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# **The rise and fall of suspicionless searches**

Ben Bowling and Estelle Marks,  
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## **Abstract**

This paper examines the extraordinary rise and fall of police powers to stop-and-search without suspicion in public places in England and Wales. Suspicionless searches – authorised by s.60 Criminal Justice and Public Order Act 1994 and s.44 Terrorism Act 2000 – rose to a peak of 360,000 in 2009 and then declined radically to fewer than 1,000 in 2016. The paper seeks to explain changes in the use of suspicionless search powers drawing on a theory of the relationship between law and policing by examining the police ‘working environment’ comprised of three structures: law, work and politics. The paper concludes with a consideration of recent reforms of stop-and-search powers and the implications for the future of suspicionless searches.

Keywords: law, police powers, policing, suspicion, stop-and-search

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## Introduction

This paper examines dramatic changes in the use of ‘suspicionless searches’ – the police power to stop-and-search people in public places without any suspicion of wrongdoing. The paper falls into seven parts. First, we consider the principles that circumscribe police power – specifically the doctrine of the ‘rule of law’ and the axiom that the state should be restrained from interfering with the private life and liberty of the individual without good grounds. We consider, specifically, the proposition that there should be no power to stop-and-search unless there is reasonable suspicion that the person stopped is involved in criminal activity. The paper then draws on police research to grind a theoretical lens through which to examine the relationship between ‘law in the books’ (in the form of statutes and cases) and ‘law in action’ (in the form of stop-and-search practice).

In light of this theoretical framework we examine stop-and-search in more detail and in particular the creation of novel powers to search people without suspicion. In part III, we turn to official statistics to tease out changes in the use of stop-and-search powers. We then consider possible explanations for the rise and subsequent fall of the powers, by examining changes in the social and political context within which police powers are exercised, the role of legislative, judicial and civil society organisations and changes within police forces. We then consider the recent Home Office review of stop-and-search powers and the current political landscape and finally, we examine the implications for the future of police powers to search without reasonable suspicion.

Our argument, in a nutshell, is that the dramatic changes in police use of suspicionless search powers can be explained by the nature of the police ‘working environment’ comprised of three structures: law, politics and work. The statutes that granted the power to search people without suspicion were the result of a political process; however, *the way in which they were used* and *how extensively*, were shaped by a much more complex relationship between law, politics and work. Case law, in a permissive or restrictive capacity, contributed to the working environment in which police use their discretionary powers. Significant changes in working practice came about through internal changes in police operational policy and occupational culture; these were, in turn, the result of interaction with the external legal and political environment. The example of suspicionless searches helps to explain how statute and case law, the political environment and the internal world, or habitus, of policing shape police operational practice.

## Towards a theory of law in policing

In attempting to explain the dramatic rise and fall in the police use of suspicionless search powers, we hope to make some progress in answering a more general question: to what extent does change in the law (a legislative act or a judicial decision) account

for changes in police practice (stop and search, crime investigation, public order policing, etc.). The relationship between law and policing been studied by criminologists but relatively neglected by legal scholars.<sup>1</sup> Thirty years ago, Baldwin and Kinsey pointed to a fundamental theoretical and conceptual inadequacy in the British debates about police reform:

...[it] completely ignored one of the key questions, namely the role of legal rules in regulating police behaviour... Nobody thought to ask whether, how and why police would get around the rules. No research was done on the extent to which the police were hindered by a lack of powers, on the reasons why officers fail to adhere to rules, on alternative ways of regulating police behaviour... or on the ways that rules operated under different policing strategies.<sup>2</sup>

Dixon sets out a theoretical model drawing on the ‘Warwick School’ (McConville, Sanders and Leng),<sup>3</sup> Kinsey and Baldwin,<sup>4</sup> the Oxford socio-legal scholar McBarnett,<sup>5</sup> criminologists Grimshaw and Jefferson<sup>6</sup> and the more recent work of Janet Chan.<sup>7</sup> Although these authors, whose theoretical tools were largely developed during the late 1970s and 1980s, come from different perspectives, their work is united by detailed analysis of policework in practice understood in its broader legal, political and cultural context. For Reiner, the challenge is to understand how ‘blue letter law’ – the police use of ‘law in action’ – contrasts with ‘black letter law’ in the books.<sup>8</sup> In this section we explore theories of policing in order to derive a framework for understanding the role of law in policework.

A starting point is the ‘rule of law’, a doctrine to which most modern governments claim to adhere, which means that no one – private citizen, government minister or official – is above the law.<sup>9</sup> It dictates that governmental authority may only be legitimately exercised in accordance with settled, written laws adopted and enforced through ‘due process’ in accordance with procedures that are clear and known in advance. The doctrine is contested and its definition soft around the edges, but the rule of law narrative in western democracies contains core principles to which state actors must adhere. The primary principle for the purpose of this discussion is that *law should restrain the exercise of discretionary state powers*; these should be: exercised within

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<sup>1</sup> David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press 1997) i.

<sup>2</sup> Robert Baldwin and Richard Kinsey (1985) ‘Rules, Realism and the Police Act’ *Critical Social Policy* 12: 89-102 at page 89, cited by Dixon 1997, px

<sup>3</sup> Mike McConville, Andrew Sanders and Roger Leng (1991) *Case For the Prosecution: Police Suspects and the Construction of Criminality*. London: Routledge

<sup>4</sup> Robert Baldwin and Richard Kinsey (1982) *Police Powers and Politics*. London: Quartet

<sup>5</sup> Doreen McBarnet, D. (1981), *Conviction: Law, the State and the Construction of Justice*, London: Macmillan. David Dixon (1997) *Law in Policing*. Oxford: Clarendon.

<sup>6</sup> Roger Grimshaw and Tony Jefferson (1984) *Interpreting Policework*. London: Allen & Unwin; Roger Grimshaw and Tony Jefferson (1984) *Controlling the Constable: Policing Accountability in England and Wales*. London: Allen & Unwin.

<sup>7</sup> Janet Chan (1997) *Changing Police Culture: Policing in a Multicultural Society*. Cambridge: Cambridge University Press.

<sup>8</sup> Robert Reiner, *The Politics of the Police* (4th Edn, Oxford University Press 2010) 209.

<sup>9</sup> Lord Bingham, ‘The Rule of Law’ (2007) 66 *The Cambridge Law Journal* 67; Tom Bingham, *The Rule of Law* (Penguin 2011); Adam Tomkins, *Public Law* (Oxford University Press 2003).

stated criteria applicable to the individual affected, objectively verifiable and amenable to legal challenge.<sup>10</sup> Rule of law doctrine aims to ensure that societies are governed within a framework that respects individual autonomy and protects citizens from arbitrary interference by the state.

This principle is important in policing where the discretionary use of power is pervasive. Indeed, one of the most important ‘discoveries’ of police research is that policing is, by nature, highly discretionary.<sup>11</sup> Empirical research shows that police officers generally ‘under-enforce’ the law using their discretion to deal with incidents using a variety of ‘peacekeeping’ methods even when an offence has been committed.<sup>12</sup> Crucial for understanding the relationship between law and policing is that ‘discretion increases as one moves down the [policing] hierarchy.’<sup>13</sup> This means that ‘*the rank-and-file officer is the primary determinant of policing* where it really counts: on the street.’<sup>14</sup> In the British tradition, broad police discretion is neither accidental nor simply a function of the practical impossibility of full enforcement. Rather, it is enshrined in the doctrine of ‘constabulary independence.’<sup>15</sup>

This common law doctrine, oft cited as a founding principle of British policing and supported by a century of case law, states that police constables should be ‘answerable to the law and the law alone.’<sup>16</sup> In this model, police decision-making – operational policy and the individual constable’s actions on the ground – should not and cannot be directed or controlled by any national or local politician or institution. As Hugh Orde, former president of the Association of Chief Police Officers, described it, this doctrine makes the police ‘autonomous professional agents of the law’, deliberately insulated from political control.<sup>17</sup> This conscious design ‘allows the police to rely on expertise, judgment and experience in taking professional decisions on operational policing.’ Despite decades of changes in the constitutional position of the police and of police accountability mechanisms, the Chief Constable remains sovereign in deciding ‘operational matters’ and the individual officer in deciding how to use his or her powers in any given situation. This raises a question: to what extent can changes in police stop-and-search practice can be explained by changes in the law? This speaks to the more general question of how law interacts with other factors to shape police operational practice.<sup>18</sup> Three theoretical models of policing – the legal-machine,

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<sup>10</sup> Bingham, *The Rule of Law* 50.

<sup>11</sup> Joseph Goldstein, ‘Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice’ (1960) 69 *The Yale Law Journal* 543.

<sup>12</sup> Reiner 19.

<sup>13</sup> James Q Wilson, *Varieties of Police Behavior* (Harvard University Press 1968) 7.

<sup>14</sup> Reiner 116. *emphasis added*.

<sup>15</sup> Lawrence Lustgarten, *The Governance of the Police* (Sweet & Maxwell 1986); Dixon; Reiner.

<sup>16</sup> Lord Denning, *R v Commissioner of Police for the Metropolis, ex-parte Blackburn* [1968] 2 Q.B. 118, [136].

