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The Right to Privacy: Gays, Lesbians, and the Constitution by Vincent J. Samar

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With a theory grounded as much in philosophy as in law, Vincent Samar's The Right to Privacy: Gays, Lesbians, and the Constitution provides a unique examination of the controversial issues surrounding the right to privacy.1 In so doing, Samar asks whether a right to privacy exists in United States constitutional law, and if so, how far its coverage and protections extend.

As the book's subtitle suggests, privacy issues are particularly important to the gay and lesbian rights movement in the United States.2 With sodomy laws in place in twenty-four states, same-sex relationships are criminal per se for millions living in the United States.3 Additionally, such issues as HIV-privacy and artificial insemination disproportionately affect gay men and lesbians, respectively. In seeking to develop an acceptable definition of legal privacy, and to justify the degree to which he believes privacy should be protected, Samar tailors much of his discussion to many of the particular privacy-related issues affecting gays and lesbians.4

Gays and lesbians faced the issue of whether the right to privacy covers them in the 1986 Supreme Court decision, Bowers v. Hardwick.5 The issue in Bowers was whether a right to privacy protects gays and lesbians from prosecution under a state sodomy statute that made adult consensual sodomy a crime.6 Michael Hardwick had been arrested by police, and charged with violating Georgia's sodomy statute7 after police witnessed him engaging in oral sex with

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* Topics Editor, Boston College Third World Law Journal.


2 See, e.g., Robin Shea Foreman, Note, Constitutional Law—The "Outer Limits" of the Right to Privacy, 22 Wake Forest L. Rev. 629, 629 (1987) (noting that gays are subject to criminal prosecution in 24 states that have adult consensual sodomy statutes); Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv. L. Rev. 1285, 1288 (1985) (noting that "commentators and litigators seeking constitutional protection for gay rights rely most frequently on the right to privacy").

3 Foreman, supra note 2, at 629.

4 SAMAR, supra note 1, at ix.


6 Id. at 187–88.

7 Georgia's sodomy statute, Ga. Code Ann. 16-6-2 (1984) states:
another man in Hardwick’s bedroom. Hardwick challenged the statute’s constitutionality, alleging that it infringed upon his rights of privacy and freedom of association.

The Supreme Court, through Justice White, refused to apply a privacy-based analysis to Hardwick’s claim. Justice White stated that the so-called “privacy cases” cited by Hardwick in support of his claim were in fact limited in their holdings to protecting the fundamental privacy interests in marriage, family, and procreation. Rather than addressing whether the Court’s previous decisions provided Hardwick with a right to privacy in his home, the Court phrased the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.” Basing its decision on what it concluded was a long history of societal condemnation of homosexuality, the Court refused to find such a fundamental right. The Court went on to state that “such conduct” was neither “deeply rooted in this Nation’s history and tradition,” nor “implicit in the concept of ordered liberty”—two elements the Court said normally characterize fundamental rights. In his dissent, Justice Blackmun disagreed with the majority’s framing of the issue. Justice Blackmun stated that an individual’s “right to be let alone,” was the real issue the Court faced in Bowers. He further stated his belief that the Court’s line of privacy cases supported Hardwick’s claim that Georgia had unconstitutionally infringed upon his right to privacy.

Because the Constitution does not expressly provide a right of privacy, the notion of “the right to be let alone,” in the sense of being free from intrusive government practices, has evolved over

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .
(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

9 See id. at 188.
10 Id. at 190.
11 For a brief discussion of the privacy cases, see infra notes 20–31 and accompanying text.
12 Bowers, 478 U.S. at 190.
13 Id. at 189 n.4.
14 Id. at 192–94.
15 Id. at 194.
16 Id. at 199 (Blackmun, J., dissenting).
17 Id. (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
18 Bowers, 478 U.S. at 203–04.
time.\textsuperscript{19} In their now famous article, \textit{The Right to Privacy},\textsuperscript{20} Samuel Warren and Louis Brandeis argued in the late nineteenth century that courts should recognize a cause of action for invasions of personal privacy based on the general proposition that a person has a right to be let alone.\textsuperscript{21} By 1965, the Supreme Court began recognizing certain rights of privacy. In \textit{Griswold v. Connecticut},\textsuperscript{22} for example, the Court invalidated a Connecticut statute that made it a crime for individuals to use contraceptives.\textsuperscript{23} Writing for the majority, Justice Douglas stated that the Bill of Rights had "penumbras" that established zones of privacy, which the State could not invade.\textsuperscript{24} He stated that these penumbras may be implied from the rights enumerated in the First, Fourth, and Ninth Amendments.\textsuperscript{25} Concurring opinions by Justices Goldberg and Harlan grounded the right to privacy more firmly in the text of the Ninth\textsuperscript{26} and Fourteenth Amendments,\textsuperscript{27} respectively.

