Deliberative Democracy Versus the Rule of Law: *Rasterfahndung* and German Anti-terrorism Versus US Intel Approaches

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ABSTRACT

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This paper examines the overlap between publicity or openness, plus different ideas about governance, discretion, and substantive standards, if one pursues judicial review. It draws on differing public law attitudes visible in German administrative (police), criminal procedure, and constitutional law, in something like the intel setting (anti-terrorism). By comparison, the American tradition includes on the law enforcement side a historical abhorrence of general warrants, but on the national security side recognizes minimal restraints on the executive given traditional views traced back to defense as one of the royal prerogatives. The practical problem is not that an exercise like effective judicial review by an FISA court looking at NSA activities is literally impossible. Rather, to make it effective, one arguably must first answer the question whether the problem is best approached in terms of reliance on a substantive rights standard like privacy, versus the balance between judicial review and executive discretion which may be understood differently in "law enforcement" versus "war-fighting" modes (and what exactly is the ultimate standard for national security?), versus the underlying governance problem of political versus legal responsibility.

The background is the following. Rasterfahndung or "pattern searches" through public databases to generate police leads as intelligence exercise were initially undertaken by German police in the 1970s as investigative response to repeated Rote Armee Fraktion attacks (the RAF or Baader-Meinhoff Gang). In the 1980s, Rasterfahndung originally undertaken under general police authority was regulated in detail by statute and subjected to judicial supervision (in line with traditional approaches to the Rechtstaat). Following 9/11, the German police employed Rasterfahndung as technique in an attempt to locate alleged al Qaida "sleeper" cells in anticipation of threatened revenge attacks within Europe, once the US undertook military action in Afghanistan in response. Recalling that several militants involved in the airplane attack on the World Trade Center had studied in Germany, overlapping nationwide database searches were carried out in Germany under judicial decrees in residency, university and similar registries focusing on criteria such as gender (male), age (18-40), study in Germany (as radicalization opportunity), religion (Muslim), place of birth (various Muslim majority countries), etc. This sifting process generated numerous leads in the form of lists of persons whom police subsequently investigated individually in various cities, but no such sleeper cells were ever found. In 2006, however, the German Constitutional Court declared the police's actions as in violation of a Moroccan university student complainant's constitutional right to informationelle Selbstbestimmung (most analogous to privacy) based upon the police actions having been undertaken without the existence of an imminent danger (understood as more specific indications of an attack to be carried out somewhere in Germany).

If you are going to increase reliance on judicial review one needs to (a) reconceive the judicial function under separation of powers to eliminate any deference to the executive in limiting his discretion, and (b) acknowledge differences in what the "rule of law" means, to the extent you talk about adherence to legal rules without the political side of control. So we can have under the "rule of law" broadly understood a government that proceeds the way the US has most recently in classified national security matters, however, then you must make correspondingly broader changes in terms of judicial and executive roles at the constitutional level, assuming judicial review were to increase. This paper is a lawyer's comparative law exercise with the goal of eliciting particularly from non-legal colleagues insights into what (philosophical, political and ethical) ideas underlying differing Continental and Anglo-American traditions have to say about the rule of law versus the Rechtstaat, and the extent to which they are consistent with US attempts to (re-)formulate standards for the FISA court in the wake of recent revelations about NSA activities.

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The practical problem is not that an exercise like effective judicial review by an FISA court looking at NSA activities is literally impossible. Rather, to make it effective, one arguably must first answer the question whether the problem is best approached in terms of reliance on a substantive rights standard like privacy, versus the balance between judicial review and executive discretion which may be understood differently in "law enforcement" versus "war-fighting" modes (and what exactly *is* the ultimate standard for national security?), versus the underlying governance problem of political versus legal responsibility.

These questions are explored through examining closely certain cases of the German Federal Constitutional Court touching in particular on Rasterfahndung, plus underlying historical themes. *Rasterfahndung* or "pattern searches" through public

databases to generate police leads as intelligence exercise were initially undertaken by German police in the 1970s as investigative response to repeated Rote Armee Fraktion attacks (the RAF or Baader-Meinhoff Gang). Following 9/11, the German police employed *Rasterfahndung* as technique in an attempt to locate alleged al Qaida "sleeper" cells in anticipation of threatened revenge attacks within Europe, once the US undertook military action in Afghanistan in response. The police lost the constitutional case, so the issue is what this tells us?

Public Law and the Rechtstaat on Background

Legal comparativists joke that the true "constitutional" underpinnings of German law consist of its traditional civilian codes such as the Civil Code (BGB, or Buergerliches Gesetzbuch covering much of traditional private law), Criminal Code (StGB, or Strafgesetzbuch as the original public law par excellence covering specific crimes as well as general doctrine in its general part), and Code of Criminal Procedure (StPO, or Strafprozessordnung as combination of the Federal Criminal Rules as well as portions of the Bill of Rights in functional terms *since it predates modern German constitution(s)*).[1] They are basically all nineteenth century creations tied to Germany's relatively late 1871 emergence as modern nation state (and hardly reflect a tradition of written or unwritten constitutionalism in the Anglo-American sense). Control of the German executive originated in late nineteenth century administrative law (Verwaltungsrecht) doctrine for specialized courts mostly to exercise control over

[1] Some might raise the criticism that such a description ignores displacement of national law through European (EU) law, as well as the addition of modern statutory frameworks to match the modern economy, such as capital markets or antitrust law, but public law is still largely traditional law, and the German Federal Constitutional Court has decided that in the case of conflict, German constitutional law should prevail over EU law.

“middle management” implementing laws, rather than sharing modern constitutional law’s focus on limiting the Leviathan state’s permissible reach as sovereign.

Traditional civilian views of separation of powers largely precluded judicial review by ordinary courts in the vein of *Marbury v. Madison*. The Germans created the Federal Constitutional Court (Bundesverfassungsgericht) under their 1949 Bonn Constitution, but deep legal structures remain. And in a doctrinal sense, much of modern German constitutional doctrine is actually borrowed from their older administrative law doctrine, developed largely in the nineteenth century as academic exercise before there was much “democracy” as we know it. This is important to the extent our conference seemingly poses the question what should be the role of democratic or political control when dealing in intelligence matters, meanwhile legal and democratic control are not the same thing. The practical problem is that secrecy and democratic political control are difficult to combine, with the peculiar result that legal control assumes disproportionate importance. But looking at these matters from an American public law perspective, can you get there from here?

Polizey and the Enlightenment Background. Modern German administrative law (Verwaltungsrecht) is the nineteenth child of eighteenth century “police law.” Modern police law (Polizeirecht) continues to exist as residual law applicable to the general maintenance of public safety and order (but not to “crime-fighting,” governed by the StPO to be discussed subsequently). Its doctrinal development is one key to understanding how the Germans conceive of the modern Rechtstaat.

As a matter of (German) hornbook law, the roots of modern police law are actually found in the older sense of Polizey or policy in contemporary usage. Polizey originally represented the "government policies" followed in early modern absolutist European states to advance the welfare of the state (e.g., looking to policies like merchantilism to advance state interests). So in legal historical terms, the distant roots of German police law actually lie in positive law provisions like the sumptuary codes of the early modern period, enacted to discourage the contemporaneous equivalent of conspicuous consumption (because buying massive foreign lace collars might disturb a favorable precious metals balance). The underlying concept was that the absolutist monarch as our stand-in for the Leviathan state could dictate policies and resulting conduct of the subjects of what was referred to as the Wohlfahrtstaat. Wohlfahrt or well-being referred to a state's general condition under the absolute monarch, using "subjects'" welfare almost paternalistically in opposition to that of self-aware citizens, in employing broad measures to raise the social, economic and cultural well-being of subjects (Untertanen in the traditional formulation, or literally "the subjected," without much of a democratic ring). In older German legal usage references to the "police state" are not references to the Third Reich, but rather to the Wohlfahrtstaat as Polizeystaat.[2]

American constitutionalists invoke the Declaration of Independence with its color of democracy and deism, referencing Locke to explain our constitutional roots rather

[2] In current German political usage, Wohlfahrtstaat is sometimes used in an exaggerated rhetorical sense by conservatives to describe the Sozialstaat or as we would say in American usage the social democratic state, so rejection of "European social democracy" recently attacked in American political discourse also exists in the home of the Sozialstaat. To that extent, the Wohlfahrtstaat is something of a portmanteau word, but the traditional legal usage aims basically at "enlightened" absolutism, rather than social democracy in the modern sense.

than Hobbes, who might find more favor with the British. The German analogue lies in the recognition that the Enlightenment yielded its own view of natural law on the Continent, specifically in the form of claims about (secular) universal or rational legal principles on which a state should be governed. For our philosophers, the links run from Wolff to Kant in German public law terms. But like the perceived link to the Declaration, the pre-history in terms of Enlightenment schemes is more a matter of atmosphere than doctrine at the lawyer's level.

Legal doctrine as such runs through changing views of Polizey, which in turn was intimately linked with the purpose of the state in Enlightenment terms. Its purpose was the Staatszweck in traditional German public law doctrine (see Preu 1983), although in modern constitutional usage often transformed into the Staatsziel or "goal of the state" as effectively the normative definition of the state (now employed by German jurists at the level of discussing the rule of law or Rechtstaat in its German interpretation, also in parallel the idea of the social democratic state or Sozialstaat, as well as informing broad concepts such as public order). The prospective trick for lawyers, however, is to be found in the eighteenth century approach to limiting the broader historical version of the Wohlfahrtsstaat as the state ruled by an absolutist monarch who undertook within his absolute discretion to do what he considered advisable for the theoretical benefit of his subjects. If the absolutist power of an enlightened monarch was theoretically still largely unlimited, the correctness of his governance at the level of individual measures was to be judged in terms of whether those measures served the purposes of the state in enlightened terms. The Staatszweck or purpose of the state was developed during the Enlightenment in a didactic vein stressing natural or universal law as the proper law to

be applied by the monarch. In this manner, the purpose of the state could impose theoretical bounds on the monarch, separate and apart from concepts like democracy. So while the Americans and French had their (historically Republican) revolutions rejecting monarchy in the late 1700s, the Germans kept their monarchs (or, more properly, their dukes and princes prior to German unification in 1871). However, the power of the (German) state was to be made subject to the purposes of the state, in a long migration from the Polizey of the Wohlfahrtsstaat to the modern Rechtstaat.

In lawyers' terms, the literal roots of modern German police (and administrative) law lie in the late Enlightenment codification undertaken by Frederick (II) the Great entitled the Allgemeines Landrecht Preussens von 1794 (ALR) in Section 10 II 17:

> To take the necessary measures to maintain public peace, security and order, and to protect the Public, or individual members of the Public, from threatened danger, is the role of the police.[3]

"Police" of course are not our modern "boys in blue," who in Germany were largely a nineteenth century creation, much as were the British bobbies. "Police" in the late eighteenth century Prussian setting constituted practically all of government outside the specific areas of finance, courts and the army (and so remained Polizey historically speaking, pending nineteenth century developments). But the ALR Section 10 II 17

[3] "Die noethigen Anstalten zur Erhaltung der oeffentlichen Ruhe, Sicherheit und Ordnung, und zur Abwendung der dem Publico, oder einzelnen Mitgliedern desselben, bevorstehenden Gefahr zu treffen, is das Amt der Polizey." In terms of production, the Allgemeines Landesrecht Preussens was a long-running project of Frederick the Great, correspondent of Voltaire and leading example of an Enlightenment autocrat. He passed away in 1786, and the ALR was largely finished before the French Revolution, although the initial 1792 version in the form of the *Allgemines Gesetzbuch fuer die preussichen Staaten* was actually withdrawn and reedited into more conservative form in the final 1794 version. It was published under Frederick William II as successor, although the original "team" of Carl Gottlieb Svarez and Ernst Ferdinand Klein who created the ALR carried at his direction the project through to fruition after Frederick the Great's death.

formulation introduces the concept of present “danger” as implicit *limitation* on government power (Gefahr; see Scholler/Bross, 13), which to this day constitutes a central concept of German public law as the legal basis necessary to justify any invasive police measure (and, more generally, government actions) outside the area of the enforcement of criminal law.

