



Article

# The European Union: Sword or shield? Comparing counterterrorism law in the EU and the USA after 9/11

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## Abstract

Drawing on the developing literature on a ‘European penology’ this article seeks to use counterterrorism as a lens through which to re-examine arguments concerning penal moderation in Europe. Counterterrorism measures adopted in the EU and the USA in the post-9/11 period are therefore scrutinized for the lessons they hold about the role of European values and institutions as a ‘shield’ against punitiveness or indeed their ability to, swordlike, cut deep into citizens’ freedoms. The resulting analysis raises questions about the need for a more refined approach to the question of ‘European’ penal values as well as pointing up the continued existence of a culture of rights in the USA.

## Keywords

Counterterrorism, European penology, human rights, punitiveness

## Introduction

Perhaps one of the richest seams of literature to emerge in response to Garland’s (2001) seminal *Culture of Control* is that which draws attention to the spatial or ‘cultural’ limits of his thesis (Garland, 2011). While many of these accounts focus on national idiosyncrasies, a more recent line of argument extends the criminological gaze outwards

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towards Europe and the role that European human rights standards and cultural norms may play in insulating member countries from repressive penal policies (Body-Gendrot et al., 2013; Daems et al., 2013; Snacken, 2006; Snacken and Dumortier, 2012; Van Zyl Smit and Snacken, 2009; Vaughan and Kilcommins, 2007). Building on the work of Whitman (2003) and others (e.g. Salas, 2005), this literature seeks to interrogate the significance of European values and human rights standards for penalty, particularly the opportunities they provide for ‘resistance’ to US-style punitive policies (Snacken and Dumortier, 2012). Writing in this journal, Snacken (2010), for example, has pointed to policies such as the rejection of the death penalty, the steady evolution of the European Court of Human Rights (ECtHR) case law on prison conditions; and the limits placed by the Court on states’ ability to criminalize certain behaviours in support of her argument that ‘penal moderation is in accordance with some of those fundamental values cherished by many Europeans’ (2010: 287). Taking up the mantle, Daems (2013) makes the case for a ‘European penology’, while emphasizing the common values that unite Europeans such as a liberal and cosmopolitan tradition. In the same volume Snacken and Van Zyl Smit (2013) argue that an understanding of European penology is better reached by focusing on the specific European institutional context, namely, the Council of Europe but also the European Union, an actor which since the creation of the Area of Freedom, Security and Justice (AFSJ) in 1999 has become increasingly active in the penal field. Here too we are witnessing a deepening commitment to human rights in its activities, with the role of human rights now formally reflected in the form of the European Charter on Fundamental Rights, now in force and legally binding on Member States when implementing EU law.

One area which has remained relatively under-examined in the context of this debate—and which this article seeks to address—is the field of counterterrorism, with only cursory discussions in the literature on the role of security matters in ratcheting up the punitive climate in Europe (Dumortier et al., 2012: 109–110; Snacken and Van Zyl Smit, 2013: 22). While this may be unsurprising in light of what Zedner (2007: 264) has described as the tendency of counterterrorism to remain ‘outside the normal boundaries of criminological knowledge’ it is nevertheless an omission in terms of the significant influence it has wielded over European crime control policy. Conceived precisely at the moment when the EU was beginning to assert itself in the criminal justice field, EU counterterrorism law and policy (such as the European Arrest Warrant, asset freezing measures, data retention and surveillance legislation, etc.) has become the ‘central driver’ (Murphy, 2013: 169) of European criminal justice cooperation in the past decade. This has been accompanied by a literature expressing concern about the securitized nature of European criminal law and justice, particularly the impact which counterterrorism policy has had on the evolution of ‘ordinary’ crime control policy in the Union since the area of ‘freedom, justice and security’ first emerged in 1999 (Baker, 2010; Baker and Roberts, 2005; Loader, 2002; Mitsilegas et al., 2003). In a report commissioned by Privacy International, for example, Hosein (2005) argues that European counterterrorism policies such as the interception of communications and data retention/profiling go much further than those adopted in the USA and furthermore (unlike US policies) lack transparency or a robust process of policy deliberation in order to keep such powers in check. In the most comprehensive study of this issue to date, Baker (2010) characterizes the

Union's existing role as a penal actor as 'governing through security' rather than 'governing through crime' (the latter being of course a reference to Simon's (2007) argument concerning the use of crime as a mode of governance in the USA). Applying this framework to the European Union, Baker observes some evidence of victim focused/crime control thinking in terms of security policies that have been adopted so far with many of these, such as the European Arrest Warrant, having been somewhat hastily adopted in the face of the 'terrorist threat' (Caneppele, 2013). Indeed, the influence of counterterrorism on criminal justice policy in the Union has been such that Dumortier et al. (2012) describe it as a 'turbo' to the penalization engine which has resulted in a significant escalation in penal measures and the punitive climate in Europe. Discussion such as this casts Europe in a very different light, one much more aligned with the US position where security demands, particularly since 9/11, have pushed it to 'the brink' (Baker, 2010: 206) of a more punitive approach.

