Privacy in the Preventive State

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Abstract:

The most frequently articulated concern in the war on terror has been the increasing level of surveillance of the population under the rhetoric of prevention of terrorist attacks. Often surveillance is thought to bring the benefits of security. Technology has come to the forefront in defining perceptions and modes of government. I argue that violations of privacy in the preventive paradigm in which the liberal constitutional states of the Federal Republic of Germany and the United States operate since 9/11should be considered not as individual concerns but as systemic harms to democracy. Finally, a holistic reconsideration of privacy is implicit in the rule of law.

Chapter One

Privacy and Terrorism

The Maze of "privacy":

Privacy is a notoriously fluid concept that has multifaceted understandings. After 9/11 and in the context of advancing technological and social networking media, it has become increasingly difficult to define the proper scope of the right to privacy. The traditional divide between public and private that has for a long time served as a threshold for defining the exercise of legitimate government powers has been blurred by technological developments that render the framework of visibility a completely new meaning. Articulating a legal right to privacy has been concomitant with the rise of sophisticated technologies that challenged in new ways people's self-perception and the construction of space. In some sense, it is obvious that real and perceived violations of the right to privacy participate in the formulation of policy approaches as well as constitute our perception of sense and space. The growing literature on privacy studies does augment the understanding of the complexity of its material and metaphysical manifestations by bringing insights from sociology, geography, cultural studies as well as communication study to bear on the links between current data-mining, surveillance and counterterrorism. In this respect, it might be useful to adopt a more nuanced and less dystopian characterization of the current social and legal facets of privacy. Already positing privacy in a rational discourse of rights and law risks reducing and larger seems to desensitize the cultural nuances as well as disconnecting the concept from its social and sociological importance.

Overall, no one particular approach can claim to be a fulfilling and exhaustive study of privacy because of the polyvalence of its nature and manisfestations. Along the difficulty of articulating one particular value to underpin privacy, the immediate concern in the context of terrorism has been according to what standard to balance the state's needs and information control. Policy analysts and scholars have tried to remedy the situation by trying to keep pace with technological changes with explicit proposals for system embedded privacy protections, such as firewalls for computers, or data-anonymization processing, but have often disregarded considerable changes in public understanding of privacy and thus fail to attend the intricacies in the workings of the constitutional state that operates on assumption of democratic support and deliberation. Frequently, the discrepancy between the legal rights to privacy as its sociological dimension can be characterized as a cultural lag in translating the technological innovations into their social environment. The concept of lag expresses the changes in the perception of reality has first and foremost sensory objectification. In mind of all these intricacies, this paper suggests a holistic reconsideration of privacy, and while it lacks a strong normative tone, it is nevertheless critical of the existing solutions to constitutional privacy law cases from the standpoint of constitutionalism and the rule of law.

To these conceptual fluctuations in the meaning of privacy, it is important to add variations in context and over time. Context thus will vary depending on the jurisdiction under consideration. Within each jurisdiction, different aspects receive legal recognition and within each legal culture there is sometimes considerable misconstruction as to what values and interests must receive constitutional recognition.[1] The idea to distinguish a category of "over time" is to underlie the sheer difference of concerns that surface under the rubric of privacy in different periods of type. Consequently, privacy interests are historical and have gradually evolved in conjunction with the rise of the bureaucratic state, advances in technology that

[1] Daniel Solove, "A Taxonomy of Privacy",154 *University of Pennsylvania Law Review* 477, January 2006, 482: "Privacy problems are frequently misconstrued or inconsistently recognized in the law"

have led to the creation of a virtual reality, together with demographic and architectural changes in urban space that effected the sense of self and space. It is important to remember that the first ever articulation of a broad right to privacy was in made concurrent to the rise of technologies and the frightening prospect they carried for the self-perception of the individual. Thus, once unimaginable technological infiltrations into the privacy of the individual generated an impulse for legal recognition of a right "to be let alone".[2]

Furthermore, the division between public and private sphere has been at the heart of the theoretical underpinning of privacy. From the seventeenth century onwards, privacy has served to demarcate the political language of the liberal state and the capitalism. The rise and fall of privacy thus has become a central tenet in the articulation of ideas about democracy both from republicans as well as liberals. The political significance of the dichotomy is reflected in the political struggles of feminists who contend the metaphor of the private sphere has served to disempower women and deprive them of equal rights and freedoms thus generally attacking the very doctrine of liberalism for failing to achieve its promise of equality for all.[3] Moreover, privacy as a legal right and a sphere of political existence is imbued with the dominant power relations and characterize more than any of the accompanying concepts of the liberal state the centrality of the asymmetry of power in legal discourse. It is charged with the potential to structure identity, recognize, and marginalize experience. The ideological impregnation of the dichotomy translates itself as well in the terrain of space and data, the two dominant leitmotifs that inform the privacy cultures of Europe and United States. So first and foremost, privacy embodies autonomy concerns in decision-making and expressive conduct. In relation to the public sphere, it is also demarcating the legitimate boundaries for governmental intrusion.

[2] Samuel Warren and Louis Brandeis, "The Right to Privacy", *Harvard Law Review* 4 (1890)

[3] Nicola Lacey, *Unspeakable subjects: feminist essays in legal and social theory* (Oxford: Hart Publishing, 1998)

This paper is organized in the following manner: *Chapter one* briefly discusses the discourse around the "war on terror" to the extent it matters for positing the "framing effect" implicit with emergency and risk paradigms, and its relevance for the subsequent position constitutional courts derive to decide on cases implicating privacy interests. This analysis is necessary to demarcate the differences in the two legal cultures of privacy in US and Germany when it comes to examining how courts have handled challenges to government measures authorized in the immediacy of the 9/11 attacks. *Chapter Two* is dedicated to a more detailed analysis of the two privacy cultures in US and Germany with respect to information protection. *Chapter Three* introduces the idea of a preventive state thus shifting the comparative analysis of the right to privacy to a general discussion of the constitutional models of Germany and US accounting for the level of divergence between the constitutional accommodations of privacy concerns in circumstances of perceived necessity for extensive preventive measures that encroach on constitutional freedoms.

War Discourse in the Context of 9/11:

"A violation of rights in one place is felt throughout the world".[4]

Immanuel Kant

[4] Immanuel Kant, *Perpetual Peace* (1795)

Kant's idea of universal constitutional rights within the ideal of a perpetual peace resonates with a widespread understanding of human rights as trumps. [5] The idea of the inherent value and dignity of the human being has accompanied the rise of the modern philosophy of human rights' law and is implicit in the construction of a universal legal rights' regime. The appeal of human rights is grounded in their absolute value and as such a finite barrier against the state violence. Together with the rise of a human rights regime, rose as well a global morality of rights that trumps any unconditional definition. Assuming absoluteness has however "preclude[d] adaptation to new circumstances"[6]. Furthermore, the idea of universal value of the human dignity impregnates the modern liberal constitutional state as revealed in the numerous constitutional guarantees against arbitrary government power like judicial review, separation of powers, constitutional review and the imposition in international human rights law of a regime of rights' derogation as well as the ascension of a militant democratic principle as recognition of circumstances that might legitimize constitutionally prescribed departure from normal times.[7]

The presence of universal discourse of human rights within the boundaries of universal constitutionalism however only facilitates seeing the vulnerability of human rights to be instrumentalized in this discourse. Security concerns make legitimate the restriction of rights within "a constitutional paradigm only if it is capable of excluding, conceptually and institutionally, the abuse of restricting rights".[8] In light of the events of 9/11, the post-modern Kantian sentiment translates into the visibility of human rights violations through powerful media images as well as the appropriation of the discourse of risk. Ulrich Beck has tried to unravel the "symbolic code "of the 9/11 attacks through reconsidering the nation-state logic of

[5] Ronald Dworkin , *Taking Rights Seriously* **(**London : Duckworth, 1991)
[6] András Sajó, "From Militant Democracy to the Preventive State?", 27 Cardozo Law Review 2255, March 2006 , Symposium "Terrorism, Globalization and the Rule of Law", 2272 (hereinafter Sajo, "Militant Democracy")
[7] Sajo, "Militant Democracy", 2255-2263
[8] Sajo, "Militant Democracy", 2257

risk.[9] According to his explanation, risks are "social constructs … based upon corresponding relations of definition". To the extent definitions are contestable they create the possibility of dramatization or minimizations of the scale of risk[10]. This relationship of contestation not only characterizes controversy within the nation-state[11] , but also on an international level. Thus, although a national event, 9/11 *became* an image of a cosmopolitan risk that directly feeds its emotionalism into legislative and executive acts.

In light of the perceived risk from another catastrophe, 9/11 brought a new mode of rights' functioning. The beginning of the discussion of this new framework in which to contextualize human rights during a war of a different kind and of different aim is fraught with conceptual difficulties not the least because there is no single definition of terrorism or a consensual understanding behind the term "terrorism"[12] or "war on terror". In the words of Richard Baxter, a prominent legal scholar, "the legal concept of "terrorism" was never inflicted upon us. The term is imprecise; it is ambiguous, and above all it serves no operative legal purpose". [13] Different theories seek to explain terrorism with the economic gains involved in such activities, or to capture some irrational, incomprehensible or religious zeal behind such existential choices as suicide-bombing, or through more traditional approaches, comprehend it as a grass-root local phenomenon that seeks to alter the terms of collective existence within a polity or alternatively achieve some other political goals[14]. From behaviorist and psychological perspective, the phenomenon of terrorism can be studied as to the motivation of terrorists, their ideological cohesiveness in small groups as well as the dynamic of their choices. Martha Crenshaw has studied terrorism from the group perspective

9 Ulrich Beck, *World at Risk* (Cambridge: Polity Press, 2007) , 67
10 Ulrich Beck, *World at Risk*, 30
11 Ulrich Beck, *World at Risk*, 27
12 See Christian Walter, Silja Voneky & Volker Roben , Frank Schorkopf (eds.) ,*Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer; April 15, 2004)
13 Ibid. , Christian Walter, " Defining Terrorism in National and International Law", 23-45, 24
14 Ibid, Frank Schorkopf, "Behavioral an Social Science perspectives on Political Violence, 3-23

and sought to explain the forces behind unity of the group in ideological cohesiveness[15]. The terrorist group is thus perceived as a unit of collective preferences that seeks to employ strategically and intentionally deeds to achieve some political goal[16]. The paramount distinguishing feature of terrorism from other political actors is its efficacy in channeling a political message. [17]

A group phenomenon perspective seems to have informed the US general framework of perception of the events of 9/11. From a European standpoint, terrorism has been perceived and regulated for more than a century as a sub- national phenomenon. The divergences in cognitive insight of the nature, actors and political goals across the Atlantic translated into different legal definitions in national legislation. Section 802 of the USA PATRIOT Act[18] has expanded the definition of terrorism to cover "domestic" terrorism as well. According to this new definition, a terrorist is a person engages in an act ""dangerous to human life"" that is qualified as violation of the criminal laws of the federal government or a state, if the act appears to be intended to (i) intimidate or coerce a civilian population; (ii) influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping. These considerations apply when the act is committed on the territory of the United States. Otherwise, the provisions regarding international terrorism would apply.

In contrast to US, the Federal Republic of Germany initially did not substantially change its criminal code. It has been fighting domestic terrorist groups for years and thus already had criminalized terrorist acts. However, in contrast to USA Patriot Act broad definition, the German Criminal Code under § 129a expressly defined organized crime but

15Ibid, Frank Schorkopf, "Behavioral an Social Science perspectives on Political Violence, 3-23

16 Ibid, Frank Schorkopf, "Behavioral an Social Science perspectives on Political Violence, 3-23

17 Ibid, Frank Schorkopf, "Behavioral an Social Science perspectives on Political Violence, 3-23

[18] USA PATRIOT Act (2001)

not any specific definition that engages with the particular political incentive of the criminals. Through European Union wide effort for the harmonization of the member states' strategies to combat terrorism within the European Framework decision of 13 June 2002, Germany amended its criminal code provision to include the aim of "unlawfully coercing an administrative body or an international organisation or of abolishing or significantly impairing the political, constitutional, economic or social structures of a state or an international organisation."[19]. Furthermore, the stipulation that the new criminal code provision should shed light on the interpretation of Article 73 sect. No. 9a Basic Law[20] creates opportunities legislative developments related to terrorism on a European level to "directly influence the interpretation of the German constitution"[21]

Framing the Debate: Security v. Liberty

In the war on terror, privacy and security intersect at the twilight. Metaphorically, they are two centrifugal forces in the state enterprise of defending national security. Privacy, being a contextually bound right, needs reconceptualization in the aftermath of 9/11. This reconceptualization is necessitated both as a consequence of the tremendous legal changes that have ensued the attacks, but also due to the rise of awareness as to how much current

[19] Christian Walter, "Submission to the Eminent Panel on Terrorism, Counter- Terrorism and Human Rights European Union Sub-Regional Hearing", Brussels, July 2007, Westfälische Wilhelms-Universität Münster, at http://ejp.icj.org/IMG/ICJGermanyWalter.pdf , 8

[20] "Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 29 July 2009 (Federal Law Gazette I p. 2248), Art. 73,9a."Matters under exclusive legislative power of the Federation":
"protection by the Federal Criminal Police Office against the dangers of international terrorism when a threat transcends the boundary of one *Land*, when the jurisdiction of a *Land*s police authorities cannot be perceived, or when the supreme authority of an individual *Land* requests the assumption of federal responsibility; "
At http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html

[21] Christian Walter, "Submission to the Eminent Panel on Terrorism, Counter- Terrorism and Human Rights European Union Sub-Regional Hearing", Brussels, July 2007, Westfälische Wilhelms-Universität Münster, at http://ejp.icj.org/IMG/ICJGermanyWalter.pdf ,8

legal doctrines do not match the reality of pervasive technologies of surveillance measured by their good chance of permanent presence for the future[22].

Uniqueness of the war on terror:

The official governmental positions on both sides of the Atlantic has underlined the exigency of the situation after 9/11 and the immense threat from terrorist attacks which required certain unusual private life interference on part of the state for the protection of its citizens' security. In official discourse, the unusualness of the measures required stems from the fact that the "war on terror" is unique and qualitatively different from any conventional military engagements or previous terrorist acts[23]. This uniqueness is well understood now by the fact the enemy is not a state, but terrorist organizations scattered around the world united under the desire to harm the USA and other peaceful democratic states[24], and theoretically at least constantly plotting a terrorist attack on innocent civilians[25]. Since the current terrorist logic is one of spectacle and fear inspiring and not any military, territorial or strategic gains, and, furthermore, its structures avail of the most sophisticated technology, the state immersed its counterintelligence and law-enforcement apparatus into massive preventive surveillance,

[22] Ibid. The "War on Terror" has been announced in the immediate aftermath of the terrorist attacks nine years ago. Some of the most problematic measures in the USA Patriot Act related to data mining and surveillance have been prolonged by the Obama administration in February, 2010. See Washington Times, "Obama signs Patriot Act extensions", at http://www.washingtontimes.com/news/2010/feb/27/obama-signs-one-year-extension-patriot-act/

[23] Manooher Mofidi & Amy E. Eckert, „Unlawful Combatants" or "Prisoners of War", 36 *Cornell Int'l L.J*. 59, Spring 2003. Mofidi and Eckert argue that the private acts of individuals could not be considered "legal act of war" under international humanitarian law". Nevertheless, the implicit refusal of the Federal government to treat captives in the "war on terror" as prisoners of war and guarantee them the requisite protection of the Geneva conventions emphasizes duplicity in the war rhetoric., 74

[24] Federal Chancellor Gerhard Schroeder of Germany announced his country would "give its unreserved support to the United States of America", Policy Statement Made to the German Bundestag, Sept. 19, 2001 at http:// eng.bundesregierung.de/dokumente/Rede/ix_56718.htm.

