

"Common values" but not when it comes to data collection – differences in U.S. and German views on privacy

Rudolph "Rob" Houck

I. Introduction

In June 2013, Edward Snowden began disclosing the enormous extent of U.S. government domestic and foreign data collection. Germans were shocked and indignant to learn that Chancellor Angela Merkel's cell phone conversations had been intercepted. They were newly confronted with the eavesdropping that has been conducted by the former World War II Allies on leading German politicians since Konrad Adenauer. Although the Guardian newspaper warned in 2001 that this practice continued, the revelation was still highly offensive to Germans. It starkly highlighted America's lack of respect for their Chancellor's privacy.*¹

In addition to U.S. government political and likely commercial spying², US-based companies like Google and Facebook often run afoul of German privacy laws. Even old economy companies like Wal-Mart get into trouble in Germany with their personnel policies, policies which seem reasonable to most Americans. Despite these repeated conflicts, German and U.S. politicians constantly emphasize our "shared values." But are these values really shared? And why are Germans so sensitive about data collection and Americans so blasé?

The short answer usually given is that Germans suffered through Nazis and Stasi intrusions on their privacy. But other reasons go back centuries.

* Thanks to my friends Betty Sue Flowers and Charles Fewell and my wife Anne for their constructive criticism.

1 Other examples include the case of the Rosenholz Stasi files, which the CIA obtained in 1991 and did not share with the Germans for many years Robert Gerald Livingston, "An Operation called 'Rosenholz'" The Atlantic Times (March 2006)) and other files obtained directly from the Stasi offices in 1989 ("CIA files stir up specter of East German secret police" CNN, November 7, 1999); see also Peter Schwarz, The NSA Given a Free Hand to Operate in Germany, Global Research (July 11, 2013).

2 <http://www.rt.com/news/snowden-nsa-industrial-interview-208/>.

Rudolph "Rob" Houck

The differences between U.S. and German views have only now become obvious - the product of cell phones, the Internet, data mining and globalization. This paper is intended to better identify these differences so that they will not be ignored and unknowingly be the source of further divisions between the U.S. and Germany. Bridging these differences, however, seems unlikely, so ingrained are they in each country's traditions.

II. Examples of German/American privacy differences

Before addressing the legal and philosophical differences between German and American views on privacy, a list of German decisions will highlight the differences in results. Germans expect these results and Americans find them hard to understand:

1. The 1983 census was called off by the German Constitutional Court due to extent of the collection of data.³ It took 4 years to scale back the level of intrusion to one acceptable to the Germans.⁴
2. Parents' rights to name their children are limited, in the interest of the child. Family names cannot be used as first names.⁵
3. Employee policies may not restrict office romances.⁶ Employees may not be "mobbed" [harassed by co-workers to get the person to resign] or given demeaning jobs.⁷

3 Herbert *Burkert*, *Privacy – Data Protection* at 53 (2000). "The freedom of the individual to decide for himself is at stake when the individual is uncertain about what is known about him, particularly where what society might view as deviant behavior is at stake. The individual therefore has the right to know and make decisions on the information being processed about him."

4 "... a public sector entity may collect, process and transfer personal data but only subject to conditions – (i) there must be a statutory basis for the activity; (ii) it must have a valid legislative basis; (iii) it must have clearness of norms and be proportional, i.e. the means must be suitable, necessary and reasonable." Paul M. *Schwartz*, *Systematic Government Access to Private Sector Data in Germany*, 2 *International Data Privacy Law* 289 (2012).

5 James Q. *Whitman*, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *The Yale Law Journal* 1151, at 1159, 1216.

6 *Id.* at 1164-65; Dr. Michael *Schmidl*, *Privacy Laws in Germany – developments over three decades*, *externer Datenschutzbeauftragter* 12 (2012).

7 *Whitman*, *Two Western Cultures*, *supra*, at 1164.

4. Employees have rights to privacy when using office phones and email. In the US, workplace privacy is "close to nil."⁸
5. Employers in retail stores may not check for receipts for items taken by employees from the store where they work.⁹
6. Video surveillance of employees is restricted.¹⁰
7. Credit reports are limited.¹¹
8. Proposed legislation would prevent potential employers from searching social network postings by a job applicant.¹²
9. Prison inmates have a right to be treated with respect and have sued their guards over their lack of respect.¹³
10. A person who has undergone a sex change has a right to have his or her birth records changed to reflect the new gender.¹⁴
11. The imposition of life sentences is restricted based on the core right to develop one's personality.¹⁵
12. People and even buildings may demand that they be blocked in Google Streetview.¹⁶
13. Parties to a lawsuit are often identified with first names and initials, not family names.
14. The identity of minors is often concealed by imposing black squares over their eyes in photos or pixelated.
15. The German military may not shoot down hijacked civilian passenger planes, even to protect the lives of other citizens on the ground.¹⁷
16. U.S. pre-trial discovery of German documents is limited.¹⁸

⁸ *Id.* at 1195.

⁹ *Schmidl*, *supra*, at 19.

¹⁰ *Id.*

¹¹ "Consumers need more than credit, they need dignity". *Id.* at 1192.

¹² *Schmidl*, *supra*, at 19.

¹³ Amanda *Ploch*, Why Dignity Matters: Dignity and the Right (or Not) to Rehabilitation from International and National Perspectives, 44 *International Law and Politics* 887, 911 (2012).

¹⁴ Stephanie *Markowitz*, Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection, 14 *Cardozo Journal of Law & Gender* 705, 720 (2008); *Der Spiegel*, August 16, 2013.

¹⁵ <http://www.sueddeutsche.de/politik/deutsches-rechtssystem-warum-lebenslang-nicht-ein-leben-lang-ist-1.317460>.

¹⁶ *Schwartz*, *Systematic Access*, *supra*, at 289.

¹⁷ Russell A. *Miller*, Balancing Security and Liberty in Germany, 4 *J.Nat'l. Sec. L. & Pol'y.* 369, 388-89 (2010).

¹⁸ *Whitman*, *Two Western Cultures*, *supra*, at 1156.

Rudolph "Rob" Houck

17. A person convicted of a crime about to be released could block the showing of a film that accurately portrayed his role in that crime.¹⁹
18. An employee properly refused to print an ad for books he believed to glorify war on grounds of conscience.²⁰

III. The "personality" mystery

The key to understanding the difference between German and U.S. views of privacy is understanding the German concept of "personality" and its relationship to freedom. Much as many Americans feel gun ownership is essential to their freedom, Germans view freedom as the right of the individual to develop his or her personality, development which requires privacy, respect and dignity. This concept is embedded in the German Constitution.

