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The Role of Political Culture in Understanding Inconsistencies between International and Domestic Privacy Law in France and the United States

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THE ROLE OF POLITICAL CULTURE IN UNDERSTANDING INCONSISTENCIES
BETWEEN INTERNATIONAL AND DOMESTIC PRIVACY LAW
IN FRANCE AND THE UNITED STATES

By Mallory S. Kruper

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Abstract

In evaluating the role of international law, most scholarship focuses on how international laws, treaties and courts function and are enforced. However, to best understand how international laws are created, as well as how they are internalized within individual countries' judicial systems, it is also necessary to look at the normative side of international law. This project applies the theory of transnational legal process to examine how recognized international norms are uniquely recognized by different legal systems. More specifically, I analyze how political culture affects the level of consistency between international privacy norms and domestic law through the study of judicial decisions from United States Supreme Court and the French Court of Cassation. I conclude that the cases studied indicate a correlation between political culture and the manner in which international privacy norms are recognized and applied. Although political culture does not lead to significantly different conceptions of privacy rights and the protections they deserve, it does affect the process through which understandings of privacy evolve in response to new technology.

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Chapter One: Introduction

One of the many discussions to come out of the Edward Snowden revelations in June 2013 is how understandings of privacy differ within the international community. The Snowden revelations, which highlighted the scope of the surveillance policies by the United States National Security Agency (NSA), led to a negative reaction within the international community, particularly the European Union, and sparked a discussion about how understandings of privacy have evolved in an increasingly digitalized world. Within six months of the Snowden incident, the United Nations (U.N.) passed a resolution regarding the “right to privacy in the digital age,” holding that states have a “responsibility to protect human rights.”¹ This newfound attention to privacy as a human right demonstrates a normative shift within the international community. But what are the current norms and how are they shifting? The oldest and most widely-recognized mention of privacy by the U.N. comes from The Universal Declaration of Human Rights (UDHR), which was adopted in 1948. Article 12 of the UDHR reads, “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”²

As mentioned earlier, the international community re-examined the question of privacy in 2013 in light of the extent of the NSA’s digital surveillance revealed by Edward Snowden, as the U.N. evaluated how technological advances have affected a modern definition of privacy.³ On June 30, 2014, the U.N. released a report entitled, “The Right to Privacy in the Digital Age” detailing how member states should recognize and protect privacy. The report recognizes that “digital surveillance may engage a State’s human rights obligations if that surveillance involves the State’s exercise of power or effective control in relation to digital communications

infrastructure,” meaning that limitations on the State’s exercise of power apply to digital surveillance as they would for any other state action with the potential to violate human rights.⁴ The report also emphasizes the importance of proportionality between the government interest in national security or criminal justice and the privacy rights of the individuals; as such, the least invasive method possible for a desired end must be used.⁵

Furthermore, in November 2014, the United Nations passed a second resolution on privacy that recalled a resolution from December 2013. The earlier treaty noted the need for a right to digital privacy, acknowledged the Human Rights Council’s adoption of the June resolution, and provided more specific definition of the right to digital privacy. The new resolution emphasizes the legal obligation of states to “respect international human rights law when they intercept private communications directly or extract personal data from a company.”⁶ The report also recognizes the “global and open nature of the Internet and the rapid advancement in information and communication technologies,” while affirming that “the same rights that people have offline must also be protected online.”⁷ The reports from June and November 2014, which are indicative of current international norms, recognize that privacy rights apply equally to digital communications and information. As such, government action that uses digital surveillance must act in accordance with previous laws designed to protect human rights such as privacy.

However, while the international norms regarding privacy in the digital age are being further defined, there remains, as demonstrated by the United States’ NSA surveillance policies, a lack of uniformity in terms of how individual countries interpret privacy issues. Different political structures could possibly explain violations of internationally recognized privacy rights in countries with dictatorial governments where human rights abuses are more common.

However, as the media following the Snowden revelations revealed, the lack of international uniformity in terms of privacy law also differs between countries with similar democratic political structures, such as the United States and France.⁸ This project seeks to understand if a distinction truly exists between how domestic law in France and the United States recognizes privacy law, but more importantly, why this distinction might exist. I hypothesize that internal political culture, as represented by a state's federal judiciary, affects the extent to which states internalize international norms within their own laws. While this project looks only at the United States and France, the conclusions regarding the effects of political culture may be relevant to understanding discrepancies between international and domestic law in other countries, and potentially other issues.

To account for this cultural aspect, this project extends beyond studying solely the relationship between international law and domestic law, where international law acts as an independent variable that affects domestic law, the dependent variable. A third variable, political culture, is added as a conditional variable on this relationship because I hypothesize that political culture alters the manner in which international law translates to domestic law. While political culture can be interpreted in numerous ways, I look specifically at the foundational legal documents, most notably the constitutions, within each state, as well as the philosophical and theoretical influences on each document. These documents provide the most relevant concept of political culture for my study, as they illustrate how society's cultural understanding of notions such as privacy are then translated into the structure of the political system. Because documents such as constitutions provide a basis for understanding political culture, I must use a form of domestic law that is well connected to constitutional principles. Federal judicial decisions provide this connection, as they involve justices interpreting constitutional principles to apply to

new legal questions. I therefore, after analyzing the political culture of each state, apply a comparative legal analysis to privacy cases within each state's highest federal court in order to understand how cultural conceptions affect the outcomes of these decisions.

I begin my study with a review of relevant international law scholarship in Chapter Two. This chapter provides an overview of the relevant theoretical discussions about international law, as well as how issues such as globalization have affected the discipline of international law. Chapter Two also discusses transnational law as a new theoretical approach for understanding laws that transcend national borders and includes a section in French to discuss relevant francophone scholarship on international law. Following the discussion of relevant literature and theory, Chapter Three delves into the methods I employ for applying these theories to my research question. The methodology section further highlights what variables are being investigated: political culture, international and domestic law, as well as how they are identified and measured. In Chapter Four I define and explore my conditional variable, political culture, in each country through an analysis of their constitutions, recognitions of protected individual rights, and the influences on each. In Chapter Five I use this understanding of political culture to review privacy cases from the United States Supreme Court. In Chapter Six I employ similar methods to examine the relationship between French political culture and domestic law as reflected in decisions by the French Court of Cassation. Finally, in Chapter Seven I analyze the patterns from Chapters Four, Five and Six concerning how the countries are applying privacy law, as well as how political culture affects these results. I am therefore able to draw conclusions in relation to my hypothesis concerning the role of political culture.

¹ Somini Sengupta, “U.N. Urges Protection of Privacy in the Digital Era,” New York Times, November 25, 2014.

² United Nations. “The Universal Declaration of Human Rights.” <http://www.un.org/en/documents/udhr/> (accessed February 28, 2015)

³ United National Human Rights Council, “The Right to Privacy in the Digital Age,” <http://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx> (Accessed February 28, 2015)

⁴ United Nations Human Rights Council, “The Right to Privacy in the Digital Age: Report of the Office of the United Nations High Commissioner for Human Rights,” 30 June 2014, http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf (accessed March 1, 2015): III.C.par.34., p.11-12.

⁵ Ibid, III.A.1.par.25., p.9.

⁶ United Nations General Assembly, “The Right to Privacy in the Digital Age,” November 19, 2014, p.3. http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/69/L.26/Rev.1 (accessed March 13, 2015).

⁷ Ibid, p.4.

⁸ Marc Rotenberg, “On International Privacy: A Path Forward for the U.S. and Europe,” Harvard International Review 35 (Spring 2014).

Chapter Two: Literature Review

Introduction

The topic of international law has certainly attracted a large amount of scholarship over the past several centuries. This chapter draws from some of this scholarship to gain a greater understanding of the relevant theories that exist surrounding international law. I begin with literature providing a more traditional approach to international law, by touching upon the international community's recognition of international law in recent history, the generally accepted sources of international law, and the traditional debates surrounding the topic. I then turn to literature addressing the current issues with international law, particularly related to globalization. This discussion transitions into a discussion of one of the most recent theoretical approaches, transnational law, and more specifically, transnational legal process, which provides a significant foundation for my own study. I end with an exploration of French literature on international law in order to gain a more comprehensive view of how scholars address international law, both currently and historically, on a more global level in order to see the theoretical differences that exist.

International Law

History of International Law

Many scholars consider Hugo Grotius to be the father of modern international law because of his publication *De Jure Belli Ac Pacis* (On the Laws of War and Peace) in 1625. In his writing Grotius emphasizes the importance of morality and justice as obligations within international society, thus providing the foundation for a series of "laws of nations". However, Grotius was not the first to write on this topic; he drew many of his ideas from Spanish

theologians such as Vitoria and Suarez, among others. These earlier theologians focused on the inherent laws that they believed guided states as a result of the Catholic Church. Grotian theory differed from these precedents by providing a “secularized” approach to these laws, where states may be bound by certain rules not because of the Church but because of an inherent sense of morality and justice within society.¹

Hersch Lauterpacht notes several key components of Grotian legal theory in his essay recognizing the tercentenary of Grotius’ death. I will focus on two specific components on his essay that are particularly relevant to an understanding of modern international law. First, Grotius argues that international relations are completely subjected to the rule of law. Part of this argument is the rejection of war as states’ absolute right but instead classifying just and unjust war. Another key aspect of this “total subjection” is religiously based, as Grotius, unlike the theologians before him, held that all international relations, not only the relations between Christian states, could be guided by treaties.² While this seems less significant in modern times, it demonstrated the important universality of international law and also helps highlight why Grotius became such a significant theorist compared to those before him.

A second component of Grotian theory is his recognition of natural law as a source of international law. While Grotius recognizes the importance of sovereign lawmakers as well as treaties and rules upon which states expressly agree, he also recognizes the importance of natural law as an independent source of law.³ Natural law is best understood as “claims of a universal consciousness of justice” or rules that, while unspoken or unwritten, still apply as law to all.⁴ Grotius applies natural law in an international context by arguing that states are bound by both “the law of nations and the law of nature”. Thus, a state may be bound to act in a certain way, not

because of an explicit contract with another state, by which the involved parties consented to be bound, but because there is a higher law that binds all.⁵

To further understand how international law originated and the significance of Grotian theory, it is beneficial to turn to the classic theoretical debate regarding the sources and nature of law. Legal theorists have traditionally been separated into two camps: natural lawyers and legal positivists. Natural lawyers, as previously mentioned, look to undefined norms and morals as sources of law that bind all humans. Legal positivists, on the other hand, claim law is simply what a sovereign decides it to be; if there is no sovereign, there can be no law.⁶ Positivism is best represented by the writings of John Austin, who argued: “laws proper or properly so called are commands: laws which are not commands, are laws improperly so called.”⁷ Furthermore, Austin notes the importance of who creates the laws and to whom those laws apply, as every law “is set by a sovereign person, or a sovereign body..., to a member or members of the independent political society wherein that person or body is sovereign.”⁸ International law is, through this traditional Austinian lens, not really law because there are not specifically commanded rules or creators of rules, but rather a series of interpreted norms designed to guide state behavior.⁹

This theoretical dichotomy is seen in Grotius’ conception of international law, specifically because he finds a balance between both natural and positive law. In recognizing that all states are bound by certain higher laws of justice, but that most international law is still specifically enumerated and consented to, Grotius acknowledges both sides. This has in some ways contributed to the debate between positivists and natural lawyers about international law, as both sides attempt to interpret Grotian theory in their favor. These two theoretical approaches therefore remain relevant to the modern debate surrounding international law. British lawyer William Edward Hall contrasts approaches to international law within this framework, claiming

that one conception, the natural law approach, included “logical applications of principles of right to international relations,” whereas the second conception, the positivist approach, looked to “the concrete rules actually in use.”¹⁰ Each of these conceptions reflects one of the two main components of Grotian international law mentioned previously.

The debate behind international law goes beyond looking at how it should be defined to include a debate of whether international law is even authoritative as law. Because of the nature of international law, and its application on states in a global arena rather than on individuals within a society, scholars have raised doubts about the legitimacy of international law as an actual form of law. In his essay “The Concept of Law,” H.L.A. Hart addresses these doubts and proposes theoretical approaches to resolve them. Hart identifies two primary doubts concerning international law. First, international law, unlike municipal law, lacks the necessary backing of threats to be enforceable. This doubt arises from the positivist concern that unless law is backed by threat or organized sanctions, it will not be considered binding by the group to whom it applies.¹¹ Hart then argues that law, whether municipal or international, gains recognition and therefore adherence through practice and general pressure for conformity. Although some states may not always follow international laws, just as some individuals may not always follow municipal laws, this does not negate their legitimacy. Therefore without being backed by authoritative threats, Hart argues that international laws may still be binding if they are generally accepted and followed by the international community.¹²

Second, Hart addresses the other core positivist concern about international law: because states are sovereign entities, they cannot be bound by a greater authority such as international law. However, Hart refutes this doubt by emphasizing that a state is bound by no law but yet is the source of law for its subjects, as each state has both a population living within certain borders

being held to a consistent set of laws and a government with a certain level of independence. However, this independence is not absolute and there are many degrees of independence and dependence between states. Hart notes that this is represented by the existence of colonies, protectorates, and confederations. By moving away from this traditional view of the 'state' it is possible to move beyond the notion that states cannot be bound by international law or can only be bound by certain forms of international law.¹³

Legal scholar David Kennedy further concentrates on the sources of international law, highlighting how the "source doctrine" approach provides a framework for understanding how states apply international law.¹⁴ Kennedy cites Article 38 of the Statute of the International Court of Justice, which acknowledges four legal sources. First, international conventions establish definitive rules between states, for example, specific treaties between countries. Second, there are international customs, which are created by "general practice accepted as law." Third, Kennedy lists "general principles of law recognized by civilized nations," which, similarly to international customs, is an inherently normative source. Fourth, judicial decisions and the findings in highly respected and qualified academia may also be used as a means of determining the rule of law in an international context.¹⁵ Kennedy's arguments thus reflect a more Grotian approach to the origins of international law, as he cites both positivist and natural law sources.

Kennedy also classifies sources of international law in another manner, by differentiating between "hard" and "soft" sources. "Hard" sources involve the consent of the parties involved, making them binding and therefore easier to enforce. These include international conventions and judicial decisions, the first and fourth sources of international law previously discussed by Kennedy. "Soft" sources, however, do not require the consent of states involved but rather are based upon international norms that the international community expects states to follow. They

include international customs and general principles accepted as law, the second and third sources defined by Kennedy. “Soft” sources of law are more complicated to enforce because it becomes easy for the state accused of breaking the “law” to argue that it has “a different idea of softness” or “a different image of the system of justice.”¹⁶ In looking at “soft” sources of law, Kennedy takes a similar approach as Hart in holding that laws may still be held as legally binding as long as they are acknowledged and followed by a significant part of the international community. A source doctrine approach to international law is therefore about more than the concrete written treaties binding states to certain behavior, but also the more abstract notions of norms and customs that can be used to persuade states to conform to internationally accepted behavior. It therefore finds a middle ground between the natural and positive law theories.

Normative International Law

Scholars often have looked to *jus cogens* norms, also called peremptory norms, when analyzing normative effects on state behavior. These norms, which create the “soft” sources of law discussed by Kennedy, are one of the most controversial sources of international law. Scholar Larry May argues that this is because *jus cogens* norms imply that “there are international normative standards that govern how States act within their own borders and toward their own subjects” and that these norms “hold true for all States, perhaps at all times.”¹⁷ Because of the universal nature of these norms, May argues that they can be used to prohibit certain actions, such as genocide, for all members of the international community, and can justify an international response if violated. This concept of officially recognizing international norms as binding determinants of international action first originated in Article 53 of the Vienna Convention in 1969. According to Article 53, a treaty may be declared as void if it conflicts with

a “peremptory norm”, or “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹⁸ This definition and application of *jus cogens* norms is significant because it allows a “soft” source of international law to supersede a “hard” source of international law if the treaty in question violates a norm. May’s interpretation of the significance of *jus cogens* norms therefore supports a notion of international law where natural law may supersede positive international law.

The heart of the controversy surrounding *jus cogens* norms can thus be reflected by the debate between positive and natural law. In applying legal positivism to international law, May argues that because there is no international sovereign creating laws, there are no binding international laws. However, he also references Hart’s philosophy because, although Hart is typically identified as a legal positivist, he does identify a minimal level of moral and legal norms within a legal society. As noted earlier, this perspective allows Hart to acknowledge certain normative international law as binding.¹⁹ While less extreme legal positivists such as Hart may be willing to accept minimal normative law, positivists generally disregard international law, particularly when normative international law is used to negate more recognized laws and treaties.

On the other end of legal theoretical spectrum, natural law also can be used to understand the discussion behind the legitimacy of international legal norms, or *jus cogens* norms. As part of her critique of international law, Hazel Fox applies natural legal theory to better explain *jus cogens* norms. She first defines natural law as laws that are not created by a specific person or group but are inherent to the legal system. *Jus cogens* norms are a form of natural law because they represent universal moral and ethical ideas that are recognized but not specifically created

by states.²⁰ The controversy behind international normative law can therefore be understood through the dichotomy of these two principal legal theories. If interpreting law from a positivist approach, international law, or more specifically *jus cogens* norms, is highly problematic because they cannot be truly created as laws and therefore cannot persuade legal action. However, if analyzing laws from a natural law approach, international law is plausible through *jus cogens* norms because it is reasonable to use universal moral and ethical beliefs to guide either individual or state behavior.

However, there is another aspect of normative international law, aside from its authority, that creates issues in terms of implementation. Although scholar Jagdish Bhagwati primarily addresses economic globalization, he does look at shortcomings within international normative law as part of his analysis. According to Bhagwati, the extent to which international norms are dictated into specific behavioral expectations affects how well they are accurately implemented by state actors. While domestic legislation and executive orders are generally more clearly defined, normative or “customary” international law is often broadly stated. This allows states to conform to international norms simply by “interpreting” them in a favorable way. It also creates controversy within the international system because the conformance of a state to customary laws is highly dependent on who is interpreting the laws.²¹ Bhagwati’s concern about the universality and implementation of international norms undermines a key component of natural lawyers’ defense of international law. According to natural legal theory, there are unwritten but universal codes of conduct that all individuals and states are bound to; if this is true, then there would not be room for such varied interpretation of international norms.

International Law and Sovereignty

To understand how these more theoretical notions are practically applied to the global political system, it is necessary to understand sovereignty and its role in interstate systems. In his lecture “The End of Geography: The Changing Nature of the International System and the Challenge to International Law”, Daniel Bethlehem provides a background to historical conceptions of sovereignty, highlighting the “Westphalian system of inter-state law.”²² This system, born from the Peace of Westphalia in 1648, centered on sovereign states whose interactions would be regulated by law. It is thus fundamental to the study of laws between states to first understand sovereignty as it applies within state borders. State sovereignty, as described by the Permanent Court of International Justice, “rests fundamentally on the notion of exclusive authority over discrete parcels of territory,” and includes the freedom to make economic, political, financial, and other decisions within state borders.²³ But why is sovereignty significant for studying international law? Bethlehem examines sovereignty as it relates to a state’s jurisdiction, or “the authority of a state to govern persons, conduct, and property by its municipal law.”²⁴ In this way, Bethlehem defines sovereignty as fitting into Hart’s traditional notion of the state by arguing that states have traditionally been given legal authority within their own territory. As a result, sovereignty, and therefore the application of a legal system, is inherently related to geography. As we begin to look at legal issues beyond state borders, state sovereignty and the jurisdiction it creates must still be considered, but they are no longer sufficient legal determinants. This is a particularly relevant consideration for my research project as it is necessary to analyze how issues, such as electronic data surveillance and privacy, that transcend state borders form international norms and law that must still be addressed by domestic legal systems within determined state borders.

Globalization and Challenges to International Law

Because of the significance of state borders and the sovereignty they represent, globalization has become a key consideration when looking at how states currently interact. This is equally true for the study of international law. A major aspect of globalization has been increased mobility, whether of individuals, of ideas, or of commercial goods. The increase in international interactions has led to a shift in the role of international law; recent international legal studies thus focus increasingly on globalization's effects on sovereign states and international institutions.²⁵ While Bethlehem, for example, does not argue that geography and borders will become obsolete, he emphasizes how transnational activity has increased as a result of globalization. Previous notions of territoriality may therefore not provide the adequate framework to address international legal issues in the future.²⁶ In other words, he concludes, globalization will not completely uproot existing international legal framework, but may require a fresh approach.

Bethlehem also touches on specific aspects of international law that, as a result of globalization, must be re-evaluated in order to remain relevant. First, international organizations and institutions still reflect territorial notions of international law, making them inadequate to address more modern legal issues facing the legal community, such as electronic communications. Bethlehem adds that it may be necessary to create a 'deemed jurisdiction' to address questions, for example cyber security, that fall outside a traditional geographic space.²⁷ Second, he notes that the international community lacks sufficient processes for the creation and implementation of laws. Because the international community lacks these standard procedures, legal practice and legal interpretations within states become flexible and inconsistent. This concern is similar to Bhagwati's commentary on international norms, as both scholars argue that

states will interpret international law in the manner that benefits them. In order to adapt to the constantly changing global environment, the international legal system must be able to efficiently reform laws.²⁸ As the international community becomes increasingly entwined, with fewer issues confined only to within state borders, there will be an increased burden on international law to adapt and properly address these legal questions.

