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2

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Abstract

Since 2015, France has experienced a particularly high number of terrorist attacks. This paper examines the French state response to such events and analyzes its effect on the relationship between civil liberties and national security. The activation of the state of emergency – as an exceptional measure that suspends warranted searches and certain freedoms – highlights a potential impediment to reconciling France's national values such as liberté with the urgent need to mitigate terrorist activity. Following the fifth consecutive renewal of this exceptional measure in December 2016, a close scrutiny of its legitimacy, its effectiveness, and its objectives is both timely and warranted. I thus ask the following two questions: In what ways have exceptional crisis measures been historically entrenched in the French socio-political order? In the aftermath of the attacks of November 2015, how does the state of emergency build on these measures and normalize the use of inherently exceptional policies?

Keywords

France, terrorism, state of emergency, human rights, democracy, Hollande

Introduction

The state of emergency in France – an exceptional measure that revives Napoleonic-era executive and policing powers and suspends certain liberties – serves as a particularly interesting case study of the evolving relationship between legal and political arsenals' response to precarious situations. Whereas exceptional measures typically respond to situations – such as a hot war – in which the prospect of a state's survival is threatened and citizens' daily life is halted, France is responding to a decades-old threat of terrorism with an approach that draws on a particular and contemporary interpretation of war. In the self-proclaimed "democratic and social republic" (Constitution of October 4, 1958, Art.1), the relatively low level of public opposition to exceptional measures that endure five consecutive prolongations since 2015 is noteworthy and anomalous. For this reason, the origins and theories behind exceptional measures in France are worthy of analysis in order to understand and contextualize their present application. France's historical construction as a pioneer of the legalization project of military government following the Revolution of 1848 is better understood through a solicitation of existing literature. Agamben (2005) and Rossiter (1948) situate the theories of exceptional measures in a historical context, explaining France's prominent position in the construction of the politics of necessity, exception, and social order. In this paper, I draw upon existing scholarly work, founding documents of the French Republic, statutes, and political discourses in order to analyze the coexistence of democratic values and exceptional laws in France today, using entrenchment and normalization as central foci. In this way, I seek to understand the processes by which entrenched exceptional measures feed into the potentially authoritarian undertones of France's state of emergency.

The structure of this paper is as follows: First, I will dedicate a literature review section to explain the work of Agamben and Rossiter, who present – in varied contexts and to different ends – a more general understanding of the legal and political theory behind the state of exception as a crisis measure and France's historically close relationship with it. Next, I examine the case of France in two discussion sections: The first discussion section explores entrenchment – it is largely historical and examines the ways in which exceptional crisis measures have been engraved in the French legal and political tradition, and how this relates to the issue of contemporary terrorism as a parallel to war. In the second discussion section, I examine the processes of normalization of the current state of exception – that is, how constraints on liberties are becoming the accepted reality on the ground through constitutional loopholes and diffusion of a particular discourse.

Literature Review

The theories behind exceptional measures and their historical applications in France are the subject of foundational academic work. Research in the disciplines of philosophy and political science reveal vastly different theoretical approaches for evaluating the fundamental role of the state of exception. While Rossiter (1948) in *Constitutional Dictatorship* illustrates the ways in which entrenched exceptional measures repeatedly save major world democracies from relinquishing their cherished form of government in the midst of crisis, Agamben (2005) in *State of Exception* explains the process by which exceptional measures legally turn citizens with constitutional liberties into politically weakened subjects which gradually submit to increased state control. The two scholars converge in their use of France

as a prime example of the state of exception in action – whereas Rossiter points to France as the pinnacle of strategic use of crisis measures in order to manage national emergencies that threaten democratic institutions, Agamben (2005) notes that France sets a precedent of using exceptional measures in such a way that allows for infiltration of arbitrary political undertones into legally binding processes, which he argues is a greater, existential threat to the democratic order (p. 5).

The basic lens through which to evaluate the state of exception draws a clear division between these two scholars – Rossiter (1948) claims that the construction of what he calls "constitutional dictatorship" (p. 5) is a practical exercise of state power in the name of protecting democracy during times of crisis, while Agamben (2005) holds that the continued use of such measures by western democracies launches a process of normalization which transforms the state of exception from a temporary crisis measure into a "working paradigm of government" (p. 1). In terms of its legality, the state of exception is legitimate because it has its roots in legislative decrees and constitutional provisions – the more divisive question is whether governments adhere to two key principles of exceptional measures: proportionality and temporariness. In other words, the bona fide state of exception is inherently temporary and responds only to the source of peril, yet history shows otherwise.

Both Rossiter and Agamben point to France as the mother of the modern state of exception that takes two distinct forms: *réel* (military), or *fictif* (political). Agamben (2005) notes that the modern state of exception morphs from being a strictly wartime measure – used first following the Revolution of 1848 and subsequent proclamation of the Second French Republic – to becoming an "extraordinary police measure to cope with internal sedition and disorder," thus taking a drastic turn from being a military to a political state of exception (p. 5). Meanwhile, Rossiter (1948) argues that the discretion to switch between these two variants is precisely what allows France to keep its democratic integrity in the face of war, insurrection, and revolution (p. 77). The frequency with which France has known such problems since 1848 leads both authors to present the state of exception not as a temporary measure that is used sparingly in isolated circumstances, but rather as a paradigm of government – something that is part of the *normal* governmental order.

