

From Privacy to Liberty: Sharing After *Lawrence*

Thomas P. Crocker*

Wanting to stay more closely connected with her close social network of friends, Jane signs up for a new cell-phone service.¹ Utilizing her phone's global positioning technology, she subscribes to a service that tracks her and her friends' whereabouts. With this service, she can find her friends easily and they can find her—down to the exact spot where she is currently reading a book over a cup of coffee. Joe does not have to wonder if Jane is currently at their favorite coffee shop. His phone will tell him. Neither Jane nor Joe intend to reveal to all the world their whereabouts. Their phones help them keep track of their friends and family—their chosen close social networks. Through the same service, each of their phones will also inform the police of their location, should the police become interested. No Fourth Amendment requirements of warrants or probable cause stand between the police and Jane's social network.

As far as the Fourth Amendment is concerned, government officials are entitled to access information that individuals publicly reveal. The Supreme Court has construed the Fourth Amendment to provide no protection in information voluntarily revealed to third parties: “the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose.”² Effectively, what a person reveals to one, she reveals to all. Because Jane reveals her location at all times to her group of friends, not to mention her cell-phone service provider, she has no expectation of privacy against state agents monitoring her movements just as if they were part of her network of friends. Moreover, her

location is publicly accessible. Police are free to conduct public surveillance of her movements with no requirement of individualized suspicion.³ By occupying public space, she no longer has an expectation of privacy in her movements.

The third-party doctrine yielding this outcome has been much maligned in the legal academy.⁴ Nonetheless it persists, despite some obvious ways it infringes upon the liberty of persons to live their lives shared in the company of others free from government intrusion and interference. As Professor Mary Coombs argued in an important article more than two decades ago, “current fourth amendment jurisprudence is impoverished and distorted by neglecting the ways in which privacy embodies chosen sharing.”⁵ Surreptitious and suspicionless monitoring of our relations with others—what we reveal to third parties—I argue undermines the conditions of ordinary personal life shared in the company of others, secure in the blessings of liberty. Liberty, however, has not been the focal consideration of Fourth Amendment jurisprudence. Privacy has.

Both the Fourth and Fourteenth Amendments protect privacy, though they do so under different doctrinal frameworks. Both protect the liberty of persons to live free from government intrusion into private spheres of their lives. Despite these similarities of overall purpose, the Supreme Court’s decision in *Lawrence v. Texas*⁶ makes manifest a conflict between the different ways each provision protects both liberty and privacy. 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.

The doctrinal conflict unfolds as follows. In the due process context, the Court describes the value of privacy as protecting “a promise of the Constitution that there is a realm of personal

liberty which the government may not enter.”⁷ In the Fourth Amendment context, the Court explains that we have “right to privacy, no less important than any other right carefully and particularly reserved to the people.”⁸ Both provisions seek to preserve a realm of personal life free from unwarranted state intrusion. Due process protects realms of personal liberty, while the Fourth Amendment protects a right to privacy. Nonetheless, these two strains of privacy have developed in relative isolation from each other. Through the Fourteenth Amendment source of privacy as protected by the liberty of the Due Process Clause,⁹ the Court has examined the substantive context and effects of government practice on the lives of persons implicated by government regulation. Through Fourth Amendment privacy as protected against unreasonable searches and seizures, the Court has established procedural protections such as the warrant requirement to constrain government officials. Under due process, the Court asks what are the effects of the practice on personal liberty and dignity. Whereas under the Fourth Amendment, the Court more often asks whether police have followed particular procedures. Police are required to follow Fourth Amendment procedures, however, only when the Court makes a threshold determination that a search or seizure has occurred. Under the Fourth Amendment, rather than asking what are the effects of the police practice on personal liberty and dignity, the Court looks to whether it can find a suitable social expectation of privacy, where privacy is narrowly construed to mean secret, undisclosed, or publicly concealed. By contrast, under due process, the Court examines the effects on the lives of individuals impacted by government policy with more exacting scrutiny, often demanding a compelling government reason for any interference with individual liberties.

In *Lawrence*, the Court begins by acknowledging that “[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places.”¹⁰ This statement

refers equally to the protection afforded the marital bedroom against invasions of liberty under due process as it does the protection granted the home against unreasonable searches and seizures under the Fourth Amendment. Writing for the Court, Justice Kennedy continues: “Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹¹ As the *Lawrence* Court explains, intimate conduct is inseparable from the personal relationships in which the conduct has meaning and therefore constitutes a private sphere where government may not intrude.

In contrast, the Court explains in cases like *Randolph v. Georgia*, that intimate relationships render one vulnerable to the consent those with whom one shares one’s life might give the police.¹² For *Lawrence*, an intimate relationship is protected through the liberty we have to live our lives free from government domination, yet for *Randolph*, an intimate relationship becomes an opportunity for government intrusion into the relationship or the home. Under the Fourth Amendment, we assume the risk that those with whom we share aspects of our lives either are, or will become, figurative agents of the State and thereby grant the State access to what we have shared. We preserve our privacy only by avoiding ordinary acts of interpersonal sharing. We must keep to ourselves. We must not reveal to others information about ourselves lest we lose our privacy protection. From the due process perspective, to preserve privacy in this manner undermines “the liberty of persons to choose” to enter into personal relationships free from government intrusion.

These two doctrinal frameworks – each purporting to protect the privacy and liberty of the individual – are in unsustainable conflict. If personal relationships “safeguard[] the ability independently to define one’s identity that is central to any concept of liberty,”¹³ and if the liberty protected by the Constitution protects “personal bond[s] that are more enduring,”¹⁴ then

the Fourth Amendment framework that views relationships as constituted by risk that the government may legitimately exploit should be revised in light of the lessons of *Lawrence*.

So far I have described the problem only in terms of constitutional doctrine. More than doctrine is at stake, however, since the constitution constructs the conditions under which ordinary life is lived. Ordinary life is constituted through activities that involve sharing with other persons in ways that are simultaneously private and public. A typical day for an ordinary person will involve sharing thoughts, information, ideas, intimacies, conversations, company, friendships, associations, dwellings, and public spaces – in short, will involve many of the features of our lives as lived in the company of other persons. These activities are private to the extent that they constitute our sphere of personal social relations as distinguished from a sphere of more impersonal, civic or official relations. These activities are public insofar as they involve social coordination with other persons in spaces and places often described as public – in offices, parks, restaurants, “public” buildings, churches, streets, sidewalks, etc.¹⁵ A single activity may entail both private and public aspects. A conversation with a friend on a park bench may be a private conversation insofar as it is not intended for public broadcast, but is also public if it occurs in a place visible to any stranger who happens to look or any eavesdropper who happens to listen. Privacy and publicity do not define entirely separate spheres of life.¹⁶ Jane’s participation in her cell phone provider’s social networking service illustrates the limited public, but still private, nature of ordinary life shared among friends. Her participation in the service reflects the value she places on staying connected with her close personal relations, but does not reflect a desire or expectation she has to make her movements known to the general public.

Fluid boundaries between what is private, though in the company of others, and what is genuinely public, even if unnoticed by others, shape how we live ordinary life. We define the

boundaries of our interpersonal relations with others by both sharing with and withholding aspects of our lives from others. How much we share and the substance of what we share with others helps constitute the closeness or intimacy of a relationship. Ordinarily, the more one shares with another, the more that sharing implicates interpersonal structures of mutual trust, care, and affection. Undercutting the notion that privacy denotes acts of non-disclosure, the more we share, the more private and personal the relationship with another person becomes. By contrast, acts of non-disclosure define our most public and impersonal relations with others.

Law is not a neutral player in this dynamic. If constitutional doctrine defines particular acts or disclosures as exposures to the public, and if public exposure forfeits privacy protections, then how the doctrine defines privacy determines what aspects of ordinary life receive protection from government interference. What receives constitutional protection in turn shapes the boundaries of ordinary life.

It is perhaps too much to hope that the Supreme Court will reverse course and abandon the third-party doctrine in order protect wider spheres of shared privacy. Constitutional law, however, does not depend on existing doctrine alone. It also depends on judicial selection and vision—the ability to see constitutional provisions in a new light.¹⁷ Professor Jed Rubenfeld, for example, has recently called for reorienting Fourth Amendment inquiry to ask “whether the search-and-seizure power the state has asserted could be generalized without destroying the people’s right of security.”¹⁸ Under Rubenfeld’s approach, the Court should hew closely to Fourth Amendment text to protect the people’s right to security. As far as privacy is concerned, the third-party doctrine may be good law, here to stay, but privacy is not the lone object of Fourth Amendment protection. If the Court focused instead on security, different aspects of

existing problems come into focus. *Lawrence* suggests another route of inquiry in shared privacy situations: ask whether a search invades a protected sphere of liberty.

This Article develops an understanding of *Lawrence* as protecting the interpersonal relationships constitutive of everyday life. Interpersonal relationships, *Lawrence* instructs, are intrinsic to the liberty of individuals who share their lives in with others, in some cases in intimacy, and in other cases in collaborative association. When the State exercises its power to criminalize conduct constituting meaningful manifestations of interpersonal relationships, whether it purports to ban contraceptives, to dictate the membership criteria for an expressive association, or to stigmatize homosexual sodomy, the State dominates a protected sphere of liberty. Criminal prohibitions are not the only means of government domination. Government also dominates the private sphere of interpersonal relations when government exploits the vulnerability that attends all acts of sharing. By gaining access to everything which we share with others, the State is able to assume the position of the one with whom we have shared. Whether it is the conversations, dwellings, belongings, or spaces we share with others, when the State occupies the position of the other with whom we share, the State risks becoming a dominant presence in the interpersonal relationships upon which the liberty of persons depends. Generally stated, if government asserts a dominant presence in the private spheres of our lives, then liberty, as both the basis for freely chosen action and as the basis for political consent on which the legitimacy of the State rests, are each at an end. Accordingly, this Article develops a framework for reorienting Fourth Amendment jurisprudence in light of *Lawrence's* protection for interpersonal liberty. *Lawrence*, at its core, is a Fourth Amendment case decided under due process.¹⁹ It is about the state's intrusion into a person's home and private life. *Lawrence's* core inquiry concerns liberty, not privacy.

The Article unfolds as follows. Part I examines how choices about personal matters are ones that occur within particular kinds of relationships into which the State may not legitimately intrude – whether the choices are about marriage, child-rearing, sexual relations, or even childbirth. Privacy is often interpersonal. Although the Court claims in *Lawrence* that “[l]iberty presumes an autonomy of self,” that includes the freedom of “certain intimate conduct,”²⁰ autonomous persons are not protected in isolation from the relationships in which they realize their distinct meaning and identity. We experience and expect privacy in the company of the others with whom we share our lives. Part I concludes that the right to privacy against government intrusion, even in public, is part of the liberty protected both by *Lawrence* and by the right to associate in cases such as *Roberts v. Jaycees*²¹ and *Boy Scouts of America v. Dale*.²²

Having examined the interpersonal nature of privacy and liberty, the Article proceeds in Part II to explore how interpersonal relations become sources of personal vulnerability under the Fourth Amendment. As constructed through Fourth Amendment doctrine, a shared life is a life fraught with assumed risks. Under the doctrinal framework derived from *Katz v. United States*,²³ we receive Fourth Amendment protection against government searches only when we have a reasonable expectation of privacy. We do not have an expectation of privacy, the Court instructs, when we reveal what was undisclosed to others. As the Court explains, when we share aspects of our lives with others, we make ourselves vulnerable to them, by assuming the risk that they may consent to government searches in our absence, or that they are agents of, or informants for, state officials. Accordingly, through its ability to exploit our vulnerability to others, the State has an often unconstrained opportunity to become a dominant presence in our lives in conflict with the constitutional protections afforded interpersonal relations.

Part III explores two ways that the assumption of risk doctrine undermines other core constitutional values. First, when the State becomes a dominant presence in our interpersonal lives, the State undermines the conditions for political interaction. Second, when courts ignore the significance of shared social practices constituting our personal lives, they allow the State to dominate the conditions under which we form our personal identities. Developing one aspect of Hannah Arendt's political theory which emphasizes the importance of interpersonal plurality in politics, this section argues that we risk having dominant government structures undermine fundamental conditions of otherwise protected personal and political life. If unchecked, these intrusions into our interpersonal private lives, as Justice Douglas warned, may create "a society in which government may intrude into the secret regions of man's life at will."²⁴ In light of these problems, Part IV suggests that courts adopt a substantive Fourth Amendment inquiry that examines the nature of the underlying relationship into which government agents wish to intrude. If the intrusion implicates a protected interpersonal relationship, then the State must follow default Fourth Amendment procedures in order to conduct a valid search. This Article concludes that Fourth Amendment jurisprudence should be reoriented and developed in light of *Lawrence* to secure social practices and expectations of shared interpersonal liberty.