In subsequent cases, the Court expanded upon the right to privacy. Within a six-year span, the Court struck down a Virginia statute that prohibited interracial marriage,\textsuperscript{28} a Massachusetts statute that made it a crime to distribute contraceptives to unmarried persons,\textsuperscript{29} a Georgia statute that prohibited the private possession of pornography,\textsuperscript{30} and, in \textit{Roe v. Wade}, a Texas statute that made a


\textsuperscript{21} Id.

\textsuperscript{22} 381 U.S. 479 (1965).

\textsuperscript{23} Id. at 484.

\textsuperscript{24} Id. at 485.

\textsuperscript{25} Id.

\textsuperscript{26} Id. at 488 (Goldberg, J., concurring). Justice Goldberg believed that the Ninth Amendment, which states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," provided a better basis for finding a privacy right in this context.

\textsuperscript{27} Id. at 500 (Harlan, J., concurring).

\textsuperscript{28} Loving v. Virginia, 388 U.S. 1 (1967). The Court held that the prohibition violated the Equal Protection Clause of the Fourteenth Amendment because it was based on a racial classification.

\textsuperscript{29} Eisenstadt v. Baird, 405 U.S. 438 (1972). Justice Brennan stated that the privacy right equates to "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 453. Important in this decision, as well as in Roe v. Wade, 410 U.S. 113 (1973), was the Court's focus on protecting the private nature of an individual's decisions in this area. Previously, as in Griswold, the Court had emphasized the importance of the marital relationship in justifying a privacy right. 381 U.S. 479 (1965).

\textsuperscript{30} Stanley v. Georgia, 394 U.S. 557 (1969). The Court held that the statute violated the plaintiff's right to privacy under the Due Process Clause of the Fourteenth Amendment, as well as his First Amendment right to receive information.
woman's decision to terminate her pregnancy a crime. 31 Although in these decisions the Court was apparently willing to recognize a right to privacy, it remained unclear exactly where constitutionally the Court was grounding the right, and just how far the privacy right's coverage extended. 32 According to many commentators looking at the broader implications of these decisions, the Court appeared to be recognizing the value of, and a right to, personal autonomy, in that the Court was protecting individual decisions in areas of marital relations, procreative choice, and sexual expression. 33

It is this emphasis on personal autonomy that provides Vincent Samar with the basis of his theory that justifies the extension of the privacy right to protecting, among other things, gays and lesbians from prosecution under sodomy statutes that make adult consensual homosexual acts crimes. 34 Samar believes that in order for participatory democratic societies to function optimally, it is crucial that government encourage personal autonomy. 35 To encourage personal autonomy, he believes the State must protect privacy. 36 Samar states that "within the context of a democratic institution, [privacy is] a necessary precondition for guaranteeing personal autonomy." 37

If the above synopsis of Samar's theory for justifying privacy seems vague to the average legal mind, perhaps it is partly because Samar brings to his analysis a background in philosophy, as well as in law. In fact, as he writes in his preface, The Right to Privacy is an outgrowth of his doctoral dissertation in philosophy at the University of Chicago. 38 In the first half of the book, Samar uses the unique perspective that this background gives him by discussing the concept of privacy and how it is defined, and positing a justification for its protection in our society.

Samar believes that one of the main reasons controversy has surrounded privacy issues in recent years is that courts, legislators, and the general public "do not have a clear understanding of the

31 410 U.S. at 113.
34 See Samar, supra note 1, at 86–103.
35 Id. at 90.
36 Id.
37 Id.
38 Id. at xiii.
scope and content of privacy or why we are justified in protecting it as a right." In other words, the Court has not adequately explained how such seemingly diverse rights as a woman's right to have an abortion and an individual's right to possess pornography are protected under the common rubric of "privacy." Samar attempts to provide this explanation by discussing the importance of autonomy to the successful functioning of democratic institutions:

Privacy should be valued in Western democracies because of its kindred relationship to the value of personal autonomy. Indeed, . . . protecting privacy . . . is, within the context of a democratic institution, a necessary precondition for guaranteeing personal autonomy. . . . [If] personal autonomy is a fundamental value to be fostered by democratic institutions, then privacy should be valued by those institutions to the same extent.

As Samar readily admits, this theory begs the question of what personal autonomy means. Samar defines autonomy as "the conditions that govern a person's participation in a rule-governed activity [which] are set by the activity itself." This follows from the classic libertarian theory espoused by John Stuart Mill—the belief that there are certain spheres in an individual's life that are beyond the permissible reach of government. While this definition sounds synonymous with a definition of privacy, Samar states that privacy is better thought of as a prerequisite to achieving individual autonomy. This is because freedom of action (at least in ways that do not infringe upon any other individual's rights) allows people to develop more fully their own opinions, ideas, and decisions, which, in theory, strengthen democratic institutions.