<sup>17</sup> Hugh Orde, ‘Tension Between Politicians and Police Is Healthy’ *The Times* (London, 18 August 2011).

<sup>18</sup> See also Ben Bowling and James Sheptycki (2015) ‘Global policing and transnational rule with law’ *Transnational Legal Theory*, Volume 6 (1) pp141-173

subcultural and environmental – can be delineated as a starting point for this investigation.

### The Legal-Machine Model

The legal ‘machine model’<sup>19</sup> or ‘legalistic-bureaucratic conception’<sup>20</sup> is the dominant theoretical model of the relationship between law and policing. It is based on a rational, bureaucratic view of how law regulates policework. Legalists argue that to understand policing we need only look at the laws governing it.<sup>21</sup> From this perspective law is an *authoritative statement* of police goals, ‘carrying a clear meaning and relevance for all subordinates that they should automatically put into practice.’<sup>22</sup> Discrepancies between legal rules and operational practice result from ‘communications blockage’: the law has simply not been properly communicated to those charged with its implementation. Legalists can be criticised for attending to how organisations *ought to function* rather than how they *actually work in practice*; but open the possibility of a precise understanding of the implementation of the law and how the structure of the police organisation facilitates (or debilitates) this. Empirical research shows that law influences practice in certain circumstances, but does not determine police policy and practice alone. Observations about police discretion lead us to examine the norms, values and working practices of street-level officers; in other words, to the study of police subculture.

### The Subcultural Model

The subcultural model grew out of the sociological tradition of participant observation of street policing documenting the occupational milieu of policework and the norms, values, customs and working practices on the ground.<sup>23</sup> Subculturalists provided a window into the hitherto closed world of policing – how the law is used by the constable on the street, how he or she makes sense of this work and of the various enabling and constraining factors that shape ‘the job’. This work has been accused of simplistic analysis of ‘canteen culture’, stereotyping police officers’ views and failing to recognise that what police officers say in the canteen is not necessarily related to what they do in practice.<sup>24</sup> It has also been criticised for taking a ‘cop sided’

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<sup>19</sup> Roger Grimshaw and Tony Jefferson, *Interpreting Policework* (Allen & Unwin 1987).

<sup>20</sup> Dixon.

<sup>21</sup> cf. *ibid.*

<sup>22</sup> Grimshaw and Jefferson.

<sup>23</sup> Michael Banton, *The Policeman in the Community* (Tavistock 1964); William A Westley, *Violence and the Police: A Sociological Study of Law, Custom, and Morality* (MIT Press 1971); Maureen E Cain, *Society and the Policeman's Role* (Routledge 1973); Simon Holdaway, *Inside the British Police: A Force at Work* (Basil Blackwell 1983); Simon Holdaway, ‘Discovering Structure: Studies of the British Police Occupational Culture’ in Weatheritt (ed), *Police Research* (Avebury Press 1989); Bethan Loftus, *Police Culture in a Changing World* (Clarendon Press 2012). Ben Bowling and James Sheptycki, *Global Policing* (Sage 2012), esp chapter 4.

<sup>24</sup> PAJ Waddington, ‘Police (Canteen) Sub-Culture. An Appreciation’ (1999) 39 *British Journal of Criminology* 287.

perspective that fails to capture the complex relationships between policing and its wider context.<sup>25</sup>

Chan's theoretical work addresses the question of how to understand policing as law in context.<sup>26</sup> Drawing on Bordieu and Sackman, Chan examines the *habitus* and the *field* of policing. The *habitus* consists of the cultural knowledge and informal structures within the police organization. The *field* consists of the social, economic, legal and political contexts that constitute the historical and contemporary relationships between the community and the police. Police practice can be seen as the interaction between the social and political context of police work in the *field* and the institutionalized perceptions, values, strategies and schemas that comprise the *habitus*. Police practice is the result of the interaction between *habitus* and *field*, a social space of conflict and competition in which participants struggle to establish control. The *habitus* is comprised of *axiomatic* knowledge (which constitutes the basic rationale for policing), *dictionary* knowledge (the categorization of people with whom the police come into contact), *directory* knowledge (which informs officers about how to 'get things done') and *recipe* knowledge (which prescribes 'menus' of acceptable and unacceptable practices in given situations).<sup>27</sup>

Subculturalists claim that law is largely irrelevant to policework. They argue that the police use law simply as a resource to 'get things done' and dismiss the idea that law shapes police practice. Law is a 'dead letter' because rank-and-file subculture – impermeable to changes in law, policies, procedures or management – determines police behaviour. Discrepancies between policy and practice stem from a conflict between management and rank-and-file subculture. Managerial understanding of what is to be done is rooted in law but fails to affect rank-and-file policework, which is dominated by police-defined goals and objectives.<sup>28</sup> For the subculturalists, law – issued in good faith or bad – is impotent and irrelevant to police practice.

The subculturalists underestimate the role of law and overstate the influence of police occupational subculture, but help to fill the gap between the substance and the ideology of law.<sup>29</sup> Subculturalists show how police expectations about the appropriate course of action in specific instances affect the outcome of police-public encounters. Procedural laws intended to govern police practice tend to be drafted permissively and give officers wide discretion to act as they see fit within situational exigencies.<sup>30</sup> Understanding the relationship between law and practice requires analysis of the nature and scope of the law, the extent to which it is permissive, and the leeway for practice

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<sup>25</sup> Bethan Loftus, *Police Culture in a Changing World* (Clarendon Press 2012).

<sup>26</sup> Chan.

<sup>27</sup> Ibid 76.

<sup>28</sup> David John Smith and Jeremy Gray, *Police and People in London: The PSI Report*, vol 4 (Gower Publishing Company Limited 1985).

<sup>29</sup> Doreen J McBarnet, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981) 5.

<sup>30</sup> Reiner 117.

to be shaped by police occupational subculture and the broader social, political and situational pressures on officers' discretion.

### The Environmental model

The most complete theory of policing is Grimshaw and Jefferson's 'environmental model'.<sup>31</sup> Their starting point is JQ Wilson's *Varieties of Police Behaviour*,<sup>32</sup> which demonstrated an observable relationship between police officers' working style, departmental policies and codes, and the prevailing political culture. This model requires cultural theories to be modified because it suggests that law, managerial strategies and political constraints 'can affect at least some areas of police behaviour some of the time'. From this premise, Grimshaw and Jefferson develop a theory that is 'faithful to the profane details of daily policework' but which links these to the 'basic environmental features' of the police organisation – management, organisational structures, processes, policies and codes, the constraints of the law and the prevailing political culture. These elements, they argue, explain the working 'style' of police officers. Grimshaw and Jefferson argue for an understanding of policing as shaped by a 'combination of structures' specifically: law, work and the 'democratic relation'.<sup>33</sup>

#### *Law*

To understand how law exerts its effects in particular situations it is necessary to know the 'formal structure' of the law – the legal powers of police, the legal demands made by the criminal law and criminal procedure, the legal powers of citizens and other legal authorities, such as the courts, prosecuting authorities or regulatory bodies. For Grimshaw and Jefferson, *law is the determinant but not dominant* structure of policework. The restrictive or permissive remit of any given law *determines* the extent to which other structures can influence police work, but the law itself *does not dominate policing practice*. It is crucial to understand the nature of the legal framework, its degree of precision and permissiveness in various situations, and its relationship with other structures. Having a concrete knowledge of legal powers and the degree of discretion embodied in them, 'opens up the prospect of law being more or less influential, rather than influential or not, depending on the powers available. If these are highly discretionary, the less constraining will be the law, and vice versa'.<sup>34</sup>

#### *Work*

Drawing on detailed empirical studies of policework, Grimshaw and Jefferson define work as a single structure with two dimensions: first, an 'organisational' element, the *vertical dimension* of rules, policies, procedures, command and control. Second, an occupational-cultural element referring to the *horizontal dimension* of norms, values,

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<sup>31</sup> Grimshaw and Jefferson.

<sup>32</sup> Wilson.

<sup>33</sup> Grimshaw and Jefferson.

<sup>34</sup> Ibid 17.



practices and everyday routines of the work groups, most importantly the rank-and-file constable.

### *The democratic relation – Politics*

Within the political domain, Grimshaw and Jefferson argue that policework is influenced and sometimes decisively shaped by the actions of a heterogeneous public composed of individuals and institutions outside the police organisation. They refer to this variously as ‘the democratic relation’, ‘community’ and ‘the public’. The core of their argument is that ‘community’, through democratic mechanisms, has the potential to enable or constrain policy-making and practice.<sup>35</sup> In our view, a more succinct way of expressing the democratic relation is to refer to this as the ‘politics’ of policing.<sup>36</sup> People come into contact with the police organisation in a variety of ways – as individual victim of crime, suspect, injured party, complainant, informant, or caller, as representatives of the community, as elected or self-appointed leaders of pressure groups, or members of organisations with which the police have institutional contact. This includes Members of Parliament and local counsellors, central government officials (especially the Home Office), local government officers, police authorities, regulators (such as the HM Inspectorate of Constabulary, the Independent Police Complaints Authority, the Equality and Human Rights Commission, etc.), as well as print and broadcast media. Each of these ‘political’ contacts can be conflictual or cooperative, sporadic or recurrent, with varying effects on both police policy and behaviour.

