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Opening The Door To The Past: Recognizing The Privacy Rights Of Adult Adoptees And Birthparents In California's Sealed Adoption Records While Facilitating The Quest For Personal Origin And Belonging

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COMMENT

OPENING THE DOOR TO THE PAST: RECOGNIZING THE PRIVACY RIGHTS OF ADULT ADOPTEES AND BIRTHPARENTS IN CALIFORNIA'S SEALED ADOPTION RECORDS WHILE FACILITATING THE QUEST FOR PERSONAL ORIGIN AND BELONGING

The law must be consonant with life. It cannot and should not ignore broad historical currents of history. Mankind is possessed of no greater urge than to try to understand the age-old question: "Who am I?" "Why am I?" Even now the sands and ashes of continents are being sifted to find where we made our first step as man. Religions of mankind often include ancestor worship in one way or another. For many the future is blind without a sight of the past. Those emotions and anxieties that generate our thirst to know the past are not superficial and whimsical. They are real and they are "good cause" under the law of man and God.[1]

[1] Bradley v. Children's Bureau of South Carolina, (S.C. Ct. Com. Pl., Apr. 9, 1979), *rev'd*, 274 S.E. 2d 418 (1981) (Judge Wade S. Weatherford, Seventh Judicial Circuit, South Carolina, granting adoptee's petition to access adoption records).

INTRODUCTION

Sealed adoption records in California consist of both court adoption files and the original birth certificates.[2] California legislation initially sealed court adoption files in 1927[3] and original birth certificates in 1935.[4] A court must find "good cause" to open sealed adoption records.[5] Adoptees' desires to discover their origins have routinely been dismissed as "mere curiosity" not rising to the level of "good cause" in this context.[6]

State legislatures across the United States have been reluctant to change the laws that originally sealed adoption records mostly in the 1930's, 1940's and 1950's.[7] Recently,

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[2] *See generally* CAL. FAM. CODE § 9200 (Deering 1996) (relating to confidentiality of court adoption files); CAL. HEALTH AND SAFETY CODE § 102705 (Deering 2001) (relating to confidentiality of original birth certificates).

[3] 1927 Cal. Stat., ch. 691, § 3, 227. ("[t]he petition, relinquishment, agreement and order must be filed in the office of the county clerk and shall not be open to inspection by any other than the parties to the action and their attorneys and the state department of public welfare except upon the written authority of the judge of the superior court."). *Id.*

[4] 1933 Cal. Stat., ch. 489, § 6, § 15a. The law originally allowed adoptees, adoptive parents and birthparents to access the original birth certificate. The statute read, "([w]henever a decree of adoption has been entered declaring a child legally adopted in any superior court in the State of California a certificate of the decree shall be recorded by the clerk of the court with the State Registrar of Vital Statistics upon a form provided for that purpose. This shall be filed with the original record of birth, which shall remain as a part of the records of the State Bureau of Vital Statistics, but which shall not be accessible to any one *except upon request of the child or his foster parents or natural parents or upon order of a court of record.*"). *Id.* (emphasis added). In 1935 the statute was amended to provide that the original birth certificate would be available only upon court order. 1935 Cal. Stat., ch. 608, § 1, § 15a.

[5] *See* CAL. FAM. CODE § 9200 ("A judge of the superior court may not authorize anyone to inspect ... any portion of any of these documents, except in exceptional circumstances and for good cause approaching the necessitous.") *See also* CAL. HEALTH AND SAFETY CODE §102705 (requiring "good and compelling cause ... [shown by or on behalf of adoptive child] ... necessary ... [to establish] a legal right.").

[6] *See* BETTY JEAN LIFTON, TWICE BORN, MEMOIRS OF AN ADOPTED DAUGHTER 106 (1975) (where the author wonders what the agency director means by "normal feelings of curiosity"). Lifton asks "[i]s she implying that adoptees are motivated by *idle* curiosity?" *Id. See also* KATARINA WEGAR, ADOPTION, IDENTITY, AND KINSHIP 31 (1997) (discussing the controversy over whether "mere curiosity" should constitute "compelling need"). Wegar argues that curiosity sufficient to prompt an adoptee to petition the court to open the records should be considered compelling. *Id.* at 134-135.

[7] *See* JOAN H. HOLLINGER, ADOPTION LAW AND PRACTICE, *Aftermath of Adoption: Legal and Social Consequences,* 13A-7 (Joan H. Hollinger, ed., 2001) (noting that only Alabama, Alaska, Delaware, Kansas, Maryland, Montana, Oklahoma, Oregon, Tennessee, and Washington currently allow for any type of access to original birth certificates or adoption records. Maryland, Montana, Oklahoma, and Washington allow access only prospectively; that is, for adoptions finalized after a certain date).

however, there has been a growing trend away from secrecy and toward openness in adoption proceedings.[8] In so-called "open adoptions", adoptive and biological parents may agree to share information about the child or even maintain ongoing personal contact.[9] Adult adoptees in many of the advanced, industrialized nations have unrestricted access to their original birth records.[10] Moreover, several states now allow adult adoptees at least partial access to original birth records and adoption files.[11]

In California, California Assembly Bill 1349 (hereinafter "AB 1349") correctly attempted to reform the laws that make it nearly impossible for adult adoptees to access private information about themselves contained in state held records.[12] In April of 2001, AB 1349 failed, however, to receive a single

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[8] Audio tape of Symposium on Perspectives on Open Adoption: Privacy vs. The Right to Know, held by the Dave Thomas Center for Adoption Law at Capital University Law School (May 3-4, 2000) (on file with author) (Joan H. Hollinger describing the current trend toward open adoptions).

[9] *See* CAL. FAM. CODE § 8714.7 (Deering 1996 & Supp. 2002) (referring to post adoption contact agreements); Martha Groves, *Caring for Our Children*, L.A. TIMES, August 8, 1999, at A3.

[10] For example, in Scotland, adoptee records have been open since 1935, in England since 1976. M. Christina Rueff, *A Comparison of Tennessee's Open Records Law with Relevant Laws in Other English-Speaking Countries*, 37 BRANDEIS L. JOURNAL 453, 465-466 (1998). New Zealand and parts of Australia also allow adult adoptees to access their birth records. *Id.* at 466-467.

[11] Alaska allows an adoptee 18 or older to receive a copy of his original birth certificate, including the attached address of the birthparents. ALASKA STAT. § 18.50.500 (Michie 2000). Birthparents and adoptees may submit change of name or address that shall be attached to the original birth certificate and released upon request. *Id.* Kansas never sealed the original birth certificate to adult adoptees. KAN. STAT. ANN. § 65-2423 (2000). In 1999, the Sixth Circuit Court of Appeals lifted a stay on a Tennessee law passed in 1996 that releases the original birth certificate and the entire adoption file. Doe v. Sundquist, 106 F.3d 702 (6th Cir. 1997), *cert denied*, 522 U.S. 810 (1997). The law had been challenged as an unconstitutional violation of birthmother privacy. *Id.* The law allows a birthparent that does not desire contact with the adoptee to file a "contact veto" that penalizes the adoptee for contact after receiving the records. TENN. CODE ANN. § 36-1-128 (1998). In November 1998 Oregon voters passed a law giving adult adoptees unrestricted access to original birth certificates. OR. REV. STAT. § 432.240 (1999). The law allows birthparents to file a contact preference form similar to the one proposed in AB 1349 but the birth certificates are released regardless of the preference indicated. *Id.* On December 29, 1999 the Oregon Court of Appeals upheld the new law against a constitutional challenge to birthmothers' right to privacy stating that the privacy right does not extend as far as birthparents would like. Does v. State, 993 P.2d 822 (Or. App. 1999). Alabama is the most recent state to allow adult adoptees unrestricted access to their original birth certificates. ALA. CODE § 26-10A-31(g) (2000). The birthparents may file a contact preference form. *Id.*

[12] *See generally* A.B. 1349, 2001-02 Reg. Sess. (Cal. 2001).

vote of support in the Assembly Judiciary Committee.[13] This bill would have allowed adult adoptees, 18 years of age or older, unrestricted access to their original birth certificate and to their entire, unredacted, adoption file.[14] AB 1349 would also have enabled birthparents to indicate their preference regarding contact by the adoptee, although the preference would not in any way affect the adoptee's access to the records.[15] Although the bill would not open confidential records to the public, but only to the pertinent adult adoptee, the Committee was concerned that the bill as written did not adequately protect the birthmother's privacy rights.[16]

The bill was amended and the Assembly Judiciary Committee reconsidered it on January 15, 2002.[17] The amended version of AB 1349 differed from the original bill in primarily one respect. The amended bill did not allow the adoptee or birthparents access to the court adoption files.[18] The amended version of the bill only made changes to the Health and Safety Code to allow adult adoptees, 18 years of age or older to obtain a copy of their original birth certificate.[19] The brief submitted in support of the bill suggested that, since birth indexes are published, the birthparents have no reasonable expectation of privacy in the original birth certificates.[20] The bill did not provide for any mechanism by which birthparents could totally block adoptee access to the original birth

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See Open Adoption Records: Adult Adoptees: Hearing on AB 1349 (Peschetti) Before the Assembly Committee on Judiciary),* 2001-02 Reg. Sess. (Cal. 2001) (statement of Saskia Kim regarding committee concerns of 1) potential violation of birthparent's right to privacy 2) adequacy of contact preference form to protect privacy interest if it exists 3) whether consent of and notice to birthparent should be required prior to disclosure 4) will fewer adoptions result if confidentiality not guaranteed and 5) whether state should disclose information if birthparents relinquished children on assumption of confidentiality).

[17] A.B. 1349, 2001-02 Reg. Sess. (Cal. 2001).

[18] *Id.*

[19] *Id.*

[20] Nina Anne M. Greeley, Analysis of the Impact of A.B. 1349 on the Right to Privacy under the California Constitution 14 (Dec. 11, 2001) (unpublished manuscript on file with author) (describing the recent public sale of the California Birth Registry pursuant to the Public Records Act). Several genealogy websites have purchased the registry and posted it on the Internet. *Id.* The registry lists all births in California including those of adoptees from 1905 to the present and includes names of birthparents. *Id* at 15.

certificates but did allow a contact preference form to be filed at the birthparents' option.[21] Once again, the committee rejected the bill in its amended form as a violation of birthmother privacy rights.[22] It eventually unanimously passed committee, however, after a compromise was reached.[23] The bill, as passed, released the original birth certificate to an adoptee that *already knew the name of her birthparents.*[24] Thus, the bill did not further its primary underlying purpose—to recognize the adult adoptee's fundamental right to learn about her origins.