[25] U.S. President George W. Bush address to the General Assembly of the United Nations in New York City on 10th November, 2001: "Every nation has a stake in this cause. As we meet, the terrorists are planning more murder, perhaps in my country or perhaps in yours. They kill because they aspire to dominate. They seek to overthrow governments and destabilize entire regions."; "Every other country is a potential target, and all the world faces the most horrifying prospect of all: These same terrorists are searching for weapons of mass destruction, the tools to turn their hatred into holocaust".

data collection, wiretapping, financial records tracking, instituting new powers to compel information disclosure, allowing for unwarranted searches, establishing austere border and immigrant checks and control.[26]

At war with "terror"?

Evaluating the war paradigm of 9/11 is absolutely crucial in understanding the extent to which there is misunderstanding as to the exact scope of executive and legislative powers to enact measures that seriously impact on human rights. There is no question that in the immediate aftermath of the events, the general support as well as the branches of government was aligned behind austere security measures. With the passage of time, however, support wanes and there is need to come to terms with a principled position to guide national security policy. The extent to which this question has remained in the realm of debate It rather lays the foundation for examining constitutional courts' jurisprudential handling of these issues when the executive and parliaments (Congress) act or legislate in the context of heightened security. Some of the mechanisms at disposal of courts will be examined later together with the most important considerations stemming from waging war as opposed to containing responses to terrorism within the boundaries of traditional criminal justice.[27] Some of these aspects, however, deserve to be mentioned in advance to make relevant the factor of time in the handling of constitutional cases in front of the US Supreme Court as well as the Bundesverfassungsgericht. In 2010, nine years after the attacks on the World Trade Center,

[26] See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* (USA PATRIOT ACT) Act of 2001

[27] Andras Sajo, " From militant democracy to the preventive state?", 27 *Cardozo L. Rev*. 2255, March 2006. Sajo explains the differences between a state of exception under which normal constitutional operation is suspended and a constitutionally permissible departure with the standard criminal justice regime.

there are at least two questions that present their prominence to constitutional law and hold the potential to elucidate some aspects of the current state of the conception of privacy and the right to privacy in European and North American context. The first has to do with the strange adjudicative predicament of whether US was/ is still/has been at war with terror.[28] In this respect, representation and official discourse clearly matter. The assumption in a liberal constitutional state is that even in times of war, restrictions on rights should follow the rule of law and not be arbitrary. From both international law and domestic law, it is important to draw the distinction between war and peace and to this extent as well between emergency and normal times. The distinction facilitates the demarcation of the possible legitimacy of action in the sphere of separation of powers and the role of courts in safeguarding civil rights.[29] Thus, even when faced with a genuine threat to national security, governments need to act within the bounds of law ascribing the limitations to be imposed on rights and observing the due process of law when acting against perceived enemies of the state. A bleak record of human rights violations has put on trial[30] the policies instigated in the name of security. Thus, the way the issue of national security and the requisite measures were presented to the public directly feeds into levels of perceived risk and degree of tolerance towards restrictions of privacy. The position of the executive in situations of national security is privileged in framing the media debate.

A further problem with the usage of terms like war has been the manner into which it structures panic driven patterns of behavior while simultaneously opening the possibility of abuse through exaggeration of potential threat or mis-presentation of the reality. This phenomenon has been known as "framing effects" reflecting the inherent quality of metaphors

[29] For an insider's view see Justice William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (1998) where he argues that in times of war the balance of powers shifts to the executive.
[30] Referring to the idea of the book by Alan M. Dershowitz, *America on Trial: Inside the legal battles that transformed our nation -from the Salem witches to the Guantanamo Detainees* (Warner Books, 2004.)

(in the case likening the terrorist attacks to "war") to draw similarities and analogies while obfuscating the clear differences especially in a traditional legal reading of acts of war[31]. Framing the attacks in terms of war against undefined military actor invites broad powers as well as presenting challenges for traditional notions of beginning and end of hostilities.Derivative of the need to have better intelligence and information sharing between the executive agencies invested with intelligence powers is the argument that a too liberally formulated right to privacy and rigid data protection laws impede the legitimate state efforts to counter terrorism[32]. That is how the debate about privacy has been framed in a bipolarity of privacy v. security, or more broadly liberty v. security. Framing the situation as one of necessary limitations of privacy and liberty for the achievement of security only now invokes serious and deserved reconsideration after some of the more drastic measures concerning indefinite detention of terrorist suspects and unwarranted wiretapping and data collection start being successfully challenged not only on their constitutionality, but also on their efficiency and inevitability as a political and legal response to terrorism as a long-term strategy in the prevention of terrorist threats.

Going back to the question of war, the answer for US has been partially, but not absolutely answered by the Obama administration. President Obama was fast to disassociate his policy plans for managing the threat of terrorism with the previous administration's dangerous flirtations with totalitarian methods of secrecy and indefinite detention without trial

[31] For a relevant discussion on the risk perception and framing see Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames Choice* (New York : Russell sage Foundation, 2000)

[32] See generally *Joint Investigation Into September 11th: Sixth Public Hearing , 01 October 2002 -- Joint House/Senate Intelligence Committee Hearing* (Counterterrorism Information Sharing With Other Federal Agencies and with State and Local Governments and the Private Sector- statement made by Eleanor Hill, Staff Director, Joint Inquiry Staff), at http://www.fas.org/irp/congress/2002_hr/100102hill.html ; see also the 9/11 Commission's investigations and recommendations at http://www.9-11commission.gov/ - http://govinfo.library.unt.edu/911/report/911Report.pdf - chapter 13: "How to do it? A different way of Organizing the Government" explaining the effort and measures undertaken in response to the terrorist attacks in information sharing and gathering, as well as how the terrorist attacks might have been prevented lest the privacy regulations were not so rigid.

and altogether dropped from official discourse references to "war"[33]. In Germany, on the opposite, authorities have never explicitly committed the country to war on terror, although the military support in Afghanistan was a signal of a change in what has been traditional German policy of neutrality in military conflicts. The war in Iraq, however, provided the opportunity for the coalition on terror to confirm certain important dissociation with the manner and style of leading the war. The German state clearly refused engagements in Iraq and was obstinate in resisting military adventures in foreign countries as part of the general strategy to fight terrorism[34]. Furthermore, on a constitutional level, in the Downing Air craft decision, the Federal German Constitutional Court struck down as unconstitutional a stature enacted as part of the war on terror which allowed as part of a defense measure in the meaning of art. Art. 87a (2) of the Basic Law[35] , the shooting down of an airplane that was hijacked to be used as a lethal weapon. The court in deciding on the merits of the case did not allow for the term "defence" to be interpreted so broadly as to include terrorist attacks and thus effectively put a constitutional seal on the German government's dissociation with the conduct of "war on terror" in favor of more conservative legal response.[36]

[33] For an analysis of the Obama's first year in office see Peter Baker, "Obama's War Over Terror", at http://www.nytimes.com/2010/01/17/magazine/17Terror-t.html?pagewanted=2 : "With joblessness still plaguing the economy and health care dominating his agenda, Obama has not wanted his presidency to be defined by the war on terror, as Bush's was. He has given relatively few public speeches on the topic and declined to discuss it for this article. Rather than seeing terrorism as the challenge of our time, Obama rejects the phrase "war on terror" altogether, hoping to recast the struggle as only one of a number of vital challenges confronting America. The nation is at war with Al Qaeda, Obama says, but not with terrorism, which, as he understands it, is a tactic, not an enemy."

[34] See CRS Report for Congress, coauthored by Francis T. Miko & Christian Froehlich , " Germany's Role in Fighting Terrorism: Implications for U.S. Policy", December 27, 2004

[35] Art. 87a (2) of the Basic Law: "Apart from defence, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law".

[36] For discussion of the decision see Oliver Lepsius, "Liberty, Security, and Terrorism: The Legal Position in Germany", *German Law Journal*, Vol. 07, No. 09, 761-776

Chapter Two

Two Cultures of Privacy

Chapter one introduced the discourse on the war on terror in order to establish the highly volatile paradigm in which constitutional rights arising out of national security intelligence measures are decided by courts. The analysis allows one to hypothesize the extent to which security concerns will take the lead when considering the constitutionality of counterterrorist legislation in US and Germany respectively. However, such conclusions might be overhasty. Despite the fact that the risk perceptions were high in the aftermath of the events in both countries, they landed on two different legal terrains. Before actually following the path of constitutional litigation after the 9/11, it is important to delineate the two legal regimes and cultures underpinning the understanding and legal protection of privacy in US and Germany. Both of these countries have been at the forefront of statutory privacy regulation in the middle of 70s and have developed substantial constitutional law jurisprudence on the subject of privacy.

The Value of Privacy:

The evolution of the legal right to privacy is grounded in certain human and societal concerns and needs. Although not absolute, the right is recognized in the Western world legally and philosophically as implicating fundamental values and principles such as liberty, autonomy and dignity of the individual. Its value for the preservation of a free and democratic society

has been widely accepted both in jurisprudential analysis of Constitutional courts[37] as well as in major scholarly works[38]. Yet as Solove has gloomily apprehended: ".. privacy is a sweeping concept, encompassing (among other things) freedom of thought, control over one's body, solitude in one's home, control over personal information, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations"[39]. But privacy has many philosophical and social dimensions. Consider scholars like Schoeman who have inquired into the exact nature of privacy semantically, as well as whether privacy is a right, a state or a level of control[40]. Till the end of his anthology replete with eulogies of privacy stemming from Posner's four privacy torts, through freedom, dignity and intimacy, the answer remains that it might be all of these. Sociologists and anthropologists have proven that need for individual and group privacy is a universal need that has its firm basis in our animal ancestors. Furthermore, there are numerous examples on the manner a degree of spatial privacy is a vital prerequisite for the reproduction and breeding, mating patterns and in general the "[promotion of] individual well being and small group intimacy".[41] Overpopulated areas where animals do not have sufficient space have also shown positive correlation with heart disease and aggressiveness among the species, with animals actually having recourse to

[37] See *Griswold v. Connecticut*, 381 U.S. 479 (*1965).* Justice Douglas writing for the majority underlined there is no general right to privacy in the Constitution, but nevertheless , it is an implied right emanating from various rights enumerated in the Bill of Rights to the US Constitution. His analysis is predicated on acknowledgment of rights in the penumbra of the 1st amendment (freedom of speech and association); 3rd amendment (prohibition against the quartering of soldiers); 4th amendment that contains a procedural guarantees against unreasonable searches and seizures "in their persons, houses, papers"; 5th amendment protection against self-incrimination; as well as in the 9th amendment allowed for the presumption that the enumerated list of rights is not finite : "Those rights not mentioned in the constitution shall be retained by the people". The 14th amendment is implicated by virtue of "ordered liberty" that might serve well to guide courts in their due process.

[38] See generally Samuel Warren and Louis Brandeis, "The Right to Privacy", Harvard Law Review 4 (1890); Alan Westin, *Privacy and Freedom*, New York: Atheneum, 1967; Donald Kommers , *The Constitutional Jurisprudence of the Federal Republic of Germany*, (2nd edition) , Duke University Press,1997; Edward J. Bloustein, "Privacy as an aspect of human dignity" in Ferdinand David Schoeman, *Philosophical dimensions of privacy: An Anthology*, Cambridge University Press 1984, Chapter 6; Jeffrey Rosen, The Unwanted Gaze: The Destruction of Privacy in America (2000), book review at: http://findarticles.com/p/articles/mi_m1316/is_6_32/ai_63165545/

[39] Daniel Solove, Understanding Privacy (Cambridge, MA: Harvard University Press 2008)

[40] Ferdinand David Schoeman ,Philosophical dimensions of privacy: An Anthology, (New York: Cambridge University Press, 1984) , Chapter 1 " Privacy : philosophical dimensions of the literature "

[41] Schoeman ,Philosophical dimensions of privacy: An Anthology, chapter 3, Alan Westin ,"The Origins of Modern Claims to Privacy" 55-76, 57

either violence to reduce the density in the populated territory, or even suicide. [42] Hannah Arendt writes on rise of the social realm has dramatically altered the conception of privacy:

> "the emergence of society-the rise of housekeeping, its activities, problems, and organizational devices-from the shadowy interior of the household into the light of the public sphere, has not only blurred the old borderline between private and political, it has also changes almost beyond recognition the meaning of the two terms and their significance for the life of the individual and the citizen".[43]

Irrespective of the psychological and anthropological grounding for the value of privacy, the manner in which the law recognizes certain aspects as worthy of protection is even richer. Actually, the language of rights itself has made possible the profligate use of privacy in so many different contexts[44]. This paper's will be interested in privacy legal manifestation, i.e privacy as a right that is both statutorily and also constitutionally protected in Germany and US. The legal right to privacy has been shaped by major developments in technology. This process started around the 70s[45] when major use of technology in government administrations spurred popular support and debate for the need of better protection of personal information.[46] Sometimes, the legal recognition of some interest has been driven by courts' far-sightedness, other times legislative bodies were first to prompt stricter standards in data protection[47]. Although the juncture of greater access of government to personal information and the use of sophisticated technology has been the stimulus to data protection development, it is arguably

[42] Schoeman ,Philosophical dimensions of privacy: An Anthology, chapter 3, Alan Westin ,"The Origins of Modern Claims to Privacy" 55-76,57
[43] Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), 38
[44] John Hollander, "The Language of Privacy", *Social Research*, Vol. 68, 2001

[45] Warren and Brandeis 's fervent support has also rested on reaction to technologically intrusive practices
[46] See Donald P. Kommers, *The Constitutional Jurisprudence at the Federal Republic of Germany*, (2d ed.1997), Duke University Press, Census Act Case (1983) 65 BVerfGE I, at 323. In this landmark decision, the Bundesverfassungsgericht recognizes "a right to informational self-determination" which triggers new developments in data protection in Germany
[47] The US Congress enacting the Right to Financial Privacy Act of 1978 after the court in *US v. Miller* decides that for the purposes of the 4th amendment , a customer of the bank has no expectation of privacy in the documents and information he supplies to the bank for his financial transactions known as the third party doctrine.

true that the nature of the legal right to privacy is generally reactive to abuses and new technologies. To the list of major events that shaped the legal protection of privacy, the use and abuse of technology in government anti-terrorist measures after 9/11 have stimulated yet another reconsideration on both constitutional and academic level.