Writing in the aftermath of World War Two, Rossiter (1948) claims that the survival prospects of democracy in an anarchic world order rely on a constitutionally entrenched mechanism of authoritarian rule, and that even if relinquishment of civil liberties ensues as a result, this is because "no sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself" (p. 314). Agamben's (2005) claim in a post-9/11 world is that exceptional measures have become anything but temporary because the labeling of terrorism – a long term and spatially undefined threat – as a type of war moves western democracies on an indefinite path of legally suspending constitutional liberties in the name of securitization.

In the context of France's most recent application of a state of emergency, both Rossiter and Agamben's general insight is a useful analytical tool. In the post-9/11 world, Agamben (2005) alludes to the state of exception as an arbitrarily applied measure – a product of politics and not military necessity – that suspends the law while enforcing its subjective will with the force of the law – it is an "extrajuridicial phenomenon" (p. 23). Agamben (2005) further points out that a state's construction of necessity, "on which the exception is founded, cannot have a juridical form" (p. 1) and as such, the state of exception

cannot be analyzed only in terms of the law – an effective suspension of the law of this type is also a product of political and social discourses, which is a key part of what this paper aims to examine (p. 4). Meanwhile, Rossiter (1948) explains that the state of exception – what he calls "constitutional dictatorship" – is subject to certain conditions and serves only one purpose:

> … to end the crisis and restore normal times. The government assumes no power and abridges no right unless plainly indispensable to that end; it extends no further in time than the attainment of that end; and it makes no alteration to the political, social, or economic structure. (p. 7)

This is significant because as I will show, the French government's rationale for prolonging exceptional measures in 2015 is strikingly close to that of Rossiter's 'constitutional dictatorship,' yet it does not seem to meet the aforementioned conditions. To allow the consequential infiltration of such contradictions into legal and political processes – via entrenchment and normalization – tests the malleability of French democracy. In my efforts to show how France has entrenched its anxieties over social order and how these are being revived to respond to terrorism with a state of exception, I draw on Rossiter's theoretical framework, which shows a complex interdependency between elements of democracy and authoritarianism that the French government seems to be relying on in its efforts to combat contemporary terrorism. In an effort to highlight the potential dangers of entrenching and normalizing the exception, I draw on Agamben's convictions, which present the state of exception in its *fictif* (political) form through which suspensions of constitutional liberties are effectuated with the force of law.

While the literature can provide a vital theoretical understanding of regimes of exception, a link to contemporary applications in France is less prominent, given the new and dynamic nature of this particular issue. Whereas Rossiter addresses states of exception arising out of hot war or rebellion, the issue of terrorism and whether it qualifies as an emergency that warrants exceptional laws is not explicitly mentioned. Agamben accounts for contemporary terrorism and signals its role in changing the concept of necessity, but cannot account for the role of socio-political discourses in France – post-2015 – in prolonging the state of emergency. As such, this paper aims to contextualize the current measures and their justifications, to explain the position of contemporary considerations such as terrorism vis-à-vis war, and to examine how the Western taboo of human rights derogations is gradually finding its place in self-declared democracies – such as France – by drawing on decades-old practices and diffusing a particular discourse.

1. Entrenchment

On January 11, 2015 – shortly after the attacks on the *Charlie Hebdo* headquarters in Paris – close to 4 million people passionately marched in the streets of Paris in the name of freedom of speech and defending France's liberal democratic values in the face of fear – it will not let terrorists win (Sayare, 2015). Marked by the slogan of 'Je Suis Charlie,' this local movement gone global stands in unified opposition to attempts – politically or religiously motivated – to undermine Western liberal democracy. The movement holds that to 'be Charlie' is to uphold freedom of speech and to continue pursuing one's life freely and in

defiance of terrorists' goals to use fear to undermine liberty (Talgorn, 2017). Therefore, in the spirit of this movement, attacks on freedom as a practice are fundamentally wrong. Whereas 'Charlie' stands as a tireless symbol of the defense of democracy, it tends to assume that attacks on democracy can only be perpetrated by terrorists. Following a series of terrorist attacks in Paris and Saint-Denis on November 13, 2015, France enters a state of emergency, authorizing significant restrictions on assembly, movement, and judicial oversight of counterterrorism measures. The French Directorate of Legal and Administrative Information (DILA) (2016) notes that prohibition of public gathering and movement in certain areas, closure of public spaces, authorization of administrative searches, and house arrests can all be effectuated without a judicial warrant under the State of Emergency of November 20, 2015.

In the weeks after the November 2015 attacks and the subsequent declaration of a state of emergency, there is no mass social movement that rises to question the *state's* role in threatening civil liberties (Paye, 2017, p. 1). This curious case of silence around government restrictions on democratic freedoms – which some 4 million protesters mobilize to support merely several months before – suggests that other factors may be at play (Sayare, 2015).

The State of Exception: A French Invention

Indeed, November 2015 is not the first time that France produces exceptional measures. In fact, as Rossiter (1948) claims, "the foremost emergency institution of modern times, the state of siege," is a French invention (p. 77). In the context of what he calls "constitutional dictatorship," France is the gold standard – from the Code Napoleon to the World Wars, the French mastery of crisis institutions have "few equals in scope and consequence" (Rossiter, 1948, p. 77). The centerpiece of exceptional measures in France is the modern state of siege, which comes to existence during the Revolution of 1848 with the objective of transferring governing powers from the state to the military in an effort to restore order (Rossiter, 1948, p. 83). Of particular note is the "extreme legality" of the state of siege (Rossiter, 1948, p. 79) – according to the Constitution of 1848, "a law will fix the occasions in which the state of siege can be declared, and will regulate the forms and effects of this measure" (Art. 106). Bancaud (2002) confirms that the state of siege's historically strong "capacity to serve the maintenance of order" in the Napoleonic era is credited to its strict grounding of military power mechanisms in law – France is thus characterized by a "tradition of étatisation" that serves as a default for all "political, social, and national crises" (p. 16). Central to the understanding of the state of siege is the fine distinction between its variants – it occupies either a real (military) or fictitious (political) form. Agamben (2005) offers useful insight on this matter:

