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The recrudescence of 'security v. privacy' after the 2015 terrorist attacks, and the value of 'privacy rights' in the European Union[1]

Maria Grazia Porcedda
University of Leeds, Centre for Criminal Justice Studies

Abstract

This article aims at rebutting the security v. privacy model in the European Union, by demonstrating the importance of 'privacy rights' in the Union and, contextually, defending the significance of the right to the protection of personal data. Accordingly, and in agreement with views of 'privacy' being an umbrella term, I demonstrate that requests to give up privacy may in fact entail giving up several entitlements. In the EU, such entitlements are divided into two qualified rights that must be looked at separately: respect for private and family life and protection of personal data. To give back value to both concepts, I adopt a law and society approach, whereby I use the work of sociologists and philosophers in a historical perspective. Thereby, I set about to highlight the reasons why both rights, as they emerged out of modernity, have become instrumental in fostering personhood – one's unique identity, protected as an expression of dignity – and enabling that autonomy so crucial for democracy. The result of such an operation not only substantially alters the nature of the expression 'security v. privacy', but also it begs daring questions for the *ordre public* of the EU.

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1 I wish to thank Dr. Martyn Egan for his invaluable reflections and advice, Professor Amy Gajda for her insight into the media campaign surrounding Samuel Warren and underpinning the famous article 'The Right to Privacy', and Sebastian Volkmann for his kind help in translating the *Volkszählungsurteil* case. Furthermore, I am indebted to Professor Marise Cremona for the fruitful conversations that led me to reach a number of relevant conclusions in this article as part of my wider doctoral work. Finally, I would like to thank Elena Brodeala and Vivian Kube for their comments on an early draft, presented as a paper in the context of the EU law seminar at the EUI. All views expressed remain mine.

Introduction

The revelations by Edward Snowden in the summer of 2013 seemed to have put a lid on the long decade of counterterrorism (Jenkins 2014) and related appeals to giving up 'privacy' in the name of security, the so-called trade-off between security and privacy. The pervasiveness of the various programmes perpetrated by the NSA with the support of like-minded European partners had demonstrated the risks of indiscriminate surveillance and intelligence-led policing. In its Agenda on Security, the European Commission (2015) clearly stated that security and fundamental rights are complementary policy objectives.

But the ominous terrorist attacks that characterized 2015 wiped out all concerns foreshadowed by Snowden. The Council (2015) proposed to intensify existing data exchanges, as well as pursue a measure previously rejected, the collection of PNR data for intra-European Union (hereafter EU) flights.[2] After suffering the attacks, France – an EU-founder – has followed in the US' footsteps, by waging a war against terrorism, and proclaiming a state of emergency entailing a wide use of administrative police and justice, currently to last until July 2017 (since November 2015) (Jacquin 2016). The trade-off model, or its legal version of balancing, had merely been lurking, to re-emerge in due time.

I join those commentators who find that the problem with the trade-off model lies in a misunderstanding of the meaning and values embodied by security and privacy (e.g. Huysman 2006; Waldron 2010; Solove 2011). While the importance of security tends to be inflated (e.g. Reiman 1995; Cohen 2013), the value of privacy as a moral[3] and legal entitlement is overlooked. What seems to be forgotten is, in particular, privacy's role in protecting "the individual's interest in becoming, being, and remaining a person" (Reiman in Schoeman 1984, 314), i.e. personhood achieved through intimacy (inter alia Westin 1967; Schoeman 1984; Inness 1996) and paving the way to the objective of autonomy so much needed in democracy (Poullet/Rouvroy 2009; Simitis 2010; Cohen 2013). This

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2 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJL 119 (PNR Directive).

3 Reiman (1995) describes moral entitlements as those that (we believe) people should have irrespective of their legal acknowledgment.

article aims at rebutting the unfortunate foundations of balancing, by expounding the importance of 'privacy rights' in relation to the *ordre public* of contemporary EU. The latter is understood as a political community built to enforce peace and striving towards the rule of law. I aim to do so by following calls for an interdisciplinary approach to rights, particularly in sociology (Pugliese 1989; Bobbio 1997; Cohen 2013), with reference to the EU's *ordre public*. I experiment with a law and society approach to speculate on the factors that enhanced the emerging of the limbs contained in the legal formulation of the rights to respect for private and family life and protection of personal data [1], and that challenged them [2]; and on the other hand, the mechanism that favoured a legal approach to the values underpinning both rights [3] and the political occurrences that subsequently spurred their recognition as rights [4]. I set to demonstrate the reasons why both rights have become instrumental in fostering personhood, one's unique identity, protected as an expression of dignity, and enabling autonomy, as they emerged out of modernity. Contextually, I defend the significance and independence of the right to the protection of personal data.

Accordingly, my chapter develops as follows. In section 1, I briefly revise 'security v. privacy', or the trade-off model, and introduce the three-stepped procedure that I will use to discuss the notion of privacy rights. In section 2, I expound that 'privacy' is an umbrella term, and that requests to give up privacy may in fact entail giving up several entitlements. In section 3, I unveil that, in the EU, privacy hides a double reference to two qualified rights which must be looked at separately: private and family life and personal data protection. Finally, in section 4 I add legal value to the notion through a law and society approach, by using work of sociologists and philosophers in a historical perspective. I conclude with implications for the trade-off model and the EU *ordre public*.

1. Situating security and privacy in the trade-off model

Before delving into the substance of my argument, it is appropriate to describe the trade-off model, a classic formulation of which is that by Posner and Vermeule (2007). The authors argue that security and liberty are comparable items that can be represented as two perpendicular axes delimiting an area of policy choices. Taking into account real-life scarcity of resources, and assuming that contemporary (US) governments are not

"dysfunctional", Posner and Vermeule (2007) argue that we have exhausted the policy options that enable us to simultaneously enhance security and liberty. Hence, a policy measure will require sacrificing one for the other, at the extreme in an all-or-nothing fashion (Solove 2007). The trade-off thesis, which, according to Posner and Vermeule, does not vouch for maximisation of security at all costs, is complemented by the so-called deference thesis. In a nutshell, at times of emergency, the executive does and should reduce civil liberties, because the latter hinder an effective response to the threat.

In my view, Posner and Vermeule's approach can be challenged on both normative and methodological grounds. Normatively, it can be shown why liberties should not be traded with security. Such critique is jurisdiction-specific, in that it has to be carried out with reference to the *ordre public* (understood as a constitutional order) of a specific country. A methodological challenge would rebut the claim whereby security and liberty are *de facto* juxtaposed (because we lie at the frontier) and that giving up liberty, in the guise of privacy, is the most efficient solution in the face of an emergency, by looking into whether privacy and security are the only dimensions at play in the trade-off model, and benchmarking the notion of efficiency.[4]

The two critiques meet at the intersection of the definitions of security and privacy, which are at the same time the object of the methodological critique, and the norm-laden tools necessary to carry out such critique.(in other words, it could be said that security and privacy are philosophically thick concepts)[5] Here I exactly wish to appraise the nature of the

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4 In this volume, Patrick Herron offers an account of several theoretical challenges against the trade-off model and an original change of perspective on liberties. Several interdisciplinary projects focussed on a methodological critique of a sort in search for alternative solutions. Among others, see the work of the SURVEILLE project (https://surveille.eui.eu/), the SurPRISE project (www.surprise-project.eu) and the PRISMS project (http://prismsproject.eu/) (all accessed 22 February 2016).

5 In philosophy, 'thin' concepts are either descriptive or evaluative/normative, whereas 'thick' concepts are both descriptive and evaluative/normative. During her speech at the conference New Philosophical Perspectives on Surveillance and Control: Beyond the Privacy versus Security Debate (FRIAS, Freiburg, 5-6 November 2015), Prof. Rafaela Hillerbrand noted that drawing evaluative conclusions based on thin descriptive concepts (and vice versa) does not produce a thick concept, but rather expresses a logical fallacy. The trade-off model may

juxtaposed concepts, which is often overlooked (Solove 2007; 2011) or misunderstood (Waldron 2010).

One of the fallacies leading to such a misunderstanding is Solove's (2011) pendulum argument. At times of emergency, the importance of the two concepts is re-assessed. Liberties such as privacy are seen as hindering security, and hence their enjoyment should be 'temporarily' compressed. The other side of the coin, epitomized by the war on terror, is that the threat to security is so fundamental as to justify the adoption of any measure, including the limitation of liberties. In this respect, it can be said that the trade-off model finds fertile ground in the securitization of risks or threats (Buzan et al. 1998), which consists exactly in attributing existential value to a particular threat justifying the adoption of any measure. In other words, there is a trade-off because the value of security swings towards its maximum level, becoming prized above anything else.

The immediate advantage of securitization, namely prioritizing an issue on the political agenda, hinders an appraisal of the ensuing regulatory framework and policies (Huysman 2006). Likewise, securitization frustrates an open-minded reflection on the diverse factors surrounding security issues, such as the role played by technological constraints in dealing with threats.[6] Hence, securitization precludes the methodological analysis necessary to prove whether trading security with privacy is the most efficient solution. As a result, security needs to be reappraised in a legally meaningful way. This can be done by substituting security with references to the measures adopted with a view to tackle offences embodying a specific criminal conduct. I return to this point in the concluding section.