Rafael Domingo further expands upon the challenges facing international law and how the international legal system must evolve with the global community.²⁹ Domingo, like Bethlehem, emphasizes that the international law will no longer remain relevant in the future if it continues to focus on political concepts such as sovereignty, territoriality, and the individual nation-state.³⁰ However, he takes a more radical approach to the future of international law, by arguing that we must move away from a system of international law based on sovereign states and toward a system of global law.³¹ More specifically, he states, “sovereignty – along with the concept of territorial jurisdiction – has run its course and done so successfully” but that “the new global order and the paradigm shift in international relations require a new legal framework, built on a series of global principles that go beyond the mold and limitations of the state-based model.”³² It is thus not only the current international legal structures that cannot properly respond to globalization, but that the theoretical approach to both international relations and international law must shift away from a focus on the nation-state.

Transnational Law

Response to Limitations of International Law

One core criticism of international law concerns the use of the word ‘international’ because the relationship it details, the interaction of sovereign states, may no longer be valid in

the study of law. If actions beyond state borders occur increasing between individuals and multinational corporations, the law governing these actions should no longer be defined in terms of being between ‘nations’. Just as many scholars, such as Bethlehem and Domingo, critique international law for its inability to adjust to an increasingly globalized world, others criticize the use of “international law” to describe a global legal order that is no longer “international”. One notable scholar with this latter viewpoint is Philip C. Jessup, who created the concept of “transnational law” as a new approach to law in the global arena. The major difference between international and transnational law is the main actors. While international law views sovereign nations as the principal actors in the global legal system, transnational law looks at “individuals, corporations, states, organizations of states, [and] other groups.”³³ Because the variety of possible actors in transnational situations, Jessup notes that transnational law encompasses both public and private law, further defining it as “law which regulates actions or events that transcend national frontiers.”³⁴ Transnational law therefore differs from international law both in terms of the actors involved as well as the types of law, public and private, that it can address.

In determining the practical application of transnational legal principles, Jessup turns first to the issue of jurisdiction. With a previous international legal approach, jurisdiction was inherently tied to sovereignty, as each state had jurisdiction within its own borders. International law could influence state action, but only national laws could affect individual citizens. International law thus only applies to individuals after it has been incorporated into a state’s national laws.³⁵ However, with transnational law, jurisdiction is less defined, an issue that Jessup suggests can be resolved by moving away from a traditional territorial notion of jurisdiction. He argues that “it would be the function of transnational law to reshuffle the cases and to deal out jurisdiction in the manner most conducive to the needs and convenience of all members of the

international community,” further noting that, “the fundamental approach would not start with sovereignty or power but from the premise that jurisdiction is essentially a matter of procedure which could be amicably arranged among the nations of the world.”³⁶ Through the adoption of transnational law, the international community can mutually create a new system of jurisdiction that can better address issues both within and between states. A transnational approach therefore creates solutions to some of the shortcomings of international law, particularly those related to state sovereignty.

But how does transnational law differ from international law and how has this newer conception of law remained relevant? In his paper discussing more recent conceptions of transnational law, Craig Scott analyzes how Jessup’s concept of transnational law has evolved. Prior to delving into these modern conceptions, Scott distinguishes transnational law from international law, arguing, “while international law as interstate law is more or less the same as talking about law between or amongst states, transnational law can variously connote law across states, law beyond states, or law through states (i.e. states’ legal systems).”³⁷ The changing nature of interactions beyond state borders has thus necessitated a change in terminology for the laws regulating these interactions. Similarly, Carrie Menkel-Meadow, a law professor at University of California Irvine argues that due to the increase in “ideas, people, services, and goods [that] cross borders... ‘international’ law is no longer a subject for only the regulation of inter-state activities.”³⁸ Transnational law, therefore, is less a completely different area of law and more a renaming of existing international law that better reflects the changed nature of these more transnational interactions. Harold Koh also expands on the nature of these transnational interactions, thus further defining transnational law. Through the use of metaphoric ‘computer-age imagery’ he highlights three key ways in which transnational law operates. First, he holds

that there are laws that are “downloaded from international to domestic law,” for example, international norms that are internalized within a domestic legal system.³⁹ Second, there are laws that are “uploaded, then downloaded;” a domestic law or legal norm is incorporated into international law, where it is then internalized by other states into their own legal systems. Finally, there are laws that are “horizontally transplanted,” or transmitted directly from one domestic legal system to another, thus bypassing the international law stage.⁴⁰ Transnational law therefore is centered on spread and internalization of norms into defined domestic or international law.

Transnational Legal Process

To demonstrate how his conception of transnational law occurs in the global system, Koh outlines the theory of transnational legal process. He defines transnational legal process as “the theory and practice of how public and private actors – nation-states, international organizations, and private individuals – interact in a variety of public and private, domestic and international for a state to make, interpret, enforce, and ultimately, internalize the rule of transnational law.”⁴¹ According to Koh, transnational legal process has four distinct characteristics. First, it is nontraditional in the sense that it eliminates standard dichotomies within international legal studies, most notably the distinction between public and private law, as well as between domestic and international law. Second, it is nonstatist as it looks at actors other than traditional nation-states. Third, it is dynamic and can shift as legal norms shift. Fourth, it is normative and therefore created and adapted by the accepted international norms.⁴² In demonstrating these four aspects, Koh also outlines how this legal process is the result of the evolution of both international legal studies as well as international relations scholarship. While this theory builds

upon Jessup's notion of transnational law by highlighting how it applies to the current international community, Koh does not significantly highlight the future of transnational law, and thus does not address Jessup's argument about jurisdiction. Therefore, in using transnational legal process within my own study, I will only look at jurisdictions as they currently exist rather than analyzing how they could shift to better address issues of privacy. Koh's acceptance of current jurisdictions also reflects a lingering respect, at least to a certain extent, for the notion of sovereignty that is so central to transnational international legal theory.

In his article, "Transnational Legal Process and State Change," Gregory Shaffer further expands on this definition of transnational legal process, first by tying it back to the roots of law.⁴³ Shaffer emphasizes that all law is, and has been in the recent past, transnational. American law, for example, originates from Roman law and English common law. More recently, it has evolved from both economic and cultural transnational interactions. Increased transnational interactions lead to spread of certain legal norms and the creation of "transnational legal orders" where accepted legal norms then govern specific areas of law.⁴⁴ Shaffer thus defines transnational legal process as "the process through which transnational construction and conveyance of legal norms takes place."⁴⁵ Shaffer also notes that the intersection of transnational legal processes with national or local legal processes can "block, adapt, translate, or appropriate a transnational legal norm and spur its reassessment."⁴⁶ To clarify the process, transnational legal processes are the recognition and spread of international legal norms, which, when sufficiently articulated and applied, can become transnational legal orders.⁴⁷ In looking more specifically at how international laws and norms are reflected nationally through transnational legal process, Shaffer argues that "transnational legal process is not reduced to a process of filling in gaps in law's implementation, but rather seen in dynamic terms in which national, international, and

transnational political, social, and legal processes interact.”⁴⁸ Transnational legal process can therefore provide an important theoretical approach for understanding both how law has evolved with the rise of globalization and how legal systems adapt to international norms.

Transnational legal process also provides a foundation for answering the question of why states only sometimes obey international laws and treaties. Traditionally scholars have analyzed this question by looking primarily at the interests and the identity of the state; however, Koh argues that neither of these fully accounts for the ‘normativity’ of transnational legal process.⁴⁹ Instead, Koh looks to the concepts of interaction and internalization as potential factors. Interaction can better describe the tendency of a state to follow international law than solely identity, as repeated interactions between state actors make up a large portion of the international laws that states obey. States are encouraged to obey because failure to do so creates friction and hinders participation in the international community.⁵⁰ Similarly, state obedience to international law can also be explained by the concept of internalization because, “as transnational actors interact, they create patterns of behavior and generate norms of external conduct which they in turn internalize.” This process of internalization results in international norms being incorporated into domestic law, further ensuring that the state will follow them. States can internalize norms through “executive action, legislation, and judicial decisions which take account of and incorporate international norms.”⁵¹ In transnational legal process, norms are therefore created through interactions, incorporated into a state’s domestic law and then obeyed through the process of internalization.

There are thus several reasons why transnational law and transnational legal process provide the best theoretical foundation for a study of the implementation of privacy law. First, with constant technological advances regarding the internet and digitally stored information,

issues related to privacy are no longer confined to national borders. Similarly, there are numerous relevant actors, such as multinational companies and individuals, and not just states. As a result, the laws and norms pertaining to privacy issues will be increasingly transnational in nature and transnational legal theory provides the best framing for understanding them. Because my study looks at how international norms and law related to privacy are internalized by domestic legal systems, transnational legal process will also be a relevant theoretical approach. However, this approach to my research question does not completely deviate from the traditional international law concepts, but rather, through a transnational law approach, builds off of core concepts of international. Most notably, the notion of sovereignty remains a pertinent consideration in analyzing the decisions of domestic courts in the United States and in France.

Revue de la littérature scientifique française

Pour une compréhension complète d'un sujet international il faut étudier des spécialistes internationales en dehors de la communauté anglophone. Alors, en cherchant une meilleure compréhension du droit international, j'étudie les travaux des spécialistes de droit qui s'expriment en français. Cette partie de la revue de littérature scientifique française examine des thèmes principaux à propos du droit international. Ces thèmes incluent le débat entre le droit naturel et le droit positif, l'évolution du sujet du droit international, et l'influence croissante du droit international au secteur privé. Je compare aussi les idées des auteurs français avec celles des auteurs anglophone pour déterminer une meilleure compréhension des thèmes généraux des spécialistes du droit international, quelque soit leurs pays d'origine. Cette partie souligne premièrement l'histoire du droit international, en discutant les travaux de Marie-Hélène Renaut

et J. de Louter. Deuxièmement, on analyse l'effet de la mondialisation sur le droit international comme souligné par les travaux de Robert Kolb et Jean-Bernard Auby.

Histoire du droit international

En construisant une histoire générale du droit international, Marie-Hélène Renaut commence avec la création de l'idée moderne du « droit des gens » qui vient de Francisco Suarez, un théologien espagnol actif à la fin du XVI^e et au début du XVII^e siècles. Suarez a souligné qu'il existe une communauté universelle entre les hommes, et selon l'interprétation de Renaut, il y a « le droit des gens... qui régit cette communauté. »⁵² Ce droit des gens peut être divisé en deux catégories : le droit des gens naturel et le droit des gens positif. Ces catégories suivent les principes générales des théories légales discutées dans la première section du travail présent. C'est à dire que le droit des gens naturel représente une « norme supérieure » qui existe pour tous. De l'autre côté, le 'droit positif des gens' est évolutif et vient des coutumes mais, aux yeux de Suarez, doit s'adapter au droit naturel.⁵³ Comme Mark Janis a discuté, Suarez était aussi un des théologiens principaux qui a inspiré Grotius.⁵⁴ Alors, ses idées du 'droit des gens' sont pertinentes à l'analyse de la théorie Grotian du droit international.

Renaut exprime, de la même façon que Janis, que Grotius a donné un aspect de positivisme au droit des gens tel qu'il avait été formulée par Suarez. Aux mots de Renaut, Grotius a été considéré le fondateur du droit international à cause de son vue que « le droit des gens est un ensemble de règles positives issues d'un accord entre les peuples. »⁵⁵ Avec cette notion, Grotius ajoute un degré de positivisme au droit des gens déterminé avant par Suarez. À part de l'explication plus théorique de Grotius, ce qui est assez similaire aux analyses de Janis et Lauterpacht, Renaut explique aussi deux sources principales de cette théorie de Grotius.

Premièrement, selon Renaut, Grotius a été influencé par les concepts libéraux. Dans son œuvre, *Du droit de la guerre et de la paix*, il crée les règles que déterminent quand un pays peut faire la guerre. Ce droit de guerre crée les causes justes pour faire la guerre ainsi que les conditions pour la neutralité et le traitement des prisonniers.⁵⁶ Ces directives d'action internationale représentent un mélange de droit naturel et de droit positif qui oblige la communauté au droit supranational. Les notions de Grotius illustraient aussi les idées principales du libéralisme, c'est à dire qu'on peut régler et limiter les pays d'un niveau supranational pour diminuer la fréquence de la guerre.

Deuxièmement, la théorie de Grotius du droit international a aussi des origines dans les considérations plus réalistes et traditionnels. Pour Grotius, la motivation de ses théories n'était pas seulement académique, mais « en grande partie commandée par le système économique qui règle le commerce. »⁵⁷ Grotius, comme un juriste en Hollande, devait aussi considérer la croissance de l'économie hollandaise. La création du droit international n'était pas, par conséquent, seulement à la poursuite des motivations libérales telles que la protection des droits des gens ou pour éviter la guerre. Les considérations économiques et les avantages commerciaux d'un système plus régulé ont provoqué aussi la création du droit international. Par exemple, le droit maritime était un des sujets particulièrement importants à Grotius parce que la Hollande était à ce temps là un pays colonial. Les actions commerciales maritimes affectaient l'économie et donc les affaires importantes de la Hollande.⁵⁸ Avec le droit international concernant ces actions maritimes, la Hollande pouvait agir sur ses intérêts nationaux significatifs. Dans ce contexte, la poursuite des lois internationales s'adapte non seulement aux idées plus libérales mais aussi aux concepts réalistes. Dans le contexte de mon étude, un point de vue réaliste peut être encore pertinent parce qu'on doit considérer comment les intérêts nationaux des pays, et non

seulement les pressions internationales, peuvent influencer les pays à appliquer le droit international.

Avec la reconnaissance du droit international à cette époque d'histoire, le débat classique légal apparaît : le droit international est-il un exemple du droit naturel ou du droit positif ? Dans une histoire du droit international classique, J. de Louter souligne ce débat classique de droit. De Louter exprime que ce type de droit n'est pas différent que les autres classifications de droit au sens que les deux perspectives peuvent s'appliquer.⁵⁹ Mais, comme H.L.A. Hart, il se penche vers une compréhension plus positiviste. De Louter note que le droit international peut être classifié comme positif parce qu'il n'est pas seulement philosophique ou morale, et il est plus qu'une partie de l'histoire ou de la politique. Le droit international influence ces domaines, et donc, doit être considéré comme un concept unique. La conclusion de Louter est claire : « le droit international n'est point un aventurier sans abri qui trouve çà et là un pauvre gîte, mais un fils légitime, qui mérite une place honorable dans la grande famille du droit. »⁶⁰ C'est à dire que le droit international n'est pas un concept abstrait qui existe conjointement avec des autres types de droit, mais qu'il mérite une reconnaissance unique comme une approche indépendante aux question légales. Bien qu'il a un point de vue très positif, l'argument représente le changement idéologique du début du XX^e siècle en faveur du droit international.

L'Effet de la mondialisation sur le droit international

Cette nouvelle perspective sur le droit international continue à évoluer, et est surtout influencée par la croissance de la mondialisation. La mondialisation n'est pas un concept récent, alors comment peut-on le définir au contexte plus courant ? Politologue français Jean-Bernard Auby qui écrit de l'influence de la mondialisation l'explique comme la croissance des

interactions transnationales : les interactions économiques, politiques, ou de communication en général.⁶¹ Robert Kolb, un professeur de droit international à plusieurs universités, analyse l'influence de la mondialisation sur ces changements idéologiques dans le domaine du droit international. D'abord, Kolb explique la nature traditionnelle du droit international à la fin du XIX^e siècle avec une description similaire à la théorie classique de Grotius. Mais, il note qu'à cette époque-là le droit international était « lié à l'appartenance à une société fermée, dont on ne devenait pas automatiquement membre, mais à laquelle on devait être admis par cooptation. »⁶² Il utilise les exemples de la Turquie et de la Chine, et du développement de leurs relations avec les pays européens pendant ce siècle, pour montrer comment cette cooptation s'est effectuée.

Au cours du XX^e siècle, le système a changé profondément à cause de la croissance de la mondialisation et de la création des organisations internationales, pendant une phase que Kolb appelle « la 'constitutionnalisation' du droit international ». ⁶³ Dans cette phase, qui est marquée par la création des organisations supranationales comme la Société des Nations, et puis les Nations Unies, on a commencé à considérer le droit international comme une doctrine pour un système global, et non plus seulement pour les relations entre un petit nombre de pays. Comme Larry May, un philosophe américain, Kolb souligne le rôle du positivisme juridique dans le droit international traditionnel, mais il insiste que cette école de pensée a dû évoluer pendant la phase de constitutionnalisation. Cette phase s'oppose aux doctrines principales de positivisme, particulièrement celles qui déterminent qui peut créer les lois.⁶⁴ En même temps, il est dans cette phase que, selon Louter, la perspective positiviste du droit international ajoute aussi la légitimité au droit international. Cette phase est donc marquée par plusieurs nouvelles perspectives et idéologies en évolution, et même en contradiction, sur les sources du droit international.

Un autre changement théorique pendant cette époque est le sujet du droit international. Pendant la phase classique du droit international, le sujet du droit était l'état ; mais, dans cette nouvelle phase, « l'individu est aussi devenu un sujet du droit international : d'où un mouvement mondial des droits de l'homme. »⁶⁵ Kolb souligne l'importance de ce deuxième changement théorique parce que le droit international n'était plus simplement les règles des relations internationales mais aussi des normes légales créées à l'égard des individus. Dans ce sens, « l'écran étatique est percé : ce qui auparavant relevait exclusivement de la compétence intérieure – le fameux domaine réservé – des États devient une matière régie (partiellement) par le droit international. »⁶⁶ Alors, cette phase représente deux changements significatifs : la création du droit international normatif et la reconnaissance légale des individus plutôt que seulement les états. L'évolution du droit international pendant le dernier siècle représente non seulement la croissance de la mondialisation, mais aussi des changements aux théories légales à l'égard du système international et de ses lois.

Ce changement de théorie légale est significatif pour Jean-Bernard Auby dans son étude sur la 'globalisation' du droit. En général, Auby affirme que la mondialisation a provoqué le droit international à être plus privatisé, au sens qu'il est créé plus souvent pour le secteur privé. Faisant référence à Gunther Teubner, Auby écrit, « le centre de gravité du droit se déplace vers des régimes privés, et le droit global s'appuie de plus en plus sur des ressources autonomes : multinationales, consultants juridiques globaux, fonds, associations, etc. »⁶⁷ Cet argument suit le raisonnement de Kolb à propos du sujet du droit international ; si le sujet du droit international a décalé des états aux individus, il suivrait que le droit international en évoluant, influencerait le secteur privé et non seulement des relations internationales au domaine public. Auby écrit sur

plusieurs aspects du droit international avec cette perspective, mais c'est sa discussion du droit international normatif qui est particulièrement pertinente à cette étude.

En discutant la création du droit international normatif, il fait référence à la croissance du droit international privé. Il existe récemment un accroissement des sources du droit international ; une partie de cet accroissement est le résultat de plusieurs organisations internationales, mais une autre partie importante est provoquée par le secteur privé et l'accroissement des transactions internationales. Il y a des soucis que la multitude des sources diminuerait la légitimité du droit international, mais Auby propose une autre hypothèse. Il soutient que, « il y a au contraire prolifération de normes. »⁶⁸ La croissance du commerce international, une des conséquences de la mondialisation, provoque la création des normes légales au domaine international.

Pour décrire comment les normes relèvent aux organisations du droit Auby utilise les classifications des règles primaires (c'est à dire, les règles de la société) et des règles secondaires (c'est à dire, les règles qui créent des règles primaires), une philosophie que vient de H.L.A. Hart. Auby affirme que les normes internationales agissent comme les règles primaires et dictent les actions certains aux individus et aux pays. Les organisations du droit, de l'autre côté, agissent comme les règles secondaires parce qu'ils créent un système duquel les normes peuvent émerger.⁶⁹ Cependant, en proposant cette théorie, Auby présente aussi des soucis avec une approche trop simple parce la création du droit international reste un processus compliqué. La complication principale, selon lui, est un problème de distinction. La distinction entre les législateurs et les exécutifs qui existe au niveau national n'existe pas si clairement au niveau international. Similairement, la distinction entre le niveau national et le niveau international n'est pas toujours claire ; il y a une « mélange de droit international et de droit interne. »⁷⁰ Par

conséquent, les normes qui sont créées dans le système international sont souvent très générales parce qu'elles doivent s'appliquer aux plusieurs pays avec des systèmes juridiques différents. Alors, il y a des grandes divergences au niveau national parce que les pays peuvent interpréter les mêmes normes dans les façons différents.⁷¹ Cet argument est pertinent à ce projet parce qu'il suggère qu'il y a des facteurs au niveau national qui mènent aux interprétations différents aux pays quand ils sont confrontés avec les mêmes normes internationales.

Conclusion

This chapter illustrates a theoretical shift in how scholars approach the topic of international law. This theoretical shift is primarily the result of recent globalization, the increase global interactions, especially between individuals and businesses. Interactions continue to transcend state borders and involve non-state actors, leaving traditional international law, or the laws governing the actions of sovereign states, increasingly outdated. As some scholars, such as Daniel Bethlehem and Rafael Domingo, highlight the downfalls with the current international legal system, other scholars, such as Phillip Jessup and Harold Koh, propose “transnational law” as a better theoretical framework for understanding and governing global interactions. Harold Koh also proposes the theory of transnational legal process, in which international law is created and subsequently internalized within domestic law. The French literature provides a similar perspective on international law, although Auby's analysis of globalization and international law provides a more positive outlook on how international normative law functions within the current system. While French scholarship has not addressed transnational law in the manner that Anglophone scholarship has, the discussions of international law by both Auby and Kolb touch on many of the same key notions of transnational law, such as the role of international norms and

the process of internalization. This suggests that the core ideas of transnational law are more widespread globally than they may seem; there may simply be an issue of scholars internationally not yet adopting the term “transnational”. Overall, Koh’s theory of transnational legal process provides the best framework for understanding my own question, as it looks at how international and domestic laws interact.

