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The French Intelligence Act: Resonances with the USA PATRIOT Act

Pierre-Antoine Chardel, Robert Harvey, and H el ene Volat. Translated by Ashar Foley

Highlights

- The French Intelligence Act in July 2015 was passed in response to the January *Charlie Hebdo* attacks without a significant public debate before being ruled to be within the principles of the French Republic
- In 2001, the USA PATRIOT Act was passed with similar language focusing on the need for security and surveillance in exceptional circumstances
- Both French and American governments focused on the need for surveillance as a patriot matter to prevent future attacks from outsiders of society
- Unlike the direct surveillance model by the NSA revealed by Snowden’s leaks, the French Intelligence Act requires internet service providers and telephone operators to be able to detect “terrorist threats” in their data when requested by the government
- Given the prevalence of tracking by consumer technologies today, are individuals implicitly submitting to greater surveillance?

 French Intelligence Act	 USA PATRIOT Act	
✓	Enacted in Wake of an Attack	✓
✓	Little or No Public Debate	✓
✓	Exception to Civil Liberties	✓
✓	Patriotic Discourse	✓
✓	Uses Data from Personal Technology	✓

Comparing the lead-up to the passage of the French Intelligence Act to the US PATRIOT Act.

Editor's Note

Given the recent terrorism attacks in Paris on November 13, 2015, and the subsequent actions by the French government to increase security and its surveillance powers, Technology Science is publishing this political philosophy analysis paper to give context to recent events. The French Intelligence Act was passed in July 2015 as a response to the January attacks on the magazine *Charlie Hebdo*. This paper focuses on the French Intelligence Act, especially in comparison the US PATRIOT Act of 2001 passed in response to terrorist attacks in the United States. What are the similarities and differences? The recent public attention due to the unsettling Paris attacks presents a unique opportunity to focus on historical examples of surveillance laws passed in response to terrorism attacks.

Abstract

This paper is a study in political philosophy. In the wake of the January 2015 terrorist attacks in Paris, the French parliament adopted an Intelligence Act. Some considered the Act, passed in May and June of the same year, balanced, justified, and necessary. Others rejected it as an ill-conceived erosion of freedom. Does this Act blatantly undermine the democratic balance between the need for security and the demand for civil rights and liberties? The public might have expected the French Intelligence Act of 2015 to give rise to a serious, frank, and open debate about the means for combating terrorism without imposing measures that appear detrimental to citizen privacy. Instead, on July 23, just months after the terrorist attacks, the Constitutional Council, which François Hollande, the President of the Republic, had asked to convene about the constitutionality of this law, delivered its verdict: the Intelligence Act in no way violates the principles of the Republic [1]. Some compare the situation in France to that in the United States in 2001, when a set of emergency laws under the acronym USA PATRIOT Act were hastily promulgated several weeks after the criminal attacks of September 11, 2001. Is the Intelligence Act in France essentially a French Patriot Act?

Analysis summary: We perform a political philosophy comparison of the French Intelligence Act of 2015 to the USA PATRIOT Act of 2001 using political and historical contexts. We find that although some differences are in evidence, such as relative engagement in debates surrounding the legislation, and relative challenges based on the constitutionality of legislation, there are profound similarities, such as legislation occurring hastily and in the immediate wake of particularly spectacular terrorist attacks, social acceptance of sweeping surveillance measures, and, social acceptance of loss of privacy in the age of personal electronic connectivity.

Introduction

On September 11, 2001, two airliners hijacked by al-Qaeda agents crashed into both towers of the World Trade Center in New York City, eventually destroying both buildings and killing people inside and many of those who had responded. On the same day, another plane

rammed into the Pentagon, and a fourth crashed into a pasture in Pennsylvania, the terrorists' plan seemingly thwarted by passengers. In all, 2,996 people died, including the 19 hijackers. In response, a 342-page body of laws known as the USA PATRIOT Act was passed in late October 2001. It was signed by President George W. Bush on October 26.

On January 7, 2015, two brothers claiming association with al-Qaeda burst into the Paris office of the satirical magazine *Charlie Hebdo*, killing 11 people with their assault rifles. As they escaped, they executed a police officer. An associate of the two killed another police officer the next day. Then, on January 9, the same individual took shoppers at a kosher supermarket hostage, killing four before being killed himself. In response, an Intelligence Act lending sweeping authority to the Prime Minister was passed in June 2015 and declared constitutional in July, a few months after the original attack.

Background

Heinous acts or anxious anticipation of heinous acts against the U.S. population and its interests have historically led to either hasty or seemingly over-reactive legislation and practice. Here are some examples.

