FEAR AND CONTROL

A Conversation between DIDIER BIGO and MIREILLE DELMAS-MARTY

MAXIMUM SECURITY AND PREDICTION

Police Practices and New Technologies: The grammar of the future perfect (future antérieur) and its effects

BIGO

Anderton said: « you’ve probably grasped the basic legalistic drawback to precrime methodology. We’re taking in individuals who have broken no law. » « But surely they will » Witwer affirmed with conviction. » « Happily they don’t – because we get them first, before they can commit an act of violence. So the commission of the crime is absolute metaphysics. We claim they’re culpable. They, on the other hand, eternally claim they’re innocent. And, in a sense, they are innocent. »... « In our society we have no major crimes » Anderton went on, « but we do have a detention camp full of would-be criminals » Philip.K.Dick (The Minority Report, Citadel Press, NY, reprint 1987, 2002., p 72.)

It would be nice if the category of « would-be criminals » was still a subject of science fiction, but it is not anymore the case. Monitoring the future has become a routine of different bureaucracies in order to anticipate and to prevent certain forms of human behaviour considered as dangerous, evil, illegal or just unwanted. This monitoring or management of the uncertainty of tomorrow is associated with technologies of profiling, data mining, and constitutions of risk group categories whose main goal is to assess the future through the knowledge of patterns derived from the past in order to act on time, to have a grip on the present.

The pretence in the capacity to read the future as if it was a “future perfect” is considered a difficult task, but nevertheless a possible one, if complex technologies are put into a system of systems giving indications about who, still unknown, may act dangerously for the society. Science can predict. A pre-crime strategy is possible if the information about human behaviour is gathered in order to produce a global policing knowledge. The administration of the lives of men is in progress.

The prevention discourse, which has existed for so long has gone a step further with the belief of scientific capability to predict human behaviour by sophisticated software. It is not enough to assess possible futures, to do simulation and alternative scenarios and to guess what virtual future has the most chance to become actualised, now the professionals of security technologies want to reduce all these possible futures to only one future; often the future of the worst case scenario. And it is this selected future that they read as a future perfect, as a future already fixed, a future they already know. This “colonisation” of the future to control the present is a major characteristic, if not the central feature, of the way a government by unease spreads over and is deployed in many social universes of contemporary societies, but especially in “security” matters. It drives the way policing insecurity is done today and is the by-product of the existence of transnational guilds of professionals of (in)security who share the same view of the world to come, even if they disagree about the priorities of the threats and in the means to struggle against them.

A shared belief appears in all these diverse circles. If technologies are fully networked, if the knowledge is shared at a global level about the patterns of specific categories of events or people predetermined to be more dangerous than others, then the unpredictable is largely reduced, tangentially reduced to zero. In environment circles the narrative of catastrophe will be prevalent. In police matters, the narrative will be about the personal safety
concerning crime and the collective security concerning terror as war, with the belief that they can be achieved simultaneously through technology of anticipation. Coercive actions can be deployed and taken before the “others” themselves commit actions with negative consequences for order and stability. That is the new definition of Prevention. These actions are in theory justified by the necessity and responsibility to “protect” the population from the threat of a bunch of individuals with weapons of mass destruction or more insidious means of “corruption” of the society (organised crime, trafficking etc) and the promise to have an effective pre-crime strategy (violent crime, rapes etc), and they have proliferated as arguments for new laws concerning terrorism, organised crime, hooliganism, freezing of assets, but also illegal migration and beyond these laws to justify extraordinary renditions, diffusion of list of suspects, and all the different practices that we have labelled illiberal practices of liberal regime (Bigo, Didier, Laurent Bonelli, Thomas Deltombe (dirs.) (2008). Au nom du 11 septembre... Les démocraties à l’épreuve de l’antiterrorisme. Paris, La Découverte).

