

Introduction

September 11, Counter-Terrorism and the Rule of Law

Anything can happen, the tallest towers
Be overturned, those in high places daunted...
Ground gives. The heaven's weight
Lifts up off Atlas like a kettle lid.
Capstones shift. Nothing resettles right.*

A DECADE HAS passed since the attacks in New York and Washington DC on 11 September 2001 claimed the lives of 2,973 victims and 19 hijackers. The response to those events has dramatically reshaped the relationship between states and individuals across the globe and nothing has resettled right. In the United States (US) the USA PATRIOT Act has extended the power of the state to conduct surveillance of its citizens.¹ In the United Kingdom (UK) the time an individual may be detained without charge has increased from 7 to 28 days, while some individuals are placed under indefinite house arrest.² In Australia legislation has introduced new criminal offences and new powers for intelligence agencies.³ Much of the action by states and international organisations in the 'war on terror' has been criticised because of its effect on human rights and the rule of law.⁴ The trend in both the US and UK has been towards pre-emptive intervention that attempts to eliminate threats to national security before they arise. Building on twentieth-century ideas of risk and actuarial justice, these trends undermine traditional legal protections by shifting the target of law enforcement from acts already committed to action that

* S Heaney, 'Anything Can Happen: After Horace, Odes, I, 34', *District and Circle* (London, Faber, 2006).

¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001. D Cole and J Lobel, *Less Safe, Less Free: Why America Is Losing the War on Terror* (New York, The New Press, 2007) 31–32.

² Prevention of Terrorism Act 2005, Terrorism Act 2006. For discussion see C Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, 2nd edn (Oxford, Oxford University Press, 2009); C Walker, *Terrorism and the Law* (Oxford, Oxford University Press, 2011).

³ J McCulloch and S Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the "War on Terror"' (2009) 49 *British Journal of Criminology* 628.

⁴ *Ibid.*

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may be committed in the future.⁵ The adoption of new counter-terrorism legislation around the world has given rise to several libraries' worth of popular and scholarly literature.⁶ However, amidst this proliferation of law and literature, there has been no sustained examination of EU counter-terrorism action. For present purposes, existing literature on EU counter-terrorism action may be divided into two broad categories: non-legal and legal. First, scholars in diverse disciplines including philosophy, criminology and politics have attempted to provide an overview of post-September 11, 2001 counter-terrorism action and have criticised the practical effects of EU law and policy.⁷ Second, legal scholars have described and critiqued various discrete measures adopted by the European Union (EU), including the Framework Decision on Combating Terrorism, the European Arrest Warrant and targeted asset-freezing sanctions.⁸ The latter works tend to focus strictly on the legal developments and implications for EU law. However, to adequately understand the diffuse effects of the 'war on terror' on the EU legal system it is necessary to draw on both legal and non-legal literature and develop a critique of EU counter-terrorism action that is rooted in the wider academic debate.

If the 'war on terror' provides the contemporary backdrop for this book then the rule of law is the legal concept at its core. The rule of law is an essentially contested concept⁹ which we most often hear of when it is being flaunted by outlaws or violated by states. This is because it is a political concept which comes to the fore when it is 'under stress' and is most valued in places where it has been ignored in the past.¹⁰ In such circumstances, opposing ideologies may view the principle as either a luxury or an indispensable necessity. The polarisation of opinions on the meaning and usefulness of the rule of law has been visible on both sides of the Atlantic since 11 September 2001. The actions of governments across the world have been criticised for violating the principle while some of those governments have attempted to evade such criticism by claiming that the 'rules of the game' have changed.¹¹ While some actions by governments have appeared unlawful others seem to exploit gaps in legal protection and cannot easily be called illegal. The relationship between the war and the rule of law is therefore a complex one in which both terrorism and action taken to combat it can reshape legal principles in new and challenging ways.

⁵ Cole and Lobel, n 1 above, p 1.

⁶ M Breen Smyth, J Gunning, R Jackson, G Kassimeris, P Robinson, 'Critical Terrorism Studies: An Introduction' (2008) 1 *Critical Studies on Terrorism* 1, 1.

⁷ See for some useful examples: L Amoore and M de Goede, *Risk and the War on Terror* (London, Routledge, 2008); JP Sterba (ed), *Terrorism and International Justice* (Oxford, Oxford University Press, 2003); P Scraton (ed), *Beyond September 11: An Anthology of Dissent* (London, Pluto Press, 2002); T Rockmore, J Margolis and AT Marsoobian (eds), *The Philosophical Challenge of September 11* (London, Wiley-Blackwell, 2004).