“Danger” as abstract concept is not enough, however, since some degree of present or imminent danger as contemplated by ALR Section 10 II 17 is necessary. Further, the subject of the endangerment presumably must encompass one of the protected purposes of the state under what will become the Rechtstaat. Foreshadowing where our journey is headed in terms of modern German constitutional analysis, the very generalized threat of Islamic terrorism post-9/11 was found not to be a sufficiently concrete “danger” to justify database searches based upon an individual’s gender, age, religion, place of study, country of origin, and related characteristics in order to develop lists of persons of interest for further investigation as potential “sleepers” or members of suspected Islamic terror cells (at least not when subjected to an interest balancing analysis in terms of proportionality focused on a fundamental right analogous to privacy). So the traditional element of “danger” traceable to the 1794 precursor of modern police (and administrative) law assumes a constitutional dimension.

On the technical side we should recognized the (circular?) challenge in determining the imminence of a “danger” as precondition to the state’s very authority to avoid it. Lawyers might regard this as in the nature of some kind of probability calculation in practical terms, meanwhile our philosophers presumably recognize the epistemological challenge of governance in determining the necessary “ripeness” of a

danger only to be rendered moot by government action to avoid that selfsame danger (as hypothetical exercise). Foreshadowing, the analogy may be to hardly verifiable claims that justify classified work such as NSA activities on the basis that they have prevented largely undisclosed attacks (so our own version of a hypothetical claim). And how to strike a vital balance in what is admitted to be a hypothetical exercise (as opposed to probable cause's role in American law enforcement where the underlying crime is a given)?

Contrast this with the seemingly simpler Anglo-American legal focus on limiting intrusive actions via strategies like the warrant preference incorporating the judge's third party probability analysis concerning its very purpose (and a corresponding abhorrence of the general warrant as prior authorization to undertake invasive measures without probable cause, in the traditional formulation). The further story lies in the legal formulation of "imminence" in terms of danger, which German police/administrative law traditionally, and now constitutional law two hundred years on still struggles to articulate in terms of legal doctrine alongside parallel doctrines similarly addressing the problem of how to transform the early modern Wohlfarhtstaat into the Rechtstaat.

The Nineteenth Century Roots of the Rechtstaat. There are three elements of interest in nineteenth century German legal developments as precondition to our understanding of modern German constitutional analysis. They include the final transition from the Wohlfahrtstaat, conceptualization of the state's authority as being bounded by criminal law enforcement and the prospective avoidance of dangers to society, and the rise of modern German administrative law in a doctrinal sense (much of which was simply

taken up into German constitutional law post-1949 via the Federal Constitutional Court interpreting the Bonn Constitution).

The first nineteenth century element of German legal doctrine involves definitive settlement of the lingering eighteenth century question how to distinguish between a paternalistic Wohlfahrtstaat rooted in absolutism, and the modern Rechtstaat of theoretically limited scope. We already recognized a theoretical boundary for government actions inherent in focusing on the purpose of the state (Staatszweck) under Enlightenment views, but at the time of the 1794 Section 10 II 17 ALR's implicit focus on Gefahrenabwehr, it presumably would have been conceived of more as a caution of conscience to an enlightened monarch like Frederick the Great, rather than as a legal limit on the monarch's actual powers (or equally, as directive to "middle management" in terms of Prussia's subsidiary officials concerning how the monarch expected them to implement his general directives).

Our philosophers should recognize a historical problem, however, that the first half of the nineteenth century following the Napoleonic Wars represented generally for all Continental states a period of effective backsliding amounting to conservative, aristocratic counterrevolution. This culminated in the 1848 revolutions throughout Europe, which in the German context emphasized Pan-Germanism (meaning national union), popular discontent with autocratic government while advocating increased political freedom, liberal state policies, democracy, nationalism and freedom from censorship (1848 being referred to as the Maerzrevolution or March Revolution in the German context). The 1848 revolutionaries fail in the short term miserably, and details of the deeper social history of Central Europe lie beyond this paper's scope. But in

terms of legal and political developments, the March Revolution's role in the German narrative is to plant the seed of modern Germany's 1871 unification under Prussian leadership, culminating in the modern German state to the extent it contains modern citizen (Buerger) expectations in opposition to the ancien regime's attitudes towards subjects (Untertanen).

So in 1871 Germany becomes a "modern," unified state, meanwhile scholars of German public law highlight the 1882 Kreuzberg Judgment of the Prussian Supreme Administrative Appeals Court on a level that can only be compared among American lawyers to the prominence of *Marbury v. Madison*. So how could a zoning case involving the equivalent of height restrictions in Berlin become *the* key precedent in German public law for development of the Rechtstaat, thus ultimately modern German constitutionalism?

Recognize first that the Duke of Wellington, of Peninsula Campaign and Waterloo fame, hardly features in the German narrative of the Napoleonic Wars. Instead, mythic German narrative contemplated opposition to, and occupation by, the Napoleonic forces being overcome largely by Prussian will. In 1821, a statue to commemorate Prussia's victory in its newly finished "Wars of Independence" was erected on a high hill in Berlin as Prussia's capital (in its Kreuzberg District). As a result of the combination of Berlin's rapid industrialization and rising land prices, within a relatively short time the entire area surrounding the patriotic monument was increasingly occupied by what were described as tall, unattractive barrack-like accomodations for the new urban proletariat, which threatened to obscure the historic monument. Meanwhile, Germany was caught up in a flush of patriotism as result of its

1871 national unification under Prussian leadership, as well as the related defeat of the French yet again in the 1870 Franco-Prussian War.

The police headquarters of Berlin issued a land use regulation under the equivalent of ALR Section 10 II 17 to restrict the height of buildings in Kreuzberg (arguably to preserve the view of the Independence Wars monument, although query whether the aesthetic judgment inherent in a description of the buildings as "barracks-like" was equally the motivating factor). A Kreuzberg landowner seeking to build yet another profitable tenement to house the new factory workers challenged in administrative court the denial of a building permit, which prevented him from building the building he wanted on land that he already owned.

The landowner asserted what German legal scholars might characterize as a nineteenth century bourgeoise claim to undisturbed enjoyment of property rights, posing the question of whether the police's power circumscribed by the scope of Gefahrenabwehr extended in the traditional manner of the Wohlfahrtstaat to broad ideas about general welfare in terms of aesthetics (versus being limited more to concrete threats to public health, which the newly built workers' quarters would not represent). The property and limited government arguments drew in return somewhat weak advocacy that youths' contemplation of Prussia's glorious past in form of the Independence monument would contribute to the national defense in convincing them to join the army, etc., but the administrative appeals court ultimately determined that the proper scope of Gefahrenabwehr was limited (and the height restriction or appearance regulation was correspondingly beyond the state's powers). So the Kreuzberg Judgment as affirmation of citizen property rights in German terms circumscribes state

regulatory power under public law, understood as the final nail in the coffin for the Wohlfahrt concept, long before the existence of Germany's modern Bonn Constitution of 1949. This is described in German public law scholarship as incorporating a traditional liberal Rechtstaat conception of police law and state authority (liberal-rechtstaatliches Polizeirecht). The "liberal Rechtstaat" terminology incorporates that European view which traditionally emphasizes the liberty and property interests of individuals over communally oriented claims, whether articulated in terms of the state or society. As such, it seemingly incorporates a nineteenth century view of "rights."

The second nineteenth century public law development of interest involves creation of the institutions of the German criminal justice system as conscientious doctrinal exercise in reforming the traditional inquisitorial criminal trial process much criticized, but actually very little reformed, during the Enlightenment.[4] The overarching concept of criminal law enforcement (Strafverfolgung) matters chiefly to us because it is the doctrinal twin to the avoidance of "danger" to the public (Gefahrenabwehr) that we have already seen in 1794 ALR Section 10 II 17 as further specified by the 1882 Kreuzberg Judgment. Foreshadowing modern constitutional law, the police's authority (and by extension the state's power) to undertake any invasive measures came to be defined by the dual mandates of Gefahrenabwehr and Strafverfolgung circumscribed by the purpose of the state (Staatszweck) as limitation on its power. Matters beyond the prevention of (concrete) dangers to the public as circumscribed by the purpose of the state and criminal law enforcement itself are simply beyond the state's power.

[4] Criminal law itself as core German public law was only reformed in the nineteenth century, with the key scholarly contributions in German eyes probably coming from Beccaria's late Enlightenment opposition to the entire ancien regime view of criminal law including corporal punishment and, theoretically, still torture seemingly as social control mechanism, plus Anselm von Feuerbach's adaptation of criminal law doctrine along the lines of Kant to focus on issues of individual responsibility.

The German Code of Criminal Procedure (StPO) was the mechanism for reforming inquisitorial procedure, and the ultimate national product of the 1870s is itself the product of much state-level experimental reform in German-speaking jurisdictions during the first half of a tumultuous nineteenth century.[5] But from a common law lawyer's perspective, what is distinctive about the StPO is that by design it regulates not only the forensic trial and pretrial charging stages of the process, but also the prior investigation of the alleged crime. In a legal historical sense, this is a function of the idea that the legal institution to be reformed was the early modern inquisitorial trial itself, which was by its nature more an exercise in direct judicial investigation typically followed in camera by non-public proceedings.

On a procedural level, the inquisitorial judge's function was eventually split into two parts, what became the current public phase of the proceedings run by one or more judges (German courts are largely collegial courts), and the pretrial or investigatory proceedings for which the prosecutor was nominally responsible. The police in practice actually control the investigatory proceedings via the simple expedient that the prosecutor rarely even knows of an alleged crime's existence before police turn investigative files over to the prosecutor for a charging decision.

The modern legal fiction, however, is that the organizationally separate police are designated by statute as "assistants" of the prosecutor as a matter of law.[6] Meanwhile, during the investigative phase, the police effectively act based upon delegated authority designed for the prosecutor as quasi-judicial officer. Police often initiate invasive investigative measures under standard StPO exceptions designed for situations where

[5] For those desiring more detail, the standard work for following the development of the German criminal justice system over a longer period of time is Schmidt, 1983.
[6] Under Section 152 of the Gerichtsverfassungsgesetz or GVG.

delaying investigative means would threaten their success (invoking danger in delay or Gefahr im Verzug).[7] Specific StPO provisions require varying levels of suspicion equating to the equivalent of "reasonable suspicion" or "probable cause" in fourth amendment terms as preconditions for a variety of invasive measures on the level of searches, seizures, and arrests. By comparison to the fourth amendment, however, the StPO renders it very difficult to jail suspects in terms of impinging upon liberty interests, but relatively easy to search premises in terms of more limited protection of property interests. This differing relative emphasis on protection of the person visible as early as the nineteenth century StPO arguably may come to matter in modern constitutional interpretation when facing the question whether and how to conceive of a substantive right to place in opposition to augmented surveillance as presented by NSA activities (e.g., how to protect the person as opposed to a place).

[7] Compare Nelles 1980. The pattern is reflected differently over time in different parts of the civilian world, since French law, for example, retained the "investigative judge" or magistrate in the pretrial phase. The doctrinal problem in reforming inquisitorial procedure was the idea that the traditional inquisitorial judge ran the investigation and then switched to the tryer of fact at a certain point, raising obvious issues of prejudice if the presiding judge had made the initial charging decision wearing a slightly different hat. The prosecutor or Staatsanwalt as quasi-judicial officer embodied the German resolution, but our own interest is focused less on the internal rationale of trial or pretrial oriented reforms and more on the practical outcome that police act in a criminal investigatory capacity in the investigatory phase effectively under quasi-judicial powers delegated from the prosecutor. The investigatory phase of the criminal "trial" (Ermittlungsverfahren) is theoretically carried out under the strict supervision of the prosecutor (described in traditional doctrine as "master" of the investigatory phase as "Herrin des Ermittlungsverfahrens"), but German criminologists and criminal law scholars came to the view at the latest in the 1970s that the police themselves were "master of the investigatory phase." This raises in turn subsidiary problems about how to control the police. In the US, similar concerns of constitutional criminal procedure were addressed via exclusionary rules, which German law traditionally disfavored. The only sanctioned exclusionary rule approach in the StPO was traditionally an absolute exclusion of coerced confessions under StPO Section 136a. This arguably was based more in reaction to police practices during the Third Reich, rather than reliability concerns as such motivating various American exclusionary rules. However, precisely in areas touching on constitutionally protected privacy-like interests that will concern us in the Rasterfahndung setting (freie Entfaltung der Persoenlichkeit or free development of the person), exclusionary provisions have been added recently to the StPO for such evidence inadvertently gathered in wiretaps and similar surveillance. What is not yet clear is whether such excluded evidence would lead to a full "fruit of the poisonous tree" analysis excluding all evidence connected to the forbidden knowledge, but it would seem more likely that use of such causally "tainted" evidence as a matter of general doctrine would be subject more likely to a proportionality analysis, rather than an absolute bar on its use.

