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Family

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prefer to limit FIPs to reduced elements of notice, consent, and accountability. They complain that other elements are unworkable, expensive, or inconsistent with openness or free-speech principles.

In 1999 Justice Michael Kirby of the High Court of Australia and former chair of the OECD committee that developed the 1980 guidelines spoke at an international privacy conference. He noted the many changes brought about by new computer and communication technologies and suggested that it might be time for a review of the guidelines.

See also: **Opt-in vs. opt-out; Privacy notices**

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Robert Gellman

Family

Privacy within family law has two fundamental yet interrelated meanings. First, privacy can mean privatization, the use of internal rather than external norms, and thus, the legal ability of those within the relationship to control their own rights and responsibilities, such as through prenuptial contracts, cohabitation agreements, or separation agreements. There has been a general movement since the last third of the twentieth century to allow for increased private contracting before, during, and at the end of marriage, as well as between cohabiting couples. States have adopted different standards for judging these contracts, sometimes applying general standards of contract law, while at other times stressing the nature of the fiduciary relationship between marital partners. While these contracts have been upheld when they relate to obligations between intimate partners, courts have been far stricter when these agreements affect the rights of children through child support or child custody, generally holding that the state must decide these issues under a "best interest of the child" test.

Second, privacy can denote a protected sphere. The right to engage in any activities that one chooses within that sphere. Older understandings of marital privacy were summarized by Blackstone as involving the wife's legal existence being "suspended" during the course of the marriage, with the husband responsible for protecting his wife during her coverture. Based on this reasoning, a wife could not testify against her husband in court because she did not have a separate legal identity from him. As another example, because of the wife's legal disabilities during marriage, there was a specific doctrine—the "necessaries doctrine"—that allowed her to buy necessities from a third party, using her husband's credit. If the husband refused to pay for the necessaries, the creditor could sue the husband for the debt. As women have become able to maintain their own separate existence during marriage, the conceptions of marital privacy have changed.

Based on contemporary privacy law, this entry discusses two different aspects of family privacy: (1) the marital relationship and (2) the parent-child relationship. A third form of familial privacy related to sexual decisionmaking outside of marriage is discussed elsewhere. The constitutional development of marital relationship privacy involves two distinct elements: the right to marry and the right to sexual privacy for marital decisionmaking.

The first form of marital privacy protects the very decision of whom to marry. State laws generally establish who may marry whom, prohibiting, for example, polygamous and incestuous marriages. Although the Supreme Court had frequently discussed the right to marry, it was only in 1967 that the Court addressed the nature of the right itself, striking down Virginia's anti-miscegenation law in ***Loving v. Virginia,* 388 U.S. 1 (1967)**. In subsequent cases, the Court established the quasi-fundamental nature of the right (for heterosexuals) to marry. This form of marital privacy has become increasingly controversial in the context of same-sex marriage, where advocates argue that individuals should have the freedom to choose their partners. In *Goodridge et al. v. Department of Public Health* (2003), finding a right to same-sex marriage, the Massachusetts Supreme Judicial Court reiterated that individuals are protected against burdensome regulations of their right to marry, finding that the Massachusetts constitution prevented undue governmental interference with issues of "personal liberty." On the other hand, other courts have distinguished the fundamental nature of the right to marry a person of the opposite sex, which is historically protected, from the option of marrying a person of the same sex, which has not been a traditionally protected legal right. Courts have repeatedly held that the right to marital privacy does not extend to polygamous or incestuous relationships.

The second form of marital privacy involves the right to relational privacy; this right is most frequently addressed in the context of sexual decisionmaking. Perhaps the first reference in Supreme Court jurisprudence to the privacy of the marital relation occurs in the 1885 bigamy prosecution of *Cannon v. United States.* Angus Cannon was unable to offer testimony that he had not "cohabited," in a sexual sense, with a particular woman, because the Court was so protective of marital privacy.

The concept of marital privacy was also important in other nineteenth-century courts. Marital privacy was repeatedly used as a justification for failing to prosecute spousal violence. Rather than sustaining the eighteenth-century notion of marital unity, nineteenth-century courts began to use marital privacy as the theory for

protecting against intervention in the ongoing family. By contrast, divorce courts often inquired into minute details of marriages; once the marriage ended, courts felt free to examine the marital relationship in surprising detail.

It was only in 1965, in ***Griswold v. Connecticut,* 381 U.S. 479,** that the Court directly addressed the concept of marital privacy, locating it in the penumbras of various constitutional rights. *Griswold* involved the provision of contraceptives to a married couple in violation of a Connecticut statute that criminalized the using, or helping others to use, contraceptives. Seven years later, in ***Eisenstadt v. Baird,* 405 U.S. 438 (1972),** a contraceptive case involving unmarried people, the Court found that the right to privacy was not restricted to the confines of marriage, and that, although it attached to marital couples, it also attached to individuals who might comprise a couple. In 2003, in ***Lawrence v. Texas,* 539 U.S. 558,** the Court allowed the right of privacy to protect same-sex sexual intimacy.

Because marital privacy applies both to the couple and to the individuals involved in a marriage, a wife is not required to inform her husband, much less receive his consent, before having an abortion. The Supreme Court recognized, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), that while both marital partners have similar interests in living children, state abortion regulations have a much stronger effect on the wife's liberty interest than on the husband's.

Ultimately, the constitutionally developed right to marital privacy protects the relationship between husband and wife from undue interference. It creates and preserves a "**zone of privacy**" surrounding the marital relationship, specifically in the context of sexual decisionmaking, but also more generally in its affirmation of other constitutional protections for the **home** and the family.