During World War I, the U.S. Congress enacted the Sedition Act of 1918. The Act targeted individuals who publicly criticized the government. It made it a crime to “willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of the Government of the United States” or to “willfully urge, incite, or advocate any curtailment of the production” of the things “necessary or essential to the prosecution of the war.” The Act was repealed in 1921, two years after World War I ended.

After Hitler and the Nazis had invaded most of Europe, the U.S. Congress enacted the Alien Registration Act (or Smith Act) of 1940 to keep aliens under close surveillance. The Act made it a criminal offense to advocate the overthrow of the U.S. government. The law also required all alien residents to file a statement about their personal and occupational status and their political beliefs. The Act remains on the books. The Sedition Act of 1918 and the Alien Registration Act of 1940 seriously curtailed First Amendment rights in the United States.

On December 7, 1941, the Japanese made a surprise military strike on the United States naval base at Pearl Harbor. A couple of months later, in February 1942, President Roosevelt issued Executive Order 9066, which called for the forced incarceration of some 120,000 people of Japanese ancestry living in the United States. Most of the incarcerated (62 percent) were U.S. citizens.

The House Un-American Activities Committee was a U.S. congressional committee created in 1938 (and ultimately dissolved in 1975) to ferret out U.S. citizens with Nazi ties. Its role broadened to investigate disloyalty and subversive activities by individuals or businesses it suspected of Communism. Even though he was not a member of the committee, Senator Joseph McCarthy is well known for making sweeping claims that large number of

Communists and Soviet spies were in the United States, thereby motivating ongoing committee investigations.

The perpetration or the anticipated perpetration of heinous acts in France or against French interests has also led to legislation restricting civil rights. Here are some examples.

During the Third Republic (1870–1940), anarchists made several bombings and assassination attempts. These motivated the “villainous laws” (lois scélérates) of 1893–94. These laws restricted the freedom of the press and effectively silenced all anarchist groups, including pacifists and antimilitarists.

After World War II, in 1945 emergency measures were taken that nationalized key sectors of the economy, such as energy, air transport, banking, and insurance, and established a Social Security and welfare system. The party structure emerged and later that year elections were held. France adopted a new constitution and a parliamentary form of government. This was the launch of the Fourth Republic (1946–1958).

Together, the Fourth Republic and the Fifth Republic (1958–present) evolved France’s three-tier notion of “states of emergency.” An actual state of emergency is a version of the state of exception (see note 19) that is slightly less restrictive than the state of siege, in which all powers are transferred to the military.

States of emergency were regularly imposed in France during the Algerian War, notably from 1961 to 1963, during which a massacre of Algerians in Paris by the police took place on the night of October 17, 1961. The concept of a state of emergency was revived in 2005 to impose curfews during riots in poor housing estates in the suburbs. Curfews and emergency powers were imposed again the day after the November 2015 attacks at Le Bataclan concert hall and other Paris locations (see note 2).

In the face of modern terrorism, both the United States and France have recently enacted mass surveillance laws. These laws survey the entire population or a substantial fraction of populations in order to find suspicious activity or to monitor a small group. By its nature, mass surveillance tends to violate notions of privacy, civil and political rights, and freedoms. Today’s digital society makes mass surveillance possible in ways previously unimagined, including unprecedented surveillance of communication and online use. How do the political and historical contexts of these countries influence their mass surveillance laws?

Methods

A political philosophy analysis often compares two cases in order to discover philosophical elements surrounding events of historical and political importance. In comparing recent mass surveillance laws in the United States and France, we believe the critical dimensions of comparison are: (A) the discursive contexts of mass surveillance, (B) the introduction of laws of exception into the domain of national security, and (C) the aesthetic of generalized

surveillance. In each dimension of comparison, we use authoritative sources to discover what may be generalizable, to identify philosophical mechanisms at play, to identify salient differences, and to discover what appears to be superficially similar. Specifically, we compare American and French dispositions in answers to the following questions.

A. Discursive Contexts of Mass Surveillance

1. How does the government characterize its mass surveillance law in light of civil liberties?
2. What is the public response to and knowledge of the mass surveillance law?
3. What is the discourse around patriotism and mass surveillance?
4. Who are identified as the targets of the mass surveillance?

B. Security and Exceptionality

1. Is security an exception to civil liberties?
2. What roles do patriotism and timing play?
3. Can uses creep beyond terrorism?
4. How are specific acts characterized as generalized notions of war?

C. An Aesthetic Aligned with Generalized Surveillance

1. Where might patriotic dogmatism lead?
2. What are the historical parallels?
3. What role does personal technology play?