These actions, called recently preventive actions, and thus reframing what previously prevention meant, develop under the label of prevention an offensive approach of intrusive surveillance, control and coercion justified by the idea to protect in advance. They are in our view profoundly “illiberal” even if enacted by liberal regimes and in the name of protection, security and even freedom. But most of the authorities see them as the most important and the most effective of the security practices, and mass coercion or traditional wars are in comparison seen as an old fashioned way to cope with danger and threat, and as a failure of prevention. To justify this posture, many practitioners insist on the fact that nowadays, the nature of the threat has changed, and it is not possible anymore than policing practices continue to be enacted as they were in a “detective story”, i.e. enacted only after the commission of the act. The destruction will be too important in case of a “nuclear bomb in a rucksack” (Ashcroft). The security providers then need to anticipate by using, instead of mass coercion, an individualised approach towards unknown individuals by reduction of patterns of suspicion to a single unit. It will be implemented through data mining, categorisation, profiling, extraction of information from human beings, detention and even targeted killing of potential enemies, torture and elimination of the targets, which may help the terrorists to grow. Terrorist Information Awareness, previously called Total Information Awareness is still the project of many experts, even if it has been subjected to limits. Policing has reached new frontiers and has crossed them. Policing is not any more crime control, it includes immigration controls, intelligence activities, and policing is now trying to swallow peace enforcement, counterterrorism, counterinsurgency and war and to digest it as a boa does with big chickens. Policing requires then to reframe the different professions of policemen, custom officers, border guards, military personnel, spies and analysts and push them to work together. Policing has left behind police organisations and their traditions. Defence, policing, border controls and intelligence processing are thus changing because of this insecuritisation of the social and political world where the most traditional institutions of security plug in their interests, discourses and practices. They fill unease and anxiety with their priorities, even if religion, economy or environmental institutions also play more generally with this tension creating an array of local complexity beyond the range of this
specific intervention, but which explains why nominally a semantic insecurity continuum of all form of dangers is possible, as for example in the main strategic papers about the future done in the US or in the EU under the label of civil security (Bigo, Didier, Anastassia Tsoukala (Eds) (2008). Terror, Insecurity and Liberty. Illiberal practices of liberal regimes after 9/11. Oxoan and New York, Routledge.).

Then, police, intelligence services, armed forces are not the only institutions of security, and do not have an exclusive monopoly, but they are often considered the most authorised to tell us (their citizen, their “administrés”) what is threatening, who is dangerous, and what is fated. So, they are at the heart of this process of management of life for categories of population considered as virtually dangerous because of an anticipated future behaviour not yet actualised. But it is also the contribution of many technicians in computerisation, risk managers in bank, private companies of software of profiling and biometrics technologies. Not to speak about the applied social sciences of anthropology, criminology, psychology, political science, and positivist criminal law delivering bodies of knowledge that are supposed to be operationalised with success.

This will to predict shared by so many managers of insecurity, through gathering more and more information, is the product and, at the same moment, reinforces the de-differentiation between the institutions of security, traditionally specialised along the lines of categories of enmity, adversity, abnormality. And this de-differentiation process is now generating calls by his promoters for cooperation, convergence, and even fusion between these diverse institutions (public or private, national or international, coercive or welfare) with some success on the channelling of information and an asymmetric access favouring intelligence services. But, as it is so transversal, and multidimensional, even if it undermines liberty, equality and presumption of innocence, it limits the awareness of the public, under the charm of speed and comfort, associated with new freedom, and then the trend is resisted only by a few as we will see later on.

To put it in a nutshell, policing today deals with future, more than with past as in criminal justice logic. Policing is about “intelligence”, anticipation, prediction, and means of controlling the troublemakers wherever they are and before they even think about disorders. The problem of this justification and narrative is obvious: we don’t have “precogs” in the police. We don’t have mutants reading the future. It is still the dream of the perfect police for many security experts and the nightmare of a surveillance society for many citizen and foreigners targeted as unwelcome. For the present, no human being, no technology can assess for sure what will happen. Science and sacrificial astrology are still embedded into the belief to have knowledge of the future. Science is not purified from beliefs and stereotypes.