Given the different approaches taken by these two literature streams, this article seeks to use counterterrorism as a lens through which to re-examine arguments concerning penal moderation in Europe. Adopting the metaphor employed by Dumortier et al. (2012), the counterterrorism example is scrutinized for the lessons it holds about the role of European values and institutions as a 'shield' against punitiveness or indeed their ability to, swordlike, cut deep into citizens' freedoms. To this end, a comparative approach—contrasting developments in the EU with those in the USA—is adopted given the insights it affords into the question of Europe's position in relation to the rest of the world (Pakes, 2015: 5). Through cross-Atlantic comparison of counterterrorism law and policy we gain a better perspective on European initiatives, particularly given the frequent use of the 'punitive turn' in the USA as a foil for arguments concerning a European penology (see, for example, Daems, 2013: 27–28). As the EU is a supranational body and not a sovereign state like the USA it goes without saying that the nature of the comparison is not strictly 'like-for-like'; inter-state measures such as the European Arrest Warrant do not have a meaningful equivalent in the USA, for example. As comparative scholars such as Dannemann (2006) have remarked, however, we should beware of a rigid focus on similarity/difference and instead seek to strike a proper balance between these qualities in accordance with the purpose of the comparative inquiry.

In line with the approach taken by members of the 'European penology' school of thought, 'punitiveness' for this purpose will be defined broadly incorporating: 'a wide variety of actors' ranging from 'primary criminalization by legislators, to decisions taken by practitioners within the criminal justice system (police, prosecution, sentencing, etc.), or to attitudes of revenge or forgiveness of victims of crime' (Snacken and Dumortier, 2012: 2). The article thus proceeds in the next part to provide an overview of European Union and US law and policy in this area in the period since 2001, examining some of the key measures taken by the USA and the European Union in response to the events of 9/11. This is followed by a more detailed look at some of the most significant criminal law measures adopted with the Framework Decisions on Combating Terrorism (hereafter 'FDCT') and the European Arrest Warrant (hereafter 'EAW') providing the main focus as the flagship measures in the EU response (Hassan, 2010).<sup>1</sup> Extra-legal measures are subsequently examined in line with suggestions in the literature that many of the coercive practices associated with the 'war on terror' have been deployed outside of the

criminal process (Lazarus et al., 2013). The final part discusses the implications for the literature arising from a survey of law and policy in this area. The resulting analysis, it is argued, reveals a more nuanced situation than is often assumed to be the case: while the highly punitive measures taken by the USA in the period immediately following the 9/11 attacks cannot be gainsaid, some of these have been subsequently watered down or abandoned. They have also, to a significant degree, been ‘contained’ within the exceptional realm. In contrast, the significant body of EU counterterrorism legislation which has accrued since 9/11 has driven radical and *permanent* change in at least some areas of mainstream criminal law and procedure in EU Member States.

## EU and US responses to 9/11

### Background

In order to fully appreciate EU activism in this area it is necessary to briefly trace the ‘genealogy’ of the European approach to counterterrorism (Hassan, 2010). Beginning with the 1992 Treaty of Maastricht which first conferred competence on the Union in the field of justice and home affairs, justice policy at the time of the Twin Towers attack had evolved to the point where agreement had been secured to the construction of an ‘Area of Freedom, Security and Justice’ (AFSJ) and to the principle of mutual recognition. The 9/11 terrorism emergency thus occurred precisely at the moment when the EU was beginning to assert itself in the criminal justice field resulting in counterterrorism becoming the focal point for the development of the EU’s role in this area (Murphy, 2011). The sheer volume of counterterrorism measures adopted by the EU bears testament to this with a recent report by SECILE (2013) identifying 239 such measures for the period 2001–2013. While implementation of some of these measures has been patchy (Den Boer, 2006; European Commission, 2007), many of the most significant (and controversial) instruments in terms of their impact on domestic criminal justice, for example, the European Arrest Warrant, have now been successfully transposed and implemented by Member States (Coolaset, 2016; European Commission, 2014).

Following the attacks the European Council hastily arranged an extraordinary (emergency) meeting of the *chefs de cabinet* in Brussels on 20–21 September. The meeting sought to address the deficiencies in EU action in this area, namely, the lack of a common legal definition of terrorism, the absence of a harmonized system of penalties and a basis for accelerated extradition, and set itself the deadline of December 2011 to reach agreement on several legal acts (Monar, 2005). Most prominent among these was the adoption of a framework decision on the EAW and a decision harmonizing Member States’ penal laws on the definition and sentencing of terrorism (FDCT). While the European Commission had been working on proposals in these areas for many months it is difficult to overstate the transformative effect of the 9/11 attacks in this area. As Den Boer (2006: 90) has written, ‘all of a sudden decisions were possible on dormant dossiers’. By 27 December 2001, the EU had constructed a common definition of terrorism and issued a common list of terrorist organizations, the first such definition by an international body, although final adoption of the FDCT was delayed until 13 June 2002 because of parliamentary scrutiny. The EU Framework Decision on the Arrest Warrant and the Surrender

Procedures between Member States (Council of the European Union, 2002a), which overhauled the law on extradition between Member States, was similarly delayed due to parliamentary scrutiny until 13 June 2002.