I. Interpersonal Privacy After *Lawrence v. Texas*

Constitutional privacy developed along two trajectories. First, by focusing on matters of procreation, family, and marriage, the Supreme Court recognized a right to privacy. Although the Constitution does not specifically refer to privacy, the Court grounded the right of privacy in both particular Bill of Rights provisions and in the structure and interconnection of particular rights taken in combination. Second, by articulating the value protected by the Fourth

Amendment prohibition against unreasonable searches and seizures, the Court recognized a core right to privacy in one's person, home, and effects. Again, the Constitution does not explicitly name privacy for protection. Nonetheless, the Court developed a Fourth Amendment jurisprudence focused on protecting reasonable expectations of privacy. Regarding the first trajectory, the Court has shifted significantly away from further development of privacy protections in favor of protecting a realm of personal and interpersonal liberty grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments. Capable of protecting the same sphere of private and personal life as the right to privacy, the right to liberty is particularly important to constitutional text and tradition. The content and importance of this constitutional trajectory—from privacy to liberty—is the focus of the present section. So far, the Court has not made a similar turn to liberty in the Fourth Amendment context, despite the recognition that it is often called upon to balance the interests of security and liberty.²⁵ As I shall argue in the sections that follow, Fourth Amendment jurisprudence should follow a similar trajectory—from privacy to liberty—especially regarding the protection of intimate and interpersonal relations as *Lawrence v. Texas* suggests.

A. Privacy as Personal

Through a line of cases going back over half a century, the Supreme Court has developed the intertwined ideas of liberty and privacy as protecting a realm of human life free from government intrusion. Relying on the Due Process Clause of the Fourteenth Amendment, the Supreme Court protected the rights to conceive and raise one's own children, in important respects, free from government interference.²⁶ During this same period, the Court also relied on the Equal Protection Clause to protect rights relating to marriage, procreation, and family free

from laws that differentially impact personal choices about how to live in meaningful relationships with others.²⁷ The interlocking protections provided by the Due Process and Equal Protection clauses were articulated beginning with *Griswold v. Connecticut* as protections of the right to privacy.²⁸

Specific constitutional guarantees create what the *Griswold* Court called “zones of privacy,” or “area[s] of protected freedom” into which government may not intrude.²⁹ Drawing on the “penumbras” and “emanations” from other specific Bill of Rights guarantees such as the protection “of the sanctity of a man’s home and the privacies of life”³⁰ under the Fourth and Fifth Amendments, the Court sought to protect the intimate association of the marital relationship in the absence of a single, textually explicit provision upon which it could rely.³¹ The right of association is a “peripheral First Amendment right,” the Court noted, that protects “the freedom to associate and privacy in one’s associations,”³² including the relation of marriage. Because “privacy surround[s] the marital relationship,” government cannot invade the sanctity of this interpersonal association without exceedingly compelling reasons. Important as the right to privacy in one’s associations may be, marriage is not just any association, because it “is an association that promotes a way of life,” according to Justice Douglas writing in *Griswold*, and constitutes “a harmony in living” with “bilateral loyalty.”³³ Although *Griswold* struck down a law forbidding the use of contraceptives as having a “destructive impact” on the marital relation, later decisions broadened the “zone of privacy” to extend to other personal relations that may involve questions of sex and its potential consequences.³⁴ Despite the language focusing on the right of the individual to be free from unwanted government intrusion in *Eisenstadt v. Baird*,³⁵ which extended the protection for the use of contraceptives to non-married persons, the right of

privacy was not something one exercised alone and in isolation from other persons. Marriage, child rearing, and contraception all involve interpersonal associations with other persons.

Consequences of sexual relationships between heterosexual adults disproportionately fall on women, who must bear the immediate burden of choosing how to organize and shape the direction of their lives in light of their pregnancy.³⁶ In view of the Court's recognition that privacy protects choices related to marriage and procreation, it was only a small, albeit momentous, step to recognize privacy's protection for a woman's choice to terminate her pregnancy. Privacy became the linchpin of the Court's opinion in *Roe v. Wade*, as Justice Blackmun wrote, "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."³⁷ What has created enduring controversy over the articulation and application of a right to privacy is its textual status.³⁸ Justice Blackmun, writing in *Roe*, followed a similar scatter-shot method to the one Justice Douglas employed in *Griswold*, noting that "[t]he Constitution does not explicitly mention any right of privacy,"³⁹ though it appears in different guises in several constitutional provisions.⁴⁰ Ultimately, the Court expressed its belief that the right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty."⁴¹ As if to underscore the importance of that founding, after several cases considering various ways in which a woman's right to choose to end her pregnancy could be regulated by the State,⁴² Justices O'Connor, Kennedy, and Souter began and ended their joint opinion in *Planned Parenthood v. Casey* with the word "liberty."⁴³ In between, and in the process of upholding a woman's fundamental right to shape key aspects of her life, the joint opinion emphasized the fact that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may *not* enter."⁴⁴ As if to accept the invitation to read the Bill of Rights *as* a Constitution,⁴⁵ the Court focused on liberty, both as a right specifically

guaranteed by the Fifth and Fourteenth Amendments, and as a right more broadly construed as a “promise of the Constitution.”

We learn from the joint opinion much more about the shape and content of this right of privacy from the personal matters the Court’s precedents had addressed. Each precedent

involv[ed] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 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.⁴⁶

The joint opinion, while grounded in its acknowledgment of the interpersonal relations of marriage, family, child rearing, and education, struck a decidedly more individualist chord, focusing as it did on the “explication of individual liberty.”⁴⁷ Where the State would insist on “its own vision of the woman’s role,”⁴⁸ women, the Court concluded, must have liberty to envision their own lives and their own place in society.⁴⁹ Choices about how to live our lives, when these choices are about intimate and personal matters, shape the meaning and purpose of our everyday life projects. Self-direction in defining the parameters of one’s own life, the Court instructs, is at the heart of liberty.

It may be true that liberty entails a protected space of self-determination, but recognition of this fact does not necessarily mean that the Court will protect the liberty to choose to engage in particular acts when they are embedded in public, personal, and moral ambiguity.⁵⁰ As if to follow the Court’s anti-privacy rationale in *Bowers v. Hardwick*, the *Casey* Court did note that “[a]bortion is a unique act.”⁵¹ In *Bowers*, the Court had construed a challenge to a law criminalizing the act of sodomy as a question of “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”⁵² By focusing on the act in question, the *Bowers* majority effaced both the personal and interpersonal aspects of

criminalizing homosexual sodomy. When focusing on the act as something the State may regulate, the Court need not perceive the roles the interpersonal act plays and the meaning it may have in the lives of the individuals who may choose to engage in the act.⁵³ Without recognition of how intimate acts intertwine with personal lives and relationships, the Court did not need to consider privacy as a limit on the proper sphere of government intrusion. Nonetheless, the *Casey* Court immediately complicated the focus on the act of abortion by suggesting that it is one “fraught with consequences for others,” in the process acknowledging the many others involved and implicated by a woman’s choice.⁵⁴ Privacy in making fundamental decisions about the course of one’s life is not an isolated value, marking as it does a site of deep division over what matters are public and what matters are beyond government determination, even if they are not matters that involve the person claiming privacy alone.

Privacy, as a separate analytic category in *Casey*, faded back into the liberty right from whence it emerged. One way of understanding the textual indeterminacy of privacy is that it delimits an area of personal liberty involving choices about personal, not public, matters. When the State intervenes to determine whether one can marry a person of a different race,⁵⁵ or whether certain people can get married at all,⁵⁶ or whether a parent can teach her child German,⁵⁷ or whether an individual may use contraceptives,⁵⁸ the State converts decisions about how persons seek to live and direct the course of their lives into public matters. Public matters are ones about which government may set standards and rules applicable to everyone, irrespective of particular circumstances, or individual wishes. Private matters are those properly determined by the persons within whose lives they provide meaning and purpose. Of course, this idea is broad, to say the least, for there are all kinds of decisions persons make concerning how to live and direct the course of their lives. Employing the term “privacy” in this context is a conceptual

attempt to distinguish choices about personal matters that are truly personal in nature from those that may be properly considered public. In marking this distinction with the concept of privacy, the Court sought to preserve “a realm of personal liberty which the government may *not* enter.”⁵⁹

B. Liberty as Interpersonal

In *Lawrence v. Texas*, the Court issued a resounding opinion vindicating the right to liberty to live one’s life free from state intrusion. Articulating the central object protected by privacy as “spheres of our lives” involving “liberty of the person” without grounding its reasoning specifically on the concept of privacy, Justice Kennedy, writing for the majority, began the opinion:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.⁶⁰

Lawrence involved a state statute criminalizing homosexual sodomy. Almost as if in response to *Griswold*’s hypothetical question as to whether we would “allow the police to search the sacred precincts of marital bedrooms,”⁶¹ officers of the Harris County, Texas Police Department entered John Geddes Lawrence’s apartment and found him engaged in a sex act with another man.⁶² Here, the facts involved no marriage, and no recognition of a “sacred precinct,” yet the intrusion into the privacy of a dwelling and the interference with a sphere of Mr. Lawrence’s life are no less significant. The facts of this case also illustrate both domains in which liberty operates: the home, or “the spatial,” and the personal, or “more transcendent dimensions.” Both dimensions

of liberty establish a prohibition against the government becoming a dominant presence in our lives.

Despite the fact that the bedroom invaded was not the marital bedroom, the Court nonetheless recognized that the State's actions implicated an interpersonal relationship. "The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."⁶³ Moreover, the State's statute and actions touch "upon the most private human conduct, sexual behavior, and in the most private of places, the home."⁶⁴ Thus, we have the interweaving of the two, often separate strands of privacy, the personal and the home, where both are conceived, not entirely as sites of individual isolation, but as places in which one shares intimacies with others. With whom one shares intimacies in life, and how those intimacies are expressed within a private sphere of life are not the proper matters for governmental regulation. Of course, the quick response from Justice Scalia in dissent is that such a claim calls into question all manner of other public morals legislation involving prostitution, gay marriage, adultery, fornication, and obscenity. Indeed, some, perhaps all, of this kind of legislation is in doubt in the wake of *Lawrence*.⁶⁵ The point, however, is not to designate which acts are now permissible and which are not, for that persists in thinking that *Lawrence* is only about regulation of a particular sex act. Rather, the point is to recognize that *Lawrence* is more importantly about a sphere of interpersonal relations that are constitutive of particular forms of everyday life which government may not itself define.⁶⁶

In moving back and forth between a statement of liberty as autonomy and liberty as interpersonal, the Court also recognized the status-definitional implications of the laws that consigned not just sex acts, but also ways of everyday living and relating to others as criminal.

In this light, the *Lawrence* Court concluded that the harm wrought by the Texas statute was the stigmatization of intimate personal relations that attends the prohibition against sodomy.⁶⁷ The Court claimed that “[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse.”⁶⁸ In so claiming, the Court emphasized the importance of the relationship for which the physical acts that may accompany the relationship are only one aspect. To suggest otherwise, to make the interpersonal act the defining feature of the relationship, is to fail to understand the vital role the relationship itself plays in the lives of the individual whose liberty is implicated. To reduce the meaning and importance of interpersonal relations to the mere performing of sex acts is to reduce the realm of human expression to the domain of physical bodies in motion. We are embodied beings, but we are not simply bodies who act; rather, physical acts in the presence of or in contact with other persons have meaningful roles to play in defining the worlds we inhabit. When interpersonal physical contact is “within the liberty of persons to choose” in pursuing their own conceptions of everyday human life, then they may fulfill the interpersonal relationship “without being punished as criminals.”⁶⁹

Opposing the notion that the State may control the meaning, role, and place of personal relationships in our everyday moral lives, the Court writes: “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”⁷⁰ What is at issue is not the ability to engage in a physical act, as Justice Scalia writing in dissent emphasizes⁷¹ and the majority in *Bowers* argued,⁷² but the ability to have a particular kind of relationship between persons who are self-defining beings. Government interference in the relationship is strictly limited in its ability “to define the meaning

of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”⁷³ We live our everyday lives in the company of others, sometimes in intimate relations, sometimes in more impersonal social and business relations, and often in many different kinds of relations somewhere in between. The more intimate the relation, the closer the relation is to partially defining who we are as embodied moral agents. When we associate with others to form enduring personal bonds, we do so in fulfillment of everyday life projects that are constitutive of personal and interpersonal liberty.

