Expanding Conceptions of Privacy: A Comparative Study of the European Court of Human Rights and the United States Supreme Court

A Senior Honors Thesis

Presented in Partial Fulfillment of the Requirements for graduation with research distinction in Political Science in the undergraduate colleges of the Ohio State University

by

Emily Smart

The Ohio State University
June 2009

Project Advisor: Professor Lawrence Baum, Department of Political Science
Everybody wants privacy. Even though we are in the age of reality television and tell-all books, it remains a topic of heated debate and discussion. Often, privacy is the simple desire to be absent of any intrusion; other times, it is at the core of one’s ability to create a public persona. Increasingly, it is also the foundation of the freedom to make a difficult personal decision without outside forces dictating one’s choice. Whatever the reason may be, people will go to great lengths to protect their privacy.

This desire to protect privacy is easily illustrated by the actions of many governments. In this thesis, I examine and compare the ways in which two institutions, the United States Supreme Court (Supreme Court) and the European Court of Human Rights (ECtHR), act in regards to privacy. Although there are many other courts that deal with matters of privacy, my analysis focuses solely upon these two courts because, in my opinion, there are many parallels between these courts. When necessary to avoid distortion of the right to privacy, I will include information about how other institutions protect privacy and how lower courts rule. Ultimately, I aim to describe the current state of the right to privacy, offer reasons why differences in the two court’s interpretations may occur, and make suggestions about ways in which the right can develop in the United States in the future.

Before discussing the current state of privacy, it is important to understand exactly what I mean by the right to privacy. While it is obviously an idea many hold dear, it is also amorphous and new threats to privacy arise and change the entire discourse on the subject.

A Definition of Privacy

Defining privacy is notoriously difficult. Oftentimes, what is private for one person is public for another; therefore creating an all-encompassing standard is troublesome. For the purposes of my study, privacy is the security of the home, the liberty to make intimate decisions, the control of personal information, and the ability to think, speak, and act without an audience. This is far from the only definition that exists. Many scholars have attempted to define privacy with varying degrees of success.
In their famous article “The Right to Privacy,” Samuel Warren and Louis Brandeis defined privacy as “the right to be let alone” (1890). This definition is vulnerable to criticism for being overly broad because there are many ways in which a person could fail to let a person alone that have nothing to do with privacy, such as assault (Arneson, 2000, p. 91). Other scholars have connected privacy with a person’s ability to define himself, arguing without privacy one lacks the ability to create a persona that is safe from judgment and intrusion. This importance is highlighted in the context of social interaction: much of how we interact with other people relies upon controlling the release of information and seeking or avoiding the presence of others (Weinreb, 2000, p. 37). Also along this line of thought is the idea privacy has an important impact upon society. In their book, The Right to Privacy, Ellen Alderman and Caroline Kennedy describe the importance of privacy to Americans:

Why we as Americans so cherish privacy is not easy to explain…. [Privacy] protects the solitude necessary for creative thought. It allows us the independence that is part of raising a family. It protects our right to be secure in our own homes… [and] encompasses our right to self-determination and to define who we are. …The right to privacy, it seems, is what makes us civilized. (1995, p. xiii)

Moreover, a definition of privacy largely depends upon the context of a situation because, as with many concepts, privacy can mean one thing to the general public, but something entirely different in scope and application in the legal sphere.

Types of Privacy

Even though a single definition of privacy is elusive, it is easy to break down privacy by type as I have done for my definition. One set of types is physical, decisional, informational, and formational (Zucca, 2007, p. 100). Physical privacy deals with the protection of the home, property, and possessions. In America, this type of privacy is protected by the Fourth Amendment’s prohibition against
unreasonable search and seizure. Decisional privacy refers to a person’s ability to make intimate
decisions about his or her life, such as whether to bear a child or engage in certain sexual acts. A
person’s ability to control the information divulged about him or her is at the heart of informational
privacy, and formational privacy “refers to privacy as interiority” (Zucca, 2007, p. 100). Formational
privacy relates closely to our ability to think and express ourselves while being alone without
disturbance or disclosure; a person keeping a secret diary exemplifies this type of privacy. When one
combines these four components, a definition of privacy becomes clearer, and it is as complex as human
lives and experiences. It is also important to note there are limits to privacy, and when people’s rights
collide the law must intervene.

I will focus my comparison of the two courts to the areas of informational and decisional
privacy. Therefore, the relevant parts of my definition of privacy are the liberty to make intimate
decisions about oneself, and the ability to control the type and manner in which personal information is
shared. There are multiple reasons why I choose to focus on these two types of privacy. First,
informational and decisional privacy are areas of law that are constantly evolving in both of the courts I
am comparing, and each court addresses these issues from a different perspective, thus highlighting any
contrasts that exist. Second, these two areas deal most closely with constitutional issues, which are under
the jurisdiction of both the Supreme Court and the European Court of Human Rights. Finally, strict
standards or tests for evaluating these types of privacy cases do not exist in either court; often,
conflicting precedents create confusion for lower court judges about which way to interpret the law.

Origins of Governmental Protections

Although they approach the right in different ways with different interpretations, each court
addresses what is commonly understood in the United States as a constitutional right to privacy, among
other issues. While you will not find the word privacy in the first ten amendments to the United States
Constitution, the protections of the home, mind, and associations from government intrusion that do appear certainly have a basis in a fundamental desire for privacy. In 1965, the Supreme Court released an opinion for the case *Griswold v. Connecticut* that articulated this belief that the Constitution has an implied right to privacy. In the plurality opinion, Justice Douglas states that “various guarantees [in the Bill of Rights] create zones of privacy” (*Griswold*, at 484). Furthermore, Justice Douglas and others reiterate the importance of the Ninth Amendment which states that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people” (U.S. Constitution, 9th Am.). Subsequent cases examine in more detail exactly what this constitutional right to privacy does and does not include, and the rest of this section highlights some of these issues.

On the other hand, the European Court of Human Rights addresses issues that arise from the European Convention on Human Rights (ECHR). Unlike the United States Constitution, the ECHR contains a specific article that addresses privacy. Article 8 states:

1) Everyone has the right to respect for his private and family life, his home and his correspondence.

2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This language clearly creates a way to evaluate the actions of public authorities. First, there should generally be a protection of privacy unless a violation of private life is necessary in a democratic society. Another important detail to note is that the ECtHR operates with an understanding that governments have certain positive obligations; that is to say that in certain respects the government must
take action either to protect privacy rights from private actors (such as newspapers) or offer a way in which a person could receive a remedy from a violation. It is because of this philosophy that this court hears cases that involve private action even though the country is listed as the party in the case.

Both courts have final say in the matters that come before them, unless their legislative bodies amend the documents they interpret. As one may imagine, once issues arise that are not explicitly mentioned in the documents or that change rapidly due to social norms or technology, the court’s role becomes increasingly more complex and difficult. This is the case with privacy.

Levels of Protection of Privacy

The next important area to discuss is how each type of privacy, decisional and informational, is situated currently. I will give a brief overview of some topics that are associated with privacy in each region. In doing so, I will spend most of my time addressing the most recent cases because I aim to describe privacy protections as they affect people currently; however, I will discuss previous cases where I feel they put the current situation in a better context. This is the primary reason why I base my comparison on court cases from a different period of years. As will become clear through the rest of this section, American courts began to deal with a constitutional right to privacy in the mid-1960s while the ECtHR did not have an explosion of privacy cases until much later. Even though the American cases may be older, they still remain the most current cases to handle an individual privacy issue.

Coding and Scoring of Cases

In order to assess the level of privacy protection for these issues, I will use a scoring system. For cases that have been brought to the court and decided in favor of protecting privacy, regardless of whether the court decided it using privacy as the basis, I assign a value of one (1). For cases that either have not been addressed by either the ECtHR or the Supreme Court and for issues in which a protection exists at a lower level (for example, at the state level) I will assign a value of zero (0). I still score these
cases because it offers more information about the issues and their practical handling by the courts without distorting the systematic comparison of these two courts. Finally, for cases that either court has addressed but stated that no protection exists regardless of whether it is explicitly under privacy, I will assign a negative one (-1). I discuss my rationale for the score as I evaluate each issue, and a chart detailing this follows each type of privacy.

**Decisional Privacy**

First, I will address decisional privacy. Often, people describe decisional privacy as freedom and liberty in areas where the government should have little involvement. Traditional examples include procreation, marriage, and education. While many feel the government should not intrude, laws about these subjects do still exist. Many times, the justification for interference rests upon protecting community standards of decency; other times a separate, competing interest exists that conflicts with privacy, for example, protecting human life. The issues that I find relevant in the area of decisional privacy are the following: homosexual rights, abortion, in-vitro fertilization, naming, transgender rights, contraceptives, and assisted suicide. I choose these issues because they are at the heart of many new cases and because, for the most part, they have been addressed by both the United States and Europe.

**Use of Contraceptives.** As I’ve stated before, the case that started a constitutional right to privacy in the United States was *Griswold v. Connecticut* (1965). The case specifically dealt with a married couple’s right to use contraception. Eventually this right was extended to unmarried couples as well (*Eisenstadt v. Baird, 1971*). The ECtHR has never addressed a case under Article 8 that dealt with this area. Because the Supreme Court heard this case and decided it in favor of privacy rights, I scored it a 1. Since the ECtHR has not addressed this particular issue, it receives a 0.

---

1 Note that the court did not strike down this law because of privacy, rather that the distinction in the eyes of the legislature between married and unmarried couples had no rational basis.
Homosexual Rights. Next, I will address the issue of homosexual rights. In the United States, the Supreme Court most recently addressed homosexual rights in *Lawrence v. Texas* (2003). This case challenged a Texas anti-sodomy law. While executing a search warrant, police found the petitioner John Geddes Lawrence and his partner engaged in a private, consensual, sexual act and subsequently arrested them (*Lawrence v. Texas, 2003*). The majority declared the law unconstitutional and held that the issue must be regarded as the right of homosexuals to “choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons” (*Lawrence*, at 558). The Court’s assertion that people have the freedom to choose what kinds of consensual sexual acts in which they engage in the privacy of their homes is an example of a constitutional protection of a right to privacy. Because of this protection of privacy, I scored this issue a 1 for the United States.

In Europe, attitudes about homosexual behavior vary from country to country. Arguably the most conservative country in this respect is Ireland, and it was from Northern Ireland that the major case involving anti-sodomy laws came to the European Court of Human Rights, *Dudgeon v. UK* (1981). *Dudgeon* is very similar to *Lawrence* and, in fact, Justice Kennedy cites it in the opinion of the court. In Northern Ireland it was a crime to engage in sodomy, police were increasingly harassing homosexuals, and Jeffrey Dudgeon feared being prosecuted for this offense. The ECtHR held that this type of law was a violation of Article 8 because “the very existence of this legislation continuously and directly affects his private life” (Goldhaber, 2007, p. 37-38). Seven years later in the case *Norris v. Ireland* (1988), the ECtHR found that a similar law in the Republic of Ireland was also a violation of private life. Because these two cases only differ in location, with one expanding this decision to the Republic of Ireland, I scored them together, and they receive a 1 combined.