Criminal Justice Practices and the Development of Predictive Justice

DELMAS-MARTY

Since September 11, 2001, the objective of security, which is ever more present in political discourse in Europe as well as the United States, has transformed criminal law into a law of security based on the illusion that life can be risk free and legitimated greater limitations of individual freedoms.
Judicial review is illusory when it is not focused on the proof of guilt, but on a diagnosis of dangerousness and a prognosis of recidivism, which is a mere probability that, by its very uncertainty, precludes proving the contrary. While an accused is presumed innocent and benefits from doubt, dangerousness is necessarily presumed. After repressive, compensatory and restorative justice, we now have predictive justice. But can it still be called justice?

In the recently created French system of post-conviction preventive detention (rétention de sûreté), judges have little say. Instead, ad hoc commissions were created to make the decisions, but their composition is so diverse (psychiatrists, psychologists, sociologists, criminologists, prefects and victims’ representatives) they have not been granted expert status.

When this so-called “preventive” measure becomes indefinite, even permanent, detention, it breaks completely with the rule of law. Dissociated from punishment as retribution, such deprivation of liberty serves neither the educational nor the therapeutic function that, according to international human rights law, legitimates internment of minors and the mentally ill; nor is it similar to the short-term administrative detention of aliens who are being deported or extradited. It is purely a “social defense” measure of neutralization.

This raises an important issue. Based on pairing guilt with punishment, criminal law postulates free will, while pairing dangerousness with preventive detention negates it—and may therefore lead to destroying criminal law. As Hegel put it, punishment is “a criminal’s right” because by punishing him, “we honor him as a reasonable being.” But “if we consider him merely a harmful beast that must rendered incapable of doing harm, or that we seek to frighten or change,” (Principes de philosophie du droit, trans. A. Kaan, Gallimard, 1940, §100, p. 135 ff.) we deny him that honor.

DEHUMANIZATION

Humanist Anthropology/Warrior Anthropology
DELMAS-MARTY

I use “anthropology” to emphasize that in addition to the more political aspects concerning the rule of law and its mutations, criminal law expresses societal views of the human being.

After the Second World War, the emergence of a law of human rights, designed in particular to limit the excesses of criminal repression, seemed to indicate that humanist anthropology had won. Why then has there been, especially since 9/11 and the “return of the dangerous person” as defined by the 19th-century Italian Positivist School (Lombroso et al.), a renewal of criminal justice practices belonging to a warrior anthropology that leads to negating fundamental rights?

The predefined enemy used to be the hereditary enemy identified with an adverse national group, such as in the Franco-German wars. It then became an ethnic-racial group within a country, such as appeared in Germany and was at the heart of late 20th-century conflicts. The terrorist attacks of September 11, 2001 then marked the beginning of global terrorism, turning “unlawful enemy combatants” into global enemies and justifying dehumanizing practices. Even if the term is no longer used, dangerousness is understood as a very high probability with uncertain effects. Yet it is
presented to give the illusion that one can, in fact, evaluate levels of
dangerousness and determine which detainees are dangerous and
must be imprisoned without trial.

To dispel the illusion while trying to combat the very real dangers in
this world, we must come back to humanist anthropology. It is both
more modest, because it doesn’t promise to eliminate all risks, and
more ambitious, because it recognizes and seeks to reinforce
individual autonomy, to increase every one’s ability to take
responsibility for herself. In short, it tries to understand humans in their
complexity.

But legal humanism will continue to be fragile as long as it remains
limited to discourse on free will, to a binary opposition between
security and freedom or criminal law and human rights, as if they
were mutually exclusive. Humanist anthropology is strengthened,
however, when it counters warrior anthropology with the principle
of equal dignity, which introduces the complexity, or contradictions,
that characterize the “irreducible human attribute,” which is neither
life nor liberty, but the mystery that means “every human being is all
of humankind.”

With respect to terrorism, the European Court of Human Rights has
become a site of resistance to the 9/11 effect. In its February 28,
2008 decision in Saadi v United Kingdom, the Court openly
addressed the issue of global terrorism, holding that Italy would
violate article 3 if it carried out its decision to deport Saadi, a
suspected terrorist, to Tunisia, where he risked being tortured.