When considered within the trade-off model resting on the securitization of threats, the depth of rights is diluted, in that the reasons why they were originally safeguarded is suddenly overshadowed. The reverse mechanism takes place here: there is a trade-off because the value of privacy swings towards its minimum level, becoming an obstacle against achieving the most cherished objective. The case for privacy may be worsened by the fact that the right is presented (in policy discourses) as an excuse to cover misdeeds, or as resistance to intrusive practices carried out for security purposes (Solove 2011; González Fuster et al. 2013).

transform security and privacy as thin concepts, though in different ways, and lead to several logical fallacies.

6 In this sense, securitization transforms security in a thin-evaluative concept. In this volume, Orrù reaches similar conclusions.

Hence attention focuses on the (desired) quantum of privacy:[7] since we have or need little privacy, we can sacrifice it. To be sure, Scott McNealy's infamous aphorism as the CEO of Sun Microsystems "you have zero privacy anyway" so "get over it" (Sprenger 1999) remains unmatched by politicians. Yet, the mantra that "if you have done nothing wrong, you have nothing to hide" (Solove 2007; 2011), works on the same reductive trail: since the quantum of privacy needed by law-abiding citizens is very limited, they should not be worried vis-à-vis the government's attempt to intrude upon it. Undervaluing privacy flattens its other dimensions, in this case those concerning its value, and hinders an evaluation of the effects of a regulatory framework and policies limiting it. In order to seriously appraise the concept, we need to restore its full normative meaning.

Although contesting the use of security and liberty as terms of reference, let alone their comparability, would be a valid exercise in any democratic society, the specific meaning of their dimensions, once unpacked, changes according to (legal) culture. This is because the range of available responses to threats (and values) are jurisdiction-specific; a similar claim can be made for rights, at least insofar as their interpretation is concerned. Hence, adding legal-descriptive purchase to security, and legal-normative meaning to privacy, is a contextual exercise. Since the importance of security in our contemporary European society seems unchallenged, I find more urgent to delve into the richness of the concept of privacy vis-à-vis the European Union *ordre public*, and what we stand to lose if we trade it for security. In this work, I look at the European Union *ordre public* as built on the *telos* of a solid application of the rule of law against the legacy of war-ridden fascist and totalitarian regimes.[8]

The discussion, which develops previous work of mine (in Porcedda, Vermeulen and Scheinin 2013), builds on and integrates existing literature (*inter alia*, Reiman 1984; Schoeamn 1984; Inness 1996; Rodotà 2009; Poullet/Rouvroy 2009; Solove 2011; Cohen 2013; González Fuster et al. 2013; Kreissl et al. 2013; Lynskey 2015). In order to render legal-

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7 It could be said that securitization transforms privacy into a thin-descriptive concept.

8 Borrowing from Fried, if "my sketch of this underlying perspective leaves the reader full of doubts and queries, I draw comfort from the fact that a more elaborate presentation" of this claim is in progress (Fried in Schoeman 1984, 206).

normative meaning to privacy, I develop my argument in three steps. First, I unveil the slippery meaning of the term; second, I anchor the analysis in the EU legal framework, where privacy embodies two rights; and third, since this slippery meaning is connected to degrading the value inherent in the right, I set to add normative grip to it in (the EU) context.

2. Privacy: one all-encompassing word, globally

The first step to add normative grip is to show the complexity of 'privacy', irrespective of any jurisdiction.[9] The birth of privacy as a legal concept is typically linked to the famous article written by Warren and Brandeis (1890) at the end of the 19th century. Quickly labelled as 'the right to be let alone', pursuant to an expression coined by Judge Cooley, privacy was initially subsumed under tort law,[10] not least due to the circumstances that motivated Warren and Brandeis to write the article (see *infra*).

Article 12 of the Universal Declaration of Human Rights[11] (hereafter UDHR) gave privacy the seal of a legally acknowledged right in the signatory states. The formulation of article 12 UDHR was almost entirely transcribed into article 17 of the International Covenant on Civil and Political Rights[12] (hereafter ICCPR), the first legally binding formulation of the right, which reads

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- 2. Everyone has the right to the protection of the law against such interference or attacks.

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9 Hence in this section I purposely do not refer to regional texts such as the European Convention on Human Rights and Council of Europe Convention 108, which will feature in later sections.

10 Articulated by Prosser (1960). Privacy was initially addressed under tort law also in Germany, as recounted by Simitis (2010).

11 General Assembly of the United Nations (1948) *Universal Declaration of Human Rights, Resolution 217*.

12 International Covenant on Civil and Political Rights, I-14668, UNTS n° 999.

The Human Rights Committee of the United Nations has avoided providing strict definitions of the dimensions of article 17,[13] an approach followed by other courts on similar matters. According to commentators, privacy includes identity, integrity and intimacy, relating to the body, acts and information, and autonomy of action (Nowak 2005); family is broadly interpreted and understood as in the state party at stake;[14] home is the place where one resides or works[15] (Nowak 2005; Blair 2005); correspondence extends beyond letters. Honour and reputation are not defined, but are still protected from attack, e.g. as deriving from having one's name and full contact details published on the UN Security Council's terrorist list.[16] Oftentimes 'the right to privacy' is used as a catch-all phrase to refer to all dimensions of article 17 ICCPR (Scheinin 2009).

At the times when the ICCPR was adopted, the consequences of applied informatics, particularly in relation to private and public uses of databases, triggered several scandals (Rodotà 1973; Newman 2008) that fuelled renewed policy attention on privacy. Alan Westin (1967) was the author of another popular definition of privacy, i.e. "the control over personal information" which could be processed in such databanks (although, in his treatise, he seems to broaden the scope beyond that definition[17]). Westin's work was at the basis (González Fuster 2014) of the development of the 'fair information principles' (Gellman 2012), which oversee the functioning of 'information privacy'. Such understanding of privacy was given legal, if unbinding, substance by the OECD 1980 Privacy

13 United Nations Human Rights Committee (1988) *General Comment No. 16. The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)*.

14 Ibid.

15 Ibid.

16 *Sayadi and Vinck v. Belgium, CCPR/C/94/D/1472/2006, Communication No. 1472/2006* (Human Rights Committee).

17 His followers have paid little attention to a second definition of privacy which, in fact, encompasses the dimensions partly recognized by the law: "viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude, or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve" (Westin 1967, 5).

Guidelines, recently revised,[18] which contain soft law concerning the control over information relating to any identified or identifiable individual (personal data according to article 1 (b) of the Annex).

Westin's work paved the way to a stream of studies that still thrives today; ever since, scholars have competed to provide the ultimate definition of privacy. Some authors searched for the dimensions of privacy worthy of protection. Westin found solitude, intimacy, anonymity and reserve (1967); Fried identified privacy as key for respect, love, friendship and trust (1984); Clarke (2006) isolated the privacy of the person, of behaviour, of personal communications and of personal data; Finn et al. (2013) added to Clarke's list privacy of thoughts and feelings, of action, of image, of location and space and of association (including group privacy). Solove (2007) preferred taking inspiration from Wittgenstein's concept of family resemblances, while Nissenbaum (2011) suggested concentrating on context, and Regan (2002) on privacy as a common good.

I do not privilege any single author's definition, as I take the view that privacy encompasses all abovementioned dimensions, including the goal of protecting personal data, which makes privacy, as González Fuster (2014) notes, inherently ambiguous. In this respect, I agree with the idea that privacy is an umbrella term[19] (Solove 2007) and, as I detail later on, that it is fundamentally dynamic (Cohen 2013, 1906), because I belong in the group of authors, like Westin (1967), Reiman (1984), Gavison (1984), Inness (1996) and Cohen (2013) who consider privacy as instrumental to the development of identity/personhood based on intimacy and leading to autonomy. What is fundamental for the development of identity and personhood cannot be decided once and for all. Nonetheless, I agree with Bennett (2011) that, for all the scholarly criticism, the term has too much intellectual and political grip to be set aside. As a result, in the EU legal order it may be more correct to talk about 'privacy rights', with the constraints that I formulate below.

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18 Organization for the Economic Cooperation and Development, Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, C(80)58/FINAL, as amended on 11 July 2013 by C(2013)79.

19 Though compare Andrade's (2011) criticism of the superimposition between 'privacy', 'data protection' and personal identity. According to him, the role of such an umbrella term should be performed by 'personal identity' instead.

The second operation needed to add normative grip to 'privacy' is to anchor it in the EU legal framework, where, despite its appeal, the concept bears uncertain legal significance.

In *Hungary v. Slovak Republic,* the Court of Justice of the European Union (hereafter CJEU) recalled that "EU law must be interpreted in the light of the relevant rules of international law, since international law is part of the European Union legal order and is binding on the institutions",[20] and therefore the formulation in article 17 ICCPR cannot be, and has not been, ignored. However, the EU is not party to the ICCPR, and even if it were, the parts thereof which are not customary in nature (Cremona 2006) would not supersede written primary law such as the Charter (Rosas/Armati 2010) but rather, as the CJEU has held, e.g. in *Wachauf*, "supply guidelines to which regard should be had".[21] The same argument can be made in relation to Convention 108.[22]

As the seminal work carried out by González Fuster (2014) demonstrates, no mention is made of 'privacy' in primary law; as for secondary law, privacy is inconsistently referred to, alongside the

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20 Judgment of 16 October 2012 in *Hungary v Slovakia*, C-364/10, EU:C:2012:630 para 44.