Privacy and technology:

Certain aspects of the human existence have received special legal recognition as privacy rights. These aspects might be delineated according to different notions such as associational privacy that entails the right of the individual to be free in the relationships and associations she creates without being subjected to governmental interference[48]. The right of the individual to his own body is another aspect under the heading of privacy. Bodily privacy has been very closely related to the protection of individual autonomy and freedom of choice especially in US.[49] Another aspect is what might be named "communication privacy: the ability to communicate with people without others knowing what was communicated, including communication in person or by email, telephone, computer or other means".[50] Spatial privacy is arguably the oldest notion recognized under the rubric privacy, and this is all the more true in American jurisprudence since the right to privacy has evolved in the context of the spatial boundaries of the home as the most sacred and inviolable place where the individual must be free from governmental intrusion.

Methods of data collection: Data protection or informational privacy is the newest legally recognized dimension of privacy. Data protection generally pertains to "one's power

[48] Kevin Keenan, *Invasion of Privacy: a reference handbook* (Greenwood : ABC-Clio,Inc, ,2005),5. Keenan has systematized the various aspects of privacy receiving legal recognition into five separate categories: associational privacy, bodily privacy, communication privacy, data privacy and spatial privacy.
[49] In Roe v. Wade , 410 U.S. 113 (1973), the US Supreme court recognized the right to have an abortion under the heading of privacy although affirming as in other major decisions that bodily privacy is not absolute.See Jacobson v. Massachusetts, 197 U.S. 11 (1905) (vaccination); Buck v. Bell, 274 U.S. 200 (1927) (sterilization).
[50] See Kevin Keenan, *Invasion of Privacy: a reference handbook* (Greenwood : ABC-Clio,Inc, ,2005),.5

to determine who can collect and access information about oneself".[51] Data protection legislation has been triggered through the introduction of more and more sophisticated technology capable of storing, generating and manipulating information about individuals in radically new ways without even impinging on their spatial privacy. Methods for data-gathering include but are not limited to what has been deemed more traditional as well as newer advances in technology: arrest records, bank records, cable television, computer crime, computer data banks (private and governmental), credit reporting, electronic eavesdropping, employment polygraphing, employment records, medical records, school records, social security numbers, national identity cards containing biometric information, surveillance technology, tax records, wiretaps, data mining, etc.[52] Many of this data collection devices serve perfectly legitimate government needs In the aftermath of the 9/11, government made quick recourse to this new techniques. The Bush administration signed into law the Enhanced Border Security and Visa Entry Reform Act of 2002 that introduced biometric identification such as fingerprints and face scanners upon entry in the country as part of a more aggressive preventive strategy at airport and external borders for immigration checks inspection.[53]

Harms: On the landscape of informational privacy, some features have surfaced as problematic and the law usually regulates aspects of informational privacy pertaining to collection of information, processing, dissemination and invasion[54]. Although the collection and storage of information is not nor per se dangerous for the privacy interests of individuals, the government's usage and storage of personal information has for historical reasons been suspect. Legal recognition of informational privacy and support for the introduction of data

[51] See Kevin Keenan, *Invasion of Privacy: a reference handbook* (Greenwood : ABC-Clio,Inc, ,2005),.5

[52] For further elaboration on how each of these administrative tools might violate privacy in US see Warren Freedman, *The Right of Privacy in the Computer Age*, Greenwood Press, Inc. , 1987, 93-111 : discussing the right to privacy in the computer technology age specifying briefly the protection afforded in federal, state and constitutional law. For similar analysis in Germany see Collin Bennett *Regulating privacy* (*Data protection and Public policy in Europe and the United States)* (Ithaca, NY: Cornell University Press,1992)

[53] Enhanced Border Security and Visa Entry Reform Act , [H.R. 3525], May 14, 2002

[54] Daniel Solove, "A Taxonomy of Privacy",154 *University of Pennsylvania Law Review* 477.

protection laws gained momentum in the 60s and 70s as part of a more subtle awareness to the power of technology when combined with an ever growing state administration[55]. The juncture of state bureaucratization and technological means of surveillance and information processing has been decried combined with horrific accounts for the life of the modern individual and her privacy were made up.[56] The state has always been seen as the greatest challenge to the abuse of personal information relating to the individual, not because the government has the legitimate right to gather information about individuals to sustain the welfare state and provide services to its citizens, but because "[the] total surveillance of George Orwell's 1984 could only be achieved by the state"[57]. On the more abstract level, warnings have been well articulated by philosophers such as Foucault who argued that the rationality that prompted the art of government in the modern state inevitably is to give rise to more or less excessive rationalization of the state and its mechanisms of power. The Nazi welfare represented the extreme of this rationalization because of the complete internalization of the juridical system in the state apparatuses and the employment of racial cleanliness as a normative technology. However, his words are worth remembering: "The relationship between rationalization and excesses of political power is evident. And we should not need to wait for bureaucracy or concentration camps to recognize the existence of such relations".[58]

Information privacy:

[55]See Collin Bennett, *Regulating privacy*(*Data protection and Public policy in Europe and the United States)* (Ithaca, NY: Cornell University Press,1992), (hereinafter Bennett, *Regulating privacy*) especially chapter 2 " The Politics of Data Protection"

[56] Bennett, *Regulating privacy*, 37: Bennett accounts for the rise in privacy concerns out of the state's capacity to collect of various sensitive information about individuals and a renewed interest in the work of George Orwell *1984* as the professed year of 1984 approached.

[57] Francesca Bignami, "European versus American liberty: A Comparative Analysis of Antiterrorism Data mining", 48 Boston College Law review 609, May 2007, 637

[58] Michel Foucault , *The Foucault Reader* ,ed. Paul Rabinow, 13

Arguably, this particular manifestation of the right to privacy, informational privacy, is easier and much more concrete to become an object of investigation and has readily loomed as one of the most serious abuses of power in US and Europe in the context of the fight against terrorism. Some particularization of the concerns is necessary in light of the fact that the general sounding of "right to privacy", though certainly more appealing, is blurrier in both its conceptual and legal materialization, or more precisely implicates all of the above mentioned values and legal protections. Daniel Solove has compiled a useful taxonomy of privacy in which he suggests formulating privacy concerns according to the harms they inflict[59]. He argues that taxonomy is needed for the conceptual vagueness of privacy only contributes to its being easily defeated when balanced against countervailing interests.[60]His claim is that without understanding privacy harm there is no way to protect from them. His theory does steps back from articulating any first principles grand theory for protection of privacy and assumes a pragmatic approach based on the understanding that some activities although harmful might do not automatically require recognition as rights. And that some rights would necessarily require to be balanced with an overarching principle.

However, the difficulty of reducing privacy to a right to determine what information about oneself is available to others begs the question about the moral status of privacy. It begs the question why should there be a right for people to determine the information about themselves. Consider also the justification for pragmatic approach to privacy in the context of the war on terror. In this respect, it is also problematic to confirm his claim with any certainty that national security interests are better articulated precisely because a lot of the aspects relating to threats to national security remain partly or completely hidden from the public, and it is the same hollow incantation Solove attributes to the emotive rhetoric behind violations of

[59] Daniel Solove, "A Taxonomy of Privacy", 154 *University of Pennsylvania Law Review* 477, January 2006(hereinafter Solove, "Taxonomy of Privacy")
[60] Solove, "Taxonomy of Privacy"

privacy that resounds when concepts of national security are invoked. The skepticism in giving outright priority to the value of national security in the context of the war on terror is implicit in the nature of the war and the way it alters traditional notions of criminal law and law enforcement by employing measures that have purely preventive as opposed to punitive character thus effectively stripping traditional constitutional protections of privacy. In the context of terrorism, it is often a neglected aspect that special executive powers under the rubric of national security have trumped any claims that traditional search and seizure and data collection standards apply, partly due to the many exemptions that are created in statutory acts relaxing the standards for obtaining information , but also as symptomatic of the larger shift in jurisprudential analysis concerning "special needs". The problem becomes obvious once the realization that the war on terror only superficially alludes to temporality and also that courts have long ago embraced in certain cases involving law enforcement and regulatory functions of the state a doctrine of special needs that exempts the government from individualized suspicion and issuance of warrant on probable cause.[61] Even more serious is the question in what balancing tests are engaged courts when examining an anti-terrorist law for its constitutionality. The role of courts thus is very important to channel larger societal concerns over growing data collection.

In the comparative constitutional scholarship, some commentators have suggested privacy protection in the Germany and United States are underpinned by different values with liberty underpinning the right to privacy in America, and dignity infusing privacy thinking in European societies.[62] Although it is true that the two models sharply diverge, it is clear human dignity understood as the intrinsic value of every human being is part of the philosophical as

[61] Carol S. Steiker, "Foreword: The Limits of the Preventive State", 88 J. Crim. L.& Criminology 771 . Steiker analyzes in detail two decisions of the Supreme court that nicely illustrate the growing challenge posed by the preventive state – the lack of any clear constitutional doctrine on the question "to what extent the state's attempt to prevent or prophylactically deter (as opposed to investigate) crime and to incapacitate or treat (as opposed to punish) wrongdoers insulates the state actions from the limits the law would otherwise place on the investigative/punitive state".

[62] See James Q. Whitman, "The Two Western cultures of privacy: Dignity versus Liberty. 113 Yale L.J. 1151

well as legal tradition in America. Furthermore, human dignity is at the center of constitutionalism and the rule of law in the modern constitutional systems of liberal democracies. Asserting such tremendous divergence between the two cultures seems exaggerated as it might well be argued that the concept of dignity has its functional equivalence in philosophical understanding of autonomy and liberty. Of course, the presence of the principle of human dignity as a written constitutional right produces different jurisprudential and constitutional analysis.[63] But arguing there is no commonality in dignitary concerns is belittling the value both systems place on the individual and his/her rights. After all, the possibility of ever making a meaningful comparison between the two systems is the fact they have been philosophically and legally devoted to liberal constitutionalism.

That is also a starting point of analysis in this paper. The context of the discussion of privacy in the preventive state is liberal constitutionalism. It presupposes the presence of legal recognition of certain aspects of individual life which are not ordinarily subject to governmental intrusion as the individual in the liberal democratic state is conceived as a moral agent capable of reason. So except for the welfare state mechanisms of isolating individuals or preventive restrictive measures applied to the individual deviating from the norm (and the norm being that of autonomy and consciousness of the individual of his/her actions), the "normal" state of affairs is individuals left alone to conduct their lives and make choices inherent of their status as free members of society. This Lockean understanding of society is predicated on the western tradition of liberal constitutionalism of limited government, separation of powers as means to curb excessive centralization of power , human rights protection and accountable government. Privacy is the liberal philosophical tradition is the necessary civilizational achievement that allows for the growth and existence of civil

[63] Basic Law for the Federal Republic of Germany, art.1

society and prevents its total politization.[64] These characterize all the western liberal democracies and particularly the ones under discussion-Germany and the US. The firm grounding of rights in the dichotomy public/private often invokes communitarian and feminist critiques who criticize the autonomous individualistic grounding of the concept of privacy as allowing for the multiplication of abuses and the veiling of violations under the guise of rights.

Critiques of this philosophical underpinning of the legal right to privacy underlie the atomizing aspect of privacy, its undesirability as a tool of building communitarian participatory democratic society that values cooperation, community and active citizen participation. There are many ways to respond to the communitarian critiques by centering the argument on harms inflicted to individuals and how these individual harms translate for the viability of participatory democracy (Chilling effect, discouraging individual idiosyncrasies, discouraging political participation, and normalizing effect on behavior and discourse, breeding mistrust and paranoia are only few of the these harms that would be the result effects of a policy of total). Clearly, privacy means many things to many people and admitting its sometimes subjective and also multifaceted nature should not presuppose total disavowal of the concept as such.Some approaches of similar scope have sought to underlie the derivative nature of the right to privacy to the result that any harm or violation that we name privacy right or violation can simply be labeled with another more clearly articulated and constitutionally entrenched right such as liberty or autonomy[65]. This paper strives to posit a better understanding of privacy as a holistic concept and legal right. A holistic understanding of privacy is a necessary step in any consideration of the war on terror and its effects on

[64] See Colin Bennett, *Regulating privacy*, 32: "privacy bolsters the boundaries between competing, countervailing overlapping centers of power. It builds or supports barriers both between the individual and the state and within the contours of civil society"

[65] Ferdinand David Schoeman, *Philosophical Dimensions of Privacy: An Anthology*, Cambridge University Press 1984, chapter 11 , Judith Jarvis Thomson, "The right to privacy"

privacy because of the nature of the harm that is inflicted upon both individuals but also society at large. Arguably, the systemic effect on privacy rights is much more important in such reconsideration of privacy.

The systemic effect of privacy violations translated beyond immediate concerns for the individual such as second usage of personal information, identity theft, mismanagement and fallibility of technologies, or the harm implicit in the wrongful conviction which is both material, psychological and dignitary. Technologically powered surveillance does not only decipher the "unwanted gaze", it translates into controlling psychological fears of who knows what about us. In the war on terror, usage of financial, consumer data, video surveillance, and unwarranted wiretapping converge with the preventive mechanisms and produce the reality of society that is dangerous and needs control by an overarching paternalistic preventive state. Constant surveillance's logic subverts normal criminal justice methods by turning individuals into suspects without any reason for individualized suspicion which offends not only personal privacy but political freedom and as such it endangers the democratic foundations of the state. Under the veil of secrecy, governments have instigated massive surveillance complexes in the construction of the preventive state. In the form of national security letters, gag orders, racial and religious profiling, financial data disclosure on government's will, intrusive police practices, the curtailing of associational freedoms and implicit censure through the national security rational of media, the "war on terror" subverts political freedom and basically implicates al the rights and freedoms that should serve as a bulwark against such profound interference.