### *Hypotheses*

In the attempt to understand how law, work and politics shape the police use of stop-and-search powers, we draw on Grimshaw and Jefferson’s environmental theory, supplemented with ideas developed by Chan, to set out four general hypotheses:

1. Police practice cannot be explained fully by any single factor – law, work, or politics – but only by the complex interaction between them.
2. Law, being the determinant structure of policework, will dictate whether or not police officers *may* use a particular power but not *how frequently* police use their powers, *against whom* or *under what circumstances*.
3. The less tightly and precisely the legal structure is articulated (or more discretionary and ambiguous), the more likely it is that police practice will be influenced by ‘occupational common sense’, managerial directives or political pressure.

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<sup>35</sup> Grimshaw and Jefferson., p20-22

<sup>36</sup> Robert Reiner, *The Politics of the Police*

4. Changes in the political environment contribute to shaping the axiomatic, directory and recipe knowledge within the police work environment, which in turn contributes to shaping police operational practice.

These hypotheses guide our inquiry into the relationship between law and the use of suspicionless searches, but we acknowledge that the elements shaping police practice also feed into each other in different ways at different times. Developing an account of the relationship between law and policing involves looking at the way in which these elements interact over time. It is often difficult to separate the political elements from the broader context, or work-based elements from political developments. In what follows, we offer a narrative that develops over time, identifying the different elements as they come into play and returning to these hypotheses in the conclusion. First, we must examine the legal powers of stop-and-search and the extent of their use.

### **The power to stop-and-search**

The conventional justification for the power to stop someone in the street and search their person, clothing, personal items, or their vehicle, is the police requirement for the legal tools to prevent and detect crime.<sup>37</sup> Where a person is suspected of a criminal offence, going equipped to commit one, or having the fruits of criminal activity in their possession, the police should have the power to search them and then arrest or release them if the officer's suspicions are allayed.<sup>38</sup> By investigating people suspected of wrongdoing, crime can be detected and prevented and, in so doing, the police provide public safety and uphold their end of the social contract.

It is axiomatic, therefore, that in a democracy no one should be stopped and searched by the police – with all the intrusions into privacy and interference with liberty that this entails – unless there are reasonable grounds to do so. This axiom has frequently been violated with respect to specific groups – for example vagrants, ‘habitual criminals’

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<sup>37</sup> Carole F. Willis (1983) *The Use, Effectiveness and Impact of Police Stop and Search Powers*, Home Office Research and Planning Unit Paper 15, London: Home Office. Lustgarten, L (2002) *The Future of Stop and Search*, *Criminal Law Review* 603. Ben Bowling and Estelle Marks, ‘Towards a Transnational and Comparative Perspective’ in Rebekah Delsol and Michael Shiner (eds), *Stop and Search: The Anatomy of a Police Power* (Routledge) 175. Ben Bowling and Leanne Weber (eds) *Stop and Search: Police Power in Global Context*. (Routledge 2012). Rebekah Delsol and Michael Shiner (2006) ‘Regulating stop and search: a challenge for police and community relations in England and Wales’, *Critical Criminology*, 14 (3), pp.241-263. Joel Miller (2010) ‘Stop and search in England: a reformed tactic or business as usual?’ *British Journal of Criminology*, 50 (5), pp. 954-974. John Ip (2013) ‘The reform of counterterrorism Stop and Search after *Gillan v United Kingdom*’, *Human Rights Law Review* 13(4) pp.729-760.

<sup>38</sup> The Police and Criminal Evidence Act 1984, s66 requires the Secretary of State to issue codes of practice in connection with the exercise of statutory powers by police officers. PACE Code A relates to the statutory powers of stop and search and requirements to record public encounters by police officers and staff. See Michael Zander *The Police and Criminal Evidence Act 1984* (7<sup>th</sup> edition). (Sweet & Maxwell 2015). See also Paul Quinton (2011) *The formation of suspicions: police stop and search practices in England and Wales*, *Policing and Society*, 21(4), pp. 357-368.

and people of minority ethnic origin.<sup>39</sup> Nonetheless, this remains a fundamental legal principle. Crucially, this legal axiom mirrors the views of the general public: people should be stopped only for genuinely good reasons; the police should be able to explain these reasons and should avoid stopping people randomly or routinely.<sup>40</sup>

Section 1 of The Police and Criminal Evidence Act 1984 (hereafter PACE) is the paradigm example of a stop-and-search power constrained by ‘reasonable suspicion’ and is – in theory at least – consistent with public views about how the power should be used. In theory, it balances the protection of personal liberty with the need to investigate allegations of criminal conduct. The PACE Codes of Practice state that ‘the primary purpose of stop-and-search powers is to enable officers to allay or confirm suspicions about individuals without exercising their power of arrest.’ It is therefore an ‘intermediate power’ lying between arresting someone and doing nothing.

### **Suspicionless search powers**

The 1994 Criminal Justice and Public Order Act (hereafter CJPOA) and the 2000 Terrorism Act permit the police to stop-and-search without suspicion. As Lord Brown put it, this ‘radically ... departs from our traditional understanding of the limits of police power’.<sup>41</sup> In the case of s.60 of the CJPOA, a police officer may stop any pedestrian or vehicle within an authorised area and search for offensive weapons or dangerous instruments, whether or not there are grounds to suspect that the person is in possession of such articles. Authorisations are made ‘in anticipation of violence’, that is when a senior officer reasonably believes incidents involving serious violence may take place in a locality or that people are carrying dangerous instruments or offensive weapons and considers it ‘expedient to give authorisation’ to use stop-and-search ‘to prevent their occurrence’. In the case of the (now repealed) s.44 of the Terrorism Act, and its replacement power s.47A, a police officer may stop a person or vehicle within an authorised area and conduct a search for articles ‘of a kind which could be used in connection with terrorism’. This power may be exercised whether or not the constable has grounds for suspecting the presence of such articles. Under s.44, authorisations by a senior officer could be made when considered ‘expedient for the prevention of acts of terrorism,’ a threshold that was raised to ‘necessary’ under s.47A. Authorisations under both s.44 and the new s.47A must be confirmed by the Secretary of State within 48 hours, or cease to be effective.

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<sup>39</sup> Ben Bowling and Coretta Phillips, ‘Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search’ (2007) 70 *The Modern Law Review* 936; Leanne Weber and Ben Bowling, ‘Valiant Beggars and Global Vagabonds: Select, Eject, Immobilize’ (2008) 12 *Theoretical Criminology* 355.

<sup>40</sup> Vanessa Stone and Nick Pettigrew, ‘The Views of the Public on Stops and Searches’ (Home Office, Policing and Reducing Crime Unit, Research, Development and Statistics Directorate 2000).

<sup>41</sup> *R. (on the application of Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12 [74].

The wording of s.44 and s.60 does not preclude the possibility of conducting searches at random. Although both s.60 and s.44 have specific purposes and permit searches *only for specific items*, they require no suspicion that the person stopped is carrying such items. It is not clear from the statute how far suspicion *ought to guide* the use of powers that *do not require* suspicion. Officers have unlimited discretion in choosing whom to stop, but in practice they tend to target individuals based on a ‘hunch’ or ‘professional intuition’.<sup>42</sup> We see here how common-sense work-values shape police practice. Research and statistical evidence confirms that people stereotyped by the police as more likely to be involved in crime and terrorism – e.g. those of African, Caribbean, middle-Eastern and Asian descent – are significantly more likely to be targeted than those from other groups.<sup>43</sup> In other words, suspicionless powers are targeted at ‘the usual suspects’.

In contrast to s.1 PACE, suspicionless searches conflict with the rule of law principles described above. Both s.60 and s.44 placed unfettered power in the hands of individual officers, unrestrained by any requirement of suspicion – reasonable or otherwise – to interfere with the day-to-day lives of individuals. The ‘environmental’ theory of the relationship between law and police practice predicts that it is such highly discretionary powers that will be most extensively affected by shifts in police management, occupational common sense and prevailing political sentiments. Whilst these powers are referred to as ‘exceptional’ stop-and-search powers; the statistical data show that they quickly became a normal part of street policing.

### Stop-and-search Statistics

Official records illustrate the astonishing rise and fall of suspicionless searches.<sup>44</sup> In 2001/2, the first full year of the operation of the 2000 Terrorism Act, the Home Office recorded 10,200 stops under s.44. This quadrupled by 2006/7, then rose even more rapidly to almost 127,000 in 2007/8 and to a peak of over 210,000 in 2008/9. Recorded use then dropped sharply from 2009 to 2011, when s.44 was repealed and replaced by s.47A, which has not been used in England and Wales at the time of writing.

In the first full year of its operation, the Home Office recorded close to 8,000 searches under s.60. It stayed at about this level until 1999/2000 when just over 6,800 searches were recorded. This nearly doubled the following year and continued to rise to a peak of over 150,000 in 2008/9. The use of the power then fell sharply, reaching a new low of around 1,000 searches in 2014/15 and 2015/16.