The interpersonal aspect of relationships finds protection in other applications of the “liberty protected by the Constitution.”⁷⁴ Respect for the integrity of interpersonal relations has also been articulated in terms of a “freedom of association.” When government attempts to control or dictate the terms of our personal relations or to force inclusion of unwanted persons into our group associations, it violates a realm of protected freedom “to advocate public or private viewpoints,”⁷⁵ and “interferes with individuals’ selection of those with whom they wish to join in a common endeavor.”⁷⁶ In *Roberts v. Jaycees*, the Court considered how the forced inclusion of women into a male-only organization might affect the organization’s members’ freedom of intimate and expressive association. The Court noted “that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation,” and by so doing, these bonds “act as critical buffers between the individual and the power of the State.”⁷⁷ Citing cases protecting due process liberty rights, the Court recognized the role that interpersonal relationships play in providing “emotional enrichment,” and “the ability independently to define one’s identity that is central to any concept of liberty.”⁷⁸ We enter into relationships with others as part of what it means to be human, and part of what it means to form a community. Everyday life is inescapably lived in the company and with the cooperation of others. Even though “the

Bill of Rights is designed to secure individual liberty,” the Court recognized that “it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.”⁷⁹ As the Court recognizes, individual liberty is inseparable from the “highly personal relationships” on which it depends, and thus individual liberty is not liberty in isolation from all others.⁸⁰

If we view *Lawrence* alongside *Roberts*, we see that interpersonal relations play a significant role in safeguarding personal liberty in multiple settings, from personal decisions that implicate others as the Court in *Casey* recognized, to the intimate relations at stake in criminalization of sodomy, to the expression of ideals and beliefs at issue in regulating interpersonal associations. Liberty is not limited to individuals whose lives are complete only when secreted away from all others, nor is liberty concerned only with protecting particular actions or behaviors. Because liberty creates a “zone of privacy” shared and experienced with others, we see the Court preserving a sanctuary in which individuals may live in relationships with others free from interference by the State.⁸¹

There is no small amount of irony, in light of *Lawrence*, in the Court’s protecting the Boy Scouts of America’s expressive rights to associate for the partial purpose of expressing a strictly heterosexual normative ideal. In *Boy Scouts of America v. Dale*, the Court considered whether James Dale, a former Eagle Scout and also a gay man, “would significantly burden the Boy Scouts’ desire to not promote homosexual conduct as a legitimate form of behavior.”⁸² Although the Court was fixated again on the approval or disapproval of particular conduct, the Court protected the right of the group “not to propound a point of view contrary to its beliefs.”⁸³ Why is this expression of particular beliefs important? The Court does not fully explain, but relies instead on the notion that the freedom to associate includes the ability to exclude others who do

not share the group's particular views where those views in part define the identity of the group.⁸⁴ In so doing, the Court goes beyond protecting the ability to associate for the purpose of advancing beliefs and ideas in order to protect the integrity and dignity of the association as it projects its identity into the world.⁸⁵ Public identity is manifest through the content of the expressive association of individuals who share common ideals and beliefs. Thus, the State may not exercise its power to require a group to include an individual as a member who "would significantly burden the organization's right to oppose or disfavor homosexual conduct"⁸⁶ by his mere presence in the organization.⁸⁷

What is interesting here is that from the perspective of protecting the status of homosexual persons, *Lawrence* and *Dale* pull in opposite directions. But from the perspective of protecting choices about how we live our lives together, they are of a piece. The intimate association in *Lawrence*, as defining the identities and meanings of interpersonal relations, and the social association in *Dale*, as defining the group's expressive identity, are both protected. Both are situations in which the government may not legitimately interfere, because to do so would be to dictate the content of the message or the character of the relationship. Both protect the ability to define through conduct and expression core aspects of life touching on morality and dignity free from laws functioning as "severe intrusion[s]"⁸⁸ that would subject the individual or group to homogenizing constraints.⁸⁹ Finally both decisions avoid analytically relying on the concept of privacy, opting for liberty and First Amendment freedom of expression respectively.

C. Autonomy, Intimacy, and Dignity: The Interpersonal Values of Liberty and Privacy

These similarities among cases protecting individual, interpersonal, and associational liberty can be read to advance a core interest in decisional and expressive autonomy. From privacy's origin in protecting personal decisions about sex and childbirth, to *Lawrence's* emphasis on the liberty to choose with whom to engage in intimate conduct, to *Dale's* preserving a right to control the expressive "message" an association chooses to project to the world, a core interest in autonomy is undoubtedly often at stake. In the academy, this view has often held sway,⁹⁰ aided by language in the Court's cases indicating a strong solicitude for protecting decisional autonomy. Some applications of *Lawrence* emphasize the autonomous independence of individual, private conduct. The Fifth Circuit, for example, applied *Lawrence* to hold that a Texas state law criminalizing the sale and lending of sexual devices violates an individual's right to engage in private intimate conduct.⁹¹ Because autonomy is a value that vindicates personal independence from other individuals, autonomy could be understood to undercut the importance the Court places on personal relations as necessary and sacrosanct aspects of liberty. To do so, however, would require us to ignore the repeated emphasis the Court places on personal liberty's dependence on relationships with others.

Autonomy, understood through the lens of privacy, can take different forms – the desire "to be let alone," the ability to withhold information from others, the will to maintain secrecy, or the choice to enter into intimate relations with others. The "right to be let alone" is the most general formulation with the most distinguished pedigree.⁹² When government interferes with our daily life, whether by searching our person or belongings or by regulating personal aspects of our lives, it fails to respect an independent realm where we might be let alone in pursuit of our life

projects. Being let alone is a capacious notion manifest in many aspects of autonomy over personal life choices. For example, in being let alone, an individual also has a strong interest in protecting certain matters from unauthorized access by others.⁹³ In so doing, one preserves the ability to develop a distinct sense of personhood separate from and uncontrolled by others. When we withhold aspects of our lives from others and when they recognize and respect our choices concerning what we wish to keep private through our withholding, we experience the space to develop our own identity.⁹⁴ Taken to an extreme, privacy becomes the keeping of secrets, a conception the Court has embraced in the Fourth Amendment context, emphasizing that nondisclosure to others ensures that information about oneself “will remain secret.”⁹⁵

More than ways of choosing to withhold aspects of one’s life from others or of desiring to be let alone, privacy as autonomy is about making decisions on how to live one’s life free from unwanted intrusion. “Put compendiously, the most basic autonomy-right is the right to decide how one is to live one’s life, in particular how to make the critical life decisions,” which constitute the content of everyday life, as Joel Feinberg explains.⁹⁶ This conception of decisional privacy is found most clearly in claims by the Court to protect the “most intimate and personal choices a person may make in a lifetime.”⁹⁷ We chart our life course and develop ourselves as unique persons through the choices we make about how we want to live our everyday lives. Both of what Michael Sandel calls “old” and “new” privacy involve autonomous choices about what kinds of facts to keep personal in avoiding disclosure to others, which are intertwined with decisions about how to live our lives.⁹⁸ Without dwelling too long on the conceptual complexity of privacy in relation to autonomy, it seems clear that the decisions in *Dale* and *Lawrence*, focusing as they do on the ability of persons and groups to choose how to present themselves in public by reserving the right to control what they do in private, rest squarely amidst this tangled

web of related conceptions of privacy as autonomy even if they do not rely explicitly on the concept of privacy.⁹⁹ As *Lawrence* makes clear, “[l]iberty presumes an autonomy of self.”¹⁰⁰

In addition, more than protecting spheres of autonomous choice, privacy can also manifest itself as “control over information which enables us to maintain degrees of intimacy,” as Charles Fried has influentially argued.¹⁰¹ Fried’s view of privacy depends upon the kind of sharing that creates the possibility for intimacy. Intimacy requires sharing spaces, experiences, emotions, thoughts, information, and many other things with other persons. After all, one cannot be intimate with oneself. For Fried, privacy as the ability to withhold information about oneself, is the necessary condition “for relationships which we would hardly be human if we had to do without – relationships of love, friendship and trust.”¹⁰² This relational emphasis expands the realm of privacy as autonomy beyond choice, but in so doing it makes privacy a transactional commodity.¹⁰³ Sharing, for Fried, is thus not intrinsically valuable for the role it plays in constituting an interpersonally shared form of life. Rather, privacy is instrumental for development of certain kinds of relationships which are themselves necessary for developing aspects of one’s personhood.¹⁰⁴ So much of our lives – from family to friends, to work, and to community – requires various degrees of mutual sharing and reciprocal trust through which we develop a distinct personal identity. These instrumental values of intimacy are consistent with the concerns in both *Lawrence* and *Dale*, but are by themselves incomplete. As Jeffrey Reiman argues, Fried’s understanding of the importance of sharing is missing “the context of caring which makes the sharing of personal information significant.”¹⁰⁵

In our ordinary forms of life, we experience bonds of affection with those who matter most in our lives, encouraging them to open themselves up to us in a relation of mutual trust and care.¹⁰⁶ We sustain our relationships of mutual care through sharing our lives with others,

thereby opening ourselves to them in ways that leave us exposed.¹⁰⁷ When we share with others we leave the artificial shell of isolated privacy to experience a form of privacy in the company of another. The company we keep with others ranges over many different kinds of relationships, often involving varying degrees of friendship and the intimacies friendship enables.¹⁰⁸ As Professor Ethan Leib argues, friendship “is especially indispensable to the kind of good life our society prizes: lives with deep private and personal connections.”¹⁰⁹

Friendship is no stranger to law.¹¹⁰ Law often frames the background structures within which friendships exist. By acknowledging the significance of a mutual bond formed through interpersonal intimate conduct, the *Lawrence* Court moves beyond protecting the decision to enter into a personal relation in order to protect the reciprocity intrinsic to “a personal bond that is more enduring.”¹¹¹ The Court repeatedly focuses on the importance of the relationship at issue in the criminalization of conduct variously described as homosexual, intimate and private. Thus, even if autonomy is a central feature of liberty, autonomous life is not life lived in isolation from others.¹¹² Whether understood instrumentally or constitutively, interpersonal relations are both the occasion in cases like *Lawrence* and *Griswold* for the Court to protect liberty, and the object of its protections.

Focusing on the conduct of individuals, as constitutive of particular social practices, highlights the degree to which the lives of embodied persons are at stake. We are embodied agents, acting and reacting to bodily stimuli in our environments. We have an upright posture that helps us orient our perceptions of the world.¹¹³ As behavioral psychologists suggest, our upright posture also constructs the ways we encounter and interact with other persons.¹¹⁴ Our interactions with others are always at varying physical distances, and change given the degree of familiarity and reciprocal trust we have with them. By contrast, when we focus on autonomy,

we tend to focus on the cognitive and volitional aspects of agency, which conceptually can be divorced from questions of embodiment. The Platonic image of the unruly parts of the soul encourages us to think in terms of the intellectual ability to control the passions and, in important respects, deny our bodily existence.¹¹⁵ Protecting self-expression is a way of protecting the intellectual ways in which we understand ourselves and others. Organizations may not have bodies, but they have identities and are capable of constitutionally protected expression. When we focus on the autonomy of expression, or the autonomy of choices about how to live life, we focus on cognitive and volitional aspects of our lives. Although these aspects are no doubt constitutive, they are not exhaustive of our experience.

