

The background of the cover is a photograph of a bridge, likely the London Bridge, with the Elizabeth Tower (Big Ben) and the Houses of Parliament visible in the distance across the River Thames. The scene is captured in a hazy, golden light, possibly during sunrise or sunset. The bridge's ornate metalwork and arches are prominent in the foreground and middle ground.

# *Preventive Justice & the Power of Policy Transfer*

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James Thomas Ogg



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# Preventive Justice and the Power of Policy Transfer

*For my parents, Sue and Alan*

# List of Statutes

Anti-Social Behaviour Act 2003  
Anti-Terrorism, Crime and Security Act 2001  
Company Directors Disqualification Act 1986  
Computer Misuse Act 1990  
Convention for the Protection of Human Rights and Fundamental  
Freedoms  
Crime and Courts Act 2013  
Crime and Disorder Act 1998  
Criminal Justice Act 2003  
Criminal Justice and Court Services Act 2000  
Criminal Justice and Immigration Act 2008  
Criminal Justice and Police Act 2001  
Criminal Justice and Public Order Act 1994  
Domestic Violence, Crime and Victims Act 2004  
Drug Trafficking Offences Act 1986  
Family Law Act 1996  
Football Spectators Act 1989  
Football (Disorder) Act 2000  
Football (Offences and Disorder) Act 1999  
Gaming Act 1968  
Housing Act 1996  
Licensed Premises (Exclusion of Certain Persons) Act 1980  
Magistrates' Court Act 1980  
Misuse of Drugs Act 1971  
Police Reform Act 2002  
Policing and Crime Act 2009  
Powers of Criminal Courts (Sentencing) Act 2000  
Prevention of Terrorism Act 2005  
Proceeds of Crime Act 2002  
Protection from Harassment Act 1997  
Public Order Act 1986  
Road Traffic Act 1988  
Road Traffic Offenders Act 1988  
Serious Crime Act 2007  
Serious Organised Crime and Police Act 2005  
Sexual Offences Act 2003

Terrorism Prevention and Investigation Measures Act 2011  
Theft Act 1968  
Violent Crime Reduction Act 2006

### **Foreign Legislation**

Racketeer Influence Corrupt Organization Act 1970  
The Italian Code of Criminal Procedure [*Article 416 bis*]

# List of Cases

- A and others v. Secretary of State for the Home Department [2004]  
UKHL 56
- AS (Pakistan) v. Secretary of State for the Home Department [2008]  
EWCA Civ 1118
- Clingham (formerly C) (a minor) v. Royal Borough of Kensington and  
Chelsea; R (McCann) v. Crown Court at Manchester [2002] UKHL 39
- Engel v. Netherlands [1976] 1 EHRR 647
- R (McCann) v. Crown Court at Manchester [2001] 1 WLR 358
- R (McCann) v. Crown Court at Manchester [2003] 1 AC 787
- R v. Cuthbertson [1981] AC 470
- Secretary of State for the Home Department v. AF and another [2009]  
UKHL 28
- Secretary of State for the Home Department v. E and another [2007]  
UKHL 47
- Secretary of State for the Home Department v. JJ and others [2007]  
- UKHL 45
- Secretary of State for the Home Department v. MB and others [2007]  
UKHL 46
- Welch v. UK [1995] 20 EHRR 247



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# List of Abbreviations

ACPO	Association of Chief Police Officers
ASBO	Anti-Social Behaviour Order
CPS	Crown Prosecution Service
CT	Counter Terrorism
CUREC	University of Oxford Central University Researcher Ethics Committee
ECHR	European Convention on Human Rights
HMCE	Her Majesty's Customs and Excise
IPP	Imprisonment for Public Protection
LP	Cabinet Legislative Programme Committee
NCA	National Crime Agency
NCIS	National Criminal Intelligence Service
NCS	National Crime Squad
NOMS	National Offender Management Service
PC	Parliamentary Counsel
RCPO	Revenue and Customs Prosecutions Office
RICO	Racketeer-Influenced Corrupt Organizations Act 1970
RSHO	Risk of Sexual Harm Order
SCA	Serious Crime Act 2007
SCPO	Serious Crime Prevention Order
SFO	Serious Fraud Office
SOCA	Serious Organised Crime Agency
SOCPA	Serious Organised Crime and Police Act 2005
SOPO	Sexual Offences Prevention Order
TPIM	Terrorism Prevention and Investigation Measure