⁸ See, eg: E Dumitriu, 'The EU's Definition of Terrorism: The Council Framework Decision on Combating Terrorism' (2004) 5 *German Law Journal* 585.

⁹ WB Gallie 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167–98.

¹⁰ A Marmor, 'The Rule of Law and its Limits' (2004) 23 *Law and Philosophy* 1.

¹¹ T Blair, PM Press Conference, 5 August 2005.

I. TERRORISM AND THE RULE OF LAW

Terrorism poses several challenges to the rule of law, most notably through the action taken by states in response to it. However, the first challenge to the rule of law is posed by the act of political violence itself. For Montesquieu the rule of law exists ‘in order to avoid . . . constant fear created by the threats of violence and the actual cruelties of the holders of military power.’¹² On this basis, those who engage in terrorism operate contrary to the rule of law—as do all those who knowingly violate the criminal law. However, unlike most ordinary criminals, those who engage in *political* violence seek to fundamentally undermine the state and its legal order. While this threat can in some circumstances be real—such as the effective control the Provisional Irish Republican Army held over certain parts of Derry and Belfast in Ireland during the ‘Troubles’¹³—it seems unlikely that the modern terrorism could cause states in Europe or North America to collapse. As Lord Hoffmann defiantly declared in the Belmarsh case, ‘there is no doubt that we shall survive Al-Qaeda.’¹⁴ As such, while terrorism is a rejection of the rule of law, the real threat for liberal democracies often comes from the state’s response to the violence and not the violence itself.

The problem of response begins with the problem of definition. ‘Terrorism’ is, like the rule of law, a contested concept. Fortunately, when examining counterterrorism, which is the state’s response to what it perceives as terrorism, it is not necessary to venture too far into the debate on the definition of terrorism itself. It is sufficient to note that states, international organisations, and especially those involved in scholarly discourse, have failed to agree a definition of that which they seek to combat.¹⁵ The principal problem is that any definition of terrorism is considered pejorative. The link between ‘terror’ and ‘political violence’ can be traced to Robespierre and the Reign of Terror in the French Revolution. Robespierre described terror as ‘nothing else than swift, severe, indomitable justice; it flows, then, from virtue.’¹⁶ However, moral claims made by Robespierre were swiftly rebutted by Edmund Burke, who referred to the Jacobins as ‘those Hell-hounds called terrorists.’¹⁷ Ever since, the idea of ‘terrorism’ has been morally loaded, giving rise to the tired adage that one man’s terrorist is another man’s freedom fighter.¹⁸ The Thatcher government in the UK offers a clear example of a state

¹² Baron Charles de Montesquieu, quoted in J Sklar, ‘Political Theory and the Rule of Law’ in AC Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology* (Toronto, Carswell, 1987) 5.

¹³ D McKittrick and D McVea, *Making Sense of the Troubles* (London, Penguin, 2001).

¹⁴ *A v Secretary of State for the Home Department* [2004] UKHL 56 [96].

¹⁵ B Saul, *Defining Terrorism in International Law* (Oxford, Oxford University Press, 2006).

¹⁶ For a discussion of the origins of the term see the thoughts of Jacques Derrida in G Borradori (ed), *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago, University of Chicago Press, 2003) 102–03. For a useful perspective from cultural theory see T Eagleton, *Holy Terror* (Oxford, Oxford University Press, 2005).

¹⁷ E Burke, *Letters on a Regicide Peace* (1796).

¹⁸ C Gearty, ‘Terrorism and Morality’ (2003) *European Human Rights Law Review* 377. For an excellent exposition of the struggle over the use of the language in ‘terror’ in public debate see S Poole, *Unspeak* (London, Little Brown, 2006).

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attempting to gain advantage in conflicts through the use of language in relation to political violence. In the 1980s, Irish Republican prisoners in the Maze Prison sought special status as recognition that they were not ordinary inmates but rather political internees. Prime Minister Margaret Thatcher responded that

There is no such thing as political murder, political bombing or political violence. There is only criminal murder, criminal bombing and criminal violence. We will not compromise on this. There will be no political status.¹⁹