¹ Mark Weston Janis, The American Tradition of International Law: Great Expectations 1789-1914. Oxford: Clarendon Press, 2004: p.32-33.

² Hersh Lauterpacht, “The Grotian Tradition in International Law,” in Grotius, Vol. 1, eds. John Dunn and Ian Harris (Cheltenham, UK: Edward Edgar Publishing, Inc., 1997): p.414-416.

³ Ibid, 416.

⁴ Stephen C Neff, Justice Among Nations: A History of International Law (Cambridge, MA: Harvard University Press, 2014): p.9-10.

⁵ Lauterpacht, 416-417.

⁶ Larry May, “Jus Cogens Norms,” in Philosophical Problems and the Law, 5e, ed. David M. Adams (Boston: Cengage Learning, 2012): p.49.

⁷ Janis, p.39.

⁸ Neff, p.224

⁹ Janis, p.39.

¹⁰ Neff, p.224

¹¹ H.L.A. Hart, “International Law,” in Philosophical Problems and the Law, 5e, ed. David M. Adams (Boston: Cengage Learning, 2012): p.41.

¹² Ibid, p.42-43.

¹³ Ibid, p.43-44.

¹⁴ David Kennedy, “Sources of International Law,” American University Journal of International Law and Policy 2 (1 1987): p.1-94.

¹⁵ Ibid, p.2-3,8-9.

¹⁶ Ibid, p.22.

¹⁷ May, p. 46.

¹⁸ Ibid, p.47.

¹⁹ Ibid, p.49.

²⁰ Hazel Fox, “Time, History, and Sources of Law Peremptory Norms: Is There a Need for New Sources of International Law,” in Developments in International Law, Vol. 58, eds. Matthew Craven and Malgosia Fitzmaurice (Leiden: Brill Academic Publishers, 2007): p.121.

²¹ Jagdish Bhagwati, In Defense of Globalization (Oxford: Oxford University, 2007): p.176-177.

²² Daniel Bethlehem, “The End of Geography: The Changing Nature of the International System and the Challenge to International Law,” The European Journal of International Law 25 (1 2014): p.13.

²³ Ibid, p.13.

²⁴ Ibid, p.14.

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- ²⁵ David J. Bederman, Globalization and International Law (New York: Palgrave MacMillan, 2008): p.55.
- ²⁶ Bethlehem, p.15,17.
- ²⁷ Ibid, p.20.
- ²⁸ Ibid, p.23.
- ²⁹ Rafael Domingo, “The Crisis of International Law,” Vanderbilt Journal of Transnational Law 42 (5 2009): p.1543-1593.
- ³⁰ Ibid, p.1544.
- ³¹ Ibid, p.1546-1548.
- ³² Ibid, p.1580.
- ³³ Philip Jessup, Transnational Law (New Haven: Yale University Press, 1956): p.3.
- ³⁴ Ibid, p.2.
- ³⁵ Ibid, p. 35-36.
- ³⁶ Ibid, p.71.
- ³⁷ Craig Scott, “‘Transnational Law’ as Proto-Concept: Three Conceptions,” German Law Journal 10 (7 2007): p.866.
- ³⁸ Carrie Menkel-Meadow, “Why and How to Study ‘Transnational’ Law,” UC Irvine Law Review 1 (1 2011): p.117.
- ³⁹ Harold Koh, “Integrating Transnational Legal Perspectives into the First Year Curriculum: Why Transnational Law Matters,” Penn State International Law Review 24 (Spring 2006): p.745.
- ⁴⁰ Ibid, p.746.
- ⁴¹ Harold Koh, “Transnational Legal Process” Nebraska Law Review 75 (1996): p.183-184.
- ⁴² Ibid, p.184.
- ⁴³ Gregory Shaffer, “Transnational Legal Process and State Change,” Law & Social Inquiry 37 (Spring 2012): p.229-264.
- ⁴⁴ Ibid, p.229-230.
- ⁴⁵ Ibid, p.235.
- ⁴⁶ Ibid, p.230.
- ⁴⁷ Ibid, p.236.
- ⁴⁸ Ibid, p.239.
- ⁴⁹ Koh, “Transnational Legal Process” p.199-203.
- ⁵⁰ Ibid, p.203.
- ⁵¹ Ibid, p.204.
- ⁵² Marie-Hélène Renaut, L’Histoire du Droit International. Ligugé: Aubin Imprimeur, 2007, p.8.
- ⁵³ Ibid, p.66.
- ⁵⁴ Janis, p.32-33.
- ⁵⁵ Renaut, p. 8.
- ⁵⁶ Ibid, p. 76-77.
- ⁵⁷ Ibid, p.73.
- ⁵⁸ Ibid, p.72-73.
- ⁵⁹ J. de Louter, Le Droit International Public Positif (Oxford: Imprimerie de l’Université, 1920): 8-9.
- ⁶⁰ Ibid, p.9.
- ⁶¹ Jean-Bernard Auby, La globalization, le Droit, et l’État (Paris: Montchrestien, 2003): p.13-16.

⁶² Robert Kolb, “Mondialisation et Droit International,” Relations Internationales 3 (123, 2005): p.73.

⁶³ Ibid, p.80.

⁶⁴ Ibid, p.80-82.

⁶⁵ Ibid, p. 92.

⁶⁶ Ibid, p. 92.

⁶⁷ Auby, p.68.

⁶⁸ Ibid, p.70.

⁶⁹ Ibid, p.70.

⁷⁰ Ibid, p.71.

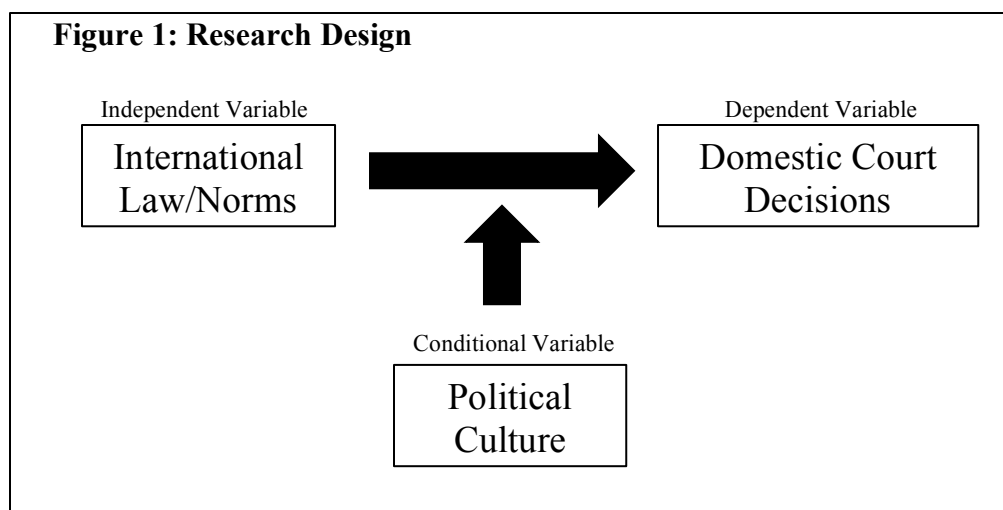
⁷¹ Auby, p.73.

Chapter Three: Methodology

This project seeks to understand the relationship between domestic and international law, with special attention to political culture's effect on this relationship. Although traditional scholarship on international law has suggested a positivist, top-down approach to international law, in which considerable tension exists between international laws and the national laws created by sovereign states, Harold Koh's theory of transnational legal process suggests a more fluid relationship between the two forms of law. Koh's theory suggests a more a cyclical and normative manner of understanding international (or 'transnational') law in which different national laws and norms converge to influence the creation of international law. These international laws are in turn internalized back into domestic legal systems for a more standardized recognition of international norms. Because I am most interested in the second part of this cycle, how international norms are incorporated into domestic law, my study employs a careful analysis of the current international standards concerning privacy and technology as well as how law in France and the United States responds to these questions.¹ However, it is not only the differences between international and domestic privacy law, or between French and American privacy law, that are of interest but how political culture affects these difference. I argue that aspects of a state's political culture, rather than solely that state's international standing or national security interests, impact the level of consistency between domestic and international law.

To test this relationship my research design includes three variables (Figure 1). The independent variable for this study is international law and norms. Because this project looks at privacy law applicable to both France and the United States I look to international law applicable to both countries, more specifically, resolutions and reports originating from the United Nations.

This variable is derived from three different texts, as noted in Chapter One: Article 12 of the Universal Declaration of Human Rights from 1948, which recognizes a right to privacy as a human right,² the United Nations' resolution on December 18, 2013, which recognized the need for a specified "right to privacy in the digital age,"³ and the United Nations resolution on November 25, 2014, which created greater legal protection for this right to privacy."⁴ My dependent variable is domestic law, which I will study through French and American appellate court decisions focusing on privacy issues related to technology. I chose to analyze court decisions because I argue judicial decisions better reflect changes in a more politically neutral application of political culture to legal questions than legislation would, as the legislative branch, affected by the electoral process, is more vulnerable to varying political influences. Court decisions, being in theory more insulated from current politics, weigh current law and legal principles in the context of the greater constitutional and cultural values on which the country was built in order to address current legal questions.



To clearly study how the relationship between international and domestic law is affected by culture, my research design includes political culture as a conditional variable. While

‘political culture’ has been defined and interpreted in numerous ways depending on the purpose of the study, I largely base my conditional variable on the definition by Sidney Verba, who, in the 1960s, was one of the early scholars to analyze political culture as a political science phenomenon. Verba argues that political culture does not refer to the specific political institutions within a state, but rather “a system of beliefs about political interaction and political institutions.”⁵ Several decades later, in further defining a theory of political culture, Gabriel Almond expands on the ideas of scholars such as Verba to create four ways in which the theory can explain political culture, two of which are relevant to my own study. First, “political culture has cognitive, effective and evaluative components... [in other words] it includes knowledge and beliefs about political reality, feelings with respect to politics and commitments to political values.”⁶ This explanation bears some resemblance to Verba’s definition as it relates to the factors encompassing political culture. Second, Almond discusses the ramifications of political culture, noting, “political culture affects political and governmental structure and performance; it constrains it, but surely does not determine. The causal arrows between culture and structure and performance go both ways.”⁷ Political culture is thus not only a descriptive factor in political science, but can also influence political outcomes. Using political culture as a conditional variable in my study as a means to understand different domestic laws is pursuant of these conclusions.

To more specifically conceptualize political culture in the context of my research question, I draw from the works of Verba and Almond to define political culture as the foundational legal doctrines or the constitutions from which a state is governed. This follows the two general definitions of political culture forwarded by Verba and Almond: the structure of the political system and how citizens perceive and interact with this system. A constitution follows

the first definition because it determines the entire structure of the government within a state. It also reflects societal perceptions of the government because a constitution, at least within the two countries I am analyzing, is created by representatives from the society that it governs. While this definition of political culture is not necessarily broad enough to be applicable to all research, it does apply the general definitions within political science scholarship in a manner that is relevant to a legally based study. To choose the documents, I look to the current constitution within each state, as well as the primary document identifying human rights. For the United States I will use the U.S. Constitution, written in 1789, and the Bill of Rights, written in 1791.⁸ In France I study The Declaration of the Rights of Man, which was written in 1789 and acts as the Preamble to the first constitution, written in 1791, and the current constitution, which was written in 1958.⁹ Although France's constitution is the French Republic's fifth constitution, and thus more recently written than the U.S. Constitution, the use of both French documents will illustrate both the core foundational principles of the French Republic, as well as the current political structure. To analyze the political culture within each state, I look to the nature of each document (when it was written, the context for its creation) as well as the relevant philosophical and theoretical influences on each, as this second consideration highlight which ideologies were held to be culturally significant at the time of the document's creation.

To operationalize the dependent variable, I use judicial decisions from each country's highest federal courts which have applied privacy law to legal questions related to technology. Because this project seeks to analyze the effects of a conditional variable, political culture, I sought to keep the dependent variable as consistent as possible for the two cases. Therefore, I looked at a narrow class of privacy cases, specifically those related to possible infringements of privacy as a result of more technologically advanced methods of surveillance, such as

wiretapping and Global Positioning Systems (GPS) tracking. I also include cases in which more advanced technology increases the scope of police search or seizure, for example the search of cell phones and laptop computers.

To search for cases I use the case law database on LexisNexis® Academic for U.S. cases, and Legifrance and Juricaf, two online French case law databases, for French cases. I search for terms such as “privacy” and “technology”, or in the case of the French databases, “la vie privée” and “technologie”. In order to prevent significant lurking variables, such as the influence of now-obsolete legal principles and outdated technology, I created temporal boundaries for my case selection. However, I could not create too rigid of temporal bounds because questions related to privacy and technology do not reach the supreme courts of both countries too frequently. It was thus necessary to have a somewhat broader timeframe in order to have a sufficient number of cases to analyze and I limited my cases to those occurring in the past thirty years. Although thirty years still allows for the possibility of lurking variables it strikes a balance between decreasing this possibility while also allowing for a more in-depth analysis of privacy concerns surrounding technology. I made one exception to this rule, allowing one U.S. case from 1967 because it acted as such a landmark case for judicial recognition of privacy in relation to new technology. For the United States I analyze the following four Supreme Court cases: *Katz v. United States* (1967), *Bartnicki v. Vopper* (2001), *United States v. Jones* (2011), and *Riley v. California* (2014). The four cases from the French Court of Cassation, which are named numerically, are: 86-90297 (1987), 10-11777 (2011), 11-84308 (2011), and 12-82391 (2014).

To measure the dependent variable, I use a standard set of questions for each case, as this method ensures more standardized results while also allowing room for legal interpretation. The method therefore acts as somewhat of a hybrid between more abstract comparative legal analysis

and more concrete content analysis, as each method has its advantages and disadvantages. In their comprehensive study of content analysis of judicial decisions Mark Hall and Ronald Wright highlight that content analysis is ideal when each case is equally influential, and when determining the outcome of cases, or the specific legal principles used.¹⁰ By looking only at these superficial aspects of a case, researchers can boost the internal validity of their study through the use of coding to decrease bias. However, failing to look at why outcomes are decided can decrease the external validity of the study.¹¹ Hall and Wright therefore note that content analysis can be a useful tool for augmenting traditional legal analysis, especially in descriptive legal studies.¹² Because I want to determine a standardized set of data about court decisions, but also understand the general reasoning behind these decisions, a mix of content analysis and general legal analysis was the best method. To strike the balance between these methods I developed a standard series of questions for reading each case (Figures 2).

Figure 2: Questions Guiding the Reading of Privacy Cases

1. What was the constitutional question reviewed by the Court?
2. What was the outcome of the case? Did the Court rule in favor of protecting privacy or against it?
3. What tests and/or legal principles did the Court use?
4. Did the Court cite any preceding cases from this study; if so, did they expand on or move away from the previous holding?
5. What elements of political culture are evident in the Court's decision?
6. Did the Court cite any international laws or international courts?

These questions provide a standardized view of the cases that will simplify the process of comparing cases from two different legal systems. Furthermore, using this set of questions rather than pure content analysis provides a more comprehensive understanding of exactly how the Court is interpreting privacy as a constitutional issue.

Upon completing my examination of the conditional and dependent variables in Chapters Four through Six, I delve into an analysis of the researched variables in full. In other words, I examine what patterns exist in relation to privacy protections and recognitions in domestic court decisions, as well as the extent to which these protections are consistent with international norms. Although there are many facets of international norms, I use international laws from the United Nations as representative of what is held to be normal within the international community in relation to privacy law. Thus, in the context of my independent variable, international law and international norms become generally interchangeable. To measure this variable I draw from the three sources of international privacy law discussed in Chapter One: Article 12 of the UDHR, the U.N. report from June 30, 2014 on “the right to privacy in the digital age,” and finally the follow-up report from November 2014 further detailing the extent to which countries must protect privacy. From this analysis, I can fully test my hypothesis by determining to what degree differences in political culture account for inconsistencies between international and domestic privacy law in France and the United States. Although I cannot prove a causal relationship between political culture and the manner in which international norms are internalized, I am able to deduce correlations between political culture and the inconsistencies between domestic and international law.

Résumé de la méthodologie

Dans ce projet, j'étudie comment la culture politique influence le niveau de cohérence entre le droit international et les lois nationales. Autrement dit, j'analyse comment la culture politique affecte le rapport entre le droit international et le droit national. Le design de recherche pour ce projet utilise trois variables. Ma variable indépendante est les normes internationales de

la vie privée. Pour déterminer ce que la communauté internationale considère comment la norme, j'utilise le droit international, plus spécifiquement les résolutions passées par les Nations Unies concernant la vie privée. Ma variable dépendante est les lois nationales. Puisqu'il existe plusieurs types de loi, j'étudie les décisions judiciaires à la place des lois passées par les législatures. Avec les décisions judiciaires je peux voir comment les interprétations de la vie privée évoluent et répondent à la nouvelle technologie. Pour examiner cette variable, j'utilise les cas de la Cour Suprême des Etats-Unis et la Cour de Cassation en France. Pour chaque pays j'analyse quatre cas judiciaires qui concernent l'applications des standards nationaux de la vie privée sur les technologiques spécifiques, par exemple, les écoutes téléphoniques, le pistage avec GPS, et le recherche des portables.

Ma variable conditionnelle est la culture politique. Comme les études des politologues suggèrent, plusieurs définitions de la culture politique existent. Mais, pour la culture politique au contexte de ce projet, la définition appropriée est la suivante : la fondation du système judiciaire, y compris les constitutions ou les autres doctrines qui créent le fond de la compréhension sociétale des concepts légaux. En étudiant la culture politique, ou plus spécifiquement ces fondations, on se tourne aux caractéristiques du pays comme le rôle du gouvernement, les droits donnés aux hommes et aux femmes, et comment les cours fédérales sont structurées. Pour les Etats-Unis, j'analyse la Constitution et la Déclaration de Droits, et pour la France j'étudie la Constitution de la V^e République et la Déclaration des Droits de l'Homme et du Citoyen. À part de considérer comment ces documents reflètent les structures et les rôles des branches judiciaires, j'examine aussi les idéologies populaires avec les auteurs des documents pour que je puisse mieux comprendre leurs implications culturelles.

Donc, je peux comparer non seulement comment les connaissances de la vie privée évoluent dans les deux pays mais aussi comment les deux pays appliquent différemment les normes de la vie privée aux mêmes questions légales. La méthode générale employée dans cette étude est une analyse comparative de droit. Pour mieux mesurer et comparer les cas judiciaires, j'utilise une série standardisée de questions s'appliqueront à chaque cas (Figure 3). Ces questions seront liées aux principes légaux sur la vie privée, aux concepts courants au niveau international sur le sujet, et à la culture politique. Cette série de questions donne plus de validité interne à l'étude parce qu'il y a des informations uniformes pour chaque cas. En mesurant la variable conditionnelle, la culture politique, j'utilise un type similaire d'analyse comparative pour examiner les constitutions de chaque état. Cependant, cette analyse de la variable conditionnelle sera avant l'analyse des cas juridiques pour que je puisse faire référence aux aspects spécifiques de culture politique pendant l'analyse des cas. Enfin, avec ces informations, j'analyse comment la culture politique se présente aux décisions juridiques, comment c'est différente entre les deux pays, et comment ces différences peuvent expliquer les incohérences entre les lois nationales et le droit international par rapport à la vie privée.

Figure 3: Questions pour les cas judiciaires sur la vie privée

1. Quelle est la question constitutionnelle revue par la Cour ?
2. Quel est le résultat du cas ? Est-ce que la Cour a prononcé un jugement favorable ou opposé à la vie privée ?
3. Auxquels tests ou principes légaux la Cour a-t-elle recours ?
4. La Cour cite-t-elle les cas précédents significatifs ; si oui, augmente ou a diminué les protections de la vie privée ?
5. Quels éléments de la culture politique sont évidents dans la décision ?
6. La Cour cite-t-elle des lois internationales ou des décisions des cours

¹ Marc Rotenberg, "On International Privacy: A Path Forward for the U.S. and Europe" Harvard International Review 35 (Spring 2014)

² United Nations, “The Universal Declaration of Human Rights,” <http://www.un.org/en/documents/udhr/> (accessed February 28, 2015)

³ United Nations, “The Right to Privacy in the Digital Age,” <http://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx> (accessed February 28, 2015).

⁴ Somini Sengupta, “U.N. Urges Protection of Privacy in the Digital Era,” New York Times, November 25, 2014.

⁵ Sidney Verba, “Comparative Political Culture.” In Political Culture and Political Development, eds. Lucian W. Pye and Sidney Verba (Princeton, N.J.: Princeton University Press, 1965), p. 516.

⁶ Gabriel A. Almond, “The Study of Political Culture,” in Political Culture in Germany, eds. Dirk Berg-Schlosser and Ralf Rylewski (New York: St. Martin’s Press, 1993), p.15.

⁷ Ibid, p.15.