The period after the Madrid bombings saw fresh impetus brought to this area. The European Council adopted a new declaration on combating terrorism on 25 March containing 57 specific measures, many of which as Statewatch (2004) has commented were only vaguely related to terrorism *stricto sensu*. In 2005, after the 7/7 London bombings, the Counterterrorism Strategy sought to simplify the wide range of counterterrorism measures for Member States under four headings (prevent, protect, disrupt and respond). The commitment to 'prevention' in the 2005 Strategy marks another point of distinction with the US strategy which has been less concerned with the 'root causes' of terrorism. As Coolaset (2011: 238) has pointed out, however, the degree of consensus on this point should not be overestimated: 'among the EU member states, most were adamant that the emphasis should be on repressive measures'.

Compared with the scale of the European response, the body of US legislation over the same period appears rather more modest. The US Patriot Act 2001 hastily adopted by Congress in the aftermath of the attacks was followed by two large pieces of reforming legislation, namely, the Department of Homeland Security Act 2002 and the Intelligence Reform and Terrorism Prevention Act 2004. The former effected probably the largest overhaul of government structure in the period since the Second World War in establishing the Department of Homeland Security and the latter *inter alia* created a new director of national intelligence in an effort to centralize the intelligence function. Subsequent legislation, however, appears more reactive than proactive, responding to the decisions of the courts on the rights of military detainees and controversy surrounding the National Security Agency (NSA) warrantless spying programme.<sup>2</sup> The impact of the legislation also appears less significant than in other countries: Roach (2011: 161) describes the Patriot Act as 'mild compared to the responses of other democracies' and Banks (2005) similarly wonders how the Patriot Act became a 'lightning rod' for critics of the Bush administration. In fact, many of the most infamous responses to the attacks were measures taken unilaterally by the executive in the years immediately following the attacks such as: the detention of more than 5000 foreign nationals; the indeterminate detention of suspected terrorists or 'enemy combatants' in Guantanamo Bay; the 'disappearance' of persons into so-called CIA 'black sites' or secret prisons; and 'extraordinary rendition' of suspects to countries where they are at risk of torture. Some of these actions such as the detention of 'enemy combatants' have been justified with reference to the Authorization of Military Force (AUMF) passed by Congress in a direct response to the events of 9/11. This resolution authorizing the President to 'use all necessary and appropriate force' against the perpetrators of 9/11 was sweeping in its breadth and represented a clear endorsement of the 'war model' by Congress (Oliverio, 2008). Gradually, however, through litigation and public opposition, many of these policies have begun to be reversed (see later).

## **Criminal law measures**

As noted earlier two of the signal reforms introduced by the EU in the period immediately following 9/11 concerned a common definition of terrorism (FDCT) and a new

procedure for extradition between Member States (EAW). Each of these measures will be considered separately below.

### *FDCT: Terrorism offences*

As the trigger for a wide range of coercive powers (Amnesty International, 2005; Murphy, 2012a) the definition of terrorism is obviously critical, however, in an EU context this issue assumed particular importance as so few Member States had any specific legislation criminalizing terrorism prior to the adoption of the Framework Decision in 2002 (Amnesty International, 2005; Argomaniz, 2009). Indeed, the number of Member States with legislation which criminalized terrorist acts autonomously went from six prior to 9/11 to 22 by 2007 (Chaves, 2015). Roach (2013: 29) describes this as ‘an explosive growth’ or ‘viral propagation of anti-terrorism laws in Europe’ whose impact should not be underestimated.

In terms of reforms at Member State level, the definition of terrorist offences inevitably led to the adoption of new criminal offences in those states without anti-terrorism legislation (Chaves, 2015). Legislation was also required in those states which already had counterterrorism legislation in place given that they all had definitions of terrorism that were narrower than the EU’s (Chaves, 2015). In the 2002 FDCT these new offences took the form of directing, creating, supporting or participating in a terrorist group and this was extended in 2008 to include offences of public provocation to commit a terrorist offence, recruitment and training for terrorism (including via the internet). These offences have been criticized for the threat they pose to fundamental legal principles as well as the preventative or pre-emptive direction in which they take the criminal law (Murphy, 2012a). Indeed, such was the concern of the European Parliament about the 2008 amendments that it sought to introduce human rights safeguards into the legislation, amendments which were rejected by the Council, save for a declaratory (and arguably superfluous) statement regarding the general requirement to respect fundamental rights (European Parliament, 2008). It is worth noting that all of these offences are subject to enhanced sentencing as the Decision also provided for minimum maximum sentences (15 years for directing and eight for participatory or preparatory acts). This is the case even if group offences are not applicable to an individual given the requirement for Member States to enact ‘effective, proportionate and dissuasive’<sup>3</sup> criminal penalties for all offences linked to terrorism (Murphy, 2012a). Unlike the EU, the USA, constrained by First Amendment principles of freedom of association, did not enact multiple new terrorist crimes such as membership or incitement to terrorism. The only new offences created by the Patriot Act were those relating to attacks on mass transportation<sup>4</sup> and harbouring or concealing terrorists<sup>5</sup> as well as some minor changes to the offence of providing ‘material support’ for terrorism.<sup>6</sup>