In order to tie this belief in the importance of privacy to the Constitution, Samar refers to interpretations of the Ninth Amendment that posit that the Ninth Amendment signals the existence of federal constitutional rights beyond those specifically enumerated in the Constitution. Samar admits that this differs from the tra-

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39 Id. at 13.
40 Id. at 90.
41 Id.
42 Id. at 86-87.
44 See Samar, supra note 1, at 95.
45 Id. at 96.
46 Id. at 93 (citing John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 34-41 (1980)); see also Griswold v. Connecticut, 381 U.S. 479, 486 (Goldberg, J.,
ditional interpretation of the Ninth Amendment, which holds that it was included in the Bill of Rights to assure the ratifiers that the Bill of Rights would not extend the powers of the federal government beyond those specified in Article I, § 8, of the Constitution. In response to this traditional argument, Samar refers to John Hart Ely's theory regarding the framers' intentions in drafting the Ninth Amendment:

Ely argues that since the Tenth Amendment also serves to assure the ratifiers of the limit on federal powers, the Ninth Amendment must serve the function of bringing in additional rights beyond those specifically enumerated in the Constitution. . . . Ely concludes, [the Ninth Amendment] must have been intended to incorporate other federal constitutional rights than what the first eight amendments set out in The Bill of Rights. Thus, according to Samar, the Ninth Amendment encourages people to discover and develop their own interests by guaranteeing the sanctity of their decisions with respect to those interests. Samar refers to this as the "substantive freedom" component of autonomy, and he justifies the broad interpretation of the Ninth Amendment by stating that because there is a clear connection between "the protection of autonomy as a fundamental end of democratic government and the protection of privacy, . . . it would not be too large a claim for the Ninth Amendment to protect privacy as we have construed it."  

After justifying the basis for a constitutional right of privacy in this way, Samar goes on to write that there are only two circumstances in which the right of privacy may be sacrificed in a democracy. First, when a competing right conflicts, and the situation is such that the interest in autonomy is better served by protecting the competing right, the privacy interest may be ignored. For example, when a newspaper publishes information about a politician's prior drug use, the individual's right to privacy conflicts with the newspaper's First Amendment right to freedom of speech. In such a case, a court may find that autonomy is fostered more by the public having access to important information about their lead-

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47 Samar, supra note 1, at 93.
48 Id. (citing Ely, supra note 46, at 38).
49 Id.
50 Id. at 93–94.
51 Id. at 103.
ers than by protecting the privacy of the public figure. In that case a court may rule that the First Amendment right trumps the privacy right.

Outside of a direct conflict between privacy and other constitutional rights, the other instance in which the privacy right may be sacrificed occurs when the government wants to protect an interest that is more "compelling" than privacy to preserving autonomy.\(^{52}\) In this situation, though, the burden would be on the government to show that the interest that it seeks to protect, to the detriment of the privacy right, is indeed compelling. Therefore, the presumption will always be that privacy, as the fundamental requirement of autonomy, is the most compelling right.

As an example of a compelling interest that supercedes the privacy right, Samar states that the protection of the public's health and well-being is more compelling than the privacy interest in allowing a person to keep explosives in the home.\(^{53}\) He points out, however, that the existence of a seemingly compelling governmental interest does not mean that the government can justify any degree of intrusion into the right of privacy.\(^{54}\) For example, again in the context of the protection of public health, protecting the safety of the nation's blood supply is probably a compelling interest justifying the requirement that donors' blood be tested for HIV antibodies. On the other hand, requiring agencies and hospitals to keep a list of the names of all those persons who tested positive for the virus goes beyond the interest in protecting the nation's blood supply, and in fact has a negative impact on personal autonomy. In sum, even after the Court determines that the government has a valid compelling interest that justifies governmental intrusion into the privacy right, the government should not intrude into the privacy right if such encroachment would foster less autonomy than it protects.

Critics of this type of broad implication of privacy rights generally adhere to a "strict constructionist" view of constitutional rights.\(^{55}\) They believe that the framers "specifically rejected the idea that the Court should be a 'Council of Revision' with the authority to alter legislative policy."\(^{56}\) Therefore, critics believe that legislative

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\(^{52}\) Id.

\(^{53}\) Id. at 112.

\(^{54}\) Id. at 115.