The idea of moral freedom, and the idea that it can be achieved through commitment to human dignity and *free unfolding of personality*, lies at the root of the German constitutional vision....The unbridled individualism of the United States, [is characterized by] its focus on unrestrained market forces and more absolute personal freedom, unrestrained by a moral structure.....²¹[italics added]

Americans simply are not familiar with the concept of "personality" in a legal sense, certainly not in the context of freedom, and this is at the core of some important disputes and misunderstandings between Americans and Germans.²²

...[O]ne of the most baffling of German juristic creations [to Americans is] "personality." Personality is ...a concept that Germans have often invoked where Americans would invoke liberty....Where Americans often think of "freedom" as opposed primarily to tyranny, 19th century Germans often thought of "freedom" as opposed primarily to determinism. To be free

19 Peter E. *Quint*, Free Speech and Private Law in German Constitutional Theory, 48 Md. L.Rev. 247, 300 (1989); Friedrich *Kuebler*, How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights 27 Hofstra L.R. 335, 367 (1998).

20 *Quint*, supra, at 274-5.

21 Edward J. *Eberle*, The German Idea of Freedom, 10 Oregon Review of International Law 1, 35(2008).

22 *Quint*, supra, at 315.

was...not to be free from government control, nor to be free to engage in market transactions. Instead, to be free was to exercise free will..."²³

This German freedom to exercise free will and develop one's personality requires privacy, including control over information and data regarding the person.

...[A] notable difference from the American conception of rights is the Article 2(1) guarantee [of the German Basic Law] "to the free development of...personality"... Personality rights center on development of human capacity and protection of a person's interior life, made concrete through protections like control over information personal to an individual, such as inquiry into habits and activities and rightful portrayal, rightful quotation and rightful honor of a person.²⁴

"Personality" is a concept that does not appear in the U.S. Constitution at all and which Americans do not associate with their legal rights.²⁵ Privacy likewise does not appear there and had to be interpreted into the U.S. Constitution, as will be seen. To make this point more vivid, Googling "German Constitution personality" will produce many pages of entries discussing the philosophy of freedom. Doing the same search for the U.S. Constitution will produce a discussion of the personalities of the individual framers of the document.

So Americans and Germans may well not even share the same concepts of freedom, making speaking different languages a relatively minor problem by comparison.

23 *Whitman*, Two Western Cultures, *supra*, at 1180. "Privacy is the road not taken [by Americans]." Guy E. *Carmi*, Dignity - The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification, 9 U. Pa. J. Const. L. 957, at 984-5(2014); also Paul M. *Schwartz* and Karl-Nikolaus *Peifer*, Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept, 98 Cal. L.Rev. 1925, at 1927 (2010).

24 *Eberle*, *supra*, at 4; this language is similar to that found in Article 22 of the Universal Declaration of Human Rights – "everyone...is entitled to realization...of the economic, social and cultural rights indispensable for *his dignity and the free development of his personality*." [italics added] Albert M. *Dendich*, Privacy, Poverty, and the Constitution, 54 Cal. L.R. 407 (1966), in which the connection between dignity, personality and wealth is made.

25 *Quint*, *supra*, at 279.

IV. Dignity moves up and down, expands and contracts

Besides the conceptual problem for Americans in understanding "personality", German concepts of privacy, personality and dignity have changed over time. They go back to Cicero.²⁶ Roman thought included the concept of *dignitas hominis* – meaning special honor and respect. This sort of respect was originally available only to the upper classes, if only because dignity requires privacy, something which can be obtained only with wealth.²⁷ But a broader, less wide-spread concept included dignity of human beings simply as human beings, whatever their accomplishments or status in society.²⁸ Hugo Grotius adopted that broader view and wrote that even the slain enemy should be honored in death and buried with dignity, not treated like an animal.²⁹

The early modern German absolutist rulers tried to supervise and control even "the intimate, personal behavior of its subjects. ...[T]here is no evidence for ...a conception of 'private life' in the late seventeenth or early eighteenth centuries."³⁰ But after the 30 Years' War, the German Cameralists - advisors to the many princes who ruled parts of the Holy Roman Empire - developed theories of government that recognized its limits. Johann Heinrich Gottlob von Justi (1717-1771) argued for recognition of a private family sphere ruled by the father, noting that certain behavior "can never become an object of civil laws because oversight is impossible."³¹ Other German thinkers recognized the private sphere and tied it to honor and personality.³²

26 Andreas Rosenfelder, *Kurze Geschichte der Privatsphäre*, Die Zeit, 07.03.2010.

27 Isabel V. Hull, *Sexuality, State, and Civil Society in Germany, 1700-1815*, 44 (1996); Quint, *Free Speech*, supra, at 251, regarding dignity and aristocracy; Daniel J. Solove, *Conceptualizing Privacy*, 90 Cal. L. Rev. 1087, 1133-1143.

28 Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 The European Journal of International Law 655, 656-7 (2008).

29 *Id.* at 659.

30 Hull, supra, at 95.

31 *Id.* at 191.

32 "It is the duty of the state to protect the honor of the female sex; that is, to see that women are not compelled to give themselves up to men they do not love; for this honor is a part, nay, the noblest part of their personality." Johann Gottlieb Fichte, *Grundlagen des Naturrechts nach Prinzipien der Wissenschaftslehre* 1796) 424; see also Theodor Gottlieb von Hippel, *On Improving the Civil Status of Women* (1792).

The French Declaration of the Rights of Man and of the Citizen (1789) expanded dignity from nobility down to the common man.³³ Ironically, 20th century fascist regimes – not only in Germany – also stressed honor and dignity, and also expanded them down from the upper classes to the masses, but left out people the state decided were outsiders. The fascist concept was a "community-based, not an individual-based, personality interest," and the Nazi regime used it to control political and social behavior.³⁴ Two legal citations from the period are particularly chilling: The leading German legal authority on German civil law, Otto Palandt, stated in the 1940's:

National Socialist legal feeling regards the Volk-comrade as a member of the Volk community, who fulfills the demands of his legal position in the service of the Volk community, and who as such has a claim that the legal position that has been conferred upon him be safeguarded and protected against attacks of any kind. In this sense, it can be said that the Volk-comrade has a general right of *personality* that ought to be recognized, including...a right to join in the common labor of the community and right to recognition, *respect and honor*.³⁵ [Italics added]

Less well-known but more disturbingly explicit is a law dissertation written in 1935:

The good of the whole Volk comes first. The right of *personality* has to comply with this doctrine. ...[E]ach person has a specific value for the community of the Volk. This value comprises itself and permits itself to some extent to be calculated according to a person's cultural, economic, and moral achievements. The negative side is also to be taken into account, i.e. this value decreases or disappears entirely when the person is active in a fashion antagonistically or harmful to the Volk.³⁶

So honor, personality and community were all important factors in Nazi Germany, but they were perverted to control the German people and to dehumanize those who did not fit the regime's definition or support its plans.