⁸ “Constitution of the United States,” http://www.archives.gov/exhibits/charters/constitution_transcript.html (accessed November 22, 2014)

⁹ “Déclaration des Droits de l’Homme et du Citoyen de 1789,” <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789> (accessed November 23, 2014); “The Constitution of the Fifth Republic,” <http://www.france.fr/en/institutions-and-values/constitution-fifth-republic.html> (accessed November 23, 2014).

¹⁰ Mark A. Hall and Ronald F. Wright, “Content Analysis of Judicial Decisions,” California Law Review 96 (Feb 2008): p.83-85.

¹¹ Ibid p.88.

¹² Ibid, p.85,90.

Chapter 4: An Analysis of Political Culture

Introduction

This study seeks to push beyond describing *how* international law may be internalized differently in states, to *why* international law is internalized differently. More specifically it will examine how political culture can influence this process by acting as a conditional variable on the relationship between international and national law. This chapter will establish an understanding of political culture in both the United States and France, as well as address how this political understanding may relate to an understanding of privacy. As noted in Chapter Three, political culture has been defined and studied in a myriad of ways depending on the focus of the project. Because this study seeks to understand how political culture affects judicial understandings of privacy, I turn to an analysis of political culture related to the principles and philosophical ideas on which the country was built. Although this is only one aspect of culture, this philosophical and historical approach highlights the cultural understandings of government, of the citizen, and of the relationship between the two, as well as how these understandings have permeated a culture's political system and created a unique understanding of legal questions, such as those related to privacy. This historical angle is needed because, as Bernhard Grossfeld argues in his assessment of comparative law, "often the best explanation of a legal institution lies in its history rather than in its current operation."¹ Therefore, to fully understand a country's unique cultural understanding of the role of its legal and political institutions, it is necessary to study the philosophical and theoretical concepts that influenced and inspired the creation of these institutions.

To gain this historical and philosophical understanding of political culture, I analyze the founding documents from each country; including their constitutions and their declaration of

rights. An analysis of these documents is an effective method for understanding first, the general principles on which each country was founded and structured, and second, the nuanced philosophical undertones that make each system unique. For the United States, I analyze the Constitution of the United States, including the Bill of Rights; for France, I analyze both the Declaration of the Rights of Man and of the Citizen (*La Déclaration des Droits de l'Homme et du Citoyen*) and the Constitution of the Fifth Republic, the current governing constitution. By studying the Bill of Rights separately from the U.S. Constitution, the analysis of U.S. documents can mirror that of the French documents, where the citizens' rights were recorded in a separate document. This also recognizes that Bill of Rights, although now considered a part of the U.S. Constitution, was written two years after the Constitution was adopted. Aside from studying the documents themselves, I also use secondary sources, specifically the works of scholars who specialize in the philosophical and theoretical influences present during these eras. Drawing from these sources will provide a more nuanced understanding of the cultural implications of each document. In each document, I look first to the context in which it was written, for example, who wrote it, why it was created, and most importantly the political and philosophical theories that inspired its core ideas. I then turn to a discussion of the actual content of the document as relevant to my study, looking at how the structure of the government system or recognition of protected rights provides insight into the political culture of the country.

United States

The Constitution of the United States

The Constitution of the United States was written in 1787 by an assembly of state delegates seeking to respond to the inadequacies of the Articles of Confederation, the previous

governing document.² Before delving into the contents of the Constitution, it is first necessary to understand the context of its creation. After declaring independence from Britain, the colonies that later became the United States had the difficult task of structuring a new government. In their book on the origins and development of the Constitution, Alfred Kelly, Winifred Harbison and Herman Belz highlight the significance of republicanism in the political order at the time. Republicanism, or the theory that the government should be a public matter with an emphasis on the well-being of society over the well-being of a specific group, was a new but prevailing theory during the colonial and revolutionary era.³ Aside from being accepted as option for Americans previously under the rule of a monarch across the Atlantic, a republican government was also a logical step. The United States lacked a titled aristocracy, such as those existing in many European countries. Thus, without the British crown, “the popular element [was] the only basis of government.”⁴ Although republicanism was popular, it was not the prevailing theory behind the Articles of Confederation, which created a “confederal union” of states, each of which had its own Constitution.⁵ Under this system, each state was recognized as its own sovereign entity, while the central motivation behind having a single “United States” was a need for a unified defense against potential aggression from Britain and other external threats.⁶ Constitutional law scholars Kelly, Harbison, and Belz argue that it was a lack of republicanism, and not a lack of responsibility at the national level, as commonly believed, that created the weaknesses of the Articles of Confederation and inspired the creation of the Constitution.⁷

Before analyzing the effects of republicanism, and other influential theories, on the Constitution itself, I would first like to examine the dominant theories of this period and how they became a part of the founding fathers’ political foundations. To understand this context for framing of the Constitution, David Bederman turns to a brief analysis of higher education in the

United States during the eighteenth century, as the subjects and authors studied at college often represent the general influences on the elite, who then affect the population as a whole.

Bederman notes that the main universities in the colonies, those attended by the founding fathers, focused heavily on the classics, particularly Greek and Roman philosophy. Many Framers “regarded the classical tradition as granting useful knowledge and valuable historic precedent on what John Adams called ‘the divine science of politics.’”⁸

It was from the study of the success of the Greeks and Romans, two famous republican powers, that led Adams to ultimately embrace republicanism.⁹ In learning about former governments who followed this doctrine, the founding fathers were also able to learn from some of the shortcomings of those political systems. For example, Adams noticed that a downfall for Rome was the lack of separation between the executive, judicial and legislative branches, and the exact responsibilities of each was never sufficiently defined. The Romans assumed that having a “mixed government” with representation from all groups would act as a method of checks and balances, an assumption that unfortunately often led to an abuse of power.¹⁰ Therefore not only did the classics provide a theoretical and philosophical foundation for the key political actors in American, but they also provided opportunities to learn from the successes and failures of similar governments. This historical perspective gave the Framers of the Constitution the ability to more effectively and successfully apply classical philosophy to a new political system.

Aside from the classics themselves, the founding fathers often cited several secondary writers on the classics. Montesquieu, for example, was a popular influence as his 1748 work, *L’Esprit des lois (The Spirit of the Laws)* was one of the most referenced works on the classics cited by the Framers.¹¹ Montesquieu was primarily a republican, and *The Spirit of Laws* details the several ways in which republics may effectively govern.¹² However, in discussing this legal

system, Montesquieu brought up one of the central problems facing the Framers: republics are often geographically small, thus there was the question of whether this model would even be attainable for the United States.¹³ The Framers also turned to Montesquieu's model of a "Confederate Republic", which is based on the theory that there is a net benefit from creating a confederacy out of small, previously independent states. A union of states increases the ability of the states to respond to internal and external threats, without losing the benefits of a small, more localized government.¹⁴ Through this model, the Framers could use a federalist approach to apply the advantages of a republican government on a larger scale. These works, whether classical or works building off of classical works, demonstrate a central political ideology at the time of the American Revolution. The Framers were primarily supporters of creating a republic, while also drawing from Montesquieu's logic on federalism, as a means of applying republicanism to a larger geographical area.

However, it is important to note the difference between republicanism and democracy in this context, as many of the founding fathers were in support of a republic but staunchly opposed to creating a democracy. At the time of the framing of the Constitution, democracies were widely regarded as short-lived and unsuccessful, or as James Madison opined: "Democracies have been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have, in general, been as short in their lives as they have been violent in their deaths."¹⁵ What, then, is the major difference between a republic and a democracy, at least in relation to how the terms were employed at the end of the eighteenth century? At the most basic level, democracies were considered governments ruled by the people, whereas republics were considered governments comprised of representatives for the people. Although republics could be less reflective of actual popular opinion on certain topics, they had

the advantage of providing greater stability.¹⁶ During Thomas Jefferson's presidency the United States moved closer toward democracy, as he was a greater supporter of democratic principles; however, the Constitution was still based on republican, not democratic theory.¹⁷

With this theoretical foundation, I turn now to the Constitution itself. The document is comprised of seven articles, plus a preamble and the Bill of Rights.¹⁸ The central articles outline the powers of each branch of government, detailing a system of careful checks and balances that incorporates some of Adams' concerns regarding the failures of the Roman checks and balances systems. Of these central articles, the most relevant to this study are Articles III and IV which detail the power of the judiciary and the relationship between federal and state governments respectively. Most notable of Article III is Section 1, which creates one Supreme Court, and recognizes the ability of the Congress to establish inferior courts as necessary. Section 2 touches on the jurisdiction of the judicial branch, such as the types of cases the judicial power has the authority to rule on and when the Supreme Court is given original or appellate jurisdiction. However, it is important note Sanford Levinson's observation that nowhere in the Constitution are the courts explicitly given judicial review.¹⁹ In comparison with the executive and legislative branches, the judicial branch is given little explicit constitutional power. Instead, much of the judicial branch's power comes from the Judiciary Act of 1789. Although this Act is, of course, separate from the Constitution itself, it is still worth noting because it used the power given to Congress by Article III to establish actual courts from abstract constitutional concepts. It is from this Act that the powers given to the judicial branch went from abstract notions to tangible duties, and an actual Supreme Court was created.²⁰

Although Article IV relates less directly to the functions of the judiciary, it is an important article for understanding how the political theories previously mentioned actually

became a part of the Constitution, and therefore a part of American political culture. Most notable in Article IV is Section 4, which reads: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.”²¹ This section reflects two important aspects of the prevailing political views at the end of the eighteenth century. First, it specifically designates a republican form of government, not a democracy.²² Second, the recognition of both state government and the federal government’s duty to protect its states also follows Montesquieu’s theories surrounding federalism. Although exact language for these concepts may have evolved over time, for instance the evolution of the terms ‘republican’ and ‘democratic’, these theories remain a part of the Constitution and therefore a part of the United States’ political culture.

It is also worth noting in relation to the Constitution, how the Framers’ experience with legal systems influenced the role of the courts in the United States. As a former British colony, the newly formed United States adopted the standards of English common law. Common law is best understood as “judge-made law”, where the courts have the ability to extend or limit law through the use of precedent. Therefore, to understand law required not only understanding the original written code, but also the judicial interpretations of the law.²³ As such, any written laws, and therefore the Constitution, act as dynamic legal documents with the capacity to evolve through interpretation and application.

The Bill of Rights

Because the Bill of Rights was written two years after the Constitution, it draws from many of the same philosophical and political theories. However, it is important to note why the

Bill of Rights came into existence. Garrett Epps, a law professor at The University of Oregon, argues that the Framers were, “far more concerned with making sure that the government had enough power to survive than with ensuring that it recognized the rights of the people.”²⁴ The need to recognize individual rights and protect them from government intrusion was a secondary consideration, primarily led by James Madison. Madison initially proposed twelve amendments, although only ten were actually ratified. Former Supreme Court Justice Lewis Powell articulates the significance of the amendments formally ratified as a part of the Bill of Rights. These ten amendments are based on the limitation of federal power, not state power. Madison’s amendment applying these rights as protections from the states was never ratified; it was only in later judicial considerations that the Supreme Court held the Bill of Rights protected citizens from local government.²⁵ This represents the importance, at least initially, of state autonomy and stability over the protection of the individual, thus reflecting some of the core tenets of republicanism and federalism. In other words, the ability of the states to make decisions within their own borders took precedent over the universal protection of individual liberties.

In turning to the actual content of the Bill of Rights, Epps notes three important characteristics. First, the document primarily recognizes negative liberties, a term used by twelfth-century philosopher Isaiah Berlin to describe protection from certain government action.²⁶ For example, the First Amendment protects citizens *from* government infringement on their freedom of speech, of the press, and to practice their religion, the Fourth Amendment protects citizens *from* “unreasonable searches and seizures,” the Eighth Amendment protects citizens *from* “cruel and unusual punishments.”²⁷ This is in contrast to positive rights or liberties, or the right *to* be provided a liberty or service by the government.²⁸ Second, the concept of equality appears nowhere within the original ten amendments. As a result, Epps argues that the

Bill of Rights acted as, “a set of limitations on the government of a republic that permitted vast inequality on the basis of class, sex and race.”²⁹ These inequalities did not begin to be addressed until 1868, with the ratification of the Fourteenth Amendment. Finally, Epps highlights the vagueness and indeterminate nature of much of the language within the amendments, therefore leaving the Bill of Rights open to great debate and interpretation. For example, he notes that the Fifth Amendment discusses “due process of law,” the Sixth a “speedy” trial, as well as other similarly vague terms in other amendments that are not explicitly defined.³⁰ This vagueness is a significant consideration when looking at political culture, especially in my next chapter when I begin to analyze how political culture is reflected in recent judicial interpretations of privacy. There must be a distinction made between current understandings of these amendments, and the actual original language. By showing the evolution of these concepts, it will be possible to understand the cultural implications of judicial decisions.

In analyzing the Bill of Rights, it is also worth noting that the concept of privacy is never mentioned. Rather than detail a positive right to privacy, the Bill of Rights instead provides certain negative rights that have been interpreted to also provide an implicit right to privacy. For example, the Fourth Amendment recognizes that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”³¹ Read literally, the Fourth Amendment protects individuals from unreasonable searches and seizures, thus securing a negative right from government intrusion into one’s private affairs. Although it does not explicitly address a right to privacy, it does provide an implicit recognition of private affairs, whether it be one’s own private home or papers and effects. It is this implicit

right to privacy that the Supreme Court later recognized in cases such as *Katz v. United States*, and has continued to apply to privacy and technology issues since that landmark cases.³² It is therefore, this aspect of the Bill of Rights that will be particularly relevant for my study.

Conclusion

With this overview of the Constitution and the Bill of Rights, the question then becomes, what do these documents highlight in terms of political culture, particularly political culture as relevant to privacy concerns? A reflection upon the political and philosophical influences, primarily the classics, on the founding fathers demonstrates the role of republican and federal theories in framing the Constitution. In applying these theories to the Constitution, the Framers sought to create a republic that struck a balance between political stability and the fair representation of the people. Through a federalist approach, the Framers could also find a balance between the advantages of a central government, while also retaining a level of state autonomy. This autonomy is particularly visible in the Bill of Rights, and the lack of constriction on state action that it initially allowed. The Bill of Rights also reflects a focus on negative rights, or a protection from government intrusion. However, as noted above, many of these rights were vaguely construed using terms that were never explicitly defined. This vagueness leaves the Bill of Rights open to judicial interpretation, as the Supreme Court acts upon the powers given by both Article III and the Judiciary Act of 1789. Overall, both the Constitution and the Bill of Rights represent a concern about federal intrusion, whether on the autonomy of the states or the personal liberties of the individual.

France

Nous nous tournons maintenant à une recherche de la culture politique en France, avec l'étude des deux documents gouvernementaux qui sont centraux au pays français. Dans un premier temps, nous analysons la *Déclaration des Droits de l'Homme et du Citoyen*, qui a été passée en 1789 et donc précède la constitution actuelle en France, qui a été passée en 1958. Puisque ce premier document était un des premiers résultats concrets de la Révolution française et représente les changements de mentalités pendant la Révolution, il est nécessaire de discuter les influences politiques et philosophiques sur cette période historique de la nation française avant de commencer l'analyse du document soi-même. Puis, dans un deuxième temps nous analysons la Constitution de la V^e République pour comprendre comment ces influences politiques ont évolué et sont reflétées dans la constitution actuelle.

La Déclaration des Droits de l'Homme et du Citoyen

Il reste un grand débat sur les influences principales pendant la Révolution : quels penseurs étaient signifiants, comment leurs idées étaient utilisées, et à quel point ils ont influencé les révolutionnaires. Cependant, il y a deux penseurs de cette période qui sont reconnus comme des influences signifiantes : Montesquieu et Jean-Jacques Rousseau. Comme nous l'avons mentionné dans la partie précédente, Montesquieu a proposé plusieurs études nouvelles de la politique dans son œuvre *De l'esprit des lois*, publiée pour la première fois en 1748. Dans cette œuvre, Montesquieu définit deux idées principales qui ont été utilisées pendant la Révolution française. Premièrement, il réaffirme sa reconnaissance des lois naturelles qui existent comme les libertés universelles des individus mais aussi les privilèges des certains, une idée qui vient des théoriciens classiques. Il affirme que « le monde intelligent soit aussi bien gouverné que le

monde physique, » ainsi il y a « aussi des lois qui par leur nature sont invariables. »³³ Une de ces lois naturelles est « le désir de vivre en société. »³⁴ Alors, Montesquieu décrit comment les hommes ont utilisé les lois naturelles pour créer une société basée sur les lois positives. Il y a, selon lui, trois types de droit qui gouvernent les états. D'abord, le droit des gens dicte comment les membres des états doivent interagir. Ensuite, le droit politique impose des règles sur le gouvernement de chaque état, et protège ainsi le rapport entre les citoyens et l'état. Enfin, le droit civil régit « le rapport que tous les citoyens ont entre eux. »³⁵ Par conséquent, les lois naturelles influencent la création des tous les types de droit, qui sont compris comment les systèmes des lois, positifs.

De ce fait, ses idées sur le droit naturel et ses observations des systèmes différents font avancer aussi une nouvelle compréhension de l'intersection entre le droit positif et le droit naturel. Plus spécifiquement, il voit les deux types de droit comme moins divisés que l'on ne l'a pensé.³⁶ Les lois naturelles créent la base de tous les types de droit qui gouvernent les hommes, mais elles seules créent des systèmes de droit différents à cause des cultures différentes, et donc les interprétations variées. Même si on tente d'appliquer les lois naturelles, et donc les concepts de la justice universelle, on peut avoir encore des lois défectueuses. Les lois sont toujours influencées par les conditions et les besoins de la société qu'il gouverne et par la volonté variée des individus qui le créent. Pour s'adapter à cette questions, on doit ajuster les lois aux conditions uniques de la société pour que les principes universelles de la justice puissent exister et protéger les libertés des individus.³⁷

Cette reconnaissance du gouvernement unique qui est nécessaire pour l'avancement des lois naturelles mène au deuxième concept principal de Montesquieu dans son œuvre, l'idée de la séparation des pouvoirs. Pendant ces études des systèmes légaux différents il et donc les

distributions des pouvoirs qui sont les plus effectives.³⁸ L'importance de la séparation des pouvoirs est une idée bien discutée dans la partie de notre étude sur la culture américaine, mais il faut revisiter le contexte des libertés individuelles, et puis de la Révolution française en générale. Montesquieu reconnaît l'importance des droits de l'individu et soutient un système de pouvoir bien équilibré parce qu'il peut mieux protéger ces libertés.³⁹ La séparation des pouvoirs fournit aussi une stabilité pour le gouvernement sans créer le despotisme, un concept qu'il continue à condamner.⁴⁰ Montesquieu pense que la politique et l'exercice raisonnable du pouvoir sont « le lieu de compromis entre les intérêts des individus et le fait de la société. »⁴¹ Dans ce sens, il représente un modèle de libéralisme plus modéré, l'équilibre entre la stabilité gouvernementale et la protection des libertés individuelles.

Montesquieu propose, certainement, de nouveaux concepts de droit et de gouvernement dans *De l'esprit des lois*, mais le plus grand problème est que son œuvre était principalement une étude sur les systèmes de droit. Il détaille les problèmes qu'il voit et les théories très générales qu'il croit être les plus efficaces mais il ne donne pas de recommandation concrète qui peuvent être utilisés par les révolutionnaires.⁴² Dans ce sens, Montesquieu fournit une connaissance des systèmes de droit différents et questionne les formes de gouvernement nouvelles. Cette perspective est intéressante parce qu'il peut expliquer comment les idées de Montesquieu ont été utilisées des façons très différents par plusieurs parties pendant la Révolution. Pour les révolutionnaires, les idées de Montesquieu ont été complétées par les théories des autres penseurs célèbres de cette période; une des ces influences politiques, et peut être l'influence la plus notable, est Jean-Jacques Rousseau.

Rousseau était une influence célèbre principalement à cause de son œuvre *Du Contrat Social*, publié en 1762. Comme avec des autres théoriciens, les spécialistes de l'histoire de la

Révolution ne sont pas d'accord à l'égard d'influence exacte de Rousseau, mais c'est presque universellement accepté qu'il a été une influence très signifiante. Roger Barny, par exemple, soutient que Rousseau était une plus grande influence que Montesquieu, en disant que « la 'bible' des révolutionnaires, dès le début, ce n'est pas l'*Esprit des lois*, mais le *Contrat social*. »⁴³ *Du Contrat Social* affirme des notions d'une société égale et démocratique qui deviennent des piliers des théories des révolutionnaires française.⁴⁴ Mais qu'est-ce que c'est, cette idée de rousseauisme qui était souvent citée pendant la Révolution ? En général, Rousseau propose qu'il y a un ordre social qui « est un droit sacré qui sert de base à tous les autres. »⁴⁵ Dans ce sens, la société doit être réglée comme une association des individus. S'il y a trop de pouvoir au chef du gouvernement qui traitent les citoyens comme des esclaves dépourvus des libertés individuelles, ce n'est plus un gouvernement légitime.

En bref, Rousseau reconnaît la différence « entre soumettre une multitude et régir une société. »⁴⁶ C'est la responsabilité de la société de s'assurer que le gouvernement aussi que les autres membres de la société demeurent le contrat social.⁴⁷ Cependant, il y a un compromis entre la protection de l'ordre social et les libertés individuelles qui sont indépendantes des autres. Rousseau affirme que, « c'est qu'au lieu de détruire l'égalité naturelle, le pacte fondamental substitue au contraire une égalité morale et légitime à ce que la nature avait pu mettre d'inégalité physique entre les hommes, et que, pouvant être inégaux en force ou en génie, ils deviennent tous égaux par convention et de droit. »⁴⁸ L'ordre social qu'il propose crée l'égalité entre tous les hommes par un gouvernement qui s'agit comme une association volontaire des citoyens.