Turning to the second aspect of family relationship privacy, there are several different categories of parent-child privacy that courts have defined and protected. First, there is a right to raise children, including the authority to direct their religious and educational upbringing, which has been repeatedly recognized by the Supreme Court. Second, there is, at least under certain circumstances, a right to establish a relationship with a child that is explicit in cases involving unwed fathers.

One critical aspect of parent-child relational privacy concerns the right to raise a child in the manner that one chooses. In *Meyer v. Nebraska* (1923), the Court asserted that the right of liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life . . . to marry, establish a home and bring up children."

Parental autonomy is not absolute. Indeed, although courts defer to the notion of parental control, the state can remove children from their parents' care for abuse and neglect, require children to attend some form of schooling, and establish a minimum work age for children. Moreover, just as with respect to other privacy rights, the constitutional reasoning that supports parental autonomy is somewhat sparse, even if it is grounded in pragmatic concerns. In *Meyer,* the Court explained that it had never posited a definitive explanation of the liberty guaranteed by the Fourteenth Amendment, but that "without doubt," it included

the right to raise children. On the other hand, regardless of their legal basis, the cases can be seen as establishing a precedent for privacy.

A second aspect of parent-child privacy concerns the rights of men to have relationships with their children: a married man has the right to a relationship with a child, and an unmarried man has an enforceable right against an unmarried mother to establish a relationship with their child. In a series of cases beginning with *Stanley v. Illinois* in 1972, the Supreme Court considered the rights of unwed fathers. Generally, the Court has protected the rights of unwed fathers when they have lived with or established a substantial relationship with their children, unless the unwed father is asserting rights against an "intact" family.

In the first case, *Stanley v. Illinois,* the Court used procedural due process to find that an intact biological family could not be broken up without a hearing on the unfitness of the parents. The father in that case had lived sporadically with his children. Six years later, the Court held in *Quilloin v. Walcott,* that an unwed father who had not lived with his children could be denied parental rights based on application of the best interest standard. Allowing the new husband of the biological mother to adopt the children would help preserve an existing family unit, and because the biological father had never lived with the child or the mother, the Court held that the state could deem his rights inferior to the best interests of the child. One year later, however, the Court struck down a statute that precluded an unwed father from objecting to the adoption of his children since he had maintained a substantial relationship, had lived with and had acknowledged paternity of his children.

Then, in *Michael H. v. Gerald D.,* the Supreme Court upheld the constitutionality of a California statute that presumed that a child born to a married woman, who was cohabiting with her husband, was a child of the marriage, unless the presumption was challenged within two years. In that case, a man not married to the mother had a 98.07 percent probability of being the biological father; he sought to be declared the father under California law. Even though he had some established relationship to both the mother and the child, and had lived with them both, he had no constitutionally recognized legal rights as a father. A plurality of the Court opined that the family unit traditionally given respect did not include an unwed father who sought to establish a relationship with his child when the mother was married to someone else.

The unwed child cases can be reconciled to mean three things. First, unwed fathers have the opportunity, in certain circumstances, to establish relationships with their children. Second, preservation of the traditional family unit takes priority over the rights of even the unwed biological fathers who do establish a relationship with their children. Third, although a relationship may exist between an unwed father and his child, legal rights as a father may not always be recognized.

See also: **Children's Online Privacy Protection Act of 1998 (COPPA); Privacy, definition of; Privacy, philosophical foundations of; Public/private dichotomy; Women and privacy**

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Family Educational Rights and Privacy Act (FERPA)

Few privacy laws affect the lives of parents and students on an everyday basis as does the Family Educational Rights and Privacy Act (FERPA). FERPA affords parents the right to inspect and review their children's education records; the right to seek to amend information in the records they believe to be inaccurate, misleading, or a violation of privacy; and the right to consent to the disclosure of **personally identifiable information** from the education records. When a student turns 18 years old or enters a postsecondary institution at any age, the rights under FERPA transfer from that student's parents to the student ("eligible student"). The FERPA statutory citation is 20 U.S.C. §1232g and its regulatory citation is 34 C.F.R. Part 99.

FERPA was one of the first federal privacy statutes passed by Congress. Senator James L. Buckley of New York was the main architect and legislative sponsor of FERPA, adding the provisions as an amendment to a pending education bill in the summer of 1974. By introducing this legislation, Buckley sought to address what he viewed as a violation of the rights of parents, who were being denied access to information schools maintained on their children, and to address a routine lack of privacy of students' education records. President Ford signed FERPA into law on August 21, 1974, with an effective date of November 19, 1974. On December 31, 1974, Senator Buckley and Senator Claiborne Pell of Rhode Island cosponsored major amendments to FERPA to address ambiguities that had arisen about the new requirements in the four months after its passage, making the changes retroactive to its effective date.

Simply put, FERPA protects the privacy of education records and the privacy interests of parents in their children's education records. FERPA does this by conditioning the receipt of federal education dollars by educational agencies and institutions on the condition of compliance with FERPA's requirements. As a general rule, FERPA applies to all public school districts and virtually all postsecondary institutions, public and private. Private schools at the K-12 level, for the most part, are not recipients of U.S. Department of Education funds and are, thus, not subject to FERPA.

The requirements of FERPA center on the definition of "education records." The term is broadly defined to mean all records that contain information directly related to a student and that are maintained by the educational agency or institution or by a party acting for the agency or institution. While parents and eligible students must provide consent before personally identifiable information from