In Europe, moreover, the problems associated with these associative and preparatory offences are compounded by the EU definition of terrorism itself. This definition is also expansive, defining terrorist acts as those committed with the aim of:

seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or

destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

(Article 1(1))

The list of offences goes beyond violence to include serious property damage ‘likely to result in major economic loss’ (Article 1(1)(d)), a move which has been criticized, particularly when interpreted in the context of the broadly drafted reference to ‘unduly compelling’ a government (Douglas-Scott, 2004). While drafted more tightly than the UK provisions, it does appear broader than the definitions adopted by most of the UN conventions on terrorism and the Patriot Act itself (Roach, 2011, 2013; Zedner, 2013). Indeed, Roach (2011: 181) describes the latter’s approach as ‘comparatively restrained’ in terms of its narrow focus on ‘violent acts or acts dangerous to a human life’ and the absence of reference to religious or political motives.

### *European Arrest Warrant*

The European Arrest Warrant (EAW)—‘the jewel in the crown of the EU’s response to the terrorist attacks’ (Douglas-Scott, 2004: 223)—probably represents one of the most prominent yet possibly also the most controversial of the EU counterterrorism measures (Van Sliedregt, 2010). While proposals for the EAW predated the events of 9/11, negotiations between Member States on this sensitive area were so protracted that it really only became ‘politically palatable’ (Murphy, 2012b: np) in the period after the attacks. Indeed, while the proposal had already been under preparation by officials for a period of two years, national views on the most basic features of the instrument were ‘very, very far apart’ (Kaunert, 2007: 396) until the events of 9/11.<sup>7</sup> The measure, adopted in a Framework Decision of 13 June 2002 (Council of the European Union, 2002b), revolutionized laws relating to extradition in the EU, effectively transforming what was once a detailed judicial procedure with strict legal requirements such as the dual criminality rule<sup>8</sup> into an administrative ‘box ticking exercise’ (MacGuill, 2012). The procedure is now a summary one whereby the merits of the request are taken on trust and the receiving Member State is obliged to execute an EAW unless one of the very limited grounds of objection is applicable. The considerable efficiencies gained by the measure (particularly the reduction in delays) have been noted by the European Commission (2011), something which, given that justice delayed is often justice denied, may well work in ease of requested persons. Yet the benefits in terms of expeditious hearings must also be considered against strong concerns voiced about disproportionality, violations of procedural rights, poor detention conditions and the imprisonment of innocent persons (European Parliament, 2014; Hammarberg, 2011). While space constraints do not permit a full examination of the concerns voiced, two observations relevant to the current argument can be made. First, as with the FDCT discussed earlier, it is surprising given the ostensible respect for human rights principles proclaimed in various EU legal instruments that the prospect of serious breaches of human rights was not expressly stated as a ground on which extradition could be refused, an omission which has led to highly variable protection of rights across Member States (Anagnostopoulos, 2014; Magyar, 2012).

Another significant concern is with net-widening or ‘function creep’ (Argomaniz et al., 2015) which was evident from the legislation’s inception: while it was presented to Member States and to the public as a key counterterrorist measure it included within its scope a long list of (32) offences, many of which, such as road traffic offences, are not even offences of specific intent.<sup>9</sup> Unsurprisingly, this has resulted in the majority of requests being issued for ordinary rather than terrorist offences as well as the systematic use of the EAW procedure for minor offences (European Parliament, 2014). This is unfortunate given the severely damaging effect which the disproportionate use of the EAW can have on individuals sought by requesting states; not only may they be taken away from their homes, families and employment for a lengthy period, perhaps for years, but they will in all likelihood be denied bail by virtue of the very fact of being a resident of another country (Fennelly, 2007).

This picture of radical change in the form of a radical new binding system of surrender stands in marked contrast to the dearth of fundamental criminal justice change to the domestic system in the USA (Roach, 2011). While inter-state measures relating to extradition have no functional equivalent in the USA, as a sovereign power rather than a supranational body it could also have introduced legislation to facilitate preventative arrests, to curtail *Miranda* rights<sup>10</sup> or to erode the accused’s right to disclosure yet it did not (Roach, 2011). Hybrid new civil/criminal measures such as control orders (UK) or special trial procedures as introduced in the UK and the Netherlands might also reasonably have been expected following the greatest ever attack on US soil, yet these too were notable by their absence (Van Sliedregt, 2010). Indeed, as discussed in more detail below, far from a ‘levelling down’ of procedural protections in the domestic criminal justice system, there has in fact been a ‘levelling up’ of core procedural guarantees to military detainees.