21 Judgment of 13 July 1989 *in Wachauf v Bundesamt Für Ernährung Und Forstwirtschaft*, C-5/88*, EU:C:1989:321* para 17.

22 Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS n° 108, 28 January 1981. Convention 108 is a *sui generis* case. Directive 95/46/EC contains a connection or *renvoi* (Cremona 2016) that underscores the relevance of Convention 108 in the Union legal order. As important, Convention 108 was amended in 1999 to enable the European Union to become party to it (yet no action was taken on the point). At the time of writing, Convention 108 is under revision, and the EU is taking active part in the negotiation (available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806a616c). Should the EU become a party to the revised Convention, then the instrument would become integral part of EU law and impose an obligation of conform interpretation of secondary law to avoid conflict. In its preamble, the GDPR, which can be seen as a specification of the right to personal data protection read in the light of article 52.2 of the Charter and the CJEU's case law in *Google Spain*, does not contain connection clauses to Convention 108. However, pursuant to recital 105 of the GDPR, adherence to Convention 108 should be taken into account when assessing the adequacy of third states' data protection legislation, and therefore Convention 108 could be seen as providing minimum standards.

expressions 'private life' and 'protection of personal data'; the same can be said of judgments interpreting such secondary law.[23] González Fuster notes that translations of applicable law betray an even more inconsistent use of terms. The General Data Protection Regulation[24] (hereafter GDPR) replacing Directive 95/46/EC,[25] currently overseeing the protection of "the right to privacy with respect to the processing of personal data" (with language taken directly from Convention 108[26]), will contain no references to privacy as such.

In the EU legal order, the various dimensions encompassed by 'privacy' are divided into two qualified rights (i.e. susceptible of being subject to permissible limitations), both enshrined in the Charter of Fundamental Rights of the European Union (Rosas and Armati 2010). Article 7 on

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23 Numerous examples can be found of unclear or perplexing uses of the term. In *Digital Rights Ireland and others*, the Court states "to establish the existence of an interference with the fundamental right to privacy, it does not matter whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way". That passage is taken, in turn, from ground 75 of the Judgment of 20 May 2003 in Österreichischer Rundfunk and Others, Joined cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, and is misquoted, in that the original referred to 'private life' instead of privacy. In Judgment of 16 October 2012 in Commission v Austria, C-614/10, EU:C:2012:631, the ECJ stated that supervisory authorities are the guardians of an unspecified "right to privacy" (para 52); in Judgment of 12 December 2013 in X, C-486/12, EU:C:2013:836 the Court referred to "the importance – highlighted in recitals 2 and 10 in the preamble to Directive 95/46 – of protecting privacy, emphasised in the case-law of the Court and enshrined in Article 8 of the Charter" (para 29). In a rather surprising passage in Judgment of 17 July 2014 in YS and others, Joined cases C-141/12 and C-372/12, EU:C:2014:2081, para 44, the Court stated "As regards those rights of the data subject, referred to in Directive 95/46, it must be noted that the protection of the fundamental right to respect for private life means, inter alia, that that person may be certain that the personal data concerning him are correct and that they are processed in a lawful manner".

24 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1.

25 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive) OJ L 281.

26 Yet, for the current discussion, it is relevant to note that the revised draft of Convention 108 seems to substantially reduce references to 'privacy'.

respect for private and family life derives from article 8 of the European Convention of Human Rights (hereafter ECHR),[27] which in turn is rooted in article 12 UDHR (European Commission of Human Rights 1956).

Article 8 on the protection of personal data embodies those elements of privacy that pertain to personal information and the free flow thereof, which are currently dealt with by Directives 95/46/EC and 2002/58/EC,[28] but without the connection to the internal market. The right, now enshrined in article 16 TFEU and 39 TEU, seems to be a disputed child, with many potential parents including former article 286 EC, and Convention 108.[29]

González Fuster (2014) and Lynskey (2015) rightly note that scholars who wish to treat the two rights separately have to justify the independence of personal data protection from article 7 of the Charter.[30] To an extent, my own analysis will not differ. Part of the problem in dealing with the matter is that, before the Charter became legally binding, the CJEU could only rely on article 8 ECHR, which encompasses not only the traditional and the informational dimensions of privacy, but also elements, such as environmental protection, which are not associated with article 7 of the Charter at all. A second problem lies in the unfortunate formulation of Directive 95/46/EC (the right to privacy with respect to the processing of personal data), which has understandably been replicated in judgments on the subject matter. Very few judgments of the CJEU, thus far, concern article 8 taken alone, e.g. *Deutsche Telekom*,[31] *Scarlet Extended,*[32] and *Sabam*.[33] Advocate General Saugmandsgaard Øe's opinion on the *Tele2 Sverige case*, in which he argued incidentally that

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27 Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols No 11 and 14), ETS n° 005. Article 8 ECHR contains no reference to the word 'privacy'.

28 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201 (e-privacy Directive).

29 European Parliament, Council and Commission, Charter of Fundamental Rights of the European Union, OJ C 303/01. European Parliament, Council and Commission, Explanations Relating to the Charter of Fundamental Rights, OJ C 303/02 (Explanations to the Charter).

30 See, for instance, Lynskey (2015).

31 Judgment of 5 May 2011 in Deutsche Telekom, C-543/09, EU:C:2011:279.

32 Judgment of 24 November 2011 in Scarlet Extended, C-70/10, EU:C:2011:771.

33 Judgment of 16 February 201 in Sabam, C-360/10, EU:C:2012:85.

article 8 of the Charter does not correspond to any rights guaranteed by the ECHR,[34] may possibly positively influence the Court's approach.

From the perspective of black letter law, the fact that two rights exist, and that personal data protection is further enshrined in both Treaties, should be a sufficient reason to accept the legitimacy of both rights (and the reference to personal data protection as fundamental (González Fuster 2014).

Furthermore, it could be useful to recall that, in the European Union legal order, personal data protection may have had more prominence than the respect for private life, due to the internal market dimension of the former, particularly in enabling the free flow of personal data.[35] Although it was not a fundamental right, in *Fisher* the Court said that the principles enshrined in Directive 95/46/EC transposed into EC law general principles that already existed at member states level.[36] On the other hand, while respect for private and family life was a right common to the constitutional traditions of the Member States, and seen as being part of the general principles of EU law as early as in the *National Panasonic* decision[37] (Kokott/Sobotta 2013), the right was only relevant in the context of restrictions on the freedom of movement and family reunification.

González Fuster (2014) notes the instrumental role played by both rights in the pursuit of the four freedoms. While personal data protection was a limitation against, but also a protection to enable, the free flow of data and the services relying on them, the right to family life went in the direction of supporting freedom of movement. However, the Lisbon Treaty marks the end of the instrumental character of the two rights, which acquire a life of their own. As the EU has embraced new competences in the criminal area, *viz*. of providing an area of security (articles 3 and 21 TEU), both rights have acquired full, and possibly equal, weight. The

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34 Opinion of AG Saugmandsgaard Øe of 19 July 2016 in Tele2 Sverige and Watson and others, Joined cases C-203/15 and C-698/15, EU:C:2016:572 para 79.

35 But Poullet and Rouvroy (2009) argue that the fundamental rights dimension always prevailed. For a discussion of the double nature of Directive 95/46/EC and the implications for its legal basis, see Lynskey (2015).

36 *Judgment of 14 September 2000 in Fisher, Case C-369/98, EU:C:2000:443* para 34.

37 *Judgment of 26 June 1980 in National Panasonic v Commission, C-136/79, EU:C:1980:169*.

potential of greater interference with personal autonomy means that the importance of respecting private and family life transcends the field of freedom of movement. Likewise, protecting personal data is more important vis-à-vis intelligence-led policing and profiling (and erosion coming from the private sector[38]).

4 Adding normative value to the two 'privacy rights' in the EU

After having legally situated the right to privacy, as a final step to challenging the reductive approach to privacy in the trade-off model, I elaborate the normative value of privacy as understood in the EU. In other words, here I discuss what 'privacy rights' are protecting, where such role comes from, and why it matters in the contemporary European democratic society (vis-à-vis pressing requests to give it up). To this effect, I follow a law and society approach, and particularly the idea of Bobbio (1997) and Pugliese (1989), whereby the importance of any right can only be understood in the light of the social circumstances determining its appearance.[39] Like all other liberties, the two privacy rights were effected by the emergence of new needs resulting from societal, cultural and technological developments.

While implicit in the legal works relating to 'privacy' in the EU, such references are not delved into (*inter alia* Poullet/Rouvroy 2009; González Fuster et al. 2013; Lynskey 2015), to the detriment of the understanding of the value of both rights (particularly pronounced with reference to personal data protection). I intend to fill the gap to confer importance to privacy again, with a view to demonstrating its valuable relation with the EU *ordre public*.

By looking into those original needs, it also becomes possible to embrace without risk of contradiction the connections between the rights to private life and to the protection of personal data. Indeed, acknowledging that the latter is independent from the right to private life

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38 In this respect, see the interesting analysis of Cohen (2013).

39 For a discussion of the deep ties between sociology and human rights, see Brunsma et al. (2013). In the same vein, I agree with Cohen's appeal to look into other disciplines to explain the value of privacy, or, as it should be more correct to say, rediscover such interdisciplinary approach, which was visible in early, but often neglected, work.

does not exclude an area of overlap (unsurprising *per se* as interdependence is part of the doctrine of human rights). Understanding this area of overlap may also help explaining why the international notion of privacy has come to embrace the goal of personal data protection. Both rights, in fact, are instrumental in fostering personhood, one's unique identity, [40] protected as an expression of dignity, and enabling autonomy as concepts emerged out of modernity.