America also experienced changes to the scope of dignity during the Revolution.

33 *McCrudden*, supra, at 660; *Whitman*, Two Western Cultures, supra, at 1165, 1173, 1176; *Miller*, supra, at 389, citing 115 BVerfGE 118, 152 (2006).

34 *Schwartz and Peifer*, Prosser's Privacy, supra, at 1949; James Q. *Whitman*, Enforcing Civility and Respect: Three Societies, 109 Yale L.J.1279 (2000), at 1284.

35 *Whitman*, Two Western Cultures, supra, at 1187-8.

36 *Schwartz, Peifer, Prosser's Privacy*, supra, at 1949 [italics added].

Rudolph "Rob" Houck

America leveled dignity down, by doing away with the mannered aristocracy and making every man a common man. In contrast, France and Germany leveled up, declaring all citizens to be aristocrats.³⁷

Alexis de Tocqueville, the revered observer of early American society, had an important observation about old and new world dignity. He associated politeness and dignity with old world aristocratic society and did not think it could survive in a democratic one:

Veritable dignity of manners consists of showing oneself always to be in one's place, neither too high nor too low; this is what the peasant aims for as much as the prince. In democracies, all places seem doubtful, and in consequence manners in a democratic society, while they are often proud, are never dignified. Moreover, they are never well regulated or truly cultivated.³⁸

V. Constitutions

The US Constitution and the German Constitution or Grundgesetz could not be more different on many levels. At their essence, the U.S. Constitution embraced English free market values and free speech; the German Basic Law reacted against them and built on German philosophers and human dignity.³⁹ Both documents are a reaction to their then recent history. The American colonies reacted to a totally different set of factors in 1783 than post-war Germany did in 1949. The two countries developed along these very divergent tracks for the next 65 years (1949-2014) before the clash of values became dramatically apparent. This paper deals with the two countries' constitutions, not as legal or symbolic matters but as reflections of the values of the two countries' citizens. Americans constantly cite their Constitution – mainly two or three articles of the Bill of Rights – as embodying American values. Likewise, although much newer and quite different, the German Grundgesetz or Basic Law has come to be highly respected by Germans along with the country's Constitutional Court.⁴⁰

37 *Whitman*, Enforcing Civility, *supra*, at 1285.

38 Alexander *de Tocqueville*, *Democracy in America* (1835) 269, as quoted in *Whitman*, Enforcing Civility, *supra*, at 1375.

39 *Whitman*, *Two Western Cultures*, *supra*, at 1180; *Carmi*, *The Enemy*, *supra*, at 957, 963.

40 *Gestiegenes Vertrauen in das Rechtssystem*, Roland Rechtsreport (2012).

VI. German constitution

The philosophical roots of the German Basic Law or "Grundgesetz" can be found in many sources including Roman law (in particular with respect to honor, dignity and insult)⁴¹; the role of the prince (different in the German provinces than in England)⁴²; dueling rules arising out of the aristocracy⁴³; Catholic humanism; and the writings of Erasmus, Christian Jacob Kraus, Friedrich Karl von Savigny, Georg Friedrich Hegel, Gottfried Wilhelm von Leibniz, Otto von Guericke, Wilhelm von Humboldt, Johann Gottlieb Fichte, Martin Luther, Samuel von Pufendorf, Immanuel Kant and Johann Wolfgang von Goethe, names few Americans other than philosophy students recognize.⁴⁴

German constitutionalism has a long, mixed history. It includes the Golden Bull (1365); the court established in the Holy Roman Empire (1495); the German "Bund" (1815); the Paulskirche Constitution (1849); the North German Confederation (1867); the Imperial Constitution (1871); the Weimar Constitution (1919); and, finally, the "interim" Basic Law (1949), which continues, with amendments, to this day. German "constitutions" have ranged from liberal but not adopted (1849), to reactionary (1871), to noble but catastrophically weak (1919). Several of those before 1949 were influenced by protestant Prussia, an influence largely lost, along with the East Prussian territory, in 1945.

German constitutional law has reacted *against* the same concepts that have *positively* influenced the development of U.S. constitutional law. Where many Americans saw French revolutionary equality, Germans saw a frightening lack of order.⁴⁵ Where many Americans saw Adam Smith's economic freedom, Germans saw the brutality of capitalism. So instead, the Germans concentrated on human free will – "a freedom from determinism, not a freedom from government."⁴⁶

41 *Whitman*, Enforcing Civility, *supra*, at 1315.

42 *Eberle*, *supra*, at 57-8.

43 *Whitman*, Enforcing Civility, *supra*, at 1284.

44 *Carmi*, Dignity, *supra*, at 966.

45 *Kuebler*, *supra*, at 248.

46 *Eberle*, *supra*, at 26-27 and 53; "German privacy law grew in large part out of an effort to create a richer German alternative to the ideas of liberty that grew up west of the Rhine, and especially to English ideas of liberty"; *Whitman*, Two Western Cultures, *supra*, at 1151.

As noted, the German constitution is anchored in human dignity - each person being valuable per se, as an end in himself, to which government and fellow citizens must give due respect. In contrast to the U.S. Constitution's added Bill of Rights, discussed below, the German Grundgesetz *begins* with a catalogue of basis rights, to an extent comparable (but see below) to the Bill of Rights (Grundrechtskatalog; Article 1). Those rights are "the very basis of every community, of peace and of justice throughout the world." They include life, bodily integrity and freedom from bodily restraint (Art. 2(2)); freedom of religion (Art. 4), expression (Art. 5), assembly (Art. 8), association (Art. 9), and petition (Art. 17); marriage, the family and the right to private schooling (Art. 6-7); privacy of the home (Art. 13) and of the mails (Art. 10); the right to travel (Art. 11), occupational freedom (Art. 12) and the right to property (Art. 14). The most important right for purposes of this analysis is Article 2(1), which protects the right to free development of personality. The Bill of Rights reflects some of these points but as restrictions on the government, not as rights of individuals which the government is charged with protecting.