California declares express privacy rights for its citizens in Article I of the California Constitution and in the Information Practices Act of 1977.[25] This Comment urges that under California law, both adoptees and birthparents should have recognized constitutional rights to privacy in the information contained in court adoption files and original birth certificates.

Part I examines the history of sealed adoption records in the United States and in California and how the social forces of the time contributed to the sealing of previously open records. Part II discusses the need for legislative reform by examining policy arguments supporting open records. Part III examines constitutional rights of privacy under the United States and California Constitutions respecting both birthparents and

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[21] A.B. 1349, 2001-02 Reg. Sess. (Cal. 2001). The contact preference form is attached to the original birth certificate and indicates whether or not the birthparent wishes to be contacted by the adoptee. The contact preference form does *not* restrict the release of the original birth certificate. *Id.*

[22] Telephone interview with Sarah Sprouse, Legislative Director, Assemblyman Anthony Peschetti, California Legislature 10th District (Jan. 20, 2002).

[23] *Id.* The bill was subsequently pulled due to the unacceptable amendments. *Id.*

[24] *Id.*

[25] The California Constitution was amended in 1974 and offers broader privacy rights than the U.S. Constitution. CAL. CONST. art. 1 § 1. In addition, § 1798.1 of the Information Practices Act of 1977 sets out the Legislative declarations and findings as follows:

> [t]he right to privacy is a personal and fundamental right protected by Section 1 of Article I of the Constitution of California and by the United States Constitution and that all individuals have a right of privacy in information pertaining to them...[t]he right to privacy to being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies...[t]he increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information...[i]n order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits. CAL. CIV. CODE § 1798.1 (Deering 1994).

adoptees. Part IV argues that the California legislature should declare privacy rights in sealed adoption records for both adoptees and birthparents. Part V analyzes AB 1349 and concludes that in both versions the privacy rights of birthmothers who do not desire disclosure are not adequately protected by the inclusion of a contact preference option. In addition, the failure of the amended bill to allow access to the court adoption files ensures that the informational privacy rights of both birthparents and adoptees in these records will continue to go unrecognized and unprotected. Finally, Part VI recommends statutory changes in the California adoption records law that will sufficiently protect the competing privacy rights of adoptees and birthparents. To rectify the current situation, there should be a presumption of openness in all adoption records, as well as a shift in the burden of persuasion to show why the records should not be opened.[26]

I. HISTORICAL DEVELOPMENT OF SEALED ADOPTION RECORDS LAW IN THE UNITED STATES AND CALIFORNIA

A. HISTORY OF SEALED ADOPTION RECORDS LAW IN THE UNITED STATES

An understanding of the evolution of sealed records in adoption law is necessary to enact sensible laws concerning these records in the present.[27] English common law did not recognize adoption.[28] Instead, orphaned or impoverished children became indentured servants who worked for masters in exchange for room and board and the chance to learn a trade.[29]

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[26] Other jurisdictions and commentators have suggested a shifting of the burden to prove why the records should not be opened. *See, e.g.*, Mills. v. Atlantic City Dep't. of Vital Statistics, 372 A.2d 646 (N.J. Super. Ct. Ch. Div. 1977); Jason Kuhns, *The Sealed Adoption Records Controversy: Breaking Down the Walls of Secrecy*, 24 GOLDEN GATE U. L. REV. 259, 289 (1994).

[27] *See generally* Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367 (2001) (for a comprehensive account of the social forces contributing to the sealing of adoption records).

[28] Kuhns, *supra* note 24, at 259, 260

[29] Janet Hopkins Dickson, *The Emerging Rights of Adoptive Parents: Substance or Specter?* 38 UCLA L. REV. 917, 923 (1991). A form of indentured servitude was imported to colonial America whereby orphanages would commonly supply children to families as apprentices. Children who were not indentured were often confined to

In the United States, it is commonly believed that adoption has always been a part of American law and that states have always secreted the identities of the parties to the adoption from each other.[30] Adoption in the United States, however, was created entirely by statute in the late nineteenth and early twentieth centuries.[31] The State, in its role as *Parens Patriae*[32] legislatively created the adoption process to provide homes for children whose birthparents cannot or choose not to care for them.[33] At that time, adoption records were not sealed from the public, the adoptee, the adoptive parents or the birthparents.[34]

Prior to the enactment of adoption laws, the welfare of parentless children was usually secondary to the needs of adoptive parents.[35] In 1851, Massachusetts passed the first adoption statute with the purpose of making the child's welfare paramount.[36] Over the next twenty-five years, many states enacted similar statutes.[37] These first adoption statutes did not restrict access to birth records because proceedings were generally informal and confidentiality was not an issue.[38]

Adoption was relatively rare in the early part of the twentieth century.[39] In the first place, child welfare workers

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asylums along with the poor and mentally ill. *Id.*

30 Samuels, *supra* note 27, at 368.

31 Kuhns, *supra* note 26, at 259-260.

32 The principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

33 *Mills*, 372 A.2d at 649.

34 Samuels, *supra* note 27, at 368.

35 For example, in the late nineteenth century, adoption or fostering of older children became popular because family farms required extra labor. *See* Janine M. Baer, The History and Consequences of Sealing Adoption Records 76 (1995) (unpublished Master's thesis, San Francisco State University) (on file with author) (citing VIVIANA ZELIZZER, PRICING THE PRICELESS CHILD 174 (1985)). Infants were of no practical use to most people at that time. Many desperate, unmarried mothers paid "baby farmers" to take their babies and find them good homes. More often than not, these children died from neglect because the "baby farmers" could not find homes for the infants and had too many to care for themselves. *Id.*

36 *Id.* at 37.

37 Dickson, *supra* note 29, at 922.

38 HOLLINGER, *supra* note 7, at 13-4, 13-5; Kuhns, *supra* note 26, at 261.

39 E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 16 (1998). In this recent comprehensive study, Carp had access to 21,500 closed adoption case records of the Children's Home Society of Washington, professional journals and files of the U.S. Children's Bureau and the Child Welfare League of America, and the annual reports and correspondence of child placement agencies across the states.

emphasized the preservation of the biological family.[40] Adoption was seen as a last resort, socially unacceptable and inferior to biological kinship.[41] In addition, adoption carried the stigma of illegitimacy. [42] The eugenics movement of the time promulgated the theory that unmarried mothers were feebleminded and passed on this trait to their offspring.[43] Therefore, children from these mothers were considered defective and better placed in an institution than adopted.[44]

In 1916, New York passed the first statute concerning adoption records mandating that the word "illegitimacy" be stricken from the court records.[45] In addition, the statute barred all persons except the involved parties from inspecting the records to the proceeding.[46] Thus, while the statute shielded the files from public scrutiny, mainly to protect against the stigma of illegitimacy, it did not seal the adoption records to the birthparents, adoptive parents, or the adoptee.[47] Minnesota passed the first "sealed records" law in 1917 barring inspection of the adoption files by any person other than the adoptive parents.[48] Other states did not enact statutes sealing adoption records from the birthparents or adoptee until much later.[49]

In 1938, the Child Welfare League of America (hereinafter "CWLA") published standards intended to provide safeguards for the adoptee, the adoptive parents and the state.[50] These safeguards attempted to maintain ties between the child and the biological family whenever possible and to shield the adoptive parents' identities from the natural parents but were not created for the purpose of protecting the birthmother's

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[40] *Id.* at 16, 68, 70.

[41] *Id.*

[42] *Id.* at 18.

[43] *Id.* at 18-19.

[44] CARP, *supra* note 39, at 18-19.

[45] 1916 N.Y. LAWS ch. 453, § 113; HOLLINGER, *supra* note 7, at 13-5; Kuhns, *supra* note 26, at 261.

[46] *Id.*

[47] *Id.*

[48] 1917 Minn. Laws ch 222, p. 337; HOLLINGER, *supra* note 7, at 13-5; Kuhns, *supra* note 26, at 261.

[49] Kuhns, *supra* note 26, at 261; Samuels, *supra* note 27, at 383 (stating that many states sealed adoption records later than commonly thought with Alabama only sealing its records in 1990). Alabama has since reopened its records with new legislation enacted in 2000. ALA. CODE § 26-10A-31(g).

[50] Baer, *supra* note 35, at 64-65.

privacy.[51] Although a variety of professionals in the child welfare field advocated sealing adoption records, all emphasized the need to recognize the adult adoptees' unrestricted right of access to the birth records. [52]

Recognizing the significance of biological kinship, social workers of this era compiled detailed family histories to give to adoptees when they became adults.[53] The most respected adoption agencies believed it was of utmost importance to preserve hereditary information that might someday be of vital importance to the child.[54] For example, in 1923, officials at the Pennsylvania Bureau of Children admonished, "[i]t is better to write a thousand records that are not used than to fail to be able to supply a vital bit of family history when it is needed." [55] In 1933, the United States Children's Bureau also recognized that the agency was sometimes the only link remaining between a child and his biological family.[56] If accurate records were not kept, family members could be lost to one another for all time.[57] The adopted child would then be "invariably tormented by a longing to know about his people."[58]

By the beginning of World War II, the professional standard was to preserve the biological heritage of adopted children for their future information.[59] Commenting on the failure of some agencies to keep records, a prominent social worker observed, "[m]any adopted children could perhaps have made a better adult adjustment if this need for knowledge about themselves and their own parents had not been frustrated."[60] As late as 1946, at the National Conference of Social Work, it was noted that "[t]he identity of a child is his

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[51] *Id* at 64.

[52] Samuels, *supra* note 27, at 385; CARP, *supra* note 39, at 68.

[53] CARP, *supra* note 39, at 68, (citing ILLINOIS CHILDREN'S HOME AND AID SOCIETY, *Where the Society Keeps the Family Records of Over 22,000 Children* in HOMELIFE FOR CHILDREN 16 (1929)); CHILD WELFARE LEAGUE OF AMERICA RECS. PRINCIPLES ON ADOPTION, (box 15, folder 5); [NEW YORK] STATE CHARITIES AID ASSOCIATION, News 11 (Feb. 1923) 6; CHILD WELFARE LEAGUE OF AMERICA, BULL. 2, (Jan. 23, 1923) 3.

[54] CARP, *supra* note 39, at 68.

[55] *Id.* at 68, (citing Grace Abbot, U.S. Children's Bureau Pub. 216, The ABC of Foster-Family Care 40 (1933)).

[56] *Id.*

[57] *Id.* at 69, (citing GRACE ABBOT, U.S. CHILDREN'S BUREAU PUB. 216, THE ABC OF FOSTER-FAMILY CARE 40 (1933)).

[58] *Id.* at 69.

[59] CARP, *supra* note 39, at 69.