D. Technological Surveillance Activities

1. What are the technologies deployed?
2. What is the role of the individual in contributing to mass surveillance?

Analysis

Below is a political philosophy analysis of the Intelligence Act and the USA Patriot Act based on the criteria described in the Methods section above.

A. Discursive Contexts of Mass Surveillance

From the American side, in late 2006, John Yoo, legal expert and counselor to the George W. Bush administration, affirmed: “[T]he government may be justified in taking measures which in less troubled conditions could be seen as infringements of individual liberties [2].” To claim that this position, stated as a defense years after the enactment of the USA PATRIOT Act, characterizes the politics of American security would be misleading, as some have voiced privacy concerns [3].

However, the American public was generally comfortable with it. According to a 2004 CNN/*USA Today*/Gallup poll taken about two years after the enactment of the USA PATRIOT Act, about one-quarter of Americans (26%) believed the Act went too far in restricting people's civil liberties in order to fight terrorism. About the same number (21%) thought it did not go far enough, while the largest number (43%) believed it was about right. However, few Americans said they were highly familiar with the details of the Act [4].

On the French side, in the days following the Senate's largely favorable vote in favor of the French Intelligence Act, Prime Minister Manuel Valls boasted of “exceptional means and measures in order to meet the serious security challenges of our time,” but added that France would take this course without actually putting “exceptional measures” in place. He continued, as if to support and legitimate this obvious tone of denial with regard to the taboo of “laws of exception”: “Recourse to the most aggressive techniques, such as the intrusion into digital and domestic information, will be exceptional [5].” The next day, Minister of Defense Bernard Cazeneuve went further, saying aloud what Valls did not: “These are measures that could put private life and the right to privacy into question [6].”

As problematic from an ethico-political point of view as these declarations are, what was popular opinion among French citizens? A poll in April 2015 run by CSA for the French news website Atlantico indicates that while 63% were favorable (of which 23% were “very favorable”), a full 72% had either never heard of the Act or didn't understand it. The vast majority of French citizens appeared more or less ignorant of the security measures proposed, as well as to the possible threat of having a police state [7].

The citizenry in both countries seem relatively unconcerned by the questions of informational ecology that are nevertheless acutely pertinent in highly technologized society. Indeed, American and French citizens may move about in a world where, the more technological or scientific the achieved innovation, the less they are encouraged to question it.

The opaqueness of technology is not the only issue. The general acceptance of the spread of surveillance technologies is not unrelated to the propensity of public opinion to go along rather passively with major decisions instituted by the State [8], particularly when the public sees itself as dispossessed in the grand scheme of dominant economic and financial paradigms. We find ourselves indirectly recalling the situation described in 1835 by Alexis de Tocqueville, a French political thinker and historian, when he attempted to imagine under

what traits despotism would be able to occur in the contemporary world. Tocqueville imagined “an innumerable crowd of like and equal men” turning endlessly upon themselves while producing petty and vulgar pleasures:

“Above these an immense tutelary power is elevated, which alone takes charge of assuring their enjoyments and watching over their fate. It is absolute, detailed, regular, far-seeing, and mild [...]; it provides for their security, foresees and secures their needs, facilitates their pleasures, conducts their principal affairs, directs their industry, regulates their estates, divides their inheritances [...]. So it is that every day it renders the employment of free will less useful and more rare [9].”

In an astonishing buck-passing of progressive unaccountability, public opinion today demands security and normalization, no doubt for want of state intervention in neoliberal deregulation, which often has violent consequences in terms of *social* insecurity [8]. This partly explains why, despite the revelations of secretive activity under the USA PATRIOT Act by the National Security Agency (NSA) [10], measures favoring public debate about the respect of privacy and of personal data remain extremely weak. Any anticipated reckoning by the public is far from certain, and if realized, may be short-lived.

Under such circumstances, the mainstay of normality is often invoked, particularly by the youngest members of society. And when normality rules the day, an exceedingly naïve question arises: If you have nothing to hide, why should you fear surveillance? Edward Snowden restates this commonplace sentiment, incisively revealing the problems within it: “Arguing that you don’t care about the right to privacy because you have nothing to hide is no different than saying you don’t care about free speech because you have nothing to say [11].” Most important, grounds for suspicion always and in all circumstances can be found where there is the will to do so. As Jean-Marc Manach writes, “It is not because you have nothing to hide that you will never be reproached. When one seeks, one finds, always [12].”