## Extra-legal measures

It is probably the range of illegal conduct engaged in by the US executive in the period post-9/11—namely, torture, extra-legal detention/rendition and the use of military tribunals rather than civilian courts—that has both elevated the United States to international notoriety and provided the most vivid illustration of ‘difference’ between the US and European approaches to punishment. Snacken and Van Zyl Smit (2013) make the (very valid) point that while torture, rendition and detention centres outside of judicial control have gained increasing acceptance in the USA (in the period prior to 2009 at least), in Europe bodies such as the European Court of Human Rights (ECtHR) and the European Committee for the Prevention of Torture (CPT) have increased supervision of places of detention and expanded the definition of torture. While some of these measures have been defended in the USA based on Congress’s AUMF and convoluted legal opinion (see, for example, the infamous ‘torture memos’: Greenberg and Dratel, 2005), it is clear that by international standards they constitute serious breaches of human rights which test the limits of the appropriate exercise of executive power.

These measures have not gone uncontested, however. A fact which is perhaps less appreciated outside of the USA is that in recent years legal and political opposition has gradually brought an end to some of the worst abuses: most of the detainees have been



released from Guantanamo Bay (although it remains open); torture and inhumane treatment are no longer official US policy; the CIA's black sites are closed; there have been no reports of rendition in years; and the widespread detention of Muslims which occurred in the immediate post-9/11 period has not been repeated (Cole, 2011; Murphy, 2012b). After some years in operation, a more considered view may also be taken on the quality of justice administered in US military tribunals. Following the long line of litigation in the US Supreme Court on the rights of Guantanamo detainees, some of the most important procedural protections such as the right to disclosure have been extended to military detainees under the Military Commission Act 2009. While the *Miranda* rule and speedy trial arguments cannot be made by suspects tried before military commissions, statements admitted as evidence are subject to the voluntariness test as in civilian trials and disclosure rules are closely modelled on the Classified Information Procedure Act 1980 (CIPA) principles that govern civilian criminal trials (Cole, 2013). Thus, in an interesting subversion of Whitman's (2003) arguments about the USA's tendency to 'level down' or reduce all offenders to a low status, procedural protections have in fact been 'levelled up' to these detainees, rather than 'levelled down' for all citizens (as occurred in Europe). These developments should also be considered against a conviction rate of 80 per cent for military tribunals (White, 2004 in Jacobson, 2006) which, compared with a conviction rate of 89 per cent for terrorist prosecutions in the Federal Courts (Center on Law and Security, 2010) casts doubt on widespread perceptions of such courts as a 'kangaroo court' (Cole, 2013). All of the above allows a much more optimistic verdict than would have been returned some years ago. Indeed, Cole (2011) argues that the rule of law has been more resilient in the USA than many commentators would have predicted in the immediate post-9/11 period.

While the EU has no equivalent to the detention of 'enemy combatants' in Guantanamo Bay, even in this area we should not be too quick to draw conclusions based on fundamental cultural differences. We do not have to probe very far into the history of European jurisdictions and their experience with terrorism to witness similar strategies: France's use of torture, military/state security courts and the paradigm of 'preventive justice' in the fight against Islamic terrorism provides a good illustration in this regard (Garapon, 2006). Likewise, the EU's position on such illegalities is somewhat more ambiguous than is commonly understood. While known for its strong commitment to the rule of law (Baker, 2013), it has also been criticized for its failure to take a more assertive role on human rights standards in the 'war on terror', with Human Rights Watch (2007) describing it as 'punching well below its weight'. Indeed, it is clear that with regard to some of the abuses associated with the war on terror, including the provision of logistical support to US air carriers engaging in illegal renditions, several of the European states do not come with clean hands. A Council of Europe report (Marty, 2006) on the matter found 14 European countries colluded in a system of illegal US detentions and transfers with subsequent reports (Marty, 2007, 2009) naming Poland, Romania and Lithuania as the sites of secret CIA prisons. This was further supported by an investigation by the European Parliament (2007) which found that at least 1245 flights operated by the CIA flew into European airspace or stopped over at European airports between 2001 and 2005 (plus an unspecified number of military flights for the same purpose). Most recently, Poland has become the first EU Member State to be found complicit in the CIA's secret detention

programme and responsible for multiple violations or rights in breach of the ECHR.<sup>11</sup> This finding—by the European Court of Human Rights (Council of Europe) rather than the European Court of Justice (EU)—begs the additional question as to why the European Commission failed to bring a rule of law challenge under Article 7 of the Treaty against those states who allowed rendition on their territory to show its seriousness about human rights (Douglas-Scott, 2008–2009).