En outre, un autre aspect *Du contrat social* qui est important pour la Révolution était le concept du moralisme, lié aux libertés naturelles et civiles. Rousseau souligne l'importance des libertés comme une partie nécessaire de l'humanité parce que, « c'est ôter toute moralité à ses

actions que d'ôter toute liberté à sa volonté. »⁴⁹ S'il ne reconnaît pas d'autonomie de l'individu et le concept de la volonté générale, le gouvernement perdrait sa légitimité.⁵⁰ Pour Rousseau, l'étude de l'histoire et des systèmes de gouvernance doit inclure la considération de la moralité, spécifiquement quand on étudie la situation des hommes. Cette perspective a influencé certains révolutionnaires de placer « cette exigence morale... au cœur de la politique. »⁵¹ Ce moralisme peut expliquer aussi l'importance de la reconnaissance des droits de l'homme avant la création d'un gouvernement structuré ; la moralité exige la justice, car, sans la justice, le gouvernement n'a plus de pouvoir légitime.

Rousseau, quand on le compare à Montesquieu, a une perspective politique plus libérale, et pour l'époque, presque radicale. Il prend certaines des mêmes idées de Montesquieu concernant les lois naturelles, et donc les libertés naturelles, mais il les utilise pour proposer une nouvelle connaissance du gouvernement. Tandis que Montesquieu garde un peu la structure du gouvernement, et donc l'influence aristocratique de laquelle il profite, Rousseau décrit un gouvernement plus interdépendant et général. Par conséquent, le rousseauisme conteste l'idée française de l'aristocratie, un aspect culturelle qui était une tradition importante dans l'histoire gouvernementale de la France. Un rejet de cette structure gouvernement était ainsi radical pour l'époque.

Mais pourquoi ces perspectives sont-elles importantes pour la création de la *Déclaration des droit de l'homme et du citoyen* ? D'abord on doit considérer le contexte de cette création. *La Déclaration* ne reconnaît pas simplement des libertés individuelles, elle marque le premier pas dans le processus de constitutionnalisation, le changement complet et idéologique du gouvernement français. La reconnaissance des lois naturelles est particulièrement importante pour cette raison. La Révolution française renverse tout l'ordre social et politique et les

révolutionnaires avaient besoin de logique pour ce rejet. Avec un appel aux droits naturels, les révolutionnaires pouvaient justifier l'abondamment d'un système de gouvernance considéré d'être tyrannique parce qu'ils cherchaient à rétablir l'ordre naturel et les droits universels des citoyens.⁵² Les théories de Montesquieu et de Rousseau concernant le droit naturel, et les libertés universelles qu'il protège, donnent la légitimité à la cause révolutionnaire française.

À part de contexte de la création de la *Déclaration*, les théories philosophiques de cette période sont aussi évidentes dans les droits protégés par la déclaration. Même le préambule désigne les articles suivants comme « les droits naturels, inaliénables et sacrés de l'Homme. »⁵³ Similairement, Article 1^{er} affirme que « les hommes naissent de demeurent libres et égaux en droits, » un des concepts principaux de l'idée rousseauiste des droits universels.⁵⁴ Ce qui est aussi important dans l'analyse de ce document est la reconnaissance des droits du pays, l'idée de la souveraineté, et donc le rapport entre l'État et le citoyen.⁵⁵ Ce document reconnaît les droits des individus, mais il reconnaît aussi ceux des citoyens. Article 15, par exemple, constate, « La Société a le droit de demander compte à tout Agent public de son administration. »⁵⁶ Cette distinction représente l'importance culturelle pendant la Révolution d'avoir des libertés individuelles protégées mais aussi une société bien cohésive qui peut se défendre face à un gouvernement trop restrictif ou oppressif. Le concept de la vie privée, comme détaillé dans cette déclaration, reflète aussi cette équilibre entre l'individu et la société. Article 17 constate que « la propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité. »⁵⁷ Cette reconnaissance est limitée à la propriété privée, mais elle note quand même que l'individu a le droit d'une vie loin de la domaine publique. Mais, en même

temps, ce droit n'est pas absolu et l'article souligne que ce droit peut être surpassé s'il y a assez de besoin commun.

La Constitution de la V^e République

L'histoire gouvernementale française depuis la Révolution est un peu plus compliquée que l'histoire américaine, principalement parce que la France est maintenant sur sa cinquième république, et donc sa cinquième constitution. L'étude de cette constitution actuelle est logique parce qu'elle s'inspire toujours des idées fondamentales de la Révolution, surtout de celles qu'on voit aussi dans la *Déclaration des Droits de l'Homme et du Citoyen*, mais aussi des changements culturels depuis le XVIII^e siècle. Pour que ce chapitre ne devienne pas une histoire considérable de la France entre 1791 (l'année du premier document constitutionnel) et 1958 (l'année de l'adoption de la constitution actuelle), je soulignerai seulement les changements les plus importants pour une connaissance générale de la culture politique.

La Constitution de la V^e République (désormais appelée 'la Constitution') est essentiellement le résultat des suggestions de Charles de Gaulle, devenu le premier président de la V^e République. De Gaulle, avec le reste de la France, voit l'instabilité de la IV^e République parce que le pouvoir donné aux « coalitions changeantes des groupes parlementaire, » est imprévisible.⁵⁸ La gouvernance était compliqué et les changements de régime passent souvent. Avec la création d'une nouvelle république, et donc un nouveau structure du gouvernement, la France cherche à créer plus de stabilité, particulièrement pour l'exécutif avec des mandats présidentiels plus durables.⁵⁹ L'accent sur le pouvoir présidentiel est la tentative de Charles de Gaulle de protéger son poste s'il devient président.⁶⁰ Ce changement représente aussi un déplacement idéologique concernant l'équilibre que Montesquieu a cherché entre la stabilité du régime et la protection des individus. Avec la Constitution de la V^e République, la France gagne

plus de stabilité contre moins de surveillance sur l'exécutif. Mais, même de Gaulle veut préserver cet équilibre et « respecter les principes et procédures démocratiques, » en mettant « la soumission finale du texte constitutionnel à la ratification populaire. »⁶¹ La Constitution a été promulguée en octobre 1958 et est comprise de quatre-vingt-neuf articles organisés en seize titres, ou catégories.⁶²

À part de ce changement fondamental de la structure de l'exécutif, comment le système judiciaire est-il organisé sous la Constitution ? La Cour de Cassation, la cour d'appel la plus haute en France, était déjà une partie du système judiciaire, mais la Constitution de 1958 ajoute aussi le Conseil Constitutionnel sous le Titre VII du document. Avec ce corps, la branche judiciaire prend deux responsabilités principales qui viennent des pouvoirs législatifs de la république précédente.⁶³ Premièrement, le Conseil supervise le processus électoral du président, et quand nécessaire, celui des députés et des sénateurs, aussi que les ratifications.⁶⁴ Deuxièmement, le Conseil détermine la constitutionnalité des lois faites par les assemblées avant qu'ils soient entrées en application. Sous Article 62, « une disposition déclarée inconstitutionnelle ... ne peut être promulguée ni mise en application. »⁶⁵ Avec la création du Conseil Constitutionnel, le système judiciaire prend la responsabilité pour une partie de la surveillance sur l'exécutif, et aussi les corps législatifs. Autrement dit, l'équilibre des pouvoirs est redistribué avec la nouvelle Constitution pour créer plus de stabilité, notamment certains pouvoirs législatifs sont transférés à l'exécutif et au système judiciaire. Ce système représente l'importance des libertés des citoyens soutenue par Rousseau, avec la protection des valeurs de la Constitution, mais au même temps, la séparation et l'équilibre des pouvoirs que Montesquieu a détaillée.

Conclusion

La Déclaration des Droits de l'Homme et du Citoyen de 1789, ainsi que la Constitution de la V^e République, montrent l'importance de quelques aspects culturels de la Révolution française qui restent signifiants pour la culture politique actuel. Premièrement, la séparation des pouvoirs et les procédures de contrôles et de contrepoids restent importantes pour la protection des individus. Mais, ces procédures ne existent pas seulement au niveau gouvernemental ; la Déclaration reflète les idées rousseauistes concernant les responsabilité des citoyens, ou ils s'agissent comme une communauté unifié pour se défendre contre l'oppression possible du gouvernement. Deuxièmement, le droit naturel fournit le fond nécessaire pour la reconnaissance des libertés universelles pour que la France peut être, au niveau gouvernemental, une société d'égalité.

Comparison and Conclusion

There are several distinctions that can be made between the political culture of the United States and that of France. Although both countries draw from similar influences, such as Montesquieu, and political theories, such as republicanism, the outcomes were considerably different. The United States came from colonial past, where the revolution provided the opportunity for self-governance. After gaining independence, it was the first time that the states were truly their own unified entity. Although Americans wanted to remain unified, there was still a strong sense of state autonomy, as this was the system they were most used to. The result was federal republic, where the states were unified for the sake of economic advantage and defense from exterior threats. However, as recognized in both the Constitution and the Bill of Rights, the states retained a certain degree of autonomy and individuality.

This differs substantially from the outcome of the French Revolution, where the French people were revolting against an oppressive, and to a certain degree despotic, monarchical rule. The French people, like the Americans, wanted the opportunity to self-rule; however, they had a unified history that the Americans did not. Because of the strong and historical sense of French culture, the French *Declaration of the Rights of Man and the Citizen* emphasizes the unity of the French people as one populace. Similarly, because France sought to distance itself from oppressive rule, rather than distant colonial rule as was the case in the United States, there was a careful separation of powers and system of checks and balances to ensure the protection of civil liberties. Furthermore, the *Declaration of the Rights of Man and the Citizen* details the role of French society in governmental oversight, ensuring that each citizen remain connected with the government of a country that once isolated its people.

The French political culture is therefore, compared to that of the United States, more concerned about the internal threat of government oppression. Aside from the content of their documents, this concern is also evident in the chronology of the documents. Although there may certainly be numerous factors affecting this order it is certainly worth noting that in France, the recognition of individual rights came before the official structuring of the government, whereas in the United States, the Bill of Rights was created two years after the Constitution. In France, the significance of certain universal liberties also reflects the influence of theories of natural law when structuring the government. Although France recognizes the possibility of government oppression, the balance between a universal society and individual rights means that certain rights are not absolute. The right to private property, for example, is recognized in some form by both the Bill of Rights and the Declaration of the Rights of Man; however, the French right more

specifically details the ability of the government to infringe on this right when there is sufficient societal need to do so.

A final consideration relates to the manner in which law is used in each country.

Although both countries have similar procedures from creating legislation, and thus codification, the United States has a greater and more recent tie to English government; the influence of English common law is therefore a major and distinguishable aspect of the American judicial system. This is a particularly relevant difference when moving to the actual analysis of privacy cases in Chapter 4. For United States cases, there will be a far greater emphasis on precedent and how certain implicit understandings of privacy from the Bill of Rights have evolved and been applied to recent technology cases. On the French side, however, it is the law actually being applied that is of significance, and how these laws, as applied, reflect the evolution of the understanding of privacy.

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³ Alfred H. Kelly, Winfred A. Harbison and Herman Belz. The American Constitution: Its Origins and Development, Vol. 1, 7e (London: W.W. Norton & Company, Inc., 1991): p.66.

⁴ *Ibid.*, p.66.

⁵ *Ibid.*, p.71.

⁶ *Ibid.*, p.76-77.

⁷ *Ibid.*, p.81.

⁸ David J. Bederman, The Classical Foundations of the American Constitution: Prevailing Wisdom (Cambridge: Cambridge University Press, 2008): p.50.

⁹ *Ibid.*, p.50.

¹⁰ *Ibid.*, p.82.

¹¹ *Ibid.*, p. 13.

¹² Peter V. Conroy, Jr., Montesquieu Revisited, ed. David O’Connell (New York: Twayne Publishers, 1992): p.72-75.

¹³ Bederman, p.85.

¹⁴ Douglas G. Smith, “An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution.” San Diego Law Review 34 (Winter 1997): p.260-261.

¹⁵ Sanford Levinson, Framed (Oxford: Oxford University Press, 2012): p.78.

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- ¹⁶ Ibid., p.83-90.
- ¹⁷ Ibid., p.81.
- ¹⁸ “The Constitution of the United States: A Transcription,” National Archives.
http://www.archives.gov/exhibits/charters/constitution_transcript.html (accessed January 20, 2015)
- ¹⁹ Levinson, p.266.
- ²⁰ Kelly, Harbison, and Belz, p.156-158.
- ²¹ “The Constitution of the United States: A Transcription.”
- ²² Levinson, p.76-77.
- ²³ James R. Stoner, Jr., Common-Law Liberty (Lawrence, Kansas: University Press of Kansas, 2003): p.10-11.
- ²⁴ Garrett Epps, “Speech: The Bill of Rights,” The Oregon Law Review (Summer 2003): p.520.
- ²⁵ Lewis F. Powell, “Our Bill of Rights” Indiana Law Review 25 (4 1992): p.938.
- ²⁶ Epps, p.520.
- ²⁷ “Bill of Rights,” National Archives.
http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html (accessed January 20, 2015)
- ²⁸ Epps, p.520.
- ²⁹ Ibid., p.520.
- ³⁰ Ibid., p.521.
- ³¹ Ibid., p.521.
- ³² Jack N. Rakove, The Annotated U.S. Constitution and Declaration of Independence (Cambridge, Massachusetts: Harvard University Press, 2009): p.230.
- ³³ Charles de Secondat de Montesquieu, De l’esprit des lois. 1758. Ed. Laurent Versini. (Paris: Éditions Gallimard, 1995): p.22.
- ³⁴ Ibid., p.24.
- ³⁵ Ibid., p.24.
- ³⁶ Kingsley Martin, French Liberal Thought in the Eighteenth Century (London: Lowe & Brydone, 1962): p.149.
- ³⁷ Ibid., p.149.
- ³⁸ Montesquieu, p.25.
- ³⁹ Philip Knee, “Le Question de l’Apparentance: Montesquieu, Rousseau et la Révolution Française,” Revue Canadienne de Science Politique 2 (Juin 1989): p.289.
- ⁴⁰ Ibid., p.293.
- ⁴¹ Ibid., p.290.
- ⁴² Denis Richet, La France Moderne: L’Esprit des Institutions Paris: Flammarion, 1973. p.142.
- ⁴³ Roger Barny, “Jean-Jacques Rousseau dans la Révolution Française (1787-1791),” Annales Historiques de la Révolution Française, 50e. (231, Jan-Mar 1978): p.113.
- ⁴⁴ Ibid, p.113-114.
- ⁴⁵ Jean-Jacques Rousseau, Du Contrat Social, 1762. Ed. Félix Alcan. Paris: Ancienne Librairie Germer Baillière, 1896): p.11.
- ⁴⁶ Ibid., p.27.
- ⁴⁷ Ibid., p.38-39.
- ⁴⁸ Ibid., p.45-46.
- ⁴⁹ Ibid., p.21.

⁵⁰ Knee, p.290.

⁵¹ Ibid., p.291.

⁵² Eric Thompson, Popular Sovereignty and the French Constituent Assembly 1789-91 (Manchester: Manchester University Press, 1952): p.25.

⁵³ “La Déclaration des Droits de l’Homme et du Citoyen de 1789,” Legifrance <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789> (accessed January 25, 2015)

⁵⁴ Guy Planty-Bonjour, “Le Droit Naturel Selon Aristote et les Déclarations des Droits de l’Homme,” Les Études Philosophiques 2 (Avril-Juin 1986): p.153.

⁵⁵ Gary Kates, ed. The French Revolution (London: Routledge, 1998): p.101.

⁵⁶ “La Déclaration des Droits de l’Homme et du Citoyen de 1789,” Art. 15, 16.

⁵⁷ “La Déclaration des Droits de l’Homme et du Citoyen de 1789,” Art. 17.

⁵⁸ “La Constitution de la V^e République,” Legifrance <http://www.france.fr/institutions-et-valeurs/la-constitution-de-la-veme-republique.html> (accessed January 25, 2015).

⁵⁹ Ibid.

⁶⁰ André de Laubadère, “La Constitution Française de 1958,” Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Journal of Comparative Public Law and International Law) 20 (1959): p.510

⁶¹ De Laubadère, p.511.

⁶² Conseil Constitutionnel, “Texte integral de la Constitution du 4 octobre 1958 en vigueur,” <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/texte-integral-de-la-constitution-du-4-octobre-1958-en-vigueur.5074.html#titre7> (accessed January 25, 2015).

⁶³ De Laubadère, p.548.

⁶⁴ Conseil Constitutionnel, “Texte integral de la Constitution du 4 octobre 1958 en vigueur,” Art.58-60.

⁶⁵ Ibid, Art. 62.

Chapter 5: United States Privacy Case Law

Introduction

In Chapter 4 I explored some of the key aspects of American political culture related to the republican structure of the government, the relationship between citizens and government as regulated by the Bill of Rights, and the governmental recognition of privacy concerns. This chapter takes these cultural understandings and analyzes how they are reflected in U.S. Supreme Court decisions about the privacy implications of new technology. In this sense, this chapter addresses a major aspect of my research question by reviewing how political culture is reflected in privacy norms within the United States. To analyze the relationship between political culture and privacy norms, I will analyze four United States Supreme Court decisions, each relating to a slightly different question concerning privacy and technology. I review *Katz v. United States* (1967) for investigative wiretapping, *Bartnicki v. Vopper* (2001) for the publication of private communications, *United States v. Jones* (2011) for vehicle tracking via global positioning system (GPS) technology, and *Riley v. California* (2014) for searches of personal technology. While reading each case I apply a standard set of eight questions (see Figure 1) in order to assure consistency between readings.

Figure 1: Questions Guiding the Reading of U.S. Privacy Cases

7. What was the constitutional question reviewed by the Court?
8. What was the outcome of the case? Did the Court rule in favor of protecting privacy or against it?
9. What tests and/or legal principles did the Court use?
10. Did the Court cite any significant preceding cases; if so, did they expand on or move away from the previous holding?
11. What elements of political culture are evident in the Court's decision?
12. Did the Court cite any international laws or international courts?

Katz v. United States (1967)

In *Katz v. United States* (1967), the Court ruled on the constitutionality of an investigation in which law enforcement collected evidence of an individual's (hereafter, "the petitioner") gambling endeavors without acquiring a warrant. The Court held that wiretapping constituted a search, and thus without a warrant infringed upon the Fourth Amendment protections of the petitioner. The Court's reasoning stemmed from the holding that the Fourth Amendment protects people and not places. It is therefore insufficient to hold that an unreasonable search did not occur simply because a physical trespass did not take place by law enforcement. The Court, in referencing the previous case of *Rios v. United States*, reaffirmed that what an individual "seeks to preserve as private, even in area accessible to the public, may be constitutionally protected."¹ An individual, such as the petitioner in this case, may therefore retain Fourth Amendment protections in public, so long as he seeks to preserve the information as private. The Court held that the petitioner had done so and therefore government action infringed upon this right, stating "the Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment."² Fourth Amendment protections therefore apply to conversations taking place within the telephone booth; these words are protected from *unreasonable* searches and seizures.

The determination for the Court was whether the search that occurred through recording protected information was reasonable; it was not, as law enforcement had not acquired a warrant. The Court has long recognized the importance of "detached scrutiny by a neutral magistrate" prior to law enforcement conducting a search.³ Although this search dealt with an electronic device, rather than the search or seizure of tangible effects, the protections are equal and thus the

requirements by law enforcement are equal.⁴ Although there are certain exceptions to the warrant requirement, such as searches occurring at the time of arrest to secure the scene, none of these exceptions can apply to the current case.⁵ The government requested the creation of a new exception for cases such as the surveillance of a telephone. However, the Court rejected this request and cites the precedent case of *Beck v. Ohio*, holding that circumventing judicial approval, “bypasses the safeguards provided by an objective predetermination of probable cause.”⁶ Furthermore, “bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations ‘only in the discretion of the police.’”⁷ The concern is therefore not only the ability of a neutral magistrate to recognize probable cause but also to determine the proper scope of a search. Removing this check would put individuals’ Fourth Amendment protection in the hands of law enforcement, a change that would prevent the verification of reasonable searches and seizures. The Court emphasized the importance of the “safeguards” for protecting individuals from unreasonable searches and seizures.⁸

Although much of the language in this case relates to the reasonableness of searches and seizures using electronic surveillance, its holding remains relevant to discussion of privacy in the United States. By recognizing the intent of the petitioner to keep information private, the Court acknowledged the importance of personal privacy as a threshold for Fourth Amendment protection. In other words, the Court could apply Fourth Amendment protections in cases where an individual demonstrated a reasonable expectation of privacy. This concept was further defined by Justice Harlan’s concurrence, in which he argued that this expectation contains both subjective and objective components; where a person has an actual (subjective) expectation of privacy that society would reasonably (objectively) view as reasonable, Fourth Amendment protections exist.⁹ The Court not only recognized privacy as a component of the Fourth

Amendment but also provided it equal protections from electronic surveillance as for physical trespass.