Abortion. Another controversial topic dealing with decisional privacy over which people have brought cases to the courts is abortion. In 1973, the Supreme Court decided *Roe v. Wade* that set up a
scheme regarding when abortion could be regulated by the state that was based upon a constitutional right to privacy (Roe v. Wade, 1973). There have been a variety other cases concerning abortion since then, but one worth noting is Planned Parenthood v. Casey which reaffirmed a right to choose to have an abortion, but also found that the state could regulate abortions as long as they did not create an “undue burden” for the pregnant woman (Planned Parenthood v. Casey, 1992). I scored these two cases together because Planned Parenthood updates Roe, and as far as privacy is concerned there were no substantial changes with the new case.

When looking over how the ECtHR handles abortion regulation, it is important to note one of the court’s philosophies: the margin of appreciation. This stems from the fact that the court presides over various countries that often have very different societal values and the belief that in certain cases the court should defer to the individual nation, instead of forcing a pan-European standard on everyone. In the area of abortion, the ECtHR largely defers to the member states' domestic law; therefore, there are varying degrees to which one can legally have an abortion. The following chart shows the current state of abortion regulations in Europe.

Table 1. Abortion Regulations in Europe

<table>
<thead>
<tr>
<th>Level of Regulation</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illegal</td>
<td>Malta</td>
</tr>
<tr>
<td>Legal only to save the life of the mother</td>
<td>Republic of Ireland</td>
</tr>
<tr>
<td>Legal for life and physical or mental health of mother</td>
<td>Spain, Portugal, Poland</td>
</tr>
<tr>
<td>Legal for life, physical and mental health of mother, economic, social reasons</td>
<td>United Kingdom, Finland</td>
</tr>
<tr>
<td>Legal upon request</td>
<td>All other European countries</td>
</tr>
</tbody>
</table>

("Europe’s Abortion Rules,” 2007)

This chart illustrates the level to which the ECtHR has allowed the margin of appreciation to dictate its rulings; however, the most restrictive regulations may be changing soon. In 2007, the court decided Tysiac v. Poland which found that there was a violation of Article 8 when a woman was not able to have an abortion that would have prevented significant eye damage. Additionally, the court is scheduled to hear a case in 2009 that deals with Ireland’s strict abortion regulations (A., B., and C. v. Ireland). In a
somewhat separate yet related manner, abortion is not a violation of Article 2, which guarantees a protection of life. The Supreme Court clearly made abortion a privacy issue; therefore, I scored the combined cases as a 1. As the ECtHR decided Tysiak in favor of privacy rights, I also score it a 1, but the next few years will certainly have a large impact on any changes on this issue.

 Naming Rights. Another issue that may seem odd to American readers is that of naming rights. Many European countries have a history of dictating the types of names that can be used for children and others. While the regulations for this issue have loosened quite a bit, some still linger. Two cases are of interest: Burghartz v. Switzerland (1994) and Guillot v. France (1996). In Burghardz, a man was not permitted to take his wife’s surname as his own, and this was seen as a violation of Article 8. For Guillot, a couple wanted to name their daughter Fleur de Marie Guillot, but was not permitted to by the registrar of birth. While the ECtHR did find that Article 8 does apply to the forenames of children, they did not find a violation because the girl was able to go by Fleur-Marie with little difficulty. In the United States, some issues as to naming do arise, but they are mostly handled by state courts and no case has reached the Supreme Court. For this issue, the ECtHR receives a 1 because it generally permits people to choose their names. Again, I grouped these cases together because they are so similar in nature. Since the Supreme Court has not addressed this issue, I scored it a 0.

 Transgender Rights. An issue that is related to a decisional right of naming is in the area of transgender rights. Oftentimes people who are transgender face difficulty in having the government officially recognize their new gender and with concealing this fact from people they encounter. One way in which unwanted suspicion about the history of a transgender person arises is when birth certificates are required for items such as jobs or licenses. In B. v. France (1992), the ECtHR found that it was a violation of Article 8 for a country to not permit updates to birth certificates of transgender people. Furthermore, in 2002 in the case Goodwin v. UK, the ECtHR again stated that the government not only
must change birth certificates, but also officially recognize the change in gender. In the United States there are no federal constitutional protections in this area; however, as with many areas of U.S. law, it is a matter handled by the states. While this issue is addressed by many states, for this study the score is a 0 because the Supreme Court has yet to address it. However, the ECtHR has, and I scored each of these cases as a 1 in this issue because governments have been forced recognize a person’s decision to change his or her gender by officially recognizing the new gender and amending birth certificates.

**Assisted Suicide.** Technology often drives changes in the law, and one issue that has arisen out of new medical technologies is assisted suicide. Again, this is an area in which the ECtHR has applied the margin of appreciation. In the case, *Pretty v. UK* (2002) a law penalizing those who assisted anyone in committing suicide was upheld because the government has an interest in protecting life and lesser penalties in the form of probation often applied to deal with individual circumstances. Therefore, a blanket ban on assisted suicide did not violate Article 8. Because of this finding, I scored this issue a -1 for the ECtHR. In the United States, this area has been addressed in many cases. Two cases in 1997, *Washington v. Glucksberg* and *Vacco v. Quill* both upheld bans on physician-assisted suicide. The rationale in *Vacco* was that the government has a right to ban this activity in the interest of delineating between refusing medical treatment and committing suicide. However, the Supreme Court did not go as far as declaring a law permitting physician-assisted suicide unconstitutional in states that permitted it. In *Gonzales v. Oregon* (2006) the Supreme Court found that the U.S. Attorney General could not prosecute doctors who assisted suicides under a federal controlled substances act. In a way, this shows the United States’ version of the margin of appreciation. Since the Supreme Court has heard cases in this issue that involve different approaches, I grouped and then scored these separately to reflect better the state of privacy in regards to assisted suicide. For *Washington* and *Vacco*, I scored a -1. For *Gonzales*, I scored a 1; therefore the net score is 0 in this issue.
In-vitro Fertilization. Finally, another way in which technology forces the courts to address new issues is in the area of in-vitro fertilization, or IVF. Currently the ECtHR has stated that they will apply the margin of appreciation to this issue, and that a British law that permitted either the man or woman to withdraw consent for IVF before the embryo was implanted was not a violation of Article 8 for the other person involved. This case involved a divorced husband who withdrew his consent for IVF for his ex-wife. The law was also upheld because it applied equally to both parties involved (Evans v. UK, (2007)). Even though this case protected other rights, it did not find in favor of the decisional privacy rights of the woman, so I scored it a -1. Again, this is not an area that has been addressed by the Supreme Court, but generally the law errs on the side of not forcing procreation. Because of this, I scored this issue a 0. Here is my assessment of the issues I analyzed that fall under decisional privacy.

Table 2. Scores for Decisional Privacy

<table>
<thead>
<tr>
<th>Decisional Privacy Issue</th>
<th>Cases: U.S. Supreme Court</th>
<th>Cases: European Court of Human Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Homosexual Rights</td>
<td>Lawrence v. Texas = 1</td>
<td>Dudgeon v. UK and Norris v. Ireland = 1</td>
</tr>
<tr>
<td>Abortion</td>
<td>Roe v. Wade and Planned Parenthood v. Casey = 1</td>
<td>Tysiac v. Poland = 1</td>
</tr>
<tr>
<td>Contraceptives</td>
<td>Griswold v. Connecticut = 1</td>
<td>Not addressed = 0</td>
</tr>
<tr>
<td>In-Vitro Fertilization</td>
<td>State regulations = 0</td>
<td>Evans v. UK = -1</td>
</tr>
<tr>
<td>Naming</td>
<td>State regulations = 0</td>
<td>Burghardz v. Sweden and Guillot v. France = 1</td>
</tr>
<tr>
<td>Transgender Rights</td>
<td>State regulations = 0</td>
<td>B. v. France = 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Goodwin v. UK = 1</td>
</tr>
<tr>
<td>Assisted Suicide</td>
<td>Washington v. Glucksberg and Vacco v. Quill = -1</td>
<td>Pretty v. UK = -1</td>
</tr>
<tr>
<td></td>
<td>Gonzales v. Oregon = 1</td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>3</td>
</tr>
</tbody>
</table>

When the cases are added together, Europe protects decisional privacy the same as the United States. It is important to note the imminent changes that may occur in Europe when the abortion case reaches the court. Furthermore, this only includes action of these two courts, and the scores do not take into account actions of lower courts, as indicated by the zeros. Therefore, for issues that I score with a
zero, it is fair to note that at least some people enjoy these privacy rights. This may help explain the United States’ score.

*Informational Privacy*

The next part of privacy I’d like to discuss is the issues regarding informational privacy. At the heart of informational privacy is the ability to control both the type of information others know about a person and the ways in which that information can be distributed or shared. The importance of informational privacy cannot be overstated; details about an individual not only shape his or her relationship with others, but also are the foundation of that person’s reputation. Looking over the cases that have reached the Supreme Court and ECtHR, I have decided to focus upon the following issues: use of image, defamation, dissemination of information, compilation of information, and drug testing. While both courts address these issues, many times this falls under tort law in the United States and usually only becomes a constitutional issue if privacy issues come into conflict with other civil rights and liberties, for example, free speech.

*Use of Image.* The first issue I’ll address is the use of one’s image. Just as knowledge of details about a person can violate his or her privacy, so can publishing his picture in the paper or using it in a way to which he or she did not consent. In Europe, there are two cases worth mentioning that fall under this category. The first, *Schussel v. Austria* (2002), deals with the image of a person running for public office. Wolfgang Schussel was already a public official and was campaigning for Prime Minister of Austria. During the election, a trade union distributed stickers that had Mr. Schussel’s face overlapped with his opponent’s face that stated, “The social security slashers and the education snatchers share a common face.” He brought a case to the ECtHR under Article 8 arguing that the Austrian government had a positive obligation to protect his privacy from third party actors, and it had failed to do so. Ultimately, the court declared his application to be inadmissible because the Austrian government had
mechanisms in place to protect his image if it had been distorted or used disparagingly, even though he was admittedly a public official. Furthermore, the court stated that the ability for the public to debate key issues, such as the policies of political candidates trumped Mr. Schussel’s right to privacy in this instance. In my coding of this case, I score it as a -1 because the court did not find for Schussel, therefore protecting his privacy. However, it is important to note that part of the rationale was Austria already had strong protections for the use of a person’s image in place at a national level.