## Implications for the literature

At the beginning of this article we noted the emerging literature on the distinctive features of a European criminal law and the role of human rights as a bulwark against US-style punitiveness. While the authors are careful to place question marks after both book titles (*viz.* Daems et al., 2013 *European Penology?*; Snacken and Dumortier, 2012 *Resisting Punitiveness in Europe?*), it is clear, as Tham (2013: 566, emphases added) observes, that ‘the sympathetic idea of common liberal values grounding European states, [is] put forward both as *description* and *prescription*’. The above discussion does little to trouble these arguments concerning the protective influence of the human rights standards promulgated by the Council of Europe and the European Convention on Human Rights (ECHR) which, to be fair, form the authors’ main focus (see Daems et al., 2013: v). It does, however, raise some questions about the coherence of a ‘*European*’ penology, particularly as applied to the policies of the European Union. This is for three reasons, based on the above discussion. First, while the Union may strongly endorse human rights values in the Charter and elsewhere, these are less in evidence in the counterterrorism, and by extension, ordinary criminal justice sphere. The failure of the Council to include formal safeguards protecting fundamental rights in the 2008 amendments to the FDCT, even in the face of objections from the European Parliament (2008), is a case in point. Even more significant is the omission of human rights grounds as a formal bar to extradition in the Framework Document on the EAW, resulting in the propagation of ‘an approach to extradition which places mutual recognition above the human rights of the requested person’ (Magyar, 2012: 4). There is also the second important question of the expanding parameters of the penal state as achieved through the second Framework Decision (FDCT). As we have seen, ‘an explosive growth’ in anti-terrorism law in this field has meant that even the six Member States which already criminalized terrorist acts were required to enlarge the number and type of behaviours included in legislation. Proscription of a wide variety of participatory and preparatory acts related to terrorism together with enhanced penalties for these offences may not lead to an immediate increase in punishment, but may result in increased punitiveness over time, as the police and prosecutorial authorities become more familiar with the new laws (Chaves, 2015). This is all the more likely in the new legal and institutional environment where the Commission and the European Court of Justice have full enforcement powers over counterterrorism measures, and where counterterrorism now exists as an established policy domain, thus marking an important difference with the counterterrorism measures of the past (Argomaniz, 2011). Rather than a ‘shield’ against the expansion of the penal state, therefore, this legislation better fits with the concept of Europe as a ‘sword’ (Dumortier et al., 2012) advancing the reach of the criminal law, particularly for those protestors and

opposition groups who may be caught up in the ambiguities of the broad definition of terrorism. As we have seen, similar measures criminalizing what may be termed 'abstract danger' were not adopted in the USA, probably on account of the strong First Amendment protections (Roach, 2011).

The final, and critical issue, concerns the spillover effect of counterterrorist legislation into the 'ordinary' criminal justice sphere, a tendency which is by now well documented (Hillyard, 1994). Unlike the USA (and to a lesser degree the UK) the EU has chosen to confine its counterterrorism measures to the criminal justice realm. While commendable, as Zedner (2014) observes, this carries its own hazards in terms of the risk of over-criminalization and incorporation of 'exceptional' procedures into normal criminal justice practice. In this regard at the EU level we may observe a pattern of EU Member States approving a policy to counter terror but including within its ambit a range of other crimes (Hosein, 2005; SECILE, 2013; Statewatch, 2004). The European Arrest Warrant probably provides the best example of this as a policy which was presented to Member States as a counterterrorism measure but applied to a significantly larger number of ordinary offences. Its systematic application to ordinary and indeed minor offences such as road traffic infractions has had punitive consequences for many thousands of Europeans with nearly 55,000 warrants issued in the period between 2005 and 2009 alone (European Parliament, 2014). A similar logic can be seen at work with the proposed European Investigation Order (EIO), another ambitious legal instrument which is listed as a counterterrorism measure in the EU's current counterterrorism strategy, but which will have significant implications for evidence gathering and fundamental rights principles in respect of all criminal offences (Anagnostopoulos, 2014; Murphy, 2012a). In the USA, on the other hand, this process of contamination has been less pronounced; while there have been reports of Patriot Act powers being used by law enforcement in the prosecution of other serious offences (Dworkin, 2003), one of the paradoxical effects of the violent nature of the 'war on terror' abroad is the protective effect it has had on the *internal* criminal justice system (Roach, 2011).

### Which 'Europe'?

In light of the above is there a need for a more refined approach to the question of 'European' penal values, one which perhaps distinguishes to a greater degree between different branches of the European institutional family? As Douglas-Scott (2008–2009: 85) has written in her survey of EU action in the security and justice field, the European Union has so far done less towards the goal of a Europe 'that can represent itself to the world as a continent of human values', than the 'other Europe' of Strasbourg and the ECHR. This is of course a reference to the Council of Europe, an international organization focused on promoting human rights, democracy and the rule of law in Europe and promulgator of the ECHR. While there is certainly a degree of overlap between the Council of Europe and the EU in terms of their commitment to human rights standards, it is also clear from the above discussion that the Realpolitik of EU criminal justice has often subordinated human rights to the perceived imperative of security.