> The state of exception is not a special kind of law (like the law of war) insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept. The history of the term *fictitious* or *political state of siege* is instructive in this regard. It goes back to the French doctrine that – in reference to Napoleon's decree of December 24, 1811 – provided for the possibility of a state of siege that the emperor could declare whether or not a city was actually under attack or directly threatened by enemy forces. (p. 4)

In this way, the state of siege responds to both tangible physical threats – such as war – and *notions* of threat that can be effectively invented. This duality will be particularly important in the upcoming discussion of the state of exception as a political determination.

By 1954, France finds itself in a hot war with the National Liberation Front of Algeria (FLN). Crediting France's failure to resist Nazi invasion in 1940 to "a huge weakness of executive power," France is determined to act differently by giving the executive more autonomy, under the assumption that this will avoid a recreation of 1940 (DILA, 2017). The push to expedite executive action in times of crisis takes the form of Law n° 55-385 of 3 April 1955 – concerning the *state of emergency* – which gives the Council of Ministers the power to activate a state of emergency for an initial twelve days, after which a law must be passed to prolong it (Law n° 55-385, Art. 2). In this way, the Law of 3 April 1955 provides a level of immediate executive discretion, yet still remains subject to the will of the people via elected representatives. With the election of Charles De Gaulle in 1958 and subsequent adoption of the Constitution of October 4, 1958 of the Fifth Republic – which still prevails today as the social contract – the possibility to enact a state of siege becomes engraved in the French Constitution. Article 16 authorizes a state of siege in cases "where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat," while Article 36 reiterates that the state of siege can only be prolonged through passage of a law (Art. 16, Art. 36). The constitutionalization of the state of siege – led by De Gaulle – is a direct response to the previous lack of a firmly entrenched mechanism that goes beyond a 'simple' law and gives the executive the authority to enact exceptional measures and to claim *pleins pouvoirs* (full powers) (DILA, 2017). In the context of the state of emergency of November 20, 2015 – for which the legal basis is the Law of 3 April 1955 – the positioning of the terrorist threat in relation to the text of this law is of central importance. While it is nearly unquestionable in the French government's eyes that Article 16 cannot apply to terrorism, they have not yet accepted the possibility that the Law of 3 April 1955 may not apply as well.

Terrorism as a Proxy for Hot War: The Political Determination

The Law of 3 April 1955 stipulates that a state of emergency may be activated in the event of "imminent danger resulting in the infringement of public order, or in cases where events present, by their nature and severity, the character of a public calamity" (Law n° 55-385, Art. 1). The 2015 application of this law is unique in that sets a precedent of regarding terrorism – which exists as an ongoing problem in France since the 1970s – as an isolated and temporary war. This is explained in part by former French President Hollande's candid statement during his November 16, 2016 address to Parliament that "France is at war," after which the first prolongation of the state of emergency is voted in at a significant majority (Présidence de la République Française, 2015). Spinosi (2016) – a lawyer at the Council of State – points out that the 2015 application in the name of terrorism is not consistent with the law of 3 April 1955 – he explains that the threat must be "imminent in the *sense* of the law" and that terrorism is moreover not an explicit "criteria prescribed in the law" of 3 April 1955 (p. 23). In order for this law to be applied faithfully to its meaning, the events constituting a "severe infringement on public order" must be "isolated and duly identifiable," which he argues is not the case with a threat of terrorism that is "diffuse

and permanent" and stretches across multiple decades in France's case (Spinosi, 2016, p. 23-24). Indeed, this distinction has had important implications throughout history - Paye (2017) notes that the law of 3 April 1955 – in the context of the Algerian War – "allows the French government to avoid declaring the state of siege," thus enabling them to consider "resistance fighters not as combatants, but as terrorists and to treat them as criminals" under the civil code (p.9).

However, the 2015 application of this law does the inverse – it considers "criminal actions – terrorist attacks – as acts of war" (Paye, 2017, p.9). In the contemporary context, such an equation is problematic – as Hoffman (1998) notes, while terrorists and criminals both use violence to realize their objectives, the motivations underpinning each of these acts are fundamentally different, meaning that state responses must be tailored around this fine distinction (p. 41). For example, whereas a terrorist's acts are "intended to have consequences or create psychological repercussions beyond the act itself" that are aimed at changing public opinion, a criminal act (Hoffman uses the example of a bank robbery) is inherently self-interested and is often motivated by personal material gain – a fundamental reordering of national values and laws is not important to criminals (Hoffman, 1998, p. 41-42). Nevertheless, the 2015 application of the state of emergency in France does not appear to fully respect this key distinction, thus blurring the distance between crime and war (Paye, 2017, p. 9).

By this logic, when Hollande declares that France is at war, he is not technically contradicting the law or the will of democratically elected representatives. It is this novel political determination of the "terrorism of war" – as Hollande calls it – that allows for a redefinition of war and rebuts Spinosi's claim that the law of 3 April 1955 does not apply to terrorism ("Après les attentats," 2015). Given that the law of 3 April 1955 does not explicitly state or define 'war' in its text, it is open to interpretation. Whereas Rossiter (1948) claims that what legitimizes the French approach to crisis measures is its grounding in law, this does not rule out vagueness – the turbid meaning of the 1955 law allows for a more *politicized* determination.