The third nineteenth century element of German legal doctrine of interest involves the idea that, relatively speaking, “modern” German administrative law arrives almost full grown in the wake of 1871 unification. The 1882 Kreuzberg Judgment has already been discussed. The entire nineteenth century is a period of German public law development,[8] but administrative law is a special case to the extent its early, classic statement as developed by Otto Mayer in treatise form (see Mayer 1895 & 1896) in the last quarter of the nineteenth century through the beginning of World War I, came almost directly upon the heels of unification (1871), and thereby filled an immediate perceived need. Mayer’s work still compares favorably with modern treatises as statement of general principles, perhaps because he seemingly borrowed heavily from existing systematized French administrative law to encompass otherwise casuistic code-less public law (compare Mayer 1886; and French administrative law had a comparatively longer history since roughly 1800 in the already centralized French state).

Classic concepts of German administrative law, such as proportionality, originally worked out by Mayer are subsequently taken up in post-1949 constitutional doctrine again not much more than fifty years later (even less when you consider interludes imposed by two wars). So there are worse ways to understand German constitutional law as part of public law than to focus on the relevant underlying administrative law doctrines, which themselves grow organically out of police law in the form of key concepts already discussed such as Gefahrenabwehr reaching back to 1794 ALR Section 10 II 17 (now matched with Strafverfolgung on the criminal law enforcement side to circumscribe the scope of the state’s authority). Beyond provenance of public law as such, this is our basis for tracing an intellectual chain of ideas running

[8] Those wishing to follow its details are referred to Stolleis 2004.

consistently from police law, through administrative law, to constitutional law. German public law arguably represents much more a unified conceptual edifice and closed system than Anglo-American public law with its heavy reliance on politics as safety valve (hence our focus on democracy), since the Rechtstaat arguably precedes democracy.

With that in mind, and to prepare for eventual constitutional interpretation, let us acquaint ourselves with a variety of basic public or administrative law concepts developed during what German legal history would regard arguably as their "founding father" generation in modern doctrinal terms. Staying for the moment with the Rechtstaat concept, we first acquaint ourselves with the concept of Gesetzesvorbehalt (aka Vorbehalt des Gesetzes) or specification by law, which in the Rechtstaat tradition serves to tie the state's hands in limiting executive discretion, viewed as inherently suspect, by channeling state action through specific legal provisions fitted to specific problems by the legislature. For example, despite the state's theoretical capacity to proceed via modern police law's general powers modelled on ALR Section 10 II 17, the Rechtstaat resolution of Gefahrenabwehr requires further specification. This is the role in a technical sense of special police law or besonderes Polizeirecht as opposed to traditional general or allgemeines Polizeirecht. So, for example, in the area of public health there is a Bundesseuchengesetz or Federal Communicable Disease Law (BSeuchG). As might be suspected from its name, this enactment has a quite wide-ranging concept of (imminent or concrete) "danger" defining the state's invasive powers in terms of Gefahrenabwehr. After all, who wants to wait for the first wave of active plague cases before imposing a quarantine? But by capturing this special regulation of

public health concerns, note that the legislature in separation of powers terms has prescribed applicable legal standards, also permitting early and broad intervention where called for, and in so doing has theoretically channeled the executive's permissible actions, hence limiting its discretion (since there is a sense that general law in the form of something like ALR Section 10 II 17 has been displaced by a raft of "special police laws").[9]

Should Gesetzesvorbehalt be analogized by American lawyers simply to an exercise like the Steel Seizure cases as addressing state power, but equally executive-legislative relations in separation of power terms when the legislative branch's enactments seemingly restrict the executive?[10] The intellectual difference is that the Steel Seizure cases represent in our terms a test in extremis of inherent versus Congressionally limited executive power, while Gesetzesvorbehalt is intended instead as rule rather than exception. Foreshadowing our specific attention to Rasterfahndung, the operational practice of comparing databases was invented by the Bundeskriminalamt (BKA, roughly equivalent to the FBI) during the turbulent 1970s Red Army Fraction (RAF) terror campaigns under the general police authority of the equivalent of ALR Section 10 II 17.[11]

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[9] At the same time, there are theoretical limitations in the nature of substantive due process limitations in modern German constitutional law on the extent to which rights may be balanced out of existence or superceded (Wesensgehalttheorie under Article 19 of the 1949 Bonn Constitution).

[10] For the benefit of philosophy participants, the Steel Seizure cases involve the American constitutional question of the extent of the President's full constitutional powers in the context of President Truman attempting to "nationalize" the steel industry to ensure continued operation in the face of a strike during the Korean War, on the basis that the steel industry's continued operation was crucial to the war effort. The question also posed the issue whether the Congress could lessen the President's inherent power by passing legislation to channel it, which arguably begins to resemble Gesetzesvorbehalt.

[11] As illustration, the BKA developed an understanding that the RAF members were trying to hide through the simple expedient of paying utility bills in cash, rather than via bank transfer (since opening a bank account meant identifying yourself). The BKA then cross checked via Rasterfahndung all households paying their utility bills in cash against other characteristics and uncovered at least one RAF safe house as a result.

This reliance on the general clause to authorize a police investigative measure was perceived as inadequate, with the result that over the next twenty-five years state-level police laws were reformed to incorporate very specific provisions governing Rasterfahndung and related anti-terror tactics, geared in part to establishing what level of concrete "danger" in Gefahrenabwehr terms was required for specific measures.[12] It might look to an American lawyer upon first glance as the simple equivalent of specifying degrees of "probable cause," but remember that the determination is whether there is a specific enough "danger" in the first place to justify an invasion of rights with the inquiry taking place on the pre-criminal act prevention side, rather than the post-criminal act repressive side. The Federal Constitutional Court then in 2006 struck down the particularly aggressive North Rhine Westfalian Rasterfahndung enactment on the basis that it had impermissibly lowered the standard of "concrete" danger to "pre-danger" or Vorgefahr when faced with generalized fears of Islamic terrorism (perhaps better "insufficiently specific" danger).

American lawyers might ask the question whether the German government would not have been better off in not seeking specificity in enactments (to preserve executive discretion), but that would misunderstand the thrust of Gesetzesvorbehalt specifically to lessen executive discretion. Under German views, the exceptional case in separation of powers terms is represented by claims of sole or broad executive branch authority (against which, the converse criticism is of a perceived extreme view that the legislative branch's authority extends monopolistically to all areas of

[12] This becomes in historical terms part of the Musterentwurf discussion covered subsequently. In a political sense, the significant element on the timing side is that a long process of changing police law arguably is completed just as German attention is diverted by reunification on an extended basis.

government authority, compare Rogall 1992, 22 et seq). But in a functional sense, this simply highlights the hidden question of executive discretion in the Rechtstaat.

Foreshadowing again, German public law would basically disfavor broad, unreviewable national security claims, including the unsuitability of judicial review based either upon separation of powers arguments that judges are just not very good at that kind of inquiry, or historically based claims to sole executive authority (for example, American claims of broad executive war powers anchored in the traditional view of defense as one of the king's prerogatives[13]). German jurists would have a visceral negative reaction to claims asserting any rechtfreies Raum or areas not subject to the coverage of "law," which they would equate to recognition of overly broad executive discretion in American conceptual terms.

Here we return to another general public law aspect of the pairing of preventive Gefahrenabwehr versus repressive Strafverfolgung as defining the scope of state power as limited by state purpose. There is a very basic doctrinal distinction between Gefahrenabwehr and Strafverfolgung at the level of executive discretion. Strafverfolgung in terms of the pursuit of criminal law violations is theoretically mandatory in traditional terms (unlike Anglo-American law's concept of prosecutorial discretion). In theory all criminal offenses must be prosecuted to protect society and assert its legal norms. German criminal justice now recognizes its own version of plea bargaining, pre-trial diversion, etc., although broad acceptance has only come in the past 20-30 years of the criminological reality that much crime is intentionally not prosecuted, comparable in various ways to US practice. But the traditional theoretical

[13] However, the UK had progressively abandoned elements of the royal prerogative over time (see Poole 2010), then most recently [Pratt UK soldier death suits, House of Lords].

bias exists towards what might be viewed as a “just desserts” theory of uniformly and strictly enforced criminal law.

Violation of state (society’s) norms requires the measured response specified by law makers, lest the norms themselves be undercut or individual violators be treated differently. The criminal law is considered the ultima ratio for a state’s vigorous assertion of its highest purposes (recalling Staatszweck). So employing one German hornbook example, the very high emphasis on life under the 1949 Bonn Constitution (resulting from opposition to crimes of the Third Reich) arguably requires the criminalization of abortion, rather than reliance simply on social welfare measures to enable women to carry all fetuses to term with minimal disadvantage. (Meanwhile, social disagreements about “right to life” versus a woman’s “right to choose” are equally strident in Germany as in the US, if not more so.)

Similarly, another stock hypothetical to highlight distinctions between US and German approaches to public law also in terms of the purposes of the state involves the question whether it would be “constitutional” simply to abolish the crime of homicide? American lawyers see no problem as long as legal protection of human life is abolished for everyone (an equal protection analysis), while German lawyers would maintain that abolishing the crime of murder would be “unconstitutional” because the state is required to use its highest means to protect human life (the ultima ratio argument).

Does this kind of approach make any difference in practice? Carrying this kind of analysis over into current problems in US homicide law and gun rights as example, German jurists presumably would approach the entire issue of our “no retreat” statutes and the Travon Martin case not as a potential racial discrimination problem, but rather in

terms of whether eliminating the duty of retreat would place an undue burden on protection even of a potential assailant's life (and so whether a "no retreat" rule might violate basic tenets of German public law, hence might be found "unconstitutional") . This would be true even against the background that the potential non-retreating victim (George Martin) might fear for his own life, since the potential loss of the victim's life presumably must be balanced against the more probable loss of the assailant's life in the absence of a retreat rule. And this also highlights the technical approach in German law of specifying a protected legal interest (Rechtsgut, also Rechtsschutzgut in the criminal law context), which must be asserted, but enables in doctrinal terms a more nuanced treatment of its protection in terms of interest or balancing conflicting Rechtsgueter.

This has consequences at a conceptual level for the analysis of rights also tying back into Gesetzesvorbehalt. Individual rights (Rechte) are subject also to an independent balancing analysis in terms of legal norms in the form of the state's justification for "invading" such rights via Eingriffe (literally, "invasions" [of rights]) as state justification to impinge on protected rights in varying degrees, based upon the relative weight of legal goods at stake. As a matter of doctrine, Eingriff is analysed in an "as applied" manner in its own analysis, with German doctrine then focusing on differences in distinguishing between classic negative rights versus positive social and economic rights in the Sozialstaat (compare Rogall, 1992, 17). And this kind of balancing is also an underlying justification for the principle of proportionality or necessity in German public law, namely that state actions must be proportional in terms of the legal interests at stake. In this sense one can over- as well as under-protect a

legal interest, so the Goldilocks solution beckons. Accordingly, for another example, in German legal analysis jaywalking could not be made a felony punishable by incarceration in excess of a year (under the traditional common law formulation). It would simply be disproportionate despite any disturbance of traffic, the potential for life-threatening accidents, etc. And classic administrative law's concept of proportionality, including the methodology of weighing competing interests or rights, is an administrative law doctrine which has been taken up into post-1949 German constitutional jurisprudence.[14]

By opposition to Strafverfolgung, Gefahrenabwehr is traditionally recognized as discretionary, subject to the caveat that what is discretionary is the *means* of protecting an interest encompassed by the purpose of the state, not whether a particular interest is worthy of protection (because of the basic role of Staatszweck).[15] Having recognized that, however, the very existence of administrative law and courts within the Rechtstaat is premised upon the idea that the executive's discretion is not unlimited. So much of classic German administrative law doctrine is aimed at the problem of how and when to recognize permissible discretion in an executive response to a problem of Gefahrenabwehr. The theoretical problem is that recognizing any too great degree of discretion in the executive would for the Rechtstaat seemingly constitute a rechtsfreien Raum or "law-free space," theoretically anathema.