A further interesting point is the extent to which this argument can be applied and extended to the institutions of the EU itself. Viewed through the lens of counterterrorism

law and policy, it is probably the European Parliament, of the three institutions of the EU (Council, Commission and Parliament), that has demonstrated the greatest commitment to human rights principles—witness its investigations into the CIA extraordinary rendition programme (European Parliament, 2007); its criticisms (cited earlier) of legislative overreaching in the 2008 Framework Decision; and its recent report calling for EAW reform (European Parliament, 2014). Servent (2010: 192) agrees, through her observation that ‘the EP [European Parliament] has developed a reputation for engaging in a strategy of contestation that questions the given balance between security and liberty’ (see also Murphy, 2013). All of this raises significant questions about the extent to which ‘Europe’ and even the European Union itself speaks with one voice, beyond what one may perhaps consider ‘baseline’ values such as the prohibition of the death penalty.

It is likely that these institutional dynamics will assume a new relevance given the entry into force of the Lisbon Treaty and the now increased capacity of the Parliament in decision making in sensitive areas such as counterterrorism. In this new context there may well be greater opportunities for the European Parliament to ‘de-securitize’ (Servent, 2010). Liberalizing measures may also follow what Murphy (2013) describes as a ‘push back’ in this area and a new emphasis on procedural rights and enhancing mutual trust in line with the Stockholm Programme and its successor.<sup>12</sup> All of these developments caution against drawing too sharp a contrast between mutual recognition and human rights as well as the complementarity which may exist in Europe between crime control and due process measures (the latter being necessary to build the mutual trust for the former) (Vaughan and Kilcommins, 2010). Lest this should suggest a brave new dawn in EU criminal justice, however, it is worth noting that while enhanced procedural protections may balance out the so far unduly repressive tone of European criminal justice, it is highly unlikely that we will see any of the existing counterterrorism measures reversed (Chaves, 2015; Murphy, 2013). Indeed, the permanent nature of much of the European legislation since 9/11 forms another important point of distinction with US counterterrorism measures taken over the period (Hassan, 2010; Murphy, 2012b). The exceptional measures unilaterally taken by the US executive in the period immediately following 9/11, though egregious and (probably) illegal, have at least permitted a certain retrenchment in the face of political and legal opposition.

### *The culture of rights in the USA*

It may be that in many ways the US case benefits from a longer-term view or less episodic analysis. While not gainsaying in any way the highly punitive measures taken by the USA in the period immediately following the Twin Tower attacks, it is undeniable that a longer-term view of US counterterrorism policy reveals the cracks in an executive approach which endorsed torture, indefinite detention and rendition. This should also be considered against a considerable degree of legislative restraint with regard to domestic criminal procedure. As has been discussed, the significant changes which counterterrorism law and policy have effected in the ‘ordinary’ EU criminal justice sphere contrast sharply with the more conservative approach to law reform adopted by the US state in the post-9/11 period. Though rarely acknowledged in the literature, or indeed wider discourse (though see Liptak, 2011),

the fact remains that a decade after 9/11 and the prosecution of many home-grown terrorist plots, there has been little serious discussion or contemplation of new legislation that would limit the rights of American citizens in attempt to prevent terrorism.

(Roach, 2011: 477)

Indeed, the lack of fundamental reform has led Jacobson (2006: 133) to criticize what he sees as the 'sacrosanct' nature of the US criminal justice system and Garapon (2006) similarly to chastise the USA for its 'inflexibility' (in comparison with France). It is important to stress again, however, that this is not in any way to gainsay or minimize the abuses that occurred in the years immediately following the attacks. While there has been a desire to keep domestic protections intact for US citizens, there has also been much infamous conduct directed at non-US citizens both inside (e.g. the 9/11 detainees) and outside of the USA. Arguments concerning the relative stability of the US criminal justice system in the period post-9/11 must therefore acknowledge the important trade-offs which have occurred between citizen and non-citizen rights, particularly in the years immediately following the atrocity (Cole, 2003).

All of these developments serve to complicate the human rights 'story' advanced in respect of the two continents. Snacken and Van Zyl Smit (2013: 6), for example, write of the relative importance of crime control and due process values in the USA/EU: '[t]he American balance is now clearly in favour of crime control values, while the European emphasis on due process and human rights has increased greatly under the influence of the ECHR'. As applied to domestic criminal justice protections in the post-2001 period in the USA, however, one may question the degree to which this holds true; unlike the EU it has been conservatism rather than change which has formed the watchword of the political reaction. While some may dismiss this as a function of the constraints imposed by the US Constitution (Jacobson, 2006), the point remains that the absence of reform, grounded in constitutional values, serves as an important reminder of a US rights culture which has continued to exist even in the midst of the punitive turn that has occurred in that jurisdiction since the mid-1970s. It is this strong adherence to due process that Garland (2010) refers to in his research on the US death penalty, *viz.* the desire to render the ultimate penalty lawful through a complex machinery of appeals and so on, and which has also been described as a key source of legitimacy in the USA (Garapon, 2006; Lewis, 2005).