The Role of Antiterrorist Legislation

What this interpretation further implies is that terrorism – as a 'war' situation – merits an expedient and authoritative approach that ordinary democratic institutions may not be equipped to handle, as is considered the case in a state of siege. However, 2015 is not the first time that France faces the problem of terrorism – according to DILA (2016), France has been "confronted with successive waves of terrorist actions" since the 1970s (para. 2). Following a "multiplication of attacks in the 1980s," the French legislative arsenal makes an official definition of terrorism, leading to the promulgation of twenty-three pieces of anti-terrorist legislation between 1986 and 2015, which – in their entirety – expand powers of surveillance, border control, and detention of potential suspects (DILA, 2016). Data in Figure 1 from the Global Terrorism Database (2016) shows a notable correlation between the promulgation of anti-terrorist legislation and frequency of terrorist incidents:

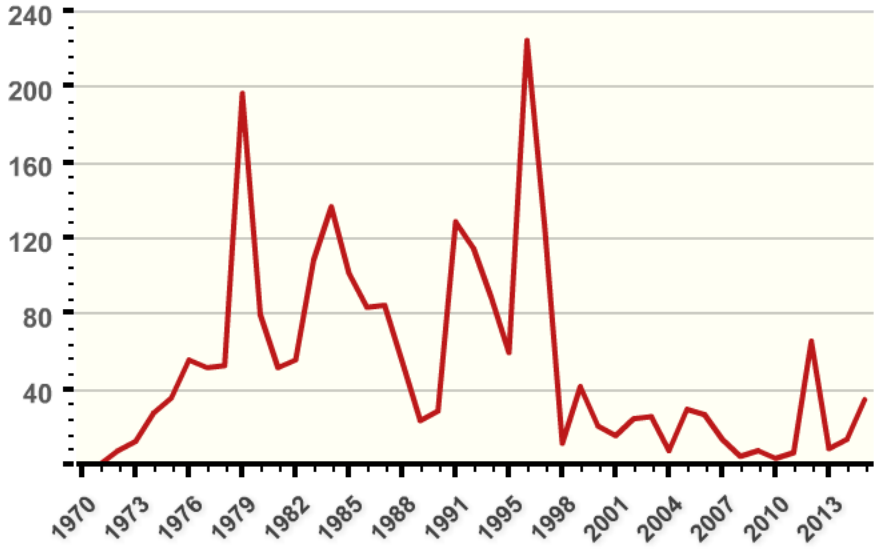

Figure 1: Number Of Terrorist Incidents Occurring in France Between 1970 and 2015
Source: Global Terrorism Database, University of Maryland (2016).

Figure 1 shows the number of terrorist incidents that meet the following criteria:

a) "there is essentially no doubt of terrorism," b) "the act is aimed at attaining a political, economic, religious, or social goal," c) there is "evidence of an intention to coerce, intimidate, or convey some other message to a larger audience," and d) "the act takes place outside the context of legitimate warfare activities." (Global Terrorism Database, University of Maryland, 2016)

Following the promulgation of the "major antiterrorist laws" in 1986 and 1996, Graph 1 shows the gradually decreasing number of terrorist incidents following the passage of those laws – it decreases from 1986 onwards and then picks up again in the 1990s, then falling rapidly after 1996 (DILA, 2016).

However, this graph is not meant to suggest a causal relationship between the enacting of anti-terrorist legislation and the decrease of incidents. Rather, what this data can show is that even during periods – such as 1995 – in which incidents are more frequent than during the period of 2015-2016, terrorism in France is not met by the activation of a state of emergency, but by additional antiterrorist legislation. This is precisely because the political equation of terrorism to war – and the state of emergency contained therein – is not officially set until November 2015. And knowing that arbitrary shifts between *reel* and *fictif* states of exception are deeply entrenched in the history of France's use of exceptional

measures, this is not without precedent.

What this data can also allude to is that a 'zero risk' of terrorism is not realistic, given that waves of terrorism repeatedly emerge even after new measures are enacted to combat them, thus confirming Spinosi's (2016) claim that the battle against terrorism is long-term and does not have clearly defined borders (p. 23). The assumption that existing antiterrorist legislation fails to prevent the 2015 attacks feeds into the state of emergency's image as a preferred pathway to a 'zero-risk' environment, giving purely legislative measures a secondary role. Ferejohn, Pasquino, and Munro (2004) note that this would also not be without precedent – historically, what distinguishes France among other major democracies such as Germany, Britain, and the United States is its more recent use of constitutional emergency powers in 1961, as a response to the generals' putsch (p. 210). Indeed, during De Gaulle's invocation of Article 16 in 1961, there is a clear shift between a *real* and *fictitious* state of exception – to this day, DILA (2017) – a French government administration – openly admits that "only a few days after the activation of Article 16, public powers had returned to their original functioning", meaning that its eventual five month duration was the product of abusive prolongation (para. 6). De Gaulle moves from a *real* state of exception that responds to a tangible physical threat to a *fictitious* one that *effectively* generates a threat, even when a physical one is not necessarily present. Therefore, the fact that France uses its exceptional constitutional powers and switches between real and fictitious states of exception as recently as 1961– while other democracies do not – may explain the current galvanization around the state of emergency as a realistic strategy for dealing with the increased threat of terrorism.