The next case is Von Hannover v. Germany (2004). The petitioner in this case is Princess Caroline of Monaco, undoubtedly a public figure. She contended that Germany did not meet its positive obligation of protection of privacy by allowing German magazines to publish pictures of her private life taken in public places. It is important to note that Germany did have protections for the privacy of public officials in place. Even if a person was deemed a public figure, pictures could not be published if they were taken in a secluded place where it was obvious the subjects were acting with an expectation of privacy. However, in public places, such as restaurants or parks, pictures could be taken. Von Hannover argued that the definition of secluded place was far too narrow, and that the privacy protections should shield her from the press for all of her actions that were not in an official capacity. The ECtHR agreed. They held that there was a violation of Article 8 because the pictures did not contribute to any kind of meaningful debate or discussion, and the public does not have a legitimate right to know where she is or what she is doing if she is not acting in an official capacity. They went on to state that the German courts had not done enough to strike a balance and, therefore, failed to meet its positive obligation. Because of the strong protections this case offers and its widespread implications, I gave it a score of 1.

This is in stark contrast to the United States. While some protections of a person’s image exist, they are more accurately described as the “right of publicity” (Barnett, 1999, p. 556). The key difference with most European law is that this right is solely a commercial one that protects public figures: a
celebrity’s image may not be used for profit without permission. This developed not as a way to protect the actual image or to have control over the ways in which it was used, but to be compensated for the use (Barrett, 1999, p. 559). Furthermore, this type of protection or remedy exists only at the state level and not in all states. Therefore in my comparison I score the United States as a 0 in this area because the Supreme Court does not address it, and the protection for the use of image in a noncommercial way is not protected.

Defamation and Libel. The issue of defamation is widespread and complex because it can cover a variety of speech. As one may gather from the way the use of image is protected in Europe, many of the defamation laws also offer significant protections. However, there are limits to what the ECtHR will define as a violation of Article 8. In the case Gunnarsson v. Iceland (2005), Mr. Gunnarsson was a large shareholder of a bank and the Secretary General of a political party. He argued that an article detailing his bank dealings harmed his honor and reputation with false statements. The Icelandic national courts did not agree, nor did they make the publishers prove the veracity of the statements as a defense because it would be difficult to do. Additionally, they believed that as a public figure Mr. Gunnarsson should be prepared to handle public discourse about his professional actions. When he brought the case to the ECtHR, the court found no violation of Article 8 because the definition of private life is not exhaustive and no case had been found to protect the reputation and honor of a person, although this may be a factor to take into account. I scored this case as a -1 because the court heard the case and did not expand privacy to include honor and reputation.

In the United States a public figure’s right to privacy in defamation cases often conflicts with the freedom of the press. Over time a standard has evolved to help deal with such cases. In New York Times v. Sullivan (1964) the court found that a plaintiff must prove the defendant acted with actual malice in a civil suit if the plaintiff is a public official. Actual malice is intentional publication of false statements or
a reckless disregard for their possible falsity. The cases of *Associated Press v. Walker* (1967) and *Curtis Publishing Company v. Butts* (1967) included public figures in this standard. Furthermore, this protection of the First Amendment can extend to stories that do not deal with public figures: in *Time Incorporated v. Hill* (1967), the Supreme Court held that a plaintiff must also prove actual malice for newsworthy events. In this case, the Hill family endured an extremely violent hostage situation. Later, a play that shared a similar plot was written, and *Life* magazine published an article that created parallels between the Hill situation and the play. The Hill family sued for defamation, and during the trial they were not required to prove actual malice because the Hills were not public figures. However, the Supreme Court reversed this decision and stated that for newsworthy events, actual malice must be shown to give the press some breathing room. I scored this group of similar cases as a -1 as well because the standard of actual malice is very difficult to prove and this applies not only to public figures, but also people involved in newsworthy events. I grouped them together because they all dealt with the requirements of a single type of standard. Another case involving defamation is *Hustler Magazine v. Falwell* (1988) which involved a parody of Reverend Jerry Falwell. In this case, the first amendment right of free speech clearly won over the privacy rights of Reverend Falwell, and, therefore, I score it a -1 as well. I scored it separately from the other cases because this particular case focused more upon whether parody should be considered part of free speech, and not about a particular standard that must be met.

*Dissemination of Information.* Sometimes there is information that is not inherently hurtful or defamatory that a person simply wants to keep private. In Europe, this kind of protection of private life can come under many forms. The first two I’ll talk about are the cases of *Mikulic v. Croatia* (2002) and *Odievre v. France* (2003), which both involve releasing information about parenthood. In *Mikulic*, a child wanted to prove that a man was her father. The potential father continually missed court dates to
establish paternity, and the petitioner argued that by not having a mechanism in place to force the man to comply with court orders the Croatian government failed to meet its positive obligation under Article 8. They found this because a child’s ability to know his own father is an essential part of his private life and at times can outweigh the counter privacy right of the parent. However, it is not a clear case in all instances. In *Odievre*, an issue came up regarding France’s law that allowed mothers to make a birth secret. If they chose to do so, there was no way for the child to see documentation about the identity of her mother. For this instance, partially because the law was so clear, the court held that the mother’s privacy outweighed the child’s desire to know the birth mother’s identity. Although these cases are similar, a person was compelled to release information in *Midulic* while in *Odievre*, the birth mother was not. Therefore, *Mikulic* receives a -1 and *Odievre* receives a 1.

Dissemination of information cases take other forms as well. In another case, *Biriuk v. Lithuania* (2008) the ECtHR found Lithuania in violation of Article 8 because the government did not meet its positive obligation when a person’s HIV status was published. In another case, government action is the subject; *Sidabras and Dzianutas v. Lithuania* (2005) deals with a ban of ex-KGB members from certain positions in government. The ECtHR found this to be a violation of their Article 8 rights, and I have included it in this section because the people were forced to disclose their ex-KGB status to private employers, an action which certainly was not desirable. I gave each of these cases a score of 1 because the extend privacy rights.

In the United States, some of these issues do not arise because of the nature of our national system. Additionally in areas such as paternity and maternity, states usually have the jurisdiction. However, there is one case that clearly deals with dissemination of information: *Cox Broadcasting Corporation v. Cohn* (1975). The state of Georgia made it a misdemeanor to publish a rape victim’s name, so the father of a rape victim brought a case against the newspaper company that published his
daughter’s name. The Supreme Court declared the law unconstitutional because the state could not bar
the publication of accurate information that was available to the public. This case scored a -1 because
the state’s intention of protecting the privacy of a sensitive group of people was in conflict with the
freedom of the press.

Compilation of Information. Oftentimes, a person may not want another body to collect
information about him or her. In Europe, the cases Rotaru v. Romania (2000) and Amann v. Switzerland
(2000) established the general principle that the government cannot collect information or keep secret
files on a person if they are put to use and the person cannot access them to refute them. In Rotaru, a
person who engaged in political meetings and organizations had information collected about him by the
government. Hermann Amann was a Swiss businessman who sold battery-operated depilatory device.
When a woman from the Soviet Union embassy called to order his product, the Swiss government
started to monitor his business activities secretly. These cases together help create the same standard that
whatever kind of legal actions in which one may participate, the government cannot monitor secretly.
Therefore, I scored them together as a 1. However, there are some instances in which the government
has a legitimate reason for collecting secret information, such as when a person has access to sensitive
national security information as stated in Leander v. Sweden (1987). While the government does have a
compelling reason to collect secret information in this case, Leander does not expand privacy rights.
This case receives a -1.

In the United States, there is a case very similar to Rotaru and Amann: Laird v. Tatum (1972). In
this case, the Army was legally compiling secret information about people involved in certain political
activities. The political activists argued that their knowledge that the information was being collected by
law enforcement, even if the government did not act upon it, created a chilling effect on their speech.
The Supreme Court disagreed, stating that fears about possible future government action did not make
the case justiciable. This case receives a -1. Two other cases involve other areas of constitutional protection that are not necessarily privacy rights. In *NAACP v. Alabama* (1958), the Supreme Court found that attempts by Alabama to make the NAACP give them their membership lists conflicted with the members ability to freely associate. Additionally, in the case *Albertson v. Subversive Activities Control Board* (1965), the Supreme Court found that Communist Party members did not have to submit their names because of Fifth Amendment concerns. In these cases, the right to privacy is protected for people in various organizations, and, therefore, I scored them together as a 1. From the breadth of these cases in particular, the varying ways that the ECtHR and the Supreme Court handle privacy begins to become clear.

*Drug Testing.* Another area in which some privacy concerns arise is in drug testing. Often, drug testing in general is an accepted practice if it advances some purpose that is beneficial to society, but concerns arise that there should be strong limits to who can be drug tested and when it is appropriate. In Europe, the appropriateness of drug testing is often determined by whether it is necessary in a democratic society which is the second part of Article 8, and the following cases exemplify this principle. In *Wretlund v. Sweden* (2004) an office cleaner at a nuclear facility objected to being randomly drug tested as she did not have access to areas of high sensitivity nor did her work involve areas of high sensitivity. The ECtHR found this practice to be acceptable and dismissed her claim under Article 8 because the purpose of keeping nuclear facilities drug free was necessary in a democratic society. In another similar case, *Madsen v. Denmark* (2002), an employee of a Danish shipping company who did not navigate the ship in any way also objected to random drug testing. Again, the court stated that because this employee was still considered to be part of the safety staff, the government and employers aim of enhancing public safety through drug testing was necessary in a democratic society, and the case was declared inadmissible. Because these cases are similar in that they deal with
employment situations and both permit drug testing in a way that is necessary in a democratic society I scored them together as a -1.

However, not all cases of drug testing are permitted under the Convention. In the case of *Jalloh v. Germany* (2006), a suspect was forced by police to take medicine in order to induce vomiting to prove drug use. This was found to be a violation of Article 3 of the Convention which states that no person should be subject “to torture or inhuman or degrading treatment or punishment.” Article 8 privacy concerns were included in this case, but they were not decided separately because there was already an Article 3 violation. Even though this case also involved a different part of the Convention, it nonetheless extended a protection of privacy, and I scored it a 1 just as I did for Fourth and Fifth Amendment issues in the United States that I discussed earlier.

In the United States, much of drug testing falls under the Fourth and Fourteenth Amendments which protect citizens from searches and seizures without due process of law. First, I examine two cases that are similar to the European cases above. In *Skinner v. Railway Labor Executives’ Association* (1989), the Supreme Court upheld random drug testing of employees because of the government’s compelling interest in protecting the safety of the railways. Additionally in *National Treasury Employees Union v. Von Raab* (1989), employees who dealt directly with drug interdiction and carried a firearm were required to submit to random drug testing. The Supreme Court found that the government had a compelling interest to ensure that those people who worked with firearms and drugs are physically and mentally unimpeachable, and this outweighed any privacy concerns. Similarly, I scored these cases together as a -1 because they permit drug testing.

Another case that is very similar to a European case is that of *Rochin v. California* (1952). Police forced Mr. Rochin to have his stomach pumped in order to prove his use of drugs. The Supreme Court
found that this violated his rights to due process, and that this type of evidence was inadmissible. This case I also scored a 1 because it sets limits upon invasions of privacy for evidentiary purposes.