[14] See the Apoteke Urteil, 7 BVerfGE 377, 405 et seq (1958). Concerning structural aspects of proportionality in German constitutional law including an overview of recent criticism touching also on procedural democracy views and general problems of judicial review, see Pirker 2013, 91-133.

[15] The practical problems are not encountered with interests involving exclusion of the state in the nature of first generation or negative rights in human rights terms, but rather with interests requiring positive engagement of the state, in the nature of second generation or positive rights in human rights terms. So Gefahrenabwehr may become complex in the Sozialstaat context, but is less so if the concern is anti-terrorism or law enforcement.

On the practical side, German jurists would certainly recognize the adage that there is more than one way to skin a cat. Speaking doctrinally, however, principles like proportionality and the requirement of protecting legal interests progressively lessen, and eventually theoretically eliminate discretion (the general German administrative law terminology is Ermessensreduktion auf null, or the reduction of discretion to zero, while police law statutes typically employ the concept of Pflichtgemaess or "duty-bound" exercise of discretion).[16] The access to the administrative court channels responses, as opposed to the typically American democratic political response in terms of "unelecting" the city council or zoning board members, or even state-level judges and prosecutors, who make decisions with which one disagrees. But the underlying assumption is that courts under German public law will decide questions that might be avoided by US courts under doctrines like political question or deference based upon separation of powers concerns, which represents functionally the election for political over legal control. Otherwise, the whole concept of legal control in Rechtstaat terms simply does not work. Foreshadowing, however, we recall the practical problem that the secrecy surrounding intelligence matters and democratic political control are difficult to combine, with the presumed result that *effective* legal control assumes disproportionate importance. But can you have very effective legal control if American judicial deference is the rule?

The last classic police law area to explore is the doctrinal development of the necessary degree of imminence requirement for "danger" visible in the Gefahrenabwehr

[16] In German administrative law's terms, however, the pattern case is more likely to arise in areas like traffic and zoning laws rather than anti-terrorism. The practical example in German legal process typically involves hotly litigated NIMBY problems involving local government siting of roads and the permissibility of 24 hour public road use by trucks in an idyllic Alpine valley in which potential threats to groundwater and loud trucks unite local farmers and villagers.

analysis reaching all the way back to ALR Section 10 II 17. But that takes us beyond the nineteenth century as continuing discussion.

Police Law in the Late Twentieth Century, "Concrete" Danger, and the Musterentwurf Controversy. Modern public law in Germany has a particularly checkered legal and social past as a result of German history's ups and downs during the twentieth century. German legal scholarship normally presents "modern" public law history sectioned as Enlightenment, entire nineteenth century through 1914, silence during World War I followed by the Kaiser's 1918 abdication, creation of the (doomed) Weimar Republic typically being portrayed as a perhaps too idealistic attempt to revive constitutional yearnings of the 1848 March Revolution in the face of great social upheaval, the Third Reich as general derailment, and getting back on track in 1949 with the Bonn Constitution. All of this is true to a certain degree, but still fails to convey the full flavor of the modern German experience for our purposes.

After 100+ years, German legal scholarship concedes the difficulty in the definition of a sufficient "imminence" of danger to justify state action under Gefahrenabwehr in terms of an all-encompassing philosophical or doctrinal formulation of the sort favored by civilians (compare sources in Darnstaedt 1983, 22; Hansen-Dix 1982, 19-20). But the Sisyphian effort continues based upon the sentiment articulated by a leading twentieth century police law commentator that "where the police confront us, only there do we know how far the power of the state may reach."[17] The most widely quoted judicial definition stems from the same Prussian Supreme Administrative Appeals Court that decided the Kreuzberg case, namely that a "danger" in the sense of

[17] Wacke 1975, Section 1897. Wacke is like Corbin, but for police law.

police law is presented when in the normal course of events a well-founded expectation exists that injury would be suffered without an intervening action of the police, or, formulated otherwise, there exists a recognizably objective possibility of developments encompassing injury.[18] Perhaps our philosophers can make something of it, but lawyers find such a definition circular, if not hypothetical.[19]

The traditional hornbook formulation for law students and the police is that "concrete" danger is required, but that merely redirects the inquiry to the question what constitutes *concrete* danger? Modern police law enactments often specify that "concrete" danger involves danger that exists in the individual case ("im einzelnen Falle bestehen"), but that translates simply into requiring a determination on the facts of the individual case (so we shall presumably know it when we see it as "on the facts" determination, again a not particularly helpful test). This in turn may be extended into a probability type analysis (compare Wagner 1987, 79-91), but we have already noted the problem of a hypothetical determination. And prognosis analysis in epistemological terms that our philosophers might favor has not yielded more convincing results (compare Darnstaedt 1983).

The definitional process over the longer term has functioned more by negative exclusion than positive specification. It has also become a mixed exercise in technical

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[18] Or restated as the majority view in the police law literature: "'Gefahr' [ist] die bei ueblichem Ablauf der Geschehnisse begruendete Befuerchtung, dass ein schaedigendes Ereignis ohne Dazwischentreten der Polizei sich verwirklichen werde, [77 PrOVGE 341, 345,] oder anders formuliert, die erkennbare objective Moeglichkeit eines Schadens enthaltende Sachlage [77 PrOVGE 33, 338]." Hansen-Dix 1982, 19.

[19] Meanwhile the traditional German legal academic approach was to treat this as a probability exercise, disregarding the difficulty that avoiding the danger (and thus rendering it hypothetical) seemingly undercuts the whole idea of a probability analysis. Similarly, the traditional commentary approach was to distinguish between "abstract" and "concrete" danger, with the conceptual difference between a legal prohibition on causing injury, and the actual avoidance of injury, tying into a variety of hypothetical cases seeking to distinguish between repressive and preventative injuries, but that simply recapitulates the background concept of Strafverfolgung and Gefahrenabwehr themselves as both serving the protection of legal interests in social terms.

areas of special police law (besonderes Polizeirecht). So assessing the "concreteness" of danger in terms of Gefahrenabwehr is presented equally in the technical context of addressing communicable diseases under the BSeuchG or the potential problems of nuclear reactors (under the Bundesatomgesetz or AtG), as compared to general police law (allgemeines Polizeirecht) residually governing actions of Germany's uniformed police. Philosophers may view striving for a single, convincing definition as mirroring perhaps the conceptual straitjacket problem of lawyers, but that has not slowed the output of German legal dissertations attempting to push that rock up the mountain (compare, e.g., Darnstaedt 1983; Hansen-Dix 1982).

But the casuistic attempts to define imminence have yielded certain results. The terminology is not standardized, but it is fair to state that "concrete" is a term of art,[20] but an indefinite one (unbestimmter Rechtsbegriff), a not unexpected result in German legal terms when dealing with a general clause like 1794 ALR Section 10 II 17. As a consequence, in German legal terms it becomes perfectly legitimate in special legislation like the BSeuchG or AtG to provide a different and even more specific definition in employing the same or similar language arguably with a different meaning (the portmanteau word problem; recalling the idea that imminence in terms of danger may be different for public health authorities dealing with communicable disease, as opposed to police dealing with an individual threatening to kill themselves or others). And the literature distinguishes between reasonable and unreasonable mistakes

[20] Or at least concrete danger, since imminence is embedded in the idea of danger itself, bearing in mind that "concrete" as adjective has been added more in interpretation, since Gefahrenabwehr is open-ended. Now that concrete danger has been constitutionalized as concept by the Rasterfahndung Court, there presumably will be a new flurry of theorizing.

concerning the presence of danger, without thereby contributing much to conceptual clarity (Anschein- versus Putativgefahr).

Yet another distinction in the literature touching on degrees of danger concerns the problem under police law of actions taken in defense presumably of public order against the property or person of an innocent third party (a person considered not to be in violation of police law, technically a non-disturber of the public order or "Nichtstoerer"). The classic hypothetical, and probable source of the legal rule, involves the problem of how to stop fires within a city involving townhouse-style row buildings as in the medieval streetscape. The practical answer is to destroy a few houses to create a firebreak before the fire arrives, but then the issue becomes that any owner of the home sacrificed for the firebreak did not cause the fire, yet they sacrifice their property if their house is intentionally destroyed to save others. The Nichtstoerer problem is dealt with in traditional German police law in conditioning measures affecting them on the standard of "present danger" (gegenwaertige Gefahr), presumably because present danger threatening immediate loss does not permit the luxury of seeking alternatives to preserve the innocent party's property (e.g., given the fire burning at the opposite end of the long row building from the end where the Nichtstoerer dwelling is located). This casts the problem of who shall bear the cost of sacrifice for the public good in "imminence" of danger terms (seemingly short term probability), although it involves the allocation of loss rather than the normal negative restraint of denying the state authority to invade private property at all. There is a sense that "present danger" is an even higher standard than "concrete danger" in probability terms, but their practical distinction

lies more in application against the person or property of a person violating the law versus an innocent third party.

Foreshadowing, in the modern context of Rasterfahndung a very large number of ordinary, non-involved citizens may be identified at least initially as something like false positives. As a matter of police law, many subjects pulled into a Rasterfahndung will effectively be innocent third parties (Nichtstoerer in police law terms), raising the resulting question whether the proper imminence of danger standard for Rasterfahndung should be “present danger” in recognition of the measure’s widespread invasive effects on innocent third parties, or whether rather the standard should be the lower one of “concrete danger” in recognition that the real focus of police law is on protection of the society from danger, so the incidental innocent third party “losses” in terms of infringement upon their rights are unfortunate but simply to be borne as part of social life. But the choices of standard are articulated seemingly in probability of danger terms.

Similarly, one of the most basic problems in developing a defensible concept of the imminence of danger is the problem of police authority to investigate potential danger (Gefahrenuntersuchung), since they invariably represent an invasion (Eingriff) of police into the rights (Rechte) of individual citizens in what amounts to a balancing exercise. Investigation itself is necessary, but presumably care must be taken to have the ability to investigate potential danger, thereby encroaching upon citizen rights under Eingriffstheorie, not to collapse simply from the investigatory stage of potential danger directly into the concept of actual danger (bearing in mind the problem that in the

Gefahrenabwehr setting, finding the danger theoretically can lead to its avoidance, so the “successful” Gefahrenabwehr measure avoids the hypothetical danger).

There was, however, a sustained attempt originating in law enforcement circles to attenuate the concept of imminent danger reaching back to the 1970s-1980s under a German analogue to the American law and order movement. This involved attempts to reconceptualize the traditional legal categories of Strafverfolgung and Gefahrenabwehr tied to the StPO and PolG, which the changes dawned upon the legal community over time as police practices themselves evolved over circa fifteen years. This occurred initially in mooting “preventative” criminal law enforcement measures in the spirit of “fighting crime” (vorbeugende Verbrechensbekaempfung) aimed in effect at extending the reach of the StPO beyond individualized suspicion of a specific crime to the extent it governed the investigative phase of criminal trials. This merged in a technical sense into an attempt to extend the authority of the police acting as the prosecutor’s assistants in criminal investigations (Hilfsbeamte der Staatsanawaltschaft under Section 152 GVG) by allowing them to employ their typically broader legal authority for Gefahrenabwehr under police law in furtherance of criminal investigations. The police measures targeted included in particular undercover agents, technical surveillance (e.g., wiretapping), police observation, Rasterfahndung itself, as well as Razzias (area and control point searches), aimed at organized criminality and narcotics offenses in particular.

The formal justification on the side of the police was that they should no longer react against the individual crimes of individual perpetrators, instead considering themselves to be fighting criminality as a whole, often at the level of a so-called criminal organization (for example, one trafficking in narcotics). The doctrinal terms of art were

on the side of Strafverfolgung “Vorfeldermittlungen” (precursor investigation), and on the side of Gefahrenabwehr “Gefahrenvorsorge” (preparation for danger). Claims were made that these ideas were in the nature of a third way. There was clear recognition that such police approaches hardly fit the carefully constructed nineteenth century conceptual edifice defining the proper scope of state authority exhaustively as rooted strictly in Strafverfolgung or Gefahrenabwehr, and placed undue pressure on subsidiary characteristics such as Strafverfolgung being mandatory, while Gefahrenabwehr was a discretionary exercise. The problem from a Rechtstaat point of view was that police practices had to be brought within doctrinal paths such as Gesetzesvorbehalt, even while straining to achieve justifications such as reasoning that crime-fighting as activity served protection of the public (compare Wesslau 1989, 238-339).