### Figure 1 Suspicionless Searches

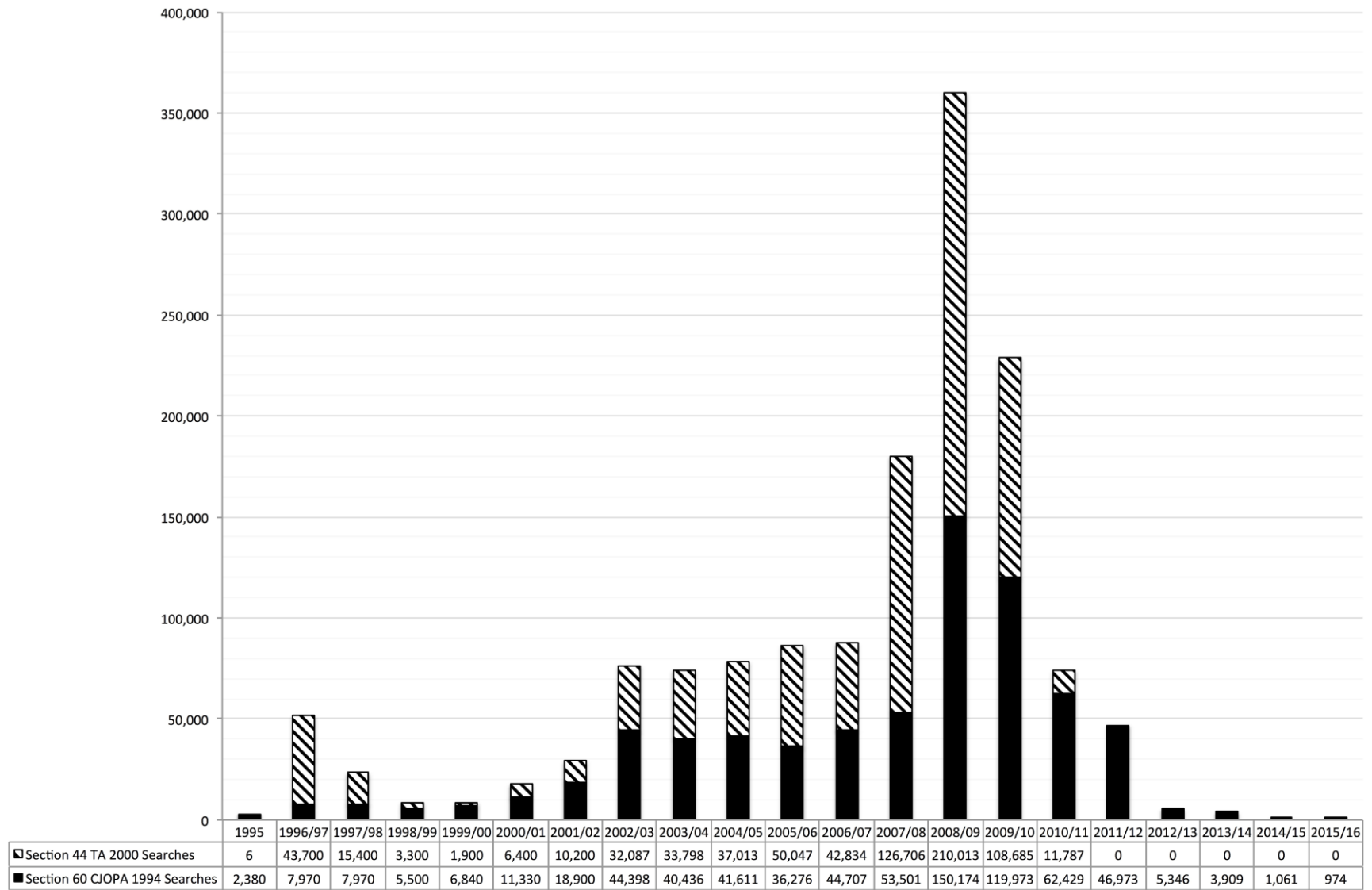
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<sup>42</sup> *Gillan and Quinton v United Kingdom* (4158/05) (2010) 50 EHRR 45 [23] and [83].

<sup>43</sup> Bowling and Phillips.

<sup>44</sup> Until 1998 these statistics were published in annual Home Office bulletins entitled *Arrests for Notifiable Offences and the Operation of Certain Police Powers under PACE* and from 1998 onwards in bulletins entitled *Police powers and procedures, England and Wales*.

## Suspicionless Searches



There are some parallels with PACE searches. In the first year of its operation, police recorded just under 110,000 searches under s.1 rising tenfold over the next decade. While suspicionless searches were used sparingly in the early years of their existence at the peak in 2008/09 they accounted for 31% of all recorded searches. Subsequently the use of suspicionless search dropped much more swiftly than PACE searches and by 2014/15 suspicionless searches made up only 0.2% of all searches.

Stop-and-search data are no exception to the criminological rule that official statistics must be treated with caution.<sup>45</sup> The statistics presented above are compiled from records completed by the police officers conducting searches, collated by police forces and submitted to the Home Office. The data are, therefore, bound to be incomplete in various ways and are vulnerable to changes in police recording practice. Although making a record of a search is a statutory requirement, it is possible that changes in recorded stop-and-search have been influenced to some extent by changes in police officers enthusiasm for paperwork and their managers stringency in ensuring compliance with the PACE Codes of Practice. However, we have no reason to believe that the data are heavily influenced by changes in recording practice over time. The sheer magnitude of the rise and fall is also reason to think that official records reflect a real change in the use of these powers. We contend that, bearing in mind the above caveats, police records provide a reasonably valid and reliable indicator of patterns in police utilisation of stop-and-search powers.

### **Explaining the Rise of Suspicionless Searches**

What explains the rise in the use of suspicionless searches? The obvious starting point is the law that granted new powers. It should be remembered that prior to 1994, the police did, in fact, conduct suspicionless searches. Research evidence showed that in a very large number of searches the grounds for PACE searches were vague and flimsy, did not satisfy the precondition of 'reasonable suspicion' and were therefore illegal.<sup>46</sup> Nonetheless, the grant of specific new powers explicitly legalised suspicionless searches that had previously been conducted outwith the law.

The suspicionless search powers in the CJOPA 1994 were introduced by the Conservatives with the support of the Labour opposition. The law was introduced in the context of widespread concern regarding rising crime rates, football hooliganism, IRA terrorism and illegal raves. At the Conservative Party conference in October 1993 Home Secretary Michael Howard outlined a 27 point-plan to crack down on crime. The CJOPA was a major part of this plan and 'an important weapon in the fight against

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<sup>45</sup> Dixon; Bowling and Phillips; Paul Quinton.

<sup>46</sup> Lustgarten; Dixon; Quinton. See also D. Brown, *PACE Ten Years On: A Review of the Research*, Home Office Research Study 155, Home Office Research and Statistics Directorate (London: Home Office, 1997)

crime.’<sup>47</sup> Labour’s support for the bill departed from their traditional civil liberties approach to the politics of law and order. Shadow Home Secretary, Tony Blair convinced the Labour Party that it could not win a general election while appearing to be soft on crime.<sup>48</sup> The CJOPA enacted a number of controversial reforms and parliamentary debate centred on the abolition of the right to silence and the introduction of secure training facilities in the youth justice system rather than the extension of police powers. Despite its draconian nature Labour did not oppose the bill at second reading and it received Royal Assent on 3 November 1994.<sup>49</sup>

Suspicionless search powers were utilised sparingly for several years until just before Labour’s landslide election victory in 1997, when the political landscape shifted. The concept of zero-tolerance policing arrived from New York, where it was heralded a phenomenal success in preventing murder and other serious crime. Stop-and-search (or in the USA Stop-and-Frisk) is presented as a key weapon in the zero-tolerance policing toolbox, and in January 1997 Tony Blair committed New Labour to zero-tolerance tactics.<sup>50</sup> By the time the Terrorism Act 2000 created permanent counter terrorism powers, suspicionless search rates had begun a steady climb. The New York terror attacks on 11 September 2001 undermined political opposition to the infringement of civil liberties. The threat of terrorism formed a large part of the broad context for the rise of suspicionless search. The events of 9/11 inspired deep-seated fear in the British public psyche, which were further entrenched by the 2004 Madrid bombings. These fears were realised on 7 July 2005 when terrorists attacked the London transport system, killing 52 people and injuring 700. In June 2007 an unexploded bomb was found in a car parked on Haymarket in central London and a partially successful attack was carried out at Glasgow International Airport.

Pausing momentarily to consider our hypotheses set out above, this period shows understanding marked rises in the use of suspicionless search powers requires an environmental analysis. Although law permits the police to use particular powers, the frequency of their use requires understanding of the impact of significant events in the broader social and political field and the impact of these on the habitus of policing. The political endorsement of stop-and-search as tool to fight crime and terrorism shaped police operational policy and also occupational culture of policing. The language of zero tolerance, an emphasis on deterrence-based models of policing in political discourse and force policies, the importance of ‘getting results’ became part of the

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<sup>47</sup> Martin Wasik and Richard D Taylor, *Blackstone’s Guide to the Criminal Justice and Public Order Act 1994* (Blackstone Press 1995).

<sup>48</sup> Keith D Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (Oxford University Press 2010).

