



The Right to Privacy

The word *privacy* does not appear in the U.S. Constitution. The Fourth Amendment protects privacy of landowners from unreasonable search and seizure by the government. This is the most direct protection of privacy in the Constitution. There is an inherent contradiction between freedom of speech in the First Amendment, particularly in relation to the press, and the personal right to privacy. Ultimately this contradiction leads to a conflict between privacy and the press, between the right to be let alone and the right to know. In an article in the Harvard Law Review in 1890, Louis Brandeis and Samuel Warren defined a personal right to privacy as separate from property. Brandeis and Warren outlined the right of privacy on the notion of "inviolate personality." The criterion for protection was the general right to immunity of the individual.

The Fourteenth Amendment right of "liberty," has been the basis for family law, giving parents the right to make decisions regarding their children's welfare. It declares that no person will be denied "life, liberty or property, without due process of law." The court defined these rights as "deeply rooted in this nation's history and tradition" and "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if sacrificed." These rights include marriage, procreation, contraception, family relationships, child-rearing and education, abortion, and consensual sexual activity between adults. Although seen as fundamental, these rights are not absolute. Justice O'Connor reinforced the concept of personal liberty when she said, "...At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

Confidentiality is an application of the right to privacy in mediation. Finding the boundaries between the parents' right to know and their right to maintain separate lives, is an important part of family mediation. Understanding our Constitutional right to privacy is not an abstraction, but an issue we are being asked to sort out in our everyday lives. Before the passage of the USA PATRIOT Act in 2001, confidentiality in mediation was complex. It is now more precarious. The government under Section 215 may confiscate any of the mediator's records, while the mediator would be prohibited from informing the parties. It is essential that mediators and parties be clear about the limitations on privacy throughout mediation.

The reality of privacy is confusing. What was a shared privacy right of the intact family, becomes the individual privacy rights of the adults who choose to live separately. While children have no privacy rights, when parents separate, the child is in the difficult position of maintaining the privacy rights of the parents as they go back and forth. What information is necessary for parents to share and what is private? How can children differentiate the two? Without support, children feel confused and apprehensive about what they can and cannot say to each parent as they attempt to adjust to a variety of shared parenting arrangements.