Other U.S. cases deal with different aspects of drug testing. In Chandler v. Miller (1997), the state of Georgia required all candidates for public office to certify that they took a drug test and that the results were negative. The Supreme Court found that this type of law was unconstitutional because the state’s interest was not strong enough to override the personal privacy of the candidates under the Fourth Amendment. In another case, Board of Education of Independent School District No. 92 of Pottawotomie County v. Earls (2002), all students that participated in extracurricular activities were subject to random drug testing. The Supreme Court upheld this policy because it furthered the legitimate interest of preventing drug use and addiction in public schools, and the students who participated in extracurricular activities had a lowered expectation of privacy. Furthermore, urine testing is not invasive and therefore does not violate the privacy of the students. These two cases receive a 1 and a -1, respectively, because the privacy rights of candidates are protected, while the privacy rights of students are not.

As in Europe, however, there are limits to how far drug testing can go even if the government seems to have a good reason. In the case Ferguson v. City of Charleston (2001), the Supreme Court addressed a case that dealt with drug testing of pregnant women. If a pregnant woman tested positive, these results would be given to law enforcement. The Supreme Court held that this was an illegal search because, although the aim was to get women into drug treatment programs, it ultimately served as evidence for law enforcement. Furthermore, the Court did not find that a special need, other than use for law enforcement, existed, so the Fourth Amendment applied. This case clearly protects the mother’s privacy and therefore receives a 1.
Table 3. Scores for Informational Privacy

<table>
<thead>
<tr>
<th>Informational Privacy Issue</th>
<th>Cases: U.S. Supreme Court</th>
<th>Cases: European Court of Human Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use of Image</td>
<td>State issues, not protected for noncommercial use = 0</td>
<td>Schussel v. Austria = -1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Von Hannover v. Germany = 1</td>
</tr>
<tr>
<td>Defamation and Libel</td>
<td>Hustler Magazine v. Falwell = -1</td>
<td>Gunnarsson v. Iceland = -1</td>
</tr>
<tr>
<td>Dissemination of Information</td>
<td>Cox Broadcasting v. Cohn = -1</td>
<td>Biriu v. Lithuania = 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Sidabras and Dzautas v. Lithuania = 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Mikulic v. Croatia = -1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Odievre v. France = 1</td>
</tr>
<tr>
<td>Compilation of Information</td>
<td>Laird v. Tatum = -1</td>
<td>Rotaru v. Romania and Amann v. Switzerland = 1</td>
</tr>
<tr>
<td></td>
<td>Albertson v. Subversive Activities Control Board NAACP v. Alabama = 1</td>
<td>Leander v. Sweden = -1</td>
</tr>
<tr>
<td>Drug Testing</td>
<td>Rochin v. California = 1</td>
<td>Jalloh v. Germany = 1</td>
</tr>
<tr>
<td></td>
<td>Ferguson v. City of Charleston = 1</td>
<td>Wretlund v. Sweden and Madsen v. Denmark = -1</td>
</tr>
<tr>
<td></td>
<td>Chandler v. Miller = 1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Board of Education v. Earls = -1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Skinner v. Railway Labor Executives’ Association and National Treasury Employees Union v. Von Raab = -1</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>-2</td>
<td>1</td>
</tr>
</tbody>
</table>

Current State of Privacy Protections

As I’ve mentioned throughout this paper, my purpose is to analyze the ways in which the Supreme Court and the European Court of Human Rights handle the right to privacy. Because of a variety of differences in the ways in which the courts hear cases, the types of case brought to them, and the documents they interpret, there are often issues and areas in which the two courts do not match completely. I have chosen to note that these differences exist, but to ensure that my analysis is as systematic as possible I have not included lower court decisions or other state and national laws that are outside the reach of the jurisdictions of these courts. I emphasize that this is not to say that because the highest court has not addressed privacy concerns for a single issue that protections of some kind do not exist. Therefore, the chart below contains my view of the privacy protections that exist currently at the level of either the Supreme Court or the ECtHR.
Table 4. Total Scores for Privacy

<table>
<thead>
<tr>
<th>Type of Privacy</th>
<th>United States</th>
<th>Europe</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decisional</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Informational</td>
<td>-2</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>1</td>
<td>4</td>
</tr>
</tbody>
</table>

It is clear that there is a significant discrepancy in the levels of privacy protection in the United States and Europe in the area of informational privacy. What will follow are some possible explanations for these differences and ways in which the right to privacy may or may not be enhanced in both geographic areas.

**Possible Explanations for Differences**

While it is important to note the current state of privacy protections in both Europe and the United States, in many ways the more interesting questions deal with why these differences in privacy rights occur. In this section, I present some reasons why I believe the level of privacy protections differ in these two areas. Because this is not a quantitative study, I will not be able to prove that these are the exact reasons for the discrepancies I observed. However, I believe that I can highlight the most likely explanations and identify any correlations that exist. In order to ensure that my analysis remained as systematic as possible, I determined that my dependent variable would be the levels of privacy protection as discussed in the previous section of the paper and that my independent variables would be a set of conditions that I believed would explain why the differences in privacy protections occur. When I discuss my final independent variable, my dependent variable shifts from the total amount of privacy protections to which type, decisional or informational, is protected more. For each of my independent variables I qualitatively analyze its effect on levels of privacy protections, if any. Finally, I will discuss
which variables in my opinion correlate best with the levels of privacy protections I observed both in the United States and Europe.

Description of Independent Variables

When I started to think about reasons why legal privacy protections may be different between the United States and Europe, one of the first items that came to mind were societal differences. These types of differences manifest themselves throughout government and legal systems, so I have considered them at length. The following list of variables is not exhaustive by any means; however, they are the ones that I initially felt could have the most impact on the right to privacy.

Type of protection. If privacy rights are protected explicitly, there will be a greater overall protection of privacy. In many ways this difference is the most obvious between the United States and Europe. Article 8 of the ECHR explicitly protects the right to privacy, while the U.S. right has developed through case law. To analyze this variable I use the text of the constitutional documents as well as the overview of case law that has been presented earlier in this paper.

Trust in Government. The less trust a society has in its government, the greater the extent of privacy protections. I believe a society’s feelings about its government often will be reflected in the law, especially at a constitutional or equivalent level. The rationale for this particular variable is that if a society does not trust its government to make the correct policy decisions generally, one of the ways to ensure protection is to enact legal protections. Because all of the judges that serve on both the Supreme Court and the ECtHR do not operate in a vacuum, information about how a society feels about a subject is also applicable to how the justices make their decisions. Either because the judges feel the same way as the society at large does, or because they pay attention to these sentiments. In order to measure the society’s trust in government, I utilized information from the General Social Survey for information about the United States and the Eurobarometer for information from Europe. Both of these surveys are
reputable and have surveyed their respective populations for decades. When compiling my information, I chose survey questions with similar wording when identical ones were not available, and I attempted to gather information from a variety of years for both locations. In the case of the Eurobarometer, I selected information from a group of European countries that are part of the Council of Europe and under the jurisdiction of the ECtHR, that were from varying parts of Europe, and that had survey results from multiple years. My goal was to provide an accurate picture of European variability while still being able to compare it as a singular area under the jurisdiction of a single court.

*Attitudes toward the Federal Government (U.S.) and International Bodies (Europe).* The next independent variable I analyzed dealt with attitudes towards government at high levels: The more negative the attitudes toward the federal government’s power or the more negative the attitudes toward international bodies, the lesser the level of federal or international protections of privacy. This would be because if a society has negative attitudes toward the federal government or international government, the more likely they are to leave privacy protections to state governments or national governments. At this point I obviously could not make as direct of a comparison between the two areas because the Supreme Court is a domestic high court while the ECtHR is an international court. However, similarities remain. In the United States, the Supreme Court often weighs the differences in values that exist among the fifty states when making decisions, and the ECtHR does this as well, except at an international level. Again, I relied on survey data to analyze this variable, this time again using the General Social Survey for information from the United States as well as the Eurobarometer. For the U.S., I focused on questions about the power of the federal government, while for Europe I looked at questions that dealt with feelings about international bodies enforcing solutions and fears about a loss of national identity within international organizations.
Accessibility. The more accessible the courts are, a greater protection of privacy will exist. The idea behind this variable was inspired by Charles Epp’s work on rights revolutions and the factors that lead to them (Epp, 1998). A rights revolution in this context is a transformation in the focus of a court from a focus on property and business rights to a focus on individual civil rights and liberties (Epp, 1998, p. 2). In his book, Epp points to a variety of factors that can lead to a rights revolution in a country including an independent judiciary that has control over its docket, rights oriented judicial leadership, a rights conscious society, and the existence of support structures in the form of legal advocacy groups. His thesis is that while the first three conventional explanations are often necessary for a rights revolution, it is the existence of support structures that remains the main determinant of whether a rights revolution will occur. While I will not mirror Epp’s approach to comparing the courts, I do utilize key ideas of his to form my own variable. I will examine what I call the overall accessibility of the two courts by discussing the following factors: control of the docket by the court, the existence of an individual right of petition, the percentage of cases brought to the court that are heard, and the existence of basic support structures such as legal advocacy groups. Together, these factors form a picture of the overall accessibility of the court, and I feel this has a potential impact upon privacy rights because the more accessible courts are, the more cases there will likely be, which can lead to movement as far as privacy rights are concerned.

Type of Privacy Valued More. The type of privacy a society values more, either based on liberty or dignity, will have a greater protection legally. At this point, my dependent variable shifts. For the previous independent variables, I focus on how they may affect the overall level of privacy protections; however, for this variable I am more interested in the level of protection of informational privacy in relation to decisional privacy. In my earlier description of this, I noted that I would only discuss two types of privacy, informational and decisional, out of the four I briefly described. These two conceptions
of privacy are based upon ideas of dignity and liberty. A protection of informational privacy helps protect a person’s dignity, while a protection of decisional privacy helps protect a person’s liberty. I believe that the type of privacy that a society values more will be protected to a greater extent legally because societal values are often reflected in law. To analyze this variable, I rely upon the work of James Whitman in his article “Two Western Cultures of Privacy: Dignity versus Liberty” (Whitman, 2004). I supplement Whitman’s findings with other academic works and my own research utilizing survey data again, this time again from the General Social Survey and the Eurobarometer.

Variable Data

Type of Protection

This is the most straightforward variable because it deals with the text of the U.S. Constitution and the ECHR. While some states expressly protect privacy rights in their state constitutions\(^2\) and there are federal laws that protect privacy in certain areas, such as health and education,\(^3\) there is no explicit right to privacy mentioned anywhere in the Constitution. Any of the Constitutional protections of privacy developed through a progression of cases, and this did not begin until 1965. As discussed earlier, this is not the case in Europe. When the Council of Europe first drafted the Convention on Human Rights and Freedoms in 1950, it used the newly-formed United Declaration of Human Rights as a starting point. The document went into force in 1953, and it contained Article 8, which expressly protects private and family life. However, the individual right to complaint was not a mandatory part of membership in the Council of Europe until 1998 when Protocol Number 11 took effect (“Information Document on the Court,” p.1). Since then, all citizens of the member countries not only have a right to privacy, but also ways in which to seek remedies when it is infringed.