These measures do not translate to the same effect upon separation of powers and procedural guarantees for the data protection and privacy. As mentioned already, the constitutions of the different states are differently afflicted due to divergence in administrative agencies, national security agencies' scope of legal powers, the different positions Germany

and US especially have in terms of foreign intelligence and counter-intelligence structures. The main comparator in this paper will be the preventive state and how the structural components of the preventive state which are predicated on historical experience, constitutional tradition and philosophical underpinnings crystallized into similar or diverging level of protection of privacy and data collection. The comparative analysis is in itself valuable not the least because Germany has some of the elements of militant democracy built into its constitution which are also present into the preventive state. For this paper, the term preventive state is somewhat preferred over other terms generally used in the literature such as national surveillance state, counter-terror state, and others[66]. The preventive connotation is preferable because of its ability to establish a link with the official discourse that justifies the tight measures affecting privacy and data collection. The idea of open and accountable government is corollary to the idea of privacy as a bulwark against excessive politization of society. Alan Westin enumerates several of the reasons behind the need for data protection for the preservation of the democratic state:

> " ….it prevents the total politization of the state, it bolsters religious diversity and tolerance, it protects the membership of voluntary associations; it fosters free scholarly investigations; it protects the electoral process by forbidding government inquiries into a citizen's voting records; it establishes barriers against compulsory self-incrimination and intrusive police practices; and it protects the activities of the press and other institutions which operate to keep government accountable".[67]

The caveat of comparison: There are a few necessary qualifications to be made before analyzing the differences between the two legal regimes in Germany and US. For the purposes of this analysis, only cases that are relevant to reveal potential divergence in the implementation of anti-terrorist measures have been selected. This restriction is important if the picture is to become clearer as to which aspects of privacy receive better protection. This

[66] For a discussion of the emerging preventive state Andras Sajo, " From militant democracy to the preventive state?", 27 Cardozo L. Rev. 2255, March 2006
[67] Alan Westin, *Privacy and Freedom*

qualification requires narrowing the focus to constitutional cases that regulate data collection and informational self-determination by public bodies. This delimitation of the spheres of analysis is predicated on the structural differences between two regimes. In Germany, there is no separate legal regime for private or public bodies. Some convergence in the war on terror as amounts to policy and type of legislation- curtailing the right to privacy: surveillance, wiretapping, exchange of information on financial data flows, passenger names, European arrest warrant received renewed impetus (although its efficacy is currently contested in terms of the several national constitutional courts that rejected its constitutionality). Surveillance might be achieved by a number of means that utilize different technology- imagery, signal, and human. The types of surveillance techniques used are eavesdropping, wiretapping, bugging, etc. For the purposes of this analysis, mainly those features related to data protection and informational privacy will be invoked. The invocation of the terrorist rationale in the paper is the conscious effort to see how security terrorist discourses have translated into law enforcement practices and techniques of crime prevention. The technological means employed do not really matter as to the fact privacy concerns are seriously implicated.

GERMANY:

Constitutional framework and the right to informational self-determination:

Germany has been extolled as one of the countries providing the strictest regimes of data protection in Europe, a statement not without its rationale[68]. Likewise, the German Basic law has a unique constitutional system for the protection of privacy. Germany is the only country that provides a constitutional protection for privacy of communications and data related to communications. Art. 10 of the Constitution provide that "the confidentiality of letters, as well as the confidentiality of post and telecommunications is inviolable" and that

[68] *Privacy International* , at http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-559535

"[r]estrictions may only be ordered pursuant to a statute."[69]. The Nazi past of the country has often been pointed as the cornerstone for the high level of constitutional protection. [70] Bignami's re-creates a gloomy story of the draft of Norwegian soldiers during the Nazi occupation of Norway through the files of a Government record containing the names , addresses , the sex , dates of birth , and other personal information of the population, that serves to underlie the benchmark of privacy regulation in Europe.[71] Nazism and communism have thrown a long shadow on the constitutional privacy regimes and cultural perceptions of European nations over the manipulation of data by the Government. In denial of their totalitarian past, the drafters of the Basic Law made human dignity a centerpiece of the constitution. According to Article 1 "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority".[72] As a central pillar of the Grundrechtskatalog (Bill of Rights), article 1 is not subject to constitutional amendment.[73] It has been the rationale of some of the major constitutional court decisions. The intellectual roots of the inviolable right can be traced to Kantian ideals of universal rights and the value of persons as such. This interpretation and the subsequent jurisprudential reading of the principle have been consistent with the framers intent to dissociate the right from any particular philosophy or religious tradition. [74]

The principle of human dignity has often been used in constitutional jurisprudence in conjunction with the right to free development of personality. Article 2 (1) reads "[e]very person shall have the right to free development of his personality insofar as he does not

[69] Basic Law for the Federal Republic of Germany, Art.10
[70] See Francesca Bignami, "European versus American Liberty: A Comparative Privacy Analysis of Antiterrorism data Mining", 48 *Boston College Law Review* 609 (hereinafter Bignami, "European versus American Liberty")
[71] Bignami, "European versus American Liberty", 609-610
[72] Basic Law for the Federal Republic of Germany, Art. 1(1)
[73] Basic Law for the Federal Republic of Germany, Art. 79 (3)
[74] See Donald P. Kommers, *The Constitutional Jurisprudence at the Federal Republic of Germany* (Duke University Press ,2d ed.,1997), 301 (hereinafter Kommers)

violate the rights of others or offend against the constitutional order or the moral law"[75]. The second clause of Article 2 stipulates:

> "Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law."[76]

The personality clause is not absolute and does not invoke an affirmative obligation to be promoted. The right to free development of personality has often been interlinked with other substantive positive rights in the constitution.[77] The free development of personality has been interpreted on a case by case basis and allowed for the emergence of jurisprudence of spheres in which the individual receives different level of protection of his privacy[78]. Regardless of the shifting boundaries of these spheres in the context of social developments, the court has delimited an "ultimate domain of inviobility in which a person is free to shape his life as he or she sees fit"[79] This core sphere received greatest protection since it is closest to the dignity of the person. [80]In the *Eppler case*[81], the court reasoned that having statement falsely attributed to someone, even without "actual violation of privacy" would implicate the right to the person to his self-image closely linked with the "concept of self-determination"[82] In a series of cases, the court has substantiated a framework of private concentric personal spheres. The least protected (Individualsphare) includes the protection of the right to self-determination, a right to resocialization after imprisonment, and a right to know one's biological parents.[83] The private sphere includes inviobility of one's core area/home, defamation and private

[75] Basic Law for the Federal Republic of Germany Art. 2 (1)
[76] Basic Law for the Federal Republic of Germany, Art. 2 (2)
[77] Kommers, *The Constitutional Jurisprudence at the Federal Republic of Germany* , 313
[78] Kommers, 313
[79] Kommers, 320
[80] Kommers, 320
[81] Eppler case (1980), BVerfGE 148, in Kommers, 320
[82] Kommers, 322
[83] Christian DeSimone, "Pitting Karlsruhe Against Luxembourg? German Data Protection and the Contested Implementation of the EU Data Retention Directive", 11 German Law Journal 291-318 (2010), at http://www.germanlawjournal.com/index.php?pageID=11&artID=1240" , 293 (hereinafter DeSimone, "Pitting Karlsruhe Against Luxembourg?")

correspondence.[84] The most intimate sphere (Intimsphare) demarcates the innermost feelings and thoughts of the individual , as well as sexual privacy and privacy of his/her diaries.[85]

The other two constitutional provisions relevant for the scope of protection of privacy is Article 10 [Privacy of correspondence, posts and telecommunications] has been are interpreted to include the content of letters and other written correspondence. The article has been interpreted further to include individual control over "how postal communications are stored, utilized, or distributed".[86] Article 13 protects the home. A search of the home "may be authorized only by a judge or, when time is of the essence, by other authorities designated by the laws". Acoustical surveillance is allowed if the person is believed on the grounds of particular facts he "committed an especially serious crime specifically defined by a law."[87] The same provision, art.13 (3) requires a warrant in the "aftermath of the surveillance", if the timing did not allow it in advance of the surveillance. [88]

Technology, State and the Courts:

The modern link between technological means for data collection in the exercise of state power and their encroachment on the right to privacy as substantiated in the German Basic law was considered in case concerning an all-population census in 1969. The Microcensus case[89] is the first of the two cases decided in between sixteen years in which the court had to decide on the constitutionally permissible limit of the collection of personal data in a census. These two cases have been considered at the centerpiece of the German privacy jurisprudence and the first to draw the link between free development of personality as

[84] DeSimone, "Pitting Karlsruhe Against Luxembourg?", 294
[85] DeSimone, "Pitting Karlsruhe Against Luxembourg?", 294
[86] Nicole Jacoby, "Redefining the Right to be Let Alone: Privacy Rights and the Constitutionality of Technical Surveillance Measures in Germany and the United States", 35 *Georgia Journal of International and Comparative Law* 433, Spring 2007, 458
[87] Basic Law for the Federal Republic of Germany Art. 13
[88] Basic Law for the Federal Republic of Germany Art.13
[89] Microcensus case (1969), 27 BVerf GE I , in Kommers 299

enshrined in art. 2(1) of the Basic Law and the inviolable principle of human dignity. The issue before the court arouses out of an amendment to a statute providing for a periodical census of the population in which standard household and employment statistics was collected. The amendment that was added in 1960 meant to require additional informational of leisure and vacation upon the financial sanction for refusal of submission. The case required the court to balance the legitimate interests of the community to receive personal information about the individuals relevant for "central governmental planning". In this case, the court found the requirement for compulsory disclosure of private information did not violate the right of individual dignity since it did not touch on the most intimate sphere of his personality. However, the court provided that even if the information was to be used for purely statistical purposes and was anonymized, the rights of the individual to human dignity are violated of he is transformed of a "mere object". It further contended that the principle of human dignity is violated of the state records and "register all aspects of his personality". The fact that the information was not pertinent to the most personal sphere which is obvious by the fact that the government could have obtained the information form other channels albeit with greater difficulty, and that the state provided for its confidentiality, including criminal liability for disclosure, was a sufficient evidence that the information Furthermore, the court regarded. In the eyes of the court, there was no implicit violation of the human dignity principle.

Building on preceding interpretation of the principle of human dignity[90], the court as well in subsequent decisions have emphasized an interpretation of the constitution in the spirits of Kantian philosophy underlying the symbiotic relationship between man and community as the means for the actualization of his liberty. The dignitarian interpretation[91] of

[90] Mephisto case (1971), 30 BVerf GE 173, in Kommers, 301: "man as an autonomous person who develops freely within the social community".
[91] Kommers, 299-360

the rights of the individual thus always had to be understood as proportional to some underlying public goal. In a series of cases, the FGC has defined a conception of the individual in according the Basic Law. In the Census Act case in 1983[92], the second census case on which the court decided, the right to informational self-determination was recognized. The right guarantees individuals "the fundamental capacity ... to decide for themselves about the disclosure and use of their personal data."[93] It is considered the cornerstone of the German data protection regime and the truly unique feature of the German constitutional system. Although the court built on its preceding jurisprudence in the Microcensus case that linked the right to free development of personality and the right to human dignity, it nevertheless emphasized the change in technologies as an important factor in its analysis. The court upheld the census, but substantiated the link between freedom of personal development and the principle of self-determination in their technological context with certain procedural restrictions. In order for the data collection to be constitutional, the principle of specificity and proportionality had to be observed. The principle of purpose –specification was that "the goal and extent of the data processing must be fundamentally connected to ..a particular purpose".[94]

The public upheaval over the census in which regional planning information was to be combined and compared to data in community registers reflected the rising anxieties over the sophistication of modern technologies and their capacity to infringe upon the personal sphere of the individual. From a sociological standpoint, a right to informational self-determination would provide the necessary guarantees for the stratification of personal roles deemed vital in the complex modern reality of sub-systems where individual are required to assume different

[92] *Census Act Case* (1983) 65 BVerfGE 1, in Kommers , 323
[93] DeSimone, "Pitting Karlsruhe Against Luxembourg?", 293
[94] See DeSimone, "Pitting Karlsruhe Against Luxembourg?", 296

public and private roles in their communication.[95] The construction of such dense web of social roles without the risk of flattening the core individuality of every human being could be achieved only if individuals are capable to determine and control "who knows what about them".[96] The right to informational self-determination resounded with a particular vision of the democratic polity in which the "social" and "legal order" facilitates public discussion and active civic participation. In line with proportionality principle of the constitutional court's jurisprudence, the court reasoned a limitation to the right to informational self-determination might be permissible when "it is overwhelmingly in the collective interest". Furthermore, the limitations to informational self-determination are to be deemed constitutional if specifying the purpose of the limitation and the prescribed limiting period. The requirement for purpose specification is a condition the court used to strike down several law enforcement and criminal investigations measures especially in the context of measures enacted after 9/11.

In yet another case concerning the intrusive usage of surveillance technologies, the court declared significant parts of a law on acoustic surveillance unconstitutional through establishing the interdependence of human dignity, free development of personality and the inviobility of the home.[97] A new law successive of a constitutional amendment of art.13 (The inviobility of the home) that permitted the acoustic surveillance of private premises without the knowledge of the suspects in occasions in which there was well-founded evidence that established the suspect had committed "one or more of a series of crimes, such as murder, treason, or money laundering"[98]. In the Large Eavesdropping Attack Case, the court linked its doctrine of private spheres to the home as "last refuge" in which effectively the innermost feelings, desires and thoughts are expressed. Unlike in previous cases that linked the

[95] See DeSimone, "Pitting Karlsruhe Against Luxembourg?", 294
[96] See DeSimone, "Pitting Karlsruhe Against Luxembourg?", 294
[97] The Large Eavesdropping Attack Case (2004) ; for a discussion of the decision see Nicole Jacoby, "Redefining the Right to be Let Alone: Privacy Rights and the Constitutionality of Technical Surveillance Measures in Germany and the United States", 35 Georgia Journal of International and Comparative Law 433, Spring 2007, 468-470 (hereinafter Jacoby, "Redefining the Right to be Let Alone")
[98] Jacoby, "Redefining the Right to be Let Alone", 471

constitutionality of a statute infringing on the right to informational self-determination to the observance of the principle of purpose-specification, i.e the condition that infringements on the right are constitutional only when "the requirements and the extent of the limitation are clearly regulated so that citizens can adjust their behavior accordingly"[99], the court considered the very means of surveillance too intrusive into the private sphere of communication which the court defined in relational terms : "conversations between close family members or other persons of trust, such as members of the clergy, physicians, and the criminal defense attorneys".

Before turning to the examination of those aspects of US constitutional law most relevant for the protection of personal privacy in the context of enlarged national intelligence operations, it is important to attend to one defining case in the German constitutional court jurisprudence on the question of government wiretapping that became the center of privacy alarms in United States after 9/11.[100] The Strategic Telegram Surveillance case decided in 1999 considered the scope of powers of the Federal Intelligence agency to conduct surveillance of international telephone and telefax communications without observing the probable cause as a procedural requirement. [101] Effectively, the case involved the constitutional right to art.10 of the Basic Law: "the confidentiality of letters, as well as the confidentiality of post and telecommunications is inviolable".

The complaint in front of the court was brought by professionals whose activities required intensive international communications. The law challenged in this case allowed for the surveillance of communications for the purpose "to investigate serious crimes, such as arms and drug trade, counterfeiting, money laundering, and terrorism if these activities could

[99] DeSimone, "Pitting Karlsruhe Against Luxembourg?", 296
[100] James Risen & Eric Lichtblau , "Bush Lets U.S. Spy on Callers Without Courts". NYT's December 16, 2005, at http://www.commondreams.org/headlines05/1216-01.htm
[101] For a discussion of the decision see Jacoby, "Redefining the Right to be Let Alone"

be connected to a risk of attack on Germany"[102]. The manner into which surveillance was established was through search terms and the data which was collected could be used to in the prosecution of the crimes described above.[103] Furthermore, the intelligence –gathered information could be shared among different agencies including the police for purposes that these agencies might see fit. [104] The complainants thus feared that their legitimate professional activities' communication might be captured because of the manner indiscriminately captured specific terms.