Human life and action is also unavoidably embodied. Philosophers as well as behavioral and social psychologists emphasize the fact that embodied aspects of our lives can be inseparable from who we are and how we experience the world.¹¹⁶ So when the State seeks to control aspects of our embodied lives, the State may intrude more fundamentally into those aspects of our lives from which our experience of ourselves is inseparable. The experience of sex and sexuality are intrinsically bodily, and often shared with others. Just as our identities are inseparable from our embodied experiences, personal relationships are inseparable from embodied relations to others, whether in the ways we share physical and public space with others, altering our behavior by the mere presence of other persons, or whether in “the most private human conduct, sexual behavior, and in the most private of places, the home.”¹¹⁷ How we act in the presence of others, what we reveal about ourselves or knowingly expose to others, at least partially constitute how we understand the boundaries between privacy and publicity. As the philosopher Charles Taylor explains, “[m]y sense of myself, of the footing I am on with others, is in large part also embodied. The deference I owe you is carried in the distance I stand

from you, in the way I fall silent when you start to speak, in the way I hold myself in your presence.”¹¹⁸

Arguing that much of what is important in our moral lives is intertwined with our affirmation of ordinary life, Taylor writes:

[O]ur dignity is so much woven into our very comportment. The very way we walk, move, gesture, speak is shaped from the earliest moments by our awareness that we appear before others, that we stand in public space, and that this space is potentially one of respect or contempt, of pride or shame. Our style of movement expresses how we see ourselves as enjoying respect or lacking it, as commanding it or failing to do so.¹¹⁹

Our dignity is not only woven into our embodied relations with others in private, but is essential to how we relate to others in public. We are in the presence of other persons in myriad spaces, some of which afford greater intimacy and seclusion, others of which occur in undifferentiated public places.

In both private and public settings we are exposed to others, and thereby made vulnerable to them as Jean Paul Sartre suggests, both physically and attitudinally.¹²⁰ Sartre writes, “when one becomes “conscious of *being looked at*,” one realizes “that I am vulnerable, that I have a body which can be hurt, that I occupy a place and that I can not in any case escape from the space in which I am without defense – in short, that I *am seen*.”¹²¹ Vulnerability can lead to harm in myriad ways. For example, others may fail to offer us the respect as persons one we are owed. A person’s dignity can be demeaned by others’ failure of respect or recognition.¹²² The space in which we fulfill our embodied lives can be disrupted by the State by failing to recognize the boundaries of our shared, yet private, lives.¹²³ When the *Lawrence* Court suggests that “[t]he State cannot demean [homosexuals’] existence or control their destiny”¹²⁴ through the use of criminal statutes, it confirms the centrality of interpersonal relations to human dignity.¹²⁵ How a person’s existence can be defined as homosexual depends on the nature of that person’s

relationship to particular others. The *Lawrence* Court also confirms that we remain vulnerable from the possibility that others will not treat our everyday forms of life with the respect owed to us as possessing the dignity of free persons.¹²⁶

We manifest our human dignity through the relationships we form and the commitments we keep. The *Lawrence* majority recognized that “dignity as free persons” requires protection for adults who choose to enter into intimate relationships with others.¹²⁷ In order to respect the dignity of persons, the State must not intrude into the self-determining and life-constituting relations that are inseparable from our everyday lives lived in the company of others. Not only does fulfillment of the liberty of persons require interpersonal relations, it also requires shared spaces of interpersonal interaction wherein these relationships may exist. Without privacy in the company of others, without what strictly speaking is *privacy in public*, the dignity and liberty of persons cannot be realized. Such is the lesson of *Lawrence*, augmented by the principles of *Roberts* and *Dale*.

As the constitutional history of the concept reveals, and the political hostility to its protection cautions, privacy, as a specific articulation of one aspect of liberty, is fraught with difficulty. We protect something we call privacy in multiple contexts where it plays multiple roles in our lives. Privacy’s fecundity lies in its ability to organize diffuse rights protections, from the First Amendment’s protection in cases like *Stanley v. Georgia*,¹²⁸ to its protection of choices involving childbirth in *Roe v. Wade*,¹²⁹ to its protection of telephone booth conversations in *Katz v. United States*,¹³⁰ all of which protect forms of everyday private life. Privacy’s barrenness, by contrast, lies in its lack of specific textual grounding. It is almost as if a right that is everywhere visible is nowhere to be found, and for that reason always seems to be in danger of disappearing as a chimera always gesturing towards something else fundamental at stake. These various

privacy protections, as *Lawrence* teaches, are all ways of protecting fundamental liberty, understood to encompass shared forms of life lived in personal relationships with other persons. As the Court in *Casey* articulated the point in its closing sentences, by “interpreting the full meaning of the covenant in light of all our precedents,” the Court’s task is to “define the freedom guaranteed by the Constitution’s own promise, the promise of liberty.”¹³¹

As we shall see in the following section, privacy has settled more comfortably into Fourth Amendment jurisprudence where it can be controlled and circumscribed to mean “secret,” “concealed,” or hidden from view. By narrowly construing privacy as that which is kept secret from others, the Supreme Court’s Fourth Amendment jurisprudence fails to acknowledge the importance interpersonal relationships play in fulfilling the promise of liberty. In losing sight of liberty lived through interpersonal relations with others, the Fourth Amendment now stands in considerable tension with the lessons of *Lawrence*.

II. Interpersonal Privacy Under the Fourth Amendment

As a matter of everyday life, we are all vulnerable when speaking to other persons because they may repeat what we say. We all know the practical and theoretical nature of this structure well, at least as a feature of ordinary language. Once we utter an expression – communicate a message – we can no longer lay claim (if ever we could) to control the meaning of what we say or to limit its iteration beyond *this* context, in our *presence*, with regard to *this* text.¹³² To use the language of legal discourse central to our analysis in what follows, we “assume the risk,” that other persons will do with our words what they will. Meaning is slippery, and there are no guarantees that the messages we send will be received with the content we intended. For

example, we of course assume a risk of infelicity, of mis-fire, a risk that the listener or reader will fail to understand what we intend to convey, that our messages will not be received, that what we say will be repeated “out of context,” construed and repeated to mean something we did not say or intend to say. These are the risks associated with ordinary language use, with the writing and saying that comprise much of our shared social lives. But this is not the assumed risk which touches fundamental aspects of constitutional law and principle.

More than infelicity, in choosing to speak, we assume the risk of a particular form of repetition. For example, whenever we communicate with others through speech or writing, they may repeat our words, thoughts and meanings in contexts and to others we may neither intend nor desire. More particularly, we assume the risk that in sharing, other persons will take our words to have a particular kind of legal significance – that is, as evidence of criminal wrongdoing, of potential wrongdoing, or of political dangerousness – and in virtue of that significance, repeat them to an officer of the State. Whether in the presence of informants,¹³³ eavesdropping devices,¹³⁴ or the consent of another,¹³⁵ the speaker assumes the risk that when speaking to another person, she speaks to a state agent. When speaking to another person, one loses control of one’s words and unveils the privacy of one’s thoughts, which may be then conveyed to the State irrespective of one’s desire to limit one’s speech to the present company or to a chosen audience.

Under current constitutional doctrine, such a situation is not only constitutionally acceptable, but perhaps socially desirable. Community policing, for example, thrives on consensual and congenial citizen-police encounters through which citizens convey information concerning illegal activity to the police.¹³⁶ Effective crime prevention as well as investigation often requires citizens to convey information they have about other persons’ statements, attitudes

and behaviors to government agents. To be part of a community is to be open in some respects to surveillance by one's neighbors who act as the first line of police in regulating the conformity of individual behavior to community standards. Community policing has costs and benefits, but one assumption of the practice is that persons have no right of privacy in their publicly observable behavior or in their communications with others.¹³⁷ In what follows, I examine the Fourth Amendment framework within which we assume the risk of State intrusion into our interpersonal lives through our everyday acts of sharing.

A. Assuming the Risk of Disclosure

As persons who share our lives in the company of others and who share our thoughts and intentions through language with others, we are always vulnerable to those with whom we share. In this vulnerability, we arrive at a well-established principle of Fourth Amendment jurisprudence – we assume the risk that in speaking to other persons that they are, or become, the synecdochical figure of the State. What we share with others, we share with the State. In the words of one commentator, “. . . the fourth amendment creates no right to share information with all the world save governmental officers.”¹³⁸ In a series of cases, the Supreme Court has made clear that I can no longer have an expectation of privacy in what I knowingly expose to the public.¹³⁹ As the foundational modern case, *Katz v. United States*, explained: “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”¹⁴⁰ Modern Fourth Amendment jurisprudence has largely hinged on the Court's determination about what counts as reasonable social expectations concerning the relation between what is private and what is public. The *Katz* framework has

focused primarily on social expectations of privacy that are objectively reasonable as defining what constitutes a search: if there is no expectation of privacy, then there is no search for constitutional purposes.¹⁴¹

If one exposes something to the public, then the Court has generally held that one receives no constitutional protection for what one has exposed. A jurisprudence of public visibility dominates Fourth Amendment analysis, such that state officers are permitted to see whatever one exposes to the public, whether in one's trash,¹⁴² on one's property,¹⁴³ or on the road.¹⁴⁴ The consequences of public visibility can be avoided only by hiding from the view of others those items one wishes to keep private. Even within the confines of one's own backyard, yet outside the protective curtilage of the home, one's activities are vulnerable to observation by agents of the State, whether from the air¹⁴⁵ or from a vantage on the property.¹⁴⁶ Moreover, so long as officers are legally where they are entitled to be,¹⁴⁷ and look where they are entitled to look, whatever they see receives no Fourth Amendment protection. Police officers are not required to shield their eyes from what is readily apparent in order to protect the privacy of the individual who may have inadvertently exposed something private to public view.¹⁴⁸ This logic also applies to the supposed sui generis nature of the dog's nose, capable of smelling readily apparent odors of illegal narcotics that may emanate from a suitcase or car.¹⁴⁹ Even though narcotics officers can learn about the contents of luggage, the Court reasoned in *United States v. Place* that "the sniff discloses only the presence or absence of narcotics."¹⁵⁰ Thus, what is readily apparent to the eyes or dog's nose receives no constitutional protection. When we disclose aspects of our lives, knowingly or inadvertently, we assume the risk of potential public inspection.

A similar jurisprudence of hearing mimics that of seeing. In sharing public discourse with others, one loses any expectation of privacy – that is, privacy relative to the State – in what one

shares. Government agents are free to pose as ordinary citizens, gain the confidence of unwitting persons engaged in criminal activity, and testify in court about what they saw and heard.¹⁵¹ Moreover, the government is free to use or gain the benefit from ordinary citizens operating as informants.¹⁵² If either an agent or an informer wears a recording or transmitting device, officials may also receive the benefits of technology, free from Fourth Amendment limitation.¹⁵³ Why do persons receive no search or seizure protections in these circumstances? The Court in *Hoffa v. United States* recited the “assumption of risk” rationale to answer this question: “The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.”¹⁵⁴

One assumes the risk under *Katz* of knowingly exposing to the public conversations or actions when the public consists of invited persons as visitors to one’s hotel suite¹⁵⁵ or even when the public is a single person in the security of one’s own home.¹⁵⁶ In essence, a person broadcasts to the world what he tells to a close confidant under the “risk that his companions may be reporting to the police.”¹⁵⁷ The nature of the place where the conversation occurs does not matter, for even in the security of one’s own home, when one shares a conversation with another person, one is knowingly exposing one’s thoughts and intentions to the public, and since the government is not required to shield itself from what is knowingly exposed to the public, one may also be exposing one’s thoughts to government officials.

Even if we construe in everyday terms what one shares with others as “private discourse,” with an intended private audience, in that sharing, one also shares figuratively with the State. Under this assumption of risk analysis, privacy is understood to have a very narrow scope, while the public is given an exceedingly capacious understanding. An everyday conception of privacy

as including one's communications with other people animates Justice Douglas's impassioned dissent in *White*, where he recognizes that "[t]he individual must keep some facts concerning his thoughts within a small zone of people," yet "[m]onitoring, if prevalent, certainly kills free discourse and spontaneous utterances."¹⁵⁸ Yet the Court employs the assumption of risk rationale to construe the public as consisting of a single individual, so that if one shares one's thoughts or intentions with anyone, the other person becomes one's "public" for Fourth Amendment purposes. As the Supreme Court has explained:

It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now non-private information.¹⁵⁹

Because sharing spreads through repetition at the discretion of those with whom one has shared, such acts of sharing must always potentially implicate the exercise of state power over what is shared through the current law of search and seizure.

What gets repeated does so through the autonomous consent of the other. Sharing is accordingly mediated by consent and autonomy. Individuals are always free to cooperate with police, consenting to searches and seizures officers would have no independent ability to justify. A permissive Fourth Amendment jurisprudence finds no values at stake when consent is autonomous, because the law of search and seizure limits what state officers may do only in the absence of consent. Consent is the touchstone of police investigative work freed from constitutional constraint. If persons voluntarily consent to repeat to state agents what they have heard, or if persons consent to show state agents spaces not exposed to the public, then the Court has made clear that there is no Fourth Amendment protection afforded what is revealed to the State.¹⁶⁰ As a rule, a reasonable person consents to a search when she would have felt free to

decline the officer's request to search.¹⁶¹ As a matter of police practice it is always best to obtain consent and thereby operate free from the fine Fourth Amendment distinctions governing police behavior.