Adding to these differences, German law is more codified and unified than American law, in large part due to the influence of Roman and Napoleonic law. Germans systematize and regulate legal concepts, starting from a central concept and pursuing it through various applications. They are rightly known for their thoroughness and attention to detail. Their laws attempt to deal with all situations.⁴⁷ The concept of personality and dignity in the German Constitution emanates from a central core into other laws, where it may not appear specifically. The German attitude is that the state enforces regulations. Enforcement is not dependent on private litigation and judge-made decisions as in the United States.⁴⁸

The German Basic Law of 1949 has 146 Articles, has been amended frequently and covers even such matters as the film industry, hunting (Ar-

47 America "overlooks and ignores the culture of the German Rechtsstaat, a culture that requires, in deference to the rule of law, that legal documents provide as much guidance as possible to their interpretation by the judiciary and other government agencies"; Donald P. Kommers, *The Basic Law: A Fifty Year Assessment*, 53 SMU L.Rev. 447, 487 (2000).

48 At the heart of the controversy over enacting a privacy regime is a classic debate between the use of the market and use of regulations to achieve policy objectives; John C. O'Quinn, *None of Your Business: World Data Flows, Electronic Commerce and The European Privacy Directive*, 12 Harvard Journal of Law and Technology 683 (1999) 694; *Burkert*, *supra*, at 46.

ticle 75, now repealed) and a beer tax (Article 106 (2) no.4). Of course 1949 Germany had already become an economically mature country before adopting its new constitution; so many more economic and governmental relationships had to be regulated. The prior weaknesses of the Weimar Republic and abuses of the Third Reich had to be specifically dealt with. It was viewed as an interim, working document – not as poetry.

This paper supposes that the German Grundgesetz reflects specifically German values. Given the circumstances of its adoption, however, the question arises whether it was instead imposed by the victorious Americans, English and French. While certain aspects of the Basic Law were very important to the Western Allies - mainly decentralization of government - the Allies were divided and hence their influence was diminished. The French wanted Germany to be a loose confederation of sovereign provinces – not capable of posing any further threat to France. The English were willing to let the form of government evolve over time. The Americans were convinced that only an economically and politically strong Germany could avoid growing Soviet influence. At the same time that the Constitution was being hammered out, the communists took over in Czechoslovakia and the Berlin Blockade was going on. The U.S. successfully pushed the French and British to fall in line and exchange speed of adoption for getting their way.⁴⁹

The Allied conditions were thus very general: democracy, federalism, and fundamental rights. If the new constitution was to succeed, it had to be the work of the Germans. As General Lucius Clay wrote:

...reform obtained by order of the occupation authorities is not likely to be lasting, and our hope is that it can be brought about by the German people. In fact the minimum requirements laid down by the Allies coincided fully with the ideas of the Germans themselves.⁵⁰

Eventually a compromise was reached that was acceptable to both parties (the German Parliamentary Council and the Allies). As a former Justice of the Constitutional Court has written, "Allied intervention did not succeed

49 Erich J.C. *Hahn*, *The Occupying Powers and the Constitutional Reconstruction of West Germany, 1945-1949*, German Historical Institute, Occasional Paper No. 13, 31 (1995).

50 David P. *Currie*, *The Constitution of the Federal Republic of Germany* 9 (1995).

Rudolph "Rob" Houck

in branding the Basic Law with the stain of an instrument imposed by the occupying powers."⁵¹

VII. U.S. constitution

In 1776, the American colonies declared their independence from England and drafted the Articles of Confederation. It took 5 years to ratify them and they quickly proved to be inadequate. In 1783, the U.S. Constitution was adopted, providing for a stronger central government. It is the oldest and, even with 27 amendments, shortest constitution in the world. It is centered on liberty, but liberty achieved not by granting positive rights due its citizens but by limiting government authority, separating, balancing and checking the government, thereby empowering people to live their lives largely as they determine, free from restraint. At its core, the American idea of freedom aims for freedom *from* government. It is a "negative" constitution, prohibiting the government from intruding in its citizens' lives.⁵²

The U.S. constitution is to be seen against a background of non-representational, "oppressive" English rule.⁵³ Like the Magna Carta (1215), it is a reaction to perceived abuses by the king – limiting governmental powers. The first ten amendments were adopted 8 years later (1791) as the "Bill of Rights" to assuage the fears that the central government would be too strong. Despite its name, it is not a catalogue of rights *to* do things, but rather restrictions on the government, mainly having to do with criminal law and punishment. Two of the most important amendments are essentially contradictory and reflect - even in the United States - the tension between U.S. and German values. The 1st Amendment guarantees freedom of speech and press; and the 4th Amendment protects against unreason-

51 Helmut *Steinberger*, 200 Jahre amerikanische Bundesverfassung 33 (1987); see also Gebhard *Ziller*, Trends in the Development of Federalism under the Grundgesetz (Basic Law), 1949-1989, 74 (1995).

52 Frederick *Schauer*, The Exceptional First Amendment 24 (2004).

53 Hessian troops considered American rebels to be ingrates; the colonists' lives were so much better than the ones the Hessians led back home. Rodney *Atwood*, The Hessians - Mercenaries from Hessen-Kassel in the American Revolution (1980).

able searches and seizures.⁵⁴ It does not include an explicit right to human dignity or privacy.⁵⁵ Freedom of speech at its core values transparency, while freedom from searches blocks the same transparency.

Embodied in the Constitution and U.S. statutes generally is the concept of ad hoc "regulatory parsimony": before the U.S. legal system acts, the lawmaker will wait for strong evidence that demonstrates the need for a regulatory measure.⁵⁶ Once a problem requiring statutory attention is identified, the solution is likely to be the smallest one that still solves the problem. Usually, non-economic values such as human dignity do not enter into the calculus.⁵⁷

Many of the rights that Americans think come from the U.S. Constitution had to wait for expansive interpretation by the Supreme Court many years later. This is particularly true of the right of privacy, as will be seen.

The U.S. Constitution is directed at limiting government and creating a space for individuals to act, free from government restrictions. "...[P]rivacy begins with the Fourth Amendment... the right against unlawful searches and seizures." But the U.S. right to privacy per se is not spelled out in the Constitution at all. It has been developed in Supreme Court decisions, but only in limited areas.⁵⁸

Over 100 years after the adoption of the U.S. Constitution, Samuel Warren and Louis Brandeis tried to expand the right to be free of unwarranted search and seizure into a general right of privacy by means of a law review article.⁵⁹ In a reaction against newspaper gossip columns that would be considered harmless today, the authors argued that limitations on

54 Less importantly, the 5th Amendment guarantees a right to trial by jury and against self-incrimination and 8th Amendment prohibits cruel and unusual punishment.

55 Potter *Stewart* dissenting in *Griswold v. Connecticut* notes he "can find no...general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever decided by this Court." *Griswold v. Connecticut*, 381 US 479, 530 (1965).