The court rested its decision on art.10, art.1 in conjunction with art.2 (1) and declared the statute constitutional. The parts declared unconstitutional were those related to the dissemination of the collected information .In line of its reasoning in the Census Act case, the court applied a standard of review that would meet the proportionality test and the principle of purpose-specification.[105] In the Census Act case, the court has explicitly confirmed that the collection of anonymized data for "yet –to-be determined purposes"[106] would fail to meet the purpose specification requirement. Furthermore, the court in Census Act case has reinforced a separation of powers link in data collection. The separation of powers requirement in this context translated into the requirement for the purpose of the data collection, each state agency to be considered as separate data collector. Thus, the data sharing between agencies in the Strategic Telegram Surveillance case was deemed unconstitutional.[107] In construing the scope of the limitation, the constitutional court applied the same argumentation in its previous decision on privacy. Thus not the intrusiveness or arbitrarily collection of data bits was seen as problematic by the court but rather the manner into which information was

[102] Jacoby, "Redefining the Right to be Let Alone", 468
[103] Jacoby, "Redefining the Right to be Let Alone", 468
[104] Jacoby, "Redefining the Right to be Let Alone", 468
[105] See DeSimone, "Pitting Karlsruhe Against Luxembourg?",296
[106] DeSimone, "Pitting Karlsruhe Against Luxembourg?", 296
[107] Jacoby, "Redefining the Right to be Let Alone", 470

decontextualized and thus created preconditions for a chilling effect on individuals.[108] Thus, the court affirmed its position that bare collection of information is not problematic per se, but rather the exclusionary effect that violates fair information practices.[109] The FGCC stipulated that the individual whose information has been collected would have to be informed aftermath regardless of the period of storage.[110]

Overall, the FGCC managed to build a comprehensive constitutional regime of data protection firmly grounded in the inviobility of human dignity, free development of personality and the principle of self-determination. The court jurisprudence on free development of personality was modulated by the changing technological innovations and administrative centralization processes in the modern state thus guaranteeing that novel ways to collect process and manipulate information. Thus, the jurisprudence of the FGCC was predicated on a particular vision of the individual and the society in which she lives. The theory informing constitutional understanding saw the control over information and subsequent usage of that information as a vital part of the integrity of the individual and his capacity to retain distinctive, civic identity.

UNITED STATES:

Privacy as an implied right:

Unlike in the German Basic Law, privacy does not find textual support in the Bill of Rights although the court has construed "zones of privacy" around the core of different

[108] For a discussion on the different harms implicated in the concept of privacy see Daniel Solove, "A Taxonomy of Privacy", 154 *University of Pennsylvania Law Review* 477, January 2006
[109] Daniel Solove, "A Taxonomy of Privacy", 154 *University of Pennsylvania Law Review* 477, January 2006, 523: "an individual must be able to "find out what information about him is in a record and how it is used"
[110] Jacoby, "Redefining the Right to be Let Alone", 470

constitutional provisions[111]. The lack of textual grounding has fraught the American legal conception with inconsistencies and sparked a furious debate over judicial activism that has in some sense has led to the demise of usage of the concept of privacy in constitutional jurisprudence.[112]

Its sheer broadness and vagueness has made it a volatile framework for constitutional adjudication. The Warren and Brandeis's article "The Right to Privacy" is considered the legal christening of the value of privacy. To a certain extent, Warren and Brandeis have expounded a vision for the future in the sense that they captured the attenuation of the sphere of privacy that accompanies the rise of modern technologies and the complex social hierarchies in the life of the individual. This analysis has its repercussions for the modern reading of the right since it propounds the intricate relationship of a self-awareness that grows with the complication of the social world. The right to privacy according to Miller has been a misnomer from its very conception and self-defeating particularly because of the fact "so much is not private, nor can it be" [113] in a technologically produced and lived reality.

The complexities of the modern life and the rise of technologies have been then and now the cornerstone of the analysis of privacy. The initial stimulus for the publication of the article has been the commercial use of person's images which according to Warren and Brandeis was contrary to the spiritual nature of the human being. Entrenched in a property paradigm, the legal right to privacy was allowed to grow and reflect the intangible aspects of the human mind and thoughts. With mind of the potential of common law to grow and reflect changes in political, social and economic affairs, the two justices proposed the inclusion of a tort law with the name intrusion of privacy. The appeal of privacy started immediate claims and tort

[111] Griswold v. Connecticut, 381 U.S. 479 (1965)

[112] See David J. Garrow, *Social Research*, Vol. 68, No. 1 (Spring 2001): "Privacy as a reputable constitutional concept has been the victim—and probably in all truthfulness the no longer breathing or revivable victim—of the constitutional commentators whose academic assaults on first *Griswold* and then far more so *Roe* have left both of those rulings with the widespread reputation of being either an analytical laughingstock or at least an academic embarrassment."[112]

[113] Jeremy Miller, "Dignity as a New Framework, Replacing the Right to Privacy", 30 Thomas Jefferson Law Review 1, 1

law jurisprudence quickly developed, but it did not receive legal recognition in the constitution until the controversial decision of Griswold v. Connecticut,[114] By the time the challenge was brought, the US Supreme has already recognized the "sanctities of man's home and the privacies of life" [115]in a case that held unconstitutional federal subpoenas of business record files. In another decision prior to Griswold, the court had to decide on the constitutionality of a state statute that required the forceful sterilization of persons who were convicted three or more times of crimes ranging from felony to violation of the revenue acts[116]. Writing for the majority, Justice Douglas, the inventor of the right to privacy, considered the intrusion upon marriage and procreation as one of the gravest "civil rights violations"[117].

In Griswold v. Connecticut, the state had to decide on the constitutionality of a state law that criminalized the provision of information and medical instruction about contraceptives to married couples. The director of Planned Parenthood League of Connecticut Estelle Griswold and a physician were charged with the illegal dissemination of information and hence fined in accordance with the Connecticut statute. By the time of the decision, the practice of deriving rights without textual basis has been solidified and Justice Douglas had to apply an "analogous, non-constitutional, core/penumbra reasoning to justify third party standing for the defendant appellants"[118] and allow the criminal statute to be voided on the basis in violated marital privacy. In fact, as Kanter argues, even if considering in whole and in part the justifications proposed by the majority there is still no guarantee that the various penumbras of the enlisted rights would add up to a satisfactory justification of the right to privacy. Justice Douglas by analogizing with the first amendment derived right of freedom of

[114] Griswold v. Connecticut, 381 U.S. 479 (1965)
[115] Boyd v. United States**,** 116 U.S. 616 (1886), citing Entick v Carrington, 19 How. St. Tr. 1029
[116] Skinner v. State of Oklahoma ex. rel. Williamson Oklahoma 316 U.S. 535 (1942)
[117] Skinner v. State of Oklahoma ex. rel. Williamson Oklahoma 316 U.S. 535 (1942)
[118]Stephen Kanter " THE GRISWOLD DIAGRAMS: TOWARD A UNIFIED THEORY OF CONSTITUTIONAL RIGHTS", *Cardozo Law Review* Vol. 28:2, 630

association concluded that „specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." He further contended that various "guarantees create zones of privacy" with freedom of association in the penumbra of the 1st amendment, and others equally protecting a zone of privacy around the 3rd (prohibition against the quartering of soldiers in private homes), 4th (prohibition against unreasonable searches and seizures), 5th amendment(prohibition against self-incrimination), 9th amendment (reservation of the rights retained by the people), and 14th (due process of rights making the bill of rights applicable to states). Based on this doctrinal predicament where in the Bill of rights to ground a right to privacy, there were considerable disagreements among the concurring justices as to which right is most suitable to embody the interest at stake.

The concurring opinion of Justice Harlan deserves separate mention here. In his opinion he contends that the due process clause of the 14th amendment stays on its own to guarantee the liberty of the individual to be free from the undue moral judgments by the state in his conduct and personal affairs[119]. He articulates the interest at state as one of liberty in the privacy of the home, but distinguishes the kind of intrusion implicit in the fourth amendment from the one the criminalization of contraceptive advice inflicts: "It is clear, of course, that this Connecticut statute does not invade the privacy of the home in the usual sense, since the invasion involved here may be accomplished without any physical intrusion into the home"[120] The progeny of Griswold evolved in remarkably different directions to reflect different interests that sought legal recognition. The right to privacy was followed by the right to be

[119] Griswold v. Connecticut, 381 U.S. 479 (1965) (Justice Harlan dissenting opinion)
[120] Griswold v. Connecticut, 381 U.S. 479 (1965) (Justice Harlan dissenting opinion)

from free from undue burden in decision-making in intimate matters as marriage and procreation. [121]

Fourth amendment: Defining "reasonable expectations of privacy":

In the context of data protection and informational self-determination, the fourth amendment to the U.S Constitution is the central constitutional provision guaranteeing the right of people to be free from arbitrary governmental intrusion:

> 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.[122]

The fourth amendment has been applied in criminal justice context usually in the form of exclusionary rule[123]. The exclusionary rule stipulates that evidence gathered in a conduct or seizure without probable cause would not be admitted into court[124]. The origins of the amendment can be traced to the colonial general searches and the writs of assistance which arguably sparked the flame of the American Revolution. The general searches were widely used to suppress seditious libel and leading to raids of printing houses and publishers' homes.[125] The fourth amendment is considered to contain generally two parts that invoke separate consideration. The jurisprudence under the fourth amendment for the most time strived to delineate the scope of protection afforded in the first part of the clause. More

[121] Roe v. Wade, 410 U.S. 113 (1973) (the Court extended the constitutional right to privacy to the freedom of a woman to have an abortion); Lawrence v Texas, 539 U.S. 558 (2003) (holding that intimate consensual homosexual acts are protected under the due process of law (14th amendment))
[122] U.S. Constitution, 4th amendment
[123] Weeks v. United States, 232 U.S. 383 (1914 (prohibiting the admissibility of illegally obtained evidence in federal court); consider as well Mapp v. Ohio, 367 U.S. 643 (1961) extending the prohibition to state courts.
[124] Weeks v. United States, 232 U.S. 383 (1914
[125] See Thomas Y. Davies, "Recovering the Original Fourth Amendment", 98 *Michigan Law Review* 547 (1999)

precisely, the court strived to define what is "unreasonable" and what constitutes "search and seizure". In Olmstead v. United States[126] the question of whether evidence obtained through wiretapping of private telephone conversations should be admissible in court proceedings. The court held that to trigger fourth amendment protection a "search" and "seizure" must constitute a physical trespass and since the wiretapping in case did not , the evidence was admissible. Writing in dissent, Justice Brandeis's lamented over the "right to be let alone-the most comprehensive of the rights and the most valued by civilized men."

Katz v. United States breathed new life into the fourth amendment when the court emphasize that the protection from unreasonable searches was meant to protect people and not simply physical places and thus basically overturned the trespass property –based doctrine employed in Olmstead v. United States. [127] In Katz, a recording listening device was placed on a telephone booth by agents of the FBI that later sought to use the evidence in court for criminal proceedings. [128]To decide the case, the Supreme Court justices had to account whether eavesdropping on calls from a telephone booth in a public place constitutes search in the context of the fourth amendment. The court reasoned that it did since by entering into the telephone booth and closing the door, the defendant had had reasonable expectations for the privacy of his communications[129]. The court's opinion resounded with the Warren and Brandeis's analysis of the pervasive technologies in modern life by claiming the vital role public telephone communications had come to play in private communications. The fact that Katz sought to preserve his communications as private, "even in an areas accessible to the public"[130], extended the fourth amendment protection to his communications. In a concurring opinion, Justice Harlan established the two-pronged test that currently guides fourth amendment protection jurisprudence, albeit the test has considerably been modified from its

[126] Olmstead v. United States, 277 U.S. 438 (1928)
[127] Katz v. United States, 389 U.S. 347 (1967)
[128] Katz v. United States, 389 U.S. 347 (1967)
[129] Katz v. United States, 389 U.S. 347 (1967)
[130] Katz v. United States, 389 U.S. 347 (1967)

initial thrust. The test required in Katz from a judge to determine whether a suspect has had reasonable expectations of privacy in her/his activities and whether the suspects' subjective expectation of privacy is one that society is prepared to accept. [131]

Although the test in Katz was particularly promising for establishing strict protection over privacy encroachments, the court has gradually relaxed the test. In its current application, a police observation from public space and the data captured thus captured would not be considered a search for the purposes of fourth amendment. In California v. Ciraolo[132], the court held that a person could not have a reasonable expectation of privacy in growing marihuana in his backyard. The police has received an anonymous signal that marihuana is grown in the backyard of the defendant's house and used an airplane to surveil the area of his home because the defendant had built high wall which did not allow visibility from the ground. In upholding the constitutionality of the surveillance, the court held that "protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home". Even more importantly for future jurisprudence on the use of advanced technologies in surveillance was the court's affirmative belief that "any member of the public flying to airspace who gleaned down could have seen everything that these officers observed ".Powell's strong dissent emphasized the court was misconstruing the test in Katz by emphasizing the physical position of police instead of seeing whether the surveillance activity "invaded a constitutionally protected reasonable expectation of privacy".

Gradually, a consideration of the means of surveillance made its way in court's reasoning on the range of limitations of criteria necessary to support the assumption that society is ready to recognize a subjective expectation of privacy. In Dow Chemical Company v. United States[133], a private company refused to subject its premises to the inspection of the EPA (Environmental Protection Agency) and EPA subsequently hired an aerial photographer

[131] Katz v. United States, 389 U.S. 347 (1967) (Justice Harlan's concurring opinion).
[132] California v. Ciraolo , 476 U.S. 207 (1986)
[133] Dow Chemical Company v. United States , 476 U.S. 227 (1986)

without search warrant. Dow filed a suit in a district court charging EPA has violated his fourth amendment rights. The fact that pictures could be taken from a public space with a publicly available technology qualified as sufficient in the eyes of the court to discharge the proceedings and consider ERA did not require a search warrant.

In Smith v Maryland[134], the court decided whether the use of pen registers, a technical device that allows the numbers dialed from a phone number to be monitored, without prior search warrant violated the fourth amendment. The police has initiated pen register monitoring on a suspect of burglary who was making harassment calls to the victim of his burglary. Smith argued that he has legitimate expectations in the numbers dialed from his phone number and subsequently the pen monitoring violated the fourth amendment. The logic in Katz that a person could not have legitimate expectations of privacy in what he knowingly exposes to the public controlled the reasoning in Smith as well. The fact that the numbers dialed from his private telephone number were already available for business purposes to the telephone company precluded any further considerations of his privacy interest.