Hollande's Constitutionalization Project: A Contemporary Entrenchment Effort

As such, former President Hollande's active pursuit to constitutionalize the state of emergency is less surprising. After considering the fact that Article 16 and 36 – concerning the state of siege – require that the functioning of the Republic's institutions be under severe threat, Hollande holds that the "situation with which France is confronted" (Projet De Loi Constitutionelle, N° 3381, 2015) following the attacks of 2015 cannot legitimately be addressed by a state of siege, yet this does not stop him from pursuing what he calls "a *different* constitutional regime" ("Après les attentats," 2015). Merely days after the November 2015 attacks, Hollande appears at the forefront of an effort to introduce Article 36-1, which would constitutionalize the state of emergency, guaranteeing that a law would henceforth not be able to modify or re-interpret the vague conditions under which the state of emergency can be activated – which currently includes terrorism – thus cementing a "civilian regime in crisis mode" during times of persistent terrorist threat (Projet De Loi Constitutionelle, N° 3381, 2015). Hollande further remarks that "this regime cannot – in fact – be anything but exceptional" (Projet De Loi Constitutionelle, N° 3381, 2015). An important distinction between *exceptional* and *temporary* should be made here – they are not synonymous. While the measures taken under the state of emergency are indeed exceptional – in that they authorize an exit from *normal* protections of civil liberties – this does not mean they are inherently temporary, as Hollande is suggesting. France already provisionally accepts that terrorism is war via the use of the 1955 law in response to the 2015 attacks, meaning that if the terrorist threat persists for an indefinite period of time and if the 1955 law is entrenched in the Constitution as unquestionably applicable to terrorism – as

would be the case under Article 36-1 – exceptional measures can continue without limit.

The push to constitutionalize responds directly to critical voices such as Spinosi's, which shed light on the ways in which the 1955 law does not actually enumerate terrorism as a legitimate reason to launch a state of emergency – terrorism is not spatially or temporally defined in the way that the 1955 law stipulates the threat must be (Spinosi, 2016, p. 23-24). What constitutionalization would thus do is officially define terrorism as applicable under the 1955 law, making exceptional measures on this basis anything but temporary. When Hollande further claims that "democracy cannot fight those who deny its values" unless democracy stays true to itself, he suggests that constitutionalizing even undemocratic measures is a manifestation of France's commitment to both democracy and national security (Projet De Loi Constitutionelle, N°3381, 2015). This is strikingly close to Rossiter's argument that a state can adopt authoritarian measures in times of crisis and still proclaim itself to be democratic, provided that its undemocratic practices are engraved in a constitution.

Apart from being highly contradictory, these statements shamelessly suggest that what makes a country democratic is the mere maintenance of a constitution that serves as a social contract – it is less important what that social contract concretely means for the relationship between citizen and state. Paye (2017) contends that Hollande's proposed constitutionalization would fundamentally change this relationship:

> The insertion of the state of emergency into the Constitution gives a legal, textual basis to a reorganization of state power. The change in relation between citizens and the government is inscribed in the reversal of the very function of the Constitution itself: its purpose is no longer to guarantee rights and establish limits to the exercise of power, but, on the contrary to decree punitive measures, that is, to curtail civil freedoms and abolish the guarantees for these freedoms in the face of the arbitrary exercise of state power. (p. 5)

Under his "different constitutional regime" ("Après les attentats," 2015), Hollande proposes to legally reposition terrorism from a "nuisance to public order" to "a profound threat to the legal-constitutional order" (Ferejohn et. al., 2004, p. 210). It is this second and climactic level of entrenchment that would profoundly change the role of a constitution from one that *protects* liberties – as is the case in a truly democratic state – to one that *limits* civil liberties in the name of order. As Rossiter (1948) claims, authoritarian undertones and constitutional democracy can overlap during times of crisis – he cites it as the only way to protect democracies in the long term (p. 314). While Hollande's proposition fails in March 2016, effectively killing a further attempt at entrenchment, the months-long effort to constitutionalize exceptional measures is significant because it exemplifies a contemporary mirror of De Gaulle's efforts to engrave a *particular* interpretation of a law into the Constitution. Moreover, this shows that Hollande is highly aware that critiques like Spinosi's are valid – if Hollande truly believed that the 1955 law could be eternally viewed as applicable to terrorism despite strong opposing claims such as Spinosi's, he would not have pushed so hard to constitutionalize the idea of terrorism as war. While Hollande's effort does not materialize, this does not stop a process of normalization of the exception from unfolding in the background.

2. Normalization

When Further Entrenchment Fails, Normalization Prevails: The Democratic Erosion of Democracy

Before any further discussion around the issue of the state of emergency as a normalizer of civil liberties derogations can continue, two important facts must be reiterated: 1) The application of the 1955 law in response to the 2015 attacks has been cleared as constitutional and 2) The application of the state of emergency – while initiated by the Executive – has passed through both the Senate and the National Assembly and was voted in and prolonged multiple times with a notable majority. Not only does this apparent respect for the democratic process explain why public response is minimal, but it also presents a potential roadblock to evaluating the actual undemocratic characteristics of this exceptional measure, given that it is *procedurally* democratic and that it can self-legitimize by referring back to its creation through democratic processes. I propose to work through this limitation by returning to Agamben's framework of the state of exception's composition. He notes that historically – in the state of siege – the "extension of the military authority's wartime powers into the civil sphere" and the "suspension of the constitution (or constitutional norms that protect individual liberties)" eventually "merge into a single juridical phenomenon that we call *the state of exception"* (Agamben, 2005, p. 5). In the context of a state of emergency – a sort of successor to the state of siege – 'police' powers take the place of 'military,' thus creating a working framework with which to evaluate the issue at hand. By looking into the ways in which the Constitution of October 4, 1958 – and the Declaration of Rights of Man and of Citizen of 1789 embedded therein – prescribe individual liberties as beholden to laws that evolve – such as the 1955 law – and by examining the expansion of police powers under the state of emergency, I can more clearly examine the processes of normalization of exceptional measures. Moreover, I propose that a focus on *substantive* – as opposed to *procedural* aspects – makes it possible to transcend the manifestly democratic naissance of the state of emergency and to thus focus on the *democratic-ness* of the measures contained therein.