4.1 Giving normative depth to the right to private and family life (art. 7)

Article 7 of the Charter reads: "Everyone has the right to respect for his or her private and family life, home and communications". In the intention of the European legislator (article 52.3 of the Charter), Article 7 derives from and corresponds to article 8 ECHR. The latter is rooted in article 12 of the UDHR, but the drafters of article 8 ECHR chose the English expression 'private life' instead of 'privacy' as the English translation of the French *vie privée* (adding to the babel of formulations pointed at by González Fuster (2014)). Unfortunately the *travaux préparatoires* of article 12 UDHR contain scant details of the discussions leading to the adoption of the right. Similarly, the drafters of article 8 ECHR left to future generations limited cues for the rationale for enshrining the right in the Convention. Perhaps this could relate to the lack of substantial philosophical debates on privacy reported by Schoeman (1984) that continued until the 1960s. A law and society approach is in this case inevitable, in the attempt to trace back the roots of the right in the near past, and relate such an approach to the enlightening, yet constantly evolving interpretations provided, for instance, on article 8 ECHR by the European Court of Human Rights (hereafter ECtHR). I do so by reflecting

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40 A different opinion is expressed by Andrade (2011). For him, privacy and identity, which are both substantive rights, can be at odds, because they express two different elements of a broader right to personality. The protection of personal data, which is a procedural right, should be subsumed under a right to identity, as distinct from the right to privacy. While the distinction between personality and identity could add an interesting analytical layer, I believe that Andrade's analysis could have led to different conclusions if it had been based on a deeper parsing of the legal and moral conceptual elements of privacy rights. After a deeper reading, in fact, privacy rights prove capable of protecting the possibility of change and of multiple identities.

on each of the four limbs contained in the legal formulation of the right. I begin with the one closest to 'privacy', private life, the discussion of which also lays the foundations for the approach to the other three limbs, in the sense that I analyse the remaining three limbs in the light of the outcome of the discussion concerning private life.

4.1.1 The right's first limb: private life

The acknowledgment of the existence of private life predates the appearance of the right, and can be traced back to the Greek polis, so that it would seem tempting to discuss it by contrast with its antonym 'public'. Following this temptation to reflect on the model of the Greek polis would lead down a dead-end, as Arendt (1998) brilliantly expounded. In the ancient Greek civilization, the private coincided with the household, which was at once necessary for men to be free and take part as peers in the public affairs of the city, but also despised as a domain of deprivation from the most quintessentially human achievement of excellence through speech.[41] Public life, where few enjoyed equality and liberty, could only be practised by those who were relieved from the need to earn their living, something enabled by the (productive) household. The household was in turn the seat of inequality, and to maintain said inequality, the male leader was entitled to use violence against family members, slaves and employees alike.[42] The household carried with it a sense of deprivation, of withdrawal from the public view, and not partaking in a common life (Arendt 1998).

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41 Arendt maintains that Aristotle's adage that 'man is by nature political, that is social', is the result of a mistranslation. 'Social', the need of company, was a concept produced by the Romans, who showed more respect for life in the household. For Arendt, such wrong reading is supported by the fact that today's society is organized in the guise of an enormous family whose primary concern is production and survival.

42 Unfortunately the home can still be the theatre of unequal relationships and violence toward women and children, a feature that has led scholars to identify 'privacy' as the excuse for patriarchal domination. On this point, see Schoeman (1984). I believe, however, that this comes from the unfortunate, but not uncommon, conflation of 'privacy' with 'secrecy', i.e. forbidding disclosure because of a superior cause, as discussed by Westin (1967).

This is not what Warren and Brandeis referred to in their article. The authors described privacy as an *emerging* societal, moral and philosophical need in search for legal protection, "a right to personality" or identity, namely the expression of one's life, such as emotions, sentiments, facts of life, happenings, actions, sexual life and relationships with others (implicitly unobserved). The authors believe protecting private life, as personality or identity connected to intimacy, to be a young need. The point is not that personality or intimacy had never existed before, but that, as Westin (1967) noted, it is precisely when these features are both enhanced and threatened – whether because they become matter of public enquiry (Warren/Brandeis), policy (Arendt) or intrusion (Westin) – that they become cherished values requiring legal protection, and enter the realm of freedom. Private life lost its meaning of deprivation in concomitance with the "enrichment of the private sphere through modern individualism" (Arendt 1998), underpinned by the elevation of intimacy to a value.

I believe a succinct account of the social circumstances effecting such changes is necessary to appraise the extent to which the values undergirded by private life matter in today's society. To do so, I adopt the views of Charles Taylor (1992, 1989) and Hannah Arendt (1998, 1960) concerning late modernity, and Westin's (and Arendt's) early work on intimacy that laid the basis for later discussions (*inter alia* Schoeman 1984; Inness 1996; Cohen 2013).[43] Such account entails four moves recalling, on the one hand, the factors that enhanced the surfacing of a given dimension of private life [1], and that challenged them [2]; and on the other hand, the mechanism that favoured a legal approach to the concept [3] and the political occurrences that subsequently spurred its recognition as a right [4].

I begin with the enhancing factors [1]. With the passage to modernity, identity stopped being attached to the role inherited at birth, and the former was no longer implicitly recognized. Detaching one's identity from one's social role was effected by the idea of authenticity, i.e. of one's originality. This, according to Taylor, found its roots in the idea that the concepts of right or wrong were anchored in human feelings, in "a voice within" (Taylor 1992, 26), which is to be listened to if one wants to live a

43 For a different path leading to the conclusion that the importance of identity and personality emerged in the XIX Century, see Andrade (2011).

full life. Such idea, which at the beginning was conceived of as a way to connect to God, lost its religious connotations and came to be associated with intimacy enjoyed in private, whose first advocate was Rousseau (Arendt 1998). To be sure, intimacy had always existed, and according to Westin (1967), it is a quintessentially animal need used in a dialectic manner with sociality. Intimacy is a distance-setting mechanism (within the same species) to reproduce, breed, play and learn, whereas sociality is interpreted as being a desire for stimulation by fellows. Patterns of privacy and sociality at the levels of the individual, household and community are expressed in different forms in all cultures of the world. Westin refers widely to anthropological work, showing how different devices (Tuaregs' veils, humour, backslapping, fans, or sunglasses) perform the function of distance-setting, the symbolic realization of privacy and withdrawal from society. Reserve, as well as the existence of intimacy, serve the double function of allowing the development of one's personality by making sense of the different roles played by the individual in a community (Murphy 1964),[44] and the safeguarding of one's social status. Taylor notes that the notion of authenticity was fully developed by the father of Romanticism, Johann Herder, according to whom every human being is intrinsically different and original, and has to be true to herself, i.e. live her life her way, as a goal in life, against an instrumental approach to one's life and the levelling demands of the community. This leads to the second move.

Indeed, as mentioned above, while modernity enabled the liberation of the self, the appearance of the nation state, society, and technology threatened reserve and intimacy [2]. Major organizational changes

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44 The point has been then taken in the contributions edited by Schoeman, where for instance Jeffrey H. Reiman argues: "the relationship between privacy and personhood is a twofold one. First, the social ritual of privacy seems an essential ingredient in the process by which 'persons' are created out of pre-personal infants. It conveys to the developing child the recognition that his body to which he is uniquely 'connected' is a body over which he has some exclusive moral rights. Secondly, the social ritual of privacy confirms, and demonstrates respect for, the personhood of already developed persons." He refers to both as "conferring title to one's existence" and further claims "to the extent that we believe that the creation of 'selves' or 'persons' is an ongoing social process…the two dimensions become one: privacy is a condition of the original and continuing creation of 'selves' and 'persons'" (1984, 310). See also Inness (1996) and Cohen (2013).

begetting the nation state unleashed the need to intrude into the private sphere in a more extensive way (Westin 1967), aided by the evolution of public and private bureaucratic practices, notably explained in the work of Weber. Similarly, society emerged when economic activities previously confined to the household became a source of concern for the public realm. Hence, the household – the social – was elevated to the public (Arendt 1998). In other words, the social realm infused and occupied the space of politics, thus suffocating both politics and private life, and placing levelling demands of conformism. This both threatened and spurred intimacy as the antidote against such demands of conformity.

In this respect, Warren and Brandeis' idea of 'being let alone' could be one extreme of the spectrum, coinciding with the choice of excluding any 'significant others' from one's life.[45] As for the emergent consequences of technological progress, that is, in my view, what spurred Warren and Brandeis' contribution.[46] The article contains references to the improvement of long-distance photography and the proliferation of sensational periodicals[47] (the development of the press stemming from the organizational changes above). Warren and Brandeis were writing to protest against the increasing intrusion of the press suffered by Warren into his family affairs, due to the fact that he had entered a politically powerful family by means of marriage. As documented by Gajda (2007), Warren had married Mabel Bayard, a US Senator's daughter. However, differently from the classic account of the origins of the famous essay given by Prosser (1960), it was neither Warren, nor his wedding, who was the immediate object of attention, but rather his wife and father-in-law, who became himself the focus of gossip columns when he married a lady twenty years younger. From 1882 until 1890, detailed and variously intrusive accounts of the Warren-Bayard family life featured or were

45 But Taylor (1992) acknowledged that even the hermit and the solitary artist are engaged in a form of dialogue: the former with God, and the latter with the future public who will admire the artist's works.

46 And, in agreement with Andrade (2011), the development of identity (Andrade rightly points out that our description of the evolution of mankind, from Paleolithic to the Information Age, is marked by different stages of technological development).

47 By means of example "If you may not reproduce a woman's face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination." (Warren and Brandeis 1890).

mentioned 60 times, often in gossip columns or front page, by the most circulated newspapers, and the 'Right to Privacy' had no practical effect over media attention, including the coverage of Warren's own death twenty years later (Gajda 2007).