56 Ralf *Poscher* and Russell *Miller*, *Surveillance and Data Protection in the Conflict between European and American Legal Cultures*, AICGS (December 9, 2013).

57 Joel R. *Reidenberg*, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 *Stan. L. Rev.* 1315, 1346 (1999-2000).

58 Gerhard *Casper*, *Guardians of the Constitution*, 53 *Southern California Law Review* 773, 784 (1979).

59 Samuel D. *Warren*, and Samuel D. *Brandeis*, *The Right to Privacy*, IV *Harvard L. Rev.* (1890); for a discussion of privacy in the United States during this period, see *Solove*, *Privacy*, *supra*, at 1133-1143, including the development of the hallway.

Rudolph "Rob" Houck

"search" in the 4th Amendment applies not only to the walls of one's home but to a zone of privacy that moved with the individual, giving him or her space to develop a personality.

Brandeis and Warren drew on English common law sources, but also on German philosophy and the "right of personality." Brandeis grew up speaking German at home and had studied in Dresden. Their article uses the following terms –

man's spiritual nature, his feelings, his intellect, his right to be let alone, human emotions, family honor, intellectual and emotional life, sacred precincts of private and domestic life, thoughts and aspirations, privacy, insult, facts relating to his private life and rights to one's personality.⁶⁰

Brandeis went on to be a justice on the U.S. Supreme Court, where he tried to put his views into practice. In one of the first cases involving the right of privacy, the court was confronted with a state law, passed during World War I, which prohibited schools from teaching pupils a foreign language. The law was clearly directed at German. Brandeis and a majority decided that this law invaded a family's private right to determine a child's education and overturned the law.⁶¹ Only much later, more important U.S. Supreme Court decisions based on this newly created concept of privacy were *Griswold v. Connecticut*⁶² (1965, overturning a state law which prohibited teaching even married couples about contraception) and *Roe v. Wade*⁶³ (1973, permitting some abortions).

Pushing back against Brandeis was another famous judge, stating a position more typical of U.S. views. Oliver Wendell Holmes wrote: "[T]he ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market...."⁶⁴

So, despite several important Supreme Court decisions, the Brandeis-Warren attempt to introduce European privacy rights to the U.S. was an

⁶⁰ *Id.*

⁶¹ *Meyer v. State of Nebraska*, 262 US 390 (1923).

⁶² *Griswold v. Connecticut*, 381 US 479 (1965).

⁶³ *Roe v. Wade*, 410 U.S. 113 (1973).

⁶⁴ *Abrams v. US*, 250 US 616, 630 (1919) in a dissent.

"unsuccessful continental transplant."⁶⁵ Privacy rights took on the free press and the free market and those two factors won.⁶⁶

In fact, the American focus on free speech is "a defining feature of American Society,"⁶⁷ making the U.S. an "outlier" among Western democracies.⁶⁸

[T]he U.S. legal tradition focuses its protection of citizens against the use of state power and regulates government access to data. At the constitutional level, the Supreme Court interprets the 4th Amendment protection against warrantless searches and seizures to protect a "reasonable expectation of privacy" and has ruled that access to the contents of a telephone call require a warrant issued on probable cause. The constitutional restriction on access does not, however, extend to information provided to a third-party because the Supreme Court has also ruled that there is no "reasonable expectation of privacy" in such information. Since online traffic data is generated and maintained by third-parties, the Supreme Court's third-party doctrine means that public authorities will likely not face constitutional limits on data access.⁶⁹

One European judge went so far as to call American free speech "a fetish."⁷⁰ Indeed, in contrast to the vague 4th Amendment right of privacy, the 1st Amendment rights of freedom of speech and press tip the scales *against* privacy and dignity, especially if the government is not the intruder. As to secrets from other individuals, "American law views each individual as generally bearing the privacy of the ill-chosen friend who breaches a confidence."⁷¹ Once a person has given a third party access to

65 *Whitman*, Two Western Cultures, *supra*, at 1204.

66 Edward J. *Bloustein*, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 NYUL Rev. 963, 965 (1964); indeed, wiretapping without a warrant was legal in the US, despite Brandeis's dissent, until 1967. *Katz v. United States*, 389 US 347 (1967), overruling *Olmstead v. US*, 277 US 438 (1928).

67 Steven J. *Heyman*, Free speech and human dignity 1.

68 *Schauer*, Exceptional Amendment, *supra*, at 4, 17, 19; *Kuebler*, *supra*, at 335; *Carmi*, The Enemy, *supra*, at 960-1, 988.

69 Joel R. *Reidenberg*, The Data Surveillance State in the United States and Europe, 48 Wake Forest L. Rev. (2014) 6-7.

70 Boštjan M. *Zupančič*, ECHR, App. No. 59320/00 (2005) 40 EHRR 1 = NJW 2004, 2647, In the case of Von Hannover v. Germany.

71 *Nader v. General Motors Corp.*, 255 NE2nd 765, 770 (NY 1970), cited in Paul M. *Schwartz*, Regulating Governmental Data Mining in the United States and Germany: Constitutional Courts, the State, and New Technology, 53 William & Mary Law Review 351, at 385 (2011).

the information – including a telephone company – the individual has "no reasonable expectation of privacy" in the information.⁷²

The United States stands alone, even among democracies, in the extraordinary degree to which its constitution protects freedom of speech and the press.⁷³ On the other hand, Germany is probably *the most speech-restrictive democracy in the Western world*.⁷⁴ [Italics added] However, virtually all other Western democracies lie closer to the dignity pole than the liberty pole, leaving the United States in an ever-growing isolation.⁷⁵

In summary then, the U.S. Constitutional protections of privacy, such as they are, are limited to government action. Private communication and data are "fair game." Furthermore, privacy – the key to dignity – is an add-on to Americans' constitutional rights but freedom of speech – at the other end of the privacy spectrum – is considered an essential American right.⁷⁶

VIII. Consequences for data collection, retention and analysis

New technologies have long posed challenges to privacy protection and dignity. Photography created problems in the 19th century. The death-bed photo of Otto von Bismarck was deemed too private to be permitted to be distributed. In France, the risqué pictures of Alexander Dumas with a Texas actress were likewise banned.⁷⁷ We have seen that gossip in the popular press was at the root of Brandeis's attempt to curb free speech in the U.S. Writing over 50 years ago, before the advent of the Internet, Edward Bloustein foresaw that "scientific and technological advances have raised the spectre of new and frightening invasions of privacy."⁷⁸

⁷² *Reidenberg*, Surveillance, supra, at 8.

⁷³ Guy E. *Carmi*, Dignity versus Liberty: The Two Western Cultures of Free Speech, 26 Boston University International Law Journal 277, at 339 (2008).

