents cannot properly claim that their constitutional right to privacy has been violated. *Hill*, 7 Cal. 4th 1 at 36-37; *People ex rel. FTB v. Superior Court*, 164 Cal. App. 3d 526, 541 (1985) (no violation of the constitutional right to privacy because no reasonable expectation of privacy in the names and incomes of policyholders in Safeco’s deferred annuity plan where the information sought was required by law to be produced to the FTB and the IRS).

C. Open Records Laws Are Narrowly Tailored And Do Not Constitute An “Egregious Breach Of Social Norms” Rising To The Level Of A Violation Of The Right To Privacy.

Finally, even if birth parents had a protectible privacy right and a reasonable expectation of privacy, the California Supreme Court has made it clear that not every intrusion into one’s private information constitutes a violation of one’s constitutional right to privacy. “Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual potential impact to constitute an egregious breach of social norms underlying the privacy right.” *Hill*, 7 Cal. 4th at 5. Open records legislation cannot constitute an “egregious breach” because it would not allow public access to identifying information, but rather would limit access to those persons directly involved in the adoption process. *See Hill*, 7 Cal. 4th at 38 (intrusion which is limited and “carefully shielded from disclosure except to those who have a legitimate need to know” may “assuage privacy concerns.”) Moreover, adoptees seek only those documents that relate to them directly. Every other citizen of this state has access to his or her original birth certificate. Adoptees deserve access to that fundamental personal document as well.

As Adam Pertman explains in his recently published examination of adoption in America, *Adoption Nation*, society’s concept of adoption has changed radically in the past two decades. The cloak of secrecy that once shrouded the adoption process is

rapidly falling away. Pertman, *Adoption Nation*, Perseus Books Group (2000), at pp. 44-48; *see also*, Samuels, 53 Rutgers L. Rev. at 435-36. More and more adoptees are searching for, and finding, their birth parents and the truth of their origins. More and more birth parents and adoptive parents are choosing some form of open adoption as the benefits of openness become better understood. *Id.* at pp. 15-18 (“[S]ocial-work and mental-health experts have reached a consensus during the last decade that greater openness offers an array of benefits for adoptees . . .” at the same time as they have learned of the “emotional and psychic injuries” that secrecy and denial inflict on birth mothers.)¹⁹

Further, research demonstrates that, in contrast to the speculation that most birth parents seek to maintain secrecy around adoption, a significant majority of birth mothers are themselves interested in obtaining information about their relinquished children. One study of birth mother preference indicates that over 90% of birth mothers welcomed contact from their children. *See*, “Birth Parent Responses to Confidential Intermediary Searches on Behalf of Adoptees,” compiled by Fred F. Greenman, Sept. 9, 1999; *see also*, Pertman, *Adoption Nation*, at pp. 129-130.

It simply is not credible, in such a social climate, to assert that allowing adult adoptees access to the most fundamental information about themselves is somehow “an egregious breach of social norms.” To the contrary, in the past ten years four states have

¹⁹ Pertman also demonstrates that there is no real evidence behind the notion that increased openness in adoption will lead to a decrease in adoptions and an increase in abortions: “Most states with closed records report higher abortion rates and lower adoption rates than either Kansas or Alaska [the only two states in which adoptees’ documents have always been open]; furthermore, historically, the incidence of abortion in a given state has not dropped after it sealed birth certificates and other identifying information.” *Id.* at pp. 128-30. Subsequent data confirms this conclusion. *See* American Adoption Congress “Abortion and Adoption Data from States Who Have Enacted Access” 2007 at http://www.americanadoptioncongress.org/reform_adoption_data.php.

adopted legislation granting adult adoptees unfettered access to their previously sealed original birth certificate. Such legislation is being considered in other states. No constitutional challenge to these or to any open records law has been successful. *See Does 1-6 v. State of Oregon*, 164 Or. App. 543, 562-566 (1999); *Doe v. Sundquist*, 2 S.W.3d 919, 925-26 (Tenn. 1999); *Doe v. Sundquist*, 106 F.3d 702, 706-707 (6th Cir. 1997).

D. Even If Birth Parents Have A Legitimate Right To Privacy In Their Children’s Birth Information, Adult Adoptees’ Interest In Discovering The Truth Of Their Origin Is A Compelling Competing Interest That Justifies Disclosure.

Even if a birth parent were able to meet the threshold requirement of a reasonable expectation of privacy, and thus demonstrate an arguably protectible privacy interest in hiding information concerning the birth parent’s connection to the adoptee, that interest would have to be balanced against the interests of the adoptee in having access to that information. *Hill*, 7 Cal. 4th at 40. To complete the constitutional analysis, *Hill* requires that privacy interests be balanced against other countervailing interests, because an “[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest.” *Hill*, 7 Cal. 4th at 38.