Yet, these developments were not sufficient for the newly discovered values to become legally relevant. Another change was needed: the redistribution of the positive effects of modern individualism thanks to the *telos* of equality of recognition spurred by dignity [3]. Taylor recounts that dignity was the product of modernity linked with the evolving sources of legitimation of the polity and substituting honour. Honour, automatically recognized at birth to few, was previously the basis of pre-determined, social hierarchies ruled by natural law, whereby life was respected in abidance by a superior law. The new social contract that paved the way to democracy hinged on the idea of universal, natural (subjective) rights, whereby life is respected because of the intrinsic value of human beings (Taylor 1989). Such equal value carried recognition– the social policy of equal recognition, through procedural justice or fairness – and "is now universally acknowledged in one form or another" (Taylor 1992, 49), to the point that its denial can be perceived as discriminatory. Dignity, the sense of self-worth, is a cornerstone of contemporary legal and political systems: it calls for respect which is accorded to all, and what commands respect is the very fact of being a human being. Respect has also an active meaning, in terms of subjective rights, of freedom and self-control (Taylor 1989; Reiman 1984). Indeed, the combined effect of respect for dignity and uniqueness paved the way to the value of autonomy, which stems from what, according to Taylor, seems to be the strongest moral concerns of our time: the respect for life, integrity, and well-being of human beings, which grew from Locke through to Romanticism. "To talk of universal…rights is to connect respect for human life and integrity with the notion of autonomy. It is to conceive people as active co-operators in establishing and ensuring the respect that is due them. This…goes along with…the conception of what it is to respect someone. Autonomy is now central to this…For us respecting personality involves as a crucial feature respecting the person's moral autonomy" (Talor 1989, 12).

This leads to the final and decisive move [4]. Fascist and totalitarian regimes demonstrated the dangerous consequences of crushing reserve, intimacy and autonomy, and eased the transition of 'privacy' from a legal category to a fundamental right, from privilege of the élite to a human right. The ideologies supporting fascist and totalitarian regimes aimed at regimenting individuals, in pursuit of a corporatist society where the

single is a function of the total (Bobbio 1997). Autonomy, understood as non-conforming action (Arendt 1998), is instead seen as quintessential to the continuity of democracy. This is the value of private life implicit in the right, and defended by the courts. In *Pretty v. UK*, the ECtHR said "the notion of personal autonomy is an important principle underlying the interpretation of its guarantees".[48] The import of this for our EU democratic society is recalled in the last part of this article.

4.1.2 The right's second limb: family life

Before continuing, I must recall that I revise the value of family life, like the remaining limbs of article 7 of the Charter, in relation to my main argument, i.e. that they are instrumental to personhood, identity and autonomy as the quintessential function of the right, and not to the wider concept of the creation of family, which forms the object of different rights.[49] As a result of such restricted focus, the application of the four steps of the methodology is necessarily less extended.

Privacy is neither absolute, nor is it exhausted by intimacy. On the one hand, intimacy and reserve enjoyed in private enable us to maintain consistency among the roles played in the face of change, giving sense to one's biography (Bagnasco et al. 2001, 167). On the other hand, Westin (1967) reminds us how such mechanisms are in dialogue with the need for sociality (and even societal surveillance as a mechanism to enforce norms). One's identity results in particular from the interaction between the mechanism of identification (the sense of belonging to a group) and individuation (defining oneself against the external world and those that do not form part of our group). The development of one's identity could be said to concretize in being able to answer the question "who am I?"

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48 *Pretty v. the United Kingdom, no. 2346/02, CE:ECHR:2002:0429JUD00234602* para 61.

49 For instance, article 9 of the Charter protects the right to marry and to found a family, whereas article 24 concerns the broad rights of the child. An investigation of how the creation of a family can be encouraged or hindered by social factors is beyond the scope of this study. For suggestions of how the wider subject of family could be tackled with a law and society approach see, for the American context, Hattery and Smith (2013). It must be highlighted that the debate of how socio-economic factors, including gender, impact on family types, marriage patterns, and family formation is heated (Kertzer 1991; Puschman/Solli 2014).

(Bagnasco et al. 2001, 167). Identity is defined through dialogue, by using "human languages of expression" (Taylor 1992, 33) to interact with 'significant others', throughout one's lifetime. Significant others try to recognize a certain identity in us, and it is in dialogue with significant others that we define ourselves. Such dialogue starts early in life, through different stages of socialization, the first of which takes place in the family.

Family is in fact another crucial component of the private realm. Family is patently the most basic human formation, or community, in which people find themselves, and to which they cling for necessity and survival.

Similarly to private life, family life has lost its privative connotation in parallel with two cultural changes of utmost relevance today. Here I highlight the enhancing and limiting factors that led to the legal significance of family life.

First, Taylor (1989) reminds that one of the most fundamental interactions for identity is that of love. The increasing possibility to choose freely one's partner, which places love at the heart of the family, makes family life instrumental to the development of identity. Second, the period of reformation made 'ordinary life' more valuable than previous modes of living. Accordingly, the good life was identified with everyday life, spent in the family and in one's productive activity, in worship of god (Taylor 1989) or, from the 19th century, focussing on enjoying the small, charming things (Arendt 1998) [1].

In parallel to private life, fascist and totalitarian regimes also tried crushing family life, which should have either mirrored the organization of the regime, or be annihilated; the prohibition of interracial marriages, as well as using children to report non-conforming political activities of parents, showed the risks of annihilating the protection afforded to the family [2]. Indeed, such experiences were among the reasons used in support of the adoption of article 8 ECHR as described in the *travaux préparatoires* (European Commission of Human Rights 1956) [4].

The importance of enjoying life with one's partner, and spending time with the family, is confirmed by secondary legislation on family reunification recognized, for instance, in relation to citizens taking advantage of the freedom of movement pursuant to article 21 TFEU.[50] In

50 In Runevič, the CJEU acknowledged that protection of the family has been instrumental in eliminating "obstacles to the exercise of the fundamental

Metock, the ECJ referred to "normal family life",[51] which is in line with (mostly) consistent case law on the matter [3].[52] Glendon notes how family life, self-determination and individual privacy contributed over time to deregulation, stressing her concern that the retreat of law can foment an undue prevalence of private power relations; "where general ideas about the conduct of family life are expressed in the law, they are bland and 'neutral', capacious enough to embrace a variety of attitudes and lifestyles" (1989, 145). Yet, current sociological research can help showing that shifting meaning does not equal loss of importance.[53] In keeping with the argument presented here, embracing wider understandings of family life (without lessening protection against the potential shortcomings of unleashed private power relations) can pave the way to greater autonomy, as is the case of same-sex couples and the termination of abusive relationships. The words of a recent ECtHR judgment could support this view, in particular "…The State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life".[54]

freedoms guaranteed by the Treaty" (*Judgment of 12 May 2011 in Runevič-Vardyn and Wardyn, C-391/09, EU:C:2011:291*, paragraph 90). The CJEU also noted the negative impact of certain policies on family life, for instance the freezing of funds (*Judgment of 6 June 2013 in Ayadi v Commission, C-183/12 P, EU:C:2013:369* , paragraph 68). The ECJ adjudicated on family issues also in the context of cooperation in civil matters. There, it has ruled that the determination of what constitutes 'family environment' can be linked with the concept of habitual residence (Judgment of 22 December 2010 in Mercredi, C-497/10 PPU, EU:C:2010:829, paragraph 56).

51 Judgment of 25 July 2008 in Metock and Others,C-127/08, EU:C:2008:449 paras 62 to 64.

52 For further discussions, see Coutts (2015).

53 With reference to the American case, Hattery and Smith (2013) note that the shifting understanding of what family means does not subtract from its importance, but simply that its meaning evolves in line with societal changes.

54 X and Others v Austria, no 19010/07 CE:ECHR:2013:0219JUD001901007, paragraph 139.

4.1.3 The right's third limb: home

As clarified in the case of family life, I revise the value of home in relation to my main argument, i.e. its support to personhood, identity and autonomy as the quintessential function of the right. Moreover, it should be immediately clarified that the typical understanding of respect for home in article 7 of the Charter concerns its inviolability, rather than the right to a home (which would fall within social rights). As a result of such restricted focus, the application of the four-step methodology (the factors that enhanced the appearance of this limb of the right [1], and that challenged them [2]; and on the other hand, the mechanism that favoured a legal approach to the concept [3] and the political occurrences that subsequently spurred its recognition as a right [4]) is necessarily less extended.

The home is typically the seat of the household,[55] where private and family life takes place (although not solely, as the case law of the ECtHR shows). For Arendt (1998), home, in the sense of possessing (owning) one's private space, may actually be the ancient Greeks' only legacy retained as it was in today's concept of privacy.

Edward Coke's famous statement "A man's home is his castle – for where shall he be safe if it not be in his house?" (sometimes said to originate in ancient Rome) has turned home into a safe haven against public power (authority). The origins of such a conception of the home connect to trespass of chattels and the Castle Doctrine.[56] In this sense, the home was the first to acquire legal protection, even before the legal discovery of privacy. The *travaux préparatoires* of article 12 UDHR testify to how several countries had granted constitutional protection to the inviolability of the home before the adoption of the Declaration (Morsink 1999) [1, 4].

The possibility for the home to become the place where one can also enjoy private and family life, by hiding from the public eye (the social), is

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55 As opposed to the house, which is generally regarded as simply a building (Westin 1967, p. 5).