In order to determine whether consent was given in particular situations, the Court has refused to look at the social circumstances or structures that might impact the degree to which consent is voluntary. For example, race may play a significant role in whether consent is in fact voluntary in a particular situation. Tracey Maclin argues that "for most black men, the typical police confrontation is not a consensual encounter."¹⁶² Moreover, background social practices and expectations based on perceived social roles place intense social and psychological pressure on individuals to comply with police officer requests.¹⁶³ This pressure, together with a widespread belief by individuals that they do not really have a choice but to consent to requested searches, at least partially explains why so many individuals carrying illegal narcotics nonetheless consent to searches. Moreover, by targeting the poor, minorities, and those who live more of their lives in more visible places on streets and sidewalks, driving vehicles more susceptible to technical vehicular violations, there is an uneven distribution of whose consent is regularly sought.¹⁶⁴ Despite the racial, social and psychological problems associated with how it operates in encounters between citizens and police, consent continues to function as a vital part of police practice,¹⁶⁵ and as a central mechanism by which persons are rendered vulnerable to others. We may be in control to some extent over whether we consent to a search or not, but we have no control over whether those with whom we share our lives might consent to a search of shared possessions or places in our presence or absence.¹⁶⁶

Even in cases where it is difficult to claim that we have voluntarily consented to reveal private information, the fact that we have shared the information with others means that we have

relinquished an expectation that it “will remain secret”¹⁶⁷ as the Court explains in *Smith v. Maryland*. If information is no longer secret, and if the Court equates privacy narrowly with secrecy, as it often does, then once one reveals information to a third party, government agents are free to benefit from one’s act of sharing.¹⁶⁸ When we make phone calls, we “voluntarily convey[] numerical information to the telephone company and ‘expose[]’ that information,” which in turn means that we “assume[] the risk that the company would reveal to police the numbers” we dialed.¹⁶⁹ As Justice Marshall noted in dissent, it is difficult to understand in what sense we “voluntarily” convey information to the telephone company when such conveyance is a necessary condition for use of the telephone in the first instance.¹⁷⁰ Presumably, we have a choice not to use the telephone if we wish to keep the numbers we would have dialed private. A similar situation obtains for bank records or loan applications. If we wish to participate in the modern economy, we must have a bank account, but in so doing, we “voluntarily” convey to our bank private information about our transactions about which we no longer have an expectation of privacy: “The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.”¹⁷¹ There are large parts of our lives in which we reveal limited information about ourselves to others for specific, transactional purposes in the expectation that the use of that information will be circumscribed by the limited transactional purpose.¹⁷² If government officials were to compile much of this information, as they may without judicial supervision under current jurisprudence, they could learn a large amount about our private lives.

We consent to convey information necessary to complete each transaction only to the extent that we could “choose” not to engage in transactions with others. Of course, such a choice is entirely illusory. Thus, although our consent to reveal undisclosed information is a significant

analytic element in determining what is public, consent need only be nominal in order to trigger assumed risks of exposure of otherwise private information to government agents.

The consent at issue when assuming the risk of sharing with others is not merely the nominal consent to share information with others, but also the revealing of shared spaces. When we share our lives with others, under the Supreme Court's "third party consent" doctrine, we assume the risk that they will consent to police searches over the places and items which we share

[Section omitted on Fourth Amendment approaches, under the third-party doctrine, to sharing living spaces with others]

III. Liberty under Due Process and the Fourth Amendment:

Protecting Shared Privacy

Focusing on the relation between a narrow conception of privacy and the person who bears the right, the Court has emphasized the claim that expectations of privacy are personal rights "that must be invoked by an individual,"¹⁷³ Moreover, the general principle employed is that it is the "individual [who] shares information, papers, or places with another, [and] assumes the risk that the other person will in turn share access to that information or those papers or places with the government."¹⁷⁴ These cases construct a particular form of personal identity as "the individual," not as a person who inhabits thick inter-subjective social relations and forms of life with others; rather, these cases protect persons who are conceived in social isolation.

While it may be true that individual persons bear constitutional rights, it need not be necessary that those rights apply only to individuals when they are in social isolation from others. In Chief Justice Roberts' analysis of assumed risk through sharing a dwelling, he notes that: "To the extent a person wants to ensure that his possessions will be subject to a consent search only due to his *own* consent, he is free to place these items in an area over which others do *not* share access and control, be it a private room or a locked suitcase under a bed."¹⁷⁵ Here we have the image of the hermetically sealed individual, who must share a house with others, but locks his closet, his door, locks his suitcase and hides under the bed – indeed, locks himself off from others in order to maintain his personal privacy, in order to limit the risk of exposure to the State. Engaging with others is risky. Isolation, locked under a bed, is the freedom of the individual. This imagery constructs a vision of privacy at odds with both social practice and our expectations of having liberty to share our lives with others free from invasive government intrusion into our interpersonal relationships. This imagery is also at odds with important aspects of our political and personal lives to which I now turn.

A. The Political

If we name as totalitarian the State that seeks to dominate, to take the figurative place of, the other with whom I share, then we identify one of two central problems the practice of sharing raises (at least regarding sharing as construed through Fourth Amendment jurisprudence). To the extent that in sharing I make myself vulnerable to the displacement of the other with whom I share, when the State is figured as the other, we risk the loss of the political – that is, the loss of the plurality of interactions among persons that constitute the political realm. Instead of an open possibility of multiplicity in interactions among persons, the State attempts to create the

conditions for a dialectical encounter between the privacy it constructs and its own exercise of power. In so doing, the State dominates political space, becoming the other, and therefore eliminating the political realm as a space of heterogeneous multiplicity.

Justice Douglas warned of the creeping domination of public and private spheres through government surveillance of much of our lives, arguing that the “privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps.”¹⁷⁶ Writing in dissent in *Hoffa v. United States*, Justice Douglas criticized the willing acceptance of government use of confidants to obtain private information. We live in “a society in which government may intrude into the secret regions of man’s life at will.”¹⁷⁷ Lamenting the shrinking sphere of life free from government intrusion, he wrote that a time may come “when the most confidential and intimate conversations are always open to eager, prying ears. When that time comes, privacy, and with it liberty, will be gone.”¹⁷⁸ Flourishing political life requires the freedom to think, listen, and speak with others openly in public space without the fear of repercussions, whether in the form of sanctions or in the form of unwanted government surveillance.¹⁷⁹ When the State takes the place of the other, the State is able to dominate political space through manipulating content of the conversation, seeking its own ends rather than allowing the ends of the political participants.¹⁸⁰ As Professor Jed Rubenfeld has argued: “The danger, then, is a particular kind of creeping totalitarianism, an unarmed occupation of individuals’ lives. That is the danger of . . . a society standardized and normalized, in which lives are too substantially or too rigidly directed.”¹⁸¹ Although domination of individual lives is certainly a risk, the problem is not simply one in which the government exerts its power over the totality of our lives lived in isolation from others. Rather, the problem comes from the disappearance of interpersonal

multiplicity. If the others with whom we share our lives are always putative state agents, then we lose the interpersonal relations on which the exercise of our liberty is grounded.

Appealing to Hannah Arendt's political theory here, I would like to suggest that the human condition is one of plurality in which each person inhabits a world peopled with many other persons, and thus "this plurality is specifically the condition ... of all political life."¹⁸² If when I share a conversation, a dwelling, perhaps even a form of life, with another and that other becomes the figure of the State, then plurality is at an end, and thus, so too is the political. Because a robust existence of the political world depends on the plurality of perspectives, "The end of the common world has come when it is seen only under one aspect and is permitted to present itself in only one perspective."¹⁸³ We are at risk of having only two perspectives, which may reduce to one – "mine" and the figure of the State with whom I share. But if one accepts with Arendt that human freedom depends on multiplicity, and that freedom does not reside in the "inner realm" of the will and private consciousness but rather in public action and interaction, then we recognize with Arendt that, "[t]he reality of the [political] realm relies on the simultaneous presence of innumerable perspectives."¹⁸⁴ These perspectives must be made visible in public space, not so that the State can see and control them, but because political reality requires public interaction and "[t]he life of a free man need[s] the presence of others."¹⁸⁵ Echoing this theme, Justice Douglas in dissent in *United States v. White* from the growth of the assumption of risk doctrine, wrote, "[m]onitoring, if prevalent, certainly kills free discourse and spontaneous utterances."¹⁸⁶

Sharing with the State in the form identified here is inconsistent with essential features of our political world. The Supreme Court regularly construes this political world in the free speech context as a place of political interaction receiving the highest level of constitutional

protection.¹⁸⁷ Yet, we see that the same form of political interaction, where I share interactions with another, the State is able to occupy that position in such a manner as to undermine (actually potentially) an essential condition of the political – shared multiplicity.

What this analysis presupposes is that there is a personal and interpersonal realm that is not already imbricated by State power. Perhaps these issues about the political and the personal may disappear or may be easily explained away. What constitutes a private space or a personal dwelling, and the sense in which either may be free from state intrusion, are all considerations that are already embedded within legal relations to the State, which are always subject to change. State officials can monitor a person's private life, even inside the home, so long as they demonstrate probable cause to justify their actions.¹⁸⁸ Moreover, the very notion of privacy, of the subject who stands apart from the State, may itself be a creation of the State. Indeed, when one attempts to specify precisely what is meant by Fourth Amendment privacy, the concept seems constantly to evade definition, as we have already seen.¹⁸⁹ We are caught in webs of antecedently existing social structures, operating in relation to state objectives, in virtue of which we claim the existence of a domain of "privacy." Thus, we can view the risks entailed by sharing as nothing more than a by-product of the "real" social conditions that produce both the possibility of "privacy" as well as its limits. Accordingly, there is no subject who stands apart from the conditions that produce both the possibility of privacy and the risks of sharing. Our expectations of privacy, like the risks we assume, all depend on what the Supreme Court construes as protected under the Fourth Amendment. What can be recognized as a legitimate expectation is itself a product of background social practices partially constructed by governmental practice.¹⁹⁰

However compelling it may be at first blush, this argument moves too fast. In an important sense, even if what counts as mine is structured by law, it is quite a different matter for the State to occupy the position of another subject. No doubt, the thought that there is a realm of pure freedom, unstructured by social and state control, is a utopian fantasy, one that exists only in an imagined time before time.¹⁹¹ Yet we need not posit such a realm of freedom in order to vindicate a meaningful interest in liberty. As we have seen, the issue is not the involvement of the social or the State, but the domination of each over the lives of individuals. What is needed is the space in which individuals may cultivate intimate relationships and the group associations they choose in light of their own life projects, free from a dominating state presence. Perhaps the conditions under which I choose, and the structure of choice, are each intertwined with social and state mechanisms of control, but the structures of intersubjective recognition in which we find ourselves nonetheless remain our own.

B. The Personal

The second problem with sharing as construed under Fourth Amendment Jurisprudence is the account of personal identity and social life it provides.

Let's return first to the decision in *Carter* – here the holding is that I have no personal expectation of privacy when temporarily in the company of others, at the other's place. Lloyd Weinreb comments that “the decision in *Carter* is possibly the most clearly mistaken and the underlying jurisprudence the most inadequate of all the cases decided under the Fourth Amendment in the past thirty years.”¹⁹² The mistake is to think that we have, or expect, privacy only when connected to one particular place, the one where we have a bed for the night. But this is an entirely mistaken view of the nature of our forms of life, in which we also have

expectations of what Weinreb calls “privacy of presence” – that is, a kind of privacy that we share with others when we are in each others’ presence, temporarily occupying a place, but nevertheless do not expect to be performing for all the world, and certainly not for state officials. This criticism is directed to the Court’s conception of human life, and personal identity, which forms the unacknowledged social background the Court invokes and constructs.