## Conclusion

To recall the arguments made by Snacken, Daems and others at the start of this article, we may wonder whether a more fine-grained approach to the question of *European* penal values is to be preferred to the straightforward association of certain penal values with 'brand Europe' *tout court* (Baker, 2013). Space might also be found within the debate to account for the continued existence of a rights culture on the other side of the Atlantic as evidenced by a sustained commitment to constitutionalism *in the domestic US criminal justice system* in the period following the largest attack on US domestic soil (Hosein, 2005). This is, of course, not to suggest a convergence of rights cultures. The US rights

tradition is more inward-looking and self-sufficient than the European human rights framework and is not afraid to diverge from international human rights norms (Ignatieff, 2009). For Americans, human rights are ‘American values, writ large’ (Ignatieff, 2009: 14) while for Europeans these denote more universal values. Moreover, both cultures, as we have seen, are mediated strongly by the demands of security. Whatever their relative merits, however, we should be wary of ‘blind spots’ (Hosein, 2005: 2) in analysing counterterrorism policy and criminal justice policy more generally, lest the ‘distracting sway of the American case’ (Sparks, 2001: 165) causes us to neglect similar and perhaps more expansive initiatives within Europe itself.

Read across to the broader literature on security, the above observations raise several questions around the security–rights binary and the ‘politics of rights scepticism’ (Lazarus and Goold, 2007: 6) more generally. While the human rights credentials of the European Union are little in doubt, their failure to act as a bulwark against excessive securitization recalls earlier arguments made by Zedner (2007) and others (Krasmann, 2012) regarding the limits of the human rights idiom as a means of resisting the siren call of ‘security’ and the emerging paradigm of preventive justice. In seeking only compliance or, at best, the establishment of a political and juridical ‘culture of justification’ (Dynzenhaus, 2007), the discourse on human rights assumes a common concern about rights in this field. As Krasmann (2012: 381–382) argues, the fatal flaw in the argument is that ‘it presupposes what has yet to arise, namely a common concern about governmental encroachment in the name of security and a willingness of all parties to join in that discourse’. When combined with the sheer instrumentality and hegemonic force of executive and legislative action (Weber et al., 2014: 99) one may find human-rights abusing measures rapidly outpacing judicial proceedings (witness the findings by the ECtHR on CIA black sites some 12 years after the event). With the most recent attacks in Paris, Brussels and Nice exerting considerable political pressure for an integrated EU response, and subsequent legislation such as the foreign terrorist fighter provisions proving contentious in terms of their legality (Human Rights Watch, 2015), these factors remain highly salient. This remains so even in an EU without the UK which, though perhaps more open to arguments by Germany and other countries on the importance of privacy and other human rights, could potentially see more rapid and deeper integration in areas where the UK has hitherto been a barrier to progress (Bond et al., 2016).

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## Notes

1. While it may be argued that the EAW is exclusively a counterterrorism measure given that it applies to all serious offences, it must be firmly located within the post-9/11 EU 'policy drive' given that: (1) it was announced as a central plank of EU counterterrorism strategy; (2) it spent years in limbo prior to the 9/11 attacks and in all likelihood would not have been adopted in its current form (including most of the key provisions) 'but for' the Twin Tower attacks (Den Boer, 2006; Kaunert, 2007; Murphy, 2012b); and (3) surrender forms an important part of the EU counterterrorist action plan. Indeed, Argomaniz (2011: 21) notes that 'it is now widely regarded as the most important operational instrument in the European fight against terrorism for its impact in the reduction of the length of time of the extradition procedures and its extensive utilisation by national authorities (European Commission, 2005a, 2006)'. This article adopts the approach espoused by many previous studies of EU counterterrorism which treats the EAW as a lynchpin of the EU counterterrorist response (see, for example, Argomaniz, 2009, 2011; Argomaniz et al., 2015; Bures, 2011; Murphy, 2012a; SECILE, 2013).
2. See, for example, Detainee Treatment Act 2005 (in response to *Rasul v. Bush* (2004) 542 US 466) and Military Commissions Act 2006 (in response to *Hamdan v. Rumsfeld* (2006) 548 US 557).
3. Article 5.
4. Section 801.
5. Section 803.
6. Section 805.
7. For a detailed discussion on the extent to which the EAW was politically constructed as an instrument on the 'war on terror', see Kaunert (2007).
8. That is, that the act in respect of which extradition is sought is recognized as criminal in both the requesting and extraditing State.
9. That is, offences requiring intention or recklessness rather than mere negligence. See further the highly critical judgment of Hardiman J in *Tobin v. Minister for Defence* (No. 2) [2012] IESC 37.
10. Under the 1966 decision in *Miranda v. Arizona* confessions obtained as a result of a custodial interrogation without protective safeguards, namely, warnings and a waiver of rights, will be excluded.
11. *Al-Nashiri v. Poland; Abu-Zubaydah v. Poland* Application no. 28761/11, 24 July 2014.
12. The Stockholm Programme is a multi-annual working programme setting out the priorities for the area of freedom, security and justice for the period 2010–2104.

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