56 The writ of habeas corpus (protection against illegal deprivation of liberty) could be seen as a logical antecedent of the protection of the home, as individuals needed first to be granted physical protection. However, to establish such a link, more research is needed.

more recent, as it depends on the concrete availability of seclusion [1].[57] Suffice to note here that, for the very large majority of the population, the availability of seclusion is connected to sociological and demographic changes: the shrinking of the family; the improvement of standards of living and better dwellings; more affordable heating and lighting allowing people to spend time in separate rooms; and the appearance of modern bathrooms that changed hygienic customs into private rituals (Ward 1999). Currently, there seems to be a recrudescence of the high-density cities that hindered seclusion, where people live close together, creating 'qualified privacy', because the buffers between individuals' dwellings are removed (ibid.) [2].

The importance of both conceptions of home has been once more highlighted by dictatorial practices in the 20th century in Europe. The extensive use of indoors/covert surveillance and expropriations were both a way to remove the protection afforded by the home. The first allowed at once finding out dissenters and instilling the Orwellian fear[58] of being constantly checked, today referred to as 'chilling effect', whereas the latter was a way of socializing non-conforming individuals (Arendt 1960). However, the dictatorial experiences may have played a lesser role, given that the entitlement to the protection of the home had already gained legal protection. Nevertheless, currently the inviolability of the home is apprehended as part of the wider reasoning on private life, as the ECtHR noted recently in the case of *Stolyarova v Russia*, where it opined that "the margin of appreciation in housing matters is narrower when it comes to the rights guaranteed by Article 8 [than it is for those guaranteed by in Article 1 of Protocol No. 1], because Article 8 concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community".[59]

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57 The article of Warren and Brandeis is a case in point.

58 For a discussion of the continued relevance of the panoptic element (implicit in Orwell's surveillance) in contemporary forms of surveillance, see Linder in this volume.

59 Case of Stolyarova v Russia, no 15711/13, CE:ECHR:2015:0129JUD001571113, paragraph 59.

The understanding of the home as a safe haven from public authority and from society may be challenged by information and communication technologies, for instance in the form of self-surveillance.[60]

4.1.4 The right's fourth limb: (Confidential) communications

Perhaps the value of communications, which encompass every form of spoken and written interaction, is the most self-explanatory: it is our primary tool of interaction and exchange, the way how we express our needs and ourselves. Arendt (1998) reminds us that communications play an important role in intimacy: expression modulates intimacy, to the extreme point that, once uttered, certain experiences lose their individual character altogether (as in the case of pain[61]). It is also crucial in the construction of the self (Taylor 1989). If identity building is a relational process, and relationships are partly substantiated through language, then communications and language (ibid) must have always been relevant in this respect. Perhaps it is for the immediate appeal of communications, and their strong relation with intimacy, that eminent scholars (Westin 1967; Fried 1984) identified privacy with the control over knowledge about oneself. Although I agree with Reiman's (1984) rebuttal of that equation, it must be kept in mind that control over knowledge about (including originating from) oneself is part of the legal right of the definition, particularly ensuring the confidentiality of communications. Confidentiality can be described as the ability to ensure that a message and the information contained therein reach the intended recipient(s) only.

Similarly to the previous two sections, here I approach the value of communications in relation to its support to personhood, identity and autonomy as the quintessential function of the right. As before, the specific needs embodied by communications have acquired legal significance through a series of enhancing and limiting factors.

As for the enhancing factors, the link between communications and identity has been made explicit in Romanticism, when the creation of the

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60 An innovative perspective of self-surveillance is offered by Michele Rapoport in this volume. The extent to which individuals will embrace the changes she depicts could testify to an important paradigm shift.

61 According to Arendt, the very act of uttering one's pain detaches the experience from the individual and breaks the link with her intimacy.

self through expression and language was bridged with art. Uniqueness turned being true to oneself, i.e. creating oneself regardless of constraining moral codes and the demands of others, into a goal in itself (Taylor 1989) [1]. It follows that the expropriation of one's communications, through recourse to surveillance of any kind, or the threat thereof, can prove particularly harmful for the creation of the individual's image of herself [2].

If the environment does not offer reassurances of confidentiality, forms of cryptography are used. The attempt to infuse communications with confidentiality through cryptography for political reasons has existed since antiquity, as much as interception for political needs, as exemplified by the surveillance undergone by one of Italy's founding fathers, Mazzini (Lepore 2013). In this respect, fascist and totalitarian regimes have not particularly 'excelled', in that the violation of private correspondence is certainly not their invention (Kahn 2006). Nor does the temptation to violate communications confine itself to dictatorial regimes, as Snowden's revelations remind us. While by no means constituting the only relevant technological development, information and communication technologies (from the telegraph to the Internet) are associated with the tools enabling the deepest intrusion. And yet, communications stand out as one of the entitlements most cherished throughout Europe's history (Kahn 2006).

4.2 Giving normative-legal value to the right to personal data protection (art. 8 of the Charter)

Article 8 reads

> "1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority."

Data are pieces of raw information that concern an identified individual, or that enable her identification (Article 29 Data Protection Working Party 2007).

Similarly to that done for the right to private life, this section intends to show the value of personal data protection enshrined in article 8 of the Charter, by reasoning on the historical conditions of its appearance, due to the scant hints contained in the *travaux préparatoires* to article 8 of the Charter (Lynskey 2015). In doing so, I draw on the work of several

'privacy' scholars. Here I also undertake a law and society approach to give back value to the right, but in a slightly different manner than that followed for the right to respect for private and family life, in that I detach accounts on the appearance of the notion from its value. This is an intentional choice, because I want to describe its value vis-à-vis the right to private life in order to differentiate the two. I begin by referring to the historical progression leading to the adoption of the right, in which context I highlight the four moves described above: the factors that enhanced the surfacing of the existence of the concept of personal data [1a], and that challenged its protection [2]; and the mechanism that favoured a legal approach to the concept [3] and the political occurrences that subsequently spurred its recognition as a right [4]. Then, I move on to describing personal data protection's value [1b], as partly in synergy with and partly different from private life.

4.2.1 The emergence of the notion of personal data protection

Westin's point whereby a new need enters the realm of freedom when it is both enhanced and challenged applies to personal data protection. As above, I believe a brief account of the mechanisms at play is instrumental in better grasping the value of the right.

The appearance of the notion of personal data is certainly related to the ability of the state to collect encompassing information on its citizens for the purposes of censuses, and the implementation of public welfare measures (Rodotà 1973). But the invention of computerized systems and the unprecedented (personal) data processing capabilities they enabled perhaps plays the biggest role. González Fuster (2014) notes that in the original version of 'data protection', the German *Datenschutz*, *Daten* indicates data processed by a computer system, rather than raw information. A relatively small invention, the so-called 'search function,' which allowed to select the desired words or portion of content in a text, led to impressive business opportunities, notably building searchable, refined databases for both the public and private sectors (Eriksson/Giacomello 2012). This, in turn, enabled the development of a fundamental feature: the (trans-border) 'flows' of personal information, whereby data containing personal information were exchanged, point-to-point, to support bureaucracy, to supply national and international businesses (shipping, travelling), or as a business itself (e.g. marketing) [1a].

Yet, those same developments would soon show their problematic face. Simitis (2010) recalls how the early debate on computers was dominated by Norbert Wiener (the father of cybernetics) and Frank, who saw in 'cybernetic machines' a way to rationalize society, allowing objective decisions to be taken. The enthusiastic approach that led to building the databanks of the Land of Hessen in the mid-60s cooled down when the surveillance capabilities of processing the health and income-related data of most of the population of the Land started being questioned [2]. The outcome was the adoption of the Data Protection Act of the State of Hessen in 1970. The act was able to benefit from earlier discussions in the US Congress (Simitis 2010), based on Westin's work (González Fuster 2014), taking place between 1966 and 1968. The interaction of the uncovering of surveillance-related scandals (Rodotà 1973; Newman 2008), and the adoption of pioneering legal instruments, triggered comprehensive academic and legal reflections on the possible impact on human rights, at the time expressed in terms of privacy, and the establishment of international thematic commissions producing reports, studies, and international declarations, such as the United Nations' 1975 Declaration.[62]

It was the opposing needs of profiting from the market potential of the flow of data, and the dangers a wild flow could provoke, which pushed the matter into the legal realm [3]. The US spread the successful legacy of Fair Information Principles (hereafter FIPs), standards to treat information fairly and avoid unwelcome effects while benefitting from the flow of data (Gellman 2012). Firstly applied in the US in the 1974 Privacy Act, and further refined in 1977, FIPs informed the Privacy Guidelines of the OECD,[63] and Convention 108, both of which use the expression 'privacy' to refer to the protection of personal data. Both instruments dealt with the need to reconcile the smooth trans-border flow of personal data, in the light of their increasing economic importance, with the protection of the individuals concerned. The advent of the information society has exacerbated such tension, to the point that, depending on the preferred reading of article 8, the flow may have acquired the role of intrinsic balance to the protection of personal data (González Fuster 2014).

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62 General Assembly of the United Nations, *Declaration on the Use of Scientific and Technological Progress in the interest of Peace and for the benefit of Mankind* (Thirtieth Session, 2400th plenary meeting, 1975).