As an initial matter, if a birth parent has a privacy interest regarding the connection between himself and herself and a relinquished child, the child has an identical interest, which has to date been ignored but which now must be considered and balanced. What is at stake for both birth parent and adoptee is the connection between them, that is, a single connection looked at from two sides. Whatever degree of importance may attach to the birth parent’s desire to hide from and to avoid the relational consequences of that connection, the same degree of importance attaches to the adoptee’s desire to learn of, and perhaps to be able to experience the relational consequences of, that connection. Further, the birth parent had a crucial role in creating that connection,

while the adoptee had none; *i.e.*, the birth parent's actions created consequences that would foreseeably affect the future well being of the adoptee. Equity and ordinary principles of tort law thus favor the adoptee's interests.²⁰

More important, however, is the adoptee's right to the truth about his or her origins. This right to personal autonomy is more than a mere competing interest; it is fundamental and compelling. In *Hill*, the California Supreme Court held that where a case involves "an obvious invasion of an interest fundamental to personal autonomy . . . a 'compelling interest' must be present to overcome the vital privacy interest." 7 Cal. 4th at 34. The Court later affirmed that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of life." *American Academy of Pediatrics, supra*, 16 Cal. 4th at 333. An adoptee's right to access information about his or her origins implicates a fundamental personal autonomy interest in personhood and self-definition.²¹ When weighed against a birth parent's presumed

²⁰ The fact that the adoptee had no say whatsoever in the process by which his or her records were amended and/or sealed is obvious, since, at the time of amendment and/or sealing, the adoptee was a child whose interests were presumably being represented, if at all, by the state. But current law ignores the equally obvious corollary to that fact: the adult that the child becomes must suffer the consequences of a decision that was made without his or her consent and that no longer can be said to serve his or her interests.

²¹ *See, e.g.*, Carolyn Burke, Note, "The Adult Adoptee's Constitutional Right to Know his Origins," 48 S.Cal.L.Rev. 1196-1220 (1975); Cahn & Singer, 2 U.Pa.J.Const.L. at 191 ("What seems most objectionable about sealed birth records is not that the State is interfering with the decisional autonomy of adoptees but that, by controlling access to this information, the State is playing far too large a role in constructing an identity for them.")

interest in keeping the circumstances of an adoption permanently secret from the adult the child has become, there is simply no contest.²²

E. The Use Of “Contact Preference Forms” Is An Effective Way To Balance The Needs And Rights Of Both Birth Parents And Adult Adoptees.

As noted above, Cal Open recognizes that the implementation of open records legislation raises political and social concerns about birth parents’ desires regarding contact with their relinquished offspring. Accordingly, Cal Open supports the use of “contact preference forms” to address these concerns.

In the past decade, Oregon, Alabama, New Hampshire and Maine have passed open records laws that give birth parents the opportunity to file “contact preference forms” with the State, which will then be sent to adopted persons along with their requested birth certificates.²³ Birth parents may indicate on those forms whether they wish contact with their adult offspring and whether they would prefer that such contact be initiated by the parties themselves or through a privately-retained intermediary. If birth

²² Adoptees may also have an “informational” privacy interest in maintaining the accuracy of private information relating to themselves. Jurisprudence for the constitutional right to privacy emanates from the California Supreme Court case, *White v. Davis*, 13 Cal. 3d 757 (1975). In *White*, the Court found that one of the four mischiefs to be remedied by adoption of the constitutional right to privacy was the “lack of a reasonable check on the accuracy of existing records.” 13 Cal. 3d at 775. The altering of the adoptee’s birth records happens either at the time of birth or at the time of adoption. Under current law, the state has the power to alter records relating to the adoptee. The altering of the information relates to the adoptee, yet the adoptee has no control over its content. Adoptees, having reached adulthood, should be entitled to obtain and control the accuracy of that information.

²³ Oregon’s Measure 58 was approved by the voters on November 3, 1998. Alabama, New Hampshire and Maine enacted new laws and amended existing statutes to open records to adult adoptees in 2000, 2005 and 2007, respectively. (See Ala.Code 22-9A-12, 26-10A-31, 26-10A32; N.H. Rev. Stat. § 5-C:9; 18-A MRSA § 9-310, 22 MRSA §§ 2765, 2768, 2769)

parents request no contact, they are asked to provide current medical information to the adoptee. Contact preference forms thus allow birth parents to make their desires known without denying adoptees the right to access their own information. Further, they appear to work. Cal Open is unaware of *any* reported incident in these four states in which an adoptee has failed to respect the wishes expressed by his or her birth parent expressed in a contact preference form. *See, e.g.*, American Adoption Congress, “Adoptee Access Succeeds in Oregon and New Hampshire” 2007 (“no violations of contact preference requests have been reported” in Oregon); Linda Baker, “The Past Unsealed”, Adoptive Families Magazine, 2009.²⁴

III. CONCLUSION

Closed adoption laws were a result of a now-antiquated philosophy of shame associated with illegitimacy and adoption. That philosophy led to the introduction of a crude set of laws that buried a perceived societal problem by denying adoptees access to their original birth records, perpetuating the stigmatization associated with illegitimacy, relegating an entire class of citizens to second class status, and effectively victimizing the weakest participant—the child. To continue to abrogate adoptees’ rights is to perpetuate those effects for no justifiable reason.

The California Legislature has the authority, and we submit, the duty, to put a long overdue end to the legacy of shame and to proclaim that the right “to define one’s own concept of existence, of meaning, of the universe and of the mystery of life” is good cause to allow all citizens, including adopted ones, access to the fundamental records of their origins.

²⁴ At http://www.americanadoptioncongress.org/reform_access_success.php and <http://www.adoptivefamilies.com/articles.php?aid=957>, respectively.

Respectfully submitted,

NINA ANNE M. GREELEY

CAL OPEN