Sociologically, one can remark on the fact that, despite various protest movements, both in the streets and on the Web, and even very sharp expressions of concern (notably from the Council of Europe, the Quadrature du Net, the Human Rights League, Amnesty International, Human Rights Watch, the *Syndicat de la Magistrature*, and Reporters without Borders), the attitude of the majority in France with regard to the Intelligence Act demonstrates a docile acceptance that is more or less conscious of the fact that measures are likely to violate certain fundamental principles of the Republic. In these respects, the reception of the Intelligence Act in France resembles the reception of the USA PATRIOT Act, even though the attacks are not altogether comparable. Following the spectacular crimes perpetrated by Osama bin Laden’s henchmen, the Bush administration appeared to rouse and maintain concerns of terror in the minds of the populace, without limit and for as long as possible. This was not exactly the case in France.

Indeed, the contexts for the attacks of January 2015 in Paris and of 2001 in New York are not easy to compare, primarily from a socio-historical point of view. As many specialists of the Arab world emphasize, ISIS and its strategies—though they have as their origin the same radical “Islamist other”—are profoundly different from al-Qaeda. Gilles Kepel is particularly eloquent on the subject [14]. Furthermore, American patriotism has no equivalent in France’s political arena. The French political class, for several years now, has shown a propensity to favor the adoption of greater surveillance and security measures in response to legitimate societal anxieties, not only in regard to terrorism, but increasingly also with respect to unemployment and social insecurity. This phenomenon had already been quite in evidence in some of the speeches made by candidates between the two rounds of the 2012 presidential election.

Today, however, the terrain is even less stable for a socialist government increasingly tempted to play the game of the parties on the extreme right by promoting a politics of security. This game is not only dangerous from a democratic point of view but also quite inappropriate, for if the aim of the Intelligence Act is to block terrorism coming from outside of Europe, what need is there to access and decrypt every single voice and written communication made in the entire country? For contrast, the *Charlie Hebdo* attackers were French citizens. At a time when the revelations made by Edward Snowden have led to the repeal of the related articles of the PATRIOT Act, is it not questionable for France to enact what may be a similar law?

If surveillance of the entire population is what the Intelligence Act makes lawful, its current application targets certain specific segments of the population according to a postcolonial discourse applied to contemporary European demographics. In his portentous essay of 2007, Mathieu Rigouste highlighted “the discursive orientations inherited from the colonial wars which have been recovered to serve the technological repertory of security intelligence [15].” This sociologist rigorously and systematically demonstrates the genealogy of the *enemy from within*. “The notion of the gray area,” he writes, “is decisive here. It opens the door for including inner territories—i.e., working-class districts—among breeding grounds for the postcolonial threat in a broader theory of transnational territories as lawless zones [15].”

Focused on an enemy defined in American discourse as fundamentally “Islamic” (and thus hopelessly inassimilable and “other,” permanently from elsewhere) the U.S. government’s security approach may systematically fail to prevent any terrorist act committed by an American of European ancestry. Potential blindness of the American disposition when it comes to an enemy “among us” may seem absolute: the April 1995 attacks in Oklahoma City, perpetrated by two extreme-right Anglo-Saxon libertarians, offer reasonable though imperfect evidence. Another example is the crime perpetrated in Charleston against members of an African-American church by the young white American Dylann Roof in 2015.

In the case of France, since Algerian independence in 1961, the enemy proliferates in certain zones of the Metropolis, where his right to exist in peace is endlessly questioned. Can French

security imagine a terrorist profile other than something akin to a Merah or a Coulibaly? Mohammed Merah, a Franco-Algerian Salafist terrorist, killed seven individuals—principally Jews and French military personnel—in March 2012 in and near Toulouse. Amedy Coulibaly, a French terrorist of Malian ancestry, partnered with the Kouachi brothers, who committed the attack on *Charlie Hebdo* headquarters, killing a policewoman the day after the newspaper was hit and four people in a kosher supermarket the following day. Can the potential terrorist be someone besides an outsider or a recently immigrated individual?

The discourse in both the United States and France has yet to grapple with their own citizens performing acts of terrorism.

B. Security and Exceptionality

The conclusion of the 2006 essay *De l'exception à la règle: USA PATRIOT Act* [13] analyzes the consequences of measures the United States passed into law in the wake of September 11, 2001. In that work's final chapter, the authors raised the question of the influence of those measures on other countries and of the danger that they might become a model or paradigm. Consequently, there is something profoundly ironic in the fact that at the very moment when the French National Assembly passed the Intelligence Act, the Second U.S. Court of Appeals in May 2015 released a 97-page ruling denouncing the illegality of the massive collection of telephone data by the NSA since the PATRIOT Act took effect. This document deemed the extent of surveillance since 9/11 to be “stupefying” and the NSA guilty of having overstepped statutory boundaries through a perceived misuse of section 215 of the PATRIOT Act.

