RUTGERS UNIVERSITY LAW REVIEW

VOLUME 71 | ISSUE 5 SUMMER 2019

# ANOTHER OPPORTUNITY FOR THE CALIFORNIA SUPREME COURT TO CORRECT THE LOWER COURT'S APPLICATION OF *HILL*'S PRIVACY TEST. *LEWIS V. SUPERIOR COURT*, 397 P.3D 1011 (CAL. 2017)

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## I. INTRODUCTION

In *Lewis v. Superior Court*,[1] the California Supreme Court considered whether the Medical Board of California violated article I, section 1 of the California Constitution;[2] specifically the right of privacy, when accessing patients' records without consent for investigative purposes.[3] A doctor challenged the alleged privacy invasion on behalf of his patients, which made it necessary for the court to resolve whether the doctor even had standing to do so under the constitutional provision, and ultimately whether the intrusion was outweighed by the Board's interests.[4]

* J.D., Rutgers Law School, May 2019.

1. 397 P.3d 1011 (Cal. 2017).
2. CAL. CONST. art. I, § 1.
3. *Lewis*, 397 P.3d at 1014.
4. *Id.* at 1015–17.

This Comment will first provide the history of privacy rights in California and the evolution of evaluating these claims in the California courts, leading up to the supreme court decision in *Lewis*. Next, this Comment will lay out the factual and procedural history, followed by a discussion of the court's analysis. Finally, this Comment will discuss how the court correctly decided *Lewis*, but inadequately assumed that the "prima facie" threshold elements were satisfied without first providing a thorough evaluation of the issue. In addition, this Comment will discuss the recent development of privacy rights in California—the enactment of the California Consumer Privacy Act of 2018.

## II. HISTORY OF PRIVACY RIGHTS IN CALIFORNIA

The California Legislature added an explicit constitutional right to privacy in article I, section 1 in 1972[5] as a result of a ballot initiative.[6] The amendment was an "alternative basis for developing the right to privacy" within the state that gives the right "a more secure foundation."[7] Only a handful of states have similar provisions protecting individuals' right to privacy.[8] The provision declares: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*."[9] The first California Supreme Court decision to address a claim under the constitutional privacy provision was *White v. Davis*.[10] The court established "that the amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention

5. CAL. CONST. art. 1, § 1.

6. Scott A. Baxter, *Informational Privacy and the California Public Records Act*, 30 MCGEORGE L. REV. 778, 780 (1999).

7. Robert S. Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 385, 385–86 (1981). Sometimes, California's enumerated right is considered to be greater than the scope of the United States Constitution's unenumerated right of privacy. J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 329 (1992).

8. Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMPLE L. REV. 1279, 1282 (1992) (listing California, Alaska, Montana, Hawaii, and Florida as states with a similar constitutional provision); *see also Privacy Protections in State Constitutions*, NCLS (Nov. 7, 2018), http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx.

9. CAL. CONST. art. I, § 1 (emphasis added). *Compare* CAL. CONST. art. I, § 1, *and* Gormley, *supra* note 8, at 1282 ("adding 'privacy' to the host of inalienable rights" in California), *with* ALASKA CONST. art. I, § 22, MONT. CONST. art. II, § 10, HAW. CONST. art. I, § 6, *and* FLA. CONST. art. I, § 23 (each adopting brand new, freestanding privacy provisions by constitutional amendment).

10. 533 P.2d 222 (Cal. 1975).

must be justified by a *compelling interest*."[11] Thereafter, California courts seesawed between the "compelling interest" standard and a more general balancing test—analogous to the standard used to evaluate unreasonable search and seizure claims under the Fourth Amendment and article I, section 13 of the California Constitution—for evaluating issues under the California privacy clause.[12]

Years later the California Supreme Court—while still validating the prior cases that used the "compelling interest" standard—developed a new standard in order to encompass private entities.[13] In *Hill*, student athletes attending Stanford University sued the National Collegiate Athletic Association ("NCAA") contending its drug testing program violated their privacy rights secured by article I, section 1 of the California Constitution.[14] The court began its analysis by addressing the question, for the first time, of whether the California constitutional right to privacy may be enforced against private parties.[15] Looking to the drafter and voter intent of the ballot arguments,[16] the *Hill* court determined that the privacy right of action, not including other clauses in article I, section 1, should extend to private entities in addition to public governmental entities.[17]

11. *Id.* at 234 (emphasis added) (finding plaintiff's complaint detailing defendant's alleged covert surveillance stated a prima facie violation of both the federal and state constitutions).

12. *See, e.g.*, Ingersoll v. Palmer, 743 P.2d 1299, 1309–10 (Cal. 1987) (finding a compelling state interest to conduct sobriety checks compared to plaintiff's privacy interest); Schmidt v. Superior Court, 769 P.2d 932, 944–45 (Cal. 1989) (balancing the privacy interest against a competing interest); Long Beach City Emps. Ass'n v. Cty. of Long Branch, 719 P.2d 660, 666 (Cal. 1986) (referencing "compelling governmental interest"); People v. Stritzinger, 668 P.2d 738, 742 (Cal. 1983) (finding patients' privacy interest in psychotherapy must yield to compelling state interests); Cty. of Santa Barbara v. Adamson, 610 P.2d 436, 440 (Cal. 1980) (applying the compelling interest test to an alleged privacy violation); Loder v. Municipal Court, 553 P.2d 624, 628 (Cal. 1976) (finding no privacy right to expungement of arrest record, referencing a "compelling interest").

13. Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 654, 657 (Cal. 1994). By redefining the elements and defenses, the court developed the privacy test still used by California courts in analyzing claims under article 1, section 1.

14. *Id.* at 637.

15. *Id.* at 641.

16. *Id.* at 642 ("The repeated emphasis in the competing ballot arguments on private party relationships and transactions . . . create enforceable privacy rights against both government agencies and private entities." (emphasis omitted)).

17. *Id.* at 644 ("Our holding in this regard is necessarily confined to the Privacy Initiative. We intimate nothing about the existence of rights of action or permissible defendants in legal proceedings that may be brought either under other clauses in article I, section 1 or other parts of our state Constitution."). Some commentators were not appeased with this reasoning and declared that "[t]he decision in *Hill* should probably be reversed and decisions from the courts of appeals extending the privacy clause to private employers should be disapproved." Kelso, *supra* note 7, at 334.

In doing so, the California Supreme Court questioned the lower court's decision to apply the existing legal standard for invasions of privacy by government agencies with respect to invasions of privacy by private entities, i.e., "(1) a 'compelling state interest' in support of drug testing; and (2) the absence of any alternative means of accomplishing that interest."[18] Emphasizing that the standard is of a compelling *state* interest, the court acknowledged the difficulties this standard would face if applied to a *private* entity.[19] Namely, it would fail to justify any activity that has an impact on individual privacy "in most, if not all" cases.[20] As a result, the court held that not every assertion of a privacy interest under article I, section 1 must be overcome by a "compelling interest."[21] Instead, only cases involving "an obvious invasion of an interest fundamental to personal autonomy" call for the "compelling interest" standard, and alternatively, if a privacy interest is "less central, or in bona fide dispute," a general balancing test is employed.[22]

In light of these two forms of privacy interests, the *Hill* court fashioned a new two-pronged test to analyze a cause of action alleging violation of the article I, section 1 right to privacy.[23] The first prong involves satisfying the three "prima facie" threshold elements of an invasion of privacy claim and the second entails a balancing of interests. The first, seemingly obvious, element of the three "prima facie" threshold elements is "the identification of a specific, legally protected privacy interest."[24] This privacy interest must be classified as one of the two types: "(1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); [or] (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')."[25] The second element "is a reasonable expectation of privacy on plaintiff's part" which requires consideration of the totality of the circumstances, such as customs, practices, and physical settings surrounding the particular activity involved.[26] The third element

18. *Hill*, 865 P.2d at 644 (citing *Long Beach City*, 719 P.2d at 666).

19. *Id.* at 645–46.

20. *Id.* The court also noted that neither the language nor history of the Privacy Initiative supports such a standard. *Id.* at 654.

21. *Id.* at 654; *see also* White v. Davis, 533 P.3d 222, 224 (Cal. 1975) (signifying only some aspects of the state constitutional right to privacy, those implicating government action impacting freedom of expression, are held by a "compelling state interest" standard).

22. *Hill*, 865 P.2d at 653.

23. *Id.* at 654–55.

24. *Id.* at 654–55. This is a question of law decided by the court. *Id.* at 657.

25. *Id.* at 654.

26. *Id.* at 655. These are mixed questions of law and fact. *Id.* at 657. Additionally, the court referred to common law protections to aid their analysis but were careful to clarify

determines whether the court was careful to avoid de minimis intrusions by requiring "[a]ctionable invasions of privacy [to] be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right."[27]

Next, if the above elements are satisfied, the California Supreme Court clarifies that "[p]rivacy concerns are not absolute" and "they must be balanced against other important interests."[28] As such, the defendant can prevail if they show their invasion of privacy is justified because it "substantively furthers one or more countervailing interests."[29] As discussed above, the standard by which the countervailing interest is measured hinges on the classification of the protected privacy interest determined in the first element.[30] To reiterate, if the privacy interest is of the first class ("informational privacy"), then a general balancing test is used; but if it is of the second class ("autonomy privacy") and is a fundamental interest, then the "compelling interest" test is used.[31] Finally, the plaintiff can rebut this evidence by presenting the existence of "feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests."[32]

Applying its elaborate test, the *Hill* court first found there existed legally protected privacy interests from the NCAA's drug testing program. Second, however, the students did have a diminished expectation of privacy in intercollegiate athletic circumstances. Third, the intrusion did involve a serious, as opposed to de minimis, invasion of privacy. The court moved forward with a hefty analysis of the purpose and interest of the NCAA in protecting the health and safety of student athletes competing in their program, ultimately concluding that the NCAA's competing interests outweighed that of the student plaintiffs.[33] The *Hill* test became the controlling law in analyzing article 1, section 1 claims in the California courts.