The protection of privacy from government interference provided by the *Katz* Court also reflects several aspects of political culture as highlighted in Chapter 3. First, the primary focus of the discussion surrounding the reasonableness of searches and seizures was on the role of a neutral magistrate in preventing the overstep of law enforcement. Therefore the Court did not recognize the importance of privacy from all intrusion, but only overly invasive and thus unreasonable government intrusion. This framing returns to the concept of the careful balance of powers within the Constitution to protect citizens from undue government interference and oppression. Justice Douglas further expanded upon this idea in his concurrence, arguing that “under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested.”¹⁰ This is, he noted, especially true for matter regarding national security. He therefore disagreed with providing the Executive branch with the power to “resort to electronic eavesdropping without a warrant ... in ‘national security’ matters.”¹¹ Although not binding authority, Justice Douglas detailed a concern about the Executive Branch circumventing the warrant requirement for national security, and infringing upon the rights of citizens in the process.

Second, the majority opinion also carefully discussed how privacy is detailed within the Fourth Amendment, as it provides recognition to the states’ authority in certain regards. The Court stated, “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’ That Amendment protects individual privacy against certain kinds of governmental intrusion... Other provisions of the Constitution protect personal privacy from other forms of government invasion. But the protection of a person’s *general* right to privacy – his right to be

let alone by other people – is, like the protection of his property and his very life, left largely to the law of the individual States.”¹² From a federal level, the Court is only concerned about violations of privacy through government intrusion; other aspects of personal privacy remain with the power of the state. This continued focus on the rights of the states reflects the continued republican traditions created by the framing of the Constitution, where the federal government protects citizens from unreasonable government intrusion while leaving significant deference to the states.

Bartnicki v. Vopper (2001)

The Court also addressed the privacy implications of wiretapping as conducted by private citizens, rather than by the government. In *Bartnicki v. Vopper* information from a telephone call was recorded and released to the press, requiring the Court to look at the intersection between First Amendment free speech rights and an individual’s right to privacy concerning their conversations. More specifically, this case involved contentious collective-bargaining negotiations between a teachers’ union and school board in Pennsylvania, during which a conversation involving Bartnicki, the union’s primary negotiator, was intercepted, recorded, and released to several radio stations.¹³ The interception of the call was held to violate § 2511(1)(c) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, entitled “Wiretapping and Electronic,” a law designed to “protect effectively the privacy of wire and oral communications.”¹⁴ The specific section violated applies to any person who, “willfully discloses or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of

a wire or communication.”¹⁵ This law was expanded to include radio transmissions through the Electronic Communications Privacy Act of 1986.¹⁶

However, in the case of *Bartnicki*, the individual responsible for the recording of the conversation in question was never discovered; instead, the suit was filed against those, including Vopper, who had played the conversation on the radio. The case before the Court therefore related to “the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue.” Because the conversation played related to a public negotiation, it was considered to be a public issue. Despite being a more public issue, there remain privacy considerations for *Bartnicki* because of the manner in which the conversation took place, that being via cellular phone.¹⁷ However, the press also has an interest in its ability to “[publish] matters of public importance.”¹⁸ The case before the Court therefore presented “a conflict between interests of the highest order – on the one hand, the interest in the full and free dissemination of information concerning public issues, and on the other hand, the interest in individual privacy and, more specifically, fostering private speech.”¹⁹

Although the Court recognized the importance of privacy in telephone conversations, they ultimately held that the First Amendment protections for the press outweighed privacy concerns, thus ruling in favor of Vopper. This holding was based on the acceptance of three key aspects of the respondents’ argument. First, the respondents were not actually involved with the illegal interception of the conversation. Second, although the conversation itself was recorded illegally, the respondents’ obtainment of it from the individual who recorded it was legal. Third, the subject of the conversation was “a matter of public concern.”²⁰ In other words, although the information was collected illegally, the respondents should not be held liable. Furthermore, the press has the freedom to publish matters of public concern. The Court noted that this First

Amendment protection creates an issue for the application of the statute in this case, as “state action to punish the publication of truthful information seldom can satisfy constitutional concerns.”²¹

The Court weighed this First Amendment protection against the privacy considerations held by the petitioner. They recognized that “privacy of communication is an important interest,” and is an interest recognized by both judicial precedent and by legislation. Title III of the statute applied to the case, for example, was created to protect this privacy interest and thus, “[encourage] the uninhibited exchange of ideas and information among private parties.”²² Failing to properly protect this interest, and give individuals reason to believe that their private conversations could be made public “might well have a chilling effect on private speech.”²³ However, the Court also recognized that not all intrusions on privacy are equally offensive and, because the petitioner was involved in activities of public concern, the related speech had diminished privacy protections, as “one of the costs associated with participation in public affairs is an attendant loss of privacy.”²⁴ The Court therefore concluded that “in this case, privacy concerns give way when balanced against the interest in publishing matters of public importance.”²⁵

Although this case does not relate to the Fourth Amendment implications of privacy, it still has important ramifications for a judicial and legislative understanding of privacy. First, the Court’s protection of individuals’ private conversations is not by any means absolute. It may be outweighed by the more explicit protections in the Bill of Rights, such as the First Amendment protection of the freedom of the press. Second, the privacy protections afforded to conversations are not equal for every individual or every situation. Although they are still protected from the monitoring and recording prohibited by Title III, conversations concerning points of general

public interest are not universally protected from the press simply because they may have originally occurred in a private realm. When these more public matters are concerned, the priority is an individual's ability to share truthful information with the public, rather than an individual's ability to protect their views from all external actors.

However, this second point was contested by Chief Justice Rehnquist in his dissent, an opinion with which Justice Scalia and Justice Thomas also joined. Chief Justice Rehnquist approached the question between the freedom of the press and the right to privacy as both originating from the First Amendment protections on speech. He argued that the majority opinion, "diminishes, rather than enhances, the purposes of the First Amendment: chilling the speech of the millions of Americans who rely upon electronic technology to communicate."²⁶ Privacy concerns, he argued, are inseparably related to the "desire that personal conversations be frank and uninhibited," a desire that would be jeopardized by widespread surveillance and publicizing of private affairs, even those of potential public interest. By attempting to protect one aspect of First Amendment protections, the majority created concerning implications for the First Amendment freedom of speech, as individuals' concerns that their conversations be made public could have a "chilling" effect on their speech. Although this was a concern considered by the majority, Chief Justice Rehnquist argued in his dissent that this chilling effect was properly avoided through Title III; the statute should therefore have weight over the press interests of the respondents.²⁷

Although Chief Justice Rehnquist's dissent is by its nature contrary to the precedent created by this decision, and therefore not binding authority, it shows the variety of views held by the justices in relation to privacy issues. The majority let freedom of the press outweigh privacy interests, but there remain concerns about how failing to protect privacy surrounding

speech may affect the nature of individuals' communications. It is also worth drawing attention to Chief Justice Rehnquist's use of the First Amendment to recognize individuals' right to privacy in relation to their speech. Whereas, the Court in *Katz* used the Fourth Amendment to protect individual's speech, where it maintained a reasonable expectation of privacy, from government intrusion, the First Amendment may also provide implicit protection of an individual's private speech from being brought into the public realm by other individuals.

United States v. Jones (2012)

The Court in *United States v. Jones* applied some of the legal reasoning evolving from *Katz* to a more current technological issue. In *Jones*, police officers used a Global-Positioning-System (GPS) tracking device to monitor an individual's movements in his vehicle, after suspecting his involvement in trafficking narcotics. Although the police used a variety of surveillance techniques, the GPS tracking was the only method under contention because the warrant justifying it was void at the time of installation. The district court in the District of Columbia had given the government a warrant authorizing the use of a tracking device on the respondent's vehicle, to be installed in D.C. borders and within ten days; however, officers installed the tracking device eleven days later and in Maryland. Because the warrant no longer applied, a search or seizure could not, under the Fourth Amendment, be constitutional; the question before the Court was therefore "whether the attachment of a... GPS tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets constitutes a search or seizure within the meaning of the Fourth Amendment."²⁸

To determine if a search or seizure occurred, the Court turned to two previous tests used in Fourth Amendment jurisprudence. First is the traditional trespass doctrine from English common

law, where a physical intrusion or occupation of an individual's protected property constitutes a search. This understanding of Fourth Amendment protections reflected the cultural importance of property rights as a part of the Constitution.²⁹ However, as technology advanced this limited view of searches and seizures was expanded upon by Justice Harlan's test in his concurrence in *Katz*. As mentioned earlier, this test finds that "a violation occurs when government officers violate a person's 'reasonable expectation of privacy.'"³⁰ Although the *Katz* test is more inclusive of Fourth Amendment violations that involve technology, the Court in *Jones* was careful to note that this new test is not a substitute from the common-law trespass doctrine. In other words, a lack of a reasonable expectation of privacy does not preclude a Fourth Amendment violation from occurring if a physical intrusion on protected property occurs: "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common law trespassory test."³¹ In determining whether a Fourth Amendment search or seizure occurs, the Court thus looks first to whether a physical trespass has occurred; if there has been no physical intrusion then a determination of a reasonable expectation of privacy may subsequently establish that a search has occurred.

For the case at bar in *Jones*, the Court held that the common-law trespass doctrine provided sufficient means to establish that a search occurred, as the installation of the GPS tracking device on the respondent's vehicle "encroached on a protected area."³² Because of the physical trespass that occurred, the Court did not need to apply the *Katz* test to determine whether an individual has a reasonable expectation of privacy in his long-term movements while in his vehicle. By focusing solely on the physical trespass side of the *Jones* investigation, the Court failed to address the constitutionality of GPS tracking itself, and therefore whether GPS tracking without an unconstitutional trespass would be constitutional.

Although the majority opinion failed to rule on this question regarding GPS tracking itself, Justice Sotomayor addressed the concern in her concurrence. Her concurrence agreed with the majority's holding that the government violated the respondent's Fourth Amendment protections by, "intruding on a constitutionally protected area." However, she argued that ending the analysis there fails to recognize the other Fourth Amendment violation that occurred through the long-term surveillance; it is also necessary to analyze how expectations of privacy were implicated. Although this secondary analysis was not necessary to find the government's actions in *Jones* unconstitutional, Justice Sotomayor recognized "physical intrusion is now unnecessary to many forms of surveillance."³³ These forms of surveillance will therefore soon require the sole application of the *Katz* test, a test that she then applies in her concurrence. Justice Sotomayor, as well as Justice Alito in his concurrence, argued that "longer GPS monitoring in investigations of most offenses impinges on expectations of privacy."³⁴

To understand why this violation occurs, Justice Sotomayor drew a comparison between GPS tracking and traditional police surveillance. Even though similar information can be obtained through police surveillance, which does not require a warrant, as through GPS monitoring, because both involve movements on public roads, the implications of GPS technology for privacy are considerable. She noted, "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflect a wealth of detail about her familial, political, professional, religious and sexual associations."³⁵ Although the nature of the information may be similar to police surveillance, the quantity of information collected may reveal very private aspects of an individual's regular actions. Furthermore, "because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement

practices: ‘limited police resources and community hostility.’”³⁶ The inexpensive and efficient nature of GPS technology may make it an attractive option for law enforcement with limited resources. However, Justice Sotomayor raised concerns about how the limitless use of this technology may lead to unchecked police invasion into individuals’ private lives. This practice would “alter the relationship between citizen and government in a way that is inimical to society,” as “awareness that the Government may be watching chills associational and expressive freedoms.”³⁷ The implications of widespread, unchecked GPS tracking, are therefore considerable enough that they could alter the manner in which individuals act.

Although Justice Sotomayor’s concurrence does not provide binding authority, it does provide an interpretation of the privacy concerns regarding GPS tracking technology that are lacking from the majority opinion. Justice Sotomayor acknowledged that while the question at hand may have been easily resolved through the common-law trespass doctrine, the case had far greater implications for personal privacy and Fourth Amendment jurisprudence. The government’s ability to use technology to monitor an individual’s every movement goes beyond traditional surveillance methods to chip away at the liberties provided by the Bill of Rights. As noted in *Katz*, an individual’s Fourth Amendment protections do not disappear when he enters the public realm, but only where he no longer demonstrates a reasonable expectation of privacy.³⁸ Although an individual may not have an expectation of privacy in short-term movements on public roads, Justice Sotomayor acknowledges that this expectation of privacy does exist when considering the aggregation of one’s movements long-term.

In terms of political culture, the majority opinion and Justice Sotomayor’s concurrence highlight the influence of several aspects of American political culture as discussed in Chapter Four. First, the emphasis on the common-law trespass test to determine when searches and

seizures occur shows the continued influence of English common law, as well as the importance of property rights. By emphasizing the supplementary nature of the *Katz* test to the trespass doctrine, the Court ensured the protection of private property from physical intrusion, regardless of whether there is an expectation of privacy. Thus, although reasonable expectations of privacy are recognized as providing Fourth Amendment protections, the emphasis is still on the protection of private property. This represents the original language of the Fourth Amendment, as protecting individuals' "persons, houses, papers, and effects," and not their privacy. Second, Justice Sotomayor's concerns about the future implications of GPS tracking reflect a desire to ensure that Fourth Amendment protections are not diminished by new technology. The government's ability to more efficiently conduct surveillance should not excuse invasions into a person's private life.

Riley v. California (2014)

In June 2014 the Court issued a joint ruling on two separate cases: *Riley v. California* and *United States v. Wurie*, both of which dealt with a police search of an arrested individual's cell phone without acquiring a warrant. In the case of *Riley*, the petitioner was pulled over for driving with expired registration tags; his car was impounded and during the routine investigation of the impounded vehicle law enforcement discovered two handguns. The petitioner was arrested for possession of a concealed and loaded firearm. During the search of his car, law enforcement found items associated with a gang, and "went through" the petitioner's smart phone to look for incriminating photos of illegal gang activity; they found photos that led to the petitioner being convicted for attempted murder, among other charges.³⁹ In the case of *Wurie*, law enforcement witnessed the respondent make an apparent drug deal, subsequently arresting him. While at the

police station, the police seized two cell phones on his person, searching one, a flip phone, for recent calls. Law enforcement was able to use his call log to locate his home phone number and home address. After acquiring a search warrant, they searched his home, finding illegal drugs, a firearm and cash; the respondent was convicted of distributing crack cocaine, and two other related charges. In both cases the defendant sought to suppress all evidence yielded through the warrantless search of their cell phone.⁴⁰ Although the cases were argued separately, one opinion was issued for both due to the similarity of the facts.

The question before the Court was therefore whether police may conduct a search of the content of an arrestee's cell phone, as they would with any other effect found on his person at the time of arrest, without first obtaining a warrant. The Court held that this is an unreasonable search, and thus an unconstitutional infringement of the Fourth Amendment. Although the Court has long recognized the right of the government to "search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime,"⁴¹ they also recognized that the scope of this government power has been contested for equally as long.⁴² To determine the constitutional scope of this power in relation to cell phones the Court turned to three landmark cases regarding this issue.

First, in *Chimel v. California* (1969), law enforcement searched the entire home of an arrestee on the grounds that this search lied within a recognized warrant exception where officers may protect their own safety by "remov[ing] any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape."⁴³ However, the Court held that this exception did not apply to *Chimel*, because the search went beyond what was necessary to ensure the security of the arrest and the safety of the officers. Second, the Court narrowed this holding in *United States v. Robinson* (1973), in which an officer inspected a pack of cigarettes found on an arrestee's

person, discovering capsules of heroin. The Court held this to be a reasonable search “even though there was no concern about the loss of evidence, and the arresting officer had no specific concern that Robinson might be armed.”⁴⁴ Because the cigarette package was personal property “immediately associated with the person of the arrestee,” law enforcement was entitled to inspect it.⁴⁵ Finally, the Court in *Arizona v. Gant* (2009), applied these principles to vehicles, adding that law enforcement may also search a vehicle “when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”⁴⁶

To apply these principles to the case of cell phones, the *Riley* Court turned to the balancing test reflected within these previous decisions. Through this balancing test, the Court determines when a warrant is necessary for a search at the time of arrest, “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”⁴⁷ Unlike in *Robinson*, where the concerns about the destruction of evidence and the safety of officers outweighed the privacy considerations of the individuals, “there is no comparable risk when the search is of digital data.”⁴⁸ Although the government in both cases argued that there may be risks of losing data through encryption or remote wiping, many law enforcement agencies have begun using “Faraday bags” which isolate the phone from radio waves and thus protect the government’s interests until a warrant can be acquired without infringing upon the privacy concerns of the individual.⁴⁹

The Court then turned its attentions to the other half of the balancing test; what are the privacy considerations at hand with cell phone technology. Cell phones are able to provide a greater variety and a greater quantity of information at one’s fingertips than previous technology. In this sense, “cell phones differ in both a quantitative and qualitative sense from other objects

that might be kept on an arrestee's person."⁵⁰ A person would be unlikely to carry with them every piece of mail they receive, a complete log of all phone call, a full photo album, a rolodex of contact numbers, or quantities of private information, yet through a cell phone this information can be now found on their person.⁵¹ This quantity and variety of information available is even greater when cloud computing is taken into consideration, as information stored remotely can also be accessed through an individual's cell phone.⁵² Even if police were to search a phone only for specific information, they could still discover different information as an unintended effect of their search. By allowing law enforcement to search an individual's cell phone, they would be able to gain a significantly larger quantity and variety of information than would reasonable ever be available on an arrestee's person in the pre-digital era – a “significant diminution of privacy.”⁵³ The Court ultimately recognized that “modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’”⁵⁴ The protections guaranteed by the Fourth Amendment still apply to this information, even though individuals may now carry this information on their person. The search of a cell phone without a warrant therefore fails the balancing test and is an unconstitutional infringement of an arrestee's Fourth Amendment protections.

The decision in *Riley* also contained several implications for American political culture, both in terms of state powers and the separation of federal powers. Similarly to *Katz v. United States*, the question at bar related to the overstepping of the government during an investigation, and not the invasion of privacy by other members of society. However, where *Katz* specifically noted the role of the state in determining and protecting general rights to privacy, it is worth noting that the respondent in *Riley* was the State of California, as the Supreme Court of California denied the petition for review, while the U.S. Supreme Court granted certiorari.

Although this is hardly a unique occurrence, it reflects the Court's willingness to intervene with state issues related to the infringement of a liberty protected by the Bill of Rights.

The importance of the separation of powers, another element of political culture discussed in Chapter Four, also appears in Justice Alito's concurrence. In discussing his concerns regarding the scope of the majority opinion, he notes the advantage of passing legislation to clarify the issue, as Congress had done to clarify the use of electronic surveillance after the decision in *Katz*. Justice Alito states that "because of the role that these devices have come to play in contemporary life, searching their contents implicates very sensitive privacy interests that this Court is poorly positioned to understand and evaluate." By contrast, "legislatures, elected by the people, are in a better position...to assess and respond to the changes that have already occurred and those that will almost certainly take place in the future."⁵⁵ Whereas the Court often addresses the need to prevent government oppression, it is interesting how the separation of powers may also be used, albeit in a concurrence, to offer power from the judicial branch to the legislature.

Conclusion

Through these four decisions, the Supreme Court recognized that a qualified right to privacy exists and is provided a certain degree of protection. As the Court held in *Katz*, the Fourth Amendment may provide this protection when a reasonable expectation of privacy is infringed by a governmental investigation. The specific test created by Justice Harlan in his concurrence for this case, has been applied by the Court to determine when a reasonable expectation of privacy occurs. Although the *Jones* Court did not need to apply the *Katz* test, as a physical trespass had occurred which automatically classified the investigation as a search,

Justice Sotomayor's concurrence stressed the need to address how privacy is implicated by advanced electronic surveillance. The Court addressed this question three years later in *Riley*, where they recognized the unique nature of cell phones, in comparison to other effects an individual may carry on their person, and held that law enforcement must acquire a warrant prior to searching an arrestee's cell phone. However, privacy is not solely protected from government intrusion. The *Bartnicki* Court recognized the privacy of individual conversations which may be protected from intrusion and publication by other individuals. Although the Court ultimately held that other liberties protected by the Bill of Rights may outweigh privacy interests in certain cases, it upheld the general ruling that private communications warrant a certain degree of protection.

¹ *Rios v. United States*, 364 U.S. 253 (1960), in *Katz v. United States*, 389 U.S. 347, 351 (1967)

² *Katz v. United States*, 389 U.S. 347, 353 (1967)

³ *Id.* at 356.

⁴ *Id.* at 355.

⁵ *Id.* at 358, footnotes 20, 22.

⁶ *Beck v. Ohio*, 379 U.S. 89, 96 (1964), in *Katz* at 358.

⁷ *Id.* at 97, in *Katz*, at 358-359.

⁸ *Katz*, at 356-357.

⁹ *Id.* at 361.

¹⁰ *Id.* at 359.

¹¹ *Id.* at 359.

¹² *Id.* at 350-351.

¹³ *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001)

¹⁴ *Id.* at 523.

¹⁵ *Id.* at 524.

¹⁶ *Id.* at 524.

¹⁷ *Id.* at 518.

¹⁸ *Id.* at 534.

¹⁹ *Id.* at 518.

²⁰ *Id.* at 525.

²¹ *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979), in *Bartnicki* at 527.

²² *Bartnicki* at 532.

²³ *Id.* at 533.

²⁴ *Id.* at 534.

²⁵ *Id.* at 534.

²⁶ *Id.* at 542.

²⁷ *Id.* at 555-556.

²⁸ *United States v. Jones*, 565 U.S. 948, 948 (2012)

²⁹ *Id.* at 949.