By denying the prisoners' claim to political status, she sought to deny the existence of a political dispute and to reduce the conflict to a simple case of a state enforcing its criminal law. While Thatcher prevailed at the time, former internees are now in government in Northern Ireland. In a similar vein, the UK Conservative Party recently issued an apology for Margaret Thatcher's branding of Nelson Mandela as a terrorist.²⁰ Defining 'terrorism' by reference to the moral legitimacy of the actor's cause is not a sound basis for law which requires general rules and equal application. A morally subjective approach to the definition of a crime would undermine the principle of legal certainty that is at the heart of the rule of law.²¹ It is for this reason that the international community has historically avoided defining terrorism per se, focusing instead on certain actions that may be carried out for political ends, such as hijacking an airplane.²² Indeed, so problematic is the term from the both legal and philosophical perspectives that some have called for it to be abandoned altogether.²³

The problem of defining terrorism is compounded by the state's tendency to overreact to it. The case reports of the European Court of Human Rights provide a plethora of examples of states that have strayed from fundamental legal principles in their attempts to respond to the real or perceived threat of political violence.²⁴ Indeed, the very first case before the Court concerned the anticipation of a threat to the integrity of the Irish state.²⁵ Much of the Court's law on the right to life, prohibition against torture and inhuman or degrading treatment and right to personal liberty has flowed from such cases. Rights violations by the Irish and British states in response to Republican and Loyalist violence, by the Spanish state in response to Basque separatists and by Turkey in relation to the Kurdish minority have all demonstrated the tendency of ostensibly liberal states to overreact to challenges to state authority. Violations of the European Convention on Human

¹⁹ M Thatcher, 'Speech in Belfast', 5 March 1981, available at www.margaretthatcher.org, last accessed 5 May 2010.

²⁰ 'Cameron: We Were Wrong to Call Mandela a Terrorist', *Independent* (26 August 2006).

²¹ All definitions of the rule of law include some element of legal certainty. See, for an example of a narrow definition that nonetheless includes legal certainty, J Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195.

²² Saul, n 15 above, p 129.

²³ C Gearty, 'Terrorism and Morality' (2003) *European Human Rights Law Review* 377.

²⁴ S Sottiaux, *Terrorism and the Limitation of Human Rights: The ECHR and the US Constitution* (Oxford, Hart Publishing, 2008).

²⁵ *Lawless v Ireland* (1960) 1 EHRR 1.

Rights are particularly noteworthy as the Convention contains clear limitations on rights and the facility to derogate from most rights in times of emergency.²⁶

Despite the problems for the rule of law caused by both the difficulty of definition and the tendency to overreact, perhaps the greatest challenge posed by terrorism and counter-terrorism to liberal democracies is its effect on political discourse. Most definitions of terrorism view the phenomenon as a form of violent communication.²⁷ The purpose of the violence is not merely the immediate harm caused, but the message sent by the act to the wider population and the state apparatus. Mutua notes that '[t]he broad and vague use of the term "terrorist" ... has had a chilling effect on legitimate debate and differences on serious issues both in the academe and in popular public and political discourses'.²⁸ The fear caused by political violence polarises politics and undermines rational discussion.

This polarised discourse is most clearly demonstrated by the chimera of 'balancing liberty and security' or, put more bluntly, by asking whose human rights come first.²⁹ It is in the tension between what is just and what is necessary that the true problems of legal philosophy are revealed.³⁰ As terrorism damages the fragile consensus on divisive philosophical issues, it raises the question of what a just society can legitimately do in response to actions that reject that society's very foundational values. In the aftermath of the September 11 attacks in New York and Washington DC, that question came to the fore and may well be the defining philosophical challenge of the twenty-first century so far.

II. A 'WAR ON TERROR'

The 'war on terror' was declared by US President George W Bush in the aftermath of the attacks on 11 September 2001. While many states have overreacted to terrorism, the reaction of the United States following the 2001 attacks has been singular. It was not the first time in history that the phrase has been, but it may be the most significant.³¹ The declaration of has shaped legal, political and cultural

²⁶ CA Gearty, *Principles of Human Rights Adjudication* (Oxford, Oxford University Press, 2003) 40–41.

²⁷ AP Schmid, 'Terrorism: The Definitional Problem' (2004) 36 *Case Western Reserve Journal of International Law* 375, 382.

²⁸ M Matua, 'Terrorism and Human Rights: Power, Culture, and Subordination' (2002) 8 *Buffalo Human Rights Law Review* 1, 10.

²⁹ T Blair, 'Labour Party Conference Speech 2005', *Guardian* (27 September 2005).

³⁰ F Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Leamington Spa, Berg Publishers, 1986) 12.