[60] *Id.*

sacred right, and he should not be deprived of it either through indifference or through lack of realization of his concern with it."[61]

Considering the widespread recognition of the adoptee's right to access vital information about his heritage, it is difficult to understand why the standard eventually changed to the lifelong sealing of adoption records. The reasons for sealing adoption records may be best understood in the context of the stigma associated with illegitimacy in the early twentieth century.[62] Society subjected unwed mothers to shame and humiliation.[63] Their illegitimate children were also outcasts. The stigma of unwed motherhood was so pervasive that these women sometimes chose to abandon, murder or neglect their children.[64]

In 1930, two vital statistics registrars proposed the device of the amended birth certificate to protect adopted children from psychological damage caused by the stigma of illegitimacy.[65] By amending the birth certificate the state seals the original birth certificate and issues a new document naming the adoptive parents as the birthparents of a legitimate child.[66] Thus, amended birth certificates became a form of "state-enforced identity change."[67] Thirty-five states required an amended birth certificate by 1941.[68] The original proposal, however, specifically recommended that the sealed

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[61] *Id.*

[62] Baer, *supra* note 35, at 37.

[63] *Id.*

[64] *Id.* at 38, (citing SHIRLEY FOSTER HARTLEY, ILLEGITIMACY 8 (1975)).

[65] CARP, *supra* note 39, at 53-54.

[66] *Id.* at 54.

[67] Baer, *supra* note 35, at 63. It could be argued that the birth parent should be the one to take on a new identity, similar to that offered in a witness protection program, if they desire lifelong anonymity from their offspring.

[68] CARP, *supra* note 39, at 54. An unfortunate side effect of these statutes was to cover up the criminal practices of disreputable adoption agencies during the 1930's and 1940's. *See* Baer, *supra* note 35, at 77-79, (citing LINDA TOLLETT AUSTIN, BABIES FOR SALE: THE TENNESSEE CHILDREN'S HOME ADOPTION SCANDAL (1993)). The most notorious example was the Children's Home Society of Memphis, Tennessee, headed by Georgia Tann. *Id.* at 77. Tann worked in conjunction with a local judge in terminating the parental rights of impoverished birth parents against their will. *Id.* at 58-59, 78. Until her death in 1950, Tann sold approximately 1500 children, many in California, including to celebrities in Hollywood. *Id.* at 78. Tann often completely fabricated information on birth certificates. *Id.* at 79.

original certificate should be opened if the child, adoptive parents or birthparents wished to inspect it.[69]

B. HISTORY OF SEALED RECORDS LAW IN CALIFORNIA

In 1927, the California legislature enacted a law requiring that court adoption files be closed to all parties except the adoptive parents.[70] Then, in 1933, California enacted a law requiring the amendment of an adopted child's birth certificate to omit the birthparents' names.[71] This law also addressed the issue of confidentiality of the original birth certificate but did not seal the records from the adoptee, birthparents or adoptive parents.[72]

In 1935, California became one of the earliest states to prevent the actual parties to the adoption from inspecting the original birth certificates.[73] Assemblyman Ernest C. Crowley sponsored a bill (AB 390) requiring that amended birth certificates, previously optional, become mandatory.[74] This bill originally did not intend to seal the records from parties to the adoption.[75] At the same time, however, Assemblyman Charles Fisher, citing to cases of "extortion" committed against adoptive parents in southern California, presented a bill (AB 391) to make original birth certificates of adoptees unavailable

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[69] *Id.* at 56.

[70] 1927 Cal. Stat., ch. 691, § 3, 227. The law required that the adoption proceedings be closed to inspection except to "parties to the action." *Id.* The current statute regarding court adoption files also seals the records to inspection except to "parties to the action". CAL. FAM. CODE § 9200. "Parties to the action" is generally considered to be only the adoptive parents who actually went to court. Telephone interview with Martin Brandfon, J.D. (Nov. 14, 2001). Thus, some counties in California allow adoptive parents to inspect and copy the adoption records. *Id.* Other counties interpret the statute differently and will not allow even the adoptive parents to inspect the records. *Id.* Still other counties also consider the birthparents "parties to the action" and will release the adoption records to them. Telephone interview with clerk at Contra Costa County Records Dep't (Feb. 22, 2002).

[71] 1933 Cal. Stat., ch. 489, § 6, § 15a. Not everyone had birth certificates at this time especially children born out of wedlock. *See* Baer, *supra* note 35, at 51-52. In fact, birth certificates did not become mandatory in California until 1915, when every child was required to have his or her birth recorded and kept by an office of vital records. *Id* at 52. This action was part of a national program to register births for the purpose of researching child welfare issues as well as providing proof of age for school attendance. *Id* at 53.

[72] 1933 Cal. Stat., ch. 489, § 6, § 15a.

[73] Baer, *supra* note 35, at 61.

[74] *Id.*

[75] *Id.*

to anyone, including the adoptive parents, birth parents and the child, except by court order. [76] His concern was that an extortionist could threaten to tell the child he or she was adopted.[77] Thus, it appears that the original dual purpose in sealing records in California was to give adoptive parents the discretion to tell their child of the adoption as well as to protect the adoptive family from any outside interference, especially extortion.[78] Both bills were presented to the Judiciary Committee where they were consolidated and amended.[79] As a result, AB 390 both altered the birth certificates of adoptees and prevented all the parties to the adoption from inspecting or receiving a copy of the original birth certificate.[80]

In 1984, California passed a non-retroactive law allowing birthparents to consent to the future disclosure of their identity if an adult adoptee age 21 years or older files a request for information.[81] The amendments of 1984 also added a mutual consent registry whereby the adult adoptee and the birthparent may voluntarily sign and file "waivers of confidentiality" to the release of identifying information.[82] Very few reunions, however, result from this type of passive system.[83] If only one party files a waiver, the Department of Social Services cannot solicit the other party's consent.[84] Additionally, many adoptees and birthparents are not even aware that this system exists.[85]

In California, the only option remaining to adults adopted prior to January 1, 1984 is to persuade the court that "good

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[76] *Id.*

[77] *See* Legislative News, *Bill to Keep Adoptions Secret Is Introduced,* SACRAMENTO BEE, Jan. 22, 1935, at 6.

[78] *See id.*

[79] Both Charles Fisher and Ernest Crowley were members of the Judiciary Committee and the Social Services and Welfare Committee. Baer, *supra* note 35, at 62. Charles Fisher had also been president of Homes and Children's Alliance, Inc., of Oakland from 1927 to 1931. *Id.* at 62, (citing to CALIFORNIA BLUE BOOK (1932)).

[80] Baer, *supra* note 35, at 62.

[81] CAL. FAM. CODE § 9203 (Deering 1996 & Supp. 2002). This law has no effect on those adopted prior to 1984. *Id.*

[82] CAL. FAM. CODE § 9204 (Deering 1996).

[83] Samuels, *supra* note 27, at 431 (noting that estimates for reunion rates through state and local passive registries range from a high of 4.4% to a median of 2.05%, with lack of higher rates attributable in part to lack of funds and staff for the programs).

[84] CAL. FAM. CODE § 9204.

[85] I was not aware of the system even though I had been searching for my birthparents for over 20 years.

cause" exists to open the records.[86] Since there is no universal definition of "good cause," judges in some counties may grant the petitions while others would be denied even where there is similar cause.[87] For example, one judge may consider a congenital heart problem to be a good reason to open sealed records, while another judge may find that treatment of a congenital heart problem does not require the release of identifying information. Thus, there may be "wide disparity and unequal treatment of adoptees" filing these petitions.[88]

II. THE NEED FOR LEGISLATIVE REFORM

The social attitudes toward illegitimacy during the 1930's made it possible for the adoption and child welfare agencies to easily pass the sealed records legislation that persists in California today.[89] Over time, laws originally enacted to give confidential status to the adoptee and the adoptive family evolved into a system of secrecy. [90] This secrecy in turn influenced societal attitudes toward adoption.[91] Attempts by adoptees to access information about their origins, although once anticipated and thought natural by social workers, "came to be socially disfavored and considered abnormal."[92] Over time, lifelong secrecy and anonymity came to be viewed as an essential component of adoption.[93]

While these laws may have made sense in that era, the reasons for sealing adoption records in the 1930's, 1940's, and 1950's no longer exist. There is no longer the same stigma on women bearing children out-of-wedlock.[94] Contraception and abortion are available to women who choose not to bear children.[95] Adoption laws need to keep up with changing times in the twenty-first century. The visible presence in our society of non-traditional families such as blended families, single

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[86] *See* CAL. FAM. CODE § 9200; CAL. HEALTH AND SAFETY CODE § 102705.

[87] Telephone interview with Martin Brandfon, J.D. (Nov. 14, 2001).

[88] Martin Brandfon, J.D., *Secrecy Continued,* (1998), *at* http://www.caopen2001.org/media/histo ry.

[89] *See* Baer, *supra* note 35, at 37-38.

[90] Samuels, *supra* note 27, at 367.

[91] *Id.*

[92] *Id.*

[93] *Id* at 370-371.

[94] Kuhns, *supra* note 26, at 271.

[95] *Id.*

parent families and gay families, make it more acceptable to bring out into the open the fact that adopted children have two sets of families. The laws should reflect that it is natural for many adoptees to desire to discover their original heritage. Furthermore, in those cases where the adoptee has reached the age of majority, it is in the public interest to allow the adoptee access to her adoption records.[96]

A. THE PSYCHOLOGICAL NEED TO KNOW ONE'S ORIGINS

Psychology recognizes that an individual cannot have a healthy sense of self-esteem without complete identity formation. [97] Furthermore, research indicates that the loss of biological ties can interfere with the development of an adoptee's identity.[98] Throughout an adoptee's life, the issue of being adopted may arise at critical points as an overwhelming feeling of loss.[99] Studies show that the loss experienced by an adoptee is more pervasive, less socially recognized, and more profound than that of death or divorce.[100] Anyone who has experienced death or divorce may relate to the deep pain described by some adoptees as "cellular".[101] In fact, it has been suggested that the sense of loss and disconnectedness experienced by many adoptees is essentially an adaptive grieving process.[102] Reconnecting with one's origins can have a

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[96] *See, e.g.*, Doe v. Sundquist, 2 S.W. 3d 919, 924 (Tenn. 1999). *See also* DAVID M. BRODZINSKY ET AL, THE LIFELONG SEARCH FOR SELF 186 (Anchor Books, 1993) (stating "[o]n the question of opening birth records to adult adoptees, we feel very little ambivalence: it simply should be done. [t]hese records, after all, are about the adoptee, and we are troubled by the idea that some hospital clerk or agency social worker stands between those records and the person for whom they can do the most good.").