The Declaration of Rights of Man and of Citizen of 1789 vis-à-vis The Law

The state of emergency's civil liberties derogations fall under two broad categories: 1) restrictions on freedom of assembly and 2) cancellation of necessary warrants for searches of persons and property by police. In this section, I focus on restrictions on freedom of assembly. Under Articles 4, 5, and 10 of the Declaration of Rights of Man and Citizen of 1789, the right to assemble is constitutionally protected – however, this freedom can only be enjoyed if it does not lead to the injury of others (Art. 4), does not lead to the harm of society (Art. 5), and does "not disturb the public order established by law" (Art. 10). These key exceptions are fulfilled under the comprehensive nature of the state of emergency – in the context of an *exceptionally* high terrorist threat, public assembly and movement can potentially lead to the injury of others and society, and thus it can be broadly interpreted as disturbing public order. Under the state of emergency, the closure of public spaces, the prohibition of public gatherings, and the prohibition of movement of certain persons are possible – the definition of 'disturbance' is broadened in the framework of a law that responds to national security concerns (Law n° 55-385, Art. 5, 6, 7, 8). To date, the most publicized restrictions on public gatherings have concerned civil society groups such as environmental

activists attempting to organize protests (Borredon & Pécout, 2015). As such, the state of emergency can override constitutionally protected liberties such as freedom of assembly – all without *procedurally* contradicting the Declaration of Rights of Man and of Citizen of 1789. This confirms Agamben's proposition that an integral half of the construction of a state of exception is the legal suspension of constitutionally protected liberties. The other half lies in extended policing powers.

Police Powers under the State of Emergency: The Role of Article 66

Article 66 of the Constitution of October 4, 1958 states that "no one shall be arbitrarily detained. The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the *conditions laid down by statute*" (Art. 66). Under the State of Emergency of November 20, 2015, it is the exclusive duty of *administrative* judges to verify – on an *a posteriori* basis – only the *grounds* and *proportionality* of detentions, *not* infringements of individual liberties that can take place in the process (Bonzon, 2016). *Judicial* judges – who are the only judges qualified to verify possible infringements of individual liberties – are excluded from this process under the state of emergency. In the context of expanded police powers – which include house arrests and warrantless administrative searches of private homes and vehicles – judicial judges have no role in determining whether any of these actions infringe on individual liberties and to what degree (Bonzon, 2016). As such, when Article 66 states that "no one shall be arbitrarily detained," it does not explicitly specify what arbitrary detention includes or excludes – this is something that is governed point-in-time by statute (Constitution of October 4, 1958, Art. 66). Under the state of emergency, *warrantless* raids, house arrests, and searches of private belongings are not considered to be arbitrary, unless the grounds for these actions are ruled illegitimate by administrative judges, which is determined *not before* these powers can potentially violate civil liberties, but *a posteriori*. Moreover, administrative judges are not formally considered to be part of the "Judicial Authority" that Article 66 stipulates, yet they are the only body making judgments related to detentions vis-à-vis Article 66 under the state of emergency (DILA, 2012). In this way, the Law of 3 April 1955 effectively annuls judicial judges' constitutionally mandated duty to protect individual liberty under Article 66, thus showing the profound effects of the state of emergency in enforcing expanded police powers with no *substantive* oversight of constitutional liberties.

As such, Agamben's equation is complete. The artful use – under the state of emergency – of 'except where law prohibits' clauses in the Declaration of Rights of Man and of Citizen allows for an effective cancellation of constitutionally-protected liberties, while policing powers are expanded through a statutorily prescribed focus on procedure at the detriment of substantive due process – France therefore presents itself as a state of exception. The profound danger of this process lies in its development under the umbrella of a manifestly democratic process – the state of emergency of November 2015 is activated following a majority vote in both the Senate and National Assembly and has not been determined to be unconstitutional. It is this process of formally eroding democracy through *normal* democratic procedure that shields it from criticism and from claims that it is undemocratic. The exception is *normalized* by a legitimate process and rests in line with the French tradition – dating back to the state of siege – whereby "the power to suspend the laws can belong only to the power that produces them, that is, parliament," thus erasing

notions of exception (Agamben, 2005, p. 12).

Normalization and Prolongation Through Rhetoric: Security as a Political Goal

As has been explained in the first section of this paper, the state of exception takes one of two forms – a real (military) form or fictitious (political) form – and that its most recent application draws heavily on *political* undertones and uses entrenched constitutional exceptions to normalize derogations of civil liberties. In this section, I focus on the ways in which the state of emergency normalizes a new socio-political order whereby security is no longer a public good, but a "paradigm of government" (Agamben, 2005, p. 1). In the days following the attacks of November 13, 2015, the state of emergency is activated for an initial three months with the justification that the immediate threat of another attack in the Île-de-France region needs to be neutralized promptly, which it is and for that the measure deserves credit. Moreover, the majority of legitimate terrorist investigations opened and illegal firearms seized through administrative searches happens during this initial three-month period, and as such its use in response to an *imminent* threat in an *isolated* area – such as the Île-de-France region – is much more in line with the meaning of the Law of 3 April 1955 (Urvoas, 2016).