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their intention. *See id.* at 649 ("By referring to the common law, we seek merely to draw upon the one hundred years of legal experience surrounding the term 'privacy' in identifying legally protected privacy interests and in describing the process by which such interests are compared and weighed against other values. That experience suggests that the common law's insistence on objectively reasonable expectations of privacy based on widely shared social norms, serious violations of those expectations, and thorough consideration of competing interests, is an invaluable guide in constitutional privacy litigation.")

27. *Id.* at 655. These are mixed questions of law and fact. *Id.* at 657.

28. *Id.* at 655.

29. *Id.* at 657. Defendants may also plead and prove other defenses such as the unclean hands doctrine and consent. *Id.*

30. *See id.* at 653.

31. *See id.* at 653–54

32. *Id.* at 657. This is a threshold question of law for the court. *Id.*

33. *Id.* at 657–68.

Soon after, in 1997, the California Supreme Court evaluated a privacy claim pursuant to *Hill*, deciding the appropriate standard was the "compelling interest" because a fundamental autonomy right was implicated.[34] In *American Academy of Pediatrics*, the challenged statute required a pregnant minor to obtain parental consent or judicial authorization before having an abortion, which is an issue that "unquestionably impinges upon 'an interest fundamental to personal autonomy.'"[35] The court reasoned that the State's interests in protecting the health of minors and preserving parent-child relationships were not compelling enough to undermine a minor's fundamental right to privacy guaranteed by the California Constitution.[36] This case remains the only case since *Hill* where the "compelling interest" test was properly invoked for the appropriate class of privacy rights, i.e., an interest fundamental to personal autonomy.[37]

This analysis was reinforced in 2009 in *Hernandez v. Hillsides, Inc.*[38] The supreme court referred to the usage of the "compelling interest" test as a rare occasion.[39] Because this case involved an office space intrusion of privacy, it did not implicate autonomy privacy, and thus called for the general balancing test.[40] Once more in 2017, the supreme court unfailingly reviewed the *Hill* analysis in *Williams v. Superior Court*.[41] The *Williams* appellate court started its analysis with the presumption that any request for private information must be supported by a compelling need or interest, which the supreme court quickly remanded for improper analysis.[42] The supreme court clarified that although it did not overrule the "compelling interest" standard, it narrowed when the standard could and should apply.[43] Additionally, the court emphasized the burden for establishing the gravity of the privacy invasion is for the party asserting the privacy right, not the party seeking the information,

34. *See* Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 812 (Cal. 1997).
35. *Id.* at 805, 818.
36. *Id.* at 800, 819.
37. *See* Lewis v. Superior Court, 397 P.3d 1011, 1019 (Cal. 2017).
38. 211 P.3d 1063, 1073 (Cal. 2009).
39. *Id.*
40. *Id.* at 1066, 1073–74.
41. 398 P.3d 69, 84 (Cal. 2017)*; see also* Matthew Schechter, *California Supreme Court Issues Sharp Reminder About Privacy and Discovery*, MCMANIS FAULKNER BLOG (Aug. 3, 2017), https://www.mcmanislaw.com/blog/2017/california-supreme-court-issues-sharp-reminder-about-privacy-and-discovery.
42. *Williams*, 398 P.3d at 87, 89 ("But the flaw in the Court of Appeal's legal analysis, and in the cases it relied upon, is the de facto starting assumption that such an egregious invasion is involved in every request for discovery of private information.").
43. *Id.* at 87.

and only then does the court balance any identified competing interests.[44] With its punch line, "[t]o the extent prior cases require a party seeking discovery of private information to always establish a compelling interest or compelling need, without regard to the other considerations articulated in *Hill v. National Collegiate Athletic Assn.*, they are disapproved."[45] Only four days later did the California Supreme Court control the next *Hill* analysis in *Lewis v. Superior Court*.

## III. STATEMENT OF THE CASE

The investigation of Dr. Alwin Carl Lewis began in 2008, when the Medical Board of California ("Board") received a complaint from a patient alleging unprofessional treatment recommendations.[46] The Board first obtained, without subpoenas or patient authorization, a CURES report detailing Lewis's prescribing activity.[47] Thereafter, the Board requested five patients discovered in the CURES report to release their full medical records, for which only three consented, but the Board received administrative subpoenas to obtain the remaining two.[48] Following the preliminary investigation discoveries, the Board filed an accusation against Lewis for "unprofessional conduct, prescribing dangerous drugs without an appropriate examination, excessive prescribing, and failure to maintain adequate and accurate medical records" pertaining to the original complainant and the five additional patients.[49]

In response, Lewis argued in a motion to dismiss that by obtaining the CURES reports without a warrant, subpoena, or "good cause," the Board violated his patients' privacy rights.[50] The administrative law judge denied the motion after weighing the government's interest in monitoring the CURES reports against the invasion of privacy asserted

44. *Id.* at 87 (clarifying that requiring the party seeking information to show a compelling interest and ignoring the considerations laid out in *Hill* is improper).

45. *Id.* at 87 (citation omitted).