<sup>49</sup> Tony Blair was delighted that his clever move foxed Conservative Home Secretary Michael Howard. He said in the Parliamentary Debates, ‘I wish that Conservative Back Benchers could have seen the right hon. and learned Gentleman’s face drop about six inches when we told him that we did not intend to oppose the Second Reading.’ HC Deb 11 January 1994 vol 235 cc20-122.

<sup>50</sup> Benjamin Bowling, ‘The Rise and Fall of New York Murder: Zero Tolerance or Crack’s Decline?’ (1999) 39 *British Journal of Criminology* 531.

occupational common sense that shaped police operational practice.<sup>51</sup> The specific decision by the police to use s.44 more extensively and aggressively in the wake of international and domestic terrorist attacks is thus explicable not by reference to law, but by the space left by law for the influence of changes in the political environment.

Understanding the rise of s.60 searches, which tracked the rise of s.44, requires an examination of the media attention surrounding a perceived growth in knife crime and the police response to it. Twenty-eight teenagers were killed in London in 2007 and 29 in 2008, mostly by stabbing. As part of government and police response to public outrage the Metropolitan Police launched Operation Blunt 2 in May 2008 aimed at reducing the number of knives on London's streets. A month after the launch of the operation a gang of teenagers murdered Ben Kinsella after a seemingly innocuous argument, the 17<sup>th</sup> stabbing death of a teenager in London that year.<sup>52</sup> The murder grabbed media attention, prompted several anti-knife crime demonstrations and led to a review of knife crime sentencing.

These developments gave tacit approval for aggressive use of stop-and-search and contributed to the surge in s.60 use. It also appears that performance targets helped drive up the number of suspicionless searches. Officers in one study indicated they were assessed on yearly targets for stop-and-search. One officer identified 'massive pressure' to conduct more searches. Another stated that yearly assessments motivated them 'to get out and do some more.'<sup>53</sup> Here again, law in the books provides only a limited guide to understanding quite radical changes in the law on the streets. Here, an environmental theory is valuable to understanding the police use of law in terms of how frequently it is used, against whom it is targeted and for what reasons. The nature and extent of the use of the highly permissive s.60 power to stop and search without suspicion 'in anticipation of violence' is explicable as a result of the changing political context and the ways that this shapes the axiomatic, directory and recipe knowledge within the police working environment.

### **The abuse of suspicionless searches**

Lord Carlile, appointed statutory independent reviewer of terrorism legislation in 2001, noted many examples of poor, unjustifiable or unnecessary use of s.44.<sup>54</sup> There were several examples of s.44 being used against protestors in 2003. In addition to its use at an arms fair, which gave rise to civil litigation (discussed below), it was used to halt an anti-war protest at RAF Fairford. Liberty, a civil liberties NGO, issued complaints to

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<sup>51</sup> Ben Bradford and Jonathan Jackson 'Enabling and constraining police power: on the moral regulation of policing. LSE Law, Society and Economy Working Papers 23/2015.

<sup>52</sup> Ben Kinsella was the younger brother of Eastenders actress Brooke Kinsella and the family utilized the media attention to draw attention to teenage knife crime.

<sup>53</sup> Spencer Chainey and Ian Macdonald, 'Stop and Search, the Use of Intelligence and Geographic Targeting' (National Police Improvement Agency 2012).

<sup>54</sup> Lord Carlile, *Report on the Operation in 2008 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*. (London: June 2009) [140].



Gloucestershire police that the policy of serving s.44 notices was intended to prevent protests from taking place.<sup>55</sup> In 2005 the powers were used to search train-spotters at a station that had been included on a Home Office list of possible terror targets.<sup>56</sup> The most egregious abuse of s44 involved Walter Wolfgang, an 82-year-old anti-war activist, Labour Party member, holocaust survivor and senior member of the Campaign for Nuclear Disarmament. On 28 September 2005 he was ejected from the Labour Party Conference for heckling the Foreign Secretary, prevented from re-entering the secure zone and searched under s.44. The debacle received significant press attention and the Labour party were forced to apologise.<sup>57</sup> It later emerged that 600 protestors had been searched at the conference, none of whom had been suspected of terrorist activities and none were arrested.<sup>58</sup>

Statewatch, the civil liberties monitoring organisation, also noted many instances of s.44 being used against photographers to prevent them taking photos of police and public buildings.<sup>59</sup> Jess Herd was detained for 45 minutes whilst photographing a wedding in London Docklands in 2008.<sup>60</sup> The BBC photographer Jeff Overs was stopped whilst taking photos of St. Paul's cathedral in 2009.<sup>61</sup> Grant Smith was stopped whilst photographing Christ Church in the City of London by seven police officers and an ITV film crew who attempted to cover the incident were also told to stop filming.<sup>62</sup> Both *The Independent* and *The British Journal of Photography* launched campaigns against the police harassment of photographers under counter-terrorism laws. In 2008 Lord Carlisle noted five examples of beat officers in Greater Manchester, Sussex and South Wales using s.44 when no authorisation was in place.<sup>63</sup> In 2009 he noted examples of the police stopping and searching white people for the sole purpose of improving the racial proportionality in s.44 statistics.<sup>64</sup> In a study of the community effects of s.44 use it was noted that common outcomes of searches were alcohol confiscation, verbal warnings, the dispersal of groups under the Anti Social Behaviour Act 2003 and cannabis cautions. As one empirical study concluded, the power was used in 'speculative intrusions and the governance of less serious crime.'<sup>65</sup>

<sup>55</sup> Jamie Wilson, 'Terrorism Act "used to halt protest"' *The Guardian* 16 July 2003.

<sup>56</sup> Michael Shiner and Rebekah Delsol, 'The politics of the powers'. in (eds Rebekah Delsol and Michael Shiner) *Stop and Search: The Anatomy of a Police Power* (London: Palgrave, 2015).

<sup>57</sup> Andrew Sparrow, 'Heckler, 82, who dared call Straw a liar is held under terrorist law' *The Telegraph* 29 September 2005.

<sup>58</sup> 'Over 600 held under terror act at Labour conference' *The Scotsman* 3 October 2005.

<sup>59</sup> Max Rowlands, 'UK: The Misuse of Section 44 stop and search powers continues despite European Court Ruling' <http://www.statewatch.org/analyses/no-105-uk-section-44.pdf> [accessed 25 February 2015].

<sup>60</sup> *ibid.*

<sup>61</sup> J. Davenport, 'BBC man in terror quiz for photographing St Paul's sunset' *London Evening Standard* 27 November.

<sup>62</sup> Rowlands.

<sup>63</sup> Lord Carlile, *Report on the Operation in 2007 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*. (London: June 2008) [125].

<sup>64</sup> Lord Carlile, *Report on the Operation in 2008 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*. (London: June 2009) [140].

<sup>65</sup> Alpa Parmar, 'Stop-and-search in London: counter- terrorist or counter-productive?' *Policing and*

## Parliamentary scrutiny

Lord Carlile was a vocal opponent of police overuse of s.44. His report on operation of the Terrorism Act during 2002 and 2003 raised concerns, particularly in relation to rolling 28-day authorisations in London and the disparity in patterns of use on the ground.<sup>66</sup> He found it hard to understand ‘why s.44 authorisations are perceived to be needed in some force areas but not others with strikingly similar risk profiles.’<sup>67</sup> Lord Carlile was certain that s.44 could be used less frequently without risk to public safety. The public, he asserted, could legitimately expect ‘that they will only face police intervention in their lives...if there is reasonable suspicion that they will commit a crime.’<sup>68</sup> In many cases the search could not be justified and, he asserted, ‘a s.44 search has never led to the finding of any terrorism material [or] provided a link in the terrorism chain.’<sup>69</sup> Where reasonable suspicion existed, he wrote, other powers (e.g. s.43 TA or s.1 PACE) should be used. Yet during Lord Carlile’s tenure, s.44 use sharply increased! The government failed to address his concerns, or to acknowledge that official guidance was having little effect on the overuse of these so-called exceptional powers. The Joint Committee on Human Rights (JCHR) also criticised the use of s.44 against peaceful protestors and its potential interference with rights to freedom of speech and assembly.<sup>70</sup> The JCHR and Lord Carlile’s reports had minimal immediate effect on the use of the powers, but marked a change in the political tide and were important in civil litigation before the ECtHR.

## Legal challenges during the rise

Legal challenges to s.44 were mounted after police employed it at a demonstration against an arms fair in East London on 9 September 2003. The challenges did not fare well in the UK courts and whilst s.44 use continued to escalate, the landmark case of *Gillan & Quinton* progressed all the way to the European Court of Human Rights. The claimants were attending the demonstration when the police stopped and searched them under s.44. Mr Gillan, a 26-year-old PhD student, was attending as a peaceful protestor and Ms Quinton, a journalist, intended to document the protests.

The claimants’ cases were taken up by Liberty. s.44 was challenged on the grounds that the requirement of expedience did not sufficiently circumscribe such intrusive powers, that the rolling authorisations across London were excessive and not

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*Society* (2011) 21(4), 369-382.

<sup>66</sup> Lord Carlile, ‘Report on the Operation in 2002 and 2003 of the Terrorism Act 2000’ (2004).