This changes however by January 2016, taking a highly political turn shortly before the state of emergency is set to expire in February 2016. While Hollande affirms at the time that the general terrorist threat rests excessively high and thus prolongation is likely, the leader of the Parti Socialiste – Jean-Christophe Cambadélis – asserts that *if* an attack were to occur right after the expiration of the state of emergency, then "what would [the French people] tell us?" ("La prolongation de l'état," 2016). Not only does this statement expose the *political* motives of expunging the Parti Socialiste – Hollande's party – of any public criticism for not enacting maximum measures to stop a potential future attack, but it also shows a lack of understanding of what the state of emergency is purported to accomplish. The state of emergency is meant to be a strategy to diffuse an imminent threat of terrorist attacks, and while it does use questionable methods to this end and shows a significant decrease in its effectiveness, it is certainly not a tool to advance the agenda of political parties. Attempts such as those by Cambadélis to distract from the state of emergency's purpose *on paper* and its questionable actions on the ground are attempts to normalize exceptional measures through a rhetoric of fear and to redefine security as a *political* goal rather than a public good. Indeed, it seems that such a trend even transcends time and partisan lines – for example, current (as of June 2017) French President Emmanuel Macron and founder of the centrist party En Marche has proposed – within a month of entering his post – a sixth prolongation of the state of emergency to November 2017, despite his earlier statements favoring an exit from a regime of exception and adoption of newly refined, purely legislative counterterrorism measures (Jacquin & Pascual, 2017). Spinosi alludes to the fact that while political leadership may change, the political costs – for the party in power – of lifting the state of emergency and potentially being held responsible for a future attack are simply too great to justify a deviation from what seems to be the new norm: exceptional measures (Jacquin & Pascual, 2017).

Despite Cambadélis's partisan episode in January 2016, the state of emergency is prolonged until May 2016, but by April 20, a *new* justification for a *new* prolongation is drafted – this time by then-Prime Minister Manuel Valls, who points to the upcoming

Euro 2016 and the Tour de France in the summer of 2016 as overlapping with a continuously high terrorist threat. His proposal passes seamlessly through Parliament – again with a significant majority – thus prolonging the state of emergency until July 26, 2016 ("État d'urgence," 2016). In this way, there is a notable shift away from the logic of the response to the November 2015 attacks – whereas the state of emergency is originally put in place to diffuse a regional threat following several consecutive and unexpected attacks on a particular day, this third prolongation is different. That the occurrence of *normal, planned* public gatherings is now the *justification* for prolonging a state of emergency suggests a significant deviation not only from the 1955 law in general, but also from its initial application in November 2015. The state of emergency thus becomes normalized as a tool to facilitate the provision of security at *regular* gatherings such as sporting events, even though the law of 1955 serves a completely different purpose – to diffuse and control crisis situations that constitute a public calamity and which are unplanned, hence its categorization as an *exceptional measure*.

Nice and Beyond: Protecting Democracy with the State of Emergency

The process of normalization does not end here, however. Merely hours before a barbaric truck attack in Nice claims close to 100 lives on July 14, 2016, former President Hollande states that "we can't prolong the state of emergency forever. That would make no sense, it would mean that we are no longer a republic with laws which can apply in all circumstances," alluding to his intentions to not pursue a prolongation of the state of emergency after its set expiration on July 26, 2016 ("Hollande confirme," 2016). In the hours right after the Bastille Day attack, Hollande delivers a public address in which he explains that an attack of this nature – symbolic in that it falls on the day that France manifests its national character of supporting liberty and human rights – will be met by a fourth extension of the state of emergency until December 2016 ("Attentat de Nice," 2016). It is worth noting that the first response to the tragedies in Nice is *not* to investigate why the Bastille Day security measures – practiced no fewer than three times before the July 14 event and designed to secure the Promenade Des Anglais from vehicle entry – are not carried out in their entirety, leaving a huge portion of the Promenade inadequately protected and allowing the assailant to enter (Biseau, Mouillard, Devin, and Halissat, 2016). The first response to the Nice attack is *not* to re-evaluate the effectiveness of the practices of the state of emergency, such as the 3,600 warrantless home searches, which by July 2016 do not open but six terrorism-related investigations (Tayler, 2016, para. 12). The prevailing response is to defer to what is the norm for the eight months prior to the attack – to continue a state of exception. But this prolongation would also be evolutionary – France is attacked on its national holiday, a day that represents its strength as a champion of human rights, and thus it becomes more than a fight against inhumane terrorists, but a fight *for democracy*.

In this way, the underlying purpose of the state of emergency becomes not to secure the French territory – as is clearly shown by the lack of attention to grave administrative failures in Nice which cost lives – but it is to protect *French democracy* and the *life of the democratic institutions* which underpin it, drawing strikingly close parallels to the conditions under which the state of siege is permissible. It is this impossible presentation of 'French democracy versus tyranny under terrorists' – which leaves little room to question the dichotomy or to think beyond the rhetoric – that further carries the state of emergency to

its fifth consecutive prolongation from December 2016 to July 2017. In this recent move, Manuel Valls validates the prolongation in claiming that "it is difficult to put an end to the state of emergency" in light of the May 2017 presidential election and thus "we *also need to protect our democracy*" ("L'état d'urgence sera," 2016). Once again, the profound shift toward a focus on the *protection of the regime and the Republic* shows a significant deviation from the state of emergency's purpose upon initial application – to secure the Île-de-France region from an isolated and imminent threat on the night of November 13, 2015 and in the days following. From disrupting terrorist cells in Paris and Saint-Denis after the November 13 attacks, to calming partisan anxieties over political reputation, to securing commonplace events such as the Euro 2016 and Tour de France, to finally protecting democracy and the electoral process, the justification for enacting the state of emergency has evolved from an exceptional security measure to something that is essential to the maintenance of the Republic. It is this process of continuing the momentum of the state of exception – both in crisis and in the interlude, for both political and security reasons, in the name of protecting public goods or eroding them – that further normalizes its existence.