Yet as divergent as the American and French socio-historical contexts are, one observes that discursive contexts regarding terrorism and socio-technological interactions produce certain resonances. Despite certain positions taken and certain declarations made, a state of exception clearly emerges in both cases [16].

The first paragraph of the French bill's “rationale,” as it was presented on March 19, 2015 before the French National Assembly, is revealing in this regard:

“Information is gathered and used to learn about risks and prevent threats to our country and its people, and thus to better understand the great challenges we face. The bill thus contributes to ensuring civil rights whose preservation depends, in turn, on public order. In the current national and international contexts, strengthening intelligence policy in the full respect of individual liberties is required [17].”

Although the bill's first article specifies the aim of the law—namely the prevention of future attacks—nowhere in the bill are the threats specified to any degree. Likewise, while that first article makes a reassuring gesture in favor of the “respect of individual liberties,” it leaves unresolved the specificity and complexity of the technological means that the law is destined to deploy.

Consider the technological means that the NSA deployed in secret for a number of years. Legalizing hidden procedures that have the possibility of capturing all personal data of citizens could establish a regime of widespread suspicion acceptable to the citizenry. Trust between individual citizens—an essential dimension of all coexistence—could become nullified [18]. Moreover, a potential reign of suspicion may no longer be aimed strictly at the struggle against terrorism. The spirit of these kinds of laws is to prevent all “attacks against the republican form of its institutions” including “collective violence likely to endanger national security [17].” What constitutes danger may obviously be stretched to a point of nebulosity if possible terrorist actions become confused with acts of legitimate dissent within a democratic society.

Notwithstanding the rationale of being responsive to an attack, the urgency with which the French Intelligence Act was adopted is highly problematic. Given the usual skepticism of French public opinion, it is surprising that the legislators’ “accelerated procedure” did not cause more of an uproar. The haste with which the French government passed the Intelligence Act draws a similar context in which the USA PATRIOT Act was adopted. Unpacking the acronym for the USA PATRIOT Act reveals how patriotism intertwines with militarism in the short time table: **Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism** [13].

It took fourteen years before a U.S. senator besides Russ Feingold, the sole upper house member who opposed the USA PATRIOT Act at the time, could be quoted as harshly criticizing it.

“We all now know that the NSA has for years been using Section 215 of the PATRIOT Act to sweep up phone records of innocent Americans, without any connection to terrorism. We also know that the NSA used a similar legal theory for years to collect massive amounts of metadata related to billions of emails sent to and from innocent Americans. We must no longer allow that sort of bulk collection on innocent Americans. The American people oppose this indiscriminate dragnet collection of their records, the courts have found it to be unlawful, and the House of Representatives has voted overwhelmingly to end this program through the USA FREEDOM Act. Now is the time for the Senate to act [19].”

It was fourteen years before Americans would begin to witness the intensity of discussion that would normally have taken place prior to the hasty passage of the USA PATRIOT Act, adopted mere weeks after the attacks by a vast majority of legislators who had not even read it. We would be neglectful, however, not to recall briefly that since 2001 Section 215 of the PATRIOT Act had been the source of vehement protest in the United States by the American Library Association (ALA) and by the American Civil Liberties Union (ACLU) and other associations that defend personal freedom, and that all of these protests opposed what constituted for them a fundamental violation of the private life of citizens without, for all that, constituting an effective defense against “terrorism.”

Were it not for Edward Snowden's reports in June 2013 that the public has been subjected to massive and wide-ranging surveillance, would the silence have continued? On May 31, 2015, the U.S. Congress allowed section 215 of the Act to expire, making way for a plan to reform the NSA (the Freedom Act to which Leahy referred in his statement cited above) passed astoundingly by a wide coalition of Democrats and Republicans. However, the USA PATRIOT Act has never been abrogated, and the most questionable aspects of it, like Section 215, survive in new guises, as the USA FREEDOM Act of June 2015 clearly shows. But for the time being, the Freedom Act compels the NSA to obtain a search warrant before it can order telecommunications operators to hand over conversations between citizens, or between citizens and their foreign correspondents.