46. Lewis v. Superior Court, 397 P.3d 1011, 1015–16 (Cal. 2017). Lewis suggested his patient lose weight by participating in the "five-bite" diet. *Id.* at 1015.

47. *Id.* at 1015. The CURES database (Controlled Substance Utilization Review and Evaluation System) was created to move California's drug monitoring program online. "By statute, every prescription of a Schedule II, III, or IV controlled substance must be logged in CURES, along with the patient's name, address, telephone number, gender, date of birth, drug name, quantity, number of refills, and information about the prescribing physician and pharmacy." *Id.* at 1014; *see* CAL. HEALTH & SAFETY CODE § 11165 (West 2019). Data recorded in CURES could be provided to public agencies for disciplinary purposes. *Id.* § 11165 (c)(2)(A).

48. *Lewis*, 397 P.3d at 1015.

49. *Id.*

50. *Id.*

by Lewis.[51] The administrative hearing then resulted in a finding of unprofessional and negligent conduct, with a recommendation to revoke Lewis's license, but staying the revocation and placing him on probation for three years.[52] The Board adopted the recommendation.[53]

Following the Board's adoption of the recommendation, Lewis filed a writ of administrative mandamus seeking to set aside the Board's decision by arguing that "fundamental privacy protections guaranteed under state and federal law" were violated.[54] The Los Angeles Superior Court rejected this argument, reasoning that the Board serves a compelling public interest which justifies CURES medical history disclosure without consent.[55] Lewis's claims were finally categorized under the California Constitution when he filed a petition for writ of mandate claiming a violation of his patients' right to privacy, and the court of appeals interpreted these rights under article I, section 1, specifically as an "informational privacy" right.[56]

Based on this construal, the court of appeals applied the framework articulated in *Hill* and observed that although there is a legally identifiable privacy right in medical records, the "well-known and long-established regulatory history" of the release of controlled substance prescription records diminishes the reasonable expectation of privacy in this instance, and the privacy rights of medical records are not a serious invasion of privacy due to the safeguards already in place.[57] In spite of this conclusion that the threshold "prima facie" elements were not met, the court went even further to say that even if those elements were in fact established, the invasion of privacy was justified by the compelling government interests of "controlling the diversion and abuse of controlled substances and protect[ing] the public against incompetent, impaired, or negligent physicians."[58] Thus, the Board's actions did not violate article

51. *Id.*

52. *Id.* at 1015–16.

53. *Id.* at 1016.

54. *Id.*

55. *Id.* ("[T]he public health and safety concern served by the monitoring and regulation of the prescription of controlled substances serves a compelling public interest that justifies disclosure of prescription records without notification or consent." (quoting the superior court)).

56. *Id.*; *see* CAL. CONST. art. 1, § 1; Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.3d 633, 654 (Cal. 1994).

57. *Lewis*, 397 P.3d at 1016 (quoting Lewis v. Superior Court, 226 Cal. App. 4th 933, 948 (2014)).

58. *Id.* (quoting Lewis v. Superior Court, 226 Cal. App. 4th 933, 954 (2014)).

I, section 1 of the California Constitution.[59] The California Supreme Court granted review on this issue.[60]

## IV. THE COURT'S REASONING

### *A. The Majority*

#### 1. Third Party Rights Asserted by the Litigant

The Supreme Court of California first analyzed whether Lewis's claim had standing, i.e., whether it was proper for him to assert his patients' privacy rights, under article I, section 1 of the California Constitution.[61] The provision reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."[62] The court acknowledged that constitutional rights are "generally personal"[63] but relied on the United States Supreme Court's *Singleton v. Wulff* decision, which determined that physicians may assert their patients' privacy rights in limited contexts.[64] Interpreting *Singleton*, the court found Lewis's interests aligned with his patients' interests. Individuals may be hesitant in seeking treatment if they understood the government had the ability to access the "intimate details" contained in their medical records, and, since physicians have a primary interest in people seeking medical attention and receiving appropriate medication, this qualifies as a concern that is "inextricably bound up with the activity the [Board] wishes to pursue."[65] Secondly, the court observed that without Lewis's assertion on their behalf, the patients' rights are "likely to be diluted or adversely affected" because the patients were not notified that any of their records were even being accessed.[66]

Moreover, the Board argued that Lewis's claims were improper because a majority of the patients whose medical records were the subject of the disciplinary action consented to the release of their information. Even further, after allegedly "victimiz[ing] his patients," he should not

59. *Id.*
60. *Id.*
61. *Id.* at 1017.
62. CAL. CONST. art. 1, § 1.
63. *Lewis*, 397 P.3d at 1017 (citing People v. Hazelton, 926 P.2d 423, 428 (Cal. 1996)).
64. *Id.* at 1017; *see* Singleton v. Wulff, 428 U.S. 106, 118 (1976); *see also* Med. Bd. of Cal. v. Chiarottino, 170 Cal. Rptr. 3d 540, 546–47 (Ct. App. 2014).
65. *Lewis*, 397 P.3d at 1017 (quoting *Singleton*, 428 U.S. at 114).
66. *Id.* (quoting Griswold v. Connecticut, 381 U.S. 479, 481 (1965)).

