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# Unwitting subjects of surveillance and the presumption of innocence

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## ABSTRACT

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Presumption of innocence  
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Mass surveillance programmes introduced by several EU Member States influence the protection that citizens enjoy on the basis of fundamental rights and freedoms. This paper focuses on the impact that these programmes have on the legal principle of presumption of innocence. The authors argue that even in those circumstances where the principle does not immediately apply because mass surveillance is undertaken before any criminal charge is issued, the collection of information and potential evidence limits the guarantees offered by the principle during the stages of a legal process. It is argued that mass surveillance programmes undermine the role of the principle of presumption of innocence at the stages of a criminal process and compromise, therefore, the very effectiveness of the legal process.

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## 1. Introduction

The use of programmes for the mass surveillance of individuals as well as the legitimization of the retention of data from electronic communications in the European Union has changed our society. One may argue that currently there is a

shift from a post-crime to a pre-crime society, based on risk assessment, suspicion and pre-emption.<sup>1</sup> In this pre-crime society suspicions are not based any longer on criminal behaviour but largely on marginal behaviour and life-styles.<sup>2</sup>

Even if innocent, and not related with any criminal activities, we are watched by the State(s) every time we use internet,

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<sup>1</sup> Mariuca Morariu, 'How secure is to remain private? On the controversies of the European Data Retention directive' (2009), *Amsterdam Social Science* 1:2, 46–65; Helen Fenwick, Gavin Phillipson, 'Covert derogations and judicial deference: Redefining liberty and due process rights in counterterrorism law and beyond' (2011), *McGill Law Journal* 56:4, 863–918.

<sup>2</sup> Caspar Bowden, 'The US surveillance programmes and their impact on EU citizens' fundamental rights' (2013), *Briefing Note submitted to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs*, <[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/briefingnote/\\_briefingnote\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/briefingnote/_briefingnote_en.pdf)> accessed 1 November 2013; the term "marginal behaviour" stands here for minimal or negligible behaviour as for example constructing the profile of an individual on the basis of the search terms he uses in a search engine.

make a phone call or send an e-mail.<sup>3</sup> Other devices that we are asked to use in our households, as for example smart energy meters,<sup>4</sup> open the possibility for being watched also when turning on a light, starting the oven, or changing the television channels.<sup>5</sup> In the logic of mass surveillance programmes we can all potentially be involved in some criminal activities; we are all therefore general suspects. It is needless to say that the increase in the use of mass surveillance is closely linked with the development of technology.<sup>6</sup> Devices that we use in our daily lives offer possibilities for cheap and expedient mass collection of personal information and data.

The shift of our society to a pre-crime one can also affect some persons' relationships to others and to the State, in the sense of introducing a "culture of suspicion" which affects mutual trust, social inclusion and even creates a vague form of presumption of guilt.<sup>7</sup> This context of fear and distrust is what has sometimes been described as the "chilling effect" of the surveillance society,<sup>8</sup> which can seriously affect individuals' exercising of their rights.

Mass surveillance programmes have been discussed in the literature in the light of the problems that they create for the right to a protected private life of the individuals and the principle of proportionality.<sup>9</sup> Their extensive use by

intelligence services and law enforcement authorities has also raised the question whether these programmes can be justified in a "security weighs more than other individuals' fundamental rights" approach: in reality questioning the very fundamentals of a democratic society.<sup>10</sup> The discussion of mass surveillance programmes increasingly involves implications for the right to a fair process and especially the principle of presumption of innocence due to a shift in the burden of proof created by mass surveillance.<sup>11</sup>

The focus of this paper is on these latest developments of the debate – the way in which mass surveillance and data retention programmes influence the application of the principle of presumption of innocence (PoI). It explores the safeguards and the usefulness of this principle in the age of mass surveillance. Our main submission is that as a result of mass surveillance and data retention programmes, the principle of presumption of innocence has outlived its usefulness during the stages of a criminal process, putting at a risk the legality and effectiveness of the criminal process in a democratic society. Following this introduction, Section 2 will be devoted to the principle of presumption of innocence and its relevance in a criminal process. Its application will be discussed in light of the doctrinal debate, the European Court of Human Rights (the Court) decisions and the relevant laws. In Section 3 we discuss the use of mass surveillance programmes in the Member States of the European Union (as identified in a recent report for the European Parliament)<sup>12</sup> as well as the Data Retention Directive<sup>13</sup> as a form of legitimization of mass surveillance at EU level. The way in which the information collected with these forms of surveillance undermines the application of PoI in a criminal process is discussed. Conclusions will be drawn in Section 4.