In yet another decision related to information processed for business purposes, the Court declared a person cannot have any reasonable expectation of privacy in information held by a third party[135]. The information in case was pertaining to bank account records and the court affirmed that since the information involved standard business data to which the individual voluntarily has given access , the government may require access to these records without encroaching on the person's fourth amendment. The decision is a paradox to an extent since the requirement for banks to "maintain a copy of every customer check and deposit for six years or longer" was a requirement under the Bank Secrecy Act. Thus effectively the reasoning as to the voluntariness of the act of submitting data flawed only if considering that bank services are a necessity in modern life and the person does not have many alternative

[134] Smith v. Maryland, 442 U.S. 735 (1979)
[135] United States v. Miller, 425 U.S. 435, 1976

ways in which to handle her business and financial transactions. The third party doctrine articulated by the court in Miller contextualized in the prevalence of digitalized information in modern times had well created "a broad exception to the Fourth Amendment"[136]

Overall, in the context of advanced technologies, data collection and overwhelming government powers, the approach of the United States Supreme court cannot be considered as an adequate information and data protection regime. To remedy for the lack of coherent information protection in the constitution as well as respond to concerns over secret surveillance raised by the people in the aftermath of the Watergate scandal, US Congress enacted the Privacy Act in 1974.The scope of the statute is broad and regulates almost all kind of data that the government legitimately processes for purposes of tax collection, social and government benefits, law enforcement, employment, and many other legitimate purposes. However, there are many exemptions under the Privacy Act which shall be examined in the context of national security and the extent to which any statutory ot constitutional barriers have served as an effective barrier in government data mining, surveillance and eavesdropping programs.

Overall, "reasonable expectations test is that it is fundamentally concerned not with expectations about the nature of particular *spaces*, but rather with expectations about the accessibility of *information* about activities taking place in those spaces."[137] In Germany, the spatial metaphor mainly impregnates the analysis of the different spheres of privacy where the individual has some varying degree to intimacy in the innermost where he has the greatest. In general, the notion put behind the jurisprudence of the FGCC has been based on the idea of free and equal citizens that do no fear neither conform flatly, but rather robustly protect civic and republican values through active participation. The idea of the transparent citizen which

[136] Fred H. Cate, "Government Data Mining: The Need for a Legal Framework", 460
[137] Julie E. Cohen, "Privacy, Visibility, Transparency, and Exposure", 75 U Chi L Rev1

the Court has employed is a ubiquitous metaphor for the type of relationship the Basic Law imagines for its citizens

The other point of contention is the moral and political antiquatedness of a strict public private divide and especially spatialization that bifurcates the litigation on privacy in public and private without explicit concern for the power of the technologies involved in state surveillance and their overall effect on society.

A major difference between the constitutions in US and Germany is that state action is a prior requirement to trigger constitutional protection. The state action doctrine has been an important conceptual difference in comparison with Europe where data protection applied to all parties public and private.

With Peter Galison and Martha Minow conclude that : "the limitations of constitutional analysis, the vagaries of statutory coverage, and the frailty of individual vigilance, taken together expose personal privacy to massive challenge by corporate and market activities"[138] . They suggest that the human rights framework is a weak predicate for successful litigation of privacy interests. Lacking textual basis will always weaken its position.

In the US legal framework, there is a piecemeal approach to privacy protection which is in dire need of amendments to reflect some major technological changes in information management over the last fifteen years. Several statutes on federal levels protect privacy interest, the broadest being the Privacy Act. The Privacy Act requires from federal agencies "to store only relevant and necessary personal information and only for purposes required to be accomplished by statute or executive order"; "to collect information to the extent possible from the data subject"; "to maintain records that are accurate, complete, timely, and relevant"; "to establish administrative, physical and technical safeguards to protect the security of

[138] Peter Galison & Martha Minow,,Our Privacy, ourselves in the Age of Technological Intrusions" , 276 in *Human Rights in the "War on Terror" /* ed. by Richard Ashby Wilson (2005), p. 242-294

records"[139]. The act further prohibits the exchange of information between different agencies of personally identifiable data contained in a "system of records". The exceptions are the receipt of a written request with the written consent of the data subject.

However, there is a growing number of states that provide protection of it on state level. The divergent framework within privacy discourse has evolved and some particular differences between the approaches that have emerged in the United States and Germany. This difference in intellectual grounding has been metaphorically understood as a dignity-inspired and a liberty based approach. The underlying idea behind these labels is the difference between the constitutional grounds established for the protection of privacy. While many important decisions in the US Supreme Court jurisprudence reflect an evolving understanding of the need to establish a greater room for personal choice and expressive conduct, some underlie the fact that privacy has been understood largely within the confines of firmly established notion of territoriality and visibility without considerable attention to the evolving character of technologies. In Germany, while in lesser degree, the right to privacy is grounded in many of its manifestations on firmer grounds as it relates to data protection, information or spatial notion of trespass. The German Constitutional Court has been careful to build its privacy jurisprudence around the proliferation of technologies as well as on firmer constitutional grounds as the right to dignity which is inviolable.

Both in Germany and the Unites States, the right to privacy in its spatial dimension is best protected at the home where individuals are deemed to have greatest expectation to free from government intrusion. Statutory legislation in the country had a common staring point but have diverged with Germany having a Data protection independent supervisory body and being applicable to both private businesses and public bodies. That is where the US Supreme court considered adding the aspect of expectations to entrench a system of privacy that

[139] US Privacy Act, § 552a. (1974); at http://www.law.cornell.edu/uscode/5/usc_sec_05_00000552---a000-.html

reflects on what people perceive privacy is. It is obvious that divergence in technological developments could not serve as a proper reason for delimiting whether a privacy interest is at stake. In this respect, the right to privacy as not explicitly endowed with constitutional protection has been one of the most susceptible to judicial interpretation and conceptualization rights. The other thing then that we need to add to the analysis has been precisely the fact that constitutional courts recognize value in certain aspects of existence and elevate them to constitutional importance. Moreover, they elevate it to the plane of judicial constructs and tests. Following this understanding of constitutional courts as norm generators, privacy jurisprudence in the two jurisdictions under consideration becomes implicitly related to the articulation of broader cultural meanings, while also underlying the limitations in technological sense of the judicial tests devised in the 70s and not up-to-date with the changing realities of the highly bureaucratic high-tech state.

Chapter Three:

Spectacle, law and the rise of the preventive state

Introduction:

So far, this paper has delineated the some major differences between the two legal cultures of privacy with respect to the right of informational self-determination, their historical and theoretical underpinnings. Although initially predicated on similar understandings of the necessity to create a system that better protects individuals' personal information concerns in the context of centralized governmental powers and enhanced technological means of

information collection and usage, the two jurisdictions have in practice developed substantially different constitutional and policy instruments.

Collin Bennett in his book *Regulating Privacy* explains in detail the consensus that emerged in the 60s and 70s under increasing fear from emergence of government data banks and the technological advances in automatic data-processing.[140] He describes how the United States and Germany championed privacy regulation and cherished the ideals of information fair practices[141]. In light of the current events, individuals and scholars share the ideal of common international privacy standards to counteract violations of privacy in response to terrorism.[142] Popular culture and mass media representations of a "Big Brother" government have permanently shaped concerns of the public for encroachments on privacy and the role of technology and computers. So while he contends there was in the Western countries a political and intellectual momentum that spurred privacy regulation and almost unanimity on the value of privacy, still Bennett sees a remarkable divergence in practice and implementation over the years.

The preventive state – a model to contextualize the events of 9/11

Privacy jurisprudence after 9/11 dramatizes some serious discrepancies between the two models of information protection even further. Although the departures in privacy have been explained by differences in the constitutional text, and subsequent constitutional interpretation as well as historical differences, some further divergences have emerged in the

[140] Collin Bennett, *Regulating privacy* (*Data protection and Public policy in Europe and the United States)* (Ithaca, NY: Cornell University Press,1992), see 193-220
[141] Collin Bennett, *Regulating privacy* (*Data protection and Public policy in Europe and the United States)*
[142] See The Madrid Resolution, International Standards on the Protection of Personal data and Privacy, November 5th, 2009: at http://www.privacyconference2009.org/dpas_space/space_reserved/documentos_ adoptados/common/2009_Madrid/estandares_resolucion_madrid_en.pdf

context of the war on terror. The "framing effect"[143] as interdependent on national cultural memory and practices has reinforced different discourses on the necessity of introducing special measures in the fight against terrorism which invoked different constitutional mechanisms. The historic experience of Germany with fighting domestic terrorist groups has fortified the refinement of the constitutional tools of militant democracy. US also faced some serious internal threats that have bolstered a culture of preventive practices while likewise instituting better safeguards against government violations of privacy[144]. However, in both countries the antiterrorist campaign introduced a forceful approach of balancing privacy and security which strips privacy protection of reasonable meaning in the face of serious and conspicuous threat such as potential terrorist attack. It reinforced in public perception and official discourse the phenomenon of a risk society and ultimately recreated this risk – aversive approach in the domain of law. An overall result of the eventalization of the 9/11 and the legal response to counteract terrorism might be a qualitative change in the liberal constitutional state[145].

The concept of preventive state helps to connect the dots between privacy concerns and the overall system of governance through precaution[146]. The precautionary principle expresses the idea that "uncertainty is no excuse for inaction against serious or irreversible risks, that absence of evidence of risk is not evidence of absence of risk, and that rather than waiting for evidence of harm to be demonstrated before acting, the burden of proof should be shifted to require sponsors of a risky product or activity to demonstrate that it is safe or else be subject to regulatory restriction. The precautionary principle in counterterrorism manifest

[143] For a discussion on framing effects see Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames Choice*, New York : Russell sage Foundation, 2000
[144] The Privacy Act , 1974
[145] Andras Sajo, "Militant democracy"
[146] Jessica Stern& Jonathan B.Wiener, "Precaution Against Terrorism", *Journal of Risk Research,* Vol. 9, No. 4, 393–447, June 2006 (hereinafter Stern& Wiener, "Precaution Against Terrorism")
gainst Terrorism")

itself in the fact it operates on a "sketchy, evidence or hints of planning"[147] of a terrorist attack.

The worst probably feature of the manifestation of the precautionary principle in counterterrorism has been its predilection to respond to "worst-case scenarios of potential attackers' motivations and capabilities"[148]. At the extreme pole counterterrorism responds with rigorous measures such as detention of suspects without due process of law, a scenario already familiar even in liberal constitutional states.

The category of "preventive state" describes "a specific form of welfare state paternalism that operates against non-political security threats"[149] The model Sajó introduces is based on "clusters of counter-terror techniques" that is widely recognizable currently in many liberal constitutional systems. [150] Sajo differentiates between the models of militant democracy that has been traditionally associated with the German experience of home grown threats to the free democratic order within the rule of law and the emerging set of techniques that states have used to counteract terrorism that verge on extralegal system. His attempt is not to define which model is best, though, but which models are likely to emerge as practice over time.[151]

The models that emerge vary but nevertheless have some underlying features in common- they all face a permanent emergency.[152] To this extent, the preferred constitutional model to accommodate the threat to national security will depend on the level of perceived risk.[153] The factor of risk assessment figures as utmost. In evaluating the constitutionality of such an approach to security however signals the problem of measuring probability. On most occasions, the credibility and legitimacy of government response "depends on the strength of

[147] Stern& Wiener, "Precaution Against Terrorism"), 397
[148] Stern& Wiener, "Precaution Against Terrorism"), 397
[149] Sajó, "From Militant Democracy to the Preventive State", 2255
[150] Sajo, "From Militant Democracy to the Preventive State" , 2255
[151] Sajo, "From Militant Democracy to the Preventive State", 2259
[152] Sajo, "From Militant Democracy to the Preventive State" , 2259
[153] Sajo, "From Militant Democracy to the Preventive State", 2260

the arguments it can muster in its favor and if national security is genuinely at risk, the arguments will inevitably seem, and will often be, unusually strong." [154] Measuring the legitimacy however is also problematic since people will often lack the criteria to evaluate the effectiveness of its program except to rely on a level of publicity for successful counter measures. So in any event, those voices that are in the two extreme- libertarians or hardliners with strong executive predilection will be shaping the debate. The libertarian panic and the panic driven urge for more security might however prevent careful consideration of the extent to which measures fall short of satisfying the rule of law.

Employing the preventive model and the principle of militant democracy, it becomes clearer how Germany and US have managed constitutional order threats along a continuum of possible solutions with the model of militant democracy at the one pole, and the state of exception on its other. This is necessary only to the extent that some powers in the preventive paradigm get augmented by necessity more than others. As has already been pointed, from the beginning of the discussion on the types of measures that should be implemented, the police, law enforcement and national intelligence have voiced their concerns of the lack of adequate means to gather and most of all share information. In this respect, the preventive paradigm will mark a discussion into the degree On the other hand we need to assess both the traditional constitutional guarantees of privacy; the measures traditionally employed in the crime prevention and investigation, and how certain tendencies towards preventive justice have for long time been under way. Utilizing the principle of precaution is however problematic or at least disturbingly revealing as to the type of democracy that might become permanent after 9/11, or after the realization that risk is permanent feature of state political existence. It is nevertheless problematic as Andras Sajo has argued that even if we tend to slip into "formal, constitutionally foreseen counter-terror state", the citizens should not be deprived of taking

[154] Cass Sunstein, "Fear and Liberty", *Social Research*, vol.71, No.4, Winter 2004, 2

part in the public deliberation necessary for the legitimization of such state. The need for deliberation and vigorous public discourse seems absolute, but measured against the reality of total government secrecy and/or gradual step-by step incremental increase in state coercive powers; they seem little less plausible for the time being.

Introducing a concept as militant democracy in analyzing the war on terror according to Kent Roach might be not benefit the already complicated picture. His assumption is that many situations the arsenal of criminal law would be sufficient to fight the effects of terrorism as emphasized by the truism "Murder is murder" . To a great degree however, the choice of legal and policy armory depend on the construction of a narrative around emotional appeals of responding to a threat to the enemy of democracy. Libertarian panic and overzealous underestimation of the situation thus both seem undesirable. The definition given to militant democracy by Karl Loewenstein in 1937 echoed some of the remarkable constitutional idyosincacies of the Weimer constitution which according to the author of the term "legalistic self-complacency and suicidal lethargy" have diminished the ability of the constitutional state to respond to its enemies who used and abused the democratic means to become elected and usurp power. In the logic of the war on terror and militant democracy as well, prevention becomes the only strategy to counter the manipulation of the democratic structures. dehumanizing the enemy and even trying to insulate him from any national or international protections (Geneva conventions) becomes "necessary and proper" . The paradox implicit in militant democracy is the one identified in the ruling of the ECHR in the Refah Partisi Case where an Islamic party was banned from the democratic political process due the prospect of its becoming anti-democratic. The standard and criteria for determining the dangerousness of parties and association has been different across the two continents and supplied two different models one of the associated with the constitutionally entrenched model of militant democracy in the context of the Weimer suicidal constitution and the other conditioned upon

strong freedom of speech protection and generally prescriptions related to freedom of speech more than association.