[97] *See* BRODZINSKY, *supra* note 96, at 101-103; Naomi Cahn & Jana Singer, *Adoption, Identity and the Constitution,* 2 U. PA. J. CONST. L. 150, 173 (1999). The authors note that "...[a]cknowledging adoptees access to their birth records [would] serve[s] as an acknowledgement of the distinct challenges...they experience as they develop their identity..." *Id.* at 180.

[98] *See* WEGAR, *supra* note 6, at 45.

[99] BRODZINSKY, *supra* note 96, at 3, 9, 11-12.

[100] *Id.* at 9.

[101] NANCY NEWTON VERRIER, THE PRIMAL WOUND: UNDERSTANDING THE ADOPTED CHILD 44 (1993).

[102] *See* BRODZINSKY, *supra* note 96, at 11; VERRIER, *supra* note 101, at 40-41; BETTY JEAN LIFTON, JOURNEY OF THE ADOPTED SELF: A QUEST FOR WHOLENESS 110-117 (1994) (describing that an adoptee has a deep, inconsolable sorrow at his core, feels at some level forever an abandoned baby). Verrier goes on to quote Jungian analyst Nathan Schwartz-Salant, "[t]he condition of abandonment is not unique ... [b]ut the extremity of abandonment in the adoptee is unique."). *Id.*

beneficial effect even when adoptees discover unpleasant truths in the process.[103]

In *Mills v. Atlantic City Dep't. of Vital Statistics* the court recognized the adoptee's genuine psychological need for the information contained in the records.[104] The court stated that "[a]n adoptee who is moved to a court proceeding such as the one here is impelled by a need to know which is far deeper than 'mere curiosity'.... [T]he need has its origins in the psychological makeup of the adoptee's identity, self-image and perceptions of reality."[105] The court went on to say that it was convinced that "this compelling psychological need may constitute the good cause required [to open sealed records]."[106]

B. THE NEED TO KNOW ONE'S MEDICAL HISTORY

Adoptees should also be able to directly access genetic and medical information. At the time of the relinquishment, the birthparents are asked about any pertinent medical history in the family.[107] A young birthmother, however, may have no medical problems. She may have been unaware of her parents' medical conditions and have little or no knowledge of the medical background of the birthfather.[108] Recent advances in medical technology make this information potentially very important to the adoptee.[109] For example, if there is a history of diabetes, new scientific breakthroughs can help to detect, and prevent, the onset of this crippling disease.[110] With the human genome project underway, it may even be possible in the near future to prevent diseases in utero.[111] Thus, a

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103 Kuhns, *supra* note 26, at 271.

104 372 A.2d at 651.

105 *Mills*, 372 A.2d at 655.

106 *Mills*, 372 A.2d at 655.

107 *See* CAL. FAM. CODE § 8817 (Deering 1996 & Supp. 2002).

108 *See id.* A written report shall be made concerning the medical background of the child's biological parents "[only]...so far as ascertainable." *Id.*

109 *See* Johnson v. Super. Ct., 80 Cal. App. 4th 1050, 1067 (2000) (stating that genetic and medical history of sperm donors may lead to early detection and increased possibility of curing certain diseases).

110 *Id.*

111 The Human Genome Project is sponsored by the U.S. Department of Energy and the National Institute of Health with a goal of identifying the approximately 30,000 genes in human DNA and determining the sequence of the three billion chemical base pairs that make up DNA. *Medicine and the New Genetics at* http://www.ornl.gov/hgmis/medicine/medicine.htm (last modified Feb. 21, 2002).

complete family medical history could prove invaluable to an adoptee about to start a family. Although medical and genetic information could possibly be obtained without the release of the birth parents identity, the adoptee would be more likely to obtain a complete history if allowed to contact the birth parent directly.[112] It might take several conversations before a birth parent remembers all the details of the family medical history. Additionally, it is likely that a birth parent would be more inclined to share personal, medical problems with the affected family member rather than a complete stranger such as an intermediary. Thus, the adoptee's best interest is served by allowing the opportunity to receive current medical and genetic information directly from the biological parent.

C. SOCIOLOGICAL REASONS TO OPEN RECORDS

The Child Welfare League of America fully endorses allowing adult adoptees direct access to their adoption files and original birth certificates.[113] In January 2000, it published its "Standards for Excellence in Adoption Services" stating unequivocally:

> The agency providing adoption services should support efforts to ensure that adults who were adopted have direct access to identifying information about themselves and their birth parents. The prevailing legal practice in the U.S. prohibits adults who were adopted as children from obtaining access to their original birth certificates or to identifying information contained in their adoption records. The practice of sealing

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Already, the many new techniques developed have enabled doctors to identify susceptible areas of the genome that may be responsible for some disorders, such as diabetes, hypertension and certain forms of cancer. James R. Lupski, M.D., Ph.d., *The Human Genome Project: What it Means for You* (October 1999), *at* http://thedoctorwillseeyounow.com/articles/other/genome _4/index.shtml. *See also* Daniel Drell and Anne Adamson, *Fast Forward to 2020: What to Expect in Molecular Medicine, at* http://www.ornl.gov/hgmis/medicine/tnty.html (last modified March 6, 2001) (discussing applications of the human genome project). Medical records will include a person' complete genome allowing treatment as a biochemical and genetic individual, thus making medical intervention more specific, precise, and successful. *Id.*

[112] *See Johnson*, 80 Cal. App. 4th at 1067 (stating that in some cases obtaining genetic and medical information may require disclosure of the donor's identity).

[113] *See CWLA Supports Open Records,* (citing CHILD WELFARE LEAGUE OF AMERICA, *Standards for Excellence in Adoption Services* (2000)), *available at* http://adoption.about.com/library/b1050800a.htm?terms=CWLA+Standards +of+Excellence (last visited Mar. 9, 2002).

> records has come under scrutiny as the benefits of openness in adoption for the adopted individual, birth parents, and adoptive parents have come to be recognized as having critical psychological importance as well as importance in understanding their health and genetic status. Because such information is essential to adopted adults identity and health needs, the agency should promote policies that provide adopted adults with direct access to identifying information.[114]

Many adoptees have searched for and found their birthparents despite the existence of sealed records.[115] The overall positive effect of these searches for all parties to the adoption triangle lends support for a policy of open records.[116] For the adoptee, research indicates that the completion of the search, regardless of the outcome, leads to higher self-esteem, self-confidence, assertiveness, body image and self-perception.[117]

Birthparents have also searched for and reunited with their biological children.[118] Although it is often assumed that the adoption process allows a birthmother to obtain closure and go on with her life, studies have shown that many continue to suffer for years after the loss of a child.[119] Many of these birthparents express feelings of completion and relief once reunion allows them to tell their children that they chose adoption out of love and not rejection.[120]

In addition, evidence suggests that an adoptee's search can strengthen the bonds within the adoptive family.[121] The secrecy surrounding the adoption can cause tension within the

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[114] *Id.*

[115] Wendy L. Weiss, *Ohio House Bill 419: Increased Openness in Adoption Records Law*, 45 CLEV. ST. L. REV. 101, 126 (1997).

[116] *Id.*

[117] *Id.* at 127 (describing the psychological benefits of completing the search.)

[118] *Id.* at 118.

[119] *See* Brett S. Silverman, *The Winds of Change in Adoption Laws Should Adoptees Have Access to Adoption Records?* 39 FAM. & CONCIL. CT. REV. 85, 92; Weiss, *supra* note 115, at 121.

[120] *Id. But see* Kent Markus, *Adoption Co-Option Oregon Law Heals and Wounds at Same Time,* THE COLUMBUS DISPATCH (Ohio), June 7, 2000 (in which Kent Markus, head of the Dave Thomas National Center for Adoption Law at Capital University, opines that even if happy reunions are common, it is paternalistic and condescending for open-records advocates to tell people that their privacy and choices are unworthy of protection and that unwanted reunions will be good for them).

[121] BRODZINSKY, *supra* note 96, at 141.

adoptive family that does not exist in other families.[122] Most adoptive parents expect their children to someday search for their biological parents.[123] While this fact may cause them some fear, most support their child's desire because they recognize the genuine need.[124] Adoptive mother and psychologist, Nancy Verrier, emphatically states that, despite the adoptive parents' legitimate feelings, the adoptee has a fundamental right to know their biological parents.[125] After meeting his birthparents the adoptee has a new understanding of his relationship in his adoptive family.[126] Most adoptees come to a fuller realization that the lifelong relationship with their adoptive parents is more important than the limited relationship with birthparents even when the reunion results in an ongoing relationship.[127]

III. PRIVACY RIGHTS OF BIRTHPARENTS AND ADOPTEES

Both adoptees and birthparents have brought lawsuits unsuccessfully claiming violations of their constitutional rights to privacy in information contained in adoption records.[128] No court has ever found a constitutional right to privacy for either side.[129]

A. GENERAL RIGHT OF PRIVACY

The right to privacy does not have a single definition.[130] In the famous 1890 law review article, Samuel Warren and Louis Brandeis first described the right to privacy as an already

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122 Cahn & Singer, *supra* note 97, at 180.

123 VERRIER, *supra* note 101, at 162.

124 *Id;* Cahn & Singer, *supra* note 97, at 179-180 (stating that 84% of adoptive mothers and 73% of adoptive fathers support an adult adoptees right to disclosure of his original birth certificate).

125 *Id.*

126 *See* Weiss, *supra* note 115, at 120 (stating that "[s]ealed records laws underestimate the strength of the adoptive family").

127 *See* id. at 121; *See also* Kuhns, *supra* note 26, at 279 (stating that adoptees often become more appreciative of adoptive parents once they are able to put aside their fantasies about birthparents).

128 *See, e.g., Mills*, 372 A.2d 646; *Sundquist*, 106 F.3d 702; *Sundquist*, 2 S.W. 3d 919; Does v. State, 993 P.2d 822.

129 HOLLINGER, *supra* note 7, at 13-44.

130 Anita L. Allen-Castellitto, *Origins and Growth of U.S. Privacy Law*, 632 PRACTICING L. INST./PAT. 9, 16 (June 2001).

existing right protecting the "inviolate personality."[131] Brandeis maintained that the purpose of the Constitution is to protect Americans in their beliefs, their thoughts, their emotions and their sensations.[132] To protect that right every unjust intrusion by the government upon the privacy of the individual is a violation of the Constitution. In other words, the need for an intact, fully integrated personality is central to the concept of a right to privacy.