<sup>67</sup> Lord Carlile, ‘Report on the Operation in 2005 of the Terrorism Act 2000’ (2006) para 97.

<sup>68</sup> *Ibid* 100.

<sup>69</sup> Conrad Libischer, ‘Police Use and Misuse of S.44 Stop-and-Search Against Non-Violent Protest in Mainland Britain from February 2001 to July 2007’ [2007] Unpublished Dissertation, MA Criminology & Criminal Justice, King’s College London.

<sup>70</sup> Joint Committee on Human Rights, ‘Demonstrating Respect for Rights? A Human Rights Approach to Policing Protest’ (2009).

anticipated by the statute, that the deployment of s.44 against peaceful protestors was contrary to the legislative purpose and that s.44 had become part of day-to-day policing. Arguments were advanced under the Human Rights Act 1998: stop-and-search backed by criminal sanction constituted a deprivation of liberty under Article 5 of the ECHR; interfered with the Article 8 right to private life; and, when misused against protestors, infringed rights to freedom of expression and assembly under Articles 10 and 11. Central to these arguments was the contention that the provisions could not be considered ‘prescribed by law’ because they were insufficiently circumscribed, especially at the level of the individual officer on the street. The UK courts rejected all arguments at every stage of the appeal process. The Divisional Court dismissed the action on 31 October 2003<sup>71</sup> and the Court of Appeal reached its judgment on 9 July 2004.<sup>72</sup> The case then proceeded to the House of Lords where it was heard on 25 and 26 January 2006, judgment was given on 8 March of that year.<sup>73</sup>

The Courts consistently found in favour of the Metropolitan Police Commissioner and the Secretary of State. But they clearly did so on the basis that the statutory scheme of s.44 provided an exceptional power to be used in exceptional circumstances and for limited purposes. The finding that s.44 did not infringe individual rights was based on an explicit assumption that the power would only be used for the stated purpose to combat terrorism. The judgments of the Lords were littered with warnings about improper use of counter-terrorism powers. Lord Bingham made reference to using the power against political hecklers as an infringement of Article 10 rights (a reference to the Walter Wolfgang affair). Lord Hope argued that the best ‘safeguard against the abuse of power in practice is likely to be found in the training, supervision and discipline of the constables which are to be entrusted with its exercise.’ Lord Brown repeated Lord Carlile’s call for the powers to be used sparingly and warned that indiscriminate use may ‘imperil good community relations.’

### **Law and policing during the rise in suspicionless searches**

Despite the Law Lords’ concern about the rising use of suspicionless searches in situations which did not pertain to counter-terrorism, s.44 use rose fourfold in the year after the judgment and peaked a year later at over 250,000 searches.<sup>74</sup> The judgment in favour of the Metropolitan Police provided tacit approval for the rapidly-emerging pattern of use. While suspicionless searches rose, protests about the invasion of traditional civil liberties gained momentum. Changes in the wider context, which included growing fear of terrorism and panic about knife crime, undoubtedly affected the speed at which political and legal challenges had an effect but did not halt them.

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<sup>71</sup> *R. (on the application of Gillan) v Commissioner of Police of the Metropolis* [2003] EWHC 2545 (Admin).

<sup>72</sup> *R. (on the application of Gillan) v Commissioner of Police of the Metropolis* [2004] EWCA Civ 1067.

<sup>73</sup> *R. (on the application of Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12.

<sup>74</sup> Lord Carlile, ‘Report on the Operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006’ (2011).

The obvious, but nonetheless crucial, point here is that the rise in the use of suspicionless searches is manifestly *not the result of substantive changes in the law*. Rather, the political, organisational and cultural factors shaping the police use of the wide discretion offered by the statutes offers a compelling explanation for the radical increases in their use. However, *the law not was entirely irrelevant*. Here, we think, *the lack of change* in law had an effect on police operational practice. The consistent failure of legal challenges to s.44 provided tacit, if not explicit, judicial support for the use of suspicionless search powers and seems to have emboldened police officers of all ranks to believe they could employ an assertive, even aggressive, approach to everyday street policing.

As might be expected, there was a significant spike in the use of s.44 after the 7 July 2005 attacks but its use decreased the following year. Crucially, however, a major shift in police policy occurred in June 2007 in the aftermath of the attempted bombings in the Haymarket and the partially successful attack at Glasgow airport. In a report to the Metropolitan Police Authority, Assistant Commissioner John Yates, then MPS counter-terrorism lead, wrote that, following these events, ‘the MPS took the strategic decision to increase the use of s.44 to deter offenders and prevent further attacks.’<sup>75</sup> This point underlines our first hypothesis that police practice is best explained by the complex interaction between law, politics and work. The work element of an environmental theory of policing requires an analysis of the ‘vertical’ dimension of organisational policy and the ‘horizontal’ dimension occupational culture comprised of norms, values, axioms, routines and recipes for action. Taken together, these elements of the working environment play a key role in shaping operational practice in relation to the use of suspicionless search powers.

In one sense, however, this change has everything to do with law. The police – as officers of the law – decided to use their statutory powers to interfere with the liberty, privacy and freedom of movement of many thousands of individuals. However, this change cannot be understood by changes in ‘black letter law’ since there were none. All that had happened in terms of formal law (i.e. statute and judicial decisions) during the very sharp increase in the use of the powers was that the status quo was confirmed. Since there was no change in law, it seems clear that change in police practice is attributable to changes in operational policy and the occupational culture of the rank-and-file officers who carried out the policy. This change illustrates the interaction between the *habitus* and *field* of policing. It suggests a shift in the justification for the use of police power towards one that is explicitly oriented towards crime-control values and the assumption that patrol officers can deter violent crime and terrorism through aggressive policing. Drawing on Chan’s terminology, this ‘axiomatic change’ is accompanied by new ‘directory’ and ‘recipe’ knowledge about acceptable ways of interacting with the public. It is seems evident that changes in the political

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<sup>75</sup> AC J Yates, ‘Section 44 Terrorism Act 2000 - Tactical Use Review’ (*Metropolitan Police Authority*, 7 May 2009) <<http://policeauthority.org/metropolitan/committees/sop/2009/090507/10/index.html>> accessed 25 February 2015.

environment, including zero tolerance rhetoric along with public fears about terrorist attacks and rising knife crime, led to changes to both the vertical (policy) and horizontal (cultural) elements of the police working environment and it was these that led to the escalating use of suspicionless search powers.

### **Explaining the Decline and Fall of Suspicionless Searches**

While there were clearly environmental changes that affected the public acceptance of suspicionless searches, the sections of society disproportionately affected by police action on the ground, and other bodies set up to hold the police to account, were vocal opponents to the climbing use of these powers. As more people were subjected to suspicionless searches – often experienced as an unjustified intrusion into privacy and liberty – a ‘tipping point’ was reached.<sup>76</sup> A significant element in this change was the pushback against the powers mounted by a number of the civil society organisations – including Liberty, Justice, Human Rights Watch, the Institute of Race Relations, Statewatch and The Runnymede Trust – who campaigned against the powers. News media across the political spectrum and specialist media such as the *British Journal of Photography* took up the issue. Governmental organisations charged with holding the government to account were also critical. The Metropolitan Police Authority raised questions about the use of the power as early as 2005. As discussed above, Lord Carlile was highly critical of s.44 use in his annual reports from 2003 onwards. The relationship between politics and police practice is not linear, but the chorus of disapproval that rose during the 2000s reached a crescendo towards the end of the decade. By 2009, as the general election campaign began, the political tide turned against the power and its use began to fall.

Doubts within police circles about the value of s.44 were also evident by 2006. Metropolitan Police Assistant Commissioner Andy Hayman, then UK counter-terrorism lead, said, ‘I am not sure what purpose it serves, especially as it upsets so many people, with some sections of our community feeling unfairly targeted. It seems a big price to pay [...] we have to question the way we use a power that causes so much pain to the community we serve, but results in so few arrests or charges. Is it worth it?’<sup>77</sup> On 2 December 2008, the Home Office issued new guidelines on the authorisation of stop-and-search powers under s.44. Then on 7 May 2009, the MPS made a strategic decision to restrict the use of s.44 across the capital. In a report to the Metropolitan Police Authority, the MPS said that following the MPA’s London Debate they had consulted widely, which had ‘confirmed suggestions that the power is seen as controversial and has the potential to have a negative impact, particularly on minority communities.’ The findings supported a ‘three-layered approach to the tactical deployment of Terrorism Act powers’. This policy retained the use of s.44 powers in various ‘iconic sites’ of ‘key strategic importance’ across London. Otherwise the

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<sup>76</sup> Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference*. (Abacus 2002)

<sup>77</sup> Metropolitan Police Authority, ‘Counter-Terrorism Stop-and-Search Powers Called into Question’ 11 December.

power would be deployed by Management Board or via the Security Review Committee, on a 'prevent and deter' basis. The policy stated that 'it is expected that [the power] *will be used sparingly* unless there is a significant change in threat.' Finally, where officers see behaviour or circumstances that raise suspicion of a terrorist-related offence, they have discretion to use s.43, which permits searches for items connected with terrorism on the basis of reasonable suspicion. This new policy signalled the intention to radically reduce the use of s.44 powers. The decisions taken by MPS were mirrored by a similar policy change by the British Transport Police, the second most frequent user of s.44, in February 2009.<sup>78</sup>