Conclusion

This paper aims to highlight that France's democratic institutions are challenged in the face of contemporary terrorism, albeit in ways that often do not contradict the democratic process itself. A study of entrenchment of exceptional measures reveals the ways in which France has constitutionally and legally anchored its Napoleonic-era anxieties over social order, thus aiding in the analysis of how exactly a state of exception can overcome democratic controls in contemporary France to the detriment of civil liberties. An inquiry into normalization shows that exceptional measures as a response to contemporary iterations of terrorism are changing the public discourse around the relationship between liberty and security, leading to limited public resistance in the midst of derogations of civil liberties.

When Rossiter (1948) proclaims that the French state of exception is characterized by an "extreme legality," he is not wrong (p. 79). Exceptional measures from the state of siege in 1848 to the state of emergency of 2015 are constructed under the umbrella of democratic processes and are legitimate in this way. What carries this paradigm into the post-9/11 world order – according to Agamben (2005) – is its origins in the "democratic-revolutionary tradition and not the absolutist one," thus annulling potential claims of its antiquity and incompatibility with democracy (p. 5). And this is precisely the problem that France faces in the present day – the 2015 application broadly interprets atemporal and aspatial terrorism as a threat to the existence of the French Republic, thus activating a state of exception that legally restricts constitutional liberties, expands unwarranted policing powers, and delegates only *a posteriori* judicial oversight by administrative judges, all under the umbrella of the democratic process. The diffusion of targeted socio-political discourses presents an impossible choice between 'French democracy or tyranny under terrorists,' which incites fear and notions of absolute necessity, feeding into what Agamben (2005) calls the "paradigm of security as the *normal* technique of government" (p. 14). The growing banality of these restrictions coupled with fear explains the lack of a social movement that defends civil liberties, of the sort that 'Je Suis Charlie' manifests before the application of the state of emergency.

This paper also alludes to the issue of effectiveness. The state of emergency's

exceptional nature – as former President Hollande explicitly states – suggests that it has limits to its effectiveness (Projet De Loi Constitutionelle, N° 3381, 2015). Failures to fully implement security measures in Nice and the progressive decrease in the success of administrative searches exemplify this trend, but have not yet sparked a meaningful and comprehensive parliamentary review of this measure's effectiveness. A separate study of the administrative problems that hinder counterterrorism efforts in France would certainly be in order.

This paper has also shown that efforts to boost national security *as it relates to political reputation* play a prominent role in the recent discussion surrounding the state of emergency. The rather blunt admission by Cambadélis that prolonging the state of emergency would put his party's credibility on the line, coupled with current President Macron's deviation from previous opposition to exceptional measures for the same reason suggests that an image of *securitization* as opposed to greater de facto security may in fact be an underlying goal of each prolongation. Standing behind an effort to lift the state of emergency would thus be to assume a certain moral responsibility for potential future attacks, leading politicians and policy makers to re-evaluate national counterterrorist strategy *within* the framework of the state of emergency, and less so exploring the legislative solutions that could facilitate an exit from the state of emergency, while also boosting security. However, as this paper has shown, devastating attacks have unfolded even under a state of emergency, likely due to the diminishing effectiveness of this measure and simultaneous intensification of the terrorist threat in Western Europe.

The 2015 iteration of the state of emergency in many ways parallels the logic of Rossiter's 'constitutional dictatorship,' yet it does not satisfy the established criteria. Whereas Rossiter (1948) claims that the sole duty of the state of exception is "to end the crisis and restore normal times," this paper has attempted to show that France has not only set out on a path of perpetually maintaining a state of emergency, but it is not seeking to restore normality – it is building a *new normal,* as shown in the second part of this paper (p. 7). In this way, the objectives of the state of emergency are profoundly changing political foci – what is once an effort to diffuse a threat in the Île-de-France region in the days following the 2015 attacks has morphed into an effort to guard the broad grouping of institutions, actors, and practices that we know as *democracy*. However, as this paper has attempted to show, there is negative progress to this end.

As such, the limits of a regime of exception – historically meant to be in the order of several days – are more easily overlooked so long as terrorism remains tied to broad concepts such as protecting democracy in light of what is being treated as an effective hot war. Political discourses – stemming from different positions on the ideological spectrum – facilitate such an interpretation. Whereas former French President Nicolas Sarkozy (Les Républicains) claims that France is "in a war that will last, with a threat that will not cease to renew itself" (Albertini, 2016), former President Hollande (Parti Socialiste) asserts that "*nothing* will stop us from fighting terrorism" ("Attentat de Nice," 2016). It is through this rhetoric of eternal war – coupled with artful maneuvering between the provisions of the Constitution and the Declaration of Rights of Man and of Citizen – that permits the existence of a regime of exception in a democratic state.

The same democratic process that launches and normalizes a state of exception into pre-eminence can also eradicate constitutional loopholes and re-engrave the principles

of *proportionality* and *temporariness* into what are strictly crisis measures. Until this is realized, limits to France's state of emergency will become increasingly harder to envisage.

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