Intervening as a third party (because it feared the House of Lords
would follow the Court’s reasoning), the United Kingdom suggested
a change in jurisprudence to “put in balance”—in line with
American reasoning—the risk a person will be subjected to ill
treatment and his dangerousness to the community if not returned.
The Court declined to take this approach due to the absolute
nature of article 3: “The prospect that he may pose a serious threat
to the community if not returned does not reduce in any way the
degree of risk of ill treatment that the person may be subject to on
return” (§139).

This indicates the extent to which changes in social control are tied
to changes in the rule of law when both personal security and state
security are at stake.

Databases and “Cutting Up” the Person: The ban-opticon

As it has been explained by MDM, the social control changes. A
different anthropology is at stake. And a key question becomes who
exactly is the target of the different forms of surveillance and
control? The paradoxal answer is that the measures of prevention
target more a virtual individual than its actual persons and they
suppose that the two are co-existent but it is not sure that it is the
case at all: you as a person may live a very different life than your
data double in the many data bases of the different bureaucracies.
The process of the warrior anthropology is to slice you, to transform
you into bits of information that can be dispersed into interoperable
databases and reassemble along the wishes of the bureaucracies
and without you own consent (Bigo, Didier, Sergio Carrera, Elspeth
Delivering Liberty and Security. Londres, Ashgate.).
It looks difficult to swallow that you have been dismembered without realising it as in another sc-fi movie “the dissociated man”, but think at your everyday travels twice. Remember that preventive “border” control is often less directed toward individuals as such than it is directed towards their personal data, their ‘data double’, meaning the information collected in the data base systems which is seen as representing a ‘real’ identity, is assessed as the truth of the body, the person. In doing that, liberal governmentality is more and more driven by a reframing of freedom as speed and comfort, implying that freedom is subordinated to unease, suspicion of others, and uncertainty of the boundaries of the self. And the identity of this self is now related, not only to the soul, the body and its biometric traces, but also to the data double; to the information collected by public and private bureaucracies about the self, and supposedly telling the truth about him or her. This generates new forms of what these bureaucracies consider as irregularity through dataveillance (Bigo, Didier (2010). Freedom and Speed in Enlarged Borderzones. The Contested Politics of Mobility. Borderzones and Irregularity. V. Squire. Routledge).

Let me explain quickly what this anthropology decoupling yourself from your spirit, your language and even your body and reducing your truth to the administrative data stored between the data bases of bureaucracies imply, as you may think it is not of too much consequence, if it helps your travel and catch the undesirable. May be you have lost your freedom and humanity and you have been highly complicit to it by confusing freedom with speed of movement and comfort. Our world is populated by pre-boarding technologies that operate through internet and mobile phones, by specific corridors in airports for the travellers who have subscribed to some liberty pass exonerating them from showing their documents (called PARAFE, FREE-PASS, LIBERTY…), by packages of taxi-plane-trains which are coordinated in order to avoid delay but in which you are obliged to stay in an enlarged border zone delimited in advance and where you are obliged to go from the point of departure to the point of arrival without the right to change your mind - because the data double has been sent already in advance to the point of arrival and is waiting for its body (you) to arrive. In other words, everything is done for your comfort as long as personal data is sent in advance, stored, and compared to previous travels. At arrival they are matched, not only with your body, but also with data that links categories of people’s belonging to behavioural patterns in order to assess their dangerousness – to check the level of acceptability of your travel. But these techniques work only by the subjectification of freedom into speed and by their bodiless impact. They are preventive and they target less the individual as such than his or her data double. Like your guardian angel, your data double travels first through the flow of information coming from diverse interconnected databases. If clean enough, then you will travel safely, if not you will have trouble. But the problem is that additional layers of information - frozen at a certain period of time and fried in the present operation - create a data double that does not mirror you exactly, and the tendency of this data double to have an autonomous life increases with each travel across databases (Gary Marx, 1994, Guild Elspeth 2008, Bigo, Didier, Emmanuel-Pierre Guittet, Amandine Scherrer (dirs.) (2010). Mobilité(s) sous surveillance. Perspectives croisées UE - Canada. Montréal, Athéna). A wrong association between first name, name or nickname and she or he is not clean anymore. Remember Senator Kennedy cannot travelled to his own country. Maher Arar, Canadian citizen was transformed into a potential terrorist and sent to Syria to be tortured and it takes years to recognise it was an error from A to Z, a wrong association...
between two data doubles bearing similarities in the eyes of the Canadian services and fusioned by the US authorities. Examples are multiplying everyday because now it is not only you who have to be put under surveillance, it is also the frequentations of your data double. Certainly, you have no control over it. Your data double encounters with other data doubles you never met, but then drives your life and decides whether you are suspect or not, whether you can travel or not. You may have nothing to hide but you don’t control your data double encounters.