be permitted to assert their rights.[67] However, the court rejected this theory because two of the five patients did not consent and he did not "victimize[]" all of the subjected patients, only the one who filed the initial complaint.[68] Therefore, the court concluded Lewis properly asserted the privacy claim on behalf of his patients.[69]

2. The Merits of the Constitutional Claim

After concluding that Lewis was valid in the assertion of his patients' privacy rights, the Supreme Court of California progressed to analyze the merits of the constitutional claim under article I, section 1.[70] The court revisited its two-prong test that it had articulated in *Hill* to determine whether this constitutional right had been violated.[71] As described in Section II, the first prong of the test requires the plaintiff to establish three "prima facie" threshold elements.[72] Then, the defendant can prevail at the second prong by proving the "invasion of privacy is justified because it substantively furthers one or more countervailing interests" or by otherwise negating of any of the three threshold elements in the first prong.[73] In turn, the plaintiff "may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests."[74] Despite this burden-shifting sequence, the court proceeded by merely "assuming the Board's actions constituted a serious intrusion on a legally protected privacy interest" and moving to the next step of the analysis.[75]

To proceed with the second prong, the court must determine which standard the Board's countervailing interests must meet to overcome the patients' privacy interests: demonstrate a "compelling interest" or employ a "general balancing test."[76] Again, this determination is made based on the type of privacy interest involved in the constitutional

67. *Id.* at 1017–18.
68. *Id.*
69. *Id.*
70. *Id.* at 1018.
71. *Id.*
72. *See supra* notes 24–27 and accompanying text. The party must demonstrate: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 657 (Cal. 1994).
73. *Lewis*, 397 P.3d at 1018 (quoting *Hill*, 865 P.2d at 657); *see supra* note 29 and accompanying text.
74. *Lewis*, 397 P.3d at 1018 (quoting *Hill*, 865 P.2d at 657); *see supra* note 32 and accompanying text.
75. *Lewis*, 397 P.3d at 1018.
76. *Id.* at 1019.

violation: an invasion of "autonomy privacy"[77] or an invasion of "informational privacy" respectively.[78] Dissatisfied by the court of appeal's assumption that the Board would be required to demonstrate a "compelling interest," the California Supreme Court rehashed its finding in *Hill* that limited this standard's application and reiterated that it "decline[d] to hold that every assertion of a privacy interest under article I, section 1 must be overcome by a 'compelling interest.'"[79] Evidenced by several preceding cases, the general balancing test is applied when there is not an "obvious invasion of an interest fundamental to personal autonomy."[80] The only case for which the California courts applied the "compelling interest" test involved an "unquestionabl[e] . . . 'fundamental [interest] to personal autonomy.'"[81]

Applying these principles, the court declared the Board's actions obviously did "not implicate a fundamental autonomy right."[82] The court explained that "[t]he disclosure of information from CURES may be one consideration affecting a patient's choice to pursue treatment, but it does not significantly impair the patient's ultimate ability to make that choice on his or her own."[83] Therefore, the court applied the general balancing test to resolve whether the Board's countervailing interest justified the said invasion of the patients' privacy interest protected by article I, section 1.[84]

In doing so, the court rehashed its prior policy considerations in *Hill* when considering whether an interest makes a constitutional violation justified:

> Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise.

77. *Id.*; *Hill*, 865 P.2d at 658.

78. *Lewis*, 397 P.3d at 1016, 1019.

79. *Id.* at 1019 (quoting *Hill*, 865 P.2d at 654).

80. *Id.* (quoting *Hill*, 865 P.2d at 653)*; see also* Hernandez v. Hillsides, Inc., 211 P.3d 1063, 1073 (Cal. 2009) (denying compelling countervailing interest test due to lack of fundamental autonomy right); Pioneer Elec., Inc. v. Superior Court, 150 P.3d 198, 205 (Cal. 2007) (applying the general balancing test for a request to obtain a customer list); Loder v. City of Glendale, 927 P.2d 1200, 1222, 1226 (Cal. 1997) (applying the general balancing test for an employer drug testing applicants).

81. *Lewis*, 397 P.3d at 1019 (quoting Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 818 (Cal. 1997)); *see supra* notes 34–37 and accompanying text.

82. *Lewis*, 397 P.3d at 1019.

83. *Id.*

84. *Id. See generally* MATTHEW BENDER, 8 CALIFORNIA POINTS & AUTHORITIES § 81.240 (2019), Lexis (explaining that the right to privacy is not absolute if a "lesser" interest is at stake).

> Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.[85]

Thereafter, the court turned to the arguments of the parties.[86] Although the Board argued, and the court agreed, that the state has a great interest in protecting patients by controlling the distribution of dangerous drugs and the abuse of prescription medications, Lewis asserted that the state should "employ 'less intrusive means' of monitoring . . . by limiting searches of the CURES database to those involving good cause, as established by a warrant, subpoena, or similar legal mechanism."[87] Even further, Lewis contended that any time the court considers the impact of the government's actions on a privacy interest, the "least restrictive alternative" must be used.[88] The court quickly rejected this requirement because, as decided in *Hill*, the "least restrictive alternative" imposition is only for cases that involve a government infringement of any fundamental freedom of expression and association.[89]

Even though the "least restrictive alternative" is not required, the court noted evidence of a less intrusive alternative is still relevant in balancing the government's interests against the patients' privacy interests.[90] Accordingly, the court evaluated Lewis's suggestion for a good cause requirement to be implemented in order to access CURES reports.[91] A distinction is drawn between privacy interests associated with medical records and privacy interests associated with prescription records.[92] Since medical records contain more sensitive information than prescription records and a reasonable patient would (or should) know that the government keeps tabs on the sale and distribution of controlled

85. *Lewis*, 397 P.3d at 1019 (quoting *Hill*, 865 P.2d at 656).
86. *Id.* at 1019–20.
87. *Id.*
88. *Id.* at 1020.
89. *Id.* The relevant language relied on by Lewis, but is only applicable to government infringement of fundamental freedom of expression and association, requires that the infringing government actions: "(1) involve clear invasions of central, autonomy-based privacy rights, particularly in the areas of free expression and association, procreation, or government-provided benefits in areas of basic human need; or (2) are directed against the invasive conduct of government agencies rather than private, voluntary organizations." *Id.* (quoting *Hill*, 865 P.2d at 663).
90. *Id.*; *see Hill*, 856 P.2d at 663–64 (failing to demonstrate with substantial evidence the existence of a fully viable alternative to monitoring was detrimental to the plaintiffs' case).
91. *Lewis*, 397 P.3d at 1020–21.
92. *Id.*

substances via routinely viewed prescription records, the privacy interest associated with prescription records is less "robust."[93]

An additional consideration is how the good cause requirement might affect the efficiency and ability of the Board to "identify and correct potentially dangerous practices."[94] The court amused the idea of the Board presenting evidence to a judicial officer establishing good cause as part of their preliminary investigations, but recognized that such delays would "impede the Board's ability to swiftly identify and stop dangerous prescribing practices."[95] The court declared that although such a compromise would reduce the impact on the patients' privacy rights, it would not be an effective or feasible approach for the Board.[96]

To conclude its analysis, the court extended to discuss how the measures and safeguards that were already in place to prevent public disclosure from CURES were sufficient. It discussed several provisions of law that prohibit the wrongful public disclosure of personal information obtained from CURES.[97] Under section 11165, CURES data may only be provided to "appropriate state, local, and federal public agencies for disciplinary, civil, or criminal purposes."[98] In the hands of patient information, the Board is subject to confidentiality.[99] Moreover, under the Information Practices Act, intentional disclosure of such information is "punishable as a misdemeanor if the wrongful disclosure results in economic loss or personal injury to the individual to whom the information pertains."[100]

In conclusion, the majority balanced the privacy interests of the patients protected under article I, section 1 of the California Constitution, against the Board's countervailing interest to find the Board's interest in protecting the public from "unlawful use and diversion of a particularly dangerous class of prescription drugs and protecting patients from negligent" physicians predominates. The *Lewis* court was convinced that the "adequate protections against public disclosure" sufficiently limit the degree to which patients' privacy is invaded.[101]

93. *Id.* The court identifies that the patient should be on notice that their "personal information may be shared among government agencies" under the Information Practices Act. *Id.*; *see* CAL. CIV. CODE § 1798.24(e) (West 2019).

94. *Lewis*, 397 P.3d at 1021.

95. *Id.*

96. *Id.* The Board suggested other alternatives that would hamper their duties less, but since Lewis did not propose them, the court did not entertain them. *Id.*

97. *Id.* at 1021–22.

98. *Id.* (citing CAL. HEALTH & SAFETY CODE § 11165(c) (West 2019)).

99. *Id.* at 1022.

100. *Id.* (quoting CAL. CIV. CODE § 1798.57 (West 2019)).

101. *Id.* Though, the court acknowledged that these protections do not obviate constitutional concerns of privacy interests. *Id.*

### *B. Justice Liu's Concurring Opinion*

The concurring opinion written by Justice Liu and joined by Justice Kruger underlines how the majority engaged in the *Hill* two-prong analysis without establishing whether the first prong—the three threshold elements—was actually satisfied.[102] Justice Liu asserts that Lewis did fulfill each of the three elements in his invasion of privacy claim.[103] First, the Board conceded to the fulfillment of the first requirement, the existence of a "legally protected privacy interest" in their prescription records under the California Constitution.[104] Next, a "reasonable expectation of privacy" was met even though the majority proclaimed that a patient should know the government can access prescription records routinely.[105] The concurring opinion differentiated this by acknowledging that these considerations "do not mean that patients have no reasonable expectation of privacy with regard to their prescription records."[106]

To further delve into this element, Justice Liu noted that patients do not choose to participate in the prescription drug monitoring program, but rather they consume prescription drugs for "nonvoluntary, legitimate medical purposes."[107] This is distinguishable from *Hill*, where the students in question voluntarily participated in the activity but were not given an opportunity to consent or refuse before their information was shared with the Board, making it "difficult to conclude that the monitoring scheme entirely negates patients' expectation of privacy" in this case.[108]