Concerning the precise contours of “danger” reaching back to its 1794 ALR 10 II 17 roots, the initial state law model post-World War II was Section 14 of the Prussian Police Administration Law dating back to 1931:

“The police have the responsibility, to prevent dangers to public safety and order.”[21]

This hearkens back fairly directly to ALR Section 10 II 17, in linguistic as well as structural terms. But technical concerns from the German jurists’ viewpoint were twofold. The first involved the issue whether a distinction should be drawn between

[21] “Die Poizei hat die Aufgabe, Gefahren fuer die oeffentliche Sicherheit oder Ordnung abzuwehren.” This formulation was struck in the Preussisches Polizeiverwaltungsgesetz of June 1, 1931, essentially at the high mark of the Weimar Republic, itself a time of broad public disorder bookended by the aftermath of World War I and the beginnings of the Great Depression, commonly considered to have paved the way eventually for the Third Reich. From a distance the timing may seem strange so close to the Third Reich, but for German purposes the 1931 Prussian enactment is seen as the epitome of liberal democratic police law, particularly when viewed from the perspective of the Musterentwurf subsequently discussed. Compare Scholler/Bross 1978, 100 et seq.

responsibility (Aufgabe) and authority (Befugnis), which distinction Prussian law had not typically drawn reaching back to ALR Section 10 II 17. The second, related concern arose from the point of view of Gesetzesvorbehalt, that reliance on the general clause was suspect precisely because it did not specify in adequate detail the police's exact authority. The split treatment of responsibility and authority was claimed by some to be an indirect attempt to weaken the element of danger in qualitative terms, but that may assign too much foresight to formalism (see Wagner 1987). But the question that presented itself was what was the technical effect of subsidiary provisions and a refined view of the imminence of danger, side effects of measures on innocent third parties, and the proper relationship between general versus special police powers as the police attempted in organizational terms to break the nineteenth century conceptual bonds?

Police law itself had developed over time special authorities in terms of statutory provisions regulating common police activities such as taking persons into custody (polizeiliche Verwahrung, for example on the non-criminal side taking someone into "protective" custody who threatened suicide or showed signs of mental illness), or forced entry of an apartment (Eindringen in eine Wohnung, for example on the non-criminal side if police smelled gas in an apartment building's hallway). As a technical matter, recalling public law theory, German jurists would analyze the competing legal interests in balancing the "invasion" (Eingriff) in terms of the equivalent of liberty or property interests, placing protection of life above them. This was necessary because police law itself incorporates proportionality requirements, now typically expressly under an independent statutory provision.[22]

[22] The purpose of an express statutory provision stating the proportionality principle is arguably less for lawyers and more for the police themselves. I can witness from having personally observed in the 1980s

The pressure to address “danger” with greater specificity resulted at the level of free-standing specific provisions articulating police authorities also in areas like Rasterfahndung (as eventually challenged in the Federal Constitutional Court). It is at the point of subsidiary specific provisions that questions arose concerning the imminence of suspicion particularly in broadly invasive measures like Rasterfahndung. But what is missing still is the sense of what triggered organized attempts to change police law in particular during the period of the 1970s-1980s in parallel to the general impetus on the doctrinal side from open-ended ideas like Verbrechensbekaempfung (crime-fighting, understood to justify reconceptualization of the police)?

The hidden caution lies in recalling the socially turbulent 1960s-1970s in Germany, basically in parallel to the era of opposition to the Vietnam War in the United States. The European version of the youth rebellion included in Germany the student movement and Ausserparlementarische Opposition (APO or Extra-Parlementary Opposition), originally triggered by the so-called Notstandsgesetzgebung (emergency laws) of 1968 amending the 1949 Constitution to allow suspension of constitutional rights under a variety of circumstances (similar in tenor to Lincoln’s suspension of habeas corpus during the Civil War, but regarded with outright paranoia in 1960s Germany).[23] Groups such as unions and students took to the streets for mass demonstrations with a distinct political tenor during the height of the Cold War, which

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substantive law police and criminal procedure law classes at the Baden-Wuerttembergische Landespolizeischule (Police Academy) for police cadets and in police stations (Polizeidirektionen) active instruction and discussion of proportionality in the choice of police measures. At the patrolman’s level, from a police management point of view, the legal exhortation seemingly always reduced to the German colloquialism “nicht auf Spatzen mit Kanonen schiessen” (don’t shoot at sparrows with canons). The interesting point is that police management seemingly had internalized the legal rule and tried to restate public law doctrine in a common sense way useable by the cop on the beat.

[23] Concerning the background generally of a turbulent period, see the sources at http://www.ghi-dc.org/publications/ghipubs/rg/rg009/index.html.

demonstrations as radicalization opportunities often ended in violence. Youth rebellion took on a special character in Germany, since it included claims about unfinished denazification (which the victorious allies largely abandoned shortly after World War II's end in response to the Cold War).[24]

High profile international terrorism was visible in the form of multiple airplane hijackings and incidents like the 1972 Palestinian killings of Israeli athletes at the Munich Olympics. Meanwhile, the organized violence of relatively small but highly visible domestic terror groups like the RAF or Baader-Meinhoff Gang reaches back to the late 1960s, and continued actively through the late 1970s to divide the whole of German society. Domestic terrorism arguably had widespread social effects on German society via means like the 1977 kidnapping and killing of Hans Martin Schleyer as the German equivalent of the head of the Business Roundtable (considered a political assassination like the 1960s killings of the Kennedy brothers or Martin Luther King; in the German context the widespread social shock might best be compared to the effects of the events of 9/11 within US society leading to loud public demands for greatly increased security).[25] Beyond Vietnam, this included with the passage of time the birth of mass demonstrations drawing participants on a nationwide basis linked to environmental concerns (for example, in the 1970s linked to the Gorleben nuclear waste disposal site, and the extension of Frankfurt Airport runway into pristine forest-- of course, the same people now sit in the German Parliament thirty years later as the

[24]The highest profile example arguably involved the origin of the Bundesnachrightendienst (BND or German Intelligence Service as combined equivalent of the CIA and NSA) constituted in its original core by the Gehlen Organization as the former military intelligence department responsible for the Eastern Front, which cooperated extensively with the CIA in particular in Eastern European operations during the Cold War period.

[25] The general atmosphere also had visible effects within German government, since all German government installations were built out for security reasons visibly as fortresses, including copious barbed wire. "Innere Sicherheit" plans at the highest level of German government are subsequently discussed.

Green Party). So German society churned politically and often violently for more than a decade (particularly 1968-1980). This affected law enforcement both operationally in terms of heavy engagement in anti-terrorism and seemingly constant mass demonstration clashes beyond simple police work, as well as calling into question the legal structures under which police in particular operated, even beyond the idea that sophisticated criminality in the form of the perceived growth in organized crime and narcotics required new responses.

The social disturbances and parallel perceptions of changing criminality combined in a general discussion or debate about expanding the investigative reach of the police generally to mix authorities under the traditional elements of Strafverfolgung and Gefahrenabwehr, minimizing the "danger" element present since 1794 ALR Section 10 II 17 as clarified by the 1882 Kreuzberg Judgment, reaffirmed in the 1931 Prussian Police Administration Law as example of "liberal-Rechtstaat" police law. This initiative in the form of proposed amendments to state police law in particular was undertaken in the name of Innere Sicherheit or internal security (as opposed to external security) as political rather than legal concept. The opposition to domestic as opposed to external threats, however, was taken more seriously in Germany than many countries as a result of its history of 1920 putsches and the 1930s ascendancy of the Nazi Party also involving "brown shirt" political violence. Innere Sicherheit as the German analogue to American "law & order" was actively pursued as 1970s political strategy by the German Conference of State and Federal Ministers of the Interior (so on security practitioners' initiative at a high political level).

In terms of legal scholarship, this is recognized as the 1970s-1980s debate surrounding the so-called Musterentwurf eines einheitlichen Polizeigesetzes des Bundes und der Laender, best translated as the Model Revision of a Uniform Police Law. It sounds like an innocent uniform law discussion,[26] but in fact involved a highly politicized debate focused on a draft model law originated on the security practitioner side addressing whether and how the legal basis of police activities should evolve in a society experiencing such a high level of discord that segments of youth in particular became radicalized (e.g., the RAF). The public debate had a quite strident political side aimed at problems like highly publicized police shooting incidents and arguments about the acceptability of extreme tactical measures such as police snipers with "shoot to kill" orders (see Ehrhardt/Kunze 1979), and a smoother academic side which characterized itself as "alternative" or progressive.

"Alternative" was code for progressives as proponents of traditional liberal-Rechtstaat police law in favor of strict maintenance of traditional Gefahrenabwehr and Strafverfolgung doctrinal categories and correspondingly in opposition to police efforts they characterized generally as "moving forward the demarcation line of security" (die Vorverlegung der Sicherungslinie; best translated perhaps as "moving the 'security' goal posts")(see Wagner 1987, 1-19). The "alternative" designation was in opposition to the perceived majority of legal academics who were believed to support law & order arguments. The particular relevance of the Musterentwurf controversy for the Rasterfahndung case is that it was, to my knowledge, the last sustained public

[26] Police law is state law in Germany, while the StPO is federal law. As a result, police in the different German states work under similar but identical police law enactments, but a single federal StPO.

discussion in Germany on the issues of police authority, imminence and danger prior to the NSA revelations.

The Federal Constitutional Court, American Views of Surveillance, the 2006 Rasterfahndung Case and Related Decisions Through 2012.

We have gone to some length to explain the German public law and legal history background to enable us to analyze the Rasterfahndung case in the same terms a German lawyer would understand it. At the same time, I believe the 2006 Rasterfahndung opinion, including both the majority and dissenting opinions discussed below, and as subsequently extended by the Federal Constitutional Court through 2012, is in German terms in large part a dog whistle exercise. It incorporates continuing disagreements about "law & order" issues touching on terrorism in Germany reaching back to the 1960s, which themselves capture differences about the proper scope of state power reaching back much, much further. These disagreements figured prominently in German public discourse for circa twenty years up to the late 1980s, but then went into political hibernation arguably as a result of German society refocusing almost entirely on reunification from the late 1980s for well over a decade.[27] In effect, the old concerns were reintroduced into the German theoretical discussion by 9/11 itself.

[27] Reunification simply sucked up most of the political oxygen in Germany prior to commencement of the on-going crisis concerning the future of Europe circa 2008. And at the moment, the overwhelming American focus on Islamic extremism since 9/11 does not engage the Europeans generally to the same extent. In that light, the most recent changes in state-level German police law implementing Rasterfahndung found to encroach on the traditional bulwark of [imminent] "danger" are arguably the public law expression of a political dispute. That was the hidden sense of the Interior Ministers' Conference effectively sponsoring the Musterentwurf, and the changes post-9/11 concerning the necessary degree of danger subsequently discussed were the utcome.

What is the effect of time and distance on such questions? The caution from an American perspective is that, now that German society has the perspective of thirty years' distance from their own turbulent anti-terrorism period, they simply do not see such questions quite the same way. Meanwhile, the US arguably still views similar national security questions through the vivid political prism of 9/11, Iraq and Afghanistan, as witnessed by continuing disputes concerning Guantanamo detainees, continued military engagement in Afghanistan, disputes about WMD and Iraq, concerns about the intelligence community including but limited to the NSA, etc. The distinction may be on the German side an acceptance of terrorist incidents as in some measure unavoidable, so that relatively higher value is placed on maintaining "normal" constitutional standards because there can be no absolute guarantee of security. In simple English, this may equate to the difference between a view that the sovereign as a matter of self-preservation can undertake practically any action, versus the idea that taking extreme actions constitutes an overreaction (under which circumstances the terrorists "win" in changing society's normal behavior).[28]

Analyzing the 2006 Rasterfahndung Case. *Rasterfahndung* or "pattern searches" through public databases to generate police leads as intelligence exercise were initially undertaken by German police in the 1970s as investigative response to repeated Rote Armee Fraktion terrorist attacks (the RAF or Baader-Meinhoff Gang). *Rasterfahndung* originally was justified in technical terms under general police authority lineally

[28] The intel corollary would be that if freedom could only be preserved through police state-like levels of surveillance, you will have already lost the freedom in seeking to preserve it.

descended from 1794 ALR Section 10 II 17, and seemingly deployed in line with traditional approaches to the *Rechtstaat* in terms of imminent danger.