\(^2\) The states that have some type of privacy protections in their state constitutions are Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington (“Privacy Protections”).

\(^3\) The Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) and Health Insurance Portability and Accountability Act Privacy Rule (“OCR Privacy Brief”) are two examples of federal protection.
Contrastingly, when U.S. citizens believe that their privacy rights are infringed by the federal government, they cannot point to a specific amendment or statute for protections in most instances; they must rely upon earlier rulings and an application of other amendments to their case. When Europeans feel that their government, or in some cases private actors, have infringed their privacy rights, they simply bring a complaint under Article 8. While some may argue that in practice there is no difference in the acceptance of the right to privacy as a constitutional concept in the United States because of its development through case law, I disagree. When working in a common law framework, justices have more latitude to apply precedent or not, and this can lead to either narrow or broad interpretations, depending on the individual justice’s beliefs. When dealing with a right that is not written expressly in the Constitution, this variability is only exacerbated. Based upon my assessment of the levels of privacy protections in the United States and in Europe, this variable correlates with privacy protections because the place that has an explicit protect, Europe, has overall greater privacy rights.

**Trust in Government**

To assess the levels of trust in government, I relied upon survey data. For the United States, I gathered information from the General Social Survey which has amassed a large quantity of information about Americans for decades. I looked at the following question: “I am going to name some institutions in this country. As far as the people running these institutions are concerned, would you say you have a great deal of confidence, only some confidence, or hardly any confidence at all in them?” and the responses for the “Executive branch of the federal government” and “Congress” (Davis, Smith, & Marsden, 2007b, p. 236, 238). I compiled the results from the years 1974, 1978, 1984, 1989, 1994, 1998, 2004, and 2006. From this, I found the mean and standard deviation for each response as shown in Table 5.

<table>
<thead>
<tr>
<th></th>
<th>Great Deal of Confidence</th>
<th>Only Some Confidence</th>
<th>Hardly Any Confidence</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Table 5. Confidence in the Executive and Legislative Branches of the U.S. Government</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
As one may expect, there is some variation to the responses depending upon the year and the political situation of the time; however, it is still accurate to state that the overwhelming majority of Americans have either “only some” or “hardly any” confidence in the federal government and that this is a sentiment felt strongly from the mid-seventies to the present with surprisingly low variation over the years.

For my European data, I relied upon the Eurobarometer which routinely surveys citizens of European Union countries and has for over thirty years. There were two questions from which I gained information. The first, asked in March of 1996 was

Many important decisions are made by the European Union. They might be in the interest of people like yourself, or they might not. To what extent do you feel you can rely on each of the following institutions to make sure that the decisions taken by this institution are in the interest of people like yourself? (Eurobarometer 44.2)

This question was asked of the respondent’s national government and his national parliament. For the questions asked in 2002-2006 the question was

I would like to ask you a question about how much trust you have in certain institutions. For each of the following institutions, please tell me if you tend to trust it or tend not to trust it. (Eurobarometers 57.1, 60.1, 61, 63.4, 65.2).

This question, just as the March 1996 question, was asked of about the respondent’s national government and the national parliament. I gathered information from the following countries: France, Germany, Italy, Ireland, Great Britain, and Sweden. I chose these countries both for continuity and for a variety of countries. I took the responses from each country for each year and found the mean. Next, I

<table>
<thead>
<tr>
<th>Executive Branch</th>
<th>Mean 15.9%</th>
<th>Mean 51%</th>
<th>Mean 33.1%</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>SD 4%</td>
<td>SD 6%</td>
<td>SD 7%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Congress</th>
<th>Mean 13%</th>
<th>Mean 58.9%</th>
<th>Mean 28.1%</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>SD 3%</td>
<td>SD 5%</td>
<td>SD 7%</td>
</tr>
</tbody>
</table>

(Davis, Smith, & Marsden, 2007a)
calculated the mean over the entire period of years which were 1996, and 2002-2006. The following table shows my findings.  

Table 6. Levels of Trust in National Government and National Parliament, Europe

<table>
<thead>
<tr>
<th></th>
<th>Tend to Trust (Can Rely Upon, 1996)</th>
<th>Tend not to Trust (Cannot Rely, 1996)</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Government</td>
<td>Mean 36% SD 6%</td>
<td>Mean 62% SD 6%</td>
</tr>
<tr>
<td>National Parliament</td>
<td>Mean 43% SD 4%</td>
<td>Mean 56% SD 4%</td>
</tr>
</tbody>
</table>

As with the United States, there is some variation from year to year, and there is additional variation from country to country. However for each of the years I examined, the mean of the net feelings of trust leaned towards less trust than more trust. Furthermore, looking at individual countries, only France and Ireland in 1996 and Sweden in 2002 and 2004 had a net positive feeling toward their national government. Additionally, as far as net positive feelings toward the national parliament only France in 1996; Ireland in 1996 and 2002; and Sweden in 1996, 2002, 2003, 2004, and 2006 exhibited this sentiment. Overall, Europeans expressed a degree of distrust in their governments.

Generally speaking, while both geographic areas tend to not trust or have confidence in their governments, Americans tend to have stronger negative feelings than do Europeans. This especially holds true when looking at the lawmaking bodies of each government where the European opinion tends to split evenly. This contradicts my initial thought that trust where trust levels are lower, the levels of privacy protections are higher.

Attitudes toward the Federal Government (U.S.) and International Bodies (Europe)

For the next variable I examined, I utilized a variety of survey data. For the United States, I examined two questions to gain an accurate idea about attitudes towards the federal government’s

---

4 My information is a compilation of information gathered from Eurobarometers 44.2, 57.1, 60.1, 61, 63.4, 65.2, and I obtained them from a data file created by ISPCR in conjunction with Gesis at http://www.gesis.org/en/institute/. This data is also available at http://ec.europa.eu/public_opinion/index_en.htm for those who are not members of ISPCR. Full citations appear in the Reference section of this paper, and the reader may most easily identify the source by the Eurobarometer number.
power. The first was “And what about the federal government, does it have too much power or too little power?” with response options of “far too much power, too much power, about the right amount of power, too little power, and far too little power” (Davis et al., 2007b, p. 1516). I gathered information from 1985, 1990, and 1996. The table below shows my data.

Table 7. Power of United States Federal Government

<table>
<thead>
<tr>
<th></th>
<th>Far Too Much</th>
<th>Too Much</th>
<th>About Right</th>
<th>Too Little</th>
<th>Far Too Little</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>18.1%</td>
<td>39.6%</td>
<td>38.1%</td>
<td>3.8%</td>
<td>.4%</td>
</tr>
<tr>
<td>SD</td>
<td>6%</td>
<td>3%</td>
<td>8%</td>
<td>1%</td>
<td>0%</td>
</tr>
</tbody>
</table>

(Davis et al., 2007a)

As one may expect, most of the responses lie within the middle three choices, but the majority of Americans believe that the federal government has too much power (57.7%), and a small minority believe that it has too little power (4.2%).

Additionally, in 1996 the question was asked

Which of these two statements comes closer to your own view? It is essential that America remains one nation, or Parts of America should be allowed to become fully separate nations if they choose to? (Davis et al., 2007b, p. 1777)

The overwhelming majority of Americans, 94.4%, believe that it is essential that America remains one nation (Davis et al., 2007a). I believe these questions are indicative about American sentiments towards federalism generally. While many are not pleased with the amount of power that the federal government has currently, they are not near to believing that any state should be independent.

For the European data, I wanted to find questions that were comparable to the ones I analyzed for the United States, but that fit within the European context. I again utilize data from the Eurobaromenter and looked at two different types of questions. The first asked about the attitudes towards international bodies asking whether the respondent agreed with the following statement, “For certain problems, like environment pollution, international bodies (eg. UN, EU, WHO) should have the right to enforce solutions.” This question was asked in 1995 and 2003 (International Social Survey Programme [ISSP],
1995, 2003). Again, I compiled responses from different countries: France, Germany, Italy, Ireland, Great Britain, and Sweden. The question was not asked in France in 1995 or Italy in 2003, so the means come from a set of five countries. The other questions I examined dealt with fears about the European Union. This question asked, “Some people may have fears about the building of Europe, the European Union. Here is a list of things which some people say they are afraid of. For each one, please tell me if you, personally, are currently afraid of it, or not?” I looked at the responses for “The loss of national identity and culture.” These responses came from France, Germany, Ireland, Italy, Sweden, and the United Kingdom from the years 1995, 1997, 2001, and 2006. The table below shows the results.  

Table 8. European Attitudes Regarding International Bodies

<table>
<thead>
<tr>
<th>International Enforcing</th>
<th>Agree</th>
<th>Neither</th>
<th>Disagree</th>
<th>Disagree Strongly</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>29%</td>
<td>12%</td>
<td>9%</td>
<td>2%</td>
</tr>
<tr>
<td>SD</td>
<td>6%</td>
<td>3%</td>
<td>2%</td>
<td>0%</td>
</tr>
<tr>
<td>Fear of Loss of Identity</td>
<td>Fear</td>
<td>Do Not Fear</td>
<td>Do Not Know</td>
<td></td>
</tr>
<tr>
<td>Mean</td>
<td>31%</td>
<td>60.35%</td>
<td>7.33%</td>
<td></td>
</tr>
<tr>
<td>SD</td>
<td>9.46%</td>
<td>3.95%</td>
<td>1.26%</td>
<td></td>
</tr>
</tbody>
</table>

As the data shows, most Europeans polled agreed that, for some issues, international bodies should have the right to enforce solutions. There was not an unusual amount of variation in the responses, and over time more people agreed with the statement than disagreed. I feel this is indicative of a greater willingness to cooperate with international bodies, and, given the success of the European Union, I do believe this is an accurate picture. Furthermore, there were two additional survey questions that I examined from 2003 to support this finding. The questions asked were “In general, [COUNTRY] should follow the decisions of international organizations to which it belongs, even if the government does not agree with them,” and “International organizations are taking away too much power from the [COUNTRY NATIONALITY] government” (ISSP, 2003). The chart below has the responses from the

---

5 This information is a compilation of information from Eurobarometers 44.1, 47.2, 55, and 65.2. Again, full citations are available for each individual Eurobarometer in the Reference section.
same set of European countries. I’ve also included the responses from the United States, not as a basis of comparison as part of my research, but to offer a point of reference for American readers.