Many U.S. experts have gone on record to state that the measures France already had in place *before* January 2015 were ample and perfectly adapted to the anti-terrorist struggle. As David Raskin, former chief anti-terrorist prosecutor for the Manhattan federal court, affirmed right after the January 2015 attacks on *Charlie Hebdo* and the kosher supermarket: "The French were good, and their laws were tough [...]. I was always jealous of some of their trial procedures, because they were more favorable to the prosecutors than those in effect in the U.S.A [20]." That was before the French Intelligence Act. Today, after the passage of the Act, on a decision of the Prime Minister alone, state services free of legal oversight can access digital data by the installation of "black boxes" within telecom operations that enable the analysis of all Internet exchange. With this increased surveillance capacity, executive power in France seems fully sovereign. As Article L. 821-1 of the law explains, "implementation within national jurisdiction of information collection technologies mentioned in title V of the present text is authorized by the Prime Minister [17]." Because the Constitutional Council balked at censuring this law for its unconstitutionality [21], judicial authority is now reduced to a simple advisory function—something that those most attuned to these questions have been long predicting. The former President of the French Association of Investigating and Examining Magistrates and Prosecutor for the Antiterrorism Division, Marc Trévidic, is clear about the risks to which society is exposed under such a law:

"... if an intelligence law is not well-conceived and rational, it could easily become a formidable weapon of repression. An intelligence law should not only protect citizens against terrorism, but also against the State. We in France are doing neither. There is a total absence of control in this law. We are doing far less than what we should be doing."

According to Trévidic, in order to specify risks and do away with the "I have nothing to hide" attitude, he continues:

"In its efforts to gather political intelligence, the State may easily be tempted to spy on all of its perceived enemies, social movements, as well as protests. There is criminal intelligence and there is political intelligence. In this law, however, the criteria are rather vague. Frankly, the Prime Minister's room for maneuver is immense and the nation has no way of knowing whether something illegal will be done [22]."

In advocating for the USA PATRIOT Act, the Bush administration—politically determined to pass emergency measures—transfixed the population with euphemisms borrowed from military strategists, with rhetoric of morality, patriotism, and the hyper-technical—in short, with a vocabulary aimed at drumming up support among the masses that aligned the politics of the phantasm of an Empire of the Virtuous against the “Empire of Evil.” In this discursive configuration, a mass crime (the 9/11 attacks) becomes an “act of war.” The pursuit of a handful of terrorists transmogrifies into “generalized warfare.” The rather conventional and generally accepted notion that the nation is authorized to take up armed struggle in the event of actual invasion becomes the belief in the effectiveness of “preemptive war” against a diffuse enemy constituted not of soldiers but innumerable “foreign enemy combatants” everywhere present and nowhere visible [23].

In summary, it is striking to see this vocabulary for a world of generalized surveillance and perpetual war. Bush repeated endlessly, starting in September 2001, that “we are a country at war with terrorism.” Manuel Valls repeats today that “France is at war with terrorism, djihadism, and radical Islam.”

C. An Aesthetic Aligned with Generalized Surveillance

Imagine the society that takes shape in the aftermath of hastily adopted mass surveillance laws. Patriotism, having been the principal impetus for the surveillance tidal wave in the United States since the beginning of the twenty-first century, leaves in its wake a massive corpus of emergency measures and rhetoric that have become characteristic of the era of the USA PATRIOT Act and of the second Iraq War. Euphemisms such as “weapons of mass destruction,” “collateral damage,” and “coercive interrogation” have proliferated, prospered, and lost their strangeness or unacceptability. Is this symptomatic of a society that wants to be under a “full spectrum domination” of which “preemptive war” and “extraordinary rendition” are the only two consequences? If so, does this predict democratic decline?

As comforting as some of the rhetoric around mass surveillance may seem—“homeland security” being the prime example—it signals some of contemporary history’s worst periods. The use of such a term is curious if one considers that its most infamous deployments were in Nazi Germany and in South Africa under apartheid. The definition of homeland is merely a place to which a group of people holds a long history and cultural association. *Homelands* of yesteryear could be, as Harvey and Volat wrote in 2006,

“...territories—rather homologous to Indian reservations in the United States—where the Whites granted nominal autonomy to indigenous peoples. As for Hitler’s Germany, Nazis used the word as a patriotic pledge to their notion of Germany, and as such the term became politically synomous in the Europe of the 1930s with the ideology crouching beneath the German cognate of *Homeland: Heimatland* [24].”

When the exception becomes the rule, semantic perversions can run rampant, not only numbing people, lulling them to civil sleep, but also progressively imposing upon them a

certain aesthetic regime (since it is our *aesthesis*, which is to say our sensibility, which plainly sees itself affected and mobilized by such perversions). Such a regime may then become the only source of what is possible aesthetically.

Today, political power in France also integrates this type of discursive strategy. When Manuel Valls strives to assure the public that the French Intelligence Act eliminates any “gray zone” in its surveillance measures, he says: the government will henceforth do openly, at will, and without serious judicial limitation, what the General Directorate for Internal Security (DGSI) has already been doing unofficially for decades. Under cover of codifying methods already employed by intelligence services, the Intelligence Law seems to whitewash certain practices of the DGSI that may have been illegal.