New Anti-Terrorist measures and the Role of courts:

The German response to the terrorist attacks as already underlined has diverged from the American reaction largely predicated on the fact that Germany has inbuilt constitutional mechanism to counteract domestic threats and extreme political factions. The internal political conflicts within the country and organized terrorist attacks have forced a high level security agenda at the forefront of the German politics ever since 1970s.[155]

The position of the Constitutional court in emergency situations is regulated by the basic law. According to Article 115g[156], the functions of the Federal Constitutional Court may not be set aside or changed during a state of emergency. Thus, even though the court in principle may grow deferential, its core political institution is guaranteed by the Constitution. On the other hand, in the context of militant democracy as the principle evolved in the German post-war constitutional order, it was precisely the Constitutional court that is expected to be active in guaranteeing the prevention of an anti-democratic power. Being pro-active in the protection of the constitutional order even at the minor expense of civil liberties is one categorically separate model from the standing in opposition to democracy per se.

In the context of the German commitment to human dignity, fervent antimilitarism and a strong pacifist ethos, the rise of detention regime on the model of United States' Guantanamo basis is quite unlikely. A full-blown counterterror state is slightly likely as well in the context of the German legal and constitutional culture that centers its value system on the protection of the human dignity of the person. Any possible torture or detention model will have to overcome the legal protections in the Basic order against such illiberal practices.

[155] Conference report, *FIFTY YEARS OF GERMAN BASIC LAW THE NEW DEPARTURE FOR GERMANY,*American Institute for Contemporary German Studies, The Johns Hopkins University
[156] Basic Law for the Federal Republic of Germany

Under the German constitution (Art.2)[157]torture is prohibited along with coercive interrogative practices[158]. In this respect, the German constitutional court has used the possibility in the case of *Downing of an aircraft case* to condemn any such practices that merely turn the person into an object in the fulfillment of a state goal. A strong, Kantian, and declaratory position reverberates in the language of the court. The downing of an aircraft decision came under the controversial statute enacted under the second antiterrorist package. Air-transport Security Act ,part of the package, has empowered the "minister of defense to order that a passenger airplane be shot down, if it could be assumed that the aircraft would be used against the life of others and if the downing is the only means of preventing this present danger"[159] The statute as many others instituted after the attacks of 9/11 was reactive to an established precedent of air force attacks and under the spell of an incident with a private motor glider in Frankfurt in January 2003 that threatened to crash itself into a building.[160] Under the statute, the German minister of defense and also a commander of the German Air Force could order the shooting down an hijacked airplane if it is believed that it has been "converted for use as a terrorist weapon"[161] The question of the constitutionality of the provision in the Air Force Security Act thus came to embody in its most pure form the debate about the constitutional balance between individual freedoms and security. The Court in its decision strongly rejected any broad reading of the term "defence" as used to justify the deployment of an aircraft by the federal police. The court argued that the qualification "defence" as understood to mean defence against military attacks by armed forces could not be stretched to cover cases involving hijacked aircrafts and thus made redundant any war on

[157] Basic Law for the Federal Republic of Germany, Art.2 (the right to physical integrity)
[158] Basic Law for the Federal Republic of Germany, Art.14
[159] Luftsicherheitsgesetz [Air-transport Security Act], 12 January 2005, BGBl. I at 78. In Oliver Lepsius, "Liberty, Security, and Terrorism: The Legal Position in Germany", *German Law Journal*, Vol. 07, No. 09, 761-776 (hereinafter Lepsius, "Liberty, Security, and Terrorism")
[160] Christian Walter, *Submission to the Eminent Panel on Terrorism*, Counter- Terrorism and Human Rights European Union Sub-Regional Hearing, Brussels, July 2007, Westfälische Wilhelms-Universität Münster, http://ejp.icj.org/IMG/ICJGermanyWalter.pdf
[161] Lepsius, "Liberty, Security, and Terrorism", 763

terrorism rhetoric in the German context to serve as a profligate source for vindicating preventive measures.

The court did not rest the case with the principle violation of the separation of powers in the federal state , but continued examining the case for violations of Basic law fundamental rights. Not surprisingly, the court declared that the shooting down of an aircraft causing "the deliberate death of innocent people" violated the fundamental right to life of Art. 2 (2) sentence 1 and Art. 1 (1) of the Basic Law.

In noticeable comparison to the United States Supreme Court, the German federal constitutional court has already stricken many of the most problematic enactments established in the aftermath of the terrorist attacks. This radical divergence in treatment of matters of security has its rationale and intellectual roots in both the Basic law of the country, but also in respect to the fact Germany had substantial experience with fighting domestic terrorism.

The historical moments for the adoption of the constitution as well as the national past of the country give meaning to the constitutional regimes as a framework of government for a particular nation. With its totalitarian past behind, the German constitutional culture developed what was named a "singularly- German mindfulness of the historical significance of abrogating fundamental rights within constitutional democracy."[162] Under art. 20 (3)[163], the "legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice." This effectively has construed a broad constitutional mandate for the constitutional court as the main guarantor of the "free basic order" in Germany. Thus one of the reasons the court has been much more active in Germany lies at the heart of the organizational structure of the government. Furthermore, the FGCC does not share the same

[162] Christian DeSimone, "Pitting Karlsruhe Against Luxembourg? German Data Protection and the Contested Implementation of the EU Data Retention Directive", 11 *German Law Journal* 291-318 (2010), *at* http://www.germanlawjournal.com/index.php?pageID=11&artID=1240", 1 (hereinafter DeSimone , "Pitting Karlsruhe against Luxembourg")

[163] Basic Law of the Federal Republic of Germany, art.20

counter majoritarian difficulties and thus is free to follow a prudential reading of the constitution.

Although historically the German state has strived to dissociate with any military campaign due to its totalitarian past, it nevertheless reacted resolutely and instituted several important pieces of legislation. Among policy analysis and legislators alike, there was a consensus that the German legislation is in dire need of amendment especially in light of the fact that the 9/11 attacks have been prepared on the territory of Germany. The investigations conducted in the aftermath of the attacks corroborated that a Hamburg cell has been key in preparations for the terrorist attacks. In light of this, Germany had to reconsider its liberal asylum laws and the religious association regulation. The strict privacy protection laws in place in Germany had also been considered a crucial hindrance for the effective prevention of terrorist conspiracy in the future.[164] Differences in perception, however, played seriously when the country although recognizing the immense threat refuse to engage in a "war against terror". The context of European policy against terrorism has been tradionally perceived as a domestic issue unlike in the US. The mechanism the German government had put in place for the neutralization of extremist groups and preventing them from participating in the democratic process.

Subsequent to the attacks, Germany enacted two terrorist packages that expanded the scope of tools available to apprehend foreigners in the country, by restricting the provisions pertaining to eligibility of association. Before the attacks, Germany had a very liberal law on religious associations. The amendments introduced substantially changed the scope of religious freedom in Germany. The new law has effectively stripped the special protection of religious organizations and now the state can ban religious groups under the private associations' law. These amendments reflected the need of the government to have more

[164] For a discussion on the German trace in implementation of 9/11 attacks see CRS Report for Congress, coauthored by Francis T. Miko & Christian Froehlich , " Germany's Role in Fighting Terrorism: Implications for U.S. Policy", December 27, 2004

effective means to prevent support for terrorist organization channeled through religious associations that benefited from relaxed constitutional regime which prohibited banning extremist groups that were engaged in a religious association. The second important measure introduced with the terrorist package related to the criminalization of the operation of terrorist organizations within the boundaries of the country. Membership in terrorist organizations was criminalized with the novelty that these measures of criminalization pertained as well to any organization within the EU which made is substantially more intrusive in comparison to the previous law that operated only within Germany.

The second anti-terrorism package was passed in January, the year after the terrorist attacks and substantially enlarged the powers of the state agencies responsible for the protection of security and constitutional order. In Germany, these agencies are the Federal Office for the Protection of the Constitution, the Military Counterespionage service, the Federal intelligence service and the federal Criminal Police office. The new measures amended several important legislative acts, but nevertheless have enacted for a limited period of 5 years after which they should expire. It should be noted that the second terrorist package is overbroad set of preventive measures some of them undertaken as part of international commitments, but others based on domestic assessment of the need for legislation.

The Second Terrorist package enhanced tremendously the powers of the Federal Office for the Protection of the Constitution and the Federal Intelligence Service to gather data and information on terrorist suspects. The measures vastly broadened the powers of the government to collect personal information to improve the communication of its law enforcement agencies and intelligence service. This two have been historically separated in Germany as a reaction to the "conflation of police and intelligence service powers in Germany that resulted in the fascist secret police, Gestapo(Geheime Staatspolizei - Secret

State Police)"[165]. The urge to keep the repressive and preventive mechanisms in the criminal justice system separate however collapsed.

In the counter-terror state, Sajo predicts this gradual imposition of a model of small but constant attenuations of the standard robust procedural requirement of criminal justice. . He gives the example with USA Patriot Act. Under its provisions, the government can in practice escape evidentiary exclusivity barriers and deprives people from the protection of the fourth amendment. Techniques developed to handle minor deviations within the normalcy of societal development become normalized and "the crossing of thresholds is becoming routine."[166]For the structure of the police and intelligence being separated has characterized the major structural differences within the two constitutional systems.

The principles of federalism dictate in Germany the historical wisdom of separate federal and state competencies in police powersIn the federal structure of the German government , traditionally there have been a strong separation between the federal and state competencies in police powers. A shift in the context of the war on terror does represent a considerable change. [167] Apart from vertical, there is as well horizontal divisio within the law enforcement and intelligence units "political intelligence became the task of different services, whereby the latter was given intrusive, but not coercive powers, and the former was forbidden to employ secret service methods"[168]. The new security package has forged a premanent cooperation relations between the BND, the *Verfassungsschutz* and law enforcement authorities as well as the facilitated flow of information between them. An "Anti-Terror Database" holding personal data on terrorist suspects, accessible by regional police offices, the Federal Police (formerly Federal Border Guard), the Federal Criminal

[165] Katrin McGauran, ''Germany: Permanent State of Pre-emption,'' *Statewatch Journal*, October–December 2008, at http://www.statewatch.org/analyses/no-79-germany-permanent-state-of-preemption.pdf .
[166] Sajo, "From Militant Democracy to the Preventive State" , 2260
[167] http://www.nytimes.com/2010/06/12/us/politics/12leak.html - for a summary of the Obama's government secrecy
[168] Katrin McGauran, ''Germany: Permanent State of Pre-emption,'' *Statewatch Journal*, October–December 2008, 1

Investigation office (Bundeskriminalamt - BKA), the internal secret service(s), the BND, the MAD, and last but not least, the Customs Investigation Bureau (Zollkriminalamt - ZKA)

Thus, gradually, the vehemently protected principle of separation started to disintegrate. The anti-terror agency that was created at the beginning of the 90s has as well evolved as places where police and intelligence work together on a regular basis169 . The databases is potentially very large since it does not contain a finite list, but one with all that "support, prepare, endorse or through their doing deliberately generate" violent acts as well as "contact persons".[170]

One of the major triggers for enhanced data mining and increased information gathering has been the recommendations of the 9/11 Discourse project and the finding the 9/11 Commission's investigations and recommendations that the major obstacle for federal agencies to share information between themselves "was the single greatest failure of our government in the lead-up to the 9/11 attacks"[171]. Derivative of the need to have better intelligence and information sharing between the executive agencies invested with intelligence powers is the argument that a too liberally formulated right to privacy and rigid data protection laws impede the legitimate state efforts to counter terrorism[172]. Thus the

[169] Katrin McGauran, ''Germany: Permanent State of Pre-emption,'' *Statewatch Journal*, October–December 2008, 1

[170] Katrin McGauran, ''Germany: Permanent State of Pre-emption,'' *Statewatch Journal*, October–December 2008, 3

[171] Federal Support for Homeland Security Information Sharing: Role of the Information Sharing Program Manager: Hearing before the Subcommittee on Intelligence Information Sharing and Risk Assessment of the H. Comm. On Homeland Security, 109th Congress 23 (2005); see as well CRS Report for Congress *Data Mining and Homeland Security: An Overview*, Jeffrey W. Seifert (Specialist in Information Policy and Technology Resources, Science, and Industry Division) , Updated April 3, 2008 http://www.fas.org/sgp/crs/homesec/RL31798.pdf

[172] See generally *Joint Investigation Into September 11th: Sixth Public Hearing , 01 October 2002 -- Joint House/Senate Intelligence Committee Hearing* (Counterterrorism Information Sharing With Other Federal Agencies and with State and Local Governments and the Private Sector- statement made by Eleanor Hill, Staff Director, Joint Inquiry Staff), at http://www.fas.org/irp/congress/2002_hr/100102hill.html ; see also the 9/11 Commission's investigations and recommendations at http://www.9-11commission.gov/ - http://govinfo.library.unt.edu/911/report/911Report.pdf - chapter 13: "How to do it? A different way of Organizing the Government" explaining the effort and measures undertaken in response to the terrorist attacks in

debate about privacy was framed in a bipolarity of privacy versus security from the start. Following the same test applied under the consequentialist logic these same measures invoke, the efficiency and preventive utility of unrestricted access to personal information by the government shielded from both public scrutiny and the also fourth amendment protection will be judged only later on. Framing the situation as one of necessary limitations of privacy and liberty for the achievement of security only now invokes serious and deserved reconsideration after some of the more drastic measures concerning indefinite detention of terrorist suspects and unwarranted wiretapping and data collection start being successfully challenged not only on their constitutionality, but also on their efficiency and inevitability as a political and legal response to terrorism as a long-term strategy in the prevention of terrorist threats. [173]

Constitutional courts: In the German system of government, the German constitutional court is considered the guardian of the free democratic order. In order to place the role of the FGCC in the system of government, it is important to see the evolution of the "guardian of German democracy". The constitution of Germany was adopted in the immediate after.

While American constitutional freedoms are framed as prohibitions and as such only reflect the constitutional historical moment and the aspirations of its framers for a small government with limited powers to intrude in the personal life of individuals. The idea for the establishment of a system of checks and balances reflect this ideal situation in which the different branches of government would be busy in guarding their own domains of power and

information sharing and gathering, as well as how the terrorist attacks might have been prevented lest the privacy regulations were not so rigid

[173] For a recent critique on the efficacy of the measures see: Fred H. Cate, "Government Data Mining: The Need for a Legal Framework",Harvard Civil Rights-Civil Liberties Law Review,469-477; for the use of anti-terrorist laws to suppress freedom of speech and political dissent in Europe , see "A survey of the effects of counter-terrorism legislation on freedom of the media in Europe" by David Banisar , *Media and Information Society Division Directorate General of Human Rights and Legal Affairs, Council of Europe*, November 2008 at http://www.privacyinternational.org/issues/terrorism/speakingofterror.pdf

would leave the individual alone. The role of the Supreme Court to this effect is coequal to the other branches as they all have the obligation to protect the constitution.