⁷⁴ *Id.* at 337.

⁷⁵ *Id.* at 361-2.

⁷⁶ *Carmi*, The Enemy, supra, at 967, 988, 997.

⁷⁷ Sally *Ramage*, Privacy - Law of Civil Liberties 274-75 (2007); The U.S. equivalent was Dale Earnhardt, a race car driver whose autopsy pictures were of great public curiosity. Solove, Conceptualizing Privacy, supra, at 1148 note 358. Not related to technology, but still worthy of note, French mortgages, normally recorded, were not if the borrower was a nobleman.

⁷⁸ *Bloustein*, supra, at 963.

Data creation, collection and analysis is simply another, albeit major, technological development which presents challenges to German concepts of freedom. In the German view:

... private data mining and publicly mandated surveillance...diminish the zone of individual freedom. ... [T]he ability of citizens to make decisions about their personal information and their ability to decide when and how to disclose their thoughts, beliefs and activities are impaired.⁷⁹

The more that is known about a person, the easier the person is to control. Control can lead to manipulation and truncation of free will and self-determination, undercutting the prime means by which a person forms her identity [and personality] and stands as an individual in society.⁸⁰

So by this analysis, the more data available about a person to the government or 3rd parties, the more control those parties have over the individual, the less constitutionally-protected freedom the person has.

Most EU countries therefore developed the view that the processing of personal data is forbidden unless it is specifically allowed. Permission must be explicitly given by each individual and only on the basis of informed consent.⁸¹ Europe has a complex set of rules applicable to data retention. For instance, the basic framework set out in Directive 95/46/EC prohibits the storage of data beyond the duration required to fulfill the purposes of data collection."⁸²

The protection of consumer data reflects in many ways the ...clash of attitudes. Europeans have aggressively *condemned traffic in consumer data*: It is, Europeans believe, a serious potential violation of the *privacy rights* of the consumer if marketers can purchase data about his or her preferences, and regulation is thus imperative. The resulting protections are embodied in the European Commission's forceful Privacy Directive of 1995, under which Europeans claim the authority, as the Wall Street Journal puts it, to play "Privacy Cop to the World."⁸³ [italics added]

Since the United States is usually charged with trying to apply its laws extraterritorially and being the world's policeman, this is a surprising role change.

79 *Reidenberg*, Data Surveillance, *supra*, at 27.

80 *Eberle*, *supra*, at 70.

81 Herbert *Burkert*, Data Protection (U. St. Gallen) 58.

82 *Reidenberg*, Data Surveillance, *supra*, at 5-6.

83 *Whitman*, Two Western Cultures, *supra*, at 1192.

IX. United States

U.S. law views personal data quite differently.

U.S. law is essentially silent on data retention, but regulates access to data held in the private sector by public authorities. This tracks the U.S. legal system's implementation of privacy right that restrains state power and focus on individualistic freedoms.⁸⁴

...[T]he United States does not rely on a notion that personal information cannot be processed in the absence of a legal authorization. Rather it *permits* information collection and processing unless a law *specifically forbids* the activity....The U.S. approach [to data] ...gives relatively free rein to companies to try new kinds of data processing.⁸⁵ [Italics added]

U.S. laws then come at the regulation of data from the standpoint of consumer commercial protection. For example, they *require* U.S. communications companies to retain data so that consumers can question their phone bills. Once we go down the path of personal data as part of commerce and not part of one's personality, the results can be anticipated. Things purchased tell even more about the individual than websites visited, because the purchase involves a person's commitment, not idle curiosity.⁸⁶

German privacy rights contrast dramatically with the American approach, where personal information is not treated as a right but as a commodity to be freely gathered, accessed, exchanged, and bought and sold on the idea that it is in consumers' best interest as a matter of economic efficiency and satisfying consumer preference....The difference in approach is, at its essence, grounded in a difference of world view; Germans prize dignity, even over money; American prize money. For Germans, the image of a person revealed by personal data is decisive; accordingly, that is something the person should control. For Americans, faith in markets is considered sufficient; people trust markets to determine appropriate use of personal information.⁸⁷

...[T]he United States does not limit data exports to other countries and has not created a national data protection commission.... As for oversight, the closest that the United States comes to a national data protection agency is the Federal Trade Commission (FTC)[!].U.S. law constrains only limited, sector-specific protections for sensitive information. It also does not generally re-

84 *Reidenberg*, supra, at 4-5.

85 Paul M. *Schwartz*, *The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures*, 126 *Harvard L.R.* 1966, at 1978 (2009).

86 Christopher *Slobogin*, *The Meaning of Intellectual Privacy*, 87 *Texas Law Rev.* 25 (2009).

87 *Schwartz and Peifer*, *Prosser's Privacy*, supra, at 71-2; *Eberle*, supra, at 71-72; *Burkert*, supra, at 58.

strict automated processing....At the level of form and substance then, the United States has taken a different path than the EU in regulating information privacy.⁸⁸

The German-U.S. gap in legislative philosophy already mentioned makes the differences more dramatic. American legislative "parsimony" means that the United States regulates information privacy on a *sector-by-sector* basis, with different statutes for the public and private sectors, different statutes depending on the content of the data, and even the way the data is collected.⁸⁹

[The US] piecemeal approach makes the United States "the great exception.... It regulates information privacy on a sector-by sector basis. The United States also has different statutes for the public and private sectors.... In some U.S. privacy statutes, a...distinction [is made] related to the form in which the data is held, or the contents of the information. FERPA [Family Education Rights and Privacy Act] regulates only information that is found in 'educational records', the Video Privacy Protection Act of 1988 covers only 'pre-recorded video cassette tapes or similar audio visual materials', and the Fair Credit Reporting Act reaches only credit reports. By contrast [to U.S. law], under the EU's omnibus approach, the law protects data regardless of the entity which holds it, or the type of information in a record.⁹⁰

The effects on commerce are obvious. The U.S. has become the world center of private and public data mining while German software development more typically focuses on industrial applications. As a result, the U.S. has developed huge, well-financed, vested interests that oppose limitations on data collection and commercialization. Even Americans who do not benefit financially from Silicon Valley are proud to be the home country of these innovative companies.

One U.S. legal observer sees data retention in particularly black terms:

The existence of retained [communications] traffic data, the reliance on uncertain access rules, the recourse to an elusive proportionality, the dependence on private actors, and the privileges accorded to national security collectively place *privacy and values in democracy at a turning point. In the aggregate, these elements increase the transparency of citizens' online lives and reduce the sphere of privacy that citizens can enjoy. This transparency is destructive of man's fundamental democratic values.*⁹¹

88 *Schwartz*, Privacy Collision, *supra*, at 1977-8.