Privacy scholar Anita L. Allen-Castellitto recently outlined some privacy concepts useful to this analysis.[133] She suggests that a fuller, more modern definition of the right to privacy might be "the claim that society is obligated to adopt laws and promote practices that shield against unwanted intrusion, disclosures, publicity, and interference with matters of personal decision making, identity and conscience."[134] Privacy thus promotes the values of personhood, intimacy, autonomy, tolerance, fairness and limited governmental involvement. [135] Privacy enhances a person's ability to develop as an individual, to express oneself, relax and reflect.[136] Privacy allows a person to choose close relationships and keep others at a distance.[137] Furthermore, privacy enables an individual to determine their destiny through managing access to personal information.[138]

B. FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY

The United States Constitution does not explicitly identify any specific right to privacy. In *Griswold v. Connecticut*, however, the United States Supreme Court held that a state law prohibiting the dissemination of information about contraceptives was unconstitutional as a violation of the right to privacy.[139] The Court reasoned that a fundamental right of privacy exists in the "penumbras" emanating from specific

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[131] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).
[132] *Id.*
[133] Allen-Castellitto, *supra* note 130, at 18.
[134] *Id.* at 16.
[135] *Id.* at 15.
[136] *Id.* at 18.
[137] *Id.*
[138] Allen-Castellitto, *supra* note 130, at 18.
[139] Griswold v. Connecticut, 381 U.S. 479 (1965).

amendments contained in the Bill of Rights, and in the concept of ordered liberty guaranteed by the Fourteenth Amendment.[140] As further evidence of the penumbras, the Ninth Amendment states that the enumeration of certain rights in the Constitution does not serve to limit the recognition of other fundamental rights retained by the people.[141]

The United States Supreme Court has recognized that the United States Constitution protects privacy rights relating to marriage, procreation, contraception, motherhood, family relationships and child rearing.[142] The Court has been unwilling, however, to recognize a fundamental right to privacy regarding disclosure of personal information.[143] Instead, the Court applies a mere rational basis test to determine whether the state's interest in gathering or releasing private information outweighs any personal privacy interest in non-disclosure.[144]

C. CALIFORNIA CONSTITUTIONAL RIGHT TO PRIVACY

By contrast, the California Constitution expressly provides that all people have a fundamental right to privacy.[145] Article I, section 1 of the California Constitution declares that "[a]ll 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."[146] This provision is self-executing, and creates a legal and

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[140] *Id.*

[141] U.S. CONST. amend. IX.

[142] *See Griswold*, 381 U.S. 479; Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding unconstitutional a Massachusetts statute banning the distribution of contraceptives by non-physicians); Moore v. East Cleveland, 431 U.S. 494 (1977) (finding a zoning ordinance which allowed only members of single "family" to live together violated the Constitution); Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry is fundamental right).

[143] *See* Whalen v. Roe, 429 U.S. 589 (1977) (holding that prescription drug users' privacy interests in not having the state gather information about their drug usage was outweighed by the state's interest in gathering data).

[144] *Id.*

[145] CAL. CONST. art. I, § 1; Am. Acad. of Pediatrics v. Lungren, 16 Cal. 4th 307, 325-326 (1997); Johnson, 80 Cal. App. 4th at 1068.

[146] CAL. CONST. art. I, § 1.

enforceable right of privacy for every Californian.[147] Furthermore, while the federal constitution recognizes a right of privacy only against state action, the California Constitution protects against state action and invasion of the right of privacy by private entities.[148]

In addition, the Information Practices Act of 1977 (hereinafter "IPA") declares that "the right to privacy is a personal and fundamental right protected by Section 1 of Article I of the Constitution of California and by the United States Constitution and that all individuals have a right of privacy in information pertaining to them."[149]

The test for determining a violation of a person's right to privacy in California was first articulated in *Hill v. National Collegiate Athletic Association.*[150] A state constitutional right of privacy is only violated where there is (1) a legally protected privacy interest, (2) a reasonable expectation of privacy in the circumstances, and (3) conduct by the defendant constituting a serious invasion of privacy.[151]

Legally recognized privacy interests in California are divided into two, often intertwining branches.[152] The first is informational privacy.[153] This branch includes access and control over personal information, issues of anonymity, confidentiality and secrecy.[154] Informational privacy is often described as an interest in precluding the dissemination or misuse of sensitive and confidential information. [155] The second branch is known as autonomy privacy.[156] This type includes the right to make personal decisions without observation, intrusion, or interference.[157] Autonomy privacy protects for example, a woman's right to choose an abortion and a competent adult's right to refuse medical treatment. [158]

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147 Bd. of Med. Quality Assurance v. Gherardini, 93 Cal. App. 3d 669, 678 (1979).

148 *See* Hill v. N. C. A. A., 7 Cal. 4th , 1, 20 (1994).

149 CAL. CIV. CODE § 1798.1. *See* accompanying text *supra* note 23.

150 *Hill*, 7 Cal. 4th at 20 (holding that mandatory drug testing did not violate a person's constitutional right to privacy).

151 *Johnson*, 80 Cal. App. 4th at 1068.

152 *Id.*

153 *Hill*, 7 Cal. 4th at 35.

154 Allen-Castellitto, *supra* note 130, at 17.

155 *Johnson*, 80 Cal. App. 4th at 1068.

156 *Hill*, 7 Cal. 4th at 35.

157 *Id.*

158 *Roe*, 410 U.S. 113; Thor v. Superior Ct., 5 Cal. 4th 725 (1993).

The second essential element of the *Hill* three-prong test is a reasonable expectation of privacy.[159] Surrounding circumstances and factors may affect the extent of a privacy interest.[160] Where, for example, advance notice is given of an impending action, an otherwise serious invasion may no longer be considered to satisfy this element.[161] In addition, societal norms play a role in determining whether a reasonable expectation of privacy exists.[162] Thus, a privacy interest is relative to current community customs and practices.[163]

Finally, the invasion of privacy must be of a sufficiently serious nature to constitute an "egregious breach of the social norms underlying the privacy right."[164] A fully functioning society depends upon many interrelated aspects of community life and could not function if all intrusions into private matters were found to be unconstitutional.[165]

Regardless of how privacy is defined, that right is not absolute and must be balanced against other important interests.[166] Not everything is subject to privacy protection.[167] There is a danger that one person's privacy rights may interfere with other equally or more important needs, policies, and values.[168] Likewise, privacy should not be characterized as synonymous with secrecy.[169] Privacy that borders on secrecy can be dangerous.[170] Crimes such as violence, fraud, and abuse may go undetected and unreported if perpetrated behind closed doors.[171] Thus, an invasion of the right to privacy may be justified if it substantially furthers one or more legitimate and

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159 *Hill*, 7 Cal. 4th at 36.

160 *Id.*

161 *Id.*, (citing Ingersoll v. Palmer, 43 Cal. 3d 1321, 1346 (1987)) (sobriety checkpoints do not violate constitutional right to privacy).

162 *Hill*, 7 Cal 4th at 36.

163 *Id.*

164 *Id.* at 37.

165 *Hill*, 7 Cal. 4th at 37.

166 *Johnson*, 80 Cal. App. 4th at 1070.

167 Allen-Castellitto, *supra* note 130, at 19.

168 *Id.*

169 Heidi Hildebrand, *Because They Want to Know: An Examination of the Legal Rights of Adoptees and Their Parents*, 24 S. ILL. U. L. J., 515, 534 (2000) *citing* to Charles Fried, *Privacy*, YALE L.J. 475, 482 (1968).

170 Allen-Castellitto, *supra* note 130, at 19.

171 *Id.* (for example, Georgia Tann's illegal child-selling practices at the Tennessee Children's Home Society) *See* Baer, *supra* note 33, at 77.

important countervailing interests.[172] Sometimes protecting privacy is not desirable or practical.[173]

D. THE ADOPTEE'S RIGHT TO PRIVACY

Challenges to the practice of sealing adoption records began in the 1970's as adoptees found that the overwhelming majority of adoptees shared the same psychological need to know their origins and experienced the same frustrations in trying to discover the truth of their identities.[174] Adoptees began to band together through support organizations.[175] They unsuccessfully challenged sealed records statutes in court, alleging violations of their federal constitutional rights to privacy, violations of their equal protection rights under the Fourteenth Amendment to the United States Constitution, and violations of their rights to receive important information under the First Amendment to the United States Constitution.[176]

Adoptees have argued that they have First Amendment and substantive due process rights to information about their origins.[177] The First Amendment protects both freedom of speech and also the freedom to receive information.[178] This right to receive information contained in adoption records is essential to the adoptee's "personhood."[179] In other words, the information the adoptee seeks is essential to his capacity to become a fully integrated psychological being.[180]

Thus, adoptees argue that the right to access personal information concerning their origins is fundamental and

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172 *Johnson*, 80 Cal. App. 4th at 1070.

173 Allen-Castellitto, *supra* note 130, at 19.

174 *See* Samuels, *supra* note 27, at 158.

175 For example, the Adoptees' Liberty Movement Association (ALMA).

176 *See* Alma Soc'y Inc. v. Mellon, 601 F.2d 1225, (2d Cir.), *cert denied*, 444 U.S. 95 (1979). Adoptees also asserted anti-slavery rights under the Thirteenth Amendment. *Id.*

177 HOLLINGER, *supra* note 7, at 13-43.

178 Audra Behne, *Balancing the Adoption Triangle: The State, The Adoptive Parents and the Birth Parents—Where Does the Adoptee Fit In?* (1997) 15 IN PUB. INTEREST. 49, 69, (*citing* Lamont. v. Postmaster General, 381 U.S. 301, 307 (1965)) (where the Court held that a state statute requiring a recipient of foreign communist propaganda to make a formal written request for his mail violated the individual's right to receive information under the First Amendment).

179 *Mellon*, 601 F.2d at 1231; HOLLINGER, *supra* note 7, at 13-43.