\(^{55}\) Id. at 122.

judgments, such as sodomy statutes, should remain in place unless they contravene a principle "fairly discoverable" in the Constitution57 (or, of course, if they are repealed by the state's legislature). As Robert Bork indicated during his Senate confirmation hearings, strict constructionists do not necessarily believe that a right to privacy is fairly discoverable in the Constitution.58

Responding to this strict constructionist argument, Samar quotes Ronald Dworkin:

Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my meaning was limited to these examples. . . .59

Samar summarizes Dworkin by arguing that the Constitution appeals to various moral concepts, but that it does not prescribe specific moral conceptions.60 The framers had the opportunity to place particular moral conceptions into the Constitution to govern the Supreme Court's decision-making. Because they chose not to fix specific moral conceptions into the Constitution, the framers intended that the Court look at the broad principles underlying the Constitution.61 According to Samar, one of the most important principles underlying the Constitution is the interest in fostering autonomy. He believes that this is best achieved by protecting privacy interests.62

Unlike other commentators who have attempted to justify the right to privacy by looking for explicit constitutional guarantees,63 Samar justifies the right to privacy by relating it to the fundamental ends of our government—autonomy and democracy.64 In this way Samar believes he removes his theory of justification from the debate over whether privacy itself is guaranteed in the Constitution, because he chooses to discern the practical objectives of democratic institutions in order to conclude that the privacy right is a precondition to personal autonomy.65

57 Wertjes, supra note 19, at 1238.
58 See Samar, supra note 1, at 5.
59 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1977), cited in Samar, supra note 1, at 122.
60 Samar, supra note 1, at 123.
61 See id.
62 Id. at 90.
63 Id. at 131 (citing RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW 83 (1988)).
64 Samar, supra note 1, at 132.
65 See id.
After developing his autonomy-based justification for a general right to privacy, Samar uses the last part of his book to apply his conception to ten topical and controversial privacy issues: openly gay school teachers; gay and lesbian parenting and marriage; surrogate motherhood; privacy and AIDS; adult consensual sodomy statutes; the justification of abortion rights; data banks and electronic fund transferring services; pornography and drugs in the home; employer drug testing of employees; and the right to die.\textsuperscript{66} In each situation, Samar sets up the issue and explains how his analysis would be used to resolve the controversy. This application section is extremely helpful to the reader, as it places the more philosophical underpinnings of Samar's theory into legal contexts that are perhaps more familiar to the reader.

Samar's application of his theory to the issue of the openly gay school teacher provides a good example. Samar alludes to a situation where Jim, a public school teacher, is openly gay.\textsuperscript{67} Roger, a parent of a child in Jim's class, objects to having a gay teacher because of the harm he thinks may befall the child (presumably in the form of influencing the child's sexual orientation).\textsuperscript{68} This presents a potential conflict of rights situation. Before there is a conflict, however, Roger must show that he has a right that is being infringed upon by Jim's sexuality.\textsuperscript{69} To accomplish this, Roger must establish a causal psychological connection between a child's sexual orientation and the sexual orientation of one of that child's teachers.\textsuperscript{70} Samar then lists all of the reasons refuting such a connection, thus concluding that there is not a conflict of rights in this situation.\textsuperscript{71} Even if Roger could somehow show a causal connection between a school teacher's sexual orientation and the sexual orientation of the children he or she teaches, Roger would still have to show that homosexuality is in itself harmful before a court should, under Samar's theory, weigh which party's rights are more important to fostering personal autonomy.\textsuperscript{72}

\begin{itemize}
\item \textsuperscript{66} \textit{Id.} at 139.
\item \textsuperscript{67} \textit{Id.} at 142–43.
\item \textsuperscript{68} \textit{Id.} at 143.
\item \textsuperscript{69} \textit{Id.}
\item \textsuperscript{70} \textit{Id.} Samar states that "if Roger should assert, as the basis for his claim, that Jim's being allowed to continue to teach would cause Roger to lose favor with God, a court should not take account of it. The truth of such a claim cannot be assessed on the basis of the standards of evidence normally relied on by courts." \textit{Id.}
\item \textsuperscript{71} \textit{Id.} at 144–46.
\item \textsuperscript{72} See \textit{id.}
\end{itemize}
In each of these cases, Samar states that once there is a conflict between the rights of two or more parties, personal autonomy becomes the deciding factor. He concludes that because privacy is so often critical to fostering autonomy, in many of the most controversial issues facing the courts in the privacy area, adhering to his autonomy-based theory of privacy would result in finding the privacy right dominant in most situations.

It is Samar's application of his autonomy-based theory for justifying a broad right of privacy to these controversial situations that makes Samar's *The Right to Privacy* a particularly interesting addition to the already crowded field of books and articles discussing the basis for the privacy right. Additionally, the philosophical base from which Samar writes gives this book some unique insights into why privacy is in fact valued in our society, and why a broad theory of privacy rights fits within the context of our democratic institutions.

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75 *Id.* at 139.