Table 9. 2003 Responses Regarding International Bodies

<table>
<thead>
<tr>
<th>Country Should Follow</th>
<th>Agree strongly</th>
<th>Agree</th>
<th>Neither agree nor disagree</th>
<th>Disagree</th>
<th>Disagree strongly</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>5.0%</td>
<td>31.5%</td>
<td>30.0%</td>
<td>28.5%</td>
<td>5.0%</td>
</tr>
<tr>
<td>SD</td>
<td>3%</td>
<td>5%</td>
<td>5%</td>
<td>6%</td>
<td>2%</td>
</tr>
<tr>
<td>US</td>
<td>4.7%</td>
<td>25.1%</td>
<td>34.4%</td>
<td>30.1%</td>
<td>5.7%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Taking Too Much Power</th>
<th>Agree strongly</th>
<th>Agree</th>
<th>Neither agree nor disagree</th>
<th>Disagree</th>
<th>Disagree strongly</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>10.4%</td>
<td>36.1%</td>
<td>26.9%</td>
<td>23.6%</td>
<td>3.0%</td>
</tr>
<tr>
<td>SD</td>
<td>5%</td>
<td>6%</td>
<td>7%</td>
<td>8%</td>
<td>2%</td>
</tr>
<tr>
<td>US</td>
<td>9.7%</td>
<td>26.4%</td>
<td>32.8%</td>
<td>28.6%</td>
<td>2.4%</td>
</tr>
</tbody>
</table>

For these questions, France is an interesting outlier in that 11.2% of people surveyed agree strongly that their country should follow international bodies’ decision even if their government disagrees, but 17.7% also strongly agree that international bodies are taking too much power from their country. Also of note is that 16.6% of Great Britain’s citizens also agreed strongly that international bodies are taking too much power.7

Overall, it seems that Europeans have a positive attitude towards international bodies. They seem to agree that international bodies should enforce solutions and slightly more hold this opinion than not even when their domestic government disagrees. However, concerns remain that international bodies will lead to a loss of national identity and that international bodies are taking too much power from domestic governments.

When comparing the United State and Europe in this respect, it seems that Americans have a less favorable view of federal powers than do Europeans of international bodies. This supports my initial beliefs that where there are generally negative attitudes to the level of government of the court, there will be less privacy protections at that level as well. For the United States this seems especially appropriate given the number of areas in which privacy protections are only found at the state level.

---

6 Excluding France, the new European mean is 3.7% for agree strongly.
7 Excluding France and Great Britain, the new European mean is 7%.
Accessibility

The next independent variable I will discuss deals with the overall ease of accessibility of the courts. First, I will discuss the control that each court has over its own docket. Each court has mechanisms set up that decide how cases will reach the highest level. In the U.S., the court must grant a writ of certiorari, which is an order that allows the parties to argue their case before the court. While the court does have rules that form a guideline as to the cases it will hear, there is never a guarantee that they will grant cert. The most important factor is the decision of the justices themselves. During a conference the court conducts, four of the nine justices must vote to hear a case. Other factors include whether a case is justiciable, that is, whether a case is a judicial, not a political matter. In order for a case to meet this requirement it must be a real case and controversy, the parties need to have a direct interest, it must be ready for decision, and it cannot be moot (Hall & Patrick, 2006, p. 10). In other words, a person who is directly involved in a real case must file the petition regarding an incident that has already happened and has yet to be decided or reconciled. Even when all of these conditions are satisfied, it does not mean the Supreme Court will hear the case. Scholars continue to speculate as to the reasons why the Supreme Court decides to hear or not hear a case. Individual feelings about the case certainly have an influence on the docket. Some scholars have found that a judge’s values in a variety of subjects and his or her decisions to hear and decide cases regarding civil liberties cases correlate highly (Segal, Epstein, Cameron, & Spaeth, 1995, p. 812-813). There is also evidence to suggest that public opinion has a great deal of influence on the justices’ decisions in general (McGuire & Stimson, 2004, p. 17). However, these conferences are held in private, and the only information we have comes from notes that some justices have left behind; therefore, any knowledge gained from former judges may be irrelevant to the current court depending upon the composition of the court.
The structure of how a case gets to the ECtHR is quite different. A petitioner must first contact the court about a potential human rights violation. The case will be provisionally assigned to a reporting judge, or judge rappaorteur, and then the petitioner must fill out an application. The court will assign the case to a unit, and from there the case will go before a three-judge committee. The committee uses Article 35 of the Convention to decide the admissibility of an application. The Article states that the case must have exhausted all domestic remedies, it must not be a case substantially similar to a previous case, and it must not be incompatible with the Convention or its protocols (Arold, 2007, p. 59-60). Additionally, it cannot be an anonymous complaint, nor can it be under examination by another international body, nor can the complainant abuse the right of petition (Clements, 1994, p. 36-38). If the case is admissible it will go before the chamber. If it is a normal case it will go before seven judges, if it is a case of considerable controversy it will go before a grand chamber of seventeen to twenty judges (Arold, 2007, p. 58). The following flow chart created by the Court offers a clear picture of the steps a case can take.
Figure 1. Case-Processing Flowchart

This flowchart indicates the progress of a case through the different judicial formations. In the interests of readability, it does not include certain stages in the procedure – such as communication of an application to the respondent State, consideration of a re-hearing request by the Panel of the Grand Chamber and friendly settlement negotiations.

(Case-processing Flowchart, 2009)
Unlike the Supreme Court, if a case is deemed admissible it will be heard by the ECtHR. The ECtHR has had an explosion of cases since 1998, and one of the options reformers put forward was to give the judges the ability to refuse to hear certain cases. This was widely rejected because of fears that adopting an American style certiorari procedure would be “alien to the philosophy of the European human rights protection system,” and it risked “politicizing the system as the Court would have to select cases for examination.” Furthermore, the group felt that this would create a greater margin of appreciation than what already exists currently (“Report of the Group,” para. 42). In many ways, this is logical for the ECtHR to avoid this because it must already address the difficulties associated with applying protections of human rights to so many different countries and so many different cultures.

The next aspect of accessibility that I will discuss is the existence of an individual right of petition. In the United States, citizens have been able to bring cases to the court since its inception. The only limitations on this exercise occurred when an individual was not thought of as a citizen as was the case when slavery existed. In Europe, the individual right of petition did not exist as far as the ECtHR was concerned until the adoption of Protocol 11 in 1998. Protocol 11 changed many aspects of the court; in many ways, it altered the role and ability of the court to hear cases completely. Besides streamlining case-processing and other reforms, Protocol 11 guaranteed that every person had a right of individual petition. This was a change from the previous structure in which cases originating in applications by private individuals or non-governmental organisations could only come into being if the State concerned had declared that it accepted the Commission's competence in the matter and could only be decided by the Court if the State had, in addition, declared that it recognised the Court's jurisdiction. (“Protocol No. 11,” Commentary on the provisions of the Protocol section, para. 75)

---

8 This is a result of Protocol 11, which I will discuss later in this section.
The ability for individuals to bring cases of human rights violations against their country has been essential to the transformation and relevance of this court.

This leads to the next aspect of accessibility: the percentage of cases heard by the courts. The Supreme Court does not hear all of the petitions that people file; in fact, they hear less than two percent of the petitions an average (Hall & Patrick, 2006, p. 9). This could be due to a variety of factors, including the fact that some cases do not meet the criteria that the Supreme Court has outlined; however, this low percentage is also due in part because the Supreme Court’s docket is almost entirely discretionary. Furthermore, the workload of the justices may change depending on the composition of the court and personality of the Chief Justice. In contrast, the ECtHR must hear all cases that are deemed admissible, that is to say those that meet the ECtHR’s criteria as discussed earlier. This leads to an astounding number of cases that the ECtHR hears.

What is important to note is that judgments are not the only ways in which the case law of the ECtHR develops. When making a decision as to the admissibility of a case, the case is put before a panel of judges who consider the merits of the case and release an opinion that is in a similar format as judgments. Many times, stating that Article 8 does or does not apply to a subject is just as important as whether the court issues a judgment on the particular case. As stated before, the judges cannot avoid a case that is admissible under the ECtHR’s guidelines.

Finally, I examine one of the parts of what Charles Epp called support structures. These are structures that exist within a society that facilitate the process of bringing cases to court. Moreover, these structures often lead to a greater success rate for the individuals bringing suit because “successful rights litigation usually consumes resources beyond the reach of individual plaintiffs…” (Epp, 1998, p.18). The aspect which I will discuss is the existence of legal advocacy groups that are focused on individual rights. In the United States, legal advocacy groups have existed since the turn of the last century.
Furthermore, “after the early fifties, the number of organizations supporting constitutional rights litigation began to increase” (Epp, 1998, p. 52). One example of this is the American Civil Liberties Union (ACLU) which not only offers support to individuals, but also crafts strategies and seeks test cases in order to pursue their goals more effectively. The ACLU has been involved in many different areas of litigation, including the right to privacy (“About Us”). More importantly, however, they are far from the only legal advocacy group that exists. They have continued to grow, and often exist simultaneously with other types of advocacy groups. Other examples are the NAACP and Lambda Legal, which advocates for lesbians, gay men, bisexuals, transgender people, and people with HIV (“About Lambda Legal”). These groups all have attorneys that advocate for special groups.

In Europe, similar legal advocacy groups exist both at the national and international level. For example, the European Human Rights Advocacy Centre dedicates itself to cases under the ECHR in Russia and Georgia (“About Us: EHRAC”). Additionally, the group Liberty works on protecting human rights in England and Wales, while the European Roma Rights Centre works on Roma rights and change-oriented litigation (“What is”). These are but a few of the organizations that exist, and there are also international branches of many groups as well.

Overall, the Supreme Court and the ECtHR are similar in their accessibility. Both have strong legal advocacy groups, and an individual right to petition. The ECtHR hears more cases, but that is largely due to differences in the size, structure, and scope of that court compared to the United States. It is, however, important to note the differences in the ways in which the justices control their docket. While U.S. Supreme Court justices may pick which cases to hear and offer no rationale for the choice, the cases brought to the ECtHR must be heard in some fashion, even if only to be declared inadmissible. This correlates with the fact that the ECtHR has had more recent and more often changes to privacy rights.
Type of Privacy Valued More

Few would be surprised to learn that Americans and Europeans have different views on a great number of subjects. As James Whitman states in his article “The Two Western Cultures of Privacy: Dignity versus Liberty,” these differences also hold true for privacy:

…[T]here are, on the two sides of the Atlantic, two different cultures of privacy, which are home to different intuitive sensibilities, and which have produced two significantly different laws of privacy. (Whitman, 2004, p. 1160)

Some of these differences stem from each culture’s understanding of privacy. Continental European privacy generally revolves around the dignity of people, while American privacy generally centers itself on liberty. In Europe, privacy protections are “a form of protection of a right to respect and personal dignity,” including the right to one’s image, name, and reputation (Whitman, 2004, p. 1161). In America, it is easier to understand privacy rights as protections against intrusions by the state, especially dealing with matters of the home. For example, there are protections against state intrusion into the home in the Fourth Amendment in America as well as remedies for people who have had incorrect information about them publicized through tort law as well as the right of publicity that I discussed previously. Furthermore, in Griswold many of the justices were particularly concerned about the ramifications of enforcing a ban on the use of birth control by searching the “sacred precincts of the marital bedroom for telltale signs of the use of contraceptives” (Griswold, at 485). It is clear that much of the rationale behind providing a constitutional right to privacy in the U.S. remains bonded to the idea of the home as a private location.