One hardly needs to elaborate on this picture to at least get the first inkling that there is something amiss here. Professor Lloyd Weinreb and other critics argue that the Court’s view of privacy addresses a very different conception of a shared form of life than the one many of us experience and expect. That shared form of social life is one in which we keep the company of others, and in so doing, ordinarily expect that our company has a degree of privacy, particularly with regard to state surveillance. We form ourselves as persons, and sustain our identity over time, through our shared interactions with others. Part of who I am requires identity formation in shared social situations.¹⁹³ Under the Court’s third-party jurisprudence, these shared social situations do not receive privacy protection against state intrusion and power.¹⁹⁴

Turning to Hannah Arendt again, she argues that “[w]ithout a politically guaranteed public realm, freedom lacks the worldly space to make its appearance.”¹⁹⁵ Freedom is experienced in the presence of others, in a shared social space, that through interaction forms the realm of the political. A similar structural problem exists here, as with the problem of the political. Again, if we name the problem “totalitarianism,” when the State takes the social position of other, it eliminates the conditions of human spontaneity, the ability to cultivate my identity and my life projects through interaction with reciprocal others with the open possibility of creating new forms of life.¹⁹⁶ Here the State takes a position of domination over identity formation, displacing a multiplicity to construct a dialectical relation where it figures on both sides – taking

the position of the other with whom I interact, and setting the terms by which my identity cultivation may occur.

Of course, social interaction, and the social construction of identity, is a form of control too. I'm not suggesting here that there is a realm of pure freedom. No doubt, risk already inhabits my openness to the other. But the other shares a condition of reciprocity. She is reciprocally vulnerable to me. This condition does not exist when the State occupies the position of other. The problem, then, is that the State, through my practice of sharing, is actually always potentially in a position to set the terms of the interaction. The State attempts to construct what the conditions of an otherwise intimate or associational interaction will be through its power to participate as the other through whom one realizes one's protected liberty.

In *Boy Scouts v. Dale*, the Court concluded that forced inclusion of a homosexual member would radically disrupt the identity-expressive practices of the Boy Scouts. Dale was construed as an outsider intruding upon the expressive identity of the group. If the inclusion of Dale disrupted the identity of the Boy Scouts, then it would seem to follow that inclusion of state agents within one's social network, within one's confidence, or over one's objection would also disrupt the identities and meaning of our personal relationships and ordinary lives. The Court has taken seriously the notion that social practices and associations have meaning for personal identity. There is therefore a basis for applying that notion when state officials intrude upon our identity-expressive ordinary activities. It seems abundantly evident that our form of life is constituted through acts of sharing with particular others – intimate partners, family members, friends, or associates – which we do not intend or expect to become acts of sharing with the world at large.

IV. A Substantive Fourth Amendment

When we recognize that shared relationships with others are “central to any concept of liberty,”¹⁹⁷ as the Supreme Court has made clear, the analytic distinction between what is private and what is public becomes practically less important, and conceptually less useful. In understanding and protecting the status of interpersonal relationships to remain free from the dominating presence of government intrusion, *Lawrence’s* liberty applies to government searches no less than to criminal statutes. Just as the government may not demean particular relationships “or control their destiny by making their private sexual conduct a crime,”¹⁹⁸ the Constitution should not allow government officials to exploit the vulnerability constitutive of those relationships for suspicionless investigative purposes. To do otherwise, would allow government officials to invade and undermine the liberties of ordinary life.

Fourth Amendment jurisprudence should be refocused in light of the protections provided interpersonal liberty. To do otherwise, to overcome the conflict by limiting the scope of *Lawrence*, would be to ignore background social practices of interpersonal sharing. To do otherwise would also fail to secure the blessings of liberty, as promised by the Constitution as a whole, to areas of our lives where government domination is most invasive. Moreover, like the minority views of Justices Holmes and Brandeis, calling for greater First Amendment protections for political speech, which later flowered into robust free speech protections,¹⁹⁹ Fourth Amendment jurisprudence does have countervailing considerations, calling for greater protections for our interpersonal lives on which a future Court may draw.²⁰⁰ Foremost among them are the connections between personal security and liberty from the Court’s early and important decision in *Boyd v. United States*.

The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions on the part of the government, and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . .²⁰¹

In this early attempt to articulate the values protected by the Fourth and Fifth Amendments, the Court recognized that the "very essence of constitutional liberty and security" was at stake. Justice Brandeis, drawing on *Boyd*, also emphasized the import of liberty when it came to government intrusion upon shared communications. He wrote, "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen."²⁰²

Perhaps it was a conceptual mistake for the Warren Court to call what the Fourth, Fifth, Ninth, and Fourteenth Amendments protect "privacy." Employing "privacy" tempts us to establish a conceptual opposition with "publicity," and to protect as private only that which is not public. Privacy is has been construed as secrecy and solitude, the keeping to oneself in the company of no other. As we have seen however, privacy and publicity do not neatly form a paired opposition. When we share our lives with others in intimacy, we no longer live in complete "privacy," though it could hardly be said that we have exposed ourselves to the public. Moreover, we often live our lives in expectation of privacy, even if attenuated privacy, when in public. Assuming as we must, that the liberty protected in the Constitution is more than a right against its procedural deprivation, then what is at stake through all these Amendments is not only the implicit notion of privacy, but the explicit protection of liberty. Accordingly, the Fourth Amendment is as easily read to protect the liberty of individuals to live free from unwarranted

government intrusion at home alone as it is to protect the liberty of individuals in public among others. By protecting privacy, the Fourth Amendment shares with due process the important task of protecting one essential aspect of liberty. Liberty thrives only when government does not play a dominant role in our interpersonal lives – a principle echoed in both theory and practice.

Arguing that the Fourth Amendment text specifically provides for a “right of the people to be secure” in their houses, persons and belongings, Professor Rubinfeld concludes that the focus on privacy has obscured the Fourth Amendment’s “distinctive political valence.”²⁰³ That political valence secures shared personal life from state domination. He argues, rightly I think, that when we focus on the right to security, which the Fourth Amendment textually protects, we see that the harm to be avoided “is the stifling apprehension and oppression that people would justifiably experience if forced to live their personal lives in fear of appearing ‘suspicious’ in the eyes of the state.”²⁰⁴ Security, however, is not an end in itself, related as it is to protecting features of ordinary life. Security is above all valued for its relation to the Constitution’s commitment to “secure the blessings of liberty.”²⁰⁵ The Preamble makes clear that security is a value related to liberty, not just of the individual, but to “ourselves and our Posterity.”²⁰⁶ The commitment to liberty in the Preamble, and by implication in the Fourth Amendment, is a commitment collectively shared by the people, and inter-generationally preserved. To be secure from suspicionless state surveillance of shared social life is to enjoy the liberty to live ordinary life in the company of others. The persons, houses, papers and effects the Fourth Amendment secures are essential features of ordinary life lived free from state domination.

The claim that the Fourth Amendment protects privacy, narrowly construed, is deeply embedded in Fourth Amendment jurisprudence. Therefore, disentangling privacy is not an easy task. Yet, it is simultaneously true, as the *Lawrence* Court makes clear, that “*Liberty* protects the

person from unwarranted government intrusions into a dwelling or other private places.”²⁰⁷ As an initial matter, if the privacy (narrowly construed) that the Fourth Amendment protects would allow a particular kind of government intrusion, it does not follow that the liberty protected by the Fourth Amendment need also permit the intrusion. Just as the protections afforded intimate relations diverge between the liberty protected by due process and the privacy protected by the Fourth Amendment, the *privacy* protected by the Fourth Amendment may diverge from the *liberty* it protects as well. Thus, when the Court reasons that if a person knowingly exposes information to someone else, or shares a dwelling with another, she no longer has an expectation of privacy, it may also be the case that the same act of sharing does not defeat liberty. Privacy and liberty may overlap, and the former may be valued for its ability to foster the latter, but the two need not always coincide. Liberty may protect practices of interpersonal sharing where privacy would fail.

[Doctrinal developments/suggestions omitted]

IV. Conclusion

Constitutional law is capacious in scope, and interstitial in practice. So much constitutional discussion focuses on the narrow doctrinal issues surrounding specific clauses. John Hart Ely made this critique commonplace, calling the problem one of “clause-bound interpretation.”²⁰⁸ When we look more broadly at the Constitution, however, we see repeating themes and motifs. Privacy, of course, is one of these themes, though not explicitly named in Constitutional text. Both the Fourth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments protect privacy, though they do so under doctrinal frameworks responding to different institutional pressures and social settings. The privacy due process protects emerges in

interpersonal situations – marriage, family, intimate relationships, and procreation. In *Lawrence v. Texas*, we learn further that the liberty protected by due process, does not protect the person in isolation, but protects the personal relationships that constitute our human lives. Nonetheless, the privacy protected by the Fourth Amendment excludes the privacy we experience in public when we share our lives with others. Interpersonal relations constituted through acts of sharing conversations, information, and our homes render us vulnerable to the State because the Supreme Court construes such acts of sharing as risks we assume in making public aspects of our lives. This doctrine misconstrues social practice and fails to recognize the liberty *Lawrence* protects as a right to associate with others through interpersonal relations free from state intrusion. If we are to avoid ever increasing capacities for government to dominate our lives, one place to draw a firm, but bright line, is not only at the threshold of the home, but also around the interpersonal relations essential to realizing our constitutionally protected liberties. We should re-examine and re-conceive how our Fourth Amendment privacy protections intertwine with “the components of liberty in its manifold possibilities.”²⁰⁹ As I have argued, moving from considerations of privacy to those of liberty allows us to better understand and protect acts of interpersonal sharing that constitute much of our everyday lives.

NOTES:

* Assistant Professor of Law, University of South Carolina School of Law. J.D. Yale Law School; Ph.D. Vanderbilt University.

¹ See e.g., Amol Sharma and Jessica E. Vascellaro, *Phones Will Soon Tell Where You Are*, WALL STREET J., March 28, 2008, at A1.

² *United States v. Miller*, 425 U.S. 435, 443 (1976).

³ *United States v. Knotts*, 460 U.S. 276, 281-82 (1983) (holding no expectation of privacy in public movements); *United States v. Karo*, 468 U.S. 705 (1984) (same).

⁴ See e.g., CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* (2007); Donald L. Doernberg, “*Can You Hear Me Now?*”: *Expectations of Privacy, False*

Friends, and the Perils of Speaking Under the Supreme Court's Fourth Amendment Jurisprudence, 39 IND. L. REV. 253, 284 (2006) (“The harm that the Amendment protects against is the loss of the sense of security that inevitably accompanies the idea that no matter where one is, and no matter what one does, the government may be listening or watching.”); Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 753 (2005) (“The third-party doctrine presents one of the most serious threats to privacy in the digital age.”); Scott E. Sunby, *Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen*, 94 COLUM. L. REV. 1751, 1761 (1994) (criticizing the Court's reliance on privacy because “[if] an individual's privacy is already largely abrogated, any additional privacy intrusions will appear to be only incremental by comparison.”). But see, Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. ___ (2009) (defending the third party doctrine).

⁵ Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1593 (1987). Moreover, she argues that “[a] view of the world that recognizes the essential interconnectedness of people and the importance of intimacy and sharing is foreign to the atomistic social theory underlying the Court's present doctrine.” *Id.* at 1635.

⁶ 539 U.S. 558 (2003).

⁷ *Lawrence*, 539 U.S. at 578 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)).

⁸ *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

⁹ The Article refers to the Fourteenth Amendment in this context as shorthand for the Due Process Clause of both the Fifth and Fourteenth Amendments.

¹⁰ 539 U.S. at 562.

¹¹ *Id.*

¹² 547 U.S. 103 (2006).

¹³ *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

¹⁴ *Lawrence*, 539 U.S. at 567.

¹⁵ See WOLFGANG SOFSKY, *PRIVACY: A MANIFESTO* 7 (2007) (“People leave more traces behind them than they realize.”)

¹⁶ See Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005).

¹⁷ Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1 (2007).

¹⁸ Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 131 (2008).

¹⁹ Constitutional criminal procedure, at least as applied to the states, is an elaborate articulation of due process. Early criminal procedure cases were initially decided as due process cases. See e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936) (holding confessions based on torture violate due process).

²⁰ *Lawrence*, 539 U.S. at 562.

²¹ 468 U.S. at 609 (1984).

²² 530 U.S. 640 (2000).

²³ 389 U.S. 347 (1967).

²⁴ *Hoffa v. United States*, 385 U.S. 323, 343 (1966) (Douglas, J., dissenting).

²⁵ See, e.g., Fourth Amendment “special needs” cases.