³¹ The *New York Times* records several pre-2001 uses of the phrase, including: 'The War on Terrorism: European Measures for its Extermination', *New York Times* (2 April 1881) in relation to Russian Anarchists; 'British Arrest Jewish Mayors', *New York Times* (5 August 1947), a story relating to violence in Palestine that made reference to the 'British war on terrorism' and 'Congress; The War on Terrorism, from Tripoli to Belfast', *New York Times* (30 April 1986), in relation to Irish republican links to Libya.

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debate ever since.³² Despite its initial popularity, the decision to declare war has been described as ‘a serious normative and pragmatic error.’³³ Normatively the declaration gave the status of soldiers to mere criminals, and pragmatically, it is a war that cannot be won.³⁴ In some respects the declaration could be considered a mere rhetorical flourish that was deemed a necessary response to the sheer scale of the violence.³⁵ The respected US commentator, Phillip Bobbit, has since claimed that the US is at the beginning of the ‘wars against terror’; a prophesy that threatens to cement a seemingly perpetual war in the public’s collective imagination.³⁶

The declaration of ‘war’ did have certain benefits from the Bush administration’s point of view. A war allows the US President to ‘invoke his special mystique as Commander in Chief’ and thus may provide the ‘rhetorical cover’ for acts of ‘questionable legality.’³⁷ Most pertinently, the ‘war’ has facilitated an important shift in global counter-terrorism—from a traditional criminal justice approach to one that is ‘pre-emptive’:

[T]he impact of 9/11, of the London bombings, and the continuing threat of catastrophic risk has significantly increased the pressure on governments to think and act pre-emptively. The trajectory towards anticipatory endeavour, risk assessment and intelligence gathering is accelerating.³⁸

After 11 September 2001, the Bush government developed various doctrines based on pre-empting terrorist attacks before they occur. These new doctrines are evident in both the external and internal counter-terrorism efforts of the US.³⁹ Externally, the US Security Strategy trumpeted the need for pre-emptive war:

The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.⁴⁰

Internally, the USA PATRIOT Act 2001 allowed law enforcement officers broad powers justified in terms of preventing a further attack on US soil.⁴¹ Perhaps the most memorable image of the pre-emptive approach to counter-terrorism

³² P Sands, *Lawless World: Making and Breaking Global Rules* (London, Penguin, 2005) 153.

³³ J Habermas, *The Divided West* (London, Polity Press, 2006) 14–15.

³⁴ *Ibid.*

³⁵ L Richardson, *What Terrorists Want: Understanding the Terrorist Threat* (London, John Murray, 2006) 208.

³⁶ P Bobbit, *Terror and Consent: The Wars for the Twenty-First Century* (London, Allen Lane, 2008).

³⁷ B Ackerman, ‘This is Not a War’ (2004) 113 *Yale Law Journal* 1870, 1871.

³⁸ L Zedner, ‘Pre-Crime and post-Criminology?’ (2007) 11 *Theoretical Criminology* 261, 264.

³⁹ The ‘paradigm of prevention’ was introduced by former US Attorney General John Ashcroft. See: J Ashcroft, ‘Speech to the Council on Foreign Relations’, 10 February 2003.

⁴⁰ The White House, ‘The National Security Strategy of the United States’, September 2002, available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/index.html>. For the case in favour of pre-emptive war, see: AD Sofaer, ‘On the Necessity of Pre-emption’ (2003) 14 *European Journal of International Law* 209.

⁴¹ Cole and Lobel, n 1 above, p 31.

has been the indefinite detention without trial of 'enemy combatants' at the military base in Guantánamo Bay and more recently at Bagram Airbase.⁴² The Bush administration's aim was made clear by former US Attorney General John Ashcroft: 'our single objective is to prevent terrorist attacks by taking suspected terrorists off the street'.⁴³

In taking a pre-emptive approach, the Bush administration reflected the risk society thinking that had become increasingly influential in criminal justice in the latter half of the twentieth century. A punitive turn and new thinking on crime prevention caused institutional cultures to shift more and more towards coercion and control.⁴⁴ While use of the criminal sanction was increasing, other forms of social control were also being developed: aimed at regulating the risks of modern life. This led to the rise of a mode of governance known as the 'risk society'.⁴⁵ Risks are 'consequences that relate to the threatening forces of modernization and to its globalization of doubt'.⁴⁶ Such risks might include damage to property from climate change, threats to public health from pandemics, and the dangers posed by global economic uncertainty. In recent decades, the threat of crime has increasingly been seen as such a risk. In the risk society, criminal behaviour is taken to be an ordinary part of life: 'a contingency for which there are risk technologies to help spread the loss and prevent recurrence ... a technical problem that requires an administrative solution'.⁴⁷