89 *Schwartz*, Prosser's Privacy, *supra*, at 1974.

90 *Id.* at 1975.

91 *Id.* at 26.

Rudolph "Rob" Houck

Promising to make the gulf between the U.S. and Europe wider,

In January 2012, the EU released its Proposed General Data Protection Regulation. The Proposed Regulation carries a potential for destabilization of the current status quo. The Proposed Regulation ...develops a controversial "right to be forgotten" and elaborates stricter requirements before "consent can be used as a justification for data processing. These aspects of the Proposed Regulation create greater distance between the EU and the U.S. systems for information privacy law and cast the current status quo into doubt.⁹²

Clearly, the two legal models, U.S. and European, are moving farther apart, not closer together.

X. Effects of terror on German data collection

Americans are generally aware of the changes in their rights to privacy since 9-11. But Germany felt the effects of terror already in the late 1960's, more than 30 years earlier and before the Internet, at a time when only universities and other large institutions had mainframe computers. The cause was the student unrest of 1968 – in part a reaction against the immorality or complicity of prior generations – and the subsequent domestic violence of the Baader Meinhof Gang and Rote Armee Fraktion.⁹³

In 1968 (and again in 2001), Germany adopted so-called G-10 "eavesdropping" statutes – a reference to Article 10 [privacy of correspondence] of the Grundgesetz. They list the nature of the dangers that justify the use of strategic surveillance. These include the risk of: (i) an armed attack on Germany; (ii) the committing of international terrorist attacks with a direct relation to Germany; (iii) international trafficking in weapons of war; (iv) drug trafficking; and (v) a limited set of other significant dangers. The statute also sets obligations for the Bundesnachrichtendienst⁹⁴ to check whether the collected personal data are "necessary" for one of the statutory purposes set for in the Statute. If not, such data are to be immediately erased. The statute however "contains an absolute prohibition on the capture of communications from the core area of private life formation."⁹⁵

92 *Schwartz*, Prosser's Privacy, *supra*, at 1994.

93 *Miller*, *supra*, at 375.

94 BND - German foreign intelligence.

95 *Schwartz*, Systematic Government Access, *supra*, at 297.

During this period German law enforcement also developed "data screening" or mining ("Rasterfahndung").⁹⁶ A well-known example was trying to identify terrorists by (i) taking all the electric customers who paid in cash (instead of by wire transfer as is normal in Germany) and then (ii) weeding out all the customers who were properly registered with the local police. The resulting individuals could be looked at more closely even before computers were in wide use. Whether the procedure worked or not is disputed.⁹⁷ The Federal Constitutional Court decided that it *could* be used, but only in instances of a specific threat:

[O]ne has to live with this general threatening situation for years; evidence of its existence alone cannot permit a distinct infringement upon the important fundamental right of informational self-determination. Only the limitation to a concrete threat, which has to be constituted on a factual basis and not on the reference to a diffuse international situation, may justify a measure against so many completely unsuspecting people.⁹⁸

This balancing and proportionality performed by the Constitutional Court is typical of its attitude towards all anti-terror measures.

9-11 also had an effect on surveillance powers in Germany. "A significant development...since [then] and, indeed, since the end of the Cold War has been a steady stream of legislation that expands the powers of the Bundeskriminalamt⁹⁹, BND¹⁰⁰, Bundesamt für Verfassungsschutz¹⁰¹, as well as related agencies, and an increase in their ability to work together and to share information.¹⁰²

The Constitutional Court has gone through phases since 1947, presently being less likely than before to permit intrusions into the private sphere in looking for threats to the state. This may be a function of the maturing of the state and its (understandable) desire to differentiate itself from the United States.¹⁰³

⁹⁶ *Id.* at 292; *Kett-Straub*, *supra*, at 968.

⁹⁷ *Id.* at 974.

⁹⁸ *Id.* at 973; *Reidenberg, Data Surveillance*, *supra*, at 20-21; *Schwartz, Systematic Government Access*, *supra*, at 293 (data screening is not per se disproportionate; must be a particular risk) [italics added].

⁹⁹ BKA - Federal investigative police authority.

¹⁰⁰ See Fn. 94.

¹⁰¹ BfV - Federal Office for the Protection of the Constitution.

¹⁰² *Schwartz, Systematic Government Access*, *supra*, at 296.

¹⁰³ *Miller*, *supra*, at 395.

XI. Other factors and conclusions

In addition to the constitutional and philosophical differences between the United States and Germany, other factors are at play, making differences in attitudes between the two countries even greater.

Germany's code system of laws is focused on a theoretically correct answer grounded in basic principles. The practical outcome is less important. In contrast, Americans care primarily about the practical outcome and legal experts are left to trying to integrate many outcomes back into an existing body of law. So German judicial decisions focus less on implementation – something quite difficult in the data arena – both in the private, commercial sector and the public defense sector.¹⁰⁴

Germany's history of two lost wars in the 20th century and its being subject to possible threats from neighbors for centuries has made it used to threats of violence. More recently, the United States lost its sense of invulnerability in one dramatic day. The U.S. reaction was also dramatic and compromises in Constitutional protections followed. Normal legislative procedures were ignored in the interest of a quick reaction.¹⁰⁵ These are only now, 14 years later, being reconsidered. But the major U.S. "reform" is not to end data collection but to turn over the job to the private sector, with ready access to it by means of warrants readily granted by the FISA [Foreign Intelligence Surveillance] Court.¹⁰⁶ These protections would certainly not satisfy Germans and in any event they do not apply to them.¹⁰⁷

Germans lost most of their enthusiasm for nationalism in the aftermath of World War II and the Holocaust. Several post-1945 generations view overt German patriotism and national pride as dangerous and destructive. Individuals did not fly the German flag until the 2006 World Cup. This left the German system of laws (court system and police) as the subject of

104 *Id.* at 311; Karl N. *Llewellyn*, *The Bramble Bush* (1951).

105 <http://www.onthemedial.org/story/on-the-media-2015-05-29/>.

106 Geoffrey *Stone*, Reflections on the FISA Court, *Huffington Post*, (September 4, 2013) http://www.huffingtonpost.com/geoffrey-r-stone/reflections-on-the-fisa-c_b_3552159.html; the reform act as passed in June, 2015 is entitled the USA Freedom Act.