63 OECD Privacy Guidelines.

Supra (section 3) I mentioned that the EU originally took an instrumental approach to data protection. The EU began addressing the matter around 1973 to harmonize Member States' approach, and at the same time counter the commercial and legal dominance of the United States in the field (González Fuster 2014). While Convention 108 was initially deemed sufficient to address personal data protection, it was the adoption of the Schengen Convention that spurred the need to adopt more substantial legislation at Member States' level and, in the face of the lack of harmonization and the waxing information society (Bangemann et al. 1994), a Directive. The inclusion of article 8 into the Charter, which paved the way to the end of an instrumental approach to it, was the modernising result (Piris 2010) of the favourable presence of several 'personal data protection' activists among the members of the drafting Convention (González Fuster 2014) [4]. Thus far, I have hinted only indirectly at the value embodied by the right, to which I turn in the following two paragraphs.

4.2.2. Personal data bearing value synergic with private life, with a twist

I agree with González Fuster (2014) that modern information technology, although crucial, is insufficient alone to explain the elevation of personal data protection to a right [4]. In part, the right aims to protect the same values underpinning private life; the two rights meet at the intersection of identity, autonomy and dignity [1b]. I see this relationship as one of synergy, rather than dependence of personal data protection on private life. This holds true also in the partly related case of personal data embodying information concerning the private life of the individual, from which I begin my discussion.[64]

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64 While I agree with Lynskey's (2015) conclusion that the right to personal data protection should be treated as a fully-fledged independent right, I believe that the three models she uses to explain the origins of the right to personal data protection are complementary, rather than standing in opposition. The first finds its roots in dignity–based personality rights, stemming from the German legal tradition; she finds some explanatory purchase in them, in that it can explain the fact that harms can ensue from the processing of un-risky data, and has support in the informational self-development case law. The second and most accredited model finds that data protection stems from private life; while it can explain the overlap between private life and data protection, she finds that it is not supported

Whenever personal data contain information that allows reconstructing details about the private life, social circles or communications that individuals would rather keep private, there is a clear and manifest overlap between the objects the two rights seek to protect, which usually is intimacy (individual and relational) functional to personhood and identity. In this case, the only difference that could be traced is the one found by Rodotà (2009). On the one hand, the right to private and family life tends to be static, in that it relates to the physical and spatial dimension of the individual. On the other hand, the right to personal data protection is dynamic, in that it refers to data by their nature detached from the person and susceptible to flow. In this respect, protecting personal data equals stepping up protection of intimacy; this is a possible reading, for instance, of the *Google* v. *Spain* case.[65]

A second, connected point of overlap concerns the fact that both rights aim at keeping solid control of the process overseeing the creation of one's identity (and, relatedly, dignity and autonomy). If we agree that information concerning intimacy is itself an integral part of intimacy, and we accept that gatekeeping one's intimacy is required to foster the creation of independent identities, then, gatekeeping one's intimate information (of which Westin's (1967) notion of control is an aspect (Reiman 1984, 1995)) is crucial for identity and, relatedly, autonomy. This was the sense of the landmark judgment pronounced by the German Constitutional Court in relation to the regulation of census, and which was crucial in the construction of a European culture of the protection of personal data. In 1983 the Court claimed that individuals have a "right to informational self-determination" deriving directly from article 1 (1) and 2 (1) of the German Constitution (the Basic Law) whereby the rights to freedom are inviolable (Poullet/Rouvroy 2009). The judgment reads

> "Those who cannot understand with sufficient certainty which information related to him or her is known to certain segments of his social environment, and who is

by case law. The third is that personal data and privacy overlap but are different; while she finds that there is some traction in the literature, she prefers this model because she finds it is better supported by case law. I believe these models are not in contradiction, but rather they are complementary. First, there was a general rediscovery of personality rights based on dignity, which I argue private life rests upon; the appearance of personal data protection, serving similar purposes, was immediately linked to private life (just like private life had been linked to property rights); time proved the usefulness of having two rights which merit to be treated independently, but the common origin and purpose testify to an overlap.

65 *Judgment in Google Spain and Google, C-131/12, EU:C:2014:317.*

not able to assess to a certain degree the knowledge of his potential communication partners, can be hindered profoundly in their freedom of self-determination to plan and to decide. The right of informational self-determination stands against a societal order and its underlying legal order in which citizens cannot know any longer who knows what about them when and in which situations."[66]

Having said that, I believe the two rights oversee the protection of identity differently, and Rodotà's distinction can be useful to exemplify this. Individuals need a physical and emotional margin of manoeuvre, a material or ideal space where they can feel free to develop their personality; this is where the right to private life comes into play. Individuals, however, need also reassuring that, once that personality is expressed, its integrity can be protected against direct or indirect attempts to deny its richness. In a society preoccupied by the need to categorise the behaviour of individuals according to standards, for the sake of planning and regulating economic activities, and where behaviour is conditioned according to status (particularly the function or role undertaken (Arendt 1998)), profiling[67] (Kuehn/Mueller 2012), helped by big data (Kuner et al. 2012), appears alluring. There has been no shortage of attempts to justify a commercialization of personal data based on the economic potential they carry, which, however, "ignore the full social costs of data use" (Simitis 2010, 1999). Profiling removes the power of individuals to make (and change) claims about who they are. Retaining control over personal data allows the individual to oppose being seen as a conditioned animal

66 65 BVerfGE 1, (1983), *Volkszählungsurteil* para 154. "Wer nicht mit hinreichender Sicherheit überschauen kann, welche ihn betreffende Informationen in bestimmten Bereichen seiner sozialen Umwelt bekannt sind, und wer das Wissen möglicher Kommunikationspartner nicht einigermaßen abzuschätzen vermag, kann in seiner Freiheit wesentlich gehemmt werden, aus eigener Selbstbestimmung zu planen oder zu entscheiden. Mit dem Recht auf informationelle Selbstbestimmung wären eine Gesellschaftsordnung und eine diese ermöglichende Rechtsordnung nicht vereinbar, in der Bürger nicht mehr wissen können, wer was wann und bei welcher Gelegenheit über sie weiß." (retrieved here: http://www.servat.unibe.ch/dfr/bv065001.html). A translation of some fundamental passages of the case is available at: https://freiheitsfoo.de/census-act/.

67 Article 4.4 of the GDPR defines profiling as "any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements."

(Arendt 1998), whereby association to a flat category crushes his or her richness. It could be useful in this respect to recall Reiman's (1995) four risks entailed by the collection of personal data: the risk of extrinsic loss of freedom (the chilling effect), the risk of intrinsic loss of freedom (the actual limitation of the right), symbolic risks (impinging on the individual's ownership of oneself), and the risk of psychopolitical metamorphosis (infantilizing adults, turning them into Marcuse's one-dimensional man).

Recital 75 of the GDPR acknowledges that: "… where personal aspects are evaluated, in particular analysing or predicting aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, in order to create or use personal profiles", there is a "risk to the rights and freedoms of natural persons" which could lead to "physical, material or non-material damage". It is in this light that profiling of children is inadvisable, as they "may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data" (recital 38 of the GDPR).

4.2.3 The independence of personal data protection

There are instances, however, in which personal data embody information which does not immediately unveil details on one's private life. Kranenborg (2008) and Lynskey (2015) note that the ECtHR has systematically denied protection to such data which, instead, fall within the purview of article 8 of the Charter (Kokott/Sobotta 2013). The importance of protecting data is intimately linked to contemporary advances in informatics spurred by the Internet (Rodotà 2014).

First, cloud computing detaches the data from a physical location (Armbrust et al. 2009), and once in the cloud, data is difficult to tame (Gayrel et al. 2010). Big data (Jones 2012; Tene/Polonetsky 2012) aims at stacking as much data as possible in unique databases (following the encouraging results of using large databases in science and meteorology) in the hope that producing vast haystacks will enable identifying the desired 'needles'. Big data challenges the principle of purpose limitation and data minimisation, in that data are not collected and exchanged for limited purposes by known data controllers, and there is an incentive to collect as many data as possible; this has triggered discussions about a new facet of the right to data protection, the right to be forgotten, or the

ultimate deletion of one's data.[68] The Internet of Things merges the two approaches: everyday objects connect to the Internet and their information, stored in the cloud, leads to ever-bigger data.

Second, personal data is also exposed to cybercrime and cyber surveillance, which begs the question of whether protecting data is akin to protecting information systems in accordance with the information security canons. The question was partly answered by the German Constitutional Court when it declared unconstitutional a North-Rhine Westphalia Law allowing the domestic intelligence services to secretly search online private computers, to the effect of recognizing that confidentiality and integrity of information technology systems (computers, networks and other IT systems) form part of the tenets of data protection (derived from articles 1(1) and 2(1) of the German Basic Law), adding to informational self-determination (Hülsmann et al. 2011).[69]

The bottom line of such dramatic and entrenched developments of informatics is manifold. On the one hand, it is not possible to anticipate the way how personal data can be used. Hence the rationale of a right: all personal data deserve protection irrespective of the immediate danger posed by their processing. However, in order to accommodate legitimate processing (which "should be designed to serve mankind", recital 4 of the GDPR), the exact technical, organizational and legal measures enacted to safeguard data will depend on the assessment of the (known) risk posed by the processing according to a well-established risk-based approach.[70] The GDPR refers to generic risks,[71] significant or high risks to the rights and freedoms of natural persons which may lead to physical, material or non-

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68 See in this respect *C-131/12 - Google Spain and Google*.

69 The decision extends the protection of personal data enshrined in article 10 of the German Basic Law "to ways of processing, which, in a narrower interpretation, do not fall under telecommunications, in particular to the contents of computer-hard disks and the use of Internet services. The new basic right supports the right to informational self-determination and thus takes the new risks into account, which the increasing networking of IT-systems involves." See the press release of the judgment at: http://www.bfdi.bund.de/cln_007/nn_672850/EN/PublicRelations/PressReleases/2008/07-08-OnlineSearches.html%3E.