³⁰ *Id.* at 950.

³¹ *Id.* at 952.

³² *Id.* at 952.

³³ *Id.* at 955.

³⁴ *Id.* at 955.

³⁵ *Id.* at 955.

³⁶ *Id.* at 956.

³⁷ *Id.* at 956.

³⁸ *Id.* at 957.

³⁹ *Riley v. California*, 573 U.S. 2480, 2480-2481 (2014)

⁴⁰ *Id.* at 2481-2482.

⁴¹ *Weeks v. United States*, 232 U.S. 383, 392 (1964), in *Riley* at 2482.

⁴² *Riley*, at 2482.

⁴³ *Chimel v. California*, 395 U.S. 752, 762-763 (1969), in *Riley* at 2483.

⁴⁴ *United States v. Robinson*, 414 U.S. 218, 236 (1973), in *Riley* at 2483.

⁴⁵ *Riley*, at 2484.

⁴⁶ *Arizona v. Gant*, 556 U.S. 332 (2009), in *Riley* at 2484.

⁴⁷ *Riley*, at 2484.

⁴⁸ *Id.* at 2485.

⁴⁹ *Id.* at 2487.

⁵⁰ *Id.* at 2489.

⁵¹ *Id.* at 2489.

⁵² *Id.* at 2491.

⁵³ *Id.* at 2493.

⁵⁴ *Id.* at 2494-2495.

⁵⁵ *Id.* at 2497.

Chapitre Six: Jurisprudence française sur la vie privée

Introduction

Dans Chapitre Quatre j'ai examiné les aspects de la culture politique en France qui viennent de: *la Déclarations des droits de l'homme et du citoyen*, et de la Constitution de la V^e République. Dans Chapitre Six, je prends cette connaissance de la culture politique et je l'applique à une analyse des décisions de la Cour de Cassation concernant la vie privée. J'analyse quatre cas, et chacun concerne un aspect différent de la vie privée lié aux avancées technologiques. Puisque la Cour nomme ses cas avec les chiffres et pas avec des noms des parties représentées, (comme le fait la Cour Suprême des Etats-Unis), je les identifie seulement par les chiffres. J'étudie le cas 86-90297 (1987), qui concerne l'écoutes téléphoniques, le cas 10-11777 (2011), qui concerne la fouille gouvernementale des portables technologiques, et les cas 11-84308 (2011) et 12-82391 (2014) qui concernent l'utilisation du GPS pour le pistage. Pendant la lecture des ces cas j'utilise une série des questions (Figure 1) pour assurer une analyse standardisée de chaque cas.

Avant de commencer cet analyse, je veux brièvement discuter comment les cas judiciaires en France sont différents des cas judiciaires aux Etats-Unis. D'abord, le système judiciaire français a une influence plus romaine, comparé au système américain qui est influencé plus par le système anglais. C'est à dire que le système français utilise plus la codification dans les décisions tandis que le système américain compte sur le précédent créé par la jurisprudence. Le résultat est que les décisions françaises sont souvent plus courts et directement affiché que ceux des Etats-Unis. À la place d'une analyse longue des principes légales, La Cour française applique et interprète simplement le code français aux situations contestées.¹ Bien que nous voyions l'évolution des conceptions légaux moins dans ces décisions, on peut encore voir

comment la Cour de Cassation interprète le droit individuel à la vie privée vis-à-vis des nouveaux modes de surveillance, comme les écoutes téléphoniques et la géolocalisation. L'application du code, et les articles du code eux-mêmes, peuvent aussi nous offrir un moyen de mieux comprendre l'interprétation de la culture politique dans les normes légales nationales en France.

Figure 1: Questions pour les cas judiciaires français

13. Quelle est la question constitutionnelle revue par la Cour ?
14. Quel est le résultat du cas ? Est-ce que la Cour a prononcé un jugement favorable ou opposé à la vie privée ?
15. Auxquels tests ou principes légaux la Cour a-t-elle recours ?
16. La Cour cite-t-elle les cas précédents significatifs ; si oui, augmente ou a diminué les protections de la vie privée ?
17. Quels éléments de la culture politique sont évidents dans la décision ?
18. La Cour cite-t-elle des lois internationales ou des décisions des cours internationales ?

86-90297 (1987) : Écoutes téléphoniques

Dans cet appel du 11 février 1987, la Chambre criminelle de la Cour de Cassation considère le pourvoi contre un arrêt de la Cour d'appel d'Aix-en-Provence. Ce cas porte sur l'arrêt d'un homme qui a porté « l'atteinte à l'intimité de la vie privée et utilisation d'installations de télécommunications sans autorisations. »² Le prévenu a été trouvé coupable par les juges de fond d'avoir écouté et enregistré les conversations de son épouse. Le prévenu a commencé ces écoutes en 1982, après que sa femme a constaté l'installation d'un téléphone dans l'appartement, sans savoir que son épouse y avait mis aussi des appareils enregistreurs. Il a justifié cet enregistrement en disant qu'il avait « les doutes sur la fidélité de son épouse. »³ En 1983, le couple a reçu, pendant une procédure de divorce, une ordonnance de non conciliation, et

la femme a démarré son propre entreprise. Le prévenu a continué d'enregistrer les conversations de sa femme chez elle et à son bureau. Il constate d'avoir « fait placer le matériel pour écouter les communications de son épouse ».

Par conséquent, la question devant la Cour est si cet enregistrement téléphonique est une atteinte criminelle de la vie privée. Pour déterminer la constitutionnalité de l'arrêt et la condamnation, la Cour se tourne à la logique employée par la cour d'appel. D'abord, la Cour d'appel reconnaît que les appareils étaient dans le logement du prévenu et « qu'il ne peut y avoir atteinte à la vie privée d'installer un système d'écoute sur les lignes téléphoniques situées dans son propre domicile tout autant que celui de sa femme. »⁴ Mais, il a continué de le faire après le divorce et dans l'appartement de son ancienne épouse ainsi que dans son bureau. De plus, la Cour souligne l'importance du caractère des conversations ; l'atteinte de la vie privée « n'est constitué[e] que si les conversations surprises ont un caractère privé. »⁵ Bien que les juges de fond n'aient pas fait une analyse des ces conversations, la nature des enregistrements constatés par le prévenu délinéent un caractère privé. Enfin, l'aveu du prévenu qu'il a écouté et enregistré les conversations de son épousé pendant et après leur mariage, et dans leur résidence aussi que dans son bureau, montre une atteinte de la vie privée. Malgré les violations mineures de la Cour d'appel, comme l'échec de rechercher le caractère exacte des conversations enregistrées, la Cour de Cassation reconnaît que la décision est valide, disant que, « exemptes d'insuffisance et de contradiction, la Cour d'appels a caractérisé en tous ses éléments constitutifs, le délit d'atteinte à l'intimité de la vie privée. »⁶ Donc, la Cour rejette le pourvoi.

Bien que la Cour ait rejeté le pourvoi, cet appel néanmoins reflète les aspects de la culture politique en France. D'abord ce cas concerne l'atteinte à la vie privée d'un individu par un individu, et pas par l'État. Donc il reflète que les citoyens ont de la protection universelle de

ces types de violations, et pas simplement la protection de l'atteinte gouvernementale. Ce point de vue montre un de piliers de la *Déclaration des droit de l'homme et du citoyen* ; ce document a créé plus des libertés individuelles qui sont protégées de l'oppression de l'État, il a créé aussi une société cohésive et réglée. De plus, ce rejet ne discute pas les différences entre les écoutes téléphoniques et les atteintes de la vie privée plus traditionnelles, comme la violation de la propriété. La simplicité de la décision montre aussi l'empressement de la Cour de reconnaître la surveillance électronique comme une atteinte de la vie privée similaire aux ceux de l'époque pré-numérique. Enfin, bien que cette décision soit un rejet d'un appel, elle montre les connaissances simples et culturelles sur l'utilisation de la surveillance électronique qui viole la vie privée.

10-11777 (2011) : Saisie d'informations électroniques

Cet appel du 18 janvier 2011 vient d'une cour d'appel à Paris pour que la Chambre commerciale de la Cour de Cassation puisse le considérer. Ce cas concerne une investigation autorisée par le tribunal de grande instance à Paris pour rechercher la fraude fiscale. La cour a donné le pouvoir aux agents de l'administration des impôts à faire des opérations de visite et de saisie des endroits probablement utilisés par les chefs de l'entreprise en question. Selon l'ordre judiciaire, ils ont saisi un ordinateur portable et un disque dur externe qui avaient été scellés par les propriétaires. Ensuite, les investigateurs ont copié certains fichiers de l'ordinateur et toutes les informations du disque qui ont été restituées par le prévenu. L'entreprise en question a fait recours contre le déroulement de ces opérations.⁷ La décision de la Cour à propos de la légalité de l'investigation est une réponse à chaque action prise par les avocats de l'entreprise.

En général, les avocats pour l'entreprise proposent des moyens au sujet des détails plus petits de l'investigation et pas l'investigation elle-même. Par exemple, ils affirment que « la

signature du procès-verbaux des opérations de visite et de saisie et d'inventaire de saisie sans réserve ne constitue pas une renonciation à exercer les voies de recours ouvertes à la loi à tous les intéressés. »⁸ Autrement dit, quand les prévenus ont signé le procès-verbaux, ils n'ont pas abandonné leurs droits comme citoyens de faire des appels à propos de la manière dans laquelle les informations ont été ramassées. De plus, cette signature ça ne donne pas de liberté illimitée à l'investigation de saisir, de copier, et d'utiliser tout ce qu'ils ont trouvé. Le gouvernement a toujours l'obligation de faire une inventaire complète des documents saisis, une exigence que l'entreprise soutient n'était pas faite correctement.⁹ Enfin, les avocats pour l'entreprise affirment que la saisie de la correspondance entre les avocats et l'entreprise était une saisie illégale.¹⁰ Cependant, la Cour décide que ces moyens ont été fondés sur les contresens des processus faits pendant l'investigation et les pouvoirs donnés à l'enquête par la cour de grande instance à Paris ; la Cour rejette le pourvoi.¹¹

Puisque ce cas concerne la légalité d'une saisie d'informations électroniques d'une entreprise, sa signifiante pour la vie privée n'est pas immédiatement évidente. Cependant, le concept de la vie privée est mentionné dans un des moyens annexe de l'opinion. Les avocats pour l'entreprise font référence à l'article 8 de la convention européenne des droits de l'homme qui constate que, « toute personne a droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance. »¹² La saisie des correspondances entre les prévenus et leurs avocats transgresse, selon cet argument, ce droit internationalement reconnu. Quoique la Cour ne mentionne pas cette protection spécifiquement, l'inclusion de cet argument par les avocats montre que le droit international est une considération de la communauté légale. Cette mention fait référence aussi aux conséquences sur la vie privée de l'investigation, et à l'argument que l'étendue de la saisie des informations constitue une atteinte du droit. Puis, les arguments revus

par la Cour reflètent des soucis implicites liés à la vie privée. Les arguments concernant l'étendue des saisies et l'investigation en général reflètent l'idée que la vie privée puisse être violée même en cas de mandat judiciaire.

En outre, la culture politique est reflétée dans les références à la séparation des pouvoirs. Les avocats des prévenus disent que « l'administration est en droit d'appréhender tous les documents » qui sont « visés par l'ordonnance judiciaire autorisant les opérations de visite et saisie. »¹³ Alors, ils reconnaissent la capacité de l'administration de faire des saisies d'informations privées à cause de l'autorisation judiciaire qui détermine la légalité des saisies. Il y a un équilibre entre les communications privées d'un acteur, dans ce cas une entreprise, et l'intérêt gouvernemental d'appliquer les lois. Les enquêtes seront légales pourvu qu'ils suivent les lois démocratiquement créées, c'est à dire, le Code français. Dans ce sens, ce cas reflète des aspects *Du Contrat Social* de Rousseau dans lequel il reconnaît la nécessité de protéger les droits individuels du despotisme mais en même temps de créer une société cohésive et bien fonctionnante des individus qui est basée sur le compromis.

11-84308 (2011) : Écoutes téléphoniques et géolocalisation

Ce pourvoi du 22 novembre 2011 devant la Chambre criminelle de la Cour de Cassation, concerne une investigation des prévenus soupçonnés des crimes liés aux stupéfiants et le blanchiment d'argent. Les quatre prévenus ont fait des appels séparés en réponse aux formes de surveillance utilisées pendant l'investigation : les écoutes téléphoniques, la géolocalisation des véhicules, et la sonorisation et la captation d'images d'un parking souterrain.¹⁴ À cause des similarités des pourvois, la Cour les analyse ensemble. Dans leur décision, la Cour répond aux cinq arguments des avocats pour les prévenus à propos des atteintes légales spécifiques. En

général, les avocats soutiennent que l'investigation a enfreint les articles de quatre systèmes légaux différents : article 16 de la Déclaration des droits de l'homme et du citoyen, articles 16 et 66 de la Constitution, article 8 de la Convention européenne des droits de l'homme, et plusieurs sections du code de procédure pénale.¹⁵

Premièrement, les avocats pour les prévenus affirment que la saisie de la localisation et la liste des appels des trois lignes téléphoniques en question n'était pas suffisamment autorisée. Les officiers de la police ont reçu l'autorisation du procureur de la République mais cela n'est pas, selon les avocats, l'autorisation nécessaire ; c'est à dire, l'autorisation d'un juge. La manque d'autorisation d'une partie neutre la rend nulle.¹⁶ La Cour n'est pas d'accord avec cet argument. Selon elle, il y avait suffisamment de soupçon pour justifier cette mesure, conformément au code du procédure pénale, sans violer le droit de liberté protégé par l'article 5 de la Convention européenne des droits de l'homme.¹⁷ La Cour ainsi rejette ce premier argument. Les avocats font un argument similaire à propos de l'autorisation déplacée de la géolocalisation ; cet argument est également rejeté par la Cour pour des raisons similaires.¹⁸

Les autres trois moyens faits par les avocats concernent des débats plus techniques. Par exemple, le deuxième moyen affirme que les enquêteurs n'ont pas fini les écoutes téléphoniques avant la date donnée par l'autorisation, un fait incorrect rejeté par la Cour.¹⁹ Le cinquième argument soutient aussi que les informations saisies pendant l'investigation étaient en dehors de celles dictées par le juge d'instruction.²⁰ Cependant, la Cour trouve que le juge avait permis l'investigation de certains faits, ce qui a mené à d'autres informations suspicieuses, alors l'enquête sur toutes les informations est permmissible. Le dernier moyen technique utilisé par les avocats est un peu plus pertinent à la vie privée parce qu'il concerne la nature d'un parking souterrain où les enquêteurs ont fait les opérations de sonorisation et a pris des images. Les

avocats soutiennent que le parking, qui est sous d'un immeuble, constitue un « lieu d'habitation » et pas un « lieu privé » ; donc, il faut avoir des autorisations spéciales pour y faire des investigations.²¹ La Cour trouve que la mise en place des dispositifs techniques était faite selon les directives données par le code de procédure pénale. Enfin, la Cour rejette entièrement le pourvoi.

12-82391 (2014) : La géolocalisation

Dans cet appel du 15 octobre 2014, la Chambre criminelle de la Cour de Cassation considère un cas où les autorités ont utilisé la géolocalisation sur un véhicule comme un de leurs modes d'investigation des suspects. À la fin de l'investigation, les suspects ont été reconnus coupables de plusieurs crimes liées aux activités criminelles associées avec les bandes organisées, telles que le vol avec arme, l'assassinat, les tentatives d'assassinat, et les infractions à la législation sur les armes. Les convictions viennent de deux arrêts différents, alors les avocats pour la défense font deux arguments pendant l'appel.²² Le premier concerne principalement l'utilisation de la géolocalisation tandis que le deuxième répond aux classifications des convictions données comparées aux crimes faites. Dans les deux arguments, le conseiller fait appel à la Convention européenne des droits de l'homme et du code de procédure pénale en France.²³

Le premier argument soutient que l'usage de la géolocalisation, mise sur le véhicule d'un des suspects, constitue une atteinte à la vie privée. La Cour répond à l'argument en constatant que l'usage de la géolocalisation n'est jamais explicitement adressée dans le droit français. Par conséquent, ils se tournent aux autres parties du code de procédure pénale en vigueur, plus spécifiquement les articles 12, 14, et 41, qui, «confient à la police judiciaire le soin de 'constater

les infractions à la loi pénale, d'en rassembler les preuves et d'en rechercher les autres' sous le contrôle du procureur de la République ». ²⁴ La police a suivi les procédures pour les autres modes d'investigation ; la question est alors si la géolocalisation nécessite plus de contrôle à cause de sa nature plus envahissante. La Cour décide que ces nouvelles procédures ne sont pas nécessaires parce que la géolocalisation ne conduit qu'aux mêmes données informatiques que surveillance visuelle, la forme plus traditionnelle de surveillance. En outre, la Cour revoit la condition du véhicule, qui avait une ouverture suspecte dans la carrosserie, et donc, a donné aux officiers la cause de l'investiguer plus profondément. ²⁵

Ensuite, les avocats pour les prévenus font référence à la Convention européenne des droits de l'homme. Ils soutiennent que la police a violé l'article 6, §1, de la Convention, qui constate que, « Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle. » ²⁶ Les avocats affirment que l'usage de la géolocalisation a eu lieu sans considération appropriée par des parties neutres. Elle a donc influencé injustement le reste des procédures judiciaires. Cet atteinte aussi représente un abus de pouvoir que l'article 6 de la Convention interdit. ²⁷ L'argument mentionne aussi l'article 8 de la Convention, déjà cité dans la discussion du cas 10-11777. Cet article donne plus de protections aux individus contre l'intrusion injustifiée du gouvernement ; cependant, la Cour décide que ce mode de surveillance n'est pas plus envahissant que d'autres. Le droit européen et français ne créent pas de « liste limitative de moyens d'investigations, » alors les juridictions peuvent les interpréter par rapport aux techniques nouvelles. ²⁸ Enfin, les avocats citent une décision de la Cour européenne des droits de l'homme de 1984, qui applique l'article 8, en

disant, « dans le contexte de mesures de surveillance secrète la loi doit user de termes assez clairs pour indiquer à tous de manière suffisante en quelles circonstances et sous quelles conditions elle habilite la puissance publique à recourir à de telle mesures. »²⁹ Cependant, la Cour affirme que les articles 12, 14, et 41 du code de procédure pénale donne cette direction claire nécessitée par la Cour européenne. Par conséquent, ce premier argument n'est pas admis par la Cour.

De plus, les avocats promeuvent un deuxième moyen, celui désigné à adresser la classification des convictions des prévenus. Alors, ce moyen se concentre principalement sur les désaccord entre les histoires des prévenus et des investigateurs, et sur les lois concernant les classifications des crimes. Par conséquent, ce deuxième moyen n'est pas pertinent aux considérations de la vie privée ou même à la surveillance ; en bref, la Cour n'a pas admis le moyen et le pourvoi en général a été rejeté. Les détails importants de ce cas viennent du premier moyen et les interprétations faites par la Cour. La Cour considère comment les protections individuelles données par le droit français et le droit européen s'appliquent aux nouvelles manières de surveillance, et décident que la géolocalisation est légale dans ce cas parce qu'elle est similairement que les autres modes de surveillance. Donc, l'usage de la géolocalisation sur une véhicule dans le contexte de cette investigation ne nécessite pas d'interprétation nouvelle des lois existantes. Dans un contexte culturel, cette décision reflète comment le droit individuel à la vie privée est nuancé, surtout en termes d'une investigation qui concerne le bien-être de la société en général. Si les autorités suivent les règles mis en place pour la protection des individus contre l'abus de pouvoir, ces types d'infractions de la vie privée peuvent être légales.

Conclusion

Ces cas judiciaires montrent comment la Cour de Cassation en France a interprété le droit pertinent en France pour déterminer la légalité des surveillances faites par le gouvernement et par les individus avec l'usage de la nouvelle technologie. Principalement la Cour fait référence au code pénal français pour ces interprétations mais avec les trois cas les plus récents, nous voyons que le droit international, plus spécifiquement la Convention européenne des droits de l'homme, devient une considération importante. En outre, ces décisions montrent que la reconnaissance de la vie privée existe déjà dans les lois nationales et internationales mais que la Cour accepte comme légales deux atteintes de ce droit. Premièrement, si la personne qui fait l'atteinte à la vie privée de l'autre est l'épouse du victime, comme dans le cas 86-90297, la Cour reconnaît leur vie privée ensemble sans l'intrusion de l'État. Deuxièmement, si l'atteinte est faite par un agent de la loi qui a de la cause probable à faire une investigation pour protéger le reste de la communauté, cette atteinte est légale s'il suit les directives du code pénal français. Donc, la jurisprudence française sur la vie privée souligne comment la Cour a trouvé un équilibre entre les droits individuels et les intérêts gouvernementaux.

¹ Nina Nichols Pugh, "The Structure and Role of Courts of Appeal in Civil Law Systems," Louisiana Law Review 35 (5 1975): p.1168-1169.

² France, Cour de Cassation, Chambre criminelle, 11 février 1987, 86-90297. Par. 3.

³ *Id.* à Par. 7.

⁴ *Id.* à Par. 8.

⁵ *Id.* à Par. 11.

⁶ *Id.* à Par. 14.

⁷ France, Cour de Cassation, Chambre commerciale, 18 janvier 2011, 10-11777, Par. 1.