If this is how crime is understood then the goal of the criminal justice system 'is not to eliminate crime but, accepting the "normalization" of crime, to make tolerable the twin burdens of crime and control through systemic co-ordination'.⁴⁸ Therefore criminal justice is superseded by 'actuarial justice'.⁴⁹ Actuarial justice is

concerned with techniques for identifying, classifying and managing groups assorted by levels of dangerousness. It takes crime for granted. It accepts deviance as normal ... Thus its aim is not to intervene in individuals' lives for the purpose of ascertaining responsibility, making the guilty 'pay for their crime' or changing them. *Rather it seeks to regulate groups as part of a strategy of managing danger.*⁵⁰

⁴² K Greenberg, *The Least Worst Place: How Guantanamo Became the World's Most Notorious Prison* (Oxford, Oxford University Press, 2009).

⁴³ J Ashcroft, 'Prepared remarks for US Mayors' Conference', October 25 2001, available: www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm.

⁴⁴ D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago, University of Chicago Press, 2001).

⁴⁵ U Beck, *Risk Society: Towards a New Modernity* (London, Sage Publications, 1992).

⁴⁶ *Ibid.*, p 22.

⁴⁷ RV Ericson and KD Haggerty, *Policing the Risk Society* (Oxford, Clarendon Press, 1997) 40.

⁴⁸ I Brownlee, 'New Labour: New Penology? Punitive Rhetoric and the Limits of Managerialism in Criminal Justice Policy' (1998) 25 *Journal of Law and Society* 313, 324.

⁴⁹ M Feeley and J Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30 *Criminology* 449; M Feeley and J Simon, 'Actuarial Justice: The Emerging New Criminal Law' in D Nelken (ed), *The Futures of Criminology* (London, Sage Publishing, 1994).

⁵⁰ Feeley and Simon, 'Actuarial Justice', n 49 above, p 174 (emphasis added).

The final point is particularly important in the context of counter-terrorism. In the past the concept of 'dangerousness'⁵¹ was to justify the preventive detention of those considered a threat to public safety.⁵² Despite the precedent's resonance, determinations of dangerousness were primarily concerned with the characteristics of particular individuals.⁵³ Actuarial justice goes further by basing decisions in statistical analysis rather than individual judgments. It grounds its logic in the likelihood of criminality in those with particular traits rather than a prediction of outcomes in individual cases.⁵⁴ Feeley and Simon offer three characteristics of such an approach: the whole population is the target of power; that power is aimed at prevention and risk minimisation; and justice is viewed as the rationality of the system of control.⁵⁵ The primary goal is not deterring the public from committing crime, or seeking retribution against, or rehabilitation of, those who have broken the law. Rather it is to manage dangerous persons through incapacitation: curtailing their ability to interact with and harm the law-abiding majority. To achieve this objective, criminal law must be viewed as 'only one of a range of formal and informal forms of social control from which one has to choose in a rational way, unhampered by moral considerations'.⁵⁶ Even before 11 September 2001, courts were 'rethinking the values of constitutional criminal jurisprudence from an orientation deeply informed by actuarial justice'.⁵⁷

The resonance of post-September 11, 2001 action by the US government with risk society thinking is clear, both in terms of the targets of the action ('suspected terrorists') and the action itself (incapacitation). Thus, individuals captured overseas have been subject to indefinite detention in Guantánamo Bay and latterly Bagram Airbase. Political organisations have had their assets frozen in accordance with 'material support' legislation. Iraq was invaded ostensibly to pre-empt any use of weapons of mass destruction by Saddam Hussein. However, despite the superficial similarities, recent counter-terrorism efforts are not as compatible with an actuarial approach as they may seem. Two central differences exist. The first difference is caused by the incalculability of the threat. The risk society treats crime as predictable. On the other hand, 'the war on terror recognizes that the sheer uncertainty and randomness of terrorist attack renders conventional

⁵¹ Dangerousness is 'a pathological attribute of character: a propensity to inflict harm on others in disregard or defiance of the usual social and legal constraints ...'. See J Floud and W Young, *Dangerousness and Criminal Justice* (London, Heinemann, 1981) 20.

⁵² Ibid; N Walker, 'Unscientific, Unwise, Unprofitable or Unjust? The Anti-Protectionist Arguments' (1982) 22 *British Journal of Criminology* 276.

⁵³ J Steele, *Risks and Legal Theory* (Oxford, Hart Publishing, 2004), 43.