180 HOLLINGER, *supra* note 7, at 13-43; Cahn & Singer, *supra* note 97, at 190-191.

requires strict scrutiny of any state law infringing that right.[181] In order to rise to the level of a fundamental right under the U.S. Constitution, the right to access personal information must be inherent in the concept of ordered liberty such that neither justice nor fairness would exist without it.[182] The courts consider history and tradition to determine which rights are important enough to be treated as fundamental.[183]

For example, in *Bowers v. Hardwick* the United States Supreme Court held that there is no fundamental right to engage in homosexual acts in the privacy of one's home because homosexual sodomy is not "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."[184] Likewise, the Second Circuit Court of Appeals held that no fundamental right exists for an adoptee to know the identity of his biological parents.[185]

In *Alma Society Inc. v. Mellon*, the Second Circuit Court of Appeals rejected the adoptees' claim that New York sealed records statutes violated a right to privacy in information integral to their self-development.[186] The adoptees argued that the New York statutes violated the Due Process Clause because the adoptees were constitutionally entitled to the information contained in the records.[187] The Court of Appeals held that the adoptees' claims did not conform to any existing articulation of the fundamental right to privacy.[188] The *Mellon* Court, while recognizing the adoptees' important interest in learning of their biological roots, concluded that this interest had to be weighed against the equally important interest of possible intrusions upon the privacy of birth and adoptive parents.[189]

Significantly, the court failed to articulate whether birthparents or adoptive parents had any constitutional right of privacy in information contained in adoption records.[190] Instead, the court used a rational relationship test in balancing

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181 HOLLINGER, *supra* note 7, at 13-43.
182 *Griswold*, 381 U.S. 479.
183 *Id.*
184 Bowers v. Hardwick, 478 U.S. 186 (1986).
185 *Mellon*, 601 F.2d 1225.
186 *Id.*
187 *Id.* at 1227-1228.
188 *Id.* at 1231.
189 *Id.* at 1236; HOLLINGER, *supra* note 7, at 13-46.
190 Cahn, *supra* note 97, at 161.

the interests of all members of the adoption triad.[191] The sealed record statutes were upheld because they were rationally related to the legitimate state purpose of protecting the integrity of the adoption process.[192] Since marriage and family issues are traditionally under the state's domain, the *Mellon* Court also gave deference to the state's choices as to how to best protect the various privacy interests involved.[193]

E. THE BIRTHPARENTS' RIGHT TO PRIVACY

Opposition to open adoption records is typically based on the privacy interests of the birthparents in identifying information contained in the records.[194] Opponents argue that some birthparents made their decision to relinquish a child for adoption based on a belief that they were guaranteed lifelong anonymity and privacy. [195] In Tennessee and Oregon, constitutional challenges to open records statutes based on the birthparents right to privacy in information contained in adoption files have not been successful however.[196]

In 1995, Tennessee enacted a law allowing adult adoptees access to their previously sealed adoption court records and to their original, unaltered birth certificates.[197] The information

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191 Cahn & Singer, *supra* note 97, at 161.

192 Kuhns, *supra* note 26, at 24.

193 Cahn & Singer, *supra* note 97, at 161.

194 *See* Frank Hunsaker, *Oregon's Ballot Measure 58 A Grossly Unfair and State-Sanctioned Betrayal of Birth Mothers,* 39 FAM. & CONCIL. CT. REV. 75 (2001).

195 *See id.* at 77.

196 *See generally Sundquist*, 106 F.3d 702; *Sundquist*, 2 S.W. 3d 919; *Does v. State*, 933 P.2d 822.

197 *See generally* TENN. CODE ANN. § 36-1-125 (2001). The law was originally to be effective July 1, 1996. Telephone Interview with Anita Cowan, Program Manager, Post Adoption, Department of Children's Services, Nashville, Tennessee. (Sept. 25, 2001). Because of the intervening lawsuits, however, the law did not go into effect until Sept. 27, 1999. At that time, the State Department of Children's Services (hereinafter, "SDCS") began processing over 2,000 requests received during the three-plus years the law was in litigation. Since that time they have received another 1800 requests for access to records. *Id.* Under the new law, an adoptee receives access to records after signing a sworn statement not to make contact if the birthparent (or sibling) registers a contact veto. If, after receiving the records, the adoptee wishes to make contact, this law requires the SDCS to search for individuals and give them the opportunity to register a contact veto. *Id.* As of Sept. 21, 2001, the SDCS had completed searches for 1041 individuals. 311 of these individuals consented to contact and an additional 306 did not file either a consent or veto within the 90-day period, thus implying consent to contact. 219 were deceased and 21 were not located. 184 did not consent to contact. There have been only three or four reported violations of a contact veto and no charges filed in these cases. *Id.*

is withheld only in cases of rape or incest.[198] Before receiving records, adoptees must sign a sworn statement that they will not contact a birth relative[199] until the state has given the party the opportunity to file a contact veto.[200] A contact veto does not prevent the adult adoptee from accessing the records but imposes criminal or civil penalties if unwanted contact is made with the birthparent.[201] The purpose of the law is to:

> ... favor the rights of adopted persons ... to obtain information concerning the lives of those persons and to permit them to obtain information about themselves from the ... sealed adoption records ... to which they are entitled, but also to recognize the rights of parents and adopted persons not to be contacted.[202]

Birthparents immediately challenged the Tennessee law as a violation of the constitutional right to familial privacy, reproductive privacy, and the non-disclosure of private information.[203] The Sixth Circuit Court of Appeals held that the law did not violate the federal constitutional right to familial privacy.[204] The court reasoned that under the new law people are still free to marry, raise children, adopt children, and give children up for adoption.[205] The court held that births are "simultaneously an intimate occasion and a public event," and noted that birth records have many purposes, one of which is "furthering the interest of children in knowing the circumstances of their birth."[206] The court further held that birthparents had no constitutional right to block disclosure of adoption records.[207]

The issue was also raised in the state courts where it was argued that the Tennessee Constitution gives broader privacy

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198 TENN. CODE ANN. § 36-1-127(e)(2) (2001). The birthparent may, however, consent in writing to its disclosure even in cases of rape or incest. *Id.*

199 Birth relatives may include birthparents, grandparents, and siblings. TENN. CODE ANN. § 36-1-128 (2001).

200 TENN. CODE ANN. 36-1-130 (2001).

201 TENN. CODE ANN. 36-1-132 (2001).

202 TENN. CODE ANN. 36-1-101(a) (2001) (emphasis added).

203 *See generally Sundquist*, 106 F.3d 702.

204 *Id.* at 706.

205 *Id.*

206 *Id.*

207 *Id.*

rights to the birthparents than the U.S. Constitution.[208] The Tennessee Supreme Court nevertheless upheld the statute against claims that the law impaired vested rights of the birthmothers and violated their right to privacy.[209] The court reasoned that adoption records were not always closed and thus the birthparent did not have a reasonable expectation that the records would forever remain sealed.[210] Further, adoptees always had the ability to petition the court to open the records if it was found to be in his best interest with no requirement that the birthparent be notified or allowed to object.[211]

Likewise, an Oregon ballot initiative was upheld against a constitutional challenge brought by six birthmothers.[212] Under the Oregon statute, adoptees age twenty-one and older may receive copies of their original birth certificate upon request.[213] A birthparent may file a "contact preference form" to indicate her preference for direct contact, contact through an intermediary, or no contact.[214] In *Does v. State* the birthmothers argued that the Oregon law intruded on their constitutional rights of privacy and impaired the State's obligation of contract.[215] The Oregon court held that a birthmother does not have "a fundamental right to give birth to a child and then have someone else assume legal responsibility for that child"[216] and that "[a]doption necessarily involves a child that already has been born, and a birth is, and historically has been, essentially a public event." [217]

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208 *Sundquist*, 2 S.W.3d at 925.

209 *Id.*

210 *Id.*

211 *Id.*

212 Does v. State, 993 P.2d at 825, *rev. denied*, 6 P.3d 1098 (2000), *stay denied*, 530 U.S. 1228 (2000). The Oregon House of Representatives passed the bill to complete the enactment. H.B. 3194, 70th Leg. Assem., Reg. Sess. (Or. 1999).

213 OR. REV. STAT. 432.240. Oregon's law was not implemented until May 31, 2001. Oregon Center for Health Statistics and Vital Records, at http://www.ohd.hr.state.or.us/chs/certif/58update.h tm (last visited Oct. 10, 2001). By that time the State Center for Health Statistics had completed processing requests for 5565 birth certificates. By May 31, 2001, 411 contact preference forms from biological parents had been received. Of this total, an overwhelming 384 wanted contact with the adoptee, while only 27 filed a preference for no contact. *Id.*

214 OR. REV. STAT. 432.240.

215 993 P.2d at 825.

216 *Id.* at 836.

217 *Id.* at 825.

IV. THE CALIFORNIA LEGISLATURE SHOULD DECLARE PRIVACY RIGHTS FOR BIRTHPARENTS AND ADOPTEES

Courts have recognized adoptees' interests in obtaining information essential to the formation of their identity, knowledge of their biological roots and useful medical and genetic information.[218] These recognized interests should fit under the broad umbrella of fundamental privacy rights granted to all citizens under the California Constitution and the Information Practices Act of 1977 and deserve the State's protection. The IPA specifically states that "all individuals have a right of privacy in information pertaining to them."[219] Ironically, Article I, section 1 of the California Constitution and the IPA were originally enacted due to concerns about too much government involvement and computerized collection of personal information.[220] The intent was to limit governmental snooping and intrusion.[221]

Undeniably, the state has a strong interest in protecting the statutorily created adoptive family.[222] Yet the state continues to meddle in the affairs of the parties to the adoption long after its involvement is warranted.[223] In the majority of cases, the birthparents do not oppose the adoption records being made accessible to an adult adoptee.[224] Thus, the state should have an affirmative duty to make sure a conflict exists before it routinely denies an adult adoptee access to this information.[225]

California does not distinguish between the right of privacy of adults and children.[226] Regardless of the status of the individual, the test remains whether a governmental intrusion into the privacy right is justified by a countervailing

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218 *See, e.g., Mellon*, 601 F.2d at 1233; *Mills*, 372 A.2d at 650.

219 CAL. CIV. CODE § 1798.1.

220 *Hill*, 7 Cal. 4th at 36.

221 *Gherardini*, 93 Cal. App. 3d at 678.

222 *Mellon*, 601 F.2d at 1235; Cahn & Singer, *supra* note 97, at 190.

223 Cahn & Singer, *supra* note 97, at 191.

224 Statistics show the majority of birthparents, adoptees and adoptive parents support open adoption records. Julie K. Sandine & Frederick F. Greenman, *Tennessee's Adoption Law Balancing the Interests of the Adoption Triad,* 39 FAM. & CONCIL. CT. REV. 58, 67 (2001).

225 Cahn & Singer, *supra* note 97, at 191-192.

226 Am. Acad. of Pediatrics v. Van de Kamp, 214 Cal. App. 3d 831 (1989).

state interest.[227] The status of the person may be relevant, however, in so far as it affects a particular state interest. Thus, when the adoptee is a child, the state's interest in protecting the integrity of the adoptive family may outweigh the adoptee's need to discover his biological origins. When the adoptee reaches the age of majority, however, the state's interest arguably becomes a less compelling reason to deny access to personal information concerning the adoptee's origins. Instead, it may be argued that a state has a compelling interest in ensuring that the adult adoptee is afforded the opportunity to complete his identity formation if necessary by discovering the identities of his birthparents.

Under California law, adoptees should be found to have a fundamental right to know the identities of their biological parents. In *Mills v. Atlantic City Dep't of Vital Statistics* the court found that although "information regarding the heritage, background and physical and psychological heredity of any person *is essential to that person's identity and self-image*, it did not fall within the protected zones of privacy in the penumbras of the Bill of Rights.[228] As the *Mills* court recognized, however, the parameters of privacy are continually being defined.[229] California law allows us to look at privacy in broader terms of "personhood", identity, and self-development.[230] "Privacy rights [also] have psychological foundations emanating from personal needs to establish and maintain identity and self-esteem by controlling self-disclosure."[231] It follows that accessing and protecting information *essential* to the development of one's person's identity and self-image should be deemed a fundamental right under our state laws.