The foundations of European privacy appear to have less to do with protecting the home from government intrusion and more with promoting the dignity of all people within a society. For much of Europe’s past, protections of dignity only applied to royalty of the aristocratic elite. Once this idea began
to change and the class structure became more egalitarian, the rest of society demanded that their privacy protections in the form of choosing the ways in which they presented themselves to society exist as well. Therefore, when countries like France first started drafting constitutions that contained a freedom of the press, an accompanying part stated “‘private life’ as an integral part of personal honor, would not be subject to press depredations” (Whitman, 2004, p. 1172). This kind of limit to freedom of the press and the mention of personal honor seems unusual in light of the ways in which American constitutional law, with its considerable press protections, developed. Even during times in which the French did not have privacy protections from their government, the idea was that personal honor was more precious than life itself (Whitman, 2004, p. 1174). Additionally, unlike in the United States, privacy rights can trump property rights, even in the case of photos taken with the subject’s consent. In the case of Alexander Dumas some embarrassing pictures taken of him consensually were going to be dispersed. A French court held that he had the right to withdraw his consent to their publication stating, among other facts, that “‘The very publication’ of such photos could put such a person on notice ‘that he had forgotten to take care for his dignity, and remind him that private life must be walled off in the interest of individuals, and often in the interest of good morals as well’” (Dumas, 13 A.P.I.A.L. at 250 as quoted in Whitman, 2004, p. 1176). Again, it is clear that as far as the French are concerned, personal dignity and honor is at the forefront of the rationale for privacy protections, especially when dealing with intrusions by the press or the publication of photographs.

France is not alone in this kind of thinking. Germany is another example of a country who ties privacy protections with the idea of the dignity of a person. Much of the basis for German privacy rights lie in the idea of personality. For Germans, personality is a concept similar to liberty, but instead of the freedom from any type of intrusion, it is similar to the freedom from determinism (Whitman, 2004, p.

---

9 The original text: "[L]’effet même de la publication ... que si la vie privée doit être murée dans l’intérêt des individus, elle doit l’être aussi souvent dans l’intérêt des moeurs . . . ."
1181). Basically, it is the liberty of free will. The German protection of personality has its roots in a combination of the Roman law of insult as well as artistic property law (Whitman, 2004, p. 1183). This protection from insult along with the idea that artists not only owned their own work but also the ways in which that work is presented provided a strong and logical basis for laws which protected the public persona of people from a number of intrusions. Again, cases involving pictures are at the heart of the history of this right: pictures of Otto von Bismarck on his deathbed were prohibited from distribution (Whitman, 2004, p. 1185). This idea that the personality needed protection did not disappear in later German history. Whitman claims that even the policies of the Nazis during World War II still emphasized a protection of honor and personality, although only for those who were considered racially pure (2004, p. 1187-1188). In the wake of the horrors of the Holocaust, this “downward social extension of a claim to honor” continued, and in many ways was argued for more passionately than ever (Whitman, 2004, p. 1189). Whether in Germany or in France, it is clear that the roots of privacy protections flourished not within a framework of liberty from government, but instead the ideas that human honor and dignity are precious and a valuable way of protecting them is through informational privacy. As I have illustrated in earlier parts of this thesis, there are many examples of how these core beliefs manifest themselves to extents that may seem extreme or bizarre to Americans, for example the case involving the Princess of Monaco. However, at this point it is important to note that simply because an area supports a kind of privacy more vigorously than another does not mean that it neglects to value all types of privacy.

To find additional support of this idea that European and American ideas regarding privacy differ, I again consulted survey work in this field. As before, I utilized the General Social Survey for the American data and the Eurobarometer for the European data. The information I gathered from the
United States came from a survey conducted in 2000. I looked at two questions that I believed were the most relevant. First,

Many people think it is important to have complete freedom of the press and news media in the United States. Others think that the press too often invades the privacy of public figures—like Senators or members of Congress by printing stories that contain personal details about their private lives. Which of the three statements on this card comes closest to your feelings about balancing freedom of the press and the right to privacy? (Davis et al., 2007b, p. 1088)

When responding to this question, 21.3% said that the press should have complete freedom, 64.1% said that the press should develop its own code of ethics, and 14.6% stated that the government should keep them from printing it (Davis et al. 2007a). The next question I looked at was

I’m going to read you several statements about freedom. Each one may say something true and important about freedom, but I’d like to know how important each statement is to you. Is it one of the most important things about freedom, extremely important, very important, somewhat important, or not too important? Freedom is having a government that doesn’t spy on me or interfere in my life. (Davis et al., 2007b, 1086)

Responses to this statement were as follows: 29.8% stated it was one of the most important things, 25.7% said it was extremely important, 32.3% stated it was very important, 8.2% said it was moderately important, 2.4% said it was somewhat important, and 1.6% said it was not too important (Davis et al., 2007a). These responses seem to support the contention that Americans believe strongly that freedom is tied to a lack of interference from government, and given the choice between the freedom of the press or personal privacy, freedom has more support. These two ideas seem to be opposite from European ideas.

I did not uncover identical information for Europe; however, when polled, Europeans felt that the values of peace and human rights were far more important than individual freedom. The respondents
were asked to pick their three most important values, and the top three were peace (45%), human rights (42%), and respect for human life (41%). Only 21% chose individual freedom (“Standard Eurobarometer 69.” p. 17). This seems to support the arguments that Whitman puts forward when discussing European values. Additionally, others have supported this claim. In her essay “The Right to Privacy,” Étienne Picard states that in French domestic law “the right to privacy receives a quasi-systematic precedence over freedom of expression…even though the latter [is] indispensable for democracy” (Picard, 1999, p. 54). This all supports Whitman’s characterization of European history and behavior.

Based upon these differences, it seems that Europe puts more emphasis on informational privacy, as that has to do more with a person’s dignity, while Americans more passionately protect decisional privacy, as that deals more with the liberty to make decisions without government interference. All of this is relative, and it is not to say that Americans do not value dignity and Europeans do not value liberty; however, they place a different emphasis on each. The best way to conceptualize the difference is that “American privacy law is a body caught in the gravitational orbit of liberty values, while European law is caught in the orbit of dignity” (Whitman, 2004, p. 1163). This view correlates with the levels of privacy protection for each type. Americans have a greater protection of decisional privacy than informational privacy. Furthermore, Europeans have a greater protection of informational privacy than decisional privacy, and they have a greater protection of informational privacy do Americans.

Summary

After examining my independent variables, I conclude that all of them except for trust in government correlates with the levels of privacy protection. Moreover, the correlation extends to the direction the level of privacy rights move. The following table summarizes my findings.

Table 10. Summary of Variable Data

<table>
<thead>
<tr>
<th>Variable</th>
<th>U.S.</th>
<th>Europe</th>
<th>Correlation with Privacy Protections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of Protection</td>
<td>Not explicit</td>
<td>Explicit</td>
<td>Where explicit in document,</td>
</tr>
</tbody>
</table>
While four of the five variables that I examined do appear to correlate with privacy protections, I do not feel that they all have the same level of influence. First, I will discuss the three variables that have an effect on overall privacy protections, and then I will address the variable that affects the type of protection that is protected more.

When it comes to the overall level of privacy protections, much of my views about which variable has the most influence stems from my understanding of the ways in which courts, especially the United States Supreme Court, function. Of the variables that I examined in this thesis that potentially impact the levels of privacy protection, two stand out as having a larger influence: accessibility and the type of protection. First, I will address the issue of the court’s accessibility. As I discussed earlier the ECtHR and the Supreme Court are similar in most respects when it comes to accessibility; however, the one point at which they diverge the most is when it comes to control of their docket. The Supreme Court has almost complete control of its own docket, that is to say that the nine justices serving on the court choose which cases they will hear. This is the opposite for the ECtHR where all cases that are not dismissed for administrative errors will either end in a decision or judgment. Therefore, in the United States issues regarding privacy that may be politically volatile or unpopular may never be chosen by the Supreme Court while the ECtHR must at the very least explain why it finds that the ECHR does not apply.
The next variable that I believe has a large influence on privacy protections is the type of privacy protection. The fact that a right to privacy does not exist expressly in the United States Constitution undoubtedly influences the way in which it is perceived and handled by the public and the courts. While it is true that the Supreme Court “found” the right to privacy in the mid-1960s, the right has not been as expansive as other rights, such as freedoms of speech, religion, and assembly. So far, the Supreme Court has only applied it to a handful of cases involving marriage, procreation, childbearing, and family (Beachamp, 2000, p. 279). Moreover, it has often decided cases that logically seem to be privacy cases with other parts of the Constitution, such as the equal protection and due process clauses of the Fourteenth Amendment. Examples of this include right to die cases. Furthermore, the creation of a right to privacy infuriated many who believed that the Supreme Court was acting outside of its role within the separation of powers “Griswold v. Connecticut: Wayward Decision-making in the Supreme Court” exemplifies this view when the author argues that the creation of a right to privacy in this case was dangerous to democracy and created “judicial Don Quixotes who dash about correcting perceived public policy shortcomings” (Fein, 1989, p. 559). It is clear that the way in which this right was formed, out of a judicial plurality opinion instead of an amendment or statute, influences the ways in which people react to it.

Today, there is immense pressure for justices accept that a right to privacy now exists, as seen in the confirmation hearings of Judge Robert Bork. Judge Bork is a conservative judge who had argued against judicial activism, often citing the decision in Griswold as a key example of this. President Reagan nominated Judge Bork to the Supreme Court, and his criticism of Griswold became the focus of the nomination process. Eventually, the controversy about his opinion regarding Griswold and other unenumerated rights led to the failure of his nomination (Bloom, 1989, p. 534-544). While this does support the idea that judges must accept the right to privacy, it does not mean that the judges must
expand the right or more clearly define it. Few cases in the recent past attempt to expand the right to privacy at all. It is the controversy that exists because of this perceived lack of legitimacy of the Supreme Court’s ability to create rights not written in the Constitution that I believe has hampered the development of a right to privacy the most.

Another way in which the effects of a lack of an explicit right to privacy manifest itself is how the judges apply precedent. When judges in a common law system write opinions, they often cite cases that came before as the rationale for their current decision. An adherence to precedent is called *stare decisis*. The respect of *stare decisis* has been shown to limit the ways in which justices can frame their decisions; that is to say, judges, even if they truly want to follow their own ideology, must adhere to precedent in some way for their opinions to appear legitimate (Knight and Epstein, 1996, 1031-1032). However, this illustrates that justices are free to apply precedent as they see fit. Even though a case may be similar to another previous case, the justices can label it as something else and declare that the precedent does not apply. In this case, there has been a lack of justices who point to *Griswold* or its progeny as the rationale for protecting privacy rights. Furthermore, the ability to interpret the right to privacy as broadly or narrowly as possible is hindered when there is no amendment with which to refer. Moreover, the lack of an explicit right to privacy also changes the framework in which the right is viewed. For example, when an Article 8 case reaches the ECtHR, the justices first determine whether there was a violation of the right to private life, and if so, if this violation was necessary in a democratic society. This is something that cannot be done as easily in the United States because the justices only have fractured reasoning from a variety of cases under a variety of circumstances. Even in *Griswold*, a majority of the judges could not agree on exactly what the basis for a right to privacy was. Justice Douglas’s opinion was a plurality opinion. The concurring opinion, which agreed with the result of the case, disagreed fundamentally with the rationale (*Griswold*, 1965).
These complications do not occur in Europe. While it is true that the ECtHR states there is a large margin of appreciation when interpreting some cases under Article 8, this often happens because the justices are sensitive to the fact that the members of the Council of Europe are not a homogenous group with identical societies. Therefore, variation occurs under the margin of appreciation doctrine, not because of the whims and ideologies of individual judges. Even if the whims and ideologies of individual judges affect the margin of appreciation, this effect may be mitigated by the number of judges and the structure of the court.