107 David *Cole*, Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens? 25 *T. Jefferson L. Rev.* 367-388 (2003); Karen Nelson *Moore*, *Aliens and the Constitution*, 88 *NY L. Rev.* 801 (2013).

great national pride, as reflected in public opinion polls.¹⁰⁸ In the United States, however, neither the court system generally nor the Supreme Court enjoys as great respect.¹⁰⁹ The U.S. Chamber of Commerce, for example, is one of the U.S. legal system's biggest critics and formed the Institute for Legal Reform, to change it.¹¹⁰

As already briefly noted, computers, software and Internet-based programs, including social media, developed early in the United States, and personal fortunes were made with few regulations to slow the process. In the meantime, a large portion of the U.S. economy developed based on the freedom to collect, process and monetize individual data – a valuable, new raw material – obtained without payment to the subject or much attention to the extent of the information gathered. Consent is usually given by a single click, without reading or trying to negotiate the pages of fine print. One commentator calls data the new oil, and privacy advocates, the new Greens.¹¹¹

Many factors about the nature of data make enforcement of the German position on dignity and data protection more difficult if not impossible: (i) almost every organization collects some data; (ii) organizations possessing data change and reemerge; (iii) data is constantly being generated, stored, shared and analyzed in ever greater volume, from ever increasing sources; (iv) it flows world-wide in seconds; (v) government regulation is always chasing behind economic incentives and innovations; and (vi) data exists forever, often in many locations.¹¹²

Broadly stated, Americans, as citizens in a large, powerful country, do not adopt international treaties or feel bound by many international laws or

108 http://www.ifd-allensbach.de/uploads/tx_reportsdocs/August12_Bundesverfassungsgesicht_01.pdf

109 <http://www.zeit.de/politik/deutschland/2012-07/umfrage-institutionen-karlsruhe> .
109 <http://www.people-press.org/2014/05/06/supreme-court-favorability-rebounds/> / Supreme Court Favorability Rebounds (May 2014) noting that the Court's favorability had climbed above 50%.

110 http://www.instituteforlegalreform.com/uploads/sites/1/ILR13052-overview_brch_WEB_FINAL.pdf.

111 <http://www.wired.com/insights/2014/07/data-new-oil-digital-economy/>; <http://www.forbes.com/sites/perryrotella/2012/04/02/is-data-the-new-oil/>; Meena Harris, Covington at #SXSW: If "Big Data Is the New Oil" Then "Privacy Is the New Green".

(March 10th, 2014); <http://www.insideprivacy.com/emerging-technologies/covington-at-sxsw-if-big-data-is-the-new-oil-then-privacy-is-the-new-green/>.

112 *Burkert*, supra, at 64.

Rudolph "Rob" Houck

norms. They think Americans "do the right thing" and "our way is the right way."¹¹³ In contrast, Germans have been betrayed by the feeling of "being right" and, as a mid-sized country without means or appetite to use force, are more dependent on treaties and legal concepts. Germans expect to be respected by the United States, and they perceive spying, especially spying on their highest and most respected elected official, to be a personal affront. Their honor as a country has been disrespected.

Distilled to one sentence,

[T]here is simply an inevitable tension between the worldview of a Goethe, for whom the development of "personality" was "the greatest blessing of the children of the earth" and the worldview of a Jefferson, for whom press liberty was the indispensable foundation of a free society."¹¹⁴

So what is to be done?

The first step is to recognize the problem and the depth of the problem. That includes the security and economic aspects of the problem. Germans underestimate the wealth created by data collection and mining and American admiration for the ingenuity behind it. American success in this new economy is a point of national pride, especially among younger Americans. Germans also underestimate (although less so) the American fear of vulnerability to terrorism – mainly foreign – and the widespread attitude that almost anything is justified in the name of security. Germans further underestimate the level of suspicion among security specialists, including within branches of the same government like the CIA and the FBI. The discredited Iraqi intelligence source "Curveball" and the CIA's blaming of the German BND for information the BND had strongly qualified is an example of cooperation gone bad.¹¹⁵ At the intergovernmental level, Germany's close business and political ties with countries Americans view with great suspicion makes transparency less likely.

113 Ruth Bader *Ginsburg*, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 *Idaho L. Rev.* 1, 8 (2003), in which she refers to "our island" or "lone ranger" mentality. Schauer, *Exceptional Amendment*, *supra*, at 30.

114 *Whitman*, *Two Western Cultures*, *supra*, at 1198.

115 <http://www.latimes.com/world/middleeast/la-na-curveball20nov20-story.html#page=1>. The BND warned the CIA that Curveball might be fabricating evidence of Iraq's nuclear program, but the warnings were ignored by the CIA and Curveball's claims became a significant justification for the second Iraq war. Once weapons of mass destruction were not found, the CIA blamed the BND.

Germans should realize that they are extremists on the issue of dignity and development of personality. They care about their data the way many Americans feel about their gun rights.

On the other side, Americans are becoming more aware of the risks involved in data collection and analysis. If Germans would make these risks more apparent to Americans, the average American might be more wary about checking the box or posting material on line. Germans could also develop their own, competing applications, offering Americans a greater level of privacy. Of course if the German app does not monetize the data, it will need a different economic model to operate. This could be fee for service, government support or payment by insurance companies. But the insurance company could not have access to the data per se. American companies cannot compete because they would be suspected of being incapable or resisting U.S. government demands.

Americans are unlikely to become more accepting of risks of terror. The recent adoption of minor civil rights protections in the field of government data collection was viewed by many Americans with suspicion.¹¹⁶ If Germans want protection from U.S. government data collection, they will have to take their own measures, such as encryption and use of wholly-controlled communications. This would constitute a mini-arms race as the U.S. pours billions of dollars and young engineers and mathematicians into breaking encryptions generally (not just German ones). Germany shows no willingness to make such investments. Furthermore, the U.S. data gatherers would then be less likely to share data with the Germans as they do now.

Finally, data is here to stay and is the enemy of privacy. Even the EU "right to be forgotten" applies only to data search engines and not to the underlying data. The French insistence on foreign compliance with its right to be forgotten is an example of overreach more typical of America. The internet of things, digitization of health records and collection of real time heart rates will permit even greater intrusion into privacy. As the cost of searching drops, other, less responsible alternatives to Google will develop and make the right to be forgotten meaningless. As noble and deep-rooted as the right to develop one's personality may be, to the extent it is dependent on privacy, it is likely to disappear. Americans will have a much easier time adjusting to this reality than Germans will. It is not as

¹¹⁶ <http://thehill.com/policy/technology/208411-senators-attack-nsa-reform-bill>.

Rudolph "Rob" Houck

much an American-produced problem as a problem that happens for now to have an American face. Thus we come full circle. In Greek and Roman times, only the very wealthy and powerful enjoyed privacy. Soon, only those who do not own cell phones or drive or use the Internet or will do so.