Thus, the adoptee can show a violation of his right to privacy by applying the three-part *Hill* test. First, the adoptee has a legally protected privacy interest known as informational privacy. California courts have held that the ability to control the circulation of information pertaining to oneself is a

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227 *Hill*, 7 Cal. 4th at 36.
228 *Mills*, 372 A.2d at 650 (emphasis added).
229 *Id.* at 651.
230 *Hill*, 7 Cal. 4th at 25.
231 *Id.*

fundamental right.[232] The information contained in sealed adoption records unquestionably pertains to the subject of the adoption proceedings—the adoptee herself. Furthermore, the adoptee is arguably the most important party to the adoption[233] since the legal standard in the adoption context is to serve the "best interests of the child."[234] The records contain essential personal, genealogical and medical information concerning the adoptee. Thus, the adoptee has a legally protected privacy interest in the information contained in her sealed adoption records.

Second, the adoptee has a reasonable expectation of privacy (in the sense of access to personal information) in information concerning the circumstances of her birth. Adoption records have not always been sealed in California and are at least partially open in several states.[235] Additionally, adoptees have always been able to petition the court to open the records for "good cause."[236] Many adult adoptees have a true need to know the identity of their birthparents in order to complete their identity formation.[237] The current professional awareness of the psychological benefits to adoptees that desire to and do in fact discover their biological origins, gives the adoptee a reasonable expectation that the state will facilitate rather than frustrate his quest for identity completion.

Third, California privacy laws were enacted primarily to limit government involvement in our personal affairs.[238] It does not make sense to continue to withhold vital information from the person to whom it pertains in the name of privacy. After the adoptee reaches the age of majority, the state's interest in protecting the newly formed adoptive family is diminished. Interference by the state beyond this point should thus be found to constitute an egregious invasion of the adoptee's fundamental right of informational privacy.

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232 *See, e.g.*, Palay v. Super. Ct., 18 Cal. App. 4th 919 (1993).

233 *See Mills*, 372 A.2d at 649.

234 *See* In re Jose v., 50 Cal. App. 4th 1792, 1794 (1996); In re Jessie G., 58 Cal. App. 4th 1, 8 (1997); In re Zachary G., 77 Cal. App. 4th 799, 808-809 (1999) (discussing application of the "best interest of the child" standard in the adoption context).

235 *See supra* notes 3, 4 and 11 and accompanying text.

236 *See supra* note 5 and accompanying text.

237 Cahn & Singer, *supra* note 97, at 172.

238 *Hill*, 7 Cal. 4th at 36.

Under California privacy law the birth mother should also be found to have a fundamental right of privacy in the adoption records.[239] In *Johnson v. Superior Court of Los Angeles,* the Court of Appeals applied the three-prong *Hill* test and found that a sperm donor had a constitutional right of privacy in his medical history and his identity.[240] The Court concluded, however, that countervailing interests outweighed his privacy interest.[241]

In *Johnson,* the parents of a six-year old child suffering from inherited kidney disease, brought an action to compel disclosure of the identity of the biological father.[242] The court

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[239] Applying the *Hill* three-pronged analysis to birthmother privacy rights it is clear the birthmother has a legally protected privacy interest. The information contained in the adoption records contains her identity as the birthmother of a child she relinquished for adoption. The information has been kept confidential from the public to the extent she has not disclosed it. The records may also contain intimate and personal details of the reasons why she gave the child up for adoption. This information may be sensitive in that she may have gone on to start a new life and may not have told her new family about the child she relinquished. Additionally, the birthmother has a reasonable expectation of privacy from the public in the information contained in adoption records. Indeed, the records were originally sealed to prevent them from the public scrutiny. However, the birthmother does *not* have a reasonable expectation of privacy from the *adoptee* in that: (1) the adoptee has always been able to petition the court to open the records for "good cause;" (2) original birth indexes in California are published on CD-ROM and can be cross-indexed with adoptees' amended birth certificates in order to discover the birthparents' names. Greeley, *supra* note 18, at 14-15; (3) under California Family Code § 9200, the adoption file is open to inspection by the "parties to the action" and their attorneys. Thus, adoptive parents may inspect and copy the court files and convey the information to the adoptee. CAL. FAM. CODE § 9200; (4) the birthparent may have waived any right to privacy from the adoptee by disclosing the fact of the adoption to others; (5) natural law does not give a birthparent the right to remain anonymous from their own child. Telephone interview with Martin Brandfon, J.D. (Nov. 14, 2001); and (6) there was never a guarantee of anonymity although the birthmother may have been told by social workers that the information would be kept confidential. *Sundquist*, 2 S.W.3d at 925. Thus, although the birthmother has a privacy interest in her identity, especially from public scrutiny, under the totality of the circumstances here regarding confidentiality practices, it would be unreasonable for her to expect that her identity would never be disclosed to her natural child. Third, the fact that an adoptee is allowed access to their adoption records and original birth certificates cannot be said to constitute a serious invasion of the birthmother's right to privacy. In the first place, some adoptees receive the information and do nothing with it. They are satisfied with the identifying information and do not feel a further need to search and reunite with their birthparents. Furthermore, even if the adoptee does search for and find his birthparent it is not necessarily a serious invasion of their privacy simply because the adoptee contacts the birthparent. A serious invasion of privacy would involve some sort of harassment such as repeated contact after the birthparent has expressed a desire to be left alone.

[240] *Johnson*, 80 Cal. App. 4th at 1069.

[241] *Id.*

[242] *Id.; see also* CAL. FAM. CODE § 7613 (Deering 1996 & Supp. 2002) (all records

found that because insemination records are only open to inspection for "good cause" a limited privacy interest has been created for sperm donors.[243] Furthermore, the court concluded that the disclosure of the donor's identity would constitute a serious invasion of privacy if not reasonably curtailed.[244] The court found, however, that the donor's expectation of privacy was diminished because he knew that non-identifying information and, with good cause, identifying information could be disclosed.[245] Similarly, a birthparent has a reasonable expectation of privacy in court adoption records and sealed birth certificates. This privacy interest, however, is lessened by the fact that identifying information may be disclosed on a judicial finding of good cause.

A common misconception of those unfamiliar with adoption law is that all birthparents oppose open records.[246] Statistics have shown, however, that the majority of birthparents actually support open records for adult adoptees.[247] Most birthparents would like contact with the children they parted with years ago.[248] Thus, it is not accurate to depict the privacy controversy over sealed records as one between adoptees and birthmothers.[249] Courts err when they do not factor into their analyses that privacy rights of adoptees and birthparents are often not mutually exclusive.[250] In this regard, it becomes clear that the state should not structure its laws concerning adoption to automatically preclude access to adoption records.[251]

It is clear, however, that the right to privacy asserted by a birthmother may be in direct conflict with the right of the adoptee to access personal information concerning the circumstances of her birth. There is no analogous situation where two parties have an informational right of privacy in the

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relating to the insemination are subject to inspection only upon a court order for good cause shown).

243 *Johnson*, 80 Cal. App. 4th at 1069.

244 *Id.*

245 *Id.*

246 Sandine & Greenman, *supra* note 224, at 67.

247 *Id.*

248 *Id.*

249 M. Ann Rutledge, *If I Am, Then I Must Know*, THE BALTIMORE SUN, July 5, 2000, at 15A (a birthmother questioning the concern for privacy rights of birthparents when the overwhelming majority support open records legislation).

250 Cahn & Singer, *supra* note 97, at 191.

251 *Id.*

same personal records. However, in *Palay v. Superior Court of Los Angeles* the Court of Appeal held that the privacy rights of the mother in prenatal records were outweighed by the legitimate need of discovery by defendants.[252] The court found that the prenatal records of the mother were intertwined with and inseparable from the child and therefore discoverable in a medical malpractice action on behalf of the child.[253] The *Palay* court stated that the open-ended quality of the decision in *Griswold v. Connecticut* makes it clear that the concept of privacy may be applied in a wide variety of contexts beyond the marital relationship.[254]

While, in the adoption context, no similar sharing of the body exists, the records nevertheless contain vital information pertaining to both mother and child and as such, are inseparable.[255] The *Palay* court did not go so far as to say that both mother and child had an informational right of privacy in the prenatal records because the issue was not between mother and child.[256] The logical extension of the court's finding, however, is that both retain a privacy interest in the information contained in inseparable adoption records. Similarly, adoptee and birthmother share inseparable privacy rights in adoption records and original birth certificates.

Thus, the birthparent has a privacy right that must be balanced with the competing right of the adoptee. In cases where those privacy rights conflict, the birthmother's right to remain anonymous must be weighed against the adoptee's right to access personal information concerning his identity. A privacy right is not violated if the intrusion furthers legitimate and countervailing interests.[257] If feasible and effective alternate measures would have satisfied the countervailing interests, then the invasion of privacy is unjustifiable.[258] Thus, the state must not use overbroad means of enforcement.[259] There are less intrusive ways to protect a birthmother's privacy than to effectively keep the information contained in the

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252 18 Cal. App. 4th at 934.
253 *Id.*
254 *Id.* at 932.
255 *Id.*
256 *Id.*
257 *Johnson*, 80 Cal. App. 4th at 1070.
258 *Palay*, 18 Cal. App. 4th at 934.
259 *Johnson*, 80 Cal. App. 4th at 1070.

original birth certificates secret from the very person whose birth is there recorded.