The Federal Constitutional Court's majority opinion initially noted the historical background of Rasterfahndung starting with the RAF,[29] and that it had been legislated into StPO Section 98a under a 1992 Criminal Procedure Code amendment aimed at narcotics and related organized crime. Meanwhile, as a matter of state law it had always been taken up as preventive measure under state police laws, and Rasterfahndung provisions were part of state police laws in most German jurisdictions pre-9/11. Post-9/11, the Court noted that in recent years a number of German states had changed the applicable Rasterfahndung authorizations in their police laws. Whereas the original language had provided for a "present danger" (gegenwaertige Gefahr), many states had since changed their laws in lowering requirements in terms of the required threshold of danger (Gefahrenschwelle) and affected legally protected interest (Schutzgut). In so doing, the overwhelming majority of state legislatures had changed the nature of Rasterfahndung under their police laws to a wholly preventative invasive police measure preceding danger in terms of authorization (Vorfeldbefugnis).

The Court then recited the factual background. Following 9/11, the German police employed Rasterfahndung as technique in an attempt to locate alleged al Qaida "sleeper" cells in anticipation of threatened revenge attacks within Europe, once the US undertook anticipated military action in Afghanistan in response. Beyond general chatter, the threats included direct statements of the Afghan Ambassador to Germany affiliated with the then Taliban government that European governments involving

[29] The full text of the decision is available online (in German) at BVerfG, 1 BvR 518/02 vom 4.4.2006, Absatz-Nr. (1 - 184), http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html.

themselves in the US response would themselves suffer attacks. Recalling several militants involved in the airplane attack on the World Trade Center had studied in Germany, with the participation of the Bundeskriminalamt (BKA, generally analogous to the FBI) overlapping nationwide database searches were carried out by state police authorities throughout Germany under judicial decrees in residency, university and similar registries focusing on criteria such as gender (male), age (18-40), study in Germany (as radicalization opportunity), religion (Muslim), place of birth (various Muslim majority countries), etc. This sifting process generated numerous leads in the form of lists of persons whom police subsequently investigated individually in various cities, but no such sleeper cells were ever found.

The search criteria were actually developed by the Innere Sicherheit working group of the German National Conference of Federal and State Ministers of the Interior in consultations commencing September 18, 2001, in cooperation with the Federal Border Police (Bundesgrenzschutz, roughly equivalent to a combined version of the US Border Patrol and Immigration), the Federal Office for Protection of the Constitution (Bundesamt fuer Verfassungsschutz, roughly equivalent to the FBI in dealing with domestic subversion), and the Federal Intelligence Service (BND or Bundesnachrichtendienst, roughly equivalent to the CIA and NSA combined in dealing typically with foreign intelligence). After collection of initial data matches by state-level agencies, they were forwarded to the BKA and assembled in a combined nationwide database entitled Sleepers (Schlaefer).

The complainant was a Moroccan student studying at the University of Duisburg who alleged that his constitutional right to *informationelle Selbstbestimmung*

(subsequently discussed, but informational self-determination is a right somewhat analogous to privacy associated with the person) had been violated based upon invasive actions having been undertaken without the existence of an “imminent” danger under a judicial authorization, dated October 2, 2001. To that extent, the case clearly posed the question of how to interpret the imminence of danger issue as prerequisite to police authority under Section 31 of the North Rhine Westphalian (NRW) State Police Law as 1990 enactment. In response to concerns like Gesetzesvorbehalt and control of the police, the applicable statutory provision had incorporated a specific authorization for Rasterfahndung, including a catalogue of requirements including that it be undertaken only under a judicial order, providing in relevant part:

> Section 31 *Rasterfahndung*
>
> (1) Police can demand from public authorities and others outside of government the delivery of data relating to the person for specific groups of persons from databanks for purposes of automated comparison with other collections of data, insofar as this is necessary for the prevention of a *present danger* [NB, ed italics] for the continuation or safety of the country or of a constituent state, or for the preservation of an individual’s person, life, or freedom (Rasterfahndung).
>
> (2) The request for the delivery is to be limited to name, address, date and place of birth as well as other data necessary for the individual case; it may not extend to data relating to the person which is the subject of a requirement of professional or official secrecy. Personal data not included in the request for delivery may be included when a restriction of information to the requested data is not possible due to significant technical difficulties, or because of a disproportionate time or cost necessary to separate it out; such data may not be used by the police.
>
> (3) If the purpose of the measure is completed, or it becomes clear that it cannot be completed, the delivered and in connection with the measure additionally compiled data shall be deleted from data storage devices and the files, to the extent they are not required for any proceedings related in content, shall be destroyed. A written record shall be prepared concerning the measure taken.

This written record shall be especially preserved, protected by technical and organizational measures and at the end of the calendar year which follows the destruction of the data or files referred to in the first sentence of this subsection (3), shall be destroyed.

(4) The measure may be ordered only by a judge upon application by the head of the [police] unit. Jurisdiction shall lie in the ordinary state court in the district of which the police unit is headquartered. Procedurally, the provisions of the Law Concerning Matters of Ordinary Jurisdiction shall apply in appropriate fashion.

(5) Persons against whom further measures are directed after completion of the Rasterfahndung are to be informed about the same, as soon as this can be accomplished without endangering the purpose of the further use of the data. Notification by the police shall be omitted if a criminal investigation has been opened against the subject of the measures arising out of the same factual circumstances.[30]

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[30] Section 31 Rasterfahndung

(1) Die Polizei kann von oeffentlichen Stellen und Stellen ausserhalb des oeffentlichen Bereichs die Uebermittlung von personenbezogenen Daten bestimmter Personengruppen aus Dateien zum Zwecke des automatisierten Abgleichs mit anderen Datenbestaenden verlangen, soweit dies zur Abwehr einer gegenwaertigen Gefahr fuer den Bestand oder die Sicherheit des Bundes oder eines Landes oder fuer Leib, Leben oder Freiheit einer Person erforderlich ist (Rasterfahndung).

(2) Das Uebermittlungsersuchen ist auf Namen, Anschrift, Tag und Ort der Geburt sowie andere fuer den Einzelfall benoetigte Daten zu beschraenken; es darf sich nicht auf personenbezogenen Daten erstrecken, die einem Berufs- oder besonderen Amtsgeheimnis unterliegen. Von Uebermittlungsersuchen nicht erfasste personenbezogenene Daten duerfen uebermittelt werden, wenn wegen erheblicher technischer Schwierigkeiten oder wegen eines unangemessenen Zeit- oder Kostenaufwandes eine Beschraenkung auf die angeforderten Daten nicht moeglich ist; diese Daten duerfen von der Polizei nicht genutzt werden.

(3) Ist die Zweck der Massnahme erreicht oder zeigt sich, dass er nicht erreicht werden kann, sind die uebermittelten und im Zusammenhang mit der Massnahme zusatzlich angefallenen Daten auf den Datentraegern zu loeschen und die Akten, soweit sie nicht fuer ein mit dem Sachverhalt zusammenhaengendes Verfahren erforderlich sind, zu vernichten. Ueber die getroffene Massnahme ist eine Niedershcrift anzufertigen. Diese Niedershcrift ist gesondert aufzubewahren, durch technische und organisatorische Massnahmen zu sicher und am Ende des Kalendarjahres, das dem Jahr der Loeschung der Daten oder der Vernichtung der Akten nach Satz 1 folgt, zu vernichten.

(4) Die Massnahme darf nur auf Antrag des Behoerdenleiters durch die Richter angeordnet werden. Zustaendig ist das Amtsgericht, in dessen Bezirk die Polizeibehoerde ihren Sitz hat. Fuer das Verfahren gelten die Vorschriften des Gesetzes ueber die Angelgenheiten der freiwilligen Gerichtsbarkeit entsprechend.

(5) Personen, gegen die nach Abschluss der Rasterfahndung weitere Massnahmen durchgefuehrt werden, sind hierueber durch die Polizei zu unterrichten, sobald dies ohne Gefaehrdung des Zwecks der weiteren Datennutzung erfolgen kann. Die Unterrichtung durch die Polizei unterbleibt, wenn wegen desselben Sachverhalts ein strafrechtliches Ermittlungsverfahren gegen den Betroffenen eingeleitet worden ist.

The Court noted that in 2003 the first subsection of Section 31 was changed by the legislature to eliminate the prior requirement of present danger[31] as follows:

> Police can demand from public authorities and others outside of government the delivery of data relating to an unspecified number of persons, which are intended for purposes of automated comparison with other collected data, of persons who cause a danger in the sense of [subsection] 4 presumably applicable points of comparison, insofar as this is necessary for the prevention of a present danger for the continuation or safety of the country or of a constituent state, or for the preservation of an individual's person, life, or freedom (Rasterfahndung). The data comparison shall aim at the exclusion of persons; it can also serve the investigation of a danger against persons as possible cause of a danger as well as determining the characteristics of such persons that increase such danger. The police can request further data extracts from other organizations to augment incomplete data, and prepare the transferred data media in a technical process to enable automated comparisons.[32]

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[31] Of course, technically speaking the 2003 version of the statute hardly has any place in the challenge of a police measure undertaken in 2001 under color of the law's 1990 version. The Federal Constitutional Court presumably included the formally inapplicable statute to demonstrate the degree of error to which the German state legislatures had descended in completely eliminating the concrete danger element presumably in moving the boundaries of police preventive authority ever further in the direction of "pre-danger." In any case, the Court eventually finds the absence of even present danger on the facts.

[32] Die Polizei kann von oeffentlichen Stellen und Stellen ausserhalb des oeffentlichen Bereichs die Uebermittlung von personenbezogenen Daten einer unbestimmten Anzahl von Personen, die bestimmte, auf Verursacher einer Gefahr im Sinne des Paragrafen 4 vermutlich zutreffende Pruefungsmerkmale erfuellen, zum Zwecke des maschinellen Abgleichs mit anderen Datenbestaenden verlangen, soweit dies zur Abwehr einer Gefahr fuer den Bestand oder die Sicherheit des Bundes oder eines Landes oder fuer Leib, Leben oder Freiheit einer Person erforderlich ist (Rasterfahndung). Der Datenabgleich soll den Ausschluss von Personen bezwecken; er kann auch der Ermittlung eines Verdachts gegen Personen als moegliche Verursacher einer Gefahr sowie der Feststellung gefahrenverstaerkender Eigenschaften dieser Person dienen. Die Polizei kann zur Ergaenzung unvollstaendig uebermittelter Daten die erforderlichen Datenerhebungen auch bei anderen Stellen durchfuehren und die uebermittelten Datentraeger zur Ermoeglichung des maschinellen Abgleichs technisch aufbereiten.

The Court eventually analyzes in its opinion the somewhat obtuse language "it can also serve the investigation of a danger against persons as possible cause of a danger as well as determining the characteristics of such persons that increase such danger." It is not entirely clear, but this language arguably encompasses "preventive crime-fighting" mentioned previously as problematic, to the extent it would appear possibly to be directed against organized crime bands or sellers of narcotics in terms of who logically might have the recited characteristics. This inference stems from both the employment of conceptual language that appears to come from the StPO in the form of Ermittlung eines Verdachts gegen Personen and the curious turn of phrase Feststellung gefahrverstaerkender Eigenschaften dieser Person, which sound like they may fit into the category of police law provisions intended for use by Hilfesbeamte der Staatsanwaltschaft in order to gain individualized suspicion of a specific criminal law violation formally necessary as a matter of law to open a criminal investigation (or otherwise reflect "targeting" of specific groups, as the police thought to do originally in shifting from the mentality of prosecuting individuals for individual crimes, to fighting "heightened" crime as general social problem

The Court then reviewed literally the grounds of decision in the judicial order of the lower court (Duesseldorf Amtsgericht) which originally authorized the Rasterfahndung on October 2, 2001, which followed in great detail the literal terms of Section 31 NRWPolG, reciting a litany of seeming characteristics of Islamic extremists who engaged in acts of violence, and according to police were affiliated with the same group that had carried out the 9/11 attacks in the US.[33] According to police, there were 42 persons in NRW suspected as supporters or contact people in the network of Osama Bin Laden, and that the growing threat of an American military attack in the Middle East meant that a corresponding act of terrorist revenge could take place at any time.