Further, when the French executive authority alone possesses and controls this supreme power of surveillance over the people, this concerns not only the current government but also all those who might come to power in the future. The almost total absence of resistance to such attacks on individual freedom suggests that the French citizen may have become as normalized to mass surveillance as his fellow American.

In France, security had long been in decline as a topic in political discourse [25], so are current French security and surveillance policies merely the carbon copy of those extolled in the United States? Probably no more than ISIS is the exact copy of al-Qaeda, for as in the case of this pair, the one exists in response to, and in struggle against, the other. In this area, French policies have been conceived with lucid knowledge of American security legislation. Furthermore, they reflect the available and expansive technological means of 2015 and no longer those of 2001. One notable difference with 2001 is that our digital environments instill and install in us inexorably, every day that passes, the phenomenon of *traceability*. The order of the hypermodern era is, as psychoanalyst Gérard Wajcman writes, to render possible the permanent capture of all of our activities:

“Formerly, power entailed being master of the gaze. But the gaze’s power obtained only insofar as it was hidden. “To see without being seen” was an attribute of the power of God or of the guard of Jeremy Bentham’s Panopticon. Today, the master’s gaze is no longer hidden but unveiled. Its eye is everywhere, and everywhere visible. It is in this that I maintain that hypermodernity is the establishment of a civilization of the gaze [26].”

The intensity of permanent identification becomes a factor in social recognition. As people are identified, they occasionally feel themselves recognized as a consequence. Does the dependence of the contemporary subject on its technological supplement thus amount to a return to the “grand narratives” deconstructed by Lyotard in the early 1980s [27]? If so, the illusion that people are emancipated or almost so will be impervious to critique.

The unquestioned motif of progress—and the “grand narrative” that sustains it—intervenes similarly in the adoption of the Intelligence Act. The intention of the French power structure is to avoid the failures of and, above all, the objections against the USA PATRIOT Act while at

the same time improving it. The old saw of French exceptionalism is alive and well in the claims made by certain politicians about the virtues of a distinctly French finesse even in the era of generalized surveillance.

Additionally, social and political acceptance everywhere in the world of personal technologies has evolved vastly since 2001. Citizens now massively depend on gadgets that are as close to being bodily prostheses as imaginable. These markers of “improvement” or added comfort are now necessities of existence [28]. The socio-technological change between 2001 and 2015 should thus allow an account of the evolution of the relationship between the vastness of information in our world and the operation that we call “intelligence”—in all senses of the word—that still reigns over it. In freely surrendering personal data (a word whose origin means “given”) each time a person turns on a little personal device that is somewhat permanently linked to the Web and to GPS networks, does the public not also willingly, albeit unconsciously, surrender some of its freedoms? Is there not something contradictory today, consequently, in the very notion of people being dispossessed of their personal data? Are people not, in other words, the involuntary accomplices of the coercive policies they may condemn?

As Alice Béja rightly observes, “To speak of ‘data’ is to suppose, on the one hand, that the information is true and unconstructed and, on the other hand, that it is given voluntarily, as a sort of *gift* that web users spontaneously make to the government and to the enterprises that collect them [29].” And is not this “we”—since it comprises all those who own and more or less constantly use a smartphone—enormous? Was not Michel Foucault’s most convincing warning in *Discipline and Punish* that total control by the normalization of populations happens when the subjects form themselves into subjects subjected to their own control? Is not integrally controlled man *self*-controlled man?

Plan Vigipirate is France’s national security alert system, consisting of four threat levels represented by five colors: white, yellow, orange, red, and scarlet. Was the first indication of this interiorization of the police in the context of French security measures not already deducible in Vigipirate, the first phases of which appeared in the early 1990s? As Mathieu Rigouste has stressed, the Vigipirate scheme “rests on a principle of shared responsibility for our security [15].” In effect, Vigipirate demands the same of citizens as it does of counter-terrorism services, to conduct generalized surveillance over the entire social environment and to act against terrorism. However, it also “promotes a psychological action upon the population in order to motivate them to isolate subversives and to practice self-surveillance [29].”

In short, today even more than in 2001, are the people not the absolute accomplices of the dilution and disintegration of their own freedom as individuals? Just as personal infatuation with smartphones and other technological mediations continues to grow, allowing for the capture and diffusion of personal data, so does personal dependence, and personal complicity in the atrophy of personal freedom becomes naturalized. People hardly ever think

of setting personal devices aside in order to regain a little autonomy and vacation from surveillance. Personal fascination with technological “democracy,” personal blind faith, and the fetishization of personal prostheses, sanctioning human bodies’ surrender to the machine, realizes and actualizes the “docile body” that Michel Foucault conceived in order to describe the most deep-seated forms of social control today. It is in such a human-technological context, fostering widespread acceptance, that the Intelligence Act can henceforth institute the possibility of a grand-scale intrusion into personal digital living spaces.