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# 1

## Introduction

At the heart of this book lies an urge to understand better the nature of criminal justice policy and decision-making in the United Kingdom, during a time of complex reform. Over the decade of the former New Labour government, there were marked shifts in criminal law and criminal justice policy. In particular, during the period 1997–2007, the UK saw a rapid expansion of crime control policies and an increased number of new (many wide-reaching) criminal laws passed by parliament (Morris 2006; Lacey 2007: 174–175). The Act at the core of this book, the Serious Crime Act 2007, marked the 60th piece of Home Office legislation during this 10-year period, whereas by contrast there ‘were only 48 pieces of Home Office legislation in the previous 100 years’ (Brimelow 2007: 1).<sup>1</sup> This increase in legislative activity has provided academics interested in criminal justice with numerous new fields of analysis. These analyses have typically concerned the consequences of such expansion (such as problems of overcriminalisation and a growing prison population) and criticism of excessively wide-reaching powers, and the creation of new measures, particularly in the state’s response to anti-social behaviour and terrorism (Garland 2001: 75–76; Matthews and Young 2003: 7; Crawford 2009). However, researchers have tended to concentrate on one substantive policy arena (for example, anti-social behaviour or terrorism) rather than on the apparent pattern of new measures, which together mount a strong attack on the rights of those accused or suspected of involvement in criminal activity (and on the criminal trial; see Ashworth and Zedner 2008). That is, there is a general trend among these new developments to introduce legislation that makes prosecution easier or even non-essential.<sup>2</sup>

An important sub-group of these new measures, and the focus of this book, is a family of preventive orders, many of which involve a

hybrid of civil and criminal proceedings. Hybrid orders diminish the rights of accused or suspected individuals by avoiding the criminal trial process altogether (Simester and von Hirsch 2006: 175). As these orders are defined as 'civil' and 'preventive' (and not criminal and punitive), they have the benefit of being applied in proceedings with a lowered civil standard of proof, and less stringent controls over the admission of evidence (for example, the admission of hearsay evidence). Moreover, they have the additional benefit (though not for the accused person) of creating criminal offences for breach of the terms of an order, which can carry heavier punishments than conventional High Court powers of contempt (and are arguably often disproportionate to the original behaviour that triggered the order to be imposed) (Ashworth 2004: 279).

While the literature concerning the rights of accused individuals has discussed the principles and underlying efficacy of these orders, there has been limited engagement in understanding *why* these developments have occurred in the first place (Lacey 2009: 946). Criminology as a discipline has ingenuously accepted the explanation of a politicisation of crime control without adequate consideration of (or search for) alternative explanations for these developments. The widely accepted explanation is based on a perception by the state that a trade-off exists between the competing demands of the rights of the accused and those of the public,<sup>3</sup> and that there has been a political aspiration to 'rebalance the Criminal Justice System in favour of the law-abiding majority' (Home Office 2006b).<sup>4</sup> Crime control undeniably became a more pronounced instrument of political exertion in the 20th century – the beginnings often attributed to the election manifestos of the Conservative Party in 1979, but then later escalated under New Labour.<sup>5</sup> Other global phenomena such as *Governing Through Crime* (Jonathan Simon 2007) and a *Culture of Control* (David Garland 2001) suggest governments have (for good or ill) exploited perceptions of crimes to introduce programmes, measures, and practices that powerfully affect the lives of many. However, politicisation has become an overused, catch-all explanation, which has led to a simplified presumption that politicians and political agendas are wholly responsible for the new direction in criminal justice (that is, a 'top-down' view of policy-making). This book shows that a more nuanced examination of the dynamics of policy-making can augment the simplistic political explanations for these new developments, by recognising the structural forces that are also at play in the policy-making process.

The aim of this book is to explain the proliferation of preventive orders across a wide and diverse range of areas of crime policy in the



UK (including anti-social behaviour, domestic violence, football-related violence, sexual offences, terrorism, and organised crime). This is achieved through a detailed case study analysis of the process involved in developing one of the more controversial (yet less scrutinised) civil preventive orders, the Serious Crime Prevention Order (hereafter SCPO).<sup>6</sup> Analysis of the genesis of this single measure is also used as a springboard to explore three under-researched themes in criminal justice scholarship: new developments in serious and organised crime control in the UK; a prevailing preventive ideology in criminal justice, or 'preventive justice'; and 'policy transfer' as a common part of the domestic policy-making process. These three contemporaneous topics can be connected through an analysis of the SCPO. Three broad research questions shape this book's enquiry:

1. How can we best explain the spread of the preventive order model as a key response in crime control?
2. What can a detailed study of the policy process tell us about the increased prevalence of new preventive practices in crime control?
3. To what extent, if any, does policy transfer play a role in the domestic process of policy-making and innovation?

Accordingly, two specific empirical research questions guide the analysis of the origins of the SCPO (in Part II of this book):

1. What was the nature and extent of the role played by the preceding preventive orders in the formulation of the SCPO?
2. Did decision-makers knowingly formulate the SCPO and other preventive orders as part of a broader goal to foster an alternative system of preventive justice?

It is argued that domestic policy transfer is a driving force in everyday policy-making, and, as a result, enhanced systems could be developed to accommodate and facilitate the process of transfer. The SCPO, a novel measure in organised crime control, is argued to be the consequence of incremental processes of policy transfer that have evolved the preventive order model across distinct areas of crime control (encompassing Anti-Social Behaviour Orders, Football Banning Orders, Sexual Offender Orders, and terrorism Control Orders<sup>7</sup> among others). This incremental process may also be indicative of the broader shift towards a system of (criminal) preventive justice. The dynamics of this mechanism of policy transfer are developed into an exploratory framework. At a