### **Legal challenges and the fall in suspicionless searches**

*Gillan & Quinton v United Kingdom* progressed to the European Court of Human Rights in May 2009 and judgment was handed down on 12 January 2010. The Court held that the coercive powers under s.44 interfered with the right to respect for private life under Article 8.<sup>79</sup> In order for an interference with Article 8 to be justified it must be 'in accordance with the law', pursue a 'legitimate aim' and be 'necessary in a democratic society'. s.44 fell at the first hurdle; although it had a basis in domestic law, it failed to meet the rule of law requirements to protect against arbitrary interference with individual rights. The court opined that the requirement of 'expedience' at the authorisation stage placed almost no restraint on senior police officers, so applicants would 'face formidable obstacles in showing any authorisation and confirmation to be an abuse of power.'<sup>80</sup> The rolling authorisation programme in London demonstrated that the geographical and temporal restrictions placed on s. 44 provided no restriction at all in practice.<sup>81</sup> The primary cause for concern was the 'breadth of discretion conferred on the individual officer.'<sup>82</sup> The lack of any need for even subjective suspicion led the court to conclude that there was 'a clear risk of arbitrariness in the grant of such broad discretion to the police officer.'<sup>83</sup> The powers breached Article 8; they were not in 'accordance with the law.'

Despite the ECtHR ruling that s.44 searches were incompatible with the ECHR and were therefore unlawful, the police continued to use these powers for more than a year<sup>84</sup> until March 2011 when the UK government responded by replacing s.44 with s.47A. This amended the requirements so that a senior officer must reasonably expect acts of terrorism to take place and consider it 'necessary' to authorise use of the powers. Given that the breadth of discretion s.44 gave to individual officers was the

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<sup>78</sup> Genevieve Lennon, 'Precautionary Tales: Suspicionless Counter-Terrorism Stop and Search' (2013) 15 *Criminology and Criminal Justice* 44, 48.

<sup>79</sup> *Gillan and Quinton v United Kingdom* (4158/05) (2010) 50 EHRR 45 [63].

<sup>80</sup> *ibid* [80].

<sup>81</sup> *ibid* [81].

<sup>82</sup> *ibid* [83].

<sup>83</sup> *ibid* [85].

<sup>84</sup> Alpa Parmar, 'Stop and Search in London: Counter-Terrorist or Counter-Productive?' (2011) 21 *Policing and society* 369.

main cause of concern for the Strasbourg court, s.47A may still not comply with Article 8, but at the time of writing the power has never been used in England and Wales and has been used only once in Northern Ireland.<sup>85</sup>

More recently, a legal challenge to s.60 was mounted by Ann Juliette Roberts, who was searched following a dispute with a ticket inspector on a bus in north London. The bus stop where Ms Roberts disembarked was in an area where a s.60 authorisation had been put in place two hours earlier. The police officer questioning Ms Roberts conducted a s.60 search because, in the officer's opinion, it was not unusual for middle-aged women in the area to be carrying offensive weapons. Liberty joined the case and made representations on behalf of Ms Roberts. Arguments were made under Articles 5 and 8 as well as Article 14, which prohibits discrimination on the grounds of race. s.60 use has fallen disproportionately on Black communities, with Black people being up to 28 times more likely to be searched under s.60 than whites during the 2008/09 peak. All the arguments failed in the divisional court,<sup>86</sup> the Court of Appeal<sup>87</sup> and recently in the Supreme Court.<sup>88</sup> The ECtHR have refused to consider an application on Roberts without giving detailed reasons for a refusal on admissibility. Nonetheless, this case has had a fairly profound impact on the use of section 60.<sup>89</sup>

The police reaction to the *Roberts* case was significantly different to that following their success in *Gillan*. Instead of assuming that success in the UK courts amounted to tacit approval of these measures, under pressure from the Home Office, the police pre-empted the possibility of the case progressing to Strasbourg. The day that *Roberts* received permission to proceed to the courts, Craig Mackey, MPS Deputy Commissioner, wrote to all Chief Constables and Commissioners informing them of the challenge.<sup>90</sup> This was followed by new guidance on s.60 authorisations, requiring them to be 'necessary', rather than merely 'expedient'. As in the case of s.44 it is not changes in the law affecting police practice. It is changes in *police operational policy* in response to a lack of change in the law and perhaps in anticipation of defeat in Strasbourg.

### **The End of Suspicionless Searches?**

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<sup>85</sup> Rebekah Delsol and Michael Shiner, 'The Politics of the Powers' in Michael Shiner and Rebekah Delsol (eds), *Stop and Search: The Anatomy of a Police Power* (Palgrave Macmillan 2015).

<sup>86</sup> *R. (on the application of Roberts) v Commissioner of Police of the Metropolis* [2012] EWHC 1977 (Admin).

<sup>87</sup> *R. (on the application of Roberts) v Commissioner of Police of the Metropolis* [2014] EWCA Civ 69

<sup>88</sup> *R. (on the application of Roberts) v Commissioner of Police of the Metropolis* [2015] UKSC 79

<sup>89</sup> Rebekah Delsol and Michael Shiner.

<sup>90</sup> C Mackey, 'S.60 Criminal Justice and Public Order Act 1994' *The Guardian* (London, 12 January 2012).

The politics of stop-and-search shifted radically in the run up-to the 2010 general election. The use of suspicionless powers peaked in 2008/9 at the end of the Labour government's third term. Having 'overtaken the Conservatives on the right' in their criminal justice and law enforcement policies,<sup>91</sup> New Labour's zero-tolerance rhetoric seemed at odds with a public mood that had become sceptical of the value of suspicionless search powers and concerned about their abuse. Rather than upping the law and order rhetoric, the Conservative opposition pledged to curtail state intrusion into the private lives of individuals. In June 2009, then opposition leader David Cameron said that the Conservatives would roll back Labour's 'control state' and scrap s.44.<sup>92</sup> Citing the search of Andrew Pelling MP while photographing a cycle path,<sup>93</sup> Cameron declared that the powers were used unnecessarily. The 2010 Conservative election manifesto pledged to restore civil liberties. It accused Labour of creating the 'worst of all worlds – intrusive, ineffective and enormously expensive'. It had 'replaced trust with suspicion' and subjected 'Britain's historic freedoms to unprecedented attack.' Following the election, the new Home Secretary Theresa May, told the House of Commons: 'I will not allow the continued use of s.44 in contravention of the European Court's ruling and, more importantly, in contravention of the civil liberties of every one of us.'<sup>94</sup>

The Equality and Human Rights Commission, which had long been concerned about stop-and-search powers, also began to focus on s.44 and subsequently s.60.<sup>95</sup> In a highly influential report, entitled *Stop and Think*, the Commission concluded that police use of PACE stop and search powers was sometimes unlawful, disproportionate, discriminatory and damaging to relations within and between communities. It raised challenging questions about the effectiveness of stop and search powers and led to enforcement action by the EHRC against the worst performing police forces. The shift in the political environment and the publication of the EHRC reports stimulated engagement between academics, lawyers, senior police officers and civil liberties groups who came together to discuss ways of achieving fair and accountable use of

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<sup>91</sup> David Downes and Rod Morgan, 'Overtaking on the Left: The Politics of Law and Order in the "Big Society."' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th Edn, Oxford University Press 2012).

<sup>92</sup> Rosa Prince, 'David Cameron: Conservative Government Will End Stop and Search' *The Telegraph* (London, 25 June 2009).

<sup>93</sup> The Telegraph, 'Tory MP Stopped and Searched by Police for Taking Photos of a Cycle Path' *The Telegraph* (London, 6 January 2009).

<sup>94</sup> Home Office, 'Theresa May Tells Parliament That the Government Will Change How Stop and Search Powers Are Used under the Terrorism Act' 8 July 2010.

<sup>95</sup> Equality and Human Rights Commission (2010) *Stop and Think: A critical review of the use of stop and search powers in England and Wales*, Manchester: Equality & Human Rights Commission; Equality and Human Rights Commission (2012) *Race disproportionality in stops and searches under Section 60 of the Criminal Justice and Public Order Act 1994*, Briefing Paper No.5, Manchester: Equality and Human Rights Commission; Equality and Human Rights Commission (2013) *Stop and think again: towards race equality in police PACE stop and search*, Manchester: Equality and Human Rights Commission.



stop and search powers. One product of this engagement was the creation, in November 2010, of StopWatch a coalition of academics, lawyers and young activists that was launched at King's College London by the Reverend Jesse Jackson. StopWatch has, since then, worked closely with police services, government, lawyers and young people to improve the use of stop and search powers. It has used a variety of mechanisms – including policy briefings, video, flash mobs, and theatre – to stimulate public debate about what young people want from the police, how stop and search powers could be improved and of alternative ways of carrying out good policing.