Here, the adoptee should be found to have a privacy interest in accessing information vital to their psychological identity. Any intrusion upon the adoptee's ability to access this information must then be justified by a countervailing state interest. The state has a diminished interest in preserving the privacy of the adoptive family now that the adoptee has reached adulthood. While a birthmother also has a privacy interest in maintaining the confidentiality of her identity, her needs are outweighed by the adult adoptee's privacy interest. The adoptee has no other way to get the personal information necessary to complete his identity formation. Nothing short of the identity of the birthparents will suffice. The birthmother, on the other hand, will retain a large measure of confidentiality even if the records are disclosed to the adoptee as the records will continue to be inaccessible to the public.[260]

V. ANALYSIS OF AB 1349

In many respects, the original AB 1349 that allowed access to both adoption court files and the original birth certificates was a better bill than the amended version.[261] First, and perhaps most importantly, the bill was predicated on a presumption of openness. It assumed that *all* information pertaining to the adoptee held by the state in confidential files would be released to an adoptee that requested the information upon the age of majority.[262] Identifying information contained in adoption files would be released whether or not the birthparent desired contact.[263] The bill was thus consonant with the findings that most adoptees have natural and psychological needs to know their origins and sent a clear message to all members of the adoption triad that it is the normal procedure to open the records once the adoptee reaches adulthood. The flaw with the original bill was that it did not adequately address the issue of birthmother privacy. It

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260 *See* A.B. 1349, 2001-02 Reg. Sess. (Cal. 2001).
261 *Id.*
262 *Id.*
263 *Id.*

provided for a contact preference form but no way for the birthmother to block the release of records.[264]

The amended version of AB 1349, however, failed to adequately protect the privacy interests of both the birthparents and the adoptee. While the bill provided a mechanism by which those birthparents not desirous of contact with their relinquished children could register this preference, the birthparents had no way to avoid all contact or to totally block unwanted disclosure of information contained in the original birth certificates.[265] The bill's contact preference form did not give adequate protection to a birthmother who believed that she would be harmed by the release of private, identifying information. Furthermore, the bill did not provide for a means by which the adoptee could access her court adoption records without petitioning the court for good cause.[266]

Both versions of AB 1349 respected the confidential nature of the information contained in the records. In keeping with the original purpose of sealing the records, AB 1349 continued to shield the records from the public scrutiny.[267] The proposed legislation continued to protect the newly developing adoptive family from outside interference during the time that such protection is needed. It only allowed the limited release of information to the parties to the adoption after the adoptee had reached the age of majority.[268]

Precisely because AB 1349 did not provide adequate protection for birthmother privacy, however, the committee required a compromise to pass the bill. AB 1349, as amended in committee, would allow access to original birth certificates only if an adoptee 18 years of age or older had already identified her birthparent.[269] Thus, the amended bill operated primarily to ensure the birthparents' lifelong anonymity from their biological children while completely failing to recognize or protect the adoptees' fundamental informational right of privacy. AB 1349, as amended in committee, simply re-enforced the imbalance of protection for birthmother privacy at

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264 *Id.*
265 *See* A.B. 1349, 2001-02 Reg. Sess. (Cal. 2001).
266 *Id.*
267 *Id.*
268 *Id.*.
269 *Id.*

the expense of the adoptee. The legislature appears to have ignored the fact that the original purpose of sealing adoption records was to shield the newly formed adoptive family from the prying eyes of the public, not to protect the privacy of the birthparents.[270]

VI. PROPOSAL: A SHIFT IN BURDEN TO PROVE GOOD CAUSE WHY THE RECORDS SHOULD NOT BE OPENED

When both the adoptee and the birthparents desire the disclosure of the information contained in the adoption records there is no conflict as to whose privacy rights take precedence. After the adoptee matures, sealed records no longer best serve the interests of the parties to the adoption in the majority of the cases. This proposition supports legislation with a presumption of openness rather than what is effectively lifelong secrecy. In cases where the equal privacy interests do conflict, the burden should shift to the birthparent to prove "good cause" why the information contained in the adoption files should *not* be released to the requesting adult adoptee.[271]

The current presumption under California law operates strongly against the release of adoption records. Adoptees have a heavy burden to prove "good cause" sufficient to get a court order to open the records.[272] In reality, the psychological reasons for opening the records are the most compelling. Other jurisdictions, such as New Jersey have recognized these interests.[273] These courts have articulated the primary goal of adoption law as one to promote and protect the welfare of the adoptee.[274] Thus, in cases where there are equal but competing interests, the balance should tip in favor of the adoptee.

The presumption of openness should be based on the goal of promoting the welfare of the adult adoptee. Any adoptee age 18 or older would get the entire court adoption file as well as their original birth certificate unless a birthparent objects.[275] A

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[270] *See supra* Part I. A-B.

[271] Many commentators as well as some courts have advocated shifting the burden to the birthparents. *See, e.g., Mills*, 372 A.2d at 654; Kuhns, *supra* note 26, at 289.

[272] *See supra* note 5 and accompanying text.

[273] *See, e.g., Mills*, 372 A.2d at 655 (stating that the adoptee's psychological need is compelling and may constitute good cause to open the adoption records).

[274] HOLLINGER, *supra* note 7, at 13-31.

[275] In California the age of majority is 18. CAL. FAM. CODE § 6502 (Deering 1996 &

birthparent objection, however, would not be an absolute veto to the release of records. If a birthparent objects, the dispute would be resolved in court by both sides presenting their arguments to the judge in writing. No party would have to make a personal appearance, thus preserving the privacy of the individuals.

The birthparent would have the burden of proving "good cause" in order to maintain the sealed adoption records. "Good cause" would be defined as "causing severe harm or danger." For example, "good cause" may exist if the birthmother was suffering from acute mental illness and a psychiatrist believed that disclosure would compromise her mental health or lead her to suicide. "Good cause" may also exist where the birthmother reasonably fears her current husband would kill her if the records revealed that the adoptee was conceived during a secret affair. Mere embarrassment would not constitute "good cause". If the court found "good cause" it would have the discretion to withhold all information from the requesting adoptee, or, alternatively, release information with instructions not to contact the birthparent.

Similarly, there should be the same presumption of openness for a birthparent requesting access to the previously sealed adoption files. If an adoptee objects, they would also have to show "good cause" why the records should not be opened. Thus, the intent of the statute would be primarily directed at changing the presumption of secrecy and anonymity to one of openness after the adoptee becomes an adult.

The new statute should require a waiting period of one year after an adoptee or birthparent requests the records. During that year objections to the release of identifying information contained in adoption court files or original birth certificates could be filed. The procedure for filing objections would be advertised through the press and in public notices. In addition, upon receiving a request for access to records, the appropriate department would send a notice to the last known address of the other party. Furthermore, the Department of Social Welfare or Vital Statistics would maintain a list of pending requests for records. Birthparents or adoptees could contact the appropriate department to discover whether the

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other party has requested records. If no objection were filed during that year, the records would be automatically released to the requesting party. Thus, a birthmother who wishes to remain anonymous must take affirmative action during that one-year window to file an objection with the state to the release of adoption files.

Moreover, even if the records are released, a birthparent or adoptee should have the option of filing a contact veto similar to that provided for in Tennessee.[276] In this situation, the adoptee would have the psychological benefit of the identifying familial information while the birthparent's privacy would be secured from unwanted intrusion into her household. If a contact veto is filed, there should be a provision for renewal every three years to allow for a change of mind.

This proposal will alleviate the burden on the courts. As it now stands, every adoptee that wants to access records must petition the court and prove "good cause."[277] Under existing law the adoptee will not prevail in most cases, thus wasting the court's time and money. Since, in the majority of the cases, the birthparent does not oppose the records being made accessible, the automatic access will dramatically reduce the number of cases requiring a judicial determination. The courts will only have to become involved in those few cases where birthparents strongly oppose the opening of records.

This proposal brings the law into harmony with the prevailing trend of openness in adoptions. It protects the integrity of the adoptive family while the child is young, but allows the adoptee to integrate the loose ends of his identity in adulthood. This proposal also fairly protects the constitutional rights of the minority of birthparents who may be harmed by the disclosure of the information contained in the adoption records.[278]

CONCLUSION

Original birth certificates and adoption records hold intimate and essential personal information concerning the adoptee's origins. One who has not had this vital information

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[276] *See generally* TENN. CODE ANN. § 36-1-128.

[277] CAL. FAM. CODE § 9200; CAL. HEALTH & SAFETY CODE § 102705.

[278] Sandine & Greenman, *supra* note 224, at 67.

withheld from him is unable to comprehend the magnitude and injustice of the denial that is experienced by the adoptee. An 81-year old retired Air Force Colonel who had served 29 years with over 98 combat hours flight time, was recently denied access to his adoption records.[279] Both his adoptive parents were deceased and most likely his birthparents were also deceased.[280] He expressed his feelings of indignation and betrayal in a letter to the Missouri legislature in support of open records:

> This is not right...[t]his is not a superficial or whimsical notion on my part but rather an attempt to pass to my children and their offspring information that might be of value to them. I've served my country and I've served it well. It is a travesty of justice to continue to deprive me of information that virtually every other person in America has available, which is access to my original birth certificate.[281]

This letter illustrates the absurdity and cruelty of continuing to structure adoption laws around a lifelong regime of secrecy. "Someday, of course, the records will be unsealed...and in the future people will look on today's strange attitudes toward adoptees as we look on many of the Victorian's irrational prejudices."[282] To be sure, the archaic laws of secrecy will not survive in the climate of openness and acceptance of the twenty-first century. But adoptees and birthparents should not have to wait any longer for sealed record laws to die a slow but natural death. There is a need for immediate legislative reform to bring the law into consonance with the repercussions it has on all parties to the adoption, especially the adoptees. California should follow the lead of other states in enacting bold reforms to confidentiality statutes concerning adoption records.

A large number of adoptees and birthparents most affected by the current sealed records statutes are running out of time. Birthparents of children born during the 1940's and 1950's

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[279] Audio tape of Symposium on Perspectives on Open Adoption, *supra* note 8 (Janice Goldwater commenting on the paradox of this high ranking military officer having access to top secret government documents while being denied access to his own adoption records).

[280] *Id.*

[281] *Id.*

[282] LIFTON, *supra* note 6, at 271.

when adoptions were at their peak are approaching the end of their lives with little time remaining for reunion. There is no policy justification for continuing to routinely withhold such information from the parties most affected. The purpose of adoption is to provide for the best interests of a child by finding a home for a child to grow up as a member of a permanent family. That purpose having been served, the state has a duty to allow the parties to the adoption to pursue life, liberty, privacy, and the pursuit of happiness unimpeded by governmental interference. AB 1349, while an attempt in the right direction, ultimately failed to go far enough to ensure the recognition and protection of fundamental rights of both adoptees and birth parents. The California Legislature has been timid in enacting legislation due to its legitimate concern for protecting birthmother privacy rights. The Legislature, however, has effectively ignored the fundamental rights of adoptees. By adopting the proposal advanced in this Comment, open adoption records laws can provide adequate safeguards to protect the privacy rights of those birthparents that with good cause object to the release of the information to the adoptee. At the same time, the rights of adoptees to discover their biological origins will finally be recognized and protected.

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After searching for over twenty years, I found my birthmother and three half-sisters during the writing of this article. It took a few days for the initial shock to wear off for my 72-year old birthmother and then she immediately began to establish a relationship with me. The relationship, of course, will never match the history I have with my adoptive mother who raised me and continues to love me and be there for me every day of my life. It was she who realized how important it was for me to discover my biological origins. Without her assistance I probably still would not have this vital information. Thanks to both my mothers, I no longer have unanswered questions about my past. I finally feel complete.