

**Abstract: From Privacy to Liberty: Sharing After *Lawrence***  
**Thomas P. Crocker**

*From Privacy to Liberty* addresses the failure of the Constitution to protect shared social aspects of ordinary life. Under the Supreme Court's third-party doctrine, if I reveal information to another person, I no longer have an expectation of privacy, and thus, I no longer have Fourth Amendment protection in that information. This much-maligned doctrine has been criticized by many, and defended only once recently in the pages of the *Michigan Law Review*. The effect of this doctrine is to leave most aspects of ordinary life shared in the company of others constitutionally unprotected. For example, revealing one's location to a network of friends and family under a cell-phone service such as Loopt entails that one no longer has Fourth Amendment protection against a State official accessing this information. In an increasingly socially networked world, the Fourth Amendment may fail to protect precisely those liberties to live free from state surveillance and intrusion the Constitution should protect. With the third-party doctrine well-entrenched in Supreme Court jurisprudence, what conceptually and jurisprudentially can be done?

This Article develops an understanding of *Lawrence v. Texas* as protecting the interpersonal relationships constitutive of everyday life and develops a framework for revising Fourth Amendment jurisprudence in light of *Lawrence's* protection for interpersonal liberty. By following the lessons of *Lawrence*, we can reorient Fourth Amendment jurisprudence away from its focus on privacy in order to protect interpersonal liberty. From its opening sentence—"Liberty protects the person from unwarranted government intrusions into a dwelling or other private places"—*Lawrence* sounds like a Fourth Amendment case decided under due process. For *Lawrence*, an intimate relationship is protected through the liberty we have to live our lives free from government domination, yet under current Fourth Amendment jurisprudence, an intimate relationship becomes an opportunity for government intrusion into the relationship or the home. Under the Fourth Amendment, when we share aspects of our lives with others, we assume the risk that they will grant the State access to what we have shared. The State does not invade our privacy when it accesses what we have shared. Against the background of the third-party doctrine, we preserve our privacy only by avoiding ordinary acts of interpersonal sharing. By contrast, the *Lawrence* Court explains that intimate conduct is inseparable from personal relationships in which the conduct has meaning and therefore constitutes a private sphere where government may not intrude. As a consequence of these different doctrinal frameworks, persons who share their lives with others through intimate and expressive relationships receive protection from government interference under due process, but these same acts of sharing render persons vulnerable to government intrusion under the Fourth Amendment.

I argue that if personal relationships "safeguard[] the ability independently to define one's identity that is central to any concept of liberty," as the right to associations case *Roberts v. Jaycees* instructs, and if the liberty protected by the Constitution protects "personal bond[s] that are more enduring," as *Lawrence* concludes, then the Fourth Amendment framework, which views relationships as constituted by risk that the government may legitimately exploit, should be revised in light of the lessons of *Lawrence*. These lessons focus our attention on liberty, not privacy. The Court's focus on privacy under the Fourth Amendment has obscured the broader constitutional goal of protecting liberty. I am not alone in seeing the need for developing a new focus for the Fourth Amendment. Professor Jed Rubenfeld has recently argued in his article *The End of Privacy*, that the Fourth Amendment protects a "right to be secure," not a right to privacy. I agree that we need to move away from privacy, but argue that the primary goal of ensuring security is to protect liberty.

Appealing to the political theory of Hannah Arendt, I suggest that important aspects of both ordinary personal and political life are at stake in the need to protect the liberties of shared social practices free from unwarranted government intrusion. Liberty is not the liberty of isolated individuals, but the liberty of everyday life lived in the company of others.

The version provided for the Workshop omits some sections of a longer article, but the overall argument and framework is included.