Present danger was found by the lower court judge also for North Rhine Westfalia, even though it was not possible in terms of prognosis to foretell an immediately pending attack. In terms of a prognosis judgment, it was also considered that any lesser probability of such a revenge attack occurring should be balanced by the great magnitude of injury to be expected should it occur.

Finally, the lower court judge found the Rasterfahndung measure to be proportional. It was well suited to reveal potential extremist Islamic terrorists as "sleepers" who had the characteristics set forth in the search criteria. The Rasterfahndung itself constituted the least intrusive means to locate them with a comparable effort to achieve comparable results. The protection of all threatened installations was in part impossible and in part achievable only with disproportionately

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(e.g., organized crime and narcotics trafficking). The provision is in any case hardly a masterpiece of German legislative drafting.

[33] What a German speaker notices is that the majority's very extensive review of the lower court order is in indirekte Rede, a German grammatical form indicating close tracking of the original source despite the absence of quotation marks. In linguistic terms, that presumably allowed the majority opinion to summarize the lower court order while preserving the equivalent of direct quotation to support claims about the legal and factual statements underlying the lowest court's order. And the lower court order is reviewed effectively in very great detail.

great effort. So Rasterfahndung constituted the sole preventive possibility realistically promising success in uncovering sleepers. In light of the threatened danger to the person and lives of [NRW] inhabitants, the invasion of the affected parties' informational self-determination rights was also proportional in the narrower sense.

Thereafter the Federal Constitutional Court separately recited statistics demonstrating the broad reach of the Rasterfahndung measure in terms of the numbers of persons sifted at various stages. In total, approximately 5.2 million data sets were compared from 396 NRW Einwohnermeldeaemter (municipal level offices where all residents in Germany are customarily registered) covering 4.7 million people, 61 institutions of higher education and similar training centers covering 475 thousand people, and approximately 90 thousand registrants from the central registry for foreigners. According to the NRW Ministry of Justice, sifting them against the nationwide agreed search criteria yielded 11,004 data sets. The balance of 5,222,717 datasets were then timely deleted/destroyed.

The BKA received the selected 11,004 datasets, of which it was determined subsequently 1,185 did not fit the selection criteria (for example, the selectees were discovered after the fact to be female, bearing in mind that the vast majority presumably had non-Western names which German police would not necessarily recognize as non-male in the first instance).[34] Later two German citizens were discovered in the dataset, also to be deleted. The Court reviewed in painful detail further progressive reduction of the data sets moving between the federal and state law enforcement agencies with rejected data sets then being deleted/destroyed until at a certain point 72 remaining

[34] The majority opinion indicates elsewhere that on a nationwide basis the "sleeper" database came to include approximately 32,000 persons. So NRW ultimately contributed approximately one-third of the database.

cases were subjected to a closer local NRW police investigation, of which eight lead to unspecified police law measures, but against which eight not a single criminal investigation was opened.

The Federal Constitutional Court then reviewed the Morroccan student constitutional complainant's outcome in essentially appealing further via complaint the lower court's original order authorizing the Rasterfahndung measure in the local regular trial court (Landesgericht). The regular trial court upheld the lower court order in a decision dated October 29, 2001, just as the US commenced military action in Afghanistan, and NATO participation by Germany had been agreed. The Court reviewed the proceedings and reasoning in similar detail to the opinion of the lower court, with the only notable addition perhaps consisting of recitation of the regular trial court's treatment of Section 32(1) NRWPolG requirement of "present danger" in reasoning that "a danger may be said to be a present danger when the injurious event has already begun or when the disturbance should commence in the immediate future with a probability bordering on certainty." The regular trial court sees its discussed test satisfied in the immediate aftermath of 9/11, including Germany's declaration of unqualified solidarity with the US and the commencement of military action against Afghanistan. It also referenced the possibility of especially great injury resulting from a revenge attack in Germany, with the result that the presumed potentially high level of injury allowed in relative terms a less strict probability determination concerning the judgment of danger.

The regular trial court also referenced the established rule of the highest Federal Administrative Court established in multiple decisions that less specific expectations are

appropriate for the probability determination, when the expected damages are large and relative importance of the protected legal interest is greater. It went on separately to argue that the measure was proportional and the complainant would be required to accept some limitation of his right to informational self-determination given the justified claim of all other citizens to a safe and undisturbed life. *In any case authorizing police measures for the purpose of prevention of danger (Gefahrenvorsorge) and investigation of danger (Gefahrenerforschung) was no longer connected to the avoidance of* concrete *dangers directed only against the person causing them. It was much more the case that the police's authority to take action in advance of danger (Vorfeldbefugnisse) against everyone* (NB, ed italics).

In balancing the competing interests, it was certainly true that the complainant subjected to the Rasterfahndung had not created any police disturbance in a legal sense. But traditional limitations of the authority of police measures to those causing a disturbance had certainly been recognized in areas like air traffic control (citing Section 29 of the German Air Traffic Control Law as example). Because of his particular location at a particular time, the complainant was simply obligated as a member of society to accept his social duties [in accepting the police investigative measures](NB, ed italics).

The regular trial court further argued that in the case of police law impositions on innocent third parties, particular attention must be paid to proportionality. *But the imposition on the complainant involved was minor, and the situation approached that of emergency. So the action was proportional. When police acting on their knowledge of the dangers and face of terrorism know that people of certain nationalities are to be regarded as suspicious in this regard, this is based upon facts known in investigation*

(NB, ed italics).[35] No intimate details of the complainant were invaded by the Rasterfahndung measure, so the regular trial court argued that there was no impingement on the personal sphere of private life designated for protection by the Federal Constitutional Court.

Somewhat pointedly, the Court did not rebut in detail the argumentation of the regular trial court in close proximity. Instead, the majority seem content to let appearances speak for themselves, saving rejection for generalized doctrinal reasons later. The gist of the majority's argument is ultimately an examination of proportionality relying technically upon the juxtaposition of the idea of Rasterfahndung as a state action of broad effect also on many innocent third parties and coupled with relatively serious invasion of the complainant's highly ranked protected legal interest (development of the person under informational self-determination). In the absence of a sufficient specific determination of danger, proportionality was simply not possible. Instead, the Court functionally constitutionalized the "concrete danger" standard rooted in older police law in finding disproportionality in the absence of a sufficient threshold of danger as protection of the complainant's legal interests. (Although on the facts, the majority

[35] For a German speaker, this echoes of "driving while Arab." This is again in indirekte Rede and so represents a faithful recitation of the regular trial court's opinion, so presumably the lower court actually included this reasoning in its opinion. Given the prior (suspiciously over-) expansive interpretation of police powers on the preventive side, the most sympathetic interpretation of the court's opinion is that police are justified acting on their experience of preventing criminality in targeting suspicious groups (essentially accepting the reasoning of police in the 1970s-1980s as part of the Musterentwurf debate that they had shifted to fighting crime heuristically, rather than pursuing individual criminals, presumably in defense of society's interests). And so citizens of Muslim majority nations are presumed to be fair game in a reasonable suspicion sense, at least that is the import of the lower court's reasoning offered in upholding the original determination. The Federal Constitutional Court subsequently rejects this reasoning in upholding the constitutional complaint, but his provides some evidence that the arguments about crime-fighting and police authority current in the 1970s-1980s are still present at the level of day to day law enforcement and the German criminal justice system. The hidden point may be that a side effect of acceptance of something like the police crime-fighting model associated with the 1970s-1980s and the Musterentwurf lead to permanent stigmatization of suspect groups since the police always subject them to close scrutiny even in the absence of individualized suspicion. Hence the hidden link to the US "driving while black" narrative.

found that judicial order of the Rasterfahndung was based neither upon “concrete” or “present” danger, the former being the Court’s minimum standard, and the later being the 1990 statute’s standard, which was theoretically considered to be stricter.)

The majority reaffirmed the traditional rule that the state’s authority was limited to Strafverfolgung or Gefahrenabwehr, under circumstances that may represent sub silencio the clearest articulation of what constitutes Gefahrenabwehr since the 1882 Kreuzberg Judgment itself (and now clearly declares it a constitutional fundament). In deciding against requiring a “present danger” standard as constitutional requirement for Rasterfahndung despite broad invasion of innocent third party interests, however, the majority opinion arguably does place some increased emphasis on the value of protecting the state (society) at the constitutional level, leaving to the legislature the process of divining future dangers to be protected against. But the Court seemingly came down hard in favoring the “alternative” side in the Musterentwurf debate, finding the legislature responsible for updating the law under what might be interpreted as Gesetzesvorbehalt reasons, but still subject to Rechtstaat constraints in its actions to protect even against terrorist actions aiming at destruction of the state’s free democratic or “freiheitlich demokratisch” political order, and human life itself as the highest legal interest. So the exercise becomes one of balancing liberty and national security interests under the fundamental purposes of the state, because there is no basis for the pursuit of absolute security.[36]

What does the majority opinion have to say about the substantive right claim underlying the constitutional complaint? Stepping out of the opinion context to interject necessary background information, informational self-determination (informationelle

[36] See decision at Paragraph 126-30.

Selbstbestimung) is a right derived in prior Federal Constitutional Court jurisprudence from Article 2(1) in connection with Article 1(1) of the 1947 Bonn Constitution, originally in the context of the 1983 German census.[37] The operative question is what personal data can be collected, stored and manipulated by the state, and to what end(s). The Morroccan student in question essentially argued that in collecting and manipulating his personal data as part of the Rasterfahndung effort, his right of control was violated. Informational self-determination is the constitutional basis of German, and ultimately EU-based data protection efforts, and represents for some a forward looking response to the quandary of how to modernize protection of the person online and in the modern digital world. In a technical sense, it presents a clear departure from traditional nineteenth century rights viewed as being rooted in property rights, etc.

A more detailed treatment of the informational self-determination concept is obviously of interest in the intel context, but is simply beyond the scope of this paper as offering too many of its own complexities. For our philosophers, it constitutes the idea of privacy defined as the right of the individual to decide what information about himself should be communicated to others and under what circumstances. Its closest analog in American law is privacy, since it is based in ideas about development of the person. Recognition of informational self-determination as constitutional right was the subject of extensive criticism within Germany on the scholarly level initially, perhaps because it was created along the lines of "penumbral rights" in the American constitutional

[37] For the full text in German, see http://www.servat.unibe.ch/dfr/bv065001.html.

context.[38] But with the passage of time, it now seems generally accepted among German jurists.

The majority's approach to the protected interest question in terms of informational self-determination was largely limited to positing that Rasterfahndung represented a very serious invasion of it. It concerned personal data including constitutionally protected aspects such as religion, and impacted large numbers of people, including innocent third parties for police law purposes. The two interests particularly threatened by violation of informational rights included the possibility that a subject would become further involved in investigative proceedings to his detriment, or in the alternative that they might suffer social stigmatization. That was a particular risk here, given the combined selection criteria of "foreigner" and "Muslim."

Informational self-determination is not without bounds, but could only be limited on the basis of law subject to proportionality requirements. And proportionality requires that the invasion of rights not be out of proportion to the justification of the measure taken. In the case of Rasterfahndung, that required concrete danger. More broadly, it was desirable that the same criteria for judging the seriousness of invasion be employed as for other constitutionally protected rights, in particular telecommunications secrecy under Article 10(1) and protection of residences under Article 13(1) of the Constitution.