²⁶ *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

²⁷ See *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating law criminalizing inter-racial marriage as violating equal protection); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding, under equal protection, forced sterilization of convicted felons was unconstitutional).

²⁸ 381 U.S. 479 (1965). In *Lawrence v. Texas*, Justice Kennedy emphasized the interlocking nature of due process and equality. He writes, “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter oint advances both interests.” 539 U.S. 558, 575 (2003). See also Laurence H. Tribe, *Lawrence v. Texas: The ‘Fundamental Right’ That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1902-1907 (2004) (discussing the Supreme Court's blending of due process and equality).

²⁹ *Griswold*, 381 U.S. at 485.

³⁰ *Boyd v. United States*, 116 U.S. 616, 630 (1886).

³¹ The indirect complexity of the Court's rationale was at least partially caused by the Court's desire to avoid the ill-reputed notion of Substantive Due Process derived from *Lochner v. New York*, 198 U.S. 45 (1905), and repudiated in cases starting with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

³² *Griswold*, 381 U.S. at 483 (citing *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)).

³³ *Id.* at 486.

³⁴ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is 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."); *Carey v. Population Servs. Int'l.*, 431 U.S. 678 (1977) ("[T]he Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.").

³⁵ *Eisenstadt*, 405 U.S. at 453.

³⁶ On the idea that the issue of choice related to pregnancy is one of equality, see Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

³⁷ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

³⁸ As Louis Henkin put it, "[w]hat we do not know with confidence are the determinants of that zone of privacy, or the principle of inclusion within it." Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1423 (1974). This method of recognizing overlapping "zones of privacy" throughout the Bill of Rights has been subjected to withering criticism. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 940 (1973) (claiming the decision "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."). Additional criticisms include, Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 480 (1990) (footnote omitted) ("*Roe v. Wade* is an unpersuasive opinion, and the root of its unpersuasiveness is the Supreme Court's failure to ground its decision, that abortion is a fundamental right, in the text of the Constitution."); Geoffrey C. Hazard, Jr., *Rising Above Principle*, 135 U. PA. L. REV. 153, 166 (1986) ("*Roe* is justly subject to criticism on grounds of legitimacy . . . because it can fairly be said that it went too far beyond precedent. *Roe* tried to effectuate through the medium of a single judicial decision a greater change in the law than is permitted under our constitutional system.").

³⁹ *Id.* at 152-53.

⁴⁰ Among the relevant provisions include the First, Fourth, Fifth, and Ninth Amendments, as well as the liberty guaranteed by the Fourteenth Amendment. *Id.*

⁴¹ *Id.* at 153.

⁴² See *Webster v. Reproductive Health Services*, 452 U.S. 450 (1989); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

⁴³ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁴⁴ *Id.* at 847.

⁴⁵ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1131 (1991) ("Instead of being studied holistically, the Bill has been chopped up into discrete chunks of text with each bit examined in isolation.").

⁴⁶ *Casey*, 505 U.S. at 851.

⁴⁷ *Id.* at 852.

⁴⁸ *Id.*

⁴⁹ On the importance of developing constitutional vision, see Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1 (2007).

⁵⁰ For some there is no ambiguity in the multifarious situations in which the Court might protect a woman's ability to make choices regarding her pregnancy. See, e.g., Steven G. Calabresi, *How to Reverse Government Imposition of Immorality: A Strategy for Eroding Roe v. Wade*, 31 HARV. J.L. & PUB. POL'Y 85, 85 (2008) ("*Roe v. Wade* was . . . not merely wrongly decided. It was also profoundly immoral.").

⁵¹ *Casey*, 505 U.S. at 852.

⁵² *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

⁵³ In dissent, Justice Blackmun argued that the majority was indeed blind to the facts and implications of both precedent and the current case. He wrote, “[o]nly the most willful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence.” 478 U.S. at 205 (Blackmun, J., dissenting). Furthermore, the majority’s unwillingness to see the principle animating the Court’s precedent was possible only by “closing our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment’s Due Process Clause.” *Id.* at 204.

⁵⁴ *Casey*, 505 U.S. at 852 (recognizing consequences “for the woman . . . for the persons who perform and assist in the procedure; for the spouse, family, and society . . . for the life or potential life that is aborted.”)

⁵⁵ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁵⁶ *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

⁵⁷ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁵⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵⁹ *Casey*, 505 U.S. at 847.

⁶⁰ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

⁶¹ *Griswold*, 381 U.S. at 485.

⁶² *Lawrence*, 539 U.S. at 562.

⁶³ *Lawrence*, 539 U.S. at 567.

⁶⁴ *Id.*

⁶⁵ *Id.* at 590 (Scalia, J., dissenting). See Cass R. Sunstein, *Liberty after Lawrence*, 65 OHIO ST. L. J. 1059 (2004) (discussing *Lawrence*’s implications for various forms of sex, marital and employment regulations); Cass R. Sunstein, *What Did Lawrence Hold? Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27 (same).

⁶⁶ I have in mind here something more capacious when referring to ordinary or everyday life. Charles Taylor explains: “‘Ordinary life’ is a term of art I introduce to designate those aspects of human life concerned with production and reproduction, that is, labour, the making of the things needed for life, and our life as sexual beings, including marriage and the family.” CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 211 (1989). Some of the practices of ordinary life are both more central to personal notions of meaning and more private insofar as they encompass aspects of life shared with increasingly fewer persons as we move inward from communities and friends to extended family units to the marital relation itself.

⁶⁷ *Lawrence*, 539 U.S. at 575 (“The stigma this criminal statute imposes, moreover, is not trivial.”).

⁶⁸ *Lawrence*, 539 U.S. at 567.

⁶⁹ *Id.* at 567.

⁷⁰ *Id.* at 567.

⁷¹ *Id.* at 594 (Scalia, J., dissenting) (“Not once does [the Court] describe homosexual sodomy as a ‘fundamental right’ or a ‘fundamental liberty interest’ . . .”).

⁷² *Bowers*, 478 U.S. at 191 (framing the issue as involving “a fundamental right to engage in homosexual sodomy”).

⁷³ *Lawrence*, 539 U.S. at 567.

⁷⁴ *Lawrence*, 539 U.S. at 567.

⁷⁵ *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

⁷⁶ *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

⁷⁷ *Id.* at 618-19.

⁷⁸ *Id.* at 619.

⁷⁹ *Id.* at 618.

⁸⁰ Regarding liberty, the Court has recognized the importance of interpersonal relations. Regarding equality, the Court has often rejected the importance of group identity. Regarding equal protection, Justice O’Connor claimed that the Constitution “protect[s] persons, not groups.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Liberty protections for associations and intimacy involve far more personal and interpersonal relations than the relations that exist merely on the basis of a group classification according to characteristics such as race or gender.

⁸¹ Limitations on state interference may even apply to the military's "Don't Ask, Don't Tell" policy. The Ninth Circuit held "that when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*," it must justify its intrusion to satisfy a heightened standard of judicial review. *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008).

⁸² *Dale*, 530 U.S. at 653.

⁸³ *Id.* at 654.

⁸⁴ The problem with this reasoning is that all racist or misogynist employers want to exclude others as part of the expression of their views. See Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).

⁸⁵ The more limited view of associational rights is expressed: "[T]he First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right 'to engage in association for the advancement of beliefs and ideas.'" *NAACP v. Button*, 371 U.S. 415, 430 (1963). See also *NAACP v. Patterson*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

⁸⁶ *Id.* at 659.

⁸⁷ Such reasoning implies the group as a group has a single view on homosexuality which would be severely burdened in the same way that an individual would be burdened to adopt views she did not hold. But the facts do not support this proposition, for no doubt there existed internal dissent and difference nationally over this very issue of including gay members. See Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 508 (2001) ("[T]he Court ignored internal dissent in the Scouts over homosexuality and treated Boy Scouts culture like a 'thing' that is static, homogeneous, bounded, and distinct.").

⁸⁸ *Id.* at 659.

⁸⁹ Jamal Green argues that the Court in both *Dale* and *Lawrence* protects what he calls "metaprivacy," "the right to engage in status-definitional conduct free from normalizing governmental interference." Jamal Green, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L. J. 1862, 1875 (2006). The right to shed government-imposed stigma is an important due process development. "Themes of respect and stigma are at the moral center of the *Lawrence* opinion, and they are entirely new to substantive due process doctrine." Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 97 (2003).

⁹⁰ See, e.g., Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1425 (1974) ("Primarily and principally the new Right of Privacy is a zone of prima facie autonomy.").

⁹¹ *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 746 (5th Cir. 2008) ("The case . . . is about controlling what people do in the privacy of their own homes because the State is morally opposed to a certain type of consensual private intimate conduct. This is an insufficient justification for the statute after *Lawrence*."). But see, *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004) (holding that an Alabama anti-obscenity statute prohibiting the sale of sex toys does not violate a fundamental right under *Lawrence*).

⁹² The "right to be let alone" was first conceptualized by Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). Later Justice Brandeis articulated the right: "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

⁹³ As Charles Fried suggests, "Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves." Charles Fried, *Privacy*, 77 YALE L. J. 475, 482 (1968). Ruth Gavison also writes, "A loss of privacy occurs as others obtain information about an individual, pay attention to him, or gain access to him." Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L. J. 421, 428 (1980).

⁹⁴ See e.g., *Lawrence* 539 U.S. at 562 (protecting "liberty of the person both in its spatial and in its more transcendent dimensions."); *Casey*, 505 U.S. at 851 (articulating "right to define one's own concept of existence.").

⁹⁵ *Smith v. Maryland*, 442 U.S. 735, 743 (1979).

⁹⁶ Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 454 (1983). Feinberg enumerates some of the relevant life decisions as "what courses of study to take, what skills and virtues to cultivate, what career to enter, whom or whether to marry, which church if any to join, whether to have children, and so on." *Id.*

⁹⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

⁹⁸ Sandel explains: “The new privacy protects a person’s ‘independence in making certain kinds of important decisions,’ whereas the old privacy protects a person’s interest ‘in avoiding disclosure of personal matters.’” Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 524 (1989) (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)). Both forms of privacy involve the exercise of autonomous control over aspects of one’s life.

⁹⁹ If one attempts to define privacy, one quickly realizes that the concept is very elusive, ranging over a number of different interests and values. Robert Post has lamented that “[p]rivacy is a value so complex, so entangled in competing, and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all.” Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L. J. 2087, 2087 (2001). Moreover, Daniel Solove suggest that “[t]he difficulty in articulating what privacy is and why it is important has often made privacy law ineffective and blind to the larger purposes for which it must serve.” See Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1090 (2002).

¹⁰⁰ *Lawrence*, 539 U.S. at 562.

¹⁰¹ Charles Fried, *Privacy*, 77 YALE L. J. 475, 485 (1968).

¹⁰² *Id.* at 475. See also James Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFFAIRS 323, 329 (1975) (“[B]ecause our ability to control who has access to us, and who knows what about us, allows us to maintain the variety of relationships with other people that we want to have, it is, I think, one of the most important reasons why we value privacy.”).

¹⁰³ Jeffrey Reiman describes this approach as “a market conception of personal intimacy,” through which “[t]he reality of my intimacy with you is constituted not simply by the quality and intensity of what we share, but by its unavailability to others – in other words, by its scarcity.” Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFFAIRS 26, 32 (1976).

¹⁰⁴ As Ruth Gavison puts it: “Privacy also functions to promote liberty in ways that enhance the capacity of individuals to create and maintain human relations of different intensities. Privacy enables individuals to establish a plurality of roles and presentations to the world.” Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L. J. 421, 450 (1980).

¹⁰⁵ Reiman, *supra* note 68, at 33.

¹⁰⁶ Axel Honneth, developing an intersubjective basis for morality built on the imperatives of mutual recognition, considers: “Through our acts of affection, we encourage another person to open himself or herself up to us emotionally in such a way that he or she is rendered so vulnerable as to deserve, instead of mere moral respect, all the benevolence we can muster.” AXEL HONNETH, *DISRESPECT: THE NORMATIVE FOUNDATIONS OF CRITICAL THEORY* 178 (2007).

¹⁰⁷ See, e.g., SUSAN MULLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 19-21 (1988).

¹⁰⁸ See, Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631, 665 (2007) (arguing that “[t]he law makes possible and structures friendships, whether it does so consciously or not.”). See generally, ARISTOTLE, *NICOMACHEAN ETHICS* bks. VIII-IX (Terence Irwin trans., 1985); ALASDAIR MACINTYRE, *AFTER VIRTUE* 155 (2d ed. 1984) (“The type of friendship which Aristotle has in mind is that which embodies a shared recognition of and pursuit of a good. It is this sharing which is essential and primary to the constitution of any form of community, whether that of a household or that of a city.”).