Lastly, this was "a serious invasion of privacy," as Justice Liu rejected that adequate precautions were taken to render the intrusion de minimis.[109] Unlike the majority opinion, the concurring opinion concluded that the third element was met.[110] In so finding, Justice Liu highlighted the importance of privacy protection due to the "advances in data science hav[ing] enabled sophisticated analyses of curated information as to a particular person. Where, as here, one government

102. *Id.* at 1023 (Liu, J., concurring).
103. *Id.*
104. *Id.*
105. *Id.* at 1023–24.
106. *Id.* at 1023.
107. *Id.* at 1024.
108. *Id.*
109. *Id.* at 1024–25.
110. *Id.*

agency discloses patients' sensitive medical information to another, the privacy intrusion cannot be dismissed as trivial."[111]

The distinction made by the concurring opinion—that Lewis succeeded on the first prong of the *Hill* test—does not cause diversion from the ultimate conclusion that the second prong of the test fails.[112] As the explained by the majority opinion, the government interests behind the monitoring of prescription drugs was "sufficiently weighty to justify the privacy invasion here."[113]

## V. AUTHOR'S ANALYSIS AND IMPLICATIONS

The California Supreme Court arrived at the right conclusion in *Lewis* using the well-established and continuously upheld *Hill* test, but left the first prong—the establishment of the "prima facie" threshold elements—in the dust. While properly establishing the privacy right involved is indisputably one of "informational privacy," the majority only considered this first element in order to determine the path in regard to the second prong analysis. Yes, using the general balancing test is proper for this type of privacy intrusion, and although prescription information is personal and sensitive, the interest in protecting the public from unlawful use of dangerous prescription drugs and protecting patients from negligent or incompetent physicians tip the scale in favor of the Board. But did the Board's actions comprise a significant intrusion on a privacy interest protected by the California Constitution's privacy provision? Did the patients have a reasonable expectation of privacy against the release of their prescription records? Did the Board's conduct constitute a serious invasion of privacy?

The majority left these questions unanswered while being more concerned with keeping the status quo of its reformed balancing test and teaching the lower courts the proper usage of it. The supreme court itself had previously recognized that if the "prima facie" threshold elements are not established, there is no need to balance the interests.[114] Instead, it prioritized stressing that the appellate court was incorrect yet again in assuming the standard for which the Board must overcome the privacy invasion is by a "compelling interest."[115]

111. *Id.* at 1025.
112. *See id.*
113. *Id.*
114. Williams v. Superior Court, 398 P.3d 69, 86 (Cal. 2017) ("Because two of the three threshold *Hill* requirements are absent here, we need not move on to a balancing of interests.").
115. *Lewis*, 397 P.3d at 1019.

However, the concurring opinion's analysis should be the future practice of evaluating the test, rather than the majority's approach of merely assuming the latter two threshold elements of the *Hill* test are established and running straight to the general balancing test (or the "compelling interest" standard where appropriate).[116] In his concurring opinion, Justice Liu caught the oversight of the majority and clarified that he believes each of the three elements are indeed satisfied, accompanied by a proper analysis.[117] To compare the statements of outcome, the majority opinion declared: "Because any *potential* invasion of privacy caused by the Board's actions was justified by countervailing interests, we conclude that the Board did not violate article I, section 1 of the California Constitution when it obtained patient prescription records from CURES."[118] The concurring opinion more suitably declared: "In sum, the disclosure of CURES data to the Board is not a de minimis intrusion on patients' reasonable and legally protected privacy interests. But, as today's opinion explains, the government interests behind the prescription drug monitoring program are sufficiently weighty to justify the privacy invasion here."[119] The California court need not forget its burden-shifting paradigm established in *Hill*, while cleaning up the lower court's use of it.[120]

By finding in favor of the Board, who intruded on the patients' privacy rights, the concurrence was careful in recognizing that these privacy rights are not de minimis, but serious violations that require acknowledgment. Justice Liu's "second" opinion stressed the importance of being weary of these constitutional violations amended by the ballot voters in the growing age of technology.[121] He addressed the concern of privacy invasions as being more than just disclosure, but of the mere access or usage of personal information without reason, which is even more pressing today "because advances in data science have enabled sophisticated analyses of curated information as to a particular person."[122]

116. Interestingly, Justice Liu delivered both the majority and the concurring opinions.

117. *Id.* at 1023 (Liu, J., concurring). Conversely, the court of appeal found the "prima facie" case was not satisfied because the second two elements were not met. *Id.* at 1016. The court of appeal gave it gave an evaluation, at least.

118. *Id.* at 1022 (emphasis added).

119. *Id.* at 1025 (Liu, J., concurring).

120. *See* Williams v. Superior Court, 398 P.3d 69, 84, 87 (Cal. 2017); *see also* Schechter, *supra* note 41.

121. *See Lewis*, 397 P.3d at 1025 (Liu, J., concurring).