⁵⁴ E Silver and LL Miller, 'A Cautionary Note on the Use of Actuarial Risk Assessment Tools for Social Control' (2002) 48 *Crime Delinquency* 138, 139–43.

⁵⁵ Feeley and Simon, 'Actuarial Justice', n 50 above, p 177.

⁵⁶ I Brownlee, 'New Labour: New Penology? Punitive Rhetoric and the Limits of Managerialism in Criminal Justice Policy' (1998) 25 *Journal of Law and Society* 313, 323.

⁵⁷ Feeley and Simon, 'Actuarial Justice', n 50 above, p 180.

risk assessment techniques inadequate'.⁵⁸ Former US Defence Secretary Donald Rumsfeld has referred to the 'unknown unknowns'—those threats that we do not even know that we do not know about.⁵⁹ In the face of these unknowns, government agencies have taken to imagining potential future attacks: replacing the statistical basis of actuarial justice with a worst case scenario hypothesis.⁶⁰ Any action based on such an exercise can only be justified by reference to a possible future rather than one that is statistically probable.

The second difference between actuarialism and post-September 11 counter-terrorism lies in the attitude to the harm. Actuarial justice operates on the basis of crime as an everyday occurrence to be regulated and managed (but, implicitly, never eradicated). On the other hand, the Bush administration sought to prevent all terrorist attacks regardless of their likelihood. This 'One Percent Doctrine' was described by former Vice President Dick Cheney: 'If there's a 1% chance that Pakistani scientists are helping al-Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response'.⁶¹ While a traditional risk society accepts a certain level of violence, post-September 11 counter-terrorism does not. The acceptable level of risk is zero.

The difference between pre- and post-September 11 approaches to criminal justice and counter-terrorism in particular is captured in the use of the term 'pre-emption' rather than 'prevention'. Both preventive and pre-emptive approaches aim to avoid harm by incapacitating dangerous groups and individuals. However, since the al-Qaeda attacks, as the risk is considered incalculable, the potential damage catastrophic, and any harm intolerable, measured action based on prudential assessments is impossible. It is at this point that the approach shifts from prevention to pre-emption. Thus it can be said that 'prevention takes place when, for example, someone knows a house will catch fire today and tries to prevent it happening—even if that includes infringing property rights. [Pre-emption] would mean that one occupies the house, arguing that a fire could break out any time'.⁶² In this example, pre-emption entails a greater intervention without concrete evidence of harm. The same tendencies can be observed in post-September 11 counter-terrorism action. Cole and Lobel note that while 'preventive strategies have become increasingly common in ordinary criminal law enforcement as well ... the Bush administration's preventive paradigm is qualitatively more extreme'.⁶³

⁵⁸ M de Goede, 'The Politics of Preemption and the War on Terror in Europe' (2008) 14 *European Journal of International Relations* 161, 164.

⁵⁹ D Rumsfeld, 'Briefing to the US Department of Defence', 12 February 2002.

⁶⁰ M de Goede, 'Beyond Risk: Premediation and the Post-9/11 Security Imagination' (2008) 39 *Security Dialogue* 155, 158.

⁶¹ R Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of its Enemies since 9/11* (New York, Simon & Schuster, 2006).

⁶² O Kessler, 'Is Risk Changing the Politics of Legal Argumentation?' (2008) 21 *Leiden Journal of International Law* 863, fn 7. Kessler uses the example to highlight the difference between prevention and precaution, but it is equally applicable to the difference between prevention and pre-emption.

⁶³ Cole and Lobel, n 1 above, p 267.

A pre-emptive strategy is an enabler of government action. Pre-emption facilitates authoritarian counter-terrorism action because it demands that action be taken against an unknown threat and so consigns traditional ideas of prevention and deterrence to obsolescence.⁶⁴ For the state governed through pre-emptive counter-terrorism, the ideal situation is not the normalisation of violence, but the normalisation of the threat of violence. Whereas a successful attack may undermine the public's confidence in government's ability to fulfil its role as public protector, an ongoing sense of threat creates a political environment where anything is possible. To justify the extreme measures adopted following 11 September 2001, the Bush administration resorted to the flawed strategy of a 'war on terror', divisive political tactics, and the cultivation of an atmosphere of fear. Following the attacks, President Bush claimed 'every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.'⁶⁵ Statements such as these can be effective in coercing support from allies, quelling internal dissent, and engendering an Us/Them mentality amongst the population.⁶⁶ While this book does not examine US counter-terrorism in detail it is useful to draw out the key characteristics of post-September 11 counter-terrorism in that jurisdiction. The profound effect US policy has had on global counter-terrorism as well as the evident shift towards pre-emption that has taken place makes the US the paradigmatic example of action in this policy field in the past decade.