<sup>3</sup> Glenn Greenwald, Ewen MacAskill, Laura Poitras, 'Edward Snowden: the whistleblower behind the NSA surveillance revelations', *The Guardian* (9 June 2013) <<http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance>> accessed 20 January 2014; Ewen MacAskill, Julian Borger, Nick Hopkins, Nick Davies, James Ball, 'GCHQ taps fiber-optic cables for secret access to world's communications', *The Guardian* (21 June 2013) <<http://www.theguardian.com/uk/2013/jun/21/gchq-cables-secret-world-communications-nsa>> accessed 20 January 2014.

<sup>4</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211, 94–136, art 3(8).

<sup>5</sup> Elinor Mills, 'Researchers find smart meters could reveal favorite TV shows', *CNet News* (24 January 2012) <[http://news.cnet.com/8301-27080\\_3-57364883-245/researchers-find-smart-meters-could-reveal-favorite-tv-shows/](http://news.cnet.com/8301-27080_3-57364883-245/researchers-find-smart-meters-could-reveal-favorite-tv-shows/)> accessed 27 April 2013; Ulrich Greveler, Benjamin Justus, Dennis Loehr, 'Multimedia Content Identification Through Smart Meter Power Usage Profiles' (2011) <[http://epic.org/privacy/smartgrid/smart\\_meter.pdf](http://epic.org/privacy/smartgrid/smart_meter.pdf)> accessed 27 April 2013; Colette Cuijpers, Bert-Jaap Koops, 'Smart metering and privacy in Europe: Lessons from the Dutch case', in Serge Gut-wirth, Ronald Leenes, Paul de Hert, Yves Pouillet eds., *European data protection: Coming of age* (Springer 2013) 269–293.

<sup>6</sup> Pat O'Malley, 'The politics of mass preventive justice', in Andrew Ashworth, Lucia Zedner, Patrick Tomlin, eds., *Prevention and the limits of the criminal law* (OUP 2013) 273–295.

<sup>7</sup> See *S. and Marper v. The United Kingdom* App no. 30562/04 and 30566/04 (ECHR, 4 December 2008) para. 122.

<sup>8</sup> Neil M. Richards, 'The dangers of surveillance' (2013), *Harvard Law Review* 126, 1934–1965.

<sup>9</sup> Working document 1, on the US and EU Surveillance programmes and their impact on EU citizens fundamental rights, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Claude Moraes, (US and EU Surveillance programmes) <[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/wd\\_moraes\\_1012434/wd\\_moraes\\_1012434en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/wd_moraes_1012434/wd_moraes_1012434en.pdf)> accessed 20 December 2013; Ian Brown, Douwe Korff, 'Terrorism and the proportionality of internet surveillance' (2009), *European Journal of Criminology* 6:2, 119–134.

<sup>10</sup> Didier Bigo, Sergio Carrera, Nicholas Hernanz, Julien Jean-desboz, Joanna Parkin, Francesco Ragazzi et al., 'National programmes for mass surveillance of personal data in EU Member states and their compatibility with EU law' (2013), Study submitted to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, (National programmes for mass surveillance) <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493032/IPOL-LIBE\\_ET\(2013\)493032\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493032/IPOL-LIBE_ET(2013)493032_EN.pdf)> accessed 1 November 2013.

<sup>11</sup> See Romanian Constitutional Court, Decision no. 12581, 8 October 2009 <[http://www.legi-internet.ro/fileadmin/editor\\_folder/pdf/decision-constitutional-court-romania-data-retention.pdf](http://www.legi-internet.ro/fileadmin/editor_folder/pdf/decision-constitutional-court-romania-data-retention.pdf)> accessed 1 November 2013; Katerina Hadjimatheou, 'The relative moral risks of untargeted and targeted surveillance' (2013), *Ethical Theory and Moral Practice*, 17:2, 187–207.

<sup>12</sup> National programmes for mass surveillance (n 10).

<sup>13</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, (Data Retention Directive) OJ L 105, 54–63 (The Directive was recently invalidated by the CJEU decision in joint cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and others* [2014] nyr).

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