D. Technological Surveillance Activities

As mentioned earlier, the public learned of some of the activities engaged by the NSA under the PATRIOT Act through information made public by Edward Snowden [30]. Revealed activities include the following. Secret court orders allow the NSA to regularly gather *en masse* Americans’ phone records and text messages from telephone companies. The NSA can regularly request user data from the servers of U.S. tech giants like Google, Facebook, Microsoft and Apple, and the companies are compelled by law to comply. The NSA has techniques to circumvent widely used web encryption technologies in order to improve the utility of the NSA’s surveillance programs.

The French Intelligence Act portends an era of massive automated surveillance through the installation of “black boxes” to access Internet service providers and hosts. Governments, current or future, will be able to demand that telephone operators and ISPs implement algorithms capable of detecting “terrorist threats” as a function of grouped keywords searched or sites consulted. “Specific access” and “privileged profiles” may then be established for precisely purposes contrary to the spirit of individual rights and freedoms. Article L. 851-3 authorizes “for the exclusive needs of terrorism prevention, the immediate collection, on the network of electronic communications operators, the connection data of persons previously identified as presenting a threat.” By the same logic and in the same spirit, Article L. 851-4 anticipates that “the Prime Minister can order electronic communications operators and Internet service providers to detect, by an automatic process, suspicious sets of connection data, the anonymity of which will be lifted only when a terrorist threat is revealed [30].”

With these ambitions, as we have only begun to describe above, this new law follows the example of the USA PATRIOT Act in envisioning the most complete realization of what Rouvroy considers as a “fantasy of control over all potentialities [31],” nourished by the American military doctrine of “full spectrum dominance [32].” The societal consequences incurred by such a fantasy go far beyond the sole issue of terrorism (as complex as it is!): *any* “threat to order,” from industrial sabotage to a mere protest conceived by law-abiding citizens, can become suspect. What becomes clear, above all, in the establishment of such measures is a vision of man who is henceforth predictable and who, consequently, can be placed under control through entirely technological means. Such an understanding of

humanity is eminently contestable and even scandalously naïve, however, if we consider (as is always possible) that there may be something formally undetectable in the planning of a terrorist act. The novel by Yasmina Kadra, *L'Attentat (The Attack)*, eloquently and poignantly reveals this dimension of unpredictability [33]. For that matter, it is by no means insignificant that within the intelligence community (notably within the DGSI), certain agents admit a preference for human intelligence, “which they judge more effective, although they of course do not disdain the information technology brings them [34].”

The ever-expanding use of digital devices for the purpose of policing may give rise to a principle of responsibility regarding *scale* (or, to invoke Hans Jonas’s expression, to an “ethics of the future”)—a principle engaging society not only legally, but morally vis-à-vis both present generations and those to come. For what is at stake is the preservation of the global social balance within human technological environments—an equilibrium founded on the respect of our fundamental values: autonomy, respect for privacy, freedom, and the exercise of free will.

Discussion

From our political philosophy analysis, some themes are evident. The decisions made by the U.S.A. and France so far in the twenty-first century have largely contributed to the spread of surveillance into every aspect of existence—choices that could well become irreversible given the forms of their materialization. As with problems caused by environmental degradation, society risks reaching a point of no return, especially since the systems and devices involved in surveillance tend to be intangible and are thus particularly resistant to our critical apprehension. In rendering possible the capture of our communicational exchanges in a normative and legislative context, society risks no longer being able to participate in the free exercise of our social imagination or in individual and collective creativity—in theory and in practice—which all democratic society requires in order to continually redefine itself and to “make a new beginning,” according to the terms put forth by Hannah Arendt. This is all the more the case when the citizens are compelled to demonstrate in the polis their sense of responsibility (in favor of ecology or of sustainable development, for example). Yet what form of responsibility is possible without autonomy, without freedom of action and speech, without the possibility of formulating a “counter-speech” even if not explicitly forbidden by law? What perversions of established orders, what “beginnings” will still be possible in a society where everyone knows herself or himself to be perpetually under surveillance? Hannah Arendt, in her own time, expressed this fear so very well: “Only if we rob the newborn of their spontaneity, their right to begin something new, can the course of the world be defined deterministically and predicted.” It is for people, therefore, to ask themselves what world they want to continue to build, and according to what values.

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