Giving data in order to travel smoothly and to enjoy freedom is thus a more complex operation than it appears. Even if you have nothing to hide, you cannot control the matching of your data with other data. It goes beyond the traditional notion of privacy. It has to do with a statistical approach to surveillance, which prohibits the movement of the most suspicious ten per cent of the travelling population in order for the others to be at ease (see visa statistics). It has to do with a world of smart borders where experts pretend they have the knowledge for filtering and sorting out preventively the potential terrorists, criminals, hooligans, or irregular migrants from the genuine masses of tourists. It has to do with your acceptance to trade freedom of thought for speedy movement under light surveillance and to think that if you have nothing to hide, then surveillance and freedom can go easily together; it is then not an Orwellian world with a Big brother, it is a ban-opticon world into which self exposure through the web and bureaucratic routines turn freedom into speed and comfort, and which excludes "only" 10% (Bigo, Didier (2007). Detention of Foreigners, States of Exception, and the Social Practices of Control of the Banopticton. Borderscapes: Hidden Geographies and Politics at Territory’s Edge. P. K. Rajaram and C. Grundy-Warr, Minneapolis, University of Minnesota, pp. 57-101.). Welcome to the final stage of consumerist society where we consume security and surveillance as pure freedom and put the others in detention camps in the name of this very freedom (not even our security or our justice).

REHUMANIZATION

Necessary Unforeseeability

BIGO

Extracting information, collecting data, sorting data, constructing profiling, establishing patterns and recognition software of these behavioural patterns, exchanging them, storing them, using them for the purpose of surveillance and control, are not efficient and are not technical activities only. They are creating "errors" and are political activities implying judgements. They are questions of choices and sovereign decisions of multiple authorities. They are dealing with human lives, bodies and souls. They are dealing with beliefs and norms and ethics. They are object of judgement about their legitimacy.

Extracting information of human bodies when they refuse to confess may be "dirty". Establishing categories and criteria for sorting out data is tainted by prejudice and discrimination. Exchanging information on personal data and on more general categories of population is opening a dark market of suspicion, dumping presumption of innocence, and selling to other bureaucracies, unease, fears and insecurities entrenched into the coding of information and intelligence interpretations. Ericson has spoken quite rightly of an operation of social distribution of bad. Storing
information in order to make it available decades after, is dismantling history and meaning, by the very process of deep freezing and frying them later on, as if this discrete series is a comprehensive continuity, and by the very fact to try to cut and paste details of the past into an accurate picture of the future. (Didier Bigo et Pierre Piazza Les conséquences humaines de l’échange transnational des données individuelles, Cultures et Conflits 76 Fichage et Listing Hiver 2009)

