

Foreword: A Note about Privacy

As I write, privacy is making headlines. Within the past year we have confirmed two new justices to the United States Supreme Court, and in both cases the potential justices were questioned vigorously at their confirmation hearings about their views on a constitutional right to privacy: whether it exists, what the shape of it might be, and how it might be applied to the issue of abortion. New headlines keep highlighting stories about the mass distribution of personal information as a result of the breach of security systems—at several large corporations and most recently within the military—that were meant to keep personal information private. The passage of the PATRIOT Acts (I and II) in the wake of September 11, 2001, have caused many to question the government's right to scrutinize the lives of private citizens for the sake of national security. These days, many Americans are talking about privacy—as a social concept, a legal concept, and maybe (or maybe not) a constitutional right. 1

And while the specific issues mentioned above have a distinctly modern flavor, our society's preoccupation with privacy is nothing new. Debates about privacy, its meanings and implications, have been part of our national conversation since this country's earliest days. For those who founded this country, thinking about privacy meant, among other things, grappling with questions such as exactly who could quarter their horses where (and when, and for what purpose). Today, most Americans are more likely to be concerned with privacy as it relates to their medical records or their credit card numbers. Whether the private realm constitutes a physical space (such as home, or private property) or the more encompassing idea of individual bodies or decision-making abilities has been the subject of much debate, and will be explored throughout this book. 2

Regardless of the particular application, privacy in the United States has always been about balance: safety and security on one hand, and liberty and freedom on the other. Examining this balance raises the question of whether the government has a responsibility to protect its citizens (from violence or terrorism, for example), and if so, to what extent, and how? To what extent can or should the government, in a free society, be allowed to intrude into the home? For example, does the desire to protect the nation from the threat of terrorism justify governmental surveillance of citizens' private phone calls? And where does one draw the line between protection and intrusion? 3

Privacy as it concerns individuals and their relationship to the state is often inextricably tied to questions of liberty and the substantive due process clause of the Fourteenth Amendment of the Constitution. This amendment declares ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law." Deprivation of life and property are concepts that are readily grasped, but what is liberty? And what would be the "due process" for depriving someone of that liberty? Is liberty simply another way of saying "the right to be let alone"? Or is 4

it something bigger—a right to self-determination, to autonomy, to live the life one chooses to lead? The debate about privacy raises questions about liberty and freedom, key concepts in the construction of "American-ness."

The events of September 11 brought all of these questions into sharp and urgent focus. Subsequent government responses to these events seem to imply that the state (here, the federal government, but more broadly, any governmental actor) does have a duty to protect its citizens, and that some intrusion into the private realm is a necessary means to that end. New questions arise almost daily: if the government can monitor the private mail and library records of its citizens, will it make us all safer? The hope of those who support such actions, of course, is that it will; the fear expressed by those who oppose them is that such intrusions threaten freedom and liberty itself. This discussion about privacy and the state's attempt to protect Americans from acts of terror engages many of the same issues raised in any consideration of the state's responsibility to protect citizens from acts of violence within the home. 5

The way we understand privacy in this country is vitally important to the way we understand liberty, freedom, and what it means to be an American. The concepts of freedom and liberty, while ever-changing, have always been crucial aspects of the American national identity. And they are also crucial to our understanding of domestic violence and the related issues of reproductive rights and same-sex relationships that I explore in this book. The way that privacy is understood and enacted in each of these cases has implications, not just for the issues themselves, but also for our shared understanding of liberty and freedom. 6