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# Gay-Rights as a Particular Instantiation of Human Rights

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# VINCENT J. SAMAR, GAY-RIGHTS AS A PARTICULAR INSTANTIATION OF HUMAN RIGHTS

64 Alb. L. Rev. 983, 1011-1015 (2001).

[W]e can derive a definition for what a private act is, which I take to be central to the law of privacy. That definition is: "An action is self-regarding (private) with respect to a group of other actors if and only if the consequences of the act impinge in the first instance on the basic interests of the actor and not on the interests of the specified class of actors." The definition derives from the two common strands of privacy law insofar as it provides a theoretical definition of what self-regardingness means and a rationale for understanding why one would claim to be left alone. \* \* \*

[T]here is a sense in which any act (by the mere fact of its being known) can affect another person. A fundamentalist Christian, for example, may feel disgust living in a state that allows abortion or same-sex sexual relationships. Thus, to avoid the problem of having no act ever be private, I understand the phrase in the first instance to mean that a mere description of the act without the inclusion of any additional facts or causal theories suggests a conflict with another's interest. \* \* \*

Another issue concerning the definition of a private act is the difference between the basic interest of the actor and the interest of the specified class of actors. The point is not to undo, by an overly broad sense of the word "interest," what the specification of "in the first instance" achieves. To prevent this from happening, one must understand a basic interest as an interest that does not presuppose any institutional or factual conception. Any other interest is a derivative interest, as it would include such institutional or factual conceptions. So, for example, the

category "freedom" subsumes such basic interests as expression, privacy, thought, and worship. The category of well-being subsumes such basic interests as health, physical integrity, and mental equilibrium. By contrast, the right to marry is derivative of the basic interest in freedom combined with the institutional arrangement of marriage, and the right to a primary education is derivative of the basic interest in well-being combined with the factual conception that a primary education advances one's well-being.

However, the definition of a private act does not capture why private information and states of affairs are protected. For that a separate, but related, definition of a private state of affairs is needed. "A state of affairs is private with respect to a group of other actors if and only if there is a convention, recognized by the members of the group, that defines, protects, preserves, or guards that state of affairs for the performance of private acts." The first definition works to define what a private act is. The second works to identify the privacy interest at stake where information and places are causally connected to private acts. The two definitions are related because what other people know or can find out about another may inhibit a person from the performance of private acts. They are also related because people sometimes need a private space to feel the personal satisfaction that makes worthwhile the performance of private acts. Thus, while the first definition is part of what is meant by privacy, the second definition comes about because of the psychological/causal connection between private acts and what others can find about them.

A justification for the right to privacy begins with autonomy as a value. Properly understood, autonomy, in the sense meant here, refers to the conditions under which one acts, as opposed to privacy, which involves the nature of one's action. The conditions under which one acts, if autonomous, should follow out of the nature of the action itself and not from any outside forces. So, for example, if individuals play the stock market, their choices are autonomous even when limited by the economic laws of supply and demand, but they are less autonomous when SEC regulations mandate additional, non-market rules. Understood in this way, the value associated with autonomy is the value associated with self-rule, in which the individual is free to act unless doing so would jeopardize the equal autonomy of others. That said, one could use this notion of justified autonomy itself as a justification for privacy rights.

The justification works as follows. If autonomy is a value, then the most idealized instance of autonomy must also be a value. Since privacy, according to our definition, involves only actions that do not affect others in the first instance, it must be a value if autonomy is valued. One often wants to say that autonomy is limited only when another's interest is at stake. However, since privacy, by definition, involves only those actions

where another's interests are not at stake, at least not in the first instance, to value autonomy at all, \* \* \* is to value privacy.

Beyond protecting private acts, this notion of autonomy also justifies democratic government and private states of affairs. Where the former justification of private acts is *a priori*, the latter two are *a posteriori*. That is to say, where, in the former situation, the value of private acts follows out of what it means to value autonomy at all, in the latter situation the value of private information and states of affairs derive from the causal connection autonomy has to both democracy and private states of affairs. That connection is that protecting these latter two ends preserves autonomy generally. Promoting democracy protects autonomy by ensuring that everyone can engage in self-rule; protecting private states of affairs guarantees autonomy by providing individuals with the opportunity to perform private acts. Interestingly, democracy and the protection of private states of affairs are inter-justificationally related because, if one has the opportunity to engage in private acts or to discover information about them, one can be a more informed voter. And if one is an informed voter, one will seek to protect private states of affairs as a condition under which that information is obtained unless there would be some harm caused to others in the process. So, even from a minimal understanding of autonomy, such as involving the idealized protection of private acts, one can derive safeguards for the protection of private places and private information. \* \* \*

[Basic human rights include a right to privacy. What does the human right to privacy mean specifically for gay-rights? It means that laws, which prohibit adult consensual same-sex activities in the home, are morally illicit and should be held unconstitutional if the constitution is to be interpreted as affording basic human rights protections.]