The FGCC, on the other hand, is a major political actor which political importance has to be contextualized in the Nazi past of the country. The Basic law was enacted with the purpose to safeguard the repetition of the past thorough a constitutional system that would not allow the instrumentalization of the democratic political machinery to overthrow the democratic order.

To this effect, some of the rights in the Federal Basic Law are framed in the positive thus creating obligation on the part of the branches of government to facilitate and uphold these rights positively. The positive obligation of the state to promote certain values among which the inviolable value of dignity have produced as discussed in the preceding chapter a considerable panoply of protection of different aspects of the personality of the individual.[174] Overall, the role of the state could be characterized as one that enables the actualization of freedom and autonomy for its citizens.

In light of the fact German law has its inbuilt system of militant democracy , the derogation from fundamental rights has been justified The Germany, derogation from fundamental rights protected in the Basic Law has been justified "by reference to the defence of "justifying necessity" under the Penal Code". The justifying necessity has been often used during the 70s when the state was fighting left-wing extremist groups. Regardless of the limitation necessitated however all curtailments of freedom have to comply with the principle of inviolable human dignity.

In the *Census Act Case* [175](1983), in which the court recognized the right to informational self-determination, the criteria that the Court considered as necessary to decide upon in cases arising out of government collection and processing of information. The Court

[175] Census Act Case (1983) 65 BVerfGE 1, in Kommers , 323

has substantiated the relationship between personal development and the principle of self-determination in their technological context with certain procedural restrictions. The right guarantees individuals "the fundamental capacity ... to decide for themselves about the disclosure and use of their personal data."[176]

The Preventive Telecommunications Surveillance case arose in front of the FGCC in respect to a constitutional complaint against a Lower Saxony law. The state law permitted police acoustic surveillance for suspect individuals where "facts justify the assumption that they will in the future commit crimes of considerable seriousness"[177] The law covered telephone calls, text messages on mobile phones, and emails. The surveillance covered both content and traffic data. The court first examined the constitutionality of the law in respect to whether the principle of federalism has been observed. As evidenced in the Downing of an Aircraft case, many of the surveillance measures did not comply with the basic principle of separation of powers. In this case, the court struck the lower because a state, not the Federal government has overstepped its powers. The court found that the state has legislated in an area where it has concurrent jurisdiction with the federal government. The Basic law (art. 74) provides a list of areas in which federal government and states have concurrent jurisdiction. The Landers are prevented to exercise their powers within this list including ordinary civil and criminal law including principally established the powers of the federal government. Thus the state government has overstepped its powers.

In the Data Screening case the court had to decide whether dragnet investigations are constitutional. Data screening for the purposes of German law is defined as:" a special method of profiling using electronic data processing. Police authorities acquire individual-related data sets from private or public places, which are collected for completely different purposes. The

[176] DeSimone, "Pitting Karlsruhe Against Luxembourg?", 293
[177] DeSimone , "Pitting Karlsruhe against Luxembourg", 293

information is then screened automatically for certain criteria and compared (matching/screening). A young student Muslim has been the target of such screening and challenged its constitutionality before the police. Deciding on the case in the immediacy of 9/11 presented a chance to test whether the momentum of panic and all supported resolute measures would pass constitutional muster. The court reasoned that a general threat was not a permissible justification for preventive data screening and violated fundamental right of informational self-determination in conjunction with human dignity principle. The reasoning of the court supported the view that data screening without probable cause would trigger would be compounded by secrecy of the government for the conduct of such processing of personal data. Furthermore, the court found that the implications for some groups would be stigmatization in light of the fact that after the 9/11 attacks, the data screening targeted Muslims.

The developments in the United States closely mirrored some of the aspects in Germany with cluster of preventive and discriminating infringements on individual rights. The NSA surveillance program [178]has not been an officially disclosed program so the information pertinent here is based on whatever information has been publicized in the media.

Three problems presented themselves with urgency: third party effect doctrine, the constitutional basis of litigation (4th amendment, data protection regime and its exceptions to national security measures), the power of judicial review of executive and legislative acts and historical roles of the courts in the protection of civil liberties.

In respect to challenging the anti-terrorist measures implicating privacy instituted by the Bush administration in the ten years after the beginning of the war on terror, there seems to be little ground for comparison between the rate of constitutional review by the FGCC for

[178] "The NSA Wiretapping Program", FOR THE RECORD, publication of the Center on Law and Security at the NYU School of Law, Volume One / January 2007

cases related to anti-terrorist package measures and those coming before the Supreme Court of the United States. Those few that made their way to the docket, the court declined to examine even in the presence of public outcry[179]. In fact, the selective practice of granting certiorari of the American Supreme Court has long been characterized as extremely political in nature and highly arbitrary when invoked to suggest that courts have to mirror public opinion[180]. Although historically the court has been deferential in cases of national security and foreign affairs, in terms of its constitutional position as a co-equal branch in the system of government, there is little doubt that the US Supreme Court has the leverage to decide on both controversial cases, but also cases that literally juxtapose national security interest and constitutional liberties. With the hindsight of history, the constitutional recognition of privacy[181] itself was and still is considered an example of a dubious and unprincipled constitutional reasoning, regardless of the substantive individual interests at stake. The standard critique has been that although the outcome has been right, the doctrine of emanations and penumbras opened the constitution in the words of Justice Black to the moral judgments of the justices themselves in search of collective traditions[182]. In relation to national security interest, the court has exhibited considerable commitment to freedom of speech and even though the decision in the Pentagon case was rendered at the height of the Vietnam War, the court still preferred to see freedom of speech and the press protected.[183]

[179] Geoffrey Stone," Bush's NSA Surveillance Program: What Happens Now?", The Huntington Post, February 5, 2006; http://www.huffingtonpost.com/geoffrey-r-stone/bushs-nsa-surveillance-pr_b_15124.html

[180] See Edward A. Harnett, "Questioning Certiorari: Some Reflections Seventy – Five years After the Judges'Bill", 100 *Columbia Law Review* 1643, 1718-1726 (2000).

[181] Griswold v. Connecticut. This critique has been consistent with the current practice of the court which reasons put privacy interests from the standpoint of "liberty" rather than privacy.

[182] Griswold v. Connecticut 381 U.S. 479 (1965) (Justice Black , dissenting opinion): ""Our Court certainly has no machinery with which to take a Gallup Pole… to determine what traditions are rooted in the "collective conscience of our people"

[183] New York Times v, United States; United States v, Washington Post Co. 403 U.S. 713 (1971) (The Pentagon Papers Case) . The NYT has published a top secret defense Department study of the Vietnam War in 1971 which contained secret information on the military strategy of the government in Indochina. The government sought to enjoin further publication of the documents on the ground such scenario would undermine national security The court held in this case that the government had not met the heavy burden of proof to show that prior restraint was justified.

From the preceding examples, it is obvious that neither timing nor substantial divergence in public opinion is a factor in deciding which cases are to be litigated in front of the Supreme Court. Some however historical patterns reveal that courts are likely to be more deferential while the wartime hostilities have not subsided. Thus, predictably, courts have started seeing cases on the merits only after the initial panic from the threat of terrorist attacks have settled.

Yet, some structural and constitutional constraints have prevented litigation. Shawn Boyne has summarized the possible constraints that in the war on terror would thwart possible contestations as"1.) The requirement of actual litigation, 2.) the geographic location of the alleged constitutional violation, and perhaps most importantly 3.) the fact that the country is at war".[184] This last category seems rather unclear and as this paper has tried to emphasize, the legal reality of war is a matter of interpretation and debate[185]. What however is operationalizeable from this category is the fact it has been at the center of the discussion of the constitutionality of measures implicating the right to privacy. The standard argumentation of the Bush administration has been that the NSA surveillance program has been authorized by Congress with the passage of the AUMF[186]. This effectively only underlies that in the war on terror, the role of the courts is important to safeguard the separation of powers mechanism without compromising legitimate national security and intelligence measures.

The NSA program when disclosed by the NYT on December 16, 2005.[187] the public has been shocked and outraged . NSA surveillance program has been authorized by President

[184] Shawn Boyne, "The Future of Liberal Democracies in a Time of Terror: a Comparison of the Impact on Civil Liberties in the Federal Republic of Germany and the United States", 11 *Tulsa Journal of Comparative and International Law* 111, Fall 2003, 138

[185] The public debate on whether America has crossed policy and academic fields and has become a debating sport. For a recent debate on the National Public Radio between Michael Hayden & David Frakt on the status of enemy combatants and the ensuing dilemma whether US is at war see http://www.npr.org/templates/story/story.php?storyId=129941946

[186] Authorization for Use of Military Force, (AUMF) ,Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) giving the powers to the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11th in order to prevent "any future acts of international terrorism against the United States."

[187] The NSA Wiretapping Program", FOR THE RECORD, publication of the Center on Law and Security at the NYU School of Law, Volume One ,January 2007

Bush in the aftermath of the terrorist attacks. It allowed the administration to intercept communications without judicial authorization when at least one of the parties was located in the United State.[188] The administration has firmly negated the allegations that purely domestic communication is intercepted and insisted that the program operates only there is "reasonable basis to conclude that one party to the communications is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda"[189]. The administration has reported that the program is not permanent and requires re-authorization every 45 days. It is legitimate , however, to assume that the data-mining for law- enforcement and national security purposes would strive to capture as much as possible personal information since from a pure technological necessity the principle has been that bigger sample allows for better chance of pattern-based searches which has been the focal point of government data-mining programs after 9/11.[190] Measured against the popular culture images of Big Brother, the disclosures of the NSA surveillance program has fostered suspicion and uncertainty as to the range of the information collected and its further processing.

The extent to which the Supreme court was selective in contesting presidential power is evidenced by the fact that even against the outcry of the secret NSA surveillance program and its considerable public disapproval, the Supreme court asked by the American Civil Liberties Union(ACLU) to rule on the constitutionality of the program, the declined to review the case. [191] ACLU was the plaintiff that initially brought the case against the National Security agency in front of district court which declared the program unconstitutional. In the

[188] The NSA Wiretapping Program", Volume One , January 2007
[189] The NSA Wiretapping Program", FOR THE RECORD, publication of the Center on Law and Security at the NYU School of Law, Volume One ,January 2007
[190] Fred H. Cate, "Government Data Mining: The Need for a Legal Framework"
[191] James Risen & Eric Lichtblau **,** "Bush Lets U.S. Spy on Callers Without Courts". NYT's December 16, 2005 Bush Lets U.S. Spy on Callers Without Courts, at http://www.commondreams.org/headlines05/1216-01.htm ; see also ACLU official website for the NSA surveillance programme legal contestation saga at http://www.aclu.org/national-security/court-denies-government%E2%80%99s-broad-assertions-secrecy-refusal-turn-over-nsa-eavesdrop

ccase before the lower court instead of trying to defend the programme on constitutional grounds, the Bush administration invoked its national security character in an effort to prevent further litigation and decision on the merits. The NSA program was declared unconstitutional by the district court on grounds that it violated the fourth amendment to the constitution. The Michigan Federal Court concluded in its judgment that the fourth amendment to the constitution:

> "….requires reasonableness in all searches. It also requires prior warrants for any reasonable search, based upon priorexistingprobable cause, as well as particularity as to persons, places, and things, and the interposition of a neutral magistrate between Executive branch enforcement officers and citizens. In enacting FISA, Congress made numerous concessions to stated executive needs…[t]he wiretapping program …..has undisputedly been implemented without regard to FISA and of course the more stringent standards of Title III, and obviously in violation of the Fourth Amendment." [192]

This decision was appealed in the Sixth Circuit Court of Appeals which dismissed the legal challenge on grounds that the plaintiffs did not have "standing" to bring the case since their were not able to prove they personally have been spied. The Supreme court has refused to see the case. The third party doctrine in Miller has meant that the Government can freely access the information of million Americans and their bank accounts. The doctrine of third party effect has been furiously criticized as making possible the free and unrestricted data-mining of personal information under the pretext of security while in fact serious "manipulating the law".

[192] ACLU v. National Sec. Agency, 438 F. Supp. 2d 754, 775 (E.D. Mich., 2006), vacated, 493 F.3d 644 (6th Cir. 2007)

Conclusion:

The new paradigm is characterized by the preventive nature of policy responses-data collection on lack of individualized suspicion and wiretapping without court order or warrant, considerable video surveillance in public spaces, racial profiling and intrusive technical and physical bodily searches on airports. The tools in the war on terror represent the juncture of the preventive state and technological innovations. The German and American courts jurisprudence have significantly diverged on these tools' constitutionality. In comparing German and American responses to terrorism, scholars often boil down the analysis to privacy protection's being entrenched to different values. A holistic reconsideration of the problem of information and privacy in national security contexts should approach the subject taking into account the jurisprudential analysis of the courts in historic perspective with due diligence to the fact Germany and United States entrenched the value of privacy in the constitutional order .[193] On the political dimension of the purpose of protecting privacy and personal data in both jurisdictions stand the old liberal doctrine of limited government and the prevention of the state from intrumentalizing its power to become tyrannical. In this understanding, the two systems have no serious value cleavages. It is only to the extent to which they will manage to accommodate the security concerns within the rule of law that civil liberties can be protected. The creation of a digital portrait of a person is a very real possibility.[194] Daniel Solove gives this interesting account of the use of metaphors to describe the power relations operating in society. He differentiates between the power embodied in Huxley and Orwell insidious force employed for a particular design. Indeed as he points, the power employed in Kafka's "The Trial" is shrouded in mystery, it is totally incomprehensible and its mysteriousness is the reason for the protagonist's struggles to reach a point of understanding for his crime. Nor this

[193] In Germany, the constitutional hierarchy is subjected to the overarching principle of dignity. In the US, the right to privacy implicates many of the rights in the Bill of rights(ordered liberty)
[194] Daniel Solove, *The digital person: Technology and Privacy in the Information Age* (New York University Press2004,)

is the totalitarian state that targets people because of their political views as Solove emphasizes. It is an account of a completely different power mechanism in operation. Consider the usage of CCTV as a preventive measure for crime as well as counterterrorism. The point of CCTV markedly well illustrates this point as an account of its ineffectiveness, the murkiness of its legality, the lack of funds to actually control its register and operation is even furthermore complicating the rationale of its imposition under the banner of security against crimes and prevention of threats against national security(see Times square recent threat when the use of CCTV only proved even better that the preventive mechanism does not serves so well the purposes for which it was enacted. Solove's account of the metaphors of Orwell and Kafka bring insight into the major problems implicit in governmental surveillance- its chilling effect produced by the mere process of being watched, the knowledge of being watched and its chilling effect, and the subsequent issue of whether and how this information being captured is used and manipulated and for what ends. "This is where Orwell meets Kafka"[195]

[195]Daniel Solove, *The digital person: Technology and Privacy in the Information Age* (New York University Press2004,), p.42

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