How to resist these tendencies? How can we claim back our humanity and freedom from their reframing by the bureaucracies and the experts of security? I see sense of humor against the bureaucrats as the best tool; We need to challenge their discourse about predictive behavior any time we can, politely but firmly, to deprive them from their pretence they know us better than us and that they know our future. They are not fortuneteller or if so they are charlatans. We need to be more cautious about speed and comfort, and we have to refuse to buy the commercialization of speed fraudulously called liberty, and may the lawyers may help here to ask civil compensations for each time the bureaucrats pretends to know the future in order to justify their control and then try to escape the consequences of their acts pleading for their genuine ignorance, beginning may be with Mr Tony Blair. We need to reclaim contingency as part of life, hazard as a right, uncertainty and opportunity as part of a risky life which cannot be reduced to a danger to be protected to. We have to escape the sense of fear and unease that is the condition of our subjectification, and it is may be there that MDM and me would disagree. For me the fear-solidarity she will expose is opposed to the fear-exclusion, but it is nevertheless a fear driven move. But as always, the sociologist is better analyzing the consequences that to propose new normative frameworks and her proposals are central to debate.

**Danger is Inevitable: From Fear-Exclusion to Fear-Solidarity**

**DELMAS-MARTY**

Faced with unavoidable dangers (because danger is peculiar to the human condition), the precautionary principle is caught between two temptations (C. R. Sunstein, Law of Fear: Beyond the Precaution Principle, CUP, Cambridge, 2005.): justifying governmental inertia and maintaining the status quo, such as when the principle is invoked in the area of risks (in environmental law, for example), or justifying a warrior offensive when it is invoked with respect to threats such as terrorism (“shoot first, ask questions later,” the approach in Iraq the Bush administration tried to justify by calling it preventive war).

In either case, the response is based on fear but, in the second, it also fuels fear, which then spreads like wildfire (“Fear as Wildfire”), taking several paths (the media, interest groups, political leaders) and leading to overestimating dangers until it whips up a kind of hysteria, which “the law might reflect.” There is legislative hysteria in France, as well: since 2001, there has been a significant increase in laws allowing the gathering and keeping of ever-more intrusive data, in addition to laws on recidivism that instrumentalize the precautionary principle, on which they are explicitly based, in the name of protecting potential victims. But Franklin Roosevelt’s famous 1933 response to similar hysteria still seems applicable: “the only thing we have to fear is fear itself.”
To try to limit violations of fundamental freedoms, Cass Sunstein suggests a legislative and judicial framework he hopes is restrictive. I am rather skeptical of his broad suggestions, especially since they postulate a homogenous culture of fear, whereas studies into the perception of risk show its highly diverse nature (types of dangers, socioprofessional categories, etc.). For example, “the Chernobyl accident is perceived differently in Germany and France, England and Spain, Ukraine and Russia. For many Europeans, the dangers posed by climate change far exceed those of nuclear energy or terrorism” (Beck, “Le danger nucléaire escamoté,” Le Monde, August 7, 2008). The same is true when climate change is compared to sanitary risks.

Spreading fear has nonetheless helped extend application of the precautionary principle from natural dangers and technology to criminality, such that it now justifies—with little to no public protest—dangerousness as an autonomous concept, arbitrary black lists, scandalous black sites and torture, and the frightening shift of the concept of traceability from food products to human beings, which the president of the French commission on information technology and freedoms (CNIL) has criticized, saying “this society where everything must be traceable is becoming a nightmare, and if we don’t put up some protections today, it will soon be too late.” (Turk, “Le réveil sera très douloureux,” Libération, March 28-29, 2009)

He may not be heard, because the current consensus is based on a simplification of the extremely complex concept of human security. It is easier to clearly identify an enemy as quickly as possible and use sensationalism, which opens the door to all sorts of manipulations and creates the illusion that excluding every dangerous person will ward off every possible threat. This is why it is essential to distinguish between fear of the other, which leads to hate and exclusion, and fear of danger, which implies that there is a common good we must protect together, and therefore solidarity, which indicates that we share a common destiny.

Conclusion: Unforeseeability and Endangerment, Requirements for Creativity

The best response to the Bin Laden/Big Brother alliance will be both concrete and innovative. The point is not to eliminate chance or dangers. Technological, political and legal innovations may be synchronized, but this requires giving research a global status and developing worldwide expertise in governance.
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