¹⁰⁹ Leib, *supra* note 95, at 654.

¹¹⁰ See *id.*; Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009); Ethan J. Leib, *Friendships & Contracts*, 59 EMORY L.J. ____ (2010).

¹¹¹ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

¹¹² Robert Post argues that when we dress up privacy in the language of autonomy, we “miss the plain fact that privacy is for us a living reality only because we enjoy a certain kind of communal existence.” Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 1010 (1989).

¹¹³ See, e.g., Erwin Straus, *The Upright Posture*, in *PHENOMENOLOGICAL PSYCHOLOGY: THE SELECTED PAPERS OF ERWIN W. STRAUS* 139 (Erling Eng trans., 1966) (“Upright posture pre-establishes a definite attitude toward the world; it is a specific mode of being-in-the-world.”).

¹¹⁴ *Id.* More sources.

¹¹⁵ PLATO, PHAEDRUS.

¹¹⁶ *See, e.g.*, MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004); MARK JOHNSON, *THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON* (1987); ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

¹¹⁷ *Lawrence*, 539 U.S. at 567.

¹¹⁸ CHARLES TAYLOR, *PHILOSOPHICAL ARGUMENTS* 171 (1995).

¹¹⁹ CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* 15 (1989).

¹²⁰ Jean Paul Sartre argues that one's whole orientation to the world changes when one is in the presence of another person for whom one becomes the object of the other's look: "If someone looks at me, I am conscious of being an object." JEAN PAUL SARTRE, *BEING AND NOTHINGNESS* 363 (Hazel E. Barnes trans., 1956).

¹²¹ *Id.* at 347.

¹²² *See* AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* 92 (Joel Anderson trans., 1995) ("[T]he reproduction of social life is governed by the imperative of mutual recognition, because one can develop a practical relation-to-self only when one has learned to view oneself, from the normative perspective of one's partners in interaction, as their social addressee.")

¹²³ The State can dominate shared spaces, the public sphere, in greater or lesser ways. *See* ERVING GOFFMAN, *ASYLUMS* 23-32 (1961). Invading spaces in which we engage in our most embodied activities is central to our understanding of privacy. "Certainly in common usage a basic meaning of privacy is that of a private space, like a bathroom or a home, from which others may be excluded." Post, *Social Foundations of Privacy*, *supra* note X, at 971.

¹²⁴ *Lawrence*, 539 U.S. at 578.

¹²⁵ As Lawrence Tribe argues: "The 'liberty' of which the Court spoke was as much about equal dignity and respect as it was about freedom of action – more so, in fact. And the Court left no doubt that it was protecting the equal liberty and dignity not of atomistic individuals torn from their social contexts, but of people as they relate to, and interact with, one another." Laurence H. Tribe, *Lawrence v. Texas: The 'Fundamental Right' That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004).

¹²⁶ Dignity has not played as prominent a role in American constitutional thinking. It is a cornerstone, however, of International Human Rights. Article 1 of the Universal Declaration of Human Rights, for example, provides: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." *See* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUROPEAN J. OF INT'L. L. 655, 679-80 (2008) (developing conception of a minimum content for 'human dignity'). *See also*, James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L. J. 1151 (2004).

¹²⁷ *Lawrence*, 539 U.S. at 567.

¹²⁸ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

¹²⁹ 410 U.S. 113 (1973).

¹³⁰ 389 U.S. 347 (1967).

¹³¹ *Casey*, 505 U.S. at 901.

¹³² *See* JACQUES DERRIDA, *LIMITED INC.* (1988). Of course, I don't mean to suggest that clarifications and further reiterations are not possible, *see e.g.*, H.P. Grice, *Meaning*, 66 PHIL. REV. 377 (1957), but simply that in circulating meanings tied to practices that exceed anything private and particular to me, I must always express myself through publicly available modes of expression that exceed my control. *See e.g.*, J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962); STANLEY CAVELL, *MUST WE MEAN WHAT WE SAY?* 42 (1976).

¹³³ *Hoffa v. United States*, 385 U.S. 293 (1966).

¹³⁴ *United States v. White*, 401 U.S. 745, 751 (1971).

¹³⁵ *United States v. Miller*, 425 U.S. 435, 443 (1976) ("[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities.").

¹³⁶ Tracey L. Meares and Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 201-206; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 COLUM. L. REV. 551, 600-08 (1997).

¹³⁷ See e.g., *United States v. Lee*, 2724 U.S. 559 (1927) (relying on public exposure of cans of alcohol on deck of a boat).

¹³⁸ Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. L. REV. 1, 32 (1983).

¹³⁹ *Katz v. United States*, 389 U.S. 347, 351-52 (1967); *United States v. Miller*, 425 U.S. 435 (1976)..

¹⁴⁰ *Katz*, 389 U.S. at 351-52.

¹⁴¹ Justice Harlan, writing in concurrence, stated the rule the Court has followed as “a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” *Id.* at 361 (Harlan, J., concurring).

¹⁴² *California v. Greenwood*, 486 U.S. 35 (1988).

¹⁴³ “[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields.” *Oliver v. United States*, 466 U.S. 170, 179 (1984).

¹⁴⁴ *United States v. Knotts*, 460 U.S. 276, 281-82 (1983).

¹⁴⁵ *Florida v. Riley*, 488 U.S. 445 (1989).

¹⁴⁶ *United States v. Dunn*, 480 U.S. 294, 304 (1987) (concluding that peering into a barn outside the curtilage of the house in open fields does not constitute a search).

¹⁴⁷ *Arizona v. Hicks*, 480 U.S. 321 (1987) (articulating “plain view” standard).

¹⁴⁸ See e.g., *Ciraolo v. California*, 476 U.S. 207, 213-14 (1986) (“Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed.”).

¹⁴⁹ *United States v. Place*, 462 U.S. 695, 707 (1983) (reasoning that “the canine sniff is sui generis.”); *Illinois v. Caballes*, 543 U.S. 405 (2005).

¹⁵⁰ *Place*, 462 U.S. at 707.

¹⁵¹ *Lewis v. United States*, 385 U.S. 206 (1966).

¹⁵² *Hoffa v. United States*, 385 U.S. 293 (1966).

¹⁵³ *United States v. White*, 401 U.S. 745 (1971). See also *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1952).

¹⁵⁴ *Hoffa*, 385 U.S. at 303.

¹⁵⁵ *Id.*

¹⁵⁶ *Lewis*, 385 U.S. at 210-11.

¹⁵⁷ *White*, 401 U.S. at 752.

¹⁵⁸ *Id.* at 762-63 (Douglas, J., dissenting).

¹⁵⁹ *United States v. Jacobsen*, 466 U.S. 109, 117 (1984) (holding no privacy in a shared footlocker).

¹⁶⁰ *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

¹⁶¹ *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

¹⁶² Tracey Maclin, “*Black and Blue Encounters*” – *Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 272 (1991); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1306 (1990) (“[V]ery few persons will have the moxie to assert their Fourth Amendment rights in the face of police authority.”).

¹⁶³ Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 24-206 (discussing psychological studies that find that “people who are targeted for a search by police and informed that they have a right to refuse nonetheless feel intense pressure to comply and feel that refusal is not a genuine option.”).

¹⁶⁴ See William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266-67 (1999) (“Privacy, in Fourth Amendment terms, is something that exists only in certain types of spaces; not surprisingly, the law protects it only where it exists. Rich people have more access to those spaces than poor people; they therefore enjoy more legal protection.”).

¹⁶⁵ See *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (describing how officer who gained consent in contested search requested consent to search vehicles in 786 traffic stops in one year alone).

¹⁶⁶ There are limits, however, as to who is understood to have sufficient authority to consent to a search. A hotel clerk, for example, does not have authority to consent to a search of a guest's hotel room. *Stoner v. California*, 376 U.S. 483, 488 (1964). Nor does a landlord have authority to consent to a search of a tenant's home. *Chapman v. United States*, 365 U.S. 610 (1961).

¹⁶⁷ *Smith v. Maryland*, 442 U.S. 735, 743 (1979).

¹⁶⁸ "The Cases and literature on search and seizure, and to a lesser extent on self-incrimination, routinely emphasize the individual's ability to keep some portion of his life secret, at least from the government." William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1016 (1995).

¹⁶⁹ *Id.* at 744.

¹⁷⁰ "[U]nless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. It is idle to speak of 'assuming' risks in contexts where, as a practical matter, individuals have no realistic alternative." *Id.* at 750 (Marshall, J., dissenting).

¹⁷¹ *United States v. Miller*, 425 U.S. 435, 443 (1976). See also *United States v. Payner*, 447 U.S. 727 (1980) (applying assumption of risk for information found on loan applications).

¹⁷² See Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137 (2002).

¹⁷³ *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).

¹⁷⁴ *Randolph*, 547 U.S. at 128 (Roberts, C.J. dissenting).

¹⁷⁵ *Id.*

¹⁷⁶ *Hoffa v. United States*, 385 U.S. 323, 343 (1966) (Douglas, J. dissenting).

¹⁷⁷ *Id.* Justice Douglas also notes that police have been employing peepholes in men's bathrooms and working men's rooms to solicit homosexuals. *Id.* at 342-43. See David Alan Sklansky, "One Train May Hide Another": Katz, Stonewall, and the Secret Subtext of Criminal Procedure, 41 UC DAVIS L. REV. 875, 880 (2008) ("Homosexuality and its policing . . . were an important part of the background against which the Court constructed the modern constitutional law of the criminal process.").

¹⁷⁸ *Id.* at 354.

¹⁷⁹ See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.").

¹⁸⁰ Examples of these kind of activities include the FBI COINTELPRO program, and more recent use of participatory surveillance. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 494-500 (2004). Additional Source.

¹⁸¹ Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989).

¹⁸² HANNAH ARENDT, *THE HUMAN CONDITION* 41 (1958).

¹⁸³ *Id.* at 58.

¹⁸⁴ *Id.* at 57.

¹⁸⁵ HANNAH ARENDT, *ON REVOLUTION* 31 (1963).

¹⁸⁶ *United States v. White*, 401 U.S. 745, 762 (1971) (Douglas, J., dissenting) (warning that advocates of assumption of risk doctrine "should spend some time in totalitarian countries and learn firsthand the kind of regime they are creating here.").

¹⁸⁷ See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). See generally, OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1995).

¹⁸⁸ See, e.g., *United States v. Karo*, 468 U.S. 705 (1984).

¹⁸⁹ As Robert Post observes: "Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all." Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L. J. 2087, 2087 (2001).

¹⁹⁰ Foucault on governmentality.

¹⁹¹ See, e.g., THOMAS HOBBS, *LEVIATHON*. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1973).

¹⁹² Lloyd L. Weinreb, *Your Place or Mine? Privacy of Presence under the Fourth Amendment*, 1999 SUP. CT. REV. 253, 256.

¹⁹³ See GEORGE HERBERT MEAD, *MIND, SELF AND SOCIETY* (1934).

¹⁹⁴ See Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1635 (1987) (“A view of the world that recognizes the essential interconnectedness of people and the importance of intimacy and sharing is foreign to the atomistic social theory underlying the Court’s present doctrine.”).

¹⁹⁵ HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 149 (1968).

¹⁹⁶ Arendt refers to this condition as “natality.” ARENDT, *THE HUMAN CONDITION*, supra note X, at 9.

¹⁹⁷ *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

¹⁹⁸ *Lawrence*, 539 U.S. at 578.

¹⁹⁹ See *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

²⁰⁰ See *Minnesota v. Carter*, 525 U.S. 83, 106-109 (1998) (Ginsburg, J., dissenting); *United States v. White*, 401 U.S. 745, 768 (Harlan, J., dissenting); *Hoffa v. United States*, 385 U.S. 323, 340 (1966) (Douglas, J., dissenting).

²⁰¹ *Boyd v. United States*, 116 U.S. 616, 630 (1886).

²⁰² *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

²⁰³ Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 117 (2008).

²⁰⁴ *Id.* at 127.

²⁰⁵ U.S. Const., Preamble.

²⁰⁶ *Id.*

²⁰⁷ *Lawrence*, 539 U.S. at 562 (emphasis added).

²⁰⁸ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

²⁰⁹ *Lawrence*, 539 U.S. at 578.