Besides these two variables, I found that correlates with my observations on privacy rights. This is the attitude of the society toward the federal government or the international governing bodies. For this variable, I found that Europeans have a slightly more positive attitude to international bodies than Americans do of the federal government. This I do not think has as large of an effect on the right to privacy as the previous variable. However, I do think that it has an enormous impact on the levels at which one will find privacy protections. Throughout my description of privacy rights, there were many issues which in the United States were matters of state, not federal, law. It is outside of the scope of this thesis to detail the levels of privacy for citizens of each of the fifty states, but I would distort the truth if I did not acknowledge the fact that there are many privacy protections at the state level. It is my suspicion that if the United States felt the same way towards the scope of the powers of the federal government as Europeans do towards the scope of the powers of international bodies that more privacy protections would occur at the federal level. Unfortunately, this is difficult to test, so my idea remains speculative without further research. However, I can state that Europeans have a favorable attitude towards international bodies, and it is at the international level that these privacy protections occur, while Americans have an unfavorable view of federal power, and there is a deficit of privacy protections at that level.
As for my final variable, the type of privacy valued more, I believe there are compelling reasons to believe that this is why the protection of informational privacy is so weak in the U.S. and so strong in Europe as well as vice-versa for decisional privacy. In his book, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA*, Lorenzo Zucca discusses what happens when rights that are at the core of the law and society come in direct conflict with each other (2007, p. ix-xvi). In my opinion, this is an excellent framework in which to understand the right to privacy. Often, the right to privacy is only at issue when it conflicts with another fundamental legal right, such as free speech or the protection of human life. In this kind of conflict where both rights have a sound footing at a constitutional level, I believe the “tie-breaker” is often based upon the society’s assignment of value to a right. Therefore, I feel that the type of privacy valued more by a society has a real effect upon how it holds up in a fight against other fundamental legal rights and other types of privacy. This is substantiated by both the American and European cases: in America, the freedom of speech is so highly valued that the right to privacy often does not prevail. Perhaps because of this, informational privacy protections in general do not seem as important or necessary. On the other hand, a freedom from government intrusion is a highly valued fundamental legal right, as verified by the widespread knowledge and pride for the Fourth Amendment. Therefore, decisional privacy rights are more valued. At this point, I’d again like to echo the sentiments from previous parts of this thesis that this is all relative and an enhanced protection of one type of privacy does not mean that the other is not valued at all. In conclusion, when it comes to conflicts of rights that are of such an importance, I believe that societal values explain how the decisions are finally made.

What Can Be Done

Now, I move on to my assessment of what can be done with the right to privacy in the United States. Before I address my specific ideas, I would like to discuss why I believe this issue is so important
and so relevant today by offering a few examples. Because privacy is so broad an area, I will narrow my discussion to two issues of privacy: control over the use of one’s image and transgender rights.

From the material that I have presented, it is clear that at a constitutional level Europeans enjoy a greater protection of privacy regarding the use of their image. This right extends to photographs taken of people in the public who are engaged in certain situations, such as marching in a gay pride parade (Hauch, 1994, p. 1220). It also extends to pictures of people on their deathbeds, even awarding families damages for the publication of these photographs (Hauch, 1994, p. 1251). The extent of these types of protections is often surprising for American audiences. In the example of the man marching in the gay pride parade, the rationale for the French national court was even when a person exposes a detail about himself in a limited public sphere it does not mean he sacrifices his privacy to a larger group (Whitman, 2004, p. 1197). Unlike the people in these cases, the Catsouras family in California has had a much different experience attempting to control the use of their deceased daughter’s image. Nikki Catsouras was eighteen years old when she died in a car crash in 2006, and the sight of Nikki’s body was so gruesome that the coroner at the scene did not allow her parents to see it in order to identify it. Unfortunately, the parents were not spared from this sight for long because pictures of the crash scene began circulating the internet. Two California Highway Patrol dispatchers had sent the pictures to friends and family; one’s attorney alleges that it was to warn of the dangers of the road stating, “Any young person that sees these photos and is goaded into driving more cautiously or less recklessly—that’s a public service” (Bennett, 2009). No matter what the intentions, the pictures left the inboxes of family and entered websites, some of them dedicated to “hard-core pornography and death” (Bennett, 2009). The parents, fearing that their three other children would inadvertently come across the pictures took steps to remove them from websites, but the effort became extremely difficult because “the family has no legal basis to compel Web sites to remove the photos, and no amount of programming magic could

---

10 See discussion of the case Von Hannover v. Germany for a clear example.
keep them from spreading to new sites” (Bennett, 2009). The family sued the CHP for negligence among other charges, but the superior court judge dismissed the case ruling the dead have no privacy rights and the family could not bring suit. The family has not been able to control the pictures and continues to live in fear of accidentally seeing them every time they conduct a Google search. If the United States citizens had stronger privacy rights, or if the rights that do exist in some states were extended to the federal level, Nikki Catsouras’s family would have some means of controlling the image and dignity of their daughter and sister. In this area, American courts could follow the example that European courts have set regarding the dissemination of nude pictures without consent. In Europe, people can sue internet service providers and governments can fine people who post pictures without consent (Whitman, 2004, p. 1198-1199). These examples show how a democracy that also values freedom of speech and expression is able to protect privacy rights.

This is not the only area in which the United States lacks in privacy protections. The legal needs of transgendered people have changed along with technology, and in many ways the law has yet to meet those needs (“Transgender Rights”). While some protections exist, they are often not comprehensive, and courts often disagree with each other creating “a conflicting body of opinions hydra-like in its complexity” (Madeira, 2002, p. 129). Although it may not seem clear at first consideration, the inability to self-define one’s legal sex on official documents can have harmful implications. First, transgendered people should have the ability to keep their decision to change their birth sex private. Second, the decision to alter official documents, such as birth certificates and passports, should be permitted by states and the federal government. These steps could have an enormous impact on the level of discrimination that transgendered people face. I will use the process of applying for a passport as an example. When one applies for a passport, she can do so at the local post office as long as she has the proper photograph and her original birth certificate. In conducting this everyday business, the person in
my example, if not permitted to alter her birth certificate, will necessarily be forced to reveal her transgendered status to a complete stranger. While she may not experience any discrimination by the post office worker, she will nonetheless have her privacy rights violated in the process of completing a simple application. This is one of the many ways in which a transgendered person may be forced to reveal his former gender.

Both of these examples show that there are significant gaps in American privacy protections that have not been addressed at the federal or constitutional level. This gap creates significant variations in privacy protections among the fifty states. Our society is highly mobile, and this has a huge impact upon the privacy rights of communities that need them the most, such as transgendered people. It is for this reason that I believe that if there is to be any significant improvement to American privacy rights, it must be at the federal level, preferably a constitutional one.

The first way to do this would be to remedy what I believe is the most significant difference between the United States and Europe: the lack of an explicit right to privacy in the Constitution. This would not prevent the damage done by private actors, but it would be the most logical place to begin. To do this, an amendment would need to be drafted and brought to the states for ratification. Its wording could acknowledge that privacy exists within a framework of cherished rights like the freedom of speech and press, yet also provide a clear protection for the American people. In doing so it could echo the text of Article 8, for example:

The right to privacy shall not be infringed except when necessary for the protection of democracy and the interests of national security, public safety or the economic well-being of the country or state, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
As in Europe, I see the phrase “when necessary for the protection of democracy” as the way in which courts can apply their discretion to a variety of circumstances and locations. Courts could address this as they address profanity or obscenity, that is to say they could take into account community standards in their decisions. It would obviously take a considerable amount of time for the courts to flesh out exactly what the right means and the best ways of protecting it. This language will give flexibility for cases that address issues concerning the press and ensure that a chilling effect on speech will not occur.

This would only address part of the problem with American privacy protections. When dealing with private actors, the Constitution does not apply. Although in Europe, the ECtHR has applied Article 8 to the actions of non-governmental authorities, it does so because of the idea of positive obligations. Positive obligations are areas in which the government becomes responsible for private actions because it lacks laws that allow plaintiffs to sue and receive damages. I believe that it is unrealistic to apply this kind of framework to the Supreme Court, but I strongly believe there is room for strengthened laws in this area. Congress could start by repealing laws and regulations that shield internet service providers from liability lawsuits. Additionally, torts such as invasion of privacy and defamation could be reworked within a framework that values privacy more than what currently exists, and allows families of those people whose privacy was violated to sue, even if that person is deceased.

There are many reasons why the levels of privacy protections are what they are in America today. By comparing and examining how a similar society with a court dedicated to human rights addresses privacy, I hope that I have shed light on ways in which American privacy protections can improve. It is possible to protect and promote democratic values like freedom of speech and expression while still maintaining a culture that respects the dignity and freedom of its members. Privacy has been y cherished here since 1789, even if only in the “penumbras formed by emanations” of the Bill of Rights.
References

*A, B, and C v. Ireland*, Application no. 25579/5.


Biriuk v. Lithuania, no. 23373/03 (2008).


European Convention of Human Rights and Fundamental Freedoms, Article 2.

European Convention of Human Rights and Fundamental Freedoms, Article 3.

European Convention of Human Rights and Fundamental Freedoms, Article 8.

European Convention of Human Rights and Fundamental Freedoms, Article 35.


*Evans v. United Kingdom*, no. 6339/05 (2007).


*Goodwin v. United Kingdom*, no. 28957/95 (2002).


Jalloh v. Germany, no. 54810/00 (2006).


Karlheinz, R. & Marlier, E., EUROBAROMETER 44.2 BIS MEGA-SURVEY: POLICIES AND PRACTICES IN BUILDING EUROPE AND THE EUROPEAN UNION, JANUARY-MARCH 1996 <Computer file>. Conducted by INRA (Europe), Brussels. ICPSR ed. Ann Arbor, MI:


*Madsen v. Denmark*, no. 58341/00 (2002).


Pretty v. United Kingdom, no. 2346/02 (2002).


Schussel v. Austria, no. 42409/98 (2002).


Sidabras and Dziautas v. Lithuania, nos. 55480/00 and 59330/00 (2004).


*Tysiac v. Poland*, no. 5410/03 (2007).

U.S. Constitution, 9th Am.