⁸ *Id.* à Par. 3.

⁹ *Id.* à Par. 4-5.

¹⁰ *Id.* à Par. 7.

¹¹ *Id.* à Par. 6, 8.

¹² Conseil de l'Europe, "Convention européenne des droits de l'homme," Art. 8, §1, http://www.echr.coe.int/Documents/Convention_FRA.pdf (accessed February 24, 2015)

¹³ *Id.* Troisième moyen, Par. 7.

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- ¹⁴ France, Cour de Cassation, Chambre criminelle, 22 novembre 2011, 11-84308, Par. 1.
- ¹⁵ *Id.* Premier moyen, Par. 1.
- ¹⁶ *Id.* Premier moyen, Par. 2-4.
- ¹⁷ *Id.* Premier moyen, Par. 6-7.
- ¹⁸ *Id.* Troisième moyen.
- ¹⁹ *Id.* Deuxième moyen.
- ²⁰ *Id.* Cinquième moyen. Par. 1-2.
- ²¹ *Id.* Quatrième moyen, Par. 2-3.
- ²² France, Cour de Cassation, Chambre criminelle, 15 octobre 2014, 12-82391. Par. 1-4.
- ²³ *Id.* à Par. 10, 14.
- ²⁴ *Id.* à Par. 12.
- ²⁵ *Id.* à Par. 12
- ²⁶ Conseil de l'Europe, "Convention européenne des droits de l'homme," Art. 6, §1, http://www.echr.coe.int/Documents/Convention_FRA.pdf
- ²⁷ France, Cour de Cassation, Chambre criminelle, 15 octobre 2014, 12-82391. Par. 12.
- ²⁸ France, Cour de Cassation, Chambre criminelle, 15 octobre 2014, 12-82391. Par. 12.
- ²⁹ Cour Européenne des Droits de l'Homme, Ch. 2. 2 août 1984. n° 8691/79, §67; cité dans France, Cour de Cassation, Chambre criminelle, 15 octobre 2014, 12-82391. Par. 12.

Chapter Seven: Analysis and Conclusion

Introduction

Through this study I explore how political culture affects the degree to which domestic legal understandings of privacy are consistent with the international norms. I use aspects of Harold Koh's theory of transnational legal process in order to understand why privacy norms differ by country. To review, Koh explains transnational legal process as, "the theory and practice of how public and private actors... interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately internalize rules of transnational law."¹ It is this process of internalization around which I base my study, by using Supreme Court decisions in France and the United States to track how international norms correlate with domestic legal understandings. Although I am unable to prove a causal relationship between the two variables, and thus show if norms are truly internalized, I can make conclusions about the level of consistency between domestic and international norms. Furthermore, I am specifically interested in how political culture affects this consistency. As noted in Chapter One, I hypothesize that political culture acts as a conditional variable on the relationship between international norms and domestic law; it can therefore explain why normative understandings of privacy law differ in France and the United States.

Analysis

In order to give the necessary context to my analysis, it is important to briefly discuss the inherent differences between the legal systems in question. The American legal system, as noted in Chapter Five, is founded on English common law and therefore is greatly based on precedent. To make judicial rulings the Court not only looks to the Constitution and to statutory laws

created through legislative processes, but also to how similar questions have been previously evaluated and interpreted in previous decisions. Future decisions therefore indicate an evolution in terms of how a constitutional or statutory principle has been understood and re-evaluated as society changes. However, this same concept of judicial precedent is not applicable to the French judicial system, because, as noted in Chapter Six, the French primarily draw from the Roman judicial system, which emphasizes codification over precedent. As a result, French Supreme Court decisions do not draw from preceding cases, but rather from parts of the French Civil or Criminal Code, as well as specific international laws. This approach implies more shorter, less analytic judicial decisions, where the court weighs the facts of the case against the specific details of the statute to determine if an infringement has occurred.

A primary theme of significance for my research question relates to how the separation of powers is used as a tool for protecting the privacy rights of individuals. Although in national security issues the separation of powers more often relates to presidential and judicial powers broadly, this is manifested more often in my cases as a separation between the police and the judicial branch. French case 12-82391, for example, reflects a lack of clear boundary between the police and judicial duties, as reflected by the legality of prosecutorial approval for digital surveillance, instead of approval from a neutral magistrate. Less judicial oversight exists for police action throughout the process because numerous guidelines are put on police action through legislative action, as demonstrated by the extent to which appellate review relies on the French code.² U.S. case *Katz v. United States*, by contrary, highlights the role of the judicial branch as a separate but vital actor in the investigative process. The court in *Katz* put significant emphasis on the importance of the warrant as a means of putting necessary limits on police action that ensure the protection of an individual's fundamental constitutional liberties.³

The difference in the degree of separation between the executive and judicial branches primarily reflects a difference in political culture. In France, the legislative branch is given significant power to preserve the rights of the individual, as it is the French code on which both the judicial and executive branches rely. In the United States the judicial branch has a more constant check on investigations throughout and after the investigative process. Ultimately, the U.S. and France, in *Katz* and 12-82391 respectively, still recognize the rights of the individual to be secure from unwarranted government intrusion; it is the process government action must take that differs as a result of political culture, not protection of the right itself. Thus, although it manifests itself differently due to political culture, the careful separation of power remains a tool for ensuring the protection of individual privacy rights in both countries.

The position of the actor infringing another's privacy rights also influences the application of privacy law. It is the person or institution responsible for the infringement of privacy that is most notably addressed in these decisions. The degree to which the courts allow this actor's interests to outweigh an individual's right to privacy often depends on whether they are private or government actor. The courts in both countries give greater protection to individuals against government intrusion. For example, in the three U.S. cases that involved a police investigation (*Katz*, *Jones*, and *Riley*), the Court required strict adherence to a warrant and other standard procedures designed to protect Fourth Amendment rights whenever the investigation involved either a physical trespass or a violation of a reasonable expectation of privacy. Similar protections exist in the French cases, although, as previously noted, they primarily come from the French code. The Courts in both countries are careful to preserve an individual's right to privacy, whether in relation to their movements, their conversations, or their personal effects, from overly intrusive government action.

However, these protections are not uniformly applied, as they may diminish when the actor responsible for the infringement of privacy is another individual. In other words, the protection of privacy may be outweighed by other legal or constitutional considerations. For example, in the U.S. case of *Bartnicki v. Vopper*, the Court applied a balancing test between one individual's right to privacy and another's right to the freedom of the press under the First Amendment. Because this case dealt with a balancing of individual rights, rather than a balance between a state interest and an individual right, the right to privacy did not receive guaranteed preference and could be more easily outweighed. The French case 86-90297, which dealt with a husband wiretapping his ex-wife's phones, similarly provided a different view of privacy right than in the cases dealing with governmental intrusion of privacy. Because of the facts of the case, the Court looked not only at the privacy rights of the victim of the wiretapping, but also the privacy allotted to the relationship between the parties. The Court held that while the individuals were married, any wiretapping was not illegal, but following the divorce it became an infringement on the wife's private life, and thus criminal activity. This case also concerns the power of the State in relation to privacy issues because the relationship of the married couple is granted such a degree of privacy that the State is unable to intervene to protect the privacy of one of the individuals. In both countries, the protection of the individual's privacy is more dynamic and dependent on other factors when it is infringed by another private individual, rather than by the government.

The power acknowledged by the Court to violate a right to privacy is also affected by the nature of the individual whose right is being infringed. The extent to which an individual's life is subject to public scrutiny is, for example, a considerable factor when the Court determines what level of protection the individual's right to privacy receives, as was the case in the U.S. Supreme

Court's decision in *Bartnicki*. Because the individual whose private conversations were publicized had a public role in a labor union, the Court found that his conversations related to that function were considered less private and thus were subject to a lesser degree of protection. Similarly, in the French case 10-11777, which concerned government seizure of a laptop and other technological effects as a part of a tax fraud investigation, the Court reviewed a case where the individuals in question were in a different position than the average individual under investigation. In 10-1177, the owners of the laptop and other electronics were also leaders of the company under investigation; their expectation of privacy over the seized effects was affected by the public nature of the company. However, in reviewing the possibility of a violation of privacy, the Court, in this case the Commercial chamber of the Court of Cassation, analyzed the individual right to privacy in a similar manner to the other studied cases, which appeared before the Criminal chamber. Because the investigation carefully followed the limits of the judicial authorization, it was considered a legal breach of privacy.

The varying degree of privacy rights afforded to individuals, although a standard concept between the two countries, manifests itself differently in France and the U.S. and reflects aspects of each country's political culture. In France, the Rousseauian tradition is where the right to privacy is more general, and not just a right to privacy from unwarranted government invasion. The United States Bill of Rights protects individuals from government intrusion, not from individuals' transgressions. Although the law protects against individuals, such as Title III of the law cited in *Bartnicki*, the priority is to protect against government intrusion.⁴ Again, each court provides a recognition of the right to privacy that should be protected, although this recognition is somewhat influenced by political culture. However, the nature of the actor whose privacy is infringed and the actor who is violating it also affects the degree of protection granted.

The degree to which each country's court draws from international law is another interesting detail linked to political culture. While the French court in these cases never explicitly uses international law, either from the United Nations or the European Union, attorneys appeal to the logic and validity of international law to support their arguments. In both 10-11777 and 12-82391, the appeals cite the European Convention on Human Rights, a convention adopted in 1950 that made the protections of the UDHR binding for countries in the European Union.⁵ Contrarily, the United States Supreme Court never cites international law in the three decisions cited, nor does the decision mention any of the briefs submitted making an appeal to international law. Although the weight given to international law is not specifically linked to the historical aspects of political culture discussed in Chapter Four, for France it represents the evolution of political culture with the country's membership in the European Union. For the United States, the lack of reference to international law, at least in these four privacy cases, demonstrates the overwhelming priority given to sovereign, domestic law.

A final consideration relates to the manner in which each country adapts their conceptions of privacy protections to changing technology. This is one area where political culture seems particularly relevant, as the cultural influences on the judiciary affect the manner in which privacy norms are reconsidered in relation to new technology. The U.S. Supreme Court draws from its English common law heritage by heavily relying on judicial precedent. This evolution can be seen in the four U.S. privacy cases, beginning with *Katz v. United States*, where the Court builds off of previous search and seizure cases in order to create a new understanding of how privacy applies to individuals under the Fourth Amendment. The *Katz* test is then cited in both *Jones* and *Riley* as a principle from which the Court can draw for understanding how

foundational understandings of Fourth Amendment protections, and privacy rights by extension, can be applied to newer technology such as GPS and cell phones.

By contrast, the French court is influenced by the codifying traditions of Roman law. As mentioned earlier, rather than interpreting previous decisions, the Court of Cassation determines whether current French code may apply or if new law is needed. For example, in case 11-84308 from November 22, 2011, the Court considered the legality of a police investigation involving the use of GPS on a car. Although the French code did not specifically address the legality of such technology, the Court was able to apply existing legal norms regarding searches to the question at bar. The Court determined that because similar information could be obtained through visual surveillance and that the application of the GPS technology was authorized by the necessary authorities, it was no different from less advanced forms of surveillance already considered acceptable. The decisions from both Courts suggest that new legislation is not always necessary for a court to evaluate how privacy norms apply to new technology. Whether through the application of pre-existing judicial principles and tests or parts of the legal code, both Courts are able to adapt current law to emerging technologies. However, this raises the question as to whether existing legal foundations are adequate for understanding how privacy rights are implicated by more invasive technological means of investigation.

There are therefore four main patterns evident within the eight court decisions in my study. First, the effects of political culture on the separation of powers alters the process through which the State reviews privacy rights, although it does not affect the State's recognition and protection of the rights themselves. Second, the ability to outweigh an individual's right to privacy is determined by the nature of the actor responsible for the infringement; the government, for example, is often less able to infringe upon privacy rights than another private

individual. The public or private nature of the individual whose rights are affected also impacts the degree to which courts recognize the right to privacy. Third, the degree to which courts specifically cite international laws also signifies an important cultural difference. Fourth, the method of reviewing judicial questions, which is highly affected by political culture, is often responsible for how privacy protections are applied to new issues of technology. However, the difference in how new issues are reviewed, in weighing new technology against privacy interests, does not diminish the established recognitions of privacy.

Conclusion

The eight court decisions reviewed appear to provide support for the hypothesis that political culture affects the relationship between international law and domestic law, but also influences the degree to which domestic judicial decisions are consistent with international norms. Through the decisions studied, characteristics of international laws, such as protection against arbitrary interference with an individual's privacy, were mirrored in aspects of the Court's reasoning. The notable differences between French and U.S. court decisions derived from the manner in which these questions were reviewed. Because the manner of reviewing questions is heavily dependent on political culture, it would seem that, in the context of this study, political culture acts as a conditional variable.

To measure the relationship between international and domestic law, I primarily draw from Harold Koh's theory of transnational legal process, which he defines as being nontraditional, nonstatist, dynamic, and normative.⁶ I focus on the latter two of these characteristics, by viewing international law, or transnational law as Koh would view it, as dynamic, in the sense that it is constantly changing and evolving, and normative because it is

based on norms. The significance that Koh puts on the normative component of transnational law helps explain how there is a notable consistency between the recognized privacy protections on an international and domestic level, even when courts, such as the U.S. Supreme Court, do not specifically cite or consider international law in their decisions. Because my study highlights the extent to which privacy norms are consistent between domestic and international law, it supports aspects of Koh's theory of transnational legal process. The influential role of political culture can thus provide greater context for understanding how transnational legal processes may realistically play out in different cultural contexts.

My study can also help to address some of the earlier concerns voiced by international legal scholars. Scholars such as Daniel Bethlehem, Jagdish Bhagwati, and Rafael Domingo have voiced that international law is inadequate to deal with the increase in globalization where interactions are no longer as limited by sovereign borders.⁷ However, by focusing on how international law becomes a set of norms that are internalized by individual countries, international law can still be relevant to an increasingly globalized world. The consistency between privacy law between the UDHR and U.S. case law, even though the U.S. Supreme Court, never explicitly cites international law would suggest that the process of internalization is not always a conscious, political action. As such, it would pose less of a direct threat to a country's sovereignty; instead of being a challenge to a domestic country's laws, international norms complement domestic judicial analysis and become a part of domestic law. However, it is also possible that the consistency between domestic and international law in this case is simply the result of the countries studied having a major role in the creation of international law. Because they also created these laws, assimilation to new international norms was never necessary to the same extent that it may have been for other countries or for other laws.

Transnational legal process, as applied in this study, also provides another layer to an understanding the efficacy of different sources of law. Although Larry May discussed the manners in which soft sources of international law, such as jus cogens norms, may supersede hard sources of international law, such as treaties, the distinction between these sources may be less distinct.⁸ My method of operationalizing my independent variable includes understanding “hard sources” of international law, such as the UDHR, as representative of international norms, or “soft sources”. By considering hard and soft sources as inherently linked, it is easier to understand how soft sources of international law may help countries to implement hard sources of international law. In other words, we can better understand how aspects of international laws are implemented on a domestic level by looking more specifically at how the relevant international norms have been internalized. This unification of hard and soft sources also provides support for H.L.A. Hart’s argument that international law, despite being difficult to enforce, may gain legitimacy through practice and general acceptance.⁹ Although Hart proposes a more positivist view of international law, where laws are clearly written and defined, the practice and acceptance of law demonstrates a normative element that, if applied to more general international norms, may assist with a more broader implementation and recognition of international legal concepts.

Questions for Future Research

There are numerous opportunities for the results of the study to be expanded upon or simply drawn from in future studies. First, the design of my study is primarily based around Koh’s third and fourth characteristics of transnational legal process, as my research focuses on laws being dynamic in normative. One way of expanding upon my own research is to better

consider and apply the first two characteristics of Koh's theory of transnational legal process: nontraditional and nonstatist. Consideration of these factors would require a research design that analyzes the manifestation of international norms in a context other than formal court decisions, as the judicial branch still fits into a more traditional, state-centered classification. Other aspects of a country's culture, such as business actions or the media, may provide a more nuanced view of the process through which international norms are fully internalized within a country. Similarly, an analysis of media portrayals of privacy could indicate a difference between how governments internalize norms and how people understand privacy.

The scope of my study was limited to a narrow class of international law: privacy law as it applies to individual liberties. To better understand the relationship between international norms, domestic law, and political culture it would be beneficial to conduct apply similar methods to other areas of law. I studied international laws that more abstractly recognized human rights, therefore leaving a certain degree of variability when applied in domestic law. If my research design were applied to more concrete, detail-oriented international law, this would allow scholars to better understand the discrepancies between domestic and international law, as well as how political culture explains these differences. This would also help us to understand if more abstract norms are better internalized than specific international law, and to what extent this may be true. Furthermore, applying this model to privacy court decisions in other countries with a greater difference in political cultures may provide greater evidence for the role of political in the internalization process. My research indicated high consistency between international norms and domestic judicial decisions; however, further research could help us better understand if this consistency would remain true for other forms of international law or in other countries. Similarly, further research could be done on the extent to which courts cite

international law in other areas and the other aspects of political culture that may influence this level of citation.

There are also other areas for future research by applying my research design to a greater variety of case law. For example, my conception of privacy in the context of newer technology was somewhat limited to the U.S. Supreme Court's application of the Fourth Amendment to searches and seizures involving technology. Because the international laws in question, such as Article 12 of the UDHR, also refer to protections on an individual's family, correspondence and reputation, there are aspects of privacy rights that are not encompassed by traditional Fourth Amendment jurisprudence. If this study were expanded to include cases that involve conceptions of privacy found in other Amendments, such as the First or Fourteenth Amendments, it may be possible to better understand how the Court more generally internalizes privacy norms.

Furthermore, in France there was a case that appeared before the Commercial chamber instead of the Criminal chamber, because it involved a tax fraud investigation. Although the Court still applied the same privacy considerations as it would in other criminal appeals, it would be interesting to focus more specifically on how the type of investigation affects the privacy rights that are recognized and to what extent they are affected. This could be especially relevant because the debate on international privacy norms arose from a critique of how the U.S. National Security Agency invaded individuals' digital privacy for the sake of national security. By focusing on the implications of the type of investigation, we can better understand how privacy rights are affected differently in criminal investigations and issues of national security.

Finally, the courts chosen for my dependent variable may not properly indicate how privacy rights are always protected. The question of privacy between the U.S. and other nations was recently triggered by the surveillance policies of the National Security Agency. These

policies were not reviewed by the Supreme Court, but rather the Foreign Intelligence Surveillance Court (commonly referred to as the FISA Court). Because the FISA Court reviews warrants for “foreign powers” and “agents of foreign power” and is not subject to the same level of public oversight, it would likely weigh privacy concerns in a different manner from that of the Supreme Court, yielding decisions with fewer similarities to international norms.¹⁰ A research design focused on FISA Court actions may allow for a more comprehensive view at how privacy rights are implicated by all surveillance related to technology, not only policies that may be considered by the Supreme Court.

This research project evolved from a curiosity about how new technology affects individuals’ rights to privacy, as well as how varying countries recognize these rights differently. I wanted to explore how political culture may influence the manner in which countries implement international law and internalize international law. By choosing France and the United States, I could analyze the nuanced role of political culture in countries with similar political systems and membership to international organizations. Through my study of four cases from the U.S. Supreme Court and from the French Court of Cassation, I learned that both countries recognize very similar rights to privacy. However, it is the process through which the State evaluates privacy and the manner through which the Court applies privacy right protections to questions of new technology that are affected by political culture. Although political culture does have an influence on the process of internalization, there was a higher level of consistency in terms of the rights recognized than I had anticipated. This suggests that political culture has an influential role when norms are internalized but that this role is limited. The extent to which it is limited, as well as the other specific factors that affect norm internalization are questions for further research.

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- ¹ Harold Koh, "Transnational Legal Process," *Nebraska Law Review* 75 (1996): p.182-183.
- ² France, Cour de Cassation, Chambre criminelle, 15 octobre 2014, 12-82391
- ³ *Katz v. United States*, 389 U.S. 347, 355-357 (1967)
- ⁴ Title III of the Omnibus Crime Control and Safe Street Acts of 1968, 82 Stat. 211, Title III: Wiretapping and Electronic Surveillance, cited in *Bartnicki v. Vopper*, 532 U.S. 514, 523 (2001)
- ⁵ Conseil de l'Europe, "Convention européenne des droits de l'homme," http://www.echr.coe.int/Documents/Convention_FRA.pdf
- ⁶ Koh, p. 184.
- ⁷ Daniel Bethlehem, "The End of Geography: The Changing Nature of the International System and the Challenge to International Law," *The European Journal of International Law* 25 (1 2014): p.23; Jagdish Bhagwati, *In Defense of Globalization* (Oxford: Oxford University, 2007): p.176-177; Rafael Domingo, "The Crisis of International Law," *Vanderbilt Journal of Transnational Law* 42 (5 2009): p.1544.
- ⁸ Larry May, "Jus Cogens Norms," in *Philosophical Problems and the Law*, 5e, ed. David M. Adams (Boston: Cengage Learning, 2012): p.47.
- ⁹ H.L.A. Hart, "International Law," in *Philosophical Problems and the Law*, 5e, ed. David M. Adams (Boston: Cengage Learning, 2012): p.42-43.
- ¹⁰ "Foreign Intelligence Surveillance Court," http://www.fjc.gov/history/home.nsf/page/courts_special_fisc.html (accessed March 2, 2015).

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