Concerning proportionality, the traditional police law calculus visible in the lower court opinions stressing the magnitude of potential loss as lowering the probability element was not acceptable. The majority emphasized that even where great damage

[38] The basic arguments involved some skepticism of the scope of basic rights not tied closely to the text of the 1949 Constitution.

to protected legal interests might occur if a danger were to be realized, a minimum probability calculus in terms of danger must be maintained, or there would be no practical restraints on police action. Thus, in the case at hand "concrete danger" was necessary to justify the Rasterfahndung measure as touching on personality interests. And concrete danger is to be determined based on facts, rather than vague beliefs [about Islamic extremist terror as threat, or vague foreign affairs opinions], addressing the individual situation. The absence of concrete danger also impacts analysis of Rechtstaat interests and infringement upon personal rights affected by data, because without the requisite specificity of a concrete danger the state's powers could not be controlled.

Minority Opinion. The minority opinion was written by Justice Haas, who coincidentally left the Federal Constitutional Court relatively shortly thereafter. Dissenting or minority opinions are provided for under Federal Constitutional Court procedure, but are still a relative rarity. I believe it fair to characterize Justice Haas as something of a conservative judging by her dissent record (see BVerfG Press Release, dated October 1, 2006), and in her dissenting opinion she literally accuses the majority of a lack of "judicial self-restraint" in not deferring to legislative judgments. She seems to take the side of "law and order" against the majority which has effectively taken what was the "alternative" side in the Musterentwurf debate.

There is a bit of a words versus music distinction to be drawn in reviewing her opinion. The opinion is directed as rebuttal against specific arguments made by the majority, but what comes through is her seeming preference for law and order as

necessary element. The problem from the lawyer's technical viewpoint is simply whether she has a different view than the majority which apparently wishes to draw boundaries around the state and accordingly challenges unselectively the majority's arguments in disagreeing with the result, versus basing her opposing to the majority opinion in seeing the facts of the case differently and articulating specific arguments that convince her that the majority reached the wrong conclusion.

So she argues at a basic level against the idea that Rasterfahndung imposed a significant burden on the constitutional complainant, because he effectively had no grounds to raise its impact on innocent third parties. She found arguments about stigmatization effects to be overblown, because religion was essentially a matter of public record. She found little or no weight to arguments about invasion of complainant's legal interests when the state used the complainant's data in the entire Rasterfahndung exercise, which is seemingly a challenge to the entire informational self-determination jurisprudence of the Court.

Finally, she advanced a number of arguments conditioned on liberty interests and premised on the idea that increase security engenders increased personal development so that measures undertaken in the name of security are actually a positive contribution. Otherwise, development of individuals would be surpressed precisely if they feared terrorist attacks. Along these lines, it was appropriate for the legislature to move the line of prevention in anticipation of problems, so that the majority's requirement of concrete danger was simply misplaced (and ignored the consideration that should be shown to the people's democratically elected representatives).

In German terms it seemed a slightly more erudite version of the Musterentwurf arguments of the 1970s-1980s, which at a certain level reflect differing views about law and order issues generally. Justice Haas was in any case not in favor of imposing stricter limits on the state, and in German terms seemed to want "more rather than less" state.

Federal Constitutional Court 2011-12 Follow-On Jurisprudence for Rasterfahndung Opinion. There are two subsequent opinions of the Federal Constitutional Court from 2011 and 2012 that reinforce the message of the Rasterfahndung opinion in employing or further developing the majority's approach. Thus, in 2011 the Court faced a challenge to the constitutionality of a law reforming matters like wiretapping and undercover agents in German law by amending the StPO, placing matters clearly in the Strafverfolgung category. [39] The changes in the law would probably be characterized in German eyes as motivated by what we have described elsewhere as Gesetzesvorbehalt concerns in detailing permissible executive activities, although others would oppose any increase in activity like wiretapping on principle.

The connection to the Rasterfahndung opinion lies in its attention to the problems of Strafverfolgung and personal development. It recognized what would be regarded as extremely serious "invasions of rights" touching on personality in terms of Eingriffe, but then found they could be ameliorated via means such as limitations on the use of evidence won if they went too far. This seems consistent with the Rasterfahndung majority that where the state adhered to traditional formal protections

[39] New Telekommunications Monitoring Law, BVerfG Decision of October 12, 2011, available at http://www.hrr-strafrecht.de/hrr/bverfg/08/2-bvr-236-08-1.php?referer=db

like the categories of Strafverfolgung and Gefahrenabwehr, merely undertaking serious "invasions" touching on personal development was not unconstitutional, because it would be balanced by the state's high interest in an effective criminal justice system (presumably as a function of Staatszweck and Strafverfolgung generally). Further, it recognized personality issues also in telecommunications (as opposed to Rasterfahndung's focus on information drawn from government offices in the midst of investigative activities).

The 2012 case[40] involved a challenge to the Telecommunications Law premised upon an informational self-determination claim in conjunction with registers containing data allowing identification of persons online under certain circumstances. It is almost more an IT exercise than judicial opinion, since it addresses in relevant part problems of non-fixed IP addresses and the issue whether the categories in the law might inadvertently compromise online anonymity. It is important partially in applying the informational self-determination analysis to telecommunications, since which are protected under a different, specific constitutional provision. The Court extended the Eingriff analysis along data processing lines approaching the original Census Opinion, with special attention to Gesetzesvorbehalt.

The initial item of interest, however, involved coincidentally the government agencies authorized to pull the information.[41] They specifically include courts and Strafverfolgung agencies (presumably prosecutors at the Staatsanwaltschaft, also perhaps police as prosecutors' "assistants"), police of the

[40] Norms of Telekommunications Law, BVerfG Decision of January 24, 2012, available at http://www.hrr-strafrecht.de/hrr/bverfg/05/1-bvr-1299-05-1.php?referer=db.
[41] See Opinion Section 33-40, setting forth the categories under Section 112(2) of the Telecommunications Law.

federation and constituent states for purposes of Gefahrenabwehr, customs offices for purposes of criminal proceedings and enforcement proceedings, domestic security and intelligence agencies including the BND, military intelligence (NB, which allegedly has a function close to that of the NSA), state and federal constitutional protection agencies (analogous to the FBI when fighting domestic subversion), and a variety of less important recipients (such as the German equivalent of 911 call centers).

Most interestingly, the Court goes on to affirm the "concrete danger" analysis of the Rasterfahndung Court,[42] seeming to reinforce the concept that simply allowing the state unlimited access through too low threshold requirements was unacceptable. It discusses applicable minimum threshold requirements for Eingriffe, in exploring the problem of investigations to determine the presence of a danger (Gefahrenverdacht), and applies a proportionality analysis. The Court went on to note, however, that intelligence agencies were subject to an even lower threshold, "being active in principal independent of concrete dangers in preparatory stages" ("grundsaetzlich unabhaengig von konkreten Gefahren im Vorfeld taetig werden").[43] Having noted that the Court stated, however, that such agencies engaged in strictly limited activities not including police measures, since they operated only for the immediate benefit of "politically responsible Organs of the state, or otherwise for the public" ("[d]ies rechtfertigt sich aber aus deren beschraenkten Aufgaben, die nicht unmittelbar auf polizeiliche Massnahmen ausgerichtet sind, sondern nur auf eine Berichtspflicht gegenueber den politisch verantwortlichen Staatsorganen beziehungsweise der Oeffentlichkeit zielen"). It then goes on to draw further distinctions

[42] See Opinion Sections 177-78.
[43] See Opinion Section 177.

pointing to a lower threshold for intelligence than Strafverfolgung purposes. The idea of a special category for intelligence obviously bears watching, but my expectation is that their activities would still be covered by traditional hidden limitations like the purpose of the state (Staatzweck), and the general thrust that there are still thresholds applicable in the intel setting, they are just lower presumably than concrete danger.[44]

Choices. At one level the Federal Constitutional Court may be regarded once again as having acted as peculiarly German tribunal constitutionalizing German administrative law doctrine as time honored approach to making new=old law. In that case, structural interpretive arguments targeting history and the Rechtstaat may be our surest guide. In that light the case might be interpreted mostly like a substantive due process exercise for our purposes, under which the Court has simply sketched Germans' boundaries for acceptable state power as cautionary tale for Americans by comparison in terms of general NSA activities.

In that sense, the case also tells us as much about how others will see us, as we think about ourselves (here the Germans after the NSA bugged Chancellor Merkel). So for example, the idea that the NSA treated international surveillance as "rechtfreien Raum" or law-free zone in Rechtstaat terms perhaps due to ideas about the fourth amendment's limited international reach is likely to grate very deeply. And others' opinions represent collateral damage, which it is not clear the NSA appreciates when its activities have a broader negative effect on the internet and US enterprises, casting

[44] Interesting, intel is implicitly carved out of Gefahrenabwehr seemingly, but the nature of the Court's remarks here might be viewed as the equivalent of dicta in the US setting. They were opining on a telecoms law generally without an apparent intel element beyond the idea of them being authorized agencies who could access the

them in the terms in which the US has raised questions about foreign enterprises like Huwawei. Meanwhile, the internet and US enterprises arguably contribute much more to American interests than the perceived value of “kitchen sink” style NSA surveillance. Is the whole game worth the price of admission in that case, under which circumstances criticizing FISA rule revisions is almost beside the point?

It is also not clear that the NSA appreciates aspects of the public international law import of what it does, since as state practice their “everyone’s doing it” argumentation edges towards recognizing a *legal* right as opposed to practical custom of borderless surveillance (since customary law equals state practice under opinio juris). This is the problem that, in objective terms, other states will not be far behind in terms of technical capabitities. And if the NSA approach to cross border surveillance is advancing the likelihood of an objectively unfavorable public international law outcome in terms of prospective rules, at the very least that is incompatible with attendant US interests amidst the increasingly loud “cyberwar” chatter.

Pursuing another interpretation of the Rasterfahndung case, the techniques of the Court’s approach (proportionality, interest-balancing, close examination of legislative enactments and executive application in the sensitive area of national security) raise questions whether such an examination even would be possible for an American court. This is particularly true if one believes that the Federal Constitutional Court acted more like an administrative court in the Rechtstaat tradition measuring the executive against strict standards, meanwhile an American court might defer to the executive on complex national security matters, or as a matter of separation of powers ideas. The problem is that what the Federal Constitutional Court actually does in conducting its proportionality

analysis is arguably to circumvent legislative (and executive) weighing of such factors by inserting its own express weighing of the factors, and finding the political branches' calculus insufficient for constitutional purposes (but here the constitutional exercise begins to look more like scrutiny in the Continental administrative law tradition). And even within the hidden framework of the German Rechtstaat approach, the gist of the Rasterfahndung dissent's argument is that the majority's action is "undemocratic." This may be where the Rechtstaat's different approach most visibly might run afoul of American separation of powers views, including the proper role of judicial review.

In that case, the question is whether FISA court standards as given are sufficiently improvable, or whether the underlying public law doctrine problems indicates that alternatives beyond traditional judicial review under the rules of American public law would be better sought. So if we would have technical problems empowering the FISA court beyond marginally improving it rules, and (democratic) political oversight does not seem to be working, there might be other possibilities (ombudsman, independent agency with fulltime supervisory board with politically ad technically balanced representation, etc.). On the other hand, we also could look closely as a matter of constitutional law at how revising the FISA statute more deeply might enable a different approach by the courts. But in that case, the attention presumably should be on the structural powers of the court, rather than reinforcing its current judicial outlook. And does the tail begin to wag the dog in American public law terms, if we recast broader public law doctrine to deal with specific intel issues?

Finally, if the Court's opinion really hangs on the nature of the protected rights it balances, it may be more important for our purposes to focus on what it is about the

nature of the special German substantive rights (free development of the person, traceable backwards to the Court's Census Judgment). Their source lies to a great extent in ideas like a new approach to a new technological world, focused more on data protection rather than even our closest constitutional rights analogy in terms of privacy. And data protection and privacy views are increasingly colliding across borders also in regulatory terms, so that presumably would become broader than an exercise oriented towards improving the FISA court rules in support of their capacity to enforce existing rights.

This presumably could be undertaken in reexamining how we might reconceptualize "reasonable expectations of privacy," which potential process Justice Sotomayor mused about during her confirmation. But we should recognize in that case we would be embarking upon a longer process reaching far outside intelligence concerns. And if it is to work in a borderless world, the constitutional corollary may be that non-American citizens' "reasonable expectations" must also have some protection outside our territorial boundaries. That might lie at the bottom of a shift from protection of places founded on nineteenth law property views, to the updated protection of persons (personality) based upon our understanding of a changing, digitally-based environment.

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