Stop-and-search came under renewed scrutiny in the wake of the summer riots of 2011. Interviews with rioters identified stop-and-search as a major source of discontent and a motivation for rioting.<sup>96</sup> An independent 'Communities and Victims' panel set up by the government in the aftermath of the riots concluded that 'Where young law-abiding people are repeatedly targeted there is a very real danger that stop-and-search will have a corrosive effect on their relationship with the police.'<sup>97</sup> Continued concern led Her Majesty's Inspectorate of Constabulary (HMIC) to undertake a thematic inspection of the fairness and effectiveness of stop-and-search powers in 2013. HMIC found that 'most officers have not received any training in the use of stop-and-search powers since they joined the service' and 'in the absence of regular training... police officers are developing habits which are learned through watching and listening to others.'<sup>98</sup> HMIC concluded that stop-and-search without reasonable grounds caused dissatisfaction and upset, and although some think it will help 'control the streets' in the short-term, it may lead to major disorder in the long term. The report concluded that '[o]verpolicing or heavy-handed policing can prompt defiance.'<sup>99</sup>

Anticipating the findings of the HMIC report, the Home Secretary launched a public consultation on stop-and-search in July 2013. The consultation yielded more than 5,000 submissions and in April 2014 the Home Secretary set out a package of reforms to the use of police stop-and-search powers, especially those without reasonable suspicion. The reforms aimed to ensure that the power is targeted where there is genuine reasonable suspicion, to increase the proportion of stops resulting in arrest and to reduce the overall use of the powers. When the Home Secretary announced the reforms she said that 'if the numbers do not come down, if stop-and-search does not become more targeted, if those stop-to-arrest ratios do not improve considerably, the government will return with primary legislation to make those things happen.'<sup>100</sup>

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<sup>96</sup> Dan Roberts, Paul Lewis and Tim Newburn, *Reading the Riots: Investigating England's summer of disorder*. (London: Guardian Shorts, 2011).

<sup>97</sup> Riots Communities and Victims Panel *After the riots: The final report of the Riots Communities and Victims Panel*. (London: Riots Communities and Victims Panel, 2013), p 71

<sup>98</sup> HMIC, 'Stop and Search Powers: Are the Police Using Them Effectively and Fairly?' (2013).

<sup>99</sup> Mike Hough, 'Procedural Justice and Professional Policing in Times of Austerity' (2013) 13 *Criminology and Criminal Justice*.

<sup>100</sup> Home Office, 'Stop and Search: Theresa May Announces Reform of Police Stop and Search'.

## Discussion

This paper set out to explain the sharp rise and sudden fall in the police use of suspicionless search powers in the two decades between 1994 and 2014. This is, in our view, a substantively important question in its own right and one that should be of interest to legal scholars. The paper also seeks to contribute to a broader and more general theoretical question: what is the relationship between ‘black letter’ law in the books and ‘blue letter’ law in on the streets? In this concluding part, we try to draw out a tentative answer to the general question by answering the more specific one.

The example of the rise and fall of suspicionless searches confirms the hypothesis, based on Grimshaw and Jefferson’s environmental theory of policework, that police practice is explicable as the complex interaction between law, work and politics. The evidence also supports the hypothesis that law is the determinant structure that shapes policework. Law defines the objects of policing and the scope and methods used by the police to interact with members of the public. It should and does define the limits of coercive and intrusive powers. There is a caveat, however: empirical research indicates that the police did in fact conduct suspicionless searches before 1994 even though these were outwith the law. This raises significant questions about the limits of the rule of law to restrain police power.<sup>101</sup> Nonetheless, statute law authorised suspicionless powers in the first instance and it is clear that once these powers were granted to the police by the CJPOA 1994, they were used to a greater and greater extent over the next decade.

Understanding the law is also essential to explaining why these powers dwindled towards insignificance five years past the peak of their use. The broad and unrestrained power to use suspicionless searches in the context of counter terrorism ceased to be available to be used lawfully by the police when s.44 was replaced by s.47A. Most important in this process was the progress of *Gillan* through the courts. This case had a significant impact initially in tacitly permitting the use of suspicionless searches and then, following the decision of the ECtHR in November 2010, in bringing their use in counterterrorism to an end. Again a caveat: s.44 use had already begun to fall before the ruling and some searches continued even after the judgement was issued. *Gillan* also had important knock-on effects on the use of s.60 as a power similarly lacking circumscription and the legal challenge to s.60 in *Roberts* had an effect on police policy and practice.

Our examination of suspicionless searches shows that an analysis of the law is necessary, but not sufficient, to explain police practice. As predicted by the

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<sup>101</sup> Ben Bowling and James Sheptycki (2015) ‘Global policing and transnational rule with law’ *Transnational Legal Theory*, Volume 6 (1) pp141-173

environmental approach, despite its *determinant* effect on police practice, law is far from the *dominant* influence. Although ‘law in the books’ determines whether the police *may use* a particular lawful power, it cannot explain how frequently they *actually use* such powers, *against whom*, or *in what circumstances*. The central argument of this paper is that explaining how the use of statutory powers – especially its extent – is shaped by police constables as ‘officers of the law’ requires detailed analysis of the police working environment comprised of political, organisational and cultural factors as well as legal factors.

Crucial to understanding changes in the use of suspicionless searches are changes in the political field. The mid-1990s can be seen as the high point of authoritarian ‘law and order’ policies resulting from the bidding war between the Conservatives and Labour to become the party toughest on crime and disorder. The suspicionless search powers granted by the CJOPA 1994 and the Terrorism Act 2000 were intended to be exceptional powers, but encouraged by New Labour’s ‘tough on crime’ and ‘zero-tolerance’ rhetoric, their objects expanded until they were used routinely, especially after major public anxieties about knife crime and terrorism. By 2010, suspicionless searches were used twenty times more frequently than when they were first introduced.

The dramatic fall in the use of suspicionless search powers also requires an understanding of other changes in the *field* and the effect these had on the *habitus* of policing – its administrative policies and occupational culture. Civil society organisations, the mass media, the Independent Reviewer of Terrorism Legislation, the Equality and Human Rights Commission and Her Majesty’s Inspector of Constabulary, and the shift by the Conservative Party to a much more libertarian stance all played a role. A new civil society organisation – StopWatch – was formed to engage in research and action for fair and accountable policing and played a role in this process. The 2011 riots and the public reaction to these identified stop-and-search as part of the ‘toxic mix’ leading to resentment and anger towards the police. There is compelling evidence that these changes in the *field* had an impact on the *habitus* of policing, with changes in organisational policy and occupational culture *within the police organisation* leading to changes in the extent to which the powers were used.

Stop-and-search powers are created by law; but that law is highly permissive in defining how the powers may be used. The extent to which they can be used, against whom and in what circumstances is an operational policy matter that is shaped by elements of the *habitus* interacting with the *field* of policing. Returning to our environmental hypotheses about policing practice, it is evident that suspicionless powers are more permissive and have a less substantial and precisely articulated legal structure than those requiring reasonable suspicion (e.g. s1 PACE). They are therefore more susceptible to being shaped by work-related values evident in police occupational culture and administrative policies. As environmental theory of policing predicts, the more permissive, discretionary and ambiguous the law, the greater the opportunity for occupational common sense to shape police practice. This clearly illustrates the

potential for substantial changes in the use of police powers irrespective, or in the absence, of changes in law.

This analysis has implications for the use of s.1 PACE, especially in relation to the occurrence of unlawful suspicionless searches carried out by police officers under this statute. Although PACE searches require ‘reasonable suspicion’, in more than a quarter of the cases examined by HMIC in 2012 no grounds for suspicion were recorded.<sup>102</sup> This observation – and its impact on public confidence in policing – became the focus of the Home Secretary’s reforms. The attempts to tighten the PACE code of practice – by narrowing the definition of reasonable suspicion and introducing sanctions for police officers breaching the code – has the potential to reduce the use of the powers. As the environmental approach to understanding policework predicts, where policing tasks are strongly determined by law, administrative systems, managerial directives and supervision *need not fail* to regulate police powers.

### Conclusion

A twenty-year experiment with suspicionless searches in England and Wales seems to have come to conclusive end. The powers rose exponentially from the mid-1990s to 2009 and then dropped dramatically; s.44 has been repealed; s.47A has never been used on the mainland, and new guidance leaves s.60 significantly curtailed. The extent of the use of suspicionless search powers in 2016 was but the faintest echo (less than one per cent) of the extensive and aggressive enforcement that characterised policing five years earlier. Searches under PACE have come under scrutiny and their number is falling. A reform process that began in earnest in 2009 has gradually tightened police discretion, and the Home Office has made strenuous efforts to reduce stop-and-search in general. The overall effect has been to squeeze suspicionless searches, almost entirely, out of police practice through political and administrative means. The fall in the use of these powers may be claimed as a victory for those who assert the principle that police should only ever be permitted to search a person where there are genuine reasonable grounds to suspect wrongdoing. However, we remain concerned that a significant shift in the security situation or political landscape could trigger a resurgence of suspicionless searches. For this reason, we think it would be better if the powers were repealed by primary legislation. The theoretical and substantive evidence suggests that while the power to stop-and-search without suspicion remains on the statute book the danger persists that their use could increase without public debate or political consideration of the serious invasion of individual rights that these powers entail.

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<sup>102</sup> HMIC.