Pre-emptive measures go beyond risk society thinking, challenging legal principles and reshaping criminal justice. Three changes are evident. First, control of coercive power is shifted away from the criminal justice process and towards executive, administrators and private actors. When such mechanisms are employed for pre-emptive counter-terrorism, legal accountability is difficult, as executive organs of state are given much discretion in relation to national security matters. Second, just as the exercise of coercive power changes, so too does its target. In the absence of clear information on who poses a threat, the net is cast widely to catch all potential perpetrators. One CIA (Central Intelligence Agency) operative noted that the question asked is not 'whether the men could be linked to a crime, [but the] broader issue of whether the men posed a danger.'⁶⁷ Criminal offences are drafted more broadly to catch behaviour that may not cause harm but may offer support or encouragement to those that do seek to cause harm.⁶⁸ The third and final area of change relates to the nature of the action taken. Despite broadly drafted criminal statutes, many 'suspected terrorists' are not prosecuted.

⁶⁴ de Goede, n 60 above, p 162.

⁶⁵ GW Bush, *Address to a Joint Session of Congress and the American People*, 20 September 2001.

⁶⁶ The US/Them distinction is a cornerstone of the political philosophy of Carl Schmitt. See: C Schmitt, *The Concept of the Political* (Chicago, Chicago University Press, 2007).

⁶⁷ Quoted in M de Goede, 'Beyond Risk: Premediation and the Post-9/11 Security Imagination' (2008) *Security Dialogue* 155, 163.

⁶⁸ Eg, 'material support' laws under the USA PATRIOT Act. For a discussion, see: D Cole, 'Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror' in A Bianchi and A Keller (eds), *Counterterrorism: Democracy's Challenge* (Oxford, Hart Publishing, 2008).

In the absence of criminal prosecutions, control takes the form of incapacitation: preventive detention or the freezing of financial assets. Such severe measures blur the distinction between criminal, civil and administrative law enforcement. The general public, and ‘suspect populations’ in particular, find themselves subject to pervasive surveillance.⁶⁹ Once this Pandora’s Box has been opened, it is not easily closed—as demonstrated by the legal difficulties experienced by the Obama administration in closing Guantánamo Bay.⁷⁰ In the midst of the developing pre-emptive approach to counter-terrorism, rule of law principles are being challenged and reshaped.⁷¹

III. METHODOLOGY AND A FRAMEWORK FOR ANALYSIS

Despite the ubiquity of the rule of law in post-September 11 writings there remains an inherent methodological danger in its use—and that danger is that the criticism might slide towards vague denunciations of unsatisfactory law. This tension is a perhaps inevitable consequence of reliance on a concept such as the rule of law. In this book the rule of law is seen as a politico-legal ideal to which constitutional systems, and the EU in particular, aspire. But it is also seen as an umbrella term for a collection of legal principles, which, if upheld, lead to a better legal system and one that is more respectful of the inherent dignity of its subjects. This latter understanding of the rule of law means that the counter-terrorism measures assessed are criticised both for their doctrinal failings (a lack of legal certainty or the bestowing of wide discretion on executive and administrative actors) but also, in a ‘law in context’ manner, for the negative impact they have had on European populations. These developments are considered to be indicative of a trend in governance towards the ‘pre-emptive’—a term which in the present context springs from criminology but which has analogous counterparts in other areas of study of law and regulation. The approach taken in this book is to argue that the cumulative effect of these legal and socio-legal failings of EU counter-terrorism law, which is pre-emptive in nature, amounts to a failure by the EU to live up to the politico-legal ideal of the rule of law.

The book is divided into three parts. Part One presents the historical and theoretical background for the study and consists of this Introduction and the first two chapters. Chapter One analyses the development of EU counter-terrorism and in particular the ‘Action Plan Against Terrorism’, a forty page document of policies and legislative proposals aimed at securing Europe from terrorism. Chapter Two traces the development of the EU rule of law which is described as having two

⁶⁹ Paddy Hillyard’s work on the construction of a ‘suspect community’ in the UK under the Prevention of Terrorism Acts foreshadowed much of this thought: P Hillyard, *Suspect Community: People’s Experience of the Prevention of Terrorism Acts in Britain* (London, Pluto Press, 1993).

⁷⁰ D Cole, ‘Closing Guantánamo: The problem of preventive detention’, *Boston Review* (January/February 2009), available at: www.bostonreview.net/BR34.1/cole.php.