122. *Id.*; *see also* GEORGE H. MUPHY, VOTER INFORMATION GUIDE FOR 1972, GENERAL ELECTION 27 (1972), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1773&context=ca_ballot_props ("Fundamental to our privacy is the ability to control circulation of personal information. This is essential to social relationships and personal freedom. The

Californians are aware of this and continue to be directly involved in pursuing their privacy and the rights afforded to them under their state constitution. The right of consumers to keep their information private was on the table for California's 2018 ballot initiative.[123] "[T]he proposal would require significant new disclosure from companies that collect, buy or share the personal information of Californians."[124] Californian consumers would be able to know who is really using their information, and be afforded the ability to say no to sharing it.[125] "[T]he ballot initiative . . . would apply to all businesses that collect and deal data for commercial purposes" as well.[126] "If [Californians] just knew how much we knew about them, they'd be really worried," said a California tech engineer regarding the issue.[127]

Subsequently, the California Consumer Privacy Act was passed on June 28, 2018 as a result of that ballot initiative.[128] The bill reads:

> (h) People desire privacy and more control over their information. California consumers should be able to exercise control over their personal information, and they want to be certain that there are safeguards against misuse of their personal information. It is possible for businesses both to respect consumers' privacy and provide a high level transparency to their business practices.
>
> (i) Therefore, it is the intent of the Legislature to further Californians' right to privacy by giving consumers an effective way to control their personal information, by ensuring the following rights: (1) The right of Californians to know what personal information is being collected about them. (2) The right of Californians to know whether their personal information is

proliferation of government and business records over which we have no control limits our ability to control our personal lives.").

123. John Myers, *There's a Season for California's 2018 Ballot Initiatives, and This Is It*, L.A. TIMES (Jan. 21, 2018), http://www.latimes.com/politics/la-pol-ca-road-map-ballot-initiatives-signatures-20180121-story.html.

124. John Myers, *How Your Data Are Shared and Sold Could Be California's Marquee Ballot Battle in 2018*, L.A. TIMES (Nov. 26, 2017), http://www.latimes.com/politics/la-pol-ca-road-map-privacy-consumers-ballot-measure-20171126-story.html.

125. *Id.*

126. Jazmine Ulloa, *Proposed California Ballot Initiative Would Give Consumers More Control over Their Personal Information Online*, L.A. TIMES (Sept. 1, 2017), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-proposed-california-ballot-initiative-1504313223-htmlstory.html.

127. Myers, *supra* note 124.

128. California Consumer Privacy Act of 2018, A.B. 375, 2017–18 Reg. Sess. (Cal. 2018) (codified as CAL. CIV. CODE §§ 1798.100–.198 (West 2018)).

> sold or disclosed and to whom. (3) The right of Californians to say no to the sale of personal information. (4) The right of Californians to access their personal information. (5) The right of Californians to equal service and price, even if they exercise their privacy rights.[129]

This Act recognizes the original intent of the California voters in 1972 when they amended the California Constitution to include privacy among the inalienable rights in article 1, section 1, noting that "[f]undamental to this right of privacy is the ability of individuals to control the use, including the sale, of their personal information."[130] In response to this enactment, the International Association of Privacy professionals describes it as "the most influential privacy law the United States has ever seen."[131] California's citizens, courts, and legislature continue to protect their right to privacy with these changes, but privacy advocates urge that "[t]he CCPA is just a start."[132] Perhaps the Golden State's landmark privacy laws will continue to develop and begin bleeding into other states.[133]

## VI. CONCLUSION

The California Supreme Court reaffirmed its *Hill* constitutional privacy analysis in *Lewis v. Superior Court*. The court concluded that although Lewis had standing to assert his patients' constitutional privacy rights, the Board's interests in protecting patients and regulating dangerous prescription drugs outweigh the intrusion of privacy accessing their medical records through CURES. In so finding, the supreme court was more interested in reviewing the lower court's application of the balancing tests within the *Hill* privacy test than the proper application of the test in its entirety. Although the outcome was proper, the court need not diminish the structure of its test or the prima facie threshold elements in its efforts to guide the lower courts in correctly applying it.

129. *Id.* § 2(h)–(i).

130. *Id.* § 2(a).

131. *Alastair Mactaggart on the Genesis of the California Consumer Privacy Act at Privacy. Security. Risk. 2018*, CALIFORNIANS FOR CONSUMER PRIVACY, https://www.caprivacy.org (last visited Mar. 26, 2019).

132. Adam Schwartz et al., *How to Improve the California Consumer Privacy Act of 2018*, ELECTRONIC FRONTIER FOUND. (Aug. 8, 2018), https://www.eff.org/deeplinks/2018/08/how-improve-california-consumer-privacy-act-2018.

133. *See* Benjamin Freed, *On Data Privacy, State AGs Say They're Following California's Lead*, STATESCOOP (Jan. 30, 2019) https://statescoop.com/state-attorneys-general-california-data-privacy/.

Californians have continued to develop avenues for protecting their individual privacy, specifically guarding their personal information with newly enacted regulations.