70 Article 29 Data Protection Working Party, *Statement on the role of a risk-based approach in data protection legal frameworks, WP 218* (2014).

71 References to risk are found in recitals 15 (risk of circumvention), recital 24, recital 28, 38, 65, 71, 74-77, 80, 81, 83, 85, 96, 98, as well as articles 24.1, 25.1, 27.2(a), 30.5, 32, 33, 35.7(c)(d) and 35.11, 36, and 39.2.

material damage (recital 75), as well as data security risks (recital 83). If fully anonymised data are not considered personal data any longer, pseudonymised data (article 4(5) of the GDPR) pose low risk. The so-called sensitive data pose significant risks (recital 51), whereas high risks follow from a specific assessment, e.g. in relation to data breaches or new technologies.[72] By means of example, recital 75 indicates the risk to discrimination, identity theft or fraud, financial loss, damage to reputation, loss of confidentiality of personal data protected by professional secrecy, unauthorised reversal of pseudonymisation, a significant economic or social disadvantage, the deprivation of the exercise of one's data rights, the processing of special categories of sensitive data and of vulnerable people, or processing on a large-scale basis.

On the other hand, personal data collected for different legitimate purposes can be crossed without consent to lead to decisions that affect the individual in very material ways. It is not a coincidence that both the GDPR and the revised Convention 108 insist that automated decisions, i.e. decisions that do not involve human agency, undergo heightened controls.[73] Decisions based on automated processing stem from a partial depiction of the individual, which is based on the expropriation of the control over identity and (digital) personality. Recital 71 of the GDPR recommends such decisions not to concern a child (in the GDPR, a child aged 13 or under), and offers examples of the negative effects of such decisions on the data subject, e.g. "automatic refusal of an online credit application or e-recruiting practices without any human intervention".

To act differently would lead to a loss of autonomy, but in a more subtle, and thus more dangerous, way (Arendt 1998). It is for this reason that it is crucial to safeguard 'the digital/electronic persona' as distinct from the physical persona (Rodotà 2009), needing specific legal protection, substantiated in procedural rights safeguarding the use of personal information, as indeed is the case of paragraph two and three of article 8 of the Charter.[74]

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72 The GDPR refers to high risk in recitals 76, 77, 84, 86, 90, 91 and articles 34 and 35.

73 In a similar vein, see the recent European Parliament draft Report with recommendations over the personality and responsibility of artificial intelligence (European Parliament 2016).

74 On the relevance of the second paragraph of the article to trace a neat line between article 7 and 8, see also Kokott and Sobotta (2013).

In this respect, personal data protection can be assimilated to a procedural right akin to non-discrimination, understood as a measure of accessibility (United Nations High Commissioner for Human Rights 2012), other than availability, of goods and services. Its function is to prevent individuals suffering from a spiral of other human rights infringements, including but not limited to the right to respect for private and family life, as well as affecting the realization of a substantive right.[75]

Indeed, personal data protection can be seen as serving as the necessary basis for the enjoyment of other civil and political rights such as freedom of expression, association, assembly (Poscher/Miller 2013), and movement, which could not be effectively enjoyed otherwise.

Certainly it will be for the CJEU to provide a final answer on the independence of personal data. The CJEU could rely on article 52.2 of the Charter concerning rights derived from the Treaties (as could be the case of personal data protection). Furthermore, the Court's adoption of definitions contained in secondary law could play to the advantage of article 8. The new GDPR, in fact, does not formulate rules on personal data protection in subsidiary terms to private life. In this respect, the CJEU may follow the same approach as in *Fisher*, by embracing the Regulation's formulation before it enters into force.

4.3 The value of articles 7 and 8 for the EU *ordre public*

Fascist and totalitarian regimes demonstrated the dangerous consequences of crushing the four dimensions of the legal definition of the right to respect for private and family life discussed in this article, to the extent that "the rise of totalitarianism…its consistent non-recognition of civil rights, above all the right to privacy, makes us doubt not only of the coincidence of politics with freedom, but their very compatibility" (Arendt 1960, 30). Reiman recalls Goffman's studies concerning the impact of total institutions on the self, whose mortification of the self passes through the removal of any privacy" (1984, 310). Totalitarian regimes crushed private and family life, home and correspondence with the use of ideology

75 For a similar conclusion, see Poscher and Miller (2013), for whom the right to informational self-determination is anticipatory in nature, in that it "anticipates a potential harm resulting from the collection, storage and use of personal information".

and terror, with a view to curbing individuals' spontaneity and leeway for action, and substituted autonomy with automatic processes (Arendt 1960). By stifling spontaneity of political action, what Arendt called Machiavelli's *virtù* (ibid), regimes[76] would neutralize the possibility to effect social change.

The same could be argued about personal data. The physical elimination of 'the enemy' in the wake of WWII would often pass through lists of dissidents and their ethnical or religious affiliations. However, it was perhaps the 20th century dictatorial regimes in Europe and reactions to the Cold War that showed the widest consequences of the collection of personal data to categorize individuals between friends and foes, chill the autonomy of the former and seriously imperil that of the latter.

Our modern democracies are founded on the (ideal) notion of the autonomous citizen endowed with a unique identity, worthy of equal respect because of one's intrinsic dignity, who retains liberty, the freedom to act politically, at a minimum through voting, and the prerogative to request the correct application of the rule of law. The ECtHR opined that "although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees" including "a right to personal development".[77] A polity based on the (ideal of the) rule of law is a polity of autonomous citizens (Bobbio 1997), as supposedly is the EU pursuant to its Treaties.

Independent identities enabling autonomy cannot be developed without enjoying the four limbs enshrined in article 7 of the Charter, because "privacy prevents interference, pressures to conform, ridicule, punishment, unfavorable decisions, and other forms of hostile reaction. To the extent that privacy does this, it functions to promote liberty of action, removing the unpleasant consequences of certain actions and thus increasing the liberty to perform" (Gavison 1984, 363-364).[78] Similarly, they cannot be developed without the enjoyment of the protection of personal data, which

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76 Cohen (2013) compellingly argues that this is not only the case of political regimes, but also of democracies and liberal economies based on modulated surveillance. See also Poullet and Rouvroy (2009).

77 Pretty v. the United Kingdom, no. 2346/02, CE:ECHR:2002:0429JUD00234602, paragraph 61.

78 See the risks found by Reiman (1995) described in section 4.2.2.

prevents individuals from being infantilised and seen as a conditioned animal, whereby association to a flat category crushes his or her richness and stifles the ability to behave autonomously (*supra*, section 4.2.2).

It would be foolish to rely on the work of the past to enjoy such prerogatives if the understanding of their significance is not kept alive, particularly in the face of the repeated challenges of terrorism. But it would also be foolish to believe that we could afford oblivion if and when the terrorist threat is over. In her essay, Cohen discusses the dangers of sleepwalking in a modulated democracy, where we allow the creation of surveillance infrastructures that organize the world for us, force us to look at the world through their lenses, and are ultimately exploited "by powerful commercial and political interests" (2013, 1912).[79]

5. Conclusions

In these pages I have attempted to show that the understanding of privacy subsumed by the trade-off model is flawed with respect to EU law. I have done so by considering that the trade-off model flattens privacy rights by removing their normative depth, or importance, which I have tried to re-establish through a 'law and society'-based analysis of the right to respect for private and family life, and the right to the protection of personal data as understood in the EU. Contextually, I have sought to demonstrate that both rights are crucial in a EU legal framework oriented towards a solid application of the rule of law, preventing dictatorship to take roots and its members to descend in a war, in that they foster that autonomy that solely can perpetrate and maintain democracy.

Of the many conclusions that can be drawn, one is that the statement "trading-off security with privacy" grows ever emptier, as the two terms are incommensurable. Earlier I announced I would address a way to make the two terms commensurable, e.g. for the sake of appraising the efficiency of measures. Accordingly, the trade-off would have to be reformulated, by substituting 'security' with the specific measures used to tackle offences, and 'privacy' with its legally relevant dimensions. One could take as an example one limb of the (much debated) definition of

79 In this respect, see the very interesting dystopic forecast made by Lanier (2013).

terrorism applicable in the EU,[80] and obtain the following substitute for the trade-off model: using the method/tool X to combat (prevent) the "seizure of aircraft, ships or other means of public or goods transport" at the expense of the protection of personal data as embodiment of autonomy. Only then could a serious proportionality test be applied.

This reformulation begs the question: how important are autonomous citizens endowed with equally valuable identities through their dignity and taking part in a democratic society based on the rule of law? As Advocate General Saugmandsgaard Øe said,

> "the requirement of proportionality *strictu senso* implies weighing the advantages resulting from (a) measure in terms of the legitimate objective pursued against the disadvantages it causes in terms of the fundamental rights enshrined in a democratic society. This particular requirement therefore opens a debate about the values that must prevail in a democratic society and, ultimately, about what kind of society we wish to live in."[81]

Here lies the importance of privacy rights and, contextually, the real nature of the EU *ordre public*.

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80 Council Framework Decision 2008/919/JHA of 28 November 2008 amending framework decision 2002/475/JHA on combatting terrorism, OJ L 330 (Framework Decision on Terrorism).

81 Opinion of AG Saugmandsgaard Øe of 19 July 2016 in *Tele2 Sverige and Watson and others*, Joined cases C-203/15 and C-698/15, EU:C:2016:572 para 248.