⁷¹ Cole and Lobel, n 1 above, p 33.

aspects: a constitutive aspect and a safeguarding aspect.⁷² The conception of the EU rule of law developed here is based on the work of Armin von Bogdandy.⁷³ It considers the rule of law as being concerned with both constituting the legal order and the safeguarding of individuals within that order. This conception is used for several reasons. First, it incorporates both the views of those who consider the principle as enforcing state power and those who claim it protects individual autonomy. Second, it is sufficiently flexible to incorporate an evolving set of rules under its safeguarding aspect. The particular usefulness of von Bogdandy's conception though is that it provides the intellectual tools to bridge the gap between the politico-legal ideal of the rule of law and the second understanding of the concept as a collection of legal rules and values about the nature of the law and its application. As such, it is suitable tool for use in a study faced with the methodological problems that have already been discussed.

In unpacking the concept, Chapter Two begins with a consideration of the community of law in the EU, describing the development of an international rule of law in Europe, and illustrating the manner in which the European Court of Justice (ECJ) ensured that European law was enforced. Having addressed the constitutive aspect of the rule of law, the focus switches to the principles that make up its safeguarding aspect. Here, it draws on the jurisprudence of the ECJ and the European Court of Human Rights (ECtHR) in elucidating the principles that must be upheld. Part One concludes by outlining the trends towards pre-emptive counter-terrorism in EU action and the manner in which the EU rule of law is vulnerable to being eroded by a pre-emptive approach.

Part Two contains an analysis of five areas of EU counter-terrorism action. Europe is no stranger to terrorism. It was an Anglo-Irish philosopher's condemnation of a French revolutionary that first wedded the concepts of political violence and terror. In the twentieth century—apart from the many acts of states in the two World Wars and afterwards that might be labelled 'terrorism'—a wide range of transformational and ethno-nationalist groups used violence as a means to further their political ends.⁷⁴ This history has led to counter-terrorism efforts by several European states at national level and sporadic attempts at co-operation at international level. It is thus hardly surprising that the EU became involved in counter-terrorism after 11 September 2001 and increasingly so following the attacks in Madrid and London in 2004 and 2005 respectively. As a result of the EU's action in this field, counter-terrorism action in Europe can now be described as taking place in one of three types of legal system: national, European Union or international. The distinction is not a clear one. EU Member States may pursue

⁷² Ibid.

⁷³ A von Bogdandy, 'Constitutional Principles' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, 1st edn (Oxford, Hart Publishing, 2006) 15–18. Note also the updated chapter: A von Bogdandy, 'Founding Principles' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, rev 2nd edn (Oxford, Hart Publishing, 2009) 28–33.

⁷⁴ L Richardson, *What Terrorists Want: Understanding the Terrorist Threat* (London, John Murray, 2006) 40–56.

national policies through EU law-making institutions or international treaties. Similarly, any EU law adopted as part of counter-terrorism action relies on the Member States to enforce it. The interaction between national, international and EU counter-terrorism policies reflects a wider migration of legal rules in this field since 11 September 2001.

Nonetheless, it is possible to identify legislation adopted at EU level and to study it as 'EU counter-terrorism'. Such measures are the subject of the analysis in this book. The objective of the analysis is to determine whether or not the adoption of the measures, their transposition into national law and subsequent enforcement has affected the rule of law in the EU. These measures all feature in the EU Action Plan and they facilitate an examination of different aspects of EU counter-terrorism action. The measures in question are the Framework Decision on Combating Terrorism (as amended); the Anti-Money-Laundering Directives; targeted asset-freezing sanctions; the Passenger Name Record Agreements and the Data Retention Directive; and the European Arrest and Evidence Warrants.

Part Three draws together the discussion and addresses the core question of how the 'war on terror' has affected the EU's commitment to the rule of law. Chapter Eight addresses the state of the rule of law in the EU today and how it is being reshaped by pre-emptive counter-terrorism. It brings together the various strands of thought from Part Two: the nature of EU counter-terrorism action and the effect on the rule of law. The conclusions suggest that the EU rule of law is being reconfigured to the detriment of both the EU legal order and those individuals subject to EU law. These developments are made all the more disturbing as they come at a time when EU law is playing an increasing role in criminal justice in Europe. The Epilogue looks to the future under the Lisbon Treaty, the Stockholm Programme and the newly-updated Council Action Plan against Terrorism. It asks whether the EU can develop more rule of law compliant counter-terrorism in the post-'war on terror' world.